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VOLUME 6

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Cross references. — Equitable remedies and proceedings in equity generally, T. 23, C. 3.

Law reviews. — For annual survey article discussing trial practice and procedure, see 51 Mercer L. Rev. 487 (1999). For

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dure and Legal Realism as a Jurisprudence of Law Reform,” see 44 Ga. L. Rev. 433 (2010).

RESEARCH REFERENCES

ALR. — Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 ALR5th 107.

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Cross references. — Citation of chapter as “Georgia Civil Practice Act,” § 9-11-85. Procedure in magistrate courts, § 15-10-40 et seq. Practice and procedure in garnishment proceedings, T. 18, C. 4. Authority to enact local rules, Uniform Superior Court Rules, Rule 1.2. Motions for summary judgment, Uniform Superior Court Rules, Rule 6.5.

Editor’s notes. — The short title for this chapter (the “Georgia Civil Practice Act”) is provided for in § 9-11-85 rather than in the first section of this chapter, where the short title for a chapter of the Code is normally provided for. This results from the fact that the renumbering of sections of this chapter follows the numbering scheme of the Federal Rules of Civil Procedure rather than the usual scheme observed elsewhere in the Code.

Law reviews. — For article advocating the adoption of the federal rules of civil procedure in Georgia, see 18 Ga. B.J. 297 (1956). For article discussing rule-making

power and advocating, Supreme Court of Georgia be vested with rule-making power over both civil and criminal procedure, see 23 Ga. B.J. 303 (1961). For article comparing the Federal Rules of Civil Procedure to Georgia trial practice procedures prior to the adoption of the Georgia Civil Practice Act, see 1 Ga. St. B.J. 315 (1965). For article, “The Georgia Civil Practice Act of 1966: Preliminary Observations,” see 2 Ga. St. B.J. 419 (1966). For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For article, “The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act,” see 3 Ga. St. B.J. 383 (1967). For article discussing counterclaims and cross-claims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article, “Synopsis of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act,” see 4 Ga. St. B.J. 503 (1968).

For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For article discussing 1976 to 1977 developments in Georgia's practice and procedure, see 29 Mercer L. Rev. 265 (1977). 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 survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For annual survey of law on trial practice and procedure, see 35 Mercer L. Rev. 315 (1983). For article surveying 1983 Eleventh Circuit cases on trial practice and procedure, see 35 Mercer L. Rev. 1295 (1984). For annual survey on trial practice and procedure, see 36 Mercer L. Rev. 347 (1984). For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985). For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For article, "On with the Old!," see 24 Ga. St. B.J. 13 (1987). For annual survey on trial practice and procedure, see 43 Mercer L. Rev. 441

(1991). For annual survey on trial practice and procedure, see 44 Mercer L. Rev. 421 (1992). For annual survey article on trial practice and procedure, see 49 Mercer L. Rev. 313 (1997). For annual survey article on trial practice and procedure, see 50 Mercer L. Rev. 359 (1998). For annual survey article discussing trial practice and procedure, see 51 Mercer L. Rev. 487 (1999). For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000). For article, "Trial Practice and Procedure," see 53 Mercer L. Rev. 475 (2001). For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012).

For note, "Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act," see 7 Ga. St. B.J. 385 (1971). For note analyzing the Civil Procedure Act of 1966, and its application from 1966 to 1976, see 11 Ga. L. Rev. 546 (1977). For note, "Venue in Multidefendant Civil Practice in Georgia," see 6 Ga. State U.L. Rev. 427 (1990). For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996). For review of 1996 civil practice legislation, see 13 Ga. St. U.L. Rev. 23 (1996).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

USE OF CASE LAW CONSTRUING FORMER LAW AND FEDERAL RULES

RETROACTIVE APPLICATION OF CHAPTER

APPEALS

General Consideration

Construction of Civil Practice Act.

— Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) should be liberally construed and applied. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is in derogation of the common law and must be strictly construed and followed. *Tahoe Carpet Indus., Inc. v. Aetna Bus. Credit, Inc.*, 153 Ga. App. 317, 265 S.E.2d 116 (1980).

Purpose. — Civil Practice Act (see now

O.C.G.A. Ch. 11, T. 9) is intended to be a revolutionary and sweeping revision of Georgia's legal procedure. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Purpose and scope of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) was to comprehensively and exhaustively revise, supersede, and modernize pretrial, trial, and certain post-trial procedures in civil cases. *Bradberry v. Bradberry*, 232 Ga. 651, 208 S.E.2d 469 (1974).

Paramount purpose of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is to simplify procedure in civil cases. *Morgan v. Reeves*, 226 Ga. 697, 177 S.E.2d 68 (1970).

Promotion of justice intended. — Rules set forth in the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) are intended to promote and not to obstruct the administration of justice and thus enable the court to do substantial justice rather than to decide cases upon technicalities with no relationship to the rights of the parties to litigation. *Mundt v. Olson*, 155 Ga. App. 145, 270 S.E.2d 344 (1980).

Decisions on the merits promoted. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is designed to simplify civil procedure by deemphasizing form and technicality in order that substantive rights of litigants may be asserted and tried on the merits. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) should serve to reduce number of decisions resolved on grounds with no relation to merits of litigation. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

Technicalities minimized. — One of the purposes of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) was to minimize situations in which actions abated on account of niceties of technical rules of practice and procedure. *Tyree v. Jackson*, 226 Ga. 690, 177 S.E.2d 160 (1970).

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).

Notice pleading substituted for issue pleading. — Basic premise of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is that it does away with "issue pleading" and substitutes "notice pleading." *Byrd v. Ford Motor Co.*, 118 Ga. App. 333, 163 S.E.2d 327 (1968); *General Tel. Co. v. Pritchett*, 119 Ga. App. 53, 165 S.E.2d 918 (1969).

New rules under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) restrict pleadings to task of general notice-giving,

and invest the depositions and discovery process with a vital role in preparation for trial. *Byrd v. Ford Motor Co.*, 118 Ga. App. 333, 163 S.E.2d 327 (1968).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) abolished "issue pleading," substituted in lieu thereof "notice pleading," and directs that all pleadings shall be construed as to do substantial justice. *Sheppard v. Yara Eng'g Corp.*, 248 Ga. 147, 281 S.E.2d 586 (1981).

Under the spirit and intent of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), "notice pleading" has been substituted for "issue pleading." *Mills v. Bing*, 181 Ga. App. 475, 352 S.E.2d 798 (1987).

Notice pleading requirements. — Under notice pleading procedure of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), only a short and plain statement of the claim is required; nevertheless, a complaint must give a defendant notice of the claim in terms sufficiently clear to enable the defendant to frame a responsive pleading thereto. *Allen v. Bergman*, 201 Ga. App. 781, 412 S.E.2d 549 (1991).

Purpose of notice pleading. — Objective in adopting the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), and rejecting "issue" pleading was to avoid dismissal on technicalities and to give parties fair notice of claims and/or defenses to be asserted against the parties; the discovery process was to be used to fill in details. The substance or function of a pleading, rather than the pleading's name, should determine the pleading's nature. *Edelschick v. Blanchard*, 177 Ga. App. 410, 339 S.E.2d 628 (1985).

Word "hearing," as contained in the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), is limited in its context to court hearings on motions. *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972); *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

Special plea of mistaken identity not required. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) does not require that a party must specially plead or raise by motion the defense that the plaintiff sued the wrong person (in this case, individuals rather than a corporation). *Calhoun v. Herrin*, 125 Ga. App. 518, 188 S.E.2d 273 (1972).

General Consideration (Cont'd)

Since the Declaratory Judgment Act (see now O.C.G.A. Ch. 11, T. 9) contains no special provisions for pleading, the test of what is needed to withstand a motion to dismiss petition for declaratory judgment is determined under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Southeastern Fid. Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 118 Ga. App. 861, 165 S.E.2d 887 (1968).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is applicable to actions seeking declaratory judgment, and the test of what is needed to withstand a motion to dismiss petition for declaratory judgment is determined under that Act. *Rockdale County v. City of Conyers*, 231 Ga. 477, 202 S.E.2d 436 (1973).

Declaratory judgments. — Declaratory Judgment Act, O.C.G.A. Ch. 4, T. 9, is governed by the practice rules contained in the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *Town of Thunderbolt v. River Crossing Apts., Ltd.*, 189 Ga. App. 607, 377 S.E.2d 12 (1988).

Suit on contract that only licensed person can enter. — Civil Practice Act, O.C.G.A. Ch. 11, T. 9, does not require a person suing on a contract permitted to be entered into only by licensed persons to plead the existence of such a license in order to state a claim, but, at whatever stage of the proceedings it appears that the plaintiff is seeking to recover upon a contract permitted to be entered into only by persons holding licenses issued as a regulatory measure, it becomes imperative for the plaintiff to prove that the plaintiff holds such a license and held such a license at the time the contract was entered into in order to authorize a recovery. *Myers v. Wynn*, 201 Ga. App. 764, 412 S.E.2d 581 (1991).

Criminal contempt is tried under rules of civil procedure, rather than under rules of criminal procedure, and the preponderance of the evidence is sufficient to convict the defendant. *Hill v. Bartlett*, 124 Ga. App. 56, 183 S.E.2d 80 (1971). But see *In re Crane*, 253 Ga. 667, 324 S.E.2d 443 (1985).

Applicability to juvenile courts. — Civil Practice Act, O.C.G.A. Ch. 11, T. 9,

does not apply to juvenile courts. In *re N.N.G.*, 196 Ga. App. 765, 397 S.E.2d 40 (1990).

Claim for indebtedness. — While a creditor may bring separate actions to foreclose a security interest and on an indebtedness, and both remedies may be sought in the same action, the claim for indebtedness, whether filed in a separate action or in the same action as foreclosure proceeding under former Code 1933, § 67-701 (see now O.C.G.A. § 44-14-230 et seq.), must stand or fall upon the principles set forth in the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), including, but not limited to, process and service of process, and may not be “piggy-backed” into court using special rules applicable to foreclosure actions under former Code 1933, § 67-701 (see now O.C.G.A. § 44-14-230 et seq.). *Porter v. Midland-Guardian Co.*, 242 Ga. 1, 247 S.E.2d 743 (1978).

Other statutory time periods control. — Provisions of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, which deal with time frames do not apply to periods of time which are definitely fixed by other statutes, such as O.C.G.A. § 32-3-14. *Bates & Assocs. v. Department of Transp.*, 186 Ga. App. 828, 368 S.E.2d 544, cert. denied, 186 Ga. App. 917, 368 S.E.2d 544 (1988).

Act creating municipal court repealed. — Adoption of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) had effect of repealing provisions of Ga. L. 1952, p. 2184 et seq., the Act creating Municipal Court of Columbus, which are contrary to its provisions. *Lee v. G.A.C. Fin. Corp.*, 130 Ga. App. 44, 202 S.E.2d 221 (1973).

Waiver of jury trial. — Passage of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) did not change the time-honored rule of law that when a party has the right to demand a jury trial and fails to do so, the party may be held to have waived the jury trial. *Marler v. Citizens & S. Bank*, 139 Ga. App. 851, 229 S.E.2d 786 (1976), *aff'd*, 239 Ga. 342, 236 S.E.2d 590 (1977).

Equitable complaint in appeal from probate court not maintainable. — Nothing in the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) can be construed as

authorizing the superior court to entertain a complaint in equity in a case on appeal from the probate court as on appeal jurisdiction of superior court is no greater than that of probate court. *Logan v. Nunnally*, 230 Ga. 588, 198 S.E.2d 321 (1973).

Party dismissed only when no set of facts supports claim. — Party should not be dismissed for failure to state a claim against such party, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff's claim which would entitle the plaintiff to relief against that party. *Sheppard v. Yara Eng'g Corp.*, 248 Ga. 147, 281 S.E.2d 586 (1981).

Cited in *Willis v. Byrd*, 116 Ga. App. 555, 158 S.E.2d 458 (1967); *Peacock Constr. Co. v. Turner Concrete, Inc.*, 116 Ga. App. 822, 159 S.E.2d 114 (1967); *Townsend & Ghegan Enters. v. W.R. Bean & Son*, 117 Ga. App. 109, 159 S.E.2d 776 (1968); *Crosby v. Crosby*, 224 Ga. 109, 160 S.E.2d 362 (1968); *Algernon Blair, Inc. v. Trust Co.*, 224 Ga. 118, 160 S.E.2d 395 (1968); *Republic Mtg. Corp. v. Beasley*, 117 Ga. App. 303, 160 S.E.2d 429 (1968); *Lloyd Indus., Inc. v. O'Neal Steel, Inc.*, 117 Ga. App. 328, 160 S.E.2d 433 (1968); *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968); *Funderburg v. Wold*, 117 Ga. App. 638, 161 S.E.2d 376 (1968); *Clark v. Perrin*, 224 Ga. 307, 161 S.E.2d 874 (1968); *Seaboard Air Line R.R. v. Hawkins*, 117 Ga. App. 797, 161 S.E.2d 886 (1968); *Cail v. Griffin*, 224 Ga. 431, 162 S.E.2d 356 (1968); *Cook v. Barfield*, 224 Ga. 355, 162 S.E.2d 417 (1968); *B-W Acceptance Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968); *Watkins v. Coastal States Life Ins. Co.*, 118 Ga. App. 145, 162 S.E.2d 788 (1968); *Banks v. Champion*, 118 Ga. App. 79, 162 S.E.2d 824 (1968); *Zappa v. Allstate Ins. Co.*, 118 Ga. App. 235, 162 S.E.2d 911 (1968); *O'Neil v. Moore*, 118 Ga. App. 424, 164 S.E.2d 328 (1968); *Woodall v. First Nat'l Bank*, 118 Ga. App. 440, 164 S.E.2d 361 (1968); *Pritchard v. State*, 224 Ga. 776, 164 S.E.2d 808 (1968); *Morris v. Townsend*, 118 Ga. App. 572, 164 S.E.2d 869 (1968); *Lovett v. Lovett*, 225 Ga. 251, 167 S.E.2d 590 (1969); *Cohen v. Garland*, 119 Ga. App. 333, 167 S.E.2d 599 (1969); *Todd v. Waddell*, 120 Ga. App. 20, 169

S.E.2d 351 (1969); *Bragg v. Bragg*, 225 Ga. 494, 170 S.E.2d 29 (1969); *Foster v. Lankford*, 120 Ga. App. 573, 171 S.E.2d 662 (1969); *Doe v. Moss*, 120 Ga. App. 762, 172 S.E.2d 321 (1969); *Fender v. Fender*, 226 Ga. 129, 173 S.E.2d 211 (1970); *Siefferman v. Kirkpatrick*, 121 Ga. App. 161, 173 S.E.2d 262 (1970); *Fendley v. Weaver*, 121 Ga. App. 526, 174 S.E.2d 369 (1970); *McKinnon v. Neugent*, 226 Ga. 331, 174 S.E.2d 788 (1970); *Steelman v. Associates Disct. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970); *Tankersley v. Security Nat'l Corp.*, 122 Ga. App. 129, 176 S.E.2d 274 (1970); *Seaboard Coast Line R.R. v. Clark*, 122 Ga. App. 237, 176 S.E.2d 596 (1970); *Martin v. Prior Tire Co.*, 122 Ga. App. 637, 178 S.E.2d 306 (1970); *Employers Liab. Assurance Corp. v. Berryman*, 123 Ga. App. 71, 179 S.E.2d 646 (1970); *Pichulik v. Air Conditioning & Heating Serv. Co.*, 123 Ga. App. 195, 180 S.E.2d 286 (1971); *Stevens v. Stevens*, 227 Ga. 410, 181 S.E.2d 34 (1971); *Hill v. Small*, 228 Ga. 31, 183 S.E.2d 752 (1971); *Roberts v. Artistic Ornamental Iron Co.*, 124 Ga. App. 744, 186 S.E.2d 143 (1971); *Buffington v. McClelland*, 125 Ga. App. 153, 186 S.E.2d 550 (1971); *Payne v. Shelnutt*, 126 Ga. App. 598, 191 S.E.2d 487 (1972); *Gregory v. King Plumbing, Inc.*, 127 Ga. App. 512, 194 S.E.2d 271 (1972); *Williams v. Nuckolls*, 230 Ga. 697, 198 S.E.2d 870 (1973); *Boyer v. King*, 129 Ga. App. 690, 200 S.E.2d 906 (1973); *Logan v. Nunnally*, 130 Ga. App. 33, 202 S.E.2d 220 (1973); *Continental Ins. Co. v. Mercer*, 130 Ga. App. 339, 203 S.E.2d 297 (1973); *DeKalb County v. McFarland*, 231 Ga. 649, 203 S.E.2d 495 (1974); *Fulton County v. Corporation of Presiding Bishop*, 133 Ga. App. 847, 212 S.E.2d 451 (1975); *Goolsby v. Allstate Ins. Co.*, 133 Ga. App. 781, 213 S.E.2d 42 (1975); *Hodges Appliance Co. v. United States Fid. & Guar. Co.*, 133 Ga. App. 936, 213 S.E.2d 46 (1975); *Wiley v. Georgia Power Co.*, 134 Ga. App. 187, 213 S.E.2d 550 (1975); *Burston v. Caldwell*, 506 F.2d 24 (5th Cir. 1975); *Thomas v. Firestone Tire & Rubber Co.*, 139 Ga. App. 40, 227 S.E.2d 870 (1976); *Bowen v. State*, 144 Ga. App. 329, 241 S.E.2d 431 (1977); *Buchan v. Duke*, 153 Ga. App. 310, 265 S.E.2d 308 (1980); *Weems v. McCloud*, 619 F.2d 1081

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(5th Cir. 1980); *Bowers v. Continental Ins. Co.*, 753 F.2d 1574 (11th Cir. 1985).

Use of Case Law Construing Former Law and Federal Rules

Precedential value of case law construing former actions. — While provisions which have been repealed specifically by the Act which enacted the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) have been rendered void and are generally no longer effective, cases construing such former sections are of precedential value in construing the same or similar provisions found elsewhere in the Code. *Bowen v. State*, 239 Ga. 517, 238 S.E.2d 62 (1977).

Use of federal case law in construing chapter. — Since the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is modeled and predicated on the Federal Rules of Civil Procedure, federal cases, while not binding precedent, will be considered as persuasive authority in construing pertinent provisions. *Poole v. City of Atlanta*, 117 Ga. App. 432, 160 S.E.2d 874 (1968).

As the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is substantially identical to the Federal Rules of Civil Procedure, it is appropriate to resort to federal cases for its construction. *Harper v. DeFreitas*, 117 Ga. App. 236, 160 S.E.2d 260 (1968).

Because of the similarity between the state Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and the Federal Rules of Civil Procedure, it is proper that the court give consideration and great weight to constructions placed on the federal rules by the federal courts. *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 321 S.E.2d 383 (1984).

Retroactive Application of Chapter

Remedial statutes are not inoperative, although of a retrospective nature, provided the statutes do not impair contracts, and only go to confirm rights already existing, in furtherance of the remedy, by curing defects and adding to means of enforcing existing obligations.

Berry v. Siskin, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Law which merely alters procedure may be made applicable to past transactions. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

No person has a vested right in any course of procedure, nor in the power of delaying justice, nor of deriving benefit from technical and formal matters of pleading. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Effect of simultaneous repeal and reenactment of automatic dismissal provisions. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Appeals

Chapter controls over Appellate Practice Act. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), being the latest expression of legislative will, must control over provisions of the Appellate Practice Act (see now O.C.G.A. Art. 2, Ch. 6, T. 5), if conflict exists. *Howard v. Smith*, 226 Ga. 850, 178 S.E.2d 159 (1970).

Application of chapter on appeal. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) may be applied on appeal in reviewing the judgment of the trial court rendered under the former procedure in cases filed prior to the chapter's effective date. *Bazemore v. Burnet*, 117 Ga. App. 849, 161 S.E.2d 924 (1968).

Regardless of when judgment was entered below, the appellate court must apply the new rules of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Grubbs v. Duskin*, 118 Ga. App. 82, 162 S.E.2d 762 (1968).

In reviewing enumeration of errors, the appellate court must apply the new rules of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) regardless of when judgment was entered below. *Ghitter v. Edge*, 118 Ga. App. 750, 165 S.E.2d 598 (1968).

Court of appeals must apply the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) as it exists at the time of its judgment rather than the law prevailing at the rendition of judgment under review. *Turner v. Bank of Zebulon*, 128 Ga. App. 404, 196 S.E.2d 668 (1973).

ARTICLE 1

SCOPE OF RULES AND FORM OF ACTION

9-11-1. Scope of chapter; construction.

This chapter governs the procedure in all courts of record of this state in all actions of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Code Section 9-11-81. This chapter shall be construed to secure the just, speedy, and inexpensive determination of every action. This chapter shall also apply to courts which are not courts of record to the extent that no other rule governing a particular practice or procedure of such courts is prescribed by general or local law applicable to such courts. (Ga. L. 1966, p. 609, § 1.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 1, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For article advocating specialized pleadings and procedures to meet needs of juvenile court practice, see 23 Mercer L. Rev. 341 (1972). For article surveying developments in Georgia trial practice and procedure from mid-1980

through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For article discussing the scope of the “Civil Practice Act,” see 19 Ga. St. B.J. 130 (1983). For article surveying trial practice and procedure in 1984-1985, see 37 Mercer L. Rev. 413 (1985). For article, “Business Associations,” see 53 Mercer L. Rev. 109 (2001).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
COURTS TO WHICH CHAPTER APPLICABLE**General Consideration**

Divorce proceedings. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is applicable to divorce proceedings. *Price v. Price*, 243 Ga. 4, 252 S.E.2d 402 (1979).

Administrative procedure. — Motions for judgment on the pleadings and for summary judgment are functionless and inappropriate in superior court when that court is sitting as an appellate court under authority of the Administrative Procedure Act (see now O.C.G.A. Ch. 13, T. 50). *Walker v. Harden*, 129 Ga. App. 782, 201 S.E.2d 483 (1973).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is not applicable to proceedings under the Georgia Administrative Procedure Act (see now O.C.G.A. Ch. 13, T. 50). *Georgia State Bd. of Dental Exmrs. v.*

Daniels, 137 Ga. App. 706, 224 S.E.2d 820 (1976).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) has no application to judicial review of administrative agency decisions under Ga. L. 1964, p. 338, § 20 (see now O.C.G.A. § 50-13-19). *Walker v. Harden*, 129 Ga. App. 782, 201 S.E.2d 483 (1973); *Hewes v. Cooler*, 169 Ga. App. 762, 315 S.E.2d 276 (1984).

Workers' compensation. — Provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) with regard to taking depositions are not applicable to workers' compensation claims unless made so by statute pertaining specifically to workers' compensation claims. *National Biscuit Co. v. Martin*, 225 Ga. 198, 167 S.E.2d 140 (1969).

O.C.G.A. § 9-11-15(c) has not been in-

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corporated into the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *McLendon v. Advertising That Works*, 292 Ga. App. 677, 665 S.E.2d 370 (2008).

Uninsured Motorist Act, O.C.G.A. § 33-7-11(d), which gives insurance companies wide latitude in deciding whether to join a lawsuit against an uninsured motorist and requiring uninsured motorist carriers to follow the same rules of civil procedure that apply to every other litigant does not limit or impede an insurer's ability under that statutory framework to opt-in or opt-out of litigation. *Kelly v. Harris*, 329 Ga. App. 752, 766 S.E.2d 146 (2014).

Habeas corpus proceeding. — Habeas court's order denying an inmate's verified petition, which asserted that trial counsel rendered ineffective assistance, was reversed as the allegations contained in that petition served as sufficient evidence to support the inmate's claim that counsel failed to file a notice of appeal after being instructed by the inmate to do so. *Rolland v. Martin*, 281 Ga. 190, 637 S.E.2d 23 (2006).

In rem quiet title actions. — Default judgment against owners in a quiet title action based on the owner's failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, was inapplicable. *Woodruff v. Morgan County*, 284 Ga. 651, 670 S.E.2d 415 (2008).

Civil procedure rules not adequate substitute for substantive constitutional rights of in personam forfeiture proceedings. — In an in personam forfeiture proceeding, pursuant to the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-7(m), a trial court erred by finding that the civil

procedural rules set forth in the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, were an adequate substitute for the substantive constitutional rights to which the property owners were entitled. As a result, the Supreme Court of Georgia held that § 16-14-7(m) was unconstitutional because the statute deprived in personam forfeiture defendants of the safeguards of criminal procedure guaranteed by the United States and Georgia Constitutions. *Cisco v. State*, 285 Ga. 656, 680 S.E.2d 831 (2009).

Chapter not applicable to appellate courts. — Scope of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is procedure in the trial courts of record, and it does 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).

Construction with court rules. — Upon reading the rules within the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, in para materia with Ga. Unif. Super. Ct. R. 24.6(B), the trial court was authorized to grant a divorce well after 30 days from the time an answer would have been due; hence, the trial court did not err in denying a wife's motion to set that judgment aside. *Hammack v. Hammack*, 281 Ga. 202, 635 S.E.2d 752 (2006).

"No cure" rule contravenes chapter. — "No cure" rule, requiring party to dismiss present action, pay costs in that and all previous actions, and then refile the same action, places an unnecessary burden on trial courts, delays determination of action on its merits, and increases expense to courts and litigants; hence, that rule contravenes the purpose of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) as set out in Ga. L. 1966, p. 609, § 1 (see now O.C.G.A. § 9-11-1) to "secure the just, speedy, and inexpensive determination of every action." *McLanahan v. Keith*, 239 Ga. 94, 236 S.E.2d 52 (1977), but see *Couch v. Wallace*, 249 Ga. 568, 292 S.E.2d 405 (1982); *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983).

Want of prosecution rule. — Regardless of efficiency of local two-year want of prosecution rule, the General Assembly has set forth a five-year rule for all actions of a civil nature in all courts whose prac-

tice and procedure is governed by this chapter, so that for those courts the local two-year rule would be conflicting. *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976).

Appeal from a decision of the policemen's pension board should be taken in accordance with the procedures provided for in statute (Ga. L. 1953 (Nov.-Dec. Sess.), p. 2707). *Simmons v. Board of Trustees*, 167 Ga. App. 511, 306 S.E.2d 759 (1983).

Requirements of the Condemnation Act override all provisions of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, in conflict with the Condemnation Act's special purposes. *DOT v. Defoor*, 173 Ga. App. 218, 325 S.E.2d 863 (1984).

Section invoked to make error harmless when not involving genuine issue of material fact. — Trial court's failure to consider two timely filed depositions when ruling on a motion for summary judgment was manifestly harmless since there was nothing in the depositions which raised a genuine issue of material fact; thus, to reverse and remand the case under these circumstances would only serve to prolong litigation and undermine the policy in favor of "the just, speedy, and inexpensive determination of every action." *Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n*, 247 Ga. 730, 279 S.E.2d 442 (1981).

Court of Appeals will not reverse a grant of summary judgment, even if it appears that the trial court erroneously failed to consider a portion of the record, unless the appellant can show that a genuine issue of material fact remains for trial. *Holtzendorf v. Seckinger*, 195 Ga. App. 177, 393 S.E.2d 13 (1990).

There is no requirement generally that a party litigant show what deposition would prove before the litigant is allowed to take the deposition. *Brown Transp. Corp. v. Truett*, 174 Ga. App. 189, 329 S.E.2d 521 (1985).

Construction of pleadings. — Even though it is true that, when the sufficiency of a complaint is questioned, the pleadings must be construed in a light most favorable to a plaintiff, the trial court correctly dismissed the defendant business from the terminated employees' lawsuit for lack

of jurisdiction when the pleadings so construed did not demonstrate that the business committed a tort in Georgia. *Balmer v. Elan Corp.*, 261 Ga. App. 543, 583 S.E.2d 131 (2003), *aff'd*, 278 Ga. 227, 599 S.E.2d 158 (2004).

Insufficiency of service. — Trial court did not err in refusing to dismiss the petitioner's application for a writ of habeas corpus; even assuming that a requirement existed that the district attorney had to be served with a copy of the application, the state failed to timely raise the argument that it applied since it did not set forth the argument either in its answer to the petitioner's application or by motion filed before or simultaneously with the answer, and thus the defense of insufficiency of service was waived. *State v. Jaramillo*, 279 Ga. 691, 620 S.E.2d 798 (2005).

Cited in *Bray v. Central Chevrolet, Inc.*, 118 Ga. App. 493, 164 S.E.2d 286 (1968); *Woodall v. First Nat'l Bank*, 118 Ga. App. 440, 164 S.E.2d 361 (1968); *Bragg v. Bragg*, 225 Ga. 494, 170 S.E.2d 29 (1969); *Hines v. Wingo*, 120 Ga. App. 614, 171 S.E.2d 905 (1969); *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970); *Taylor v. Donaldson*, 227 Ga. 496, 181 S.E.2d 340 (1971); *Gresham v. Symmers*, 227 Ga. 616, 182 S.E.2d 764 (1971); *Koehler v. Massell*, 229 Ga. 359, 191 S.E.2d 830 (1972); *Boyer v. King*, 129 Ga. App. 690, 200 S.E.2d 906 (1973); *Zachery v. Geiger Fin. Co.*, 130 Ga. App. 243, 202 S.E.2d 689 (1973); *Nat'l Health Servs., Inc. v. Townsend*, 130 Ga. App. 700, 204 S.E.2d 299 (1974); *Pate v. Milford A. Scott Real Estate Co.*, 132 Ga. App. 49, 207 S.E.2d 567 (1974); *Yeargin v. Burleson*, 132 Ga. App. 652, 209 S.E.2d 99 (1974); *American Tire Co. v. Creamer*, 132 Ga. App. 781, 209 S.E.2d 240 (1974); *English v. Milby*, 233 Ga. 7, 209 S.E.2d 603 (1974); *Sikes v. Sikes*, 233 Ga. 97, 209 S.E.2d 641 (1974); *Cochran v. McCollum*, 233 Ga. 104, 210 S.E.2d 13 (1974); *McMichael v. Georgia Power Co.*, 133 Ga. App. 593, 211 S.E.2d 632 (1974); *Coppedge v. Columbus*, 134 Ga. App. 5, 213 S.E.2d 144 (1975); *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975); *Jernigan v. Collier*, 234 Ga. 837, 218

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S.E.2d 556 (1975); *Sellers v. Home Furnishing Co.*, 235 Ga. 831, 222 S.E.2d 34 (1976); *Liberty Forest Prods., Inc. v. Interstate Paper Corp.*, 138 Ga. App. 153, 225 S.E.2d 731 (1976); *Leggett v. Benton Bros. Drayage & Storage Co.*, 138 Ga. App. 761, 227 S.E.2d 397 (1976); *C & S Land, Transp. & Dev. Corp. v. Grubbs*, 141 Ga. App. 393, 233 S.E.2d 486 (1977); *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977); *Worthen v. Jones*, 240 Ga. 388, 240 S.E.2d 842 (1977); *Retail Union Health & Welfare Fund v. Seabrum*, 240 Ga. 695, 242 S.E.2d 18 (1978); *Roe v. Doe*, 246 Ga. 138, 268 S.E.2d 901 (1980); *Hanover Ins. Co. v. Nelson Conveyor & Mach. Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981); *Goodyear v. Trust Co. Bank*, 248 Ga. 407, 284 S.E.2d 6 (1981); *Evans v. Montgomery Elevator Co.*, 159 Ga. App. 834, 285 S.E.2d 263 (1981); *Financial Bldg. Consultants, Inc. v. American Druggists Ins. Co.*, 91 F.R.D. 62 (N.D. Ga. 1981); *Orr v. Culpepper*, 161 Ga. App. 801, 288 S.E.2d 898 (1982); *Williams v. Lewis*, 163 Ga. App. 729, 296 S.E.2d 81 (1982); *Walker v. Little*, 164 Ga. App. 423, 296 S.E.2d 636 (1982); *Downey v. Downey*, 250 Ga. 497, 299 S.E.2d 558 (1983); *Hughey v. Emory Univ.*, 168 Ga. App. 239, 308 S.E.2d 558 (1983); *Coates v. Mulji Motor Inn, Inc.*, 178 Ga. App. 208, 342 S.E.2d 488 (1986); *Barone v. McRae & Holloway*, 179 Ga. App. 812, 348 S.E.2d 320 (1986); *Wheeler's, Inc. v. Wilson*, 196 Ga. App. 622, 396 S.E.2d 790 (1990); *Ga. Pines Cmty. Serv. Bd. v. Summerlin*, 282 Ga. 339, 647 S.E.2d 566 (2007).

Courts to Which Chapter Applicable

Legislative authority to enact procedure for particular court. — Legislature has specific constitutional authority for enacting special rules of procedure applicable only to a particular court. *Critz Buick, Inc. v. Aliotta*, 145 Ga. App. 805, 245 S.E.2d 56 (1978).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is a general law of this state and applies to all courts classified as courts of record herein. *Electro-Kinetics Corp. v. Wilson*, 122 Ga. App. 171, 176 S.E.2d 604 (1970).

Chapter controls over special laws in conflict therewith. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), being a general law relating to that classification of courts known as courts of record, must necessarily be controlling over any special law applicable to a particular court of record in a particular locality in conflict therewith. *Electro-Kinetics Corp. v. Wilson*, 122 Ga. App. 171, 176 S.E.2d 604 (1970).

When provision of special Act establishing court of record conflicts with a provision of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), the Civil Practice Act controls. *Pittman v. McKinney*, 135 Ga. App. 192, 217 S.E.2d 446 (1975).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) applies only to courts specified in this section, as limited by Ga. L. 1967, p. 226, § 33 (see now O.C.G.A. § 9-11-81) and as extended by Ga. L. 1970, p. 679, § 8, relating to state courts of counties. *Martin v. Prior Tire Co.*, 122 Ga. App. 637, 178 S.E.2d 306 (1970).

Characteristics of court of record. — Presence of the following characteristics is indicative that a particular court is a court of record: (1) the court has power to fine and imprison; (2) the court exercises the court's functions independently of the person of the magistrate; (3) the court proceeds according to the course of the common law; (4) the court has a seal; and (5) the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the record of the court and are of such high and supereminent authority that their truth is not to be called in question. *DeKalb County v. Deason*, 221 Ga. 237, 144 S.E.2d 446 (1965), answer conformed to, 113 Ga. App. 555, 149 S.E.2d 155 (1966).

Permanent record essential feature of court of record. — One essential feature necessary to constitute a court of record is that a permanent record of the proceedings of the court must be made and kept, that is, a precise history of a suit from its commencement to its termination, including conclusions of law thereon drawn by the proper officer for the purpose of perpetuating the exact state of

facts. *DeKalb County v. Deason*, 221 Ga. 237, 144 S.E.2d 446 (1965), answer conformed to, 113 Ga. App. 555, 149 S.E.2d 155 (1966).

State courts. — All state courts having concurrent jurisdiction with superior courts to try misdemeanor cases by jury trial or having civil jurisdiction unlimited in amount with superior courts in all matters, with certain exceptions, became subject to rules of practice and procedure applicable to the superior courts as set forth in the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Marler v. C & S Bank*, 239 Ga. 342, 236 S.E.2d 590 (1977).

Probate courts. — Probate court is a court of record. *Slocumb v. Ross*, 119 Ga. App. 567, 168 S.E.2d 208 (1969).

Probate court is a court of record and thus is bound by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Leathers v. Gilland*, 141 Ga. App. 681, 234 S.E.2d 336 (1977).

Appeals to superior court from probate court. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) generally governs in de novo investigations in superior court on appeal from probate court. *McKnight v. Mitchell*, 142 Ga. App. 344, 235 S.E.2d 763 (1977).

Juvenile courts. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), although not in itself applicable to juvenile courts, may be adopted as to procedures not specifically provided for in the Juvenile Code (see now O.C.G.A. Ch. 11, T. 15). In re *L.L.W.*, 141 Ga. App. 32, 232 S.E.2d 378 (1977).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is not applicable in the juvenile courts unless its rules are adopted by the courts as to procedures not specifically provided for in the Juvenile Court Code (see now O.C.G.A. Ch. 11, T. 15). *Crook v. Georgia Dep't of Human Resources*, 137 Ga. App. 817, 224 S.E.2d 806 (1976).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is not per se made applicable to juvenile courts, but its provisions may be

adopted by a juvenile court as to procedures for which provision is not specifically made in the Juvenile Code (see now O.C.G.A. Ch. 11, T. 15). *Ray v. Department of Human Resources*, 155 Ga. App. 81, 270 S.E.2d 303 (1980).

Civil and Criminal Court of DeKalb County not court of record. — In making the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) applicable only in courts of record, the General Assembly did not include Civil and Criminal Court of DeKalb County, which court is not required to enroll nor does it enroll for permanent memorial its acts and proceedings. *DeKalb County v. Deason*, 221 Ga. 237, 144 S.E.2d 446 (1965), answer conformed to, 113 Ga. App. 555, 149 S.E.2d 155 (1966).

Conflicting local municipal court rule void. — Local rule of the Municipal Court of Columbus (a court of record), which provides that if a party fails to file a demand for a trial by jury on or before 5:00 p.m. on the last business day before docket call, the right to a jury trial is “presumed waived” and the case is set down on the nonjury calendar, is in conflict with O.C.G.A. § 9-11-39, and, to the extent of the conflict, it is void. *Raintree Farms, Inc. v. Stripping Ctr., Ltd.*, 166 Ga. App. 848, 305 S.E.2d 660 (1983).

Special master's award in condemnation proceeding. — Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with sufficient notice under the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which the utility intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. *Ga. Power Co. v. Stowers*, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Justice of the peace court is not a court of record, and it is therefore not subject to the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). 1967 Op. Att'y Gen. No. 67-351.

City Court of Albany is a court of record within the meaning of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). 1974 Op. Att'y Gen. No. U74-31.

Neither Professional Practices

Commission nor local board of education is a court of record for purposes of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) and, therefore, such commission is without authority to compel a party to proceeding before it to submit to medical examination pursuant to Ga. L. 1972, p. 510, § 8 (see now O.C.G.A. § 9-11-35). 1977 Op. Att'y Gen. No. 77-48.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, § 20. 32 Am. Jur. 2d, Federal Courts, § 20.

Am. Jur. Pleading and Practice

Forms. — 1 Am. Jur. Pleading and Practice Forms, Accord and Satisfaction, § 33.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 10, 16, 17.

9-11-2. One form of action.

There shall be one form of action, to be known as “civil action.” (Ga. L. 1966, p. 609, § 2.)

Cross references. — Definition of “civil action” for purposes of title generally, § 9-2-1.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 2, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For article surveying

developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981). For annual survey of administrative law, see 38 Mercer L. Rev. 17 (1986). For article, “The Civil Jurisdiction of State and Magistrate Courts,” see 24 Ga. St. B.J. 29 (1987).

JUDICIAL DECISIONS

This section furnishes a single uniform procedure by which a litigant may present a litigant's claim in an orderly manner to a court empowered to give the litigant whatever relief is appropriate and just; the substantive and remedial principles that applied prior to it are not changed. *Burnham v. Lynn*, 235 Ga. 207, 219 S.E.2d 111 (1975).

Jurisdictional distinctions between law and equity remain. *Burnham v. Lynn*, 235 Ga. 207, 219 S.E.2d 111 (1975).

Cited in *Adler v. Ormond*, 117 Ga. App.

600, 161 S.E.2d 435 (1968); *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970); *Owens v. Cobb County*, 230 Ga. 707, 198 S.E.2d 846 (1973); *Caito v. State*, 130 Ga. App. 831, 204 S.E.2d 765 (1974); *Sikes v. Sikes*, 233 Ga. 97, 209 S.E.2d 641 (1974); *McGarvey v. Board of Zoning Appeals*, 243 Ga. 714, 256 S.E.2d 781 (1979); *Roe v. Doe*, 246 Ga. 138, 268 S.E.2d 901 (1980); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 249 Ga. 662, 293 S.E.2d 331 (1982); *Pack v. Mahan*, 294 Ga. 496, 755 S.E.2d 126 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, §§ 18, 19. 27A Am. Jur. 2d, Equity, § 4. 32 Am. Jur. 2d, Federal Courts, §§ 17, 19, 20.

C.J.S. — 1A C.J.S., Actions, §§ 1 et seq., 84. 35A C.J.S., Federal Civil Procedure, §§ 34, 35, 40, 41.

ARTICLE 2

COMMENCEMENT OF ACTION AND SERVICE

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

9-11-3. Commencement of action; filing of civil case filing form.

(a) A civil action is commenced by filing a complaint with the court.

(b) At the time of filing the complaint for a civil action in superior court or state court, the plaintiff shall file the appropriate civil case filing form with the clerk of the court. The form shall contain complete information and shall be substantially in the form prescribed in Code Section 9-11-133. The filing of the complaint shall not be delayed for the filing of the case filing form. If, after a civil action has been filed, the court presiding over the civil action decides that the civil case filing form has not been filed or has been filed incorrectly, the court shall require the plaintiff to file the civil case filing form or an amended form. In no case shall the failure to accurately complete the civil case filing form required by this Code section provide a basis to dismiss a civil action. (Ga. L. 1966, p. 609, § 3; Ga. L. 2000, p. 850, § 1; Ga. L. 2001, p. 4, § 9; Ga. L. 2006, p. 648, § 1/ HB 1195.)

Cross references. — Authority of Superior Court clerks, § 15-6-60.

Editor's notes. — Ga. L. 2000, p. 4, § 10, not codified by the General Assembly, provides that the amendment to this Code section is applicable to civil actions commenced in superior or state court on or after July 1, 2000.

Ga. L. 2006, p. 648, § 3/ HB 1195, not codified by the General Assembly, pro-

vides that the amendment to this Code section shall apply to actions and judgments filed on or after July 1, 2006.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 3, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5570 and former Code 1933, § 81-112 are included in the annotations for this Code section.

Section integral part of statutes of limitations. — By holding that service of process does not relate back to toll statutes of limitations unless the plaintiff has acted diligently, the Georgia courts have interpreted O.C.G.A. §§ 9-11-3 and 9-11-4

as integral parts of the state statutes of limitations. *Cambridge Mut. Fire Ins. Co. v. City of Claxton*, 720 F.2d 1230 (11th Cir. 1983).

Appeal to superior court from county tax assessment is a “complaint”, which is required to be answered by responsive pleading. *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977).

Filing must be followed by service. — Filing of the petition is treated as the commencement of the suit only when followed by due and legal service. *Murphy v. Ferguson-McElhaney Motor Co.*, 40 Ga. App. 847, 151 S.E. 663 (1930) (decided under former Civil Code 1910, § 5570); *Hilton v. Maddox, Bishop, Hayton Frame & Trim Contractors*, 125 Ga. App. 423, 188 S.E.2d 167 (1972).

Date of filing of petition in clerk’s office is the date of commencement of the suit, but this is so only when service is had on the defendant. *Duren v. Pollock*, 46 Ga. App. 706, 169 S.E. 44 (1933) (decided under former Code 1933, § 81-112).

Filing is not commencement of an action unless followed by service within a reasonable time, but once service is perfected the service will relate back to original date of filing, which will be considered the date of commencement of lawsuit. *Franek v. Ray*, 239 Ga. 282, 236 S.E.2d 629 (1977); *Robinette v. Johnston*, 637 F. Supp. 922 (M.D. Ga. 1986).

Georgia cases interpreting the language of O.C.G.A. §§ 9-11-3 and 9-11-4 conclude that the filing of the complaint does not toll the statute of limitations unless a plaintiff exercises diligence and ensures the complaint is served as quickly as possible; filing is still not the commencement of suit unless followed by service within a reasonable time, but once service is perfected upon a defendant, service will relate back to the original date of the filing which will be considered the date of the commencement of the law suit. *Roberts v. Jones*, 390 F. Supp. 2d 1333 (M.D. Ga. May 9, 2005).

Despite the fact that the Court of Appeals of Georgia could not discern whether a personal injury action filed by a husband and wife against a driver was dismissed because the statute of limitation had ex-

pired or because the husband and wife were not diligent in attempting service, the trial court did not abuse the court’s discretion in dismissing the action because the driver had never been personally served with the complaint prior to the expiration of the statute of limitation. *Nyass v. Tilahun*, 281 Ga. App. 542, 636 S.E.2d 714 (2006).

Timeliness of service. — Trial court properly dismissed a plaintiff’s personal injury action filed against the defendant on insufficient service of process grounds as: (1) plaintiff did little to pursue service; (2) plaintiff inappropriately shifted the burden of the search on the court; and (3) the fact that the defendant served interrogatories and a request for production did not amount to a waiver of an insufficient service of process defense. *Kelley v. Lymon*, 279 Ga. App. 849, 632 S.E.2d 734 (2006).

Bankruptcy trustee’s late service on a driver did not relate back to the filing of the personal injury complaint when the trustee failed to show that the trustee reasonably and diligently insured that service was made as quickly as possible after the driver made the trustee aware of the driver’s true residence. *Webster v. Western Express, Inc.*, No. 5:05-CV-350 (WDO), 2007 U.S. Dist. LEXIS 70011 (M.D. Ga. Sept. 21, 2007).

Because a plaintiff did not satisfy the plaintiff’s burden of showing that the plaintiff exercised due diligence in perfecting service of process on the defendant, the trial court abused the court’s discretion in denying the defendant’s motion to dismiss. *Jones v. Brown*, 299 Ga. App. 418, 683 S.E.2d 76 (2009).

Action commenced as of filing date. — Service or waiver is essential, but when made service relates back to the date of filing, which establishes the date on which the action is commenced. *Taylor v. Kohlmeyer & Co.*, 123 Ga. App. 493, 181 S.E.2d 496 (1971).

Trial court did not err in dismissing an officer’s claims against an entity on the ground that the claims were filed in violation of an automatic bankruptcy stay provided by 11 U.S.C. § 362 because, when the original complaint was filed, that entity was a debtor in bankruptcy; the auto-

matic stay was in effect at the time the action was commenced, rendering the claims against the entity void ab initio. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011), cert. denied, No. S12C0399, 2012 Ga. LEXIS 561 (Ga. 2012).

Failure to file civil case filing form not fatal. — Putative biological father's failure to pay a filing fee and file a civil case filing form required by O.C.G.A. § 9-11-3(b) was not fatal to the father's legitimation claim because the clerk, when asked by the father, did not require payment of a filing fee, and the father's attorney merely followed the procedure suggested by the clerk. *Brewton v. Poss*, 316 Ga. App. 704, 728 S.E.2d 837 (2012).

Action not pending until service is perfected. — Court does not have jurisdiction of the defendant until after service of process, and, accordingly, while action commences when petition is filed, it is not a "pending suit" between the parties until after service of process. *Hilton v. Maddox, Bishop, Hayton Frame & Trim Contractors*, 125 Ga. App. 423, 188 S.E.2d 167 (1972).

Laches finding against plaintiff. — In a personal injury suit, although the plaintiff passenger attempted to serve the defendant driver only once prior to the expiration of the statute of limitation, upon encountering difficulty locating the driver, the passenger's response was delayed at best, notwithstanding the imminent running of the statute of limitation, and the passenger did not even try to serve the driver until after the statute had run; thus, under the circumstances, the trial court properly found the passenger guilty of laches. *Patterson v. Lopez*, 279 Ga. App. 840, 632 S.E.2d 736 (2006).

Good faith delivery to deputy sheriff instead of clerk deemed filing of complaint. — When there is a timely and good faith compliance with a deputy clerk's uncontroverted intention that the act of delivery of a complaint to a deputy sheriff would constitute delivery to and receipt by the clerk for purposes of filing, the complaint is to be considered filed as of the date of the compliance with that expressed intention. *Forsyth v. Hale*, 166 Ga. App. 340, 304 S.E.2d 81 (1983).

Venue will be determined as of date of filing as long as service is subsequently perfected upon the defendant within a reasonable time period. *Franek v. Ray*, 239 Ga. 282, 236 S.E.2d 629 (1977).

For purposes of venue and other jurisdictional questions, a party's residence at the time of filing suit is the determining factor. *Franek v. Ray*, 239 Ga. 282, 236 S.E.2d 629 (1977).

Effect of instructions to "hold" pleadings at the time of filing. — Handing the clerk a petition, with instructions to endorse upon the petition an entry of filing and to issue process, but to "hold it" until plaintiff notified the clerk further, was not filing of a suit or commencement of an action within the meaning of the former statute, until such instructions were withdrawn; and if bar of statute of limitations attached before such instructions were withdrawn, the action was barred, notwithstanding service was regularly perfected after withdrawal of the instructions. *Roddy v. Hartford Accident & Indem. Co.*, 65 Ga. App. 632, 16 S.E.2d 81 (1941) (decided under former Code 1933, § 81-112).

Application for contempt may not, standing alone, serve to commence a civil action for damages as it is not a complaint. *Opatut v. Guest Pond Club, Inc.*, 254 Ga. 258, 327 S.E.2d 487 (1985).

Cited in *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970); *Wheeler v. Wheeler*, 229 Ga. 84, 189 S.E.2d 427 (1972); *Owens v. Cobb County*, 230 Ga. 707, 198 S.E.2d 846 (1973); *Yeargin v. Burleson*, 132 Ga. App. 652, 209 S.E.2d 99 (1974); *Pascoe Steel Corp. v. Turner County Bd. of Educ.*, 139 Ga. App. 87, 227 S.E.2d 887 (1976); *Mock v. Copeland*, 160 Ga. App. 876, 288 S.E.2d 591 (1982); *Harris v. Sampson*, 162 Ga. App. 241, 290 S.E.2d 165 (1982); *Land v. Casteel*, 195 Ga. App. 455, 393 S.E.2d 710 (1990); *Day v. Burnett*, 199 Ga. App. 494, 405 S.E.2d 316 (1991); *Cochran v. Bowers*, 274 Ga. App. 449, 617 S.E.2d 563 (2005); *Kirkland v. Tamplin*, 283 Ga. App. 596, 642 S.E.2d 125 (2007); *Fox v. City of Cumming*, 289 Ga. App. 803, 658 S.E.2d 408 (2008); *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008); *Batesville Casket Co. v. Watkins*

Mortuary, Inc., 293 Ga. App. 854, 668 S.E.2d 476 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Abatement, Survival, and Revival, §§ 12, 13. 1 Am. Jur. 2d, Actions, § 79.

C.J.S. — 1A C.J.S., Actions §§ 1 et seq., 305, 310 et seq. 35A C.J.S., Federal Civil Procedure, § 300.

9-11-4. Process.

(a) **Summons — Issuance.** Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) **Summons — Form.** The summons shall be signed by the clerk; contain the name of the court and county and the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address; and state the time within which this chapter requires the defendant to appear and file appropriate defensive pleadings with the clerk of the court, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against him or her for the relief demanded in the complaint.

(c) **Summons — By whom served.** Process shall be served by:

(1) The sheriff of the county where the action is brought or where the defendant is found or by such sheriff's deputy;

(2) The marshal or sheriff of the court or by such official's deputy;

(3) Any citizen of the United States specially appointed by the court for that purpose;

(4) A person who is not a party, not younger than 18 years of age, and has been appointed by the court to serve process or as a permanent process server; or

(5) A certified process server as provided in Code Section 9-11-4.1.

Where the service of process is made outside of the United States, after an order of publication, it may be served either by any citizen of the United States or by any resident of the country, territory, colony, or province who is specially appointed by the court for that purpose. When service is to be made within this state, the person making such service shall make the service within five days from the time of receiving the summons and complaint; but failure to make service within the five-day period will not invalidate a later service.

(d) **Waiver of service.**

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) Upon receipt of notice of an action in the manner provided in this subsection, the following defendants have a duty to avoid unnecessary costs of serving the summons:

(A) A corporation or association that:

(i) Is subject to service under paragraph (1) or (2) of subsection (e) of this Code section; and

(ii) Receives notice of such action by an agent other than the Secretary of State; and

(B) A natural person who:

(i) Is not a minor; and

(ii) Has not been judicially declared to be of unsound mind or incapable of conducting his or her own affairs.

(3) To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request shall:

(A) Be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent or other agent authorized by appointment to receive service of process for a defendant subject to service under paragraph (1) or (2) of subsection (e) of this Code section;

(B) Be dispatched through first-class mail or other reliable means;

(C) Be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) Make reference to this Code section and shall inform the defendant, by means of the text prescribed in subsection (l) of this Code section, of the consequences of compliance and of failure to comply with the request;

(E) Set forth the date on which the request is sent;

(F) Allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) Provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

(4) If a defendant located within the United States that is subject to service inside or outside the state under this Code section fails to comply with a request for a waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure is shown.

(5) A defendant that, before being served with process, returns a waiver so requested in a timely manner is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(6) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (5) of this subsection, as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(7) The costs to be imposed on a defendant under paragraph (4) of this subsection for failure to comply with a request to waive service of summons shall include the costs subsequently incurred in effecting service, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(e) **Summons — Personal service.** Except for cases in which the defendant has waived service, the summons and complaint shall be served together. The plaintiff shall furnish the clerk of the court with such copies as are necessary. Service shall be made by delivering a copy of the summons attached to a copy of the complaint as follows:

(1)(A) If the action is against a corporation incorporated or domesticated under the laws of this state or a foreign corporation authorized to transact business in this state, to the president or other officer of such corporation or foreign corporation, a managing agent thereof, or a registered agent thereof, provided that when for any reason service cannot be had in such manner, the Secretary of State shall be an agent of such corporation or foreign corporation upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or her or with any other person or persons designated by the Secretary of State to receive such service a copy of such process, notice, or demand, along with a copy of the affidavit to be submitted to the court pursuant to this Code section. The plaintiff or the plaintiff's attorney shall certify in writing to the Secretary of State that he or she has

forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered office or registered agent listed on the records of the Secretary of State, that service cannot be effected at such office, and that it therefore appears that such corporation or foreign corporation has failed either to maintain a registered office or to appoint a registered agent in this state. Further, if it appears from such certification that there is a last known address of a known officer of such corporation or foreign corporation outside this state, the plaintiff shall, in addition to and after such service upon the Secretary of State, mail or cause to be mailed to the known officer at the address by registered or certified mail or statutory overnight delivery a copy of the summons and a copy of the complaint. Any such service by certification to the Secretary of State shall be answerable not more than 30 days from the date the Secretary of State receives such certification.

(B) As used in this paragraph, the term “managing agent” means a person employed by a corporation or a foreign corporation who is at an office or facility in this state and who has managerial or supervisory authority for such corporation or foreign corporation;

(2)(A) If the action is against a foreign corporation doing business in this state without authorization to transact business in this state that has a managing agent or against a nonresident individual, partnership, joint-stock company, or association doing business in this state that has a managing agent, to such agent, or to a registered agent designated for service of process.

(B) As used in this paragraph, the term “managing agent” means a person employed by a foreign corporation doing business in this state without authorization to transact business in this state or a nonresident individual, partnership, joint-stock company, or association doing business in this state who is at an office or facility in this state and who has managerial or supervisory authority for such foreign corporation, nonresident individual, partnership, joint-stock company, or association;

(3) If against a minor, to the minor, personally, and also to such minor’s father, mother, guardian, or duly appointed guardian ad litem unless the minor is married, in which case service shall not be made on the minor’s father, mother, or guardian;

(4) If against a person residing within this state who has been judicially declared to be of unsound mind or incapable of conducting his or her own affairs and for whom a guardian has been appointed, to the person and also to such person’s guardian and, if there is no

guardian appointed, then to his or her duly appointed guardian ad litem;

(5) If against a county, municipality, city, or town, to the chairman of the board of commissioners, president of the council of trustees, mayor or city manager of the city, or to an agent authorized by appointment to receive service of process. If against any other public body or organization subject to an action, to the chief executive officer or clerk thereof;

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

(7) In all other cases to the defendant personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(f) Summons — Other service.

(1) Service by publication.

(A) **General.** When the person on whom service is to be made resides outside the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of the summons, and the fact shall appear, by affidavit, to the satisfaction of the judge or clerk of the court, and it shall appear, either by affidavit or by a verified complaint on file, that a claim exists against the defendant in respect to whom the service is to be made, and that he or she is a necessary or proper party to the action, the judge or clerk may grant an order that the service be made by the publication of summons, provided that when the affidavit is based on the fact that the party on whom service is to be made resides outside the state, and the present address of the party is unknown, it shall be a sufficient showing of such fact if the affiant shall state generally in the affidavit that at a previous time such person resided outside this state in a certain place (naming the place and stating the latest date known to affiant when the party so resided there); that such place is the last place in which the party resided to the knowledge

of affiant; that the party no longer resides at the place; that affiant does not know the present place of residence of the party or where the party can be found; and that affiant does not know and has never been informed and has no reason to believe that the party now resides in this state; and, in such case, it shall be presumed that the party still resides and remains outside the state, and the affidavit shall be deemed to be a sufficient showing of due diligence to find the defendant. This Code section shall apply to all manner of civil actions, including those for divorce.

(B) **Property.** In any action which relates to, or the subject of which is, real or personal property in this state in which any defendant, corporate or otherwise, has or claims a lien or interest, actual or contingent, or in which the relief demanded consists wholly or in part of excluding such defendant from any interest therein, where the defendant resides outside the state or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of summons, the judge or clerk may make an order that the service be made by publication of summons. The service by publication shall be made in the same manner as provided in all cases of service by publication.

(C) **Publication.** When the court orders service by publication, the clerk shall cause the publication to be made in the paper in which sheriff's advertisements are printed, four times within the ensuing 60 days, publications to be at least seven days apart. The party obtaining the order shall, at the time of filing, deposit the cost of publication. The published notice shall contain the name of the parties plaintiff and defendant, with a caption setting forth the court, the character of the action, the date the action was filed, the date of the order for service by publication, and a notice directed and addressed to the party to be thus served, commanding him or her to file with the clerk and serve upon the plaintiff's attorney an answer within 60 days of the date of the order for service by publication and shall bear teste in the name of the judge and shall be signed by the clerk of the court. Where the residence or abiding place of the absent or nonresident party is known, the party obtaining the order shall advise the clerk thereof; and it shall be the duty of the clerk, within 15 days after filing of the order for service by publication, to enclose, direct, stamp, and mail a copy of the notice, together with a copy of the order for service by publication and complaint, if any, to the party named in the order at his or her last known address, if any, and make an entry of this action on the complaint or other pleadings filed in the case. The copy of the notice to be mailed to the nonresident shall be a duplicate of the one published in the newspaper but need not

necessarily be a copy of the newspaper itself. When service by publication is ordered, personal service of a copy of the summons, complaint, and order of publication outside the state in lieu of publication shall be equivalent to serving notice by publication and to mailing when proved to the satisfaction of the judge or otherwise. The defendant shall have 30 days from the date of such personal service outside the state in which to file defensive pleadings.

(2) **Personal service outside the state.** Personal service outside the state upon a natural person may be made: (A) in any action where the person served is a resident of this state, and (B) in any action affecting specific real property or status, or in any other proceeding in rem without regard to the residence of the person served. When such facts shall appear, by affidavit, to the satisfaction of the court and it shall appear, either by affidavit or by a verified complaint on file, that a claim is asserted against the person in respect to whom the service is to be made, and that he or she is a necessary or proper party to the action, the court may grant an order that the service be made by personal service outside the state. Such service shall be made by delivering a copy of the process together with a copy of the complaint in person to the persons served.

(3) **Service upon persons in a foreign country.** Unless otherwise provided by law, service upon a person from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within the United States:

(A) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(B) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(i) In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(ii) As directed by the foreign authority in response to a letter rogatory or letter of request; or

(iii) Unless prohibited by the law of the foreign country, by:

(I) Delivery to the person of a copy of the summons and the complaint; or

(II) Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(C) By other means not prohibited by international agreement as may be directed by the court.

(4) Service upon persons residing in gated and secured communities.

(A) As used in this paragraph, the term “gated and secured communities” means multiple residential or commercial properties, such as houses, condominiums, offices, or apartments, where access to the multiple residential or commercial properties is restricted by a gate, security device, or security attendant that restricts public entrance onto the property; provided, however, that a single residence, farm, or commercial property with its own fence or gate shall not be included in this definition.

(B) Any person authorized to serve process shall be granted access to gated and secured communities for a reasonable period of time during reasonable hours for the purpose of performing lawful service of process upon:

- (i) Identifying to the guard or managing agent the person, persons, entity, or entities to be served;
- (ii) Displaying a current driver’s license or other government issued identification which contains a photograph; and
- (iii) Displaying evidence of current appointment as a process server pursuant to this Code section.

(C) Any person authorized to serve process shall promptly leave gated and secured communities upon perfecting service of process or upon a determination that process cannot be effected at that time.

(g) **Territorial limits of effective service.** All process may be served anywhere within the territorial limits of the state and, when a statute so provides, beyond the territorial limits of the state.

(h) **Return.** The person serving the process shall make proof of such service with the court in the county in which the action is pending within five business days of the service date. If the proof of service is not filed within five business days, the time for the party served to answer the process shall not begin to run until such proof of service is filed. Proof of service shall be as follows:

- (1) If served by a sheriff or marshal, or such official’s deputy, the affidavit or certificate of the sheriff, marshal, or deputy;
- (2) If by any other proper person, such person’s affidavit;
- (3) In case of publication, the certificate of the clerk of court certifying to the publication and mailing; or

(4) The written admission or acknowledgment of service by the defendant.

In the case of service otherwise than by publication, the certificate or affidavit shall state the date, place, and manner of service. Failure to make proof of service shall not affect the validity of the service.

(i) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) **Alternative service.** The methods of service provided in this Code section are cumulative and may be utilized with, after, or independently of other methods of service. Whenever a statute provides for another method of service, service may be made under the circumstances and in the manner prescribed by the statute or under any other methods prescribed in this Code section. The provisions for service by publication provided in this Code section shall apply in any action or proceeding in which service by publication may be authorized by law; and, where by law special provision is made for service by publication, the procedure for such service by publication provided in this Code section may be utilized in lieu thereof. In all cases or special proceedings where the requirements or procedure for service, or both, are not prescribed by law and in any situation where the provisions therefor are not clear or certain, the court may prescribe service according to the exigencies of each case, consistent with the Constitution.

(k) **Service in probate courts and special statutory proceedings.** The methods of service provided in this Code section may be used as alternative methods of service in proceedings in the probate courts and in any other special statutory proceedings and may be used with, after, or independently of the method of service specifically provided for in any such proceeding; and, in any such proceeding, service shall be sufficient when made in accordance with the statutes relating particularly to the proceeding or in accordance with this Code section.

(l) **Forms.**

NOTICE OF LAWSUIT AND REQUEST FOR
WAIVER OF SERVICE OF SUMMONS

TO: (Name of individual defendant or name of officer or agent of corporate defendant) as (title, or other relationship of individual to corporate defendant) of (name of corporate defendant to be served, if any)

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this

notice. The complaint has been filed in the (court named on the complaint) for the State of Georgia in and for the County of (county) and has been assigned (case number of action).

This is not a formal summons or notification from the court, but rather my request pursuant to Code Section 9-11-4 of the Official Code of Georgia Annotated that you sign and return the enclosed Waiver of Service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within 30 days (or 60 days if located outside any judicial district of the United States) after the date designated below as the date on which this Notice of Lawsuit and Request for Waiver of Service of Summons is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the Waiver of Service is also attached for your records. **YOU ARE ENTITLED TO CONSULT WITH YOUR ATTORNEY REGARDING THIS MATTER.**

If you comply with this request and return the signed Waiver of Service, the waiver will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed except that you will not be obligated to answer or otherwise respond to the complaint within 60 days from the date designated below as the date on which this notice is sent (or within 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Georgia Rules of Civil Procedure and then, to the extent authorized by those rules, I will ask the court to require you (or the party on whose behalf you are addressed) to pay the full cost of such service. In that connection, please read the statement concerning the duty of parties to avoid unnecessary costs of service of summons, which is set forth on the Notice of Duty to Avoid Unnecessary Costs of Service of Summons enclosed herein.

I affirm that this Notice of Lawsuit and Request for Waiver of Service of Summons is being sent to you on behalf of the Plaintiff on this _____ day of _____.

Signature of plaintiff's attorney
or

Unrepresented plaintiff

WAIVER OF SERVICE OF SUMMONS

To: (Name of plaintiff's attorney or unrepresented plaintiff)

I acknowledge receipt of your request that I waive service of a summons in the action of (caption of action), which is case number (docket number) in the (name of court) of the State of Georgia in and for the County of (county). I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me. I understand that I am entitled to consult with my own attorney regarding the consequences of my signing this waiver.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by the Georgia Rules of Civil Procedure.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the entity on whose behalf I am acting) if an answer is not served upon you within 60 days after the date this waiver was sent, or within 90 days after that date if the request for the waiver was sent outside the United States.

This _____ day of _____, _____.

(Signed)

(Printed or typed name of defendant)

as (title) _____
of (name of corporate defendant, if any)

NOTICE OF DUTY TO AVOID UNNECESSARY COSTS OF SERVICE OF SUMMONS

Subsection (d) of Code Section 9-11-4 of the Official Code of Georgia Annotated requires certain parties to cooperate in saving unnecessary costs of service of the summons and the pleading. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for such defendant's failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may

later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must, within the time specified on the waiver form, serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and also must file a signed copy of the response with the court. If the answer is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received. (Ga. L. 1966, p. 609, § 4; Ga. L. 1967, p. 226, §§ 1-3, 51; Ga. L. 1968, p. 1036, § 1; Ga. L. 1968, p. 1104, §§ 1, 2; Ga. L. 1969, p. 487, § 1; Ga. L. 1972, p. 689, §§ 1-3; Ga. L. 1980, p. 1124, § 1; Ga. L. 1982, p. 3, § 9; Ga. L. 1984, p. 22, § 9; Ga. L. 1989, p. 364, § 1; Ga. L. 1991, p. 626, § 1; Ga. L. 1993, p. 91, § 9; Ga. L. 2000, p. 1225, § 1; Ga. L. 2000, p. 1589, §§ 3, 4; Ga. L. 2002, p. 1244, § 1; Ga. L. 2010, p. 822, §§ 2, 3, 4/SB 491; Ga. L. 2012, p. 695, § 1/HB 1048; Ga. L. 2013, p. 591, § 1/SB 113.)

The 2013 amendment, effective July 1, 2013, added the subparagraph (e)(1)(A) designation; in subparagraph (e)(1)(A), in the first sentence, substituted "such corporation or foreign corporation, a managing agent thereof, or a registered agent thereof," for "the corporation, secretary, cashier, managing agent, or other agent thereof," and inserted "or foreign corporation", in the third sentence, inserted "registered" in the middle and substituted "such corporation or foreign corporation" for "the corporation", in the fourth sentence, substituted "appears" for "shall appear" and substituted "such corporation or foreign corporation outside this" for "the corporation outside the", and substituted a period for a semicolon at the end; added subparagraph (e)(1)(B); rewrote paragraph (e)(2); and inserted a comma in the first sentence of paragraph (e)(5).

Cross references. — Service on resident minors over age 14 temporarily outside state, § 9-10-70. Specific instances in which process may be served by publication, § 9-10-71. Service of process on person outside state over whom personal jurisdiction has been acquired through such person's transacting business in state, owning real property in state, etc., § 9-10-94. Form of summons, § 9-11-101. Service of process on registered agents of corporations, § 14-2-501 et seq. For fur-

ther provisions regarding service of process on foreign corporations, § 14-2-1507 et seq. Giving of notice to person of attachment issued against his property, § 18-3-14. Service of copy of summons of garnishment, § 18-4-64. Service on persons outside state regarding child custody proceedings, § 19-9-45. Manner of service of notice of intention to exercise power of eminent domain, § 22-2-20 et seq. Service of process in actions relating to exercise of power of eminent domain for public transportation purposes, § 32-3-8 et seq. Service of process on insurance companies, § 33-4-2 et seq. For further provisions regarding service of process on county where county is party defendant, § 36-1-5. Service of process on nonresident arising out of motor vehicle accident or collision involving such nonresident, §§ 40-12-1, 40-12-2. Designation by itinerant entertainment enterprises of agent for service of process, service on Secretary of State in absence of such designation, and penalty for permitting operations in violation of such requirement, § 43-1-15. Service of process in proceedings for registration of land, § 44-2-67 et seq. Service of notice of petition for probate in solemn form, § 53-3-14.

Editor's notes. — Ga. L. 2000, p. 1225, § 8, not codified by the General Assembly, provides that the amendment to this Code

section is applicable to civil actions filed on or after July 1, 2000.

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.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 4, see 28 U.S.C.

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For article, “The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act,” see 3 Ga. St. B.J. 383 (1967). For article, “The Georgia Long Arm Statute: A Significant Advance in the Concept of Personal Jurisdiction,” see 4 Ga. St. B.J. 13 (1967). For article, “Synopsis of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act,” see 4 Ga. St. B.J. 503 (1968). For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970). For article, “Foreign Corporations in Georgia,” see 10 Ga. St. B.J. 243 (1973). For article discussing the inapplicability of Civil Practice Act provisions concerning service of process to personal property foreclosures, see 11 Ga. St. B.J. 230 (1975). For article discussing *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976), holding Georgia’s notice requirement for year’s support unconstitutional prior to 1977 revision, see 13 Ga. St. B.J. 85 (1976). For article examining waiver of objections to venue and lack of personal jurisdiction by default, see 12 Ga. L. Rev. 181 (1978). For article surveying Georgia cases in the area of business associations from June, 1977 through May, 1978, see 30 Mercer L. Rev. 1 (1978). For article surveying Georgia cases in the area of

trial practice and procedure from June, 1979 through May, 1980, see 32 Mercer L. Rev. 225 (1980). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on commercial law, see 34 Mercer L. Rev. 31 (1982). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986). For annual survey on trial practice and procedure, see 42 Mercer L. Rev. 469 (1990). For article, “Service of Process by E-Mail,” see 5 Ga. St. B.J. 32 (2000). For article, “Domestic Relations Law,” see 53 Mercer L. Rev. 265 (2001). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For article, “What is Reasonable Service?,” see 12 Ga. St. B.J. 22 (2007). For survey article on administrative law, see 60 Mercer L. Rev. 1 (2008). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012). For article, “2013 Georgia Corporation and Business Organization Case Law Developments,” see 19 Ga. St. B.J. 28 (April 2014).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972). For note advocating a clearer definition of proper corporate agents for service of process, and discard of the provision allowing process to be left at the most notorious place of abode, see 11 Ga. L. Rev. 546 (1977). For note, “Extra! Read All About It: Why Notice by Newspaper Publication Fails to Meet Mullane’s Desire to Inform Standard and How Modern Technology Provides a Viable Alternative,” see 45 Ga. L. Rev. 1095 (2011).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, §§ 5552, 5554, 5556, 5562, and 5566 and former Code 1933, §§ 81-201 through 81-220, 81-1201, 81-1205, and 81-1313 are included in the annotations for this Code section.

Strict construction. — Statutes providing for service of process must be construed with strictness as this is the method by which the court obtains jurisdiction over a person sued in order to be able to render judgment against that person. *Cawthon v. McCord*, 83 Ga. App. 158, 63 S.E.2d 287 (1951) (decided under former Code 1933, § 81-202).

Provisions of this section must be strictly construed, since notice is the very bedrock of due process. *Thompson v. Lagerquist*, 232 Ga. 75, 205 S.E.2d 267 (1974); *Lanier v. Foster*, 133 Ga. App. 149, 210 S.E.2d 326 (1974); *Cook v. Bright*, 150 Ga. App. 696, 258 S.E.2d 326 (1979).

Federal rules. — Georgia law does not add to the ways in which service may be

effected under the Federal Rules of Civil Procedure. *Dorman v. Simpson*, 893 F. Supp. 1073 (N.D. Ga. 1995).

Georgia Tort Claims Act. — O.C.G.A. § 50-21-35 does not provide the exclusive method for service of process on a state entity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., rather, O.C.G.A. § 9-11-4(e)(5), part of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, applies to claims brought under the Georgia Tort Claims Act, and accordingly service on a community board was not improper when the summons and complaint were not handed personally to the board's director. *Ga. Pines Cmty. Serv. Bd. v. Summerlin*, 282 Ga. 339, 647 S.E.2d 566 (2007).

Substantial compliance with requisites of law with respect to issuing and serving of process will be sufficient, and when notice is given, no technical or formal objection shall invalidate any process. *Gainesville Feed & Poultry Co. v. Waters*, 87 Ga. App. 354, 73 S.E.2d 771 (1952) (decided under former Code 1933, § 81-220).

Purpose of service. — Object of process is to notify the defendant when to

General Consideration (Cont'd)

appear and answer. *Minsk v. Cook*, 48 Ga. App. 567, 173 S.E. 446 (1934) (decided under former Civil Code 1910, § 5552).

Law requires service not simply for form, or as a snare to trap litigants, or to prevent adjudication of a legal controversy, but its sole purpose is to put defendant on notice that the defendant is being sued and afford the defendant ample opportunity to be heard on any defense that the defendant may wish to make thereto. *Jones v. Jones*, 209 Ga. 861, 76 S.E.2d 801 (1953) (decided under former Code 1933, §§ 81-201 and 81-211).

Only purpose of process is to give the party proper notice of proceedings and when that party's appearance will be required, and when that is done, process has served its purpose. *Heffner v. Dutton*, 106 Ga. App. 786, 128 S.E.2d 337 (1962) (decided under former Code 1933, § 81-220).

Purpose of process and service is to bring defendant into court. *Tyree v. Jackson*, 226 Ga. 690, 177 S.E.2d 160 (1970).

Object of service on the defendant is to afford the defendant notice of pendency of proceeding and to afford the defendant an opportunity to appear and to be heard. *Tyree v. Jackson*, 226 Ga. 690, 177 S.E.2d 160 (1970).

Summons issued by a clerk of court under O.C.G.A. § 9-11-4 is not an order of court for the purpose of requiring an answer to an amended complaint and a defendant is not required to file an answer to an amended complaint unless the trial court itself has affirmatively ordered such answer. *Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006).

Process is means whereby court compels appearance of defendant before it for compliance with its demands. *Burch v. Crown Laundry*, 78 Ga. App. 421, 50 S.E.2d 768 (1948), *aff'd*, 205 Ga. 211, 53 S.E.2d 116 (1949) (decided under former Code 1933, § 81-201).

Meaning of "substituted" service. — As the only mode of service known to common law was personal service, the only legal alternative type of service is that authorized by statute; thus, any service other than personal service is that type substituted by statute to be used in

lieu of personal service. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, *rev'd on other grounds*, 240 Ga. 376, 240 S.E.2d 856 (1977).

Actual notice. — O.C.G.A. § 9-11-4 should be liberally construed to effectuate service when actual notice of suit has been received by the defendant. *Trammel v. National Bank*, 159 Ga. App. 850, 285 S.E.2d 590 (1981).

Necessity of service is not dispensed with by mere fact that defendant may in some way learn of or have actual knowledge of filing of the action. *Trammel v. National Bank*, 159 Ga. App. 850, 285 S.E.2d 590 (1981).

Mere fact that the defendant knew of the lawsuit brought by the plaintiff is irrelevant when no summons was issued and served upon the defendant. *Elmore v. Elmore*, 177 Ga. App. 682, 340 S.E.2d 651 (1986).

Effect of mere passage of time on validity of service. — Complaint should not have been dismissed when, although service was not perfected until 13 days after the complaint was filed, which was 11 days after the expiration of the six-month grace period of the renewal statute, the trial judge made no finding of laches, lack of diligence or any factor other than mere lapse of time, nor would the facts have supported such a finding. *Bennett v. Matt Gay Chevrolet Oldsmobile, Inc.*, 200 Ga. App. 348, 408 S.E.2d 111, *cert. denied*, 200 Ga. App. 895, 408 S.E.2d 111 (1991).

Rule nisi may be used as process in lieu of a summons when the defendant is required to appeal at a time other than within 30 days after service. *Chancey v. Hancock*, 233 Ga. 734, 213 S.E.2d 633 (1975).

Custody judgment sought to be enforced by attachment for contempt is separate and independent proceeding from one in which visitation rights are granted, and being so, it is necessary in latter case to perfect service of petition and rule nisi on parent in custody. *Connell v. Connell*, 221 Ga. 379, 144 S.E.2d 722 (1965), *later appeal*, 221 Ga. 859, 148 S.E.2d 294 (1966) (decided under former Code 1933, § 81-202).

Notice of habitual violator status and concomitant license revocation is not service of civil process as described in O.C.G.A. § 9-11-4, but rather under O.C.G.A. § 40-5-58(b), a driver is to be informed of the driver's status as an habitual violator by certified mail or by personal service, accomplished in the case at bar when the police officer delivered the notice to the licensee. *Hardison v. Booker*, 179 Ga. App. 693, 347 S.E.2d 681 (1986).

No default judgment for failure to file defensive pleadings in appeal from property evaluation. — Appeal procedure outlined in O.C.G.A. § 48-5-311(f) does not contemplate the filing of a “complaint” or “answer,” and a default judgment will not lie for failure to file defensive pleadings in a de novo hearing on appeal in the superior court from a property evaluation. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

Motion for summary judgment and statute of limitation. — Whether the defendant's motion for summary judgment to dismiss the complaint as barred by the statute of limitation should be granted is determined by whether the plaintiffs' have shown that the plaintiffs acted in a reasonable and diligent manner in attempting to assure that a proper service was made as quickly as possible. *Abelt v. Nelson*, 204 Ga. App. 501, 419 S.E.2d 749 (1992).

Statutory limitation period is not waived by insurer through initial denial of coverage for a claim. The denial of any claim by an insurer generally constitutes notice to the insured that the insured must pursue the insured's legal remedies under the policy, which includes perfecting service upon the insurer within a reasonable time following the filing of a complaint. *Bowman v. United States Life Ins. Co.*, 167 Ga. App. 673, 307 S.E.2d 134 (1983).

Motion to dismiss is the proper vehicle to seek resolution of the issue of lack of service or insufficient service of process, and such a motion, when tried on affidavits pursuant to O.C.G.A. § 9-11-43(b) does not become a motion for summary judgment. *Terrell v. Porter*, 189 Ga. App. 778, 377 S.E.2d 540 (1989).

Because a personal representative failed to effectuate proper service of a personal injury suit on a passenger of a vehicle involved in an accident in which the decedent was killed, especially after having been placed on notice that service had not been perfected, the passenger's motion to dismiss that suit was properly granted. *Ballenger v. Floyd*, 282 Ga. App. 574, 639 S.E.2d 554 (2006).

Because service of process of a consolidated declaratory judgment action was not sufficiently perfected on two defendant brothers, neither waived service, and despite the fact that one brother might have had notice of the earlier action, the clear requirements of O.C.G.A. § 9-11-4(e)(7) were not dispensed with, and the trial court erred in denying the brothers' motion to dismiss the action. *Tavakolian v. Agio Corp.*, 283 Ga. App. 881, 642 S.E.2d 903 (2007).

Reasonable diligence established. — Because the plaintiff presented sufficient evidence that, after filing its complaint, it provided the sheriff's office with the defendant's correct address, and a few weeks later, contacted the sheriff's office to inquire whether service had been completed upon the defendant and learned that repeated service attempts were unsuccessful, evidence of reasonable diligence supporting the denial of a motion to set aside a default judgment was found; moreover, unlike O.C.G.A. § 9-11-4(e)(1), service via overnight delivery was supported and did not violate the defendant's due process rights. *B&B Quick Lube, Inc. v. G&K Servs. Co.*, 283 Ga. App. 299, 641 S.E.2d 198 (2007).

Reasonable diligence not shown. — Motorist sued a driver over injuries allegedly sustained in an auto accident. As the motorist took no steps whatsoever to perfect service for approximately four months after the limitations period of O.C.G.A. § 9-3-33 lapsed, the motorist did not act diligently; therefore, service of process did not relate back to the original filing date. *McCullers v. Harrell*, 298 Ga. App. 798, 681 S.E.2d 237 (2009), cert. denied, No. S09C1914, 2010 Ga. LEXIS 55 (Ga. 2010).

Notice to debtor in foreclosure sale. — There is no indication of a legislative intent to incorporate within the reporting

General Consideration (Cont'd)

provision of O.C.G.A. § 44-14-161 the time requirement of subsection (c) of O.C.G.A. § 9-11-4, for service on a debtor within five days from the day the report of a foreclosure sale is presented to the judge. *Oviedo v. Connecticut Nat'l Bank*, 194 Ga. App. 626, 391 S.E.2d 417 (1990).

Service of process made on Sunday is no longer invalid due solely to fact that it was made on Sunday. *Trammel v. National Bank*, 159 Ga. App. 850, 285 S.E.2d 590 (1981).

Service properly made in county where defendant found instead of county of venue. *Georgia Power Co. v. Harrison*, 253 Ga. 212, 318 S.E.2d 306 (1984).

County of service of divorce pleadings. — There is no requirement that defendant in divorce proceeding shall be served within county where venue properly lies. *Alcorn v. Alcorn*, 245 Ga. 1, 262 S.E.2d 778 (1980).

Objection to improper venue. — When party has received actual notice of suit, there is no due process problem in requiring the party to object to improper venue within period prescribed. *Williams v. Mells*, 138 Ga. App. 60, 225 S.E.2d 501 (1976).

Failure to comply with statute. — Trial court did not err in granting a creditor's motion for default judgment on the ground that a debtor failed to answer the complaint within thirty days pursuant to O.C.G.A. § 9-11-12(a) because the trial court was authorized to conclude that the debtor's counsel executed an acknowledgment and waiver pursuant to O.C.G.A. § 9-10-73, that, therefore, the debtor's answer was due within thirty days after the acknowledgment and waiver, and that because it failed to serve an answer within that thirty-day period, its answer was untimely. O.C.G.A. § 9-11-4 did not apply because the acknowledgment of service the creditor drafted and submitted to the debtor did not make reference to § 9-11-4, and the creditor also did not inform the debtor by means of the text prescribed in § 9-11-4(1). *Satnam Waheguru Corp. v. Buckhead Cmty. Bank*, 304 Ga. App. 438, 696 S.E.2d 430 (2010).

No proof of issuance of summons in the record.

— There was no proof in the record that a summons was issued identifying the law firm that foreclosed on a plaintiff's home as a defendant, although the law firm was mentioned in the complaint. Therefore, no jurisdiction was obtained over the law firm, and the law firm was not in default. *Fairfax v. Wells Fargo Bank, N.A.*, 312 Ga. App. 171, 718 S.E.2d 16 (2011).

Cited in *Bacon v. Winter*, 118 Ga. App. 358, 163 S.E.2d 890 (1968); *Taylor v. State Bank*, 119 Ga. App. 50, 165 S.E.2d 920 (1969); *Lowery v. Adams*, 225 Ga. 248, 167 S.E.2d 636 (1969); *State Farm Mut. Ins. Co. v. Smith*, 120 Ga. App. 345, 170 S.E.2d 716 (1969); *Outlaw v. Outlaw*, 121 Ga. App. 284, 173 S.E.2d 459 (1970); *Pharris v. Mayor of Jefferson*, 226 Ga. 489, 175 S.E.2d 845 (1970); *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970); *Tallant v. Tallant*, 227 Ga. 26, 178 S.E.2d 887 (1970); *Gresham v. Symmers*, 227 Ga. 616, 182 S.E.2d 764 (1971); *Paine v. Lowndes County Bd. of Tax Assessors*, 124 Ga. App. 233, 183 S.E.2d 474 (1971); *Fidelity & Cas. Co. v. Wilson*, 124 Ga. App. 444, 184 S.E.2d 21 (1971); *State Farm Mut. Auto. Ins. Co. v. Pritchett*, 124 Ga. App. 815, 186 S.E.2d 510 (1971); *Goldberg v. Painter*, 128 Ga. App. 214, 196 S.E.2d 157 (1973); *Swanson v. Holloway*, 128 Ga. App. 453, 197 S.E.2d 151 (1973); *Loukes v. McCoy*, 129 Ga. App. 167, 199 S.E.2d 125 (1973); *Railey v. State Farm Mut. Auto. Ins. Co.*, 129 Ga. App. 875, 201 S.E.2d 628 (1973); *Lee v. G.A.C. Fin. Corp.*, 130 Ga. App. 44, 202 S.E.2d 221 (1973); *Daniel v. Federal Nat'l Mtg. Ass'n*, 231 Ga. 385, 202 S.E.2d 388 (1973); *Zachery v. Geiger Fin. Co.*, 130 Ga. App. 243, 202 S.E.2d 689 (1973); *Housing Auth. v. Millwood*, 472 F.2d 268 (5th Cir. 1973); *Stanley v. Local 926, Int'l Union of Operating Eng'rs*, 354 F. Supp. 1267 (N.D. Ga. 1973); *DeKalb County v. Chapel Hill, Inc.*, 232 Ga. 238, 205 S.E.2d 864 (1974); *B & J Bonding Co. v. Bell*, 232 Ga. 623, 208 S.E.2d 555 (1974); *Adams v. Citizens & S. Nat'l Bank*, 132 Ga. App. 622, 208 S.E.2d 628 (1974); *Sikes v. Sikes*, 233 Ga. 97, 209 S.E.2d 641 (1974); *Aiken Asphalt Paving Co. v. Winn*, 133 Ga. App. 3, 209 S.E.2d 700 (1974); *Clements v.*

Jones, 133 Ga. App. 11, 209 S.E.2d 707 (1974); Lukas v. Pittman Hwy. Constructing Co., 134 Ga. App. 305, 214 S.E.2d 398 (1975); Jere Power Car Land, Inc. v. Moss, 134 Ga. App. 523, 215 S.E.2d 288 (1975); George v. Southern Ry., 135 Ga. App. 531, 218 S.E.2d 447 (1975); Jernigan v. Collier, 234 Ga. 837, 218 S.E.2d 556 (1975); Watson v. Watson, 235 Ga. 136, 218 S.E.2d 863 (1975); Phillips v. Williams, 137 Ga. App. 578, 224 S.E.2d 515 (1976); Hardwick v. Fry, 137 Ga. App. 770, 225 S.E.2d 88 (1976); Fain v. Hutto, 236 Ga. 915, 225 S.E.2d 893 (1976); Reading Assocs., Ltd. v. Reading Assocs. of Ga., Inc., 236 Ga. 906, 225 S.E.2d 899 (1976); Leniston v. Bonfiglio, 138 Ga. App. 151, 226 S.E.2d 1 (1976); Pascoe Steel Corp. v. Turner County Bd. of Educ., 139 Ga. App. 87, 227 S.E.2d 887 (1976); Howard Concrete Pipe Co. v. Cohen, 139 Ga. App. 491, 229 S.E.2d 8 (1976); Hopkins v. Hopkins, 237 Ga. 845, 229 S.E.2d 751 (1976); Echols v. Dyches, 140 Ga. App. 191, 230 S.E.2d 315 (1976); Todd's Constr. Co. v. Trusco Leasing, Inc., 140 Ga. App. 452, 231 S.E.2d 477 (1976); In re J.B., 140 Ga. App. 668, 231 S.E.2d 821 (1976); McPherson v. McPherson, 238 Ga. 271, 232 S.E.2d 552 (1977); DOT v. Massengale, 141 Ga. App. 70, 232 S.E.2d 608 (1977); Adams v. Upjohn Co., 142 Ga. App. 264, 235 S.E.2d 584 (1977); Norman v. Daniels, 142 Ga. App. 456, 236 S.E.2d 121 (1977); Atlanta Whses., Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977); Diaz v. First Nat'l Bank, 144 Ga. App. 582, 241 S.E.2d 467 (1978); Canal Ins. Co. v. Cambron, 240 Ga. 708, 242 S.E.2d 32 (1978); Spencer v. Taylor, 144 Ga. App. 641, 242 S.E.2d 308 (1978); Porter v. Midland-Guardian Co., 145 Ga. App. 262, 243 S.E.2d 595 (1978); Anderson v. Southeastern Capital Corp., 148 Ga. App. 164, 251 S.E.2d 55 (1978); Lake v. Hamilton Bank, 148 Ga. App. 348, 251 S.E.2d 177 (1978); Anderson v. Southeastern Capital Corp., 243 Ga. 498, 255 S.E.2d 12 (1979); DOT v. Ridley, 244 Ga. 49, 257 S.E.2d 511 (1979); Chalfant v. Rains, 244 Ga. 747, 262 S.E.2d 63 (1979); Victor v. First Trust & Deposit Co., 154 Ga. App. 97, 267 S.E.2d 638 (1980); Walker v. Ferrier, 154 Ga. App. 717, 270 S.E.2d 30 (1980); Commercial Bank v. Simmons, 157 Ga. App. 391, 278 S.E.2d 53 (1981); Greer v. Heim, 248 Ga. 417, 284 S.E.2d 11 (1981); Knox v. Landers, 160 Ga. App. 1, 285 S.E.2d 767 (1981); Frazier v. HMZ Property Mgt., Inc., 161 Ga. App. 195, 291 S.E.2d 4 (1982); Portis v. Evans, 249 Ga. 396, 291 S.E.2d 511 (1982); Smith v. Griggs, 164 Ga. App. 15, 296 S.E.2d 87 (1982); Ellenberg v. DeKalb County (In re Maytag Sales & Serv., Inc.), 23 Bankr. 384 (Bankr. N.D. Ga. 1982); Cambridge Mut. Fire Ins. Co. v. City of Claxton, 96 F.R.D. 175 (S.D. Ga. 1982); Brumit v. Mull, 165 Ga. App. 663, 302 S.E.2d 408 (1983); Villaruz v. Van Diviere Oil Co., 251 Ga. 145, 304 S.E.2d 58 (1983); Dubberly v. Nail, 166 Ga. App. 378, 304 S.E.2d 504 (1983); Bullard v. Citizens & S. Nat'l Bank, 167 Ga. App. 47, 306 S.E.2d 51 (1983); Tuggle v. Tuggle, 251 Ga. 845, 310 S.E.2d 224 (1984); Lee v. Pace, 252 Ga. 546, 315 S.E.2d 417 (1984); 404 Music Group v. Bass, 170 Ga. App. 113, 316 S.E.2d 558 (1984); Gant v. Gant, 254 Ga. 239, 327 S.E.2d 723 (1985); Siler v. Johns, 173 Ga. App. 692, 327 S.E.2d 810 (1985); Ewing v. Johnston, 175 Ga. App. 760, 334 S.E.2d 703 (1985); Negelow v. Mouyal, 178 Ga. App. 53, 342 S.E.2d 14 (1986); Goodman v. Diaz, 646 F. Supp. 52 (M.D. Ga. 1986); Devendorf v. Midkiff, 184 Ga. App. 722, 362 S.E.2d 398 (1987); Chitwood v. Southern Gen. Ins. Co., 189 Ga. App. 697, 377 S.E.2d 210 (1988); Southern Guar. Ins. Co. v. Cook, 194 Ga. App. 613, 391 S.E.2d 452 (1990); Phillips v. Connecticut Nat'l Bank, 196 Ga. App. 477, 396 S.E.2d 538 (1990); McManus v. Sauerhoefer, 197 Ga. App. 114, 397 S.E.2d 715 (1990); Devins v. Leafmore Forest Condominium Ass'n, 200 Ga. App. 158, 407 S.E.2d 76 (1991); Roberts v. ALC Fin. Corp., 200 Ga. App. 241, 407 S.E.2d 429 (1991); Fisher v. Muzik, 201 Ga. App. 861, 412 S.E.2d 548 (1991); Webb v. Tatum, 202 Ga. App. 89, 413 S.E.2d 263 (1991); Abe Eng'g, Inc. v. Travelers Indem. Co., 210 Ga. App. 551, 436 S.E.2d 754 (1993); Ludi v. Van Metre, 221 Ga. App. 479, 471 S.E.2d 913 (1996); In re D.R.W., 229 Ga. App. 571, 494 S.E.2d 379 (1997); Ebon Found., Inc. v. Oatman, 269 Ga. 340, 498 S.E.2d 728 (1998); Turner v. State, 234 Ga. App. 878, 508 S.E.2d 223 (1998); Rice v. Higginbotham, 235 Ga. App. 378, 508 S.E.2d 736 (1998); Teledata World Servs., Inc. v. Tele-Mart,

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Inc., 242 Ga. App. 842, 531 S.E.2d 372 (2000); *Savage v. Roberson*, 244 Ga. App. 280, 534 S.E.2d 925 (2000); *Cornelius v. Nuvel Fin. Servs. Corp.*, 256 Ga. App. 171, 568 S.E.2d 82 (2002); *Williams v. City of Atlanta*, 263 Ga. App. 113, 587 S.E.2d 261 (2003); *Smith v. debis Fin. Servs.*, 263 Ga. App. 212, 587 S.E.2d 390 (2003).

Constitutional Requirements**Constitutional validity of service.**

— Constitutional validity of any chosen method of service may be defended on the ground that it is in itself reasonably certain to inform those affected or, when conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979).

Regardless of whether a proceeding is in rem or in personam, due process requires that a chosen method of service be reasonably certain to give actual notice of the pendency of a proceeding to those parties whose liberty or property interests may be adversely affected by the proceeding. *Abba Gana v. Abba Gana*, 251 Ga. 340, 304 S.E.2d 909 (1983).

Oral notice inadequate. — Constitutional requirement of adequate notice is not fulfilled when the only probative evidence in the record concerning actual notice is to the effect that the opposing party was orally told that an action had been filed against that party; such cursory notice clearly failed to rise above the level of casual information and rumor. *Abba Gana v. Abba Gana*, 251 Ga. 340, 304 S.E.2d 909 (1983).

Form

Prayer for process not required. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) contains no requirement that prayer for process be included in the complaint as a prerequisite to valid service of process. *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974); *Black v. Black*, 245 Ga. 281, 264 S.E.2d 216 (1980).

Ga. L. 1967, p. 226, §§ 1-3 and 8 (see

now O.C.G.A. §§ 9-11-4 and 9-11-8) eliminated the necessity of a prayer for process. *Hunt v. Denby*, 128 Ga. App. 523, 197 S.E.2d 489 (1973).

Plaintiff's address. — This section requires that plaintiff's address be given only if that of plaintiff's attorney is not given. *Thibadeau v. Thibadeau*, 133 Ga. App. 154, 210 S.E.2d 340 (1974).

Objections merely to form of process. — While Ga. L. 1969, p. 487, § 1 (see now O.C.G.A. § 9-11-4) uses only word "service" and does not purport to deal with form of process, it is indicative of spirit and intent of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) with regard to both process and service, and, accordingly, when it is clear that the defendant has been served, has appeared, and has been heard on the merits, the proceeding should not be vitiated by objections going merely to form of process. *Tyree v. Jackson*, 226 Ga. 690, 177 S.E.2d 160 (1970).

Who May Serve Process

Appointment of permanent process servers. — Mandamus did not require a state court judge to appoint permanent process servers pursuant to subsection (c) of O.C.G.A. § 9-11-4 since, even if the petitioners had no other specific legal remedy, the statute provided the court with the authority as well as the discretion to appoint disinterested persons, who are citizens of the United States and at least 18 years of age, as permanent process servers, but did not mandate that the court make such an appointment when the statutory requirements have been satisfied. *Tamaroff v. Cowen*, 270 Ga. 415, 511 S.E.2d 159 (1999).

Trial court did not err in finding that service upon the county school district employees was perfected pursuant to O.C.G.A. § 9-11-4(c) because a court order appointing the process server in question as a permanent process server for the Superior Courts of the Ocmulgee Judicial Circuit, which included Hancock County, authorized that process server to serve the complaint, and the employees did not dispute that the employees were actually served with the complaint; whether the permanent process server was authorized

to file the sheriff's entries of service rather than the server's own affidavits as proof of service bore no weight in determining whether proper service was in fact made. *Cosby v. Lewis*, 308 Ga. App. 668, 708 S.E.2d 585 (2011).

Disinterested person to execute process. — Law has entrusted decision of disputes to persons wholly disinterested in the litigation, and this is equally true of the person selected to execute process necessary to adjustment of such dispute. *Dotson v. Luxtron, Inc.*, 155 Ga. App. 504, 271 S.E.2d 644 (1980).

Specially appointed person authorized to serve process. — In order for a citizen to be authorized to serve process, the citizen must be specially appointed by the court in which the action has been brought. *Capra v. Rogers*, 200 Ga. App. 131, 407 S.E.2d 101 (1991).

Because a personal injury plaintiff failed to file an action against an uninsured/underinsured motorist insurer within the applicable statutory period, and the action was not subject to renewal, as the magistrate court's determination that service was made by an unauthorized person, thus rendering the original action void, the insurer was entitled to dismissal. *Lewis v. Waller*, 282 Ga. App. 8, 637 S.E.2d 505 (2006).

Permanent process server. — Courts have the discretion and authority to appoint permanent process servers but are not required to do so. *In re Denhardt*, 231 Ga. App. 203, 498 S.E.2d 772 (1998).

Specially appointed attorney not disinterested. — Evidence was sufficient to establish that an attorney specially appointed by the court for service of process at the request of plaintiff's counsel was not a wholly disinterested party and, thus, grant of a motion to dismiss for insufficient service was proper. *Yeary v. Bell*, 228 Ga. App. 522, 492 S.E.2d 278 (1997).

Service by a private process server hired by the plaintiffs was a nullity since the process server was not appointed by the trial court as provided by O.C.G.A. § 9-11-4. *Mann v. Atlanta Cas. Co.*, 215 Ga. App. 747, 452 S.E.2d 130 (1994).

Process serving company or the company's designated agent was appointed by

the trial court to effectuate service on the out-of-state tortfeasor in the injured parties' personal injury action; although the better practice would have been to obtain an order naming a specific person to effect service, the injured parties did not transgress the requirements of O.C.G.A. § 9-11-4(c). *Passmore v. Thomas*, 255 Ga. App. 612, 565 S.E.2d 923 (2002).

Party may not serve process. — It was not legislative intent that party could be appointed as agent to serve process in the party's own case. *Abrams v. Abrams*, 239 Ga. 866, 239 S.E.2d 33 (1977).

Cousin may not serve process. — When plaintiff's cousin handed the defendant an unopened shoe box containing the complaint and summons, the plaintiff's cousin has not been shown to be one of the people enumerated in O.C.G.A. § 9-11-4 who may serve process in Georgia. Therefore, the service was insufficient to secure personal jurisdiction over the defendant. *Fortson v. Fortson*, 204 Ga. App. 827, 421 S.E.2d 106 (1992).

Attorney for the plaintiff in an action does not "stand equal" between the plaintiff and the defendant, and when so engaged is not a proper person to serve process in that action. *Dotson v. Luxtron, Inc.*, 155 Ga. App. 504, 271 S.E.2d 644 (1980).

Chief of police lacks authority to serve process, being neither a sheriff nor a deputy sheriff, nor an officer of the court, nor a "specially appointed" person, and the police chief's attempt to do so is without effect. *Townsend v. Williams*, 170 Ga. App. 766, 318 S.E.2d 510 (1984).

Deputy sheriff of county adjacent to the county where the defendant was found may not properly serve process even though the defendant's residence was near the border of the counties and the sheriff was mistaken about where that border fell. *Zimmerman v. Hammer*, 220 Ga. App. 864, 470 S.E.2d 688 (1996).

Correctional officer. — Personal service of a summons and a petition of deprivation, by a correctional officer upon an incarcerated father, was sufficient as the service procedures in the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, were not adopted nor were binding on the juvenile court, and the correctional officer was act-

Who May Serve Process (Cont'd)

ing under the direction of the court for the purposes of former O.C.G.A. § 15-11-39.1(c) (see now O.C.G.A. §§ 15-11-161, 15-11-282, 15-11-424, and 15-11-531). In the Interest of A.J.M., 277 Ga. App. 646, 627 S.E.2d 399 (2006).

Service could be by either of two sheriffs and by original or second original. — Although he appellant was incarcerated in the county jail in one county, the superior court of a different county correctly held that it had personal jurisdiction over the appellant for purposes of resolving a dispute over title to property located in that county, and it was immaterial which county sheriff personally served the appellant or whether that service was accomplished by delivery of the original or second original. *Elrod v. Elrod*, 272 Ga. 188, 526 S.E.2d 339 (2000).

Timeliness of Service

Five-day period not absolute. — Five-day period specified in subsection (c) of this section is not absolute. *Childs v. Catlin*, 134 Ga. App. 778, 216 S.E.2d 360 (1975).

Fact that the registered agent of a hospital was located outside the county in which a medical malpractice complaint was filed did not render untimely the subsequent service made on a hospital agent more than five days after the filing of the complaint. *Floyd v. Piedmont Hosp.*, 213 Ga. App. 749, 445 S.E.2d 844 (1994).

Five-day time limit in subsection (c) of O.C.G.A. § 9-11-4 provides a time frame for performance by the process server once service is sought, but does not provide a time limit within which service must be initiated by the plaintiff. *Jackson v. Doe*, 243 Ga. App. 210, 532 S.E.2d 761 (2000).

Plaintiffs are not required to perfect service within O.C.G.A. § 9-11-4(c)'s five-day period; the five-day period specifically applies to the process server. *Roberts v. Jones*, 390 F. Supp. 2d 1333 (M.D. Ga. May 9, 2005).

Within the context of a parental rights termination proceeding, a juvenile court had the discretion to determine whether to grant an extension of time for a putative father to serve his legitimation peti-

tion on the mother, pursuant to former O.C.G.A. § 15-11-96(i) (see now O.C.G.A. § 15-11-283) and O.C.G.A. § 19-7-22(b), and Georgia case law that allowed application of the procedural rules set out in the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, including O.C.G.A. § 9-11-4(c) relating to service and extensions thereto; accordingly, the juvenile court's refusal to hear the legitimation petition was error as was the decision to terminate the putative father's parental rights under former O.C.G.A. § 15-11-94 (see now O.C.G.A. §§ 15-11-310, 15-11-311, and 15-11-320) without first determining that he had standing under the legitimation action. In the Interest of A.H., 279 Ga. App. 77, 630 S.E.2d 587 (2006).

Section integral part of statutes of limitations. — By holding that service of process does not relate back to toll statutes of limitations unless the plaintiff has acted diligently, the Georgia courts have interpreted O.C.G.A. §§ 9-11-3 and 9-11-4 as integral parts of the state statutes of limitations. *Cambridge Mut. Fire Ins. Co. v. City of Claxton*, 720 F.2d 1230 (11th Cir. 1983).

Effect of service of process on statute of limitations. — Although normally the timely filing of the complaint tolls the statute of limitations with regard to process served after expiration of the statute, if the plaintiff fails to act in a reasonable and diligent manner to insure that process is properly served, the timely filing of the complaint will not toll the statute. *Ingram v. Grose*, 180 Ga. App. 647, 350 S.E.2d 289 (1986).

Owners' personal injury and property damages action against a manufacturer, which concerned a fire in January 30, 2000, was barred by the two- and four-year statutes of limitations because the owners failed to timely perfect service, as required by O.C.G.A. § 9-11-4(c), until February 23, 2004, which was more than five days after the owners filed a renewed complaint under O.C.G.A. § 9-2-61(a) on October 28, 2003. *Johnson v. Am. Meter Co.*, 412 F. Supp. 2d 1260 (N.D. Ga. 2004).

Based on sufficient evidence that a resident stood idle for six months after learning of the difficulties in serving a non-resident, the resident's personal in-

jury complaint was properly dismissed on grounds that the resident failed to exercise due diligence in effectuating service of process; hence, the statute of limitations under O.C.G.A. § 9-3-33 was not tolled. *Livingston v. Taylor*, 284 Ga. App. 638, 644 S.E.2d 483 (2007).

Relation back of service to avoid bar of statute of limitations. —

If filing of the petition is followed by timely service, perfected as required by law, even though the statute of limitations runs between the date of filing of the petition and the date of service, such service will relate back to the time of filing so as to avoid the limitation. *Childs v. Catlin*, 134 Ga. App. 778, 216 S.E.2d 360 (1975).

When the complaint is filed near the expiration of the statute of limitations, and service of process does not occur within five days, nor within period of the statute of limitation, but the plaintiff shows that the plaintiff acted in a reasonable and diligent manner in attempting to assure that proper service was made as quickly as possible, the defendant's motion to dismiss should not be granted. *McCane v. Sowinski*, 143 Ga. App. 724, 240 S.E.2d 132 (1977).

Statute of limitation is tolled by the commencement of a civil action at law. If an action is filed within the period of limitation, but not served upon the defendant within five days or within the limitation period, the plaintiff must establish that service was made in a reasonable and diligent manner in an attempt to ensure that proper service is made as quickly as possible. If reasonable and diligent efforts are not made to ensure proper service as quickly as possible, the plaintiff is guilty of laches and, in such a case, service will not relate back to the time of the filing of the complaint for the purpose of tolling the statute of limitation. *Bowman v. United States Life Ins. Co.*, 167 Ga. App. 673, 307 S.E.2d 134 (1983); *Brumbalow v. Fritz*, 183 Ga. App. 231, 358 S.E.2d 872 (1987).

Under Georgia law, in the event the statute of limitations has run between the filing and the service of the complaint, service will relate back to the date of filing only if perfected within five days of filing the complaint. Beyond the five days, ser-

vice relates back only if the plaintiff diligently attempted to perfect service. *Robinette v. Johnston*, 637 F. Supp. 922 (M.D. Ga. 1986).

Under subsection (c) of O.C.G.A. § 9-11-4, when the limitation accrues between the date of filing and the date of service and is more than five days after the filing, whether or not the service relates back is a question for the trial court, which considers the length of the elapsed time and the diligence of the plaintiff, and when the court did not consider this issue, the case will be remanded for its resolution. *Ellerbee v. Interstate Contract Carrier Corp.*, 183 Ga. App. 828, 360 S.E.2d 280 (1987); *Day v. Burnett*, 189 Ga. App. 905, 377 S.E.2d 734 (1989).

When service is made after the expiration of the applicable statute of limitation, the timely filing of the complaint tolls the statute only if the plaintiff shows that the plaintiff acted in a reasonable and diligent manner in attempting to insure that proper service was made as quickly as possible. The burden rests on the plaintiff to show lack of fault. *Slater v. Blount*, 200 Ga. App. 470, 408 S.E.2d 433, cert. denied, 200 Ga. App. 897, 408 S.E.2d 433 (1991).

Five-day relation back doctrine of subsection (c) of O.C.G.A. § 9-11-4 applies in cases where service is completed outside the applicable statute of limitation. *Dyer v. Paffenroth*, 197 Ga. App. 888, 399 S.E.2d 710 (1990).

If service is within the five days, even though the statute of limitation runs between the date of filing suit and the date of service, the service will relate back to the time of filing so as to avoid the limitation. *Day v. Burnett*, 199 Ga. App. 494, 405 S.E.2d 316 (1991).

Service of an uninsured motorist carrier within five business days after the date of filing of the complaint, in an action for personal injuries, related back to the date of filing as a matter of law, for statute of limitation purposes. *Williams v. Colonial Ins. Co.*, 199 Ga. App. 760, 406 S.E.2d 99 (1991).

Delay between the insured's filing of a tort claim and service on the uninsured motorist carrier did not require dismissal when, within the applicable period of limitations, the insured sought to serve the

Timeliness of Service (Cont'd)

insurer and the failure to make service within the limitation period was not the result of the insured's lack of diligence, but the result of the unavailability of the insurer's registered agent; whether diligence was exercised was determined from the time the insured became aware that the process server failed to perfect service, not from the date of filing the complaint. *Georgia Farm Bureau Mut. Ins. Co. v. Kilgore*, 265 Ga. 836, 462 S.E.2d 713 (1995).

When a complaint is filed near the expiration of the applicable statute of limitation, and service is made after the five-day grace period of subsection (c) of O.C.G.A. § 9-11-4, the plaintiff bears the burden of showing that the plaintiff exercised due diligence in performing service. *Scott v. Taylor*, 234 Ga. App. 543, 507 S.E.2d 798 (1998).

Since a plaintiff supplied the sheriff's office with the correct service address for the defendant when the complaint was filed, the plaintiff was justified in relying on the sheriff to perform the duty to serve process within five days of receiving the process papers under O.C.G.A. § 9-11-4(c); thus, the dismissal of the complaint on the ground that the sheriff did not serve the complaint until 13 days after it was filed and 11 days after the statute of limitations had run, was error even though the trial court expressly found that the delay constituted laches. *Lee v. Kim*, 275 Ga. App. 891, 622 S.E.2d 99 (2005).

Extraterritorial service of process upon the president of a foreign corporation doing business within this state and having an agent within this state was not valid. *Cherokee Warehouses Inc. v. Babb Lumber Co.*, 244 Ga. App. 197, 535 S.E.2d 254 (2000).

If defendant not served, no "relation back." — In a legal malpractice action alleging that a medical malpractice action was handled wantonly and recklessly, the limitation period commenced running at the time the statute of limitations had expired on the medical malpractice action without a valid suit being filed. Because the defendant in the medical malpractice action was never served, the

doctrine of "relation back" could not apply. *Plumlee v. Davis*, 221 Ga. App. 848, 473 S.E.2d 510 (1996).

Plaintiff must act reasonably diligently. — When, despite all plaintiff's diligence, service cannot be obtained within five days and before expiration of the statute of limitations, the trial judge should look at all the facts involved and ascertain whether the plaintiff was in any way guilty of laches, and if the plaintiff acted in a reasonably diligent manner then the plaintiff would not be barred. *Childs v. Catlin*, 134 Ga. App. 778, 216 S.E.2d 360 (1975).

Correct test must be whether the plaintiff shows that the plaintiff acted in a reasonable and diligent manner in attempting to ensure that proper service was made as quickly as possible. *Childs v. Catlin*, 134 Ga. App. 778, 216 S.E.2d 360 (1975).

It was error to use the "greatest due diligence" standard in determining that a medical malpractice plaintiff had not served certain defendants in a timely manner under O.C.G.A. § 9-3-71(a) as the proper standard was that of a reasonable and diligent manner pursuant to O.C.G.A. § 9-11-4(c); remand was required for a determination as to whether service upon most defendants within 30 days of filing the complaint, which was filed on the last day of the limitations period, and service on the remainder by 44 days, was within the proper standard to avoid dismissal. *Tenet Healthcare Corp. v. Gilbert*, 277 Ga. App. 895, 627 S.E.2d 821 (2006).

Plaintiff had to act with greatest possible diligence. — Trial court properly dismissed a plaintiff's personal injury action filed against the defendant on insufficient service of process grounds as: (1) the plaintiff did little to pursue service; (2) the plaintiff inappropriately shifted the burden of the search on the court; and (3) the fact that the defendant served interrogatories and a request for production did not amount to a waiver of an insufficient service of process defense. *Kelley v. Lymon*, 279 Ga. App. 849, 632 S.E.2d 734 (2006).

In a personal injury suit, although plaintiff passenger attempted to serve defendant driver only once prior to the expi-

ration of the statute of limitation, upon encountering difficulty locating the driver, the passenger's response was delayed at best, notwithstanding the imminent running of the statute of limitation, and the passenger did not even try to serve the driver until after the statute had run; thus, under the circumstances, the trial court properly found the passenger guilty of laches. *Patterson v. Lopez*, 279 Ga. App. 840, 632 S.E.2d 736 (2006).

In a personal injury action arising from an auto accident filed two days before the expiration of the applicable statute of limitation, because the record failed to show that the plaintiff acted with the greatest possible diligence to personally serve the defendant, the trial court did not abuse the court's discretion in dismissing the plaintiff's complaint based on insufficient service of process. *Moody v. Gilliam*, 281 Ga. App. 819, 637 S.E.2d 759 (2006).

Because a husband and wife failed to show what efforts they took in exercising due diligence in serving a driver close to the running of the relevant statute of limitations under O.C.G.A. § 9-3-33, their personal injury claim was properly dismissed, but the wife's loss of consortium claim survived. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

Although a personal injury litigant hired a "skip tracer," and received the report the next day, because that litigant neglected to attempt to move for an order for service by publication until almost two weeks later, and did not secure the order until over a month after that, and, there was no evidence of any contact between the litigant during the interim, the trial court did not err in finding that the litigant did not exercise the greatest possible diligence; moreover, a finding that the litigant exercised the requisite due diligence to authorize service by publication did not compel a finding that the litigant exercised the greatest possible diligence in serving the opposing party personally three months after the opposing party filed an answer, and nearly four months after the statute of limitation had run. *Green v. Cimafranca*, 288 Ga. App. 16, 653 S.E.2d 782 (2007).

In a family's lawsuit against a driver after a collision, the trial court properly

granted the driver summary judgment based on insufficient service of process. Once the driver filed an answer asserting insufficient service, the family was obligated to exercise the greatest possible diligence in effecting service, but the family did not explain the family's lack of diligence other than by a late-filed affidavit. *Abimbola v. Pate*, 291 Ga. App. 769, 662 S.E.2d 840 (2008).

Judicial determination of diligence. — If a plaintiff has taken some action to perfect service when suit is timely filed but service is perfected outside the limitation period, the trial court must determine, exercising the court's legal discretion, whether the plaintiff was diligent. *Watters v. Classon*, 193 Ga. App. 493, 388 S.E.2d 397 (1989).

Trial court's exercise of discretion in determining diligence will not be reversed on appeal unless the discretion has been actually abused and cannot be supported as a matter of law. *Morse v. Flint River Community Hosp.*, 215 Ga. App. 224, 450 S.E.2d 253 (1994).

Trial court erred in dismissing a client's legal malpractice action on the ground that the client did not act with reasonable diligence in serving the attorney because the court failed to consider the client's efforts at service outside the five-day period of O.C.G.A. § 9-11-4(c); the record presented a number of factual issues that had to be resolved in determining whether the client exercised the appropriate diligence in perfecting service on the attorney or whether the client was guilty of laches, but the trial court failed to address those issues under the appropriate standards. *Cleveland v. Katz*, 311 Ga. App. 880, 717 S.E.2d 500 (2011).

Reasonable diligence not shown. — When, in a suit for personal injuries arising out of a collision, service on a defendant was perfected approximately a year after the complaint filing and more than ten months after the statute of limitation expired, the trial court erred in finding that the plaintiff exercised reasonable diligence in perfecting service of process upon the defendant. *Land v. Casteel*, 195 Ga. App. 455, 393 S.E.2d 710 (1990).

Inordinate and unexplained delay on the part of the plaintiff in obtaining per-

Timeliness of Service (Cont'd)

sonal service on the defendant, particularly after being placed on due notice of the deficiency in the plaintiff's original service, constituted failure to exercise due diligence so as to preclude the relation back of subsequent perfected service to the original filing of the complaint. *Bailey v. Hall*, 199 Ga. App. 602, 405 S.E.2d 579 (1991).

In an action for personal injuries sustained in an automobile accident filed three days before the expiration of the statute of limitation, when the plaintiff established that the defendants no longer resided at the address shown on the accident report and were not listed in the local area city or telephone directories, but did not attempt service by publication, it was not an abuse of discretion to conclude that the plaintiff failed to establish due diligence in insuring proper service. *Lowes v. Allstate Ins. Co.*, 204 Ga. App. 148, 418 S.E.2d 465 (1992).

When the record reflected absolutely no investigative attempt to locate the defendant for a period of four and one-half years before the defendant acknowledged the untimely filed service, the trial court abused the court's discretion in denying the motion to dismiss. *Cason v. Williams*, 207 Ga. App. 550, 428 S.E.2d 444 (1993).

Trial court did not abuse the court's discretion as a matter of law in deciding that the plaintiff did not use reasonable diligence to pursue service when the record showed an unexplained lapse of over a month during the 81-day period in which there was no effort by the plaintiff to verify the defendant's address. *Devoe v. Callis*, 212 Ga. App. 618, 442 S.E.2d 765 (1994).

Trial court properly determined that the plaintiff had not been diligent in perfecting service due to the plaintiff's own failure to correctly determine the county in which the defendant resided. *Cantin v. Justice*, 224 Ga. App. 195, 480 S.E.2d 250 (1997); *Robison v. Green*, 228 Ga. App. 27, 491 S.E.2d 95 (1997).

Plaintiffs' mailing of waiver forms to in-state defendants more than a month after the running of the statute of limitations did not constitute diligence. *Lau v.*

Klinger, 46 F. Supp. 2d 1377 (S.D. Ga. 1999).

When plaintiffs offered no evidence to support their assertion that the secretary of state played a role in causing the delay in service of process, the trial court did not abuse the court's discretion in determining that the plaintiffs did not show that the plaintiffs acted in a reasonable and diligent manner in attempting service. *Pringle v. Jaganauth*, 240 Ga. App. 65, 522 S.E.2d 560 (1999), overruled on other grounds, *Farrie v. McCall*, 256 Ga. App. 446, 568 S.E.2d 603 (2002).

Because the evidence presented before the trial court failed to show that an injured passenger exercised either reasonable diligence or the greatest possible diligence in attempting service of process on an opposing driver, but instead showed that: (1) numerous attempts at service were unsuccessful; (2) the passenger filed the complaint eight days before the expiration of the limitation period, and service was not perfected until 16 months after the statute ran; (3) long lapses in time existed between failed attempts when apparently no actions were taken to effectuate service; and (4) the driver continued to reside in the same small community during the 16 months that it took to ultimately perfect service, the trial court did not err in granting summary judgment to the driver. *Moore v. Wilkerson*, 283 Ga. App. 340, 641 S.E.2d 578 (2007).

Bankruptcy trustee's late service on a driver did not relate back to the filing of the personal injury complaint since the trustee failed to show that the trustee reasonably and diligently insured that service was made as quickly as possible after the driver made the trustee aware of the driver's true residence. *Webster v. Western Express, Inc.*, No. 5:05-CV-350 (WDO), 2007 U.S. Dist. LEXIS 70011 (M.D. Ga. Sept. 21, 2007).

Complaint against a defendant who was never served was properly dismissed for insufficient service of process because the affidavit did not contain sufficient dates or a chronology to show that diligence had been exercised. The record did not show that the plaintiff had diligently pursued service on an ongoing basis or whether there were any unreasonable lapses in

time during this period when no efforts were made. *Montague v. Godfrey*, 289 Ga. App. 552, 657 S.E.2d 630 (2008).

Delay of service by sheriff. — Even though service was not perfected on the defendant until 17 days after expiration of the statute of limitation, dismissal of the claim was erroneous since the plaintiffs turned the matter over to the sheriff for service on the date the complaint was timely filed and were justified in relying on the sheriff to make service within five days of receiving the summons and complaint. *Jackson v. Nguyen*, 225 Ga. App. 599, 484 S.E.2d 337 (1997).

Inadequate justification for delay in perfecting service. — Being unaware of the concept that service of process has anything to do with the tolling of the statute of limitations, as opposed to the filing of the complaint, is not an adequate justification for delay in perfecting service. *Robinette v. Johnston*, 637 F. Supp. 922 (M.D. Ga. 1986).

Service perfected. — Trial court had jurisdiction over a home inspector, and the inspector was required under O.C.G.A. § 9-11-12(a) of the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, to file an answer to the purchaser's complaint within 30 days, but because the inspector failed to do so, the inspector was in default; the caption of the purchaser's original complaint named both the inspector and another as defendants, and because the purchaser obtained a summons against the inspector when the purchaser filed a duplicate of the complaint, and service was effected upon the inspector five days later, the new summons could have perfected the filing of the purchaser's action against the inspector and allowed for the inspector to be served, but the absence of a summons for the inspector at the time of the original filing did not change the fact that the inspector was named as a defendant in the original suit. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Reliance upon clerk's statement regarding service. — Even if the plaintiffs initially were justified in relying on a court clerk's statement that the defendant had been served, their receipt of the defendant's answer, in which the defendant

alleged an affirmative defense of insufficient service, should have put the plaintiffs on notice and inspired the plaintiffs, through counsel, to exercise the greatest possible diligence to ensure proper and timely service. Given that the plaintiffs had the defendant's correct address and were informed that the apparent agent who had accepted service was not authorized to do so, their assertions that any delay was attributable to court personnel did not explain their 29-day delay in effecting service after the defendant filed an answer. Consequently, the court did not abuse the court's discretion by determining that the plaintiffs did not exercise due diligence so as to toll the statute of limitation. *Robinson v. Stuck*, 194 Ga. App. 311, 390 S.E.2d 603 (1990).

Unreasonable delay. — Dismissal was properly granted upon the trial court's determination that unsuccessful efforts to perfect service on the defendant, who had moved, were not sufficient because the plaintiff had considerable information about the defendant which could have easily led to timely service but was not availed of, resulting in an unreasonable delay in service. *Watters v. Classon*, 193 Ga. App. 493, 388 S.E.2d 397 (1989).

Abuse of discretion. — Trial court's determination constituted an abuse of discretion in denying the appellant's motion regarding the appellee's failure to exercise due diligence in perfecting service within the statute of limitation since there was no support in the record for the appellee's contentions that the appellant evaded service. *Abelt v. Nelson*, 204 Ga. App. 501, 419 S.E.2d 749 (1992).

Late perfection of service and laches doctrine. — When a complaint is filed within the applicable statute of limitation but service is perfected more than five days after the statute expires, whether or not it relates back depends on the length of time and the diligence used by a plaintiff; so, a trial court, in the exercise of the court's discretion, must look at the facts involved and determine whether the plaintiff is in any way guilty of laches. If the plaintiff is, the plaintiff would be barred, but if the plaintiff has acted in a reasonably diligent manner then the plaintiff would not be barred.

Timeliness of Service (Cont'd)

Carver v. Tift County Hosp. Auth., 268 Ga. App. 153, 601 S.E.2d 475 (2004).

Effect of hospital governmental entity's delayed non-waiver of service. — Patients exercised due diligence (under a laches-type of test) to serve hospital after the hospital informed them, after the statute of limitations expired, that the hospital was a governmental entity that, under O.C.G.A. § 9-11-4(d), could not accept the patients' request to waive service of process; so, the patient's suit, filed before the statute of limitations expired, related back under laches and O.C.G.A. § 9-11-12(b) so that the statute did not bar the dismissed claims against the hospital and the trial court abused the court's discretion in finding otherwise. Carver v. Tift County Hosp. Auth., 268 Ga. App. 153, 601 S.E.2d 475 (2004).

Belated service as laches. — Belated service, particularly when the delay is great, is laches, authorizing the court to dismiss an action when the statute of limitations ran before service was so belatedly perfected. Hilton v. Maddox, Bishop, Hayton Frame & Trim Contractors, 125 Ga. App. 423, 188 S.E.2d 167 (1972), distinguished in Childs v. Catlin, 134 Ga. App. 778, 216 S.E.2d 360 (1975).

Finding of laches in regard to service may be made as a matter of law even when the plaintiff has made some attempt at service. Anderson v. Hughes, 196 Ga. App. 186, 395 S.E.2d 623 (1990).

Plaintiff has burden of showing lack of fault. — If a plaintiff has taken no action to perfect service, then a petition to permit belated service should be denied as a matter of law. If the plaintiff has taken some action, the trial judge must determine, exercising legal discretion, whether the plaintiff was diligent in the plaintiff's efforts. The burden of showing lack of fault is on the plaintiff. Anderson v. Hughes, 196 Ga. App. 186, 395 S.E.2d 623 (1990).

Although late service is not "invalidated," it results in no pending suit between the parties until the date of service. Hilton v. Maddox, Bishop, Hayton Frame & Trim Contractors, 125 Ga. App. 423, 188 S.E.2d 167 (1972), distinguished

in Childs v. Catlin, 134 Ga. App. 778, 216 S.E.2d 360 (1975).

Defendants not prejudiced by late service. — When the defendants, after later service upon the defendants, adopted motions and defensive pleadings of other defendants and were represented by the same attorneys, those defendants were not harmed by the late service, and the complaint was not subject to dismissal because of the late service. Pressley v. Jennings, 227 Ga. 366, 180 S.E.2d 896 (1971).

Reliance upon information given in accident report. — Trial court abused the court's discretion in finding the plaintiff failed to show due diligence in perfecting service since the plaintiff showed that the plaintiff relied upon information contained within an accident report and that the plaintiff made steady efforts, although after the expiration of the limitation period, to discover the defendant's whereabouts. Starr v. Wimbush, 201 Ga. App. 280, 410 S.E.2d 776, cert. denied, 201 Ga. App. 904, 410 S.E.2d 776 (1991); overruled on other grounds, Ragan v. Mallow, 319 Ga. App. 443, 2012 Ga. App. LEXIS 1061 (Ga. Ct. App. 2012).

Service procedure after expiration of statute of limitations. — Under Georgia law, there are essentially three rules governing service of process in cases in which the statute of limitations has expired: (1) if service is made within five days after the statute expires, service will relate back to the timely filing; (2) if service is not perfected within the five-day period, but some action is taken, and a plaintiff makes a showing that the plaintiff acted reasonably and diligently to insure service was made as quickly as possible, service may relate back to the timely filing of the complaint; and (3), when the five-day grace period has expired and the plaintiff has failed to show that the plaintiff diligently tried to serve the defendant, the court must dismiss the case. Roberts v. Jones, 390 F. Supp. 2d 1333 (M.D. Ga. May 9, 2005).

Failure to perfect service within statute of limitations. — Trial court was presented with evidence sufficient to support the court's judgment dismissing the appellant's complaint against the ap-

pellee for failure to perfect service of process because the appellant failed to serve the appellee within five days of the two-year statute of limitations, O.C.G.A. § 9-3-33; the appellee proffered evidence that: (1) the appellee did not reside in the town where service was allegedly made at the time service was attempted; (2) the appellee's brother resided at that address during the relevant time period; (3) the appellee's brother advised the appellee of the appellant's complaint after being provided with a copy of the complaint by the process server; and (4) the appellee also presented evidence from the appellee's landlord confirming that the appellee had lived at a different residence. *Jones v. Lopez-Herrera*, 308 Ga. App. 81, 706 S.E.2d 609 (2011).

Court erred in calculating five-day period. — Trial court erred in calculating the five-day period under O.C.G.A. § 9-11-4(c) for service of a client's complaint because the provisions of O.C.G.A. § 1-3-1(d)(3) applied since the five-day requirement was less than seven days; because the client filed the complaint on Friday, August 14, 2009, the client had until Friday, August 21, 2009, in which to achieve service in accordance with O.C.G.A. § 9-11-4(c) since the intervening Saturday and Sunday, August 15 and 16, 2009, were excluded from the calculation of the five-day period. *Cleveland v. Katz*, 311 Ga. App. 880, 717 S.E.2d 500 (2011).

Waiver

Right to waive service. — Service is a right conferred on the defendant for the defendant's own benefit and protection, and the defendant is free to waive service if the defendant so chooses. *Jones v. Jones*, 209 Ga. 861, 76 S.E.2d 801 (1953) (decided under former Code 1933, §§ 81-201 and 81-211).

Process must be attached unless waived. — To every petition there must be annexed a process unless the process be waived. *Burch v. Crown Laundry*, 78 Ga. App. 421, 50 S.E.2d 768 (1948), *aff'd*, 205 Ga. 211, 53 S.E.2d 116 (1949) (decided under former Code 1933, § 81-201).

Process is not absolutely essential to validity of pending action as process may be waived. *Jones v. State*, 69 Ga. App.

883, 27 S.E.2d 102 (1943) (decided under former Code 1933, § 81-201).

When there is no process and no waiver of process, no valid action arises. *State Hwy. Dep't v. Noble*, 220 Ga. 410, 139 S.E.2d 318 (1964) (decided under former Code 1933, § 81-201).

No case can proceed without service upon defendant in one of the modes prescribed by law, unless service is waived. *Trammel v. National Bank*, 159 Ga. App. 850, 285 S.E.2d 590 (1981).

In absence of service in conformity with this section or waiver thereof, no jurisdiction over the defendant is obtained by the court, and any judgment adverse to the defendant is absolutely void. *DeJarnette Supply Co. v. F.P. Plaza, Inc.*, 229 Ga. 625, 193 S.E.2d 852 (1972); *Thompson v. Lagerquist*, 232 Ga. 75, 205 S.E.2d 267 (1974); *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, *rev'd on other grounds*, 240 Ga. 376, 240 S.E.2d 856 (1977); *Collins v. Collins*, 148 Ga. App. 103, 250 S.E.2d 870 (1978); *Lester v. Crooms, Inc.*, 157 Ga. App. 377, 277 S.E.2d 751 (1981).

Since the defendant was never served with a copy of the complaint and summons attached thereto, and neither waived service or made a general appearance in the case, there is no valid suit pending in the trial court and the court does not acquire personal jurisdiction over the defendant. *Bigley v. Lawrence*, 149 Ga. App. 249, 253 S.E.2d 870 (1979).

Effect of no legal service. — When there has been no legal service or waiver of service, the court's judgment is null and void. *Henry v. Hiwassee Land Co.*, 246 Ga. 87, 269 S.E.2d 2 (1980).

Waiver equivalent to service. — When a petition has been filed and service has been waived by the defendant, such waiver, as between the parties, is equivalent of service. *Cutcliffe v. Pryse*, 187 Ga. 51, 200 S.E. 124 (1938) (decided under former Code 1933, § 81-209).

Express waiver of process required. — Acknowledgment of service, without an express waiver of process, does not constitute a waiver of valid service of process. *Bailey v. Hall*, 199 Ga. App. 602, 405 S.E.2d 579 (1991).

Document containing an "acknowledg-

Waiver (Cont'd)

ment of service" and "consent to jurisdiction" filed with a complaint did not constitute a waiver of service of summons as required by O.C.G.A. § 9-11-4. *Stamps v. Bank South*, 221 Ga. App. 406, 471 S.E.2d 323 (1996).

Capacity to waive. — Defective service is not cured by consent of a party who lacked capacity to waive the defect at the time consent was given. *Collins v. Collins*, 148 Ga. App. 103, 250 S.E.2d 870 (1978).

In a divorce proceeding, although the spouse acknowledged service of the complaint prior to the action being filed, the spouse did not, and could not, acknowledge receipt of a summons that had not yet issued. *Bonner v. Bonner*, 272 Ga. 545, 533 S.E.2d 72 (2000).

Waiver before commencement of action. — Party may waive process, service of process, and time of filing with respect to a suit against the party; and such waiver, being a different matter from a confession of judgment, may be executed before commencement of the action. *Henry & Co. v. Johnson*, 178 Ga. 541, 173 S.E. 659 (1934) (decided under former Civil Code 1910, § 5562).

Counsel's action waived service. — Because defendant's counsel waived service of the summons in an acknowledgment counsel executed, defendant was not entitled to receive any further service of the action. *Atlanta Medical Accounting Corp. v. Financial Software, Inc.*, 227 Ga. App. 311, 489 S.E.2d 93 (1997).

Appearance on motion to set aside not waiver. — When judgment is void for want of personal service of process, the defendant does not waive the question of jurisdiction or validate the void judgment by appearance after judgment in support of a motion to set aside such judgment. *Hicks v. Hicks*, 193 Ga. 446, 18 S.E.2d 754 (1942) (decided under former Code 1933, §§ 81-209 and 81-211).

Waiver of service. — When there is irregular or insufficient service or no service at all, but the defendant, not objecting to service, files a plea to jurisdiction on the ground of nonresidence in the county, the object of service (opportunity to be heard) becomes accomplished of record in

the case; hence, filing of such a plea without objecting to service is a waiver of service. *Weddington v. Kumar*, 149 Ga. App. 857, 256 S.E.2d 141 (1979).

Although a father never filed a written response to a change of custody petition, a claim that the court lacked personal jurisdiction was waived based on the father's appearance at both the temporary hearing and at the final hearing; moreover, the father waived any claim regarding the insufficiency of process or service of process. *Jones v. Van Horn*, 283 Ga. App. 144, 640 S.E.2d 712 (2006).

Trial court did not err in denying the motion for an extension of time to answer the complaint because the defendants agreed to a waiver of service yet still filed the answer late, the motion for an extension was made after the time for filing an answer had expired, and a judicial extension of the statutory time for filing the answer, in essence, would have allowed a circumvention of the default status of the action. *Mecca Constr., Inc. v. Maestro Invs., LLC*, 320 Ga. App. 34, 739 S.E.2d 51 (2013).

Motion to dismiss for a failure to timely perfect service was denied. — Because the plaintiffs acknowledged that O.C.G.A. § 9-11-4(c) controlled and the plaintiffs sought to comply with Fed. R. Civ. P. 4 by seeking a waiver of service within 25 days of filing the complaint, the defendants knew, or should have known, that the statute of limitations had expired, and when the defendants accepted service by waiver without complaint, the defendants' motion to dismiss for a failure to timely perfect service was denied; the plaintiffs' actions were reasonable and diligent. *Roberts v. Jones*, 390 F. Supp. 2d 1333 (M.D. Ga. May 9, 2005).

Acknowledgment of service ineffective to operate as waiver. — In forfeiture action when acknowledgment of service filed by claimant in the family division of the trial court was not served upon the prosecutor, and when the state did not ask the claimant to waive the requisite service of summons as authorized by O.C.G.A. § 9-11-4(d)(3), the acknowledgment was ineffective to operate as waiver of service. *Mitchell v. State*, 255 Ga. App. 507, 566 S.E.2d 24 (2002), cert.

denied, 255 Ga. App. 553, 565 S.E.2d 877 (2002).

Because a notice and waiver of service did not satisfy the requirements of O.C.G.A. § 9-11-4(d)(3), it was deemed to be a waiver of service under O.C.G.A. § 9-10-73, and the 60-day time within which to answer under O.C.G.A. § 9-11-4(d)(3) did not apply; the waiver of service under O.C.G.A. § 9-10-73 did not require any particular form, and was merely an effort to dispense with the formality and expense of actual service. *SRM Realty Servs. Group, LLC v. Capital Flooring Enters.*, 274 Ga. App. 595, 617 S.E.2d 581 (2005).

Motion for summary judgment as waiver of service. — When the defendant files a motion for summary judgment based upon the merits of a case, the defendant has made a general appearance and waived any defects in service of the complaint. *Bigley v. Lawrence*, 149 Ga. App. 249, 253 S.E.2d 870 (1979).

Defective Service

Evidence of defective service. — Defective service was shown by evidence that the complaint was not served by a sheriff or deputy, that the person was not identified as someone specially or permanently appointed by the court to serve process, and that a summons did not accompany the complaint. *Wilkinson v. Udinsky*, 242 Ga. App. 464, 530 S.E.2d 215 (2000).

Dismissal of a lawsuit for improper service was affirmed because the summons was left with an individual defendant's estranged wife at an address where the individual never lived, and because a summons was left with the father of a corporation's registered agent, and the father was not authorized to accept service for the corporation. *Thornton v. Lee*, 270 Ga. App. 224, 606 S.E.2d 32 (2004).

As the evidence showed that a subcontractor had actual knowledge of a limited liability company's (LLC's) business address when the subcontractor filed suit, but did not try to serve the LLC's officers, employees, or agents at that address, or explain why the subcontractor could not do so, substituted service on the Georgia Secretary of State's Office was not authorized by O.C.G.A. § 9-11-4(e)(1). *Anthony*

Hill Grading, Inc. v. SBS Invs., LLC, 297 Ga. App. 728, 678 S.E.2d 174 (2009).

Defense of lack of personal jurisdiction. — When the defense of lack of personal jurisdiction due to defective service is raised by way of a motion to set aside the judgment, the trial court sits as the trier of fact. *Smith v. Wood*, 174 Ga. App. 799, 331 S.E.2d 636 (1985).

Review of denial of motion to set aside. — Review of a trial court's decision denying a motion to set aside a judgment based on the defense of lack of personal jurisdiction due to defective service is by the any evidence standard. *Smith v. Wood*, 174 Ga. App. 799, 331 S.E.2d 636 (1985).

Defect not cured by defendant's actual knowledge of filing. — Defective service of process is insufficient, notwithstanding the fact that the defendant acquires knowledge of pending lawsuit. *Glass v. Byrom*, 146 Ga. App. 1, 245 S.E.2d 345 (1978).

Even if the defendant has knowledge of a pending suit, *sine qua non* is service of process in manner provided by law; hence, a default judgment based upon other than legal service is a nullity. *Collins v. Peacock*, 147 Ga. App. 424, 249 S.E.2d 142 (1978).

Actual knowledge by a defendant that a complaint has been filed does not cure a defect in service. *Anderson v. Hughes*, 196 Ga. App. 186, 395 S.E.2d 623 (1990).

Defendant who defaults does not waive defects in service, even when the defendant receives actual notice of the lawsuit. *Cook v. Bright*, 150 Ga. App. 696, 258 S.E.2d 326 (1979); *Dotson v. Luxtron, Inc.*, 155 Ga. App. 504, 271 S.E.2d 644 (1980).

Attack of judgment for lack of service. — Court of equity may entertain a direct proceeding to set aside judgment in court of law when it is alleged that the defendant in the suit had not been legally served with process, had not waived service, and had no knowledge of the proceedings. *Termplan, Inc. v. Miller*, 228 Ga. 428, 186 S.E.2d 102 (1971).

When service is insufficient to give the court jurisdiction to render judgment, and there is no waiver of service, judgment may be attacked by any person whose rights are affected by the judgment.

Defective Service (Cont'd)

Barnes v. Continental Ins. Co., 231 Ga. 246, 201 S.E.2d 150 (1973).

Order terminating an out-of-state incarcerated parent's parental rights was reversed as: (1) service of the termination petition and summons upon the parent via certified mail was insufficient under both former O.C.G.A. § 15-11-96(c) (see now O.C.G.A. §§ 15-11-281 and 15-11-282) and O.C.G.A. § 9-11-4; (2) a correctional officer who personally delivered the documents to the parent did not amount to sufficient and lawful personal service as the officer lacked the inherent authority to perfect service under O.C.G.A. § 9-11-4(c) and no court order existed to grant authority; and (3) the trial court's reliance on the service provisions of former O.C.G.A. § 15-11-39.1 (see now O.C.G.A. § 15-11-161, 15-11-282, 15-11-424, and 15-11-531), a statute dealing with service in juvenile court proceedings generally, was misplaced. In the Interest of C.S., 282 Ga. 7, 644 S.E.2d 812 (2007).

Right of defendant to ignore suit when not validly served. — When no valid process has been served upon the defendant, the defendant was entirely within the defendant's rights in regarding suit as a nullity as to the defendant and in filing no defensive pleadings. *Jones v. Roberts Marble Co.*, 90 Ga. App. 830, 84 S.E.2d 469 (1954) (decided under former Code 1933, § 81-202).

Summons cured by pleadings. — As a general rule, a defective summons will be regarded as aided or cured by pleadings served with the summons when, with all the information contained in the two papers in the defendant's possession, the defendant could not be misled as to the nature of the relief demanded, or as to the court in which proceedings are to be instituted. *W.T. Rawleigh Co. v. Watts*, 68 Ga. App. 786, 24 S.E.2d 213 (1943).

When service was not perfected on the defendant, the fact that the defendant participated in discovery and made motions in the trial court did not waive the defense of insufficiency of service since the defendant preserved the defense by specifically raising the defense in the de-

fendant's answer, reasserted the defense in the defendant's responses to interrogatories, and engaged in no conduct manifestly indicative of an intention to relinquish the defense. *Joyner v. Schiess*, 236 Ga. App. 316, 512 S.E.2d 62 (1999).

Failure to correct deficient service. — When the plaintiff did not seek to amend or correct the deficiency in service of process by serving the codefendant personally at any time before the trial court ruled on the defendant's motion to dismiss, the trial court should have granted the codefendant's motion to dismiss on the ground of insufficiency of service of process and abused the court's discretion by failing to do so. *Nazli v. Scott*, 203 Ga. App. 523, 417 S.E.2d 187, cert. denied, 203 Ga. App. 907, 417 S.E.2d 187 (1992).

In a divorce case, the husband's affidavit in support of service by publication was not sufficient because the husband failed to state that the wife resided outside of Georgia at a previous time and in a certain place; that the certain place was the last place where the wife resided to the husband's knowledge; that the wife no longer resided at that place; that the husband did not know where the wife presently resided or could be found; and that the husband did not know, had never been informed, and had no reason to believe that the wife now resided in Georgia. *Reynolds v. Reynolds*, 296 Ga. 461, 769 S.E.2d 511 (2015).

Service by publication in custody proceeding inadequate. — Trial court erred in entering a finding of contempt against a mother and in changing custody of a child from the mother to the father because the court lacked personal jurisdiction over the mother due to insufficient service of process; the trial court erred in granting the father's motion to serve the mother by publication because the father's search for the mother was legally inadequate, and the father had the mother's cell phone number, email address, and mailing address. *Coker v. Moemeka*, 311 Ga. App. 105, 714 S.E.2d 642 (2011).

Personal Service**1. In General**

Provisions relating to personal service are strictly construed because no-

tice is the very bedrock of due process. *Headrick v. Fordham*, 154 Ga. App. 415, 268 S.E.2d 753 (1980).

Strict or liberal construction. — Although the personal service requirements in paragraph (d)(7) of O.C.G.A. § 9-11-4 are generally construed strictly because notice is central to due process, when actual notice of the suit has been received by the actual defendant, paragraph (d)(7) should be liberally construed to effectuate service. *Anderson v. Bruce*, 248 Ga. App. 733, 548 S.E.2d 638 (2001).

Failure of personal service renders judgment void. — Failure to obtain service by leaving a copy of the summons and complaint at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein renders the judgment void, even if the defendant had knowledge of the pending lawsuit. *Morgan v. Pacific Fin. Co.*, 142 Ga. App. 342, 236 S.E.2d 28 (1977).

Evasion of process. — Resident who is present within state and has actual knowledge that an action has been filed against the resident in the resident's county of residence cannot avoid answering the complaint by evading the process server. *Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

Trial court did not err in concluding that the debtors had been properly served pursuant to O.C.G.A. §§ 9-11-4 and 44-14-161(c) because there was undisputed evidence from which the trial court could have concluded that the debtors were attempting to evade service; a private process server, who had a description of a vehicle that had been parked at the address of one of the debtors, saw the vehicle and followed the vehicle, but the driver noticed the server, drove past the address of the house, and when the server pulled into the driveway after the driver and approached the garage door, which was not yet closed, and announced that the server had papers, no one responded. *Winstar Dev., Inc. v. SunTrust Bank*, 308 Ga. App. 655, 708 S.E.2d 604 (2011).

Personal service required to constitute "valid action" under § 9-2-61. — In order for the filing of a complaint to qualify under O.C.G.A. § 9-2-61 as a valid

renewal of a previously dismissed action, the proceedings which were dismissed must have constituted a "valid action." Pursuant to this, it is essential that the declaration filed in the first instance should have been served personally upon the defendant or otherwise in accordance with paragraph (d)(7) of O.C.G.A. § 9-11-4. Service upon the defendant's parent at the parent's residence is not "service" within the meaning of O.C.G.A. § 9-11-4(d)(7). *Osborne v. Hughes*, 200 Ga. App. 558, 409 S.E.2d 58, cert. denied, 200 Ga. App. 896, 409 S.E.2d 58 (1991).

Alimony requires personal service. — Alimony is an in personam issue and requires personal service, and any form of substituted service will not suffice. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

All types of services not excluded by Jackson. — In light of the Jackson decision, it is not reasonable to read "proper service" as to exclude all service other than personal service. *Roberts v. Jones*, 390 F. Supp. 2d 1333 (M.D. Ga. May 9, 2005).

2. Corporations

Strict construction of substituted service provisions. — Substituted mode of service on domestic corporations, in lieu of personal service, being a creature of statute and in derogation of the common law, must be strictly construed. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977).

Service under this section is not the sole method of serving corporate defendant. *Daniel & Daniel, Inc. v. Stewart Bros.*, 139 Ga. App. 372, 228 S.E.2d 586 (1976) (see now O.C.G.A. § 9-11-4).

Service by publication. — Service by publication on a corporation is not proper since, if service cannot be had on the president or other officer or agent in an action against a corporation, the Secretary of State is the agent upon whom service may be served. *Kannady v. State Farm Mut. Auto. Ins. Co.*, 214 Ga. App. 492, 448 S.E.2d 374 (1994).

Process must be served on agent. — Corporation can only be served by service

Personal Service (Cont'd)**2. Corporations** (Cont'd)

of process upon agent of the corporation. *Browning v. Europa Hair, Inc.*, 244 Ga. 222, 259 S.E.2d 473 (1979).

Who may act as agent. — Not every employee of a corporation is an agent subject to being validly served with process directed to the corporation, since not every employee can reasonably be expected to notify corporate officers of the receipt of the complaint, but it can be expected that the attorney for the corporation, if served with process, will notify the corporate officers. *Browning v. Europa Hair, Inc.*, 244 Ga. 222, 259 S.E.2d 473 (1979).

Under Georgia law, to be proper agent to receive service, it is not necessary that the employee in question be an officer or that the employee be authorized to enter into contracts on behalf of the corporation. *Henderson v. Cherry, Bekaert & Holland*, 932 F.2d 1410 (11th Cir. 1991).

Agent must be in position to inform corporation. — Since object of service of process is to transmit notice of suit to corporation, it must be made on an agent whose position is such as to afford reasonable assurance that the person will inform the corporate principal that such process has been served. *Scott v. Atlanta Dairies Coop.*, 239 Ga. 721, 238 S.E.2d 340 (1977).

Service on corporation's president. — It is inconsequential whether the corporate address stated in service under paragraph (d)(1) of this section is in fact the place of doing business of the corporation or not, if it is there that defendant's president was found and served. *B-X Corp. v. Fulton Plumbing Co.*, 140 Ga. App. 131, 230 S.E.2d 331 (1976) (see now O.C.G.A. § 9-11-4).

When the defendant, in verifying "special appearance" which is in fact a motion to dismiss for lack of service, states on oath that the defendant is the president of the defendant corporation, the defendant's further statement that the defendant is not its agent for service of process is contrary to law and presents no issue. *B-X Corp. v. Fulton Plumbing Co.*, 140 Ga. App. 131, 230 S.E.2d 331 (1976).

Corporations were not properly served

through their presidents since the returns of service did not show that the corporations were served through the presidents, only that the presidents were served individually. *Kidd v. First Commerce Bank*, 264 Ga. App. 536, 591 S.E.2d 369 (2003).

Service on spouse of corporate president insufficient. — Service upon wife of corporation's president is not on the "president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof," nor is it service which conforms with any other provisions of law for service upon corporations. *DeJarnette Supply Co. v. F.P. Plaza, Inc.*, 229 Ga. 625, 193 S.E.2d 852 (1972).

Although service effected upon defendant's spouse was insufficient as to the professional corporation because the spouse was not an agent authorized to accept service on its behalf, the burden of showing harmful error is on the appellant, which appellant must do by the record, not by assertions appearing only in the appellant's brief or in appellant's enumerations of error and since the record provides no support for the defendant's corporation's claim of improper service, in this regard, the trial court did not err by denying the motion to dismiss the complaint. *Nazli v. Scott*, 203 Ga. App. 523, 417 S.E.2d 187, cert. denied, 203 Ga. App. 907, 417 S.E.2d 187 (1992).

Registered agent of corporation. — Former Code 1933, § 22-403 (see now O.C.G.A. § 14-2-501 et seq.) is designed to supplement Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. § 9-11-4) by adding registered agent to the list of those who may be served and thus virtually to eliminate the possibility of domestic corporations evading service of process. *O'Neal Constr. Co. v. Lexington Developers, Inc.*, 240 Ga. 376, 240 S.E.2d 856 (1977).

In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the motion to dismiss filed by an out-of-state damper part seller on the ground of insufficient service of process as personal service upon the seller's registered agent was appropriate under both the seller's State of Delaware and under Georgia law. *Vibratech, Inc. v. Frost*, 291 Ga. App. 133, 661 S.E.2d 185 (2008).

Service on Secretary of State. — Paragraph (d)(1) provides that if service cannot be made on an officer or agent of the corporation service may be perfected upon the Secretary of State, provided the plaintiff or the attorney files an affidavit showing that personal service on or notice to officers, the managing agent, or other agent of that corporation cannot be had within the state. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977).

When a domestic corporation fails to maintain a registered agent in this state, service upon the Secretary of State under former Code 1933, § 22-403 (see now O.C.G.A. § 14-2-501 et seq.) is proper, although other possibilities for service, e.g., this section's permission to serve an officer or other agent, have not been exhausted. *O'Neal Constr. Co. v. Lexington Developers, Inc.*, 240 Ga. 376, 240 S.E.2d 856 (1977).

When service is sought upon a corporation, pursuant to former Code 1933, § 22-403 (see now O.C.G.A. § 14-2-501 et seq.), the process server must make a reasonably diligent effort to serve the registered agent at the registered office before perfecting service on the Secretary of State; however, the affidavit required by paragraph (d)(1) of O.C.G.A. § 9-11-4 before service on the Secretary of State is not necessary under that section's procedure. *Bricks v. Walker Showcase, Inc.*, 255 Ga. 122, 336 S.E.2d 37 (1985).

When it was shown that the defendant corporation had vacated the addresses it had given the Secretary of State for both its principal and registered offices, the plaintiff was authorized to effect substituted service under paragraph (d)(1) of O.C.G.A. § 9-11-4 without making any additional efforts to effect personal service. *Daly's Driving Sch., Inc. v. Scott*, 238 Ga. App. 443, 519 S.E.2d 1 (1999).

Because a contractor presented sufficient evidence showing that an assignee that sued it had actual knowledge through its assignor of the contractor's physical address, yet failed to attempt service at that address before serving the Secretary of State, the trial court erred in denying

the contractor's motion to set aside the default judgment entered in favor of the assignee. *TC Drywall & Plaster, Inc. v. Express Rentals, Inc.*, 287 Ga. App. 624, 653 S.E.2d 70 (2007).

Service on attorney acting for foreign corporation. — When a foreign corporation files suit and obtains judgment in this state, and thereafter institutes garnishment on that judgment in this state, process in suit in equity to set aside that judgment may be served upon an attorney for the foreign corporation who filed first suit and garnishment as during the pendency of the garnishment such attorney is the agent of the foreign corporation subject to being served with suit to set aside. *Browning v. Europa Hair, Inc.*, 244 Ga. 222, 259 S.E.2d 473 (1979).

Service on an attorney is not permitted when personal service is required. *Estate of Thurman v. Dodaro*, 169 Ga. App. 531, 313 S.E.2d 722 (1984).

Service cannot be upon "mere employee". — For service of process upon a corporation to be valid the service must be made upon one of the types of individuals listed in O.C.G.A. § 9-11-4 and not upon a "mere employee." *Northwestern Nat'l Ins. Co. v. Kennesaw Transp., Inc.*, 168 Ga. App. 701, 309 S.E.2d 917 (1983).

Doctor's medical assistant whose duties were not managerial or supervisory, but purely medical, was not authorized to accept service of process on behalf of the doctor's professional corporation. *G.J. Soracco, M.D. v. Domineck*, 233 Ga. App. 166, 502 S.E.2d 732 (1998).

Service upon a receptionist who had never had supervisory or managerial responsibilities in the course of the receptionist's employment was insufficient. *Bowers v. Economation, Inc.*, 208 Ga. App. 661, 431 S.E.2d 420 (1993).

In a worker's suit against a corporation, there was evidence supporting the finding that service had not been perfected; the worker had not shown that the receptionist who allegedly received the complaint had managerial or supervisory responsibility, and the registered agent testified that the agent had never authorized the receptionist to receive service of process. *Aikens v. Brent Scarbrough & Co.*, 287 Ga. App. 296, 651 S.E.2d 214 (2007).

Personal Service (Cont'd)**2. Corporations** (Cont'd)

Service on president's personal secretary insufficient. — Personal secretary of corporation's president was not an agent of the corporation upon whom service of the corporation could be effected pursuant to subsection (d) of O.C.G.A. § 9-11-4 since the secretary did not occupy any position of managerial or supervisory responsibility within the organization. *Whatley's Interiors, Inc. v. Anderson*, 176 Ga. App. 406, 336 S.E.2d 326 (1985).

Service on president's personal secretary sufficient. — Service on the secretary of the company's president was sufficient since the secretary assured the serving officer that the secretary would "make certain" the president received the summons and complaint, and the company had been served with civil process perfected upon the secretary in the past. *Billy Cain Ford Lincoln Mercury, Inc. v. Kaminski*, 230 Ga. App. 598, 496 S.E.2d 521 (1998).

Service upon the secretary of a corporate hospital's secretary was sufficient service upon the defendant corporation since the evidence showed the secretary in question regularly accepted service of process. *Southwest Community Hosp. & Medical Ctr. v. Thompson*, 165 Ga. App. 442, 301 S.E.2d 501 (1983).

Service upon an executive secretary of a hospital who was paid a salary exceeding that of some of the hospital's department heads, who was delegated a great deal of responsibility, and who simultaneously served the hospital as an officer of its corporate parent, was sufficient. *Floyd v. Piedmont Hosp.*, 213 Ga. App. 749, 445 S.E.2d 844 (1994).

Service upon administrative assistant. — Although the administrative assistant was neither an officer of the corporation nor the corporation's registered agent for service of process, when nothing in the record indicated that the assistant's actual duties did not entail managerial or supervisory responsibilities and when the assistant was the person who spoke to the process server and was aware that the defendant was not available for service, it could be found from the officer's affidavit

that the assistant led the officer to believe the assistant was in charge of the office and was authorized to accept service for the defendant corporation; thus, it was error to grant the defendant's motion to dismiss for insufficient service of process. *Murray v. Sloan Paper Co.*, 212 Ga. App. 648, 442 S.E.2d 795 (1994).

Service upon a corporation was inadequate, notwithstanding the sheriff's affidavit showing that the sheriff habitually requested whether the person accepting service was authorized to do so, since the administrative assistant who accepted service testified unequivocally that the assistant never told the sheriff that the assistant was authorized to accept service. *Hardin Constr. Group v. Fuller Enter., Inc.*, 233 Ga. App. 717, 505 S.E.2d 755 (1998).

Service upon insurer's divisional claim superintendent may have been sufficient if it was established that the superintendent had managerial or supervisory responsibility and that the position afforded reasonable assurance that the superintendent would inform the company that process had been served. *McClendon v. Elzora*, 237 Ga. App. 557, 515 S.E.2d 860 (1999).

Store manager a qualified agent. — Store manager of one of the defendant-corporation's locations within the county where the alleged tortious conduct took place, who was responsible for the store's daily operations, including the supervision of other store employees and the submission of daily reports to corporate headquarters, was a qualified agent upon whom to perfect service of process, although the manager was not an officer and was not authorized to enter into contracts on behalf of the corporation. *Ogles v. Globe Oil Co.*, 171 Ga. App. 785, 320 S.E.2d 848 (1984).

Service on bank manager sufficient. — Deputy sheriff's service of a wrongful foreclosure complaint on a mortgagee's local branch manager at a branch office, rather than on the designated registered agent for service, was proper service pursuant to O.C.G.A. §§ 9-11-4 and 14-2-1510(d), and the trial court properly denied the mortgagee's motion to open a default pursuant to O.C.G.A. § 9-11-55(b).

based on the mortgagee's claim that there was no jurisdiction due to improper service; the deputy's testimony that the manager indicated that the manager was authorized to accept service and that the manager did in fact accept the papers was entitled to a presumption in favor of the return of service. *GMAC Mortg. Corp. v. Bongiorno*, 277 Ga. App. 328, 626 S.E.2d 536 (2006).

Service upon independent broker insufficient to serve insurer. — When insurer was served by service on an insurance broker who placed business with a number of companies, including the insurer, but was not officially employed or authorized for service receipt, suit was dismissed for insufficiency of service. *Standard Guar. Ins. Co. v. Landers*, 206 Ga. App. 803, 426 S.E.2d 574 (1992).

Service on registered agent in another state. — When personal service was required to be made on a foreign corporation's registered agent designated under the provisions of the Georgia Corporation Code, extraterritorial service upon the corporation's registered agent in another state did not confer personal jurisdiction upon the court in Georgia. *Todd v. Harnischfeger Corp.*, 177 Ga. App. 356, 340 S.E.2d 22 (1985).

Service by mail. — Attempt to effect service by sending a copy of the summons and complaint directly to a corporation's office via certified mail was inadequate. *KMM Indus., Inc. v. Professional Ass'n*, 164 Ga. App. 475, 297 S.E.2d 512 (1982).

Erroneous finding of fact regarding status of corporate officer. — Trial court erred in finding as fact that the person who accepted service for a corporation was at that time the secretary/treasurer and managing agent, since it could not be inferred that because the person was secretary/treasurer when the annual report was filed, the person still held that office when served. *Due W. Assocs. v. Renfro Mining & Grading Co.*, 194 Ga. App. 397, 391 S.E.2d 13 (1990).

Corporation not properly served. See *Georgia Power Co. v. O'Bryant*, 169 Ga. App. 491, 313 S.E.2d 709 (1983).

Service upon the designated agent of a German corporation's wholly-owned American subsidiary did not constitute

adequate service of process upon the German corporation. *May v. Volkswagen of Am., Inc.*, 125 F.R.D. 521 (N.D. Ga. 1989).

Neither O.C.G.A. § 9-11-4 nor O.C.G.A. § 14-2-504, the corporate service statute, authorized service on an agent of a domestic subsidiary as constituting proper service on a foreign parent corporation. *Rovema Verpackungsmaschinen v. Deloache*, 232 Ga. App. 212, 500 S.E.2d 647 (1998).

Plaintiff did not effect service on a corporation by service on a franchisee's employee who was not authorized to act as an agent for the corporation. *Stephens v. McDonald's Corp.*, 245 Ga. App. 109, 536 S.E.2d 566 (2000).

Trial court did not obtain jurisdiction over the defendant due to nonconformity of the service of process with O.C.G.A. § 9-11-4(e)(1), since the documents attached to the certificate of filing did not include either the required certification or the required affidavit and the affidavit of the private process server was inadequate. *Gamlins, Solicitors & Notaries v. A.E. Roberts & Assocs., Inc.*, 254 Ga. App. 763, 564 S.E.2d 29 (2002).

Failure to use diligence in serving corporation. — When pleadings show officer charged with executing process did not comply with O.C.G.A. § 9-11-4 by attempting with reasonable diligence to perfect the service of summons and the complaint at registered address, service was not irregular but defective, and the judgment was void. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977).

Service of process held sufficient. — Because a corporation failed in the corporation's burden of showing that the person who actually received service of process was not authorized to accept service on behalf of the corporation's registered agent, the service was properly found to be sufficient. Thus, the trial court was not required to dismiss the action based on a lack of sufficient service of process. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

O.C.G.A. § 9-11-4(e)(1) did not govern service of process in a manufacturer's breach of contract action against a distrib-

Personal Service (Cont'd)**2. Corporations** (Cont'd)

utor because the distributor was not "authorized to transact business in the State" as that phrase was used in O.C.G.A. § 9-11-4(e)(1); the distributor did not show that the distributor was a corporation incorporated or domesticated under the laws of Georgia because the distributor pointed to no evidence that the distributor obtained the requisite certificate of authority to transact business in the state from the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1501(a) and because the distributor was a nonresident subject to the long-arm statute, O.C.G.A. § 9-10-90 et seq. *Kitchen Int'l, Inc. v. Evans Cabinet Corp.*, 310 Ga. App. 648, 714 S.E.2d 139 (2011).

3. Minors

Minor not bound absent proper service. — Unlike most defenses, infancy, so far as service of process is concerned, is not a defense personal to the defendant, but is a statutory method of making parties, in absence of which minor defendant is not bound by judgment. *Smith v. Lamb*, 103 Ga. App. 157, 118 S.E.2d 924 (1961).

Both minor and parent or guardian must be served. — In order to perfect service upon a minor in this state, both the minor and the minor's father, mother, guardian, or guardian ad litem must be served. *Collins v. Collins*, 148 Ga. App. 103, 250 S.E.2d 870 (1978).

In order to perfect service upon a minor in this state, both the minor and the father, mother, guardian, or guardian ad litem must be served; if this imperative is not satisfied, the minor defendant cannot be found to be in default. *Lanier v. Foster*, 133 Ga. App. 149, 210 S.E.2d 326 (1974).

Minor cannot waive multiple service requirements of this section, for to permit such a waiver would be utterly inconsistent with the obvious intent of this section to protect minors. *Collins v. Collins*, 148 Ga. App. 103, 250 S.E.2d 870 (1978).

Appearance of minor not sufficient to validate judgment. — Appearance and pleading to an action by an infant, personally and through counsel, is not of

itself sufficient to validate a judgment when there was no service of process according to law, unless the infant is subject to an estoppel in pais based on fraud and deceit when the infant has reached such years of discretion that fraud may be imputed to the infant. *Smith v. Lamb*, 103 Ga. App. 157, 118 S.E.2d 924 (1961).

Waivers or estoppels not ordinarily being imputable against infants, mere filing of an answer and participation by an infant in legal proceedings or a trial, in the infant's own behalf or through an attorney at law employed by the infant, would not operate as estoppel or legal waiver of statutory requirements regarding service. *Brown v. Anderson*, 186 Ga. 220, 197 S.E. 761 (1938).

Invalid service on minor third-party defendant. — When minor third-party defendant was served but minor's father was never served with a copy of the third-party complaint and summons in official capacity as father and natural guardian, nor was the guardian ad litem ever appointed, neither the fact that the minor defendant had been married previously nor the fact that the father was also the plaintiff in the case validated service since failure to comply strictly with the statutory provision rendered service invalid. *Harvey v. Harvey*, 147 Ga. App. 154, 248 S.E.2d 214 (1978).

Service on minor under Nonresident Motorist Act. — Minor is not sui juris; accordingly, in order to perfect service upon a nonresident minor defendant under O.C.G.A. Ch. 12, T. 40, both the nonresident minor defendant and the minor's guardian must be served. *Medlin v. Church*, 157 Ga. App. 876, 278 S.E.2d 747 (1981).

While injured party was required to serve process on a parent in addition to serving the process on the minor, the trial court erred in dismissing the injured party's renewal action on the ground that the injured party did not amend the party's original complaint to allege the stepdaughter was no longer a Georgia resident as the stepdaughter had been properly served in the original action while the stepdaughter was a Georgia resident and service was completed once the mother was served under Georgia's Long Arm

Statute at the family's new residence in the Dominican Republic. *Trent v. Franco*, 253 Ga. App. 104, 558 S.E.2d 66 (2001).

4. Persons of Unsound Mind or Incapable of Conducting Own Affairs

Service valid. — Service of process on an individual with a mental condition in jail was proper because the individual had not been adjudicated as incompetent by the probate court and had a guardian appointed. *Trammel v. Bradberry*, 256 Ga. App. 412, 568 S.E.2d 715 (2002).

5. Counties, Municipalities, Cities, and Towns

Service on mayor was insufficient to constitute service on a city school district because the governing body of the school district, that is the chief executive officer or clerk of the city board of education, was required to be served under O.C.G.A. § 9-11-4(e)(5). *Foskey v. Vidalia City Sch.*, 258 Ga. App. 298, 574 S.E.2d 367 (2002).

6. Posting at Place of Abode

Posting ineffective when amount exceeds \$200. — Service by leaving the complaint, summons, and amended pleadings attached to the door of a residence was not effective when the amount in controversy exceeded \$200. *Silvious v. Pharaon*, 54 F.3d 697 (11th Cir. 1995).

Posting not authorized in divorce actions. — Paragraph (d)(6) was intended to apply only to complaints involving claims for money when the principal sum sought is less than \$200, and does not apply to divorce cases which are equitable in nature. *Reynolds v. Reynolds*, 231 Ga. 178, 200 S.E.2d 766 (1973); and see *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979), holding paragraph (d)(6) unconstitutional.

7. Service at Dwelling House or Usual Place of Abode

Suitable age and discretion. — When the defendants received service from person served there is some indication that that person was of suitable age

and discretion and that service was effectuated in such a manner to reasonably accomplish it. *Trammel v. National Bank*, 159 Ga. App. 850, 285 S.E.2d 590 (1981).

It is not a matter of law that a 12 year old is not a person of suitable age and discretion. It is a factual matter and the presumption of valid service stands unless rebutted by the party which moves to set aside the service. *Trammel v. National Bank*, 159 Ga. App. 850, 285 S.E.2d 590 (1981).

Service on spouse at residence. — Service of the affidavit and summons upon the garnishee's spouse at their dwelling house and usual place of abode is proper service upon the garnishee under O.C.G.A. § 9-11-4. *Cartwright v. Alpha Transp. Serv., Inc.*, 161 Ga. App. 274, 289 S.E.2d 827 (1982).

When the trial court found a continuing familial relationship between the defendant and the defendant's resident spouse in Augusta; that the defendant was not permanently separated from the spouse at the time service was perfected; that the defendant had the title to their house changed to the defendant's name after the defendant claimed they had separated but the defendant permitted the spouse to continue to live in the house; and that they continued to cohabit as soon as the spouse disposed of the house and joined the defendant in Ohio where they continued their familial relationship for another six months before the spouse filed for divorce, and there is evidence of record to support the trial court's finding that the appellant was a legal resident of their house in Augusta with the spouse when service was made, the Court of Appeals must affirm the finding of a relationship and adequate service. *Wolfe v. Rhodes*, 166 Ga. App. 845, 305 S.E.2d 606 (1983).

When a summons and complaint in the plaintiff's action to set aside a conveyance of property was served on a husband and wife by serving the husband personally at the marital home and serving the wife through delivery of the papers to the husband at the marital home, such action constituted proper service under O.C.G.A. § 9-11-4(d)(7), despite the wife's assertions that she never received the papers from the husband because at the time the

Personal Service (Cont'd)**7. Service at Dwelling House or Usual Place of Abode** (Cont'd)

parties were estranged. *Adams v. Adams*, 260 Ga. App. 597, 580 S.E.2d 261 (2003).

Evidence as to place of abode of service personal. — When evidence was silent as to whether a service person had established a new residence where the service person was stationed and was silent as to whether the service person intended to return to the mother's home upon discharge, the facts were insufficient to sustain a dismissal based on inadequate service of process since it could not be said that the service person's mother's home was not the service person's "usual place of abode" under paragraph (d)(7) of O.C.G.A. § 9-11-4. *Tolbert v. Murrell*, 253 Ga. 566, 322 S.E.2d 487 (1984).

Return of service did not need to reflect that defendant was served at "his dwelling or usual place of abode," since the return reflected that the defendant was personally served. *Patterson v. Citizens & S. Bank*, 163 Ga. App. 539, 294 S.E.2d 730 (1982).

Service left with adult boarder. — When the defendant received copy of process at the defendant's dwelling house on the same date that process was left with adult boarder in the defendant's place of abode, who in a responsible manner caused the summons and complaint to be placed in the defendant's hands, such service sufficiently complied with this section so as to support venue. *Williams v. Mells*, 138 Ga. App. 60, 225 S.E.2d 501 (1976).

Service on home visitor. — Proper service was not made by leaving the summons and complaint at the defendant's residence with a person who was not a resident there but was a student of the defendant and who had agreed to gather the defendant's mail and water the defendant's plants while the defendant was out of the country. *Coombs v. Koblasz*, 246 Ga. App. 67, 539 S.E.2d 562 (2000).

Service on family member. — Service made on the defendant's sister was proper since the sister lived in a separate dwelling located within a family compound in which the defendant's trailer was situated and there was evidence of "a

continuing familial relationship between" the defendant and the rest of the family sufficient to satisfy the presumption of proper service. *Finch v. Weaver*, 213 Ga. App. 514, 445 S.E.2d 289 (1994).

Service on the defendant's brother at the brother's residence was insufficient under O.C.G.A. § 9-11-4(e)(7) as the defendant did not reside there, did not authorize the brother to accept service, had not lived in Georgia for three months prior to the time of service, and was never personally served with the complaint. *Merriweather v. Voss*, 277 Ga. App. 240, 626 S.E.2d 201 (2006).

Service on resident at address listed on return of service held sufficient. — Service of process to a person at least 15 years old who resided at the residence listed on the return of service was sufficient; moreover, adequate and proper service of process was presumed given that the party charged with service timely filed an answer. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

Service at father's residence. — Leaving copy of summons and complaint with the defendant's father at a place where the defendant no longer resided was not sufficient service, and the defect was not cured by the defendant's actual knowledge that a complaint had been filed against the defendant. *Terrell v. Porter*, 189 Ga. App. 778, 377 S.E.2d 540 (1989).

Even though the defendant had moved from the defendant's father's residence, service on the father there was sufficient since there was substantial evidence that the defendant considered that address the defendant's permanent residence. *Cushman v. Raiford*, 221 Ga. App. 785, 472 S.E.2d 554 (1996).

Leaving copy of summons and complaint with the defendant's father at a place where the defendant no longer resided was not sufficient service, and the defect was not cured by the defendant's actual knowledge that a complaint had been filed against the defendant. *Terrell v. Porter*, 189 Ga. App. 778, 377 S.E.2d 540 (1989).

In a personal injury action, service on the driver's father was not effective service on the driver under O.C.G.A.

§ 9-11-4(e)(7) since the place of service was not the driver's dwelling house or usual place of abode. *Webster v. Western Express, Inc.*, No. 5:05-CV-350 (WDO), 2007 U.S. Dist. LEXIS 70011 (M.D. Ga. Sept. 21, 2007).

Service upon the defendant's mother at her residence, not the defendant's, was not service within the meaning of O.C.G.A. § 9-11-4. *Seabolt v. Edghill*, 192 Ga. App. 715, 386 S.E.2d 376 (1989).

Service at mother's residence. — Trial court did not abuse the court's discretion in dismissing the complaint for insufficiency of service of process since: (1) service was made at the address shown on the defendant's driver's license, which was her mother's home, but (2) the defendant no longer lived with her mother, having next lived with her father and then with friends, (3) the defendant's stepfather averred that he told the officer who served process that the defendant did not live there but that she sometimes stayed there, and (4) the defendant explained that she had not changed the address on her license, still received mail at her mother's house because her father moved a lot, and considered her mother's address to be more stable for receiving important communications. *Duke v. Buice*, 249 Ga. App. 164, 547 S.E.2d 561 (2001).

Service of process on defendant's minor daughter, who lived with mother, from whom the defendant was separated, at an address where the defendant had never resided, was completely nugatory, and the court had no jurisdiction to authorize taking of a default judgment against the defendant. *Holloway v. Frey*, 130 Ga. App. 224, 202 S.E.2d 845 (1973).

Service left with babysitter. — When a copy of the summons and the complaint is left at the defendant's dwelling place with the babysitter not residing with the defendant, there is a failure to obtain lawful service, and the fact that the defendant acquired knowledge of the pending action does not cure such defective service. *Mahone v. Marshall Furn. Co.*, 142 Ga. App. 242, 235 S.E.2d 672 (1977).

Service on nonresiding daughter-in-law at defendants' residence held improper. — Alternative

service made at the defendants' residence upon their daughter-in-law, who did not reside there, was improper because it was contrary to the requirement of paragraph (d)(7) of O.C.G.A. § 9-11-4. *Acord v. Maynard*, 198 Ga. App. 296, 401 S.E.2d 315 (1991).

Service on sister insufficient. — When the defendant was married and had a residence separate from the defendant's codefendant father and this residence was correctly given in the complaint and in the service documents, but no attempt was ever made to serve the defendant personally at the defendant's residence, rather, a copy of this summons and complaint was left with the defendant's sister at the home of the defendant's father, this service was insufficient. *Freeman v. Nodvin*, 181 Ga. App. 663, 353 S.E.2d 546 (1987).

Service upon a relative of the defendant at a place other than the defendant's residence or usual place of abode is insufficient. *Garrett v. Godby*, 189 Ga. App. 183, 375 S.E.2d 103 (1988); *Yelle v. United States Suburban Press, Inc.*, 216 Ga. App. 46, 453 S.E.2d 108 (1995).

Service on relative at place of business insufficient. — When the evidence established without contradiction that service was attempted by leaving a copy of the summons with a relative of the defendant at the defendant's place of business, such service was insufficient. *American Erectors, Inc. v. Hanie*, 157 Ga. App. 687, 278 S.E.2d 196 (1981).

When copy of process was left with the defendant's spouse at the defendant's place of business, the fact that the defendant ultimately received a summons from the spouse did not perfect otherwise invalid service. *Collins v. Peacock*, 147 Ga. App. 424, 249 S.E.2d 142 (1978).

Service to daughter living next door. — Service of process on the defendant's daughter, who lived next door to the defendant, was insufficient. *Forsythe v. Gay*, 226 Ga. App. 602, 487 S.E.2d 128 (1997).

Service on girlfriend insufficient. — Service was not properly had when the process server left the summons with the debtor's girlfriend, who did not reside with the debtor, and the server did not

Personal Service (Cont'd)**7. Service at Dwelling House or Usual Place of Abode** (Cont'd)

ascertain whether or not the girlfriend resided at the debtor's residence. *Finlon v. W&J Factors, Inc.*, 253 Ga. App. 754, 560 S.E.2d 273 (2002).

8. Agents

Service of process on apparent agent is not sufficient; service must be made on actual agent. *Headrick v. Fordham*, 154 Ga. App. 415, 268 S.E.2d 753 (1980); *Thaxton v. Georgia Insurer's Insolvency Pool*, 158 Ga. App. 407, 280 S.E.2d 421 (1981); *News-Press Publishing Co. v. Kalle*, 173 Ga. App. 411, 326 S.E.2d 582 (1985).

When a former member of a parent-teacher student association asserted false arrest, defamation, and other claims, dismissal of claims for failure to effect service of process was proper because the former member tried to serve the education board's registered agent, but the former member did not prove that the agent was authorized to accept service on behalf of employees of the school system. *Reeves v. Wilbanks*, No. 12-16611, 2013 U.S. App. LEXIS 20204 (11th Cir. Oct. 3, 2013) (Unpublished).

Burden of proof. — When the plaintiff challenged the service which was purportedly made on the plaintiff personally through the plaintiff's secretary, as the plaintiff's agent, the plaintiff bore the burden of coming forward with evidence that the plaintiff was not served personally through the plaintiff's agent for purposes of paragraph (d)(7) of O.C.G.A. § 9-11-4. *Baughan v. Alaoui*, 240 Ga. App. 661, 524 S.E.2d 536 (1999).

Service on attorney not permitted. — Service of process cannot be perfected by service on an attorney of the defendant, in lieu of serving the defendant personally, when the defendant has a legal residence in this state at which service can be perfected on the defendant. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Presiding judge, by order, may not authorize service to the defendant's attorney and by sending a copy by registered mail

to the defendant, even if the defendant is absent from the state on business for an indefinite time. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

When personal service upon an individual is required, service of process upon that person's attorney usually is not permitted. *Browning v. Europa Hair, Inc.*, 244 Ga. 222, 259 S.E.2d 473 (1979).

Service on city attorney. — Service of process was properly effectuated on a city when the city attorney was personally served because the sole provision of the city's charter regarding service of process provided that the city attorney was authorized to acknowledge service of any suit against the city; not only was evidence presented that the city attorney held oneself out to the process server as someone who could accept service on behalf of the city, the attorney's paralegal, the city clerk, and the office manager for the chief of police all claimed that the city attorney was authorized to accept service of process on the city's behalf and that anyone seeking to serve the city would be directed to the city attorney, and the city's mayor also acknowledged that the mayor designated the city attorney to accept service of process and that the mayor instructed persons seeking to serve the city not to provide the summons and complaint to the mayor but rather to serve the summons and complaint upon the city attorney. *City of East Point v. Jordan*, 300 Ga. App. 891, 686 S.E.2d 471 (2009), cert. denied, No. S10C0494, 2010 Ga. LEXIS 337 (Ga. 2010).

Service on a receptionist or a secretary is not effective service under Georgia law unless that person is an agent authorized to receive service of process on behalf of the party. *Smith v. Sentry Ins.*, 674 F. Supp. 1459 (N.D. Ga. 1987).

Service on secretary of physician at the physician's office is not personal service unless the secretary has been appointed as agent for such service. *Bible v. Hughes*, 146 Ga. App. 769, 247 S.E.2d 584 (1978); *Exum v. Melton*, 244 Ga. App. 775, 536 S.E.2d 786 (2000).

Service on office manager insufficient. — When, in a medical malpractice action, the service papers were not left at the defendant's place of abode but at the

defendant's place of business while the defendant was not present on the premises, service upon the physician's office manager, who was not appointed as the agent for service, was insufficient. *Adams v. Gluckman*, 183 Ga. App. 666, 359 S.E.2d 710 (1987).

Fact that the defendant consented to substituted service upon unidentified individuals on other occasions does not establish that the defendant's office manager was authorized to receive legal process. *Adams v. Gluckman*, 183 Ga. App. 666, 359 S.E.2d 710 (1987).

Service of process on psychiatrist's office manager, who was not a registered or authorized agent for process, was insufficient, even though the doctor may have been on the premises at the time. *Hudgins v. Bawtinheimer*, 196 Ga. App. 386, 395 S.E.2d 909 (1990).

Service on company's agent sufficient. — Catamaran purchasers' service of process was sufficient as to the company because under O.C.G.A. § 9-11-4(e)(7) personal service upon a business association could only be accomplished by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process. Because the company and the agent, as the moving party, had the initial burden of producing affidavits that demonstrated the absence of sufficient service of process before shifting the burden to the purchasers to demonstrate that service was proper, and because the company and the agent failed to meet that initial burden, the court rejected the company and the agent's argument that service of process was insufficient as to the company. *Carrier v. Jordaan*, No. CV208-068, 2008 U.S. Dist. LEXIS 114596 (S.D. Ga. Oct. 17, 2008).

In a suit alleging fraud and other claims, the trial court erred by granting the motion to dismiss for lack of personal jurisdiction of two property companies for not being served with the summons and complaint because the trial court erred in rejecting the plaintiff's evidence of a settlement proposal between the plaintiff and the two property companies since the settlement proposal was not prohibited by former O.C.G.A. § 24-3-37 (see now

O.C.G.A. § 24-4-408) as the proposal was being offered to show an agency relationship between the two property companies and a defending business person. *Cox v. Mayan Lagoon Estates Ltd.*, 319 Ga. App. 101, 734 S.E.2d 883 (2012).

Service on sheriff's captain insufficient service on deputy. — When a complaint was delivered to a sheriff's captain who delivered the complaint to the deputy named as a defendant in the complaint, service upon the deputy was insufficient since the prohibition against disclosure of the home address of a law enforcement officer under O.C.G.A. § 50-18-72 did not validate the delivery to the captain as service under O.C.G.A. § 9-11-4(e)(7). *Melton v. Wiley*, No. 07-10959, 2008 U.S. App. LEXIS 1069 (11th Cir. Jan. 15, 2008) (Unpublished).

Service at former place of business. — When service was attempted at the defendant's last known place of business and was made upon the defendant's former long-time partner and apparent agent, the defendant's new office was located a short distance from the defendant's former place of business, and the defendant's new business address (as well as the defendant's residence address) could have been easily obtained by a number of means—including the simple expedient of consulting the telephone directory—making proper service nearly 300 days after the filing of the complaint was an unreasonably long time to effect service. *Roberts v. Bienert*, 183 Ga. App. 751, 360 S.E.2d 25 (1987).

Insurance agents. — Service of process on an independent agent who represented numerous insurance companies, but who had no relationship with an uninsured motorist carrier other than to sell its policies, was insufficient to effect proper service on the carrier. *Commercial Union Ins. Co. v. Gibson*, 210 Ga. App. 823, 437 S.E.2d 808 (1993).

Service station attendant not agent. — Casual salaried laborer, with neither discretionary power nor managing authority, hired as service station attendant and working solely in that capacity, is not an "agent" in the sense contemplated by this section. *Thoni Oil Co. v. Tinsley*, 140 Ga. App. 887, 232 S.E.2d 162 (1977).

Service by Publication

Due process must be met for service. — General Assembly may enact laws providing procedure for service of process on Georgia residents by publication and by mail if state and federal concepts of due process are not violated. *Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

Legislature intended that substituted service be consistent with Constitution. — General Assembly intends that substituted service be limited to such service as is consistent with the Constitution. *Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

Service by publication may be sufficient for personal jurisdiction. — *Moreno v. Naylor*, 305 Ga. App. 504 (2010) supports the proposition that service by publication alone is insufficient for the trial court to obtain personal jurisdiction and to the extent that *Moreno* and the following cases hold that service by publication is never sufficient to confer personal jurisdiction against any defendant, those cases are overruled by the Georgia Court of Appeals: *Brasile v. Beck*, 312 Ga. App. 77 (2011); *Long v. Bellamy*, 296 Ga. App. 263 (2009); *State Farm v. Manders*, 292 Ga. App. 793 (2008); *Wyatt v. House*, 287 Ga. App. 739 (2007); *Costello v. Bothers*, 278 Ga. App. 750 (2006); *Patel v. Sanders*, 277 Ga. App. 152 (2006); *Cohen v. Allstate Ins. Co.*, 277 Ga. App. 437 (2006); *Williams v. Jackson*, 273 Ga. App. 207 (2005); *Saxton v. Davis*, 262 Ga. App. 72 (2003); *Hawkins v. Wilbanks*, 248 Ga. App. 264 (2001); *Wilson v. State Farm*, 239 Ga. App. 168 (1999); *Winters v. Goins*, 235 Ga. App. 558 (1998); *Bailey v. Lawrence*, 235 Ga. App. 73 (1998); *Smith v. Johnson*, 209 Ga. App. 305 (1993); *Douglas v. Woon*, 205 Ga. App. 355 (1992); *Starr v. Wimbush*, 201 Ga. App. 280 (1991); and *Norman v. Daniels*, 142 Ga. App. 456 (1977). *Ragan v. Mallow*, 319 Ga. App. 443, 744 S.E.2d 337 (2012).

Substituted service must be reasonably calculated to give notice. — Substituted service is dependent on whether or not form of substituted service provided and employed is reasonably calculated to give actual notice of the proceedings and an opportunity to be heard. *Melton v.*

Johnson, 242 Ga. 400, 249 S.E.2d 82 (1978).

Reasonable diligent attempt to ascertain whereabouts must be shown.

— Because notice by publication is a notoriously unreliable means of actually informing interested parties about pending suits, the constitutional prerequisite for allowing such service when the addresses of those parties are unknown is a showing that reasonable diligence has been exercised in attempting to ascertain their whereabouts. *Abba Gana v. Abba Gana*, 251 Ga. 340, 304 S.E.2d 909 (1983).

In a divorce case, the husband could have ascertained the wife's address through reasonably diligent efforts but failed to do so because the husband knew that the wife was living with a boyfriend; a few days before the trial court issued an order requiring service by publication, the wife was charged with criminal damage to the husband's property at an address in Forsyth, Georgia; and the wife's daughter, who had contact with both the wife and the husband, was aware of the wife's address; thus, service by publication did not meet the constitutional requirements of due process, and the court erred in denying the wife's motion to set aside. *Reynolds v. Reynolds*, 296 Ga. 461, 769 S.E.2d 511 (2015).

Personal service must not be possible. — Service by publication and mail does not provide due process when personal service was possible. *Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

Service by publication must be specifically authorized. — By its own terms paragraph (e)(1) of this section is limited by qualification in subsection (i) that provisions for service of publication shall apply only in actions or proceedings in which service by publication now or hereafter may be authorized by law. *National Sur. Corp. v. Hernandez*, 120 Ga. App. 307, 170 S.E.2d 318 (1969); *Schwind v. Gordon*, 93 F.R.D. 517 (N.D. Ga. 1982).

Provisions in paragraph (e)(1) of this section as to service of nonresidents by publication, which provision also includes persons who cannot be found within the state, is applicable only in those instances when service by publication is allowed by law. *Barnes v. Continental Ins. Co.*, 231

Ga. 246, 201 S.E.2d 150 (1973).

Residence out of state is sufficient to invoke service by publication under subparagraph (e)(1)(A) of O.C.G.A. § 9-11-4 when its use is authorized. O.C.G.A. § 9-11-4 does not require that a defendant be avoiding service, nor must there have been prior attempts at personal service. *Schwind v. Gordon*, 93 F.R.D. 517 (N.D. Ga. 1982).

Service by publication not authorized for in personam judgments. — There is no provision in this state whereby courts may acquire jurisdiction over a defendant by service by publication and then render an in personam judgment against the defendant. *Veal v. General Accident Fire & Life Assurance Corp.*, 128 Ga. 610, 197 S.E.2d 410 (1973); *Tapley v. Proctor*, 150 Ga. App. 337, 258 S.E.2d 25 (1979); *Schwind v. Gordon*, 93 F.R.D. 517 (N.D. Ga. 1982).

Service by publication improper on LLC. — Default judgment in favor of a limited liability company (LLC) against a second LLC was void because the trial court erred in allowing service by publication. Although service was attempted on the second LLC's registered agent without success, the first LLC did not show why service could not be had at the second LLC's address on one of the other persons listed in the statute; the first LLC had actual knowledge of the second LLC's business address and had even attempted service there; and even if the first LLC had attempted unsuccessfully to serve another person at the second LLC's principal place of business, service by publication would not have been proper because personal service through the Secretary of State could have been made. *Brock Built City Neighborhoods, LLC v. Century Fire Prot., LLC*, 295 Ga. App. 205, 671 S.E.2d 240 (2008).

Including personal judgments for torts. — There is no provision in Title 51 for service by publication in any action for personal judgment for a tort against any person, resident or nonresident. *Barnes v. Continental Ins. Co.*, 231 Ga. 246, 201 S.E.2d 150 (1973); *Gould v. Latorre*, 227 Ga. App. 32, 488 S.E.2d 116 (1997).

Personal judgment for alimony cannot be rendered against nonresident de-

fendant by substituted service. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Jurisdiction of "in rem" action affecting out-of-state defendants' interest in property may be acquired by service by publication, and personal jurisdiction by submission to jurisdiction of the court is not necessary. *Powell v. Powell*, 244 Ga. 25, 257 S.E.2d 531 (1979).

Service person not liable to in rem proceeding on basis of salary. — Defendant's salary as a member of the United States armed forces would not subject the defendant to in rem proceeding in this state when the defendant was not a resident or domiciled in this state. *Williamson v. Williamson*, 155 Ga. App. 271, 270 S.E.2d 692 (1980), *aff'd*, 247 Ga. 260, 275 S.E.2d 42, cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Requirement of subparagraph (e)(1)(C) that notice of service by publication be published four times at least seven days apart are met when publication is made on the same day of successive weeks. *Mickas v. Mickas*, 229 Ga. 10, 189 S.E.2d 81 (1972).

Compliance with subparagraph (f)(1)(A). — Because the moving party complied with O.C.G.A. § 9-11-4(f)(1)(A) in obtaining the order for service by publication and the opponents failed to object to the movant's affidavit, the trial court did not err in ordering service by publication. *Mateen v. Dicus*, 286 Ga. App. 760, 650 S.E.2d 272 (2007), 129 S. Ct. 89, 172 L.Ed.2d 30 (2008).

Requirements of publication not met. — Trial court erred when the court found that a debtor was served properly because there was no evidence that the requirements of publication under O.C.G.A. § 9-11-4(f)(1) were met, and a bank offered no evidence to show that the notice requirements of O.C.G.A. § 44-14-161(c) were met; the published advertisement for service on the debtor provided no specifics as to the date or time of the confirmation hearing as was required under the confirmation statute, O.C.G.A. § 44-14-161. *Winstar Dev., Inc. v. SunTrust Bank*, 308 Ga. App. 655, 708 S.E.2d 604 (2011).

Service by Publication (Cont'd)

Service by publication was invalid because the clerk of the superior court failed to strictly comply with the requirements for service by publication, set forth in O.C.G.A. § 9-11-4(f)(1)(C), in that the clerk did not mail copies of the order for service by publication, notice of publication, and the complaint to the defendant's known address. *Hutcheson v. Elizabeth Brennan Antiques & Ints., Inc.*, 317 Ga. App. 123, 730 S.E.2d 514 (2012).

Unsuccessful attempt to serve at last known address must be shown. — In order to justify service by publication where the address of the defendant is known, or believed to be known, generally it must be shown that service was attempted unsuccessfully at the defendant's last known address and that personal service was proven impossible. *Girard v. Weiss*, 160 Ga. App. 295, 287 S.E.2d 301 (1981), overruled on other grounds, *Amerireach.com, LLC v. Walker*, 290 Ga. 261, 719 S.E.2d 489 (2011).

Duty of court to determine whether due diligence shown. — It is the duty of the courts to determine whether the movant has exercised due diligence in pursuing every reasonably available channel of information as the decision whether due diligence has been exercised cannot be left to the movant for publication service; and, although it is the trial court which first passes upon the legality of notice, the appellate courts must independently decide whether under the facts of each case the search for the absentee interested party was legally adequate. *Abba Gana v. Abba Gana*, 251 Ga. 340, 304 S.E.2d 909 (1983).

Trial court erred by granting the defendant's motion to dismiss for lack of personal jurisdiction because the court granted the plaintiff's motion for service by publication and since the defendant was so served, the court was required to determine whether service by publication was sufficient to confer personal jurisdiction over the defendant. *Ragan v. Mallow*, 319 Ga. App. 443, 744 S.E.2d 337 (2012).

When it appears that the applicant knew of reasonably available possible channel of information concerning

the opposing party's whereabouts, or that the applicant could have discovered such a channel through the exercise of reasonable diligence, the court should assume, absent a contrary showing by the applicant, that the opposing party's address could have been ascertained by reasonably diligent efforts. *Abba Gana v. Abba Gana*, 251 Ga. 340, 304 S.E.2d 909 (1983).

Service of nonresident defendant in divorce action. — When the nonresident defendant in a divorce action was served by publication pursuant to subsection (e) of O.C.G.A. § 9-11-4 and the clerk sent a copy of the order, notice, and the complaint to the defendant by regular mail at the defendant's last known address, and the defendant stated that the defendant had not resided in Georgia for 14 years and had only visited the defendant's children in Georgia on five occasions in that time, but admitted that the defendant received a copy of the summons and complaint, the defendant was properly served. *Marbury v. Marbury*, 256 Ga. 651, 352 S.E.2d 564 (1987).

Service by publication in deprivation proceeding. — Juvenile court erred in granting service by publication of the paternal grandparents' petition alleging that the mother's children were deprived because the grandparents failed to exercise reasonable diligence to find the mother, the juvenile court concluded that the mother could not be found with due diligence within the State of Georgia without any competent evidence to support that finding, and the juvenile court failed to place any burden on the grandparents to determine what notice they had given to the mother of their deprivation petition and simply relied on evidence about the father's efforts to contact her; the grandparents did not file a written motion for service by publication and supporting affidavit as required by O.C.G.A. § 9-11-4(f)(1)(A), they had some means of communicating with the mother because the father had the mother's telephone number and was able to notify the mother by phone of the 72-hour hearing, the grandparents could have contacted the mother's relatives to ascertain the mother's whereabouts, and they could have attempted to serve the mother personally

or by registered or certified mail at the mother's prior address. *Taylor v. Padgett*, 300 Ga. App. 314, 684 S.E.2d 434 (2009).

Remand required. — In the absence of a showing that the defendant had received or waived receipt of actual notice of the lawsuit, or that reasonable diligence had been exercised in attempting to find the defendant, the judgment was vacated and the case remanded to the trial court for a determination whether service by publication met due process constitutional guarantees. *McDade v. McDade*, 263 Ga. 456, 435 S.E.2d 24 (1993).

Trial court did not err in dismissing the plaintiff's complaint since the first publication was printed only three days before the 60-day period for publication expired and the remaining three publications occurred outside the period. *Fudge v. Balkissoon*, 199 Ga. App. 755, 406 S.E.2d 116 (1991).

Service by Mail

Registered mail. — Forwarding by registered mail of a copy of the petition does not subject the defendant to the jurisdiction of the superior court, especially when it is equally clear that the defendant does not waive the failure of service and moves to dismiss the petition on that ground. *Gormong v. Cleveland Elec. Co.*, 180 Ga. App. 481, 349 S.E.2d 500 (1986), cert. denied, 479 U.S. 1103, 107 S. Ct. 1335, 94 L. Ed. 2d 186 (1987).

Fact that statutorily authorized service of additional pleadings (once service has been obtained) may be by registered mail does not justify original service of pleadings by such mail. *Gormong v. Cleveland Elec. Co.*, 180 Ga. App. 481, 349 S.E.2d 500 (1986), cert. denied, 479 U.S. 1103, 107 S. Ct. 1335, 94 L. Ed. 2d 186 (1987).

Service by certified mail could not have been made pursuant to the local service methods for Georgia courts because Georgia law has no provision for service by mail. *Madden v. Cleland*, 105 F.R.D. 520 (N.D. Ga. 1985).

In a negligence action filed by an injured driver against an insured and an insurer, the trial court did not err in dismissing the injured driver's complaint after the record revealed that: (1) the insured was never served with process

and service upon the insurer via certified mail was inadequate; (2) no privity of contract existed among the parties; (3) no unsatisfied judgment against the insured existed; and (4) no statute or provision in the insurance policy permitted the suit. *Crane v. Lazaro*, 281 Ga. App. 127, 635 S.E.2d 319 (2006), cert. denied, 2006 Ga. LEXIS 907 (Ga. 2006); cert. dismissed, mot. denied, 549 U.S. 1200, 127 S. Ct. 1278, 167 L. Ed. 2d 69 (2007).

U.S. postal employee was not agent of defendant for service of process. — District court did not abuse the court's discretion in dismissing without prejudice plaintiff's claims against the defendant for failure to serve under Fed. R. Civ. P. 4(m) because the record indicated that, after two failed attempts to serve the defendant at a United States Postal Service Post Office Box, the plaintiff instead delivered the complaint and summons to the Attorney General and to an unnamed United States Postal Service employee; even assuming that the defendant had a contract with the United States Postal Service to maintain a Post Office Box, nothing in the record indicated that the defendant authorized any United States Postal Service employee to act as the defendant's agent to receive service of process, and Georgia law did not create such an agency. *Cox v. Mills*, No. 11-12018, 2012 U.S. App. LEXIS 6579 (11th Cir. Apr. 2, 2012) (Unpublished).

Nonresidents; Residents Outside State

Courts of this state have no extra-territorial jurisdiction, and cannot make citizens of foreign states amenable to their process, or conclude them by judgment in personam, without their consent. *Tuten v. Tuten*, 227 Ga. 228, 180 S.E.2d 233 (1971); *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Personal service or waiver required. — In order for the court to bind nonresidents by the court's judgments in personam, there must be personal service or waiver of personal service upon such nonresidents; this requirement has not been changed by the enactment of this section. *Tapley v. Proctor*, 150 Ga. App. 337, 258 S.E.2d 25 (1979).

Nonresidents; Residents Outside State (Cont'd)

Registered mailing insufficient. — In equitable proceeding to modify a divorce decree with respect to custody of children, mere forwarding by registered mail of a copy of the petition, process, and order did not subject the nonresident defendant to the jurisdiction of the court. *Briggs v. Briggs*, 207 Ga. 614, 63 S.E.2d 371 (1951) (decided under former Code 1933, § 81-204).

Personal service required for in personam judgments against nonresidents. — In order for courts to bind nonresidents by their judgments in personam, there must be personal service or waiver of personal service upon such nonresidents. *Pettie v. Roberts*, 214 Ga. 750, 107 S.E.2d 657 (1959) (decided under former Code 1933, § 81-207).

Judgments in personam cannot validly be rendered against nonresident defendants when service is had only by publication. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code 1933, §§ 81-204, 81-205, and Ga. L. 1946, p. 761).

Law of this state does not provide for service by publication or otherwise upon nonresidents in actions in personam. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code 1933, §§ 81-204, 81-205, and Ga. L. 1946, p. 761, § 4).

When paternal grandparents petitioned for visitation rights, the parent of the child was not properly served with process under O.C.G.A. § 9-11-4(e)(7) because the parent had moved to Arizona to attend college, but the sheriff's deputy made service upon the maternal grandparent in Georgia, even though the maternal grandparent told the deputy that the parent had moved to Arizona. The parent should have been served personally, or by leaving copies thereof at the parent's dwelling house or usual place of abode. *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

Who may serve process under long arm statute. — While the method of

service under the long arm statute must conform to the laws of Georgia, the issue of who may serve process is determined by the law of the foreign jurisdiction in which service is made. *Samay v. Som*, 213 Ga. App. 812, 446 S.E.2d 230 (1994).

Service by publication authorized for actions in rem against nonresidents. — State statute authorizing service of process, by publication or otherwise, upon absent and nonresident defendants has no application to suits in personam, but it is sufficient authority for institution of suits in rem when, under recognized principles of law, such suits may be instituted against nonresident defendants. *Irons v. American Nat'l Bank*, 178 Ga. 160, 172 S.E. 629 (1933) (decided under former Civil Code 1910, §§ 5554 and 5556 et seq.).

Petition seeking accounting and settlement of partnership affairs and decree of title to one-half interest in land alleged to be the property of the partnership, legal title to which was in the defendant, was an action in personam, and the defendant, a nonresident, was not served and did not waive service, the superior court was without jurisdiction of such action. *Sternbergh v. McClure*, 217 Ga. 278, 122 S.E.2d 217 (1961) (decided under former Code 1933, §§ 81-204 and 81-205).

Divorce and alimony. — While service of a nonresident by publication would be sufficient to give the court jurisdiction of the defendant so far as to authorize a decree for divorce, it would not give jurisdiction so far as to authorize also a decree for alimony; while such proceeding is in rem insofar as it adjudicates the marital status, when it undertakes as an incident of the divorce proceeding to deal with the defendant's property rights, it becomes in that respect a proceeding in personam. *Axtell v. Axtell*, 181 Ga. 24, 181 S.E. 295 (1935) (decided under former Code 1933, § 81-204).

When the husband is a nonresident served by publication, the court having jurisdiction of the res of the marriage relation may render a valid decree of divorce, as well as a valid judgment or decree in rem with respect to such property when necessary to enforce the wife's claim to permanent alimony. *Grimmett v.*

Barnwell, 184 Ga. 461, 192 S.E. 191 (1937) (decided under former Code 1933, § 81-204).

Personal judgment for alimony cannot be rendered against a nonresident, or resident absent from the state, based upon service by publication, even though the act of the defendant in leaving the state may have been for the purpose of evading the support obligation. *Hicks v. Hicks*, 193 Ga. 446, 18 S.E.2d 754 (1942) (decided under former Code 1933, §§ 81-204 and 81-207).

Extent of available judicial relief in reference to alimony against nonresident defendant who is not personally served in this state, does not acknowledge service, or does not voluntarily submit to the jurisdiction of the court by appearing and pleading, is confined to seizure and utilization of such property as defendant may own, situated within the jurisdiction of the court. *Hicks v. Hicks*, 193 Ga. 446, 18 S.E.2d 754 (1942) (decided under former Code 1933, §§ 81-201 and 81-211).

Although the superior court rendering a divorce decree retains exclusive jurisdiction to enforce provisions therein relating to custody of minor children of the parties by attachment for contempt, even when subsequent to rendition of the order party sought to be adjudged in contempt has removed the party's residence to another jurisdiction, nevertheless in order for the court to bind nonresidents by the court's judgments in personam there must be personal service or waiver of personal service upon such nonresidents. *Tuten v. Tuten*, 227 Ga. 228, 180 S.E.2d 233 (1971).

Service of process on West Virginia tort defendants was insufficient to subject the defendants to the personal jurisdiction of a Georgia court, when process was not made on the defendants personally and, even though the Georgia process server was accompanied by a West Virginia process server, there was no evidence that service was made by the West Virginia process server according to the laws of that state. *Shahan v. Scott*, 189 Ga. App. 514, 376 S.E.2d 221 (1988), writ vacated, 259 Ga. 172, 377 S.E.2d 859 (1989).

Service on Georgia residents outside state. — Positive sworn statement

that the defendant was a resident of a county in this state combined with the fact, shown by the record, that the defendant was actually served at a place indicated in another state, was sufficient, prima facie, to prevent dismissal of the pleadings and return of service alone. *Burnett v. Hope*, 124 Ga. App. 273, 183 S.E.2d 505 (1971).

Personal service on the defendant in another state was valid, since there was evidence that at the time of service of the complaint the defendant was a resident of this state, e.g., that the defendant owned property here, received mail here, filed federal and state tax returns here, titled the defendant's motor vehicles here, and purchased motor vehicle license tags and safety inspection stickers here. *Rice v. Rice*, 240 Ga. 272, 240 S.E.2d 29 (1977).

Service of process outside the state upon parties defendant who are state residents is subject to the service-of-process requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and not the Long Arm Statute, O.C.G.A. § 9-10-91. *Shahan v. Scott*, 259 Ga. 172, 377 S.E.2d 859 (1989).

When plaintiff husband in divorce action alleged in his complaint that the defendant wife was a resident of Georgia but could be served at an address in South Carolina, and service on the wife was made by leaving a copy of the complaint and summons at her home in South Carolina with the wife's employee, who did not live there, the trial court erred in denying the wife's motion to dismiss for improper service since O.C.G.A. § 9-11-4 means exactly what it states, and service under that Code section must be made as provided. *Bible v. Bible*, 259 Ga. 418, 383 S.E.2d 108 (1989).

Substituted service on spouse at defendant's Florida home. — Plaintiff's substituted service on the defendant's spouse at the defendant's home in Florida was sufficient under the long-arm statute. *Jacobson v. Garland*, 227 Ga. App. 81, 487 S.E.2d 640 (1997).

Service at dwelling house or usual place of abode. — Service of process was properly made in California upon security deed holder even though the record showed a copy of the complaint and sum-

Nonresidents; Residents Outside State (Cont'd)

mons was left at the security deed holder's address with a person who was a cotenant and not the security deed holder as the service of process allowed for such service. *Lebbos v. Davis*, 256 Ga. App. 1, 567 S.E.2d 345 (2002).

Amendment of defectively served complaint. — When the plaintiffs' first complaint did not meet the conditions for personal service on a Georgia resident outside the state, a valid action was not initiated, and an amendment of the complaint to show the defendant's status as a Michigan resident, without proper service, did not cure the defective service of the first complaint. *Driver v. Nunnallee*, 226 Ga. App. 563, 487 S.E.2d 122 (1997). But see *Lau v. Klinger*, 46 F. Supp. 2d 1377 (S.D. Ga. 1999).

Because international service of process against an automobile manufacturer was properly effectuated by registered mail under the Hague Convention, the manufacturer's motion to dismiss the action based on improper service of process was properly denied; moreover, as the manufacturer refused to acknowledge service of the renewal third-party complaint, even though it had done so in the initial action, and given that the address used in the initial action was apparently incorrect, that leave of court to use a special process server upon discovering the problem was granted, that service by registered mail using the correct address was effectuated, and that perfected personal service was ultimately obtained, a due diligence finding was proper. *Mitsubishi Motors Corp. v. Colemon*, 290 Ga. App. 86, 658 S.E.2d 843 (2008).

Service of process proper on out of state resident. — Defendant failed to make an affirmative showing that the trial court lacked personal jurisdiction on the ground that service of process upon the defendant was insufficient because although the defendant contended that the service made upon the defendant failed to comply with the provisions of O.C.G.A. § 9-11-4(f)(2) of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, service of process outside the state upon state resi-

dents was subject to the service-of-process requirements of the Act, and the record supported the trial court's conclusion that the defendant was a nonresident of Georgia; the record did not suggest, and the defendant did not argue, that the defendant was a resident of the state, and the service complied with the provisions of the Long Arm Statute, O.C.G.A. § 9-10-91 et seq. *Haamid v. First Franklin Fin. Corp.*, 299 Ga. App. 828, 683 S.E.2d 891 (2009).

Given service on an Alabama resident by a private process server who verified the resident's identity through a closed door at the resident's residence before leaving the papers at the door as instructed, a trial court did not err in finding that service was proper under O.C.G.A. § 9-10-94 and striking the resident's untimely answer. The timing of the filing of the return of service was not relevant under O.C.G.A. § 9-11-4(h). *Newsome v. Johnson*, 305 Ga. App. 579, 699 S.E.2d 874 (2010).

Trial court erred by denying the husband's motion for a new trial in a divorce and child support action because the husband was not properly served with the summons and complaint as there was an absence of any evidence that service was made upon a resident of the husband's dwelling or usual place of abode in California; therefore, the court had to conclude that service was improper. *Guerrero v. Guerrero*, 296 Ga. 432, 768 S.E.2d 451 (2015).

Proof of Service

Presumption that officer performed duty. — While deputy sheriff is not authorized to leave copy of service and summons on one who is not of suitable age or discretion or who does not reside with the defendant, presumption is that public officer faithfully and lawfully performs duties devolving upon the officer by law. *Woods v. Congress Fin. Corp.*, 149 Ga. App. 156, 253 S.E.2d 834 (1979).

Although deputy sheriff is not authorized to leave copy of service and summons on one who is not of suitable age and discretion, one is presumed to have performed one's duties faithfully and lawfully so as to allow the court to accept a certificate of service signed by a deputy sheriff

as proof of personal service upon the defendant. *Trammel v. National Bank*, 159 Ga. App. 850, 285 S.E.2d 590 (1981).

Entry prima facie conclusive. — Entry made by sheriff or any officer of court having jurisdiction of the defendant and of subject matter of the suit is prima facie conclusive as to all facts properly recited therein. *Baxter v. Crandall*, 45 Ga. App. 125, 163 S.E. 526 (1932) (decided under former Civil Code 1910, § 5566).

Entry of record made by proper officer, reciting that defendants were personally served with copy of process, is conclusive evidence of service until set aside. *Deich v. American Disct. Co.*, 218 Ga. 726, 130 S.E.2d 595 (1963) (decided under former Code 1933, § 81-214).

Entry of service of the sheriff or the sheriff's deputy imports verity. *Wolfe v. Rhodes*, 166 Ga. App. 845, 305 S.E.2d 606 (1983).

Fact of service determinative. — Return of the officer is but evidence of service; it is fact of service that gives the court jurisdiction of the defendant, and not the entry of the officer, and although it is necessary, before the court can proceed, to have before it evidence of service, return of service itself is not jurisdictional. *Busey v. Milam*, 95 Ga. App. 198, 97 S.E.2d 533 (1957) (decided under former Code 1933, § 81-202).

It is the fact of service, rather than proof thereof by the return, which is of vital importance. *Busey v. Milam*, 95 Ga. App. 198, 97 S.E.2d 533 (1957) (decided under former Code 1933, § 81-202).

Critical question is fact of service and not nature of return. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980); *Attwell v. Heritage Bank Mt. Pleasant*, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

Burden on plaintiff to show diligence. — Burden is on the plaintiff, not the sheriff, to show diligence in attempting to ensure that proper service has been made as quickly as possible. *Jarmon v. Murphy*, 164 Ga. App. 763, 298 S.E.2d 510 (1982).

In a personal injury lawsuit, because, as a matter of law, an injured individual failed to carry the burden of showing that reasonable diligence was used in attempt-

ing to serve the complaint, the trial court abused the court's discretion in denying a motion to dismiss the complaint; moreover, despite the individual's attempt to argue to the contrary, the applicable test was whether the plaintiff exercised due diligence, not whether the defendant had suffered harm from the delay in service of process. *Duffy v. Lyles*, 281 Ga. App. 377, 636 S.E.2d 91 (2006).

Diligence in serving opposing party not shown. — Trial court did not err in holding that the appellant failed to act diligently in serving appellee 21 days after filing a renewal action as the appellant provided no evidence to show that the appellant exercised diligence since the appellant did not ensure that the renewal action was served. *Zeigler v. Hambrick*, 257 Ga. App. 356, 571 S.E.2d 418 (2002).

There was no abuse of discretion by a trial court's dismissal of a personal injury action by a plaintiff against a defendant due to lack of service and expiration of the limitations period as the plaintiff did not exercise reasonable diligence in attempting to serve the defendant because, although it appeared that the defendant was evading service, the plaintiff did not seek an order to serve by publication under O.C.G.A. § 9-11-4(f)(1)(A); further, there was no indication that the greatest possible diligence was exhibited upon the defendant's filing of a motion to dismiss the complaint due to lack of service. *Atcheson v. Cochran*, 297 Ga. App. 568, 677 S.E.2d 749 (2009).

Burden to show error in matter reflected in a return of service is on the defendant. *Wolfe v. Rhodes*, 166 Ga. App. 845, 305 S.E.2d 606 (1983).

Defendant's affidavits shifting burden of proof to plaintiff. — Defendant's motion to dismiss for insufficiency of personal service should have been granted when the affidavits submitted by the defendant were based on the direct personal knowledge of the affiants and were sufficient to carry the defendant's burden to overcome the prima facie presumption that service was properly made, and when the plaintiff did not provide additional evidence in support of proper service. *Yelle v. United States Suburban Press, Inc.*, 216 Ga. App. 46, 453 S.E.2d 108 (1995).

Proof of Service (Cont'd)

While a sheriff's return of service is prima facie evidence of service, it was successfully rebutted by the defendant who submitted an affidavit demonstrating that the defendants had no agents authorized to accept service. *Ritts v. Dealers Alliance Credit Corp.*, 989 F. Supp. 1475 (N.D. Ga. 1997).

Certificate as proof of personal service. — In absence of contradictory evidence, the trial court is warranted in accepting a certificate of service as proof of personal service because the presumption is that a public officer faithfully and lawfully performed the duties devolving the officer by law. *Lester v. Crooms, Inc.*, 157 Ga. App. 377, 277 S.E.2d 751 (1981).

Validity of service not affected by failure to make proof. — Both Ga. L. 1967, p. 226, § 4 and Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. §§ 9-11-4 and 9-11-5) provide that failure of proof of service, by return made thereof on face of the record, does not affect the validity of the service, and the purpose of this provision is to prevent the defendant who has been served from attacking the validity of service upon the defendant on the technical ground that the person making service failed to make proper proof thereof. *Daniel & Daniel, Inc. v. Stewart Bros.*, 139 Ga. App. 372, 228 S.E.2d 586 (1976).

Under subsection (g) of Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. § 9-11-4) and subsection (b) of Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5), failure to make proof of service shall not affect the validity of service. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

"Void" return not fatal when proper service was had. — Under this section what has formerly been characterized as a "void" return of service is not fatal to the validity of the judgment rendered under proper service, even if such judgment arises by default. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

Return of service is mere evidence of service. *Daniel & Daniel, Inc. v. Stewart Bros.*, 139 Ga. App. 372, 228 S.E.2d 586 (1976).

Return of service constitutes prima facie showing that personal service was accomplished on third-party defendant. *Harvey v. Harvey*, 147 Ga. App. 154, 248 S.E.2d 214 (1978).

Return only set aside by clear and convincing evidence. — While return of service may be traversed and impeached, it is of itself evidence of a high order, and can only be set aside upon evidence which is not only clear and convincing, but strongest of which nature of the case will admit. *Williams v. Mells*, 138 Ga. App. 60, 225 S.E.2d 501 (1976); *Woods v. Congress Fin. Corp.*, 149 Ga. App. 156, 253 S.E.2d 834 (1979); *Lester v. Crooms, Inc.*, 157 Ga. App. 377, 277 S.E.2d 751 (1981); *Wolfe v. Rhodes*, 166 Ga. App. 845, 305 S.E.2d 606 (1983).

While the return of service imports verity and is itself evidence of a high order, it is not conclusive as to the facts stated therein but may be set aside upon evidence which is not only clear and convincing, but the strongest of which the nature of the case will admit. *Daniel v. Leibolt*, 178 Ga. App. 186, 342 S.E.2d 334 (1986).

Proof in complaint. — Return of service entered upon a declaration is not conclusive as to the facts therein recited. *Attwell v. Heritage Bank Mt. Pleasant*, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

Return of service on corporation. — Return of service of process on corporate party defendant was not proof of proper service of process on an individual defendant for whom there was no return of service. *Greene v. First Lease, Inc.*, 152 Ga. App. 605, 263 S.E.2d 483 (1979).

Late filing of return of service, at least when it is not shown that any party was deceived thereby, does not void service, because while process and service are essential, return of service is only evidence of what the officer has done and is not itself jurisdictional. *Olvey v. Citizens & S. Bank*, 146 Ga. App. 484, 246 S.E.2d 485 (1978).

Amendment or proof of return after judgment. — Although the trial court should not proceed to judgment without an affirmative showing of service in the record, if the court does so proceed and upon a subsequent challenge to the judgment it appears to the satisfaction of the

court that proper service was in fact made, the original return may be amended or, if no return exists, it may be supplied so as to save that which has been done under service valid in fact. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

Voluntary dismissal after announcement of verdict not timely. — Voluntary dismissal which was presented to the trial court for filing after the plaintiff's counsel received notice that the jury was prepared to announce its verdict, which the court initially declined to accept, but which, following the entry of the verdict for the defendants, the court did accept, backdating the court's decision to reflect an earlier filing, was not timely filed, and the judgment of the trial court was reversed, with direction that the judgment be entered on the verdict. *Vanderbreggen v. Hodge*, 171 Ga. App. 868, 321 S.E.2d 218 (1984).

When deputy marshal declared on return that the marshal personally served the defendant, and there was no evidence to the contrary other than the marshal's written comments that the defendant refused to open the door, there was proper service. *Hickey v. Merritt*, 128 Ga. App. 764, 197 S.E.2d 833 (1973).

Service on clerk of chief operating officer. — Administratrix's acts of serving ante litem notice of the claims in a wrongful death action upon the clerk of a service provider's chief executive officer at the office address of the officer was sufficient under both O.C.G.A. §§ 9-11-4 and 50-21-35 to avoid summary judgment on this issue; moreover, the provider waived any service of process defense through its: (1) actual knowledge of the instant suit; (2) active participation in discovery; and (3) failure to show prejudice by any alleged defect in the service of process. *Summerlin v. Ga. Pines Cmty. Serv. Bd.*, 278 Ga. App. 831, 630 S.E.2d 115 (2006), *aff'd*, 282 Ga. 339, 647 S.E.2d 566 (2007).

Amendments

Service of amended summons. — Amendment to a summons in a dispossessory action which changed the time for the defendant's answer was required to be served with the same formal-

ities required for the original summons. *Tampa Pipeline Corp. v. City Mills Co.*, 216 Ga. App. 783, 456 S.E.2d 270 (1995).

Defective return may be amended. — Process which is merely defective and not void is amendable and is cured by the verdict. *W.T. Rawleigh Co. v. Watts*, 68 Ga. App. 786, 24 S.E.2d 213 (1943) (decided under former Code 1933, § 81-1313).

If there has been good service, but an irregular or incomplete return, defect may be cured by entry making the return conform to the facts, and thus save what is in reality a judgment based on valid service; such amendment may be made by the officer voluntarily while the officer remains in commission, or *nunc pro tunc* by order of court. *Busey v. Milam*, 95 Ga. App. 198, 97 S.E.2d 533 (1957) (decided under former Code 1933, § 81-202).

Defective return of valid service of process may be amended to speak the truth. *Smith v. Hartrampf*, 106 Ga. App. 603, 127 S.E.2d 814 (1962) (decided under former Code 1933, § 81-1313).

Irregularity in direction of process is amendable. *Everett v. McCary*, 93 Ga. App. 474, 92 S.E.2d 112 (1956) (decided under former Code 1933, § 81-1313).

When process contains command to the defendant to appear in court at a certain time for a specified purpose, and this process is actually executed by the proper officer, the mere fact that formal direction to the officer to execute process is omitted therefrom would be at most a mere clerical omission or irregularity, which could be cured by amendment. *Gay v. Sylvania Cent. Ry.*, 79 Ga. App. 362, 53 S.E.2d 713 (1949) (decided under former Code 1933, §§ 81-201, 81-220, 81-1201, and 81-1205).

Relation back. — Amendment of the return, which makes the return speak the truth, can be made, and when so amended, the amendment relates back to the date of service and is to be considered the initial return. *Busey v. Milam*, 95 Ga. App. 198, 97 S.E.2d 533 (1957) (decided under former Code 1933, § 81-202).

Facility of amendment as to a misnomer under subsection (h) of Ga. L. 1968, p. 1104, §§ 1 and 2 (see now O.C.G.A. § 9-11-4) was no less than under former Code 1933, § 81-1206 (see now O.C.G.A. § 9-10-132). *Robinson v. Reward*

Amendments (Cont'd)

Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724 (1969).

Misdescription of corporation in complaint. — Description of defendant corporation in the complaint as “U.S. Shelter Corporation of Delaware” instead of “U.S. Shelter Corporation” was a mere misnomer and not a nonamendable defect which would warrant setting aside a default judgment against the corporation. *Miller v. United States Shelter Corp.*, 179 Ga. App. 469, 347 S.E.2d 251 (1986).

Divorce action, as amendment to maintenance action, unauthorized. — When a husband had filed an action for separate maintenance, he could not institute a new cause of action for divorce through an amendment to the original action and the service provisions of O.C.G.A. § 9-11-5; he was required to serve his wife with process under O.C.G.A. § 9-11-4 so as to afford her notice of the divorce action and to afford the trial court personal jurisdiction over her with regard to the new action. *Southworth v. Southworth*, 265 Ga. 671, 461 S.E.2d 215 (1995).

Alternative Service

Dispossession proceedings. — Since former Code 1933, § 61-302 (see now O.C.G.A. § 44-7-51), relating to dispossession proceedings, did not expressly prescribe that the cumulative service provisions of subsection (i) of Ga. L. 1968, p. 1104, §§ 1 and 2 (see now O.C.G.A. § 9-11-4) were unavailable, Ga. L. 1968, p. 1104, § 2 (see now O.C.G.A. § 9-11-81), providing for exceptions to the applicability of the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9), was inoperable. *Navaho Corp. v. Stuckey*, 141 Ga. App. 271, 233 S.E.2d 217 (1977).

Garnishment proceedings. — Alternative methods of service may be used in a garnishment proceeding. *Cartwright v. Alpha Transp. Serv., Inc.*, 161 Ga. App. 274, 289 S.E.2d 827 (1982).

Application for contempt is a special proceeding within the meaning of subsection (j). *Austin v. Austin*, 245 Ga. 487, 265 S.E.2d 788 (1980).

Motion to dismiss for improper service

under Fed. R. Civ. P. 4(h) was denied because a consumer attempted service on a business's registered agent on three occasions, and when those attempts failed the consumer had reason to believe the business was evading service, the business had done on prior occasions, and the consumer proceeded with substitute service pursuant to O.C.G.A. § 9-11-4(e)(1). *Davis v. Frederick J. Hanna & Assocs., P.C.*, 506 F. Supp. 2d 1322 (N.D. Ga. 2007).

Prescription of alternate service by court unavailable when another method specified. — Although alternate service for special situations may be prescribed by court when requirements for service are not prescribed by law or are not clear or certain, such alternate service is not available when another method is prescribed by statute. *American Photocopy Equip. Co. v. Lew Deadmore & Assocs.*, 127 Ga. App. 207, 193 S.E.2d 275 (1972).

Special Statutory Proceedings

Action involving minors. — When the plaintiff filed an original action when the defendant was a minor, but did not serve the defendant's parents as required by O.C.G.A. § 9-11-4, the plaintiff's first suit was void and no valid action existed which was renewable under O.C.G.A. § 9-9-61. *Brooks v. Young*, 220 Ga. App. 47, 467 S.E.2d 230 (1996), overruled on other grounds, *Allen v. Kahn*, 231 Ga. App. 438, 499 S.E.2d 164 (1998).

Validity of service of original action outside statute of limitation. — When an original action was filed prior to the running of the statute of limitation and proper service was not perfected on the defendants until after the expiration thereof, the renewal statute, O.C.G.A. § 9-2-61, remained available to the plaintiff because the plaintiff voluntarily dismissed the original action before the trial court ruled on the reasonableness of the service therein. This decision overrules *Brooks v. Young*, 220 Ga. App. 47, 467 S.E.2d 230 (1996), to the extent it holds that there can be no valid service of an original action outside the statute of limitations. *Allen v. Kahn*, 231 Ga. App. 438, 499 S.E.2d 164 (1998).

Proper dismissal of second complaint. — When the trial court's dismissal in the original action was based upon the court's finding that the plaintiff had not acted diligently in perfecting service on the defendant, that the determination rendered the original action void; accordingly, the renewal statute did not apply and the trial court properly dismissed the plaintiff's second complaint. *King v. Wal-Mart Stores, Inc.*, 250 Ga. App. 103, 550 S.E.2d 673 (2001).

Service in renewal action. — Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation based on a second driver's lack of diligence in serving the second driver's complaint in the driver's voluntarily dismissed original action because the supreme court previously held that inasmuch as diligence in perfecting service of process in an action properly refiled under O.C.G.A. § 9-2-61(a) had to be measured from the time of filing the renewed suit, any delay in service in a valid first action was not available as an affirmative defense in the renewal action; the first driver and corporation essentially sought the rewriting of an unambiguous statute, but their arguments were properly directed to the General Assembly because when the General Assembly wished to put a firm deadline on filing lawsuits, the legislature knew how to enact a statute of repose instead of a statute of limitation. *Robinson v. Boyd*, 288 Ga. 53, 701 S.E.2d 165 (2010).

Lack of diligence not shown. — Trial court erred in dismissing the plaintiff's action based on the fact that the defendant had been served after the limitation period expired and that the plaintiff failed to act diligently to ensure service in a timely fashion as the undisputed factual record showed that the plaintiff did in fact pay the filing fees and service fee; and apart from the unsupported finding that the plaintiff failed to pay the filing fees, the trial court provided no further justification for the court's conclusion that the plaintiff lacked due diligence in serving

the defendant, nor did the record show any. *Callaway v. Goodwin*, 327 Ga. App. 875, 761 S.E.2d 407 (2014).

Application for dismissal of guardian. — Because the application for dismissal of a guardian was published as required by O.C.G.A. § 29-2-84(a), the probate court did not lack personal jurisdiction even though the ward was never served with notice of the dismissal under O.C.G.A. § 9-11-4 or O.C.G.A. § 29-2-77. *Utica Mut. Ins. Co. v. Mitchell*, 227 Ga. App. 830, 490 S.E.2d 489 (1997).

Personal service on garnishee. — O.C.G.A. § 18-4-62, relating to the method for service of process on a garnishee, does not expressly state that the personal service provisions of subsection (d) of O.C.G.A. § 9-11-4 are unavailable, and further, subsection (j) of that section provides that "service shall be sufficient when made in accordance with the statutes relating particularly to the proceeding or in accordance with this section." *Alpha Transp. Serv., Inc. v. Cartwright*, 248 Ga. 701, 285 S.E.2d 713 (1982).

In rem forfeiture actions. — Property owner's motion to dismiss was properly denied in city's in rem forfeiture action because the service requirements of the Civil Procedure Act, O.C.G.A. § 9-11-4(a), did not apply and the property owner was informed of the owner's appellate rights as required by O.C.G.A. § 32-3-1 et seq. *Whigham v. City of Atlanta*, 262 Ga. App. 742, 586 S.E.2d 412 (2003).

Construction with other law. — O.C.G.A. § 9-6-27(a) complemented, rather than conflicted with O.C.G.A. § 9-11-4(k), which expressly established that the methods of service could have been used as alternative methods of service in special statutory proceedings; a taxpayer's failure to comply with O.C.G.A. § 9-6-27(a) in a case seeking mandamus and injunctive relief against a county was immaterial because the taxpayer served the county in the ordinary manner. *Haugen v. Henry County*, 277 Ga. 743, 594 S.E.2d 324, cert. denied, 543 U.S. 816, 125 S. Ct. 63, 160 L. Ed. 2d 22 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions decided under former Code 1933, § 81-204 and Ga. L. 1975, pp. 1291 and 1292 are included in the annotations for this Code section.

Service by private citizen. — Private citizen may serve process only if the citizen is specially appointed in a particular case. 1988 Op. Att'y Gen. No. U88-27.

Garnishment is a quasi-in-rem action, and consequently, when the defendant is out of state or cannot be found or

served, service can be effected by publication. 1975 Op. Att'y Gen. No. U75-72 (opinion based on former Ga. L. 1975, pp. 1291, 1293).

Personal service ordinarily required. — Unless some other mode is especially provided for by statute, service of process or legal notice must ordinarily be made personally on the party or individual in question. 1965-66 Op. Att'y Gen. No. 66-94 (opinion rendered under former Code 1933, § 81-204).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Associations and Clubs, §§ 52, 53. 23 Am. Jur. 2d, Depositions and Discovery, § 89. 42 Am. Jur. 2d, Infants, § 191 et seq. 62B Am. Jur. 2d, Process, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Process, §§ 1, 8, 18, 37, 50, 68, 92, 123.

C.J.S. — 7 C.J.S., Associations, §§ 80, 81. 19 C.J.S., Corporations, §§ 804 et seq., 1030 et seq. 35A C.J.S., Federal Civil Procedure, § 217 et seq. 68 C.J.S., Partnership, §§ 14, 276. 72 C.J.S., Process, § 1 et seq.

ALR. — Mandamus to compel a court to take jurisdiction of a cause that it has erroneously dismissed for supposed insufficiency or lack of service, 4 ALR 610.

Effect of defects or informalities as to appearance or return day in summons or notice of commencement of action, 6 ALR 841; 97 ALR 746.

Submission on agreed statement of facts or agreed case as waiver of defect in pleading, 8 ALR 1172.

Immunity of nonresident suitor or witness from service of process as affected by the nature or subject matter of the action or proceeding in which the process issues, 19 ALR 828.

Service of process upon agent of party by estoppel or implication of law, 30 ALR 176.

Service of process upon actual agent of foreign corporation in action based on transactions outside of state, 30 ALR 255; 96 ALR 366.

Jurisdiction of suit to remove cloud or quiet title upon constructive service of process against nonresident, 51 ALR 754.

Immunity from service of civil process of nonresident requested or required to remain in state pending investigation of accident, 59 ALR 51.

Conclusiveness of recital in judgment as to appearance or service of process, 68 ALR 385.

Waiver of immunity from service of summons by failure to attack service, or to follow up an attack, before judgment entered thereon, 68 ALR 1469.

May suit for injunction against a nonresident rest upon constructive service or service out of state, 69 ALR 1038.

Is service of notice or process in proceeding to vacate or modify judgment to be made upon owner of judgment or upon the attorney, 78 ALR 370.

Constitutionality, construction, and applicability of statutes relating to service of process on unincorporated association, 79 ALR 305.

Appearance to make application for extension of time or continuance, or order in that regard, as waiver of objection to jurisdiction for lack of personal service, 81 ALR 166.

Appearance for purpose of making application for removal of cause to federal court as a general appearance, 81 ALR 1219.

Exemption from service of civil process on ground of public policy independently of statute, 85 ALR 1340; 94 ALR 1475.

Necessity that newspaper be published in English language to satisfy requirements regarding publication of legal or official notice, 90 ALR 500.

Constructive service of process against nonresident in suit for specific performance of contract relating to real property within state, 93 ALR 621; 173 ALR 985.

Immunity of nonresident from service of process while in state for purpose of settling or compromising controversy, 93 ALR 872.

Immunity of legislators from service of civil process, 94 ALR 1470.

Relief as to costs or disbursements as changing special appearance to general appearance, 102 ALR 224.

Return of service of process in action in personam showing personal or constructive service in state as subject to attack by showing that defendant was a nonresident and was not served in state, 107 ALR 1342.

Judgment of court of a state in which the defendant was personally served as subject to attack in another state upon the ground that he was not properly subject to service or that the service or his appearance was the result of fraud or mistake, 115 ALR 464.

Necessity for and degree of relationship to infant as affecting representation as next friend or guardian ad litem, 118 ALR 401.

Power of infant to acknowledge service of process or to bind himself by waiver or estoppel in that regard, 121 ALR 957.

Amendment of process or pleading by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa, 121 ALR 1325.

Actual knowledge of pendency of action, or evasion of personal service, as affecting right to relief from judgment by default on constructive or substituted service of process, 122 ALR 624.

Amendment of process or pleading by changing or correcting mistake in name of party, 124 ALR 86.

Substituted service, service by publication, or service out of the state, in action in personam against resident or domestic corporation, as contrary to due process of law, 126 ALR 1474; 132 ALR 1361.

Who is member of family within statute relating to service of process by leaving copy with member of family, 136 ALR 1505.

Exemption of member of armed forces from service of civil process, 143 ALR 1518; 149 ALR 1455; 150 ALR 1419; 151 ALR 1454; 153 ALR 1419; 156 ALR 1449; 158 ALR 1450.

Revival of judgment by constructive service of process upon nonresident, as affected by due process and full faith and credit clauses, 144 ALR 403.

Statute providing for service by publication on "unknown persons" in action relating to real property as permitting such service on persons in possession or occupation of the land, 146 ALR 713.

Requisites of service upon, or delivery to, designated public official, as a condition of substituted service of process on him, 148 ALR 975.

Summons as amendable to cure error or omission in naming or describing court or judge, or place of court's convening, 154 ALR 1019.

Suits and remedies against alien enemies, 155 ALR 1451; 156 ALR 1448; 157 ALR 1449.

Effect of time of execution of written appearance or waiver of service, 159 ALR 111.

Duty to recognize and give effect to decrees of divorce rendered in other states, or in a foreign country, as affected by constructive service of process or lack of domicile at divorce forum, 163 ALR 368.

Constructive service of process in action against nonresident to set aside judgment, 163 ALR 504.

Appearance by guardian ad litem without service of summons, 164 ALR 529.

Leaving process or notice at residence as compliance with requirement that party be served "personally" or "in person," "personally served," etc., 172 ALR 521.

Validity and effect of constructive service upon nonresident in action, otherwise in personam, seeking lien or title in respect to property in state described in pleadings, but not attached, 174 ALR 417.

May proceedings to have a person declared insane and to appoint a conservator or committee of his person or estate rest

upon substituted or constructive service of process, 175 ALR 1324.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicile, since Williams decision, 1 ALR2d 1385; 28 ALR2d 1303.

Necessity, in service by leaving process at place of abode, etc., of leaving a copy of summons for each party sought to be served, 8 ALR2d 343.

Foreign corporation's purchase within state of goods to be shipped into other state or country as doing business within state for purposes of jurisdiction or service of process, 12 ALR2d 1439.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 ALR2d 1179.

Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication, 21 ALR2d 929.

Power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state, 25 ALR2d 1202.

Who is an "agent authorized by appointment" to receive service of process within purview of Federal Rules of Civil Procedure and similar state rules and statutes, 26 ALR2d 1086.

Valid foreign divorce granted upon constructive service as precluding action by spouse for alimony, support, or maintenance, 28 ALR2d 1378.

Allowance of fees for guardian ad litem appointed for infant defendant, as costs, 30 ALR2d 1148.

Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 ALR2d 928.

Power to grant annulment of marriage against nonresident on constructive service, 43 ALR2d 1086.

Application of doctrine of *idem sonans* or the like to substituted or constructive service of process, 45 ALR2d 1090.

Immunity from service of process of public officer while attending court in official capacity, 45 ALR2d 1100.

Service of process on person in military service by serving person at civilian abode or residence, or leaving copy there, 46 ALR2d 1239.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 ALR2d 1364.

Sufficiency of affidavit made by attorney or other person on behalf of plaintiff for purpose of service by publication, 47 ALR2d 423.

Necessity of personal service within state upon nonresident spouse as prerequisite of court's power to modify its decree as to alimony or child support in matrimonial action, 62 ALR2d 544.

Who is "managing agent" of domestic corporation within statute providing for service of summons or process thereon, 71 ALR2d 178.

Rule 4(d)(5), Federal Rules of Civil Procedure, relating to service upon an officer or agency of the United States, 73 ALR2d 1008.

Service of process upon dissolved domestic corporation in absence of express statutory direction, 75 ALR2d 1399.

Failure to make return as affecting validity of service or court's jurisdiction, 82 ALR2d 668.

Propriety of service of process in an in personam action on resident minor defendant whose only guardian is a nonresident and cannot be served validly either within or without state, 86 ALR2d 1183.

Place or manner of delivering or depositing papers, under statutes permitting service of process by leaving copy at usual place of abode or residence, 87 ALR2d 1163.

What is "public place" within requirements as to posting of notices, 90 ALR2d 1210.

Construction and effect of provision for service of process against minor on a parent, guardian, or other designated person, 92 ALR2d 1336.

Sufficiency of designation of court or place of appearance in original civil process, 93 ALR2d 376.

Attack on personal service as having been obtained by fraud or trickery, 98 ALR2d 551.

Validity of service of process on nonresident owner of watercraft, under state "long-arm" statutes, 99 ALR2d 287.

Mistake or error in middle initial or middle name of party as vitiating or inval-

identating civil process, summons, or the like, 6 ALR3d 1179.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 ALR3d 738.

Jurisdiction on constructive or substituted service, in divorce or alimony action, to reach property within state, 10 ALR3d 212.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time and place of appearance, trial, or filing of necessary papers, 21 ALR3d 1255.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicile, as used in

statutes relating to service of process, 32 ALR3d 112.

Validity of service of summons or complaint on Sunday or holiday, 63 ALR3d 423.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service: state cases, 77 ALR3d 841.

Who is "person of suitable age and discretion" under statutes or rules relating to substituted service of process, 91 ALR3d 827.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 ALR4th 1115.

9-11-4.1. Certified process servers.

(a) **Certified process servers.** A person at least 18 years of age who files with a sheriff of any county of this state an application stating that the movant complies with this Code section and any procedures and requirements set forth in any rules or regulations promulgated by the Judicial Council of Georgia regarding this Code section shall, absent good cause shown, be certified as a process server. Such certification shall be effective for a period of three years or until such approval is withdrawn by a superior court judge upon good cause shown, whichever shall first occur. Such certified process server shall be entitled to serve in such capacity for any court of the state, anywhere within the state, provided that the sheriff of the county for which process is to be served allows such servers to serve process in such county.

(b) **Certification procedures.**

(1) Any person seeking certification under this Code section shall upon applying for certification present evidence that he or she:

(A) Has undergone a criminal record check based on fingerprints and has never been convicted of a felony or of impersonating a peace officer or other public officer or employee under Code Section 16-10-23;

(B) Completed a 12 hour course of instruction relating to service of process which course has been approved by the Administrative Office of the Courts in consultation with the Georgia Sheriffs' Association;

(C) Passed a test approved by the Administrative Office of the Courts which will measure the applicant's knowledge of state law

regarding serving of process and other papers on various entities and persons;

(D) Obtained a commercial surety bond or policy of commercial insurance conditioned to protect members of the public and persons employing the certified process server against any damage arising from any actionable misconduct, error, or omission on the part of the applicant while serving as a certified process server; and

(E) Is a citizen of the United States.

(2) A sheriff of any county of this state shall review the application, test score, criminal record check, and such other information or documentation as required by that sheriff and determine whether the applicant shall be approved for certification and authorized to act as a process server in this state.

(3) Upon approval the applicant shall complete a written oath as follows: "I do solemnly swear (or affirm) that I will conduct myself as a process server truly and honestly, justly and uprightly, and according to law; and that I will support the Constitution of the State of Georgia and the Constitution of the United States. I further swear (or affirm) that I will not serve any papers or process in any action where I have a financial or personal interest in the outcome of the matter or where any person to whom I am related by blood or marriage has such an interest."

(c) **Renewal and revocation of certification.** A certified process server shall be required to renew his or her certification every three years. Any certified process server failing to renew his or her certification shall no longer be approved to serve as a certified process server. At the time of renewal, the certified process server shall provide evidence that he or she has completed three annual five-hour courses of continuing education which courses have been approved by the Administrative Office of the Courts and has undergone an updated criminal record check. The certification of a process server may be revoked or suspended by a superior court judge for cause at any time. If a complaint has been filed by a sheriff alleging serious misconduct by the process server, such judge may suspend the certification for up to five business days while the matter is considered by the judge.

(d) **Fees.** The sheriff shall collect a fee of \$80.00 for processing the application required by this Code section.

(e) **Registry.** The sheriff shall forward \$30.00 of each fee received to the Georgia Sheriffs' Association. The Georgia Sheriffs' Association shall maintain a registry of certified process servers.

(f) **Service by off-duty deputy sheriff.** An off-duty deputy sheriff may serve process with the approval of the sheriff by whom he or she is

employed and shall be exempt from certification under this Code section.

(g) **Impersonation of public officer or employee.** It shall be unlawful for a certified process server to falsely hold himself or herself out as a peace officer or public officer or employee and any violation shall be punished as provided in Code Section 16-10-23.

(h) **Notice to sheriff.** (1) Prior to the first time that a certified process server serves process in any county he or she shall file with the sheriff of the county a written notice, in such form as shall be prescribed by the Georgia Sheriffs' Association, of his or her intent to serve process in that county. Such notice shall only be accepted by a sheriff who allows certified process servers to serve process in his or her county. Such notice shall be effective for a period of one year; and a new notice shall be filed before the certified process server again serves process in that county after expiration of the one-year period.

(2) The provisions of this subsection shall not apply to a certified process server who was appointed by the court to serve process or who was appointed as a permanent process server by a court.

(i) **Credentials.** A sheriff of any county of this state shall at the time of certification provide credentials in the form of an identification card to each certified process server. The identification card shall be designed to clearly distinguish it from any form of credentials issued to certified peace officers and will not be in the shape or form of a law enforcement badge. A certified process server shall display his or her credentials at all times while engaged in the service of process.

(j) **False representation.** It shall be unlawful for any person who is not a certified process server to hold himself or herself out as being a certified process server. Any person who violates this subsection shall upon conviction be guilty of a misdemeanor. (Code 1981, § 9-11-4.1, enacted by Ga. L. 2010, p. 822, § 5/SB 491; Ga. L. 2015, p. 1065, § 1-1/SB 135.)

The 2015 amendment, effective May 6, 2015, deleted former subsection (k), which read: "**Sunset and legislative review.** This Code section shall be repealed effective July 1, 2015, unless continued in effect by the General Assembly prior to that date. At its 2013 regular session the General Assembly shall review this Code

section to determine whether it should be continued in effect."

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012).

9-11-5. Service and filing of pleadings subsequent to the original complaint and other papers.

(a) **Service — When required.** Except as otherwise provided in this chapter, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. However, the failure of a party to file pleadings in an action shall be deemed to be a waiver by him or her of all notices, including notices of time and place of trial and entry of judgment, and all service in the action, except service of pleadings asserting new or additional claims for relief, which shall be served as provided by subsection (b) of this Code section.

(b) **Same — How made.** Whenever under this chapter service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the person to be served or by mailing it to the person to be served at the person's last known address or, if no address is known, by leaving it with the clerk of the court. As used in this Code section, the term "delivery of a copy" means handing it to the person to be served or leaving it at the person to be served's office with a person in charge thereof or, if such office is closed or the person to be served has no office, leaving it at the person to be served's dwelling house or usual place of abode with some person of suitable age and discretion residing therein. "Delivery of a copy" also means transmitting a copy via e-mail in portable document format (PDF) to the person to be served using all e-mail addresses provided pursuant to subsection (f) of this Code section and showing in the subject line of the e-mail message the words "STATUTORY ELECTRONIC SERVICE" in capital letters. Service by mail is complete upon mailing. Proof of service may be made by certificate of an attorney or of his or her employee, by written admission, by affidavit, or by other proof satisfactory to the court. Failure to make proof of service shall not affect the validity of service.

(c) **Same — Numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties, and that the filing of any such pleading and service thereof upon the plaintiff constitutes

due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court within the time allowed for service.

(e) **“Filing with the court” defined.** The filing of pleadings and other papers with the court as required by this chapter shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(f) **Electronic service of pleadings.**

(1) A person to be served may consent to being served with pleadings electronically by:

(A) Filing a notice of consent to electronic service and including the person to be served’s e-mail address or addresses in such pleading; or

(B) Including the person to be served’s e-mail address or addresses in or below the signature block of the complaint or answer, as applicable to the person to be served.

(2) A person to be served may rescind his or her election to be served with pleadings electronically by filing and serving a notice of such rescission.

(3) If a person to be served agrees to electronic service of pleadings, such person to be served bears the responsibility of providing notice of any change in his or her e-mail address or addresses.

(4) If electronic service of a pleading is made upon a person to be served, and such person certifies to the court under oath that he or she did not receive such pleading, it shall be presumed that such pleading was not received unless the serving party disputes the assertion of nonservice, in which case the court shall decide the issue of service of such pleading. (Ga. L. 1966, p. 609, § 5; Ga. L. 1967, p. 226, § 4; Ga. L. 2001, p. 854, § 1; Ga. L. 2009, p. 73, §§ 1, 2/HB 29.)

Editor’s notes. — Ga. L. 2001, p. 854, § 3, not codified by the General Assembly, provides that the 2001 amendment shall apply to judgments or decisions entered on and after July 1, 2001.

Ga. L. 2009, p. 73, § 5/HB 29, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to motions to dismiss filed after July 1, 2009.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 5, and an-

notations pertaining thereto, see 28 U.S.C.

Law reviews. — For article, “Foreign Corporations in Georgia,” see 10 Ga. St. B.J. 243 (1973). For article surveying Georgia cases in the area of trial practice and procedure from June 1979 through May 1980, see 32 Mercer L. Rev. 225 (1980). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For annual

survey of law on domestic relations, see 62
Mercer L. Rev. 105 (2010).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
WHEN SERVICE REQUIRED
HOW SERVICE MADE
PROOF OF SERVICE
FILING
WAIVER OF NOTICE

General Consideration

Arbitration award is not a pleading within the meaning of O.C.G.A. § 9-11-5. *Davis v. Gaona*, 260 Ga. 450, 396 S.E.2d 218 (1990).

Amendment of complaint. — Complaint against unnamed municipal employees may be deemed amendable by the trial court under subsection (c) of O.C.G.A. § 9-11-5 and, thus, the plaintiff may substitute the proper named individuals. *Harper v. Savannah Police Dep't*, 179 Ga. App. 449, 346 S.E.2d 891 (1986).

Dismissal of the appellant's claims against the city is not authorized on the ground that the plaintiff named the "City of Savannah," rather than the "Mayor and Aldermen of the City of Savannah," because a misnomer in a defendant's name is an amendable defect as the record fails to reflect that the trial court exercised the court's discretion in determining whether to allow appellant to amend the appellant's complaint in this respect. *Harper v. Savannah Police Dep't*, 179 Ga. App. 449, 346 S.E.2d 891 (1986).

Divorce action, as amendment to maintenance action, unauthorized. — When a husband filed an action for separate maintenance, he could not institute a new cause of action for divorce through an amendment to the original action and the service provisions of O.C.G.A. § 9-11-5; he was required to serve his wife with process under O.C.G.A. § 9-11-4, so as to afford her notice of the divorce action and to afford the trial court personal jurisdiction over her with regard to the new action. *Southworth v. Southworth*, 265 Ga. 671, 461 S.E.2d 215 (1995).

Duty to keep in touch with attorney. — There is a duty on the defendant's

part to keep in touch with the defendant's attorney, in order to answer interrogatories or take such other action as the defendant's attorney might find necessary pending litigation, and the defendant's failure to maintain such contact amounts to conscious indifference to the consequences, which the courts equate with willful misconduct. *Carter v. Merrill Lynch, Pierce, Fenner & Smith*, 130 Ga. App. 522, 203 S.E.2d 766 (1974).

Proper notice served on counsel. — Trial court was authorized to find that proper notice had been served on counsel and that the plaintiff's failure to maintain contact and cooperate with the plaintiff's counsel about the pending litigation so that discovery could be made was willful misconduct. *Addington v. Anneewakee, Inc.*, 204 Ga. App. 521, 420 S.E.2d 60 (1992).

Failure to appear due to lack of notice. — Trial court erred in dismissing defensive pleadings for failure to appear because the buyer did not receive notice of the proceeding. *Keogh v. Bryson*, 319 Ga. App. 294, 735 S.E.2d 293 (2012).

Cited in *Slocumb v. Ross*, 119 Ga. App. 567, 168 S.E.2d 208 (1969); *Shepherd v. Shepherd*, 225 Ga. 455, 169 S.E.2d 314 (1969); *Tottle v. Player*, 225 Ga. 431, 169 S.E.2d 340 (1969); *Farr v. Farr*, 120 Ga. App. 762, 172 S.E.2d 158 (1969); *Golden v. Credico, Inc.*, 124 Ga. App. 700, 185 S.E.2d 578 (1971); *Harris v. Harris*, 228 Ga. 562, 187 S.E.2d 139 (1972); *Newell Rd. Bldrs., Inc. v. Ramirez*, 126 Ga. App. 850, 192 S.E.2d 184 (1972); *Boardman v. Georgia R.R. Bank & Trust Co.*, 127 Ga. App. 63, 192 S.E.2d 390 (1972); *Locklear v. Morgan*, 127 Ga. App. 326, 193 S.E.2d 208 (1972); *Humble Oil & Ref. Co. v. Fulcher*,

128 Ga. App. 606, 197 S.E.2d 416 (1973); Mackey v. Mackey, 232 Ga. 207, 205 S.E.2d 855 (1974); A & D Barrel & Drum Co. v. Fuqua, 132 Ga. App. 827, 209 S.E.2d 272 (1974); Berman v. Berman, 233 Ga. 76, 209 S.E.2d 622 (1974); Europa Hair, Inc. v. Browning, 133 Ga. App. 753, 212 S.E.2d 862 (1975); Osceola Inns v. State Hwy. Dep't, 133 Ga. App. 736, 213 S.E.2d 27 (1975); Swindell v. Swindell, 233 Ga. 854, 213 S.E.2d 697 (1975); Register v. Kandlbinder, 134 Ga. App. 754, 216 S.E.2d 647 (1975); Jernigan v. Collier, 234 Ga. 837, 218 S.E.2d 556 (1975); Osteen v. GECC, 137 Ga. App. 546, 224 S.E.2d 453 (1976); Gregory v. Tench, 138 Ga. App. 219, 225 S.E.2d 753 (1976); Daniel & Daniel, Inc. v. Stewart Bros., 139 Ga. App. 372, 228 S.E.2d 586 (1976); Howard Concrete Pipe Co. v. Cohen, 139 Ga. App. 491, 229 S.E.2d 8 (1976); Brown v. Rooks, 139 Ga. App. 770, 229 S.E.2d 548 (1976); In re J.B., 140 Ga. App. 668, 231 S.E.2d 821 (1976); Aetna Fin. Co. v. Pair, 141 Ga. App. 243, 233 S.E.2d 218 (1977); Barger v. Hill, 143 Ga. App. 87, 237 S.E.2d 518 (1977); Berger v. North Am. Co., 146 Ga. App. 475, 246 S.E.2d 716 (1978); King v. King, 242 Ga. 770, 251 S.E.2d 516 (1979); Bigley v. Lawrence, 149 Ga. App. 249, 253 S.E.2d 870 (1979); Good Housekeeping Shops v. Hines, 150 Ga. App. 240, 257 S.E.2d 205 (1979); Gross v. Pyrofax Gas Corp., 151 Ga. App. 130, 259 S.E.2d 137 (1979); Carter v. Carter, 244 Ga. 670, 261 S.E.2d 619 (1979); James v. James, 245 Ga. 624, 266 S.E.2d 224 (1980); Proffitt v. Housing Sys., 154 Ga. App. 114, 267 S.E.2d 650 (1980); Oliver v. Thomas, 158 Ga. App. 388, 280 S.E.2d 416 (1981); Greer v. Heim, 248 Ga. 417, 284 S.E.2d 11 (1981); J.L. Lester & Sons v. Smith, 162 Ga. App. 506, 291 S.E.2d 251 (1982); Martin v. Newman, 162 Ga. App. 725, 293 S.E.2d 18 (1982); Myers v. Department of Human Resources, 162 Ga. App. 885, 293 S.E.2d 480 (1982); Wilson v. Barton & Ludwig, Inc., 163 Ga. App. 721, 296 S.E.2d 74 (1982); Fiske v. Kings Point Condominium Ass'n, 250 Ga. 544, 299 S.E.2d 737 (1983); Forsyth v. Hale, 166 Ga. App. 340, 304 S.E.2d 81 (1983); International Longshoremen's Ass'n v. Saunders, 182 Ga. App. 301, 355 S.E.2d 461 (1987); Wilson v. City of Atlanta, 184 Ga. App. 651, 362

S.E.2d 460 (1987); Whatley v. Bank S., 185 Ga. App. 896, 366 S.E.2d 182 (1988); Vurgess v. State, 187 Ga. App. 700, 371 S.E.2d 191 (1988); State v. Shearson Lehman Bros., 188 Ga. App. 120, 372 S.E.2d 276 (1988); Freeman v. City of Brunswick, 193 Ga. App. 635, 388 S.E.2d 746 (1989); Jim Walter Homes, Inc. v. Roberts, 196 Ga. App. 618, 396 S.E.2d 787 (1990); Chrysler Credit Corp. v. Brown, 198 Ga. App. 653, 402 S.E.2d 753 (1991); First Community Bank v. Bryan Starr & Assocs., 203 Ga. App. 696, 417 S.E.2d 330 (1992); Clinton Leasing Corp. v. Patterson, 209 Ga. App. 336, 433 S.E.2d 422 (1993); Magnan v. Miami Aircraft Support, Inc., 217 Ga. App. 855, 459 S.E.2d 592 (1995); Jayson v. Gardocki, 221 Ga. App. 455, 471 S.E.2d 545 (1996); Mingledorff v. Stokely, 223 Ga. App. 183, 477 S.E.2d 374 (1996); Randall v. Randall, 274 Ga. 107, 549 S.E.2d 384 (2001); Williams v. City of Atlanta, 263 Ga. App. 113, 587 S.E.2d 261 (2003); Koby v. Koby, 277 Ga. 160, 587 S.E.2d 48 (2003); Rouse v. Arrington, 283 Ga. App. 204, 641 S.E.2d 214 (2007); Rouse v. Arrington, 283 Ga. App. 204, 641 S.E.2d 214 (2007); Weaver v. State, 299 Ga. App. 718, 683 S.E.2d 361 (2009); Mitchell v. Cancer Carepoint, Inc., 299 Ga. App. 881, 683 S.E.2d 923 (2009); McRae v. Hogan, 317 Ga. App. 813, 732 S.E.2d 853 (2012); Howard v. Alegria, 321 Ga. App. 178, 739 S.E.2d 95 (2013); Sherman v. Dev. Auth., 324 Ga. App. 23, 749 S.E.2d 29 (2013); Target Nat'l Bank v. Luffman, 324 Ga. App. 442, 750 S.E.2d 750 (2013).

When Service Required

Every written notice must be served. — Statute requires every written notice to be served. Jones v. Jones, 230 Ga. 738, 199 S.E.2d 239 (1973).

Normally, appearance is made by filing defensive pleadings, and language contained in this section is based on such normal procedure. Moss v. Bishop, 235 Ga. 616, 221 S.E.2d 38 (1975). but see; Shaheen v. Dunaway Drug Stores, Inc., 246 Ga. 790, 273 S.E.2d 158 (1980).

Approval of consent judgment extending restraining order as appearance. — When no defensive pleadings were filed by the defendants, but a con-

When Service Required (Cont'd)

sent judgment extending a temporary restraining order was entered in the case, upon which approval of the defendant's counsel was shown, this appearance was sufficient to require notice of amendments, etc., in the litigation. *Moss v. Bishop*, 235 Ga. 616, 221 S.E.2d 38 (1975). But see *Shaheen v. Dunaway Drug Stores, Inc.*, 246 Ga. 790, 273 S.E.2d 158 (1980).

Answer and cross action in divorce proceeding. — When, in a pending suit for divorce filed by the husband, the wife files an answer and cross action seeking divorce, child custody, and alimony, statutory provisions with respect to process and service are applicable to such cross action. *Walker v. Walker*, 228 Ga. 615, 187 S.E.2d 289 (1972).

Notice of hearing on motion. — Publication in an official county organ of notice of the date of hearing on a motion was not sufficient because notice of a hearing on a motion is required to be served. *TMS Ins. Agency, Inc. v. Galloway*, 205 Ga. App. 896, 424 S.E.2d 71 (1992); *King v. Board of Regents*, 215 Ga. App. 570, 451 S.E.2d 482 (1994); *Edens v. O'Connor*, 238 Ga. App. 252, 519 S.E.2d 691 (1999).

In a personal injury case, the trial court erred in granting partial summary judgment to the property owner because the court conducted a hearing on the motion for summary judgment despite the court's failure to give written notice to the parties of the hearing date in accordance with O.C.G.A. §§ 9-11-5(b) and 9-11-6(d). *Cofield v. Halpern Enters.*, 316 Ga. App. 582, 730 S.E.2d 63 (2012).

Late notice of hearing on motion did not cause prejudice. — In a suit for breach of a promissory note and related guaranties, while the guarantors were not properly served with the rule nisi order setting the April 15, 2014 hearing, the guarantors learned of the hearing on April 10, 2014, and the lack of notice, thus, did not prevent the guarantors' counsel from preparing for or appearing at the April 15 hearing nor was there any evidence that the guarantors were deprived of the guarantors' right under O.C.G.A. § 9-11-6(d) to serve affidavits opposing the motion as late. *MJL Props. v. Cmty. & S. Bank*, 330

Ga. App. 524, 768 S.E.2d 111 (2015).

Withdrawal of demand for jury. — There is no provision in the laws of this state that notice of withdrawal of demand for jury by the plaintiff must be served on the defendant. *Newton v. Newton*, 226 Ga. 440, 175 S.E.2d 543 (1970).

Notice of additional claim. — It is the spirit of this section that when a claim is undefended, written notice must be served on the party before an additional claim can be demanded. *Lambert v. Gilmer*, 228 Ga. 774, 187 S.E.2d 855 (1972).

Divorce petition which gives no indication by its pleadings that the wife is seeking alimony cannot be amended by introduction of evidence when the husband has filed no pleadings and does not litigate issues at the trial. *Lambert v. Gilmer*, 228 Ga. 774, 187 S.E.2d 855 (1972).

Service of motion for substitution of parties provided for in Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-25(a)(1)) is to be effected on the parties as provided in Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5) and upon persons not parties as provided in Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. § 9-11-4) for service of a summons. *Anderson v. Southeastern Capital Corp.*, 243 Ga. 498, 255 S.E.2d 12 (1979).

Joining of party. — When a motion to add a party is granted, or when the court orders an additional party brought in on the party's own motion, service of process must be made in the usual way. *Housing Auth. v. Millwood*, 472 F.2d 268 (5th Cir. 1973).

Summary judgment without notice improper. — When summary judgment is obtained by the defendant in the plaintiff's absence at a hearing on a motion, without notice to the plaintiff, on grounds entirely distinct from those plead in a prior summary judgment motion, and by support of an affidavit of which the plaintiff had likewise no notice, grant of summary judgment was in error. *Jackson v. Bekele*, 152 Ga. App. 417, 263 S.E.2d 225 (1979).

When service is properly made, actual notice is not required. *Allen v. Board of Tax Assessors*, 247 Ga. 568, 277 S.E.2d 660 (1981).

Motion for substitution. — If an executor of a deceased party desires the protection of the 180-day limitation period for a motion for substitution, the executor can file a suggestion of death on the record and serve it on the other party's counsel. Having failed to so act, the executor cannot complain of lack of diligence on the part of the other party. *Dubberly v. Nail*, 166 Ga. App. 378, 304 S.E.2d 504 (1983).

How Service Made

Notice to an attorney is notice to client employing the attorney, and knowledge of attorney is knowledge of client, when such notice and knowledge come to attorney in and about subject matter of the attorney's employment. *Austin v. Austin*, 245 Ga. 487, 265 S.E.2d 788 (1980).

Jurisdiction not afforded by service on attorney. — Service upon attorney who represents a person is not service upon the person so as to give the court jurisdiction when personal service is required. *Souter v. Carnes*, 229 Ga. 220, 190 S.E.2d 69 (1972).

Service of pleadings and orders may be made upon party not represented by counsel by delivering a copy to the party or by mailing it to the party at the party's last known address. The envelope used for mailing need not include a post office box or zip code number when the address shown of record does not contain such information. *Regante v. Reliable-Triple Cee of N.J., Inc.*, 251 Ga. 629, 308 S.E.2d 372 (1983).

Service on a party's attorney was invalid when the attorney served was representing the party's insurer in the pending proceeding, although the attorney was representing the party's interests in another proceeding. *Southern Intermodal Logistics v. Carolina Cas. Ins. Co.*, 181 Ga. App. 110, 351 S.E.2d 509 (1986).

Mailing of an amended complaint to the defendant's attorney was not proper service because, although O.C.G.A. § 9-11-5 permits service of pleadings subsequent to the first complaint on a party's attorney, it does not allow service of process on an attorney. *Driver v. Nunnallee*, 226 Ga. App. 563, 487 S.E.2d 122 (1997); but see

Lau v. Klinger, 46 F. Supp. 2d 1377 (S.D. Ga. 1999).

Service by mail when party aware of lawsuit. — Once apprised of the pendency of a lawsuit, a party's constitutional right to notice and an opportunity to be heard is met by service by mail provided by subsection (b) of O.C.G.A. § 9-11-5. *Allen v. Board of Tax Assessors*, 247 Ga. 568, 277 S.E.2d 660 (1981); *Sun v. Jones*, 188 Ga. App. 552, 373 S.E.2d 656 (1988).

Service by mail proper when case proceeded as pending action. — Court properly confirmed the foreclosure sales because the case proceeded as a pending action, not an entirely new action and service of all subsequent pleadings and written notices were authorized to be made by mail in accordance with O.C.G.A. § 9-11-5(b). Following entry of the remittitur from the first case, the matter was reinstated in the trial court and was returned to the posture the matter occupied prior to judgment. *Belans v. Bank of Am., N.A.*, 309 Ga. App. 208, 709 S.E.2d 853 (2011).

Service complete upon mailing. — Service by mail is permissible and upon mailing of the service copy, service is complete; thus, the fact that service is complete, if unrefuted, controls. *Allen v. Board of Tax Assessors*, 247 Ga. 568, 277 S.E.2d 660 (1981).

When a party opposing summary judgment filed an affidavit and served the affidavit by mail the same day, one day before the summary judgment hearing as required by O.C.G.A. § 9-11-56(c), the affidavit was not untimely; under O.C.G.A. § 9-11-5(b), service by mail was complete upon mailing. *Kirkland v. Kirkland*, 285 Ga. App. 238, 645 S.E.2d 626 (2007), cert. denied, 2007 Ga. LEXIS 646 (Ga. 2007); 552 U.S. 1312, 128 S. Ct. 1898, 170 L.Ed.2d 749 (2008).

Mailing of call of inactive cases. — "Calendar Call of Inactive Cases" is an order of the court when properly drawn and signed by the judge, and upon proof of mailing to counsel's last known address, the court is authorized to dismiss cases listed for want of prosecution. *Roark v. Northeast Sales Distrib. Co.*, 124 Ga. App. 10, 183 S.E.2d 83 (1971).

When counterclaim is pending at time original action is dismissed, at-

How Service Made (Cont'd)

torney of record in initial action continues to be the attorney of record in the counterclaim unless discharged, and is the person upon whom motions may be served until final judgment. *Maslia v. Maslia*, 243 Ga. 44, 252 S.E.2d 469 (1979).

Service of request for admissions may be perfected by mail. *Tyson v. Automotive Controls Corp.*, 147 Ga. App. 409, 249 S.E.2d 99 (1978).

Motion for discovery sanctions may be mailed. — Motion to impose sanctions under Ga. L. 1972, p. 510, § 10 (see now O.C.G.A. § 9-11-37) can be properly served upon the defendant's attorney by mail pursuant to subsection (b) of Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5). *Phillips v. Peachtree Hous.*, 138 Ga. App. 596, 226 S.E.2d 616 (1976).

Service of rule nisi by mail. — Service by mail made of motions for new trial, as well as of "all notices and other papers hereunder" and "all other similar motions, orders and proceedings" includes rules nisi issued on motions for new trial. *Short v. Riles*, 141 Ga. App. 881, 234 S.E.2d 710 (1977).

Notice of contempt action. — After final decree of divorce, alimony, and child custody has been entered and no action is pending, contempt proceeding requires personal service on the defendant; however, if a contempt action is still pending in the trial court, notice can properly be served on the attorney of record. *Smith v. Smith*, 244 Ga. 230, 259 S.E.2d 480 (1979).

Two discovery requests to married parties sufficient. — When discovery requests were served in one envelope at the parties' marital residence, but there were separate discovery requests in the envelope for the husband and the wife, the discovery met the service requirements of O.C.G.A. § 9-11-5(a), wherein "each of the parties" was to be served; the fact that the return of service on the discovery listed "discovery responses" rather than "discovery requests" did not invalidate the service thereof, pursuant to O.C.G.A. § 9-11-5(b). *Adams v. Adams*, 260 Ga. App. 597, 580 S.E.2d 261 (2003).

Acknowledgment of waiver of service. — After a realty group acknowl-

edged a waiver of service under O.C.G.A. § 9-10-73, the group had 30 days to file an answer, and upon failing to do so in that time period, a default judgment under O.C.G.A. § 9-11-55 was validly entered in favor of a flooring company despite the fact that the company failed to provide the group with notice pursuant to O.C.G.A. § 9-11-5(a); the group failed to assert a timely defense, and the default certificate filed by the company satisfied the requirements of Ga. Unif. Super. Ct. R. 15. *SRM Realty Servs. Group, LLC v. Capital Flooring Enters.*, 274 Ga. App. 595, 617 S.E.2d 581 (2005).

Proof of Service

Subsection (b) virtually eliminates requirement of proof of service, except such as will satisfy the trial court, in the court's discretion. *Roberts v. Roberts*, 226 Ga. 203, 173 S.E.2d 675 (1970).

Ga. L. 1967, p. 226, § 4 and Ga. L. 1968, p. 1104, § 4 (see now O.C.G.A. §§ 9-11-5 and 9-11-15) require only that party amending pleading certify service of the amendment on the other party's counsel by mail contemporaneous with filing of the amendment. *Locklear v. Morgan*, 127 Ga. App. 326, 193 S.E.2d 208 (1972).

Proof by certificate of counsel. — Proof of service of pleadings and other papers subsequent to the filing of the original complaint may be by certificate of counsel. Such service is perfected when there is proof of service in one of the ways specified in the statute, even though the adverse party may not have in fact received actual notice. *Owen v. M & M Metro Supply, Inc.*, 198 Ga. App. 420, 401 S.E.2d 612 (1991).

In an employment dispute, the trial court was authorized to find that the employer was served with requests for admissions, based on the employee's counsel's assertion, pursuant to O.C.G.A. § 9-11-5(b), and therefore partial summary judgment based on matters deemed admitted was proper. *Am. Radiosurgery, Inc. v. Rakes*, 325 Ga. App. 161, 751 S.E.2d 898 (2013).

Attorney's certificate of service applied to attached transcripts. — Trial court considering a habeas corpus pro-

ceeding erred when the court refused to consider guilty plea transcripts that had been attached to the state's responsive brief due to a finding that the transcripts were not served on the petitioner, when the attorney's certificate of service had indicated that only the brief was served on the petitioner; pursuant to O.C.G.A. § 9-11-5(b), the attorney's certificate of service of the brief was prima facie proof of service of the attached transcripts, which were incorporated in the brief. *Scott v. Wright*, 276 Ga. 12, 573 S.E.2d 49 (2002).

When a voluntary dismissal is clearly shown to bear a certificate of service so that the defendant is served with notice of the voluntary dismissal prior to the defendant's attempt to initiate a counterclaim, there is no pending counterclaim which might permit the defendant to object to the voluntary dismissal under O.C.G.A. § 9-11-41(a), despite the fact that the defendant may not have received actual notice. *Young v. Johnson*, 167 Ga. App. 837, 307 S.E.2d 730 (1983).

Service not invalid for failure to make proof. — Ga. L. 1967, p. 226, §§ 1-4 (see now O.C.G.A. §§ 9-11-4 and 9-11-5) provides that failure of proof of service does not affect the validity of the service; purpose of this rule is to prevent a defendant who has been served from attacking the validity of service upon the defendant on the technical ground that the person making service failed to make proper proof thereof. *Daniel & Daniel, Inc. v. Stewart Bros.*, 139 Ga. App. 372, 228 S.E.2d 586 (1976).

Under Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. § 9-11-4(g)) and subsection (b) of Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5), failure to make proof of service shall not affect the validity of service. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

Service not invalidated by incorrect certificate. — Fact that a defendant's attorney incorrectly indicated on a certificate of service that service of a motion to dismiss had been made by mail when service was made electronically was of no legal consequence and did not invalidate the service, pursuant to O.C.G.A.

§ 9-11-5(b). *Worley v. Winter Constr. Co.*, 304 Ga. App. 206, 695 S.E.2d 651 (2010).

On late filing of return. — Late filing of return of service, at least when it is not shown that any party was deceived thereby, does not void the service because while process and service are essential, return of service is only evidence of what the officer has done and is not itself jurisdictional. *Olvey v. Citizens & S. Bank*, 146 Ga. App. 484, 246 S.E.2d 485 (1978).

Notice of hearing presumed served. — When a trial court indicated that the court sent a notice of a combined rescheduled hearing on a construction manager's motion for summary judgment and a hearing on the issue of unliquidated damages to a condominium owner, it was presumed that such notice was sent and received in compliance with O.C.G.A. §§ 9-11-5(b) and § 9-11-6(d), and the owner's mere contention that the owner did not receive notice of the hearing was not controlling and did not satisfy the owner's burden of showing that notice was in fact not received; accordingly, the owner's claim that the owner did not appear at the hearing because notice was insufficient lacked merit, due process was met, and the judgment entered from the hearing was affirmed. *Blue Stone Lofts, LLC v. D'Amelio*, 268 Ga. App. 355, 601 S.E.2d 719 (2004).

Insufficient evidence that parties properly served with notice of summary judgment hearing. — Summary judgment order was vacated because the record contained insufficient evidence upon which the court of appeals could base a decision; the record contained no rule nisi or other evidence indicating that the parties were properly served with notice of the summary judgment hearing date pursuant to O.C.G.A. §§ 9-11-5(b) and 9-11-6(d), and there was no indication in the record that a transport company actually received notice, although its notice of appeal asked the trial court clerk to omit nothing from the record on appeal. *Sprint Transp. Group, Inc. v. China Shipping NA Agency, Inc.*, 313 Ga. App. 454, 721 S.E.2d 659 (2011).

Filing

Filing means filing with clerk of court under subsection (d) of this section.

Filing (Cont'd)

Hopkins v. Harris, 130 Ga. App. 489, 203 S.E.2d 762 (1973).

Despite the claim by the owners of a corporation that the trial court erred in refusing to allow the owners to intervene in the case as the true owners of the property in question, because the owners never properly filed or asserted a motion to intervene, no error resulted; moreover, their argument that the trial court erred in refusing to allow them to file their motion to intervene also provided no basis for relief. Rice v. Champion Bldgs., Inc., 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Only exception to filing of pleadings at clerk's office is that judge may file papers and transmit the papers to the clerk's office. State v. Jones, 125 Ga. App. 361, 187 S.E.2d 902 (1972).

Trial judge merely signing the rule nisi is not the equivalent of filing under subsection (e) of O.C.G.A. § 9-11-5. Wal-Mart Stores, Inc. v. Curry, 206 Ga. App. 775, 426 S.E.2d 581 (1992).

Filing by mail not provided for. — If the legislature intended to say filing by mail was permissible and should date from date of mailing, he legislature would have so provided. Hopkins v. Harris, 130 Ga. App. 489, 203 S.E.2d 762 (1973) (on motion for rehearing).

Subsection (b) of this section does not enlarge upon the time allowed for filing papers with the clerk under subsection (d), nor make provision for filing by mail. Hopkins v. Harris, 130 Ga. App. 489, 203 S.E.2d 762 (1978) (on motion for rehearing).

In transmitting complaint to clerk by mail, counsel takes risk of delays in the mail. State v. Jones, 125 Ga. App. 361, 187 S.E.2d 902 (1972).

Judge not required to permit filing with judge. — Subsection (e) of this section does not require judge to permit papers to be filed with the judge. English v. Atlanta Transit Sys., 134 Ga. App. 621, 215 S.E.2d 304 (1975).

While this section authorizes a judge to permit papers to be filed with the judge, it does not require that the judge do so.

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); Hannula v. Ramey, 177 Ga. App. 512, 339 S.E.2d 735 (1986).

Filing to be made within time allowed for service. — Under subsection (d) of this section, filing of pleadings must take place within time allowed for service. Hopkins v. Harris, 130 Ga. App. 489, 203 S.E.2d 762 (1973).

Time for filing answer with clerk of court is 30 days after complaint has been served on the defendant. Hopkins v. Harris, 130 Ga. App. 489, 203 S.E.2d 762 (1973) (on motion for rehearing).

Response to motion for summary judgment is timely filed if filed on date of hearing, notwithstanding language in subsection (d) of this section requiring all papers after complaint to be filed within time allowed for service. Gross v. Pyrofax Gas Corp., 151 Ga. App. 130, 259 S.E.2d 137 (1979).

Agreement to continue hearing on summary judgment motion and time for response. — When the hearing on the plaintiff's motion for summary judgment and time for response was continued by agreement to date of hearing and the defendant's response was filed on that date, such filing was timely. Liberty Forest Prods., Inc. v. Interstate Paper Corp., 138 Ga. App. 153, 225 S.E.2d 731 (1976).

Timely service of pro se responses. — Under the circumstances, when timely service of pro se responses was made on the plaintiff, failure to file responses to requests for admission in the trial court did not support a judgment on the merits in favor of the plaintiff as such result would not be consistent with the principles of substantial justice. Mundt v. Olson, 155 Ga. App. 145, 270 S.E.2d 344 (1980).

Filing of judgment constitutes entry of judgment. — Filing of a judgment in open court with the trial judge as provided in subsection (e) of O.C.G.A. § 9-11-5 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).

Failure to timely file affidavit may cause affidavit to be stricken. — Trial court can exercise the court's discretion in

determining whether to consider an affidavit filed on the hearing date, and there is no abuse of this discretion in striking an affidavit when the evidence shows that the defendant had this affidavit prior to the first hearing date and was negligent in failing to timely file the affidavit with the court. *Crucet v. Bovis, Kyle & Burch*, 180 Ga. App. 765, 350 S.E.2d 322 (1986).

Differentiation between response to summary judgment motion and affidavit supporting such motion not required. — In determining whether to strike an affidavit as untimely filed, the trial court is not required to differentiate between a response to a summary judgment and an affidavit filed in support of such a motion, as O.C.G.A. § 9-11-6(d) provides that opposing affidavits must be served no later than one day before the date of the hearing and subsection (d) of O.C.G.A. § 9-11-5 provides all papers served upon a party shall be filed with the court within the time allowed for service. *Crucet v. Bovis, Kyle & Burch*, 180 Ga. App. 765, 350 S.E.2d 322 (1986).

Depositions properly filed notwithstanding incorrect case numbers. — When the plaintiff filed depositions with the clerk of the court via cover letter properly identifying the case by style and case number, the mere fact that the depositions themselves did not bear the correct case number did not negate the fact that the depositions were filed. Inasmuch as the clerk of the court received the depositions for filing, the depositions would be deemed to have been filed. *Whisenant v. Fulton Fed. Sav. & Loan Ass'n*, 194 Ga. App. 192, 390 S.E.2d 100 (1990).

Depositions properly filed despite judge's error. — When depositions were filed with a judge, but the judge through oversight failed to transmit the depositions to the clerk's office, the court verified that the parties were aware the court had considered the depositions, and the defendants' attorney failed to file the depositions in the clerk's office, the court properly ordered that the depositions be sent by supplemental record, as authorized by subsection (f) of O.C.G.A. § 5-6-41, and the depositions were considered part of the record. *Custom Lighting & Decorating, Ltd. v. Hampshire Co.*, 204 Ga. App.

293, 418 S.E.2d 811 (1992).

Fee payment may be required. — Clerk of court may justifiably refuse to file a complaint until the proper fees have been paid. *Orr v. Culpepper*, 161 Ga. App. 801, 288 S.E.2d 898 (1982).

Fee nonpayment does not invalidate filing. — Statutes making the payment of fees a prerequisite to filing a complaint are directory only, and a failure to pay these fees will not render the filing of a complaint invalid. *Orr v. Culpepper*, 161 Ga. App. 801, 288 S.E.2d 898 (1982).

Filing in separate courts. — As the clerks of the state court of one county and the clerks of the superior court of that same county are different persons, the receipt of the notice of appeal by the state court of the county may not be imputed in any way to be equivalent to receipt of that document by the clerk of the superior court of that county. *Pittman v. Curry*, 161 Ga. App. 384, 288 S.E.2d 661 (1982).

Defendant is not entitled to notice of trial if the defendant does not file defensive pleadings in the action. *Wallace v. Wallace*, 229 Ga. 607, 193 S.E.2d 832 (1972).

Construction with § 9-11-54. — Provisions of O.C.G.A. § 9-11-54(c)(3), requiring that notice of trial be served upon a defaulting party in a medical malpractice case involving a claim for damages exceeding \$10,000.00, prevail over the provisions of O.C.G.A. § 9-11-5(a) providing that a defaulting party waives all notices of trial. *Southwest Community Hosp. & Medical Ctr. v. Thompson*, 165 Ga. App. 442, 301 S.E.2d 501 (1983).

Waiver of notice in divorce action. — When the defendant fails to file pleadings in a divorce action, the defendant waives all notices, including notice of time and place of trial. *Gibson v. Gibson*, 234 Ga. 528, 216 S.E.2d 824 (1975); *Brooks v. Brooks*, 242 Ga. 444, 249 S.E.2d 244 (1978).

When the defendant in a divorce action fails to file defensive pleadings the divorce is, by definition, uncontested, and such failure constitutes waiver of notice of the hearing on the final decree. *Hardwick v. Hardwick*, 245 Ga. 570, 266 S.E.2d 184 (1980).

When a party fails to file defensive

Filing (Cont'd)

pleadings in a divorce action, the party waives notice of the hearing on the final divorce decree. *Harris v. Harris*, 258 Ga. 496, 371 S.E.2d 399 (1988).

Defendant in a divorce action who failed to file a responsive pleading waived notice of the final hearing, and because the defendant was represented by counsel the professional responsibilities of opposing counsel did not require that opposing counsel inform the defendant of the final hearing. *Lucas v. Lucas*, 273 Ga. 240, 539 S.E.2d 807 (2000).

Notice of issues not raised in complaint. — Party is entitled to notice of issues not raised in complaint which are decided by the court in a divorce action, notwithstanding the fact that no answer has been filed. *Harris v. Harris*, 258 Ga. 496, 371 S.E.2d 399 (1988).

Husband's dismissal of divorce suit does not amount to waiver of notice requirements because a failure to file an answer to wife's counterclaim; absent order of court requiring husband to answer the counterclaim upon dismissal of his action, it remains automatically denied and husband is entitled to notice under the statute. *Carroll v. Carroll*, 237 Ga. 441, 228 S.E.2d 832 (1976).

Personal jurisdiction for a contempt proceeding is properly based upon personal jurisdiction obtained in previous pending action in which injunction is issued. *Anthony v. Anthony*, 239 Ga. 273, 236 S.E.2d 621 (1977).

Waiver provisions control over local rules. — Waiver of further notice of hearings and trial provided for in subsection (a) of O.C.G.A. § 9-11-5 controls over conflicting local court rules. *Hulsey Pool Co. v. Troutman*, 167 Ga. App. 192, 306 S.E.2d 83 (1983).

Waiver provisions inapplicable to party whose pleading dismissed as discovery sanction. — Provision in subsection (a) of O.C.G.A. § 9-11-5 that "failure of a party to file pleadings in an action shall be deemed to be a waiver by him of all notices, including notices of time and place of trial..." applies only to parties who fail to file pleadings and not to a party whose pleadings are dismissed as the re-

sult of a discovery sanction. *Green v. Snellings*, 260 Ga. 751, 400 S.E.2d 2 (1991).

When an owner's suit did not arise out of a title insurance company's business as an insurer, pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para III, the trial court erred in finding venue under O.C.G.A. § 33-4-1(2); in addition, the grant of an interlocutory injunction was error because there was no showing that the title company had any opportunity to challenge the applicability of an amendment to add a quiet title action under O.C.G.A. § 23-3-62 to the complaint. *First Am. Title Ins. Co. v. Broadstreet*, 260 Ga. App. 705, 580 S.E.2d 676 (2003).

Waiver of Notice

Court's assurance of notice. — Although, as a general rule, a party who fails to file defensive pleadings waives all right to notice, when the plaintiff appeared at the hearing pro se two days after the plaintiff's answer would have been due and the plaintiff was assured by the court that the hearing regarded only matters of temporary custody and support and that the plaintiff would receive notice of the final hearing, although the plaintiff may have initially waived the plaintiff's right to notice of the final hearing, the plaintiff was given the court's assurance that the plaintiff would receive notice of the final hearing, and was, therefore, entitled to such notice. *Anderson v. Anderson*, 264 Ga. 88, 441 S.E.2d 240 (1994).

Court's order to opposing party to notify defaulting party of judgment. — Although a bicyclist failed to comply with the trial court's order to notify a driver of a default judgment against the driver for \$2.9 million, such failure did not permit the trial court to vacate the judgment under O.C.G.A. § 9-11-60(g) because the trial court had no duty to notify the driver of the judgment, pursuant to O.C.G.A. §§ 9-11-5(a) and 15-6-21(c). *Winslett v. Guthrie*, 326 Ga. App. 747, 755 S.E.2d 287 (2014).

Summary judgment motion. — Even though the defendant was never served with a motion for summary judgment, since the trial court gave the defendant fair notice of an opportunity to respond to

the motion, the statutorily-mandated service requirement was waived. *Ferguson v. Duron, Inc.*, 244 Ga. App. 19, 534 S.E.2d 142 (2000).

Ex parte default judgment against codefendant was proper under subsection (a) of this section since 116 days had passed without response to the complaint seeking liquidated damages in an action on the contract. *Hubert v. Lawson*, 146 Ga. App. 698, 247 S.E.2d 223 (1978).

When defendant failed to answer the complaint, the defendant waived any notice of further action in the case. *T.A.I. Computer, Inc. v. CLN Enters., Inc.*, 237 Ga. App. 646, 516 S.E.2d 340 (1999).

No reversible error was found because a contestant in a quiet title action waived service of process, neglected to file any pleadings, and failed to file a record to support the claims of error on appeal, and given that the special master found three independent bases, which on their face supported the judgment entered. *Brown v.*

Fokes Props. 2002, Inc., 283 Ga. 231, 657 S.E.2d 820 (2008).

Although a default judgment was not permissible in a divorce case, O.C.G.A. § 19-5-8, a trial court did not err in entering a judgment of divorce on the pleadings pursuant to O.C.G.A. § 19-5-10(a) after a defendant failed to file responsive pleadings, thereby waiving notice of the hearing under O.C.G.A. § 9-11-5. The trial court properly relied on the plaintiff's verified complaint and domestic relations affidavit in dividing the parties' property. *Ellis v. Ellis*, 286 Ga. 625, 690 S.E.2d 155 (2010).

Notice of challenge to sufficiency of answer not waived. — Waiver contemplated by O.C.G.A. § 9-11-5 does not include waiver of notice of a challenge to the sufficiency of the defendant's answer since one had been timely filed. *Brown v. Brown*, 217 Ga. App. 245, 457 S.E.2d 215 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, §§ 850, 856. 62B Am. Jur. 2d, Process, § 129 et seq.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 220 et seq. 71 C.J.S., Pleading, §§ 418, 419, 421 et seq. 72 C.J.S., Process, §§ 31, 32.

ALR. — Immunity of nonresident suitor or witness from service of process as affected by the nature or subject matter of the action or proceeding in which the process issues, 19 ALR 828.

Withdrawal of paper after delivery to proper officer as affecting question whether it is filed, 37 ALR 670.

Jurisdiction of suit to remove cloud or quiet title upon constructive service of process against nonresident, 51 ALR 754.

Is service of notice or process in proceed-

ing to vacate or modify judgment to be made upon owner of judgment or upon the attorney, 78 ALR 370.

Power of infant to acknowledge service of process or to bind himself by waiver or estoppel in that regard, 121 ALR 957.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 ALR2d 1364.

Who is "person of suitable age and discretion" under statutes or rules relating to substituted service of process, 91 ALR3d 827.

Construction of state offer of judgment rule — Issues concerning revocation and succession, 116 ALR5th 433.

Service of process via computer or fax, 30 ALR6th 413.

9-11-6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by this chapter, by the rules of any court, by order of court, or by an applicable statute, the computation rules prescribed in paragraph (3) of subsection (d) of Code Section 1-3-1 shall be used.

(b) **Extension of time.** When by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may extend the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period extended if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; provided, however, that no extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict.

(c) **Unaffected by expiration of term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court, except as otherwise specifically provided by law. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it, except as otherwise specifically provided by law.

(d) **For motions; for affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by this chapter or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) **Additional time after service by mail or e-mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper, other than process, upon him or her, and the notice or paper is served upon the party by mail or e-mail, three days shall be added to the prescribed period. (Ga. L. 1966, p. 609, § 6; Ga. L. 1967, p. 226, §§ 5, 6; Ga. L. 1985, p. 648, § 2; Ga. L. 2009, p. 73, § 3/HB 29.)

Cross references. — Computation of time in regard to exercise of privileges or discharge of duties prescribed or required by election laws, § 21-2-14. Procedure regarding making of motions for new trial generally, § 5-5-40 et seq.

Editor's notes. — Ga. L. 2009, p. 73, § 5/HB 29, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall ap-

ply to motions to dismiss filed after July 1, 2009.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 6, see 28 U.S.C.

Law reviews. — For survey article on death penalty decisions from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 175 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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1. IN GENERAL

2. SUMMARY JUDGMENT PROCEEDINGS

ADDITIONAL TIME AFTER MAILING

General Consideration

Construction with Appellate Practice Act. — 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).

Inapplicable to judicial review of medicaid determination. — Georgia Civil Practice Act's (see O.C.G.A. Ch. 11, T. 9) three-day rule under O.C.G.A. § 9-11-6(e) was inapplicable to a determination of timeliness with respect to a petition for judicial review of a Medicaid applicant's claim for benefits, pursuant to O.C.G.A. § 50-13-19; similarly, the certified mail rule under O.C.G.A. § 50-13-23 was expressly deemed inapplicable pursuant to O.C.G.A. § 49-4-153(c) and, accordingly, the applicant's petition was properly denied as untimely. *Gladowski v. Dep't of Family & Children Servs.*, 281 Ga. App. 299, 635 S.E.2d 886 (2006).

Cited in *Martin Theaters of Ga., Inc. v. Lloyd*, 118 Ga. App. 385, 165 S.E.2d 909 (1968); *Insurance Co. of N. Am. v. Dimaio*, 120 Ga. App. 214, 170 S.E.2d 258 (1969); *Johnson v. Frazier*, 121 Ga. App. 212, 173 S.E.2d 434 (1970); *DeKalb County v. McFarland*, 226 Ga. 321, 175 S.E.2d 20 (1970); *Bulloch County Bank v. Dodd*, 226

Ga. 773, 177 S.E.2d 673 (1970); *Bramlett v. Smith*, 227 Ga. 523, 181 S.E.2d 849 (1971); *Dowdy v. White*, 123 Ga. App. 729, 182 S.E.2d 517 (1971); *Goodman v. Kenney*, 124 Ga. App. 709, 185 S.E.2d 632 (1971); *Clayton McLendon, Inc. v. McCarthy*, 125 Ga. App. 76, 186 S.E.2d 452 (1971); *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972); *Mickas v. Mickas*, 229 Ga. 10, 189 S.E.2d 81 (1972); *Van Keuren v. Loomis*, 128 Ga. App. 136, 195 S.E.2d 776 (1973); *Smith v. Smith*, 230 Ga. 238, 196 S.E.2d 437 (1973); *Turner v. Bank of Zebulon*, 128 Ga. App. 404, 196 S.E.2d 668 (1973); *Robinson v. Bassett*, 128 Ga. App. 711, 197 S.E.2d 799 (1973); *Hightower v. Berlin*, 129 Ga. App. 246, 199 S.E.2d 335 (1973); *Kitson v. Hawke*, 231 Ga. 157, 200 S.E.2d 703 (1973); *Livesay v. King*, 129 Ga. App. 751, 201 S.E.2d 178 (1973); *Larwin Mtg. Investors v. Delta Equities, Inc.*, 129 Ga. App. 769, 201 S.E.2d 187 (1973); *Brannon v. Trailer Craft Mfg. Co.*, 130 Ga. App. 766, 204 S.E.2d 477 (1974); *Webb v. Oliver*, 133 Ga. App. 555, 211 S.E.2d 605 (1974); *Osceola Inns v. State Hwy. Dep't*, 133 Ga. App. 736, 213 S.E.2d 27 (1975); *Porter v. Murlas Bros. Commodities*, 134 Ga. App. 96, 213 S.E.2d 190 (1975); *Evans v. Goodyear Tire & Rubber Co.*, 135 Ga. App. 75, 217 S.E.2d 318 (1975); *Vitiaz v. Chrysler Credit Corp.*, 135 Ga. App. 606, 218 S.E.2d 313 (1975); *Jernigan v. Collier*, 234 Ga. 837, 218 S.E.2d 556 (1975); *Lansky v. Goldstein*, 136 Ga. App. 607, 222 S.E.2d 62 (1975); *Earwood v. Liberty Loan Corp.*, 136 Ga. App. 799, 222 S.E.2d 204 (1975); *Liberty Forest Prods., Inc. v. Interstate Paper Corp.*, 138 Ga. App. 153, 225 S.E.2d 731 (1976); *Gregory v. Tench*, 138 Ga. App. 219, 225 S.E.2d 753 (1976); *Johnson v. Fortson*, 237 Ga. 367, 227

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S.E.2d 392 (1976); *Brown v. Rooks*, 139 Ga. App. 770, 229 S.E.2d 548 (1976); *Whitaker v. Whitaker*, 237 Ga. 739, 229 S.E.2d 603 (1976); *Leathers v. Gilland*, 141 Ga. App. 681, 234 S.E.2d 336 (1977); *Maslia v. Hamilton*, 239 Ga. 52, 235 S.E.2d 485 (1977); *Craig v. Citizens & S. Nat'l Bank*, 142 Ga. App. 474, 236 S.E.2d 166 (1977); *Green v. Decatur Fed. Sav. & Loan Ass'n*, 143 Ga. App. 368, 238 S.E.2d 740 (1977); *Mullis v. Bone*, 143 Ga. App. 407, 238 S.E.2d 748 (1977); *Charamond v. Charamond*, 240 Ga. 34, 239 S.E.2d 362 (1977); *Cobb County Fair Ass'n v. Boyle*, 143 Ga. App. 754, 240 S.E.2d 136 (1977); *Prudential Timber & Farm Co. v. Collins*, 144 Ga. App. 849, 243 S.E.2d 80 (1978); *Central Mut. Ins. Co. v. Wofford*, 145 Ga. App. 836, 244 S.E.2d 899 (1978); *Chattahoochee Holdings, Inc. v. Marshall*, 146 Ga. App. 658, 247 S.E.2d 167 (1978); *Legend Carpets v. Stinson*, 147 Ga. App. 58, 248 S.E.2d 48 (1978); *Bull v. Bull*, 243 Ga. 72, 252 S.E.2d 494 (1979); *Safe-Lite Mfg., Inc. v. C.E. Morgan Bldg. Prods., Inc.*, 150 Ga. App. 172, 257 S.E.2d 19 (1979); *Yeomans v. American Nat'l Ins. Co.*, 150 Ga. App. 334, 258 S.E.2d 1 (1979); *Creamer v. State*, 150 Ga. App. 458, 258 S.E.2d 212 (1979); *McAllister v. City of Jonesboro*, 151 Ga. App. 260, 259 S.E.2d 666 (1979); *Gibbs v. Spencer Indus., Inc.*, 244 Ga. 450, 260 S.E.2d 342 (1979); *Cielock v. Munn*, 244 Ga. 810, 262 S.E.2d 114 (1979); *Massengale v. Georgia Power Co.*, 153 Ga. App. 476, 265 S.E.2d 830 (1980); *Exum v. City of Valdosta*, 246 Ga. 169, 269 S.E.2d 441 (1980); *Phillips v. Old Republic Life Ins. Co.*, 155 Ga. App. 537, 271 S.E.2d 676 (1980); *Copeland v. Levine*, 157 Ga. App. 327, 277 S.E.2d 320 (1981); *Oliver v. Thomas*, 158 Ga. App. 388, 280 S.E.2d 416 (1981); *Williams v. Universal Decorators, Inc.*, 161 Ga. App. 165, 288 S.E.2d 115 (1982); *McIntosh v. McLendon*, 162 Ga. App. 220, 290 S.E.2d 157 (1982); *Atlanta Professional Ass'n for Thoracic & Cardiovascular Surgery, P.C. v. Allen*, 163 Ga. App. 400, 294 S.E.2d 647 (1982); *Gilbert v. Decker*, 165 Ga. App. 11, 299 S.E.2d 65 (1983); *Willingham v. Bridges*, 165 Ga. App. 35, 299 S.E.2d 392 (1983); *Pierce v. Gaskins*, 169 Ga. App. 446, 309 S.E.2d 658 (1983); *Suttle v. Northside Realty Assocs.*, 171 Ga. App. 928, 321 S.E.2d 424 (1984); *Biggs v. McDougall*, 175 Ga. App. 87, 332 S.E.2d 381 (1985); *Williamson v. SUNOCO, Inc.*, 176 Ga. App. 661, 337 S.E.2d 441 (1985); *Albers v. Brown*, 177 Ga. App. 620, 340 S.E.2d 260 (1986); *Daniel v. Leibolt*, 178 Ga. App. 186, 342 S.E.2d 334 (1986); *Mack v. Smith*, 178 Ga. App. 652, 344 S.E.2d 474 (1986); *Alliance Auto Acceptance Lease, Inc. v. Chuck Clancy Ford, Inc.*, 182 Ga. App. 182, 355 S.E.2d 112 (1987); *Wimberly v. Karp*, 185 Ga. App. 571, 365 S.E.2d 131 (1988); *Thompson v. Tom Harvey Ford Mercury, Inc.*, 193 Ga. App. 64, 387 S.E.2d 28 (1989); *Jet Air, Inc. v. EPPS Air Serv., Inc.*, 194 Ga. App. 829, 392 S.E.2d 245 (1990); *Jewell v. State*, 200 Ga. App. 203, 407 S.E.2d 763 (1991); *Kelley v. Daugherty*, 201 Ga. App. 291, 410 S.E.2d 759 (1991); *Professional Cleaners v. Phenix Supply Co.*, 201 Ga. App. 634, 411 S.E.2d 781 (1991); *First Community Bank v. Bryan Starr & Assocs.*, 203 Ga. App. 696, 417 S.E.2d 330 (1992); *Lend Lease Trucks, Inc. v. TRW, Inc.*, 206 Ga. App. 410, 425 S.E.2d 293 (1992); *Harris v. Hanna Creative Enters.*, 208 Ga. App. 549, 430 S.E.2d 846 (1993); *Dixon v. Barnes*, 214 Ga. App. 7, 446 S.E.2d 774 (1994); *ABE Eng'g, Inc. v. Fulton County Bd. of Educ.*, 214 Ga. App. 514, 448 S.E.2d 221 (1994); *Stephenson v. Ingram*, 239 Ga. App. 892, 522 S.E.2d 500 (1999); *Glass v. Glover*, 241 Ga. App. 838, 528 S.E.2d 262 (2000); *Woods v. State*, 243 Ga. App. 195, 532 S.E.2d 747 (2000); *Nash v. State*, 243 Ga. App. 800, 534 S.E.2d 492 (2000); *U. S. Traffic Corp. v. Turcotte*, 246 Ga. App. 187, 539 S.E.2d 884 (2000); *Randall v. Randall*, 274 Ga. 107, 549 S.E.2d 384 (2001); *Currington v. State*, 270 Ga. App. 381, 606 S.E.2d 619 (2004); *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008); *Clawson v. Intercat, Inc.*, 294 Ga. App. 624, 669 S.E.2d 671 (2008); *Laurel Baye Healthcare of Macon, LLC v. Neubauer*, 315 Ga. App. 474, 726 S.E.2d 670 (2012); *Brooks v. Multibank 2009-1 RES-ADC Venture, LLC*, 317 Ga. App. 264, 730 S.E.2d 509 (2012); *Copeland v. Wells Fargo Bank, N.A.*, 317 Ga. App. 669, 732 S.E.2d 536 (2012); *McRae v. Hogan*, 317 Ga. App. 813, 732 S.E.2d 853 (2012);

Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014); *RLBB Acquisition, LLC v. Baer*, 329 Ga. App. 483, 765 S.E.2d 662 (2014); *N. Druid Dev., LLC v. Post, Buckley, Schuh & Jernigan, Inc.*, 330 Ga. App. 432, 767 S.E.2d 29 (2014); *SJN Props., LLC v. Fulton County Bd. of Assessors*, 296 Ga. 793, 770 S.E.2d 832 (2015).

Computation of Time

“Day” defined. — Day consists of 24 hours, from midnight to midnight. *Gilmore v. State*, 127 Ga. App. 249, 193 S.E.2d 219 (1972), rev’d on other grounds, 235 Ga. 348, 219 S.E.2d 447 (1975).

Absent contrary policy, computation hereunder applies. — Computation of time provided for by this section has been held applicable unless a contrary policy is expressed in a governing statute or court decision. *Zeeman Mfg. Co. v. L.R. Sams Co.*, 123 Ga. App. 99, 179 S.E.2d 552 (1970).

Subsection (a) is applicable to proceeding which is had after commencement of the action. *Warrick v. Mid-State Homes, Inc.*, 139 Ga. App. 301, 228 S.E.2d 234 (1976).

“An applicable statute” construed. — Phrase “an applicable statute,” contained in subsection (a) of this section, refers to statutes expressly applicable to proceedings had after commencement of an action. *Davis v. U.S. Fid. & Guar. Co.*, 119 Ga. App. 374, 167 S.E.2d 214 (1969).

Phrase “applicable statute” in subsection (a) of this section refers directly only to statutes applicable to proceedings had after commencement of the action and, hence, would not apply expressly to a statute of limitations. *Zeeman Mfg. Co. v. L.R. Sams Co.*, 123 Ga. App. 99, 179 S.E.2d 552 (1970).

Subsection (a) not applicable to statutes of limitation. — Subsection (a) of this section is a rule of procedure relating to acts done or proceedings had after commencement of an action and to any statutes expressly applicable to such proceedings, and is not intended to modify and change existing statutes of limitation. *Davis v. U.S. Fid. & Guar. Co.*, 119 Ga. App. 374, 167 S.E.2d 214 (1969); *Georgia*

Power Co. v. Whitmire, 146 Ga. App. 29, 245 S.E.2d 324 (1978).

Subsection (a) of this section does not apply directly to determine computation of period of time involved in a statute of limitation. *Davis v. U.S. Fid. & Guar. Co.*, 119 Ga. App. 374, 167 S.E.2d 214 (1969).

Adoption of subsection (a) of this section by analogy, for application to statutes of limitation, is not warranted in view of case law holding that when the time prescribed for bringing an action is computed by years or months, Sundays are to be excluded. *Davis v. U.S. Fid. & Guar. Co.*, 119 Ga. App. 374, 167 S.E.2d 214 (1969).

Subsection (a) of this section provides for computations of time applicable to proceedings after commencement of the action, and does not apply in determining time within which an action may be instituted, or when an action may be barred by a statute of limitation. *Schaefer v. Mayor of Athens*, 120 Ga. App. 301, 170 S.E.2d 339 (1969).

Service of uninsured motorist carrier within five business days after the date of filing of the complaint in an action for personal injuries related back to the date of filing as a matter of law for statute of limitation purposes. *Williams v. Colonial Ins. Co.*, 199 Ga. App. 760, 406 S.E.2d 99 (1991).

Time prescribed by § 5-6-43 computed hereunder. — Subsection (a) of Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6) applies to computation of time prescribed by Ga. L. 1968, p. 1072, § 6 (see now O.C.G.A. § 5-6-43), providing for transmittal of record to appellate court by trial court clerk within five days after filing of transcript of evidence. *Zeeman Mfg. Co. v. L.R. Sams Co.*, 123 Ga. App. 99, 179 S.E.2d 552 (1970).

When Sunday is last day to file pleading. — When the last day for filing a petition for a writ of certiorari falls on a Sunday, the appellant has until Monday to file the petition. *Salter v. City of Thomaston*, 200 Ga. App. 536, 409 S.E.2d 88 (1991).

Period relating to insurance policy. — Ten-day notice period required for cancellation of an insurance policy is governed by O.C.G.A. § 1-3-1 for computation of time rather than by O.C.G.A.

Computation of Time (Cont'd)

§ 9-11-6. *Southern Trust Ins. Co. v. First Fed. Sav. & Loan Ass'n*, 168 Ga. App. 899, 310 S.E.2d 712 (1983).

Extension of Time

Subsections (b) and (d) provide flexibility in filing times. — O.C.G.A. § 9-11-56(c), relating to affidavits in support of summary judgments, requires that only supporting material which is “on file” at least 30 days before the hearing shall be considered for the movant and subsections (b) and (d) of O.C.G.A. § 9-11-6 provide flexibility by authorizing the trial judge, or the parties by stipulation, to extend the filing times. *Porter Coatings v. Stein Steel & Supply Co.*, 247 Ga. 631, 278 S.E.2d 377 (1981).

Subsection (b) not applicable to periods of time fixed by other statutes. — Subsection (b) of this section does not apply to periods of time which are definitely fixed by statute, such as time for filing notice of appeal. *Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos.*, 116 Ga. App. 503, 157 S.E.2d 767 (1967).

Subsection (b) of this section applies only to an act required or allowed to be done by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), a notice given thereunder, or an order of the court, and does not apply to periods of time which are definitely fixed by other statutes. *Wilson v. City of Waycross*, 130 Ga. App. 253, 203 S.E.2d 301 (1973); *Miller v. Georgia Real Estate Comm'n*, 136 Ga. App. 718, 222 S.E.2d 183 (1975).

Granting of extensions of time, as permitted under certain circumstances by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) does not apply to periods of time which are definitely fixed by other statutes. *McClure v. Department of Transp.*, 140 Ga. App. 564, 231 S.E.2d 532 (1976).

Because the time for filing a petition for judicial appraisal is set by O.C.G.A. § 14-2-1330, subsection (b) of O.C.G.A. § 9-11-6 did not apply to permit a trial court to grant an extension of time before the commencement of such a legal action; thus, when a corporation failed to commence the proceeding within the statutory 60-day period, the court did not have

subject matter jurisdiction to reach the merits of the petition. *Riddle-Bradley, Inc. v. Riddle*, 217 Ga. App. 725, 459 S.E.2d 576 (1995).

Response to discovery requests. — Extension of time to respond to plaintiff's motions for summary judgment, sanctions, and discovery requests was upheld because trial judges have broad discretion in controlling discovery and the appellate courts will not interfere with a trial court's exercise of that discretion in the absence of abuse. *Butler v. Household Mortg. Servs., Inc.*, 244 Ga. App. 353, 535 S.E.2d 518 (2000).

Appeal from administrative agency not covered. — Subsection (b) of this section may not be utilized to obtain an extension which would allow the late filing of an appeal to the superior court from an administrative agency after extension of a specified time. *Miller v. Georgia Real Estate Comm'n*, 136 Ga. App. 718, 222 S.E.2d 183 (1975).

Judicial discretion to extend time. — Subsection (b) of this section gives the trial court wide discretionary authority to enlarge the time within which an act may be done, but the discretion to be exercised is a judicial discretion, not an unrestrained one. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

In a summary judgment action, while O.C.G.A. § 9-11-6(b) permitted late service of affidavits in support of a motion, in giving such permission, the trial court was not required to make a written finding of excusable neglect; accordingly, the court was not required to state the court's basis for finding excusable neglect. *Green v. Bd. of Dirs. of Park Cliff Unit Owners Ass'n*, 279 Ga. App. 567, 631 S.E.2d 769 (2006).

Trial court did not err in denying the motion for an extension of time to answer the complaint because the defendants agreed to a waiver of service yet still filed the answer late, the motion for an extension was made after the time for filing an answer had expired, and a judicial extension of the statutory time for filing the answer, in essence, would have allowed a circumvention of the default status of the action. *Mecca Constr., Inc. v. Maestro Invs., LLC*, 320 Ga. App. 34, 739 S.E.2d 51 (2013).

Failure to move to reopen within 30 days. — O.C.G.A. § 9-11-6 is inapplicable when the plaintiffs did not move to reopen a case within 30 days of entry of the judgment and although the court had discretion to act on the motion, the case was no longer pending at the time the court acted on the motion. *Gabel v. Revels*, 203 Ga. App. 131, 416 S.E.2d 103 (1992).

Judgment obtained against a deceased defendant is void, and the trial court does not err in vacating the judgment, setting the judgment aside, and dismissing the action, when no party has been substituted since the suggestion of death and no reason has been shown that the failure to act was the result of excusable neglect so as to allow an extension of time. *Franklin v. Collins*, 167 Ga. App. 596, 307 S.E.2d 66 (1983).

In order to obtain enlargement of time within which to do an act, request for enlargement must be made before the expiration of the period originally prescribed, or as extended by previous order, and if such request is made after expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect. *Wall v. Citizens & S. Bank*, 145 Ga. App. 76, 243 S.E.2d 271 (1978).

Private agreement between counsel to extend time to file pleadings is not binding on the court, except when a written stipulation by counsel is filed in the case. *Minnesota Mut. Life Ins. Co. v. Love*, 120 Ga. App. 502, 171 S.E.2d 361 (1969); *Peterson v. American Int'l Life Assurance Co.*, 203 Ga. App. 745, 417 S.E.2d 402, cert. denied, 203 Ga. App. 907, 417 S.E.2d 402 (1992).

Private agreement between counsel extending time to file pleadings is not binding except when in compliance with O.C.G.A. § 9-11-6 and the agreement is filed with the court. *Ewing v. Johnston*, 175 Ga. App. 760, 334 S.E.2d 703 (1985); *Fadum v. Liakos*, 186 Ga. App. 556, 367 S.E.2d 843, cert. denied, 186 Ga. App. 917, 367 S.E.2d 843 (1988).

Defendant was in default for failure to timely answer a complaint, even if there was an agreement to extend the time to answer during settlement negotiations, since the defendant failed to comply with

the requirements of subsection (b) of O.C.G.A. § 9-11-6 for extending the time to answer. *Roberson v. Gnann*, 235 Ga. App. 112, 508 S.E.2d 480 (1998).

Burden of obtaining order or stipulation. — When counsel for the defendant knew that the time for filing defensive pleadings had expired, but believed that the plaintiff had agreed to extend the time for filing an answer, the burden was upon counsel to obtain the proper order or stipulation. *Minnesota Mut. Life Ins. Co. v. Love*, 120 Ga. App. 502, 171 S.E.2d 361 (1969).

Extension of time to answer request for admissions. — Trial judge has authority under subsection (b) of Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6) to grant an extension of time for filing answers to request for admissions of fact, if the request is within time allowed under Ga. L. 1972, p. 510, § 9 (see now O.C.G.A. § 9-11-36(a)) for such filing, with or without motion; if such time has expired, there must be a motion to allow late filing. *National Bank v. Great S. Bus. Enterprises, Inc.*, 130 Ga. App. 221, 202 S.E.2d 848 (1973).

While a trial judge has authority to grant extensions of time for filing a response after the time for answering a request for admissions has expired, there must be a motion to allow the late filing under subsection (b) of Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6), or a motion for withdrawal of the admissions under Ga. L. 1972, p. 510, § 9 (see now O.C.G.A. § 9-11-36(b)). *Custom Farm Servs., Inc. v. Faulk*, 130 Ga. App. 583, 203 S.E.2d 912 (1974).

Excusable neglect. — That defendant's original counsel was confused as to the rule in Georgia for filing an answer to a suit did not constitute excusable neglect as a matter of law. *Barone v. McRae & Holloway, P.C.*, 179 Ga. App. 812, 348 S.E.2d 320 (1986).

"Press of business" does not constitute excusable neglect which would justify the untimely filing of defensive pleadings. *Labat v. Bank of Coweta*, 218 Ga. App. 187, 460 S.E.2d 831 (1995).

Pursuant to O.C.G.A. § 9-11-36(b), a trial court properly granted a bank a one-day extension to respond to a request

Extension of Time (Cont'd)

to admit after the bank served the bank's response one day late because the trial court found excusable neglect based on the bank's counsel's mistaken belief that the opposing party's counsel had granted a one-day extension in which to respond. 131 Ralph McGill Blvd., LLC v. First Intercontinental Bank, 305 Ga. App. 493, 699 S.E.2d 823 (2010).

Error to deny motion to dismiss absent showing of excusable neglect.

— When there was no evidence from which the trial court could find excusable neglect as a matter of fact and, as a matter of law, the plaintiff's explanation that counsel was confused as to the law in Georgia regarding substitution of an executor of a decedent's estate in place of a deceased defendant did not constitute excusable neglect, the trial court abused the court's discretion in denying the executor's motion to dismiss the plaintiff's suit for failure to seek substitution of parties within the 180-day limitation period in O.C.G.A. § 9-11-25(a)(1). *King v. Green*, 189 Ga. App. 105, 375 S.E.2d 53, cert. denied, 189 Ga. App. 912, 375 S.E.2d 53 (1988).

Expiration of Term

As to background of subsection (c) of this section, see *Union Circulation Co. v. Trust Co. Bank*, 143 Ga. App. 715, 240 S.E.2d 100 (1977), rev'd on other grounds, 241 Ga. 343, 245 S.E.2d 297 (1978).

Amendment or revocation of interlocutory ruling. — Rule against amending or revoking a judgment after expiration of term in which the judgment was entered has no application to interlocutory rulings, so long as the case continues from term to term, until final judgment. *Union Circulation Co. v. Trust Co. Bank*, 143 Ga. App. 715, 240 S.E.2d 100 (1977), rev'd on other grounds, 241 Ga. 343, 245 S.E.2d 297 (1978).

Motions and Affidavits**1. In General**

Citation for contempt not covered by subsection (d). — Subsection (d) of

this section applies to written motions in a pending case and has no application to a citation for contempt, which is an independent proceeding authorized by law. *Gibson v. Gibson*, 234 Ga. 528, 216 S.E.2d 824 (1975).

Purpose of subsection (d). — Purpose of subsection (d) of this section is to prevent a party from being surprised on the day of hearing by an affidavit that the party is not in a position to answer. *Fairington, Inc. v. Yeargin Constr. Co.*, 144 Ga. App. 491, 241 S.E.2d 608 (1978); *Bailey v. Dunn*, 158 Ga. App. 347, 280 S.E.2d 388 (1981).

Purpose of subsection (d) of this section is to provide parties with sufficient notice to prepare a response to a motion, and a postponement granted by the trial court serves that purpose. *Southwest Ga. Prod. Credit Ass'n v. Wainwright*, 241 Ga. 355, 245 S.E.2d 306 (1978).

Opposing affidavits. — Right of the court to set another date for the hearing affects only the five-day rule which is found in the first sentence of subsection (d) of O.C.G.A. § 9-11-6. The last sentence of the same subsection grants an opposing party the right to file opposing affidavits up to one day before the hearing. The court cannot deny an opposing party the party's statutory right to file opposing affidavits up to one day before the scheduled hearing. *Operation Rescue v. City of Atlanta*, 259 Ga. 676, 386 S.E.2d 126 (1989).

Time for objection to affidavit. — There is no requirement that the party moving for a summary judgment object to the opposing affidavits prior to the time when the affidavits will actually be considered, even when the affidavits were filed before the statutory deadline. *Mitchell v. Haygood's Hauling & Grading, Inc.*, 194 Ga. App. 671, 391 S.E.2d 481 (1990).

Notice of hearing on motion. — Publication in an official county organ of notice of the date of hearing on a motion was not sufficient because notice of a hearing on a motion is required to be served. *TMS Ins. Agency, Inc. v. Galloway*, 205 Ga. App. 896, 424 S.E.2d 71 (1992); *King v. Board of Regents*, 215 Ga. App. 570, 451 S.E.2d 482 (1994); *Edens v. O'Connor*, 238 Ga. App. 252, 519 S.E.2d 691 (1999).

When a trial court indicated that the court sent a notice of a combined rescheduled hearing on a construction manager's motion for summary judgment and a hearing on the issue of unliquidated damages to a condominium owner, it was presumed that such notice was sent and received in compliance with O.C.G.A. §§ 9-11-5(b) and 9-11-6(d), and the owner's mere contention that the owner did not receive notice of the hearing was not controlling and did not satisfy the owner's burden of showing that notice was in fact not received; accordingly, the owner's claim that the owner did not appear at the hearing because notice was insufficient lacked merit, due process was met, and the judgment entered from the hearing was affirmed. *Blue Stone Lofts, LLC v. D'Amelio*, 268 Ga. App. 355, 601 S.E.2d 719 (2004).

In a suit for breach of a promissory note and related guaranties, while the guarantors were not properly served with the rule nisi order setting the April 15, 2014 hearing, the guarantors learned of the hearing on April 10, 2014, and the lack of notice, thus, did not prevent the guarantors' counsel from preparing for or appearing at the April 15 hearing nor was there any evidence that the guarantors' were deprived of the guarantors' right under O.C.G.A. § 9-11-6(d) to serve affidavits opposing the motion as late. *MJL Props. v. Cmty. & S. Bank*, 330 Ga. App. 524, 768 S.E.2d 111 (2015).

Notice of trial. — Denial of motion to set aside a default judgment against a corporation was not an abuse of discretion as the trial was properly noticed by publication of the trial calendar in the county's legal gazette; publication of a court calendar in the county's legal organ of record was sufficient notice to the parties to appear. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Insufficient evidence that parties properly served with notice of summary judgment hearing. — Summary judgment order was vacated because the record contained insufficient evidence upon which the court of appeals could base a decision; the record contained no rule nisi or other evidence indicating that the parties were properly served with notice of the summary judgment hearing

date pursuant to O.C.G.A. §§ 9-11-5(b) and 9-11-6(d), and there was no indication in the record that a transport company actually received notice, although the company's notice of appeal asked the trial court clerk to omit nothing from the record on appeal. *Sprint Transp. Group, Inc. v. China Shipping NA Agency, Inc.*, 313 Ga. App. 454, 721 S.E.2d 659 (2011).

Motion for continuance may be heard ex parte under subsection (d) of this section. *Piper v. Piper*, 139 Ga. App. 19, 227 S.E.2d 842 (1976).

Subsection (d) provides a minimum of five days between service and hearing of any motion, unless a different period is fixed by order of court. *Burger Chef Sys. v. Newton*, 126 Ga. App. 636, 191 S.E.2d 479 (1972) (see now O.C.G.A. § 9-11-6).

Affidavit served on day of hearing. — Affidavit which shows on the affidavit's face that the affidavit was served on the day of the hearing cannot be considered as evidence on the hearing unless accompanied by something in the record, such as an order of court, showing that the court has exercised the court's discretion and allowed the affidavit to be served. *Malone v. Ottinger*, 118 Ga. App. 778, 165 S.E.2d 660 (1968).

Failure to give five-day notice required by subsection (d) of this section, absent order by the court, is fatal to intervention. *Osteen v. GECC*, 137 Ga. App. 546, 224 S.E.2d 453 (1976).

Five-day rule not absolute. — Five-day service rule of subsection (d) of this section is not a hard and fast one. *Burger Chef Sys. v. Newton*, 126 Ga. App. 636, 191 S.E.2d 479 (1972).

Affidavit served eight months before trial court's decision gave sufficient notice. — On a lessor's motion for summary judgment on a lease and guaranty, because neither party requested a hearing on the lessor's motion and no hearing was held, the 30-day period for filing the lessor's counsel's affidavit in O.C.G.A. § 9-11-56(c) did not apply. The requirement in O.C.G.A. § 9-11-6(d) that the affidavit be served with the motion was to ensure adequate notice; in this case, the affidavit was filed eight months prior to the trial court's decision. *Triple T-Bar, LLC v. DDR Southeast Springfield*,

Motions and Affidavits (Cont'd)**1. In General** (Cont'd)

LLC, 330 Ga. App. 847, 769 S.E.2d 586 (2015).

Untimely filing of affidavits in response. — Married couple who brought a professional malpractice suit against a hospital authority and a physical therapist did not timely respond to renewed motions to dismiss, but waited almost a year to file the couple's response. Because the response was patently untimely under Ga. Unif. Super. Ct. R. 6.2 and without leave of court to be filed late, the trial court did not abuse the court's discretion when the court struck the response as well as an expert's new affidavit under O.C.G.A. § 9-11-6(d). *Cogland v. Hosp. Auth.*, 290 Ga. App. 73, 658 S.E.2d 769 (2008).

Consideration of untimely affidavits discretionary. — Court is vested with discretion whether to consider affidavits untimely served. *Strickland v. DeKalb Hosp. Auth.*, 197 Ga. App. 63, 397 S.E.2d 576 (1990).

Although the trial court is vested with discretion to consider affidavits not timely filed, the refusal to exercise that discretion is not error. *Trend-Pak of Atlanta, Inc. v. Arbor Commercial Div., Inc.*, 197 Ga. App. 137, 397 S.E.2d 592 (1990).

Showing of excusable neglect under statute not required in malpractice case. — O.C.G.A. § 9-11-9.1(e) expressly allowed the trial court, in the court's discretion, to extend the time for filing amendments to defective affidavits and granted the court the authority to consider an untimely filed amended or supplemental affidavit. Thus, in a medical malpractice case, the trial court erred by finding that in the absence of a showing of excusable neglect under O.C.G.A. § 9-11-6(b), the court had no discretion to allow a patient to file a late-filed amended affidavit. *Schofill v. Phoebe Putney Health Sys., Inc.*, 315 Ga. App. 817, 728 S.E.2d 331 (2012).

Simultaneous filing requirement not absolute. — Requirement of simultaneous filing of motion and supporting affidavits is not absolute, but this section would, in a proper case authorize the trial

court to extend the period for filing the movant's affidavits. *Wall v. Citizens & S. Bank*, 145 Ga. App. 76, 243 S.E.2d 271 (1978), overruled on other grounds, *McKeever v. State*, 189 Ga. App. 445, 375 S.E.2d 899 (1988).

Second affidavit properly considered. — In a breach of contract action between a business and an advertiser, while the best evidence rule required the advertiser to produce the first affidavit provided by the advertiser's senior director of business affairs, and the trial court erred in considering the first affidavit without requiring the affidavit's production, given that the second affidavit showed that the parties entered into the contract at issue, which included the forum selection clause, the trial court properly considered the affidavit to that effect to support the advertiser's motion to dismiss on personal jurisdiction grounds. Consequently, when this second affidavit was not filed in violation of O.C.G.A. § 9-11-6(d), the trial court properly considered the second affidavit. *Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 660 S.E.2d 797 (2008).

Requirement of simultaneous filing in subsection (d) of O.C.G.A. § 9-11-6 is not absolute, and the trial court is authorized to extend the period for filing the movant's affidavits. *Riberglass, Inc. v. ECO Chem. Specialties, Inc.*, 194 Ga. App. 417, 390 S.E.2d 616 (1990).

Late affidavit improperly considered absent extension. — Trial court improperly considered a late affidavit which was not filed with a motion when there was nothing in the record to show that the movant requested an extension of time in which to serve and file the affidavit or a finding of excusable neglect in failing to serve the affidavit with the notice of the motion. *Big Canoe Corp. v. Williamson*, 168 Ga. App. 179, 308 S.E.2d 440 (1983).

Error to consider late-filed material in support of motion absent extension. — Since movant elected to rely on certain documentary evidence in support of the movant's motion for summary judgment but neither filed the motion 30 days prior to the hearing nor requested an enlargement of time within which to make

such a filing, the trial court erred in considering this material in support of the motion for summary judgment. *Benton Bros. Ford Co. v. Cotton States Mut. Ins. Co.*, 157 Ga. App. 448, 278 S.E.2d 40 (1981).

When notice of motion to intervene was personally served two days prior to confirmation hearing, the plaintiff's objection to such motion for lack of proper notice was well taken since the motion to intervene was not timely; such motion could not, in view of the objection, be taken up until a day subsequent to the confirmation hearing date. *Greer v. Federal Land Bank*, 158 Ga. App. 60, 279 S.E.2d 308 (1981).

Motion in limine. — Five-day service rule of subsection (d) of O.C.G.A. § 9-11-6 is not applicable to motions in limine. *Walton v. Datry*, 185 Ga. App. 88, 363 S.E.2d 295, cert. denied, 185 Ga. App. 911, 363 S.E.2d 295 (1987).

Discretion to consider affidavits not timely filed. — While the trial court is vested with discretion to consider affidavits not timely filed, the refusal to exercise that discretion is not error. *Empire Shoe Co. v. Nico Indus., Inc.*, 197 Ga. App. 411, 398 S.E.2d 440 (1990).

Trial court's denial of a buyer's request to amend a fee petition was not an abuse of discretion; the buyer failed to request to supplement the evidence at the fee petition hearing and only requested permission to submit additional affidavits after the petition was denied. *Scoggins v. Kia Motors Am., Inc.*, 272 Ga. App. 495, 612 S.E.2d 823 (2005).

In a mandamus action wherein a principal sued a school superintendent seeking reinstatement to a former position, the trial court did not err by considering the principal's affidavit filed late in support of the principal's petition for mandamus, showing that the principal was earning less in an assignment as a math teacher because of a reduction in working hours, as it was within the trial court's discretion to consider opposing affidavits not served within statutory time limits. *Hall v. Nelson*, 282 Ga. 441, 651 S.E.2d 72 (2007).

Finding of excusable neglect did not constitute abuse of discretion. — When the trial court denied a motion by

the defendants for permission to serve late responses to certain requests for admissions filed by the plaintiff and subsequently awarded summary judgment to the plaintiff based on the admissions created by the defendants' failure to respond to the requests in a timely manner, the defendants' only reason for the delay in submitting the responses being that the defendants had been without legal representation at the time the requests for admission were served upon the defendants, and had neither knowledge of the time limitation nor that the defendants' failure to respond would be considered an admission of the requests, the trial court did not abuse the court's discretion in concluding that this assertion failed to constitute a showing of excusable neglect. *Haynes v. Hight*, 190 Ga. App. 497, 379 S.E.2d 21 (1989).

2. Summary Judgment Proceedings

Purpose of section. — O.C.G.A. § 9-11-6 ensures that the party against whom summary judgment is sought will be provided with a full and final opportunity to meet and attempt to controvert assertions against that party. *Bailey v. Dunn*, 158 Ga. App. 347, 280 S.E.2d 388 (1981).

Thirty-day pre-hearing time period implements due process. — Statutory requisite that, unless waived or extended, supporting material must be on file at least 30 days before a summary judgment hearing is an implementation of the fundamental principle of due process. *Bonds v. John Wieland Homes, Inc.*, 177 Ga. App. 254, 339 S.E.2d 318 (1985).

Waiver of thirty-day pre-hearing time period. — Affidavit relied on in support of a motion for summary judgment must be on file for at least 30 days prior to the hearing. This strict requirement may be waived by the opposing party's acquiescence in the use of the untimely materials, or if the movant seeks and obtains an order from the trial court under subsection (b) of O.C.G.A. § 9-11-6 extending the time for filing. *Gunter v. Hamilton Bank*, 201 Ga. App. 379, 411 S.E.2d 115 (1991).

While trial judges may exercise judicial discretion to permit the late filing of affi-

Motions and Affidavits (Cont'd)**2. Summary Judgment****Proceedings (Cont'd)**

davits, the party seeking to file affidavits late must make a motion and obtain an extension from the court pursuant to subsection (b) of O.C.G.A. § 9-11-6. *Hershiser v. Yorkshire Condominium Ass'n*, 201 Ga. App. 185, 410 S.E.2d 455 (1991); *Pierce v. Wendy's Int'l, Inc.*, 233 Ga. App. 227, 504 S.E.2d 14 (1998).

Application of subsection (d) to affidavits supporting summary judgment motion. — Affidavits in support of a motion for summary judgment, not served in compliance with subsection (d) of this section, are not properly before the court considering such motion. *Fairington, Inc. v. Yeargin Constr. Co.*, 144 Ga. App. 491, 241 S.E.2d 608 (1978).

Construction of subsection (d) and § 9-11-56 together in determining timeliness of affidavits. — In determining whether affidavits in support of a motion for summary judgment are properly before the court considering such motion, Ga. L. 1967, p. 226, §§ 5, 6 and 25 (see now O.C.G.A. §§ 9-11-6(d) and 9-11-56(e)) must be read together. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

To determine whether affidavits in support of a motion for summary judgment are properly before the court considering the motion, O.C.G.A. §§ 9-11-6 and 9-11-56 must be read together. *Bailey v. Dunn*, 158 Ga. App. 347, 280 S.E.2d 388 (1981); *Citizens & S. Nat'l Bank v. Dorsey*, 159 Ga. App. 784, 285 S.E.2d 242 (1981).

Service of affidavits with motion for summary judgment. — Provision of subsection (d) of this section that when a motion is supported by an affidavit, affidavit shall be served with the motion applies to affidavits in support of a motion for summary judgment. *Wall v. Citizens & S. Bank*, 145 Ga. App. 76, 243 S.E.2d 271 (1978), overruled on other grounds, *McKeever v. State*, 189 Ga. App. 445, 375 S.E.2d 899 (1988).

Ga. L. 1967, p. 226, §§ 5, 6 and 25 (see now O.C.G.A. §§ 9-11-6(d) and 9-11-56(e)) require affidavits in support of a motion for summary judgment to be served with

the motion, unless a movant seeks and obtains an extension from the court pursuant to subsection (b), and any such extension should also ensure that the party opposing the motion will have 30 days within which to respond. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

Trial court did not err in denying motions to strike the amended affidavits of a bank employee on the ground that the affidavits were not filed contemporaneously with the bank's motions for summary judgment because the trial court extended the time for filing the amended affidavits pursuant to O.C.G.A. § 9-11-6(d); the bank explained the bank's reasons for filing the amended affidavits. *Shropshire v. Alostair Bank of Commerce*, 314 Ga. App. 310, 724 S.E.2d 33 (2012).

Burden on movant to invoke court's discretion. — When affidavit made in support of summary judgment motion is not served with the motion, the burden is on the movant, not the opposing party, to invoke the trial court's discretion with regard to late filing, and an objection by the opposing party at a hearing instead of by motions is not a waiver of that objection. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

Failure to request extension or show excusable neglect. — When no request is made prior to making a motion for summary judgment for enlargement of the time to file and serve affidavits, nor a finding of excusable neglect in failing to serve the affidavits with notice of the motion for summary judgment, the movant for summary judgment has failed to proceed in a manner that would permit the trial court to exercise the court's discretion. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

Affidavits not timely served. — Even though subsection (d) of O.C.G.A. § 9-11-6 and O.C.G.A. § 9-11-56(c) require an opposing affidavit to be served at least one day prior to a summary judgment hearing, the trial court is vested with discretion to consider affidavits not so served. *Liberty Nat'l Life Ins. Co. v. Houk*, 248 Ga. 111, 281 S.E.2d 583 (1981).

Untimely secondary affidavit voided summary judgment. — Trial

court improperly relied upon the defendant's second affidavit in granting the defendant's motion for summary judgment when the second affidavit, not filed in a timely fashion, contained new averments specifically relied upon by the trial court. *Corry v. Robinson*, 207 Ga. App. 167, 427 S.E.2d 507 (1993).

Differentiation between response to summary judgment motion and supporting affidavit not required. — In determining whether to strike an affidavit as untimely filed, the trial court is not required to differentiate between a response to a summary judgment and an affidavit filed in support of such a motion, as subsection (d) of O.C.G.A. § 9-11-6 provides that opposing affidavits must be served no later than one day before the date of the hearing and O.C.G.A. § 9-11-5(d) provides that all papers served upon a party shall be filed with the court within the time allowed for service. *Crucet v. Bovis, Kyle & Burch*, 180 Ga. App. 765, 350 S.E.2d 322 (1986).

Dismissal of counter-affidavit proper when filing untimely. — Trial court did not abuse the court's discretion in ruling that a counter-affidavit filed in opposition to a motion for summary judgment was untimely when counsel had notice of a hearing as originally scheduled for over a month prior to that hearing yet had not procured counter-affidavits to those filed by the movant, a week's continuance had been granted with counsel having been expressly advised that the summary judgment statute would be followed closely, and the counter-affidavit was not mailed nor otherwise served until the very day of the hearing as rescheduled. *Saville v. Purvis*, 172 Ga. App. 116, 322 S.E.2d 321 (1984).

Court need not consider motion supported by untimely affidavits. — Trial court's "failure to rule" on a motion to consider additional evidence in opposition to a grant of summary judgment is not error when the affidavits to be filed would be untimely. *Splash Splash Waterslides, Inc. v. Cherokee Ins. Co.*, 167 Ga. App. 589, 307 S.E.2d 107 (1983).

Affidavits supplied before court's decision considered. — When the trial court made no decision at the summary

judgment hearing but took the matter under advisement, and it was undisputed that the defendant supplied the supporting affidavits before the trial court's decision on the matter, the trial court was authorized to consider the evidence submitted by the defendant. *Howell Mill/Collier Assocs. v. Gonzales*, 186 Ga. App. 909, 368 S.E.2d 831 (1988).

Objection to the timeliness of an affidavit submitted in response to a motion for summary judgment will be deemed waived unless the objection is itself timely raised in the trial court. *Pruitt v. Tyler*, 181 Ga. App. 174, 351 S.E.2d 539 (1986).

Waiver for failure to object. — When the plaintiff failed to raise an objection below to the defendant's affidavit on the ground that the objection was not timely filed and served, the plaintiff's contentions in that regard will not be considered on appeal. *Mahaffey v. First Nat'l Bank*, 157 Ga. App. 844, 278 S.E.2d 729 (1981).

Any error arising from a failure to file timely an affidavit in support of a motion for summary judgment is waived by the adverse party's failure to object to the filing of the affidavit in question in the trial court. *Southeastern Hose, Inc. v. Prudential Ins. Co. of Am.*, 167 Ga. App. 356, 306 S.E.2d 308 (1983).

Failure of a maker and guarantors to obtain rulings on their motions to strike the amended affidavits of a bank employee on the ground that the affidavits were not filed contemporaneously with the bank's motions for summary judgment resulted in a waiver of appellate review of the issue. *Shropshire v. Alostair Bank of Commerce*, 314 Ga. App. 310, 724 S.E.2d 33 (2012).

Mere reference to local court rules is not sufficient notice. — Subsection (d) of O.C.G.A. § 9-11-6, O.C.G.A. § 9-11-56, and the spirit of the summary judgment procedure contemplate that the respondent shall have actual notice of a day upon which the matter will be heard and judgment rendered upon the record then existing. A mere reference to the local court rules sent by the attorney does not give such actual notice and opportunity to be heard. *Ferguson v. Miller*, 160 Ga. App. 436, 287 S.E.2d 363 (1981).

Motions and Affidavits (Cont'd)**2. Summary Judgment****Proceedings (Cont'd)**

Discretion as to late affidavits. — Strict requirement that affidavits in support of motions for summary judgment shall be served with the motion is not absolute, but trial judges may exercise judicial discretion to permit the late filing of affidavits. *Citizens & S. Nat'l Bank v. Dorsey*, 159 Ga. App. 784, 285 S.E.2d 242 (1981).

Record must show court allowed late filing. — Affidavit made in opposition to motion for summary judgment not served at least one day before the hearing is barred by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) from consideration as evidence unless the record discloses the trial court, in the exercise of the court's discretion, has allowed the affidavit to be served and considered. *Talley v. City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264 (1981); *Brown v. Rowe*, 178 Ga. App. 575, 344 S.E.2d 245 (1986).

On a motion for summary judgment in a wrongful death against an adult care home, the trial court erred in disregarding supplemental briefing by the parties; the trial court authorized the supplemental briefing itself and the opposing party had not objected. *Blake v. KES, Inc.*, 329 Ga. App. 742, 766 S.E.2d 138 (2014).

Court's error in conducting hearing in absence of proper service of notice of the hearing, on the motion for summary judgment, on plaintiff was not harmless since the plaintiff was deprived of the plaintiff's statutory right to file opposing affidavits up to one day before the hearing. *Goodwin v. Richmond*, 182 Ga. App. 745, 356 S.E.2d 888 (1987).

Failure to give notice of hearing. — In a personal injury case, the trial court erred in granting partial summary judgment to the property owner because the court conducted a hearing on the motion for summary judgment despite the court's failure to give written notice to the parties of the hearing date as required by O.C.G.A. § 9-11-6(d). *Cofield v. Halpern Enters.*, 316 Ga. App. 582, 730 S.E.2d 63 (2012).

Response to motion for summary judgment filed on date of hearing is

timely, notwithstanding the language in subsection (d) of this section requiring all papers after the complaint to be filed within the time allowed for service. *Gross v. Pyrofax Gas Corp.*, 151 Ga. App. 130, 259 S.E.2d 137 (1979); *Martin v. Newman*, 162 Ga. App. 725, 293 S.E.2d 18 (1982).

Time for service of affidavits opposing summary judgment. — Ga. L. 1967, p. 226, §§ 5, 6 and 25 (see now O.C.G.A. §§ 9-11-6(d) and 9-11-56(c)) should be read together so as to vest in the court discretion to permit opposing affidavits to a motion for summary judgment to be served at some other time than that provided in Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56). *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Generally, affidavits must be served on the opposing parties, and affidavits made in opposition to a motion for summary judgment not served at least one day before the hearing are barred. *Johnson v. Aetna Fin., Inc.*, 139 Ga. App. 452, 228 S.E.2d 299 (1976).

Party opposing motion for summary judgment has until the day prior to the hearing to serve opposing affidavits, unless the trial court in the court's discretion permits the affidavits to be served at a later date. *Gross v. Pyrofax Gas Corp.*, 151 Ga. App. 130, 259 S.E.2d 137 (1979).

Trial court, in the court's discretion, can consider affidavit filed on day of the hearing. *Leagan v. Levine*, 158 Ga. App. 293, 279 S.E.2d 741 (1981).

Trial court's decision to consider affidavits not reversed absent abuse of discretion. — Affidavit made in opposition to a motion for summary judgment should, under O.C.G.A. § 9-11-56(c) and subsection (d) of O.C.G.A. § 9-11-6, be served on the opposite party at least one day prior to hearing the motion; the court has discretion to consider affidavits not so filed, however, and the court's ruling on this issue will not be reversed unless there is an abuse of discretion. *Liberty Nat'l Life Ins. Co. v. Houk*, 157 Ga. App. 540, 278 S.E.2d 120, aff'd, 248 Ga. 111, 281 S.E.2d 583 (1981).

Trial court cannot exercise the court's discretion under O.C.G.A. § 9-11-6 if no request is made for an extension of time within which to file and

serve affidavits prior to making a motion for summary judgment, and there is no finding of excusable neglect in failing to serve the affidavits with notice of the motion for summary judgment. *Bailey v. Dunn*, 158 Ga. App. 347, 280 S.E.2d 388 (1981).

Late-filed affidavit in opposition. — Affidavit made in opposition to a motion for summary judgment may be admitted without objection, the time of service may be waived, or the court may for some other reason find it in the interest of justice to consider the evidence. *Liberty Nat'l Life Ins. Co. v. Houk*, 157 Ga. App. 540, 278 S.E.2d 120, aff'd, 248 Ga. 111, 281 S.E.2d 583 (1981).

Borrowers received sufficient notice under O.C.G.A. § 9-11-6(d) of a summary judgment hearing because the borrowers' counsel received notice of a hearing on a lender's summary judgment motion in January 2005 and the summary judgment hearing was held on March 3, 2005. *Hawk v. DaimlerChrysler Servs. N. Am., LLC*, 275 Ga. App. 712, 621 S.E.2d 828 (2005).

When timely response to motion filed, oral argument erroneously denied. — Because the responding party timely responded to a summary judgment motion, pursuant to Ga. Unif. Super. Ct. R. 6.3, given the appellate court's construction of both O.C.G.A. §§ 1-3-1 and 9-11-6, the trial court erred in denying that party oral argument on the motion and in granting summary judgment to the movant. *Green v. Raw Deal, Inc.*, 290 Ga. App. 464, 659 S.E.2d 856 (2008).

Additional Time after Mailing

Rationale underlying subsection (e) of this section is to insure that a party is not unduly burdened by uncertainty of postal delivery. *Akins v. Magbee Bros. Lumber & Supply Co.*, 152 Ga. App. 904, 264 S.E.2d 334 (1980).

When three-day rule replaced by "rule of reason." — When and only when notice is effectuated by regular mail, and statutes prescribe that another method will satisfy the notice requirement,

three-day extension gives way to a "rule of reason" for which there is no sound argument to the contrary; however, when transmittal by ordinary mail is the prescribed method of giving notice, and statutes specify that such mailing (not certified or registered) will satisfy notice requirement, the fact that the legislature specified that such mailing alone is sufficient to satisfy the notice requirement is a sound argument to the contrary. *Favors v. Travelers Ins. Co.*, 150 Ga. App. 741, 258 S.E.2d 554 (1979); *DeLoach v. Georgia Firemen's Pension Fund*, 213 Ga. App. 202, 444 S.E.2d 137 (1994).

Subsection (e) of Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6) is not applicable to computations under former Code 1933, § 20-506 (see now O.C.G.A. § 13-1-11), relating to enforcement of obligations to pay attorney's fees on notes, etc. *Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851 (5th Cir. 1979).

Three-day rule applied. — Order granting summary judgment on the 32nd day after filing and service of a motion for summary judgment was premature, when the plaintiff had served the defendants with notice via regular mail and therefore had 33 days from the date of mailing to respond to the motion. *Pyramid Constr. Co. v. Star Mfg. Co.*, 195 Ga. App. 644, 394 S.E.2d 598 (1990).

When a habeas corpus petitioner cross-appealed the trial court's decision after the warden appealed it, the petitioner's cross-appeal was timely because it 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).

Because a party served the party's requests for admissions by mail, three days were added to the prescribed thirty-day response period pursuant to O.C.G.A. § 9-11-6(e). *Patel v. Columbia Nat'l Ins. Co.*, 315 Ga. App. 877, 729 S.E.2d 35 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 61B Am. Jur. 2d, Pleading, § 856 et seq. 74 Am. Jur. 2d, Time, § 12 et seq.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 23. 71 C.J.S., Pleading, § 167 et seq. 86 C.J.S., Time, §§ 4, 16.

ALR. — Interlocutory decree as subject to modification after term other than for correction of clerical errors, 169 ALR 121.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 ALR2d 1364.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

Validity of service of summons or complaint on Sunday or holiday, 63 ALR3d 423.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service: state cases, 77 ALR3d 841.

ARTICLE 3

PLEADINGS AND MOTIONS

Cross references. — Motions in civil actions, Uniform Superior Court Rules, Rule 6. Reply, Uniform State Court Rules, Rule 6.2. Commencement of proceedings in Juvenile Court, Uniform Rules for the Juvenile Courts of Georgia, Rules 4.1 —

4.7 and 5.1 — 5.3. Filing of petition in Juvenile Court proceedings, Uniform Rules for the Juvenile Courts of Georgia, Rules 6.1 — 6.9. Motions in probate court, Uniform Rules for the Probate Courts, Rule 6.

RESEARCH REFERENCES

Am. Jur. Trials. — Litigating Construction Liens, 53 Am. Jur. Trials 367.

ALR. — Libel and slander: reports of

pleadings as within privilege for reports of judicial proceedings, 20 ALR4th 576.

9-11-7. Pleadings allowed; form of motions.

(a) **Pleadings.** There shall be a complaint and an answer; a third-party complaint, if a person who is not an original party is summoned under Code Section 9-11-14; and a third-party answer, if a third-party complaint is served. There may be a reply to a counterclaim denominated as such and an answer to a cross-claim, if the answer contains a cross-claim. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) **Motions and other papers.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by this chapter.

(c) **Demurrers, pleas, etc., abolished.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used. (Ga. L. 1966, p. 609, § 7; Ga. L. 1967, p. 226, § 7.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 7, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For article discussing counterclaims and crossclaims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article surveying de-

velopments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981).

For note, "Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act," see 7 Ga. St. B.J. 385 (1971).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PLEADINGS

MOTIONS AND OTHER PAPERS

ABOLISHMENT OF DEMURRERS, ETC.

General Consideration

Cited in Zappa v. Allstate Ins. Co., 118 Ga. App. 235, 162 S.E.2d 911 (1968); Travelers Ins. Co. v. Johnson, 118 Ga. App. 616, 164 S.E.2d 926 (1968); Georgia R.R. & Banking Co. v. Frazer, 118 Ga. App. 810, 165 S.E.2d 607 (1968); Hall v. Rogers, 225 Ga. 57, 165 S.E.2d 829 (1969); GMAC v. Jackson, 119 Ga. App. 221, 116 S.E.2d 739 (1969); Addis v. First Kingston Corp., 225 Ga. 231, 167 S.E.2d 656 (1969); DeFee v. Kaley, 119 Ga. App. 538, 167 S.E.2d 758 (1969); Insurance Co. of N. Am. v. Dimaio, 120 Ga. App. 214, 170 S.E.2d 258 (1969); Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724 (1969); Southern Concrete Co. v. Carter Constr. Co., 121 Ga. App. 573, 174 S.E.2d 447 (1970); Goodman v. Kenney, 124 Ga. App. 709, 185 S.E.2d 632 (1971); Boardman v. Georgia R.R. Bank & Trust Co., 127 Ga. App. 63, 192 S.E.2d 390 (1972); Roberts v. Framer, 127 Ga. App. 237, 193 S.E.2d 216 (1972); Hancock v. Nashville Inv. Co., 128 Ga. App. 58, 195 S.E.2d 674 (1973); Humble Oil & Ref. Co. v. Fulcher, 128 Ga. App. 606, 197 S.E.2d 416 (1973); Loukes v. McCoy, 129 Ga. App.

167, 199 S.E.2d 125 (1973); A & D Barrel & Drum Co. v. Fuqua, 132 Ga. App. 827, 132 S.E.2d 272 (1974); Easterling v. Easterling, 231 Ga. 889, 204 S.E.2d 610 (1974); Irby v. Christian, 132 Ga. App. 796, 209 S.E.2d 245 (1974); Ogden Equip. Co. v. Talmadge Farms, Inc., 132 Ga. App. 834, 209 S.E.2d 260 (1974); Hayes v. Superior Leasing Corp., 136 Ga. App. 98, 220 S.E.2d 86 (1975); Wilbanks v. Wilbanks, 238 Ga. 660, 234 S.E.2d 915 (1977); Goforth v. Fogarty Van Lines, 143 Ga. App. 432, 238 S.E.2d 768 (1977); Prudential Timber & Farm Co. v. Collins, 144 Ga. App. 849, 243 S.E.2d 80 (1978); Hasty v. Randall, 152 Ga. App. 365, 262 S.E.2d 626 (1979); Jackson v. Bekele, 152 Ga. App. 417, 263 S.E.2d 225 (1979); Brown v. Quarles, 154 Ga. App. 350, 268 S.E.2d 403 (1980); Gaul v. Kennedy, 246 Ga. 290, 271 S.E.2d 196 (1980); Alex v. Parkway-Boulevard Corp., 157 Ga. App. 269, 277 S.E.2d 276 (1981); Hendricks v. Hubert, 158 Ga. App. 371, 280 S.E.2d 396 (1981); Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981); Davidson v. Walsh, 158 Ga. App. 845, 282 S.E.2d 366 (1981); Smith v. Mack, 161 Ga. App. 95, 289 S.E.2d 299 (1982); McCrary v.

General Consideration (Cont'd)

Poythress, 638 F.2d 1308 (5th Cir. 1981); Marsh v. Way, 255 Ga. 284, 336 S.E.2d 795 (1985); McKay v. Nally, 173 Ga. App. 372, 326 S.E.2d 560 (1985); Pettus v. Smith, 174 Ga. App. 587, 330 S.E.2d 735 (1985); Clements v. Toombs County Hosp. Auth., 175 Ga. App. 651, 334 S.E.2d 188 (1985); Mack v. Smith, 178 Ga. App. 652, 344 S.E.2d 474 (1986); King v. Plummer, 196 Ga. App. 711, 397 S.E.2d 5 (1990); Watkins v. M & M Clays, Inc., 199 Ga. App. 54, 404 S.E.2d 141 (1991); Cain v. Moore, 207 Ga. App. 726, 429 S.E.2d 135 (1993); Zohoury v. Zohouri, 218 Ga. App. 748, 463 S.E.2d 141 (1995); M & M Mobile Homes of Ga., Inc. v. Haralson, 233 Ga. App. 749, 505 S.E.2d 249 (1998); Brandon v. Newman, 243 Ga. App. 183, 532 S.E.2d 743 (2000); Fox v. City of Cumming, 289 Ga. App. 803, 658 S.E.2d 408 (2008); Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008); Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165 (2009); Clayton County v. Austin-Powell, 321 Ga. App. 12, 740 S.E.2d 831 (2013).

Pleadings

Response to defense raised in answer. — Plaintiff is not required to plead estoppel by replication to defeat the defense raised by the defendant in an answer. Harris v. First Nat'l Bank, 163 Ga. App. 49, 292 S.E.2d 725 (1982).

No responsive pleadings are required to an amendment. Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612 (1970).

Answer to amended complaint not required. — Construing the pertinent provisions of O.C.G.A. §§ 9-11-7, 9-11-8, 9-11-12, 9-11-15, and 9-11-21 in pari materia, it is clear that the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, authorizes the addition of parties, by order of the court, and that an “amended complaint” effecting such an addition does not require a responsive pleading, unless the trial court orders a reply thereto. Chan v. W-East Trading Corp., 199 Ga. App. 76, 403 S.E.2d 840 (1991); Hamelberg v. National Ass'n of Gov't Employees, 221 Ga. App. 337, 471 S.E.2d 283 (1996); Random Ac-

cess, Inc. v. Atlanta Datacom, Inc., 232 Ga. App. 269, 501 S.E.2d 610 (1998).

Amendment of admissions not a pleading. — Response to requests for admission is not a pleading as pleadings are defined as seven specific filings, including a complaint and an answer and case law distinguishes an amendment of a complaint from the withdrawal or amendment of admissions, which are governed by different statutory procedures and schemes. Brougham Casket & Vault Co., LLC v. DeLoach, 323 Ga. App. 701, 747 S.E.2d 707 (2013).

Deposition allowed after case is already in default is not generally considered a pleading. Hazzard v. Phillips, 249 Ga. 24, 287 S.E.2d 191 (1982).

Motions and Other Papers

Unreported calendar call does not constitute a “hearing or trial” in which oral motions to strike or dismiss can be received and considered. Woods v. State, 243 Ga. App. 195, 532 S.E.2d 747 (2000).

Application for contempt is a motion. — Since an application for contempt does not come within the definition of a pleading, it is necessarily a motion as defined in subsection (b) of this section. Hines v. Hines, 237 Ga. 755, 229 S.E.2d 744 (1976); Fields v. Fields, 240 Ga. 173, 240 S.E.2d 58 (1977).

Contempt action to enforce court-ordered child support payments is an independent proceeding that is ancillary to the divorce action and is not a new civil action requiring 30-days notice of hearing. Brown v. King, 266 Ga. 890, 472 S.E.2d 65 (1996).

Application for contempt was motion as defined in O.C.G.A. § 9-11-7(b) and was not a pleading. Black v. Mealor, 268 Ga. App. 612, 602 S.E.2d 325 (2004).

Probate court contempt motion under O.C.G.A. § 9-11-7(b) was not subject to the requirement of O.C.G.A. § 9-11-52 for a probate court to make findings of fact; and, even if it was, the ousted executor did not request such findings in advance of the hearing. Black v. Mealor, 268 Ga. App. 612, 602 S.E.2d 325 (2004).

Application for order for preliminary hearing may be made by motion.

Howland v. Weeks, 133 Ga. App. 843, 212 S.E.2d 487 (1975).

Findings and conclusions not required for motions. — Provisions of Ga. L. 1970, p. 170, § 1 (see now O.C.G.A. § 9-11-52) which require findings of fact and conclusions of law by the trial court are not applicable to motions. *Hines v. Hines*, 237 Ga. 755, 229 S.E.2d 744 (1976); *Fields v. Fields*, 240 Ga. 173, 240 S.E.2d 58 (1977); *Lupo v. Long*, 145 Ga. App. 876, 245 S.E.2d 73 (1978).

Motion for summary judgment may be made orally at hearing for temporary relief. *Royston v. Royston*, 236 Ga. 648, 225 S.E.2d 41 (1976).

Oral motion may not raise insufficiency of process or service. — Defense of insufficiency of process or service does not come within the scope of this section allowing oral motions at trial or hearing. *Petroleum Carrier Corp. v. Jones*, 127 Ga. App. 676, 194 S.E.2d 670 (1972) (see O.C.G.A. § 9-11-7).

Motion opposing motion not authorized. — There is no provision for motion opposing a motion, and a motion to dismiss a motion is unauthorized, though not expressly prohibited, the same purpose being accomplished by opposing the motion; hence, the court did not err in overruling a motion to dismiss the defendants' "motion to quash service, etc." *Howland v. Weeks*, 133 Ga. App. 843, 212 S.E.2d 487 (1975).

Civil action for damages not commenced by contempt application. — Application for contempt may not, standing alone, serve to commence a civil action for damages as it is not a complaint. *Opatut v. Guest Pond Club, Inc.*, 254 Ga. 258, 327 S.E.2d 487 (1985).

Oral motion to dismiss made during hearing before the answer was filed effectively presents the matter to the trial court. *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981).

Effect of default judgment. — Defendants were not precluded by operation of a default judgment against the defendants from arguing that no claim existed that would allow the plaintiff any recovery. *Spears v. Mack & Bernstein, P.C.*, 227 Ga. App. 743, 490 S.E.2d 463 (1997).

Demand for jury trial on damages issue. — Upon a review of the evidence

before the trial court, because neither of an individual's filed documents amounted to a "pleading" which placed damages in issue, neither document was in the nature of a formal answer, and neither actually disputed the amount of damages claimed, the trial court did not err in denying the individual a jury trial on the issue of damages; hence, the appeals court noted that to avoid doubt and confusion in the future, a defendant desiring a jury trial should file an answer specifically contesting damages and a demand for jury trial on the issue of damages, both clearly labeled as such. *Diaz v. Wills*, 286 Ga. App. 357, 649 S.E.2d 353 (2007).

Closure of hearing. — Motion for closure of a hearing to the public or press must be in writing, be served upon the opposing party, be filed with the clerk of the court, and be posted on the case docket for at least one 24 hour period in advance of the time when the motion will be heard. *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982).

Post-verdict oral request converted request for fees in counterclaim to motion. — In a civil suit involving the title of real property, a trial court erred by denying the prevailing parties' oral post-verdict request for an award of attorney fees under O.C.G.A. § 9-15-14(a) as such oral request converted the original request made in a counterclaim to a motion, and the opposing party had the opportunity to be heard and argue against the award. *Nesbit v. Nesbit*, 295 Ga. App. 763, 673 S.E.2d 272 (2009).

Failure to move to dismiss in custody case. — Although the defendants argued that the trial court in a custody case erred in failing to dismiss the action based on collateral estoppel, abatement, res judicata, and forum non conveniens, the record did not reflect that the defendants moved to dismiss the action based on these doctrines. *Wiepert v. Stover*, 298 Ga. App. 683, 680 S.E.2d 707 (2009), overruled on other grounds, *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013) (decided under former O.C.G.A. § 15-11-28).

Abolishment of Demurrers, etc.

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) abolished demurrers in

**Abolishment of Demurrers,
etc. (Cont'd)**

civil cases. *Bramblett v. State*, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978).

Construal of demurrer as motion to dismiss. — Court may regard general demurrer for failure to state a cause of action as a motion to dismiss for failure to state a claim for which relief may be granted, and when sufficiency of the complaint is thus questioned, this chapter requires that it be construed in the light most favorable to the plaintiff, with all

doubts resolved in the plaintiff's favor even though unfavorable constructions are possible, so that not unless allegations of the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts should the complaint be dismissed. *Ghitter v. Edge*, 118 Ga. App. 750, 165 S.E.2d 598 (1968).

Attach on venue by motion not precluded. — Subsection (c) of this section does not prevent an attack on the pleading by motion pointing out alleged insufficiency of venue in the pleading. *Williamson v. Perret's Farms, Inc.*, 128 Ga. App. 687, 197 S.E.2d 754 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parties, § 275 et seq. 61A Am. Jur. 2d, Pleading, §§ 31 et seq., 107 et seq., 211 et seq., 373 et seq.

Am. Jur. Pleading and Practice Forms. — 7C Counterclaim, Recoupment, and Setoff, § 3.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 236, 246, 289, 311, 312, 341, 342, 344, 350, 351, 354. 35B C.J.S., Federal Civil Procedure, § 902. 71 C.J.S., Pleading, §§ 3, 98 et seq., 183 et seq., 213.

ALR. — Pleadings containing self-serving declarations as evidence, 1 ALR 39.

Application of doctrine of res judicata to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 2 ALR 534; 142 ALR 905.

Counterclaim or set-off as affecting rule as to part payment of a liquidated and undisputed debt, 4 ALR 474; 53 ALR 768.

Proof of issues in previous action where no pleadings were filed, 10 ALR 1502.

Admissibility of pleadings for purposes other than the establishment of the facts set out therein, 14 ALR 103.

May unconstitutionality of statute be raised by demurrer to pleading, 71 ALR 1194.

Amendment of pleadings after limitation has run by change in capacity in which suit is prosecuted, 74 ALR 1269.

Amendment of pleading after limitation period by substituting new defendant, or changing allegations as to capacity in which defendant is sued or the theory upon which defendant is sought to be held responsible for another's wrong, as stating a new cause of action, 74 ALR 1280.

Necessity and sufficiency of reply to answer pleading of statute of limitations, 115 ALR 755.

Burden of allegation and proof in civil cases as regards exception in statute, 130 ALR 440.

Pleading last clear chance doctrine, 25 ALR2d 254.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 ALR5th 237.

9-11-7.1. Redacted information; exceptions and filings under seal; correction; protective orders; waivers.

(a) **Redacted filings.** Except as provided in subsections (b) and (c) of this Code section or unless the court orders otherwise, a filing with the court that contains a social security number, taxpayer identification number, financial account number, or birth date shall include only:

- (1) The last four digits of a social security number;
- (2) The last four digits of a taxpayer identification number;
- (3) The last four digits of a financial account number; and
- (4) The year of an individual's birth.

(b) **Garnishment.** A summons of garnishment that is filed with a court shall only include the last four digits of the defendant's social security number, taxpayer identification number, or financial account number; provided, however, that the plaintiff shall provide the defendant's full social security number, taxpayer identification number, or financial account number, if reasonably available to the plaintiff, on the copies of the summons of garnishment served on the garnishee and defendant.

(c) **Exemptions from redaction requirement.** Subsection (a) of this Code section shall not apply to the following:

- (1) A financial account number that identifies property allegedly subject to forfeiture in a civil forfeiture proceeding;
- (2) The official record of an administrative or agency proceeding;
- (3) The official record of a court or tribunal in another case or proceeding;
- (4) A filing made in a probate court; and
- (5) A filing made under seal as provided in subsection (d) of this Code section.

(d) **Filings made under seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the filer to file a redacted version for the public record. A filer may petition the court to file an unredacted filing under seal. The court shall retain all filings made under seal as part of the record.

(e) **Correction of unredacted information.** An inadvertent failure to redact information which is required to be redacted shall be a curable defect and shall not preclude a document from being filed with the court. The court may order an unredacted filing be sealed and may also order that a redacted version of the same filing be filed for the public record.

(f) **Protective orders.** For good cause, the court may:

- (1) Order a filing which contains additional personal or confidential information, other than the information required to be redacted pursuant to this Code section, be sealed and may also order that a redacted version of the same filing be filed for the public record; and

(2) Limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(g) **Option for reference list.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. Such reference list shall be filed under seal and may be amended as of right. Any reference in a civil action to a listed identifier shall be construed to refer to the corresponding item of information.

(h) **Waiver of protected identifiers.** A filer waives the protections provided by subsection (a) of this Code section to the extent that he or she makes his or her own filing without redaction and not under seal. (Code 1981, § 9-11-7.1, enacted by Ga. L. 2014, p. 482, § 2/SB 386.)

Effective date. — This Code section became effective July 1, 2014.

Editor's notes. — Ga. L. 2014, p. 482, § 10/SB 386, not codified by the General Assembly, provides, in part, that this Code

section shall apply to any filings made on or after July 1, 2014.

Law reviews. — For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

9-11-8. General rules of pleading.

(a) Claims for relief.

(1) **“Action for medical malpractice” defined.** As used in this Code section, the term “action for medical malpractice” means any claim for damages resulting from the death of or injury to any person arising out of:

(A) Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such services or by any person acting under the supervision and control of a lawfully authorized person; or

(B) Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment.

(2) **Form of complaint, generally; action for malpractice.** An original complaint shall contain facts upon which the court's venue depends; and any pleading which sets forth a claim for relief, whether an original claim, counterclaim, a cross-claim, or a third-party claim, shall contain:

(A) A short and plain statement of the claims showing that the pleader is entitled to relief; and

(B) A demand for judgment for the relief to which the pleader deems himself entitled; provided, however, that in actions for

medical malpractice, as defined in this Code section, in which a claim for unliquidated damages is made for \$10,000.00 or less, the pleadings shall contain a demand for judgment in a sum certain; and, in actions for medical malpractice in which a claim for unliquidated damages is made for a sum exceeding \$10,000.00, the demand for judgment shall state that the pleader “demands judgment in excess of \$10,000.00,” and no further monetary amount shall be stated.

Relief in the alternative or of several different types may be demanded.

(3) **Sanctions.** If the provisions of subparagraph (B) of paragraph (2) of this subsection are violated, the court in which the action is pending shall, upon a proper motion, strike the improper portion of the demand for judgment and may impose such other sanctions, including disciplinary action against the attorney, found in Code Section 9-11-37 as are appropriate.

(b) **Defenses; form of denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Code Section 9-11-11.

(c) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to be concise and direct; alternative statements.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Code Section 9-11-11.

(f) **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice. (Ga. L. 1966, p. 609, § 8; Ga. L. 1967, p. 226, § 8; Ga. L. 1976, p. 1047, § 1.)

Cross references. — Provision that judge is qualified to try civil case where no defense is filed, irrespective of relationship to party or interest in case, § 15-1-9.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 8, see 28 U.S.C.

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). 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 developments in Georgia workers' compensation law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 323 (1981). For article, "Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reas-

essment," see 17 Ga. L. Rev. 33 (1982). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For survey article on recent developments in Georgia law of remedies, see 34 Mercer L. Rev. 397 (1982). For article, "Baby Doe Cases: Compromise and Moral Dilemma," see 34 Emory L.J. 545 (1985). For article, "On with the Old!," see 24 Ga. St. B.J. 13 (1987). For article, "Georgia's 'Door-Closing' Statute: Who Bears the Burden?," see 24 Ga. St. B.J. 141 (1988). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

For comment, "Legislative Limitations on Medical Malpractice Damages: The Chances of Survival," see 37 Mercer L. Rev. 1583 (1986).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 81-101, 81-105, and Ch. 3, T. 81 are included in the annotations for this Code section.

Bills in equity are unknown to Georgia practice since the Uniform Procedure Act of 1887, Ga. L. 1887, p. 64. *Sengstacke v. American Missionary Ass'n*, 196 Ga. 539, 26 S.E.2d 891 (1943) (decided under former Code 1933, § 81-101).

Judicial notice. — Pleadings contradicting anything which must be judicially noticed are nugatory. *South Am. Managers, Inc. v. Reeves*, 220 Ga. 493, 140 S.E.2d 201 (1965).

Maxim res ipsa loquitur has no application to pleadings; it is only a rule of evidence. *Chapman v. Phillips*, 112 Ga. App. 434, 145 S.E.2d 663 (1965) (decided under former Code 1933, § 81-101).

Constitutionality of questions. — In order to raise a question as to the constitutionality of a law, at least three things must be shown: (1) statute or particular part or parts thereof being challenged must be stated or pointed out with fair precision; (2) provision of the Constitution which it is claimed has been violated must be clearly designated; and (3) it must be shown wherein the statute, or designated part thereof, violates such constitutional provision. *DeKalb County v. Post Properties, Inc.*, 245 Ga. 214, 263 S.E.2d 905 (1980).

Construction with other statutes. — In an action for damages, O.C.G.A. § 9-11-8(a)(2)(B), part of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, requires a written demand in the complaint for the damages requested; thus, if a court were to interpret O.C.G.A. § 44-14-3(c) as permitting a demand for liquidated damages to be made in the complaint, the section would have no real meaning because the Civil Practice Act already imposes such a requirement. Accordingly, if § 44-14-3(c) is to serve any real purpose, it must be

construed as a requirement that a grantor make a written demand on the grantee for the liquidated damages as a condition precedent to creating the liability that serves as the basis for a lawsuit. *SunTrust Bank v. Hightower*, 291 Ga. App. 62, 660 S.E.2d 745 (2008).

O.C.G.A. § 9-10-112 is not "faulty" for conflicting with O.C.G.A. § 9-11-8(b). — O.C.G.A. § 9-10-112, as the more specific statute, prevails over § 9-11-8(b). *Baylis v. Daryani*, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Municipal ordinance need not be specifically pled. — There is no requirement that municipal ordinances be specifically pled as a prerequisite to the ordinance's admission in evidence. *Morgan v. Reeves*, 226 Ga. 697, 177 S.E.2d 68 (1970).

Party to action is bound by material allegations in the party's pleadings, so long as they remain in the party's pleadings, and the opposite party may rely upon an admission as having established the fact alleged in the opposing party's favor, no proof thereof being needed. *Martin v. Pierce*, 140 Ga. App. 897, 232 S.E.2d 170 (1977).

Civil Practice Act, O.C.G.A. Ch. 11, T. 9, which permits alternative pleadings does not change the rule of evidence that a party is bound by the party's judicial admissions. *Ditch v. Royal Indem. Co.*, 205 Ga. App. 478, 422 S.E.2d 868, cert. denied, 205 Ga. App. 899, 422 S.E.2d 868 (1992).

Answer required from all parties named in complaint. — When an answer was filed in the name of only one of four separate entities named as the defendants in the action, the other three defendants could not benefit from the answer and, having filed no answer of their own, were in default. *McCombs v. Southern Regional Medical Ctr., Inc.*, 233 Ga. App. 676, 504 S.E.2d 747 (1998).

No waiver of sovereign immunity. — O.C.G.A. § 9-11-8 does not constitute a statutory waiver of immunity for suits in negligence against the state. *James v. Richmond County Health Dep't*, 168 Ga.

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App. 416, 309 S.E.2d 411 (1983).

Solemn admissions in judicio as made in pleadings are conclusive against the party making the admissions, unless formally withdrawn from the pleadings, and a party to a suit will not be allowed to disprove an admission made in the party's pleadings, unless it has been withdrawn from the record; the opposite party may rely upon the admission as having established the fact alleged in the opposing party's favor, and no proof thereof is needed. *Puppy Love Kennel, Inc. v. Norton*, 158 Ga. App. 69, 279 S.E.2d 312 (1981).

Admissions in judicio proper. — Note and guaranty became admissions in judicio and plaintiffs were entitled to rely upon admissions contained in the answer that the copies were identified and authentic and the admittance by the trial court was proper. *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

Trial court may hear attack on judgment. — When the trial court orders entry of a settlement amount and dismisses a case with prejudice and the plaintiff files a motion for new trial and a motion to set aside, contending that the plaintiff did not agree to the settlement and that the plaintiff's attorney was without authority to compromise, the trial court does not err in hearing this attack on the judgment; the matter is still in the breast of the trial court and the proceedings toll the time for appeal. *Sunn v. Mercury Marine*, 166 Ga. App. 567, 305 S.E.2d 6 (1983).

No default judgment for failure to file defensive pleadings in appeal from property evaluation. — Appeal procedure outlined in O.C.G.A. § 48-5-311(f) does not contemplate the filing of a "complaint" or "answer," and a default judgment will not lie for failure to file defensive pleadings in a de novo hearing on appeal in the superior court from a property evaluation. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

No judgment on pleadings based on answer only. — In an action to recover under a payment bond filed by a supplier,

because the pleadings did not show that the supplier was unable to establish a defect in the notice of commencement, and a general contractor averred in the contractor's first affirmative defense that the contractor had filed a notice of commencement with the Clerk of the Superior Court of Fulton County and had posted the notice of commencement at the project site, such an averment had to be considered to be denied by the supplier for purposes of a motion for judgment on the pleadings. *Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 279 Ga. App. 894, 633 S.E.2d 59 (2006).

Cited in *Campbell v. Brock*, 224 Ga. 16, 159 S.E.2d 409 (1968); *Chastain Fin. Co. v. Sherwood*, 117 Ga. App. 556, 161 S.E.2d 401 (1968); *Seaboard Air Line R.R. v. Hawkins*, 117 Ga. App. 797, 161 S.E.2d 886 (1968); *Bazemore v. Burnet*, 117 Ga. App. 849, 161 S.E.2d 924 (1968); *Hawes v. Central of Ga. Ry.*, 117 Ga. App. 771, 162 S.E.2d 14 (1968); *Hirsch's v. Adams*, 117 Ga. App. 847, 162 S.E.2d 243 (1968); *Ryder v. Schreeder*, 224 Ga. 382, 162 S.E.2d 375 (1968); *B-W Acceptance Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968); *Consolidated Credit Corp. v. Short*, 224 Ga. 369, 162 S.E.2d 435 (1968); *Clark v. Piedmont Hosp.*, 117 Ga. App. 875, 162 S.E.2d 468 (1968); *D.G. Mach. & Gage Co. v. Hardy*, 118 Ga. App. 45, 162 S.E.2d 852 (1968); *Frink v. Derst Baking Co.*, 224 Ga. 642, 163 S.E.2d 712 (1968); *Keith v. Byram*, 118 Ga. App. 364, 163 S.E.2d 753 (1968); *Bacon v. Winter*, 118 Ga. App. 358, 163 S.E.2d 890 (1968); *Beck v. Johnston*, 118 Ga. App. 541, 164 S.E.2d 342 (1968); *City Dodge, Inc. v. Atkins*, 118 Ga. App. 676, 164 S.E.2d 864 (1968); *Travelers Ins. Co. v. Johnson*, 118 Ga. App. 616, 164 S.E.2d 926 (1968); *Addington v. Ohio S. Express, Inc.*, 118 Ga. App. 770, 165 S.E.2d 658 (1968); *G.E.C. Corp. v. Levy*, 119 Ga. App. 59, 166 S.E.2d 376 (1969); *Apollo Homes, Inc. v. Knowles*, 119 Ga. App. 239, 166 S.E.2d 644 (1969); *Goette v. Darvoe*, 119 Ga. App. 320, 166 S.E.2d 912 (1969); *Greene v. McIntyre*, 119 Ga. App. 296, 167 S.E.2d 203 (1969); *McKinnon v. Neugent*, 225 Ga. 215, 167 S.E.2d 593 (1969); *Cohen v. Garland*, 119 Ga. App. 333, 167 S.E.2d 599 (1969); *Jones v. Van Vleck*, 119 Ga. App. 846, 169 S.E.2d 178

(1969); Columbus Bank & Trust Co. v. Dempsey, 120 Ga. App. 5, 169 S.E.2d 349 (1969); Anthony v. Anthony, 120 Ga. App. 261, 170 S.E.2d 273 (1969); Nipper v. Crisp County, 120 Ga. App. 583, 171 S.E.2d 652 (1969); Holland Furnace Co. v. Willis, 120 Ga. App. 733, 172 S.E.2d 149 (1969); Grand Lodge, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612 (1970); Reynolds v. Wilson, 121 Ga. App. 153, 173 S.E.2d 256 (1970); Hogan v. Maxey, 121 Ga. App. 490, 174 S.E.2d 208 (1970); Feldman v. Whipkey's Drug Shop, 121 Ga. App. 580, 174 S.E.2d 474 (1970); Shepard v. Morrison, 121 Ga. App. 762, 175 S.E.2d 407 (1970); J.D. Jewell, Inc. v. Hancock, 226 Ga. 480, 175 S.E.2d 847 (1970); Morgan v. White, 121 Ga. App. 794, 175 S.E.2d 878 (1970); Daniel v. Yow, 226 Ga. 544, 176 S.E.2d 67 (1970); Townsend v. Lewis, 122 Ga. App. 135, 176 S.E.2d 457 (1970); Register v. Stone's Indep. Oil Distribs., 122 Ga. App. 335, 177 S.E.2d 92 (1970); Harper v. Ballensinger, 226 Ga. 828, 177 S.E.2d 693 (1970); Edwards v. Simpson, 123 Ga. App. 44, 179 S.E.2d 266 (1970); Cook v. Seaboard Coast Line R.R., 311 F. Supp. 584 (S.D. Ga. 1970); Frazier v. Rainey, 227 Ga. 350, 180 S.E.2d 725 (1971); Mathews v. McConnell, 124 Ga. App. 519, 184 S.E.2d 491 (1971); Tingle v. Harvill, 228 Ga. 332, 185 S.E.2d 539 (1971); Stalvey v. Osceola Indus., Inc., 124 Ga. App. 708, 185 S.E.2d 629 (1971); Crowder v. Department of State Parks, 228 Ga. 436, 185 S.E.2d 908 (1971); Norfolk & Dedham Mut. Fire Ins. Co. v. Jones, 124 Ga. App. 761, 186 S.E.2d 119 (1971); Candler v. Clover Realty Co., 125 Ga. App. 278, 187 S.E.2d 318 (1972); Roesler v. Etheridge, 125 Ga. App. 358, 187 S.E.2d 572 (1972); Payton v. Johnson, 228 Ga. 810, 188 S.E.2d 504 (1972); Freezomatic Corp. v. Brigadier Indus. Corp., 125 Ga. App. 767, 189 S.E.2d 108 (1972); Gamble v. Reeves Transp. Co., 126 Ga. App. 161, 190 S.E.2d 95 (1972); Myers v. Clark, 126 Ga. App. 154, 190 S.E.2d 134 (1972); Young v. Bozeman, 229 Ga. 195, 190 S.E.2d 523 (1972); Miller v. Columbus, 229 Ga. 234, 190 S.E.2d 535 (1972); Woods v. Canady, 126 Ga. App. 389, 190 S.E.2d 920 (1972); Porter-Lite Corp. v. Warren Scott Contracting Co., 126 Ga. App. 436, 191 S.E.2d 95 (1972); McDonald v. Rogers, 229 Ga. 369, 191 S.E.2d 844 (1972); General Fin. Corp. v. Davis, 126 Ga. App. 821, 191 S.E.2d 865 (1972); Coast Scopitone, Inc. v. Self, 127 Ga. App. 124, 192 S.E.2d 513 (1973); Wesley Chapel Bldrs., Inc. v. Sapiro, 127 Ga. App. 383, 193 S.E.2d 638 (1972); City of Lawrenceville v. Humphries, 229 Ga. 724, 194 S.E.2d 84 (1972); Culverhouse v. Atlanta Ass'n for Convalescent Aged Persons, 127 Ga. App. 574, 194 S.E.2d 299 (1972); Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972); Alexander v. Boston Old Colony Ins. Co., 127 Ga. App. 783, 195 S.E.2d 277 (1972); West v. Forehand, 128 Ga. App. 124, 195 S.E.2d 777 (1973); Roberts v. Harrell, 230 Ga. 454, 197 S.E.2d 704 (1973); Owens v. Cobb County, 230 Ga. 707, 198 S.E.2d 846 (1973); Murray Chevrolet Co. v. Godwin, 129 Ga. App. 153, 199 S.E.2d 117 (1973); Loukes v. McCoy, 129 Ga. App. 167, 199 S.E.2d 125 (1973); Management Search, Inc. v. Kinard, 231 Ga. 26, 119 S.E.2d 899 (1973); Camp v. Fidelity Bankers Life Ins. Co., 129 Ga. App. 590, 200 S.E.2d 332 (1973); Frey v. Friendly Motors, Inc., 129 Ga. App. 636, 200 S.E.2d 467 (1973); Giant Peanut Co. v. Carolina Chems., Inc., 129 Ga. App. 718, 200 S.E.2d 918 (1973); Snooks v. Factory Square, Inc., 129 Ga. App. 772, 201 S.E.2d 168 (1973); Searcy v. Godwin, 129 Ga. App. 827, 201 S.E.2d 670 (1973); Mathews v. Greiner, 130 Ga. App. 817, 204 S.E.2d 749 (1974); Neal v. McCall, 131 Ga. App. 347, 206 S.E.2d 114 (1974); Baldwin v. Ariail, 232 Ga. 376, 207 S.E.2d 17 (1974); McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373 (1974); Yeargin v. Burleson, 132 Ga. App. 652, 209 S.E.2d 99 (1974); Bailey v. Bruce, 132 Ga. App. 782, 209 S.E.2d 135 (1974); Robinson Explosives, Inc. v. Dalon Contracting Co., 132 Ga. App. 849, 209 S.E.2d 264 (1974); McMichael v. Georgia Power Co., 133 Ga. App. 593, 211 S.E.2d 632 (1974); Bouldin v. Baum, 134 Ga. App. 484, 214 S.E.2d 734 (1975); Yancey v. Harris, 234 Ga. 320, 216 S.E.2d 83 (1975); Chupp v. Henderson, 134 Ga. App. 808, 216 S.E.2d 366 (1975); Dillingham v. Doctors Clinic, 135 Ga. App. 736, 219 S.E.2d 2 (1975); Filsoof v. West, 235 Ga. 818, 221 S.E.2d 811 (1976); Ford Motor Co. v. Lee, 137 Ga. App. 486, 224 S.E.2d 168 (1976); Clark v. State, 138 Ga.

General Consideration (Cont'd)

App. 266, 226 S.E.2d 89 (1976); Phillips v. Hertz Com. Leasing Corp., 138 Ga. App. 441, 226 S.E.2d 287 (1976); Ellington v. Tolar Constr. Co., 237 Ga. 235, 277 S.E.2d 336 (1976); Lunsford Co. v. Klingenberg, 138 Ga. App. 791, 227 S.E.2d 507 (1976); Thomas v. Firestone Tire & Rubber Co., 139 Ga. App. 40, 227 S.E.2d 870 (1976); Drummond v. Fulton County Dep't of Family & Children Servs., 237 Ga. 449, 228 S.E.2d 839 (1976); Skipper v. Collins, 139 Ga. App. 826, 229 S.E.2d 790 (1976); Shannondoah, Inc. v. Smith, 140 Ga. App. 200, 230 S.E.2d 351 (1976); Campbell v. Jim Walter Homes, Inc., 140 Ga. App. 435, 231 S.E.2d 450 (1976); Easley v. Easley, 238 Ga. 180, 231 S.E.2d 763 (1977); New House Prods., Inc. v. Commercial Plastics & Supply Corp., 141 Ga. App. 199, 233 S.E.2d 45 (1977); Phillips v. Abel, 141 Ga. App. 291, 233 S.E.2d 384 (1977); Building Assocs. v. Crider, 141 Ga. App. 825, 234 S.E.2d 666 (1977); Hemphill v. Congoleum Corp., 142 Ga. App. 83, 234 S.E.2d 859 (1977); Drewry v. Robinson, 142 Ga. App. 432, 236 S.E.2d 108 (1977); Lowry v. Lomire, 143 Ga. App. 479, 238 S.E.2d 594 (1977); Holt v. Rickett, 143 Ga. App. 337, 238 S.E.2d 706 (1977); Lord v. Smith, 143 Ga. App. 378, 238 S.E.2d 731 (1977); North Ga. Prod. Credit Ass'n v. Vandergrift, 239 Ga. 755, 238 S.E.2d 869 (1977); Eaton v. Weatherby, 239 Ga. 795, 239 S.E.2d 8 (1977); Kirk v. First Ga. Inv. Corp., 239 Ga. 171, 236 S.E.2d 254 (1977); Tahamtan v. Dixie Ornamental Iron Co., 143 Ga. App. 561, 239 S.E.2d 217 (1977); McElroy v. Wilson, 143 Ga. App. 893, 240 S.E.2d 155 (1977); Fonda Corp. v. Southern Sprinkler Co., 144 Ga. App. 287, 241 S.E.2d 256 (1977); Boxwood Corp. v. Berry, 144 Ga. App. 351, 241 S.E.2d 297 (1977); Crider v. First Nat'l Bank, 144 Ga. App. 536, 241 S.E.2d 638 (1978); Retail Union Health & Welfare Fund v. Seabrum, 240 Ga. 695, 242 S.E.2d 18 (1978); Holzman v. National Bank, 144 Ga. App. 710, 242 S.E.2d 299 (1978); Hall v. First Nat'l Bank, 145 Ga. App. 267, 243 S.E.2d 569 (1978); Gray v. Finance Am. Corp., 145 Ga. App. 253, 243 S.E.2d 671 (1978); Peacock v. Nat'l Bank & Trust Co., 241 Ga. 280, 244 S.E.2d 816 (1978); Whitby v. Maloy,

145 Ga. App. 785, 245 S.E.2d 5 (1978); Brown v. National Van Lines, 145 Ga. App. 824, 245 S.E.2d 27 (1978); Azar v. Accurate Constr. Co., 146 Ga. App. 326, 246 S.E.2d 381 (1978); Dixie Home Bldrs., Inc. v. Waldrip, 146 Ga. App. 464, 246 S.E.2d 471 (1978); Whiteside v. Douglas County Bank, 146 Ga. App. 888, 247 S.E.2d 558 (1978); In re Boswell, 242 Ga. 313, 249 S.E.2d 13 (1978); McCraw v. Watkins, 242 Ga. 452, 249 S.E.2d 202 (1978); McDonough Constr. Co. v. McLendon Elec. Co., 242 Ga. 510, 250 S.E.2d 424 (1978); Clark Equip. Credit Corp. v. Refrigerated Transp. Co., 148 Ga. App. 405, 251 S.E.2d 321 (1978); Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978); PMS Constr. Co. v. DeKalb County, 243 Ga. 870, 257 S.E.2d 285 (1979); Dixie Fire Servs., Inc. v. Pappas, 151 Ga. App. 760, 261 S.E.2d 653 (1979); Cooper v. Mason, 151 Ga. App. 793, 261 S.E.2d 738 (1979); Morgan v. Berry, 152 Ga. App. 623, 263 S.E.2d 508 (1979); Halpern Properties, Inc. v. Newton County Bd. of Equalization, 245 Ga. 728, 267 S.E.2d 26 (1980); Fosgate v. American Mut. Liab. Ins. Co., 154 Ga. App. 510, 268 S.E.2d 780 (1980); First Bank & Trust Co. v. Insurance Serv. Ass'n, 154 Ga. App. 697, 269 S.E.2d 527 (1980); GMAC v. Yates Motor Co., 159 Ga. App. 215, 283 S.E.2d 74 (1981); Tyson v. Henson, 159 Ga. App. 684, 285 S.E.2d 27 (1981); First Bank v. Dollar, 159 Ga. App. 815, 285 S.E.2d 203 (1981); DeLoach v. Floyd, 160 Ga. App. 728, 288 S.E.2d 65 (1981); United States Life Credit Corp. v. Johnson, 248 Ga. 852, 287 S.E.2d 1 (1982); Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982); Coffeen v. Doster, 161 Ga. App. 529, 288 S.E.2d 327 (1982); Larry's Mobile Homes, Inc. v. Robins Fed. Credit Union, 161 Ga. App. 822, 288 S.E.2d 800 (1982); United States Life Credit Corp. v. Johnson, 161 Ga. App. 864, 290 S.E.2d 280 (1982); Bettis v. City of Atlanta, 163 Ga. App. 121, 293 S.E.2d 58 (1982); Thomas v. Ronald A. Edwards Constr. Co., 163 Ga. App. 202, 293 S.E.2d 383 (1982); Cleveland v. American Motorists Ins. Co., 163 Ga. App. 748, 295 S.E.2d 190 (1982); Marchman & Marchman, Inc. v. City of Atlanta, 250 Ga. 64, 295 S.E.2d 311 (1982); Cato Oil & Grease Co. v. Lewis, 250 Ga. 24, 295 S.E.2d 527 (1982); Sawyer

v. Citizens & S. Nat'l Bank, 164 Ga. App. 177, 296 S.E.2d 134 (1982); Shepherd v. Shepherd, 164 Ga. App. 185, 296 S.E.2d 151 (1982); Citizens Bank v. Ansley, 164 Ga. App. 437, 296 S.E.2d 370 (1982); Keese v. Brown, 250 Ga. 383, 297 S.E.2d 487 (1982); Ingle v. Swish Mfg. S.E., Inc., 164 Ga. App. 469, 297 S.E.2d 506 (1982); Johnson v. G.A.B. Bus. Servs., Inc., 165 Ga. App. 284, 300 S.E.2d 325 (1983); Farlow v. Vigilant Ins. Co., 165 Ga. App. 696, 302 S.E.2d 578 (1983); Banks v. Borg-Warner Acceptance Corp., 168 Ga. App. 46, 308 S.E.2d 54 (1983); Iannicelli v. Iannicelli, 169 Ga. App. 155, 311 S.E.2d 850 (1983); Franklyn Gesner Fine Paintings, Inc. v. Ketcham, 252 Ga. 537, 314 S.E.2d 903 (1984); London v. Bank of S., 170 Ga. App. 44, 315 S.E.2d 924 (1984); Potts v. State, 170 Ga. App. 216, 316 S.E.2d 587 (1984); Summer-Minter & Assocs. v. Phillips, 171 Ga. App. 528, 320 S.E.2d 376 (1984); Davidson v. American Fitness Ctrs. Inc., 171 Ga. App. 619, 320 S.E.2d 824 (1984); McKay v. Nally, 173 Ga. App. 372, 326 S.E.2d 560 (1985); Craft v. Hospital Auth., 173 Ga. App. 444, 326 S.E.2d 590 (1985); Plank v. Bourdon, 173 Ga. App. 391, 326 S.E.2d 571 (1985); Desai v. Safeco Ins. Co. of Am., 173 Ga. App. 815, 328 S.E.2d 376 (1985); Wolfes v. Terrell, 173 Ga. App. 835, 328 S.E.2d 569 (1985); Olympic Dev. Group, Inc. v. American Druggists' Ins. Co., 175 Ga. App. 425, 333 S.E.2d 622 (1985); Macon Chrysler-Plymouth v. Sentell, 179 Ga. App. 754, 347 S.E.2d 639 (1986); Grier v. Skinner's Furn. Store of Newnan, Inc., 180 Ga. App. 607, 349 S.E.2d 826 (1986); Mr. B's Oil Co. v. Register, 181 Ga. App. 166, 351 S.E.2d 533 (1986); Maryland Cas. Ins. Co. v. Welchel, 181 Ga. App. 224, 351 S.E.2d 645 (1986); Howell v. Tidwell, 256 Ga. 647, 352 S.E.2d 372 (1987); Munna v. Lewis, 181 Ga. App. 860, 354 S.E.2d 181 (1987); Acker v. Veal, 183 Ga. App. 297, 359 S.E.2d 7 (1987); ARA Transp. v. Barnes, 183 Ga. App. 424, 359 S.E.2d 157 (1987); Roberts v. Bienert, 183 Ga. App. 751, 360 S.E.2d 25 (1987); MacDonald v. Vasselin, 188 Ga. App. 467, 373 S.E.2d 221 (1988); Murphy v. American Civil Liberties Union of Ga., Inc., 258 Ga. 637, 373 S.E.2d 364 (1988); Smith v. Doe, 189 Ga. App. 264, 375 S.E.2d 477 (1988); McCollum v. Doe, 190 Ga. App. 444, 379 S.E.2d 233 (1989); Wilson v. Wickes-Homecrafters, Inc., 191 Ga. App. 474, 382 S.E.2d 194 (1989); Sims v. Holtzclaw, 259 Ga. 537, 384 S.E.2d 656 (1989); Wright v. Food Giant, Inc., 195 Ga. App. 677, 394 S.E.2d 610 (1990); Cassidy v. Wilson, 196 Ga. App. 6, 395 S.E.2d 291 (1990); Powell v. Thomas, 199 Ga. App. 553, 405 S.E.2d 553 (1991); Brinson v. First Am. Bank, 200 Ga. App. 552, 409 S.E.2d 50 (1991); Wade v. Polytech. Indus., Inc., 202 Ga. App. 18, 413 S.E.2d 468 (1991); Haire v. Suburban Auto Body, Inc., 204 Ga. App. 16, 418 S.E.2d 163 (1992); Rogers v. Carmike Cinemas, Inc., 211 Ga. App. 427, 439 S.E.2d 663 (1994); Burnette v. McCarter, 211 Ga. App. 781, 440 S.E.2d 488 (1994); Mosier v. State Bd. of Pardons & Paroles, 213 Ga. App. 545, 445 S.E.2d 535 (1994); Bryant v. Haynie, 216 Ga. App. 430, 454 S.E.2d 533 (1995); Manning v. Robertson, 223 Ga. App. 139, 476 S.E.2d 889 (1996); Jr. Mills Constr. v. Trichinotis, 223 Ga. App. 19, 477 S.E.2d 141 (1996); Crowe v. Coleman, 113 F.3d 1536 (11th Cir. 1997); M & M Mobile Homes of Ga., Inc. v. Haralson, 233 Ga. App. 749, 505 S.E.2d 249 (1998); Cotton, Inc. v. Phil-Dan Trucking, Inc., 270 Ga. 95, 507 S.E.2d 730 (1998); Shealy v. Unified Gov't of Athens Clarke County, 244 Ga. App. 853, 537 S.E.2d 105 (2000); C & F Servs. v. First S. Bank, 258 Ga. App. 71, 573 S.E.2d 102 (2002); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006); Dudley v. Wachovia Bank, N.A., 290 Ga. App. 220, 659 S.E.2d 658 (2008); Rooks v. Tenet Health Sys. GB, Inc., 292 Ga. App. 477, 664 S.E.2d 861 (2008); Am. Teleconferencing Servs. v. Network Billing Sys., LLC, 293 Ga. App. 772, 668 S.E.2d 259 (2008); Neely v. City of Riverdale, 298 Ga. App. 884, 681 S.E.2d 677 (2009); LandSouth Constr., LLC v. Lake Shadow Ltd., LLC, 303 Ga. App. 413, 693 S.E.2d 608 (2010); Benedict v. State Farm Bank, FSB, 309 Ga. App. 133, 709 S.E.2d 314 (2011); Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542 (2011); Racette v. Bank of Am., N.A., 318 Ga. App. 171, 733 S.E.2d 457 (2012); Wright v. Hall, 292 Ga. 457, 738 S.E.2d 594 (2013).

Purpose and Construction of Pleadings

General principles. — In applying the Civil Practice Act (see now O.C.G.A. Ch. 9, T. 11) to consideration of pleadings, the following principles are applicable: (1) pleadings shall be construed to do substantial justice, that is, shall be liberally construed in favor of the pleader; (2) plaintiff need not allege a cause of action, but only sufficient facts to place the defendant on notice of the claim against the defendant; and (3) the complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Herring v. R.L. Mathis Certified Dairy Co.*, 118 Ga. App. 132, 162 S.E.2d 863 (1968), *aff'd in part and rev'd in part*, 225 Ga. 67, 166 S.E.2d 89 (1969).

Purpose is fair and just settlement. — Pleadings are intended to serve as means of arriving at fair and just settlements of controversies between litigants; pleadings should not raise barriers which prevent the achievement of that end. *Roberts v. Farmer*, 127 Ga. App. 237, 193 S.E.2d 216 (1972); *Cotton v. Federal Land Bank*, 246 Ga. 188, 269 S.E.2d 422 (1980).

Purpose of pleadings to give notice. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), issues are no longer formed by pleadings, and the pleadings serve only the purpose of giving notice to the opposite party of the general nature of the contentions of the pleader. *DeKalb County v. Georgia Paperstock Co.*, 226 Ga. 369, 174 S.E.2d 884 (1970).

Because a couple's complaint premised on an erroneous listing in a telephone directory failed to allege any of the claims they sought to pursue, specifically, interfering with their right of quiet enjoyment of their property and nuisance, and even after giving the couple the benefit of all reasonable inferences that could be drawn from their complaint, the fact remained that the directory's publisher was not placed on reasonable notice of whether the couple was asserting a claim in equity, contract, or tort, much less whether the couple were pleading a particular tort such as negligence or libel, the complaint was properly dismissed as failing to state

a claim upon which relief could be granted. *Patrick v. Verizon Directories Corp.*, 284 Ga. App. 123, 643 S.E.2d 251 (2007).

This section contemplates practice of notice pleading. *Whitworth v. Whitworth*, 233 Ga. 53, 210 S.E.2d 9 (1974).

Issue pleading eliminated. — Issue pleading has been eliminated and notice pleading was substituted. *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (1969), appeal dismissed sub nom., *Herring v. R.L. Mathis Certified Dairy Co.*, 400 U.S. 922, 91 S. Ct. 192, 27 L. Ed. 2d 183 (1970); *Stevens v. Stevens*, 227 Ga. 410, 181 S.E.2d 34 (1971); *Garrett v. Garrett*, 231 Ga. 754, 204 S.E.2d 140 (1974).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) does away with "issue pleading" and substitutes "notice pleading." *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968); *Sheppard v. Yara Eng'g Corp.*, 248 Ga. 147, 281 S.E.2d 586 (1981).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) abolished "issue pleading," substituted in lieu thereof "notice pleading," and directs that all pleadings be so construed as to do substantial justice. *Dillingham v. Doctors Clinic*, 236 Ga. 302, 223 S.E.2d 625 (1976); *Leitzke v. Leitzke*, 239 Ga. 17, 235 S.E.2d 500 (1977).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) abolished "issue pleading," substituted in lieu thereof "notice pleading," authorized pleading of conclusions, and directed that all pleadings be construed so as to do substantial justice. *Nee v. State Farm Fire & Cas. Co.*, 142 Ga. App. 744, 236 S.E.2d 880 (1977).

Issues are not made and pointed up by pleading, but by discovery, on pretrial and in the pretrial order, on motions for summary judgment, or other available techniques, and by the evidence itself, unless in instances when some matter is required to be specially pled. *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968).

Notice pleading applicable to both plaintiffs and defendants. — Liberal rules of notice pleading are to be applied to the defendants as well as the plaintiffs. *McDonough Constr. Co. v. McLendon Elec.*

Co., 242 Ga. 510, 250 S.E.2d 424 (1978).

Setoff is a cross action, and must be pled with as much certainty and definiteness as a declaration in any suit of law. *Morris v. International Agric. Corp.*, 53 Ga. App. 517, 186 S.E. 583 (1936) (decided under former Code 1933, §§ 81-101 and 81-105); *City Stores Co. v. Henderson*, 116 Ga. App. 114, 156 S.E.2d 818 (1967) (decided under former Code 1933, §§ 81-101 and 81-105).

General allegations in pleadings sufficient. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), general allegations are sufficient to support the plaintiff's claim for relief, and in most cases the same liberal rule will apply to the defendant's pleadings. *Davis v. Metzger*, 119 Ga. App. 750, 168 S.E.2d 866 (1969).

Although a claim against the defendant, as the executrix of an estate, was not explicitly set forth in the plaintiff's complaint, it could be reasonably construed under the liberal pleading requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *Dwyer v. McCoy*, 236 Ga. App. 326, 512 S.E.2d 70 (1999).

Conclusions may be pled. — While conclusions may not generally be used in affidavits to support or oppose summary judgment motions, conclusions may generally be pled. *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369 (1977).

No technical forms of pleadings or motions are required under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Decisions not made on niceties of pleadings. — Subsection (f) of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8), along with Ga. L. 1972, p. 689, § 6 (see O.C.G.A. § 9-11-15), requires that decisions be made on the merits, and not upon the niceties of pleadings. *Owens v. Cobb County*, 230 Ga. 707, 198 S.E.2d 846 (1973).

Substance, rather than nomenclature, of legal pleadings determines their nature. *Cotton v. Federal Land Bank*, 246 Ga. 188, 269 S.E.2d 422 (1980).

Pleadings not judged by name. — No matter by what name a pleading is

called, nature of the action is determined by substance. *Deen v. State*, 216 Ga. 387, 116 S.E.2d 595 (1960) (decided under former Code 1933, § 81-101).

"Title" applied to pleadings is not binding on court; pleading is judged by the pleading's contents, not by the pleading's name. *Bank of Cumming v. Moseley*, 243 Ga. 858, 257 S.E.2d 278 (1979).

Court treats pleadings as if there had been a proper designation when justice requires. *Gwinnett Com. Bank v. Flake*, 151 Ga. App. 578, 260 S.E.2d 523 (1979).

Single misstep in pleading not irrevocable. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) does not penalize a party irrevocably for one misstep in pleading. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

All pleadings shall be so construed as to do substantial justice. *McGravey v. Board of Zoning Appeals*, 243 Ga. 714, 256 S.E.2d 781 (1979).

Pleadings construed in light most favorable to pleader. — It is no longer appropriate to construe pleadings against the pleader; pleadings should be construed in the light most favorable to the pleader, with all doubts resolved in the pleader's favor, even though unfavorable constructions are possible. *DeKalb County v. Georgia Paperstock Co.*, 226 Ga. 369, 174 S.E.2d 884 (1970).

Pleading requirements of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) are to be construed liberally and in favor of the pleader, in furtherance of basic premise behind the Act to substitute "notice pleading" for "issue pleading." *Cotton v. Federal Land Bank*, 246 Ga. 188, 269 S.E.2d 422 (1980).

Construction of complaint in plaintiff's favor. — Complaint should be construed in the light most favorable to the plaintiff, with all doubts resolved in the plaintiff's favor; the plaintiff is entitled to the most favorable inferences that can reasonably be drawn from the complaint, even if contrary inferences are also possible. *Reiner v. David's Super Mkt., Inc.*, 118 Ga. App. 10, 162 S.E.2d 298 (1968); *Hodges v. Youmans*, 120 Ga. App. 805, 172 S.E.2d 431 (1969).

Purpose and Construction of Pleadings (Cont'd)

Complaints should be construed in the light most favorable to the pleader with all doubts resolved in the pleader's favor, even though unfavorable constructions are possible. *Richter v. D. & M. Assocs.*, 228 Ga. 599, 187 S.E.2d 253 (1972).

Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), when the sufficiency of the complaint is questioned the complaint must be construed in the light most favorable to the plaintiff. *Massey v. Perkerson*, 129 Ga. App. 895, 201 S.E.2d 830 (1973).

Complaint is to be construed in the light most favorable to the plaintiff, and all inferences that can be reasonably drawn are to be construed in the plaintiff's favor. *City of Rome v. Turk*, 235 Ga. 223, 219 S.E.2d 97 (1975).

Pleadings will be construed to serve the best interests of the pleader. *Rodgers v. Georgia Tech Athletic Ass'n*, 166 Ga. App. 156, 303 S.E.2d 467 (1983).

Complaint is no longer to be construed most strongly against the pleader. *Residential Devs., Inc. v. Mann*, 225 Ga. 393, 169 S.E.2d 305 (1969); *Hodges v. Youmans*, 120 Ga. App. 805, 172 S.E.2d 431 (1969); *Mitchell v. Dickey*, 226 Ga. 218, 173 S.E.2d 695 (1970); *Gill v. Myrick*, 228 Ga. 253, 185 S.E.2d 72 (1971); *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972); *Oliver v. Irvin*, 230 Ga. 248, 196 S.E.2d 429 (1973); *Almaroad v. Giles*, 230 Ga. 473, 197 S.E.2d 706 (1973).

Defensive pleadings should be liberally construed in favor of the pleader. *Wellbaum v. Murphy*, 122 Ga. App. 654, 178 S.E.2d 690 (1970).

When the claim is a traditionally disfavored cause of action, such as malicious prosecution, libel, and slander, the complaint is construed by a somewhat stricter standard. *Jacobs v. Shaw*, 219 Ga. App. 425, 465 S.E.2d 460 (1995); *Willis v. United Family Life Ins.*, 226 Ga. App. 661, 487 S.E.2d 376 (1997).

Civil rule of construction applicable to criminal cases. — Rule in civil practice that "all pleadings shall be so

construed as to do substantial justice" should be no less applicable in a criminal case, especially one involving the death penalty. *Birt v. State*, 256 Ga. 483, 350 S.E.2d 241 (1986).

Claim sustainable by proof should not be dismissed. — If complaint gives notice of any claim which plaintiff may have against the defendant that may be sustained by proper proof, the complaint should not be dismissed. *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968).

Unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the plaintiff's claim, the complaint should not be dismissed. *Richter v. D. & M. Assocs.*, 228 Ga. 599, 187 S.E.2d 253 (1972).

Party dismissed only when no set of facts supports claim. — Under the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, a party should not be dismissed for failure to state a claim against such party unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff's claim which would entitle the plaintiff to relief against that party. *Sheppard v. Yara Eng'g Corp.*, 248 Ga. 147, 281 S.E.2d 586 (1981).

Opportunity to amend defective pleadings. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), a party is to be given notice and an opportunity to amend defective pleadings when such notice will facilitate a decision on the merits. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Judgment to be specific. — While "notice pleading" may cover a multitude of sins, the judgment must be specific enough for the individual without inside knowledge to understand it, especially when the judgment is to be a muniment of title. *Sease v. Singleton*, 246 Ga. 278, 271 S.E.2d 187 (1980).

Litigation with government not to be decided on technicalities. — 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).

Affidavit requirement exception to liberal rules of general pleading. — Provision that a complaint is subject to dismissal for failure to state a claim for relief if the requisite affidavit is not filed contemporaneously with the complaint constitutes an exception to the general liberality of pleading permitted under O.C.G.A. § 9-11-8. *Redmond v. Shook*, 218 Ga. App. 477, 462 S.E.2d 172 (1995).

Allegations were sufficient to state a cause of action for breach of contract and raise the inference that the recruitment fee was included in the corporation's debt to the staffing company as the complaint specifically referenced a contract that contained a requirement for a corporation to pay a recruitment fee, and further referenced the numerous requests and demands that a staffing company made to the corporation in the corporation's attempts to collect unpaid bills under the contract. *Hope Elec. Enters. v. Proforce Staffing, Inc.*, 268 Ga. App. 302, 601 S.E.2d 723 (2004).

Buyer had set forth proper counterclaims, under O.C.G.A. § 9-11-8(a)(2) and (f), since the buyer's amended, recast and consolidated answer and counterclaim alleged that all of the alleged acts were done by individuals as agents of the corporate defendant, and that all the claims were asserted jointly and severally against all of the defendants. *Raza v. Swiss Supply Direct, Inc.*, 256 Ga. App. 175, 568 S.E.2d 102 (2002).

Shotgun pleading. — Trial court erred in granting the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted and for judgment on the pleadings because the trial court should have required the plaintiffs to amend the plaintiffs' complaint and provide a more definite statement of the plaintiffs' claims before passing upon the motions; the amended complaint was a "shotgun pleading" because the complaint was not a short and plain statement of the claims that the plaintiffs asserted as required by O.C.G.A. § 9-11-8(a)(2)(A) of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, the complaint did not give the defendants fair

notice of the nature of the claims, and the complaint did not conform to several of the specific pleading requirements of the Act, specifically O.C.G.A. §§ 9-11-8, 9-11-9, and 9-11-10. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Form of Complaint

1. In General

Complaint must give defendant notice of claim in sufficiently clear terms to enable the defendant to frame a responsive pleading. *Hodges v. Youmans*, 120 Ga. App. 805, 172 S.E.2d 431 (1969).

Short, plain statement giving defendant fair notice required. — "Short and plain statement of the claim showing that pleader is entitled to relief" is generally regarded as satisfied by short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and grounds upon which the claim rests. *Martin v. Martin*, 118 Ga. App. 192, 163 S.E.2d 254 (1968).

All that is required as to a claim is a short, plain statement showing the pleader is entitled to relief and a demand for judgment for the relief to which the plaintiff deems to be entitled. *Martin v. Approved Bancredit Corp.*, 224 Ga. 550, 163 S.E.2d 885 (1968), overruled on other grounds, *Cochran v. McCollum*, 233 Ga. 104, 210 S.E.2d 13 (1974).

Subsection (a) of this section only requires a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and grounds upon which the claim rests. *White v. Augusta Motel Hotel Inv. Co.*, 119 Ga. App. 351, 167 S.E.2d 161 (1969).

Requiring the plaintiff to make a more definite statement of the plaintiff's claim saves judicial resources and permits the trial court, when a sufficiently more definite statement has been pled, to determine whether the complaint states a claim by applying the usual standards for the legal adequacy of a complaint; although the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, does not expressly authorize a court to order a more definite statement in the absence of a motion, O.C.G.A. § 9-11-12(e), there is no reason that a

Form of Complaint (Cont'd)**1. In General (Cont'd)**

court cannot do so as an exercise of the court's inherent powers to manage the court's docket and to compel compliance with the rules and requirements of civil procedure. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

When a trial court orders a plaintiff to make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to conform to the pleading requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint under O.C.G.A. § 9-11-41(b), not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Plaintiffs' complaint recited allegations sufficient to satisfy Georgia's notice pleading standard because it was sufficient that the plaintiffs alleged that the defendants released toxic chemicals that damaged the plaintiffs' property; each defendant was on notice that the plaintiffs brought eight causes of action against the defendant, and that was all that Georgia law required. *Collins v. King Am. Finishing, Inc.*, No. 612-077, 2012 U.S. Dist. LEXIS 161493 (S.D. Ga. Nov. 9, 2012).

Number of assertable causes of action not limited because complaint contains one count. *Medoc Corp. v. Keel*, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

Brief, plain statement and demand for relief sufficient. — Brief, plain statement of the claim for which relief is

sought, coupled with a demand for such relief, is sufficient to state a claim for relief under subsection (a) of this section. *Fowler v. Fowler*, 231 Ga. 572, 203 S.E.2d 235 (1974); *Ledford v. Meyer*, 249 Ga. 407, 290 S.E.2d 908 (1982).

Complaint need not set forth cause of action, but need only set forth claim for relief. *Mitchell v. Dickey*, 226 Ga. 218, 173 S.E.2d 695 (1970); *Gill v. Myrick*, 228 Ga. 253, 185 S.E.2d 72 (1971); *Seaboard Coast Line R.R. v. Dockery*, 135 Ga. App. 540, 218 S.E.2d 263 (1975).

No longer must a cause of action be alleged in a pleading. *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972).

With adoption of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), a complaint is not required to set forth a cause of action, but need only set forth a claim for relief. *Oliver v. Irvin*, 230 Ga. 248, 196 S.E.2d 429 (1973); *Almaroad v. Giles*, 230 Ga. 473, 197 S.E.2d 706 (1973).

Complaint must give the defendant notice of a claim in sufficiently clear terms to enable the defendant to frame a responsive pleading, but it need only state a claim, and need not allege facts sufficient to set forth a cause of action. *Bazemore v. Burnet*, 117 Ga. App. 849, 161 S.E.2d 924 (1968).

Complaint does not have to allege facts sufficient to set forth a cause of action. *Hodges v. Youmans*, 120 Ga. App. 805, 172 S.E.2d 431 (1969); *Richter v. D. & M. Assocs.*, 228 Ga. 599, 187 S.E.2d 253 (1972).

Although it need not set forth a cause of action, a complaint must set forth a claim for relief. *Hogan v. Peters*, 181 Ga. App. 670, 353 S.E.2d 601 (1987).

It is not necessary that a complaint be perfect in form or set out all of the issues with particularity, it is necessary only to place the defendant on notice of the claim against the defendant. *Walton v. James & Dean, Inc.*, 177 Ga. App. 77, 338 S.E.2d 516 (1985).

Complaint alleging breach of contract sufficient. — Defendant's third-party complaint which alleged that a third-party defendant was the city's engineering firm, that the firm had inspected the sewer and drainage systems

as part of the firm's contractual obligation to the city, and that the firm had breached the firm's duties and obligations to the city by failing to determine improper construction or design of the systems, coupled with the submission of a copy of the contract in opposition to the motion for summary judgment constituted sufficient notice of a breach of contract allegation. *City of Acworth v. John J. Harte Assocs.*, 165 Ga. App. 438, 301 S.E.2d 499 (1983).

Trial court erred in granting the defendant's motion to dismiss the plaintiff's claim for breach of contract because the allegations that the defendant demanded and received from the plaintiff an additional \$3,850 for license and trophy fees in connection with the purchase of the safari arguably showed the flow of consideration directly from the plaintiff to the defendant for goods and services which the defendant failed to provide creating a third party beneficiary right for the plaintiff. *Wright v. Waterberg Big Game Hunting Lodge Otjahewita (Pty), Ltd.*, 330 Ga. App. 508, 767 S.E.2d 513 (2014).

Mere misnomer of a party in the pleadings is a defect which may be waived when the misnamed party is in fact the legally cognizable proper party in interest. *Block v. Voyager Life Ins. Co.*, 251 Ga. 162, 303 S.E.2d 742 (1983).

Dismissal for failure to comply with order for more specific pleading affirmed. — *Graham v. Development Specialists, Inc.*, 180 Ga. App. 758, 350 S.E.2d 294 (1986).

All elements of cause need not be stated. — Complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Poole v. City of Atlanta*, 117 Ga. App. 432, 160 S.E.2d 874 (1968).

Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), it is not necessary that the petition state all the elements of the cause of action. *General Tel. Co. v. Pritchett*, 119 Ga. App. 53, 165 S.E.2d 918 (1969); *Nipper v. Crisp County*, 120 Ga. App. 583, 171 S.E.2d 652 (1969).

Motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff

would be entitled to no relief under any state of facts which could be proved in support of the plaintiff's claim. *Residential Devs., Inc. v. Mann*, 225 Ga. 393, 169 S.E.2d 305 (1969); *Stevens v. Stevens*, 227 Ga. 410, 181 S.E.2d 34 (1971); *Gill v. Myrick*, 228 Ga. 253, 185 S.E.2d 72 (1971).

Complaint is not subject to dismissal unless allegations disclose with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the plaintiff's claim. *Tench v. Ivie*, 121 Ga. App. 114, 173 S.E.2d 237 (1970).

If, within framework of complaint, evidence may be introduced which will sustain grant of relief to plaintiff, the complaint is sufficient. *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968); *White v. Augusta Motel Hotel Inv. Co.*, 119 Ga. App. 351, 167 S.E.2d 161 (1969); *Stevens v. Stevens*, 227 Ga. 410, 181 S.E.2d 34 (1971); *Gill v. Myrick*, 228 Ga. 253, 185 S.E.2d 72 (1971); *Richter v. D. & M. Assocs.*, 228 Ga. 599, 187 S.E.2d 253 (1972); *Oliver v. Irvin*, 230 Ga. 248, 196 S.E.2d 429 (1973); *Almaroad v. Giles*, 230 Ga. 473, 197 S.E.2d 706 (1973); *Seaboard Coast Line R.R. v. Dockery*, 135 Ga. App. 540, 218 S.E.2d 263 (1975).

If complaint shows claim on which relief, either legal or equitable, may be granted, the complaint is not subject to dismissal. *Brittain v. Camp*, 228 Ga. 808, 188 S.E.2d 494 (1972).

Fact that plaintiff has an adequate remedy at law is not a good ground of a motion to dismiss a complaint seeking both legal and equitable relief. *Brittain v. Camp*, 228 Ga. 808, 188 S.E.2d 494 (1972).

Failure to allege lack of adequate remedy at law is not fatal error. *Golston v. Garigan*, 245 Ga. 450, 265 S.E.2d 590 (1980).

Unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff's claim which would entitle the plaintiff to relief, the pleading should not be dismissed for a failure to state a claim. *American S. Ins. Co. v. Kirkland*, 118 Ga. App. 170, 162 S.E.2d 862 (1968); *Byrd v. Ford Motor Co.*, 118 Ga. App. 333, 163 S.E.2d 327 (1968); *Satcher v. James H. Drew Shows, Inc.*, 122

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Ga. App. 548, 177 S.E.2d 846 (1970); Dillingham v. Doctors Clinic, 236 Ga. 302, 223 S.E.2d 625 (1976); Leitzke v. Leitzke, 239 Ga. 17, 235 S.E.2d 500 (1977); Nee v. State Farm Fire & Cas. Co., 142 Ga. App. 744, 236 S.E.2d 880 (1977).

Distinction between facts and conclusions immaterial. — Under notice system of pleading, ancient distinction between pleading “facts” and “conclusions” is no longer significant; the question is simply whether there is a short and plain statement of the claim. Hodges v. Youmans, 120 Ga. App. 805, 172 S.E.2d 431 (1969).

Under notice theory of pleading, it is immaterial whether the pleading states “conclusions” or “facts,” as long as fair notice is given and the statement of the claim is short and plain. Guthrie v. Monumental Properties, Inc., 141 Ga. App. 21, 232 S.E.2d 369 (1977).

True test is whether the pleading gives fair notice and states elements of the claim plainly and succinctly, and not whether as an abstract matter the pleading states “conclusions” or “facts.” Guthrie v. Monumental Properties, Inc., 141 Ga. App. 21, 232 S.E.2d 369 (1977).

It is immaterial whether an allegation is one of fact or conclusion if the complaint effectively states a claim for relief. Guthrie v. Monumental Properties, Inc., 141 Ga. App. 21, 232 S.E.2d 369 (1977).

There are no prohibitions against pleading conclusions and, if pled, the conclusion may be considered in determining whether the complaint sufficiently states a claim for relief. Guthrie v. Monumental Properties, Inc., 141 Ga. App. 21, 232 S.E.2d 369 (1977).

Prayer for process not necessary. — Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. § 9-11-4) and Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8) eliminated the necessity of prayer for process. Hunt v. Denby, 128 Ga. App. 523, 197 S.E.2d 489 (1973).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) contains no requirement that prayer for process be included in complaint as a prerequisite to valid service of

process. Matthews v. Fayette County, 233 Ga. 220, 210 S.E.2d 758 (1974).

Prayer for relief is not an allegation in the complaint which requires an answer and is not part of the plaintiffs’ cause of action. Holloman v. D.R. Horton, Inc., 241 Ga. App. 141, 524 S.E.2d 790 (1999).

Because any pleading which sets forth a claim for relief shall contain a demand for judgment for the relief to which the pleader deems oneself entitled, a general prayer for other relief does not operate to avoid mootness when there was no specific prayer for damages. Babies Right Start v. Ga. Dep’t of Pub. Health, 293 Ga. 553, 748 S.E.2d 404 (2013).

It is not necessary to pray specifically for general or nominal damages in order to present question for the jury as to nominal damages. Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979).

Absence of general allegation of negligence not fatal. — Petition which sets out facts upon which is made a claim of injury and consequent damages is sufficient to meet the requirements of notice pleading, even if there is no allegation that any or all of the facts alleged amounted to acts of negligence on the defendant’s part, when the facts alleged are sufficient in themselves to support an allegation of negligence; absence of a general allegation of negligence will not subject the petition to dismissal for failing to state a claim upon which relief can be granted. Beaver v. Southern Greyhound Lines, 120 Ga. App. 576, 171 S.E.2d 658 (1969).

Lack of claims by plaintiff in body of complaint was typographical error. — Since the defendant contended that, although a non-diverse corporation was listed in the caption of the complaint, it had not in fact brought any claims against the defendant because the body of the complaint referenced only the corporation’s sole owner, the complaint did state claims for relief by the corporation, in light of the inclusion of the corporation in the caption, the explanation that the reference to the owner was a typographical error, the obvious intent of the plaintiffs to bring claims on behalf of the corporation, and the absence of prejudice to the defendant. Campbell v. Quixtar, Inc.,

No. 2:08-CV-0045-RWS, 2008 U.S. Dist. LEXIS 46507 (N.D. Ga. June 13, 2008).

Plaintiff is no longer required to plead applicable foreign law in order to state a cause of action. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Failure to allege license is not fatal to broker's action for commission. *Maxwell v. Tucker*, 118 Ga. App. 695, 165 S.E.2d 459 (1968).

When complaint alleges terms of insurance policy and facts upon which the plaintiff relies for relief sought, it places the defendant fairly on notice of its claim, even though the policy is not attached to the complaint. *Finney v. Pan-Am. Fire & Cas. Co.*, 123 Ga. App. 250, 180 S.E.2d 253 (1971).

Counterclaim on same footing as original claim. — Insofar as general rules of pleading are concerned, a counterclaim stands upon the same footing as the original claim. *Grant v. Fourth Nat'l Bank*, 229 Ga. 855, 194 S.E.2d 913 (1972).

Complaint in third-party tort action is adequate if sufficient facts are alleged which upon proper proof would allow recovery by the third-party plaintiff from the third-party defendant under applicable substantive tort law when the subject matter is the same as that involved in the original action. *Koppers Co. v. Parks*, 120 Ga. App. 551, 171 S.E.2d 639 (1969).

Complaint in action for fraud, praying for refund of purchase price with interest, punitive damages, attorney fees, expenses of litigation and general relief, sets forth a claim for relief. *Mewall Properties & Loan Corp. v. Cutten*, 233 Ga. 291, 210 S.E.2d 819 (1974).

Petition sufficient to state negligence action. — When an indigent prisoner filed suit alleging that after the prisoners' fall on a wet floor, the prisoner was left unattended in the prison infirmary for over 14 hours until the prisoner was transported to another medical center for surgery to repair a broken leg, asserted that prison officials were negligent, requested damages for the prisoner's residual pain and disabilities, requested a jury trial, and filed the requisite pauper's affidavit and proceeded in forma pauperis,

the petition was more than sufficient to set forth a cause of action as it is only necessary that the defendants be placed on notice of the claim against the defendants. *Gonzalez v. Zant*, 199 Ga. App. 13, 403 S.E.2d 880 (1991).

It is possible for a litigant to plead oneself out of court by revealing state of facts which affirmatively shows that there is no liability on the defendant. *Hodge v. Dixon*, 119 Ga. App. 397, 167 S.E.2d 377 (1969).

Complaint showing defendant's nonliability subject to dismissal. — When a complaint reveals facts which affirmatively show that there is no liability on the defendant, the complaint is subject to dismissal. *Hatcher v. Moree*, 133 Ga. App. 14, 209 S.E.2d 708 (1974).

Dismissal of complaint when clearly without merit. — Complaint may be dismissed on motion if clearly without any merit, which may consist of an absence of law to support a claim of the sort made or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. *Poole v. City of Atlanta*, 117 Ga. App. 432, 160 S.E.2d 874 (1968).

Discretion of court to strike complaint when not in accord with chapter. — If complaint is not a "short and plain statement of the claim," it is within the trial judge's discretion whether the judge will strike the complaint, granting leave to replead in accordance with the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 183 S.E.2d 586 (1971), overruled on other grounds, *Gilson v. Mitchell*, 131 Ga. App. 321, 205 S.E.2d 421 (1974).

Jack Jones pleading forms (Ga. L. 1847, p. 490) were not repealed by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) and are still proper methods of pleading. *Airport Assocs. v. Audioptric Instructional Devices, Inc.*, 125 Ga. App. 325, 187 S.E.2d 567 (1972).

"Jack Jones Forms" which were enacted into law in 1847 may continue to be used as the forms meet the requirement of giving "a short and plain statement of the claim showing that the pleader is entitled to relief". *Hunt v. Denby*, 128 Ga. App.

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523, 197 S.E.2d 489 (1973).

2. Venue

Rules as to pleading venue were not changed by enactment of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Martin v. Approved Bancredit Corp.*, 224 Ga. 550, 163 S.E.2d 885 (1968), overruled on other grounds, *Cochran v. McCollum*, 233 Ga. 104, 210 S.E.2d 13 (1974); *Buchan v. Duke*, 153 Ga. App. 310, 265 S.E.2d 308 (1980).

Facts. — Statute requires that facts on which court's venue depends be pled. *Chancey v. Hancock*, 225 Ga. 715, 171 S.E.2d 302 (1969).

Subsection (a) of this section requires that original complaint contain facts upon which court's venue depends. *Reid v. Albright*, 142 Ga. App. 826, 237 S.E.2d 229 (1977).

Bare allegation of residence generally sufficient. — In most cases, bare allegation of the defendant's residence within the county will suffice. *Aiken v. Bynum*, 128 Ga. App. 212, 196 S.E.2d 180 (1973); *Atchinson v. Haley*, 132 Ga. App. 264, 208 S.E.2d 22 (1974); *Reid v. Albright*, 142 Ga. App. 826, 237 S.E.2d 229 (1977).

Complaint which fails to show facts establishing venue is subject to dismissal. *Chancey v. Hancock*, 225 Ga. 715, 171 S.E.2d 302 (1969).

When a complaint does not set forth facts upon which the court's venue depends, as required by O.C.G.A. § 9-11-8, the complaint is subject to dismissal. *Jones v. Woods*, 158 Ga. App. 391, 280 S.E.2d 418 (1981).

Failure to plead venue waived unless asserted by responsive pleading.

— Although O.C.G.A. § 9-11-8 requires that a complaint filed pursuant to the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, must set forth the facts on which venue is predicated, a failure to plead such facts is generally held to be waived unless asserted by responsive pleading. *G & H Constr. Co. v. Daniels Flooring Co.*, 173 Ga. App. 181, 325 S.E.2d 773 (1984).

Third-party complaint which does not contain facts upon which court's venue depends is insufficient as a matter of law. *Cantrell v. Coleman Co.*, 140 Ga. App. 344, 231 S.E.2d 123 (1976).

Complaint improperly dismissed for improper venue. — Trial court erred in dismissing a corporation's complaint for improper venue as the corporation was not bound to fail in the corporation's rescission claim under any provable set of facts because the corporation alleged that a predecessor and an Illinois entity engaged in a fraudulent course of conduct including: (1) the inducement of an unconscionable lease for defective telephone equipment; and (2) the assignment of that lease to the Illinois entity. *SRH, Inc. v. IFC Credit Corp.*, 275 Ga. App. 18, 619 S.E.2d 744 (2005).

Defenses and Denials, Generally

Answer to amended complaint not required. — Construing the pertinent provisions of O.C.G.A. §§ 9-11-7, 9-11-8, 9-11-12, 9-11-15, and 9-11-21 in pari materia, it is clear that the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, authorizes the addition of parties, by order of the court, and that an "amended complaint" effecting such an addition does not require a responsive pleading, unless the trial court orders a reply thereto. *Chan v. W-East Trading Corp.*, 199 Ga. App. 76, 403 S.E.2d 840, cert. denied, 199 Ga. App. 905, 403 S.E.2d 840 (1991).

Allegations of an amended complaint were deemed denied by operation of law, and because the holding in Division 1 of *Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee*, 249 Ga. 418, 420, 291 S.E.2d 698 (Ga. 1982), and its progeny, e.g., *Wilson Welding Service v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168 (Ga. Ct. App. 1998), conflicted with that rule of law, they were overruled; a trial court erred in holding that a defendant was required to answer an amended complaint to avoid a default and in defaulting a defendant upon a failure to answer an amended complaint. *Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006).

Answer primarily vehicle for denial. — Answer, both under present and former law, is primarily a vehicle for de-

nial. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

Chief change made by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) with regard to the answer is that an answer can incorporate defenses other than mere denial of allegations. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

Purpose of an answer is to formulate issues by means of defenses addressed to allegations of the complaint. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

Answer must be sufficiently definite to inform plaintiffs. — Although the defendant need not set forth any evidence or expose the defendant's defense in detail, it is required that an answer contain a statement of facts sufficiently definite so that the plaintiffs will be informed of the defense the plaintiffs must be prepared to meet. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

It is immaterial whether allegation is one of fact or conclusion if response effectively states an issuable defense. *Crymes v. Crymes*, 152 Ga. App. 844, 264 S.E.2d 275 (1979).

Answer may raise question as to constitutionality of a statute that will materially affect the defense. *Southern Cotton Oil Co. v. Raines*, 171 Ga. 154, 155 S.E. 484 (1930) (decided under former Code 1933, § 81-303).

While the defendant must raise all issues of law by proper pleadings, the defendant's answer may raise a question as to the constitutionality of a statute that will materially affect the defense. *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954) (decided under former Code 1933, § 81-303).

When question as to constitutionality of statute was properly raised by attacking specific Code sections as denying the defendant equal protection and due process of law, as guaranteed by the state Constitution and U.S. Const., amend. 14, and the answer clearly pointed out wherein the statute in question violated constitutional provisions, the court could not refuse to consider the question

merely because the defendant failed to point out the exact location of due process and equal protection clauses in the Constitutions. *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954) (decided under former Code 1933, § 81-303).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) has no provision similar to former Code 1933, § 81-308, providing that when facts are charged to be within the knowledge of a party or when from all the circumstances such knowledge is necessarily presumed, and that party fails to answer or makes an evasive answer, the charge is taken to be true. *Seaboard Coast Line R.R. v. Clark*, 122 Ga. App. 237, 176 S.E.2d 596 (1970).

Denial of lack of information under present and former law. — Under former law, denial for lack of sufficient information when the matter was not peculiarly within knowledge of the defendant was a sufficient denial, whereas under subsection (b) of this section, in order to take advantage of lack of information and knowledge the defendant must allege that the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment. *Consolidated Pecan Sales Co. v. Savannah Bank & Trust Co.*, 122 Ga. App. 536, 177 S.E.2d 808 (1970).

Defendant's denial of liability or indebtedness to seller satisfied O.C.G.A. § 15-10-43(c). — In magistrate court proceedings, the defendants were not required to specifically answer each allegation in a plaintiff's complaint, and the defendants were permitted from controverting liability through a general denial pursuant to O.C.G.A. § 9-11-8(b); thus, pretermitted whether the defendants' answer met the requirements for a general denial under the Civil Practice Act, (see now O.C.G.A. Ch. 11, T. 9 the answer amounted to a sufficient response in the magistrate court, denying any liability or indebtedness to the plaintiff, and the trial court erred in finding otherwise. *Jones v. Equip. King Int'l*, 287 Ga. App. 867, 652 S.E.2d 811 (2007).

General denial. — Claimant's motion to dismiss the complaint in a forfeiture action was not a responsive pleading in the nature of an answer since the com-

Defenses and Denials, Generally (Cont'd)

plaint did not raise an assertion that the property was not subject to forfeiture as required by paragraph (o)(3) of O.C.G.A. § 16-13-49, nor did the complaint contain even a general denial of the averments of the allegations of the complaint as would have satisfied subsection (b) of O.C.G.A. § 9-11-8. *Turner v. State*, 213 Ga. App. 309, 444 S.E.2d 372 (1994).

Plea of insufficient information to admit or deny is a denial. — Defendants' plea that the defendants were without sufficient information to either admit or deny certain allegations of the complaint had the effect of a denial under subsection (b) of this section. *Forsyth County Bd. of Comm'rs v. Adams*, 228 Ga. 845, 188 S.E.2d 790 (1972), later appeal, 234 Ga. 315, 215 S.E.2d 679 (1975).

Honesty required. — Second sentence of subsection (b) of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8), providing that if a party is without knowledge or information sufficient to form a belief as to the truth of an averment the party shall so state and that this statement shall have the effect of a denial, is subject to the requirements of honesty in pleading set forth in Ga. L. 1966, p. 609, § 11 (see now O.C.G.A. § 9-11-11). *Anderson v. Atlanta Univ., Inc.*, 134 Ga. App. 365, 214 S.E.2d 394 (1975).

Palpably untrue averment of ignorance. — Principle of subsection (b) does not apply if the fact as to which want of knowledge is asserted is, to the knowledge of the court, so plainly and necessarily within the defendant's knowledge that the defendant's averment of ignorance must be palpably untrue. *Weiss v. Moody*, 121 Ga. App. 682, 175 S.E.2d 82 (1970); *Anderson v. Atlanta Univ., Inc.*, 134 Ga. App. 365, 214 S.E.2d 394 (1975); *North Ga. Prod. Credit Ass'n v. Vandergrift*, 239 Ga. 755, 238 S.E.2d 869 (1977).

Knowledge of officers charged to corporation. — If officer or other persons in charge of corporation's affairs have knowledge, then the corporation should be held to have knowledge, and if those officers or others have information sufficient to form a belief as to the truth of an

averment, then the corporation has like information. *Stuckey's Carriage Inn v. Phillips*, 122 Ga. App. 681, 178 S.E.2d 543 (1970).

When the defendant "neither admits nor denies allegations," it does not amount to a denial; it must be alleged that the defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. *Stuckey's Carriage Inn v. Phillips*, 122 Ga. App. 681, 178 S.E.2d 543 (1970).

"Appearance card" not a pleading. — "Appearance card," containing no admissions, denials, or statements of inability to answer for any reason, does not meet the standards for a pleading as set forth in Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12(b)) and subsection (b) of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8). *Glenco-Belvedere Animal Hosp. v. Winters*, 129 Ga. App. 621, 200 S.E.2d 506 (1973).

Filing of letter as exhibit to defensive pleadings cannot be considered as counterclaim. *Carroll v. Afco Credit Corp.*, 143 Ga. App. 264, 238 S.E.2d 264 (1977).

Answer in response to action on a note, alleging that the note had been satisfied either by credit or by moneys received by complaint, was not a nullity but was sufficient to join the issue in the case and to withstand a motion for judgment on the pleadings and a motion for judgment by default. *Robinson v. Rearden*, 134 Ga. App. 815, 216 S.E.2d 370 (1975).

Motion to strike a defense should not be granted unless it appears to a certainty that the plaintiff would succeed despite any state of facts which could be proved in support of the defense. *Wellbaum v. Murphy*, 122 Ga. App. 654, 178 S.E.2d 690 (1970).

Defense of sovereign immunity. — Trial court erred in not granting a city's motion to dismiss the negligence claims against the city because the city was exercising a governmental function when the city demolished an abandoned house claimed to be a nuisance; therefore, the city was entitled to sovereign immunity on those claims. *City of Atlanta v. Durham*, 324 Ga. App. 563, 751 S.E.2d 172 (2013).

Affirmative Defenses

Properly amended answer is a “pleading to a preceding pleading” within the meaning of subsection (c) of this section. *Security Ins. Co. v. Gill*, 141 Ga. App. 324, 233 S.E.2d 278 (1977); *Spafford v. Maseroni*, 186 Ga. App. 290, 367 S.E.2d 102 (1988).

Purpose of requirement that affirmative defenses be pled is to prevent surprise and to give the opposing party fair notice of what the party must meet as a defense. *Phillips v. State Farm Mut. Auto. Ins. Co.*, 121 Ga. App. 342, 173 S.E.2d 723 (1970); *Roberts v. Farmer*, 127 Ga. App. 237, 193 S.E.2d 216 (1972); *McFadden Bus. Publications, Inc. v. Guidry*, 177 Ga. App. 885, 341 S.E.2d 294 (1986); *Ohoopee Prod. Credit Ass’n v. Aspinwall*, 183 Ga. App. 306, 358 S.E.2d 884 (1987); *Kal-O-Mine Indus., Inc. v. Camp (In re Lumpkin Sand & Gravel, Inc.)*, 104 Bankr. 529 (Bankr. M.D. Ga. 1989), *aff’d*, 111 Bankr. 370 (M.D. Ga. 1989).

When the affirmative defenses are pled by the defendant in the defendant’s answer, it is not necessary for the plaintiff to file any additional plea to deny the allegations of the defendant’s answer or to avoid the affirmative defenses set out therein, unless a motion is made to the court and the court directs the plaintiff to file a supplemental pleading. *Turner v. Little*, 70 Ga. App. 567, 28 S.E.2d 871 (1944) (decided under former Code 1933, §§ 81-309 and 81-311).

Payment, one of the affirmative defenses itemized in subsection (c) of O.C.G.A. § 9-11-8, may be raised by amendment. *Abdalla v. DDCB, Inc.*, 216 Ga. App. 617, 455 S.E.2d 598 (1995); *Resiventure, Inc. v. National Loan Investors*, 224 Ga. App. 220, 480 S.E.2d 212 (1996).

Because the defendant failed to plead payment in the defendant’s answer or by amendment, the trial court erred in allowing evidence of payment. *Brown v. Little*, 227 Ga. App. 484, 489 S.E.2d 596 (1997).

Insurance company argued that the trial court erred in considering the employer’s affidavit and other evidence that the funds had already been paid, in that the employer had failed to raise the affir-

mative defense of payment in the employer’s answer; however, there was certainly no surprise as the insurance company at the hearing on the motions for summary judgment claimed that the company understood the employer was asserting payment as an affirmative defense. *Companion Prop. & Cas. Group v. Tutt Contr., Inc.*, 305 Ga. App. 879, 700 S.E.2d 708 (2010).

Accord and satisfaction. — Plea of accord and satisfaction is plea in confession and avoidance, and burden of pleading and proving existence, terms, and effect of an accord and satisfaction is on the party relying upon the same. *City of Atlanta v. Gore*, 47 Ga. App. 70, 169 S.E. 776 (1933) (decided under former Code 1933, § 81-307).

Defense of accord and satisfaction or settlement of claim sued on must be specially pled. *Pilgrim Health & Life Ins. Co. v. Jenkins*, 47 Ga. App. 441, 170 S.E. 687 (1933) (decided under former Code 1933, § 81-307).

Testimony offered to prove accord and satisfaction is inadmissible on behalf of the defendant whose answer does not set up defense to which such testimony is applicable. *Blanchard v. Georgia S. & Fla. Ry.*, 117 Ga. App. 858, 162 S.E.2d 442 (1968).

Accord and satisfaction must be set forth affirmatively as a defense in the defendants’ answer and cannot be raised first by affidavit in support or opposition of a motion for summary judgment. *Slappey Bldrs., Inc. v. FDIC*, 157 Ga. App. 343, 277 S.E.2d 328 (1981).

Particularity on issues of compromise settlement and accord and satisfaction. — If a pleading is in response to a prior pleading, such issues as compromise settlement or accord and satisfaction must be set out with particularity. *J.G.T., Inc. v. Brunswick Corp.*, 119 Ga. App. 719, 168 S.E.2d 847 (1969).

Failure of consideration is an affirmative defense which must be pled. *Dromedary, Inc. v. Restaurant Equip. Mfg. Co.*, 153 Ga. App. 103, 264 S.E.2d 571 (1980).

Trial court properly granted summary judgment to an attorney in the attorney’s action to collect fees due under a written fee agreement with a former client as the attorney provided the services outlined

Affirmative Defenses (Cont'd)

within the contract, and the former client failed to produce any competent evidence supporting an affirmative defense of failure of consideration after the attorney made a prima facie case for summary judgment. *Browning v. Alan Mullinax & Assocs., P.C.*, 288 Ga. App. 43, 653 S.E.2d 786 (2007).

Plea of total failure of consideration includes partial failure. *Carlton Co. v. Allen*, 135 Ga. App. 658, 218 S.E.2d 666 (1975).

Bankruptcy. — Discharge in bankruptcy is an affirmative defense, and the defendant had the burden of proving the defense. *Commercial & Exch. Bank v. McDaniel*, 147 Ga. App. 378, 249 S.E.2d 97 (1978).

Bankruptcy, to be relied upon as a defense, must not only be pled, but must be pled at the proper time; if not pled, the defense will be held to be waived, when no legal reason is shown to account for the neglect. *Duncan v. Southern Sav. Bank*, 59 Ga. App. 228, 200 S.E. 561 (1938) (decided under former Code 1933, Ch. 3, T. 81).

Illegality represents an affirmative defense which must be pled. *Prudential Timber & Farm Co. v. Collins*, 155 Ga. App. 492, 271 S.E.2d 43 (1980).

Fraud and illegality. — Defenses of fraud and illegality are affirmative defenses which, pursuant to subsection (c) of O.C.G.A. § 9-11-8, must be expressly pled. *Bridges v. Reliance Trust Co.*, 205 Ga. App. 400, 422 S.E.2d 277 (1992).

Defense of laches must be specifically plead in responsive pleadings before the defense can be considered. *Gauker v. Eubanks*, 230 Ga. 893, 199 S.E.2d 771 (1973).

Defense of estoppel. — Estoppel is an affirmative defense, and must therefore be set forth affirmatively in pleading to a preceding pleading. *Albany Oil Mill, Inc. v. Sumter Elec. Membership Corp.*, 212 Ga. App. 242, 441 S.E.2d 524 (1994).

Estoppel is an affirmative defense and must be set forth affirmatively in a responsive pleading or in a motion for summary judgment. *Rimes Tractor & Equip., Inc. v. Agricredit Acceptance Corp.*, 216 Ga. App. 249, 454 S.E.2d 564 (1995).

In an action for wrongful foreclosure against a bank by the grantors of security deeds, the bank's theory of estoppel as an affirmative defense against the grantors' claims for cancellation of the bank's deeds under power related to the merits of the grantor's claim, an issue which had no relevancy to the bank's motion to cancel the grantors' notices of lis pendens. *Moore v. Bank of Fitzgerald*, 266 Ga. 190, 465 S.E.2d 445 (1996).

Trial court erred in finding that a handwritten agreement between the parties constituted an enforceable lease in the landlord's dispossession action as the only terms listed in the document were a payment schedule and brief damages and indemnification provisions, but there was no indication of when the lease term began or which property was covered; the statute of frauds, O.C.G.A. § 13-5-30(5), was violated, and because the affirmative defense of estoppel under O.C.G.A. § 9-11-8(c) was not raised by the parties, it was error for the trial court to have raised the issue sua sponte. *Nacoochee Corp. v. Suwanee Inv. Partners, LLC*, 275 Ga. App. 444, 620 S.E.2d 641 (2005).

Statute of limitations must be specially pled. *Sellers v. City of Summerville*, 91 Ga. App. 105, 85 S.E.2d 56 (1954) (decided under former Code 1933, § 81-307).

Statute of limitations is an affirmative defense which must be set forth when pleading to a preceding pleading. *Gaul v. Kennedy*, 246 Ga. 290, 271 S.E.2d 196 (1980).

Trial court erred in granting summary judgment to a dentist and the dental practices in a medical malpractice action, based on misdiagnosis, as the dental defendants failed to meet the defendants' burden pursuant to O.C.G.A. § 9-11-8(c) of showing undisputed evidence that the affirmative defense of the two-year limitations period of O.C.G.A. § 9-3-71(a) barred the action. *Brown v. Coast Dental of Ga., P.C.*, 275 Ga. App. 761, 622 S.E.2d 34 (2005).

Buyer's response to a seller's summary judgment motion in which the buyer raised a statute of limitations defense was properly construed as a cross motion for summary judgment as: (1) pleadings were

to be judged by the pleadings' substance and a final judgment was to grant the relief to which the successful party was entitled, even if that party had not demanded such relief; (2) Georgia law authorized a trial court to grant summary judgment to a non-moving party, sua sponte; (3) the seller had ample notice of the statute of limitation defense, but did not respond to it or amend its pleadings; and (4) more than the 30-day statutory period passed before the summary judgment was granted. *All Tech Co. v. Laimer Unicon, LLC*, 281 Ga. App. 579, 636 S.E.2d 753 (2006).

Appellants were entitled to urge on appeal that the appellees failed to show that certain legal bills fell outside the limitation period of O.C.G.A. § 9-3-31, even if they did not raise that specific factual argument in the trial court; the statute of limitations was an affirmative defense, and so the burden was on the appellees to come forward with evidence sufficient to make out a prima facie case that the appellants' billing claim fell outside the limitation period. *Falanga v. Kirschner & Venker, P.C.*, 286 Ga. App. 92, 648 S.E.2d 690 (2007).

In a medical malpractice action, because the undisputed evidence showed that both the personal injury claims and a later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly denied summary judgment as to those claims. *Cleaveland v. Gannon*, 288 Ga. App. 875, 655 S.E.2d 662 (2007), *aff'd*, 284 Ga. 376, 667 S.E.2d 366 (2008).

In a medical malpractice case, as the statute of limitations was an affirmative defense, the burden was on the doctors to establish as a matter of law that the patient's "new injury"—metastasized cancer which the doctors failed to diagnose—occurred and manifested itself more than two years before the suit was filed and that the suit was thus time-barred under O.C.G.A. § 9-3-71(a). As the doctors failed to meet that burden, the doctors were not entitled to summary judgment. *Cleaveland v. Gannon*, 284 Ga. 376, 667 S.E.2d 366 (2008).

Trial court did not err by refusing to

consider whether the applicable statute of limitations barred an institute's suit against a debtor on a promissory note and account because the record showed that the debtor failed to raise that defense of any statute of limitation either in the answer or in the response to the institute's motion for summary judgment. *Bogart v. Wis. Inst. for Torah Study*, 321 Ga. App. 492, 739 S.E.2d 465 (2013).

Res judicata. — Trial court's order vacating divorce judgment was not barred by the doctrine of res judicata when the wife filed no defensive pleadings and thereby failed to assert res judicata as an affirmative defense. *McDade v. McDade*, 263 Ga. 456, 435 S.E.2d 24 (1993).

Trial court did not err in granting a lender's motion for summary judgment because the doctrine of res judicata barred a debtor's suit alleging that the lender incorrectly charged interest on the debtor's unsecured revolving line of credit; the same matters were already litigated between the same parties in an action previously adjudicated on the merits by a court of competent jurisdiction. *Rose v. Household Fin. Corp.*, 316 Ga. App. 282, 728 S.E.2d 879 (2012).

Res judicata is an affirmative defense that must be raised in a timely filed responsive pleading. *Azarat Mktg. Group, Inc. v. Department of Admin. Affairs*, 245 Ga. App. 256, 537 S.E.2d 99 (2000).

O.C.G.A. § 9-11-8(c) does not imply that an affirmative defense can be raised only by answer or the defense is forever waived; although defendants did not raise res judicata in their answer, the defendants raised the defense in their motion to dismiss, giving the plaintiffs fair notice of the defense, and thus there was no error in the trial court's consideration of the res judicata issue. *Gerschick & Assocs., P.C. v. Pounds*, 266 Ga. App. 852, 598 S.E.2d 522 (2004).

Dismissal properly denied based on failure to plead affirmative defense.

— Trial court did not err in denying a garnishee's motion to dismiss because the garnishor, a foreign corporation, was not shown to have been transacting business in the State of Georgia without the proper certification, and the garnishee did not plead an affirmative defense under

Affirmative Defenses (Cont'd)

O.C.G.A. § 14-2-1502(a). *Carrier411 Servs. v. Insight Tech., Inc.*, 322 Ga. App. 167, 744 S.E.2d 356 (2013).

Affirmative defense of limitations cannot be raised for the first time orally at a hearing on a summary judgment motion without any notice to the opposing party. *Hansford v. Robinson*, 255 Ga. 530, 340 S.E.2d 614 (1986).

Premature attempt to raise bar of limitations. — Defendant's attempt to raise the bar of the statute of limitations in appeal by the plaintiff from an automatic dismissal for lack of prosecution was premature. *Stone v. Green*, 163 Ga. App. 18, 293 S.E.2d 506 (1982).

Written misrepresentation to obtain credit. — Former Code 1933, § 105-303 (see now O.C.G.A. § 51-6-3), providing that no action shall be sustained for deceit in representation to obtain credit from another unless the misrepresentation is a signed writing, is an affirmative defense that must be set forth in a responsive pleading or be waived. *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976).

Corporation's existence. — General denial by the defendant, or denial for lack of knowledge or information, is insufficient to raise issue as to the corporation's legal existence, and failure to raise such issue by direct negative averment results in a waiver of the defense. *Stuckey's Carriage Inn v. Phillips*, 122 Ga. App. 681, 178 S.E.2d 543 (1970).

Unconditional contracts. — This section does not require an affirmative defense for unconditional contracts in writing; a general denial of indebtedness is sufficient. *Tankersley v. Security Nat'l Corp.*, 122 Ga. App. 129, 176 S.E.2d 274 (1970).

Defense of privilege need not be affirmatively pled under subsection (c) of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8), nor under Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9), and is sufficiently raised by a motion to dismiss. *Europa Hair, Inc. v. Browning*, 133 Ga. App. 753, 212 S.E.2d 862 (1975).

Comparative negligence no longer must be affirmatively pled in response

to a pleading. *Jones v. Cloud*, 119 Ga. App. 697, 168 S.E.2d 598 (1969).

Affirmative defense of emergency vehicle need not be pled under subsection (c) of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8), nor is the defense one of the special matters listed under Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9). *Walker v. Burke County*, 149 Ga. App. 704, 256 S.E.2d 100 (1979).

Immunity is not a defense which must be specifically pled under subsection (c) of O.C.G.A. § 9-11-8. *State Bd. of Educ. v. Drury*, 263 Ga. 429, 437 S.E.2d 290 (1993).

County was immune from a lender's suit because the lender pointed to no statute creating a waiver of immunity or any factual scenario warranting a waiver with respect to the lender's claim that the county failed to give it notice of the availability of excess funds following a tax sale as required by O.C.G.A. § 48-4-5; immunity was not an affirmative defense, and it was the lender's burden to show that it was waived. *Bartow County v. S. Dev., III, L.P.*, 325 Ga. App. 879, 756 S.E.2d 11 (2014).

Motion to be dismissed as defendants, made by individuals who offered evidence to show that the owner of the vehicle whose driver was involved in an accident was a corporation, did not involve a defense which must be pled affirmatively. *Calhoun v. Herrin*, 125 Ga. App. 518, 188 S.E.2d 273 (1972).

Waiver. — If affirmative defense is not pled, it is generally held that such defense is waived. *Roberts v. Farmer*, 127 Ga. App. 237, 193 S.E.2d 216 (1972).

Although a dispossessory action was improperly transferred to superior court because a default judgment stood as a final order, appellants, against whom a third-party suit was filed after the transfer, had not challenged the propriety of the transfer in superior court and thus under O.C.G.A. § 9-11-8 had waived their argument that it was improper. *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Defendant may not avail oneself of an affirmative defense which the defendant fails to properly present. *Dromedary, Inc. v. Restaurant Equip. Mfg. Co.*, 153 Ga. App. 103, 264 S.E.2d 571 (1980).

Failure to plead the affirmative defense

of the statute of limitations for suits against developers for construction defects, as provided in O.C.G.A. § 9-3-30, results in the defense being waived. *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

Trial court erred in finding that a jury question existed as to the issue of whether a pay-if-paid provision in a contract was waived by the general contractor because a verbal statement from an employee of the general contractor to the subcontractor was insufficient to prove a waiver of that contract provision. *Vratsinas Constr. Co. v. Triad Drywall, LLC*, 321 Ga. App. 451, 739 S.E.2d 493 (2013).

When failure to plead immaterial. — Failure to plead an affirmative defense is immaterial if evidence of the defense is introduced and not objected to for failure to plead the defense, and no surprise is claimed. *Bowers v. Howell*, 203 Ga. App. 636, 417 S.E.2d 392 (1992).

Late filed defense waived. — Judgment for the defendant was reversed when the defense of failure to attach an affidavit required by O.C.G.A. § 9-11-9.1 was not presented, by way of amendment to the answer, until three months after the filing of responsive pleadings, and until the statute of limitations on the underlying claim had run. *Glaser v. Meck*, 258 Ga. 468, 369 S.E.2d 912 (1988).

Defense of sovereign immunity is not affirmative defense with respect to which the state has the burden of proof. Indeed, neither counsel for the state nor any of the state's agencies may, by affirmative action or by failure to plead, waive the defense of governmental immunity. *Kelleher v. State*, 187 Ga. App. 64, 369 S.E.2d 341 (1988).

Sovereign immunity is not an affirmative defense that must be established by the party seeking its protection. Rather, immunity from suit is a privilege that is subject to waiver by the party seeking to benefit from the waiver, such that in a wrongful death action against the Department of Human Resources, it was incumbent upon the mental health facility patient's parents to establish the department's waiver of immunity. *Georgia Dep't of Human Resources v. Poss*, 263 Ga. 347, 434 S.E.2d 488 (1993).

Sovereign immunity is not an affirmative defense within the meaning of subsection (c) of O.C.G.A. § 9-11-8 in that it is not lost even if not raised in the first responsive pleading and any waiver must be established by the party benefiting from such waiver. *Maxwell v. Cronan*, 241 Ga. App. 491, 527 S.E.2d 1 (1999).

Waiver of statute of limitations. — It is incumbent on party pleading to a preceding pleading to set forth affirmatively any statute of limitations as a defense to an action; failure to do so results in the court's determination that this issue is not raised, even though the issue may be present and could operate as a bar to recovery. *Nipper v. Crisp County*, 120 Ga. App. 583, 171 S.E.2d 652 (1969).

Unless defense of the statute of limitations is pled affirmatively by the defendant, the defense is waived. *Leslie, Inc. v. Solomon*, 141 Ga. App. 673, 234 S.E.2d 104 (1977).

When the appellant raises no affirmative defense based upon the statute of limitations, that defense is waived. *Wood v. Wood*, 239 Ga. 120, 236 S.E.2d 68 (1977).

Plaintiff waived the defense of the statute of limitations to a counterclaim by failure to raise the issue prior to the pretrial order. *Gaul v. Kennedy*, 246 Ga. 290, 271 S.E.2d 196 (1980).

Under subsection (c) of O.C.G.A. § 9-11-8, the statute of limitations is an affirmative defense which must be raised at the first opportunity. It is too late to raise the defense initially in the middle of the trial. *Owens v. Owens*, 248 Ga. 720, 286 S.E.2d 25 (1982).

Failure to raise the defense of the statute of limitation constitutes a waiver of the issue. *Coleman v. Burnett*, 169 Ga. App. 297, 312 S.E.2d 627 (1983).

Third-party defendant waived any right that the defendant would otherwise have had to rely upon the statute of limitations and the issue could not be considered on appeal, when such defense was not raised in the answer, the motion to dismiss, or other pleading filed in the trial court. *Davis v. Betsill*, 178 Ga. App. 730, 344 S.E.2d 525 (1986).

No waiver when defense raised by motion, special plea, or summary

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judgment. — If affirmative defense is not pled, it is generally held that such defense is waived, but if the defense is raised by motion, by special plea in connection with the answer, or by motion for summary judgment, there is no waiver. *Phillips v. State Farm Mut. Auto. Ins. Co.*, 121 Ga. App. 342, 173 S.E.2d 723 (1970); *Roberts v. Farmer*, 127 Ga. App. 237, 193 S.E.2d 216 (1972).

While generally defenses such as statute of limitations or laches must be affirmatively raised by written answer under subsection (c) of this section, yet when facts as to such an issue are uncontradicted, it may be disposed of by summary judgment, motion to dismiss, or motion for judgment on the pleadings. *Beazley v. Williams*, 231 Ga. 137, 200 S.E.2d 751 (1973).

Pleading not only way to raise affirmative defense. — Language of subsection (c) of O.C.G.A. § 9-11-8 does not imply that affirmative defenses may be raised only by a pleading. *Brown v. Moseley*, 175 Ga. App. 282, 333 S.E.2d 162 (1985).

Affirmative defense may be raised by motion. *Brown v. Quarles*, 154 Ga. App. 350, 268 S.E.2d 403 (1980).

Affirmative defense is timely raised for the first time in a motion for summary judgment. *Rumsey v. Gillis*, 329 Ga. App. 488, 765 S.E.2d 665 (2014).

Defendant may raise affirmative defense by motion for summary judgment, but only when a motion for summary judgment is the initial pleading tendered by the defendant. *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976).

Defense of res judicata raised by the defendant as part of the defendant's motion for summary judgment satisfied the requirements of O.C.G.A. § 9-11-8. *Hardy v. Georgia Baptist Health Care Sys.*, 239 Ga. App. 596, 521 S.E.2d 632 (1999).

When accord and satisfaction was raised by evidence in connection with motion for summary judgment, it was error to overrule the motion for summary judgment simply because the

defendant did not file a plea or accord and satisfaction as is generally required under subsection (c) of this section. *Catalina, Inc. v. Woodward*, 124 Ga. App. 26, 182 S.E.2d 921 (1971).

Evidence of failure of consideration and mistake in summary judgment proceedings. — When the defendants did not specially plead affirmative defenses of failure of consideration and mistake, as required by subsections (b) and (c) of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8), and Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9(b)), but on motion for summary judgment offered evidence in support of such defenses, thus creating issues of fact on a motion for summary judgment, the moving party was not entitled to judgment as a matter of law. *Bailey v. Polote*, 152 Ga. App. 255, 262 S.E.2d 551 (1979).

Defense of waiver may be raised by motion for summary judgment. *Daniel & Daniel, Inc. v. Cosmopolitan Co.*, 146 Ga. App. 200, 245 S.E.2d 885 (1978).

Some affirmative defenses may properly be raised by motion to dismiss, if the facts are admitted, are not controverted, or are completely disclosed on the face of the pleadings and nothing further can be developed by a trial of the issue; and the rationale of this rule is applicable to the affirmative defense of the statute of frauds. *Murrey v. Specialty Underwriters, Inc.*, 233 Ga. 804, 213 S.E.2d 668 (1975).

Disposition of issue on motion to dismiss, for judgment on pleadings, or for summary judgment. — Ordinarily affirmative defenses listed in subsection (c) of Ga. L. 1966, p. 609, § 8 (see now O.C.G.A. § 9-11-8) and any other defense not specified in Ga. L. 1967, p. 226, § 9 (see now O.C.G.A. § 9-11-12) must be asserted by answer and cannot be the basis for a motion to dismiss, but if the facts are admitted, are not controverted, or are completely disclosed on the face of the pleadings and nothing further can be developed by a trial of the issue, the matter may be disposed of upon motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment. *Ezzard v. Morgan*, 118 Ga. App. 50, 162 S.E.2d 793 (1968).

While generally defenses such as statute of limitations or laches must be affirmatively raised by written answer, yet when the facts as to such an issue are uncontradicted, it may be disposed of by summary judgment, motion to dismiss, or motion for judgment on the pleadings. *O'Quinn v. O'Quinn*, 237 Ga. 653, 229 S.E.2d 428 (1976).

Affirmative defenses listed in this section may be raised by amendment. *Security Ins. Co. v. Gill*, 141 Ga. App. 324, 233 S.E.2d 278 (1977).

No evidence of affirmative defenses under general denial. — While an express denial of allegations of a complaint is sufficient to create a triable issue, under such general denial the defendant would not be permitted to present any evidence as to the affirmative defenses of the type itemized in subsection (c) of this section. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

Under general denial, the defendant is not permitted to present evidence as to any affirmative defense of the type itemized in subsection (c) of this section. *Dromedary, Inc. v. Restaurant Equip. Mfg. Co.*, 153 Ga. App. 103, 264 S.E.2d 571 (1980).

Unless plaintiff waives objection. — Even absent a specific pleading, when accord and satisfaction is set out by evidence which is not objected to, such issue is before the court, the plaintiff having waived objection. *Wood v. Yancey Bros. Co.*, 135 Ga. App. 720, 218 S.E.2d 698 (1975).

Defense may be dismissed as a counterclaim. *Whitehurst v. Universal C.I.T. Credit Corp.*, 131 Ga. App. 202, 205 S.E.2d 489 (1974).

Under former Code 1933, § 109A-307, admission by the defendant of execution of a note to the plaintiff gives the plaintiff prima facie right to judgment, and the defendant then has the burden of establishing any claimed defense to an action as set forth in subsection (c) of Ga. L. 1976, p. 1047, § 1 (see now O.C.G.A. § 9-11-8). *Malone v. Price*, 138 Ga. App. 514, 226 S.E.2d 623 (1976).

Defendant's mere denial of debt for various general reasons not contained in Ga. L. 1976, p. 1047, § 1 (see now

O.C.G.A. § 9-11-8) does not constitute a defense under former Code 1933, § 109A-307, relating to defenses to notes. *Malone v. Price*, 138 Ga. App. 514, 226 S.E.2d 623 (1976).

Claim of statutory immunity under Georgia's workers' compensation scheme is affirmative defense and subject to waiver under Rule 8(c), Fed. R. Civ. P., in federal diversity of citizenship actions. *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530 (11th Cir. 1983).

Noncompliance with a contract provision is not an affirmative defense under subsection (c) of O.C.G.A. § 9-11-8. *Carpenters Local 1977 v. General Ins. Co. of Am.*, 167 Ga. App. 299, 306 S.E.2d 383 (1983).

Affirmative defense of failure of consideration not barred. — In a suit on a promissory note, the trial court did not err by considering the affirmative defense of failure of consideration, which the maker had not pled, since the payee failed to object when the maker's counsel argued failure of consideration in the maker's opening statement and in the maker's motion for directed verdict; this issue was thus tried by the implied consent of the parties under O.C.G.A. § 9-11-15(b). *Drake v. Wallace*, 259 Ga. App. 111, 576 S.E.2d 87 (2003).

Failure of consideration was waived by not having been raised in the pleadings, and could not be raised by an affidavit in support of a motion for summary judgment. *Hanover Ins. Co. v. Nelson Conveyor & Mach. Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981).

Defense of failure of consideration is not available when a note has been renewed. *Richards v. Southern Fin. Corp.*, 171 Ga. App. 268, 319 S.E.2d 103 (1984).

Payment is a matter that must be specially pled. *Rahal v. Titus*, 107 Ga. App. 844, 131 S.E.2d 659 (1963) (decided under former Code 1933, § 81-307).

Defense of payment must be specially pled by a principal debtor or added by amendment. *Standard Accident Ins. Co. v. Ingalls Iron Works Co.*, 109 Ga. App. 574, 136 S.E.2d 505 (1964) (decided under former Code 1933, § 81-307).

Raising defense of partial payment in response to summary judgment

Affirmative Defenses (Cont'd)

motion not untimely. — Although the defendant by the defendant's answer denied the substance of the complaint in the various averments and a plea of partial payment could have been added by amendment, the trial court did not err in considering such a claim when raised in response to the plaintiff's motion for summary judgment. *White v. McCarty*, 171 Ga. App. 666, 320 S.E.2d 796 (1984).

Defense of estoppel must be set forth affirmatively in pleading to a preceding pleading. *Jones v. Miles*, 656 F.2d 103 (5th Cir. 1981).

Pleading should not be dismissed for failure to state a claim if it appears beyond a doubt that the pleader can prove no set of facts in support of the claim which would entitle the pleader to relief. This principle is applicable to all pleadings, including special matters (fraud, mistake, and conditions precedent) under O.C.G.A. § 9-11-9. *Skelton v. Skelton*, 251 Ga. 631, 308 S.E.2d 838 (1983).

Failure to Deny

Factual assertions contained in unverified pleadings, which do not require a responsive pleading, remain mere allegations of fact unless the allegations are duly admitted by the opposing party. But factual assertions contained in unverified pleadings which do require a responsive pleading are admitted when not denied in the responsive pleading. *Behar v. Aero Med Int'l, Inc.*, 185 Ga. App. 845, 366 S.E.2d 223 (1988).

Defendant barred from disputing matter not denied. — Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading, and the defendant, who did not deny a claim of a license under the Georgia Industrial Loan Act (see nw O.C.G.A. Ch. 3, T. 7), was therefore barred from disputing the applicability of the chapter to the loan on appeal. *Termplan, Inc. v. Joseph*, 151 Ga. App. 689, 261 S.E.2d 433 (1979).

In a declaratory judgment action for a determination that a county's sign ordinance was unconstitutional, because the defendant county did not deny the plain-

tiff's averment that a true and correct copy of the applicable ordinance was attached to the complaint, the averment was admitted and no further proof was required. *Outdoor Sys., Inc. v. Cherokee County*, 243 Ga. App. 406, 533 S.E.2d 446 (2000).

Plaintiff entitled to judgment on pleadings. — Plaintiff was entitled to judgment on the pleadings when the complaint alleged that the defendant converted a vehicle and the pro se defendant merely asserted that the defendant wanted to come before the court to "state her case" since such assertion did not constitute a general denial. *Universal Underwriters Ins. Co. v. Albert*, 248 Ga. App. 415, 546 S.E.2d 361 (2001).

Insurer not bound by defendant's admissions. — Although a named, served defendant may waive the right to defend against an action, the defendant's waiver and default cannot be permitted to injure the statutory right of the insurer to defend the action in the insurer's own name, which would be the result if the insurer were held bound by the defendant's admissions based upon subsection (d) of this section. *Glover v. Davenport*, 133 Ga. App. 146, 210 S.E.2d 370 (1974).

Defendant's affirmative defense deemed denied. — If allegations of defendant's affirmative defense are not admitted, they are deemed denied. *Hancock v. Nashville Inv. Co.*, 128 Ga. App. 58, 195 S.E.2d 674 (1973).

Defendant may not obtain judgment on pleadings on basis of answer only. — Defendant may not obtain judgment on the pleadings on basis of allegations in the defendant's answer when no reply is required since under subsection (d) of this section these allegations are deemed denied. *GMAC v. Jackson*, 119 Ga. App. 221, 166 S.E.2d 739 (1969); *Lord v. Smith*, 143 Ga. App. 378, 238 S.E.2d 731 (1977).

Alternative and Inconsistent Claims and Defenses**1. Claims**

Construction of subsection (e). — Subsection (e) of this section allows inconsistent, hypothetical, and alternative

claims in pleading, and is to be construed like its federal counterpart, Fed. R. Civ. P. 8(e)(2). *D.H. Overmyer Co. v. Kapplin*, 122 Ga. App. 51, 176 S.E.2d 207 (1970).

Provision procedural. — Portion of this section which deals with pleading actions sounding simultaneously or alternatively in tort and contract is procedural, and goes only to the remedy. *Cohen v. Garland*, 119 Ga. App. 333, 167 S.E.2d 599 (1969).

Complaint may now contain as many separate claims against defendants as plaintiff may have, regardless of inconsistency, the claims may be based on legal grounds and equitable grounds, and may arise out of tort and also out of contract. *Giordano v. Stubbs*, 129 Ga. App. 283, 199 S.E.2d 322 (1973), rev'd on other grounds sub nom., *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974).

Legal and equitable claims in same complaint. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), both legal and equitable claims may be set forth in the same complaint. *Miller v. Turner*, 228 Ga. 701, 187 S.E.2d 688 (1972).

Alternative allegations are now permissible under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Miller v. Turner*, 228 Ga. 701, 187 S.E.2d 688 (1972).

Plaintiff has right to try case on alternate theories, and cannot be required to elect upon which theory to proceed. *D.H. Overmyer Co. v. Kapplin*, 122 Ga. App. 51, 176 S.E.2d 207 (1970).

Complaint which contains alternative statements of claim will not be dismissed if any one alternative statement supports the claim. *Hodges v. Youmans*, 120 Ga. App. 805, 172 S.E.2d 431 (1969); *Utica Mut. Ins. Co. v. Kelly & Cohen, Inc.*, 233 Ga. App. 555, 504 S.E.2d 510 (1998).

Inconsistent remedies may be pursued until satisfaction is obtained. *D.H. Overmyer Co. v. Kapplin*, 122 Ga. App. 51, 176 S.E.2d 207 (1970).

Party may pursue any number of inconsistent remedies prior to formulation and entry of judgment. *Waller v. Scheer*, 175 Ga. App. 1, 332 S.E.2d 293 (1985).

Party's discussion of one theory in opening argument does not limit ju-

ry's consideration. — Under O.C.G.A. § 9-11-8, a party may seek recovery under several alternative and inconsistent theories and may sue on one theory and recover under another if supported by the evidence; therefore, a party's discussion of one theory in the party's opening statement does not limit the issues which are presented for consideration by the jury so as to constrain the jury in considering the issues presented by the evidence at trial. *Barnett v. Freeman*, 157 Ga. App. 760, 278 S.E.2d 694 (1981).

Trial court's instruction that it is common practice to file inconsistent pleadings and that it is perfectly acceptable under the law to do so stated the correct principle of law and was not error. *City of Waycross v. Beaty*, 157 Ga. App. 765, 278 S.E.2d 697 (1981).

Counterclaim incorrectly stricken. — In suit to recover on purchase order, the trial court erred in striking a counterclaim for breach of warranty because it was allegedly redundant in view of an affirmative defense of right to refuse payment because of nonconformity. *Bingham, Ltd. v. Tool Technology, Inc.*, 166 Ga. App. 220, 303 S.E.2d 761 (1983).

When election between inconsistent remedies must be made. — Election of remedies, though "abolished" by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), must be made prior to judgment when inconsistent remedies are sought in one action. *Rosenberg v. Mossman*, 140 Ga. App. 694, 231 S.E.2d 417 (1976).

Election between inconsistent remedies, when necessary, can be made at any time after the verdict and prior to entry of the judgment. *Leslie, Inc. v. Solomon*, 141 Ga. App. 673, 234 S.E.2d 104 (1977).

Defense of insufficient service of process. — Trial court abused the court's discretion by dismissing the plaintiff's complaint due to insufficient process because when the defendant moved to dismiss the complaint on the ground that the service copy of the complaint lacked pages containing five paragraphs and the signature page with prayers for relief, the defendant failed to attach an affidavit of the person who received service on the defendant's behalf and, thus, the defendant

Alternative and Inconsistent Claims and Defenses (Cont'd)

1. Claims (Cont'd)

failed to submit sufficient evidence to show improper service of process. *Sampson v. Ga. Dep't of Juvenile Justice*, 328 Ga. App. 733, 760 S.E.2d 203 (2014).

2. Defenses

Defendant has right to file as many inconsistent or contradictory pleas as the defendant deems necessary for a defense. *Associated Muts., Inc. v. Pope Lumber Co.*, 200 Ga. 487, 37 S.E.2d 393 (1946) (decided under former Code 1933, § 81-310).

Contradictory or inconsistent pleas. — Defendant may in different paragraphs of an answer file contradictory or inconsistent pleas. *North British & Mercantile Ins. Co. v. Parnell*, 53 Ga. App. 178, 185 S.E. 122 (1936) (decided under former Code 1933, § 81-310).

Defendant may file contradictory pleas. *Hadden v. Fuqua*, 194 Ga. 621, 22 S.E.2d 377 (1942) (decided under former Code 1933, § 81-310).

Matters in abatement and in bar may be mixed in same answer, and one defense will not defeat another. *Galloway v. Merrill*, 213 Ga. 633, 100 S.E.2d 443 (1957) (decided under former Code 1933, § 81-305).

Defendant is entitled to file as many separate defenses as the defendant desires, regardless of whether such defenses are inconsistent or contradictory. *Brooks v. West Lumber Co.*, 88 Ga. App. 510, 77 S.E.2d 43 (1953) (decided under former Code 1933, § 81-310).

Defendant's pleas and answer may contain as many several matters as defendant thinks necessary for a defense, and no part of the answer shall be stricken out or rejected because it may be contradictory to other portions of the answer. *Johnson v. Johnson*, 218 Ga. 28, 126 S.E.2d 229 (1962) (decided under former Code 1933, § 81-310).

Pleading comparative negligence. — Alternative pleading of a defendant in a negligence suit that even if it were found negligent, the negligence of the plaintiff

equaled or exceeded its own is appropriate. *Wilson v. Norfolk S. Corp.*, 200 Ga. App. 523, 409 S.E.2d 84 (1991).

Defenses of negligence and legal accident. — Party is entitled to plead alternative theories of defense. Thus, when the plaintiff's fall in the produce department of a grocery store possibly could have been the result of an event not proximately caused by negligence but which instead arose from an unforeseen or unexplained cause, the trial court did not err in charging the jury on the theory of legal accident. *Shennett v. Piggly Wiggly S., Inc.*, 197 Ga. App. 502, 399 S.E.2d 476 (1990).

Exculpatory clause inadequate. — Trial court erred in granting summary judgment to a rehabilitation company based on a contractual exculpatory clause because the material provisions of the agreement at issue were illegible and given that an affidavit was insufficient to establish a basis for the admission of the alleged exemplar, the company failed to show that the agreement signed by the participant contained an exculpatory clause waiving and releasing the company from liability for the company's own negligence. *Sanchez v. Atlanta Union Mission Corp.*, 329 Ga. App. 158, 764 S.E.2d 178 (2014).

Inconsistent third-party complaint allowed. — In a breach of warranty action involving a survey commissioned by the defendants, the defendant's third-party complaint against the surveyor and filing of an expert's affidavit stating that the survey was incorrect did not estop the defendant from relying on the survey in defense of the action. *Ewers v. Cooper*, 217 Ga. App. 434, 457 S.E.2d 705 (1995).

Trial court erred to the extent the court ruled that an insurer was prevented from introducing any evidence on liability following a default judgment entered against the insurer because the insurer could still assert policy defenses but, otherwise, by failing to answer timely the insurer was precluded from asserting any affirmative defense included within O.C.G.A. § 9-11-8(c). *Willis v. Allstate Ins. Co.*, 321 Ga. App. 496, 740 S.E.2d 413 (2013).

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Am. Jur. 2d. — 1 Am. Jur. 2d, Accord and Satisfaction, § 48. 25 Am. Jur. 2d, Duress and Undue Influence, §§ 38, 48. 27A Am. Jur. 2d, Equity, § 183 et seq. 28 Am. Jur. 2d, Estoppel and Waiver, §§ 149 et seq., 204 et seq. 37 Am. Jur. 2d, Fraud and Deceit, § 441 et seq. 61A Am. Jur. 2d, Pleading, §§ 31 et seq., 107 et seq., 211 et seq. 73 Am. Jur. 2d, Statute of Frauds, § 475 et seq.

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Accord and Satisfaction, § 8. 8C Am. Jur. Pleading and Practice Forms, Duress and Undue Influence, § 1. 9A Am. Jur. Pleading and Practice Forms, Estoppel and Waiver, § 5. 19B Am. Jur. Pleading and Practice Forms, Pleading, §§ 32, 35.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 239, 241, 245, 249 et seq., 266, 289 et seq., 312, 328, 374, 389, 431. 35B C.J.S., Federal Civil Procedure, § 827 et seq. 71 C.J.S., Pleading, §§ 35 et seq., 40, 52, 61 et seq., 86, 94, 98 et seq., 127 et seq., 139, 145, 162 et seq.

ALR. — Pleadings containing self-serving declarations as evidence, 1 ALR 39.

Burden of proof as regards discharge in bankruptcy, 2 ALR 1672.

Judgment on claim as bar to action to recover amount of payment which was not litigated in previous action, 13 ALR 1151.

Admissibility of pleadings for purposes other than the establishment of the facts set out therein, 14 ALR 103.

Pleadings, depositions, testimony, or statements in court as constituting a sufficient writing within the statute of frauds, 22 ALR 735.

Right under general prayer to relief inconsistent with prayer for specific relief, 30 ALR 1175.

Liability to patient for results of medical or surgical treatment by one not licensed as required by law, 44 ALR 1418; 57 ALR 978.

Form of pleading necessary to raise issue of corporate existence, 55 ALR 510.

Right of foreign corporation to plead statute of limitations, 59 ALR 1336; 122 ALR 1194.

Waiver of benefit of statute or rule by which allegation in pleading of execution or of consideration of written instrument must be taken as true unless met by verified denial, 67 ALR 1283.

Amendment of pleadings after limitation has run by change in capacity in which suit is prosecuted, 74 ALR 1269.

Amendment of pleading after limitation period by substituting new defendant, or changing allegations as to capacity in which defendant is sued or the theory upon which defendant is sought to be held responsible for another's wrong, as stating a new cause of action, 74 ALR 1280.

Necessity of pleading affirmative defense in divorce suit, 76 ALR 990.

Pleading particular cause of injury as waiver of right to rely on *res ipsa loquitur*, 79 ALR 48; 2 ALR3d 1335.

Sufficiency of allegations of loss of patronage or profits to permit recovery of special damages from false publication, 86 ALR 848.

Necessity of alleging fact of agency in declaring upon contract made by party through agent, 89 ALR 895.

Waiver of tort and recovery in assumpsit for conversion as dependent on or affected by sale of the goods by the converter, 97 ALR 250.

May payment be proved under general issue or general denial, or must it be specially pleaded, 100 ALR 264.

Sufficiency of allegation of insolvency without further statement of facts, 101 ALR 549.

Time requirements prescribed by statute granting right to sue United States or a state as a condition of jurisdiction which renders it unnecessary to plead specially their breach in defense, 106 ALR 215.

Form and sufficiency of allegations of heirship, 110 ALR 1239.

Necessity and sufficiency of allegations in regard to trust in a pleading in action by trustee against third parties, 112 ALR 1514.

Propriety and effect of including in plaintiff's pleading in action for negligence diverse or contradictory allegations as to status or legal relationship as between parties or as between party and third person, 115 ALR 178.

Necessity and sufficiency of reply to answer pleading of statute of limitations, 115 ALR 755.

Sufficiency of complaint in action against railroad for killing or injuring person or livestock as regards time, and direction and identification of train, 115 ALR 1074.

Pleading waiver, estoppel, and res judicata, 120 ALR 8.

Burden of allegation and proof in civil cases as regards of exception in statute, 130 ALR 440.

Manner and sufficiency of pleading foreign law, 134 ALR 570.

Necessary allegations in a declaration or complaint in action against physician or surgeon based on wrong diagnosis, 134 ALR 683.

Necessity and sufficiency of pleading custom or usage, 151 ALR 324.

Presumption as to payment or discharge of obligation from obligor's possession of paper evidencing it, 156 ALR 777.

Manner of pleading statute of frauds as defense, 158 ALR 89.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 ALR 496.

Pleading laches, 173 ALR 326.

Propriety and effect of pleading different degrees of negligence or wrongdoing in complaint seeking recovery for one injury, 173 ALR 1231.

Necessity of pleading that tort was committed by servant, in action against master, 4 ALR2d 292.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 ALR2d 1179.

Pleading last clear chance doctrine, 25 ALR2d 254.

Pleading aggravation of a preexisting physical condition, 32 ALR2d 1447.

Pleading bona fide purchase of real property as defense, 33 ALR2d 1322.

Defense of adverse possession or statute of limitations as available under general denial or plea of general issue in ejectment action, 39 ALR2d 1426.

Manner and sufficiency of pleading agency in contract action, 45 ALR2d 583.

Pleading or raising defense of privilege in defamation action, 51 ALR2d 552.

Raising defense of statute of limitations by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings, 61 ALR2d 300.

Raising statute of limitations by motion for summary judgment, 61 ALR2d 341.

Pleading self-defense or other justification in civil assault and battery action, 67 ALR2d 405.

Necessity and manner of pleading denial of partnership in action by third person against alleged partners, 68 ALR2d 545.

Enforceability of bail bond or recognition against surety where, at time it was filed, prosecution of principal was barred by statute of limitations, 75 ALR2d 1431.

Malpractice in treatment and surgery of the ear, 76 ALR2d 783.

Recovery on quantum meruit where only express contract is pleaded, under Federal Rules of Civil Procedure 8 and 54 and similar state statutes or rules, 84 ALR2d 1077.

Pleading of election remedies, 99 ALR2d 1315.

Necessity and sufficiency of allegation, in a suit for specific performance of a contract for the sale of land, as to the adequacy of the consideration or as to the fairness of the contract, 100 ALR2d 551.

Modern trends as to pleading a particular cause of injury or act of negligence as waiving or barring the right to rely on *res ipsa loquitur*, 2 ALR3d 1335.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice, 8 ALR3d 1336.

Malpractice: liability of physician or hospital where patient suffers heart attack or the like while undergoing unrelated medical procedure, 17 ALR3d 796.

Mutuality of estoppel as prerequisite of availability of doctrine of collateral estoppel to a stranger to the judgment, 31 ALR3d 1044.

Propriety of attaching photographs to a pleading, 33 ALR3d 322.

Liability of hospital for refusal to admit or treat patient, 35 ALR3d 841.

Judgment against parents in action for loss of minor's services as precluding mi-

nor's action for personal injuries, 41 ALR3d 536.

When does jeopardy attach in a nonjury trial?, 49 ALR3d 1039.

Duty of physician or surgeon to warn or instruct nurse or attendant, 63 ALR3d 1020.

May action for malicious prosecution be predicated on defense or counterclaim in civil suit, 65 ALR3d 901.

Economic duress or business compulsion in execution of promissory note, 79 ALR3d 598.

Medical malpractice: patient's failure to return, as directed, for examination or treatment as contributory negligence, 100 ALR3d 723.

Medical malpractice: administering or prescribing drugs for weight control, 1 ALR4th 236.

Right of party litigant to defend or counterclaim on ground that opposing party or his attorney is engaged in unauthorized practice of law, 7 ALR4th 1146.

Medical malpractice: administering or

prescribing birth control pills or devices, 9 ALR4th 372.

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions, 12 ALR4th 23.

Medical malpractice: *res ipsa loquitur* in negligent anesthesia cases, 49 ALR4th 63.

Tortious maintenance or removal of life supports, 58 ALR4th 222.

Social worker malpractice, 58 ALR4th 977.

Liability for medical malpractice in connection with performance of circumcision, 75 ALR4th 710.

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice, 12 ALR5th 1.

Hospital liability as to diagnosis and care of patients in emergency room, 58 ALR5th 613.

9-11-9. Pleading special matters.

(a) **Capacity.** It is not necessary to aver the capacity of a party to bring or defend an action, the authority of a party to bring or defend an action in a representative capacity, or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to bring or defend an action, or the authority of a party to bring or defend an action in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **Conditions precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) **Official document or act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, of a judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) **Time and place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special damage.** When items of special damage are claimed, they shall be specifically stated. (Ga. L. 1966, p. 609, § 9.)

Cross references. — Form of complaint for money paid by mistake, see § 9-11-107.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 9, see 28 U.S.C.

Law reviews. — For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For article, “Georgia’s ‘Door-Closing’ Statute:

Who Bears the Burden?,” see 24 Ga. St. B.J. 141 (1988). For annual survey article on legal ethics, see 56 Mercer L. Rev. 315 (2004). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For article, “The Georgia Taxpayer Protection and False Claims Act,” see 65 Mercer L. Rev. 1 (2013).

For comment, “Pleading Constructive Fraud in Securities Litigation — Avoiding Dismissal for Failure to Plead Fraud With Particularity,” see 33 Emory L.J. 517 (1984).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CAPACITY

FRAUD, MISTAKE, AND MENTAL CONDITION

CONDITIONS PRECEDENT

SPECIAL DAMAGES

General Consideration

Construction of pleadings to do justice. — Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9) is not immune from the command of Ga. L. 1976, p. 1047, § 1 (see now O.C.G.A. § 9-11-8(f)) that pleadings be construed so as to do substantial justice. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Principle that a pleading should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff’s claim which would entitle the plaintiff to relief is applicable to all pleadings, including special matters. *Cochran v. McCollum*, 233 Ga.

104, 210 S.E.2d 13 (1974); *Bryant v. Bryant*, 236 Ga. 265, 223 S.E.2d 662 (1976).

Complaint shall not be dismissed unless the averments disclose that the plaintiff would not be entitled to relief under any set of facts that could be proved in support of the claim. *Hiller v. Culbreth*, 139 Ga. App. 351, 228 S.E.2d 374 (1976).

Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), a pleading should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff’s claim which would entitle the plaintiff to relief, and this principle is applicable to all pleadings, including special matters. *Moultrie v. Atlanta Fed. Sav. & Loan Ass’n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Pleading should not be dismissed for failure to state a claim unless it appears beyond a doubt that the pleader can prove no set of facts in support of the pleader's claim which would entitle the pleader to relief. This principle is applicable to all pleadings including special matters (fraud, mistake, and conditions precedent) under O.C.G.A. § 9-11-9. *Skelton v. Skelton*, 251 Ga. 631, 308 S.E.2d 838 (1983).

Amendment of pleading. — Pleading should not be stricken if under any state of facts within its framework the pleader might prevail, but the trial court should grant a right to amend. *Diversified Holding Corp. v. Clayton McLendon, Inc.*, 120 Ga. App. 455, 170 S.E.2d 863 (1969).

Proper remedy for seeking more particularity is by motion for more definite statement at the pleading stage or by discovery thereafter. *Cochran v. McCollum*, 233 Ga. 104, 210 S.E.2d 13 (1974); *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Remedy for failure to plead special damages is to move for a more definite statement of the plaintiff's claim. *Alta Anesthesia Assocs. of Ga., P.C. v. Gibbons*, 245 Ga. App. 79, 537 S.E.2d 388 (2000).

Trial court erred in granting the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted and for judgment on the pleadings because the trial court should have required the plaintiffs to amend the plaintiffs' complaint and provide a more definite statement of the plaintiffs' claims before passing upon the motions; the amended complaint was a "shotgun pleading" because the complaint was not a short and plain statement of the claims that the plaintiffs asserted as required by O.C.G.A. § 9-11-8(a)(2)(A) of the Civil Practice Act O.C.G.A. Ch. 11, T. 9, the complaint did not give the defendants fair notice of the nature of the claims, and the complaint did not conform to several of the specific pleading requirements of the Act, specifically O.C.G.A. §§ 9-11-8, 9-11-9, and 9-11-10. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

When a trial court orders a plaintiff to

make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to conform to the pleading requirements of the Civil Practice Act O.C.G.A. Ch. 11, T. 9 and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint under O.C.G.A. § 9-11-41(b), not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Use of motion for more definite statement to enforce section. — Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9) itself contains no mechanism for enforcing its terms, and common practice has been to use Ga. L. 1966, p. 609, § 12 (see now O.C.G.A. § 9-11-12(e)) for that purpose. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

One context in which a somewhat liberal approach to granting a motion under Ga. L. 1966, p. 609, § 12 (see now O.C.G.A. § 9-11-12(e)) is appropriate is when a request for more definite statement is used to enforce special pleading requirements of subsection (c) of Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9). *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Emergency vehicle. — Affirmative defense of emergency vehicle need not be pled under Ga. L. 1976, p. 1047, § 1 (see now O.C.G.A. § 9-11-8(c)), nor is it one of the special matters listed under Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9). *Walker v. Burke County*, 149 Ga. App. 704, 256 S.E.2d 100 (1979).

Privilege. — Defense of privilege need not be affirmatively pled under Ga. L.

General Consideration (Cont'd)

1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8(c)), nor specifically pled under Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9), and is sufficiently raised by a motion to dismiss. *Europa Hair, Inc. v. Browning*, 133 Ga. App. 753, 212 S.E.2d 862 (1975).

Mere misnomer of a party in the pleadings is a defect which may be waived when the misnamed party is in fact the legally cognizable proper party in interest. *Block v. Voyager Life Ins. Co.*, 251 Ga. 162, 303 S.E.2d 742 (1983).

Damages for mental anguish as an element of general compensatory damages need not be specially pled. *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).

Evidence of additional damages in trial de novo. — When the plaintiff appealed 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).

Cited in *Bazemore v. Burnet*, 117 Ga. App. 849, 161 S.E.2d 924 (1968); *Reiner v. David's Super Mkt., Inc.*, 118 Ga. App. 10, 162 S.E.2d 298 (1968); *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968); *Neville v. Buckeye Cellulose Corp.*, 118 Ga. App. 439, 164 S.E.2d 257 (1968); *O'Neil v. Moore*, 118 Ga. App. 424, 164 S.E.2d 328 (1968); *HFC v. Johnson*, 119 Ga. App. 49, 165 S.E.2d 864 (1969); *WSAV-TV, Inc. v. Baxter*, 119 Ga. App. 185, 166 S.E.2d 416 (1969); *Phoenix Ins. Co. v. Aetna Cas. & Sur. Co.*, 120 Ga. App. 122, 169 S.E.2d 645 (1969); *Bill Heard Chevrolet Co. v. GMAC*, 120 Ga. App. 328, 170 S.E.2d 454 (1969); *Leachman v. Cobb Dev. Co.*, 226 Ga. 103, 172 S.E.2d 688 (1970); *Butler v. Cochran*, 121 Ga. App. 173, 173 S.E.2d 275 (1970); *Georgia Educ. Auth. (Sch.) v. Davis*, 227

Ga. 36, 178 S.E.2d 853 (1970); *Smith v. Standard Oil Co.*, 227 Ga. 268, 180 S.E.2d 691 (1971); *Beckwith v. Peterson*, 227 Ga. 403, 181 S.E.2d 51 (1971); *Elsner v. Cathcart Cartage Co.*, 124 Ga. App. 615, 184 S.E.2d 685 (1971); *Butler v. Hicks*, 229 Ga. 72, 189 S.E.2d 416 (1972); *Stewart v. Jim Walter Homes, Inc.*, 229 Ga. 244, 190 S.E.2d 520 (1972); *Fleet Transp. Co. v. Cooper*, 126 Ga. App. 360, 190 S.E.2d 629 (1972); *Porter-Lite Corp. v. Warren Scott Contracting Co.*, 126 Ga. App. 436, 191 S.E.2d 95 (1972); *Commercial Credit Corp. v. Wilkes*, 229 Ga. 665, 193 S.E.2d 811 (1972); *Hancock v. Nashville Inv. Co.*, 128 Ga. App. 58, 195 S.E.2d 674 (1973); *Aiken v. Bynum*, 128 Ga. App. 212, 196 S.E.2d 180 (1973); *Hawkins Iron & Metal Co. v. Continental Ins. Co.*, 128 Ga. App. 462, 196 S.E.2d 903 (1973); *Schlicht v. Bincer*, 230 Ga. 745, 199 S.E.2d 245 (1973); *MacNerland v. Barnes*, 129 Ga. App. 367, 199 S.E.2d 564 (1973); *Management Search, Inc. v. Kinard*, 231 Ga. 26, 199 S.E.2d 899 (1973); *Smith v. Berry*, 231 Ga. 39, 200 S.E.2d 95 (1973); *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973); *Wheat v. Montgomery*, 130 Ga. App. 202, 202 S.E.2d 664 (1973); *Applegarth Supply Co. v. Schaffer*, 130 Ga. App. 353, 203 S.E.2d 277 (1973); *Vulcan Materials Co. v. Douglas*, 131 Ga. App. 21, 205 S.E.2d 84 (1974); *Hendrix v. Scarborough*, 131 Ga. App. 342, 206 S.E.2d 42 (1974); *Baldwin v. Ariail*, 232 Ga. 376, 207 S.E.2d 17 (1974); *Hannah v. Shauck*, 131 Ga. App. 834, 207 S.E.2d 239 (1974); *Wallace v. Bleakman*, 131 Ga. App. 856, 207 S.E.2d 254 (1974); *Centennial Equities Corp. v. Hollis*, 132 Ga. App. 44, 207 S.E.2d 573 (1974); *Robinson Explosives, Inc. v. Dalon Contracting Co.*, 132 Ga. App. 849, 209 S.E.2d 264 (1974); *Howard v. Dun & Bradstreet, Inc.*, 136 Ga. App. 221, 220 S.E.2d 702 (1975); *Barrett v. Simmons*, 235 Ga. 600, 221 S.E.2d 25 (1975); *Key v. Bagen*, 136 Ga. App. 373, 221 S.E.2d 234 (1975); *Scata v. Pinnacle Enters., Inc.*, 136 Ga. App. 451, 221 S.E.2d 660 (1975); *Filsoof v. West*, 235 Ga. 818, 221 S.E.2d 811 (1976); *Babcock v. Davis Realty Co.*, 138 Ga. App. 236, 225 S.E.2d 711 (1976); *Phillips v. Hertz Com. Leasing Corp.*, 138 Ga. App. 441, 226 S.E.2d 287 (1976); *Brannon v. Whisenant*, 138 Ga.

App. 627, 227 S.E.2d 91 (1976); Davis v. Ben O'Callaghan Co., 139 Ga. App. 22, 227 S.E.2d 837 (1976); Carroll v. Equico Lessors, 141 Ga. App. 279, 233 S.E.2d 255 (1977); Parker v. Centrum Int'l Film Corp., 141 Ga. App. 521, 233 S.E.2d 877 (1977); Chastain v. Simmons, 142 Ga. App. 615, 236 S.E.2d 678 (1977); Parks v. Parks, 240 Ga. 1, 239 S.E.2d 334 (1977); Boxwood Corp. v. Berry, 144 Ga. App. 351, 241 S.E.2d 297 (1977); Scroggins v. Harper, 144 Ga. App. 548, 241 S.E.2d 648 (1978); Bloodworth v. Bloodworth, 240 Ga. 614, 241 S.E.2d 827 (1978); Nelson v. Fulton County Bank, 147 Ga. App. 98, 248 S.E.2d 173 (1978); Hough v. Johnson, 242 Ga. 698, 251 S.E.2d 288 (1978); Cooper v. Mason, 151 Ga. App. 793, 261 S.E.2d 738 (1979); Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979); Windjammer Assocs. v. Hodge, 153 Ga. App. 758, 266 S.E.2d 540 (1980); Avery v. K.I., Ltd., 158 Ga. App. 640, 281 S.E.2d 366 (1981); Simpson v. Georgia State Bank, 159 Ga. App. 310, 283 S.E.2d 278 (1981); Hurst v. McDaniel, 159 Ga. App. 702, 285 S.E.2d 40 (1981); DeLoach v. Floyd, 160 Ga. App. 728, 288 S.E.2d 65 (1981); Goldstein v. GTE Prods. Corp., 160 Ga. App. 767, 287 S.E.2d 105 (1982); Dorsey Heating & Air Conditioning Co. v. Gordon, 162 Ga. App. 608, 292 S.E.2d 452 (1982); Frates v. Sutherland, Asbill & Brennan, 164 Ga. App. 243, 296 S.E.2d 788 (1982); Borenstein v. Blumenfeld, 250 Ga. 606, 299 S.E.2d 727 (1983); Lenny's, Inc. v. Allied Sign Erectors, Inc., 170 Ga. App. 706, 318 S.E.2d 140 (1984); Capps v. Mullen, 172 Ga. App. 297, 322 S.E.2d 747 (1984); Rustin Stamp & Coin Shop, Inc. v. Ray Bros. Roofing & Sheet Metal Co., 175 Ga. App. 30, 332 S.E.2d 341 (1985); Alexie, Inc. v. Old S. Bottle Shop Corp., 179 Ga. App. 190, 345 S.E.2d 875 (1986); Kauka Farms, Inc. v. Scott, 256 Ga. 642, 352 S.E.2d 373 (1987); Jacobs v. Pilgrim, 186 Ga. App. 260, 367 S.E.2d 49 (1988); Guthrie v. Bank S., 195 Ga. App. 123, 393 S.E.2d 60 (1990); Hart v. Sullivan, 197 Ga. App. 759, 399 S.E.2d 523 (1990); Kennedy v. Johnson, 205 Ga. App. 220, 421 S.E.2d 746 (1992); Bryant v. Haynie, 216 Ga. App. 430, 454 S.E.2d 533 (1995); Cobb County v. Jones Group, 218 Ga. App. 149, 460 S.E.2d 516 (1995); NationsBank v. Tucker,

231 Ga. App. 622, 500 S.E.2d 378 (1998); Leroy v. Atlanta Protective Assocs., 255 Ga. App. 849, 567 S.E.2d 1819 (2002); Woody's Steaks, LLC v. Pastoria, 261 Ga. App. 815, 584 S.E.2d 41 (2003); Miller v. Lomax, 266 Ga. App. 93, 596 S.E.2d 232 (2004); Rooks v. Tenet Health Sys. GB, Inc., 292 Ga. App. 477, 664 S.E.2d 861 (2008); Weatherly v. Weatherly, 292 Ga. App. 879, 665 S.E.2d 922 (2008); Memar v. Styblo, 293 Ga. App. 528, 667 S.E.2d 388 (2008); Walker v. Walker, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Capacity

Specific negative averment required. — In order to raise an issue as to plaintiff's capacity to sue, it is incumbent upon the defendant to set forth a defense by specific negative averment including all facts known to the defendant bearing on the plaintiff's lack of capacity. Patterson v. Duron Paints of Ga., Inc., 144 Ga. App. 123, 240 S.E.2d 603 (1977).

Effect of pleading by specific negative averment. — Effect of the procedural rule in subsection (a) of O.C.G.A. § 9-11-9 that lack of capacity must be pled by specific negative averment is to insure that the plaintiff will have an opportunity to correct the misnomer by amendment. Youmans v. Riley Properties, 180 Ga. App. 176, 349 S.E.2d 1 (1986).

General denial of corporation's existence insufficient. — General denial by the defendant or denial for lack of knowledge or information is insufficient to raise an issue as to the defendant corporation's legal existence, and failure to raise such issue by direct negative averment results in waiver of the defense. Stuckey's Carriage Inn v. Phillips, 122 Ga. App. 681, 178 S.E.2d 543 (1970).

Waiver when issue of capacity not raised before judgment. — Waiver occurs only when the defendant fails to raise issue of capacity any time before judgment. Patterson v. Duron Paints of Ga., Inc., 144 Ga. App. 123, 240 S.E.2d 603 (1977).

By failing to raise issue of legal existence or capacity by specific negative averment any time before judgment, the defendant waives the objection. Prince &

Capacity (Cont'd)

Paul v. Don Mitchell's WLAQ, Inc., 127 Ga. App. 502, 194 S.E.2d 269 (1972).

When a party desires to raise an issue as to the capacity or authority of a party to bring an action, the party must do so by specific negative averment in the responsive pleadings. Otherwise, the defense is deemed waived. *Klorer-Willhardt, Inc. v. Martz*, 166 Ga. App. 446, 304 S.E.2d 442 (1983), overruled on other grounds *Adams v. Cato*, 175 Ga. App. 28, 332 S.E.2d 355 (1985).

Challenge on appeal too late. — On appeal, the defendant could not challenge the mother's right to sue for medical expenses, etc., on the theory that such action lay with the father, when the defendant did not question the mother's capacity to sue at the outset. *Johnson v. Daniel*, 135 Ga. App. 926, 219 S.E.2d 579 (1975) (case decided prior to amendment of § 19-7-1, relating to parental control of child).

In the absence of any negative averment, including supporting particulars, the issue of the plaintiff's capacity to sue is not properly raised in the trial court and may not be raised on appeal. *Vanelzas v. Pallardy*, 166 Ga. App. 264, 304 S.E.2d 429 (1983).

Mistaken identity. — Defense of individual defendants, who offered evidence to show that the owner of the vehicle and the employer of the driver involved in an accident was a corporation, and made a motion to be dismissed as defendants, did not involve an issue which must be raised by specific negative averment under subsection (a) of this section; closest category into which this defense fits is that of "mistaken identity." *Calhoun v. Herrin*, 125 Ga. App. 518, 188 S.E.2d 273 (1972).

Lack of capacity due to failure to register need not be specially pled. — When a contractor has not complied with the provisions of O.C.G.A. § 48-13-37 requiring nonresident contractors to register with the state revenue commissioner in order to maintain an action to recover payment in state courts, the defense of the contractor's lack of capacity to maintain the suit may be asserted at trial without being specially pled under O.C.G.A. § 9-11-9. *Gorrell v. Fowler*, 248 Ga. 801,

286 S.E.2d 13, appeal dismissed, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982).

Defendant was not estopped from asserting the improper party defense on grounds that the defendant did not comply with O.C.G.A. §§ 9-11-9 and 9-11-19, since those sections, which govern the issue of legal capacity and joinder of parties, have no bearing on this matter. *Benschoter v. Shapiro*, 204 Ga. App. 56, 418 S.E.2d 381, cert. denied, 204 Ga. App. 921, 418 S.E.2d 381 (1992).

Fraud, Mistake, and Mental Condition

Subsection (b) is exception to general liberality of pleading. — Subsection (b) of this section is an exception to general liberality of pleading permitted under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), and although it is construed in *pari materia* with the remainder of the chapter, it in effect retains a long-standing rule obtaining at common law and in many states, requiring that facts must be alleged which if proved would lead clearly to the conclusion that fraud had been committed. *Continental Inv. Corp. v. Cherry*, 124 Ga. App. 863, 186 S.E.2d 301 (1971).

Purpose of subsection (b) of this section is to insure that the defendant has sufficient notice to enable the defendant to prepare a responsive pleading. *Hayes v. Hallmark Apts., Inc.*, 232 Ga. 307, 207 S.E.2d 197 (1974).

Lack of "good faith" is not same as "fraud" under this section. *McLendon v. Hartford Accident & Indem. Co.*, 119 Ga. App. 459, 167 S.E.2d 725 (1969) (see now O.C.G.A. § 9-11-9).

"Ulterior motive" is not required to be stated with particularity. *Ace-Hi Elec., Inc. v. Steinberg*, 133 Ga. App. 917, 213 S.E.2d 71 (1975).

There is no presumption of fraud; fraud must be pled and proved. *Henry v. Allstate Ins. Co.*, 129 Ga. App. 223, 199 S.E.2d 338 (1973), overruled on other grounds, *Tucker v. Chung Studio of Karate, Inc.*, 142 Ga. App. 818, 237 S.E.2d 223 (1977).

General allegation of fraud amounts to nothing; it is necessary that

complainant show, by specifications, wherein fraud consists. Issuable facts must be charged. *Candler v. Clover Realty Co.*, 125 Ga. App. 278, 187 S.E.2d 318 (1972).

Reasonable reliance sufficiently pled. — In claiming fraud and negligent misrepresentation, a shareholder did not fail to allege facts showing reasonable reliance as required by O.C.G.A. § 9-11-9(b); the amended complaint alleged that the shareholder detrimentally relied upon misrepresentations allegedly made in a press release, “as any similarly situated shareholder and investor would reasonably rely on similar press releases,” and thus it could not be said that the shareholder was bound to fail to establish reasonable reliance. *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 284 Ga. App. 387, 643 S.E.2d 864 (2007).

Reliance not shown. — Plaintiff alleged that an attorney’s statements induced the attorney’s client to breach the contract; the plaintiff does not contend that the plaintiff personally relied on any misrepresentations by the attorney, who was the defendant. Thus, because the plaintiff’s pleading shows on the pleading’s face that the plaintiff was not damaged as a result of the plaintiff’s own reliance on any false misrepresentation made by the attorney, the plaintiff’s fraud claim failed and was properly dismissed. *Fortson v. Hotard*, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

What petition to show. — Petition which sets forth circumstances to show that the defendant made misrepresentations knowing the misrepresentations were false, with the intention of deceiving the plaintiff, and that the plaintiff did in fact rely on the representations, was deceived thereby, and suffered damage as a result, met requirements of subsection (b) of this section. *Johnson v. Cleveland*, 131 Ga. App. 560, 206 S.E.2d 704 (1974).

Circumstances constituting alleged fraud must be pled with sufficient definiteness so as to advise adversary of claim which the adversary must meet. *Continental Inv. Corp. v. Cherry*, 124 Ga. App. 863, 186 S.E.2d 301 (1971).

Circumstances constituting fraud

must be stated with particularity. — Under subsection (b) of this section, circumstances constituting fraud must be stated with particularity; at the very least, pleader should designate occasions on which affirmative misstatements were made and by whom and in what way the statements were acted upon. *Diversified Holding Corp. v. Clayton McLendon, Inc.*, 120 Ga. App. 455, 170 S.E.2d 863 (1969).

Face of a complaint failed to allege any specific facts to support a finding that an engineer intentionally made false statements about the condition of a retaining wall on the plaintiff’s property when the engineer sent an inspection letter to a builder, that the engineer sent the letter to the builder with the intention of inducing the plaintiff, a third party, to rely on the letter or that the plaintiff justifiably relied on the letter; as a result, the plaintiff’s complaint was legally insufficient to present a fraud claim. *Dockens v. Runkle Consulting, Inc.*, 285 Ga. App. 896, 648 S.E.2d 80 (2007), cert. denied, 2007 Ga. LEXIS 668 (2007).

In a suit brought by a golf course development company against two other members of a limited liability company and a housing authority, the trial court erred by dismissing one of the member’s counterclaim asserting fraud as that member pled in detail numerous instances of false representations by the golf course development company that, when taken as true for purposes of the motion to dismiss, supported a claim of fraud. *Perry Golf Course Dev., LLC v. Hous. Auth.*, 294 Ga. App. 387, 670 S.E.2d 171 (2008).

When claim of fraud and deceit is stated with particularity. — Construing the pleadings in the light most favorable to the pleader, although unfavorable constructions are possible, a claim of fraud and deceit is stated with particularity when a false representation is alleged to have been made by the defendant, knowing the representation to be false (or knowledge equivalent thereof), with intent to deceive the plaintiff, who relied on such fraudulent representation and sustained loss as a result thereof. *Hiller v. Culbreth*, 139 Ga. App. 351, 228 S.E.2d 374 (1976).

Allegations of fraud must be specific and factual as to acts comprising

Fraud, Mistake, and Mental Condition (Cont'd)

the fraud, under both present and former rules of pleading. *Continental Inv. Corp. v. Cherry*, 124 Ga. App. 863, 186 S.E.2d 301 (1971).

When a company sued the company's attorneys and accountants for fraud and aiding and abetting fraud regarding their participation in a sale of the company's assets because they did not notify the company's principal of the sale, summary judgment was properly granted in favor of the attorneys and accountants because the employee who conducted the sale had apparent authority to do so and actual fraud was insufficiently pled, under O.C.G.A. § 9-11-9(b), as a response to the attorneys' and accountants' motion for summary judgment. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Student's allegations of fraud and perjury contained in a one sentence complaint were insufficient and the student did not carry the burden simply by making assertions in an appellate brief. *Majeed v. Randall*, 279 Ga. App. 679, 632 S.E.2d 413 (2006).

Homeowner failed to state a claim for fraud by overbilling by a lender, which resulted in the wrongful foreclosure of the homeowner's home by a law firm, because the homeowner did not allege fraud with particularity as required by O.C.G.A. § 9-11-9(b). The homeowner failed to state a claim under the Fair Credit Billing Act because the statute applied solely to creditors of open end credit plans pursuant to 15 U.S.C. § 1602. *Fairfax v. Wells Fargo Bank, N. A.*, 312 Ga. App. 171, 718 S.E.2d 16 (2011).

While a client's complaint contained a count for fraud, the client failed to allege any specific facts to state a cause of action for fraud pursuant to O.C.G.A. §§ 9-11-9, 51-6-1, and 51-6-2(b) because the complaint failed to allege any specific facts indicating that a former attorney intentionally made false statements to the client during the course of the representation of the client. *Fortson v. Freeman*, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

Allegations of fraud in the complaint

were well-pled and met the requirements of O.C.G.A. § 9-11-9 based on the plaintiff's allegations that showed that the defendant made a promise and did not intend to perform pursuant to the promise. *Mecca Constr., Inc. v. Maestro Invs., LLC*, 320 Ga. App. 34, 739 S.E.2d 51 (2013).

Conclusory allegations permissible. — General allegation that the plaintiff was unable to read is a conclusory allegation, in that it does not specify why the plaintiff was unable to read, but such allegations are permissible under this section. *Simmons v. Wooten*, 241 Ga. 518, 246 S.E.2d 639 (1978).

Facts must accompany conclusory statements. — Conclusory statements which allege improper representation and lack of good faith must be followed by supporting facts, and categorical assertions of fraud amounting only to conclusions are not deemed admitted by a motion to dismiss. *Continental Inv. Corp. v. Cherry*, 124 Ga. App. 863, 186 S.E.2d 301 (1971).

Mere conclusory allegations that defendants defrauded by course of dealing in which unspecified property was purchased too dearly or sold too cheaply, without indicating what transactions were referred to, do not meet statutory standards. *Continental Inv. Corp. v. Cherry*, 124 Ga. App. 863, 186 S.E.2d 301 (1971).

Averments of fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law. *Robbins v. National Bank*, 241 Ga. 538, 246 S.E.2d 660 (1978).

Remedy for failure to plead fraud with particularity, as required by subsection (b) of Ga. L. 1966, p. 609, § 6 (see now O.C.G.A. § 9-11-9), is not a motion to dismiss but a motion for a more definite statement under Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12). *Tucker v. Chung Studio of Karate, Inc.*, 142 Ga. App. 818, 237 S.E.2d 223 (1977).

Although fraud is required to be pled with particularity, failure to do so renders a complaint vulnerable to a motion for a more definite statement, but not, as an initial matter, to a motion to dismiss. *Signal Knitting Mills, Inc. v. Roozen*, 150 Ga. App. 552, 258 S.E.2d 261 (1979).

When there is a failure to plead fraud with particularity, the correct remedy is not a motion to dismiss or strike but a motion for more definite statement under Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12(e)). *White v. Johnson*, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Failure to assert a fraud claim with particularity, as required by subsection (b) of O.C.G.A. § 9-11-9, does not authorize an automatic dismissal, rather, the defendant's initial remedy in such a situation is to move for a more definite statement. *Irvin v. Lowe's of Gainesville, Inc.*, 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Proper remedy for seeking more particularity is by a motion for more definite statement (O.C.G.A. § 9-11-12(e)) at the pleading stage or by the rules of discovery thereafter. *Skelton v. Skelton*, 251 Ga. 631, 308 S.E.2d 838 (1983).

Although O.C.G.A. § 9-11-9 requires that averments of fraud be pled with particularity, failure to do so does not authorize automatic dismissal. *International Indem. Co. v. Terrell*, 178 Ga. App. 570, 344 S.E.2d 239 (1986).

Appellants' alleged failure to plead fraud with specificity did not warrant a grant of summary judgment when the appellees had not filed a motion for a more definite statement in the trial court. *Falanga v. Kirschner & Venker, P.C.*, 286 Ga. App. 92, 648 S.E.2d 690 (2007).

Pro se borrower's claims that a loan servicing company, rather than the claimed assignee, was the actual successor in interest to the lender, that it fraudulently transferred the property for the purpose of foreclosing on the property, and that the promissory note misrepresented the amount of the loan, were insufficient to satisfy the requirement that fraud be pled with particularity; the trial court should have granted the borrower a chance to replead. *Babalola v. HSBC Bank, USA, N.A.*, 324 Ga. App. 750, 751 S.E.2d 545 (2013).

When claim of fraud dismissed. — With respect to an initial motion to dismiss or motion to strike, a claim of fraud should not be dismissed unless it appears beyond doubt that the pleader can prove no set of facts in support of the claim which would entitle the pleader to relief.

Tucker v. Chung Studio of Karate, Inc., 142 Ga. App. 818, 237 S.E.2d 223 (1977).

In cases involving fraud, conspiracy to defraud, and conversion of personal property, the complaint is not subject to be dismissed upon a motion unless averments therein disclose with certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved in support of the claim. *Vickery v. General Fin. Corp.*, 126 Ga. App. 403, 190 S.E.2d 833 (1972).

Allegations made by wife that she was brainwashed by husband, that he assured her he had dropped a divorce action, and that she was suffering from severe emotional difficulties when agreements pertinent to the divorce were made, were sufficient allegations of fraud and duress to require an evidentiary hearing. *Thompson v. Thompson*, 237 Ga. 509, 228 S.E.2d 886 (1976).

Conveyance of tract by executor in defiance of will. — Allegation of devise that executor of estate attempted to convey entire tract without authority and in complete defiance of terms of will, without giving heirs an opportunity to purchase, was a sufficient allegation of fraud. *Cook v. Cook*, 225 Ga. 779, 171 S.E.2d 568 (1969).

Failure to read instrument. — Evidence of defendants that the defendants did not read the instrument and relied on information given the defendants by the plaintiff and the plaintiff's attorney was insufficient to show fraud on the plaintiff's part when there was no fiduciary relationship between the plaintiff and the defendants and they dealt with each other at arm's length. *Venable v. Payne*, 138 Ga. App. 237, 225 S.E.2d 716 (1976).

Liability of independent contractor to third person. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) does not require specific allegations when liability is attempted to be established by third person to independent contractor on theory that construction was so defective as to be imminently dangerous to third persons. *Welding Prods. v. S.D. Mullins Co.*, 127 Ga. App. 474, 193 S.E.2d 881 (1972).

Evidence of unpleaded affirmative defenses in summary judgment proceedings. — When defendants do not

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specially plead affirmative defenses of failure of consideration and mistake, as required by Ga. L. 1976, p. 1047, § 1 (see now O.C.G.A. § 9-11-8) and subsection (b) of Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9), but on motion for summary judgment offer evidence in support of such defenses, thus creating issues of fact on motion for summary judgment, the moving party is not entitled to judgment as a matter of law. *Bailey v. Polote*, 152 Ga. App. 255, 262 S.E.2d 551 (1979).

Will propounder's claim in a motion for a directed verdict that caveators failed to plead fraud with particularity was procedurally improper as the proper remedy to seek more particularity was by a motion for a more definite statement or by the rules of discovery. *Odom v. Hughes*, 293 Ga. 447, 748 S.E.2d 839 (2013).

Motion to dismiss fraud claim properly denied. — In a medical negligence, wrongful death, and fraud action, a trial court properly denied a hospital's motion to dismiss the fraud claim against the hospital and allowed the suing spouse to amend the complaint to include the specificity for a fraud claim required by O.C.G.A. § 9-11-9 as sufficient allegations were made that the hospital concealed certain events leading to the death of the decedent/patient and that hospital employees intentionally made false statements about the decedent's condition with the intention of inducing the spouse to rely on the statements or that the spouse justifiably relied on the alleged false statements, which involved the improper placement of a feeding tube into the lung of the decedent/patient. *Roberts v. Nessim*, 297 Ga. App. 278, 676 S.E.2d 734 (2009).

Conditions Precedent

Requirements inapplicable to contractual claims. — Pleading and proof requirements relating to conditions precedent, O.C.G.A. §§ 9-11-9 and 13-3-4, are inapplicable to contractual claims. *Cowen v. Snellgrove*, 169 Ga. App. 271, 312 S.E.2d 623 (1983).

Claim for breach of contract without allegation of occurrence of conditions precedent. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), a complainant can plead a claim for breach of contract without alleging performance or occurrence of conditions precedent; however, in order to prevail at trial the complainant would be required to prove performance or occurrence of conditions precedent. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) it is no longer necessary for a plaintiff in a contract action to allege performance or occurrence of a condition precedent in the plaintiff's complaint. *Olympic Constr., Inc. v. Drywall Interiors, Inc.*, 180 Ga. App. 142, 348 S.E.2d 688 (1986).

General denial that conditions precedent performed. — When complainant alleges generally that all conditions precedent have been performed or have occurred, and the defendant denies that allegation generally, but the complainant fails to insist upon the right to specific and particular denial, general allegation stands denied by general denial and requirement of proof of performance of conditions precedent remains in effect just as it would if there had been no allegation in the complaint as to the conditions precedent. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Mere general denial of allegation that all conditions precedent have been performed does not constitute admission of performance of those conditions precedent. *McLendon Elec. Co. v. McDonough Constr. Co.*, 149 Ga. App. 115, 253 S.E.2d 772 (1979).

Denial of performance or occurrence after filing of answer. — While bringing in affirmative defense of denial of performance or occurrence of conditions precedent 15 months after original answer was filed is not beneficial to orderly disposition of case, it is, nevertheless, permitted under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Sasser & Co. v.*

Griffin, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Special Damages

Special damages to be pled with particularity. — Subsection (g) of this section requires that items of special damage shall be pled with particularity. *Signal Oil & Gas Co. v. Conway*, 126 Ga. App. 711, 191 S.E.2d 624, rev'd on other grounds, 229 Ga. 849, 194 S.E.2d 909 (1972).

Since the appellee did not include in an amended complaint a plea for special damages under O.C.G.A. § 9-11-9(g), the defamation count of the amended complaint was limited to a claim alleging slander per se; employment of the Milkovich factors determined only that the alleged opinion was actionable as slander, but the Milkovich factors had no bearing on whether the words used constituted slander per se; statements which could have been interpreted as having the purpose of injuring the appellee's business by stating or implying that the appellee was going out of the real estate development business in which the appellee was

still engaged and leaving the area were not recognizable as injurious on their face, and the appellant was entitled to summary judgment on the appellee's slander per se claim. *Bellemeade, LLC v. Stoker*, 280 Ga. 635, 631 S.E.2d 693 (2006).

Special damages not recovered. — Special damages could not be recovered since the complaint did not specifically state what special damages were sought. *Tri-County Inv. Group v. Southern States, Inc.*, 231 Ga. App. 632, 500 S.E.2d 22 (1998).

By failing to plead special damages with particularity as required by O.C.G.A. § 9-11-9(g), the scoutmaster did not state a claim for defamation. *McGee v. Gast*, 257 Ga. App. 882, 572 S.E.2d 398 (2002).

Amendment of complaint. — When the plaintiffs amended the plaintiff's complaint to plead special damages by dollar amount pursuant to a court order which gave no deadline for compliance, the amendment, filed prior to the entry of a pretrial order, was proper, timely, and should have been considered by the trial court. *Torok v. Yost*, 194 Ga. App. 94, 389 S.E.2d 793 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Associations and Clubs, § 57. 19 Am. Jur. 2d, Corporations, §§ 1655, 1658, 1660. 37 Am. Jur. 2d, Fraud and Deceit, § 441 et seq. 61A Am. Jur. 2d, Pleading, § 195 et seq. 66 Am. Jur. 2d, Reformation of Instruments, § 10 et seq.

Am. Jur. Pleading and Practice Forms. — 16 Am. Jur. Pleading and Practice Forms, Labor, § 2. 19B Am. Jur. Pleading and Practice Forms, Pleading, § 422.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 162, 243, 244, 250, 265, 267, 273, 294 et seq., 308. 71 C.J.S., Pleading, §§ 5, 11, 19, 20, 23, 29, 72, 78, 79, 80, 94, 153, 606.

ALR. — Form of pleading necessary to raise issue of corporate existence, 55 ALR 510.

Right of foreign corporation to plead statute of limitations, 59 ALR 1336; 122 ALR 1194.

Necessity of alleging permanency of in-

jury in order to recover damages as for a permanent injury, 68 ALR 490.

Amendment of pleadings after limitation has run by change in capacity in which suit is prosecuted, 74 ALR 1269.

Amendment of pleading after limitation period by substituting new defendant, or changing allegations as to capacity in which defendant is sued or the theory upon which defendant is sought to be held responsible for another's wrong, as stating a new cause of action, 74 ALR 1280.

Sufficiency of allegations of loss of patronage or profits to permit recovery of special damages from false publication, 86 ALR 848.

May payment be proved under general issue or general denial, or must it be specially pleaded, 100 ALR 264.

Time requirements prescribed by statute granting right to sue United States or a state as a condition of jurisdiction which renders it unnecessary to plead specially their breach in defense, 106 ALR 215.

Form and particularity of allegations to raise issue of undue influence, 107 ALR 832.

Pleading duress as a conclusion, 119 ALR 997.

Manner and sufficiency of pleading foreign law, 134 ALR 570.

Necessary allegations in a declaration or complaint in action against physician or surgeon based on wrong diagnosis, 134 ALR 683.

Necessity and sufficiency of pleading custom or usage, 151 ALR 324.

Pleading aggravation of a pre-existing physical condition, 32 ALR2d 1447.

Sufficiency of plaintiffs allegations in defamation action as to defendant's malice, 76 ALR2d 696.

Necessity and manner, in personal injury or death action, of pleading special damages in the nature of medical, nursing, and hospital expenses, 98 ALR2d 746.

Propriety and prejudicial effect of reference by plaintiff's counsel, in jury trial of personal injuries or death action, to amount of damages claimed or expected by his client, 14 ALR3d 541.

9-11-9.1. Affidavit to accompany charge of professional malpractice.

(a) In any action for damages alleging professional malpractice against:

(1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;

(2) A domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or

(3) Any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section,

the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or

claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.

(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until 30 days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.

(e) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(g) The professions to which this Code section shall apply are:

- (1) Architects;
- (2) Attorneys at law;

- (3) Audiologists;
- (4) Certified public accountants;
- (5) Chiropractors;
- (6) Clinical social workers;
- (7) Dentists;
- (8) Dietitians;
- (9) Land surveyors;
- (10) Marriage and family therapists;
- (11) Medical doctors;
- (12) Nurses;
- (13) Occupational therapists;
- (14) Optometrists;
- (15) Osteopathic physicians;
- (16) Pharmacists;
- (17) Physical therapists;
- (18) Physicians' assistants;
- (19) Podiatrists;
- (20) Professional counselors;
- (21) Professional engineers;
- (22) Psychologists;
- (23) Radiological technicians;
- (24) Respiratory therapists;
- (25) Speech-language pathologists; or

(26) Veterinarians. (Code 1981, § 9-11-9.1, enacted by Ga. L. 1987, p. 887, § 3; Ga. L. 1989, p. 419, § 3; Ga. L. 1997, p. 916, § 1; Ga. L. 2005, p. 1, § 3/SB 3; Ga. L. 2006, p. 72, § 9/SB 465; Ga. L. 2007, p. 216, § 1/HB 221.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, “Dietitians” was substituted for “Dieticians” in paragraph (f)(7) (now paragraph (g)(8)).

Editor's notes. — Ga. L. 1997, p. 916, § 2, not codified by the General Assembly, provides that the amendment to this Code

section applies to actions filed on or after July 1, 1997.

Ga. L. 2005, p. 1, § 1/SB 3, not codified by the General Assembly, provides that: “The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services

in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2007, p. 216, § 3/HB 221, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2007, and shall apply to any action filed on or after July 1, 2007."

Law reviews. — For annual survey of tort law, see 41 Mercer L. Rev. 355 (1989). For annual survey on law of torts, see 42 Mercer L. Rev. 431 (1990). For annual survey on trial practice and procedure, see 42 Mercer L. Rev. 469 (1990). For annual survey on law of torts, see 43 Mercer L. Rev. 395 (1991). For article, "The Application of § 9-11-9.1 to Malpractice Actions in Federal Court," see 28 Ga. St. B.J. 212 (1992). For annual survey on legal ethics, see 44 Mercer L. Rev. 281 (1992). For annual survey of law of torts, see 44 Mercer L. Rev. 375 (1992). For annual survey article on the law of torts, see 45 Mercer L. Rev. 403 (1993). For article, "Georgia's Professional Malpractice Affidavit Requirement," see 31 Ga. L. Rev. 1031 (1997). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 4 (1997). For annual survey article discussing legal ethics, see 51 Mercer L. Rev. 353 (1999). For

annual survey article on legal ethics, see 52 Mercer L. Rev. 323 (2000). For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001). For article, "Trial Practice and Procedure," see 53 Mercer L. Rev. 475 (2001). For survey article on trial practice and procedure for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003). For annual survey article on legal ethics, see 56 Mercer L. Rev. 315 (2004). For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005). For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005). For annual survey of legal ethics decisions, see 57 Mercer L. Rev. 273 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007). For survey article on legal ethics, see 59 Mercer L. Rev. 253 (2007). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For annual survey on real property, see 66 Mercer L. Rev. 151 (2014).

For note, "Hewitt v. Kalish: Qualifying as an 'Expert Competent to Testify' Under O.C.G.A. Section 9-11-9.1," see 46 Mercer L. Rev. 1537 (1995).

For comment, "Brown v. Nichols: The Eleventh Circuit Refuses to Play the Erie Game with Georgia's Expert Affidavit Requirement," see 29 Ga. L. Rev. 291 (1994). For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

JUDICIAL DECISIONS

ANALYSIS

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General Consideration

Constitutionality. — O.C.G.A. § 9-11-9.1 does not violate the constitutional prohibition of Ga. Const. 1983, Art. III, Sec. V, Para III against the inclusion of more than one subject matter in a bill or in a law or a matter in the body different from the title since the caption of the overall act gives the public adequate notice that the act contains matter relating to malpractice actions against professionals generally. *Lutz v. Foran*, 262 Ga. 819, 427 S.E.2d 248 (1993).

Because nothing in O.C.G.A. § 9-11-9.1 imposed a cost or fee for filing or obtaining an expert affidavit, and because the law applied uniformly to any person or entity bringing a lawsuit for professional negligence, the trial court did not err when the court ruled that the statute withstood the constitutional challenges raised by the clients. *Walker v. Cromartie*, 287 Ga. 511, 696 S.E.2d 654 (2010).

No equal protection violation. — Trial court did not treat similarly situated individuals differently, based on the statute's application of O.C.G.A. § 9-11-9.1(b) (now (e)), because whether it was a plaintiff filing a legal malpractice claim or, as here, a defendant filing a counterclaim more than 10 days before the expiration of the statute of limitations, the party would have been required to file an expert's affidavit contemporaneously with the claim and would not be entitled to the 45-day extension period of O.C.G.A. § 9-11-9.1(b) (now (e)); accordingly, there was no equal protection violation under

U.S. Const., amend. 14 in the dismissal of the defendant's counterclaim for failure to file the affidavit in a timely manner. *Landau v. Davis Law Group, P.C.*, 269 Ga. App. 904, 605 S.E.2d 461 (2004).

Purpose of section. — Purpose of O.C.G.A. § 9-11-9.1 is to reduce the number of frivolous malpractice suits being filed, not to require a plaintiff to prove a prima facie case entitling the plaintiff to recover and capable of withstanding a motion for summary judgment before the defendant files an answer. *Bowen v. Adams*, 203 Ga. App. 123, 416 S.E.2d 102, cert. denied, 202 Ga. App. 905, 416 S.E.2d 102 (1992).

Consideration of affidavits validity limited to the four corners of the document. — Requirements of O.C.G.A. § 9-11-9.1 were satisfied when the plaintiff attached an affidavit from a competent expert even though six months later the expert was not able to confirm the negligent acts alleged. *Sawyer v. DeKalb Medical Ctr., Inc.*, 234 Ga. App. 54, 506 S.E.2d 197 (1998).

Section applies to actions in tort or contract. — O.C.G.A. § 9-11-9.1 applies to any action for professional malpractice by negligent act or omission, sounding in tort or by breach of contract for failure to perform professional services in accordance with the professional obligation of care. *Richmond Leasing Co. v. Cooper, Cooper, Maioriello & Stalnaker*, 207 Ga. App. 623, 428 S.E.2d 603 (1993).

Section applied retroactively. — O.C.G.A. § 9-11-9.1 is procedural in nature and may be applied retroactively.

Precision Planning, Inc. v. Wall, 193 Ga. App. 331, 387 S.E.2d 610 (1989); *Blackmon v. Thompson*, 195 Ga. App. 589, 394 S.E.2d 795 (1990).

In a wrongful death action, because the 45-day grace period under former O.C.G.A. § 9-11-9.1(b) (now (e)) was constitutionally required, an administratrix was entitled to the benefit of the statute's provisions and retroactive application. *Rockdale Health Sys. v. Holder*, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

The 1997 amendments to O.C.G.A. § 9-11-9.1 applied prospectively, not retroactively to an action filed prior to July 1, 1997. *Mug A Bug Pest Control v. Vester*, 270 Ga. 407, 509 S.E.2d 925 (1999), overruling *Vester v. Mug A Bug Pest Control, Inc.*, 231 Ga. App. 644, 500 S.E.2d 406 (1998).

Since legislative intent controls and the legislature expressly stated that the 1997 amendments to the statute should be applied only to actions filed after the effective date, July 1, 1997, the court could not apply the amendments retroactively. *Mug A Bug Pest Control v. Vester*, 270 Ga. 407, 509 S.E.2d 925 (1999).

Collateral estoppel barred professional negligence action. — Trial court properly granted a defending corporation summary judgment in a professional negligence suit because the identical issue of the corporation's negligent performance was addressed in a federal lawsuit; thus, collateral estoppel barred the action. *Coffee Iron Works v. QORE, Inc.*, 322 Ga. App. 137, 744 S.E.2d 114 (2013).

Applicable to counterclaims. — O.C.G.A. § 9-11-9.1 applies to the assertion of a counterclaim by a defendant. *Hardman v. Knight*, 203 Ga. App. 519, 417 S.E.2d 338, cert. denied, 203 Ga. App. 906, 417 S.E.2d 338 (1992).

Counterclaim was subject to requirement that expert's affidavit be filed. *Jordan v. Lamberth, Bonapfel, Cifelli, Willson & Stokes*, 206 Ga. App. 178, 424 S.E.2d 859 (1992).

Amendments to pleadings to assert counterclaims with respect to the filing of the expert affidavit should be subject to the limitations of subsection (e) of O.C.G.A. § 9-11-9.1. *Hardman v. Knight*, 203 Ga. App. 519, 417 S.E.2d 338, cert.

denied, 203 Ga. App. 906, 417 S.E.2d 338 (1992).

Amendment of affidavit allowed. — When an affidavit has been filed with the complaint, the affidavit can be amended to respond to challenges to the affidavit's sufficiency. *Washington v. Georgia Baptist Medical Ctr.*, 223 Ga. App. 762, 478 S.E.2d 892 (1996), aff'd in part and rev'd in part, *Porquez v. Washington*, 268 Ga. 649, 492 S.E.2d 665 (1997).

Trial court did not err in denying dismissal of a patient's medical malpractice complaint against physicians and their employers, based on the physicians' claim that the patient failed to file a timely expert affidavit which raised the claim of lack of informed consent, as required by O.C.G.A. § 9-11-9.1, as the patient's initial complaint had an expert affidavit timely filed, and thereafter, an amended affidavit asserting the lack of informed consent was filed pursuant to O.C.G.A. § 9-11-15; dismissal was not warranted unless an expert affidavit was never initially filed in a timely manner. *Bhansali v. Moncada*, 275 Ga. App. 221, 620 S.E.2d 404 (2005).

Amendment remedied affidavit deficiency. — Because the patient filed an amended medical malpractice complaint with the affidavit of the second affiant-physician, who was a board-certified neurosurgeon and had been regularly engaged in the active practice of neurosurgery for at least three of the preceding five years, the patient used the cure provision in O.C.G.A. § 9-11-9, and the trial court erred in dismissing the patient's action based upon a competency determination concerning only the original affiant-physician. *Fisher v. Gala*, 325 Ga. App. 800, 754 S.E.2d 160 (2014).

Prohibition against cure by amendments did not pertain when plaintiff filed purported affidavit, albeit a defective one, and thus the exception to that prohibition was not considered by the court as an avenue for the plaintiff to escape dismissal of the plaintiff's suit. *Phoebe Putney Mem. Hosp. v. Skipper*, 235 Ga. App. 534, 510 S.E.2d 101 (1998).

Amendment of complaint to cure defective affidavit allowed. — In a professional malpractice action, when a

General Consideration (Cont'd)

plaintiff files a complaint accompanied by an affidavit from a person not competent to testify as an expert in the action, O.C.G.A. § 9-11-9.1(e) permits the plaintiff to cure that defect by filing an amended complaint with the affidavit of a second, competent expert. *Gala v. Fisher*, 770 S.E.2d 879, No. S14G0919, 2015 Ga. LEXIS 198 (2015).

Section not restricted to medical malpractice. — Applicability of O.C.G.A. § 9-11-9.1 is not restricted to medical malpractice actions. *Housing Auth. v. Greene*, 259 Ga. 435, 383 S.E.2d 867 (1989).

Section applies to professional malpractice action. — While O.C.G.A. § 9-11-9.1 was enacted as section 3 of the Medical Malpractice Act of 1987, which applies to medical-malpractice actions or health-care providers, section 3 of the Act applies to “any action for damages alleging professional malpractice.” *Housing Auth. v. Greene*, 259 Ga. 435, 383 S.E.2d 867 (1989).

While the trial court erred in granting summary judgment against a patient in a medical malpractice action based on a failure to attach an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 because the complaint could be construed as alleging claims of ordinary negligence, to the extent the complaint could be read to allege professional malpractice claims, summary judgment was proper; moreover, there were instances in which actions performed by a professional were nevertheless not professional acts constituting professional malpractice, but, rather, were acts of simple negligence which would not require proof by expert evidence. *Brown v. Tift County Hosp. Auth.*, 280 Ga. App. 847, 635 S.E.2d 184 (2006).

State court properly denied a clinic’s motion to dismiss a negligence complaint which arose out of injuries a patient allegedly sustained by and through the negligence of one of the clinic’s employees as the patient was not suing for medical malpractice, the employee was not a licensed health care provider, and thus the patient was not required to file the necessary affidavit required under O.C.G.A.

§ 9-11-9.1. *Mt. Orthopedics & Sports Med., P.C. v. Williams*, 284 Ga. App. 885, 644 S.E.2d 868 (2007).

Former federal inmate’s argument, alleging that the Bivens decision should be extended to the inmate’s Eighth Amendment claim against private prison employees because the affidavit requirement of O.C.G.A. § 9-11-9.1(a) made recovery only theoretical under state law, failed; not only did the complaint not allege a claim for medical malpractice as defined by O.C.G.A. § 9-3-70, but even if the complaint did the inmate stood in the same shoes as anyone else in Georgia filing a professional malpractice claim and was subject to no stricter rules than the rest of Georgia’s residents. *Alba v. Montford*, 517 F.3d 1249 (11th Cir. 2008), cert. denied, 129 S. Ct. 632, 172 L.Ed.2d 619 (2008).

Trial court did not err in denying a psychiatrist’s motion for summary judgment in a patient’s medical malpractice action because whether the psychiatrist breached duties arising from the psychiatrist-patient relationship was an issue of fact; pursuant to O.C.G.A. § 9-11-9.1, the patient presented expert testimony that the psychiatrist’s breaches of the duty of care directly resulted in the foreseeable harm of the patient’s attempting suicide. *Peterson v. Reeves*, 315 Ga. App. 370, 727 S.E.2d 171 (2012).

In a medical malpractice action, a certified nurse midwife (CNM) should be considered a member of the same profession as a registered professional nurse (RN) and can offer an opinion on the standard of care exercised by a RN because the Georgia Registered Professional Nurse Practice Act, O.C.G.A. § 43-26-1 et seq., requires a CNM to be licensed as a RN, and both RNs and CNMs are regulated by the Georgia Board of Nursing; under the regulatory scheme, a CNM was a RN who had advanced training in a specialized area; and the expert affidavit statute lists only nurses, and the statute does not have a separate listing for CNMs. *Dempsey v. Gwinnett Hosp. Sys.*, 330 Ga. App. 469, 765 S.E.2d 525 (2014).

Professional malpractice or ordinary negligence. — Trial court must decide as a matter of law if the negligence alleged by a plaintiff is, in fact, ordinary

negligence or professional malpractice, requiring an expert's affidavit. *Drawdy v. DOT*, 228 Ga. App. 338, 491 S.E.2d 521 (1997).

Dismissal of an action filed by children against a health care center that operated a nursing home alleging that their parent's injuries in a fall resulted from the nursing home's failure to follow emergency room instructions to take fall precautions was proper because the children did not file an expert affidavit contemporaneously with the complaint as required by O.C.G.A. § 9-11-9.1(a); their claim sounded in professional negligence, not ordinary negligence, because the nursing home was not given a list of specific precautions to be implemented, and the decision as to what specific precautions to take was left to the medical judgment of its staff. *Gaddis v. Chatsworth Health Care Ctr., Inc.*, 282 Ga. App. 615, 639 S.E.2d 399 (2006).

Trial court did not abuse the court's discretion in vacating the court's initial order dismissing an administratrix's wrongful death complaint for failure to timely file an expert's affidavit as the record revealed that the original complaint, although not styled as a wrongful death action, nonetheless pled that a hospital's negligence caused the decedent's death and sought a judgment against the hospital in an amount in excess of \$10,000 for all damages recoverable by law. *Rockdale Health Sys. v. Holder*, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

Because a patient's complaint was so general and unspecific that the complaint could be construed to allege that a medical center was vicariously liable for the professional negligence of a licensed health care professional, as opposed to ordinary negligence, the patient was required to file an expert affidavit under O.C.G.A. § 9-11-9.1. *Health Mgmt. Assocs. v. Bazemore*, 286 Ga. App. 285, 648 S.E.2d 749 (2007).

Patient's complaint that a hospital nurse had administered the wrong medication sounded in professional negligence, not ordinary negligence; thus, an affidavit was required under O.C.G.A. § 9-11-9.1(a). *Wellstar Health Sys. v. Painter*, 288 Ga. App. 659, 655 S.E.2d 251 (2007).

Trial court did not err in granting summary judgment in favor of a hospital and the hospital's employees in a surviving spouse's wrongful death action on the ground that the spouse's claims sounded in professional negligence, not ordinary negligence, which required an affidavit under O.C.G.A. § 9-11-9.1 because whether or not the treatments ordered by the husband's treating physician and carried out by the employees were timely was a question of medical judgment, and the duties involved in the administration of medications and treatments constituted a professional service; the spouse pointed to no admissible medical testimony to support the spouse's claim that the failure of the lab technician to call the intensive care unit (ICU) when the blood arrived caused the decedent's death, and the question of whether or not the lab technician's failure to call the ICU, resulting in the failure of the ICU to administer a blood transfusion, caused the decedent's death required expert testimony, which was excluded from the case. *Pattman v. Mann*, 307 Ga. App. 413, 701 S.E.2d 232 (2010).

Because a patient's complaint did not allege any negligence in the administration of a vaccination, but rather that a medical assistant was negligent in attempting to prevent the patient's fall from an examination table, there was no need for an expert affidavit under O.C.G.A. § 9-11-9.1(a); therefore, the trial court erred in dismissing the action. *Kerr v. OB/GYN Assocs.*, 314 Ga. App. 40, 723 S.E.2d 302 (2012).

Trial court did not err by finding that a slip and fall case was one of ordinary negligence as opposed to medical malpractice because under the circumstances of the nurses knowing that the patient had been determined a fall risk, the jury could, without the help of expert testimony, find that the nurses and the nursing assistant failed to exercise ordinary care by leaving the patient unattended in the bathroom while they cleaned the room. *Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

Affidavit filed with inconsistent third-party complaint. — In a breach of warranty action involving a survey commissioned by the defendants, the defen-

General Consideration (Cont'd)

plaintiff's third-party complaint against the surveyor and filing of an expert's affidavit stating that the survey was incorrect did not estop the defendant from relying on the survey in defense of the action. *Ewers v. Cooper*, 217 Ga. App. 434, 457 S.E.2d 705 (1995).

Contribution and indemnity from third-party defendant. — O.C.G.A. § 9-11-9.1 is applicable when a third-party defendant has been brought into an action based on assertions by a third-party plaintiff that, under allegations in the plaintiff's complaint, the third-party defendant is an unidentified joint tortfeasor with the third-party plaintiff, and, therefore, if the plaintiffs are entitled to an award of damages against the third-party plaintiff, the third-party plaintiff is entitled to contribution and indemnity from the third-party defendant. *Housing Auth. v. Greene*, 259 Ga. 435, 383 S.E.2d 867 (1989).

Affidavit requirement inapplicable to claim for breach of fiduciary duty. — Action by husband and wife against attorney arising from an adulterous relationship between the attorney and wife during the period the attorney was representing her did not provide the basis for a malpractice claim, requiring an expert affidavit, but the plaintiffs did have a claim for breach of fiduciary duty based on the attorney-client relationship. *Tante v. Herring*, 264 Ga. 694, 453 S.E.2d 686 (1994).

Affidavit requirement inapplicable to claim for wrongful death. — Trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. *DeKalb Med. Ctr., Inc. v. Hawkins*, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Affidavit requirement inapplicable to intentional tort claim. — Trial court erroneously dismissed a couple's com-

plaint upon grounds that the complaint failed to state a claim upon which relief could be granted because the complaint alleged intentional torts against an attorney and that attorney's law firm, and not claims of professional malpractice or negligence; therefore, the complaint was not required to be accompanied by an expert's affidavit pursuant to O.C.G.A. § 9-11-9.1. *Walker v. Wallis*, 289 Ga. App. 676, 658 S.E.2d 217 (2008).

Affidavit requirement inapplicable in bankruptcy court. — Chapter 13 debtors' adversary proceeding for legal malpractice, filed in a bankruptcy court, did not require an affidavit concerning the standard of care under O.C.G.A. § 9-11-9.1 because the federal rules of pleading applied to the proceeding. *Pullen v. Cornelison* (In re Pullen), No. 07-65415-MHM, 2009 Bankr. LEXIS 817 (Bankr. N.D. Ga. Mar. 31, 2009).

Section inapplicable in federal cases. — O.C.G.A. § 9-11-9.1 applies exclusively to actions brought in state court and is inapplicable in federal cases. *Boone v. Knight*, 131 F.R.D. 609 (S.D. Ga. 1990).

Federal diversity action. — O.C.G.A. § 9-11-9.1 is in direct conflict with Federal Rule of Civil Procedure 8(a) which requires only notice pleading and does not apply in a federal diversity action. *Baird v. Celis*, 41 F. Supp. 2d 1358 (N.D. Ga. 1999).

Defendants' motion to dismiss for failure to file an expert affidavit with the complaint, or within 45 days of the filing thereof as set forth in O.C.G.A. § 9-11-9.1, failed because that statute was inapplicable in diversity actions; the sufficiency of the heirs' complaint was judged by the standard set out in Fed. R. Civ. P. 8, which did not require the affidavit of an expert. *Roberts v. Jones*, 390 F. Supp. 2d 1333 (M.D. Ga. May 9, 2005).

Federal application unclear. — When it was not clear at the time the plaintiff filed the plaintiff's medical malpractice complaint that O.C.G.A. § 9-11-9.1 would apply in a diversity action in federal court, the district court erred in dismissing the plaintiff's claims with prejudice. Instead, the court should have granted the plaintiff leave to amend the complaint. *Brown v. Nichols*, 8 F.3d 770 (11th Cir. 1993).

Affidavit requirement applies only to professionals defined in Code. — Affidavit requirements of O.C.G.A. § 9-11-9.1 apply only to those professions recognized under Georgia law in O.C.G.A. §§ 14-7-2(2), 14-10-2(2), and 43-1-24. *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992).

Trial court erred in dismissing real estate developers' professional negligence claims against a civil engineering contractor based on the developers' failure to file an expert affidavit with their third party complaint because the civil engineering contractor was neither a professional licensed by the State of Georgia and listed in O.C.G.A. § 9-11-9.1 nor a licensed health care facility, and, consequently, the developers were not required to file an expert affidavit with their third party complaint. *Sembler Atlanta Dev. I, LLC v. URS/Dames & Moore, Inc.*, 268 Ga. App. 7, 601 S.E.2d 397 (2004).

When affidavit required. — Although the law strictly requires an expert affidavit to be filed pursuant to O.C.G.A. § 9-11-9.1 in the appropriate case, this is only when the negligent doing of a thing must be proved by reliance upon a general standard of care or by rules of procedure used by others competently performing the same service. *Roebuck v. Smith*, 204 Ga. App. 20, 418 S.E.2d 165 (1992).

Plaintiff's claim for injuries based on the failure of hospital agents and employees to raise bed rails required an expert affidavit since whether the side rails should have been in an "up" or "down" position was a question requiring the exercise of professional skill and judgment. *Robinson v. Medical Ctr.*, 217 Ga. App. 8, 456 S.E.2d 254 (1995).

When allegations by an inmate against the medical director of a correctional institution sounded in malpractice, a supporting affidavit was required. *Brooks v. Barry*, 223 Ga. App. 648, 478 S.E.2d 616 (1996), cert. denied, 522 U.S. 899, 118 S. Ct. 246, 139 L. Ed. 2d 176 (1997).

Since the count clearly alleged that the plaintiff's spouse did not receive adequate medical care, which meant the plaintiff had to rely on the knowledge of experts with regard to what the applicable standard of care was and whether that stan-

dard was breached, the plaintiff was required to file an expert affidavit with the plaintiff's complaint. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

Since no affidavit was filed pursuant to O.C.G.A. § 9-11-9.1, an administrator of an estate was allowed to maintain claims against a nursing care facility only with regard to actions or omissions in executing nonprofessional work duties relating to the decedent's fall at the facility, and was not allowed to maintain claims based on medical questions concerning specialized expert knowledge; the alleged failure to adequately monitor for injuries and assure proper medical care fell within the realm of professional medical decision making, but the allegation that the fall was not properly documented encompassed an administrative task not involving professional medical judgment. *Brown v. Tift Health Care, Inc.*, 279 Ga. App. 164, 630 S.E.2d 788 (2006).

Trial court erred in dismissing a client's amended legal malpractice complaint, which included fraud and breach of fiduciary duty, as the client's failure to file an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 did not result in an automatic adjudication on the merits or preclude an amendment after the expiration of the relevant statute of limitation; further, the appeals court disagreed that the client's fraud and breach of fiduciary duty claims were barred because the claims arose from the same factual allegations as the original claim for professional negligence, and because the fraud claim was grounded in intentional conduct, the claim did not need to be accompanied by an expert affidavit. *Shuler v. Hicks, Massey & Gardner, LLP*, 280 Ga. App. 738, 634 S.E.2d 786 (2006).

Trial court properly dismissed a wrongful death claim by a deceased nursing home resident's children, alleging that the nursing home staff failed to properly administer the resident's medications, as such task involved the professional skill and judgment of a nurse, and nurses were licensed professionals with specialized knowledge pursuant to O.C.G.A. § 43-26-3(6) to which O.C.G.A. § 9-11-9.1 explicitly applied; as the children failed to

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comply with the expert affidavit requirement, dismissal of that aspect of the claim was proper. *Williams v. Alvista Healthcare Ctr., Inc.*, 283 Ga. App. 613, 642 S.E.2d 232 (2007).

Hospital's admission that a nurse had given a patient the wrong medication did not relieve the patient of the obligation to file an affidavit under O.C.G.A. § 9-11-9.1. *Wellstar Health Sys. v. Painter*, 288 Ga. App. 659, 655 S.E.2d 251 (2007).

Denial of practice groups' motion to dismiss parents' medical malpractice action based on the parents' failure to comply with the expert affidavit requirement of O.C.G.A. § 9-11-9.1 was error because a prior appellate decision concluded that, at the time the litigation was brought, the question of whether a plaintiff was subject to the expert affidavit requirement depended not on the identity of the defendant, but on the cause of action, and explicitly held that, without an expert affidavit, the parents could have sustained only an ordinary negligence claim; the trial court's ruling, which held that because the practice groups were not licensed professionals or licensed health care facilities, no expert affidavit was needed, violated the law of the case. The parents could not have successfully argued on the appeal that the parents malpractice claims were exempt from the expert affidavit requirement. *Atlanta Women's Health Group, P.C. v. Clemons*, 299 Ga. App. 102, 681 S.E.2d 754 (2009).

Trial court properly dismissed a title company's complaint against an attorney for failure to comply with the expert affidavit requirement of O.C.G.A. § 9-11-9.1 because the complaint set forth a legal malpractice action by asserting that the attorney breached a legal services agreement to provide an accurate title commitment on certain real property, therefore, the complaint required compliance with the expert affidavit requirement of § 9-11-9.1. *Old Republic Nat'l Title Ins. Co. v. Atty. Title Servs.*, 299 Ga. App. 6, 682 S.E.2d 134 (2009), cert. denied, No. S09C1913, 2009 Ga. LEXIS 798 (Ga. 2009).

Trial court correctly determined that a plaintiff's failure-to-warn claim against the state, arising out of the prescription of medicine for the plaintiff while the plaintiff was in a state-run hospital, alleged professional negligence and that the plaintiff's failure to comply with the affidavit requirements of O.C.G.A. § 9-11-9.1(a) warranted dismissal of the complaint. *Nail v. State*, 301 Ga. App. 7, 686 S.E.2d 483 (2009).

To the extent the "inverse condemnation" action sought compensation for damages to the property based on allegations of professional engineering negligence, the owner was required to file an expert affidavit with the complaint and dismissal was proper given the owner's failure to file an affidavit. *Bray v. DOT*, 324 Ga. App. 315, 750 S.E.2d 391 (2013).

When affidavit not required. — Plaintiffs were not required to attach a supporting expert affidavit to the plaintiff's complaint against the hospital authority based inter alia on medical malpractice claims stemming from alleged acts of negligence by the authority's agents and employees. *Dozier v. Clayton County Hosp. Auth.*, 206 Ga. App. 62, 424 S.E.2d 632 (1992).

Affidavit requirement applies against a hospital not merely when liability is based upon the doctrine of respondeat superior but when liability is further grounded upon the averment of acts or omissions requiring the exercise of professional skill and judgment by agents or employees who themselves are recognized as "professionals" under O.C.G.A. §§ 14-7-2(2), 14-10-2(2), and 43-1-24. *Dozier v. Clayton County Hosp. Auth.*, 206 Ga. App. 62, 424 S.E.2d 632 (1992).

When the plaintiff can prove negligence or breach without proof of a customary procedure and violation of the procedure, the case is not a professional malpractice case and O.C.G.A. § 9-11-9.1 does not apply to require an "expert's affidavit". *Razete v. Preferred Research, Inc.*, 197 Ga. App. 69, 397 S.E.2d 489 (1990); *Flowers v. Memorial Medical Center, Inc.*, 198 Ga. App. 651, 402 S.E.2d 541 (1991).

After the plaintiff's foot was burned by a lamp from which the heat shield had been removed during surgery — the al-

leged decision being to obtain more light by removing the heat shield or other protective device from the lamp, as opposed to bringing in another lamp or increasing the volume of overhead lights — the claim was not necessarily one of medical malpractice. If that particular act, coupled with leaving the lamp near the foot for an extended period, was the heart of the claim, then simple negligence, not medical malpractice, was involved, and medical testimony was not essential to establish liability. *Jones v. Bates*, 261 Ga. 240, 403 S.E.2d 804 (1991).

Affidavit was not required in an action by the estate of a deceased inmate against a city, county, sheriff, and medical personnel alleging claims arising from failure to respond to the inmate's request for treatment of the inmate's diabetic condition. *Howard v. City of Columbus*, 219 Ga. App. 569, 466 S.E.2d 51 (1995).

Portion of a complaint alleging that advance warning signs gave plaintiff inaccurate and confusing information as the plaintiff approached a construction site charged the violation of a mandatory Manual On Uniform Traffic Control Devices standard and did not need an expert affidavit. *DOT v. Cushway*, 240 Ga. App. 464, 523 S.E.2d 340 (1999).

When the plaintiff claimed the defendant breached a duty of privacy and tortiously interfered with the employment contract, the claims were based on the defendant's intentional act of telling the plaintiff's employer about the plaintiff's medical condition, and because the plaintiff made no claim against the defendant based on professional negligence, the plaintiff did not have to attach an expert affidavit to the complaint. *Johnson v. Rodier*, 242 Ga. App. 496, 529 S.E.2d 442 (2000).

O.C.G.A. § 9-11-9.1 did not require clients who filed an action against a law firm and several attorneys to file an expert's affidavit when the clients asserted claims for intentional breach of contract, intentional breach of a fiduciary duty, and fraud, and although the trial court properly dismissed the clients' claim for legal malpractice because the legal malpractice claim was not supported by an expert's affidavit, the trial court erred by dismiss-

ing the client's other claims. *Smith v. Morris, Manning & Martin, LLP*, 264 Ga. App. 24, 589 S.E.2d 840 (2003).

Trial court properly dismissed a patient's complaint against a hospital authority, a hospital, and a doctor based on the patient's failure to timely file an expert affidavit in support of claims of professional malpractice, as required by O.C.G.A. § 9-11-9.1(a), as the allegations were based on a misdiagnosis of the patient's medical condition, and not due to a simple clerical or administrative error and, thus, sounded in malpractice. *James v. Hosp. Auth.*, 278 Ga. App. 657, 629 S.E.2d 472 (2006).

O.C.G.A. § 9-11-9.1 did not require a patient to file an expert affidavit with a complaint for fraud, misrepresentation, and deceit against a physician because the patient's allegations that the physician knowingly and intentionally misrepresented the nature and quality of a local hospital's equipment in order to induce the patient to have heart surgery at the local hospital rather than at another hospital preferred by the patient involved no question of professional judgment; the application of O.C.G.A. § 9-11-9.1 was limited to actions for professional negligence, and assertions of intentional misconduct against a professional fell outside of the statute's scope. *Murrah v. Fender*, 282 Ga. App. 634, 639 S.E.2d 595 (2006).

Trial court erred in dismissing a wrongful death claim by children of a deceased nursing home resident, based on their allegation that the nursing home violated O.C.G.A. § 31-8-108(a)(2) of the Bill of Rights for Residents of Long-Term Care Facilities by not documenting the resident's complaints of chest pain, as the claim was based on the nonprofessional, administrative aspects of running the facility and, accordingly, it was not subject to the pleading requirement of an expert affidavit pursuant to O.C.G.A. § 9-11-9.1. *Williams v. Alvista Healthcare Ctr., Inc.*, 283 Ga. App. 613, 642 S.E.2d 232 (2007).

Couple who alleged that an engineer exceeded the authority granted in a stipulation for the engineer to remove pieces of a car for testing were not alleging professional malpractice and thus were not required to file an affidavit under

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O.C.G.A. § 9-11-9.1; resolution of the couple's claims required determination of whether the engineer complied with the language of the stipulation, not determination of whether the engineer acted in compliance with the standard of conduct applicable to professional engineers. *Burke v. Paul*, 289 Ga. App. 826, 658 S.E.2d 430 (2008).

Allegations of the complaint were so general that the allegations could have been liberally construed to claim damages based on ordinary or other negligence not controlled by the expert affidavit requirements. *Bray v. DOT*, 324 Ga. App. 315, 750 S.E.2d 391 (2013).

Affidavit requirement met. — Parents properly invoked O.C.G.A. § 9-11-9.1(b) (now (e)) because the parents could not obtain additional affidavits before filing suit, and although the parents had obtained one affidavit stating that a first group of health care providers deviated from the standard of care when the suit was filed, the parents sought an affidavit to support the parents' claims against a second group of health care providers; both affidavits were filed within the 45-day period. *Bell v. Phoebe Putney Health Sys.*, 272 Ga. App. 856, 614 S.E.2d 115 (2005).

Pre-complaint deposition not authorized. — O.C.G.A. § 9-11-27 does not authorize the grant of a petition to take a pre-complaint deposition to acquire information for preparation of an affidavit to accompany a charge of medical malpractice which affidavit is required by O.C.G.A. § 9-11-9.1. *St. Joseph Hosp. v. Black*, 225 Ga. App. 139, 483 S.E.2d 290 (1997).

Failure to file expert affidavit. — When the plaintiff failed to file an expert affidavit with the complaint for legal malpractice, the plaintiff's complaint was subject to dismissal for failure to state a claim. Since such a dismissal was a dismissal on the merits, the trial court properly dismissed the complaint with prejudice. *ABE Eng'g, Inc. v. Griffin, Cochran & Marshall*, 212 Ga. App. 586, 443 S.E.2d 1 (1994); *Stamps v. Johnson*, 244 Ga. App. 238, 535 S.E.2d 1 (2000).

Failure of medical malpractice plaintiff to file an affidavit with the plaintiff's complaint of an expert competent to testify, that specifically stated at least one negligent act or omission claimed to exist and the factual basis for each such claim, warranted dismissal with prejudice of the complaint. *Merck v. St. Joseph's Hosp. of Atlanta, Inc.*, 251 Ga. App. 631, 555 S.E.2d 11 (2001).

After medical malpractice plaintiff failed to file an expert affidavit with the plaintiff's complaint, the defect was not cured by filing an amended complaint which included the expert affidavit but did not allege that time constraints prevented the filing of an affidavit with the original complaint as required by O.C.G.A. § 9-11-9.1(b) (now (e)). *Sullivan v. Fredericks*, 251 Ga. App. 790, 554 S.E.2d 809 (2001).

In a medical malpractice and wrongful death action, the trial court did not abuse the court's discretion in denying the appellant's motion for an extension of time to file an expert affidavit; the appellant failed to allege in the appellant's complaint that the limitation period would expire within ten days of filing the complaint or that because of the time constraints the appellant was unable to obtain an expert affidavit. *Cabey v. DeKalb Med. Ctr.*, 252 Ga. App. 313, 555 S.E.2d 742 (2001).

Pursuant to O.C.G.A. § 9-11-9.1, the renewal provision in O.C.G.A. § 9-2-61(a) did not save a second medical malpractice suit that was filed by the plaintiffs, patient and wife, after the statute of limitation but within six months of their voluntary dismissal of a timely first malpractice suit because: (1) the plaintiffs failed to attach an O.C.G.A. § 9-11-9.1 expert affidavit to the first complaint and dismissed the first action without giving the defendants, doctor and employer, a chance to seek dismissal on that ground; (2) the required affidavit was not executed until after the time for filing such an affidavit in the first action had expired; and (3) the defendants raised the affidavit issue in a motion to dismiss contemporaneous with the defendants' initial responsive pleadings in the second action. *Griffin v. Carson*, 255 Ga. App. 373, 566 S.E.2d 36 (2002).

When the doctors' alleged actions required the exercise of professional judgment and skill, a patient's allegations were for professional negligence requiring an expert's affidavit pursuant to O.C.G.A. § 9-11-9.1(a); as a result, the trial court erred by denying the doctors' and medical facilities' motions to dismiss. *MCG Health, Inc. v. Casey*, 269 Ga. App. 125, 603 S.E.2d 438 (2004).

Since all parties agreed that a patient's expert affidavit was available when the patient's first medical malpractice complaint was filed but was mistakenly omitted, O.C.G.A. § 9-11-9.1 applied and permitted renewal; the trial court erred in granting summary judgment in favor of a doctor and an institute in the patient's malpractice case. *Rector v. O'Day*, 268 Ga. App. 864, 603 S.E.2d 337 (2004).

Trial court properly dismissed, pursuant to Ga. Unif. Super. Ct. R. 14, a medical malpractice action against a doctor and a hospital; the patient failed to attach a legally sufficient expert affidavit to the complaint as required by O.C.G.A. § 9-11-9.1(a) as the affidavit submitted was not taken under oath. *Harris v. Emory Healthcare, Inc.*, 269 Ga. App. 274, 603 S.E.2d 778 (2004).

Because a patient essentially alleged in a false imprisonment claim that a doctor provided inadequate medical care, the patient's failure to file an expert affidavit warranted dismissal. *Goodin v. Gwinnett Health Sys.*, 273 Ga. App. 461, 615 S.E.2d 129 (2005).

Although a patient and a husband had an expert affidavit, they failed to file the affidavit with their complaint against a doctor and the professional corporation, alleging ordinary and professional negligence, and the trial court's grant of the motion to dismiss for failure to comply with O.C.G.A. § 9-11-9.1 was with prejudice as it was on the merits; as the patient and the husband conceded that they could not seek to amend the complaint by adding the affidavit, and they had failed to voluntarily dismiss their action prior to the trial court having ruled on the motion, the patient and the husband could not seek to renew under O.C.G.A. § 9-2-61. *Bardo v. Liss*, 273 Ga. App. 103, 614 S.E.2d 101 (2005).

Husband's pro se wrongful death action against a doctor and health service providers was dismissed for failure to attach an expert affidavit under O.C.G.A. § 9-11-9.1 since the husband alleged negligence due to the doctor's issuance of a do not resuscitate order with respect to the husband's wife; such an action involved professional negligence and medical questions and, thus, required an expert affidavit. *Hardwick v. Atkins*, 278 Ga. App. 79, 628 S.E.2d 173 (2006).

In a parent's wrongful death suit against a doctor, the trial court erred by partially denying the doctor's motion to dismiss all the claims as the allegations in the complaint alleged professional negligence by asserting inappropriate multiple pain medication prescriptions, which were claims that required the filing of an expert affidavit under O.C.G.A. § 9-11-9.1(a). Since the parent failed to file such an affidavit, the doctor's motion to dismiss should have been granted in the motion's entirety. *Liu v. Boyd*, 294 Ga. App. 224, 668 S.E.2d 843 (2008).

Plaintiff failed to file an expert affidavit to support the plaintiff's claim for professional malpractice; accordingly, the trial court did not err in granting the defendant's motion to dismiss the plaintiff's professional malpractice claim. *Fortson v. Hotard*, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

Trial court did not err in dismissing with prejudice a plaintiff's medical malpractice action on the ground that the plaintiff failed to attach the required affidavits under O.C.G.A. § 9-11-9.1, and, although the plaintiff argued that the trial court should have allowed the plaintiff to amend the complaint to attach the affidavits or at least should have only dismissed the complaint as without prejudice so that the plaintiff could refile under the renewal statute, O.C.G.A. §§ 9-2-61(a) and 9-11-9.1 did not allow such amendments; dismissals for failure to attach such affidavits were dismissals for failure to state a claim and were, therefore, on the merits and with prejudice. *Roberson v. Northrup*, 302 Ga. App. 405, 691 S.E.2d 547 (2010).

Because the un rebutted evidence showed that an officer's claims sounded in

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professional negligence, rather than ordinary negligence, and the officer failed to file contemporaneously with the complaint the expert affidavit required by O.C.G.A. § 9-11-9.1(a), there was no error in the trial court's grant of a corporation's motion to dismiss. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011), cert. denied, No. S12C0399, 2012 Ga. LEXIS 561 (Ga. 2012).

Trial court did not err in dismissing a client's action against a former attorney and a law firm for the client's failure to file an expert affidavit pursuant to O.C.G.A. § 9-11-9.1(a) because the client's claims asserted legal malpractice, and the client was required to comply with the provisions of O.C.G.A. § 9-11-9.1; although the client's complaint purported to state various causes of action, the substance of the allegations raised only claims of professional negligence against the attorney and law firm since all of the allegations in the complaint concerned the attorney's legal advice and actions taken as the client's legal representative in the underlying lawsuit. *Fortson v. Freeman*, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

Failure to file expert affidavit may not be fatal. — Cases that hold that the failure to file an expert affidavit with the complaint renders the complaint void and not subject to renewal should be overruled on that point, namely, *Foskey v. Foster*, 199 Ga. App. 205 (404 SE2d 303) (1991); *Lyberger v. Robinson*, 207 Ga. App. 845 (429 SE2d 324) (1993); *Trucano v. Rosenberg*, 215 Ga. App. 153 (450 SE2d 216) (1994); *Grier-Baxter v. Sibley*, 247 Ga. App. 560 (545 SE2d 5) (2001); *Witherspoon v. Aranas*, 254 Ga. App. 609 (562 SE2d 853) (2002); *Shirley v. Hospital Auth. of Valdosta/Lowndes County*, 263 Ga. App. 408 (587 SE2d 873) (2003); and *Winfrey v. Total Health Clinic Corp.*, 255 Ga. App. 617 (566 SE2d 372) (2002). *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga. App. 145, 682 S.E.2d 165 (2009), aff'd, 287 Ga. 406, 696 S.E.2d 640 (2010).

New complaint, read in the son and the administrator's favor, adequately pled fraud, battery, conspiracy, and wrongful

death against the doctors, the nurses, and the hospital as the complaint asserted that the doctor knowingly and falsely represented to the family that the deceased's comatose condition was the result of metastasized cancer rather than aspiration, and that the doctor's intention in doing so was to deceive the family as to its actual cause. The complaint also asserted that the second doctor and the nurses were complicit in the doctor's misrepresentations and assisted the doctor in the deception of the family; that the family relied on the misrepresentations when the family agreed to admit the deceased to hospice care; and that as a proximate result of being admitted to hospice, the deceased was denied food and water and suffered renal failure. Therefore, because the son and the administrator were not required to support their adequately pled claims for fraud, battery, and conspiracy with a O.C.G.A. § 9-11-9.1 affidavit, the trial court erred when the court granted the motion to dismiss the claims. *Estate of Shannon v. Ahmed*, 304 Ga. App. 380, 696 S.E.2d 408 (2010).

Section supersedes rule as to affidavit in cases of clear malfeasance. — Mandatory direction of O.C.G.A. § 9-11-9.1 that the plaintiff "shall be required to file with the complaint" a specific expert affidavit necessarily preempts and supersedes the judicially-created rule that no plaintiff's expert affidavit might be required in cases of malfeasance so "clear and palpable" as to be reasonably ascertained by the jury without expert evidence. *Barr v. Johnson*, 189 Ga. App. 136, 375 S.E.2d 51, cert. denied, 189 Ga. App. 911, 375 S.E.2d 51 (1988); *Collins v. Newman*, 237 Ga. App. 861, 517 S.E.2d 100 (1999).

Expert affidavit not required when question was just whether acts occurred. — In a case alleging that the plaintiff was subjected to perverted mental health counseling, the court did not err in finding that no expert affidavit was required since the jury did not have to be told by an expert what is acceptable professional conduct in the circumstances. The question was whether the acts occurred, and this is purely a jury question. *Roebuck v. Smith*, 204 Ga. App. 20, 418 S.E.2d 165 (1992).

Determinative factor as to whether suit is malpractice action. — Determinative factor as to whether a suit in negligence is or is not a malpractice action within the ambit of O.C.G.A. § 9-11-9.1 is the existence or absence of allegations that the defendant-professional has rendered negligent professional services. *Jordan, Jones & Goulding, Inc. v. Wilson*, 197 Ga. App. 354, 398 S.E.2d 385 (1990).

Compliance requirement not affected by lack of privity. — Lack of privity may ultimately defeat a plaintiff's professional malpractice claim. A lack of privity does not, however, dispense with a plaintiff's compliance with the initial pleading requirement of O.C.G.A. § 9-11-9.1 when a plaintiff sues a professional and alleges a breach of the applicable standard of professional conduct. *Jordan, Jones & Goulding, Inc. v. Wilson*, 197 Ga. App. 354, 398 S.E.2d 385 (1990).

Any plaintiff, regardless of privity, who brings suit against a professional and seeks to recover for the alleged negligent performance of professional services is required to file an expert's affidavit setting forth at least one specific negligent act or omission and the factual basis for such a claim. *Jordan, Jones & Goulding, Inc. v. Wilson*, 197 Ga. App. 354, 398 S.E.2d 385 (1990).

Compliance requirement not affected by parties' knowledge of matter before court. — O.C.G.A. § 9-11-9.1 applies even though the parties are professionals with expertise in the matter before the court; the parties' knowledge of the subject matter would do nothing to evaluate the merits of an action the parties were determined to bring. *Jordan v. Lamberth, Bonapfel, Cifelli, Willson & Stokes*, 206 Ga. App. 178, 424 S.E.2d 859 (1992).

Admission of negligence no excuse for missing affidavit. — Physician's admission of negligence in medical records attached to the complaint in a medical malpractice action did not excuse the plaintiff's failure to comply with the requirement for contemporaneous filing of an expert affidavit. *Johnson v. Brueckner*, 216 Ga. App. 52, 453 S.E.2d 76 (1994).

O.C.G.A. § 9-11-9.1 imposes an initial pleading requirement on the plain-

tiff and mandates the filing of an expert's affidavit with the complaint. *Robinson v. Starr*, 197 Ga. App. 440, 398 S.E.2d 714 (1990).

O.C.G.A. § 9-11-9.1 merely imposes an initial pleading requirement on the plaintiff in a malpractice action. *Bowen v. Adams*, 203 Ga. App. 123, 416 S.E.2d 102, cert. denied, 202 Ga. App. 905, 416 S.E.2d 102 (1992).

Compliance with statute not addressed in reversal of summary judgment order. — In a medical malpractice action, because the record on appeal contained evidence creating a genuine issue of material fact as to the proximate cause of a patient's injuries, the trial court erred in granting a hospital summary judgment; moreover, the appeals court declined to hear the hospital's claim that the patient failed to comply with O.C.G.A. § 9-11-9.1. *Renz v. Northside Hosp., Inc.*, 285 Ga. App. 882, 648 S.E.2d 186 (2007).

Amendment of pleading tacitly allowed. — Trial court erred in granting summary judgment to a medical group in a medical malpractice case since the court tacitly allowed the spouse to "amend" pleadings because the court considered the entire record, in particular conflicting evidence as to the date of the decedent's death as relevant to the viability of the spouse's cause of action as complying with the exception to the contemporaneous filing requirement under O.C.G.A. § 9-11-9.1 (b) (now (e)), and no admission in *judicio* remained in bar of the spouse's claim, and a jury question existed as to the date of death of the decedent regarding the contemporaneous filing of an expert's affidavit requirement. *Knutsen v. Atlanta Women's Specialists Obstetrics & Gynecology*, 264 Ga. App. 87, 589 S.E.2d 588 (2003).

Expert affidavit may be sufficient to satisfy standards of this section. — Expert affidavit may be sufficient to satisfy the pleading standards of O.C.G.A. § 9-11-9.1. The sufficiency of the expert affidavit determines whether the complaint for malpractice is subject to dismissal for failure to state a claim. *Bowen v. Adams*, 203 Ga. App. 123, 416 S.E.2d 102, cert. denied, 202 Ga. App. 905, 416 S.E.2d 102 (1992).

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Affidavit should note recent experience. — In a professional malpractice case brought by a married couple, an expert's original affidavit was insufficient under O.C.G.A. § 9-11-9.1 and former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702), which applied retroactively. Although the expert avowed therein that the expert had been licensed to practice medicine since 1974, the affidavit contained nothing concerning the expert's recent or continuing experience as an orthopedist. *Cogland v. Hosp. Auth.*, 290 Ga. App. 73, 658 S.E.2d 769 (2008).

Expert's testimony was properly excluded in a medical malpractice suit for corrective bladder surgery for perforations following a hysterectomy because the expert's affidavit demonstrated that the expert was board certified in geriatrics, and the expert had not been engaged in the active practice of gynecology or urology for three of the five years before the patient's operation. *Hope v. Kranc*, 304 Ga. App. 367, 696 S.E.2d 128 (2010).

Trial court did not abuse the court's discretion in determining that the parent's expert was not actively engaged in the subject specialty for three of the five years prior to the alleged negligence. The expert acknowledged that the expert had done no intubations at all since the expert started working at the urgent care clinic and that the clinic did not possess intubation equipment. *Aguilar v. Children's Healthcare of Atlanta, Inc.*, 320 Ga. App. 663, 739 S.E.2d 392 (2013).

Expert affidavit which unequivocally demonstrates merits not required. — Patient cannot be required to submit an expert affidavit which unequivocally demonstrates the evidentiary merits of the patient's claim unless and until the defendant moves for summary judgment and submits evidence demonstrating that the patient's claim lacks merit. *Bowen v. Adams*, 203 Ga. App. 123, 416 S.E.2d 102, cert. denied, 202 Ga. App. 905, 416 S.E.2d 102 (1992).

Expert's affidavits need only set forth factual allegations which, if true, support at least one negligent act or omission; it need not state admissible facts or facts

sufficient to withstand a motion for summary judgment. *Crook v. Funk*, 214 Ga. App. 213, 447 S.E.2d 60 (1994); *Howard v. City of Columbus*, 219 Ga. App. 569, 466 S.E.2d 51 (1995).

In a legal malpractice action, an affidavit stating that, as a result of the defendant lawyer's failure to consult with the client or review witnesses prior to the trial, the defendant failed to introduce documents which were available and were necessary to prove the plaintiff's case was sufficient, even though the affidavit was poorly drafted and hard to follow. *Fidelity Enters., Inc. v. Beltran*, 214 Ga. App. 205, 447 S.E.2d 150 (1994).

Conflict in experts' opinions in affidavit. — In a wrongful death and medical negligence suit, a conflict between the testimony of experts in the plaintiff's expert affidavit, filed pursuant to O.C.G.A. § 9-11-9.1, merely raised an issue of fact; it could not be used to eliminate self-contradictory testimony for purposes of summary judgment. *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008).

Requirement that at least one negligent act be set forth. — O.C.G.A. § 9-11-9.1 has been interpreted as requiring that an affidavit be filed by a competent expert witness setting forth a single negligent act allegedly committed by the defendant. However, since that section establishes an exception to the general liberality of pleading permitted under the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, the statute should be construed in a manner consistent with the liberality of the Civil Practice Act when such construction does not detract from the purpose of the section. *Gadd v. Wilson & Co.*, 262 Ga. 234, 416 S.E.2d 285 (1992).

Affidavit which does not state specifically at least one negligent act or omission is fatally defective. *Edwards v. Vanstrom*, 206 Ga. App. 21, 424 S.E.2d 326 (1992).

Specific statement of negligent act or omission. — Expert's affidavit that defendant engineers "might" have used another specified design in construction at a post office site and that failure to use such a design or another appropriate alternative constituted malpractice was suf-

ficient to set forth a negligent act or omission as required by O.C.G.A. § 9-11-9.1. *Samuelson v. Lord, Aeck & Sergeant, Inc.*, 205 Ga. App. 568, 423 S.E.2d 268, cert. denied, 205 Ga. App. 901, 423 S.E.2d 268 (1992).

Affidavit must specify negligent act or omission by each defendant. — Affidavit must set forth specifically at least one negligent act or omission claimed to exist as to each professional defendant (jointly, if appropriate; otherwise, severally) and the factual basis for the claim against each defendant. *HCA Health Servs., of Ga., Inc. v. Hampshire*, 206 Ga. App. 108, 424 S.E.2d 293 (1992).

Expert's affidavit was invalid since the notary administered the oath over the telephone to the expert, who was in another state. *Schmidt v. Feldman*, 230 Ga. App. 500, 497 S.E.2d 23 (1998); *Sambor v. Kelley*, 271 Ga. 133, 518 S.E.2d 120 (1999).

Affidavit was given under oath when the affidavit was signed by the defendant in front of a notary public and they both understood that what the defendant had done was sufficient to complete the act of swearing. *Harris v. Murray*, 233 Ga. App. 661, 504 S.E.2d 736 (1998).

Effect of noncompliance with pleading requirements. — Failure to comply with the pleading requirements of O.C.G.A. § 9-11-9.1 would not authorize the grant of summary judgment. *Druckman v. Ethridge*, 198 Ga. App. 321, 401 S.E.2d 336 (1991).

Original document filed as an affidavit under the grace period of O.C.G.A. § 9-11-9.1, but without the affiant's having signed the document in the presence of a notary, was valid on its face and, thus, was not void but rather voidable. *Phoebe Putney Mem. Hosp. v. Skipper*, 235 Ga. App. 534, 510 S.E.2d 101 (1998).

Complaint and affidavit timely filed. — When nothing on the face of the record implied that the patient's O.C.G.A. § 9-11-9.1(b) (now (e)) pleading was not made in good faith, nothing contradicted their assertion that they were unable to prepare the expert's affidavit so as to file it in conjunction with their complaint, and considering a holiday, they timely filed their complaint within the 10-day compu-

tation period provided in the statute, the trial court properly denied the doctor's motion to dismiss on grounds that the patients failed to comply with the pleading requirements of O.C.G.A. § 9-11-9.1. *Waters v. Stewart*, 263 Ga. App. 195, 587 S.E.2d 307 (2003).

Negligence held linked to defendant although not expressly ascribed.

— Although the affidavit in question did not expressly ascribe the alleged negligence to the defendant, the requirement that the alleged negligence had to be linked to the defendant was substantially met since the defendant was the only defendant and, therefore, was implicitly the party to whom the plaintiff was attributing the alleged negligence. *Gadd v. Wilson & Co.*, 262 Ga. 234, 416 S.E.2d 285 (1992).

Affidavit construed most favorably to plaintiff. — O.C.G.A. § 9-11-9.1 should be construed most favorably to the plaintiff and all doubts should be resolved in the plaintiff's favor, even if an unfavorable construction of the affidavit may be possible. *Gadd v. Wilson & Co.*, 262 Ga. 234, 416 S.E.2d 285 (1992).

Res judicata defense in subsequent action. — When a prior summary judgment for an attorney in a legal malpractice action was based on a recognition that, regardless of the applicability of any pleading requirements imposed by the subsequently enacted provisions of O.C.G.A. § 9-11-9.1, the client's failure to have complied with the evidentiary requirements of O.C.G.A. § 9-11-56 nevertheless mandated the grant of summary judgment on the merits, the attorney's res judicata defense in a subsequent action was viable and the trial court erred in failing to grant the attorney's motion for summary judgment based upon the viable defense. *Robinson v. Starr*, 197 Ga. App. 440, 398 S.E.2d 714 (1990).

Dismissal required when complaint refiled with affidavit. — When no professional affidavit was filed with the original complaint and, when the complaint was refiled, an affidavit of the same date was attached, dismissal of the malpractice count was required. *Jones v. Bates*, 261 Ga. 240, 403 S.E.2d 804 (1991).

Failure to attach affidavit as amendable defect. — Failure to attach a

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supporting affidavit to the complaint in a professional malpractice action was an amendable defect under O.C.G.A. § 9-11-15(a) since the plaintiffs had obtained the affidavit before filing suit and had simply neglected to file the affidavit with the plaintiff's complaint. *St. Joseph's Hosp. v. Nease*, 259 Ga. 153, 377 S.E.2d 847 (1989).

Failure to file an expert's affidavit with a complaint for professional malpractice, as required by O.C.G.A. § 9-11-9.1, is an amendable defect, at least when the plaintiff has obtained the affidavit prior to filing the complaint and the failure to file the affidavit was the result of a mistake. *Reid v. Brazil*, 193 Ga. App. 1, 387 S.E.2d 1 (1989).

Plaintiff's failure to file an expert affidavit with the original complaint barred the plaintiff's claim for professional malpractice, filed three years after the statute of limitations expired, because O.C.G.A. § 9-11-9.1 mandates that the plaintiff's failure to file an affidavit with the original complaint could not be cured through the filing of an amended complaint which included an affidavit. *Upton County Hosp., Inc. v. Head*, 246 Ga. App. 386, 540 S.E.2d 626 (2000).

Amendment did not remedy affidavit deficiency. — Malpractice plaintiffs' purported amendment did not remedy the deficiency in the plaintiffs' complaint concerning the plaintiffs' failure to file the expert affidavit required by O.C.G.A. § 9-11-9.1. *Anderson v. Navarro*, 227 Ga. App. 184, 489 S.E.2d 40 (1997).

Evidence at hearing under § 9-11-12(d). — Subsection (e) of O.C.G.A. § 9-11-9.1 is only designed to preclude amendment under O.C.G.A. § 9-11-15 when the plaintiff completely fails to file an affidavit; subsection (e) thus does not preclude a plaintiff from presenting evidence of his or her expert's competency at a O.C.G.A. § 9-11-12(d) hearing when that expert's affidavit was initially filed with the complaint. *Hewett v. Kalish*, 264 Ga. 183, 442 S.E.2d 233 (1994).

Facsimile of affidavit. — Although O.C.G.A. § 9-11-9.1 contemplates that the original affidavit of the expert should be

filed, trial courts are not prohibited, when justice so requires, from considering facsimiles of affidavits that are available during the statutory period. *Waldroup v. Greene County Hosp. Auth.*, 204 Ga. App. 256, 419 S.E.2d 36 (1992).

Filing a facsimile copy and not the original affidavit of an expert was not an amendable defect for purposes of O.C.G.A. § 9-11-9.1. *Brown v. Middle Ga. Hosp., Inc.*, 211 Ga. App. 884, 440 S.E.2d 687 (1994).

Facsimile copy of expert affidavit satisfies the pleading standards of O.C.G.A. § 9-11-9.1 and the original may then be filed as a supplemental pleading without requiring the action to be renewed. *Sisk v. Patel*, 217 Ga. App. 156, 456 S.E.2d 718 (1995).

Facsimiles of affidavits that are available during the statutory grace period of subsection (b) of O.C.G.A. § 9-11-9.1 may be considered and, further, the original affidavit does not have to be in the plaintiff's possession, nor is the plaintiff required to demonstrate that failure to file the original during the grace period resulted from some mistake. *Roberts v. Faust*, 217 Ga. App. 787, 459 S.E.2d 448 (1995).

While a facsimile affidavit can satisfy the requirements of O.C.G.A. § 9-11-9.1, in the absence of an attached valid jurat, a writing in the form of an affidavit has no force or validity especially when the facsimile is a near but not exact copy of the original. *Allen v. Caldwell*, 221 Ga. App. 54, 470 S.E.2d 696 (1996).

Failure of plaintiff to file an expert affidavit did not warrant dismissal of a professional malpractice case since the defendant did not assert this defense in the defendant's initial responsive pleading. *Colston v. Fred's Pest Control, Inc.*, 210 Ga. App. 362, 436 S.E.2d 23 (1993).

Trial court erred by dismissing a couple's renewed negligence complaint for failing to file an expert affidavit with the couple's original complaint as required by O.C.G.A. § 9-11-9.1(a) because the record failed to contain sufficient findings showing whether any professional negligence was involved with regard to the wife falling from a testing table as it was merely speculative whether the technician had to

assess the wife's medical condition in order to decide whether she could get down from a raised table since it could have been that no professional judgment was required. The trial court additionally erred by dismissing the couple's renewed complaint because the defending medical entities waived their objection to the renewal by failing to file a separate motion to dismiss contemporaneously with their answer to the couple's original action. *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga. App. 145, 682 S.E.2d 165 (2009), *aff'd*, 287 Ga. 406, 696 S.E.2d 640 (2010).

Dismissal of action for failure to file an affidavit under O.C.G.A. § 9-11-9.1 was an adjudication on the merits for purposes of *res judicata*. *Hodo v. Basa*, 214 Ga. App. 895, 449 S.E.2d 523 (1994).

Defense of failure to file affidavit waived. — Judgment for the defendant was reversed when the defense of failure to attach an affidavit required by O.C.G.A. § 9-11-9.1 was not presented, by way of amendment to the answer, until three months after the filing of responsive pleadings, and until the statute of limitations on the underlying claim had run. *Glaser v. Meck*, 258 Ga. 468, 369 S.E.2d 912 (1988).

Renewed complaint specifically incorporating deposition of plaintiff's expert. — When a medical malpractice case was filed originally in March 1985, and dismissed in June 1988 without prejudice for failure of counsel for plaintiffs to appear at a peremptory calendar call, since the plaintiffs refiled the action within the six-month period allowed by O.C.G.A. § 9-2-61 with a renewed complaint which specifically incorporated the discovery taken in the previously dismissed action, including the deposition of the plaintiffs' expert, but failed to attach the required affidavit to the renewed complaint, and since the defendant/appellant moved to dismiss the renewed complaint for failure to file the required affidavit, the plaintiffs complied with the spirit, if not the letter, of O.C.G.A. § 9-11-9.1, and the trial court properly allowed the amendment. *Hospital Auth. v. McDaniel*, 192 Ga. App. 398, 385 S.E.2d 8 (1989).

Failure to attach expert affidavit is affirmative defense that must be as-

serted to be effective. — In a patient's medical malpractice suit against a hospital and a doctor, the trial court erred in dismissing the complaint as against the hospital based on the patient's failure to attach an expert affidavit to the patient's complaint as required by O.C.G.A. § 9-11-9.1 as such failure was an affirmative defense which had to be raised to be effective; since the hospital did not assert that defense, the patient's failure to attach the expert affidavit did not warrant dismissal of the complaint as against the hospital. *Frieson v. S. Fulton Med. Ctr.*, 255 Ga. App. 217, 564 S.E.2d 821 (2002).

Amendment of complaint to include statement regarding failure to attach affidavit. — When a medical malpractice complaint, filed within ten days of the expiration of the statute of limitations, stated that an affidavit would be filed within the extended filing time, and the affidavit was filed within that time, the plaintiff could amend the complaint to include the required language that the affidavit could not be prepared because of time constraints. *Glisson v. Hospital Auth.*, 224 Ga. App. 649, 481 S.E.2d 612 (1997).

Intent of section prior to 1989 amendment. — Intent of O.C.G.A. § 9-11-9.1, as the statute existed prior to the 1989 amendment adding subsections (e) and (f), was the same as the legislature has provided in those subsections, which is (except as provided in paragraph (b)) to cause the dismissal of a malpractice suit when an expert affidavit was not filed, unless such an affidavit had been obtained and the plaintiff by mistake or neglect merely failed "to file it." *Auston v. Greenberg Farrow Architects*, 201 Ga. App. 448, 411 S.E.2d 346 (1991).

Failure of pro se plaintiff to file affidavit. — Pro se plaintiff was allowed to amend the complaint to invoke the protections of subsection (b) (now (e)) of O.C.G.A. § 9-11-9.1, although the plaintiff failed to allege that the plaintiff was relying on that subsection when the plaintiff originally filed the complaint since the plaintiff had filed the cause of action within ten days of the expiration of the applicable statute of limitation for the plaintiff's claim. *Thompson v. Long*, 201

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Ga. App. 480, 411 S.E.2d 322, cert. denied, 201 Ga. App. 904, 411 S.E.2d 322 (1991).

Challenge to sufficiency of affidavit.

— As a motion to dismiss for an insufficient affidavit under O.C.G.A. § 9-11-9.1 is a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6), and as O.C.G.A. § 9-11-9.1 does not provide that § 9-11-12 is inapplicable, such a hearing is a permissible method by which to challenge the sufficiency of an affidavit. *Hewett v. Kalish*, 264 Ga. 183, 442 S.E.2d 233 (1994).

Plaintiffs were not required to respond with contrary evidence to the defendant's challenge to the defendant's expert's affidavit; thus, since the affidavit of the plaintiff's expert sufficiently established that the expert's expertise overlapped that of the defendant, the plaintiffs were not required to present any further evidence at that point, and summary judgment based on the sufficiency of the affidavit was improperly granted. *Stubbs v. Ray*, 218 Ga. App. 420, 461 S.E.2d 906 (1995).

Trial court erred in granting a hospital's motion to dismiss a survivor's wrongful death action based on O.C.G.A. § 9-11-9.1(e) because of a nurse's affidavit that allegedly failed to comply with former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) and because the trial court did not consider the survivor's other affidavit submitted, an unchallenged affidavit from a medical doctor. An affidavit should be construed most favorably to the plaintiff and all doubts should be resolved in the plaintiff's favor, even if an unfavorable construction of the affidavit may be possible, so long as such construction does not detract from the purpose of § 9-11-9.1 of reducing the number of frivolous malpractice suits. *Piscitelli v. Hosp. Auth. of Valdosta & Lowndes County*, 302 Ga. App. 746, 691 S.E.2d 615 (2010).

Dismissal of the patient's medical malpractice action was erroneous because the doctors failed to allege "with specificity" in the doctors' motion to dismiss, as required by O.C.G.A. § 9-11-9.1(e), the ground upon which the trial court dismissed the action, that the affidavits filed with the patient's complaint were inadequate be-

cause the affidavits said nothing of gross negligence. *Ndlovu v. Pham*, 314 Ga. App. 337, 723 S.E.2d 729 (2012).

Insufficient affidavit. — Action for legal malpractice was properly dismissed, since the affidavit submitted by the plaintiff neither stated the qualifications of the affiant nor provided the affiant's opinion as to the reasonableness or skill of the defendant attorney's conduct. *Padgett v. Crawford*, 189 Ga. App. 568, 376 S.E.2d 724 (1988).

Physician's affidavit was insufficient since the affidavit failed to show that the affiant was "an expert competent to testify" in the field of nursing and did not indicate that the defendant hospital's nursing staff breached the requisite degree of care and skill required of the nursing profession generally by deviating from the treating physician's post operative instructions. *Piedmont Hosp. v. Milton*, 189 Ga. App. 563, 377 S.E.2d 198 (1988).

Affidavit required by O.C.G.A. § 9-11-9.1 to be filed with a malpractice complaint is insufficient if the affidavit fails to show the affiant is competent to testify as an expert in the case. *Milligan v. Manno*, 197 Ga. App. 171, 397 S.E.2d 713 (1990).

Two "affidavits" of dentists accompanying a complaint for dental malpractice did not meet the requirements of O.C.G.A. § 9-11-9.1 since a jurat was not affixed to either "affidavit." In the absence of valid jurats, the documents could not be deemed affidavits. *Hill-Everett v. Jones*, 197 Ga. App. 872, 399 S.E.2d 739 (1990).

Trial court did not err in striking affidavits which, in fact, were not originals but were photocopies, since no original, signed affidavits were filed. *Gooden v. Georgia Baptist Hosp. & Medical Center*, 198 Ga. App. 407, 401 S.E.2d 602 (1991).

Affidavits establishing that the doctor did not contact the affiant for or request from the affiant any x-rays, patient chiropractic data, treatment plan, or chiropractic findings before deciding that the plaintiffs had reached maximum medical treatment failed to set forth specifically that the doctor had failed to obtain such information or that the doctor was in fact negligent merely by failing to contact the

affiant or in failing to request from the affiant the information at issue. The affidavits neither individually nor collectively set forth specifically at least one negligent act or omission claimed to exist. *Rogers v. Coronet Ins. Co.*, 206 Ga. App. 46, 424 S.E.2d 338 (1992).

When the expert affidavit of a registered nurse lacking executed jurat was received by mail by the plaintiff's attorney and was not notarized by the attorney's secretary, even though the affiant was not present and neither the attorney nor the secretary/notary had witnessed the affiant's signing, the affidavit was invalid. *Harvey v. Kidney Ctr. of Cent. Ga., Inc.*, 213 Ga. App. 319, 444 S.E.2d 590 (1994).

Affidavit containing a partial transcript of an expert's testimony in a separate criminal action pertaining to the subject of the plaintiff's medical malpractice suit did not satisfy the requirement of O.C.G.A. § 9-11-9.1. *Raskin v. Wallace*, 215 Ga. App. 603, 451 S.E.2d 485 (1994).

In a malpractice action against a physicians and hospital, dismissal of the hospital as a defendant was proper because the plaintiff's affidavit did not attribute any negligent act to the nursing staff of the hospital. *Goins v. Tucker*, 227 Ga. App. 524, 489 S.E.2d 857 (1997).

Affidavits were not sufficient because the affidavits did not specify any negligent act or omission by agents or employees of the defendant hospital, nor did the affidavits specify any facts upon which the malpractice claim against the hospital was based. *Candler Hosp. v. Carter*, 224 Ga. App. 425, 480 S.E.2d 876 (1997).

Consideration of evidentiary matters not included in affidavit is improper in acting on a motion to dismiss based on insufficiency of the affidavit. *HCA Health Servs., of Ga., Inc. v. Hampshire*, 206 Ga. App. 108, 424 S.E.2d 293 (1992).

Affidavits from earlier action functioned as amendments in later action against same defendants. — Expert affidavits, which the plaintiffs had filed in an earlier action against the defendants for medical malpractice, functioned as an amendment to the plaintiffs' complaint in a subsequent action against the same defendants since the affidavits were at-

tached to the defendants' motion to dismiss, and the plaintiff thereby complied with O.C.G.A. § 9-11-9.1. *Bell v. Figueredo*, 259 Ga. 321, 381 S.E.2d 29 (1989).

Affiant not "active participant" in litigation for purposes of "abusive litigation claim." — Attorney, who provided an expert affidavit in support of a legal malpractice claim, was not an "active participant" in the malpractice litigation and, accordingly, was not liable to the attorney charged with professional malpractice on an abusive litigation theory. *Kirsch v. Meredith*, 211 Ga. App. 823, 440 S.E.2d 702 (1994).

Procedure for challenging noncompliance. — Noncompliance with the requirement for an affidavit in a malpractice action is properly challenged in a defensive pleading seeking dismissal of the complaint for failure to state a claim, not by a summary judgment proceeding. *Williams v. Hajosy*, 210 Ga. App. 637, 436 S.E.2d 716 (1993).

Defect in an expert's affidavit attached to the complaint in a legal malpractice action should be attacked via motion to dismiss and summary judgment on the basis of such defect was inappropriate. *Freeman v. Pittman*, 220 Ga. App. 672, 469 S.E.2d 543 (1996).

Defense of noncompliance with affidavit requirement was not waived because, even though the defendant did not raise the defense in the defendant's initial responsive pleading, the defendant acted diligently in raising the defense in the first pleading the defendant filed after discovering evidence causing the defendant to challenge the validity of the affidavit. *Harris v. Murray*, 233 Ga. App. 661, 504 S.E.2d 736 (1998).

Affidavit not subject to evidentiary standards for summary judgment. — When the plaintiff brought a medical malpractice suit, did not file an expert's affidavit with the complaint, but amended the complaint within 45 days to file an expert's affidavit, the trial court erred by dismissing the plaintiff's complaint for failure of the expert's affidavit to set forth the appropriate standard of care, the expert's familiarity with that standard of care, and the specific details of how the

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defendants deviated from that standard, since the evidentiary standards applicable to evidence supporting a motion for summary judgment pursuant to O.C.G.A. § 9-11-56(e) are not incorporated in subsection (a) of O.C.G.A. § 9-11-9.1. *O-1 Doctors Mem. Holding Co. v. Moore*, 190 Ga. App. 286, 378 S.E.2d 708 (1989); *Ulbrich v. Batts*, 206 Ga. App. 74, 424 S.E.2d 288 (1992).

Nothing in O.C.G.A. § 9-11-9.1 suggests that the “factual basis” requirement must be verified by attaching documentary evidence to the affidavit. *HCA Health Servs., of Ga., Inc. v. Hampshire*, 206 Ga. App. 108, 424 S.E.2d 293 (1992); *Howard v. City of Columbus*, 219 Ga. App. 569, 466 S.E.2d 51 (1995).

Conclusory opinion insufficient to withstand summary judgment. — Malpractice plaintiff, as a respondent on summary judgment, cannot prevail on the motion, when the defendant by the content of the defendant’s expert affidavit has carried the defendant’s burden of proof, merely by presenting a conclusory opinion that the defendant was negligent or failed to adhere to professional standards of conduct, without stating the parameters of such conduct and the particulars of the defendant’s deviation therefrom. *Turner v. Kitchings*, 199 Ga. App. 860, 406 S.E.2d 280 (1991).

Affidavit requirement inapplicable to fraud claim. — Plaintiff’s fraud claim did not appear to call into question professional standards of care applicable to attorneys but instead the claim appeared to be predicated on misrepresentations which would not be misunderstood by even the most uneducated layman and would be actionable against any person; therefore, the fraud claim did not require an affidavit under O.C.G.A. § 9-11-9.1 and dismissal of the claim was error. *Hopkinson v. Labovitz*, 231 Ga. App. 557, 499 S.E.2d 338 (1998).

Motion under sections considered as failure to state claim. — Motion to dismiss for failure to file an expert affidavit under O.C.G.A. § 9-11-9.1 had to be considered as a motion to dismiss for failure to state a claim under O.C.G.A.

§ 9-11-12(b)(6). *Burke v. Paul*, 289 Ga. App. 826, 658 S.E.2d 430 (2008).

Cited in *Freeman v. Van Dyke*, 193 Ga. App. 190, 387 S.E.2d 351 (1989); *Kalustian v. McDonald*, 194 Ga. App. 435, 390 S.E.2d 657 (1990); *Smith v. North Fulton Medical Ctr.*, 200 Ga. App. 464, 408 S.E.2d 468 (1991); *Jarallah v. Schwartz*, 202 Ga. App. 32, 413 S.E.2d 210 (1991); *Jenkins County Hosp. Auth. v. Landrum*, 206 Ga. App. 753, 426 S.E.2d 572 (1992); *Lyberger v. Robinson*, 207 Ga. App. 845, 429 S.E.2d 324 (1993); *Howard v. Jonah*, 208 Ga. App. 542, 430 S.E.2d 833 (1993); *Hailey v. Blalock*, 209 Ga. App. 345, 433 S.E.2d 337 (1993); *Southmark Corp. v. Trotter, Smith & Jacobs*, 212 Ga. App. 454, 442 S.E.2d 265 (1994); *Floyd v. Piedmont Hosp.*, 213 Ga. App. 749, 445 S.E.2d 844 (1994); *French Quarter, Inc. v. Peterson, Young, Self & Asselin*, 220 Ga. App. 852, 471 S.E.2d 9 (1996); *Davis v. First Healthcare Corp.*, 234 Ga. App. 744, 507 S.E.2d 563 (1998); *In re Carter*, 235 Ga. App. 551, 510 S.E.2d 91 (1998); *Ga. Dermatology Clinic, P.A. v. Nesmith*, 254 Ga. App. 121, 561 S.E.2d 459 (2002); *DOT v. Dupree*, 256 Ga. App. 668, 570 S.E.2d 1 (2002); *Oakes v. Magat*, 263 Ga. App. 165, 587 S.E.2d 150 (2003); *Lunsford v. DeKalb Med. Ctr., Inc.*, 263 Ga. App. 394, 587 S.E.2d 859 (2003); *Campbell v. McLarnon*, 265 Ga. App. 87, 593 S.E.2d 21 (2003); *Atl. Rim Equities, LLC v. Slutzky, Wolfe, & Bailey, LLP*, No. 1:04-cv-2647-WSD, 2005 U.S. Dist. LEXIS 38262 (N.D. Ga. Dec. 20, 2005); *Travick v. Lee*, 278 Ga. App. 823, 630 S.E.2d 99 (2006); *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 283 Ga. App. 10, 640 S.E.2d 633 (2006); *Davenport v. Cummins Alabama, Inc.*, 284 Ga. App. 666, 644 S.E.2d 503 (2007); *In re Carter*, 288 Ga. App. 276, 653 S.E.2d 860 (2007); *UniFund Fin. Corp. v. Donaghue*, 288 Ga. App. 81, 653 S.E.2d 513 (2007); *Emory Adventist, Inc. v. Hunter*, 301 Ga. App. 215, 687 S.E.2d 267 (2009); *Postell v. Hankla*, 317 Ga. App. 86, 728 S.E.2d 886 (2012); *Cope v. Evans*, 329 Ga. App. 354, 765 S.E.2d 40 (2014).

Notary Requirement

De facto notary doctrine. — Pursuant to the de facto notary doctrine, an expert’s affidavit satisfied the require-

ments of O.C.G.A. § 9-11-9.1, despite the fact that the commission of the notary who attested the affidavit had expired. *Thomas v. Gastroenterology Assocs. of Gainesville, P.C.*, 280 Ga. 698, 632 S.E.2d 118 (2006).

Expert's affidavit was invalid when oath was administered by notary public over telephone. *Redmond v. Shook*, 218 Ga. App. 477, 462 S.E.2d 172 (1995).

Expert Qualification

Expert despite financial interest. — Lawyer was “an expert competent to testify” despite the lawyer’s previous representation of the plaintiff in this matter and the fact that the lawyer had a financial interest in the outcome of this suit at the time the lawyer submitted the lawyer’s affidavit. *Findley v. Davis*, 202 Ga. App. 332, 414 S.E.2d 317 (1991).

Expert in one’s own behalf. — Attorney, as well as a physician, may make an affidavit as an expert in their own behalf. *Findley v. Davis*, 202 Ga. App. 332, 414 S.E.2d 317 (1991).

Correct standard for legal malpractice claim. — In a legal malpractice claim, whether the expert resides in Georgia or is a licensed member of the bar at the time of the alleged negligence is not indicative of competency. The correct standard is whether at the time of testifying the expert has knowledge of the applicable standard of care on at least one matter on which the claim is based. *Morris v. Atlanta Legal Aid Soc’y, Inc.*, 222 Ga. App. 62, 473 S.E.2d 501 (1996).

Section applicable to claims requiring expert witness. — Affidavit was required since it was alleged that the dentist gave inappropriate medication, did not properly monitor the patient’s condition, and did not use proper technique to resuscitate the patient after the patient was in distress; these claims would require an expert witness and were not allegations of simple negligence. *Edwards v. Vanstrom*, 206 Ga. App. 21, 424 S.E.2d 326 (1992).

Self-contradictory testimony rule of *Prophesy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 343 S.E.2d 680 (1986) does not apply to the testimony of a non-party

expert witness who submits an affidavit in support of a claim of professional malpractice. *Thompson v. Ezor*, 272 Ga. 849, 536 S.E.2d 749 (2000), affirming *Ezor v. Thompson*, 241 Ga. App. 275, 526 S.E.2d 609 (1999).

Competence of affiant. — Resolution of the issue of whether the affiant physician was competent to give testimony with respect to the defendant’s area of specialty was ill-suited to disposition on a motion to strike. *Cahela v. Bernard*, 155 F.R.D. 221 (N.D. Ga. 1994).

Trial court properly denied dismissal of a patient’s widow’s medical malpractice action against assorted medical personnel and entities, based on claims that the widow’s expert affidavit pursuant to O.C.G.A. § 9-11-9.1 was insufficient as the fact that the doctor who acted as the expert was no longer licensed to practice medicine due to revocation for substance abuse issues did not impact the validity of the affidavit, which had no licensure requirement to it; the licensure issue was irrelevant to the validity of the affidavit, although licensure could be relevant for purposes of credibility. *Tenet Healthcare Corp. v. Gilbert*, 277 Ga. App. 895, 627 S.E.2d 821 (2006).

In a medical malpractice action, given the relevant past experience of the patient’s expert as a nurse, and the expert’s familiarity with the degree and skills required of nurses and other medical staff in giving intramuscular injections, the expert was sufficiently qualified to render an expert opinion in the case. *Allen v. Family Med. Ctr., P.C.*, 287 Ga. App. 522, 652 S.E.2d 173 (2007).

Trial court did not abuse the court’s discretion by dismissing the parents’ medical malpractice action because the court correctly found that the purported expert offered by the parents failed to make even one diagnosis of a vascular ring within five years of the date at issue, and had not taught others for at least three of the last five years to diagnose a vascular ring. *Spacht v. Troyer*, 288 Ga. App. 898, 655 S.E.2d 656 (2007), cert. denied, 129 S. Ct. 726, 172 L.Ed.2d 726 (2008).

Qualification of affiant. — For an affiant to constitute “an expert competent to testify” under subsection (a) of O.C.G.A.

Expert Qualification (Cont'd)

§ 9-11-9.1, the affiant's expertise must include knowledge of the standard of care applicable to the defendant-physician as to at least one of the matters on which the plaintiff's malpractice claim is based. *Chandler v. Koenig*, 203 Ga. App. 684, 417 S.E.2d 715 (1992).

Toxicologist and pharmacologist, who was not a medical doctor, was competent to give an opinion in a medical malpractice action that a drug prescribed by the defendants caused the plaintiff's miscarriage since the affiant's testimony was not offered to address the applicable standard of care, but to show causation. *Sinkfield v. Shi-Han Oh*, 229 Ga. App. 883, 495 S.E.2d 94 (1998).

When a couple who filed a medical malpractice case did not show that their experts had actual professional knowledge and experience through active practice or by teaching during at least three of the last five years, the trial court properly held under O.C.G.A. § 9-11-9.1 and former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) that the experts were not qualified to give an opinion and dismissed the case. *Akers v. Elsey*, 294 Ga. App. 359, 670 S.E.2d 142 (2008).

Trial court did not err in dismissing a medical malpractice action on the ground that an anesthesiologist's affidavit in support of the complaint was insufficient under O.C.G.A. § 9-11-9.1 because the anesthesiologist did not meet the licensing requirement for expert witnesses, former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702); although the anesthesiologist's amended affidavit in support of a medical malpractice complaint indicated that the anesthesiologist held a medical license from Pennsylvania on the date of the alleged negligent act, there was no evidence that the anesthesiologist was practicing in that state. *Craig v. Azizi*, 301 Ga. App. 181, 687 S.E.2d 198 (2009).

In a deceased patient's family's action against a hospital arising out of an alleged failure to properly treat decubitus ulcers (pressure sores), the expert affidavit failed to comply with O.C.G.A. §§ 9-11-9.1(a) and 24-7-702(c)(2); the expert was a coroner with a specialty in forensic pathology

and not engaged in the treatment of decubitus ulcers. *Hendrix v. Fulton DeKalb Hosp. Auth.*, 330 Ga. App. 833, 769 S.E.2d 575 (2015).

Affiant prima facie qualified as expert. — When the affiant was a licensed, registered nurse with specialized training in enterostomal therapy and was employed by Visiting Nurse Services, Inc. as an employee health nurse when according to the affiant, the affiant's graduate course qualified the affiant as a specialist in wound treatments, and when the affiant's opinion concerned the standard of care administered to the decedent by the defendant nursing home through the home's nursing staff, the affiant was prima facie qualified according to the affiant's training and experience to give the affiant's opinion as an expert. *Thurman v. Pruitt Corp.*, 212 Ga. App. 766, 442 S.E.2d 849 (1994).

Affidavit need not be based on affiant's actual personal knowledge. — Expert affidavit filed with a complaint pursuant to O.C.G.A. § 9-11-9.1 need not be based upon the affiant's actual personal knowledge. To the contrary, the affiant may base the affiant's expert opinion upon an assumption that the factual allegations of the complaint are true, just as the affiant could base the affiant's expert opinion at trial upon an assumption of the truth of the evidence adduced to support those allegations. *Druckman v. Ethridge*, 198 Ga. App. 321, 401 S.E.2d 336 (1991); *Ulbrich v. Batts*, 206 Ga. App. 74, 424 S.E.2d 288 (1992).

Competency of expert providing affidavit. — Rule governing the competence of a member of one school of medical practice to testify against a member of another school applies not only to testimony presented at trial but also to the affidavit required to be filed with the complaint. *Milligan v. Manno*, 197 Ga. App. 171, 397 S.E.2d 713 (1990).

Affidavit indicating that witness in an action against an allopathic physician was a licensed osteopathic physician was insufficient since the affidavit contained no evidence that the methods of treatment of the plaintiff's condition were the same so as to bring the witness within the exception to the general rule that rendered the

witness incompetent to testify. *Milligan v. Manno*, 197 Ga. App. 171, 397 S.E.2d 713 (1990).

Mere fact an affiant is an expert in his or her school of knowledge does not necessarily mean the expert is "competent to testify" under subsection (a) of O.C.G.A. § 9-11-9.1. *Chandler v. Koenig*, 203 Ga. App. 684, 417 S.E.2d 715 (1992).

Exception to the general rule is when there is proof by competent evidence that the methods of treatment are the same despite the difference in the nomenclature of the schools involved, the witness is competent to testify. *Chandler v. Koenig*, 203 Ga. App. 684, 417 S.E.2d 715 (1992).

In order for an affiant to be "an expert competent to testify," the expert either must be a member of the same professional school as the defendant or, if from a different professional school, must state the particulars how the methods of treatment are the same for the different schools in order to establish that the affiant possesses the expertise to be able to give an opinion regarding the applicable standard of care to which the defendant is held. *HCA Health Servs., of Ga., Inc. v. Hampshire*, 206 Ga. App. 108, 424 S.E.2d 293 (1992).

Court of Appeals erred by holding that O.C.G.A. § 9-11-9.1 establishes an evidentiary standard regarding the affiant's competency that must be proven at the pleading stage. *Hewett v. Kalish*, 264 Ga. 183, 442 S.E.2d 233 (1994).

Extension of Time

Meaning of "good cause" for extending time for filing. — "Good cause", within the meaning of subsection (b) (now (e)) of O.C.G.A. § 9-11-9.1, is closer in effect to "proper case" or "meritorious cause" than it is to "excusable neglect." *Brake v. Mintz*, 193 Ga. App. 662, 388 S.E.2d 715 (1989).

Language of subsection (b) of O.C.G.A. § 9-11-9.1 refers to requests for extensions prior to expiration of the initial 45-day period. Statements in *Brake v. Mintz*, 193 Ga. App. 662, 288 S.E.2d 715 (1989) and *Emory Clinic v. Wyatt*, 200 Ga. App. 184, 407 S.E.2d 135 (1991), indicating that a motion to extend the initial 45-day period may be considered under

the "good cause" standard when filed after the 45-day period has expired are dicta and will not be followed. *Dixon v. Barnes*, 214 Ga. App. 7, 446 S.E.2d 774 (1994).

Discretion of court in finding absence of "good cause." — Court of Appeals will not interfere with the discretion of the trial court in finding the absence of "good cause" within the meaning of subsection (b) (now (e)) of O.C.G.A. § 9-11-9.1 and denying a motion to extend the time for filing an expert's affidavit absent manifest abuse. *Brake v. Mintz*, 193 Ga. App. 662, 388 S.E.2d 715 (1989).

Broad discretion is vested in the trial court to determine whether "good cause" exists and what constitutes "good cause" within the meaning of subsection (b) (now (e)) of O.C.G.A. § 9-11-9.1. *Emory Clinic v. Wyatt*, 200 Ga. App. 184, 407 S.E.2d 135 (1991).

"Misinterpretation" of law not "good cause." — Trial court erred in denying the defendant's motion for summary judgment since the plaintiffs contemporaneously filed affidavit failed to specify any negligent act or omission, and the defendants' responsive pleading adequately raised the insufficiency issue. Cure by amendment, on the grounds that the affidavit was statutorily insufficient due to a "misinterpretation" of the law was prohibited. *Cheeley v. Henderson*, 261 Ga. 498, 405 S.E.2d 865 (1991); *Wright v. Crawford Long Hosp.*, 205 Ga. App. 653, 423 S.E.2d 12 (1992), cert. denied, 510 U.S. 1118, 114 S. Ct. 1069, 127 L. Ed. 2d 388 (1994); *Edwards v. Vanstrom*, 206 Ga. App. 21, 424 S.E.2d 326 (1992).

"Good cause" not shown. — Plaintiff who, subsequent to the plaintiff's treatment by the defendants, had undergone surgery in Germany, failed to show "good cause" for an extension of time to file an affidavit since the record showed that the plaintiff had approximately two years within which to collect and translate the medical records from Germany. *Archie v. Scott*, 190 Ga. App. 145, 378 S.E.2d 182 (1989).

Plaintiffs failed to demonstrate "good cause" for an extension of time since the plaintiffs' motions asserting inadequate funds and the plaintiffs' expert's departure for the Thanksgiving holiday did not

Extension of Time (Cont'd)

provide a detailed showing of the efforts the plaintiffs had made to obtain the expert's affidavit and the unavoidable reasons for the delay. *Brake v. Mintz*, 193 Ga. App. 662, 388 S.E.2d 715 (1989).

“Good cause” extension allowed. — Plaintiff properly invoked the provisions of O.C.G.A. § 9-11-15 to amend the complaint to include the language of subsection (b) of O.C.G.A. § 9-11-9.1, despite amending the complaint 75 days after the complaint was filed, the plaintiff triggered subsection (b) and the automatic 45-day extended filing period; however, even though the plaintiff could not and did not file the affidavit within the 45-day period, as the automatic extended filing period had already expired, yet, since the plaintiff fell within the provisions of subsection (b), the plaintiff was not precluded from seeking a “good cause” extension of time to file the affidavit after the statutory 45-day period had expired, but before the defendants' motions to dismiss had been granted. *Peterson v. Columbus Med. Ctr. Found., Inc.*, 243 Ga. App. 749, 533 S.E.2d 749 (2000).

In order to invoke the protections of subsection (b) of O.C.G.A. § 9-11-9.1, the plaintiff must allege in the complaint that because of time constraints, the expert affidavit could not be prepared. *Anderson v. Navarro*, 227 Ga. App. 184, 489 S.E.2d 40 (1997).

The 45-day delay provisions of subsection (b) of O.C.G.A. § 9-11-9.1 were not invoked since the applicable statute of limitation would not have expired within ten days of the date of filing of a complaint. *Legum v. Crouch*, 208 Ga. App. 185, 430 S.E.2d 360 (1993).

While plaintiff, spouse of deceased patient, was allowed to recommence a medical malpractice action under O.C.G.A. § 9-2-61 since the action was filed within six months of dismissal of the spouse's earlier timely filed suit, the applicable statutes of limitation had clearly run when the renewal action was filed and, therefore, the extension provided by O.C.G.A. § 9-11-9.1(b) (now (e)), which applied only when the complaint was filed within 10 days of the expiration of the

limitations period, was not available; the trial court properly found that the surviving spouse could not invoke the 45-day extension of O.C.G.A. § 9-11-9.1(b) (now (e)) and properly dismissed the renewal action on the basis of a failure to file an expert affidavit. *Fisher v. Coffee Reg'l Med. Ctr., Inc.*, 268 Ga. App. 657, 602 S.E.2d 135 (2004).

In an action in which a client filed a counterclaim, alleging legal malpractice against a law firm, the client's reliance on O.C.G.A. § 9-11-9.1(b) (now (e)) to extend the time within which the client had to file an expert's affidavit was misplaced as the statute of limitation on the client's counterclaim would not have expired within ten days of the filing of the counterclaim and the client was therefore not entitled to invoke the 45-day extension for filing the affidavit; the phrase “period of limitation” contained in O.C.G.A. § 9-11-9.1(b) (now (e)) plainly refers only to the statute of limitation applicable to a particular action, and does not refer to the 30 days within which responsive pleadings to a complaint must be filed. *Landau v. Davis Law Group, P.C.*, 269 Ga. App. 904, 605 S.E.2d 461 (2004).

Statute of limitations not expired. — Exception in subsection (b) of O.C.G.A. § 9-11-9.1 was not applicable as the statute of limitations did not run until much more than ten days after the filing of the original complaint. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

Applicability of 30-day time extension. — Applicability of the extension of time provided by subsection (c) (now (e)) of O.C.G.A. § 9-11-9.1 is not dependent upon an ultimate judicial determination of whether the complaint alleges an action sounding in simple negligence or whether, in truth, the viable theory of liability is professional malpractice. Nor does it require a defendant to file a skeletal answer which must be amended to address the specifications of negligence as averred in any subsequently filed expert's affidavit. *DOT v. Gilmore*, 209 Ga. App. 656, 434 S.E.2d 114 (1993).

In an action involving multiple defendants alleging professional malpractice against some, but not all, the 30-day ex-

tension for filing an answer applies only to the malpractice defendants. Inasmuch as the requisite affidavit for malpractice claims has no bearing on purely simple negligence claims, a plaintiff's invocation of subsection (b) of O.C.G.A. § 9-11-9.1 would not extend the deadline for answering the complaint for the defendants against whom only simple negligence is alleged. *DOT v. Gilmore*, 209 Ga. App. 656, 434 S.E.2d 114 (1993).

In a personal injury action, since the plaintiff did not distinguish between professional and nonprofessional defendants in making general allegations of negligence, by invoking the 45-day extension of time to file an expert's affidavit, the plaintiff automatically caused the time period for all the defendants to file an answer to be extended for 30 days from the filing of the affidavit. *McGarr v. Gilmore*, 220 Ga. App. 286, 469 S.E.2d 720 (1996).

Application of 45-day extension. — If the two conditions of subsection (b) of O.C.G.A. § 9-11-9.1 — that the period of limitation will expire within ten days of the date of filing and plaintiff has alleged that an affidavit could not be prepared because of time constraints — are met, it does not matter whether the trial court believes or disbelieves the plaintiff's allegation that time constraints prevented compliance with the contemporaneous filing requirement; the plaintiff is automatically given 45 extra days to come up with the necessary affidavit. *Works v. Aupont*, 219 Ga. App. 577, 465 S.E.2d 717 (1995).

Affidavit filed with complaint in renewal action. — In a professional malpractice action against an extermination company, since the plaintiffs voluntarily dismissed the plaintiffs' initial complaint which did not contain an expert's affidavit, filing of an amended complaint with an affidavit was permissible since the renewal action was filed within the limitations period. *Moritz v. Orkin Exterminating Co.*, 215 Ga. App. 255, 450 S.E.2d 233 (1994); *Orkin Exterminating Co. v. Carder*, 215 Ga. App. 257, 450 S.E.2d 217 (1994).

Because a health care provider simply raised a patient's failure to comply with O.C.G.A. § 9-11-9.1(a) as a defense in the provider's answer rather than in a con-

temporaneous motion to dismiss, as required by § 9-11-9.1(c), the patient was not precluded from renewing a negligence action pursuant to O.C.G.A. § 9-2-61. *Opensided MRI of Atlanta, LLC v. Chandler*, 287 Ga. 406, 696 S.E.2d 640 (2010).

Grace period eliminated. — Current version of O.C.G.A. § 9-11-9.1 eliminated the 45-day grace period for filing an expert affidavit as well as the possibility of additional extensions for "good cause" shown; a patient was not entitled to obtain additional time to file an expert affidavit in a malpractice case filed after the effective date of the current version of O.C.G.A. § 9-11-9.1. *Scott v. Martin*, 280 Ga. App. 311, 633 S.E.2d 665 (2006).

Failure to obtain extension. — Dismissal of a patient's medical malpractice case was affirmed since, on the 45th day after filing the patient's complaint, the patient moved the trial court to extend the 45-day period to file an expert affidavit, and on the 59th day after filing, the patient filed an expert affidavit without obtaining any ruling on the patient's motion to extend the filing period. It was the patient's duty to obtain a ruling on the patient's motion to extend the period, and the failure to do so before the motion to dismiss was granted was a waiver of the motion. *Lowery v. Atlanta Heart Assocs., P.C.*, 266 Ga. App. 402, 597 S.E.2d 494 (2004).

Trial court's discretion to extend time for filing amended affidavits. — O.C.G.A. § 9-11-9.1(e) expressly allowed the trial court, in the court's discretion, to extend the time for filing amendments to defective affidavits and granted the court the authority to consider an untimely filed amended or supplemental affidavit. Thus, in a medical malpractice case, the trial court erred by finding that in the absence of a showing of excusable neglect under O.C.G.A. § 9-11-6(b), the court had no discretion to allow a patient to file a late-filed amended affidavit. *Schofill v. Phoebe Putney Health Sys., Inc.*, 315 Ga. App. 817, 728 S.E.2d 331 (2012).

Application to Professions

1. General Principles

"Professional." — Legislature intended for the term "professional" as used

Application to Professions (Cont'd)**1. General Principles (Cont'd)**

in O.C.G.A. § 9-11-9.1 to be defined by O.C.G.A. §§ 14-7-2(2), 14-10-2(2), and 43-1-24. *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992).

O.C.G.A. § 9-11-9.1 applies only to those licensed professions regulated by state examining boards when licensure is predicated upon the successful completion of the specialized schooling or training necessary to obtain the expertise to practice that profession. *Harrell v. Lusk*, 263 Ga. 895, 439 S.E.2d 896 (1994).

Affidavit requirement of O.C.G.A. § 9-11-9.1 did not apply to any acts committed by a lab technician because the technician was not recognized as a "professional" under Georgia law, O.C.G.A. § 14-7-2. *Pattman v. Mann*, 307 Ga. App. 413, 701 S.E.2d 232 (2010).

2. Engineering Profession**A. In General**

Third-party complaint against an architectural firm, which was being sued in a wrongful death action for alleged faulty design and construction of a heating system, was subject to the affidavit filing requirement of O.C.G.A. § 9-11-9.1. *Housing Auth. v. Gilpin & Bazemore/Architects & Planners, Inc.*, 191 Ga. App. 400, 381 S.E.2d 550, appeal dismissed, 259 Ga. 435, 383 S.E.2d 867 (1989).

Engineers. — O.C.G.A. § 9-11-9.1 applies to professional engineers that are licensed by the State of Georgia. *Goolsby v. Gain Techs., Inc.*, No. 08-16587, 2010 U.S. App. LEXIS 1380 (11th Cir. Jan. 21, 2010) (Unpublished).

Engineering profession. — Requirements of O.C.G.A. § 9-11-9.1(a) apply to the engineering profession. *Kneip v. Southern Eng'g Co.*, 260 Ga. 409, 395 S.E.2d 809 (1990).

Dismissal of a claim for engineering malpractice for failure to file the required affidavit would have been unfair since cases applying O.C.G.A. § 9-11-9.1 to non-medical malpractice actions had not been decided until after the complaint was filed. *Kneip v. Southern Eng'g Co.*, 260 Ga. 409, 395 S.E.2d 809 (1990).

While the design of a bridge or guard-rail must necessarily involve professional (engineering) services, the installation, repair, and maintenance of those structures would not necessarily require the exercise of professional skill and judgment. *Adams v. Coweta County*, 208 Ga. App. 334, 430 S.E.2d 599 (1993).

In a wrongful death action against the Department of Transportation (DOT), the trial court erred in dismissing as insufficient DOT's defense based on plaintiff's failure to file an expert affidavit in support of a claim involving a question of professional negligence by highway engineers. *DOT v. Taunton*, 217 Ga. App. 232, 457 S.E.2d 570 (1995).

Trial court erred in dismissing the plaintiff's complaint on the ground that the plaintiff's expert's affidavit was insufficient to meet the requirements of O.C.G.A. § 9-11-9.1 since the expert supplemented the affidavit with testimony adequate to aver that DOT failed to comply substantially with engineering standards applicable at the time an intersection was planned and designed as required by O.C.G.A. § 50-21-24(10). *Lennen v. DOT*, 239 Ga. App. 729, 521 S.E.2d 885 (1999).

In an action against engineers for professional malpractice, the plaintiff was required to file an expert's affidavit with the plaintiff's complaint, and the proper consequence for the plaintiff's failure to do so was dismissal of the complaint with prejudice. *Jordan, Jones & Goulding, Inc. v. Balfour Beatty Constr., Inc.*, 246 Ga. App. 93, 539 S.E.2d 828 (2000).

Trial court properly granted summary judgment to a defendant engineer on a plaintiff's professional negligence claim pursuant to O.C.G.A. § 9-11-9.1 since the plaintiff's complaint showed on the complaint's face that the complaint involved an allegation of professional negligence that required an expert affidavit under § 9-11-9.1(a) and (d)(21), and the plaintiff failed to file such an affidavit with the complaint; the plaintiff's pro se status did not exempt the plaintiff from complying with the affidavit requirement of § 9-11-9.1. *Dockens v. Runkle Consulting, Inc.*, 285 Ga. App. 896, 648 S.E.2d 80 (2007), cert. denied, 2007 Ga. LEXIS 668 (2007).

O.C.G.A. § 9-11-9.1 can be invoked by an engineering firm named as a party defendant. *Southern Eng'g Co. v. Central Ga. Elec. Membership Corp.*, 193 Ga. App. 878, 389 S.E.2d 380 (1989), rev'd on other grounds, 260 Ga. 409, 395 S.E.2d 809 (1990).

B. Roads

Claim against county as to bridge guardrail. — Although a county is not a professional and the affidavit requirement of O.C.G.A. § 9-11-9.1 does not automatically apply to any claim asserted against the county, a complaint against the county for negligent design, installation, repair, and maintenance of the guardrails on a road bridge was the performance of professional services and required an affidavit. *Adams v. Coweta County*, 208 Ga. App. 334, 430 S.E.2d 599 (1993).

Designing of roads. — Since designing roads requires “engineering services” which have been described as the performance of professional services within the purview of O.C.G.A. § 9-11-9.1 by the Supreme Court, failure to contemporaneously file an expert affidavit with the complaint in an action for negligent repair, maintenance, and design of the road was fatal. *Jackson v. DOT*, 201 Ga. App. 863, 412 S.E.2d 847 (1991), cert. denied, 201 Ga. App. 904, 412 S.E.2d 847 (1992); *DOT v. Mikell*, 229 Ga. App. 54, 493 S.E.2d 219 (1997).

Subsection (a) does not apply to DOT. — Intent of subsection (a) of O.C.G.A. § 9-11-9.1 as amended in 1997 is that the expert affidavit requirement in a professional malpractice case applies only to an employer that is a licensed health care facility in a suit when that employer's liability is premised on the action or inaction of a licensed health care professional listed in former subsection (f); because the DOT is not a licensed health care facility, it is not an employer to which subsection (a) applies. *Minnix v. DOT*, 272 Ga. 566, 533 S.E.2d 75 (2000), reversing *Minnix v. DOT*, 240 Ga. App. 524, 525 S.E.2d 704 (1999).

Repair and maintenance of roads. — Claims against the Georgia Department of Transportation for ordinary negligence in the repair and maintenance of a

roadway did not require the affidavit of an expert pursuant to O.C.G.A. § 9-11-9.1. *Drawdy v. DOT*, 228 Ga. App. 338, 491 S.E.2d 521 (1997).

Portions of a complaint alleging various negligent failures to comply with the standards of the Manual On Uniform Traffic Control Devices (MUTCD) in the placement of the traffic control devices by the DOT's contractor required an expert affidavit since those allegations fell within the advisory or permissive categories of the MUTCD. *DOT v. Cushway*, 240 Ga. App. 464, 523 S.E.2d 340 (1999).

3. Legal Profession

Professional malpractice pre-requisite to affidavit requirement. — Since the complaint did not call into question professional standards of care applicable to attorneys, but rather raised questions concerning the existence of a legal services contract, whether any such contract was breached, and whether the defendant duped the plaintiff into purchasing advice for a false promise, the affidavit requirements of O.C.G.A. § 9-11-9.1 were not triggered. *Peacock v. Beall*, 223 Ga. App. 465, 477 S.E.2d 883 (1996).

Legal malpractice action supported by expert's affidavit. — In an action by a spouse against a divorce attorney for legal malpractice, an expert's affidavit setting forth the attorney's negligent omission from the settlement agreement of the spouse's right to military pension benefits was sufficient to demonstrate that the spouse's claim was not frivolous. *Hutchinson v. Divorce & Custody Law Ctr. of Arline Kerman & Assocs.*, 215 Ga. App. 25, 449 S.E.2d 866 (1994).

Application to professional negligence claims only and not attorney retainer agreement. — In a former client's suit for fraud, breach of contract, and other claims against a former attorney for the attorney's failure to refund a retainer after being fired, the trial court only partially erred by denying the attorney's motion to dismiss the complaint for failure to comply with the expert affidavit requirement of O.C.G.A. § 9-11-9.1 with regard to the former client's breach of contract claims as § 9-11-9.1 applies to profes-

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sional negligence claims only and, on the face of the complaint, the appellate court was unable to determine whether the former client's breach of contract claim against the attorney involved the use of the attorney's professional judgment and skill. The appellate court noted that any breach of contract claim not involving the attorney's professional judgment and skill remained pending in the trial court. *Nash v. Studdard*, 294 Ga. App. 845, 670 S.E.2d 508 (2008).

Affidavit not required for fraud. — In action against an attorney for breach of contract, breach of fiduciary duty, fraud, and professional malpractice, the trial court properly denied the defendant's motion to dismiss the fraud count for failure to file an affidavit, but properly granted the motion as to the other counts since an affidavit was required to the extent that the counts sounded in malpractice. *Hodge v. Jennings Mill, Ltd.*, 215 Ga. App. 507, 451 S.E.2d 66 (1994).

In a client's fraud claim against an attorney, neither appellate opinions that the client could pursue that claim without filing the expert affidavit required under O.C.G.A. § 9-11-9.1(b) (now (e)) in professional malpractice claims, nor the trial court's subsequent denial of the attorney's summary judgment motion, asserting a failure to show a false representation or detrimental reliance, established the law of the case precluding the trial court from subsequently granting the attorney's summary judgment motion based on the client's failure to prove damages. *Hopkinson v. Labovitz*, 263 Ga. App. 702, 589 S.E.2d 255 (2003).

Negligent exercise of legal judgment is not simple negligence. — Compliance with O.C.G.A. § 9-11-9.1 was required since the various acts and omissions averred in the complaint attempting to establish negligence on the part of an attorney each involved a situation requiring the exercise of legal judgment. Therefore, the complaint alleged professional, rather than simple, negligence. *Richmond Leasing Co. v. Cooper, Cooper, Maioriello & Stalnaker*, 207 Ga.

App. 623, 428 S.E.2d 603 (1993).

Legal malpractice action properly dismissed for failure to file affidavit.

— When the plaintiff, acting pro se, sued the defendant attorney for alleged legal malpractice arising from the defendant's representation of the plaintiff on certain criminal charges, and contemporaneously with the filing of the defendant's answer, the defendant moved to dismiss the complaint on the ground that it was not accompanied by the supporting affidavit of an expert as required by subsection (a) of O.C.G.A. § 9-11-9.1, the trial court did not err in granting the defendant's motion to dismiss. *Frazier v. Merritt*, 190 Ga. App. 832, 380 S.E.2d 495 (1989).

Plaintiff's claims against attorneys for premature settlement of a medical malpractice case were properly dismissed for failure to comply with subsection (a) of O.C.G.A. § 9-11-9.1. *Coleman v. Hicks*, 209 Ga. App. 467, 433 S.E.2d 621 (1993).

To the extent an executor's cross-claim for contribution and indemnity against an attorney was based upon acts and omissions by the attorney, in the attorney's capacity as the executor's legal representative in a legal proceeding, the claim was properly dismissed for failure to file an expert affidavit. *Crawford v. Johnson*, 227 Ga. App. 548, 489 S.E.2d 552 (1997).

Attorney representing a corporation in a bankruptcy proceeding was necessarily exercising professional or legal judgment and a suit against the attorney for actions or omissions in that proceeding is an action for professional malpractice requiring an expert affidavit. *Mendoza v. Pennington*, 239 Ga. App. 300, 519 S.E.2d 715 (1999), cert. denied, 529 U.S. 1042, 120 S. Ct. 1541, 146 L. Ed. 2d 354 (2000).

Plaintiff's claim of professional malpractice was properly dismissed because the plaintiff failed to file an expert affidavit with the complaint and since the defendant raised this defense in the defendant's answer dismissal of the claim was mandated. *Denson v. Maloy*, 239 Ga. App. 778, 521 S.E.2d 666 (1999).

Expert affidavit required on title search issue. — Action against law firm involving deficiency in a title search assigned by the firm to a nonlawyer required an expert affidavit. *Centrust Mtg. Corp. v.*

Smith & Jenkins, 220 Ga. App. 394, 469 S.E.2d 466 (1996).

4. Medical Profession

Impact rule does not apply to medical malpractice actions. — Policy concerns traditionally given for the impact rule and denying recovery for emotional distress unrelated to physical injuries are not present in medical malpractice cases because such cases require a physician-patient relationship between the defendant and the plaintiff; consequently, there is no question regarding the emotional impact of the defendant's alleged negligence on third parties or bystanders, nor is there concern about a "flood of litigation" arising from such negligence, and the concern about avoiding fraudulent or frivolous lawsuits is already addressed by the strict pleading requirements of O.C.G.A. § 9-11-9.1, the purpose of which is to reduce the number of frivolous malpractice suits filed. *Bruscato v. O'Brien*, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Claim of abandonment brought by the plaintiff against a podiatrist required the filing of an expert affidavit. *Bradford v. Rossi*, 249 Ga. App. 325, 548 S.E.2d 70 (2001).

Pharmacy. — Although a pharmacy is defined as a profession in O.C.G.A. § 26-4-2(16)(A), the State Board of Pharmacy, which is charged with regulating and licensing pharmacists, was created pursuant to O.C.G.A. Art. 2, Ch. 4, T. 26. Pharmacy is not a profession to which the affidavit requirements of O.C.G.A. § 9-11-9.1 apply. *Harrell v. Lusk*, 208 Ga. App. 358, 430 S.E.2d 653 (1993), *aff'd*, 263 Ga. 895, 439 S.E.2d 896 (1994).

Licensed pharmacist. — When a vendor of drugs or medicines is a licensed pharmacist and is sued on the basis of allegations that the pharmacist negligently dispensed the wrong drug in filling a medical prescription, the claim against the pharmacist clearly is for professional malpractice, and an affidavit is required to accompany the complaint. *Sparks v. Kroger Co.*, 200 Ga. App. 135, 407 S.E.2d 105 (1991).

Professional negligence action against a pharmacist was subject to the require-

ments of O.C.G.A. § 9-11-9.1. *Harrell v. Lusk*, 263 Ga. 895, 439 S.E.2d 896 (1994).

Drug distributor. — In a professional negligence action against a distributor of an anti-psychotic drug, failure to attach an expert affidavit required dismissal of the claims. *Presto v. Sandoz Pharmaceuticals Corp.*, 226 Ga. App. 547, 487 S.E.2d 70 (1997).

Physical therapists are "professionals" within the intent of O.C.G.A. § 9-11-9.1. *Hodo v. General Hosps.*, 211 Ga. App. 6, 438 S.E.2d 378 (1993).

Affidavit was required in an action against a physical therapy company based on the company's negligent hiring, supervision, and training of a physical trainer in the company's employ. *Georgia Physical Therapy, Inc. v. McCullough*, 219 Ga. App. 744, 466 S.E.2d 635 (1995).

Affidavit of chiropractor cannot be used against physical therapist. — Trial court erred by finding that the opinion of the patient's expert satisfied O.C.G.A. § 9-11-9.1 and former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. § 24-7-702) because despite the expert testimony that, as allowed by the expert's chiropractic license, the expert had practiced physical therapy for a number of years, chiropractic medicine and physical therapy were not the same professions. *Bacon County Hosp. & Health Sys. v. Whitley*, 319 Ga. App. 545, 737 S.E.2d 328 (2013).

Psychologists. — Expert's affidavit stating that the defendant's disclosure of confidential information was a deviation from the standard of care of a psychologist was adequate; it was not insufficient on the basis that the affidavit stated a violation of an ethical standard which, standing alone, cannot serve as a legal basis for a malpractice action. *Bala v. Powers Ferry Psychological Assocs.*, 225 Ga. App. 843, 491 S.E.2d 380 (1997).

Failure to replace disposable parts in medical instrument, as required for the instrument's safe performance, created an issue of simple negligence by hospital employees for which the hospital could be liable. Because professional skill and judgment were not involved, an affidavit under O.C.G.A. § 9-11-9.1 was not necessary. *Lamb v. Candler Gen. Hosp.*,

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262 Ga. 70, 413 S.E.2d 720 (1992).

Radiological physicist. — When the defendant's job as a radiological physicist involved calibrating the cobalt machine which is used to deliver radiation to the patient, and performing quality control services on any machines used in this therapy, and that the treating physician determines how much radiation the patient needs, and the defendant then calibrates the machine to deliver this amount, the defendant was not practicing medicine within the meaning of O.C.G.A. § 43-34-20(3) and, therefore the affidavit requirements of O.C.G.A. § 9-11-9.1 did not apply to radiological physicists. *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992).

University professor not expert in medical case. — In an action against a physician involving a procedure in which a "ken nail" biomechanical device was implanted in the plaintiff's hip, a tenured professor of applied biomechanics who was not a licensed medical doctor was not competent to testify as an expert in the case since the professor's credentials did not include the ability, education, training, or experience to perform the necessary surgery or prescribe any care to a patient with a biomechanical device. *Riggins v. Wyatt*, 215 Ga. App. 854, 452 S.E.2d 577 (1994).

In action for injuries against hospital and doctor, since the plaintiff's affidavit setting forth negligence of the doctor did not allege any negligence on the part of the hospital, the hospital was not entitled to dismissal of ordinary negligence claims; the claim of negligence in the complaint against the hospital's "staff" was not one against a "professional" or involving "professional malpractice." *Greene County Hosp. Auth. v. Turner*, 205 Ga. App. 213, 421 S.E.2d 715, cert. denied, 205 Ga. App. 900, 421 S.E.2d 715 (1992).

Respondeat superior liability of hospital. — To the extent that a complaint avers claims of hospital liability, based on the doctrine of respondeat superior, arising from acts or omissions constituting malpractice by doctors, registered

professional nurses, or other "professionals," as recognized by the appropriate statutes, an affidavit is required. To the extent that a complaint avers claims based on the acts or omissions of agents or staff employees who are not "established" by the hospital as qualifying as professionals, no supporting affidavit would be required and those claims would not be dismissed or summary judgment granted for want of an affidavit. *Legum v. Crouch*, 208 Ga. App. 185, 430 S.E.2d 360 (1993).

Medical malpractice complaint, which included an expert affidavit pursuant to O.C.G.A. § 9-11-9.1, was not subject to dismissal against various nurses although the expert did not assert any expertise in the area of nursing care as the nurses failed to raise an objection to that aspect of the affidavit's sufficiency; further, the fact that there was no negligence asserted against medical entities was not fatal and did not require dismissal as negligence was opined against the employees, and the employers were sued under a respondeat superior theory. *Tenet Healthcare Corp. v. Gilbert*, 277 Ga. App. 895, 627 S.E.2d 821 (2006).

Affidavit requirement inapplicable to ordinary negligence claim. — Requirement for an expert affidavit was inapplicable to a claim that the hospital provided inferior services and facilities; the hospital may be liable in ordinary negligence for furnishing defective equipment. *HCA Health Servs., of Ga., Inc. v. Hampshire*, 206 Ga. App. 108, 424 S.E.2d 293 (1992).

Court was without authority to say O.C.G.A. § 9-11-9.1 did not apply and the plaintiff should not be required to file an expert affidavit if negligence was shown to be clear and palpable. *Hopkinson v. Labovitz*, 231 Ga. App. 557, 499 S.E.2d 338 (1998).

Action based on an attorney's negligent filing of an erroneous deed did not contain allegations of negligence which would require an expert affidavit. *Bailey v. Joyner*, 229 Ga. App. 832, 495 S.E.2d 45 (1998).

Doctor and medical practice's failure to object, pursuant to O.C.G.A. § 9-11-9.1, with specificity to a nurse's affidavit that a plaintiff submitted in support of the plaintiff's medical malpractice claim did not

waive the issue of the nurse's competency as an expert in support of the patient's ordinary negligence claim. *Tucker v. Thomas C. Talley, M.D., P.C.*, 267 Ga. App. 820, 600 S.E.2d 778 (2004).

Trial judge did not err in denying a motion to dismiss a damages complaint filed against two medical clinics on grounds that the suing party failed to attach an expert affidavit as required by O.C.G.A. § 9-11-9.1(a) as the appeals court agreed that it was unclear from the face of the complaint whether the suing party was alleging either professional or simple negligence; hence, the suing party was entitled to pursue a simple negligence claim without an expert affidavit. *Atlanta Women's Health Group, P.C. v. Clemons*, 287 Ga. App. 426, 651 S.E.2d 762 (2007).

To the extent a patient's medical malpractice complaint could be construed to state a claim based on ordinary negligence, the trial court erred in granting a healthcare provider's motion to dismiss due to the patient's failure to file a malpractice affidavit pursuant to O.C.G.A. § 9-11-9.1 because, at least in part, the provider's alleged liability did not turn on a medical question but rather on a technician ignoring the patient's warning that the patient was going to fall off a treadmill. *OKelley v. Atlanta Heart Assocs., P.C.*, 316 Ga. App. 218, 728 S.E.2d 313 (2012).

Trial court did not err in denying a doctor's motion to dismiss an administrator's professional negligence claim based on being barred due to the failure to file an expert affidavit with the original complaint because the original complaint raised only a claim of ordinary negligence; thus, the O.C.G.A. § 9-11-9.1 affidavit requirement was not implicated at the time that the original complaint was filed. *Jensen v. Engler*, 317 Ga. App. 879, 733 S.E.2d 52 (2012).

Defective equipment supplied by hospital. — Because the patient's complaint alleged negligence against the hospital for supplying defective equipment for use in treating the hospital's patients, the case was not one against a professional or one involving professional malpractice, no expert affidavit was required, and the hospital's motion to dismiss was

improperly granted. *Ambrose v. St. Joseph's Hospital of Atlanta, Inc.*, 325 Ga. App. 557, 754 S.E.2d 135 (2014).

Because the patient's complaint alleged that the hospital breached the hospital's duty of ordinary care by providing unsafe equipment for use in treating the patient, the patient's complaint alleged simple negligence, and the hospital's motion to dismiss was improperly granted. *Ambrose v. St. Joseph's Hospital of Atlanta, Inc.*, 325 Ga. App. 557, 754 S.E.2d 135 (2014).

No specific application yet expert testimony required in medical fraud complaint. — Although O.C.G.A. § 9-11-9.1 does not apply and a plaintiff is not required to attach an expert affidavit to a medical fraud complaint, that does not mean that expert testimony will not be necessary for a jury to find in the plaintiff's favor as expert evidence is required when a medical question involving truly specialized medical knowledge, rather than the sort of medical knowledge that is within common understanding and experience, is needed. *Johnson v. Johnson*, 323 Ga. App. 836, 747 S.E.2d 518 (2013).

Battery claim does not require affidavit despite medical setting. — Patient alleging battery based on claim that surgeon punctured her duodenum during tubal ligation procedure was not required to file an expert's affidavit. *Newton v. Porter*, 206 Ga. App. 19, 424 S.E.2d 323 (1992).

Claim for battery is not an allegation of professional negligence and does not require an expert affidavit. *Upson County Hosp., Inc. v. Head*, 246 Ga. App. 386, 540 S.E.2d 626 (2000).

Doctor's alleged installation of a prosthetic patella in a backward position contrary to the instruction and design of the device constituted, if proven, an unconsented battery on the patient by the doctor and, thus, the patient was not required to file an expert's affidavit with the patient's complaint since a battery by a doctor did not come under O.C.G.A. § 9-11-9.1 and did not require an expert's affidavit. *Sood v. Smeigh*, 259 Ga. App. 490, 578 S.E.2d 158 (2003).

Affidavit not required absent "medical question." — In a negligence action against a physician and the physician's

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office staff, the affidavit of a medical expert was not required since the defendants' alleged liability did not turn on a "medical question," and a jury would be capable of determining without the help of expert evidence whether the physician's medical assistant exercised due care. *Brown v. Durden*, 195 Ga. App. 340, 393 S.E.2d 450 (1990).

Failure to attach medical records.

— In a medical malpractice action, because it was undisputed that the record on appeal failed to include the medical records on which the parents' expert's conclusions were based, the parents failed to comply with O.C.G.A. § 9-11-56(e), hence, the trial court did not err when the court granted summary judgment against the parents on this basis. *Conley v. Children's Healthcare of Atlanta, Inc.*, 279 Ga. App. 792, 632 S.E.2d 409 (2006).

Physician's affidavit must be signed in notary's presence. — Affidavit that was not signed by the physician in the presence of a notary was not valid. *Phoebe Putney Mem. Hosp. v. Skipper*, 226 Ga. App. 585, 487 S.E.2d 1 (1997).

O.C.G.A. § 9-11-9.1 was intended to eliminate frivolous actions; however, since the patient had clear evidence of simple negligence and demonstrated the patient's ability to prove such simple negligence, that statutory provision would not serve its purpose if it were applied to the patient's claim. Although O.C.G.A. § 9-11-9.1 requires an expert's affidavit be submitted in a case involving alleged professional malpractice, the trial court did not err in denying the doctor's motion to dismiss the patient's action for attaching an expert's affidavit that was arguably invalid because the affidavit was unsworn and unnotarized as the patient's complaint alleging that the doctor committed simple negligence in performing the mechanical act of reassembly of a prosthetic patella did not involve professional skill and judgment and, thus, did not require the submission of an expert's affidavit. *Sood v. Smeigh*, 259 Ga. App. 490, 578 S.E.2d 158 (2003).

Extension of time to file physician's affidavit. — When plaintiffs' treating

physician would not execute an expert witness affidavit, and this was not found out until two days before the filing deadline, the trial court's grant of an extension of time to file an affidavit was not an abuse of discretion. *Mem'l Hosp. of Adel, Inc. v. Dunn*, 251 Ga. App. 399, 554 S.E.2d 548 (2001).

Medical malpractice expert's affidavit. — In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action on grounds that the affidavit required under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) was from an orthopedist and not a fellow neurosurgeon, and was thus insufficient as a matter of law to support the husband and wife's medical malpractice complaint as the statutory area of practice or specialty in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. *Abramson v. Williams*, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (2007).

Medical expert affidavit insufficient to create jury questions. — Opinion in a O.C.G.A. § 9-11-9.1 expert affidavit that an emergency room physician's failure to treat a patient's leg fracture was below the standard of care and grossly negligent was insufficient to create a jury question. In view of the physician's affidavit, stating that the physician sought no orthopedic consult because a radiologist opined that the x-rays showed no serious fracture, the patient could not prove by clear and convincing evidence that the physician acted with gross negligence as required under O.C.G.A. § 51-1-29.5(c). *Pottinger v. Smith*, 293 Ga. App. 626, 667 S.E.2d 659 (2008).

Jury to determine doctor's credibility. — In a medical malpractice action, the trial court erred in granting summary judgment to a doctor and a pacemaker clinic because it was for a jury, not the trial court, to resolve a conflict created by an expert's contradictory testimony in an initial affidavit pursuant to O.C.G.A. § 9-11-9.1 and a subsequent deposition, and to determine the expert's credibility.

Patterson v. Bates, 295 Ga. App. 141, 671 S.E.2d 195 (2008), cert. denied, No. S09C0628, No. S09C0658, 2009 Ga. LEXIS 224, 227 (Ga. 2009).

Affidavit of physician against physical therapist. — Affidavit of an orthopedic surgeon showing the surgeon's knowledge of the professional standards of physical therapists from the surgeon's practice of medicine with their assistance was sufficient to support a medical malpractice complaint against a physical therapist. *Lee v. Visiting Nurse Health Sys.*, 223 Ga. App. 305, 477 S.E.2d 445 (1996).

Affidavit of doctor proper against nurse. — Affidavit of plaintiff's expert, a doctor, was competent regarding a nurse because the expert was familiar with the standard of care acceptable to the medical profession generally. *Tye v. Wilson*, 208 Ga. App. 253, 430 S.E.2d 129 (1993).

Nurse's affidavit. — Expert affidavit of a nurse is necessary to support a claim for professional negligence by a nurse only when the alleged act or omission by the nurse requires the exercise of professional nursing skill and judgment. To assess whether or not a co-worker had a propensity to commit the alleged sexual assault was not a matter within the professional nursing skill and judgment of the nurse, the defendant. *Bunn-Penn v. Southern Regional Medical Corp.*, 227 Ga. App. 291, 488 S.E.2d 747 (1997).

Because a doctor and the doctor's practice did not object with specificity to a nurse's affidavit that a patient submitted in support of the patient's medical malpractice complaint, they were not entitled to dismissal for failure to state a claim on account of the patient's alleged failure to comply with O.C.G.A. § 9-11-9.1. *Tucker v. Thomas C. Talley, M.D., P.C.*, 267 Ga. App. 820, 600 S.E.2d 778 (2004).

Nurses. — Plaintiff's complaint that hospital nurses who were assisting the plaintiff knew or should have known that the plaintiff was subject to falling and failed to exercise proper care to prevent the plaintiff falling sounded in professional negligence; thus, the plaintiff's action was subject to the expert affidavit requirement. *Holloway v. Northside Hosp.*, 230 Ga. App. 371, 496 S.E.2d 510 (1998).

Trial court erred in denying a hospital's motion to dismiss a medical malpractice complaint in a simple negligence action after the complainant failed to attach an expert witness affidavit pursuant to O.C.G.A. § 9-11-9.1, as a nurse's administration of medication to a patient, which was the subject matter of the suit, involved professional skill and judgment to comply with a standard within the professional's area of expertise. *Grady Gen. Hosp. v. King*, 288 Ga. App. 101, 653 S.E.2d 367 (2007).

Even if a patient clearly revoked the patient's consent to an intravenous antibiotic, the patient failed to show that it was medically feasible for a nurse to desist in the treatment without the cessation being detrimental; consequently, without an O.C.G.A. § 9-11-9.1 expert affidavit, the trial court properly dismissed the patient's complaint. *King v. Dodge County Hosp. Auth.*, 274 Ga. App. 44, 616 S.E.2d 835 (2005).

Complaint alleged that a nurse committed malpractice by not accurately triaging a patient. As the patient's expert nurse had ongoing practical experience in patient triage, and years of practical and teaching experience in supervising patient care, the expert's affidavit filed under O.C.G.A. § 9-11-9.1 was legally sufficient even though the expert had not performed emergency room triage. *Houston v. Phoebe Putney Mem. Hosp., Inc.*, 295 Ga. App. 674, 673 S.E.2d 54 (2009).

In a medical malpractice case dealing with a child's permanent disabilities, the hospital's motion for a new trial was improperly granted on the ground that a certified nurse midwife (CNM) could not testify as to the standard of care exercised by the registered professional nurses (RN) because the CNM was a member of the same profession as the hospitals RNs because the Georgia Registered Professional Nurse Practice Act, O.C.G.A. § 43-26-1 et seq., required a CNM to be licensed as a RN, and both RNs and CNMs were regulated by the Georgia Board of Nursing; a review of the regulatory scheme revealed that a CNM was a RN who had advanced training in a specialized area; and the expert affidavit statute listed only nurses and the statute did not have a separate

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listing for CNMs. *Dempsey v. Gwinnett Hosp. Sys.*, 330 Ga. App. 469, 765 S.E.2d 525 (2014).

Nurse's affidavit sufficient. — Nurse's affidavit was sufficient proof that the methods of treatment for the giving of phenergan injections by nurses and doctors are the same and, that as one familiar with the standard of care regarding the giving of these injections in both the nursing profession and in the medical profession generally, the doctor's performance fell beneath the standard of care in the medical profession. *Nowak v. High*, 209 Ga. App. 536, 433 S.E.2d 602 (1993).

Nurse's affidavit insufficient. — Trial court erred in ruling that a registered nurse could provide an expert affidavit regarding a physical therapist's care, given that O.C.G.A. § 9-11-9.1(g) categorized nurses and physical therapists as practicing separate professions, and because an expert was required to meet the conditions of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) in order to provide a § 9-11-9.1 affidavit. *Ball v. Jones*, 301 Ga. App. 340, 687 S.E.2d 625 (2009).

Attachment of medical records to affidavit not required. — As long as the affidavit itself adequately sets forth the factual basis for at least one negligent act or omission of the defendant alleged in the complaint, it is not necessary that the medical records from which the stated facts were taken be attached to the affidavit. *Ulbrich v. Batts*, 206 Ga. App. 74, 424 S.E.2d 288 (1992); *Williams v. Hajosy*, 210 Ga. App. 637, 436 S.E.2d 716 (1993).

Affidavit is not statutorily insufficient when the affidavit satisfies all the express requirements of subsection (a) of O.C.G.A. § 9-11-9.1 but fails to attach the medical documents therein referred to and relied upon by the expert when reciting in the affidavit the factual basis supporting each claim. *Dozier v. Clayton County Hosp. Auth.*, 206 Ga. App. 62, 424 S.E.2d 632 (1992).

Sufficiency of affidavit. — In an action against the hospital, physicians and nurses, the plaintiffs complied with the

requirements of O.C.G.A. § 9-11-9.1 by filing with the plaintiffs' complaint affidavits which set forth the negligence of professionals (physicians and nurses) whose acts form the basis for the claim against the hospital; amendment to the complaint merely clarified the specific basis of the hospital's liability under a theory of respondeat superior. *Thornton v. Ware County Hosp. Auth.*, 205 Ga. App. 202, 421 S.E.2d 713 (1992), cert. denied, 205 Ga. App. 901, 421 S.E.2d 713 (1992).

Affidavit of dentist was sufficient since the affidavit stated that the defendant failed to exercise the minimum degree of care and skill by failing to provide the plaintiff with notice of the serious health risks and known problems associated with interpositional implants. *Allen v. Belinfante*, 217 Ga. App. 754, 458 S.E.2d 867 (1995).

Because a statement in an expert affidavit attached to a patient's complaint did not bear a jurat, the trial court did not err in ruling that the affidavit was invalid under O.C.G.A. § 9-11-9.1. *Goodin v. Gwinnett Health Sys.*, 273 Ga. App. 461, 615 S.E.2d 129 (2005).

Because a dental patient's expert affidavit pursuant to O.C.G.A. § 9-11-9.1 was not based on certified or sworn records, nor was the affidavit based on the personal knowledge of the expert, the trial court erred in denying the dentist's motion for summary judgment in the patient's dental malpractice action; although the records custodian had failed to properly provide certified copies of the records upon the patient's discovery request, the patient waived the right to present such evidence pursuant to Ga. Unif. Super. Ct. R. 6.2 since the patient did not file a timely response to the dentist's summary judgment with an O.C.G.A. § 9-11-56(f) affidavit, and the patient did not show excusable neglect for purposes of O.C.G.A. § 9-11-60(b). *Rudd v. Paden*, 279 Ga. App. 141, 630 S.E.2d 648 (2006).

Affidavit on abortion sufficient. — Expert affidavit was sufficient when the affidavit stated that the physician performed two suction abortions on the plaintiff, that the physician failed to follow generally accepted medical practice, that the physician failed to exercise the degree

of care generally employed by medical professionals in the physician's field, and that the physician's failure to complete the two abortions constituted negligence. *Vitner v. Miller*, 223 Ga. App. 692, 479 S.E.2d 1 (1996).

Hospital could assert the insufficiency of affidavit as a defense to the hospital's liability for the alleged malpractice of individual physician-defendants who were established as professionals by the pleadings. *HCA Health Servs., of Ga., Inc. v. Hampshire*, 206 Ga. App. 108, 424 S.E.2d 293 (1992).

Witness who is member of different school of medicine than defendant. —

When the affidavit establishes that the witness is a member of a different school of medicine than that practiced by the defendant but contains no evidence that the methods of treatment of the plaintiff's condition are the same so as to bring the witness within the exception to the general rule that the witness is incompetent to testify, then the affidavit is legally insufficient. *Chandler v. Koenig*, 203 Ga. App. 684, 417 S.E.2d 715 (1992).

Allopathic physician was competent to testify as to osteopathic physician's performance when the osteopathic physician examined and treated a pediatric meningitis patient in the physician's capacity as an emergency room physician and when it was in the allopathic physician's capacity as an emergency room physician that the allopathic physician testified in an affidavit that the osteopathic physician had failed to meet the standard of care and skill required of an emergency room physician. *Handson v. HCA Health Servs. of Ga., Inc.*, 264 Ga. 293, 443 S.E.2d 831 (1994).

Testimony of pharmacologist as to physician's standard of care. — Although pharmacologist's affidavit establishes that the pharmacologist is an internationally recognized pharmacologist and possesses expertise in that area which probably far exceeds that of the average medical doctor, bare assertion that the pharmacologist is familiar with the applicable standard of care is not enough when nothing in the affidavit explains how the pharmacological education or the professional duties has provided the pharmacol-

ogist with expert knowledge of the standard of care in the prescribing of drugs ordinarily employed throughout the general medical profession by physicians who are years removed from the intensive pharmacological training the physicians received in medical school and for whom the prescribing of drugs is but one facet of their practice. *Chandler v. Koenig*, 203 Ga. App. 684, 417 S.E.2d 715 (1992).

"Period of limitation." — Doctor's motion to dismiss a widow's suit was properly denied as the "period of limitation" in O.C.G.A. § 9-11-9.1(b) (now (e)) referred to the statute of limitations in O.C.G.A. § 9-3-71(a) and the statute of repose in § 9-3-71(b); the appellate court would not delve into the factual basis for the widow's statement that the widow believed that the period of limitations was about to end as the doctor might have claimed that the statute of limitations period ran from the doctor's misdiagnosis of the patient. *Cochran v. Bowers*, 274 Ga. App. 449, 617 S.E.2d 563 (2005).

In a wrongful death suit, a medical center was properly granted partial summary judgment as to an administrator's claims of nursing malpractice since the amended complaint alleged the claims were not filed within the two-year statute of limitation period set forth in O.C.G.A. § 9-3-33. *Thomas v. Medical Ctr.*, 286 Ga. App. 147, 648 S.E.2d 409 (2007), cert. denied, 2007 Ga. LEXIS 699 (Ga. 2007).

5. Other Professions

Plumbing services. — Since plumbing services could only be performed pursuant to a license issued by the Division of Master Plumbers and Journeyman Plumbers of the State Construction Industry Licensing Board, and such Board was a "state examining board" pursuant to O.C.G.A. § 43-1-1, third party complaints against the owners of such plumbing services were professional negligence actions within the meaning of O.C.G.A. § 9-11-9.1, and the plaintiffs were required to contemporaneously file expert affidavits. *Seely v. Loyd H. Johnson Constr. Co.*, 220 Ga. App. 719, 470 S.E.2d 283 (1996).

Pest control company. — Based upon the statutory definition of professional

Application to Professions (Cont'd)
5. Other Professions (Cont'd)

service, a pest control company's control and treatment of wood destroying organisms is a profession for purposes of filing a professional malpractice action. *Colston v. Fred's Pest Control, Inc.*, 210 Ga. App. 362, 436 S.E.2d 23 (1993).

Homeowner's complaint, calling into question exterminator's conduct as a professional in its area of expertise rather than alleging negligence in the performance of administrative, clerical, or routine acts which require no expertise, alleged negligence and breach of contract in the performance of professional services requiring the filing of an expert affidavit. *Raley v. Terminix Int'l Co.*, 215 Ga. App. 324, 450 S.E.2d 343 (1994).

Application of the expert affidavit requirement to pest control services was clearly foreshadowed by *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992); thus, it was not unfair to dismiss an action for failure to file an affidavit, even though the complaint was filed before a decision that specifically applied the requirement to exterminators. *Fender v. Adams Exterminators, Inc.*, 218 Ga. App. 62, 460 S.E.2d 528 (1995).

Real estate brokers and salespersons must be licensed and, thus, are "professionals" within the intent of O.C.G.A. § 9-11-9.1. *Allen v. Remax N. Atlanta, Inc.*, 213 Ga. App. 644, 445 S.E.2d 774 (1994).

Accountants. — By alleging that the accountant failed to provide the necessary and proper tax advice normally required by a certified public accountant, the plaintiffs raised an issue as to whether the accountant performed services in accordance with the professional obligation of care for certified public accountants; accordingly, an expert affidavit should have been filed with this count of the complaint. *Hilton v. Callaghan*, 216 Ga. App. 145, 453 S.E.2d 509 (1995).

Expert affidavit was not required under O.C.G.A. § 9-11-9.1 to support the plaintiff's claim of fraud against the plaintiff's accountant. *Hilton v. Callaghan*, 216 Ga. App. 145, 453 S.E.2d 509 (1995).

Unlicensed bookkeeper and tax preparer was not a professional subject to an action for professional malpractice. *Hewitt v. Walker*, 226 Ga. App. 764, 487 S.E.2d 603 (1997).

Annuity planner. — Client's allegation that an annuity planner was negligent in transmitting information regarding the regularity of payments was not one of professional malpractice but one of simple negligence; therefore, an affidavit was not required and an affidavit was unnecessary to determine whether the planner was a "professional" within the meaning of O.C.G.A. § 9-11-9.1. *Creel v. Cotton States Mut. Ins. Co.*, 260 Ga. 499, 397 S.E.2d 294 (1990).

Manufacturers. — Requirement for an expert affidavit did not apply to a strict products liability action against a manufacturer. *SK Hand Tool Corp. v. Lowman*, 223 Ga. App. 712, 479 S.E.2d 103 (1996).

Architects. — O.C.G.A. § 9-11-9.1 applies to professional malpractice suits against architects. *McLendon & Cox v. Roberts*, 197 Ga. App. 478, 398 S.E.2d 579 (1990).

Construction program manager. — Specifically, with regard to a professional negligence claim, O.C.G.A. § 9-11-9.1(a), which requires a plaintiff asserting a professional negligence claim to submit an expert affidavit along with the complaint to set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim applies to professional malpractice claims alleging professional negligence; as the plaintiff, a surety, failed to provide the court with any evidence that the defendant, a construction program manager (CPM), hired to oversee school construction projects, was a professional as defined by any code sections, the school board could not have maintained an action against the CPM for professional malpractice, and neither could the surety as subrogee. *Carolina Cas. Ins. Co. v. R.L. Brown & Assocs.*, No. 1:04-cv-3537-GET, 2006 U.S. Dist. LEXIS 71056 (N.D. Ga. Sept. 29, 2006).

Harbor pilots. — O.C.G.A. § 9-11-9.1 applies to professional malpractice suits against harbor pilots. *Lutz v. Foran*, 262 Ga. 819, 427 S.E.2d 248 (1993).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Discovery date in medical malpractice litigation, 26 POF3d 185.

ALR. — Social worker malpractice, 58 ALR4th 977.

Veterinarian's liability for malpractice, 71 ALR4th 811.

What patient claims against doctor, hos-

pital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice, 89 ALR4th 887.

Legal malpractice in defense of criminal prosecution, 4 ALR5th 273.

Medical malpractice: negligent catheterization, 31 ALR5th 1.

9-11-9.2. Medical authorization forms; review of protected health information.

(a) In any action for damages alleging medical malpractice against a professional licensed by the State of Georgia and listed in subsection (g) of Code Section 9-11-9.1, against a professional corporation or other legal entity that provides health care services through a professional licensed by the State of Georgia and listed in subsection (g) of Code Section 9-11-9.1, or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of Code Section 9-11-9.1, contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal.

(b) The authorization shall provide that the attorney representing the defendant is authorized to obtain and disclose protected health information contained in medical records to facilitate the investigation, evaluation, and defense of the claims and allegations set forth in the complaint which pertain to the plaintiff or, where applicable, the plaintiff's decedent whose treatment is at issue in the complaint. This authorization includes the defendant's attorney's right to discuss the care and treatment of the plaintiff or, where applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians.

(c) The authorization shall provide for the release of all protected health information except information that is considered privileged and shall authorize the release of such information by any physician or health care facility by which health care records of the plaintiff or the plaintiff's decedent would be maintained. (Code 1981, § 9-11-9.2, enacted by Ga. L. 2005, p. 1, § 4/SB 3; Ga. L. 2007, p. 216, § 2/HB 221.)

Editor's notes. — Ga. L. 2005, p. 1, § 1/SB 3, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hos-

pitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is

the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.”

Ga. L. 2007, p. 216, § 3/HB 221, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2007, and shall apply to any action filed on or after July 1, 2007.”

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For article, “Georgia’s New Expert Witness Rule: Daubert and More,” see 11 Ga. St. B.J. 16 (2005). For survey article on insurance law, see 59 Mercer L. Rev. 195 (2007). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

JUDICIAL DECISIONS

Preemption by federal HIPAA law.

— Hospital’s motion to dismiss a medical malpractice action filed against the hospital based on an individual’s failure to comply with the medical record release requirement of O.C.G.A. § 9-11-9.2 was upheld on appeal as the court concluded that: (1) O.C.G.A. § 9-11-9.2 was preempted by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191; (2) the authorization set forth in § 9-11-9.2 did not satisfy the requirements for a valid HIPAA authorization; (3) the Georgia statute did not require a description of the information to be used or disclosed that specifically identified the information in a meaningful fashion; (4) the statute did not provide for an expiration date or event that related to the individual or the purpose of the use or disclosure; and (5) the statute did not contain notice of a right to revoke the authorization. *Northlake Med. Ctr., LLC v. Queen*, 280 Ga. App. 510, 634 S.E.2d 486 (2006).

Because the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 42 U.S.C. § 1320d et seq. (HIPAA), preempted O.C.G.A. § 9-11-9.2,

a patient did not have to comply with the filing requirements of the state law prior to filing a medical malpractice action against two hospitals; hence, the trial court properly granted the patient a protective order from having to contemporaneously comply with the filing requirements of O.C.G.A. § 9-11-9.2. *Crisp Reg’l Hosp., Inc. v. Sanders*, 281 Ga. App. 393, 636 S.E.2d 123 (2006).

Administratrix in a medical malpractice action authorized a release of the decedent’s medical records, and the medical practice moved to dismiss the complaint on the ground that the authorization did not comply with O.C.G.A. § 9-11-9.2; the motion was properly denied as O.C.G.A. § 9-11-9.2 was preempted by the Federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq. *Griffin v. Burden*, 281 Ga. App. 496, 636 S.E.2d 686 (2006).

O.C.G.A. § 9-11-9.2 is preempted by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) since § 9-11-9.2 is less stringent and does not comply with the requirements of HIPAA as to notice of the right to revoke. *Allen v. Wright*, 282 Ga. 9, 644 S.E.2d 814 (2007).

9-11-10. Form of pleadings.

(a) **Caption; names of parties.** Every pleading shall contain a caption setting forth the name of the court and county, the title of the action, the file number, and a designation as in subsection (a) of Code Section 9-11-7. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. A party whose name is not known may be designated by any name; and, when his true name is discovered, the pleading may be amended accordingly.

(b) **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. (Ga. L. 1966, p. 609, § 10; Ga. L. 1967, p. 226, § 47.)

Cross references. — Juvenile Court forms, Uniform Rules for the Juvenile Courts of Georgia, Rule 3.8.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 10, see 28 U.S.C.

JUDICIAL DECISIONS**ANALYSIS**

GENERAL CONSIDERATION

NAME OF COURT

NAMES OF PARTIES

EXHIBITS

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 81-105 and 81-1206, are included in the annotations for this Code section.

It was not necessary to attach copy of will to claim affidavit. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965) (decided under former Code 1933, § 81-105).

In common-law form of ejectment, it is not necessary to set out chain of title under which plaintiffs claim. Jackson v. Sanders, 199 Ga. 222, 33 S.E.2d 711 (1945) (decided under former Code 1933, § 81-105).

Letters relied on to establish acknowledgement of indebtedness sued on constituted part of cause of action, and were properly attached to petition. Martin v. Mayer, 63 Ga. App. 387, 11 S.E.2d 218

General Consideration (Cont'd)

(1940) (decided under former Code 1933, § 81-105).

In action to recover for premiums on insurance policies, it is not necessary to attach policies or copies thereof as exhibits to petition. *Hames v. Georgia Ins. Serv., Inc.*, 110 Ga. App. 376, 138 S.E.2d 607 (1964) (decided under former Code 1933, § 81-105).

Answer required from all parties named in complaint. — When an answer was filed in the name of only one of four separate entities named as defendants in the action, the other three defendants could not benefit from the answer and, having filed no answer of their own, were in default. *McCombs v. Southern Regional Medical Ctr., Inc.*, 233 Ga. App. 676, 504 S.E.2d 747 (1998).

Failure to name party. — Appellate court could not address complaints about a county since the county was not a named party to the case and the plaintiff did not seek to join the county in the proceedings below. *Strykr v. Long County Bd. of Comm'rs*, 277 Ga. 624, 593 S.E.2d 348 (2004).

Proper remedy for seeking more particularity. — Trial court erred in granting the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted and for judgment on the pleadings because the trial court should have required the plaintiffs to amend the plaintiffs' complaint and provide a more definite statement of the plaintiffs' claims before passing upon the motions; the amended complaint was a "shotgun pleading" because the complaint was not a short and plain statement of the claims that the plaintiffs asserted as required by O.C.G.A. § 9-11-8(a)(2)(A) of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, the complaint did not give the defendants fair notice of the nature of the claims, and the complaint did not conform to several of the specific pleading requirements of the Act, specifically O.C.G.A. §§ 9-11-8, 9-11-9, and 9-11-10. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

More definitive statement. — Requiring the plaintiff to make a more defi-

nite statement of his or her claim saves judicial resources and permits the trial court, when a sufficiently more definite statement has been pled, to determine whether the complaint states a claim by applying the usual standards for the legal adequacy of a complaint; although the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, does not expressly authorize a court to order a more definite statement in the absence of a motion, O.C.G.A. § 9-11-12(e), there is no reason that a court cannot do so as an exercise of the court's inherent powers to manage the court's docket and to compel compliance with the rules and requirements of civil procedure. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

When a trial court orders a plaintiff to make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to conform to the pleading requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint, not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Cited in *Murrey v. Specialty Underwriters, Inc.*, 233 Ga. 804, 213 S.E.2d 668 (1975); *Chupp v. Henderson*, 134 Ga. App. 808, 216 S.E.2d 366 (1975); *Barrett v. Simmons*, 235 Ga. 600, 221 S.E.2d 25 (1975); *Vaughn v. Collum*, 136 Ga. App. 677, 222 S.E.2d 37 (1975); *Roe v. Doe*, 246 Ga. 138, 268 S.E.2d 901 (1980); *Cato Oil & Grease Co. v. Lewis*, 250 Ga. 24, 295 S.E.2d 527 (1982); *Bakhtiarnejad v. Cox Enters.*, 247 Ga. App. 205, 541 S.E.2d 33 (2000); *Smith Serv. Oil Co. v. Parker*, 250

Ga. App. 270, 549 S.E.2d 485 (2001); *Perry Golf Course Dev., LLC v. Hous. Auth.*, 294 Ga. App. 387, 670 S.E.2d 171 (2008); *Fernandez v. WebSingularity, Inc.*, 299 Ga. App. 11, 681 S.E.2d 717 (2009); *Racette v. Bank of Am., N.A.*, 318 Ga. App. 171, 733 S.E.2d 457 (2012); *Mecca Constr., Inc. v. Maestro Invs., LLC*, 320 Ga. App. 34, 739 S.E.2d 51 (2013).

Name of Court

Failure to address a petition to a specific court is an amendable defect. *Mincey v. Stamper*, 253 Ga. 301, 319 S.E.2d 857 (1984).

Failure to specify court not fatal defect when defendant answered in correct court. — Even though the original petition was never formally amended to cure a failure to specify a court, the defect was not a ground for dismissal since the defendant admitted service of the petition and answered the petition in the correct court. *Mincey v. Stamper*, 253 Ga. 301, 319 S.E.2d 857 (1984).

Names of Parties

Persons, not their names, are sued. *Atlanta Veterans Transp., Inc. v. Westmoreland*, 123 Ga. App. 466, 181 S.E.2d 504 (1971).

Name of plaintiff must import a person, firm, or corporation; if this is not done, there is no plaintiff and no action, but a mere nullity which is subject to dismissal. *Russell v. O'Donnell*, 132 Ga. App. 294, 208 S.E.2d 107 (1974).

Action cannot be maintained in name of the plaintiff which is neither that of natural person, partnership, or such artificial person as is recognized by law as capable of suing. *Russell v. O'Donnell*, 132 Ga. App. 294, 208 S.E.2d 107 (1974).

Plaintiff's name must import person recognized by law. — Action cannot be maintained in a name as plaintiff which is neither that of a natural person, a partnership, nor of such artificial person as is recognized by the law as capable of suing, and a proceeding commenced in such a name, there being no plaintiff, is not an action, but a mere nullity, and may be dismissed at any time on motion. *Board of Educ. v. Hall*, 189 Ga. 615, 7 S.E.2d 183

(1940) (decided under former Code 1933, § 81-1206).

Amendment declaring status of party. — Action brought in name which is neither that of natural person, nor corporation, nor partnership, is a mere nullity; but if the name imports a corporation or partnership, amendment declaring status of the party may be allowed. *Johnson & Johnson Constr. Co. v. Pioneer Neon Supply Co.*, 96 Ga. App. 867, 101 S.E.2d 918 (1958) (decided under former Code 1933, § 81-1206).

Right to correct misnomer. — If the real defendant has been properly served, the plaintiff has the right to amend in order to correct a misnomer in the description of the defendant contained in the complaint. *Atlanta Veterans Transp., Inc. v. Westmoreland*, 123 Ga. App. 466, 181 S.E.2d 504 (1971); *Russell v. O'Donnell*, 132 Ga. App. 294, 208 S.E.2d 107 (1974).

Leave of court required to correct capacity of party. — Failing to name a county board member in the board member's individual capacity is not a mere misnomer that can be corrected without leave of court under O.C.G.A. § 9-11-10(a). *Bd. of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

Correction of misnomer involves no substitution of parties, nor adds new and distinct parties. *Atlanta Veterans Transp., Inc. v. Westmoreland*, 123 Ga. App. 466, 181 S.E.2d 504 (1971).

Name of either plaintiff or defendant may be corrected by amendment prior to judgment, so long as name by which originally designated party is described imports a person, firm, or corporation, even though it is in fact not so. *Russell v. O'Donnell*, 132 Ga. App. 294, 208 S.E.2d 107 (1974).

Amendment alleging corporate character. — If name in complaint does not import a legal entity, but the defendant is in fact a corporation, such defect may be cured by amendment alleging corporate character. *Russell v. O'Donnell*, 132 Ga. App. 294, 208 S.E.2d 107 (1974).

Trade name. — Petition brought in trade name may be amended by stating real or true name of the person who purports to carry on business to which petition relates; and such amendment does

Names of Parties (Cont'd)

not state new cause of action or introduce new party. *Johnson & Johnson Constr. Co. v. Pioneer Neon Supply Co.*, 96 Ga. App. 867, 101 S.E.2d 918 (1958) (decided under former Code 1933, § 81-1206).

If complaint is brought in defendant's trade name, complaint is amendable by stating real name of person doing business under that name, and the amendment does not introduce a new party. *Thomas v. Home Credit Co.*, 125 Ga. App. 876, 189 S.E.2d 470 (1972).

If unidentified party is sued as John Doe and served within limitation period, later amendment adding the party's name after the party has been identified will relate back, but if no service has been effected on a "John Doe" this proceeding does not apply. *Sims v. American Cas. Co.*, 131 Ga. App. 461, 206 S.E.2d 121, aff'd sub nom., *Providence Wash. Ins. Co. v. Sims*, 232 Ga. 787, 209 S.E.2d 61 (1974).

Fact that individual partners were not named in caption of case did not authorize setting aside judgment as this was an amendable defect. *Bolton Rd. Medical Ctr. v. Strother & Co.*, 140 Ga. App. 724, 231 S.E.2d 533 (1976).

Substitution of entirely different parties disallowed. — Proposed amendment to motion for new trial which attempts to strike name of party or parties thereto and to substitute name of entirely different parties not revealed by contents of the motion to have been intended as parties of reference in the first instance must be disallowed. *Goodman v. Kenney*, 124 Ga. App. 709, 185 S.E.2d 632 (1971).

Trial court's denial of summary judgment to a hotel limited liability corporation (LLC) in a personal injury action by an injured patron was error as the action was originally brought against a different entity, the patron attempted to add the LLC and then dismissed that action and brought a new action after expiration of the limitations period under O.C.G.A. § 9-3-33 against the LLC based on the renewal statute pursuant to O.C.G.A. § 9-2-61, but the patron never sought or obtained court permission to add the LLC as a party, as required by O.C.G.A.

§§ 9-11-15(a) and 9-11-21; as the amendment to add the LLC was more than a correction of a misnomer because the two named defendants were separate entities, O.C.G.A. § 9-11-10(a) was inapplicable and leave of court was required in order to add the LLC. *Valdosta Hotel Props., LLC v. White*, 278 Ga. App. 206, 628 S.E.2d 642 (2006).

"Interested party." — Party whose interest in property derived from an unrecorded deed received from a party who was the holder of a deed to secure debt from the record owner of the property was not an "interested party" under paragraph (1) of O.C.G.A. § 9-11-10 and had no right under O.C.G.A. § 9-11-24(a) to intervene in an in rem judicial tax foreclosure proceeding. *Burruss v. Ferdinand*, 245 Ga. App. 203, 536 S.E.2d 555 (2000).

Use of name of deceased party. — In a foreclosure proceeding, the trial court did not err in continuing to exercise jurisdiction after having been informed of the death of a party since the affidavit of dispossession and summons listed the tenant as "name of deceased or persons in possession" of the premises. *Robinson v. Georgia Hous. & Fin. Auth.*, 244 Ga. App. 653, 536 S.E.2d 548 (2000).

Exhibits

Application to forfeiture proceedings. — Under O.C.G.A. § 9-11-81 (applicability of chapter), the incorporation by reference provision of O.C.G.A. § 9-11-10, including incorporation of exhibits attached to pleadings, applies to forfeiture proceedings, unless specific, expressly prescribed rules of the forfeiture statute conflict with the incorporation of exhibits provisions. *Bell v. State*, 234 Ga. App. 693, 507 S.E.2d 535 (1998).

Properly considered in motion to dismiss. — In city's suit against a landowner for specific performance of the parties' agreement, the city's complaint attached the parties' agreement along with several other exhibits, which under O.C.G.A. 9-11-10(c) were properly considered by the trial court in ruling upon the landowner's motion to dismiss under O.C.G.A. § 9-11-12(b)(6). *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

Documents attached to motion to dismiss could not be considered. — Trial court erred in dismissing a pro se borrower's complaint for wrongful foreclosure and breach of contract against the borrower's lender's alleged assignee; the trial court could not consider documents attached to the motion to dismiss, and the complaint adequately alleged failure to give the borrower notice and improper advertising, contrary to O.C.G.A. §§ 44-14-162(a) and 44-14-162.2. *Babalola v. HSBC Bank, USA, N.A.*, 324 Ga. App. 750, 751 S.E.2d 545 (2013).

Consideration of city's ordinance during motion for judgment on plead-

ings. — In a dispute between a city and a nude dancing establishment over the city's sexually-oriented business ordinance, copies of the ordinance and other materials attached to the complaint were part of the pleadings and were properly considered on a motion for judgment on the pleadings pursuant to O.C.G.A. § 9-11-10(c). *Trop, Inc. v. City of Brookhaven*, 296 Ga. 85, 764 S.E.2d 398 (2014).

Written instrument attached as exhibit to a pleading will prevail over allegations of the pleading. *H & R Block, Inc. v. Asher*, 231 Ga. 780, 204 S.E.2d 99 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 238, 251, 289, 292, 389. 71 C.J.S., Pleading, §§ 43 et seq., 64, 68, 74, 86, 87, 90, 117, 118, 259.

ALR. — Necessity of pleading that tort was committed by servant, in action against master, 4 ALR2d 292.

Propriety of attaching photographs to a pleading, 33 ALR3d 322.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 ALR5th 237.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 ALR Fed. 369.

Propriety of use of fictitious name of defendant in federal district court, 139 ALR Fed 553.

9-11-11. Signing of pleadings; when verification required; rule abolished.

(a) Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. The signature of an attorney constitutes a certificate by him that he has read the pleading and that it is not interposed for delay.

(b) Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.

(c) The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. (Ga. L. 1966, p. 609, § 11.)

Cross references. — Practice of law by active members of Georgia State Bar and by nonresidents, Rules and Regulations

for the Organization and Government of the State Bar of Georgia, Rule 1-203.

U.S. Code. — For provisions of Federal

Rules of Civil Procedure, Rule 11, see 28 U.S.C.

Law reviews. — For annual survey of

legal ethics, see 38 Mercer L. Rev. 269 (1986).

JUDICIAL DECISIONS

Honesty and good faith required. — Statute's purpose and intent are requirements of honesty and good faith in pleading. *Stuckey's Carriage Inn v. Phillips*, 122 Ga. App. 681, 178 S.E.2d 543 (1970).

Failure to sign may be amended. — Failure of party or counsel to sign petition may be supplied by amendment. *Edwards v. Edwards*, 227 Ga. 307, 180 S.E.2d 358 (1971).

Absence of a signature by an attorney in compliance with Rule 1-203, Rules of the State Bar of Georgia and subsection (a) of O.C.G.A. § 9-11-11 was a defect which a party may timely cure by amending the complaint to add the name and signature of a Georgia attorney. *Bandy v. Hospital Auth.*, 174 Ga. App. 556, 332 S.E.2d 46 (1985).

Trial court properly found that a client's failure to sign the original answer to a law firm's complaint on an open account was an amendable defect which was cured by subsequently-filed signed and verified amended answers under O.C.G.A. § 9-11-15(a) because the amended answers were filed before the entry of any pretrial order and the firm did not show that the firm's case was prejudiced; the original answer was not a nullity under O.C.G.A. § 9-11-1(a) because the client's name on the signature line, placed there at the client's request by an attorney who represented the client in a divorce, evinced the client's intent to answer the complaint. *Edenfield & Cox, P.C. v. Mack*, 282 Ga. App. 816, 640 S.E.2d 343 (2006).

Court should grant leave to comply with requirement as to signature, rather than strike the pleading; entry of judgment by default against the plaintiff for noncompliance is the ultimate sanction, which should be invoked rarely and certainly not for minor infractions. *Lee v. Precision Balancing & Mach., Inc.*, 134 Ga. App. 762, 216 S.E.2d 640 (1975).

Default after failure to sign. — Party who was not represented by an attorney had to sign the party's own pleading be-

cause the party failed to sign the answer or have an attorney file an answer on the party's behalf within 30 days of service, the party was in default as a matter of law. *Associated Doctors of Warner Robins, Inc. v. U.S. Foodservice of Atlanta, Inc.*, 250 Ga. App. 878, 553 S.E.2d 310 (2001).

Because a corporate president did not sign an original answer on the president's own behalf or submit a valid answer within 30 days, and an answer submitted for the president by a non-attorney corporate principal was not sufficient pursuant to O.C.G.A. § 9-11-11(a), a default judgment was properly entered against the president under O.C.G.A. § 9-11-55. *Rainier Holdings, Inc. v. Tatum*, 275 Ga. App. 878, 622 S.E.2d 86 (2005).

Verification of answer. — Unless otherwise provided by law, an answer need not be verified by oath. *Harrison v. Harrison*, 228 Ga. 126, 184 S.E.2d 147 (1971).

Divorce complaint not void for lack of verification. — Fact that original complaint for divorce was not verified by the plaintiff did not render the action null and void, but was an amendable defect. *Edwards v. Edwards*, 227 Ga. 307, 180 S.E.2d 358 (1971).

Answer to garnishment petition. — Garnishee's answer to a verified post-judgment garnishment petition need not be verified. *First Nat'l Bank v. Sinkler*, 170 Ga. App. 668, 317 S.E.2d 897 (1984).

Attachment of deed to correct deficiencies in answer. — Claimants in a forfeiture action corrected any deficiencies in the claimants' answer when the claimants' filed an amended answer that incorporated by reference a recorded warranty deed, which provided necessary information and corrected the lack of verification by one of the claimants. *Bell v. State*, 234 Ga. App. 693, 507 S.E.2d 535 (1998).

Section applied retroactively. — When at the time the defendant's answer was filed, the verification of a non est factum defense was required by statute, but at the time that the plaintiff moved to

strike that defense, former Code 1933, § 20-801 had been repealed and there was no longer any statutory requirement of verification, the existing rather than the former law controls, and it was error to grant the plaintiff's motion to strike. *Ballard v. Frey*, 179 Ga. App. 455, 346 S.E.2d 893 (1986).

Matters in abatement and in bar. — As a determination whether compliance with the ante litem notice requirement of O.C.G.A. § 36-33-5 was met by property owners who asserted claims against a municipality was properly considered a matter in abatement, which should have been raised in a motion to dismiss under O.C.G.A. § 9-11-12, flexibility by the court was required; accordingly, consideration of the matter within the summary judgment context, pursuant to O.C.G.A. § 9-11-56, was proper because matters outside of the pleadings, including the

owners' depositions, were considered. *Davis v. City of Forsyth*, 275 Ga. App. 747, 621 S.E.2d 495 (2005).

Cited in *Cook v. Cook*, 225 Ga. 779, 171 S.E.2d 568 (1969); *Brown v. Olen*, 226 Ga. 492, 175 S.E.2d 838 (1970); *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973); *Ben O'Callaghan Co. v. Rose, Silverman & Hunt*, 131 Ga. App. 29, 205 S.E.2d 45 (1974); *George v. George*, 232 Ga. 389, 207 S.E.2d 26 (1974); *Anderson v. Atlanta Univ., Inc.*, 134 Ga. App. 365, 214 S.E.2d 394 (1975); *Cel-Ko Bldrs. & Developers, Inc. v. BX Corp.*, 136 Ga. App. 777, 222 S.E.2d 94 (1975); *North Ga. Prod. Credit Ass'n v. Vandergrift*, 239 Ga. 755, 238 S.E.2d 869 (1977); *Ballard v. Frey*, 179 Ga. App. 455, 346 S.E.2d 893 (1986); *Cunningham v. State*, 182 Ga. App. 266, 355 S.E.2d 762 (1987); *McCullers v. Harrell*, 298 Ga. App. 798, 681 S.E.2d 237 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 61B Am. Jur. 2d, Pleading, §§ 833, 837, 838.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 247, 401. 71 C.J.S., Pleading, § 347 et seq.

ALR. — Necessity of showing authority or qualification of affiant in affidavit made in behalf of corporation, 3 ALR 132.

Necessity and propriety of counter affidavits in opposition to motion for new trial in civil case, 7 ALR3d 1000.

Attorneys' fees: obduracy as basis for state-court award, 49 ALR4th 825.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 95 ALR Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation, 95 ALR Fed. 181.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, 96 ALR Fed. 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 ALR Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 ALR Fed. 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in antitrust actions, 99 ALR Fed. 573.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 ALR Fed. 556.

9-11-11.1. Exercise of rights of freedom of speech and to petition government for redress of grievances; legislative findings; verification of claims; definitions; procedure on motions; exception; fees and expenses.

(a) The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process.

(b) For any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, both the party asserting the claim and the party's attorney of record, if any, shall be required to file, contemporaneously with the pleading containing the claim, a written verification under oath as set forth in Code Section 9-10-113. Such written verification shall certify that the party and his or her attorney of record, if any, have read the claim; that to the best of their knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the act forming the basis for the claim is not a privileged communication under paragraph (4) of Code Section 51-5-7; and that the claim is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation. If the claim is not verified as required by this subsection, it shall be stricken unless it is verified within ten days after the omission is called to the attention of the party asserting the claim. If a claim is verified in violation of this Code section, the court, upon motion or upon its own initiative, shall impose upon the persons who signed the verification, a represented party, or both an appropriate sanction which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

(c) As used in this Code section, "act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Consti-

tution of the State of Georgia in connection with an issue of public interest or concern” includes any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

(d) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section. The motion shall be heard not more than 30 days after service unless the emergency matters before the court require a later hearing. The court, on noticed motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted notwithstanding this subsection.

(e) Nothing in this Code section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, law, or rule.

(f) Attorney’s fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition, including but not limited to dismissal by the plaintiff, of the action. (Code 1981, § 9-11-11.1, enacted by Ga. L. 1996, p. 260, § 1; Ga. L. 1998, p. 862, § 2.)

Cross references. — Freedom of speech and of the press guaranteed, Ga. Const. 1983, Art. I, Sec. I, Para. V. Freedom of speech, U.S. Const., amend. 1.

Law reviews. — For review of 1998 legislation relating to civil practice, see 15 Ga. St. U.L. Rev. 1 (1998). For article, “Don’t Raise That Hand: Why, Under Georgia’s Anti-SLAPP Statute, Whistleblowers Should Find Protection

from Reprisals for Reporting Employer Misconduct,” see 38 Ga. L. Rev. 769 (2004). For survey article on legal ethics, see 59 Mercer L. Rev. 253 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROCEDURE
APPLICATION
FEES AND EXPENSES

General Consideration

Legislative intent. — In enacting the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, the legislature declared, “it is in the public interest to encourage partic-

ipation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. The

General Consideration (Cont'd)

General Assembly of Georgia further finds and declares that the valid exercise of [these] constitutional rights ... should not be chilled through abuse of the judicial process.” *Providence Constr. Co. v. Bauer*, 229 Ga. App. 679, 494 S.E.2d 527 (1997), cert. denied, 525 U.S. 1069, 119 S. Ct. 799, 142 L. Ed. 2d 660 (1999).

Legislative intent behind Georgia’s anti-SLAPP statute, O.C.G.A. § 9-11-11.1, is to protect the public’s right to petition the government for the redress of grievances on matters of public concern, O.C.G.A. § 9-11-11.1(a), and excluding the petition itself that initiates a “proceeding” to address matters of public concern from the reach of the anti-SLAPP statute would defeat a central purpose of the statute — to protect the right to petition the government. *Hawks v. Hinely*, 252 Ga. App. 510, 556 S.E.2d 547 (2001).

Intent of the anti-Strategic Lawsuits Against Public Participation statute is to encourage the exercise of free speech and afford procedural protection to acts of communication on public issues; in connection with this procedural protection, the appellate court has held that the mere procedural filing of a verification does not end the matter as to whether a claim could go forward under O.C.G.A. § 9-11-11.1(b) and (d). *Harkins v. Atlanta Humane Soc’y*, 264 Ga. App. 356, 590 S.E.2d 737 (2003).

Construction with other law. —

Upon a proper appeal from a final order, while neither former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refile in another court constitutes “improper judge shopping,” obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457

(2007), cert. denied, No. S07C1602, 2007 Ga. LEXIS 656 (Ga. 2007).

There is no requirement that a party first seek to invoke O.C.G.A. § 9-15-14 or O.C.G.A. § 51-7-80 before seeking the protections of O.C.G.A. § 9-11-11.1. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Voluntary dismissal of a lawsuit by a plaintiff does not preclude the imposition of a sanction under O.C.G.A. § 9-11-11.1(f). *Hagemann v. Berkman Wynhaven Assoc., L.P.*, 290 Ga. App. 677, 660 S.E.2d 449 (2008).

Inapplicable to parody on trademark suit. — Anti-SLAPP statute, O.C.G.A. § 9-11-11.1, did not apply in a trademark infringement/dilution by tarnishment countersuit filed by a national discount store chain in response to the plaintiff’s declaratory judgment action because the plaintiff’s unflattering parodies of the store’s trademarks were not made in an official proceeding but were printed on t-shirts and other items that were sold on-line. *Smith v. Wal-Mart Stores, Inc.*, 475 F. Supp. 2d 1318 (N.D. Ga. 2007).

Inapplicable in federal cases arising under diversity jurisdiction. —

District court’s denial of the company owner’s motion to dismiss was proper because Georgia’s verification requirement conflicted with Fed. R. Civ. P. 11 and therefore did not apply in federal cases arising under the district court’s diversity jurisdiction. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351 (11th Cir. 2014).

Attorney’s duty to advise. — While an attorney was shielded from liability as to the issue of whether a breach occurred as to the duty of care owed to the clients by failing to verify the complaint pursuant to O.C.G.A. § 9-11-11.1(b), opting instead to dismiss the complaint and refile the complaint as a renewal action, summary judgment as to the issues of harm to the clients and a breach of the duty of ordinary care as a result of the attorney’s failure to advise was reversed. *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 283 Ga. App. 10, 640 S.E.2d 633 (2006).

Cited in *Great W. Bank v. Southeastern Bank*, 234 Ga. App. 420, 507 S.E.2d 191

(1998); *In re Carter*, 235 Ga. App. 551, 510 S.E.2d 91 (1998).

Procedure

When discovery was stayed upon motions to dismiss and the plaintiff claimed harm by the stay provisions, because the plaintiff could have sought the aid of the trial court to lift the stay for the limited purpose of conducting necessary discovery, which the plaintiff failed to do, the plaintiff could not raise the issue on appeal. *Davis v. Emmis Publ'g Corp.*, 244 Ga. App. 795, 536 S.E.2d 809 (2000).

Stay of proceedings. — Trial court did not err in holding a hearing on bond validation issues after denying a motion to strike brought by intervenors in the action based on the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, because subsection (d) allowed the trial court to hold a hearing in spite of the stay provisions, and the motion to strike was meritless. *Citizens for Ethics in Gov't, LLC v. Atlanta Dev. Auth.*, 303 Ga. App. 724, 694 S.E.2d 680 (2010), cert. denied, No. S10C1350, 2010 Ga. LEXIS 722 (Ga. 2010).

False verification. — City's counterclaims to a landowner's declaratory judgment action challenging a rezoning decision were falsely verified and thus should have been dismissed; the counterclaims did not establish abusive litigation under O.C.G.A. § 51-7-84(b) because the declaratory judgment action had not terminated. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Founder's verifications as to complaint for malicious prosecution and intentional infliction of emotional distress were false to the extent that the complaint was neither filed for a proper purpose or well-grounded in fact. The record showed that the defendants were merely reporting alleged criminal activity to the police and were not overly zealous or malicious. *Annamalai v. Capital One Fin. Corp.*, 319 Ga. App. 831, 738 S.E.2d 664 (2013).

Failure to verify complaint. — Trial court erred in holding that the plaintiff's failure to verify the complaint as required by law was an amendable defect since the plaintiff filed the verifications with an amended complaint more than ten days

(approximately two months) after the failure to file was first brought to the plaintiff's attention. *Davis v. Emmis Publ'g Corp.*, 244 Ga. App. 795, 536 S.E.2d 809 (2000).

Trial court did not err in dismissing a defamation action for failure to verify the complaint since the action arose out of the defendants' petition in opposition to the plaintiff's application for rezoning that involved alleged issues of county-wide soil and water environmental protection and alleged violations of environmental laws, which were matters of general public concern and interest. *Browns Mill Dev. Co. v. Denton*, 247 Ga. App. 232, 543 S.E.2d 65 (2000), aff'd, 275 Ga. 2, 561 S.E.2d 431 (2002).

Whether the verification required by O.C.G.A. § 9-11-11.1(b), in a claim against an individual exercising his or her free speech or right to petition for redress of grievances, is completely omitted or merely deficient upon filing, the claimant must remedy the situation within the statutory 10-day period or the complaint shall be stricken. *Hawks v. Hinely*, 252 Ga. App. 510, 556 S.E.2d 547 (2001).

Mandate of the anti-SLAPP statute, O.C.G.A. § 9-11-11.1(b), that an improperly verified complaint challenging the exercise of the right to free speech and to petition for redress of grievances shall be stricken necessarily means that the claims in any such complaint must be dismissed with prejudice as the appellate court is bound to follow the express language of O.C.G.A. § 9-11-11.1(b) and the statute explicitly mandates that the claim "shall be stricken" if the verification is not filed timely. *Hawks v. Hinely*, 252 Ga. App. 510, 556 S.E.2d 547 (2001).

Once the anti-Strategic Lawsuits Against Public Participation statute applies, a claimant must verify the complaint pursuant to the requirements of O.C.G.A. § 9-11-11.1(b), or the claim may be properly dismissed. *Harkins v. Atlanta Humane Soc'y*, 264 Ga. App. 356, 590 S.E.2d 737 (2003).

Trial court did not err in dismissing a former employee's action alleging that the consultants slandered the former employee and interfered with the former employee's business relations with a county

Procedure (Cont'd)

school district because the court properly found that verification under the Georgia anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, O.C.G.A. § 9-11-11.1(a) and (b), was required when the speech at issue could reasonably be construed as constitutionally protected free speech to which the anti-SLAPP statute applied; the county school board's consideration or review of the issue of how to implement a computer program in the county schools was an "official proceeding authorized by law" within the meaning of the anti-SLAPP statute, the consultants made written or oral statements to the board in connection with the issue under consideration or review, and nothing in the anti-SLAPP statute rendered the verification requirement inapplicable just because the consultants acted while engaged in a commercial transaction. *Lovett v. Capital Principles, LLC*, 300 Ga. App. 799, 686 S.E.2d 411 (2009).

O.C.G.A. § 9-11-11.1(a), Georgia's anti-SLAPP statute, encompassed a press conference held outside the territorial limits of Georgia by New York defendants. Because the press conference was held to address an issue under consideration by a judicial body, i.e., a nuisance lawsuit filed by the New York defendants against gun dealers, a Georgia gun dealer's slander suit was dismissed for failure to file a verification as required by § 9-11-11.1(b). *Adventure Outdoors, Inc. v. Bloomberg*, 307 Ga. App. 356, 705 S.E.2d 241 (2010), cert. denied, No. S11C0648, 2011 Ga. LEXIS 402; cert. denied, 132 S. Ct. 763, 181 L. Ed. 2d 485 (2011).

Verification of counterclaims required. — Landowner's declaratory judgment action challenging a city's rezoning decision constituted a petition to the judiciary for a redress of grievances in connection with an issue of public interest or concern, and the city's counterclaims were filed in response to the declaratory judgment action; thus, verification of the counterclaims was required. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Counterclaims do not fall outside of the

verification requirements of O.C.G.A. § 9-11-11.1, which mandates verification for any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right to free speech or the right to petition the government for a redress of grievances. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Trial court, not the party, must determine if there is a bona fide action for defamation brought in good faith and not as abusive litigation to chill constitutional rights of freedom of speech and right of expression as defined by the statute. *Browns Mill Dev. Co. v. Denton*, 247 Ga. App. 232, 543 S.E.2d 65 (2000), aff'd, 275 Ga. 2, 561 S.E.2d 431 (2002).

Neither party has the burden of proof on a motion to dismiss or strike under subsection (b) of O.C.G.A. § 9-11-11.1 because this issue is a matter of law for the trial court's determination based upon the pleadings rather than upon evidence presented by either party. *Browns Mill Dev. Co. v. Denton*, 247 Ga. App. 232, 543 S.E.2d 65 (2000), aff'd, 275 Ga. 2, 561 S.E.2d 431 (2002).

Motion to dismiss. — In O.C.G.A. § 9-11-11.1, the Georgia General Assembly has established a mechanism by which the threshold question of compliance with the anti-SLAPP statute is decided on motion to dismiss or motion to strike, and this is analogous to the statutory mechanism of O.C.G.A. § 9-11-12(b), which provides that only motions under Ga. R. Civ. P. 12(b)(6) for failure to state a claim are converted to summary judgment. Other motions under Ga. R. Civ. P. 12(b), such as to dismiss for lack of jurisdiction or for insufficiency of process, are not subject to this statutory rule, and such a motion, even when tried on affidavits pursuant to O.C.G.A. § 9-11-43(b) does not become a motion for summary judgment. *Land v. Boone*, 265 Ga. App. 551, 594 S.E.2d 741 (2004).

Conditional privilege entitled speaker to summary judgment. — Because a property owner made statements concerning valuation by a county appraiser in good faith which were limited in

scope and made during a proper meeting, and such statements were based on the owner's interest in a property, the owner was entitled to a conditional privilege under O.C.G.A. §§ 9-11-11.1 and 51-5-7(4) from the appraiser's defamation claims; as the appraiser failed in the burden of showing malice by the owner, the trial court should have granted summary judgment to the owner on defamation claims as well as all tort claims based on communications, including invasion of privacy, negligence, and emotional distress. *Smith v. Henry*, 276 Ga. App. 831, 625 S.E.2d 93 (2005).

Application

Statements in furtherance of free speech or promoting public good. — Statements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern are defined in O.C.G.A. § 9-11-11.1(c) to include written and oral statements and petitions made to legislative or executive bodies regarding an issue being reviewed by the body. Thus, opposing a rezoning application by collecting signatures for a petition, writing letters to government officials, and speaking out at an official hearing clearly fall within the category of privileged activities. *Providence Constr. Co. v. Bauer*, 229 Ga. App. 679, 494 S.E.2d 527 (1997), cert. denied, 525 U.S. 1069, 119 S. Ct. 799, 142 L. Ed. 2d 660 (1999).

In a libel action arising from a newspaper article based on reports of a Federal Aviation Administration inspection of plaintiff airlines, because the defendant did not present evidence establishing that the defendant's reporting was privileged as a matter of law, the defendant was not entitled to sanctions and dismissal of the complaint on the grounds that the plaintiff allegedly verified the complaint in violation of O.C.G.A. § 9-11-11.1. *Airtran Airlines v. Plain Dealer Publishing Co.*, 66 F. Supp. 2d 1355 (N.D. Ga. 1999).

Complaint for trespass arising from defendants' activities in gathering information for a petition in opposition to an application for rezoning did not come within O.C.G.A. § 9-11-11.1 because it did not involve free speech as part of a petition to the government. *Browns Mill Dev. Co. v. Denton*, 247 Ga. App. 232, 543 S.E.2d 65 (2000), aff'd, 275 Ga. 2, 561 S.E.2d 431 (2002).

Procedural requirements of O.C.G.A. § 9-11-11.1 did not extend to a cause of action for trespass brought by real estate developers against an environmental organization and one of its members after the organization circulated a report on the developers' failure to use proper soil erosion and sedimentation controls and opposed the developers' rezoning and land disturbance permit applications. *Denton v. Browns Mill Dev. Co.*, 275 Ga. 2, 561 S.E.2d 431 (2002).

Application for recall of elected officials. — Filing an application for the recall of elected officials in accordance with state law is an act in furtherance of the right to petition the government to redress grievances within the meaning of Georgia's anti-SLAPP statute, O.C.G.A. § 9-11-11.1(b). *Hawks v. Hinely*, 252 Ga. App. 510, 556 S.E.2d 547 (2001).

Dispute pertaining to development of property. — Action commenced by a property owner against two local residents and a neighborhood group alleging tortious interference with a sales option contract, tortious interference with business relations, trespass, and interference with the property owner's right of quiet enjoyment of the property was properly dismissed as a SLAPP suit since the action was commenced after the defendants wrote to the plaintiff and demanded that the plaintiff cease development work on the plaintiff's property conducted without a permit which disturbed wetlands on the site and a state-mandated 25 foot stream buffer zone. *Metzler v. Rowell*, 248 Ga. App. 596, 547 S.E.2d 311 (2001).

Because O.C.G.A. § 9-11-11.1, the anti-SLAPP statute, was not intended to immunize from the consequences of abusive litigation a party who asserted a claim with respect to which there existed such a complete absence of any justiciable

Application (Cont'd)

issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, the statute did not apply to a county's claim for attorney's fees under O.C.G.A. § 9-15-14, after the county was granted summary judgment on a property buyer's complaint that the buyer was entitled to a written verification of zoning compliance; hence, the trial court did not err in denying the county's motion to dismiss the county's request. *EarthResources, LLC v. Morgan County*, 281 Ga. 396, 638 S.E.2d 325 (2006).

Trespass and defacing property not protected by statute. — While the placing of signs or speech under certain circumstances might fall within the purview of the statute, trespass by pulling up land markers, defacing property, or blocking ingress and egress (without more) is not covered by the statute as none of these actions constitutes a "written or oral statement." *Metzler v. Rowell*, 248 Ga. App. 596, 547 S.E.2d 311 (2001).

Application to tortious interference with business and contract claims. — Trial court did not err in finding that the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, O.C.G.A. § 9-11-11.1, applied to the property owner's tortious interference with business and contractual relations claims because nothing in the confidentiality agreement between the chamber of commerce and the chamber's vice president indicated the statute was intended for the benefit of the property owner and the subject matter had already been communicated to the city. *Settles Bridge Farm, LLC v. Masino*, 318 Ga. App. 576, 734 S.E.2d 456 (2012).

Application to claims for malicious arrest and emotional distress. — Trial court did not err in finding that the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, O.C.G.A. § 9-11-11.1, applied to the founder's claims for malicious arrest and intentional infliction of emotional distress because the claims were predicated solely and exclusively upon the individuals' statements to police or statements made in furtherance of an ongoing investigation

and, thus, were protected by the anti-SLAPP statute. *Annamalai v. Capital One Fin. Corp.*, 319 Ga. App. 831, 738 S.E.2d 664 (2013).

Demand letter by television satellite company, which was sent to thousands of individuals informing the individuals of the satellite company's intent to pursue legal action for allegedly engaging in signal piracy, was protected by Georgia's anti-SLAPP law, O.C.G.A. § 9-11-11.1. *Buckley v. Directv, Inc.*, 276 F. Supp. 2d 1271 (N.D. Ga. 2003).

Defamation action should have been dismissed. — Trial court erred in denying an individual's motion to dismiss a defamation lawsuit filed against the individual by a humane society and the society's executive director as the individual's statements were protected under the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, as the statements were made in furtherance of the individual's right of free speech in connection with an issue of public concern as: (1) the statements were made on television and resulted in an investigation of the humane society by the county commission; and (2) the humane society was accountable to the public for ineffective animal control or inefficient use of taxpayer funds. *Harkins v. Atlanta Humane Soc'y*, 264 Ga. App. 356, 590 S.E.2d 737 (2003).

Dismissal authorized. — Plain language of O.C.G.A. § 9-11-11.1(b) authorizes dismissal of a claim that is not well grounded in fact, not warranted by a good faith argument or existing law, or if the statements are privileged; determining whether any of these aforementioned grounds applies requires more than a simple determination as to whether an affidavit was filed within a specified time. *Harkins v. Atlanta Humane Soc'y*, 264 Ga. App. 356, 590 S.E.2d 737 (2003).

Dismissal not authorized. — Because there was no evidence that any official proceeding was involved when a mother made libelous statements about a nonprofit organization, the trial court erred in concluding that the Strategic Lawsuits Against Public Participation (anti-SLAPP) statute, O.C.G.A. § 9-11-11.1, applied. *Ga. Cmty. Support & Solutions, Inc. v. Berryhill*, 275 Ga. App.

189, 620 S.E.2d 178 (2005), *aff'd*, 281 Ga. 439, 638 S.E.2d 278 (2006).

Upon certiorari review, because a parent did not perform any act which could reasonably be construed as a statement or petition within the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, the Court of Appeals of Georgia correctly reversed dismissal of a personal care provider's tortious interference with business relationship and libel per se action filed against the parent; moreover, the Court of Appeals correctly refused to expand the scope of the anti-SLAPP statute so as to encompass a wide range of speech and conduct which was arguably connected with any issue of public interest or concern, but instead, restrict the statute's application to those statements which came within the definition within O.C.G.A. § 9-11-11.1(c). *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, 281 Ga. 439, 638 S.E.2d 278 (2006).

For the procedural protections of the anti-SLAPP statute to apply, there had to be a threshold showing that the claims could reasonably be construed as a statement or petition made in relation to or in connection with an actual official proceeding. In this case, the actions and statements that formed the basis of the claims were not specified in the complaint. *Emory Univ. v. Metro Atlanta Task Force for the Homeless, Inc.*, 320 Ga. App. 442, 740 S.E.2d 219 (2013).

Animal activist's statements were privileged as matters of public concern. — Animal rights activist's statements to a television station were privileged under O.C.G.A. § 51-5-7(4) and the Anti-Strategic Lawsuits Against Public Participation statute, O.C.G.A. § 9-11-11.1, as the statements were related to the policies and procedures of a humane society and involved issues of public concern; the activist made the statements in good faith, believing that the efforts could influence or persuade government officials and the public at large to help change the problems at the humane society. *Harkins v. Atlanta Humane Soc'y*, 273 Ga. App. 489, 618 S.E.2d 16 (2005).

Statements to law enforcement in furtherance of criminal investiga-

tion. — Hindu temple's serial filing of civil complaints against individuals lawfully reporting alleged unlawful credit card fraud activity by the temple was a clear example of the type of abuse of judicial process that O.C.G.A. § 9-11-11.1 aimed to deter, and the individuals' statements to law enforcement in furtherance of a criminal investigation were privileged. Therefore, dismissal of the temple's defamation and malicious prosecution claims, along with an award of attorney's fees, was proper. *Hindu Temple & Cmty. Ctr. of the High Desert, Inc. v. Raghunathan*, 311 Ga. App. 109, 714 S.E.2d 628 (2011), *cert. dismissed*, No. S11C1887, 2012 Ga. LEXIS 49 (Ga. 2012).

Application to State Bar proceedings. — Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) statute, O.C.G.A. § 9-11-11.1, applied to complaints against an attorney before the State Bar of Georgia because State Bar proceedings were "official proceedings authorized by law" under § 9-11-11.1(c). However, a hearing was required before the defense could be allowed. *Jefferson v. Stripling*, 316 Ga. App. 197, 728 S.E.2d 826 (2012).

Fees and Expenses

Attorney fees. — When the trial court should have dismissed a city's counterclaims against a landowner as improperly verified, remand was required to determine the issue of the landowner's entitlement to attorney fees under O.C.G.A. § 9-11-11.1. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), *cert. denied*, 2008 Ga. LEXIS 128 (Ga. 2008).

When landowners sought judicial review of the zoning decisions of a board of county commissioners (board), it was error for a trial court to hold that wherefore clauses seeking attorney fees in the board's answers were claims that were falsely verified, under O.C.G.A. § 9-11-11.1(b), because: (1) the board's prayers for relief seeking attorney fees were not claims as a case brought by a plaintiff could not be turned into a damage suit by a defendant for bringing the suit while the suit was still pending; (2) O.C.G.A. § 9-11-11.1 did not require

Fees and Expenses (Cont'd)

§ 9-11-11.1(b) verifications of defensive motions so the board did not have to verify the wherefore clauses in the board's answers; and (3) O.C.G.A. § 9-11-11.1 did not bar a party defending a suit from preserving the party's right to seek attorney fees if the suit were later found to lack substantial justification so the wherefore clauses seeking attorney fees were not improper. *Paulding County Bd. of Comm'rs v. Morrison*, 316 Ga. App. 806, 728 S.E.2d 921 (2012).

Trial court abused the court's discretion by not awarding attorney's fees or other sanction. — In a suit

brought by a developer against a landowner asserting tortuous interference with business relations and other claims, a trial court abused the court's discretion by denying the landowner's motion for attorney fees under O.C.G.A. § 9-11-11.1 since the developer's lawsuit was voluntarily dismissed as the verification in the complaint was proven false and the voluntary dismissal of the suit did not replace the mandate upon the trial court to fashion an appropriate sanction in the court's discretion in favor of the landowner. *Hagemann v. Berkman Wynhaven Assoc., L.P.*, 290 Ga. App. 677, 660 S.E.2d 449 (2008).

9-11-12. Answer, defenses, and objections; when and how presented and heard; when defenses waived; stay of discovery.

(a) **When answer presented.** A defendant shall serve his answer within 30 days after the service of the summons and complaint upon him, unless otherwise provided by statute. A cross-claim or counterclaim shall not require an answer, unless one is required by order of the court, and shall automatically stand denied.

(b) **How defenses and objections presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion in writing:

- (1) Lack of jurisdiction over the subject matter;
- (2) Lack of jurisdiction over the person;
- (3) Improper venue;
- (4) Insufficiency of process;
- (5) Insufficiency of service of process;
- (6) Failure to state a claim upon which relief can be granted;
- (7) Failure to join a party under Code Section 9-11-19.

A motion making any of these defenses shall be made before or at the time of pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a

responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56.

(d) **Preliminary hearings.** The defenses specifically enumerated in paragraphs (1) through (7) of subsection (b) of this Code section, whether made in a pleading or by motion, and the motion for judgment mentioned in subsection (c) of this Code section shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a proper responsive pleading, he shall nevertheless answer or respond to the best of his ability, and he may move for a more definite statement. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party within 30 days after the service of the pleading upon him, or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses in motion.** A party who makes a motion under this Code section may join with it any other motions provided for in this Code section and then available to him. If a party makes a motion under this Code section but omits therefrom any defense or objection then available to him which this Code section

permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in paragraph (2) of subsection (h) of this Code section on any of the grounds there stated.

(h) **Waiver or preservation of certain defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived:

(A) If omitted from a motion in the circumstances described in subsection (g) of this Code section; or

(B) If it is neither made by motion under this Code section nor included in a responsive pleading, as originally filed.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Code Section 9-11-19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under subsection (a) of Code Section 9-11-7, or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) **Officer's defense of service.** The officer making service of process and the principal officer in charge of service made by a deputy need not be made a party to any action or motion where the defense or defenses under paragraph (2), (4), or (5) of subsection (b) of this Code section are asserted by motion or by answer. Any party to the action may give notice of the objection to the service, made pursuant to such paragraphs, to the officer making the service and to the principal officer in case of service made by a deputy, and the court shall afford the officer or officers opportunity to defend the service, in which case the decision on the question of service shall be conclusive on the officer and on his principal in case of service by a deputy.

(j) **Stay of discovery.**

(1) If a party files a motion to dismiss before or at the time of filing an answer and pursuant to the provisions of this Code section, discovery shall be stayed for 90 days after the filing of such motion or until the ruling of the court on such motion, whichever is sooner. The court shall decide the motion to dismiss within the 90 days provided in this paragraph.

(2) The discovery period and all discovery deadlines shall be extended for a period equal to the duration of the stay imposed by this subsection.

(3) The court may upon its own motion or upon motion of a party terminate or modify the stay imposed by this subsection but shall not extend such stay.

(4) If a motion to dismiss raises defenses set forth in paragraph (2), (3), (5), or (7) of subsection (b) of this Code section or if any party needs discovery in order to identify persons who may be joined as parties, limited discovery needed to respond to such defenses or identify such persons shall be permitted until the court rules on such motion.

(5) The provisions of this subsection shall not modify or affect the provisions of paragraph (2) of subsection (f) of Code Section 9-11-23 or any other power of the court to stay discovery. (Ga. L. 1966, p. 609, § 12; Ga. L. 1967, p. 226, § 9; Ga. L. 1968, p. 1104, § 3; Ga. L. 1972, p. 689, §§ 4, 5; Ga. L. 1993, p. 91, § 9; Ga. L. 2009, p. 73, § 4/HB 29.)

Cross references. — Form of motion to dismiss for failure to state claim upon which relief can be granted and for other grounds stated in subsection (b) of this section, § 9-11-119. Form of answer presenting defenses under subsection (b) of this section, § 9-11-120. Motions in civil actions, hearing, Uniform Superior Court Rules, Rule 6.3. Transfer/change of venue, Uniform Superior Court Rules, Rule 19. Uniform Transfer Rules.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, the formatting of subsection (j) was modified to be consistent with the other subsections of this Code section.

Editor's notes. — Ga. L. 2009, p. 73, § 5/HB 29, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to motions to dismiss filed after July 1, 2009.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 12, see 28 U.S.C.

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For article discussing counterclaims and cross claims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article, "Synopsis of 1968 Amendments

Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article examining waiver of objections to venue and lack of personal jurisdiction by default, see 12 Ga. L. Rev. 181 (1978). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article, "On with the Old!," see 24 Ga. St. B.J. 13 (1987). For article, "Georgia's 'Door-Closing' Statute: Who Bears the Burden?," see 24 Ga. St. B.J. 141 (1988). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

For note, "Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act," see 7 Ga. St. B. J. 385 (1971). For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972). For note, "Hewitt v. Kalish: Qualifying as an 'Expert Competent to Testify' Under O.C.G.A. Section 9-11-9.1," see 46 Mercer L. Rev. 1537 (1995).

For case comment, "Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem," see 21 Ga. L. Rev. 429 (1986).

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General Consideration

Editor's note. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 81-209, 81-211, 81-301 through 81-304, 81-501, and 81-503 are included in the annotations for this Code section.

Procedure identical to Uniform Superior Court Rules. — Subsection (c) of O.C.G.A. § 9-11-12 refers to O.C.G.A. § 9-11-56 as giving only “reasonable opportunity to present all material” on a motion for summary judgment and subsection (d) does not include the right to oral argument except “on application.” Under this interpretation, § 9-11-12 establishes a procedure identical to that of Rule 6.3 of the Uniform Superior Court Rules. *Dallas Blue Haven Pools, Inc. v. Taslimi*, 180 Ga. App. 734, 350 S.E.2d 265 (1986), *aff'd*, 256 Ga. 739, 354 S.E.2d 160 (1987).

Subject matter jurisdiction cannot be conferred by agreement or waived. — Georgia Supreme Court disapproves language suggesting that parties can confer subject matter jurisdiction

on a court by agreement or waive the defense by failing to raise the defense in the trial court. *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

County enjoyed immunity from negligence and nuisance claims. — Because a county enjoyed sovereign immunity from a pedestrian's negligence and nuisance claims asserted in a personal injury action against the county for the county's alleged failure to maintain a water meter cover, the trial court properly dismissed the claims. *Rutherford v. DeKalb County*, 287 Ga. App. 366, 651 S.E.2d 771 (2007).

Prevention of gambling on verdict intended. — One of the intentions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) was to prevent a party from going to trial and gambling on the verdict when a known defense to the action is available. *O'Neil v. Moore*, 118 Ga. App. 424, 164 S.E.2d 328 (1968).

Statute is applicable to custody cases as well as divorce cases. *Hopkins v. Hopkins*, 237 Ga. 845, 229 S.E.2d 751 (1976).

Applicability to negligence complaint in malpractice action. — State court properly denied a clinic's motion to dismiss a negligence complaint which arose out of injuries a patient allegedly sustained by and through the negligence of one of the clinic's employees, as the patient was not suing for medical malpractice, the employee was not a licensed health care provider, and thus the patient was not required to file the necessary affidavit required under O.C.G.A. § 9-11-9.1. *Mt. Orthopedics & Sports Med., P.C. v. Williams*, 284 Ga. App. 885, 644 S.E.2d 868 (2007).

Liberal construction of pleading does not encompass imputation or engrafting to a claim of a meaning not reasonably deducible or inferable from the pleading's explicit language. *Rossville Fed. Sav. & Loan Ass'n v. Insurance Co. of N. Am.*, 121 Ga. App. 435, 174 S.E.2d 204 (1970).

Wholesale objection insufficient. — Wholesale objection attacking as a group several paragraphs or exhibits of a complaint is insufficient if any of the paragraphs or exhibits are not subject to the criticism made. *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga. App. 380, 170 S.E.2d 724 (1969).

Jurisdiction and venue distinguished. — Jurisdiction means power of court to render binding judgment in a case, and venue means place of trial. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

"Subject matter jurisdiction" defined. — Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not the facts are sufficient to invoke the exercise of that power. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

"Jurisdiction of the person" defined. — Jurisdiction of the person is the power of a court to render a personal judgment, or to subject the parties in a particular case to the decisions and rulings made by it in such case, and is obtained by appearance or by serving the proper process in the manner required by law on persons or parties subject to be

sued in a particular action. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

Improper venue covered by jurisdiction of the person. — Term "jurisdiction of the person" is broad enough to cover lack of jurisdiction of the person resulting from improper venue. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

Disposition of affirmative defenses. — Generally, defenses such as statute of limitation or laches must be affirmatively raised by written answer, but when facts as to such an issue are uncontradicted, it may be disposed of by summary judgment, motion to dismiss, or motion for judgment on the pleadings. *Beazley v. Williams*, 231 Ga. 137, 200 S.E.2d 751 (1973).

Pleading of conclusions. — While conclusions may not generally be used in affidavits to support or oppose summary judgment motions, conclusions may generally be pled. *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369 (1977); *Holloway v. Dougherty County Sch. Sys.*, 157 Ga. App. 251, 277 S.E.2d 251 (1981).

Findings of fact and conclusions of law. — Client's claim of a procedural defect in the trial court's handling of the client's complaint seeking to vacate an arbitration award was rejected as the trial court did not have to make findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52(a) when ruling on an O.C.G.A. § 9-11-12(b)(6) claim; even if § 9-11-52(a) applied, the client did not request such findings of fact and conclusions of law. *Durden v. Suggs*, 271 Ga. App. 688, 610 S.E.2d 640 (2005).

Notice pleading requirements. — Under "notice" theory of pleading, it is immaterial whether pleading states "conclusion" or "facts" as long as fair notice is given, and the statement of claim is short and plain. *Holloway v. Dougherty County Sch. Sys.*, 157 Ga. App. 251, 277 S.E.2d 251 (1981).

Because the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 42 U.S.C. § 1320d et seq. (HIPAA), preempted O.C.G.A. § 9-11-9.2, a patient did not have to comply with the filing requirements of the state law prior

General Consideration (Cont'd)

to filing a medical malpractice action against two hospitals; hence, the trial court properly granted the patient a protective order from having to contemporaneously comply with the filing requirements of O.C.G.A. § 9-11-9.2. *Crisp Reg'l Hosp., Inc. v. Sanders*, 281 Ga. App. 393, 636 S.E.2d 123 (2006).

Equivalence of general demurrer and motion to dismiss. — General demurrer and a motion to dismiss for failure to state a cause of action, orally or in writing, are equivalent pleadings, and the latter may be made at any time before the verdict. *Willis v. Byrd*, 116 Ga. App. 555, 158 S.E.2d 458 (1967) (decided under former Code 1933, §§ 81-301 and 81-302).

Effect of answer creating genuine issue of material fact. — After the plaintiff filed a dispossessory warrant, the defendants answered and denied that a landlord-tenant relationship existed between the parties, and there was no evidence or admission that the plaintiff was the owner of the premises or that the defendants were on the premises without the landlord's consent, genuine issues of material fact remained as to the plaintiff's allegations that the plaintiff was the owner of the premises and that the defendants were tenants at sufferance. The trial court, therefor, erred in striking the defendants' answer, granting a judgment on the pleadings, and entering an immediate writ of possession. *Thomas v. Wells Fargo Credit Corp.*, 200 Ga. App. 592, 409 S.E.2d 71, cert. denied, 200 Ga. App. 897, 409 S.E.2d 71 (1991).

Failure to state claim. — If the complaint fails to state a claim, dismissal is the only remedy. *Gould v. Gould*, 240 Ga. App. 481, 523 S.E.2d 106 (1999).

Heightened federal requirements for stating a claim inapplicable. — When it was alleged defendant insurance agency held itself out as an expert and that the plaintiff insured had a special relationship with the agency and relied on the agency to procure the proper insurance, under Georgia law, it was possible a state court would find a claim was stated and it was error to find the agency was fraudulently joined in the suit involving

the codefendant insurer and to deny remand; under Georgia's notice pleading standard, the heightened pleading requirements imposed on federal plaintiffs in *Iqbal* and *Twombly* had not been adopted and the true test was whether the pleading gave fair notice and stated the elements of the claim plainly and succinctly, and not whether as an abstract matter the pleading stated conclusions or facts. *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329 (11th Cir. 2011).

Dismissal of action as non-justiciable upheld. — Because city had yet to file a condemnation action against a landowner, the landowner's suit seeking a public use determination under O.C.G.A. § 22-1-11 was properly dismissed as the suit failed to present a justiciable controversy, and the city's mere inchoate intention to do so, if at all, did not give rise to a justiciable cause of action; moreover, if the appeals court construed that section to be applicable before the initiation of a condemnation action, the court would render meaningless the phrase "before the vesting of title in the condemnor," because that clarification would be redundant. *Fox v. City of Cumming*, 289 Ga. App. 803, 658 S.E.2d 408 (2008).

Because a provision in an agreement between a minority shareholder and a corporate officer to provide the minority shareholder with management opportunities in the corporation was invalid and unenforceable, the corporation was not a party to that agreement, and the officer entered into the contract in that officer's personal capacity, a breach of contract claim related to the agreement was properly dismissed. *Levy v. Reiner*, 290 Ga. App. 471, 659 S.E.2d 848 (2008).

Because the Georgia Workers' Compensation Board, and not the Health Records Act, O.C.G.A. § 31-33-3, regulated the medical photocopying charges in workers' compensation proceedings, the trial court properly dismissed a declaratory judgment complaint filed by a photocopier, which sought guidance regarding the appropriate fee structure for medical photocopying services in workers' compensation proceedings, for failure to state a claim upon which relief could be granted. *Smart*

Document Solutions, LLC v. Hall, 290 Ga. App. 483, 659 S.E.2d 838 (2008).

Dismissal of claims held not treated as adjudication of the merits. — Having ruled that dismissal of claims against an employee was appropriate based on insufficient service, the trial court was then without jurisdiction to rule on whether the complaint against the employee should be dismissed based on the expiration of the statute of limitations under O.C.G.A. § 9-11-12(b)(6). Thus, the dismissal could not be treated as an adjudication of the merits, and res judicata did not bar a respondeat superior claim against the employee's employer. *Montague v. Godfrey*, 289 Ga. App. 552, 657 S.E.2d 630 (2008).

Error in granting motion deemed waived. — In a dispute over the use of an easement, because a landowner made no argument and cited no legal authority in support of a claim that the trial court's failure to specifically note its oral denial of a motion to dismiss in its final written order constituted an abuse of discretion, the claim was deemed abandoned under Ga. Ct. App. R. 25(c). *Woodyard v. Jones*, 285 Ga. App. 323, 646 S.E.2d 306 (2007).

Trial court did not err in dismissing an inmate's tort claim alleging false imprisonment and a claim under 42 U.S.C. § 1983 against the department of corrections on sovereign immunity grounds as: (1) the state was shielded from liability against a false imprisonment claim, pursuant to O.C.G.A. § 50-21-24(7); and (2) neither the state nor the department of corrections was a "person," as that term was defined under 42 U.S.C. § 1983. *Watson v. Ga. Dep't of Corr.*, 285 Ga. App. 143, 645 S.E.2d 629 (2007).

Failure to file defensive pleadings in appeal from property evaluation. — Appeal procedure outlined in O.C.G.A. § 48-5-311(f) does not contemplate the filing of a "complaint" or "answer," and a default judgment will not lie for failure to file defensive pleadings in a de novo hearing on appeal in the superior court from a property evaluation. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

Petition for certiorari from conviction for violation of municipal ordi-

nance 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 its 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).

Payment of costs in dismissed action jurisdictional. — Pursuant to the plain language of O.C.G.A. § 9-11-41, payment of costs in a dismissed action is not an affirmative defense but a jurisdictional matter which may never be waived. *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983), (overruling *McLanahan v. Keith*, 239 Ga. 94, 236 S.E.2d 52 (1977)); *Tucker v. Mitchell*, 252 Ga. 545, 314 S.E.2d 896 (1984).

Dismissal erroneously granted because: (1) an amendment to a county sign ordinance did not moot the claims for damages asserted by the contestants that arose from the county's enforcement of the ordinance; and (2) the trial court erroneously relied on a federal decision in support of granting the motion. *Coffey v. Fayette County*, 289 Ga. App. 153, 656 S.E.2d 262 (2008).

Cited in *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Tuggle v. Manning*, 224 Ga. 29, 159 S.E.2d 703 (1968); *Norton Realty & Loan Co. v. City of Gainesville*, 224 Ga. 166, 160 S.E.2d 819 (1968); *Kerry v. Brown*, 224 Ga. 200, 160 S.E.2d 832 (1968); *Sherman Stubbs Realty & Ins. Co. v. American Inst. of Mktg. Sys.*, 117 Ga. App. 829, 162 S.E.2d 240 (1968); *B-W Acceptance Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968); *Lake Spivey Parks v. Jones*, 118 Ga. App. 60, 162 S.E.2d 801 (1968); *Beck v. Johnston*, 118 Ga. App. 541, 164 S.E.2d 342 (1968); *Orkin Exterminating Co. v. Harris*, 224 Ga. 759, 164 S.E.2d 727 (1968); *Lowe v. Weltner*, 118 Ga. App. 635, 164 S.E.2d 919 (1968); *Travelers Ins. Co. v. Johnson*, 118 Ga. App. 616, 164 S.E.2d 926 (1968); *Hall v. Rogers*, 225 Ga. 57, 165 S.E.2d 829 (1969); *Parks v. Fort*

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v. Keaton, 227 Ga. 563, 181 S.E.2d 821 (1971); Goodwin v. First Baptist Church, 227 Ga. 603, 182 S.E.2d 105 (1971); Fireman's Fund Ins. Co. v. Northern Freight Lines, 227 Ga. 581, 182 S.E.2d 110 (1971); Wisenbaker v. Wisenbaker, 227 Ga. 610, 182 S.E.2d 114 (1971); Clark v. Lett & Barron, Inc., 227 Ga. 609, 182 S.E.2d 118 (1971); Leathers v. Klebold, 227 Ga. 683, 182 S.E.2d 423 (1971); Berrien v. Avco Fin. Servs., Inc., 123 Ga. App. 862, 182 S.E.2d 708 (1971); Arthur Murray, Inc. v. Smith, 124 Ga. App. 51, 183 S.E.2d 66 (1971); Grafton v. Turner, 227 Ga. 809, 183 S.E.2d 458 (1971); Miller v. Alderhold, 228 Ga. 65, 184 S.E.2d 172 (1971); Georgia Farm Bureau Mut. Ins. Co. v. Williamson, 124 Ga. App. 549, 184 S.E.2d 665 (1971); Dampier v. Bank of Alapaha, 124 Ga. App. 618, 184 S.E.2d 693 (1971); Griggs v. Louisville & Nashville R.R., 124 Ga. App. 629, 185 S.E.2d 546 (1971); Lee v. Peck, 228 Ga. 448, 186 S.E.2d 94 (1971); Duvall v. Duvall, 124 Ga. App. 853, 186 S.E.2d 367 (1971); Chicago Title Ins. Co. v. Nash, 228 Ga. 719, 187 S.E.2d 662 (1972); Cheek v. J. Allen Couch & Son Funeral Home, 125 Ga. App. 438, 187 S.E.2d 907 (1972); Shell v. Watts, 125 Ga. App. 542, 188 S.E.2d 269 (1972); Thompson v. Frost, 125 Ga. App. 753, 188 S.E.2d 905 (1972); Gamble v. Reeves Transp. Co., 126 Ga. App. 161, 190 S.E.2d 95 (1972); Stroud v. Willingham, 126 Ga. App. 156, 190 S.E.2d 143 (1972); Hatcher v. Hatcher, 229 Ga. 249, 190 S.E.2d 533 (1972); Miller v. Columbus, 229 Ga. 234, 190 S.E.2d 535 (1972); Butts v. Davis, 126 Ga. App. 311, 190 S.E.2d 595 (1972); Hinton v. Georgia Power Co., 126 Ga. App. 416, 190 S.E.2d 811 (1972); Frost v. Gasaway, 229 Ga. 354, 190 S.E.2d 902 (1972); Brown v. Edwards, 229 Ga. 345, 191 S.E.2d 47 (1972); Scardina v. Scardina, 229 Ga. 341, 191 S.E.2d 52 (1972); Barrett v. City of Perry, 229 Ga. 267, 191 S.E.2d 74 (1972); Peckham v. Metro Steel Co., 126 Ga. App. 685, 191 S.E.2d 559 (1972); McDonald v. Rogers, 229 Ga. 369, 191 S.E.2d 844 (1972); Kinlock v. State Hwy. Dep't, 127 Ga. App. 847, 195 S.E.2d 459 (1973); West v. Forehand, 128 Ga. App. 124, 195 S.E.2d 777 (1973); Aiken v. Bynum, 129 Ga. App. 212, 196 S.E.2d 180 (1973); Greer v. Lifsey, 128 Ga. App. 785, 197 S.E.2d 846 (1973);

Courson v. Atkinson & Griffin, Inc., 230 Ga. 643, 198 S.E.2d 675 (1973); Taylor v. Malden Trust Co., 129 Ga. App. 330, 199 S.E.2d 553 (1973); Hodges v. Youmans, 129 Ga. App. 481, 200 S.E.2d 157 (1973); Pope v. Cokinos, 231 Ga. 79, 200 S.E.2d 275 (1973); Decker v. Hope, 129 Ga. App. 553, 200 S.E.2d 290 (1973); Moore v. Moore, 231 Ga. 232, 201 S.E.2d 133 (1973); Larwin Mtg. Investors v. Delta Equities, Inc., 129 Ga. App. 769, 201 S.E.2d 187 (1973); Lee v. G.A.C. Fin. Corp., 130 Ga. App. 44, 202 S.E.2d 221 (1973); Interstate Life & Accident Ins. Co. v. Densley, 130 Ga. App. 70, 202 S.E.2d 463 (1973); Zachery v. Geiger Fin. Co., 130 Ga. App. 243, 202 S.E.2d 689 (1973); Hopkins v. Harris, 130 Ga. App. 489, 203 S.E.2d 762 (1973); Register v. Kandlbinder, 231 Ga. 786, 204 S.E.2d 145 (1974); Whitehurst v. Universal C.I.T. Credit Corp., 131 Ga. App. 202, 205 S.E.2d 489 (1974); Browning v. F.E. Fortenberry & Sons, 131 Ga. App. 498, 206 S.E.2d 101 (1974); King v. Paramount Enters., Inc., 131 Ga. App. 707, 206 S.E.2d 604 (1974); Early Co. v. Bristol Steel & Iron Works, Inc., 131 Ga. App. 775, 206 S.E.2d 612 (1974); Walker v. Anderson, 131 Ga. App. 596, 206 S.E.2d 833 (1974); Bradberry v. Bradberry, 232 Ga. 651, 208 S.E.2d 469 (1974); Adams v. Citizens & S. Nat'l Bank, 132 Ga. App. 622, 208 S.E.2d 628 (1974); Axelroad v. Preston, 232 Ga. 836, 209 S.E.2d 178 (1974); Barrett v. Barrett, 232 Ga. 840, 209 S.E.2d 181 (1974); Irby v. Christian, 132 Ga. App. 796, 209 S.E.2d 245 (1974); Burkhead v. Trustees, Firemen's Pension Fund, 133 Ga. App. 41, 209 S.E.2d 651 (1974); Rainwater v. Vazquez, 133 Ga. App. 173, 210 S.E.2d 380 (1974); Adamson v. James, 233 Ga. 130, 210 S.E.2d 686 (1974); Smith v. Wheeler, 233 Ga. 166, 210 S.E.2d 702 (1974); Friedman v. Friedman, 233 Ga. 254, 210 S.E.2d 754 (1974); Matthews v. Fayette County, 233 Ga. 220, 210 S.E.2d 758 (1974); Carlson v. Hall County Planning Comm'n, 233 Ga. 286, 210 S.E.2d 815 (1974); Watts v. Kegerler, 133 Ga. App. 231, 211 S.E.2d 177 (1974); Thomas v. Home Credit Co., 133 Ga. App. 602, 211 S.E.2d 626 (1974); Howland v. Weeks, 133 Ga. App. 843, 212 S.E.2d 487 (1975); Chancey v. Hancock, 233 Ga. 734, 213 S.E.2d 633 (1975); Redit Dev. Co. v. Crabble Pavers, Inc., 134 Ga. App. 659, 215 S.E.2d 714 (1975); Allied Asphalt Co. v. Cumbie, 134 Ga. App. 960, 216 S.E.2d 659 (1975); Evans v. Goodyear Tire & Rubber Co., 135 Ga. App. 75, 217 S.E.2d 318 (1975); American Fin. Co. v. First Nat'l Bank, 134 Ga. App. 24, 217 S.E.2d 364 (1975); Rainwater v. Vazquez, 135 Ga. App. 463, 218 S.E.2d 108 (1975); S.D.H. Co. v. Stewart, 135 Ga. App. 505, 218 S.E.2d 268 (1975); Jernigan v. Collier, 234 Ga. 837, 218 S.E.2d 556 (1975); Mitchell v. Mitchell, 235 Ga. 101, 218 S.E.2d 747 (1975); Tax Assessors v. Chitwood, 235 Ga. 147, 218 S.E.2d 759 (1975); Capes v. Morgan, 235 Ga. 1, 218 S.E.2d 764 (1975); Davis v. National Indem. Co., 135 Ga. App. 793, 219 S.E.2d 32 (1975); Carvel Corp. v. Rabey, 135 Ga. App. 856, 219 S.E.2d 475 (1975); Kitson v. Hawke, 136 Ga. App. 92, 220 S.E.2d 28 (1975); Metropolitan Atlanta Rapid Transit Auth. v. Datry, 235 Ga. 568, 220 S.E.2d 905 (1975); Barone v. Adcox, 235 Ga. 588, 221 S.E.2d 6 (1975); Massey v. Government Employees Co., 136 Ga. App. 377, 221 S.E.2d 238 (1975); National Indem. Co. v. Berry, 136 Ga. App. 545, 221 S.E.2d 624 (1975); Scata v. Pinnacle Enters., Inc., 136 Ga. App. 451, 221 S.E.2d 660 (1975); Lansky v. Goldstein, 136 Ga. App. 607, 222 S.E.2d 62 (1975); Filsoof v. West, 235 Ga. 818, 221 S.E.2d 811 (1976); Rowland v. Kellos, 236 Ga. 799, 225 S.E.2d 302 (1976); Eder v. American Express Co., 138 Ga. App. 168, 225 S.E.2d 737 (1976); Reading Assocs., Ltd. v. Reading Assocs. of Ga., Inc., 236 Ga. 906, 225 S.E.2d 899 (1976); Shepherd Constr. Co. v. State Hwy. Dep't, 138 Ga. App. 252, 226 S.E.2d 79 (1976); Dargan, Whittington & Conner, Inc. v. Kitchen, 138 Ga. App. 414, 226 S.E.2d 482 (1976); Video Entertainment, Inc. v. Cartridge Rental Network, 138 Ga. App. 540, 226 S.E.2d 794 (1976); Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266 (1976); Stewman v. Magley, 138 Ga. App. 545, 227 S.E.2d 277 (1976); National Bank & Trust Co. v. Grant, 237 Ga. 337, 227 S.E.2d 372 (1976); Pascoe Steel Corp. v. Turner County Bd. of Educ., 139 Ga. App. 87, 227 S.E.2d 887 (1976); Carroll v. Carroll, 237 Ga. 441, 228 S.E.2d 832 (1976); Wirt v. Metropolitan Atlanta Rapid Transit

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Brazeal v. NewPoint Media Group, LLC, 331 Ga. App. 49, 769 S.E.2d 763 (2015); *SJN Props., LLC v. Fulton County Bd. of Assessors*, 296 Ga. 793, 770 S.E.2d 832 (2015).

Answers and Time Therefor

Responsive pleadings in quo warranto proceeding. — Because the special statutory proceeding known as quo warranto does not prescribe special rules of practice or procedure with relation to the time of filing defensive pleadings, the question of whether responsive pleadings must be filed is controlled by O.C.G.A. § 9-11-12. *Anderson v. Flake*, 270 Ga. 141, 508 S.E.2d 650 (1998).

Purpose of an answer is to formulate issues by means of defenses addressed to allegations of the complaint. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

Answer primarily a vehicle for denial. — Answer, under both present and former law, is primarily vehicle for denial. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

Defenses as well as denials permitted in answer. — Chief change made by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) with regard to the answer is that an answer may now incorporate defenses other than mere denial of allegations. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

Meaning of “unless otherwise provided by statute”. — Language “unless otherwise provided by statute” in subsection (a) of this section refers to other laws or statutes of this state relating to a particular type of proceeding or action which might specify a different appearance day or time for filing a responsive pleading, and not to local practice rules provided in various statutes creating county civil courts. *Crosby v. Dixie Metal Co.*, 124 Ga. App. 169, 183 S.E.2d 59 (1971).

Phrase “otherwise provided by statute” in subsection (a) of this section relates to such special statutory proceedings (quo warranto, mandamus, etc.) as may pre-

scribe specific rules of practice and procedure with relation to time of filing defensive pleadings which are different from the 30 days permitted under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), and not to local practice rules provided in various statutes creating such courts as the Civil and Criminal Court of DeKalb County. *Gresham v. Symmers*, 227 Ga. 616, 182 S.E.2d 764 (1971).

Phrase “unless otherwise provided by statute” in subsection (a) of this section does not refer to local practice rules provided in various statutes creating civil and criminal county courts. *Auerback v. Maslia*, 142 Ga. App. 184, 235 S.E.2d 594 (1977).

Answer to amendment of complaint not required. — Statute requires an answer only to complaint or third-party complaint, not to amendment of a complaint. *Diaz v. First Nat'l Bank*, 144 Ga. App. 582, 241 S.E.2d 467 (1978).

No default for failure to answer counterclaim. — Since no answer is required to a counterclaim, case cannot go into default as a consequence of a party's failure to respond thereto, and no default judgment can be authorized. *Wolski v. Hayes*, 144 Ga. App. 180, 240 S.E.2d 720 (1977).

Though all summonses issued by a clerk to defendants in a counterclaim required an answer within 30 days of service or defendants would be held in default, failure to answer did not constitute default since the order adding additional defendants in a counterclaim directed the clerk to issue civil process to be served. *Adams v. First Nat'l Bank*, 170 Ga. App. 490, 317 S.E.2d 301 (1984).

Answer required from all parties named in complaint. — When an answer was filed in the name of only one of four separate entities named as defendants in the action, the other three defendants could not benefit from the answer and, having filed no answer of their own, were in default. *McCombs v. Southern Regional Medical Ctr., Inc.*, 233 Ga. App. 676, 504 S.E.2d 747 (1998).

Answer must be sufficiently definite to inform plaintiffs of defense. — Although there is no need for the defendant to set forth any evidence, or to expose

the defendant's defense in detail, it is required that the answer contain a statement of facts sufficiently definite so that the plaintiffs will be informed of the defense the plaintiffs must be prepared to meet. *Knickerbocker Tax Sys. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973).

When a nonlawyer manager of a sales lot responded to a complaint by writing a two page letter to the plaintiff's attorney, which responded to each of the grievances listed in the complaint, and filed the letter with the court, such response was sufficient to constitute an answer. *M & M Mobile Homes of Ga., Inc. v. Haralson*, 233 Ga. App. 749, 505 S.E.2d 249 (1998).

Special appearance for purpose of contesting service is not an answer or "responsive" pleading. *BX Corp. v. Fulton Plumbing Co.*, 140 Ga. App. 131, 230 S.E.2d 331 (1976).

Dismissal motion obviates need for answer. — Granting of a motion to dismiss raising subsection (b) of O.C.G.A. § 9-11-12 obviates the requirement for a timely filed answer. *Mock v. Copeland*, 160 Ga. App. 876, 288 S.E.2d 591 (1982).

Answer not treated as motion to dismiss. — In an action by attorney to collect legal fees, the trial court did not abuse the court's discretion in failing to treat the defendant client's answer, alleging that the plaintiff's attorney was ineligible to practice law, as a motion to dismiss or in failing to dismiss, sua sponte, the complaint. *Howell v. Styles*, 221 Ga. App. 781, 472 S.E.2d 548 (1996).

Response to amended complaint. — Response to an amended pleading may be made, but one is not required. *Adams v. Wright*, 162 Ga. App. 550, 293 S.E.2d 446 (1982).

Construing the pertinent provisions of O.C.G.A. §§ 9-11-7, 9-11-8, 9-11-12, 9-11-15, and 9-11-21 in pari materia, it is clear that the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) authorizes the addition of parties, by order of the court, and that an "amended complaint" effecting such an addition does not require a responsive pleading, unless the trial court orders a reply thereto. *Chan v. W-East Trading Corp.*, 199 Ga. App. 76, 403 S.E.2d 840, cert. denied, 199 Ga. App. 905,

403 S.E.2d 840 (1991).

Untimely response insufficient despite timely response to amended complaint. — Defendants' untimely filed answers to the original complaint were in violation of O.C.G.A. § 9-11-12 despite a timely response to the plaintiff's amended complaint, in light of their automatic default status, which neither defendant sought to open pursuant to O.C.G.A. § 9-11-55(a). *Day v. Norman*, 207 Ga. App. 37, 427 S.E.2d 31 (1993).

Appeal to superior court from county tax assessment brought under former Code 1933, § 92-6912 (see now O.C.G.A. § 48-5-311) was a "complaint" as contemplated by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), which was required to be answered by a responsive pleading. *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977).

Time for filing answer runs from date of service. — The 30 days within which a defendant has to file an answer begins to run from the date of service and not from the filing of the return. *Ewing v. Johnston*, 175 Ga. App. 760, 334 S.E.2d 703 (1985).

Time for filing answer in court of record may not be varied. — When the legislature declares a particular county court to be a court of record, thus bringing the court under the provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), it cannot constitutionally thereafter, either in the same Act or in a subsequently enacted law, vary the rules of practice and procedure provided for in that Act by adding provisions requiring defendants to file defensive pleadings sooner than 30 days after service of the complaint on the defendants. *Gresham v. Symmers*, 227 Ga. 616, 182 S.E.2d 764 (1971).

Entry of a rule nisi which does not expressly extend the time for answering a complaint does not suspend requirement that complaint be answered within 30 days after service. *Cheeks v. Barnes*, 241 Ga. 22, 243 S.E.2d 242 (1978).

Absent consent, no trial prior to expiration of 30-day period. — No ordinary action may be tried in the Civil Court of Bibb County prior to expiration of

Answers and Time Therefor (Cont'd)

the 30-day period given in subsection (a) of this section for filing an answer to a complaint, even though an answer has already been filed prior thereto, unless it be done by consent of the parties. *Crosby v. Dixie Metal Co.*, 124 Ga. App. 169, 183 S.E.2d 59 (1971).

Late answer filed by uninsured motorist carrier. — Trial court erred in denying an insured's motion for a default judgment and granting the uninsured motorist carrier's motion for summary judgment because the court relied upon a typographical error in case law in determining that the carrier's answer was not filed late and thereby finding that the carrier was not in default. *Kelly v. Harris*, 329 Ga. App. 752, 766 S.E.2d 146 (2014).

Answer not required. — Named defendant, who was listed in the summons that was issued but was never served with process, was not required to answer the complaint. *Hamm v. Willis*, 201 Ga. App. 723, 411 S.E.2d 771 (1991).

Time for filing answer after waiving service. — Defendant has 30 days to file an answer after the defendant waives service by making an appearance in a case because time in which jurisdiction is waived is equivalent of time service of process is made in a normal case. *Bigley v. Lawrence*, 149 Ga. App. 249, 253 S.E.2d 870 (1979).

No default if summary judgment motion pending. — If the defendants were never served, and filed a motion for summary judgment within the time for filing defensive pleadings (although the defendants never filed an answer to the complaint), it was error for the trial court to enter default judgment while such motion was pending. *Bigley v. Lawrence*, 149 Ga. App. 249, 253 S.E.2d 870 (1979).

Mere filing of a default summary judgment motion did not result in the entry of a default judgment. — Nothing showed a final or conclusive judgment on the merits in plaintiff home buyer's state court case against defendant companies, and the buyer's mere filing of a default summary judgment motion did not result in the entry of a default judgment; thus, the Rooker-Feldman doctrine did

not preclude federal jurisdiction upon removal. *Jones v. Commonwealth Land Title Ins. Co.*, No. 11-13469, 2012 U.S. App. LEXIS 1487 (11th Cir. Jan. 25, 2012), cert. dismissed, mot. denied, U.S. , 133 S. Ct. 35, 183 L. Ed. 2d 671 (2012) (Unpublished).

Default judgment should have been entered after failure to answer. — Denial of a plaintiff's motion for default judgment against a defendant was error because the defendant did not file an answer, the time for filing an answer was not extended, and under O.C.G.A. § 9-11-55(a), the defendant's case was automatically in default 30 days after being served; further, the defendant did not move to open the default. The trial court's earlier findings on cross-motions for summary judgment regarding the codefendant's lack of contractual liability were irrelevant to the issue of whether the plaintiff was entitled to default judgment. *H.N. Real Estate Group, LLC v. Dixon*, 298 Ga. App. 124, 679 S.E.2d 130 (2009).

Default judgment properly entered due to untimely answer. — Trial court did not err in granting a creditor's motion for default judgment on the ground that a debtor failed to answer the complaint within thirty days pursuant to O.C.G.A. § 9-11-12(a) because the trial court was authorized to conclude that the debtor's counsel executed an acknowledgment and waiver pursuant to O.C.G.A. § 9-10-73, that, therefore, the debtor's answer was due within thirty days after the acknowledgment and waiver, and that because it failed to serve an answer within that thirty-day period, its answer was untimely. O.C.G.A. § 9-11-4 did not apply because the acknowledgment of service the creditor drafted and submitted to the debtor did not make reference to § 9-11-4, and the creditor also did not inform the debtor by means of the text prescribed in § 9-11-4(1). *Satnam Waheguru Corp. v. Buckhead Cmty. Bank*, 304 Ga. App. 438, 696 S.E.2d 430 (2010).

Default judgment properly set aside when answer timely filed. — Trial court did not abuse the court's discretion in setting aside a default judgment entered in favor of former police officers under O.C.G.A. § 9-11-60(d) because the

default judgment was entered despite the fact that the record disclosed that a pension fund board of trustees timely answered the complaint and, thus, there was no basis upon which to claim a default judgment; the board's answer was filed 31 days after service, but because that day was a Monday and the 30th day after service fell on a Sunday, under O.C.G.A. § 1-3-1(d)(3), the answer was timely. *Stamey v. Policemen's Pension Fund Bd. of Trs.*, 289 Ga. 503, 712 S.E.2d 825 (2011).

Answer timely filed. — City council members filed the members' answer to a photographer's complaint well within the 30-day filing requirement under O.C.G.A. § 9-11-12(a) because one of the members was served with the complaint on December 20, 2007, the other was served on December 26, 2007, the case was removed to federal court on January 11, 2008, and both members filed a joint answer in federal court on January 17, 2008. *Davis v. Wallace*, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Trial court had jurisdiction over a home inspector, and the inspector was required under O.C.G.A. § 9-11-12(a) of the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, to file an answer to the purchaser's complaint within 30 days, but because the inspector failed to do so, the inspector was in default. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

How Defenses, etc., Presented

1. In General

Option to raise defenses by motion or in pleading. — Pleader may choose, at the pleader's option, to forgo opportunity to raise defenses by motion and to include the defenses in a responsive pleading. *Hayes v. Superior Leasing Corp.*, 136 Ga. App. 98, 220 S.E.2d 86 (1975).

Affirmative defenses. — Since the defendant did not assert any affirmative defenses in the defendant's responsive pleadings, any defense that the defendant may have had are deemed waived. *Burks v. Community Nat'l Bank*, 216 Ga. App. 155, 454 S.E.2d 144 (1995).

Sovereign immunity. — Community service board was a state agency, and the

limited sovereign immunity waiver for state agencies in the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., was subject to a specific exception for assault or battery. The community service board was immune from a claim arising from the stabbing death of a resident at a community home ran by the board, and a trial court's denial of a motion to dismiss filed by the board was reversed. *Oconee Cmty. Serv. Bd. v. Holsey*, 266 Ga. App. 385, 597 S.E.2d 489 (2004).

Party does not make motion to dismiss simply by confessing facts that establish lack of jurisdiction, even if the party suggests that the court might dismiss the case. *McLanahan v. Keith*, 140 Ga. App. 171, 230 S.E.2d 57 (1976), *aff'd*, 239 Ga. 94, 236 S.E.2d 52 (1977). But see *Couch v. Wallace*, 249 Ga. 568, 292 S.E.2d 405 (1982); *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983).

Reason for plea or written motion. — Rationale for requirement that defense of insufficiency of service or process must be made by plea or written motion is to provide notice to the opposite party. *Petroleum Carrier Corp. v. Jones*, 127 Ga. App. 676, 194 S.E.2d 670 (1972).

"Appearance card" not a pleading. — "Appearance card," containing no admissions, denials, or statements of inability to answer for any reason, does not meet standards for a pleading as set forth in subsection (b) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12) and Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8(b)). *Glenco-Belvedere Animal Hosp. v. Winters*, 129 Ga. App. 621, 200 S.E.2d 506 (1973).

Motions to dismiss as part of responsive pleadings. — Motions to dismiss for failure to set forth a cause of action and for failure to set forth a claim can properly be part of the defendant's responsive pleadings. *Henderson v. Fulton County Bd. of Registration & Elections*, 231 Ga. 173, 200 S.E.2d 739 (1973).

When motion to dismiss is addressed to entire pleading, such motion is properly overruled if a portion of the matter thus attacked is not subject to objections urged. *Dillingham v. Doctors Clinic*, 138 Ga. App. 41, 225 S.E.2d 500 (1976); *Goolsby v. Regents of Univ. Sys.*,

**How Defenses, etc.,
Presented (Cont'd)
1. In General (Cont'd)**

141 Ga. App. 605, 234 S.E.2d 165 (1977).

Ruling granting a motion to dismiss is an adjudication on the merits of the plaintiffs' claim, and is not equivalent to a voluntary dismissal under Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(a)). *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

Motion to dismiss based on forum selection clause. — Trial court erred in denying an employer's motion to dismiss based on a forum selection clause as the employee failed to show that a forum selection clause in a merger agreement was unreasonable since: (1) the employee's affidavit failed to address the parties' relative bargaining positions, so the employee's claim that the clause was unreasonable as the employee was only one of six partners, with a 14 percent share, failed; (2) the employee's signature on the agreement was not the result of fraud or overreaching; (3) the employee could have refused to sign the agreement; (4) the employee's claim that the employer waived any objection to venue was not raised in the trial court, and venue was not at issue; and (5) the executive employment agreement and the merger agreement were properly construed together. *SR Bus. Servs., Inc. v. Bryant*, 267 Ga. App. 591, 600 S.E.2d 610 (2004).

Dismissal because of lack of jurisdiction constitutes final termination for purposes of appeal. *McLanahan v. Keith*, 140 Ga. App. 171, 230 S.E.2d 57 (1976), *aff'd*, 239 Ga. 94, 236 S.E.2d 52 (1977). But see *Couch v. Wallace*, 249 Ga. 568, 292 S.E.2d 405 (1982); *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983).

Defense of privilege is not a defense that must be affirmatively pled under Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8(c)), nor specifically pleaded under Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9), and is sufficiently raised by motion to dismiss under subsection (b) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12). *Europa Hair, Inc. v. Browning*, 133 Ga. App. 753, 212 S.E.2d 862 (1975).

Failure of foreign corporation to obtain certificate of authority to transact business in this state is properly the subject of a dilatory plea. *Safwat v. United States Leasing Corp.*, 154 Ga. App. 341, 268 S.E.2d 395 (1980).

Plea in abatement is a dilatory plea. *Theo v. National Union Fire Ins. Co.*, 99 Ga. App. 342, 109 S.E.2d 53 (1959) (decided under former Code 1933, § 81-303).

"Dilatory pleas" are such as tend merely to defeat plaintiff's remedy or to delay or put off the suit by questioning the propriety of the remedy rather than by denying the injury; dilatory pleas may be tried separately from the main case. *Theo v. National Union Fire Ins. Co.*, 99 Ga. App. 342, 109 S.E.2d 53 (1959) (decided under former Code 1933, § 81-303).

Matters in abatement are raised and resolved under O.C.G.A. § 9-11-12, and are not proper subjects for a motion for summary judgment. *Hight v. Blankenship*, 199 Ga. App. 744, 406 S.E.2d 241 (1991).

Defenses in subsection (b), except for paragraph (6), are matters in abatement that are not within the scope of summary judgment procedure as a motion for summary judgment applies to the merits of the claim, or to matters in bar, but not to matters in abatement. *Knight v. United States Fid. & Guar. Co.*, 123 Ga. App. 833, 182 S.E.2d 693 (1971); *Boyd Motors, Inc. v. Radcliff*, 128 Ga. App. 15, 195 S.E.2d 291 (1973); *Kirkpatrick v. Mackey*, 162 Ga. App. 876, 293 S.E.2d 461 (1982).

Generally, defenses enumerated in paragraphs (b)(1) through (b)(5) and (b)(7) of this section are not proper subjects for motions for summary judgment. *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 232 Ga. 614, 208 S.E.2d 459 (1974).

Defendant's motion to dismiss or for summary judgment treated as one for summary judgment. — When matters outside the pleadings were presented and not excluded by the trial court, the defendant's motion to dismiss the plaintiff's refiled action or, in the alternative, for summary judgment would be treated as one for summary judgment and the grant of that motion would be a grant of summary judgment in favor of the defen-

dant and against the plaintiff. *Williams v. Coca-Cola Co.*, 158 Ga. App. 139, 279 S.E.2d 261 (1981).

Motion to dismiss not converted to summary judgment. — Defendant's motion to dismiss for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process was not converted to a summary judgment motion upon consideration of matters outside the pleadings and, thus, dismissal was not directly appealable under the summary judgment statute. *Church v. Bell*, 213 Ga. App. 44, 443 S.E.2d 677 (1994).

Motion for summary judgment cannot be granted on matters in abatement, such matters being properly disposed of pursuant to a motion to dismiss. *C.W. Matthews Contracting Co. v. Capital Ford Truck Sales, Inc.*, 149 Ga. App. 354, 254 S.E.2d 426 (1979); *Primas v. Saulsberry*, 152 Ga. App. 88, 262 S.E.2d 251 (1979).

Matters in abatement. — Motion for summary judgment under Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56) or a motion under subsection (b) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12) which is treated as one for summary judgment cannot be granted on matters in abatement. *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 232 Ga. 614, 208 S.E.2d 459 (1974).

Although a motion is made and treated as one for summary judgment, a motion for summary judgment cannot be used to raise a matter of abatement, such as lack of venue or jurisdiction, which must be brought under O.C.G.A. § 9-11-12. *Big Canoe Corp. v. Williamson*, 168 Ga. App. 179, 308 S.E.2d 440 (1983).

Jurisdictional type motion is not within the scope of summary judgment procedure. *Hemphill v. Con-Chem, Inc.*, 128 Ga. App. 590, 197 S.E.2d 457 (1973).

When summons and process erroneously bore the caption "State Court of Walker [County]" rather than the "Superior Court" thereof, but when other aspects of the summons and process made clear that the action was in the superior court, and when the defendant in fact filed an answer and motion to dismiss in the superior court rather than the state court,

there were no grounds to dismiss for lack of proper return of service or insufficiency of process. *Gant v. Gant*, 254 Ga. 239, 327 S.E.2d 723 (1985).

Motion in abatement properly denied. — Trial court properly denied the Department of Transportation's motion in abatement, as plaintiffs, with the plaintiffs' affidavit and deposition of the plaintiffs' expert witness, carried the plaintiffs' burden of proof by showing the Department's design and engineering malpractice, and proof of malpractice was also proof of the waiver of sovereign immunity under O.C.G.A. § 50-21-24(10). *DOT v. Dupree*, 256 Ga. App. 668, 570 S.E.2d 1 (2002).

Contractual right to file. — Founder's action against a small company, the small company's majority owner, and the owner's managing member was dismissed because the company and owner had the right to file first under the parties' ambiguous but effective standstill agreement and to give effect to a provision of the agreement that made the agreement null and void on a certain date would have meant not giving effect to another provision that afforded the company the right to file first in contravention of the parties' intent. *Thomas v. B & I Lending, L.L.C.*, 261 Ga. App. 39, 581 S.E.2d 631 (2003).

No waiver of one year policy provisions. — In an insurer's declaratory judgment action involving the insurer's obligations under a parent's property insurance policy, the insurer was properly granted summary judgment as to a child's claim since that claim was filed past the one year time limit set forth in the policy, which was a policy renewed in 2004. The child's counterclaim was filed 18 months after the declaratory judgment suit was filed and no waiver of the one year time limit was established. *Morrill v. Cotton States Mut. Ins. Co.*, 293 Ga. App. 259, 666 S.E.2d 582 (2008).

2. Subject Matter Jurisdiction

Scope of jurisdiction. — Jurisdiction of the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which that particular case belongs. *Hill v.*

How Defenses, etc.,**Presented (Cont'd)****2. Subject Matter****Jurisdiction (Cont'd)**

Kaminsky, 160 Ga. App. 630, 287 S.E.2d 639 (1981).

Jurisdiction should be decided at outset. — Jurisdiction of court to afford relief sought is a matter which should be decided preliminarily at the outset; jurisdiction either exists or does not exist without regard to the merits of the case. *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244 (1981).

Dismissal proper based on no waiver of sovereign immunity. — Trial court properly dismissed a wrongful death suit against a State of Georgia mental health agency for lack of subject matter jurisdiction because the act causing the underlying loss in the case, namely a discharged psychiatric patient setting the patient's mother on fire, constituted an assault or battery; thus, the exception in O.C.G.A. § 50-21-24(7) to the waiver of sovereign immunity applied. *Pak v. Ga. Dept of Behavioral Health & Developmental Disabilities*, 317 Ga. App. 486, 731 S.E.2d 384 (2012).

Failure to raise defense. — Trial court did not lack subject matter jurisdiction to rule on the enforcement of the judgment creditor's underlying judgment as the judgment debtor never raised the affirmative defense of subject matter jurisdiction in an answer or in a separate motion as was required by O.C.G.A. § 9-11-12(b)(1). *Wilson v. 72 Riverside Invs., LLC*, 277 Ga. App. 312, 626 S.E.2d 521 (2006).

In a transferred action between a lessee and its lessors, the superior court properly exercised subject matter jurisdiction over the action as no action was taken upon the lessee's notice of appeal, but pursuant to the magistrate's transfer order, which was authorized by Ga. Unif. Magis. Ct. R. 36; moreover, the lessors never raised the affirmative defense of lack of subject matter jurisdiction by way of an answer or in a separate motion, as was required by O.C.G.A. § 9-11-12(b)(1), or even in a motion for judgment on the pleadings. *Abushmais v. Erby*, 282 Ga. App. 86, 637

S.E.2d 725 (2006), *aff'd*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Failure to comply with notice provisions under the Georgia Tort Claims Act. — Because: (1) a patron's personal injury claim filed with the claims advisory board (CAB) in no way complied with the ante litem requirements of the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq.; (2) the patron's claim to the CAB was made under a separate statutory scheme set up under Article 4 of Title 28 dealing with the financial affairs of the general assembly, covered under O.C.G.A. § 28-5-60 et seq.; and (3) prior to filing suit, no notice was given to the Risk Management Division of the Department of Administrative Services or the Department of Motor Vehicle Safety, to the extent that the trial court denied the motion of the state to dismiss the patron's claim of \$5,000 or less, the court erred, but the order denying the patron's claim of \$5,000 or more was upheld. *State of Ga. v. Haynes*, 285 Ga. App. 637, 647 S.E.2d 331 (2007).

Erroneous reliance on statute. — Lack of subject matter jurisdiction is not necessarily established by the fact that the parties are erroneously asserting jurisdiction based on an inapplicable statute. Since all pleadings must be so construed as to do substantial justice, a court must determine whether a viable claim is presented notwithstanding erroneous reliance on the statute. *Brown v. Rock*, 184 Ga. App. 699, 362 S.E.2d 480 (1987).

Matter in abatement. — Motion to dismiss that was based on a lack of subject matter jurisdiction was a matter in abatement. *Sea Tow/Sea Spill of Savannah v. Phillips*, 253 Ga. App. 842, 561 S.E.2d 827 (2002), *aff'd in part and rev'd in part*, 276 Ga. 352, 578 S.E.2d 846 (2003).

Because subject matter jurisdiction is a matter in abatement, jurisdiction had to be resolved on a motion pursuant to O.C.G.A. § 9-11-12(b), and not by a motion for summary judgment. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Unable to render decision on merits. — Trial court lacked subject matter jurisdiction to hear the claims of the nurs-

ery owners against the state university professor related to plant cuttings the owners provided to the professor for tests and the professor's resulting conclusion that the plants grown from the cuttings had vast commercial potential; the trial court's lack of subject matter jurisdiction meant the trial court was unable to render a decision on the merits. *Feist v. Dirr*, 271 Ga. App. 169, 609 S.E.2d 111 (2004).

Collateral attack on valid default judgment unauthorized. — Trial court properly dismissed a business' contribution action filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds as: (1) the court's finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

Collateral order exception. — 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).

When the plaintiff did not give notice of claim to Risk Management Division of the state Department of Administrative Services, as specifically set forth in O.C.G.A. § 9-11-12, the plaintiff did not conform to the strict compliance requirements of the statute, and the plaintiff's claim was properly dismissed under subsection (b)(1), on the basis that the trial court did not have subject matter jurisdiction over the action. *Kim v. DOT*, 235 Ga. App. 480, 510 S.E.2d 50 (1998).

Notice required prior to abusive litigation claim. — When a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq. alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that

the claims were not counterclaims and, accordingly, dismissed the claims for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in the defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Failure to pay costs of court is a defense which is waivable if not timely raised, and does not constitute grounds for dismissal due to the lack of subject matter jurisdiction. *McLanahan v. Keith*, 239 Ga. 94, 236 S.E.2d 52 (1977). But see *Couch v. Wallace*, 249 Ga. 568, 292 S.E.2d 405 (1982); *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983).

When wife's complaint for divorce did not affirmatively allege residence so as to show on the pleadings legal jurisdiction of court over the subject matter, such issue could be raised by the evidence, and if so raised would be tantamount to an amendment of the pleadings to that effect. *Tanis v. Tanis*, 240 Ga. 718, 242 S.E.2d 71 (1978).

3. Personal Jurisdiction

Lack of jurisdiction over the person may be raised by motion to dismiss. *O'Steen v. Boone*, 117 Ga. App. 174, 160 S.E.2d 229 (1968).

Motions to dismiss for lack of jurisdiction over the person, when tried on affidavits pursuant to Ga. L. 1968, p. 1104, § 10 (see now O.C.G.A. § 9-11-43(b)), do not become motions for summary judgment. *McPherson v. McPherson*, 238 Ga. 271, 232 S.E.2d 552 (1977).

Waiver of jurisdiction over person. — Defense of lack of jurisdiction over the person may be waived by the party entitled to assert the defense under O.C.G.A. § 9-11-12. *Cale v. Eastern Air Lines*, 159 Ga. App. 630, 284 S.E.2d 647 (1981).

Trial court's ruling that the defendant did not timely assert the defendant's de-

How Defenses, etc.,**Presented (Cont'd)****3. Personal Jurisdiction (Cont'd)**

fense of lack of personal jurisdiction due to the plaintiff's laches in perfecting service was properly deemed waived since the defense was not raised by the defendant in the defendant's initial responsive pleading, pursuant to O.C.G.A. § 9-11-12(b). *Adams v. Adams*, 260 Ga. App. 597, 580 S.E.2d 261 (2003).

Defense may be raised by responsive pleading or motion. — When a default has already been entered, the defendant can raise a defense of lack of jurisdiction over the defendant's person by motion to set aside judgment and submit it to the trial court for disposition under O.C.G.A. § 9-11-60(d), but if this defense is made prior to trial, it can be asserted in a responsive pleading, or asserted by motion under paragraph (b)(2) of O.C.G.A. § 9-11-12, and resolved in the usual manner. *Wolfe v. Rhodes*, 166 Ga. App. 845, 305 S.E.2d 606 (1983).

Under O.C.G.A. § 9-11-60, a person may bring a motion to set aside a judgment void for lack of jurisdiction at any time, and O.C.G.A. § 9-11-12 could not be constitutionally applied to preclude a non-resident from bringing such a motion after a default judgment was entered against the nonresident. *Hoesch Am., Inc. v. Dai Yang Metal Co.*, 217 Ga. App. 845, 459 S.E.2d 187 (1995); *B & D Fabricators v. D.H. Blair Investment Banking Corp.*, 220 Ga. App. 373, 469 S.E.2d 683 (1996).

Motion to dismiss on jurisdictional grounds is not converted into a motion for summary judgment by the introduction of evidence pursuant to O.C.G.A. § 9-11-12(b). Nonetheless, the rule in Georgia is that the testimony of a party who offers oneself as a witness in one's own behalf at trial is to be construed most strongly against the party when it is self-contradictory, vague, or equivocal. Thus, in a divorce action, the court properly dismissed the case as under the persuasive evidence, which included the spouse's own testimony, the spouse simply had no residence in DeKalb County that the spouse could claim as a domicile. *Conrad v. Conrad*, 278 Ga. 107, 597 S.E.2d 369 (2004).

Long-arm jurisdiction. — Because a foreign corporation did not independently perform any acts in Georgia that would subject the corporation to the state's long-arm jurisdiction under O.C.G.A. § 9-10-91, the trial court properly dismissed a domestic corporation's contract and tort claims. *Catholic Stewardship Consultants, Inc. v. Ruotolo Assocs., Inc.*, 270 Ga. App. 751, 608 S.E.2d 1 (2004).

Internet car seller purposefully transacted business in the State of Georgia when the seller's agent conducted business negotiations with a buyer who lived in Georgia and when the seller delivered the vehicle in the state, so as to have established sufficient minimum contacts with the State of Georgia to authorize Georgia's exercise of personal jurisdiction over the seller under the Georgia Long Arm Statute, O.C.G.A. § 9-11-91; moreover, the state court correctly resolved the factual conflict created by the seller's affidavits and supporting documentation in favor of the buyer so as to find, for purposes of the motion to dismiss, that the buyer had not been provided with, nor agreed to, that part of the agreement containing the forum selection clause. *Aero Toy Store, LLC v. Grieves*, 279 Ga. App. 515, 631 S.E.2d 734 (2006).

Trial court lacked subject matter jurisdiction. — Trial court erred by entering a default judgment against a police officer for failing to timely answer because the officer was immune from suit on the claim brought under state law; thus, the default judgment entered on that claim was a nullity and the trial court lacked subject matter jurisdiction and should have dismissed the state law cause of action for lack of subject matter jurisdiction. *Ferrell v. Young*, 323 Ga. App. 338, 746 S.E.2d 167 (2013).

4. Venue

Motion based on facts dehors the pleading. — When motion to dismiss for lack of venue is based upon facts dehors the pleading, motion becomes a "speaking" motion and proof must be presented on the hearing as to the facts alleged. *Williamson v. Perret's Farms, Inc.*, 128 Ga. App. 687, 197 S.E.2d 754 (1973).

Forum selection clause upheld.

— Trial court erred in dismissing an action for breach of an equipment rental agreement on grounds that the forum selection clause contained therein was overbroad and unconscionable, and thus unenforceable, as: (1) the clause did not grant unfettered discretion to the plaintiff as to where suit could be brought; (2) the lessee under the agreement clearly had notice that suit could be filed anywhere the plaintiff maintained the plaintiff's principal place of business, but the clause aptly did not allow a suit to be filed in a forum where neither party had a nexus or relationship with the forum state; and (3) there was no evidence that the agreement was procured by fraud. *OFC Capital v. Colonial Distribs.*, 285 Ga. App. 815, 648 S.E.2d 140 (2007), cert. denied, 2007 Ga. LEXIS 681 (Ga. 2007).

Movant supported motion by evidence of agreed upon forum selection clause. — In a breach of contract action between an Internet-based business and an Internet advertiser, because the latter presented sufficient evidence to support its motion to dismiss a suit filed in the State of Georgia on personal jurisdiction grounds, given the forum selection clause in the contract designating the agreed-upon forum as the state and federal courts in the State of California, specifically, Los Angeles, and given the business's assent to venue, the advertiser met the advertiser's burden of proving a lack of personal jurisdiction, the trial court properly dismissed the Georgia action. *Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 660 S.E.2d 797 (2008).

Responsive pleading must refer to venue. — While it is not necessary to set forth in a responsive pleading reasons why venue is improper, in order to assert the defense, a defendant must make reference to venue. A general denial is not an assertion. *Orkin Exterminating Co. v. Morrison*, 187 Ga. App. 780, 371 S.E.2d 407, cert. denied, 187 Ga. App. 908, 371 S.E.2d 407 (1988).

Waiver of venue. — One who, being properly served, wishes to rely on a defense of lack of venue must bring the defense to the attention of the court at a proper time or the defense is waived;

allowing a case to go to default judgment is no better than allowing a case to be tried on the merits before coming in with a technical defense. *Cotton v. Ruck*, 157 Ga. App. 824, 278 S.E.2d 693 (1981).

When the plaintiff filed a lawsuit, never dismissed the lawsuit or moved for a transfer, and never raised the issue of venue until the second appeal from the trial court, the plaintiff waived any claim of improper venue. *Hixson v. Hickson*, 236 Ga. App. 894, 512 S.E.2d 648 (1999).

Claimant in a civil forfeiture proceeding could not assert on appeal that an order striking the claimant's answer and a final judgment of condemnation were void due to improper venue because the claimant did not raise that defense in the answer, thus waiving the defense under O.C.G.A. § 9-11-12(h). *Gravley v. State of Ga.*, 285 Ga. App. 691, 647 S.E.2d 372 (2007).

Personal guarantor waived any venue defense, pursuant to O.C.G.A. § 9-11-12(b), because the guarantor never raised the issue before a hearing, and as was noted at the hearing, did not file a motion to transfer venue. *Brooks v. Multibank 2009-1 RES-ADC Venture, LLC*, 317 Ga. App. 264, 730 S.E.2d 509 (2012).

Properly raised defense of improper venue is not waived implicitly by allowing the litigation to proceed over a lengthy period of time, nor is the defense waived implicitly by entering into consent orders extending discovery. *Williams v. Willis*, 204 Ga. App. 328, 419 S.E.2d 139 (1992).

Failure to transfer. — State court erred by dismissing a personal injury lawsuit filed against the Metropolitan Atlanta Rapid Transit Authority and one of its bus drivers as joint tortfeasors since the matter should have been transferred to superior court pursuant to the Uniform Transfer Rules. *McDonald v. MARTA*, 251 Ga. App. 2306, 554 S.E.2d 226 (2001).

5. Process

Motion to dismiss proper to raise insufficiency of process. — When the defendant contends that there was insufficiency of service of process, a motion to dismiss is the proper method to raise such

How Defenses, etc.,**Presented (Cont'd)****5. Process (Cont'd)**

issue. *Boyer v. King*, 129 Ga. App. 690, 200 S.E.2d 906 (1973).

Defense of “insufficiency of process” must be raised specifically. — When summons and affidavit under former Code 1933, §§ 61-402 and 61-403 (see now O.C.G.A. §§ 44-7-71 and 44-7-72), relating to distress warrants, were defective, the trial court was not authorized to dismiss the summons and affidavit on the basis of a motion to dismiss for failure to state a claim upon which relief can be granted; deficiency in the summons and affidavit was in the nature of defense of “insufficiency of process,” as described in paragraph (b)(4) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12), and failure to raise this defense specifically in defensive pleadings waived the defense. *White v. Johnson*, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Dismissal for lack of proper and timely service. — Even though the trial court found that the plaintiff did not exercise reasonable diligence in perfecting service until after the running of the statute of limitations, it was error to dismiss the claims with prejudice upon a motion to dismiss for lack of proper and timely service because there had been no adjudication on the merits. *Wilson v. Ortiz*, 232 Ga. App. 191, 501 S.E.2d 247 (1998).

Judgment of dismissal without prejudice under paragraphs (b)(2), (b)(4), and (b)(5) of O.C.G.A. § 9-11-12 was required because the plaintiff’s substituted service on the defendant’s insurer was not proper service under O.C.G.A. § 9-11-4 (d), (e)(2), or O.C.G.A. § 9-10-90 et seq. *South v. Montoya*, 244 Ga. App. 52, 537 S.E.2d 367 (2000).

Defendant’s motion to dismiss a plaintiff’s personal injury complaint should have been granted because service occurred after the two-year statute of limitations under O.C.G.A. § 9-3-33 expired, and the limitation period was not tolled because the record was devoid of evidence that the plaintiff made any attempt to personally serve the defendant for more than two years after the trial court’s order

granting a motion for service by publication. *Dunn v. Kirsten*, 273 Ga. App. 27, 614 S.E.2d 156 (2005), but see *Cohen v. Allstate Ins. Co.*, 277 Ga. App. 437, 626 S.E.2d 628 (2006).

Trial court properly dismissed a plaintiff’s personal injury action filed against the defendant on insufficient service of process grounds as: (1) plaintiff did little to pursue service; (2) plaintiff inappropriately shifted the burden of search on the court; and (3) the fact that the defendant served interrogatories and a request for production did not amount to a waiver of an insufficient service of process defense. *Kelley v. Lymon*, 279 Ga. App. 849, 632 S.E.2d 734 (2006).

Trial court erred in finding that the State Election Board was not properly served with process of an election candidate’s challenge to an election contest; but, the candidate’s failure to effect timely service of appropriate process of the contest against the mayor-elect required dismissal of the suit. *Swain v. Thompson*, 281 Ga. 30, 635 S.E.2d 779 (2006).

In a personal injury lawsuit, because, as a matter of law, an injured individual failed to carry the burden of showing reasonable diligence in attempting to serve the complaint, the trial court abused the court’s discretion in denying a motion to dismiss the complaint; moreover, despite the individual’s attempt to argue to the contrary, the applicable test was whether the plaintiff exercised due diligence, not whether the defendant had suffered harm from the delay in service of process. *Duffy v. Lyles*, 281 Ga. App. 377, 636 S.E.2d 91 (2006).

In a personal injury action arising from an auto accident filed two days before the expiration of the applicable statute of limitation, because the record failed to show that the plaintiff acted with the greatest possible diligence to personally serve the defendant, the trial court did not abuse the court’s discretion in dismissing the plaintiff’s complaint based on insufficient service of process. *Moody v. Gilliam*, 281 Ga. App. 819, 637 S.E.2d 759 (2006).

Because a personal representative failed to effectuate proper service of a personal injury suit on a passenger of a vehicle involved in an accident in which

the decedent was killed, especially after having been placed on notice that service had not been perfected, the passenger's motion to dismiss the suit was properly granted. *Ballenger v. Floyd*, 282 Ga. App. 574, 639 S.E.2d 554 (2006).

Based on sufficient evidence that a resident stood idle for six months after learning of the difficulties in serving a non-resident, the resident's personal injury complaint was properly dismissed on grounds that the resident failed to exercise due diligence in effectuating service of process; hence, the statute of limitations under O.C.G.A. § 9-3-33 was not tolled. *Livingston v. Taylor*, 284 Ga. App. 638, 644 S.E.2d 483 (2007).

Because the affidavits submitted by the defendant were sufficient to overcome the evidence of the process server's return of process, and the record supported the trial court's finding that the plaintiff did not effect service on the defendant, specifically showing that there was no signature of receipt, no log of event, no notes of service, no detailed description of the defendant, and no request for identification, dismissal of the action was proper. *Bohorquez v. Strother*, 287 Ga. App. 98, 650 S.E.2d 765 (2007).

Late-filed defense waived. — Judgment for the defendant was reversed since the defense of failure to attach an affidavit required by O.C.G.A. § 9-11-9.1 was not presented, by way of amendment to the answer, until three months after the filing of responsive pleadings, and until the statute of limitations on the underlying claim had ran. *Glaser v. Meck*, 258 Ga. 468, 369 S.E.2d 912 (1988).

Service of process waived. — No reversible error was found because a contestant in a quiet title action waived service of process, neglected to file any pleadings, and failed to file a record to support the claims of error on appeal, and given that the special master found three independent bases, which on their face supported the judgment entered. *Brown v. Fokes Props. 2002, Inc.*, 283 Ga. 231, 657 S.E.2d 820 (2008).

Service of process held sufficient. — Because a corporation failed in the corporation's burden of showing that the person who actually received service of process

was not authorized to accept service on behalf of the corporation's registered agent, the service was properly found to be sufficient. Thus, the trial court was not required to dismiss the action based on a lack of sufficient service of process. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

Because service of process to a person at least 15 years old who resided at the residence listed on the return of service was sufficient, such could not serve as a basis to dismiss the action; moreover, adequate and proper service of process was presumed given that the party charged with service timely filed an answer. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

6. Service

Evidence required to show failure of service. — When a signed entry of service was presented to the court, the defendant's submission of a one-page affidavit that stated the defendant did not receive service was not sufficient to support the defendant's claim of failure of service. *Oden v. Legacy Ford-Mercury, Inc.*, 222 Ga. App. 666, 476 S.E.2d 43 (1996).

Return as evidence of service. — Return of service indicates that service was made at the most notorious place of abode and is prima facie evidence of service. *Meier v. Bennett*, 208 Ga. App. 688, 431 S.E.2d 462 (1993).

Objection to service not grounds for summary judgment. — Court is not authorized to grant motion for summary judgment on ground of objection to service of process. *Knight v. United States Fid. & Guar. Co.*, 123 Ga. App. 833, 182 S.E.2d 693 (1971).

Sufficiency of service of process is outside the scope of summary judgment. *Concert Promotions, Inc. v. Haas & Dodd, Inc.*, 167 Ga. App. 883, 307 S.E.2d 763 (1983).

Issue raised in summary judgment motion. — Although the defendant's motion for summary judgment raised the issue of insufficiency of service of process, that defense is a plea in abatement and, as such, it is not properly a basis of a motion for summary judgment; but if the defense is raised for resolution in the trial

**How Defenses, etc.,
Presented (Cont'd)
6. Service (Cont'd)**

court and it has not otherwise been waived by the defendant, the nomenclature of the pleading which raises that issue should not be a material consideration. Under these circumstances, the proper disposition of the case is to vacate the order of the trial court on the cross-motions for summary judgment and to remand the case with direction that the plaintiff's complaint be dismissed for insufficiency of service of process. *Cheshire Bridge Enters., Inc. v. Lexington Ins. Co.*, 183 Ga. App. 672, 359 S.E.2d 702, cert. denied, 183 Ga. App. 905, 359 S.E.2d 702 (1987).

Dismissal based on statute of limitations not waived. — It is immaterial that, in the defendant's original answer, the defendant did not raise the paragraph (b)(5) of O.C.G.A. § 9-11-12 defense of insufficiency of service of process, since, regardless of its timeliness, personal service was eventually perfected on the defendant. Thus, no ground existed for any objection to the method of service. The motion to dismiss was brought on the ground that the action was barred by the statute of limitations and the defendant's right to dismissal on this ground was not waived. *Bennett v. Nelson*, 202 Ga. App. 346, 414 S.E.2d 291 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 291 (1992).

Dismissal for insufficiency of service not a ruling on statute of limitations. — Defense of insufficiency of service of process is a matter in abatement; a dismissal for insufficiency of service of process is a finding by the trial court that service was not perfected in a reasonable and diligent manner within the prescribed statute of limitation and is not a ruling that the plaintiff's action is, in fact, barred by the running of the statute of limitation. Such an issue is a factual issue and must eliminate the factual issue of tolling. *Mangram v. City of Brunswick*, 324 Ga. App. 725, 751 S.E.2d 523 (2013).

No right to confrontation or public trial in civil cases. — When a buyer claiming that the buyer was fraudulently sold real estate argued, on appeal, that

the trial court's summary dismissal of the buyer's complaint under O.C.G.A. §§ 9-11-12(b)(6) and 9-11-56 deprived the buyer of the right to confront witnesses and the right to a public trial, this claim had no merit because the right to confront witnesses and the right to a public trial only applied to criminal proceedings. *Crane v. Samples*, 267 Ga. App. 895, 600 S.E.2d 624 (2004), cert. denied, 544 U.S. 927, 125 S. Ct. 1650, 161 L. Ed. 2d 488 (2005).

Adoption of party's proposed order not clearly erroneous. — In a dispute over the use of an easement, because a landowner abandoned error regarding the denial of a motion to dismiss on service of process grounds, and the trial court properly adopted a neighbor's proposed order as the court's final order, as the landowner failed to support a claim that the findings of fact or conclusions of law were incorrect, the order denying dismissal of the action was upheld on appeal. *Woodyard v. Jones*, 285 Ga. App. 323, 646 S.E.2d 306 (2007).

No right to jury trial. — On appeal, a real estate buyer, claiming a fraudulent sell, argued that the trial court's summary dismissal of the buyer's complaint under O.C.G.A. §§ 9-11-12(b)(6) and 9-11-56 deprived the buyer of the right to a jury trial, such claim had no merit because, when the opposing parties filed an affidavit with their motion for summary judgment claiming that the misrepresentation alleged in the buyer's complaint did not occur, and the buyer did not respond to that motion, the evidence in the record was undisputed that the misrepresentation, which was the crux of the buyer's claims, did not happen, so there was no fact-finding role for a jury to perform. *Crane v. Samples*, 267 Ga. App. 895, 600 S.E.2d 624 (2004), cert. denied, 544 U.S. 927, 125 S. Ct. 1650, 161 L. Ed. 2d 488 (2005).

No right to hearing on motion. — Notwithstanding the motion's caption, a defendant's motion did not seek summary judgment but was in essence a motion to dismiss for insufficiency of service of process under O.C.G.A. § 9-11-12(b)(5); further, the ruling thereupon was not a summary judgment. Therefore, the plaintiff

was not entitled to a hearing on the motion under Ga. Unif. Super. Ct. R. 6.3. *McCullers v. Harrell*, 298 Ga. App. 798, 681 S.E.2d 237 (2009), cert. denied, No. S09C1914, 2010 Ga. LEXIS 55 (Ga. 2010).

Issue not waived. — When a spouse in an action under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., raised the issue of insufficiency of service at hearings and proceeded with the merits only after the spouse's motions to dismiss were denied, the spouse's appearances were made subject to the motions, and the spouse could not be deemed to have waived the service issue for appeal. *Loiten v. Loiten*, 288 Ga. App. 638, 655 S.E.2d 265 (2007).

Service by publication. — Trial court erred by granting the defendant's motion to dismiss for lack of personal jurisdiction because the court granted the plaintiff's motion for service by publication and since the defendant was so served, the court was required to determine whether service by publication was sufficient to confer personal jurisdiction over the defendant. *Ragan v. Mallow*, 319 Ga. App. 443, 744 S.E.2d 337 (2012).

Trial court had to determine whether attorney was authorized to accept service. — Trial court abused the court's discretion by dismissing a landlord's suit against a tenant under O.C.G.A. § 9-11-60 for lack of personal jurisdiction because a determination was necessary as to whether a law firm who accepted service was authorized to represent the tenant before the trial court determined that the court lacked personal jurisdiction over the tenant. *Endover Palisades, LLC v. Stuart*, 324 Ga. App. 90, 749 S.E.2d 381 (2013).

7. Failure to State Claim

Two-part test for dismissal of pleading. — Motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless: (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of

the relief sought. *Mooney v. Mooney*, 235 Ga. App. 117, 508 S.E.2d 766 (1998).

Complaint may be dismissed on motion if clearly without any merit, and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. *Poole v. City of Atlanta*, 117 Ga. App. 432, 160 S.E.2d 874 (1968); *Rossville Fed. Sav. & Loan Ass'n v. Insurance Co. of N. Am.*, 121 Ga. App. 435, 174 S.E.2d 204 (1970).

Motion to dismiss performs functions of general demurrer. — Motion to dismiss for failure to state a claim upon which relief can be granted under paragraph (b)(6) of this section performs substantially the same function as former common-law general demurrer. *Western Contracting Corp. v. State Hwy. Dep't*, 123 Ga. App. 331, 181 S.E.2d 89 (1971), later appeal, 125 Ga. App. 376, 187 S.E.2d 690 (1972); *International Indem. Co. v. Blakey*, 161 Ga. App. 99, 289 S.E.2d 303 (1982).

Dismissal proper under O.C.G.A. § 9-2-5 if identical case filed in another county. — Appellate court properly dismissed a second fraud and breach of contract action filed in a separate county, which was identical to one previously filed by the same plaintiff against the same defendants, under the prior pending litigation doctrine pursuant to O.C.G.A. § 9-2-5, and not under O.C.G.A. § 9-11-12(b)(6), which acted as a defense to the later filed action. *Kirkland v. Tamplin*, 283 Ga. App. 596, 642 S.E.2d 125, cert. denied, No. S07C0915, 2007 Ga. LEXIS 508 (Ga. 2007); cert. denied, 552 U.S. 1010, 128 S. Ct. 545, 169 L. Ed. 2d 373 (2007).

Motion to dismiss applies only to merits of case. — While motion to dismiss for failure to state a claim performs substantially same functions as former general demurrer, it does so only as to merits of claim, and raises no question of absence of venue appearing on the face of the complaint as was formerly raised by demurrer. *Williamson v. Perret's Farms, Inc.*, 128 Ga. App. 687, 197 S.E.2d 754 (1973).

Motion to dismiss under paragraph

How Defenses, etc.,**Presented (Cont'd)****7. Failure to State Claim (Cont'd)**

(b)(6) of this section goes solely to the merits. *Goolsby v. Regents of Univ. Sys.*, 141 Ga. App. 605, 234 S.E.2d 165 (1977).

Motion to dismiss does not raise dilatory matter or matter in abatement. — Motion to dismiss under paragraph (b)(6) of this section for failure to state a claim for which relief may be granted does not raise dilatory matter or matter in abatement as such motion goes solely to the merits. *Chatham v. Royal-Globe Ins. Cos.*, 135 Ga. App. 59, 217 S.E.2d 308 (1975).

Motion to dismiss under paragraph (b)(6) of this section for failure to state a claim for which relief may be granted does not raise questions of venue or process or service thereof, as such motion goes solely to the merits; this is the reason that consideration of evidence on such motion converts the motion into a motion for summary judgment. *Williamson v. Perret's Farms, Inc.*, 128 Ga. App. 687, 197 S.E.2d 754 (1973).

General demurrer is treated on appeal as motion to dismiss under paragraph (b)(6) of Ga. L. 1968, p. 1104, § 3 (see now O.C.G.A. § 9-11-12) for failure to state a claim upon which relief can be granted, and the ruling of the trial judge is considered as if it were based on the requirements of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8(a)). *Nipper v. Crisp County*, 120 Ga. App. 583, 171 S.E.2d 652 (1969).

Treatment of demurrer on appeal.

— On appeal, court must view petition attacked by general demurrer with regard to whether the petition states a claim for which relief may be granted; this is the test of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), which the court must apply on review regardless of when the judgment was entered below. *Hill v. Lariscy*, 118 Ga. App. 699, 165 S.E.2d 315 (1968).

Appellate court may regard general demurrer for failure to state a cause of action as a motion to dismiss for failure to state a claim for which relief may be granted. *Ghitter v. Edge*, 118 Ga. App.

750, 165 S.E.2d 598 (1968).

Motion not made in writing before trial. — Motion to dismiss for failure to state a claim can be considered although the motion is not made in writing before trial, since paragraph (h)(2) of O.C.G.A. § 9-11-12 specifically provides that: "A defense of failure to state a claim upon which relief can be granted . . . may be made . . . at the trial on the merits," and a motion made during the trial need not be reduced to writing. *Irvin v. Lowe's of Gainesville, Inc.*, 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Action involving trust and minority shareholders. — Because the trial court properly found that a Delaware appraisal proceeding was the exclusive remedy for a trust, and since the trust was no longer a shareholder in the wake of a corporate merger, the trust no longer had standing to assert such claims on the corporation's behalf, the trial court properly dismissed the trust's amended complaint for failure to state a claim upon which relief could be granted. *Paul & Suzie Schutt Irrevocable Family Trust v. NAC Holding, Inc.*, 283 Ga. App. 834, 642 S.E.2d 872 (2007), cert. denied, 2007 Ga. LEXIS 644 (Ga. 2007).

Construction of pleadings in light most favorable to plaintiff. — Since under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) issues are no longer formed by the pleadings, and pleadings serve only the purpose of giving notice to the opposite party of the general nature of the contentions of the pleader, it is no longer appropriate to construe the pleadings against the pleader, but the pleadings should be construed in the light most favorable to the pleader, with all doubts resolved in the pleader's favor, even though unfavorable constructions are possible. *DeKalb County v. Georgia Paperstock Co.*, 226 Ga. 369, 174 S.E.2d 884 (1970).

Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), on motion to dismiss, pleading attacked is construed in the pleading's most favorable light. *Gosser v. Diplomat Restaurant, Inc.*, 125 Ga. App. 620, 188 S.E.2d 412 (1972).

Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), when the sufficiency of a complaint is questioned, the

pleadings must be construed in the light most favorable to the plaintiff. *Massey v. Perkerson*, 129 Ga. App. 895, 201 S.E.2d 830 (1973).

When the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the new rules require that the complaint be construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor even though unfavorable constructions are possible; not unless the allegations of the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts should the complaint be dismissed. *Storm Sys. v. Kidd*, 157 Ga. App. 527, 278 S.E.2d 109 (1981); *Morgan v. Georgia Vitrified Brick & Clay Co.*, 196 Ga. App. 779, 397 S.E.2d 49 (1990).

All doubts resolved in plaintiff's favor. — On motion to dismiss, the complaint should be construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor. *Harper v. DeFreitas*, 117 Ga. App. 236, 160 S.E.2d 260 (1968); *Western Contracting Corp. v. State Hwy. Dep't*, 125 Ga. App. 376, 187 S.E.2d 690 (1972); *Goolsby v. Regents of Univ. Sys.*, 141 Ga. App. 605, 234 S.E.2d 165 (1977); *Quetgles v. City of Columbus*, 264 Ga. 708, 450 S.E.2d 677 (1994), cert. denied, 514 U.S. 1083, 115 S. Ct. 1794, 131 L. Ed. 2d 722 (1995).

Effect of possibility of contrary inferences. — Plaintiff is entitled to the most favorable inferences that can reasonably be drawn from the complaint, even if contrary inferences are also possible. *Harper v. DeFreitas*, 117 Ga. App. 236, 160 S.E.2d 260 (1968); *Western Contracting Corp. v. State Hwy. Dep't*, 125 Ga. App. 376, 187 S.E.2d 690 (1972).

When the sufficiency of a complaint is questioned by a motion to dismiss, the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) requires that the complaint be construed in the light most favorable to the plaintiff, with all doubts resolved in the plaintiff's favor, even though unfavorable constructions are possible. *Ghitter v. Edge*, 118 Ga. App. 750, 165 S.E.2d 598 (1968).

It is immaterial whether an allegation is one of fact or conclusion if the

complaint effectively states a claim for relief. *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369 (1977); *Ledford v. Meyer*, 249 Ga. 407, 290 S.E.2d 908 (1982).

True test is whether the pleading gives fair notice and states elements of claim plainly and succinctly, and not whether as an abstract matter the pleading states "conclusions" or "facts." *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369 (1977).

Fair notice of claim is standard. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), a petition or complaint is sufficient against a motion to dismiss if the petition or complaint gives a defendant fair notice of the nature and basis of the claim against the defendant. *Hill v. Lariscy*, 118 Ga. App. 699, 165 S.E.2d 315 (1968).

Reasonable notice not given. — Because a couple's complaint premised on an erroneous listing in a telephone directory failed to allege any of the claims the couple sought to pursue, specifically, interfering with the couple's right of quiet enjoyment of their property and nuisance, and even after giving the couple the benefit of all reasonable inferences that could be drawn from the couple's complaint, the fact remained that the directory's publisher was not placed on reasonable notice of whether the couple was asserting a claim in equity, contract, or tort, much less whether the couple were pleading a particular tort such as negligence or libel, the complaint was properly dismissed as failing to state a claim upon which relief could be granted. *Patrick v. Verizon Directories Corp.*, 284 Ga. App. 123, 643 S.E.2d 251 (2007).

Complaint is not required to set forth cause of action, but need only set forth a claim for relief. *Christner v. Eason*, 146 Ga. App. 139, 245 S.E.2d 489 (1978).

Pleading not dismissed unless no facts support claim. — Pleading should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff's claim which would entitle the plaintiff to relief. *Bray v. Central Chevrolet, Inc.*, 118 Ga. App. 493, 164 S.E.2d 286 (1968); *Hill v. Lariscy*, 118

How Defenses, etc.,**Presented (Cont'd)****7. Failure to State Claim (Cont'd)**

Ga. App. 699, 165 S.E.2d 315 (1968); Jones v. Frances Wood Wilson Found., Inc., 119 Ga. App. 28, 165 S.E.2d 882 (1969); General Tel. Co. v. Pritchett, 119 Ga. App. 53, 165 S.E.2d 918 (1969); Leonas v. Johnson, 122 Ga. App. 160, 176 S.E.2d 506 (1970); Dillingham v. Doctors Clinic, 236 Ga. 302, 223 S.E.2d 625 (1976); Bryant v. Bryant, 236 Ga. 265, 223 S.E.2d 662 (1976); Rhyne v. Garfield, 236 Ga. 694, 225 S.E.2d 43 (1976); Atlanta Assocs. v. Westminster Properties, Inc., 242 Ga. 462, 249 S.E.2d 252 (1978); Moultrie v. Atlanta Fed. Sav. & Loan Ass'n, 148 Ga. App. 650, 252 S.E.2d 77 (1979); Harold Cohn & Assocs. v. Nix, 157 Ga. App. 262, 277 S.E.2d 274 (1981); Peoples Bank v. Austin, 159 Ga. App. 223, 283 S.E.2d 81 (1981); Jones v. Phillips, 183 Ga. App. 11, 357 S.E.2d 853 (1987); Hartford Ins. Co. v. Henderson & Son, 186 Ga. App. 592, 367 S.E.2d 859, aff'd, 258 Ga. 493, 371 S.E.2d 401 (1988).

Unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the plaintiff's claim, a motion under paragraph (b)(6) of this section to dismiss a complaint for failure to state a claim should not be granted. Harper v. DeFreitas, 117 Ga. App. 236, 160 S.E.2d 260 (1968); Poole v. City of Atlanta, 117 Ga. App. 432, 160 S.E.2d 874 (1968); Ghitter v. Edge, 118 Ga. App. 750, 165 S.E.2d 598 (1968); Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724 (1969); Bell v. Atlanta Cooperage Co., 121 Ga. App. 207, 173 S.E.2d 427 (1970); Rossville Fed. Sav. & Loan Ass'n v. Insurance Co. of N. Am., 121 Ga. App. 435, 174 S.E.2d 204 (1970); Peacock Constr. Co. v. Erickson's, Inc., 121 Ga. App. 544, 174 S.E.2d 276 (1970); Blower v. Jones, 226 Ga. 847, 178 S.E.2d 172 (1970); Western Contracting Corp. v. State Hwy. Dep't, 125 Ga. App. 376, 187 S.E.2d 690 (1972); Koehler v. Massell, 229 Ga. 359, 191 S.E.2d 830 (1972); Dean v. Dean, 229 Ga. 612, 193 S.E.2d 838 (1972); Oliver v. Irvin, 230 Ga. 248, 196 S.E.2d 429 (1973); City of Jonesboro v. Clayton

County Water Auth., 131 Ga. App. 218, 205 S.E.2d 475 (1974); Europa Hair, Inc. v. Browning, 133 Ga. App. 753, 212 S.E.2d 862 (1975); Goolsby v. Regents of Univ. Sys., 141 Ga. App. 605, 234 S.E.2d 165 (1977); Christner v. Eason, 146 Ga. App. 139, 245 S.E.2d 489 (1978); Harrell v. Monroe County, 147 Ga. App. 685, 250 S.E.2d 20 (1978); Isaac v. Butler's Shoe Corp., 511 F. Supp. 108 (N.D. Ga. 1980); Holloway v. Dougherty County Sch. Sys., 157 Ga. App. 251, 277 S.E.2d 251 (1981); Pace v. Smith, 248 Ga. 728, 286 S.E.2d 18 (1982); Property Pickup, Inc. v. Morgan, 249 Ga. 239, 290 S.E.2d 52 (1982); Ledford v. Meyer, 249 Ga. 407, 290 S.E.2d 908 (1982).

Unless it can be said that under no conceivable state of facts which the plaintiff might prove under allegations of the complaint would the plaintiff be entitled to any relief, a motion to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted ought not to be sustained. Sixth St. Corp. v. City Stores Co., 229 Ga. 99, 189 S.E.2d 407 (1972); Herndon v. Aultman-Beasley, Inc., 127 Ga. App. 743, 195 S.E.2d 250 (1972).

Basic premise of the new civil procedure is that it does away with issue pleadings and substitutes notice pleadings; hence, a petition should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of the plaintiff's claim thereunder which would entitle the plaintiff to relief. Satcher v. James H. Drew Shows, Inc., 122 Ga. App. 548, 177 S.E.2d 846 (1970).

Motion to dismiss for failure to state a claim is not to be granted unless under the pleadings, construed in a light most favorable to the plaintiff, the plaintiff can establish no set of facts that would entitle the plaintiff to relief against the defendant. Wehunt v. ITT Bus. Communications Corp., 183 Ga. App. 560, 359 S.E.2d 383 (1987).

In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) was from an orthopedist and not a fellow

neurosurgeon, and was thus insufficient as a matter of law to support the husband and wife's medical malpractice complaint as the statutory area of practice or specialty in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. *Abramson v. Williams*, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (2007).

Complaint failed to state a claim upon which relief could be granted because the defendants could not be said to have tortiously interfered with the defendant's own contract. *Professional Carpet Sys. v. Saefkow*, 212 Ga. App. 131, 441 S.E.2d 98 (1994).

Dismissal of a husband's legal malpractice claim against an attorney arising out of the attorney's representation of the husband's wife and child in three appeals was proper under O.C.G.A. § 9-11-12(b)(6) and did not violate the husband's Sixth and Seventh Amendment rights as there was no attorney-client relationship between the husband and the attorney. *Crane v. Albertelli*, 264 Ga. App. 910, 592 S.E.2d 684 (2003), cert. denied, 543 U.S. 819, 125 S. Ct. 481, 160 L. Ed. 2d 359 (2004).

Trial court did not err in granting judgment on the pleadings to the state revenue department on the two associations' challenges to regulations governing distribution of malt beverages in Georgia as the undisputed facts that appeared from the pleadings showed that the state revenue department's regulations were permitted under the plain language of statutory law and were consistent with legislative intent. *Ga. Oilmen's Ass'n v. Ga. Dep't of Revenue*, 261 Ga. App. 393, 582 S.E.2d 549 (2003).

Trial court erred when the court refused to dismiss a corporation's claim that shareholders who received the corporation's stock in a merger were unjustly enriched because the corporation did not allege that the shareholders abused or disregarded the corporate form of a company it acquired to enrich themselves. *McKesson Corp. v. Green*, 266 Ga. App. 157, 597 S.E.2d 447 (2004).

In an action filed by a buyer seeking specific performance of a land sales contract, the trial court properly dismissed the buyer's complaint as specific performance was not an available remedy given evidence that one of the sellers, who was one of three siblings that owned the property sought by the buyer, did not authorize a second sibling to sell the property. *Viola E. Buford Family Ltd. P'ship v. Britt*, 283 Ga. App. 676, 642 S.E.2d 383 (2007).

Motion to dismiss properly denied.

— Motion to dismiss a case brought by an insurance company against a corporation seeking indemnification for a payment made to settle a claim against an insured of the insurance company was properly denied when, while the corporation was an additional insured under the policy at issue, the policy provided an exclusion for claims based on the sole negligence of an additional insured as a lessor; whether any of the policy exceptions applied to the exclusion was an issue to be resolved as the case proceeded. *AEW #2 Corp. v. Fed. Ins. Co.*, 268 Ga. App. 740, 603 S.E.2d 22 (2004).

Motion to dismiss improperly denied. — Trial court erroneously denied a motion to dismiss a personal injury action filed by two parents against two social hosts, arising out of the death of the parents' 20-year-old daughter, which alleged that the social hosts served the daughter alcohol, and the daughter died when the daughter drunkenly drove into a tree after leaving the social hosts' home as the action was barred due to the fact that the daughter had already reached the age of majority at the time of the accident. *Penny v. McBride*, 282 Ga. App. 590, 639 S.E.2d 561 (2006), cert. denied, 2007 Ga. LEXIS 223 (Ga. 2007).

Motion to dismiss improperly granted. — In a student's action against a college alleging ordinary and gross negligence, premises liability, and intentional infliction of emotional distress, because the student was not required to present evidence of foreseeability, but instead had to only allege facts that, if proven, could create a factual question for the jury as to whether the violent attack that was the subject of the suit, was foreseeable, the trial court erroneously dismissed the suit

How Defenses, etc.,**Presented (Cont'd)****7. Failure to State Claim (Cont'd)**

at such an early stage of the proceedings for failure to state a claim upon which relief could be granted. *Love v. Morehouse College, Inc.*, 287 Ga. App. 743, 652 S.E.2d 624 (2007).

Because it was possible that a former employee could introduce evidence within the framework of the complaint establishing that the alleged oral defamatory statements were disseminated to other co-workers who had no duty or authority giving them reason to receive the information, the Court of Appeals of Georgia erred in holding otherwise and agreeing with the trial court that the employee failed to state a claim upon which relief could be granted. *Scouten v. Amerisave Mortg. Corp.*, 283 Ga. 72, 656 S.E.2d 820 (2008).

Trial court erroneously dismissed a couple's complaint upon grounds that the complaint failed to state a claim upon which relief could be granted because the complaint alleged intentional torts against an attorney and that attorney's law firm, and not claims of professional malpractice or negligence; therefore, the complaint was not required to be accompanied by an expert's affidavit pursuant to O.C.G.A. § 9-11-9.1. *Walker v. Wallis*, 289 Ga. App. 676, 658 S.E.2d 217 (2008).

Petition for mandamus properly dismissed. — Trial court properly dismissed a landowners' petition for mandamus filed against a judge as premature and for failing to state a claim as the landowner opted to file the petition, but could have requested a hearing to allow the judge an opportunity to rule on the previously filed motions because the 90-day ruling period applicable to those motions pursuant to O.C.G.A. § 15-6-21(b) had not yet expired at the time the petition had been filed. *Voyles v. McKinney*, 283 Ga. 169, 657 S.E.2d 193 (2008).

If, within framework of complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient. *Peacock Constr. Co. v. Erickson's, Inc.*, 121 Ga. App. 544, 174 S.E.2d 276 (1970); *Koehler*

v. Massell, 229 Ga. 359, 191 S.E.2d 830 (1972); *Dean v. Dean*, 229 Ga. 612, 193 S.E.2d 838 (1972); *Christner v. Eason*, 146 Ga. App. 139, 245 S.E.2d 489 (1978).

Counterclaims. — Just as with an original claim, a motion to dismiss a counterclaim for failure to state a claim upon which relief can be granted should not be granted unless it appears to a certainty that the defendant would be entitled to no relief under any state of facts which could be proved in support of the counterclaim, and if within the framework of the complaint evidence may be introduced which will sustain the grant of relief to the defendant, the counterclaim is sufficient. *Grant v. Fourth Nat'l Bank*, 229 Ga. 855, 194 S.E.2d 913 (1972).

When one count sets forth a claim, complaint not overruled. — Motion under paragraph (b)(6) of this section to dismiss a complaint composed of several counts, when one of the counts sets forth a claim, should not be overruled. *Western Contracting Corp. v. State Hwy. Dep't*, 123 Ga. App. 331, 181 S.E.2d 89 (1971), later appeal, 125 Ga. App. 376, 187 S.E.2d 690 (1972).

Res judicata. — Sustaining of a motion to dismiss for failure to state a claim is res judicata on the merits of the claim. *Dillingham v. Doctors Clinic*, 236 Ga. 302, 223 S.E.2d 625 (1976).

Pro se complaint is not held to stringent standards of formal pleadings and the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff's claim which would entitle the plaintiff to relief. *Johnson v. Jones*, 178 Ga. App. 346, 343 S.E.2d 403 (1986).

Noncompliance with the requirement for an affidavit in a malpractice action is properly challenged in a defensive pleading seeking dismissal of the complaint for failure to state a claim, not by a summary judgment proceeding. *Williams v. Hajosy*, 210 Ga. App. 637, 436 S.E.2d 716 (1993).

Distinction between ordinary negligence and professional malpractice under § 9-11-9.1. — Trial court must decide as a matter of law if the negligence alleged by a plaintiff is, in fact, ordinary

negligence or professional malpractice, requiring an expert's affidavit under O.C.G.A. § 9-11-9.1. *Drawdy v. DOT*, 228 Ga. App. 338, 491 S.E.2d 521 (1997).

Failure to comply with a mediation provision before filing a petition for modification of a divorce decree made the petition subject to a motion to dismiss for failure to state a claim and, although the defendant failed to raise this defense in the initial answer, the defense was not waived. *Gould v. Gould*, 240 Ga. App. 481, 523 S.E.2d 106 (1999).

Prosecution by one not proper party plaintiff. — When a motion to dismiss pursuant to paragraph (b)(6) of O.C.G.A. § 9-11-12 is made based on the prosecution of a suit by one not the proper party plaintiff, such a motion is to be treated like a matter in abatement, in that the erring party, rather than having judgment entered against the party, is now simply precluded from proceeding with the suit until the error has been corrected by the substitution of the proper party plaintiff. *Amica Mut. Ins. Co. v. Fleet Multi Fuel Corp.*, 178 Ga. App. 859, 344 S.E.2d 742 (1986).

Conversion to summary judgment motion. — Motion to dismiss, as considered by the trial judge after hearing evidence, must be treated as a motion for summary judgment. *Daylight Indus., Inc. v. Allen*, 123 Ga. App. 69, 179 S.E.2d 542 (1970).

Consideration of evidence on motion under paragraph (b)(6) of this section converts the motion into a summary judgment motion as summary judgment goes to the merits. *Chatham v. Royal-Globe Ins. Cos.*, 135 Ga. App. 59, 217 S.E.2d 308 (1975).

When on a hearing on a motion to dismiss a complaint because of failure to state a claim, evidence is introduced and admitted by the court, a motion to dismiss is converted to one for summary judgment. *Jaynes v. Douglas*, 147 Ga. App. 678, 250 S.E.2d 14 (1978).

When a motion to dismiss is supplemented by argument of counsel and matters outside of the pleadings, it is treated as a motion for summary judgment. *Blasingame v. Blasingame*, 249 Ga. 791, 294 S.E.2d 519 (1982).

Motion to dismiss for failure to state a claim was converted into one for summary judgment when the letter upon which the disputed claim was founded, not made part of the pleadings, was yet clearly considered by the trial court and the plaintiffs did not object to the court's consideration of this extrinsic evidence, nor did the plaintiffs raise any issue concerning the procedural limitations applicable to hearings on motions for summary judgment. *Davidson v. American Fitness Ctrs., Inc.*, 171 Ga. App. 691, 320 S.E.2d 824 (1984).

When the court considered evidence and granted summary judgment, a motion to dismiss was subsumed and left nothing independent of it to review. *Evans v. Richardson*, 189 Ga. App. 751, 377 S.E.2d 521 (1989).

Despite the trial court's statement that the court was considering a motion to dismiss, when the motion was supplemented by affidavits of the parties and matters outside the pleadings, the motion was therefore converted into a motion for summary judgment. *White House, Inc. v. Winkler*, 202 Ga. App. 603, 415 S.E.2d 185 (1992).

Reversible error occurred when the trial court granted the defendant's motion to dismiss, after converting the motion into one for summary judgment on the ground that matters outside the pleadings were considered, without providing the plaintiff with notice and an opportunity to present evidence. *Sumner v. Department of Human Resources*, 225 Ga. App. 91, 483 S.E.2d 602 (1997).

Trial court erred when the court converted the defendant mother's motion to dismiss to a motion for summary judgment and then granted the motion without providing notice to the plaintiff father of the conversion and an opportunity to submit evidence and be heard within 30 days. *Simmons v. Brady*, 251 Ga. App. 717, 555 S.E.2d 94 (2001).

When matters outside the pleadings are considered by the trial court on a motion to dismiss for failure to state a claim, the motion is converted to a motion for summary judgment pursuant to O.C.G.A. § 9-11-56, and the trial court has the burden of informing the party opposing

How Defenses, etc.,**Presented (Cont'd)****7. Failure to State Claim (Cont'd)**

the motion that the court will consider matters outside the pleadings and that, if the opposing party so desires, the party has no less than 30 days to submit evidence in response to the motion for summary judgment. *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006).

Trial court properly dismissed a class action suit arising out of a breach of a lease agreement and filed by a group of uninsured patients against a hospital for failure to state a claim upon which relief could be granted, which the court converted to a motion for summary judgment, as the class members: (1) failed to timely object to the merits of the oral motion; (2) acquiesced to the evidence in support of the motion; and (3) failed to show they were third-party beneficiaries of the agreement with sufficient standing to sue upon a breach of its terms. *Davis v. Phoebe Putney Health Sys.*, 280 Ga. App. 505, 634 S.E.2d 452 (2006).

When a party did not object in the trial court to the conversion of a motion to dismiss for failure to state a claim into one for summary judgment, and the party did not challenge or address the conversion on appeal, any objection to the conversion was waived. *Action Concrete v. Portrait Homes - Little Suwanee Point, LLC*, 285 Ga. App. 650, 647 S.E.2d 353 (2007).

When a trial court's order granting a motion to dismiss under O.C.G.A. § 9-11-12(b)(6) was based on the parties' agreement, which was attached to and incorporated in the pleadings, the trial court's consideration of the motion did not convert the motion to dismiss to a motion for summary judgment. *Brown v. Gadson*, 288 Ga. App. 323, 654 S.E.2d 179 (2007), cert. denied, 2008 Ga. LEXIS 236 (Ga. 2008).

Not converted into summary judgment motion when no evidence introduced. — Motion to dismiss for failure to state a claim upon which relief can be granted is not converted into a motion for summary judgment when there is absolutely no evidence introduced. *Holloway v.*

Dougherty County Sch. Sys., 157 Ga. App. 251, 277 S.E.2d 251 (1981).

When matter outside the pleadings was presented to and not excluded by the court in disposition of motions for dismissal for failure to state a claim, such motions must be treated as motions for summary judgment. *Mica-Top Fixture Co. v. Frank G. Shattuck Co.*, 124 Ga. App. 100, 183 S.E.2d 15 (1971); *Bays v. River Oaks Constr., Inc.*, 244 Ga. App. 401, 535 S.E.2d 543 (2000).

Support of motion by affidavits or depositions. — When a motion to dismiss plaintiff's petition for failure to state a claim on which relief may be granted is supported by affidavits or depositions, the motion should be treated as a motion for summary judgment. *Brackett v. H.R. Block & Co.*, 119 Ga. App. 144, 166 S.E.2d 369 (1969); *McGill v. Allis-Chalmers Credit Corp.*, 133 Ga. App. 700, 212 S.E.2d 27 (1975).

Failure to file expert affidavit. — Husband's pro se wrongful death action against a doctor and health service providers was dismissed for failure to attach an expert affidavit under O.C.G.A. § 9-11-9.1, which was the equivalent of a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6), when the husband alleged negligence due to the doctor's issuance of a do not resuscitate order with respect to the husband's wife; such an action involved professional negligence and medical questions and, thus, required an expert affidavit. *Hardwick v. Atkins*, 278 Ga. App. 79, 628 S.E.2d 173 (2006).

Motion to dismiss for failure to file an expert affidavit under O.C.G.A. § 9-11-9.1 had to be considered as a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6). *Burke v. Paul*, 289 Ga. App. 826, 658 S.E.2d 430 (2008).

Read in the son and the administrator's favor, the new complaint adequately pled fraud, battery, conspiracy, and wrongful death against the doctors, the nurses, and the hospital as the complaint asserted that the doctor knowingly and falsely represented to the family that the deceased's comatose condition was the result of metastasized cancer rather than aspiration, and that the doctor's intention in doing so

was to deceive the family as to its actual cause. The complaint also asserted that the second doctor and the nurses were complicit in the doctor's misrepresentations and assisted the doctor in the deception of the family; that the family relied on the misrepresentations when the family agreed to admit the deceased to hospice care; and that as a proximate result of being admitted to hospice, the deceased was denied food and water and suffered renal failure. Therefore, because the son and the administrator were not required to support their adequately pled claims for fraud, battery, and conspiracy with an O.C.G.A. § 9-11-9.1 affidavit, the trial court erred when the court granted the motion to dismiss the claims. *Estate of Shannon v. Ahmed*, 304 Ga. App. 380, 696 S.E.2d 408 (2010).

Affidavits made in support of motions under subsection (b) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12) must conform to the requirements of former Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56(e)). *McPherson v. McPherson*, 238 Ga. 271, 232 S.E.2d 552 (1977).

Notice of conversion to summary judgment motion required. — When a motion to dismiss is converted to one for summary judgment, the opposing party must be given 30-days notice of the motion. *Jaynes v. Douglas*, 147 Ga. App. 678, 250 S.E.2d 14 (1978).

Plaintiffs are entitled to notice of conversion of a motion to dismiss into a motion for summary judgment and 30 days to respond to such motion. *Williams v. Columbus*, 151 Ga. App. 311, 259 S.E.2d 705 (1979); *Odum v. Montgomery*, 249 Ga. App. 211, 547 S.E.2d 770 (2001).

In an interpleader action involving a dispute over the payment of health insurance benefits, the trial court properly granted the hospital's motion for a judgment on the pleadings as there was no genuine issue of fact that the hospital was owed the amount for the medical expenses at issue and the trial court found that a purported settlement agreement between the employee's counsel and the hospital for less than the full amount was unenforceable as it lacked consideration. The employee agreed to waive oral argument

on all motions pending before the trial court and, therefore, acquiesced in the trial court's procedure of treating the hospital's motion for judgment on the pleadings as one for summary judgment, therefore, the trial court did not err in treating the hospital's motion as such without providing formal notice or in failing to hold a hearing on that motion. *Lamb v. Fulton-DeKalb Hosp. Auth.*, 297 Ga. App. 529, 677 S.E.2d 328 (2009).

Notice required unless waived by opposing party. — There must be proper notice of a motion for summary judgment, and if the motion is to be heard on oral testimony, proper notice must be given to the opposite party, unless notice is waived. *Myers v. McLarty*, 150 Ga. App. 432, 258 S.E.2d 56 (1979).

Absent waiver, trial court may not convert a motion to dismiss to a motion for summary judgment without affording the opposing party the required statutory notice. *Sibley v. City of Atlanta*, 152 Ga. App. 723, 263 S.E.2d 698 (1979).

Motion for summary judgment may be made orally at a hearing for temporary relief. *Royston v. Royston*, 236 Ga. 648, 225 S.E.2d 41 (1976).

It was harmless error for court to proceed, over the plaintiff's objection, to receive evidence and consider motion to dismiss as one for summary judgment, without allowing the plaintiff time to prepare the plaintiff's evidence since the plaintiff and an officer of the defendant company were both present at the initial hearing, testified, and were cross-examined, all relevant documentary evidence was identified and admitted, and the evidence showed that there was no material issue of fact to be determined but only two questions of law. *Leach v. Midland-Guardian Co.*, 127 Ga. App. 562, 194 S.E.2d 260 (1972).

Evidence must demand finding. — In summary judgment hearings under subsection (b) of Ga. L. 1972, p. 689, § 4 and 5 (see now O.C.G.A. § 9-11-12) and under Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56), evidence must demand a finding that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. *Myers v. McLarty*, 150 Ga.

How Defenses, etc.,**Presented (Cont'd)****7. Failure to State Claim (Cont'd)**

App. 432, 258 S.E.2d 56 (1979).

Consideration of exhibits. — In city's suit against a landowner for specific performance of parties' agreement, city's complaint attached the parties' agreement along with several other exhibits, which under O.C.G.A. § 9-11-10(c) were properly considered by the trial court in ruling upon the landowner's motion to dismiss under O.C.G.A. § 9-11-12(b)(6). *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

Ruling on motion to dismiss when matters outside pleadings presented.

— It is not necessary to rule on motion to dismiss when matters outside the pleadings are presented to the court and the motion is treated as one for summary judgment. *Citizens & S. Nat'l Bank v. Leaptrot*, 225 Ga. 783, 171 S.E.2d 555 (1969).

Appellate court not to broaden base of trial court's ruling.

— When no motion for summary judgment is made, and it appears from the order of the trial court that judgment was entered on consideration of the petition only, without reference to the defendant's pleadings or the affidavit contained in the record, the appellate court cannot broaden the base of the trial court's ruling, but will look only to the petition to determine whether it should have been dismissed. *Brckett v. H.R. Block & Co.*, 119 Ga. App. 144, 166 S.E.2d 369 (1969); *McGill v. Allis-Chalmers Credit Corp.*, 133 Ga. App. 700, 212 S.E.2d 27 (1975).

Motion for summary judgment on basis of complaint equivalent to motion to dismiss.

— When motion for summary judgment is made by the defendant solely on the basis of the complaint, the motion is functionally equivalent to a motion to dismiss for failure to state a claim, and the complaint should be liberally construed in favor of the complainant, with the facts alleged in the complaint taken as true. *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369 (1977).

Effect of pretrial order on filing motion.

— It was inappropriate for the court

to entertain the defendants' oral motion to dismiss for failure to state a claim made at the call of the case for trial when the pretrial order required all further motions to be filed at least 30 days prior to trial. *Irvin v. Lowe's of Gainesville, Inc.*, 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Alleging conspiracy does not prevent dismissal of statutorily abolished cause of action.

— Inasmuch as the main cause of action for alienation of a minor son's affections alleged in the complaint has been abolished statutorily, the trial court was correct in dismissing the complaint, although the plaintiff ingeniously camouflaged the plaintiff's suit with an allegation of conspiracy. *Hyman v. Moldovan*, 166 Ga. App. 891, 305 S.E.2d 648 (1983).

When plaintiff, having received nothing for the plaintiff's claimed homestead exemption,

commenced an action against the clerk of superior court for the amount of the plaintiff's homestead exemption, alleging that the loss thereof was because the defendant had failed to record the deeds, but the plaintiff had no aggregate interest in the property against which to assert the plaintiff's claimed homestead exemption, the plaintiff had no claim upon which relief could be granted, and the defendant was entitled to summary judgment as a matter of law. *Wallis v. Clerk, Superior Court*, 166 Ga. App. 775, 305 S.E.2d 639 (1983).

Legal malpractice action based on the attorneys' failure to file a workers' compensation claim on the plaintiff's behalf prior to the expiration of the applicable one-year statute of limitation was not subject to dismissal for failure to state a claim based on the contention that it was premature because the workers' compensation claim had not been adjudicated as barred by the statute of limitation. *Sapp v. Coshatt*, 245 Ga. App. 549, 538 S.E.2d 193 (2000).

Tortious interference with prospective business.

— Dismissal of a husband's claim for "unlawful interference with prospective economic advantage," which was apparently a claim of tortious interference with potential business relations, was properly dismissed under O.C.G.A. § 9-11-12(b)(6) and did not vio-

late the husband's Sixth and Seventh Amendment constitutional rights when the husband alleged that an attorney's prosecution of three appeals on behalf of the husband's wife and child was ultimately unsuccessful, and the husband might have experienced some financial benefit had the appeals been successful. These allegations in no way asserted or demonstrated: (1) improper action or wrongful conduct by the attorney; (2) that the attorney acted with the intent to injure; (3) that the attorney caused a party to fail to enter into an anticipated business relationship with the husband; or (4) that the attorney's conduct damaged the husband. *Crane v. Albertelli*, 264 Ga. App. 910, 592 S.E.2d 684 (2003), cert. denied, 543 U.S. 819, 125 S. Ct. 481, 160 L. Ed. 2d 359 (2004).

Failure to state a claim by third party beneficiaries. — Trial court did not err in granting a clinic's motion under O.C.G.A. § 9-11-12(b)(6) to dismiss for failure to state a claim the patients' action alleging that the patients were entitled to damages for breach of contract after the clinic where the patients received free outpatient dialysis treatment notified the patients that the clinic was closing because the complaint failed to state a claim that the patients were entitled as third-party beneficiaries to sue for breach of the contract between the clinic and another medical provider to provide free dialysis treatment for one year after the clinic closed. The contract did not clearly show on the contract's face that the contract was intended for the benefit of the patients as required under O.C.G.A. § 9-2-20(b), and the contract plainly showed that there was no intent to confer third-party beneficiary status on existing clinic outpatients. *Andrade v. Grady Mem'l Hosp. Corp.*, 308 Ga. App. 171, 707 S.E.2d 118 (2011).

8. Failure to Join Party

Failure to join an indispensable party is a defense which may be raised by motion. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

Not grounds for dismissal for failure to state claim. — While failure to name an individual as a party might be

the basis for corrective action as prescribed in Ga. L. 1972, p. 689, § 7 (see now O.C.G.A. § 9-11-19), it is not cause for dismissal of the complaint under grounds of failure to state a claim upon which relief can be granted. *Empire Banking Co. v. Martin*, 133 Ga. App. 115, 210 S.E.2d 237 (1974).

When not specifically raised, failure to name an indispensable party will not subject a claim to a motion to dismiss. *Empire Banking Co. v. Martin*, 133 Ga. App. 115, 210 S.E.2d 237 (1974).

Parties may be dropped or added by order of court on motion of any party or of the party's own initiative, at any stage of the action, including appeal, and on such terms as are just. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

When there has been a nonjoinder of a necessary party, such party may be added on motion of any party or by the court on the court's own initiative. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

When failure to join party amendable defect on appeal. — When question of an indispensable party is expressly passed upon by the trial court, it will be held that the plaintiff had necessary opportunity to seek addition of such party, but in absence of any disclosure by the record of an intent to raise or pass upon such question in the trial court, such defect will be deemed an amendable defect. *King v. King*, 228 Ga. 818, 188 S.E.2d 502 (1972).

When question of an indispensable party is expressly passed upon by the trial court, it will be held that the plaintiff had such notice as would have afforded the plaintiff an opportunity to seek the addition of such party, but when neither a motion to dismiss nor judgment of the trial court disclosed any intent to raise or pass upon such question, it will be deemed, for purpose of review of judgment overruling a motion to dismiss for failure to state a claim, as an amendable defect. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

Summary judgment improper. — Since a real-party-in-interest objection is a matter in abatement and does not go to the merits of an action, such an objection cannot be disposed of by means of sum-

How Defenses, etc.,**Presented (Cont'd)****8. Failure to Join Party (Cont'd)**

mary judgment but is properly disposed of pursuant to a motion to dismiss. *Fleming v. Caras*, 170 Ga. App. 579, 317 S.E.2d 600 (1984).

Judgments on the Pleadings**1. In General****Related to summary judgment.** —

Motion for judgment on the pleadings is closely related to a motion for summary judgment. *Dukes v. Joyner*, 234 Ga. 526, 216 S.E.2d 822 (1975).

Equivalence to motion to dismiss.

— When party moving for judgment on the pleadings does not introduce affidavits, depositions, or interrogatories in support of the party's motion, such motion is the equivalent of a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. *Seaboard Coast Line R.R. v. Dockery*, 135 Ga. App. 540, 218 S.E.2d 263 (1975).

When the defendant filed a motion for judgment on the pleadings but did not submit any affidavits, depositions, or interrogatories in support of the motion, the motion was treated as a motion to dismiss for failure to state a claim upon which relief could be granted. *Cox v. Turner*, 268 Ga. App. 305, 601 S.E.2d 728 (2004).

Admissions of movant on motion for judgment on pleadings. — For purposes of the defendant's motion for judgment on the pleadings, all well-pleaded allegations of the plaintiff's complaint are taken as true and all allegations of defendant's affirmative defense are taken as false. *Hancock v. Nashville Inv. Co.*, 128 Ga. App. 58, 195 S.E.2d 674 (1973).

For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of opposing party's pleading are taken as true, and all allegations of the moving party which have been denied are taken as false. *Pressley v. Maxwell*, 242 Ga. 360, 249 S.E.2d 49 (1978).

For the purposes of a subsection (c) motion, all well-pleaded material allegations of the opposing party's pleadings are taken as true, and all allegations of the

moving party which have been denied are taken as false, but conclusions of law are not so admitted. *Seaboard Coast Line R.R. v. Dockery*, 135 Ga. App. 540, 218 S.E.2d 263 (1975); *Christner v. Eason*, 146 Ga. App. 139, 245 S.E.2d 489 (1978).

When a party makes a motion for judgment on the pleadings, the party admits, for the purposes of the motion, the truth of the party's adversary's allegations, and the party is also deemed to have admitted that those allegations which have been denied by the adversary are false. *Allen v. Myers-Dickson Furn. Co.*, 122 Ga. App. 194, 176 S.E.2d 508 (1970).

After denial of motion, movant's admissions not binding. — After denial of a motion for judgment on the pleadings, admissions made by the moving party are not binding and conclusive so as to preclude the moving party from contending and proving at trial that denials in the moving party's answer of allegations of the moving party's opponent are true. *Allen v. Myers-Dickson Furn. Co.*, 122 Ga. App. 194, 176 S.E.2d 508 (1970).

Concessions made by party on motion for judgment on pleadings do not continue over for separate consideration of adversary's motion for judgment on the pleadings. *Allen v. Myers-Dickson Furn. Co.*, 122 Ga. App. 194, 176 S.E.2d 508 (1970).

Moving party must be clearly entitled to judgment. — Judgment on the pleadings may be granted only if, on the facts as so admitted, the moving party is clearly entitled to judgment. *Seaboard Coast Line R.R. v. Dockery*, 135 Ga. App. 540, 218 S.E.2d 263 (1975); *Christner v. Eason*, 146 Ga. App. 139, 245 S.E.2d 489 (1978).

Pleadings must affirmatively show that no claim in fact exists. — Since to justify a judgment on the pleadings the pleadings must affirmatively show that no claim in fact exists, the appellant's pleadings alleging the appellee's violation of a federal act were not sufficient to justify a judgment on the pleadings since the federal act did not at all address the appellant's allegations against the appellee. *Bergen v. Martindale-Hubbell, Inc.*, 176 Ga. App. 745, 337 S.E.2d 770 (1985), appeal dismissed and cert. denied, 479 U.S.

803, 107 S. Ct. 45, 93 L. Ed. 2d 7 (1986).

When plaintiff may not move for judgment on pleadings. — Plaintiff may not move for judgment on the pleadings when the answer raises issues of fact which if proved would defeat recovery. *Kramer v. Johnson*, 121 Ga. App. 848, 176 S.E.2d 108 (1970).

Judgment granted when complaint time barred. — In a medical malpractice action, when the averments in the complaint clearly showed that the negligent or wrongful act or omission occurred in March 1984, and the complaint was not filed until June 1995, the complaint was barred by O.C.G.A. § 9-3-71(b) (five-year limitation period) and the court did not err by granting judgment on the pleadings to the defendants. *Braden v. Bell*, 222 Ga. App. 144, 473 S.E.2d 523 (1996).

When motion for judgment on pleadings is based on insufficiency of the complaint, the motion should not be granted unless the allegations of the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts. *Frady v. Irvin*, 245 Ga. 307, 264 S.E.2d 866 (1980).

Complete failure to state cause or defense. — Granting of a motion for judgment on the pleadings under subsection (c) of this section is proper only when there is a complete failure to state a cause of action or defense. *Pressley v. Maxwell*, 242 Ga. 360, 249 S.E.2d 49 (1978); *Howard v. Bank S.*, 209 Ga. App. 407, 433 S.E.2d 625 (1993); *Maxwell v. Cronan*, 241 Ga. App. 491, 527 S.E.2d 1 (1999).

Under a final judgment on a separate maintenance action, the property divided between the parties became the separate estate of each party to whom it was awarded. Therefore, when the husband brought an action two years later, alleging the parties reconciled and cohabited prior to the wife's death, arguing the reconciliation rendered the agreement on the separate maintenance action void so that the property which the wife attempted to dispose of by will was not hers, there was a complete failure to state a cause of action and the trial court properly granted judgment on the pleadings. *Gideon v. Farlow*, 258 Ga. 633, 373 S.E.2d 362 (1988).

When the plaintiff sued the defendant

for malicious prosecution, after the defendant's request for a criminal arrest warrant against the plaintiff was dismissed and no arrest warrant was issued, the trial court properly granted the defendant's motion for judgment on the pleadings because the undisputed lack of the issuance of a valid warrant, accusation, indictment, or summons was fatal to the plaintiff's malicious prosecution claim. *Cox v. Turner*, 268 Ga. App. 305, 601 S.E.2d 728 (2004).

Because the minority members of a limited liability company failed to show at least one of the four criteria required for the members to proceed directly instead of derivatively, and the complaint was replete with general allegations of injuries separate and apart from the other shareholders, but the allegations did not demonstrate how this was true, judgment on the pleadings was properly entered against the minority members. *Southwest Health & Wellness, LLC v. Work*, 282 Ga. App. 619, 639 S.E.2d 570 (2006).

Because O.C.G.A. § 33-4-7 applied only to an insurer's bad faith in responding to claims for property damage, an insurer was properly granted a judgment on the pleadings as a complaint asserting that the insurer acted in bad faith in responding to a claimant's claims for personal injury failed to state a claim upon which relief under the statute could be granted. *Mills v. Allstate Ins. Co.*, 288 Ga. App. 257, 653 S.E.2d 850 (2007).

Lack of standing. — Employee's action to enjoin the enforcement of a non-compete clause in a contract between the employer and the employee's desired physician, which was treated as a judgment on the pleadings on appeal, was properly dismissed on standing grounds as the employee was neither a party to the contract nor an intended beneficiary of the contract. *Haldi v. Piedmont Nephrology Assocs., P.C.*, 283 Ga. App. 321, 641 S.E.2d 298 (2007).

Judgment erroneously denied when court lacked jurisdiction over contempt petition. — Because a trial court lacked jurisdiction to entertain a petition to hold a spouse in contempt of a divorce decree entered in another county in the absence of a petition to modify the

Judgments on the Pleadings (Cont'd)
1. In General (Cont'd)

decree, the trial court erred in denying that spouse's motion for judgment on the pleadings, or in the alternative, for a change of venue to that county's court that rendered the original judgment of divorce. *Jacob v. Koslow*, 282 Ga. 51, 644 S.E.2d 857 (2007).

Judgment on pleadings on one of several counts. — In interest of saving time, it is practical for a trial judge to enter judgment on the pleadings as to one count of a complaint if such count is subject to the motion, even though the movant may not be entitled to such judgment as to all counts. *First Nat'l Bank v. Osborne*, 233 Ga. 602, 212 S.E.2d 785 (1975).

Time for appeal of partial judgment on pleadings. — Partial judgment on the pleadings, when no matter outside the pleadings was presented or considered by the court, was not a partial summary judgment, and the plaintiffs had the right to await entry of final judgment disposing of the entire case before the plaintiffs entered an appeal. *Goolsby v. Allstate Ins. Co.*, 130 Ga. App. 881, 204 S.E.2d 789 (1974).

Treatment of averments. — In an action to recover under a payment bond filed by a supplier, because the pleadings did not show that the supplier was unable to establish a defect in the notice of commencement, and a general contractor averred in its first affirmative defense that it had filed a notice of commencement with the Clerk of the Superior Court of Fulton County and had posted the notice of commencement at the project site, such an averment had to be considered to be denied by the supplier for purposes of a motion for judgment on the pleadings. *Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 279 Ga. App. 894, 633 S.E.2d 59 (2006).

When facts show without dispute scheme to extract more than legal rate of interest for the use of money, such question need not be submitted to the jury, and it is not error for the trial court to grant the plaintiff's motion for a judgment on the pleadings under subsec-

tion (c) of this section. *Cook v. Young*, 225 Ga. 26, 165 S.E.2d 727 (1969).

Complaint sufficiently stated a promissory estoppel claim since the complaint alleged that a parent had repeatedly promised the parent's child that the parent would pay one-half of the costs of the child attending a private historically African-American college or university, that relying on this promise, the child applied to and was accepted into such a school, foregoing opportunities to apply to and enroll in other colleges or universities of significantly less cost, that the parent nevertheless refused to honor the parent's commitment, and that to avoid injustice, the parent should have been required to honor the parent's promise; thus, the trial court erred in granting the parent's motion to dismiss. *Houston v. Houston*, 267 Ga. App. 450, 600 S.E.2d 395 (2004).

Divorce granted on ground for irretrievable brokenness should be granted to both parties equally, and while such divorce may properly be granted on the pleadings, the divorce should be granted to both parties. *Herring v. Herring*, 237 Ga. 771, 229 S.E.2d 756 (1976).

Factual issues in restrictive covenant dispute. — In an agent's suit against an insurance company seeking to invalidate restrictive covenants in an agreement to sell insurance products, the court held that the trial court properly denied the agent's motion for judgment on the pleadings as to a confidential and proprietary information provision because it could not be said as a matter of law that the information defined as such did not constitute a trade secret or merely confidential information relating to the company's business. *Holland Ins. Group, LLC v. Senior Life Ins. Co.*, 329 Ga. App. 834, 766 S.E.2d 187 (2014).

Judgment on the pleadings properly granted. — In a declaratory judgment action seeking a declaration as to the enforceability of non-compete clauses in an employment contract, the trial court properly granted the competitor judgment on the pleadings because it correctly found that the pleadings showed that the lack of any limit on the scope of the restricted work or the solicitation of former customers were void and unenforce-

able under the non-severability rule as a matter of law. *Lapolla Indus. v. Hess*, 325 Ga. App. 256, 750 S.E.2d 467 (2013).

Judgment on the pleadings proper under firemen's rule. — Trial court properly granted judgment on the pleadings pursuant to O.C.G.A. § 9-11-12 to a chemical company in an injured party's claims arising from exposure to chemicals while working as an emergency medical technician (EMT), as EMTs were included under Georgia's firemen's rule, and the injured party thus could not recover for the underlying negligence which caused the chemical spill. *Kapherr v. MFG Chem., Inc.*, 277 Ga. App. 112, 625 S.E.2d 513 (2005).

Judgment on the pleadings reversed. — Construing the pleadings in a light most favorable to showing a question of fact, in an action in which: (1) the pleadings did not disclose with certainty that a supplier would not be entitled to relief in the supplier's action against a general contractor and the contractor's surety; and (2) the appeals court did not consider the supplier's averments that its "Notice to Owner/Contractor" complied with O.C.G.A. §§ 10-7-31 and 44-14-361.5 or its admission that it received a copy of the notice of commencement to establish that the general contractor's notice of commencement was otherwise proper and timely filed as required by the statutes, the general contractor and the contractor's surety were not entitled to judgment on the pleadings. *Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 279 Ga. App. 894, 633 S.E.2d 59 (2006).

In a worker's suit alleging negligence on the part of a county with regard to the county allegedly failing to properly instruct and supervise the worker in the use of a portable tar kettle machine, the trial court erred by granting the county's motion for a judgment on the pleadings based on sovereign immunity as the worker sufficiently alleged that the machine was a vehicle as contemplated by O.C.G.A. § 33-24-51, which established a waiver of sovereign immunity if the county had purchased liability insurance to cover damages and injuries arising from the use of motor vehicles under the county's management. *Hewell v. Walton County*, 292 Ga. App. 510, 664 S.E.2d 875 (2008).

Trial court erred by granting judgment on the pleadings against the employee on the employee's claim that the manager tortiously interfered with the employee's employment contract with the employer. To the extent the complaint alleged that the manager took tortious actions as a stranger to the employment contract that contributed to the employee's termination, the complaint stated a cause of action; the employee alleged that the manager, while not employed by the employer, solicited and obtained an agreement with the chief financial officer to terminate the employee after the manager was re-hired. *Brathwaite v. Fulton-DeKalb Hosp. Auth.*, 317 Ga. App. 111, 729 S.E.2d 625 (2012).

Trial court erred by granting an auto dealership judgment on the pleadings as to a buyer's consumer fraud suit because it could not be said, as a matter of law, that the buyer would not be unable to show that the reliance on representations that the minivan was undamaged and never had been in a wreck was reasonable. *Raysoni v. Payless Auto Deals, LLC*, 296 Ga. 156, 766 S.E.2d 24 (2014).

2. Treatment as Summary Judgment Motion

Scope of summary judgment procedure. — Defenses enumerated, except paragraph (b)(6) of O.C.G.A. § 9-11-12, failure to state a claim upon which relief can be granted, are matters in abatement that are not within the scope of the summary judgment procedure. *International Indem. Co. v. Blakey*, 161 Ga. App. 99, 289 S.E.2d 303 (1982).

Right to a hearing. — Trial court erred in failing to grant a client's request for a hearing on a former attorney's motion to dismiss claims for legal malpractice and intentional infliction of emotional distress because the trial court considered matters outside the pleadings. Under O.C.G.A. § 9-11-12(b), the motion was required to be treated as one for summary judgment and disposed of as provided in O.C.G.A. § 9-11-56, and all parties were to be given a reasonable opportunity to present all material made pertinent to such a motion. *Fitzpatrick v. Harrison*, 300 Ga. App. 672, 686 S.E.2d 322 (2009).

Judgments on the Pleadings (Cont'd)
2. Treatment as Summary Judgment Motion (Cont'd)

Hearing when no motion filed. — In a procedural context, the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, sanctions the hearing of a motion for a summary judgment even though no such motion is ever filed. *Richmond Leasing Co. v. First Union Bank*, 188 Ga. App. 843, 374 S.E.2d 746, cert. denied, 188 Ga. App. 912, 374 S.E.2d 746 (1988).

Procedural defects waived. — Although the trial court converted the defendant limited liability company's (LLC's) motion to dismiss the plaintiff sanitation company's action into a motion for summary judgment when the court considered matters outside the pleadings, the appellate court refused to reverse the trial court's judgment finding that an agreement which allowed the sanitation company to purchase the LLC for \$500,000 less than any amount offered by a third party was an unreasonable restraint on alienation because the trial court allowed the sanitation company to introduce evidence in support of the company's claims. *RTS Landfill, Inc. v. Appalachian Waste Sys., LLC*, 267 Ga. App. 56, 598 S.E.2d 798 (2004).

O.C.G.A. § 9-11-12(b)(6) motion may be treated as one for summary judgment. — So long as the parties are afforded sufficient time within which to file affidavits and other evidentiary materials, a trial court sua sponte can treat a paragraph (b)(6) motion under O.C.G.A. § 9-11-12 as one for summary judgment even though neither party has introduced a matter outside of the pleadings. *Zepp v. Mayor of Athens*, 180 Ga. App. 72, 348 S.E.2d 673 (1986).

Authority of court to consider matter outside pleadings. — While a petition may amply meet the liberalized requirements of notice pleading under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), so as to preclude dismissal from consideration of the petition alone, the court has authority to consider matters outside the pleadings, if presented, and if the court does, the court must dispose of the matter under summary judgment pro-

cedures. *Kiker v. Hefner*, 119 Ga. App. 629, 168 S.E.2d 637 (1969); *Gaddy v. Thomasson*, 172 Ga. App. 876, 324 S.E.2d 817 (1984); *Jim Altman Ins., Inc. v. Zorn & Son Ins. Agency, Inc.*, 184 Ga. App. 575, 362 S.E.2d 142 (1987).

Because the trial court, without objection, considered a contract between the parties and both parties relied heavily on the contract language before the trial court, the movant's motion to dismiss was converted to a motion for summary judgment under O.C.G.A. § 9-11-12(b). *Cox v. Athens Reg'l Med. Ctr., Inc.*, 279 Ga. App. 586, 631 S.E.2d 792 (2006).

Order covering matters not pled. — When order granting judgment against the appellant mentions matters not raised by the pleadings, it might be assumed that a motion for judgment on the pleadings was converted to a motion for summary judgment by consideration of matters outside the pleadings. *Williams v. Parnell*, 162 Ga. App. 573, 292 S.E.2d 425 (1982).

When the trial court considered matters outside the pleadings in deciding the plaintiff's motion to dismiss a counterclaim, the court was obligated to treat the motion as a motion for summary judgment and, since the required hearing was not held pursuant to O.C.G.A. § 9-11-56, the court's order was not amenable to appeal as a final judgment. *American Car Rentals, Inc. v. Walden Leasing, Inc.*, 215 Ga. App. 621, 451 S.E.2d 537 (1994).

Notice of conversion of motion to motion for summary judgment. — In summary judgment hearings under subsection (c) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12) and under Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56), there must be proper notice; if it is to be heard on oral testimony, proper notice must be given to the opposite party, unless notice is waived. *Myers v. McLarty*, 150 Ga. App. 432, 258 S.E.2d 56 (1979).

When, under subsection (c) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12), a motion for judgment on the pleadings is converted to one for summary judgment, the nonmoving party is entitled to notice of the motion as required by Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56(c)). *Harkins v. Harkins*, 153 Ga. App. 104, 264 S.E.2d 572 (1980).

Attachment of an affidavit to a motion to dismiss does not constitute notice that the motion will be converted to a motion for summary judgment. Until the trial court decides whether to consider or exclude matters outside the pleadings, the mere attachment of an affidavit to a motion to dismiss should not be construed to constitute notice of the conversion of that motion to dismiss into a summary judgment motion. *Hart v. Sullivan*, 197 Ga. App. 759, 399 S.E.2d 523 (1990).

In a case alleging unfair employment termination, the trial court's failure to notify the employee of the trial court's conversion of the employer's motion to dismiss to a summary judgment motion and the court's failure to give the employee at least 30 days to respond, although error, was not reversible when the employee failed to show that the employee was harmed by this deficiency in the notice; when the employee failed to provide the appellate court with a transcript of the summary judgment hearing, the trial court's summary judgment was presumed to have been correct on appeal and was affirmed. *Bynum v. Horizon Staffing*, 266 Ga. App. 337, 596 S.E.2d 648 (2004).

Trial court's failure to notify the plaintiffs that, pursuant to O.C.G.A. § 9-11-12(b), the court was converting the defendants' motion to dismiss to a summary judgment motion was not reversible error as the plaintiffs were afforded a full evidentiary hearing and failed to demonstrate any harm resulting from the lack of notice. *Smith v. Chemtura Corp.*, 297 Ga. App. 287, 676 S.E.2d 756 (2009).

Opposing party entitled to additional 30 days. — When a motion for judgment on the pleadings is converted into a motion for summary judgment, rules applicable to the latter come into play, including the length of time allowable after notice, and the opposing party is therefore entitled to an additional 30 days in which to present evidence in opposition thereto. *Davis v. American Acceptance Corp.*, 119 Ga. App. 265, 167 S.E.2d 222 (1969).

Opportunity to be given to present pertinent material. — Under subsection (c) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12), introduction of

evidence converts motion for judgment on the pleadings into a motion for summary judgment, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56). *Harkins v. Harkins*, 153 Ga. App. 104, 264 S.E.2d 572 (1980).

Personal guarantor did not show that the guarantor was harmed by a trial court's converting a bank's motion for judgment on the pleadings to a motion for summary judgment because the guarantor did not show that given additional time the guarantor would have filed additional affidavits or other supporting documentation in response to the motion for summary judgment. *Brooks v. Multibank 2009-1 RES-ADC Venture, LLC*, 317 Ga. App. 264, 730 S.E.2d 509 (2012).

Unless motions for summary judgment and judgment on pleadings combined. — When motion filed and heard contains a motion for summary judgment as well as a motion for judgment on the pleadings, and the motion for summary judgment was the only motion ruled upon, there is no requirement that the trial court offer to give the opposing party a reasonable opportunity to secure evidence or materials as the opposing party has already had notice that such would be required. *Hanson v. Byers*, 120 Ga. App. 298, 170 S.E.2d 315 (1969).

Evidence must demand finding. — In summary judgment hearings under subsection (c) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12) and under Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56), the evidence must demand a finding that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. *Myers v. McLarty*, 150 Ga. App. 432, 258 S.E.2d 56 (1979).

No intention to render summary judgment shown. — When the trial court denied the motion to dismiss for failure to state a claim on the ground that the complaint provided adequate notice of the claims and the court said "that's all you have to do," it is manifestly clear that the trial court was not intending to render a summary judgment. *Ledford v. Meyer*, 249 Ga. 407, 290 S.E.2d 908 (1982).

Judgments on the Pleadings (Cont'd)
2. Treatment as Summary Judgment Motion (Cont'd)

City's motion to dismiss on the ground of sovereign immunity should have been treated as a motion for summary judgment since the claim of immunity was based on the wording of the complaint and matters outside of the pleadings were considered by the court in reaching the court's decision. *Peeples v. City of Atlanta*, 189 Ga. App. 888, 377 S.E.2d 889 (1989).

When defendant's motion was styled as a motion to dismiss, but the record indicates that the trial court considered affidavits and discovery responses outside the original pleadings, the motion must be treated as a motion for summary judgment. *Brooks v. Boykin*, 194 Ga. App. 854, 392 S.E.2d 46 (1990).

Motion treated as one for summary judgment erroneously denied. — Trial court's order denying dismissal of a fraud claim in a medical malpractice action against a doctor, upon a motion which the trial court treated as one for summary judgment when the court considered material beyond the pleadings, was reversed as there was no evidence that the doctor knew or even suspected that the patient had a pancreatic tumor, or that the doctor withheld information regarding the tumor; thus, the doctrine of equitable estoppel did not apply and the fraud claim was barred by the statute of repose, O.C.G.A. § 9-3-71(b). *Balotin v. Simpson*, 286 Ga. App. 772, 650 S.E.2d 253 (2007), cert. denied, 2007 Ga. LEXIS 803 (Ga. 2007).

Derivative action. — Motion to dismiss a shareholder derivative action against a corporation, which was brought pursuant to O.C.G.A. § 9-11-12(b)(6) and which asserted that, under the business judgment rule and the decision of the committee to which the derivative action had been referred, the complaints had been resolved and the plaintiff therefore lacked standing to proceed against the corporation, was perhaps best considered as a hybrid summary judgment motion for dismissal because the stockholder plaintiff's standing to maintain the suit had been lost, but it did not fit neatly into a

category described in subsection (b), nor did it correspond directly with O.C.G.A. § 9-11-56, since the question of genuine issues of fact on the merits of the stockholder's claim were not reached. *Millsap v. American Family Corp.*, 208 Ga. App. 230, 430 S.E.2d 385 (1993).

Appeal from grant of motion to dismiss. — Grant of a motion to dismiss predicated upon the failure to follow a procedural requirement of the Georgia Business Corporation Code, O.C.G.A. Ch. 2, T. 14, was not convertible to a summary proceeding and, as such, the general appellate process was applicable. *McGregor v. Stachel*, 200 Ga. App. 324, 408 S.E.2d 118 (1991).

Losing party's right to direct appeal. — When motions to dismiss asserted, among other things, that the complaint failed to state a claim and the trial court considered material beyond the pleadings in ruling on the motions to dismiss, those motions were required to be treated as motions for summary judgment, and the losing party maintained the right to a direct appeal from an order granting partial summary judgment. *City of Demorest v. Town of Mt. Airy*, 282 Ga. 653, 653 S.E.2d 43 (2007).

Preliminary Hearings

Motion to dismiss must be determined in accordance with Ga. L. 1972, p. 689, §§ 4 and 5 and Ga. L. 1968, p. 1104, § 10 (see now O.C.G.A. §§ 9-11-12(d) and 9-11-43(b)). *Hart v. DeLowe Partners, Ltd.*, 147 Ga. App. 715, 250 S.E.2d 169 (1978); *Hand v. Keller*, 160 Ga. App. 884, 288 S.E.2d 597 (1982); *Derbyshire v. United Bldrs. Supplies, Inc.*, 194 Ga. App. 840, 392 S.E.2d 37 (1990).

Proper procedure for disposing of matters in abatement before trial is found in Ga. L. 1972, p. 689, §§ 4 and 5 and Ga. L. 1968, p. 1104, § 10 (see now O.C.G.A. §§ 9-11-12(d) and 9-11-43(b)). *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 232 Ga. 614, 208 S.E.2d 459 (1974); *Dawson v. McCart*, 169 Ga. App. 434, 313 S.E.2d 135 (1984) (expressly overruling *McPeake v. Colley*, 116 Ga. App. 320, 157 S.E.2d 562 (1967) which suggests summary judgment is the proper method for

raising the issue of the pendency of a former action).

Preliminary hearing is not sole means of determining sufficiency of service; such an issue can be determined on a plaintiff's motion for summary judgment if the record demonstrates no issues of fact with regard to service. *International Furn. Distribs., Inc. v. Lifshultz Fast Freight, Inc.*, 176 Ga. App. 102, 335 S.E.2d 628 (1985).

Although a preliminary hearing before trial on application of a party under subsection (d) of O.C.G.A. § 9-11-12 is one prescribed method of invoking the court's ruling on a subsection (b) defense such as insufficient service of process, such preliminary jurisdictional matters may also be decided at the pretrial conference without awaiting another hearing. *Long v. Marion*, 257 Ga. 431, 360 S.E.2d 255 (1987).

Preliminary hearing on matters in abatement. — Preliminary hearing on defenses of lack of jurisdiction over the person or subject matter and improper venue, whether made in a pleading or by motion, may be heard and determined before trial on the application of any party. *Marvin L. Walker & Assocs. v. A.L. Buschman, Inc.*, 147 Ga. App. 851, 250 S.E.2d 532 (1978).

Generally, when a motion to dismiss involves a factual issue as to a question of abatement, that is, lack of jurisdiction, improper venue, insufficiency of process, insufficiency of service of process or failure to join a party, the trial court is authorized to hear and determine these defenses before trial without a jury, or application of a party, unless the court orders that the hearing and determination thereof be deferred until trial. *Myers v. McLarty*, 150 Ga. App. 432, 258 S.E.2d 56 (1979).

Preliminary hearing over defenses of lack of jurisdiction over the person or subject matter and improper venue, whether made in a pleading or by motion, may be heard and determined before trial on the application of any party, and at such hearing factual issues shall be determined by the trial court; moreover, there is no reason why the same type of factual determination should not be made by the

trial court in a motion to set aside. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

If motion to dismiss is to determine a jurisdictional issue, a question of abatement and not on the merits, prior to trial, a jurisdictional defense may be set down for hearing and determination made before trial based upon conflicting evidence. *Williamson v. Williamson*, 155 Ga. App. 271, 270 S.E.2d 692 (1980), *aff'd*, 247 Ga. 260, 275 S.E.2d 42, *cert. denied*, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Trial judge is authorized to determine all issues relating to a venue motion, including any conflict in the evidence. *Daughtry v. Chaney-Bush Irrigation, Inc.*, 166 Ga. App. 708, 305 S.E.2d 439 (1983).

Presentation of evidence. — All parties may present evidence at a hearing on a motion challenging the sufficiency of service, and factual issues shall be determined by the trial court. *Attwell v. Heritage Bank Mt. Pleasant*, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

Finding on question of venue. — When the plaintiff argued that venue was a question of fact for a jury, and therefore should not have been determined by the court as a matter of law, but the record revealed that at a preliminary hearing pursuant to subsection (d) of O.C.G.A. § 9-11-12 the trial court, in the court's capacity as trier of fact, found the defendant was a resident of another county at the time of service, and further showed no demand for jury trial was made, nor was there objection to the judge trying the issue without a jury, it was held that the trial judge was authorized to determine the question of jurisdiction without a jury. *Clements v. Hendi*, 182 Ga. App. 118, 354 S.E.2d 700 (1987).

Jurisdictional questions involving factual issues may be tried by the court before trial. *Hardy v. Arcemont*, 213 Ga. App. 243, 444 S.E.2d 327 (1994).

Procedure when defenses made by answer. — When the choice is made to make defenses enumerated by subsection (b) of this section by answer, a motion to dismiss on the same grounds cannot thereafter be brought, but the proper pro-

Preliminary Hearings (Cont'd)

cedure is an application for a preliminary hearing under subsection (d). *Hayes v. Superior Leasing Corp.*, 136 Ga. App. 98, 220 S.E.2d 86 (1975).

Challenge to sufficiency of affidavit.

— As a motion to dismiss for an insufficient affidavit under O.C.G.A. § 9-11-9.1 is a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6), and as § 9-11-9.1 does not provide that § 9-11-12 is inapplicable, such a hearing is a permissible method by which to challenge the sufficiency of an affidavit. *Hewett v. Kalish*, 264 Ga. 183, 442 S.E.2d 233 (1994).

Application for a preliminary hearing may be made by motion under O.C.G.A. § 9-11-7(b). *Hayes v. Superior Leasing Corp.*, 136 Ga. App. 98, 220 S.E.2d 86 (1975).

Court has broad powers as to how court shall hold preliminary hearings. *Sherwood Mem. Park v. Bryan*, 142 Ga. App. 664, 236 S.E.2d 903 (1977).

Court may select method of presenting evidence, but may not refuse to hear evidence except to order that hearing and determination thereof be deferred until the trial. *Sherwood Mem. Park v. Bryan*, 142 Ga. App. 664, 236 S.E.2d 903 (1977).

All parties may present evidence at a hearing on a motion challenging the sufficiency of service, and factual issues shall be determined by the trial court. *Attwell v. Heritage Bank Mt. Pleasant*, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

Evidence at hearing under subsection (d). — O.C.G.A. § 9-11-9.1 is only designed to preclude amendment under O.C.G.A. § 9-11-15 when the plaintiff completely fails to file an affidavit; thus § 9-11-9.1 does not preclude a plaintiff from presenting evidence of his or her expert's competency at a O.C.G.A. § 9-11-12(d) hearing when that expert's affidavit was initially filed with the complaint. *Hewett v. Kalish*, 264 Ga. 183, 442 S.E.2d 233 (1994).

Imputing to trial court intent to rule on merits. — When trial court does not indicate consideration of merits, reviewing court will not impute such a de-

termination. When there is nothing in the record to suggest that the trial court notified parties prior to entry of judgment that the court would consider the merits of the claim or that the court's reasoning included consideration of merits on a de facto basis, the reviewing court will not impute such a determination to the trial court. *Georgia Power Co. v. Harrison*, 253 Ga. 212, 318 S.E.2d 306 (1984).

Questions of law. — When a question of law was presented to the court by motion in limine, it was not an abuse of discretion in failing to set matter down for hearing. *Phillips v. Marcin*, 162 Ga. App. 202, 290 S.E.2d 546 (1982).

Hearing on motion. — Subsection (d) of O.C.G.A. § 9-11-12 provides for hearing on motions raising defenses enumerated in subsection (b) of O.C.G.A. § 9-11-12 affording both parties an opportunity to present evidence and responsive argument. *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981).

Motion for More Definite Statement**1. In General**

Replaces special demurrer. — Motion for more definite statement is the modern replacement for a special demurrer. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Similar characteristics to demurrer. — Motion for a more definite statement has some of the characteristics of a special demurrer in that it is not favored, and being a critic, it must itself be perfect in that it must state the grounds therefor and must point out the defect complained of and the details desired. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Special demurrer and motion for more definite statement distinguished. — Test of a special demurrer and a motion for a more definite statement is vastly different: while a special demurrer lies to make the plaintiff set out facts more fully, so as to enable the defendant to prepare a defense, a motion for more definite statement lies only when the pleading is so indefinite that the defendant is unable to frame an answer

thereto, and only with respect to a pleading to which another pleading must be filed. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Proper remedy for more particularity is motion for more definite statement or discovery. — Proper remedy for seeking more particularity is by motion for a more definite statement at the pleading stage or by the rules of discovery thereafter. *Cochran v. McCollum*, 233 Ga. 104, 210 S.E.2d 13 (1974); *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979); *Frady v. Irvin*, 245 Ga. 307, 264 S.E.2d 866 (1980); *Skelton v. Skelton*, 251 Ga. 631, 308 S.E.2d 838 (1983).

Motion to dismiss counterclaim for failure to plead fraud and deceit with sufficient specificity made immediately preceding trial of case was properly denied since the proper remedy for seeking more particularity is by motion for a more definite statement at the pleading stage or by rules of discovery thereafter. *Glennville Hatchery, Inc. v. Thompson*, 164 Ga. App. 819, 298 S.E.2d 512 (1982).

Remedy for failure to plead with particularity is a motion for more definite statement, not a motion to dismiss, until the pleader is unable and unwilling to amend the pleadings accordingly. *Hall v. Churchwell's, Inc.*, 243 Ga. 852, 257 S.E.2d 272 (1979).

Motion to strike not remedy. — When there is a failure to plead fraud with particularity, the correct remedy is not a motion to dismiss or to strike but a motion for more definite statement. *White v. Johnson*, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

Motions for more definite statement are not favored, inasmuch as discovery procedures should be used extensively to obtain such information. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

No substitute for discovery. — Motions for more definite statement are not to be used merely as a substitute for discovery. *Padgett v. Bryant*, 121 Ga. App. 807, 175 S.E.2d 884 (1970).

Motion for more definite statement is not appropriate merely for compel-

ling information which will possibly disclose a threshold defense for the purpose of positioning the movant to move for dismissal. *DeWes Enters., Inc. v. Town & Country Carpets, Inc.*, 130 Ga. App. 610, 203 S.E.2d 867 (1974).

Ambiguous or vague pleadings. — Motion for more definite statement lies only when the pleading is so indefinite that the defendant is unable to frame an answer thereto, and only with respect to a pleading to which another responsive pleading must be filed. *Emerson v. Fleming*, 127 Ga. App. 296, 193 S.E.2d 249 (1972).

Motion for a more definite statement may only be used when the pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, and a motion to dismiss is not a responsive pleading. *DeWes Enters., Inc. v. Town & Country Carpets, Inc.*, 130 Ga. App. 610, 203 S.E.2d 867 (1974).

Unless pleadings are so vague and ambiguous that the defendant could not frame proper responsive pleadings thereto, a motion for a more definite statement should not be granted. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Enforcement of § 9-11-9 by motion for more definite statement. — Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9) itself contains no mechanism for enforcing the statute's terms, and the common practice has been to use subsection (e) of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12) for that purpose. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978); *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9), relating to pleading special matters, is not immune from the command of O.C.G.A. § 9-11-8(f) that pleadings be construed so as to do substantial justice and, thus, one context in which a somewhat liberal approach to the granting of motions under subsection (e) of Ga. L. 1976, p. 1047, § 1 (see now O.C.G.A. § 9-11-12) is appropriate is when the request for a more definite statement is used to enforce special pleading

Motion for More Definite**Statement (Cont'd)****1. In General (Cont'd)**

requirements of Ga. L. 1966, p. 609, § 9 (see now O.C.G.A. § 9-11-9(c)). *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Extreme action of dismissal of entire complaint should be taken only when the complaint had but one basis for recovery and motion for more definite statement was addressed to that sole basis. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

When there is a two-count complaint, failure to meet requirements of motion for a more definite statement as to one count would have no effect on the remaining count. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Dismissal of allegations of fraud for lack of specificity. — When the plaintiff failed to allege fraud with necessary particularity and specificity following order of court to make a more definite statement of fraud, the proper remedy was to dismiss the allegations of the complaint relating to fraud. *Moultrie v. Atlanta Fed. Sav. & Loan Ass'n*, 148 Ga. App. 650, 252 S.E.2d 77 (1979).

Motion for more definite statement proper remedy in fraud case. — When a trust beneficiary alleged a bank's fraud in the administration of the trust, and the bank alleged that the beneficiary did not plead fraud with sufficient specificity, the bank's proper course of action was to move for a more definite statement, under O.C.G.A. § 9-11-12(e), rather than to dismiss, as a pleading of a special matter, such as fraud, was not to be dismissed for failure to state a claim unless it appeared beyond doubt that the beneficiary could prove no set of facts in support of the beneficiary's claim which would entitle the beneficiary to relief. *Goldston v. Bank of Am. Corp.*, 259 Ga. App. 690, 577 S.E.2d 864 (2003).

2. Special Demurrers Under Prior Law

Special demurrer, being a critic, must itself be perfect. *Reserve Life Ins.*

Co. v. Gay, 96 Ga. App. 601, 101 S.E.2d 158 (1957) (decided under former Code 1933, § 81-304).

Special demurrer, being a critic, must itself be free from imperfections; it must lay its finger, so to speak, on the very point. *Atlanta & W. Point R.R. v. McDonald*, 88 Ga. App. 515, 76 S.E.2d 825 (1953) (decided under former Code 1933, § 81-304).

Special demurrer must specifically point out alleged imperfections in the pleadings. — Special demurrer, being a critic, must itself be perfect, pointing out clearly and specifically the alleged imperfection in the pleading attacked by it, and laying its finger, as it were, upon the very point. *Shaef Chem. Co. v. Cook*, 106 Ga. App. 223, 126 S.E.2d 806 (1962) (decided under former Code 1933, § 81-304).

Special demurrers will be overruled when their grounds are confusing and uncertain since a demurrer must itself be free from defect. *Smith v. Willoughby*, 204 Ga. 570, 50 S.E.2d 364 (1948) (decided under former Code 1933, § 81-304).

All that a special demurrer requires of a petition is reasonable definiteness and certainty, and it does not require that the pleader must indulge in needless particularities. *Cuttino v. Mimms*, 98 Ga. App. 198, 105 S.E.2d 343 (1958) (decided under former Code 1933, § 81-304).

Information in defendant's knowledge. — When information called for by a special demurrer is within the defendant's knowledge, overruling of the demurrer is not harmful error since the defendant is not thereby hindered from preparing a defense. *Steed v. Harris*, 52 Ga. App. 581, 183 S.E. 847 (1936) (decided under former Code 1933, § 81-304).

Proper judgment on a special demurrer going only to the meagerness of the allegations of a petition is not a judgment sustaining the demurrer and dismissing the petition, but a judgment requiring the pleader to amend and make a petition more certain in the particulars wherein the pleader has been delinquent. *Lundy v. City Council*, 51 Ga. App. 655, 181 S.E. 237 (1935) (decided under former Code 1933, § 81-304).

Dismissal of part or all of petition for failure to amend. — When a special demurrer to a petition is sustained, with leave to amend, and there is a failure to do so, the petition should be dismissed if the delinquency relates to the entire cause of action; but if the demurrer goes only to some particular part of the petition, the proper judgment is to strike the defective portion, and not to dismiss the entire action. *Lundy v. City Council*, 51 Ga. App. 655, 181 S.E. 237 (1935); *Sellers v. City of Summerville*, 88 Ga. App. 109, 76 S.E.2d 99 (1953) (decided under former Code 1933, § 81-304).

When a special demurrer to a petition is sustained with leave to amend, and there is a failure or refusal to amend, the petition should be dismissed if the defect to delinquency relates to the entire cause of action. *McBurney v. Woodward*, 84 Ga. App. 807, 67 S.E.2d 398 (1951) (decided under former Code 1933, § 81-304).

When a special demurrer goes only to some particular part of a petition, without which a valid cause of action would still be set forth, the result of sustaining the special demurrer would be to strike the defective portion of the petition, not to dismiss the action. *McBurney v. Woodward*, 84 Ga. App. 807, 67 S.E.2d 398 (1951) (decided under former Code 1933, § 81-304).

When a defect which is the subject of special demurrer and which goes to the petition as a whole is sustained, the court should give the plaintiff time in which to amend, and when such time is given and plaintiff fails or refuses to cure the defect by amendment, the petition should then be dismissed. *Rogers v. Adams*, 98 Ga. App. 155, 105 S.E.2d 364 (1958) (decided under former Code 1933, § 81-304).

Minute particularity not required. — Petition is not subject to special demurrer because the petition lacks minute particularity in averments of negligence, especially as to facts within the knowledge of the defendant. *Colonial Stores, Inc. v. Stanley*, 102 Ga. App. 645, 117 S.E.2d 245 (1960) (decided under former Code 1933, § 81-304).

Motion to Strike

Scope of subsection (f). — Subsection (f) of O.C.G.A. § 9-11-12 does not

embrace striking the substance of an entire claim or counterclaim. *Specialized Alarm Servs., Inc. v. Kauska*, 189 Ga. App. 863, 377 S.E.2d 703, cert denied, 189 Ga. App. 913, 377 S.E.2d 703 (1989).

Purpose. — Purpose of a motion to strike is not to excise testimony allowed in without contemporaneous objection. The stated purpose is only to strike from pleadings any insufficient defense, redundant, immaterial, impertinent, or scandalous matter. *Guthrie v. Bank S.*, 195 Ga. App. 123, 393 S.E.2d 60 (1990).

Four terms “redundant,” “immaterial,” “impertinent,” and “scandalous,” are not mutually exclusive; there is a certain amount of overlapping between the terms, particularly the first three. *Northwestern Mut. Life Ins. Co. v. McGivern*, 132 Ga. App. 297, 208 S.E.2d 258 (1974).

Meaning of “impertinence.” — “Impertinence” consists of any allegation not responsive or relevant to the issues involved in the action, and which could not be put in issue or be given in evidence between the parties. *Northwestern Mut. Life Ins. Co. v. McGivern*, 132 Ga. App. 297, 208 S.E.2d 258 (1974).

To determine whether a matter is impertinent, one must first determine the scope of the issues in controversy, and then determine whether the matter injected in the pleadings is relevant or material thereto. *Northwestern Mut. Life Ins. Co. v. McGivern*, 132 Ga. App. 297, 208 S.E.2d 258 (1974).

One test as to whether matter in a pleading is irrelevant, immaterial, or impertinent is whether evidence in support of it would be admissible. *Schaefer v. Mayor of Athens*, 120 Ga. App. 301, 170 S.E.2d 339 (1969).

Patently false and sham pleading.

— Trial court did not abuse the court's discretion in striking a legal malpractice complaint in which client's counsel sought to justify the failure to include a required expert affidavit by saying that time constraints that were caused by the limitations period did not permit the inclusion of an affidavit; the statement was patently false and a sham as counsel had twice previously filed and voluntarily dismissed complaints without the required affidavit.

Motion to Strike (Cont'd)

Smith v. Morris, Manning & Martin, LLP, 254 Ga. App. 355, 562 S.E.2d 725 (2002).

Motion to strike is not analogous to a motion for summary judgment. Leggett v. Benton Bros. Drayage & Storage Co., 138 Ga. App. 761, 227 S.E.2d 397 (1976).

Only matters within pleadings to be considered. — Absence of explicit provision for consideration of matters outside the pleadings is intentional, and upon a motion to strike the court may consider only matters within the pleadings. Unigard Ins. Co. v. Kemp, 141 Ga. App. 698, 234 S.E.2d 539 (1977).

Motion to strike not favored. — Motions to strike, alleging redundant, immaterial, impertinent, or scandalous matter, are not favored. Northwestern Mut. Life Ins. Co. v. McGivern, 132 Ga. App. 297, 208 S.E.2d 258 (1974); Medlin v. Carpenter, 174 Ga. App. 50, 329 S.E.2d 159 (1985).

Unless it is clear that it can have no possible bearing upon the subject matter of the litigation, matter in pleadings will not be stricken; if there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied. Northwestern Mut. Life Ins. Co. v. McGivern, 132 Ga. App. 297, 208 S.E.2d 258 (1974).

Motion to strike a defense should not be granted unless it appears to a certainty that the plaintiff would succeed despite any state of facts which could be proved in support of the defense. Wellbaum v. Murphy, 122 Ga. App. 654, 178 S.E.2d 690 (1970); Unigard Ins. Co. v. Kemp, 141 Ga. App. 698, 234 S.E.2d 539 (1977); West v. Griggs, 144 Ga. App. 285, 241 S.E.2d 26 (1977).

Motion to strike an answer should not be granted unless it appears to a certainty that the plaintiff would succeed despite any state of facts which could be proved in support of the defense. Potpourri of Merrick, Inc. v. Gay Gibson, Inc., 132 Ga. App. 565, 208 S.E.2d 579 (1974).

Motion to strike an allegation in a complaint is not to be granted unless, construing the pleadings in a light most favorable to the plaintiff, the plaintiff can establish

no set of facts that would entitle the plaintiff to relief against the defendant. Watkins & Watkins, P.C. v. Williams, 238 Ga. App. 646, 518 S.E.2d 704 (1999).

When a motion to strike defenses is not made without 30 days of service upon the plaintiff, the court does not abuse the court's discretion in refusing the motion, even if such defenses are legally insufficient. Potpourri of Merrick, Inc. v. Gay Gibson, Inc., 132 Ga. App. 565, 208 S.E.2d 579 (1974).

When complaint showed on the complaint's face that the statute of limitations had run, and there was no further showing by amendment or affidavit that a tolling of the statute was possible, a motion to strike the barred claims was properly granted. Leggett v. Benton Bros. Drayage & Storage Co., 138 Ga. App. 761, 227 S.E.2d 397 (1976).

Defense not clearly insufficient. — In a wrongful death action against the Department of Transportation (DOT), the trial court erred in dismissing as insufficient DOT's defense based on the plaintiff's failure to file an expert affidavit in support of a claim involving a question of professional negligence by highway engineers. DOT v. Taunton, 217 Ga. App. 232, 457 S.E.2d 570 (1995).

In a wrongful death action against the Department of Transportation (DOT), a motion to strike was not the appropriate vehicle to dispose of DOT's "public duty" defense based on the doctrine established in City of Rome v. Jordan, 263 Ga. 26, 426 S.E.2d 861 (1993). DOT v. Taunton, 217 Ga. App. 232, 457 S.E.2d 570 (1995).

Failure to move to strike waived on appeal. — On appeal from an order granting summary judgment to a store in a customer's slip and fall action, the appeals court declined to consider a store's argument that a customer's affidavit was invalid based on discrepancies in its execution as the store failed to move to strike the affidavit below, resulting in a waiver of this claim on appeal. Durham v. Patel, 282 Ga. App. 437, 638 S.E.2d 851 (2006).

Waiver or Preservation of Defenses**1. In General**

Defense waived if not raised. — By not raising the defense of lack of jurisdic-

tion over the person or improper venue by motion or responsive pleading, the defendant waives any objection the defendant may have had. *Smith v. Smith*, 248 Ga. 268, 282 S.E.2d 324 (1981), overruled on other grounds, *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Insurance company waived affirmative defense of insufficiency of service of process by failing to raise that defense in the answer to the amended complaint. *McNeil v. McCollum*, 276 Ga. App. 882, 625 S.E.2d 10 (2005).

Failure to raise defense to improper counterclaim did not act as waiver. — Because a change of custody could not be asserted as a counterclaim, pursuant to O.C.G.A. § 19-9-23, the trial court erred in denying a father's motion to dismiss the counterclaim asserted by a mother, and the father's failure to raise the matter as a defense did not act as a waiver, as he filed no response to the counterclaim. *Bailey v. Bailey*, 283 Ga. App. 361, 641 S.E.2d 580 (2007).

Failure to state particular defense immaterial if action barred by statute of limitations. — It was immaterial that the defendant did not raise the defense of insufficiency of process or service of process in the defendant's answers since motions for summary judgment and to dismiss were brought on the ground that the action was barred by the statute of limitation, and the defendant's right to dismissal on this ground was not waived. *Kannady v. State Farm Mut. Auto. Ins. Co.*, 214 Ga. App. 492, 448 S.E.2d 374 (1994).

Waiver of venue. — Husband waived any objection to venue when the husband consented to venue in Cobb County in open court; therefore, the superior court did not err in denying the husband's motion to set aside the contempt judgment. *Crutchfield v. Lawson*, 294 Ga. 407, 754 S.E.2d 50 (2014).

Default of nonresident does not waive defenses for resident co-defendant. — Default of the nonresident defendant, which would otherwise constitute a waiver of various defenses, does not estop the nonresident defendant from asserting the fact of nonresidency in the event of judgment in favor of or dis-

missal of the resident defendant. *Russell v. Hall*, 165 Ga. App. 547, 301 S.E.2d 904 (1983).

No waiver of defenses. — Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Non-duplication of payments is not an affirmative defense; thus, an insurer that was served as the plaintiff's uninsured motorist carrier in an action arising from a motor vehicle collision was not required to raise this issue in its answer or counterclaim, but was entitled to set off the amount it had already paid the plaintiffs from the amount of the judgment. *Yates v. Dean*, 244 Ga. App. 333, 535 S.E.2d 335 (2000).

2. Personal Jurisdiction, Venue, Process and Service

Jurisdiction of the person may be waived. *Harper v. Allen*, 41 Ga. App. 736, 154 S.E. 651 (1930) (decided under former Code 1933, § 81-503).

Waiver of jurisdiction cannot prejudice third persons. — Parties by consent, express or implied, cannot give jurisdiction to the court as to the person or the subject matter; jurisdiction may be waived, however, as to the person, so far as the rights of the parties themselves are concerned, but not so as to prejudice third persons. *Gates v. Shaner*, 208 Ga. 454, 67 S.E.2d 569 (1951) (decided under former Code 1933, § 81-503).

Defense of improper venue in a child custody case may be waived. *Holt v. Leiter*, 232 Ga. App. 376, 501 S.E.2d 879 (1998).

**Waiver or Preservation of
Defenses (Cont'd)**

2. Personal Jurisdiction, Venue, Process and Service (Cont'd)

Waiver of defenses inapplicable absent service or waiver thereof. — When there has been no service and no waiver of service, statutory provisions requiring such defense to be made or considered waived are not applicable. *DeJarnette Supply Co. v. F.P. Plaza, Inc.*, 229 Ga. 625, 193 S.E.2d 852 (1972).

Amendment may not raise defenses under paragraph (h)(1). — Under paragraph (h)(1) of this section, defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process may not be pled by amendment to an original pleading. *Security Ins. Co. v. Gill*, 141 Ga. App. 324, 233 S.E.2d 278 (1977).

Failure to raise issue. — Defense of lack of jurisdiction over the person or improper venue may be waived by a failure to raise these issues by a motion to dismiss or in a responsive pleading, as originally filed. *Hornsby v. Hancock*, 165 Ga. App. 543, 301 S.E.2d 900 (1983).

Defendant waives the defense of lack of personal jurisdiction due to improper venue when the defendant fails to raise the issue by motion or in the defendant's responsive pleadings. *Bouldin v. Contran Corp.*, 167 Ga. App. 364, 306 S.E.2d 685 (1983).

Defenses preserved when filed in earlier pleading. — Even though the defendants waited a year to file the defendants' motion to dismiss, the defendants did not waive defenses of insufficient service and expiration of the statute of limitation because those defenses were raised in the defendants' first defensive pleading. *Heis v. Young*, 226 Ga. App. 739, 487 S.E.2d 403 (1997).

Defense of insufficient process preserved. — Although the record revealed that defendant was never served with process, the defendant preserved the defense of insufficiency of service of process by raising the defense in the defendant's objection to the plaintiff's petition. *In re Ray*, 248 Ga. App. 45, 545 S.E.2d 617 (2001).

Trial court did not err in granting the motion to dismiss for improper service as the towing company owner preserved the defense by specifically raising the defense in the owner's answer and did not waive the owner's procedural defenses by participating in substantial litigation on the merits, or by consenting to a pretrial order that did not list the procedural defense as a remaining issue; although the pretrial order stated that there were no motions or other matters pending for the trial court's consideration, the argument that "service of process upon defendant was not proper" was specifically listed as one of the owner's contentions and, thus, the defense was not waived. *Carnes v. Reece*, 271 Ga. App. 490, 610 S.E.2d 135 (2005).

In a family's lawsuit against a driver after a collision, the driver did not waive the driver's defense of failure of service by not raising the defense in a motion to dismiss the family's claim for attorney fees and costs. The defendant raised lack of service in the defendant's answer; thus, the defense of lack of service was properly before the trial court. *Abimbola v. Pate*, 291 Ga. App. 769, 662 S.E.2d 840 (2008).

When no question of jurisdiction is raised in the justice's court, it cannot be raised after verdict and appeal, either as to jurisdiction of the person or as to jurisdiction of amount, when lack of jurisdiction as to the amount does not affirmatively appear from the pleadings. *Garrierson v. McGuire*, 114 Ga. App. 665, 152 S.E.2d 624 (1966) (decided under former Code 1933, § 81-503).

Waiver of personal jurisdiction in equity. — Principle as to waiver of jurisdiction of the person applies not only to actions at law, but also to equity cases, including actions for specific performance. *Black v. Milner Hotels, Inc.*, 194 Ga. 828, 22 S.E.2d 780 (1942) (decided under former Code 1933, § 81-503).

When a party filed objections to interrogatories and sought a ruling thereon, the party waived the matter of venue or jurisdiction of the person. *Sorrells v. Cole*, 111 Ga. App. 136, 141 S.E.2d 193 (1965) (decided under former Code 1933, § 81-503).

By being in default for failure to file a timely answer under O.C.G.A.

§ 9-11-55, the appellant waives the right under O.C.G.A. § 9-11-12 to contest the trial court's personal jurisdiction. *Stout v. Signate Holding, Inc.*, 184 Ga. App. 154, 361 S.E.2d 36 (1987); *Mine Chen v. Alexander Terry Assocs.*, 228 Ga. App. 345, 491 S.E.2d 834 (1997).

Failure to timely move for hearing.

— After a defendant pled insufficient service of process in the defendant's answer, but did not move for a hearing on the issue until after the appeal of the defendant's motion for summary judgment on the merits was ruled on adversely by the appellate court, neither the court nor the opponent was put on notice that this waivable preliminary jurisdictional defense would be insisted on. Nor did the appellate court have the issue before the court when the court labored over the case the first time. Thus, the defense was waived. *Wheeler's, Inc. v. Wilson*, 196 Ga. App. 622, 396 S.E.2d 790 (1990).

Appearance and pleading to merits.

— Objections to venue or jurisdiction of the person are waived by making a general appearance without specially reserving the matter in the answer or other defensive pleading. *Gooch v. Appalachian Lumber Co.*, 123 Ga. App. 804, 182 S.E.2d 487 (1971).

When the defendant pleads to the merits without excepting to the jurisdiction of the court, the defendant waives any objection to the jurisdiction of the person. *Moody v. Mendenhall*, 238 Ga. 689, 234 S.E.2d 905 (1977).

Service under long arm statute.

— Foreign corporation did not waive the defense of lack of jurisdiction by not raising the defense in a responsive pleading or filing a motion to dismiss after being served under the long arm statute. *Hoesch Am., Inc. v. Dai Yang Metal Co.*, 217 Ga. App. 845, 459 S.E.2d 187 (1995); *B & D Fabricators v. D.H. Blair Investment Banking Corp.*, 220 Ga. App. 373, 469 S.E.2d 683 (1996).

Waiver from pre-trial order. — Defenses of lack of personal jurisdiction, insufficient service of process, and improper venue may all be waived if the defenses are omitted, without objection, from the pre-trial order. *Rice v. Cropsey*, 203 Ga. App. 272, 416 S.E.2d 786, cert. denied, 203 Ga. App. 907, 416 S.E.2d 786 (1992).

Defendant in a promissory note case, by pleading to the merits and not raising the defense of lack of jurisdiction of the person, defective process, or improper venue, waived any objection the defendant may have had, and the court had personal jurisdiction and authority to enter a default judgment against the defendant. *Kiplinger v. Oliver*, 244 Ga. 527, 260 S.E.2d 904 (1979).

Jurisdictional defects are waived by defendant's appearance and pleading to the merits and the defendant's failure to attack the court's jurisdiction by a timely plea. *Shaef Chem. Co. v. Cook*, 106 Ga. App. 223, 126 S.E.2d 806 (1962) (decided under former Code 1933, § 81-503).

When the defendant appears and pleads to the merits of a case, without pleading to the jurisdiction of the court and without excepting thereto, a defendant thereby admits the jurisdiction of the court; and after verdict and judgment, the question of jurisdiction cannot be raised in a motion to arrest. *Olshine v. Bryant*, 55 Ga. App. 90, 189 S.E. 572 (1936) (decided under former Code 1933, § 81-503).

When a defendant appears and pleads to the merits of a case, without pleading to the jurisdiction of the court, and without excepting thereto, a defendant thereby admits the jurisdiction of the court, and cannot thereafter urge the jurisdictional question. *Olshine v. Bryant*, 55 Ga. App. 91, 189 S.E. 576 (1936) (decided under former Code 1933, § 81-503).

Trial court did not err when the court concluded that, pursuant to O.C.G.A. § 9-11-12(h)(1), a contractor waived objection to the sufficiency of service by a North Carolina deputy sheriff because the contractor appeared in court and filed a responsive pleading and motion, and the contractor failed to raise the issue of service by a North Carolina deputy sheriff in the contractor's first pleading or motion. *Merry v. Robinson*, 313 Ga. App. 321, 721 S.E.2d 567 (2011).

When attorney for wife exchanged correspondence with husband who sought divorce, and sent husband a card requesting entry of appearance, but since the wife did not submit any motions of any kind, file any pleadings, nor by any overt

Waiver or Preservation of**Defenses (Cont'd)****2. Personal Jurisdiction, Venue, Process and Service (Cont'd)**

act participate in the litigation, such facts did not constitute a general appearance by the wife so as to waive the defect in service previously ruled by the court to exist. *Baker v. Baker*, 216 Ga. 800, 120 S.E.2d 308 (1961) (decided under former Code 1933, §§ 81-209 and 81-503).

Letter written by attorney to the court clerk, enclosing an appearance card, did not constitute such appearance as would waive jurisdiction, service, or absence of process under the Code. *Baker v. Baker*, 215 Ga. 688, 113 S.E.2d 113 (1960) (decided under former Code 1933, §§ 81-209, 81-211 and 81-503).

Having failed to raise defense of lack of jurisdiction over the person in a responsive pleading or by a motion made at or before filing responsive pleadings, such defense was waived. *Hodges v. Lane*, 124 Ga. App. 830, 186 S.E.2d 322 (1971); *Gustin v. Roberts Mtg. & Inv. Corp.*, 162 Ga. App. 397, 291 S.E.2d 455 (1982).

Failure to question jurisdiction in pleadings. — Filing of a demurrer and answer, without questioning the jurisdiction, is pleading to the merits within the rule that one pleading to the merits without excepting to the jurisdiction of the court waives any objection to jurisdiction of the person. *Alexander v. Davis*, 210 Ga. 292, 79 S.E.2d 810 (1954) (decided under former Code 1933, § 81-503).

Failure to raise defenses of insufficient service, lack of personal jurisdiction, and improper venue had to be raised before or at the time of pleading, failure to do so either in the answer or by motion filed before or with the answer constituted a waiver of the defenses. *Amaechi v. Am. Honda Fin. Corp.*, 251 Ga. App. 591, 554 S.E.2d 536 (2001).

Filing of plea to merits subject to plea to jurisdiction not a waiver. — Filing of a general demurrer or other plea to the merits, when filed subject to a plea to the jurisdiction or traverse of service, is not a waiver of the special plea. *Home Fin. Co. v. Bank of La Fayette*, 215 Ga. 533, 111 S.E.2d 359 (1959) (decided under former Code 1933, § 81-503).

When jurisdiction has been expressly excepted to by filing a plea at the first opportunity, the filing of a plea to the merits thereafter without stating that it is filed subject to the earlier plea does not have the effect of waiving the plea previously filed. *Milam v. Terrell*, 214 Ga. 199, 104 S.E.2d 219 (1958) (decided under former Code 1933, § 81-503).

Failure to challenge jurisdiction and venue. — When the defendants are served officially in a legal manner, defenses of lack of jurisdiction over the person and improper venue are waived if not presented to the trial court either by motion or responsive pleading prior to judgment. *Padgett Masonry & Concrete Co. v. Peachtree Bank & Trust Co.*, 130 Ga. App. 886, 204 S.E.2d 807 (1974).

When the defendant had notice of an action and could have appeared to challenge personal jurisdiction and venue, but elected to do nothing, waiver resulted. *Echols v. Dyches*, 140 Ga. App. 191, 230 S.E.2d 315 (1976).

Defense of lack of venue must be made at earliest opportunity to plead or the defense is waived. *Maalouf v. Knight*, 237 Ga. App. 509, 515 S.E.2d 650 (1999).

One who, being properly served, wishes to rely on defense of lack of venue, must bring the defense to the attention of the court at a proper time, or the defense is waived. *Goldstein v. Atlanta Coop. Credit Ass'n*, 143 Ga. App. 890, 240 S.E.2d 155 (1977).

Defense based on forum selection clause waived. — Tenant waived the tenant's defenses of personal jurisdiction and venue based on a forum selection clause in a contract by failing to raise those defenses in the tenant's answer and counterclaim to a suit brought by the individual owner of its landlord under a separate lease contract, and the trial court erred in dismissing the owner's suit. *AIM DMC One, LLC v. Frank Gates Serv. Co.*, 325 Ga. App. 440, 754 S.E.2d 82 (2013).

Pleading to and defending on the merits when it was legally required, and at a time when the court had jurisdiction, did not constitute a waiver on the question of improper venue. *Charles S. Martin Distrib. Co. v. Roberts*, 111 Ga.

App. 653, 143 S.E.2d 11 (1965) (decided under former Code 1933, § 81-503).

Party who, having been properly served, wishes to rely on the defense of lack of venue must bring the defense to the attention of the court prior to allowing the case to go to default judgment or the defense is waived. *McDonough Contractors v. Martin & DeLoach Paving & Contracting Co.*, 183 Ga. App. 428, 359 S.E.2d 200 (1987).

Failure to raise insufficiency of process at pretrial conference waives issue. — While the better practice in proceedings under O.C.G.A. § 9-11-16 (pretrial procedure) is to make specific reference as to the disposition of preliminary matters such as those raised pursuant to subsection (b) of O.C.G.A. § 9-11-12, the trial court does not abuse the court's discretion in concluding that the defendant who knows that the service of process upon the defendant is insufficient from the time the defendant's answer is filed but, nevertheless, purposefully neglects to pursue this issue at the pretrial conference, waives the insufficiency of service of process defense and thus consents to the jurisdiction of the trial court. *Georgia Power Co. v. O'Bryant*, 169 Ga. App. 491, 313 S.E.2d 709 (1983).

Failure to raise defect in service. — Any defect in the service of process must be deemed waived when there is no indication in the record on appeal that the issue was raised in the trial court. *Taylor v. Bentley*, 166 Ga. App. 887, 305 S.E.2d 617 (1983).

Failure to give notice. — Purchaser's abuse of litigation claim against the lender was properly dismissed under O.C.G.A. § 9-11-12(b)(6) because the purchaser failed to give written notice to the lender as was required by O.C.G.A. § 51-7-84(a). *LaSonde v. Chase Mortg. Co.*, 259 Ga. App. 772, 577 S.E.2d 822 (2003).

Failure of defendant to raise question of venue, either by motion or by defense in the defendant's answer, amounts to waiver of venue. *Goldstein v. Atlanta Coop. Credit Ass'n*, 143 Ga. App. 890, 240 S.E.2d 155 (1977).

Trial court was without authority to grant the ex-husband's motion to transfer

consolidated actions for contempt and modification of custody because the ex-husband waived any defense of improper venue when the ex-husband failed to raise the defense of improper venue either in an answer or a motion to dismiss. *Hamner v. Turpen*, 319 Ga. App. 619, 737 S.E.2d 721 (2013).

Plea to the merits as waiver of venue defense. — All causes of action are ordinarily brought in the county of the residence of the defendant, but this provision of the law may be waived as by appearance and pleading to the merits without raising the point. *Georgia Power Co. v. Woodall*, 48 Ga. App. 85, 172 S.E. 76 (1933) (decided under former Code 1933, § 81-503).

Defense of improper venue is waived when defendants appear in court and plead to the merits, without challenging the jurisdiction or asserting the defense of improper venue. *Daniel v. Yow*, 226 Ga. 544, 176 S.E.2d 67 (1970).

When the defendant properly raised defense of improper venue at the appropriate time, and filed a motion within 30 days of judgment contesting that determination, the defendant's defense of lack of venue was not waived by the fact that the case was allowed to go to default judgment. *Morgan v. Berry*, 152 Ga. App. 623, 263 S.E.2d 508 (1979).

Appearance in an action by filing an answer, raising defense of insufficiency of service of process, and answering interrogatories does not constitute a waiver of defective service. *Glass v. Byrom*, 146 Ga. App. 1, 245 S.E.2d 345 (1978).

Filing of answer and counterclaim on same day as motion to dismiss. — When written motion to dismiss for insufficiency of service of process was filed on the same day as an answer and counterclaim, the defendant did not waive alleged deficiency in service. *Weems v. Weems*, 225 Ga. 154, 166 S.E.2d 352 (1969).

Waiver of irregularities of service and process by plea to the merits. — If a defendant appears and pleads to the merits, without pleading to the jurisdiction and without any protestation as to process or service, the defendant thereby admits the jurisdiction of the court and

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waives all irregularities of the process, or of the absence of process and the service thereof. *Harper v. Allen*, 41 Ga. App. 736, 154 S.E. 651 (1930) (decided under former Code 1933, §§ 81-209 and 81-503).

Appearance and pleading to the merits are a waiver of the absence of process. *Edison Provision Co. v. Armour & Co.*, 51 Ga. App. 213, 179 S.E. 829 (1935) (decided under former Code 1933, § 81-209).

Appearance and pleading to the merits are a waiver of all irregularities of the process or of the absence of process and the service thereof. *Olshine v. Bryant*, 55 Ga. App. 90, 189 S.E. 572 (1936); *Jones v. Jones*, 209 Ga. 861, 76 S.E.2d 801 (1953) (decided under former Code 1933, §§ 81-209 and 81-503).

Appearance and pleading, without a reservation by the pleader of the pleader's right to object later, are a waiver of all irregularities in the process. *Nichols v. Acree*, 112 Ga. App. 287, 145 S.E.2d 92 (1965) (decided under former Code 1933, § 81-209).

Defendant who appears and pleads to the merits of the action, without previous objection to the process, and without also objecting to the lack of jurisdiction of the court over the defendant's person, waives any objection which the defendant may have had to the issuance of the process, defects in the process, or the service, and even any objection based on the ground of total want of service. *Cherry v. McCutchen*, 68 Ga. App. 682, 23 S.E.2d 587 (1942) (decided under former Code 1933, § 81-209).

General appearance by answering a petition waives all irregularities in the service of process. *Hagins v. Howell*, 219 Ga. 276, 133 S.E.2d 8 (1963); *Franklin County v. Payne*, 115 Ga. App. 52, 153 S.E.2d 732 (1967) (decided under former Code 1933, § 81-209).

In filing a general demurrer without protesting omission of process, that defect is waived. *Harrison v. Lovett*, 198 Ga. 466, 31 S.E.2d 799 (1944) (decided under former Code 1933, § 81-209).

Filing an answer is pleading to the merits, and when done without an express reservation of the defendant's right to insist upon irregularities in the process, it amounts to a waiver of the irregularities. *Stone v. Strange*, 115 Ga. App. 56, 153 S.E.2d 587 (1967) (decided under former Code 1933, § 81-209).

Failure to raise defense of lack of service. — Contention that insufficiency of service of process is apparent on the face of the record has no merit when such defense is waived by the defendant's failure to raise the defense by motion or in the defendant's original responsive pleadings. *Christopher v. McGehee*, 124 Ga. App. 310, 183 S.E.2d 624, *aff'd*, 228 Ga. 466, 186 S.E.2d 97 (1971).

Fact that an answer was filed by the defendant prior to service on individual partners furnished no basis to set aside the judgment as the defense of lack of service was waived by failure to assert the defense in the answer. *Bolton Rd. Medical Ctr. v. Strother & Co.*, 140 Ga. App. 724, 231 S.E.2d 533 (1976).

When the defendant failed to include the defendant's contention of improper service in the defendant's motion to open the default or in the defendant's answer, the defendant waived that defense. *A.G. Spanos Dev., Inc. v. Caras*, 170 Ga. App. 243, 316 S.E.2d 793 (1984).

Defendant who has not been served with process waives any defect in service when the defendant fails to raise the defenses of lack of personal jurisdiction or lack of sufficiency of process by either motion or an answer; a debtor's letter to the court, in which the debtor identified the number of a collection case filed against the debtor by a creditor, denied owing the debt, and asserted that the creditor was indebted to the debtor sufficed as an answer, and the failure to raise personal-jurisdiction or service-of-process defenses in that answer waived the defenses. *Ahmad v. Excell Petroleum, Inc.*, 276 Ga. App. 167, 623 S.E.2d 6 (2005).

Plea to jurisdiction without objection to service. — When there is irregular or insufficient service or no service at all, but the defendant, not objecting to service, files a plea to the jurisdiction on grounds of nonresidence in the county, the

object of service (opportunity to be heard) becomes accomplished of record in the case; hence, filing of such plea without objecting to service is waiver of service. *Weddington v. Kumar*, 149 Ga. App. 857, 256 S.E.2d 141 (1979).

Attack on proof of service only. — When the defendant did not attack the validity of service or contend that no service was made, but only attacked the lack of proof thereof, the defendant waived service by appearing and pleading. *Daniel & Daniel, Inc. v. Stewart Bros.*, 139 Ga. App. 372, 228 S.E.2d 586 (1976), overruled on other grounds, *Montgomery v. USS Agri-Chem. Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

Party's appearance before the trial court subsequent to the filing of the party's pleading in which the party contests the sufficiency of process does not amount to a waiver of that defense. *Gaddis v. Dyer Lumber Co.*, 168 Ga. App. 334, 308 S.E.2d 852 (1983).

Plea to jurisdiction on ground of nonresidence as waiver of service. — When there is irregular or insufficient service or no service at all, but the defendant, not objecting to the service or want of service, files a plea to the jurisdiction on the ground of the defendant's nonresidence in the county, the object of service (opportunity to be heard) becomes accomplished of record in the case, and the filing of such plea without objecting to the service or want of service is waiver of service. *Cutcliffe v. Pryse*, 187 Ga. 51, 200 S.E. 124 (1938) (decided under former Code 1933, § 81-209).

Motion complaining of void process not waiver. — When a want of jurisdiction appears on the face of the proceedings, an appearance by motion on the part of the person at whom such void process was directed, complaining of the want of the jurisdiction of the court, is not such an appearance as will result in the waiver of the process and service. *Burch v. Crown Laundry*, 78 Ga. App. 421, 50 S.E.2d 768 (1948), *aff'd*, 205 Ga. 211, 53 S.E.2d 116 (1949) (decided under former Code 1933, § 81-501).

Plea to merits not waiver when want of service is pled. — Appearance and pleading to the merits will waive

service, if no objection is made to the want of service, but it does not have such effect when before or at the same time want of service is pled; both pleas may be filed together without destroying each other. *Cutcliffe v. Pryse*, 187 Ga. 51, 200 S.E. 124 (1938) (decided under former Code 1933, § 81-209).

Pleading to and defending on the merits when legally required to do so, and at a time when the court had jurisdiction over a codefendant, did not constitute a waiver by the defendant on the question of improper venue. *Routh v. St. Marys Airport Auth.*, 178 Ga. App. 191, 342 S.E.2d 502 (1986).

Defense of lack of service not waived. — It was clear that the defendant preserved the issues of lack of service and insufficiency of service by pleading the defenses in accordance with O.C.G.A. § 9-11-12, and, by reasserting the defenses in the defendant's motion for summary judgment, the defendant documented the defendant's intent that the defendant did not waive the defenses, and this was recognized and adhered to by the trial court. *Roberts v. Bienert*, 183 Ga. App. 751, 360 S.E.2d 25 (1987).

Participation in discovery after defense of insufficiency of service has been properly raised in an answer to a complaint does not constitute a waiver of the defective service. *Garrett v. Godby*, 189 Ga. App. 183, 375 S.E.2d 103 (1988), *cert. denied*, 189 Ga. App. 912, 375 S.E.2d 103 (1989); *Exum v. Melton*, 244 Ga. App. 775, 536 S.E.2d 786 (2000).

No waiver of jurisdiction in divorce case. — Divorce suits do not affect the formal parties to the suit alone but the entire social fabric as well; therefore, the provisions of former Code 1933, § 81-503 (see now O.C.G.A. § 15-1-2), which authorizes parties in certain cases to waive jurisdiction, does not apply to a divorce suit. *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940) (decided under former Code 1933, § 81-503).

Waiver of improper venue and jurisdictional claims found in divorce case. — Because one of the parties in a divorce trial did not raise a claim that jurisdiction and venue were improper until a motion for new trial, this

Waiver or Preservation of**Defenses (Cont'd)****2. Personal Jurisdiction, Venue, Process and Service (Cont'd)**

claim was waived under O.C.G.A. § 9-11-12(h)(1)(B). *Fine v. Fine*, 281 Ga. 850, 642 S.E.2d 698 (2007).

Waiver of venue objection. — Because the trial court erred in opening a default against lenders, the trial court also erred in transferring the case for lack of proper venue. Under O.C.G.A. § 9-11-12(h)(1), by failing to answer, the lenders waived any objection to venue. *Flournoy v. Wells Fargo Bank, N.A.*, 289 Ga. App. 560, 657 S.E.2d 625 (2008).

Waiver of personal jurisdiction defense. — Employer who appeared and participated in trial on the merits, after the trial court denied the employer's plea in abatement, submitted to the court's jurisdiction for trial on the merits and waived the employer's personal jurisdiction defense. *Singleton v. State*, 263 Ga. App. 653, 588 S.E.2d 757 (2003).

Waiver of defense of insufficient service. — Trial court's order of forfeiture was upheld on appeal and, thus, was not subject to dismissal as: (1) the trial court was presented with testimony from witnesses other than the affiant, as well as sufficient other evidence, to support the order; (2) the alleged property owner waived any defense of insufficient service; and (3) an alternative code section did not afford the owner relief. *McDowell v. State of Ga.*, 290 Ga. App. 538, 660 S.E.2d 24 (2008).

3. Failure to State Claim, Join Party, or State Defenses

Failure to state claim may be raised at time of trial. — It is certainly proper and preferable that the defense of failure to state a claim be filed along with or as a part of the answer, but subsection (h) of this section specifically permits such motion to be filed even at the time of trial. *Southern Concrete Co. v. Carter Constr. Co.*, 121 Ga. App. 573, 174 S.E.2d 447 (1970).

Failure to state a claim cannot be

raised by motion after judgment. *Loukes v. McCoy*, 129 Ga. App. 167, 199 S.E.2d 125 (1973).

Treatment as motion for summary judgment. — In an action filed by children to recover damages for injuries sustained by their parent in a fall in a nursing home facility, a motion to dismiss the action for failure to state a claim filed by the center that operated the facility was converted to a motion for summary judgment and, on appeal, was to be reviewed as such; the children, as nonmovants, submitted documentary evidence in response to the motion and, by doing so, in effect requested that the motion be converted into one for summary judgment and acquiesced in the trial court's decision not to give notice of the actual nature of the pending motion. *Gaddis v. Chatsworth Health Care Ctr., Inc.*, 282 Ga. App. 615, 639 S.E.2d 399 (2006).

In a wrongful foreclosure action, the trial court erred in conducting a hearing on the defendants' motion to dismiss and in converting the motion to dismiss into a motion for summary judgment by considering evidence outside the pleadings without giving the plaintiff prior notice as the trial court's notice of hearing stated that the court was conducting a status conference, and the notice made no mention of the defendants' motion to dismiss. *Garner v. US Bank Nat'l Ass'n*, 329 Ga. App. 86, 763 S.E.2d 748 (2014).

Failure to file defense on appeal to superior court from property evaluation. — Default judgment will not lie for failure to file defensive pleadings in a de novo hearing before a jury on appeal in the superior court from a property evaluation. *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977).

Complaint failed to state claim. — Trial court properly dismissed an inmate's petition for a writ of habeas corpus for failing to state a claim upon which relief could be granted based on a finding that such was prematurely filed in that no governor's warrant had been issued or served from the seeking state at the time the petition was filed and the inmate had only been arrested for Georgia offenses; moreover, to the extent that the inmate might have been seeking to challenge an

arrest without a warrant pursuant to O.C.G.A. § 17-13-34, insufficient facts were pled which supported such a claim. *Powell v. Brown*, 281 Ga. 609, 641 S.E.2d 519 (2007).

Failure to join indispensable party.

— Defense of failure to join an indispensable party is subject to defense of waiver under paragraph (h)(2) of O.C.G.A. § 9-11-12 and must be asserted before judgment or the defense is waived. *Adams v. Wright*, 162 Ga. App. 550, 293 S.E.2d 446 (1982).

Failure to raise the defense of failure to join an indispensable party by motion or defensive pleading results in a waiver of the defense. *Mathis v. Hammond*, 268 Ga. 158, 486 S.E.2d 356 (1997).

Immunity defense not waived if pled in answer.

— In a claim of immunity grounded on a state policy enacted to encourage the rendering of emergency medical services, defendant's answer which pled a defense of failure to state a claim upon which relief could have been granted, and asserted the action was barred under the doctrine of sovereign immunity complied with O.C.G.A. § 9-11-12 and the defendant did not waive the right to the defenses. *Ramsey v. City of Forest Park*, 204 Ga. App. 98, 418 S.E.2d 432 (1992).

Pleading of failure to state claim sufficient notice of immunity defenses.

— Under notice pleading, an answer pleading a defense of failure to state a claim was minimally sufficient to give notice of substantive immunity defenses under either O.C.G.A. § 31-11-8 or O.C.G.A. § 36-33-3. *Ramsey v. City of Forest Park*, 204 Ga. App. 98, 418 S.E.2d 432 (1992).

Case properly dismissed. — Purchaser's tortious interference with a contract claim was properly dismissed pursuant to O.C.G.A. § 9-11-12(b)(6) because the purchaser could not maintain such a claim against the lender because the lender had a direct interest in the contract. Additionally, the purchaser's abuse of litigation claim was properly dismissed under § 9-11-12(b)(6) because the lender's dispossessory claim against the purchaser and seller, the subject of the abuse of litigation claim, succeeded, which was a

complete defense under O.C.G.A. § 51-7-82(c). *LaSonde v. Chase Mortg. Co.*, 259 Ga. App. 772, 577 S.E.2d 822 (2003).

Case improperly dismissed. — Because a neighbor adequately set forth a cause of action for ejection in their amended complaint, specifically alleging that during the elevation of their own property, the adjacent landowner and its transferee appropriated the neighbor's property to the extent that they placed the fill dirt presently being used as lateral support over the common boundary and onto the neighbor's property, the trial court erred in dismissing the complaint. *MVP Inv. Co. v. North Fulton Express Oil, LLC*, 282 Ga. App. 512, 639 S.E.2d 533 (2006).

4. Subject Matter Jurisdiction

Jurisdiction of subject matter not waivable.

— Rule that a plea to the jurisdiction may be filed on appeal applies only to pleas to the jurisdiction of the subject matter, which can never be waived. *Garrison v. McGuire*, 114 Ga. App. 665, 152 S.E.2d 624 (1966) (decided under former Code 1933, § 81-503).

Dismissal for lack of subject matter jurisdiction.

— Paragraph (h)(3) of this section deals solely with the duty of the trial court to dismiss an action when it appears that subject matter jurisdiction, a nonwaivable defect which would render any judgment in the action void, is absent. *McLanahan v. Keith*, 239 Ga. 94, 236 S.E.2d 52 (1977), overruled on other grounds, *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983).

Dismissal not authorized. — When an original creditor acquired an existing debt obligation of guarantor and the substantive rights in that indebtedness were then assigned to a subsequent creditor through the sale of the original creditor's stock, there was no need for equitable reformation of any writing, and so the trial court did not err by refusing to dismiss the contract action as being beyond the subject matter jurisdiction of the county court. *Davis v. Concord Com. Corp.*, 209 Ga. App. 595, 434 S.E.2d 571 (1993).

Waiver or Preservation of**Defenses (Cont'd)****4. Subject Matter****Jurisdiction (Cont'd)**

Paragraph (h)(3) does not authorize a judge to enforce, over the objection of the defendant, a waivable defense held by that defendant. *McLanahan v. Keith*, 239 Ga. 94, 236 S.E.2d 52 (1977), overruled on other grounds, *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983).

Effect of hospital governmental entity's delayed non-waiver of service.

— Patients exercised due diligence (under a laches-type of test) to serve a hospital

after the hospital informed the patients, after the statute of limitations expired, that the hospital was a governmental entity that, under O.C.G.A. § 9-11-4(d), could not accept the patients' request to waive service of process. Therefore, the patient's suit, filed before the statute of limitations expired, related back under laches and O.C.G.A. § 9-11-12(b) and the statute of limitations did not bar the dismissed claims against the hospital and, thus, the trial court abused the court's discretion in dismissing the action. *Carver v. Tift County Hosp. Auth.*, 268 Ga. App. 153, 601 S.E.2d 475 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appearance, § 1. 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, §§ 30 et seq., 103 et seq. 24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, §§ 53, 55. 51 Am. Jur. 2d, Limitation of Actions, § 377 et seq. 61A Am. Jur. 2d, Pleading, § 211 et seq. 73 Am. Jur. 2d, Summary Judgment, § 12 et seq.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Desertion and Nonsupport, § 33. 8B Am. Jur. Pleading and Practice Forms, Dismissal, Discontinuance, and Nonsuit, § 1. 19B Am. Jur. Pleading and Practice Forms, Pleading, §§ 216, 273, 422. 20A Am. Jur. Pleading and Practice Forms, Process, § 149.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 168, 212, 214, 216, 218, 232, 289, 290, 294 et seq., 299, 301, 311, 337, 341 et seq., 377 et seq., 387, 393 et seq., 445 et seq., 448, 455, 457, 459, 460, 461. 35B C.J.S., Federal Civil Procedure, §§ 803, 809, 812, 818, 824, 827 et seq., 834 et seq., 846, 862, 863, 865, 867, 870, 875, 879 et seq., 1213, 1223. 71 C.J.S., Pleading, §§ 98 et seq., 111, 132 et seq., 123, 137, 432 et seq., 435 et seq., 461 et seq., 486 et seq.

ALR. — Plea of pendency of former action as affecting right of pleader to avail himself of objections to the former action, 32 ALR 1339.

Joinder, in one action at law, of persons not jointly liable, one or the other of whom is liable to the plaintiff, 41 ALR 1223.

Necessity and sufficiency of verification of specifications of objections to discharge in bankruptcy, 47 ALR 640.

Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction, 55 ALR 1121; 129 ALR 1240.

Constitutionality of statute or rule of court providing for summary judgment unless affidavit of merits is filed, 69 ALR 1031; 120 ALR 1400.

May unconstitutionality of statute be raised by demurrer to pleading, 71 ALR 1194.

Bar of statute of nonclaim of decedent's domicile as affecting assertion of claim elsewhere, 72 ALR 1030.

Action for abuse of process, 80 ALR 580.

May or must claim for damages from wrongful seizure of property be interposed in action or proceeding in which such seizure is made, 85 ALR 644.

May question as to qualification or competency of witness be raised by or upon motion for nonsuit or for directed verdict, absent objection on that ground when testimony was given, 93 ALR 788.

Principal contractor as necessary party to suit to enforce mechanic's lien of subcontractor, laborer, or materialman, 100 ALR 128.

Water user as necessary or proper party to litigation involving the right of ditch or canal company or irrigation or drainage district from which he takes water, 100 ALR 561.

Asking relief in addition to vacation of service of process as waiver of special appearance or of right to rely upon lack of jurisdiction, 111 ALR 925.

Consent of parties to consideration of matters extrinsic to pleading demurred to, 137 ALR 483.

Power to open or modify "consent" judgment, 139 ALR 421.

Right of defendant in civil action to change of venue upon motion made after time specified by statute or rule in that regard, as affected by fact that codefendant had made such a motion within the prescribed period, 141 ALR 1177.

Adequacy of remedy by appeal in criminal cases to preclude prohibition sought on the ground of lack or loss of jurisdiction, 141 ALR 1262.

Right of one defendant to demur to complaint because of failure to state a cause of action against codefendant, or to complain of overruling of demurrer interposed by latter, 145 ALR 676.

Domicile or residence of person in the armed forces, 158 ALR 1474.

Pleading particular cause of injury as waiver of right to rely on *res ipsa loquitur*, 160 ALR 1450; 2 ALR3d 1335.

Right to ruling on objection to jurisdiction over person before hearing or trial on merits, 161 ALR 295.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 ALR 496.

Demurring to complaint or petition in intervention as waiver of right to stand upon motion to strike, 163 ALR 917.

Appealability of ruling on demurrer to plea, answer, or reply, 171 ALR 1433.

Dissolved corporation as an indispensable party to a stockholder's derivative action, 172 ALR 691.

Appealability of order entered on motion to strike pleading, 1 ALR2d 422.

Appealability of order overruling motion for judgment on pleadings, 14 ALR2d 460.

Immunity of nonresident defendant in criminal case from service of process, 20 ALR2d 163.

Pleading last clear chance doctrine, 25 ALR2d 254.

Objection before judgment to jurisdiction of court over subject matter as constituting general appearance, 25 ALR2d 833.

Motion to vacate judgment or order as constituting general appearance, 31 ALR2d 262.

Court's power, on motion for judgment on the pleadings, to enter judgment against movant, 48 ALR2d 1175.

Pleading or raising defense of privilege in defamation action, 51 ALR2d 552.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action, 56 ALR2d 1238.

Necessity and manner of pleading assumption of risk as a defense, 59 ALR2d 239.

Pleading imputed negligence as defense, 59 ALR2d 273.

Proper procedure and course of action by trial court, where both parties move for judgment on the pleadings, 59 ALR2d 494.

Raising defense of statute of limitations by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings, 61 ALR2d 300.

Litigant's participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 ALR2d 937.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body, 65 ALR2d 1278.

Proper forum and right to maintain action for airplane accident causing death over or in high seas, 66 ALR2d 1002.

Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally, 88 ALR2d 12.

Doctrine of *forum non conveniens*: assumption or denial of jurisdiction of contract action involving foreign elements, 90 ALR2d 1109.

Prohibition as appropriate remedy to restrain civil action for lack of venue, 93 ALR2d 882.

Pleading of election remedies, 99 ALR2d 1315.

Modern trends as to pleading a particular cause of injury or act of negligence as waiving or barring the right to rely on *res ipsa loquitur*, 2 ALR3d 1335.

Summary judgment in mandamus or prohibition cases, 3 ALR3d 675.

Plea of guilty as waiver of claim of unlawful search and seizure, 20 ALR3d 724.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 ALR3d 1113.

Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case, 37 ALR3d 238.

Waiver of, by failure to promptly raise, objection to splitting cause of action, 40 ALR3d 108.

Pleading and proof of law of foreign country, 75 ALR3d 177.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service: state cases, 77 ALR3d 841.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 ALR5th 237.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 ALR Fed. 755.

9-11-13. Counterclaim and cross-claim.

(a) **Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought an action upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Code section, or (3) the claim is not within the jurisdiction of the court.

(b) **Permissive counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. But any such permissive counterclaim shall be separated for the purposes of trial, unless the parties otherwise agree.

(c) **Counterclaim exceeding opposing claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim against the state.** This Code section shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or to claim credits against the state or an officer or agency thereof.

(e) **Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his

pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) **Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) **Cross-claim against coparty.** A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. The cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **Additional parties may be brought in.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in this chapter, if jurisdiction of them can be obtained.

(i) **Separate trials; separate judgments.** If the court orders separate trials as provided in subsection (b) of Code Section 9-11-42, judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of subsection (b) of Code Section 9-11-54 when the court has jurisdiction to do so, even if the claims of the opposing party have been dismissed or otherwise disposed of. (Ga. L. 1966, p. 609, § 13.)

Cross references. — Time limitations on commencement of prosecution and enforcement of rights by way of counterclaim and cross-claim, § 9-3-97. Form for setting forth counterclaim or cross-claim in conjunction with setting forth of defenses under § 9-11-12(b), § 9-11-120.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 13, see 28 U.S.C.

Law reviews. — For article discussing counterclaims and crossclaims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article, “Current Problems with Venue in Georgia,” see 12

Ga. St. B.J. 71 (1975). For article surveying 1981-1982 Eleventh Circuit cases involving civil practice and procedure, see 34 Mercer L. Rev. 1363 (1983). For article, “Compulsory Cross-Claims?,” see 5 Ga. St. B.J. 48 (1999). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

For case comment, “Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
COUNTERCLAIMS

1. IN GENERAL
2. COMPULSORY COUNTERCLAIMS
3. PERMISSIVE COUNTERCLAIMS
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CROSS-CLAIMS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 81-101, 81-105 and 81-106 are included in the annotations for this Code section.

Controversies growing out of plaintiff's claim. — Policy of the law requires controversy growing out of cause of action alleged by the plaintiff to be settled in that suit. *Brewer v. Williams*, 210 Ga. 341, 80 S.E.2d 190 (1954) (decided under former Code 1933, § 81-106).

One who goes into court of county other than that of one's residence, to assert a claim or set up an equity, must be content to allow that court to determine any counterclaim growing out of the original suit, which the defendant sees fit to set up by a cross action. *Brewer v. Williams*, 210 Ga. 341, 80 S.E.2d 190 (1954) (decided under former Code 1933, § 81-106).

Setoff is a cross action and must be pled with as much certainty and definiteness as a declaration in any suit of law. *Morris v. International Agric. Corp.*, 53 Ga. App. 517, 186 S.E. 583 (1936); *City Stores Co. v. Henderson*, 116 Ga. App. 114, 156 S.E.2d 818 (1967) (decided under former Code 1933, §§ 8-101 and 81-105).

Applicability in dispossessor action. — Trial court correctly disallowed evidence of emblements or emoluments in a dispossessory action after the defendant failed to assert any such claim in the defendant's answer or as a counterclaim, to proffer evidence of details of the alleged specific improvements that might be the basis for such a claim, or to proffer evidence as to an agreement between the parties for reimbursement of the cost of any improvements. *Gentry v. Chateau Properties*, 236 Ga. App. 371, 511 S.E.2d 892 (1999).

Inapplicable to contempt. — Provisions of this section with respect to counterclaims and cross complaints are not applicable in contempt cases. *McNeal v. McNeal*, 233 Ga. 836, 213 S.E.2d 845 (1975); *Culpepper v. Brewer*, 242 Ga. 210, 248 S.E.2d 619 (1978).

This section is not applicable in contempt cases. *Word v. Word*, 236 Ga. 100, 222 S.E.2d 382 (1976).

Subsection (a) of this section is not applicable in contempt cases. *Blease v. Blease*, 238 Ga. 651, 235 S.E.2d 21 (1977).

Counterclaim for change of custody not permitted in contempt action. — Provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) authorizing counterclaims and cross complaints when not permitted prior to its enactment does not affect a contempt motion so that if the movant is not a resident of the county, wherein the contempt citation is filed, the court is without jurisdiction to consider a counterclaim or cross complaint to modify a prior judgment granting custody of the child. *Davis v. Davis*, 230 Ga. 33, 195 S.E.2d 440 (1973); *Fernandez v. Fernandez*, 232 Ga. 697, 208 S.E.2d 498 (1974).

Counterclaim seeking modification of a former custody judgment based on a change of conditions cannot be filed in answer to an application for contempt. *Word v. Word*, 236 Ga. 100, 222 S.E.2d 382 (1976).

In child custody cases, when the custodial parent files a contempt action in the noncustodial resident's jurisdiction for purposes of enforcing a divorce decree, a counterclaim for change of custody will not lie. *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977).

Contempt motion is not a submission to court's jurisdiction. — Motion filed seeking to have party to divorce proceeding held in contempt of court for fail-

ure to comply with decree of court is not tantamount to filing of complaint wherein movant submits to the venue of the court. *Davis v. Davis*, 230 Ga. 33, 195 S.E.2d 440 (1973); *Fernandez v. Fernandez*, 232 Ga. 697, 208 S.E.2d 498 (1974).

Recovery of damages for malicious use of process cannot be had by cross action or counterclaim since it is a condition precedent that the main suit must have terminated favorably to the defendant before the claim can be prosecuted in any fashion. *Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

Logical relationship test satisfied.

— Bank sued the bank's customer to recover for an overdraft; before filing the customer's counterclaim, the customer sued the bank in another county. As the customer raised the same claims in the customer's complaint and counterclaim, and as there was a logical relationship between the parties' claims, the customer's counterclaim was compulsory; therefore, the customer's suit against the bank was barred by O.C.G.A. § 9-2-5(a). *Steve A. Martin Agency, Inc. v. PlantersFIRST Corp.*, 297 Ga. App. 780, 678 S.E.2d 186 (2009).

Res judicata applied. — Dismissal of the complaint was affirmed because upon the plaintiffs' voluntary dismissal of the plaintiffs' complaint in the prior action, the defendants' claims stood alone and, pursuant to O.C.G.A. § 9-11-13(a), the plaintiffs were required to file as a "counterclaim" to the defendant's claims any claims which the plaintiffs had arising out of the transaction or occurrence that was the basis of the defendant's claims. *Burrowes v. Tenet Healthsystem GB, Inc.*, 319 Ga. App. 389, 735 S.E.2d 131 (2012).

Cited in *Peacock Constr. Co. v. Turner Concrete, Inc.*, 116 Ga. App. 822, 159 S.E.2d 114 (1967); *Maddox v. Maddox*, 224 Ga. 313, 161 S.E.2d 870 (1968); *Gaddis v. Moss*, 117 Ga. App. 810, 162 S.E.2d 255 (1968); *Best v. Georgia Power Co.*, 224 Ga. 669, 164 S.E.2d 125 (1968); *Clark v. Perrin*, 224 Ga. 307, 161 S.E.2d 874 (1968); *Phillips v. Georgia Power Co.*, 225 Ga. 289, 168 S.E.2d 150 (1969); *Shaw v. Davis*, 119 Ga. App. 801, 168 S.E.2d 853 (1969); *State Farm Mut. Auto. Ins. Co. v.*

Black, 120 Ga. App. 151, 169 S.E.2d 742 (1969); *Cook & Co. v. Cross*, 226 Ga. 449, 175 S.E.2d 506 (1970); *Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, 175 S.E.2d 910 (1970); *Electro-Kinetics Corp. v. Wilson*, 122 Ga. App. 171, 176 S.E.2d 604 (1970); *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970); *Jones v. Spindel*, 122 Ga. App. 390, 177 S.E.2d 187 (1970); *Leggett v. Gibson-Hart-Durden Funeral Home, Inc.*, 123 Ga. App. 224, 180 S.E.2d 256 (1971); *Georgia Heart Ass'n v. Berry*, 123 Ga. App. 692, 182 S.E.2d 148 (1971); *Autry v. Palmour*, 124 Ga. App. 407, 184 S.E.2d 15 (1971); *Martin Mgt. Corp. v. Farner*, 124 Ga. App. 552, 184 S.E.2d 597 (1971); *Buffington v. McClelland*, 125 Ga. App. 153, 186 S.E.2d 550 (1971); *Walton County Bd. of Educ. v. Academy of Social Circle*, 229 Ga. 114, 189 S.E.2d 690 (1972); *Gamble v. Reeves Transp. Co.*, 126 Ga. App. 161, 190 S.E.2d 95 (1972); *Reeves Transp. Co. v. Gamble*, 126 Ga. App. 165, 190 S.E.2d 98 (1972); *Peckham v. Metro Steel Co.*, 126 Ga. App. 685, 191 S.E.2d 559 (1972); *Watts v. Kundtz*, 128 Ga. App. 797, 197 S.E.2d 859 (1973); *Walker v. Anderson*, 131 Ga. App. 596, 206 S.E.2d 833 (1974); *Benefield v. Elder Bldg. Supply Co.*, 132 Ga. App. 195, 207 S.E.2d 678 (1974); *Baitcher v. Louis R. Clerico Assocs.*, 132 Ga. App. 219, 207 S.E.2d 698 (1974); *Frank B. Wilder & Assoc. v. St. Joseph's Hosp.*, 132 Ga. App. 373, 208 S.E.2d 145 (1974); *Von Waldner v. Baldwin/Cheshire, Inc.*, 133 Ga. App. 23, 209 S.E.2d 715 (1974); *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974); *Florida E. Coast Properties, Inc. v. Davis*, 133 Ga. App. 932, 213 S.E.2d 79 (1975); *Coffey Enters. Realty & Dev. Co. v. Holmes*, 233 Ga. 937, 213 S.E.2d 882 (1975); *Snead v. Pay-Less Rentals, Inc.*, 134 Ga. App. 325, 214 S.E.2d 412 (1975); *Coop Mtg. Invs. Assocs. v. Pendley*, 134 Ga. App. 236, 214 S.E.2d 572 (1975); *Register v. Kandlbinder*, 134 Ga. App. 754, 216 S.E.2d 647 (1975); *Monumental Properties, Inc. v. Johnson*, 136 Ga. App. 39, 220 S.E.2d 55 (1975); *W.L. Pettus Constr. Co. v. Commercial Union Ins. Co.*, 138 Ga. App. 281, 226 S.E.2d 77 (1976); *Greer v. State Farm Fire & Cas. Co.*, 139 Ga. App.

General Consideration (Cont'd)

74, 227 S.E.2d 881 (1976); Latex Filler & Chem. Co. v. Chapman, 139 Ga. App. 382, 228 S.E.2d 312 (1976); Cel-Ko Bldrs. & Developers, Inc. v. BX Corp., 140 Ga. App. 501, 231 S.E.2d 361 (1976); Wolski v. Hayes, 144 Ga. App. 180, 240 S.E.2d 720 (1977); P & J Truck Lines v. Canal Ins. Co., 148 Ga. App. 3, 251 S.E.2d 72 (1978); Scroggins v. Harper, 144 Ga. App. 548, 241 S.E.2d 648 (1978); Retail Union Health & Welfare Fund v. Seabrum, 240 Ga. 695, 242 S.E.2d 18 (1978); Coker v. Jay Hambridge Art Found., 144 Ga. App. 660, 242 S.E.2d 323 (1978); Smith v. Smith, 145 Ga. App. 816, 244 S.E.2d 917 (1978); Alesi v. Conant, 146 Ga. App. 455, 246 S.E.2d 464 (1978); Mickel v. Pickett, 241 Ga. 528, 247 S.E.2d 82 (1978); Match Point, Ltd. v. Adams, 148 Ga. App. 673, 252 S.E.2d 90 (1979); Morton v. Skrine, 242 Ga. 844, 252 S.E.2d 408 (1979); Carl E. Jones Dev., Inc. v. Wilson, 149 Ga. App. 679, 255 S.E.2d 135 (1979); Harris v. Harris, 149 Ga. App. 842, 256 S.E.2d 86 (1979); Teague v. First Bank & Trust Co., 244 Ga. 360, 260 S.E.2d 72 (1979); Wilkerson v. Chattahoochee Parks, 244 Ga. 472, 260 S.E.2d 867 (1979); Spurlock v. Commercial Banking Co., 151 Ga. App. 649, 260 S.E.2d 912 (1979); Ransom v. Waldrup, 152 Ga. App. 711, 263 S.E.2d 682 (1979); Schoen v. Home Fed. Sav. & Loan Ass'n, 154 Ga. App. 68, 267 S.E.2d 466 (1980); Roush v. Dan Vaden Chevrolet, Inc., 155 Ga. App. 372, 270 S.E.2d 902 (1980); Prescott v. Carithers, 158 Ga. App. 366, 280 S.E.2d 361 (1981); White v. First Fed. Sav. & Loan Ass'n, 158 Ga. App. 373, 280 S.E.2d 398 (1981); Peters v. Peters, 248 Ga. 490, 283 S.E.2d 454 (1981); Hazzard v. Phillips, 249 Ga. 24, 287 S.E.2d 191 (1982); H.R.H. Prince Ltc. Faisal M. Saud v. Batson-Cook Co., 161 Ga. App. 219, 291 S.E.2d 249 (1982); Atlanta Window Co. v. Haskell Assocs., 162 Ga. App. 789, 293 S.E.2d 51 (1982); David J. Joseph Co. v. S & M Scrap Metal Co., 163 Ga. App. 685, 295 S.E.2d 860 (1982); Sawyer v. Citizens & S. Nat'l Bank, 164 Ga. App. 177, 296 S.E.2d 134 (1982); Automated Medical Servs., Inc. v. Holland, 166 Ga. App. 57, 303 S.E.2d 127 (1983); Christian v. M & R Collection Adjustment, Inc., 167 Ga. App. 712, 307 S.E.2d 523 (1983); B.J. Howard Corp. v. Skinner, Wilson, Strickland, Hardy & Benson, 172 Ga. App. 446, 323 S.E.2d 664 (1984); Nindos v. Katra, Inc., 173 Ga. App. 326, 326 S.E.2d 530 (1985); Cable Holdings of Battlefield, Inc. v. Lookout Cable Serv., Inc., 173 Ga. App. 355, 326 S.E.2d 552 (1985); Medlin v. Carpenter, 174 Ga. App. 50, 329 S.E.2d 159 (1985); Hall v. Cel Oil Prods. Corp., 175 Ga. App. 813, 334 S.E.2d 724 (1985); Idowu v. Lester, 176 Ga. App. 713, 337 S.E.2d 386 (1985); Citizens Exch. Bank v. Kirkland, 256 Ga. 71, 344 S.E.2d 409 (1986); Williams v. Patel, 179 Ga. App. 570, 347 S.E.2d 337 (1986); Spence v. Hilliard, 181 Ga. App. 767, 353 S.E.2d 634 (1987); Clark v. GMAC, 185 Ga. App. 130, 363 S.E.2d 813 (1987); Pierce County Sch. Dist. v. Greene, 185 Ga. App. 269, 363 S.E.2d 825 (1987); Edenfield v. Trust Co. Mtg., 185 Ga. App. 678, 365 S.E.2d 520 (1988); Trust Co. Bank v. Shaw, 186 Ga. App. 347, 367 S.E.2d 82 (1988); A.L. Williams & Assocs. v. Faircloth, 190 Ga. App. 872, 380 S.E.2d 471 (1989); Holcomb v. Ellis, 259 Ga. 625, 385 S.E.2d 670 (1989); Coxwell Tractor & Equip. Sales, Inc. v. Burgess, 192 Ga. App. 663, 385 S.E.2d 753 (1989); Hill v. Federal Employees Credit Union, 193 Ga. App. 44, 386 S.E.2d 874 (1989); Trust Co. Bank v. Citizens & S. Trust Co., 260 Ga. 124, 390 S.E.2d 589 (1990); Norman v. Farm Fans, Inc., 203 Ga. App. 97, 416 S.E.2d 374 (1992); Haire v. Suburban Auto Body, Inc., 204 Ga. App. 16, 418 S.E.2d 163 (1992); McLain Bldg. Materials, Inc. v. Hicks, 205 Ga. App. 767, 423 S.E.2d 681 (1992); Booksing v. Holley, 210 Ga. App. 869, 437 S.E.2d 857 (1993); Block v. Woodbury, 211 Ga. App. 184, 438 S.E.2d 413 (1993); Applied Ecological Sys. v. Weskem, Inc., 212 Ga. App. 65, 441 S.E.2d 279 (1994); DOT v. Hall, 221 Ga. App. 178, 470 S.E.2d 775 (1996); Oh v. Bell, 221 Ga. App. 276, 470 S.E.2d 807 (1996); Hovendick v. Presidential Fin. Corp., 230 Ga. App. 502, 497 S.E.2d 269 (1998); Womack v. State, 270 Ga. 56, 507 S.E.2d 425 (1998); McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500, 562 S.E.2d 809 (2002); Yates Paving & Grading Co. v. Bryan County, 265 Ga. App. 578, 594 S.E.2d 756 (2004); Sampson v. Haywire Ventures, Inc., 293 Ga. App. 779, 668

S.E.2d 286 (2008); *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013).

Counterclaims

1. In General

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) allows the broadest assertion of counterclaims. *Cities Serv. Oil Co. v. Cronan*, 123 Ga. App. 794, 182 S.E.2d 484 (1971).

Counterclaim must have matured.

— To come within the scope of this section, a counterclaim must have “matured.” *Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

Time limitations. — Counterclaim was timely if filed within the time that a party was obligated to answer the main action as long as the limitations period for the counterclaim had not expired before the main action was filed. When both the main action against a truck driver and the truck driver’s third party complaint against an injured person were filed within the two year statute of limitations period, the injured person’s personal injury counterclaim against the truck driver was not barred, even though the counterclaim was filed beyond the two year period, and the trial court erred in dismissing the counterclaim. *Harpe v. Hall*, 266 Ga. App. 340, 596 S.E.2d 666 (2004).

Plaintiff must have complete cause of action when suit filed. — Rule that there can be no recovery unless the plaintiff had a complete cause of action at the time the suit is filed, and that a cause of action accruing pending suit will not entitle the plaintiff to recover, applies equally to a counterclaim. *Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

Counterclaim sets up affirmative demand. — Counterclaim, by its essential nature, goes beyond the defensive and sets up an affirmative demand; it must state the elements of such a demand, and should state a cause of action in favor of the party alleging it against the plaintiff. *Metro Chrysler-Plymouth, Inc. v. Pearce*, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

Ex delicto counterclaim may be asserted against an ex contractu action. *Elsner v. Cathcart Cartage Co.*, 124 Ga.

App. 615, 184 S.E.2d 685 (1971); *Ben L. O’Callaghan Co. v. Bond Supply Co.*, 138 Ga. App. 186, 225 S.E.2d 774 (1976).

Ex contractu counterclaim may be asserted against an ex delicto action. *Hanover Ins. Co. v. Nelson Conveyor & Mach. Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981).

Counterclaim for damages from plaintiff’s action. — Generally, the defendant cannot by counterclaim bring an action for damages against the plaintiff for having filed and prosecuted the very action in which the defendant asserts the counterclaim. *Ferguson v. Atlantic Land & Dev. Corp.*, 158 Ga. App. 33, 279 S.E.2d 470, rev’d on other grounds, 248 Ga. 69, 281 S.E.2d 545 (1981).

Effect of pending counterclaim on summary judgment. — When there is a pending valid counterclaim, the trial court need not deny a persuasive and valid motion for summary judgment, and it is not error per se to grant a motion for summary judgment when there is a pending, valid counterclaim. *Williams v. Church’s Fried Chicken, Inc.*, 158 Ga. App. 26, 279 S.E.2d 465 (1981).

Application of the prior pending doctrine. — In a personal injury accident between two drivers, the trial court erroneously denied the first driver’s motion to dismiss a counterclaim asserted by the second driver because the second driver had a prior pending action against the first driver in another county, and the parties’ status in both actions was identical. Moreover, given the first driver’s assurances that the instant suit would be dismissed in favor of defending the second driver’s claims in the prior pending action, the denial of the first driver’s motion to dismiss the second driver’s counterclaim was inconsistent with the purpose of O.C.G.A. § 9-2-5. *Jenkins v. Crea*, 289 Ga. App. 174, 656 S.E.2d 849 (2008).

Pleading which places corporation as third-party plaintiff in derivative suit. — When the affirmative pleading filed by defendant officers, under former §§ 14-2-153 and 14-2-154 (see now O.C.G.A. §§ 14-2-831 and 14-2-832), in a corporate action in tort for breach of a fiduciary duty would have the result of placing the corporation as a third-party

Counterclaims (Cont'd)**1. In General** (Cont'd)

plaintiff in a stockholders' derivative suit, the purpose of which is to procure certain relief for the benefit of the corporation, such pleading does not appear to be either a compulsory counterclaim arising out of the transaction which is the subject of the complaint under subsection (a) of O.C.G.A. § 9-11-13 or a permissive counterclaim under subsection (b) of § 9-11-13. *Henderson v. Kent*, 158 Ga. App. 206, 279 S.E.2d 503 (1981).

Counterclaim in declaratory judgment action. — Since the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is applicable to declaratory judgment actions, it would appear that the defendant in such an action could interpose a counterclaim against the plaintiff. *Harrison v. Speidel*, 244 Ga. 643, 261 S.E.2d 577 (1979).

Counterclaims and cross-claims are not properly maintainable in a declaratory judgment action when those claims do not arise out of a transaction or question presented by an action for declaratory judgment. *Colonial Penn Ins. Co. v. Hart*, 162 Ga. App. 333, 291 S.E.2d 410 (1982).

Counterclaim for contribution is permissive. — Party who chooses not to assert his or her claim for contribution as a counterclaim is not barred from bringing a separate suit for contribution after a judgment has been entered in the original tort action. *Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

Counterclaim for breach of warranty not redundant with affirmative defense of nonconformity. — In suit to recover on purchase order, the trial court errs in striking a counterclaim for breach of warranty because it is allegedly redundant in view of an affirmative defense of right to refuse payment because of nonconformity. *Bingham, Ltd. v. Tool Technology, Inc.*, 166 Ga. App. 220, 303 S.E.2d 761 (1983).

Subsequent condemnation action. — Condemnee's counterclaim for damages arising from condemnor's use of previously condemned land could not be raised in condemnor's action to condemn additional land. *Flo-Rob, Inc. v. Colonial Pipe-*

line Co., 170 Ga. App. 650, 317 S.E.2d 885 (1984).

Counterclaim outside bounds of condemnation proceeding. — After the Department of Transportation had initiated condemnation proceedings against a property owner, the owner was not permitted to file a counterclaim to recover damages for unauthorized use of the remainder because the subject of the counterclaim was outside the bounds of this type of condemnation. *DOT v. Fina Oil & Chem. Co.*, 194 Ga. App. 185, 390 S.E.2d 99 (1990).

Late filing of a counterclaim pursuant to subsection (f) of O.C.G.A. § 9-11-13 is permitted only as an amendment to pleadings already on file. Thus, once a case is in default, the defendant may not file responsive pleadings unless and until the default is opened. *Ragan v. Smith*, 188 Ga. App. 770, 374 S.E.2d 559 (1988).

Jurisdiction of property damage counterclaim in Civil Court of Fulton County. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), the Civil Court of Fulton County has jurisdiction when actions based on property damage is raised as a counterclaim. *Cities Serv. Oil Co. v. Cronan*, 123 Ga. App. 794, 182 S.E.2d 484 (1971).

Permission of court required. — While a trial court erred in dismissing a director's permissive counterclaim with prejudice, the trial court would not have erred in dismissing the claim without prejudice because the director did not seek the trial court's permission before filing the claim. *Sampson v. Haywire Ventures, Inc.*, 278 Ga. App. 525, 629 S.E.2d 515 (2006).

Judicial immunity prevented counterclaim. — Counterclaims filed by the county and the county's commissioner were properly dismissed as the judge's handling of traffic cases, including dismissal of 60 cases after the judge lost in a general election, was protected by judicial immunity. *Heiskell v. Roberts*, 295 Ga. 795, 764 S.E.2d 368 (2014).

Claims did not arise out of the same transaction. — As a developer's tort claims did not arise out of the same transaction or occurrence as the prior claims

brought by investors, the claims were properly not deemed compulsory counterclaims; rather, the developer's claims were based on the investors' filing of a *lis pendens* that occurred in the investors' action. *Meadow Springs, LLC v. IH Riverdale, LLC*, 323 Ga. App. 478, 747 S.E.2d 47 (2013).

2. Compulsory Counterclaims

When counterclaim compulsory. — This section makes counterclaims mandatory when the counterclaims arise out of the same transaction or occurrence. *Coastal Air Serv., Inc. v. Tarco Aviation Serv., Inc.*, 301 F. Supp. 586 (S.D. Ga. 1969).

Party must raise any claim against an opposing party which arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim as long as the presence of a third party is not required. *Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (5th Cir. 1982).

Compulsory counterclaim is one which: (1) arises out of the same transaction or occurrence as the main claim; and (2) has matured at the time the answer is filed. *Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

Claim which has not yet accrued cannot be treated as a compulsory counterclaim. *Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

Under Georgia law, claims that have not accrued by the time of the first pleading are not compulsory counterclaims, such that neither a civil conspiracy claim nor an unjust enrichment claim brought on behalf of a software subsidiary constituted compulsory counterclaims, for failure to accrue until a prior action had already concluded in the entry of a default judgment. *Akin v. PAFEC Ltd.*, 991 F.2d 1550 (11th Cir. 1993).

"Occurrence" or "same transaction" construed. — Term "occurrence" or "same transaction" may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. *Myers v. United Servs. Auto. Ass'n*, 130 Ga. App. 357, 203 S.E.2d 304 (1973).

Term "occurrence" or "same transaction" as used in this section has been given

a broad and realistic interpretation by the courts. *P & J Truck Lines v. Canal Ins. Co.*, 148 Ga. App. 3, 251 S.E.2d 72 (1978).

Subsection (a) and § 9-10-30 compared. — Subsection (a) of Ga. L. 1966, p. 609, § 13 (see now O.C.G.A. § 9-11-13), allowing counterclaims arising out of the transaction on which the complaint is based, may be compared to Ga. L. 1962, p. 659, § 1 (see now O.C.G.A. § 9-10-30), allowing equitable relief in the county where proceedings are pending, rather than county of residence, as to matters included in the litigation. *Howard Concrete Pipe Co. v. Cohen*, 139 Ga. App. 491, 229 S.E.2d 8 (1976).

Key phrase in subsection (a) is that the claim "arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim"; the cause of action has no express bearing on the issue, nor would the fact that the plaintiff might have a different status in the second suit, as opposed to the first, be of any consequence. *Harbin Lumber Co. v. Fowler*, 137 Ga. App. 90, 222 S.E.2d 878 (1975).

When there was some superficial relation between various libel claims, as the claims were all based upon statements made in the context of a disputed election, but it was not the election itself that was the subject matter of each of the claims but rather the individual statements themselves, evidence regarding the plaintiffs' alleged defamatory statements was largely irrelevant to the question of whether the defendant's statements were false and defamatory, and the trial court erred in dismissing the plaintiffs' claims on the ground that the claims constituted compulsory counterclaims in defendant's prior actions. *Bigley v. Mosser*, 235 Ga. App. 583, 509 S.E.2d 406 (1998).

Any claim that is logically related to a claim being sued on is properly the basis for a compulsory counterclaim. *Myers v. United Servs. Auto. Ass'n*, 130 Ga. App. 357, 203 S.E.2d 304 (1973); *P & J Truck Lines v. Canal Ins. Co.*, 148 Ga. App. 3, 251 S.E.2d 72 (1978).

Test to be applied in determining whether a counterclaim is compulsory is whether there is any logical relationship between the claim advanced by the plaintiff and the claim asserted by the

Counterclaims (Cont'd)**2. Compulsory****Counterclaims** (Cont'd)

defendant. *Myers v. United Servs. Auto. Ass'n*, 130 Ga. App. 357, 203 S.E.2d 304 (1973); *P & J Truck Lines v. Canal Ins. Co.*, 148 Ga. App. 3, 251 S.E.2d 72 (1978); *Goss & Goss Dev. Co. v. First Union Nat'l Bank*, 196 Ga. App. 436, 396 S.E.2d 19 (1990).

Broad test to be applied in determining whether a counterclaim is compulsory is whether a logical relationship exists between the respective claims asserted by the opposing parties. *Schoen v. Home Fed. Sav. & Loan Ass'n*, 167 Ga. App. 644, 307 S.E.2d 72 (1983).

Test to be applied in determining whether a counterclaim is compulsory under O.C.G.A. § 9-11-13(a) is whether there is any logical relationship between the claim advanced by the plaintiff and the claim asserted by the defendant; any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim. *Kennestone Hosp., Inc. v. Hopson*, 264 Ga. App. 123, 589 S.E.2d 696 (2003).

Separate action not maintainable on compulsory counterclaim. — Under subsection (a) of this section, party may not “decline to litigate” a compulsory counterclaim in the original action and seek to bring a separate action. *Myers v. United Servs. Auto. Ass'n*, 130 Ga. App. 357, 203 S.E.2d 304 (1973); *Brittany Apts. v. Chapman*, 141 Ga. App. 168, 233 S.E.2d 27 (1977); *Aycock v. Calk*, 228 Ga. App. 172, 491 S.E.2d 383 (1997).

Party may not raise issues arising out of the same transaction which should have been pled as a compulsory counterclaim in another separate suit. *Harbin Lumber Co. v. Fowler*, 137 Ga. App. 90, 222 S.E.2d 878 (1975).

Failure to plead a compulsory counterclaim can result in losing the right to assert that claim in a subsequent action. *Kitchens v. Lowe*, 139 Ga. App. 526, 228 S.E.2d 923 (1976).

Failure to file and litigate compulsory counterclaim subjects party to dismissal of the party's claim when brought in a separate second litigation. *P*

& J Truck Lines v. Canal Ins. Co., 148 Ga. App. 3, 251 S.E.2d 72 (1978).

Arising out of same transaction test met. — Hospital's home court did not err in transferring the remaining counterclaim to a patient's home court for trial as the hospital consented to the patient's home court trying the patient's counterclaim against the hospital for the improper release of the patient's mental health records when it invoked the jurisdiction of that court to pursue its suit against the patient for non-payment for medical services since: (1) both claims arose out of the contractual relationship between the hospital and the patient; (2) the common nexus between the claims was the mental health treatment the hospital gave to the patient; (3) the hospital sought to recover monies due for the treatment at issue in the patient's counterclaim; and (4) this commonality met the broad similarity or connectedness test as well as the arising out of the same transaction or occurrence test used for determining whether a counterclaim was compulsory under O.C.G.A. § 9-11-13(a). *Kennestone Hosp., Inc. v. Hopson*, 264 Ga. App. 123, 589 S.E.2d 696 (2003).

Trial court did not err in granting a lessee's motion to dismiss a lessor's action against the lessee because the lessor's claim for unpaid rent arose from the same transaction or occurrence as that giving rise to the lessee's prior pending action against the lessor; thus, the lessor was required to assert the lessor's claim in that action. *Metro Brokers, Inc. v. Sams & Cole, LLC*, 316 Ga. App. 398, 729 S.E.2d 540 (2012).

Declaratory judgment actions. — Counterclaims based on negligence are not properly maintainable as compulsory counterclaims in a declaratory judgment action, the subject of which involves liability or nonliability of an insurance company. *Colonial Penn Ins. Co. v. Hart*, 162 Ga. App. 333, 291 S.E.2d 410 (1982).

Treatment of setoff as type of counterclaim. — Confusion or misdesignation as to whether the defendant's defense in a loan suit was a setoff or a counterclaim would not be so harmful as to require reversal because the court can treat a setoff as a type of counterclaim, and be-

cause the court treats pleadings as if there had been a proper designation when justice requires. *Gwinnett Com. Bank v. Flake*, 151 Ga. App. 578, 260 S.E.2d 523 (1979).

When the defendant neither filed a compulsory counterclaim nor pled a set-off as an affirmative defense, there was no error in the trial court's failure to provide for a set-off for lease deposits prior to calculating pre-judgment and post-judgment interest. *American Medical Transp. Group, Inc. v. Glo-An, Inc.*, 235 Ga. App. 464, 509 S.E.2d 738 (1998).

Counterclaim for contribution in the event of judgment finding the plaintiff and the defendant guilty of concurring negligence, a claim arising out of the occurrence which is the subject matter of the complaint, and as such is maintainable; it is not in the nature of an independent suit, which can be maintained only in the county of the residence of the alleged joint tortfeasor. *Howard Concrete Pipe Co. v. Cohen*, 139 Ga. App. 491, 229 S.E.2d 8 (1976).

Recoupment of premiums from insured was a compulsory counterclaim in response to an action by an insured against an insurer for collection of insurance proceeds. *P & J Truck Lines v. Canal Ins. Co.*, 148 Ga. App. 3, 251 S.E.2d 72 (1978).

Adjudication of Truth-in-Lending claims that are not asserted in precedent state court suits on the underlying debt are precluded by subsection (a) of this section. *Chapman v. Aetna Fin. Co.*, 615 F.2d 361 (5th Cir. 1980).

Federal jurisdiction in case of removal. — State procedural statute requiring compulsory counterclaims does not control question of federal jurisdiction in case of removal. *Coastal Air Serv., Inc. v. Tarco Aviation Serv., Inc.*, 301 F. Supp. 586 (S.D. Ga. 1969).

Federal, not state, law determines who is the plaintiff and who is the defendant in removal cases. *Coastal Air Serv., Inc. v. Tarco Aviation Serv., Inc.*, 301 F. Supp. 586 (S.D. Ga. 1969).

Res judicata bars later action. — Party may not raise issues arising out of the same transaction which should have been pleaded as a compulsory counter-

claim in another separate suit. When the first suit is completed, then res judicata serves to bar proceeding with the second action. *First Fed. Sav. & Loan Ass'n v. I.T.S.R.E., Ltd.*, 159 Ga. App. 861, 285 S.E.2d 593 (1981).

Since an insured's counterclaim for property damage against a tortfeasor, which the insured later withdrew, was a compulsory counterclaim under O.C.G.A. § 9-11-13(a), the insurer was barred by res judicata and O.C.G.A. § 9-12-40 from reasserting that claim in a subsequent suit in which the insurer sought to recover from the tortfeasor for damages the insurer paid to the insured. *Allstate Ins. Co. v. Welch*, 259 Ga. App. 71, 576 S.E.2d 57 (2003).

Appeals court agreed with the trial court that the doctrine of res judicata barred the negligence and breach of contract claims asserted by two property owners against a contractor as: (1) the claims were essentially identical to the allegations in a counterclaim filed in a prior Cherokee County action; (2) the parties in the two cases were identical for purposes of res judicata; and (3) the Cherokee County suit resulted in an adjudication on the merits. *Perrett v. Sumner*, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

When a suit is voluntarily dismissed, the doctrine of res judicata cannot operate to bar a compulsory counterclaim in a later lawsuit, even if the claim was not asserted in the prior suit. *Walker v. Bishop*, 169 Ga. App. 236, 312 S.E.2d 349 (1983).

Condemnation proceeding was not a compulsory counterclaim, under O.C.G.A. § 9-11-13(a), in a federal court action brought by a condemnee seeking damages for announcement of the condemnation and seeking to enjoin it; hence, the condemnation proceeding was not barred by res judicata. *Ideal Leasing Servs. v. Whitfield County*, 254 Ga. App. 397, 562 S.E.2d 790 (2002).

Setoff and recoupment are counterclaims and not defenses and when the setoff and recoupment claims arise from the same transaction as that set forth in the original pleadings of the plaintiffs' complaint, these counterclaims are compulsory and should be raised in the defen-

Counterclaims (Cont'd)**2. Compulsory****Counterclaims (Cont'd)**

dant's original answer. *Swim Dixie Pool Corp. v. Kraemer*, 157 Ga. App. 748, 278 S.E.2d 448 (1981).

Debtor's failure to join bank officer bars further litigation against officer.

— Since the vice-president of the bank was a person necessary for proper adjudication of the debtor's defenses and third-party claim in the prior suit and vice-president's joinder was mandatory under subsection (a) of O.C.G.A. § 9-11-13, the debtor, having failed to file a compulsory counterclaim against the vice-president or to join the vice-president as an indispensable party, was also barred from further litigation against the vice-president on these issues. *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

Claim for rentals need not be made by a counterclaim in an action wherein the possessors of certain property seek to set aside a deed to one of the present title holder's predecessors in title based on alleged fraudulent misrepresentations. *Schoen v. Home Fed. Sav. & Loan Ass'n*, 167 Ga. App. 644, 307 S.E.2d 72 (1983).

Claim of abusive litigation arises, by necessity, only after the commencement of civil proceedings. It is derivative in nature, and hence it must be pled as a compulsory counterclaim or compulsory additional claim. *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986).

Although the Georgia Supreme Court has designated *Yost* abusive litigation claims as compulsory, this determination is not controlling in federal courts. *A.L. Williams Corp. v. Faircloth*, 120 F.R.D. 135 (N.D. Ga. 1987).

Waiver of defense in second action.

— Compulsory counterclaim, if not asserted in the primary action, cannot later be asserted in a second action, but this preclusive effect is not present unless the party wishing to assert the defense affirmatively raises the defense in the party's responsive pleadings. If the defense is not so raised, the defense is waived. *Hubbard v. Stewart*, 651 F. Supp. 294 (M.D. Ga. 1987).

Amendment denied when defendant had knowledge of claim.

— When the defendant introduced in evidence two letters the defendant received from the plaintiff's attorney three to four months after the subject defaulted note was executed, the defendant's counterclaim could not be added by amendment when the defendant had knowledge of the claims at the time the defensive pleadings were prepared and filed in the first instance. *Shaw v. Ruiz*, 207 Ga. App. 299, 428 S.E.2d 98 (1993).

Trial court properly granted summary judgment for an executor in the child's suit seeking recovery under quantum meruit as: (1) Georgia law applied to procedural matters such as whether a claim was a compulsory counterclaim; and (2) the claim was a compulsory counterclaim in the executor's suit against the child in Florida seeking to quiet title to properties the child allegedly improperly transferred since both suits involved the child's entitlement to a portion of the estate, and if the child was entitled to payment for the child's services, the issue should have been raised in the Florida suit to offset the claim that the child had been unjustly enriched. *Harper v. Harper*, 267 Ga. App. 553, 600 S.E.2d 659 (2004).

Insured's counterclaim for property damage against a tortfeasor, which the insured later withdrew, was a compulsory counterclaim, under O.C.G.A. § 9-11-13(a), because the counterclaim arose out of the same incident that was the subject of the tortfeasor's suit, and there was a logical relationship between the tortfeasor's claim and the insured's claim. *Allstate Ins. Co. v. Welch*, 259 Ga. App. 71, 576 S.E.2d 57 (2003).

3. Permissive Counterclaims**Permissive counterclaims do not arise out of same transaction.**

— Under subsection (b) of this section, permissive counterclaims do not arise out of the same transaction and in fact need not be tried with the main action. *Dixie Home Bldrs., Inc. v. Waldrip*, 146 Ga. App. 464, 246 S.E.2d 471 (1978).

Claims that mature or are acquired by pleader after pleading has been served are permissive rather than com-

pulsory counterclaims. *Jenkins v. Martin*, 142 Ga. App. 573, 236 S.E.2d 542 (1977).

Counterclaim in tort when main action on contract. — Permissive counterclaims may be based on a cause of action ex delicto when the main action was ex contractu. *Dixie Home Bldrs., Inc. v. Waldrup*, 146 Ga. App. 464, 246 S.E.2d 471 (1978).

Failure to assert a permissive counterclaim at the proper time will only result in the party being unable to make the contentions in the suit in question, not that the party will be barred in a future suit. *Kitchens v. Lowe*, 139 Ga. App. 526, 228 S.E.2d 923 (1976).

4. Counterclaims Maturing or Acquired After Pleading

Claims that mature or are acquired by pleader after pleading has been served are permissive rather than compulsory counterclaims. *Jenkins v. Martin*, 142 Ga. App. 573, 236 S.E.2d 542 (1977); *Wagner v. Howell Enters., Inc.*, 184 Ga. App. 394, 361 S.E.2d 698 (1987).

Because the basis for a director's counterclaim for conversion of stock did not occur until after the director filed the answer, that claim matured after the answer was filed, and thus the claim was a permissive, not compulsory counterclaim pursuant to O.C.G.A. § 9-11-13(e); a trial court erred in dismissing the counterclaim with prejudice. *Sampson v. Haywire Ventures, Inc.*, 278 Ga. App. 525, 629 S.E.2d 515 (2006).

Claim which occurs subsequent to the time of serving the pleading would fall in the category of a permissive counterclaim. *Georgia Power Co. v. Jones*, 122 Ga. App. 614, 178 S.E.2d 265 (1970).

Separate action permitted. — Supplemental counterclaim brought under subsection (e) of this section is permissive rather than compulsory; the action may be brought in a separate suit, and will not be lost if permission to plead the counterclaim is denied. *Jenkins v. Martin*, 142 Ga. App. 573, 236 S.E.2d 542 (1977).

Permission of the court is a necessary prerequisite to supplemental pleading of a counterclaim under subsection (e) of this section. *Jenkins v. Martin*, 142 Ga. App. 573, 236 S.E.2d 542 (1977).

Discretion of court under subsection (e). — Subsection (e) of this section envisions the exercise of discretion by the trial judge. *Carvel Corp. v. Rabey*, 140 Ga. App. 205, 230 S.E.2d 355 (1976).

Decision to grant or deny a motion or a counterclaim is totally within the trial court's discretion. *Jenkins v. Martin*, 142 Ga. App. 573, 236 S.E.2d 542 (1977); *Feifer v. Reliance Kitchens, USA, Inc.*, 189 Ga. App. 653, 377 S.E.2d 28 (1988).

Counterclaim predicated on the bringing of plaintiff's claim and its unsuccessful conclusion, which the defendant claims is the basis for an action for wrongful attachment, allowing the defendant to recover under the bond issued pursuant to such attachment, was a permissive counterclaim which matured or was acquired by the defendant after serving the pleading, and could properly be brought in another action; hence, the trial judge did not err in dismissing such counterclaim, in effect denying permission for the defendant to present the claim by supplemental pleading under subsection (e) of this section. *Carvel Corp. v. Rabey*, 140 Ga. App. 205, 230 S.E.2d 355 (1976).

When corporation, after filing answer, assigns various instruments to its wholly owned subsidiary, and amends its counterclaim by adding claims based on these assignments, these additional causes of action do not constitute compulsory counterclaims which the corporation was required to assert at the time it filed its original answer, when there is no evidence that the subsidiary is a sham, or that it is being used to defeat a public convenience, to justify a wrong, protect fraud, defend crime, or any other reason which in equity and good conscience would justify the disregard of its separate entity. *Bass v. Citizens & S. Nat'l Bank*, 168 Ga. App. 668, 309 S.E.2d 850 (1983).

Action for malicious abuse of process, not being in existence at the time the plaintiff served the plaintiff's pleadings in response to the defendant's original complaint, was not a compulsory counterclaim in that action and could properly be filed as a separate action. *Ostrov v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

Counterclaims (Cont'd)**4. Counterclaims Maturing or Acquired After Pleading (Cont'd)**

Counterclaim filed after party added. — Since an owner's counterclaims were filed after a transferor's son was added as a party, and the owner acknowledged that the owner did not request leave of court to file the counterclaims, the trial court properly dismissed the counterclaims; while the owner claimed that the trial court implicitly considered the claims as properly filed, no evidence in the record supported this claim. *Hale v. Scarborough*, 279 Ga. App. 614, 631 S.E.2d 812 (2006).

5. Omitted Counterclaims

Phrase "when justice so requires" in subsection (f) of O.C.G.A. § 9-11-13 furnishes an independent ground for setting up an omitted counterclaim. Thus, a trial court should grant leave to set up an omitted counterclaim "when justice so requires" even though the other grounds, "oversight, inadvertence, or excusable neglect" are not present. *White v. Fidelity Nat'l Bank*, 188 Ga. App. 539, 373 S.E.2d 640, cert. denied, 188 Ga. App. 913, 373 S.E.2d 640 (1988).

Leave of court required for filing. — Although the defendant filed a motion seeking leave to file additional counterclaims, when the defendant failed to obtain a ruling before proceeding, the trial court did not err in dismissing the defendant's additional counterclaims. *Cornelius v. Auto Analyst, Inc.*, 222 Ga. App. 759, 476 S.E.2d 9 (1996).

Discretion of court under subsection (f). — Subsection (f) of this section envisions the exercise of discretion by the trial judge. *Carvel Corp. v. Rabey*, 140 Ga. App. 205, 230 S.E.2d 355 (1976).

Under subsection (f) of this section, the trial judge is vested with discretion which will not be controlled absent a legal abuse. *Clairmont Foods, Inc. v. Huddle House, Inc.*, 142 Ga. App. 171, 235 S.E.2d 635 (1977).

Decision to allow counterclaim to be pled is matter of judicial discretion and may be reversed on appeal only if the party can demonstrate that the court abused the court's discretion. *Rohner*,

Gehrig & Co. v. Capital City Bank, 655 F.2d 571 (5th Cir. 1981).

Whether justice requires the grant of leave to set up an omitted counterclaim is a matter which addresses itself to the sound discretion of the trial court. *White v. Fidelity Nat'l Bank*, 188 Ga. App. 539, 373 S.E.2d 640, cert. denied, 188 Ga. App. 913, 373 S.E.2d 640 (1988).

Permitting an omitted counterclaim is within the discretion of the trial court; the court should be liberal in allowing such claims when no prejudice would result. *Martin & Jones Produce, Inc. v. Lundy*, 197 Ga. App. 38, 397 S.E.2d 461 (1990); *Parks v. Multimedia Techs., Inc.*, 239 Ga. App. 282, 520 S.E.2d 517 (1999).

Generally, it is a matter of the trial court's discretion whether to allow the late filing of counterclaims pursuant to subsection (f) of O.C.G.A. § 9-11-13. *Eudaly v. Valmet Automation (USA), Inc.*, 201 Ga. App. 497, 411 S.E.2d 311, cert. denied, 201 Ga. App. 903, 411 S.E.2d 311 (1991).

Trial court erred by denying a mortgagor's motion to add a counterclaim as moot because the trial court had discretion, based upon any of the factors listed in O.C.G.A. § 9-11-13(f) to permit the filing of the counterclaims, but it issued no ruling pursuant to the statute; thus, the judgment of the trial court denying the motion as moot was vacated, and the case was remanded for the trial court to exercise the court's discretion and issue a ruling on the merits of the motion. *Richards v. Wells Fargo Bank, N.A.*, 325 Ga. App. 722, 754 S.E.2d 770 (2014).

Admission of second compulsory counterclaim within discretion of court. — Whether to allow the filing of a second counterclaim which involved new theories but were clearly compulsory counterclaims based upon the same facts as the underlying complaint was within the discretion of the trial court and was not disturbed absent abuse. *Conerly v. First Nat'l Bank*, 209 Ga. App. 601, 434 S.E.2d 143 (1993).

Abuse of discretion. — When the trial court had set a deadline for motions and for the filing of a pretrial order, the court abused the court's discretion in allowing the defendant to file late counterclaims without a showing of necessity or justice

pursuant to subsection (f) of O.C.G.A. § 9-11-13; and, having allowed the defendant to file late counterclaims, the court prima facie abused the court's discretion in refusing the plaintiff time for discovery and for denying a continuance. *Eudaly v. Valmet Automation (USA), Inc.*, 201 Ga. App. 497, 411 S.E.2d 311, cert. denied, 201 Ga. App. 903, 411 S.E.2d 311 (1991).

Assertion of different basis for counterclaim on appeal. — Having first asserted grounds for adding a counterclaim which did not state a viable claim as a matter of law, the defendant could not assert a different ground on appeal, since such a claim would constitute a shifting of the position raised before and ruled upon by the trial court and, as such, it was not preserved for appellate review. *Strong v. Wachovia Bank*, 215 Ga. App. 535, 451 S.E.2d 524 (1994).

Subsection (f) of this section applies to both compulsory and permissive counterclaims. *Kitchens v. Lowe*, 139 Ga. App. 526, 228 S.E.2d 923 (1976).

Question of type of counterclaim involved is a factor to be considered by the trial judge in making a determination under subsection (f) of this section. *Kitchens v. Lowe*, 139 Ga. App. 526, 228 S.E.2d 923 (1976).

What is "excusable neglect" under subsection (f) of this section depends on whether or not the defendant or the defendant's counsel had knowledge of the existence of the claim when defensive pleadings were prepared and filed in the first instance, and whether, under the facts, there has been unreasonable or inexcusable delay in the tendering of the amendment. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974); *Aycock v. HFC*, 142 Ga. App. 207, 235 S.E.2d 578 (1977), cert. dismissed, 240 Ga. 570, 241 S.E.2d 835 (1978).

Knowledge of claim at time of filing of pleading. — Finding of oversight or of inadvertence is unsupported if it appears from the pleadings or the facts that the defendant or the defendant's counsel had knowledge of the existence of the claim when the defensive pleadings were prepared and filed in the first instance. *Blount v. Kicklighter*, 125 Ga. App. 159, 186 S.E.2d 543 (1971); *Adderholt v.*

Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978).

Judge should allow the amendment "when justice requires," even if other requirements are not met. *Kitchens v. Lowe*, 139 Ga. App. 526, 228 S.E.2d 923 (1976).

Submission of evidence and finding as to cause of delay. — Before a delayed filing of a counterclaim is allowed pursuant to subsection (f) of this section, the court should require submission of evidence and make a finding therefrom as to whether the delay was occasioned by oversight, inadvertence, or excusable neglect. *Blount v. Kicklighter*, 125 Ga. App. 159, 186 S.E.2d 543 (1971); *Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978); *Williams v. Buckley*, 148 Ga. App. 778, 252 S.E.2d 692 (1979).

It is error for court to allow late counterclaim without evidence and without requiring the defendant to make the showing required of the defendant by subsection (f) of this section. *Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978).

Courts should be very liberal in allowing amendments to include compulsory counterclaims, and even permissive counterclaims when no prejudice would result, when the pleader has not been guilty of inexcusable neglect, or has not by reprehensible conduct deprived oneself of any claim to special consideration by the court. *Blount v. Kicklighter*, 125 Ga. App. 159, 186 S.E.2d 543 (1971).

As a general rule, leave to amend and set up a counterclaim shall be given freely, but this does not dispense with the necessity of showing that justice so requires. *Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978).

Courts should be very liberal in allowing amendments to assert compulsory counterclaims when no prejudice would result. *Williams v. Buckley*, 148 Ga. App. 778, 252 S.E.2d 692 (1979).

Malpractice action against an attorney accrued on the date the attorney filed an answer without seeking leave to add an omitted counterclaim, not the date on which the statute of limitation on the counterclaim had run. *Gibson v. Casto*, 233 Ga. App. 403, 504 S.E.2d 705 (1998).

Counterclaims (Cont'd)**5. Omitted Counterclaims (Cont'd)**

Allowance of late counterclaim otherwise barred by limitations. — Trial court has discretion to allow a late counterclaim despite the fact that the statute of limitations would otherwise bar a suit on the underlying right of action. *Unnever v. Stephens*, 142 Ga. App. 787, 236 S.E.2d 886, aff'd, 240 Ga. 313, 242 S.E.2d 478 (1977).

Counterclaim filed after statute of limitations ran. — Trial court did not err in dismissing a counterclaim for unjust enrichment because the four-year statute of limitations for unjust enrichment claims had run, and purchasers and the holders of two outstanding security deeds never sought leave from the trial court to file a late counterclaim as required by O.C.G.A. § 9-11-13. *Chase Manhattan Mortg. Corp. v. Shelton*, 290 Ga. 544, 722 S.E.2d 743 (2012).

New theories after remittitur constitute new counterclaims. — Assertion of new theories as to an alleged defective foreclosure after remittitur constituted additional grounds for count one of the defendant's compulsory counterclaim and, thus, were new counterclaims which were barred. *Bellamy v. FDIC*, 236 Ga. App. 747, 512 S.E.2d 671 (1999).

Counterclaim on issue of child's custody required. — Husband was allowed to orally raise a counterclaim during the hearing on the wife's motion to modify legal custody because justice required it since the needs of the parties' child could not be satisfied in the absence of the counterclaim and consideration of the counterclaim fostered judicial economy. *Daniel v. Daniel*, 250 Ga. App. 482, 552 S.E.2d 479 (2001).

Leave to file late counterclaim properly denied. — In subscribers' class action suit against an internet access provider, the trial court did not abuse the court's discretion by denying the provider's motion under O.C.G.A. § 9-11-13(f) for leave to file omitted compulsory counterclaims against two named subscribers because: (1) the provider waited one and a half years to seek leave to file the counter-

claims; and (2) the provider knew of the basis for the provider's counterclaim when the provider filed the provider's answer. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 666 S.E.2d 420 (2008).

Cross-Claims

Constitutionality. — Subsection (g) of O.C.G.A. § 9-11-13, pertaining to cross-claims, and O.C.G.A. § 9-11-14, pertaining to third-party practice, are not in conflict with the Constitution; of course, even if they were, the venue provisions of the Constitution (Ga. Const. 1976, Art. VI, Sec. XIV, Para. VII [see now Ga. Const. 1983, Art. VI, Sec. II, Para. VIII]) would be controlling and cannot be extended or limited by the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9). *Lester Witte & Co. v. Cobb Bank & Trust Co.*, 248 Ga. 235, 282 S.E.2d 296 (1981).

Sphere of cross-claims broadened. — Amendment to subsection (g) of this section, allowing cross-claims to be filed if relating to any property that is the subject matter of the original action, was intended to broaden the sphere of such permitted pleadings. *Claude A. Hinton, Jr., Inc. v. Institutional Investors Trust*, 133 Ga. App. 364, 211 S.E.2d 169 (1974).

Cross-claim is not compulsory, but is permissive. *Vineyard v. Fowler*, 197 Ga. App. 453, 398 S.E.2d 709 (1990), reversed on other grounds, 261 Ga. 454, 405 S.E.2d 678 (1991).

Cross-claim for contribution is permissive. — Subsection (g) of O.C.G.A. § 9-11-13, which authorizes cross-claims, expressly authorizes the bringing of a cross-claim for contribution. The language of the statute, however, is permissive and in no way makes a cross-claim arising out of the same transaction or occurrence as the main claim compulsory. *Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

Cross-claiming codefendant entitled to punitive damages. — Codefendants who are plaintiffs in cross-claim for indemnification against the defendant can recover punitive damages. *Privitera v. Addison*, 190 Ga. App. 102, 378 S.E.2d 312, cert. denied, 190 Ga. App. 898, 378 S.E.2d 312 (1989).

Cross-claim against joint tort-feasor. — When a party defendant cross-claims against another defendant under subsection (g) of this section, both of whom are being sued as joint tort-feasors, one cannot have judgment against the other prior to the determination of the plaintiffs' suit. *Berry v. Cordell*, 120 Ga. App. 844, 172 S.E.2d 848 (1969).

Indemnification as against joint tort-feasors. — Fact that joint trespassers might be entitled to indemnification does not mean that other parties might not be so entitled. *Privitera v. Addison*, 190 Ga. App. 102, 378 S.E.2d 312, cert. denied, 190 Ga. App. 898, 378 S.E.2d 312 (1989).

O.C.G.A. § 9-11-13 does not authorize cross-claim against one who is no longer a party to the action. *Smithloff v. Benson*, 173 Ga. App. 870, 328 S.E.2d 759 (1985).

Person added for limited purposes. — When a party is added by the court for limited purposes (such as to protect certain funds) and has not been designated a plaintiff or defendant by the court, provisions of O.C.G.A. § 9-11-13 governing cross-claims do not apply to that party. *Spivey v. Rogers*, 173 Ga. App. 233, 326 S.E.2d 227 (1984).

Res judicata bars a party who foregoes opportunity to file permissive cross-claim from bringing the claim in a subsequent action. *Fowler v. Vineyard*, 261 Ga. 454, 405 S.E.2d 678 (1991).

Cross-claims for indemnification and contribution, and a later personal injury claim, both arising out of the same traffic accident, involve an identity of subject matter for purposes of res judicata. *Fowler v. Vineyard*, 261 Ga. 454, 405 S.E.2d 678 (1991).

Additional Parties

“Complete relief” construed. — Term “complete relief” embraces the desirability of avoiding repetitive lawsuits on essentially the same facts or subject matter, as well as the desirability of joining those in whose absence there might be a grant of hollow or partial relief to the parties before the court. *Stein v. Burgamy*, 150 Ga. App. 860, 258 S.E.2d 684 (1979).

Co-executors of a husband's deceased

parents were improperly joined in a wife's action for alimony, and the wife's reliance on the concept of complete relief as a basis for joinder was misplaced because: (1) even if the wife were to be awarded some interest in the estate, whether the wife would have to enforce that right by litigation was entirely speculative; and (2) if further litigation were to prove necessary, the issues and subject matter of litigation attempting to force a distribution from the estate would not be the same as the issues and subject matter in the wife's present action, which involved the entitlement, as a consequence of the marriage, to support from the husband; thus, the absence of the co-executors from the present litigation would not render the relief afforded the wife partial or hollow because the wife would obtain an interest as full and complete as that presently held by the husband. *Searcy v. Searcy*, 280 Ga. 311, 627 S.E.2d 572 (2006).

Absence of additional alleged joint tortfeasor is no impediment to “complete relief,” as stated in subsection (h) of O.C.G.A. § 9-11-13. *McCabe v. Lundell*, 199 Ga. App. 639, 405 S.E.2d 693, cert. denied, 199 Ga. App. 906, 405 S.E.2d 693 (1991).

Leave of court is a bare requisite when the plaintiff seeks to assert a claim against one who is not already a party to the proceedings. *Housing Auth. v. Millwood*, 472 F.2d 268 (5th Cir. 1973).

Venue is not relevant inquiry in initial determination of whether to add defendant-in-counterclaim. Instead, the reference in subsection (h) of O.C.G.A. § 9-11-13 to the existence of “jurisdiction of [potential defendants-in-counterclaim]” obviously contemplates only a determination as to whether jurisdiction over the person of potential defendants-in-counterclaim can be obtained. *McCabe v. Lundell*, 199 Ga. App. 639, 405 S.E.2d 693, cert. denied, 199 Ga. App. 906, 405 S.E.2d 693 (1991).

Procedure for bringing in additional parties. — When additional parties should be brought in pursuant to subsection (h) of Ga. L. 1966, p. 609, § 13 (see now O.C.G.A. § 9-11-13), counterclaimant or cross-claimant should serve the pleading upon the parties to the

Additional Parties (Cont'd)

action who are affected thereby, file it or file and then serve it, secure an order from the court that certain named persons be made defendants to the counterclaim or cross-claim, obtain a summons from the clerk directed to such persons, and then proceed to serve the pleading, which contains the counterclaim or cross-claim, and the summons in the manner provided in Ga. L. 1972, p. 689, §§ 1 and 3 (see now O.C.G.A. § 9-11-4) for service of the complaint and summons. *Housing Auth. v. Millwood*, 472 F.2d 268 (5th Cir. 1973).

Counterclaim not subject to estoppel. — With regard to persons who were not parties to the plaintiff's suit, even though the defendants could have asked the trial court to add them as additional parties under subsection (h) of O.C.G.A. § 9-11-13, the trial court had the discretion to deny adding the parties; thus, estoppel did not apply to the defendant's independent action against such persons. *Jacobs v. Littleton*, 241 Ga. App. 403, 525 S.E.2d 433 (1999).

Joined party may contest venue. — If a motion to join is granted and a defendant-in-counterclaim is thereafter served, then the actually "joined [rather than potentially joinable] party" may contest venue by filing a motion to dismiss, which is to be treated by the trial court as a motion to transfer pursuant to Uniform Superior Court Rule 19. If venue is shown to be proper elsewhere, it would then be incumbent upon the trial court to enter an appropriate order. Such an appropriate order might sever the counterclaim for separate trial pursuant to O.C.G.A. § 9-11-42(b) and transfer only the severed counterclaim, while retaining jurisdiction and venue over the main action. *McCabe v. Lundell*, 199 Ga. App. 639, 405 S.E.2d 693, cert. denied, 199 Ga. App. 906, 405 S.E.2d 693 (1991).

Service of process when additional party brought in. — If a motion to add a party is granted, or if the court orders an additional party brought in on the court's own motion, service of process must be made in the usual way. *Housing Auth. v. Millwood*, 472 F.2d 268 (5th Cir. 1973).

Trial court erred in failing to allow addition of plaintiff executrix as

party in individual capacity in the defendant's counter-claim for intentional infliction of mental distress as O.C.G.A. § 9-11-13 provides for addition of necessary parties for granting of complete relief. *Owens v. Owens*, 248 Ga. 720, 286 S.E.2d 25 (1982).

Third-party complaint against plaintiff's agent. — Defendant's third-party complaint against the plaintiff's agent was not cognizable against the agent under O.C.G.A. § 9-11-14 since the action could only be fairly regarded as related to the defendant's counterclaim against the plaintiff and, as such, required an order by the trial court pursuant to subsection (h) of O.C.G.A. § 9-11-13 joining the agent as a party. *McCormick v. Rissanen*, 177 Ga. App. 623, 340 S.E.2d 268 (1986).

Joinder in divorce actions of corporations. — In an action for divorce pursuant to O.C.G.A. § 19-5-1, the trial court properly granted the wife's motion pursuant to O.C.G.A. §§ 9-11-13(h) and 9-11-19(a)(1) to join two corporations as defendants by counterclaim because, by the husband's own design, any property that could be determined to be marital property was inextricably commingled with the property of the corporations, and, thus, joinder of the corporations was proper to ensure a just division of marital assets. *Gardner v. Gardner*, 276 Ga. 189, 576 S.E.2d 857 (2003).

Joinder not required. — Trial court did not err in denying a motion for joinder in that, to the extent that the addition of the principals of a real estate developer to the movant's counterclaim was sought because they were joint tortfeasors with the developer, no joinder was required. *Chaney v. Harrison & Lynam, LLC*, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

Separate Trials and Judgments

Subsection (i) of this section is not entirely clear. *Young v. Jones*, 140 Ga. App. 66, 230 S.E.2d 32 (1976).

Restrictive construction not intended. — While a literal reading of subsection (i) of Ga. L. 1966, p. 609, § 13 (see now O.C.G.A. § 9-11-13) indicates by negative implication that jurisdiction over a counterclaim or cross-claim following

dismissal of the original claim can be retained only in the limited situation in which separate trials have been ordered pursuant to Ga. L. 1966, p. 609, § 42 (see now O.C.G.A. § 9-11-42(b)), it seems clear that this restrictive construction was never intended. *Young v. Jones*, 140 Ga. App. 66, 230 S.E.2d 32 (1976).

Dismissal of main complaint. — Counterclaim is not necessarily subject to dismissal because of dismissal of main complaint. *Weems v. Weems*, 225 Ga. 19, 165 S.E.2d 733 (1969); *Young v. Jones*, 140 Ga. App. 66, 230 S.E.2d 32 (1976).

If a counterclaim can be adjudicated without regard to the main claim, it should be judicially considered even though the main claim has been dismissed. *Young v. Jones*, 140 Ga. App. 66, 230 S.E.2d 32 (1976).

Entry of summary judgment on the main case in favor of the defendant does not effect dismissal of the defendant's counterclaim. *Young v. Jones*, 140 Ga. App. 66, 230 S.E.2d 32 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, § 1 et seq. 44B Am. Jur. 2d, Interpleader, § 6. 59 Am. Jur. 2d, Parties, § 236 et seq. 61A Am. Jur. 2d, Pleading, § 355 et seq. 75 Am. Jur. 2d, Trial, §§ 60, 62.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 357 et seq. 67A C.J.S., Parties, § 131 et seq. 71 C.J.S., Pleading, § 199 et seq. 80 C.J.S., Set-off and Counterclaim, §§ 9, 10, 26 et seq.

ALR. — Application of doctrine of res judicata to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 2 ALR 534; 142 ALR 905.

Counterclaim or set-off as affecting rule as to part payment of a liquidated and undisputed debt, 4 ALR 474; 53 ALR 768.

Availability as set-off or counterclaim of claim in favor of one alone of several defendants, 10 ALR 1252; 81 ALR 781.

Plea of pendency of former action as affecting right of pleader to avail himself of objections to the former action, 32 ALR 1339.

Setting up counterclaim, set-off, or recoupment in reply, 42 ALR 564.

Right of defendant in action for injury to person or property to set up by cross-complaint claim for injury to his person or property against co-defendant, 43 ALR 879.

Judgment as a contract within statute in relation to setoff or counterclaim, 55 ALR 469.

May or must claim for damages from wrongful seizure of property be interposed

in action or proceeding in which such seizure is made, 85 ALR 644.

Necessity of process against plaintiff when cross bill or answer in nature of cross bill comes in, 96 ALR 990.

Right to enjoin prosecution of action in court of limited jurisdiction because of counter rights or claims in behalf of defendant which are beyond such limited jurisdiction, 125 ALR 337.

Pleading or attempting to prove by way of setoff, counterclaim, or recoupment, related claim barred by statute of limitations, as waiver of defendant's plea of limitation against plaintiff's claim, 137 ALR 324.

Statutory right of setoff or counterclaim as affected by defendant's conduct inducing delay in bringing action until after maturity of the claim, or assignment to defendant of the claim, against plaintiff, 137 ALR 1180.

Setoff, counterclaim, and recoupment in replevin or other action for possession of personal property, 151 ALR 519.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action, 1 ALR2d 630.

Claim for wrongful death as subject of counterclaim or cross action in negligence action against decedent's estate, and vice versa, 6 ALR2d 256.

Cause of action in tort as counterclaim in tort action, 10 ALR2d 1167.

Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 ALR2d 621.

Permissibility of counterclaim or cross action for divorce where plaintiff's action is one other than for divorce, separation, or annulment, 30 ALR2d 795.

Right of defendant in action for personal injury, property damage, or death, to bring in new parties as cross defendants to his counterclaim or the like, 46 ALR2d 1253.

Counterclaim or the like as affecting appellate jurisdictional amount, 58 ALR2d 84.

Exclusion from courtroom of expert witnesses during taking or testimony in civil case, 85 ALR2d 478.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Proceeding for summary judgment as

affected by presentation of counterclaim, 8 ALR3d 1361.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

May action for malicious prosecution be predicated on defense or counterclaim in civil suit, 65 ALR3d 901.

Appealability of order dismissing counterclaim, 86 ALR3d 944.

Right of party litigant to defend or counterclaim on ground that opposing party or his attorney is engaged in unauthorized practice of law, 7 ALR4th 1146.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 ALR4th 1115.

9-11-14. Third-party practice.

(a) **When defendant may bring in third party.** At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Code Section 9-11-12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Code Section 9-11-13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Code Section 9-11-12 and his counterclaims and cross-claims as provided in Code Section 9-11-13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this Code section against any person not a party to the action who is or

may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) **When plaintiff may bring in third party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this Code section would entitle a defendant to do so.

(c) **Exhibits attached to third-party complaint.** Any third-party complaint filed shall have attached thereto, as exhibits, a true and correct copy of the original complaint in the action and all other pleadings which have been filed in the action prior to the filing of the third-party complaint. (Ga. L. 1966, p. 609, § 14; Ga. L. 1969, p. 979, § 1; Ga. L. 1984, p. 22, § 9.)

Cross references. — Venue in third-party practice, Ga. Const. 1983, Art. VI, Sec. II, Para. VII, § 9-10-34. Conclusive effect of judgment on person vouched into court by defendant, § 9-10-13. Form of summons and complaint directed toward third-party defendant, § 9-11-122. Right to contribution among joint trespassers; effect of settlement, § 51-12-32.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 14, see 28 U.S.C.

Law reviews. — For article discussing counterclaims and cross-claims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article discussing aspects of third-party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968). For article, "Current Problems with Venue in Georgia," see 12 Ga. St. B.J. 71 (1975). For article, "Third-Party Practice in Georgia: A Decade of Experience Under the Civil Practice Act," see 13 Ga L. Rev. 13 (1978). For article surveying judicial and legislative developments in Georgia's tort laws, see 31 Mercer L. Rev. 229 (1979). For annual

survey of construction law, see 56 Mercer L. Rev. 109 (2004).

For note criticizing strict venue requirement that third-party defendants be impleaded in the counties of their residence in light of *Register v. Stone's Independent Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971), see 23 Mercer L. Rev. 667 (1972). For note advocating modification of constitutional venue provisions so as to avoid limitations on applicability of joinder and impleader provisions of Civil Practice Act, see 11 Ga. L. Rev. 546 (1977). For note, "Contribution Among Joint Tortfeasors," see 12 Ga. L. Rev. 553 (1978).

For comment on *Register v. Stone's Independent Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971), see 8 Ga. St. B.J. 428 (1972). For comment discussing Georgia law as to a defendant's right to bring in any party responsible to him for damages sought by the plaintiff, and comparing the approach of *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), see 24 Mercer L. Rev. 697 (1973).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
THIRD-PARTY PLEADINGS
THIRD-PARTY DEFENDANTS
MOTIONS
VENUE

General Consideration

Constitutionality. — Subsection (g) of O.C.G.A. § 9-11-13, pertaining to cross-claims, and O.C.G.A. § 9-11-14, are not in conflict with the Constitution; of course, even if they were, the venue provisions of the Constitution (Ga. Const. 1983, Art. VI, Sec. II) would be controlling and cannot be extended or limited by the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *Lester Witte & Co. v. Cobb Bank & Trust Co.*, 248 Ga. 235, 282 S.E.2d 296 (1981).

Jurisdictional rules of Constitution not affected by section. — Enactment of a new procedural method of bringing in parties cannot change the jurisdictional rules of the Constitution of this state. *Register v. Stone's Indep. Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971). For comment, see 8 Ga. St. B.J. 428 (1972).

Purpose of section. — Purpose of impleader provisions of this section is to avoid multiplicity of actions, to save time and cost of reduplication of evidence, and to assure consistent results from similar evidence and common issues. *Bishop v. Georgia Baptist Hosp.*, 136 Ga. App. 507, 221 S.E.2d 682 (1975).

Section should be liberally construed to promote purpose. — Court should liberally construe the impleader provisions of this section to avoid multiplicity of actions, to save time and cost of reduplication of evidence, and to assure consistent results from similar evidence and common issues. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970); *McMichael v. Georgia Power Co.*, 133 Ga. App. 593, 211 S.E.2d 632 (1974); *Voyager Life & Health Ins. Co. v. Pulaski Banking Co.*, 181 Ga. App. 201, 351 S.E.2d 725 (1986).

This section is not a device for bringing into an action any contro-

versy which may happen to have some relationship with it. *Dorsey Heating & Air Conditioning Co. v. C.C. Dickson, Inc.*, 153 Ga. App. 599, 266 S.E.2d 282 (1980).

Vouchment procedure authorized by O.C.G.A. § 9-10-13 has not been superseded by the third-party practice rule of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *Hardee v. Allied Steel Bldgs., Inc.*, 182 Ga. App. 587, 356 S.E.2d 682 (1987).

When single group or aggregate of operative facts is involved, impleader should be allowed, despite a difference in the legal nature of the claims of the various parties. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970).

Statute of limitation on contribution does not begin to run until judgment is entered against third-party plaintiff or until compromise and settlement of the claim is made. *Independent Mfg. Co. v. Automotive Prods., Inc.*, 141 Ga. App. 518, 233 S.E.2d 874 (1977); *Greyhound Lines v. Cobb County*, 681 F.2d 1327 (11th Cir. 1982).

Grounds for motion for summary judgment. — Third-party defendant is entitled to move for summary judgment against the original plaintiff on any ground for which the original defendant would be entitled to summary judgment against the plaintiff. *Empire Shoe Co. v. Nico Indus., Inc.*, 197 Ga. App. 411, 398 S.E.2d 440 (1990).

Vacation of court's order in interests of justice. — Even when entered, court may, in the interests of justice, vacate an order and reverse the court's position regarding the making of parties, so long as there is no abuse of discretion and the delay works no undue hardship upon the impleaded defendant. *Frank B. Wilder & Assocs. v. St. Joseph's Hosp.*, 132 Ga. App. 373, 208 S.E.2d 145 (1974).

Effect of judgment in third-party defendant's favor when new trial

granted to defendant. — When new trial is granted to the defendant in a primary action, but the judgment was returned in favor of a third-party defendant on a third-party complaint, the defendant may not obtain relief after a new trial from a third-party defendant. *Norman v. Walker*, 123 Ga. App. 413, 181 S.E.2d 310 (1971).

As only issue which could have been determined between truck driver and tire manufacturer in action for wrongful death of passenger was secondary liability of manufacturer (third-party defendant) to driver for death of passenger, manufacturer could not assert doctrine of estoppel by judgment in action brought against it by driver for the driver's own personal injuries. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Claims inappropriate for adjudication. — Because the claims of fraud by borrowers against a mortgage company employee were not derivative, the claims were inappropriate for adjudication under O.C.G.A. § 9-11-14(a). *McCray v. Fannie Mae*, 292 Ga. App. 156, 663 S.E.2d 736 (2008).

Cited in *Peacock Constr. Co. v. Turner Concrete, Inc.*, 116 Ga. App. 822, 159 S.E.2d 114 (1967); *Zappa v. Ewing*, 117 Ga. App. 362, 160 S.E.2d 640 (1968); *D. Davis & Co. v. Plunkett*, 224 Ga. 357, 162 S.E.2d 387 (1968); *Henton v. Gould*, 224 Ga. 512, 162 S.E.2d 722 (1968); *Register v. Stone's Indep. Oil Distribs.*, 225 Ga. 490, 169 S.E.2d 781 (1969); *Montgomery v. Richards Bldg. Materials, Inc.*, 122 Ga. App. 472, 177 S.E.2d 507 (1970); *Robinson v. Bomar*, 122 Ga. App. 564, 177 S.E.2d 815 (1970); *S.M. & M. Realty Corp. v. Highlands Ins. Co.*, 123 Ga. App. 170, 179 S.E.2d 781 (1971); *DeKalb County v. Brown Bldrs. Co.*, 227 Ga. 777, 183 S.E.2d 367 (1971); *Mathews v. McConnell*, 124 Ga. App. 519, 184 S.E.2d 491 (1971); *Martin Mgt. Corp. v. Farner*, 124 Ga. App. 552, 184 S.E.2d 597 (1971); *Roesler v. Etheridge*, 125 Ga. App. 358, 187 S.E.2d 572 (1972); *Burt v. Long*, 125 Ga. App. 385, 187 S.E.2d 578 (1972); *Shell v. Watts*, 125 Ga. App. 542, 188 S.E.2d 269 (1972); *Charles Seago Mechanical Contracting Co. v. Mobile Homes of Miss., Inc.*, 128 Ga.

App. 261, 196 S.E.2d 346 (1973); *Smith v. Foster*, 230 Ga. 207, 196 S.E.2d 431 (1973); *Taylor v. Malden Trust Co.*, 129 Ga. App. 330, 199 S.E.2d 553 (1973); *Benefield v. Elder Bldg. Supply Co.*, 132 Ga. App. 195, 207 S.E.2d 678 (1974); *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 132 Ga. App. 834, 209 S.E.2d 260 (1974); *Mack Trucks, Inc. v. Arrow Aluminum Castings Co.*, 510 F.2d 1029 (5th Cir. 1975); *Howard Concrete Pipe Co. v. Cohen*, 139 Ga. App. 491, 229 S.E.2d 8 (1976); *Champion v. Wells*, 139 Ga. App. 759, 229 S.E.2d 479 (1976); *Quilfo v. Creel*, 144 Ga. App. 653, 242 S.E.2d 319 (1978); *First Nat'l Bank v. Rapides Bank & Trust Co.*, 145 Ga. App. 514, 244 S.E.2d 51 (1978); *Young v. Jones*, 149 Ga. App. 819, 256 S.E.2d 58 (1979); *Stein v. Burgamy*, 150 Ga. App. 860, 258 S.E.2d 684 (1979); *Coleman v. Clark*, 154 Ga. App. 188, 267 S.E.2d 824 (1980); *First Bank & Trust Co. v. Insurance Serv. Ass'n*, 154 Ga. App. 697, 269 S.E.2d 527 (1980); *Roush v. Dan Vaden Chevrolet, Inc.*, 155 Ga. App. 372, 270 S.E.2d 902 (1980); *Wallace v. Scott*, 164 Ga. App. 129, 296 S.E.2d 423 (1982); *Automated Medical Servs., Inc. v. Holland*, 166 Ga. App. 57, 303 S.E.2d 127 (1983); *First of Ga. Underwriters Co. v. Beck*, 170 Ga. App. 68, 316 S.E.2d 519 (1984); *Citizens Bank v. Hooks*, 173 Ga. App. 865, 328 S.E.2d 755 (1985); *Davis v. Betsill*, 178 Ga. App. 730, 344 S.E.2d 525 (1986); *Phillips v. Tellis*, 181 Ga. App. 449, 352 S.E.2d 630 (1987); *Union Camp Corp. v. Helmy*, 258 Ga. 263, 367 S.E.2d 796 (1988); *Hyer v. Citizens & S. Nat'l Bank*, 188 Ga. App. 452, 373 S.E.2d 391 (1988); *Opatut v. Guest Pond Club, Inc.*, 188 Ga. App. 478, 373 S.E.2d 372 (1988); *Owens v. Citizens Trust Bank*, 190 Ga. App. 501, 379 S.E.2d 594 (1989); *Watkins v. M & M Clays, Inc.*, 199 Ga. App. 54, 404 S.E.2d 141 (1991); *Bowden v. Russell*, 200 Ga. App. 239, 407 S.E.2d 467 (1991); *Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 410 S.E.2d 154 (1991); *Ralston v. Etowah Bank*, 207 Ga. App. 775, 429 S.E.2d 102 (1993); *Hussey, Gay, Bell & DeYoung, Inc. v. Clay-Ric, Inc.*, 212 Ga. App. 53, 441 S.E.2d 274 (1994); *State Line Metals v. ALCOA*, 216 Ga. App. 14, 453 S.E.2d 474 (1995); *Kirsch v. Jones*, 219 Ga. App. 50, 464 S.E.2d 4 (1995); *Hovendick v. Presi-*

General Consideration (Cont'd)

dential Fin. Corp., 230 Ga. App. 502, 497 S.E.2d 269 (1998); Satilla Cmty. Serv. Bd. v. Satilla Health Servs., 275 Ga. 805, 573 S.E.2d 31 (2002); Diaz v. Wills, 286 Ga. App. 357, 649 S.E.2d 353 (2007).

Third-Party Pleadings

Liberal construction should be given to third-party pleadings. *Benson Paint Co. v. Williams Constr. Co.*, 128 Ga. App. 47, 195 S.E.2d 671 (1973).

Bringing of third-party complaint not mandatory. — While a party may set forth a claim as provided by this section, the party is not bound to prosecute the claim in this manner. *Latex Filler & Chem. Co. v. Chapman*, 139 Ga. App. 382, 228 S.E.2d 312 (1976).

Third-party complaint alleging separate and independent causes of action which were not dependent upon the outcome of the main claim was subject to dismissal when the only connection between the main claim and the third-party action was that the third-party defendant was alleged to have wrongfully deprived the defendant of the money which the plaintiff sought to collect. *Quality Ford Sales, Inc. v. Greene*, 201 Ga. App. 206, 410 S.E.2d 389 (1991).

Affirmative relief sought by defendant. — O.C.G.A. § 9-11-14 does not authorize the defendant to seek affirmative relief solely on the defendant's own behalf. Instead, the complaint must be predicated on secondary or derivative liability, such as indemnity, subrogation, or contribution. *Hennessy Cadillac v. Pippin*, 197 Ga. App. 448, 398 S.E.2d 725 (1990).

Joinder of direct claim by amendment of third-party complaint. — In an action against the defendant for injuries caused by an automobile collision, when the defendant brought a third-party complaint for indemnity and contribution against a brake repair shop, the defendant's claim for damages to the defendant's own car was properly joined by amendment of the third-party complaint. *Shleifer v. Bridgestone-Firestone, Inc.*, 223 Ga. App. 256, 477 S.E.2d 405 (1996).

Neither admission of liability nor certainty of recovery necessary. — It

is not necessary, in order to maintain a third-party complaint, that the original defendant admit liability to the original plaintiff, nor that the allegations show that recovery by the original defendant from the third-party defendant is a certainty. *Register v. Stone's Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1970), rev'd on other grounds, 227 Ga. 123, 179 S.E.2d 68 (1971).

If the impleader satisfies the pleading requirements of O.C.G.A. § 9-11-14 but nevertheless is not permitted by the trial court to bring in a third party because the defendant alternatively denied any liability, the refusal of the third-party impleader will constitute error inasmuch as it deprives the defendant of the defendant's undisputed right under the principle to bring in one who is or may be liable "to him" for all or part of the plaintiff's claim against the defendant. *ARA Transp. v. Barnes*, 183 Ga. App. 424, 359 S.E.2d 157 (1987).

Jurisdiction over a third-party direct damage claim is not destroyed if the original action is settled or disposed of in some fashion before adjudication of such claim; but the court, in the exercise of the court's discretion, either may proceed with the claim or dismiss the claim. *Cohen v. McLaughlin*, 250 Ga. 661, 301 S.E.2d 37 (1983).

Impleader properly denied. — In a dispute between adjoining landowners over title to approximately six acres of land, the trial court properly denied the adjoining neighbors' motion to implead additional third parties, and a motion to add those parties as indispensable third parties under O.C.G.A. § 9-11-19(a), because those individuals had no legal interest in the disputed property at the time the neighbors sought to add them. *Pirkle v. Turner*, 281 Ga. 846, 642 S.E.2d 849 (2007).

Third-party complaint is subject to notice-pleading provisions of Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8(a)). *Register v. Stone's Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1970), rev'd on other grounds, 227 Ga. 123, 179 S.E.2d 68 (1971).

Adequacy of third-party complaint. — Complaint in third-party tort suit is

adequate if sufficient facts are alleged which upon proper proof would allow recovery by a third-party plaintiff from a third-party defendant under applicable substantive law when the subject matter is the same as that involved in the original action. *Koppers Co. v. Parks*, 120 Ga. App. 551, 171 S.E.2d 639 (1969).

Third-party complaint should be allowed to stand if, under some construction of the facts which might be adduced at trial, recovery would be possible. *Register v. Stone's Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1979), rev'd on other grounds, 227 Ga. 123, 179 S.E.2d 68 (1971).

Response to third-party complaint required. — If a pleading is construed as a third-party complaint, a response is required, and a default judgment is proper for failure to answer. *Wolski v. Hayes*, 144 Ga. App. 180, 240 S.E.2d 720 (1977).

Petition treated as third-party complaint. — When an insured seeking to have its insurer defend it against a suit by a student filed a “petition for declaratory judgment” in the same trial court in which the student had filed suit against the insured, instead of impleading the insurer into the pending action, the appellate court would consider the insured’s petition to be a third-party complaint, as it appeared that the actions had been effectively consolidated in the trial court and that the trial court had considered the insured’s petition as if it had been properly styled a third-party complaint. *Fireman’s Fund Ins. Co. v. Univ. of Ga. Ath. Ass’n*, 288 Ga. App. 355, 654 S.E.2d 207 (2007), cert. denied, 2008 Ga. LEXIS 284 (Ga. 2008).

Third-Party Defendants

Third-party defendant may be brought in only if the third party defendant is liable over to original defendant, as in a third-party action for contribution against a joint tort-feasor. *Hyde v. Klar*, 168 Ga. App. 64, 308 S.E.2d 190 (1983).

Effect of impleader practice is to accelerate liability. *Gosser v. Diplomat Restaurant, Inc.*, 125 Ga. App. 620, 188 S.E.2d 412 (1972).

Impleader is proper only when right to relief exists under applicable substantive law. *Smith, Kline & French Labs. v. Just*, 126 Ga. App. 643, 191 S.E.2d 632 (1972).

Absolute requirement of every third-party proceeding is that its purpose must be to impose upon third-party defendant liability for part or all of the liability asserted by the original plaintiff against the third-party plaintiff. *Wolski v. Hayes*, 144 Ga. App. 180, 240 S.E.2d 720 (1977).

Substitution of a party is not authorized. *Nelson v. Sing Oil Co.*, 122 Ga. App. 19, 176 S.E.2d 227 (1970).

Third-party complaint cannot stand if the complaint’s only purpose is to tender a substitute defendant to a plaintiff because a third-party defendant must be one who is or may be liable to a third-party plaintiff for all or part of a plaintiff’s claim against the third-party defendant. *Smith, Kline & French Labs. v. Just*, 126 Ga. App. 643, 191 S.E.2d 632 (1972).

This section does not allow the tender of another defendant whose liability would flow directly to the original plaintiff rather than secondarily to the original defendant. *National Life Assurance Co. v. Massey-Ferguson Credit Corp.*, 136 Ga. App. 311, 220 S.E.2d 793 (1975).

Tender by defendant of another defendant. — Impleader is not proper when the defendant in effect tenders to the plaintiff an additional defendant against whom the plaintiff might or might not assert a claim. *Benson Paint Co. v. Williams Constr. Co.*, 128 Ga. App. 47, 195 S.E.2d 671 (1973).

This section does not allow tender of another defendant who is or may be liable to the plaintiff; third-party complaint must be against one who is or may be liable to the third-party plaintiff for all or part of the original plaintiff’s claim against the party. *Balkcom v. Mull*, 129 Ga. App. 277, 199 S.E.2d 346 (1973).

This section does not allow tender of another defendant who may be liable to the plaintiff. *Evans v. Lukas*, 140 Ga. App. 182, 230 S.E.2d 136 (1976).

No impleading when separate and independent controversies. — This

Third-Party Defendants (Cont'd)

section does not permit impleading when there are separate and independent controversies between the defendant and the third-party defendant; it sanctions the defendant's use of the third-party complaint only when the third-party defendant is or may be liable over to the defendant for all or part of the plaintiff's claim against the defendant. *Bill Heard Chevrolet Co. v. GMAC*, 120 Ga. App. 328, 170 S.E.2d 454 (1969).

Third-party pleading does not allow the defendant to implead a third-party defendant to recover on a claim on which the third-party defendant is alleged to be directly liable to the defendant; the defendant may only implead one who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. *Southern Ry. v. Insurance Co. of N. Am.*, 228 Ga. 23, 183 S.E.2d 912 (1971); *Wolski v. Hayes*, 144 Ga. App. 180, 240 S.E.2d 720 (1977); *Dorsey Heating & Air Conditioning Co. v. C.C. Dickson, Inc.*, 153 Ga. App. 599, 266 S.E.2d 282 (1980).

O.C.G.A. § 9-11-14 does not authorize defendant to seek affirmative and independent relief solely on the defendant's own behalf from one not a party to the action. *Thigpen v. Koch*, 126 Ga. App. 182, 190 S.E.2d 117 (1972); *Latimore v. International Bus. Invs., Inc.*, 189 Ga. App. 306, 375 S.E.2d 507 (1988).

Substitute defendant not shown to be secondarily liable. — Substitute defendant not shown to be secondarily liable but brought in to assert an entirely separate claim resulted in summary judgment on third-party complaint. *Lamb v. K.M. Ins. Co.*, 208 Ga. App. 746, 431 S.E.2d 744 (1993).

Notion of secondary or derivative liability is central, and it is irrelevant whether the basis of the third-party claim is indemnity, subrogation, contribution, express or implied warranty, or some other theory. *Smith, Kline & French Labs. v. Just*, 126 Ga. App. 643, 191 S.E.2d 632 (1972).

Third-party's liability must be dependent or secondary. — Third-party claim may be asserted only when third-party's liability is dependent in

some way on the outcome of the main claim or when the third-party is secondarily liable to the defendant. *Smith, Kline & French Labs. v. Just*, 126 Ga. App. 643, 191 S.E.2d 632 (1972).

Third-party defendant's secondary liability to the original defendant for the original defendant's liability on the main claim is required if a third-party complaint is to meet the statutory requirements. *Knapp v. Lolley*, 177 Ga. App. 786, 341 S.E.2d 306 (1986).

O.C.G.A. § 9-11-14 allows a defendant to bring into the action a third-party defendant who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. The third-party defendant's secondary liability to the original defendant for the defendant's liability on the main claim is required if a third-party complaint is to meet the statutory requirements. *Southern Ry. v. Union Camp Corp.*, 181 Ga. App. 691, 353 S.E.2d 519 (1987).

City could bring a third-party complaint against a corporation that allegedly damaged a pipeline supplying water to a customer since the corporation was alleged to be a tortfeasor only as to the city and it was alleged that, in that tortfeasor's capacity, the corporation was secondarily liable for any contractual damages that the city might ultimately be obligated to pay the customer. *Mayor of Savannah v. Southern Bulk Indus., Inc.*, 198 Ga. App. 867, 403 S.E.2d 447 (1991), cert. denied, 198 Ga. App. 898, 403 S.E.2d 447 (1991).

Third-party action may be maintained only against one who is secondarily liable to original defendant for part or all of the original plaintiff's claim. *Wolski v. Hayes*, 144 Ga. App. 180, 240 S.E.2d 720 (1977).

Third-party complaint must be predicated on secondary liability, and not based purely on direct liability from the third-party defendant to the plaintiff. *Brabham v. Brown*, 147 Ga. App. 766, 250 S.E.2d 495 (1978).

On grounds of indemnity, subrogation, contribution, warranty, or the like. — In order to recover on a third-party complaint, a third-party plaintiff must establish a right over against a third-party defendant either by

indemnity (in tort or in contract, express or implied), subrogation, contribution, or warranty. *Central of Ga. Ry. v. Lester*, 118 Ga. App. 794, 165 S.E.2d 587 (1968).

For third-party action to be maintained, it must appear that proposed third-party defendant is or may be secondarily liable to third-party plaintiff, and a right over against the third-party must be established, either by indemnity, subrogation, contribution, or warranty. *Bill Heard Chevrolet Co. v. GMAC*, 120 Ga. App. 328, 170 S.E.2d 454 (1969).

This section permits impleading of third party who is secondarily liable over to defendant for all or part of the plaintiffs recovery, whether by indemnity, subrogation, contribution, express or implied warranty, or otherwise. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970).

Only one who is secondarily liable to the original defendant (third-party plaintiff) may be brought in as a third-party defendant as in cases of indemnity, subrogation, contribution, warranty, and the like. *Burroughs Corp. v. Outside Carpets, Inc.*, 127 Ga. App. 622, 194 S.E.2d 487 (1972).

Third-party complaint is maintainable for contribution, as well as for indemnity, subrogation, express and implied warranty, and the like. *McMichael v. Georgia Power Co.*, 133 Ga. App. 593, 211 S.E.2d 632 (1974).

Third-party plaintiff (original defendant) must show that in some fashion a third-party defendant is or may be secondarily liable to the third-party plaintiff through indemnity, subrogation, contribution, or warranty. *National Life Assurance Co. v. Massey-Ferguson Credit Corp.*, 136 Ga. App. 311, 220 S.E.2d 793 (1975).

In a proceeding seeking confirmation of an arbitrator's award in a home construction dispute, it was not error for the trial court to join a surety the homeowners obtained to secure the release of the builder's lien on their property, even though the surety was not an indispensable party under O.C.G.A. § 9-11-14, because the surety was a necessary party whose joinder could have been ordered by the trial court absent a motion. *Marchelletta v. Seay Constr. Servs.*, 265 Ga. App. 23, 593 S.E.2d 64 (2004).

Attorney could not be held solely liable to a court reporting service for \$851.10, representing court reporting fees owed, as the clients the attorney was representing at the time the services were rendered should have been joined in the litigation, pursuant to both O.C.G.A. §§ 9-11-14(a) and 9-11-19(a), given that: (1) the clients could have been liable to the attorney for all or part of the court reporting fees; and (2) the attorney's claim that the clients made partial payment for the court reporting services also rendered the clients necessary parties for adjudication of this dispute. *Free v. Lankford & Assocs., Inc.*, 284 Ga. App. 328, 643 S.E.2d 771 (2007), cert. denied, 2007 Ga. LEXIS 560 (Ga. 2007).

Fact that third-party defendant may not be liable for all damages alleged does not preclude the use of third-party practice since this section specifically provides for partial liability; apportioning the damages would be for the jury. *Caudle v. Whiddon*, 126 Ga. App. 21, 189 S.E.2d 875 (1972).

No legal relationship between plaintiff and third-party defendant need be shown. *Smith, Kline & French Labs. v. Just*, 126 Ga. App. 643, 191 S.E.2d 632 (1972).

Fact that plaintiff has no claim against third party irrelevant. — It is irrelevant to the defendant's right to bring in a third party claimed to be liable over to the defendant that the plaintiff has no claim against the third party, or declines to assert a claim against the third-party. *Smith, Kline & French Labs. v. Just*, 126 Ga. App. 643, 191 S.E.2d 632 (1972).

Third-party complaint against plaintiff's agent. — Defendant's third-party complaint against the plaintiff's agent was not cognizable against the agent since the action could only be fairly regarded as related to the defendant's counterclaim against the plaintiff and, as such, required an order by the trial court pursuant to O.C.G.A. § 9-11-13(h) joining the agent as a party. *McCormick v. Rissanen*, 177 Ga. App. 623, 340 S.E.2d 268 (1986).

Impleading insurer who fails to defend insured. — When an insurer has disclaimed liability and refused to defend

Third-Party Defendants (Cont'd)

on behalf of the insured, automatic denial of an insured's motion to implead the insurer is improper and separate trials are justifiable only on grounds of the prejudice caused by the confusion and delay of litigating the actions together, not on the grounds of provisions in the insurance contract which attempt to override O.C.G.A. § 9-11-14. *Munday v. State Farm Fire & Cas. Co.*, 172 Ga. App. 382, 323 S.E.2d 193 (1984).

Tender of defendant liable to plaintiff. — O.C.G.A. § 9-11-14 dealing with third-party complaints does not allow the tender of another defendant who is or may be liable to the plaintiff. *Cohran v. Jones*, 160 Ga. App. 761, 288 S.E.2d 80 (1981), aff'd, 249 Ga. 510, 291 S.E.2d 538 (1982).

Third-party complaint is maintainable under Ga. L. 1969, p. 979, § 1 (see now O.C.G.A. § 9-11-14) for contribution among several joint trespassers pursuant to Ga. L. 1972, p. 134, § 1 (see now O.C.G.A. § 51-12-32). *Evans v. Lukas*, 140 Ga. App. 182, 230 S.E.2d 136 (1976).

Joint tortfeasors. — Defendant can bring in other joint tortfeasors in order to enforce claim for contribution. *Gosser v. Diplomat Restaurant, Inc.*, 125 Ga. App. 620, 188 S.E.2d 412 (1972).

If right of contribution among joint tortfeasors may arise, third-party action can be maintained, unless barred for some other reason. *Maxwell Bros. of Athens v. Deupree Co.*, 129 Ga. App. 254, 199 S.E.2d 403 (1973).

Although a defendant is not generally permitted to offer a substitute defendant by third-party complaint, a third-party complaint is nevertheless maintainable under O.C.G.A. § 9-11-14 against a joint tortfeasor for contribution. *Winkler, Inc. v. Vilston, N.V.*, 172 Ga. App. 686, 324 S.E.2d 542 (1984); *Confetti Atlanta, Ltd. v. Gray*, 195 Ga. App. 719, 394 S.E.2d 632 (1990).

Application of O.C.G.A. § 51-12-32. — Ga. L. 1972, p. 134, § 1 (see now O.C.G.A. § 51-12-32) relates only to contribution among "joint trespassers," that is, joint tortfeasors, and proposed third-party defendant cannot be made liable as a joint tort-feasor when it, as

employer, has already paid workers' compensation to the plaintiffs. *Central of Ga. Ry. v. Lester*, 118 Ga. App. 794, 165 S.E.2d 587 (1968).

Even though right to contribution does not accrue until after judgment (or compromise and settlement), a third-party action for contribution may be maintained. *Evans v. Lukas*, 140 Ga. App. 182, 230 S.E.2d 136 (1976).

Timing of right to contribution. — Fact that contribution may not actually be obtained until original defendant has been cast in judgment and has paid does not prevent impleader; impleader judgment may be so fashioned as to protect rights of other tort-feasors, so that defendants judgment over against them may not be enforced until the defendant has paid the plaintiff's judgment or more than the defendant's proportionate share, whichever the law may require. *Gosser v. Diplomat Restaurant, Inc.*, 125 Ga. App. 620, 188 S.E.2d 412 (1972).

Third-party action for contribution may be maintained even though the right to contribution does not accrue until after judgment or disposition through compromise and settlement. *Hennessy Cadillac v. Pippin*, 197 Ga. App. 448, 398 S.E.2d 725 (1990).

When third-party complaint maintainable on indemnity theory. — Third-party complaint cannot be supported on the theory of indemnity unless the third-party defendant is primarily responsible for the negligence or wrongful act which caused the injury. *Central of Ga. Ry. v. Lester*, 118 Ga. App. 794, 165 S.E.2d 587 (1968).

Defendant may bring in a third-party nonresident defendant if that defendant's liability to the original defendant allegedly arises by virtue of the tort forming the basis for the original action or by virtue of a contract between the defendant and the third-party defendant, such as one for indemnification, related to such tort. *J.C. Penney Co. v. Malouf Co.*, 230 Ga. 140, 196 S.E.2d 145 (1973).

If a defendant is sued in tort, and a nonresident third-party has contracted with the defendant to indemnify the defendant against loss for such tort, then the

indemnifying party can be brought into the action as a third-party defendant. *J.C. Penney Co. v. Malouf Co.*, 230 Ga. 140, 196 S.E.2d 145 (1973).

Plaintiff's spouse not a proper third-party defendant in tort action.

— In an action against a railroad brought by a plaintiff to recover for injuries suffered when the car in which the plaintiff was riding, being driven by the plaintiff's spouse, was struck by the train, the plaintiff's spouse was not subject to suit by the plaintiff for negligence, and therefore could not be a joint tort-feasor with the railroad; hence, since under Ga. L. 1972, p. 134, § 1 (see now O.C.G.A. § 51-12-32) the right to contribution relates only to joint tort-feasors, the third-party complaint brought by the railroad on the theory that the railroad would be entitled to contribution from the plaintiff's spouse failed to state a claim. *Southern Ry. v. Brewer*, 122 Ga. App. 292, 176 S.E.2d 665 (1970).

Maker of promissory note, sued by holder in due course, may not file third-party complaint against original payee who transferred the note before maturity without recourse. *Bill Heard Chevrolet Co. v. GMAC*, 120 Ga. App. 328, 170 S.E.2d 454 (1969).

Impleader of counterclaimant's insurer not authorized. — This section is not designed to authorize the plaintiff against whom a counterclaim has been filed to implead the defendant-counterclaimant's insurance company. *Thigpen v. Koch*, 126 Ga. App. 182, 190 S.E.2d 117 (1972).

Motions

Impleader motion more than ten days after answer within court's discretion. — When motion to implead third-party defendant is made more than ten days after original answer, motion is addressed to court's discretion. *Holland-America Line v. United Coops.*, 124 Ga. App. 375, 183 S.E.2d 620 (1971).

There is no built-in requirement as to when impleader motion allowed by court must be filed; such a motion is addressed to the discretion of the court. *Frank B. Wilder & Assocs. v. St. Joseph's Hosp.*, 132 Ga. App. 373, 208 S.E.2d 145 (1974).

Timeliness is factor governing exercise thereof.

— Decision to grant or deny motion for leave to implead a third-party defendant is committed to the sound discretion of the court, and timeliness of such motion is a factor governing the exercise of such discretion. *Jenkins v. Chambers*, 127 Ga. App. 200, 193 S.E.2d 222 (1972).

When motion for leave to implead is not promptly made and movant offers no reasonable excuse for delay, the motion may properly be denied. *Jenkins v. Chambers*, 127 Ga. App. 200, 193 S.E.2d 222 (1972); *Cherokee Nat'l Life Ins. Co. v. Coastal Bank*, 239 Ga. 800, 238 S.E.2d 866 (1977).

Trial court did not err in denying a defendant contractor's motion to add subcontractors as third-party defendants because the motion was made four years after the initial action for construction defects was brought against the contractor, and the contractor failed to explain why the contractor attempted repairs took two years or why, once the contractor was aware that the problems could not be fixed, the contractor waited another eight months to add the subcontractors. *R. Larry Phillips Constr. Co. v. Muscogee Glass*, 302 Ga. App. 611, 691 S.E.2d 372, cert. denied, No. S10C1105, 2010 Ga. LEXIS 568; cert. denied, No. S10C1094, 2010 Ga. LEXIS 587 (Ga. 2010).

Denial of motion made after summary judgment not improper.

— When motion to implead the third-party defendant was filed approximately eight months after the original answer, and after grant of summary judgment fixing liability between the original parties, it was not an abuse of the court's discretion to deny the motion. *Holland-America Line v. United Coops.*, 124 Ga. App. 375, 183 S.E.2d 620 (1971).

Order denying defendant's motion to implead a third party is not appealable, inasmuch as the order does not finally dispose of any rights of the defendant. *Davis v. Roper*, 119 Ga. App. 442, 167 S.E.2d 685 (1969).

Venue

Venue of third-party complaint for contribution. — Right of contribution from a joint tort-feasor is a substantive

Venue (Cont'd)

right, and even though an action to recover such contribution is brought as a third-party complaint, it has the nature of an independent suit, which can be maintained only in the county of residence of the alleged joint tort-feasor. *Register v. Stone's Indep. Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971). For comment, see 8 Ga. St. B.J. 428 (1972).

When the defendants, as third-party plaintiffs, seek contribution by third-party defendants of their pro rata share of any verdict and judgment obtained against them, the action cannot be brought in a county other than that of the residence of the third-party defendants. *Register v. Stone's Indep. Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971). For comment, see 8 Ga. St. B.J. 428 (1972).

Independent claim must satisfy venue requirements. — When the claim, whether advanced by the original plaintiff or the original defendants, is essentially independent rather than ancillary to the main action, it must satisfy

within itself the constitutional venue requirements (Ga. Const. 1983, Art. VI, Sec. II). *Henderson v. Kent*, 158 Ga. App. 206, 279 S.E.2d 503 (1981).

Venue of third-party complaint for indemnification. — For purposes of venue involving a nonresident third-party defendant by whom a third-party plaintiff was contractually indemnified, the "act" causing expenses and damages to the defendant (third-party plaintiff) occurred when the suit was brought in a particular county. *J.C. Penney Co. v. Malouf Co.*, 230 Ga. 140, 196 S.E.2d 145 (1973).

Claims against third party defendants barred by res judicata. — Trial court correctly ruled that the claims against the third-party defendants were barred by res judicata because there was identity of the first and second causes of action, identity of the parties or their privies, a prior adjudication by a court of competent jurisdiction, and the assignee's managing partner and primary stockholder testified at deposition that the damages sought in the second suit were the same damages sought in the first suit. *Bostick v. CMM Props.*, 327 Ga. App. 137, 755 S.E.2d 895 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parties, §§ 108, 241, 242, 257 et seq.

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Practice Forms, Parties, § 276. 20A Am. Jur. Pleading and Practice Forms, Process, § 1 et seq.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 141 et seq. 67A C.J.S., Parties, §§ 63, 64.

ALR. — Right of one brought into action as a party by original defendant upon the ground that he is or may be liable to the latter in respect of the matter in suit, to raise or contest issues with plaintiff, 78 ALR 327.

Right of defendant in action for personal injury or death to bring in a joint tort-feasor not made a party by plaintiff, 78 ALR 580; 132 ALR 1424.

Rule 14 of the Federal Civil Procedure Rules, which permits defendant to bring in as a party a third person liable in whole or in part for the claim made against the

former, as applicable or as applied in actions in which the jurisdiction of the federal court is dependent upon diversity of citizenship, 148 ALR 1182.

Right of defendant to bring in third person asserted to be solely liable to plaintiff, 168 ALR 600.

Right of defendant in action for personal injury or death to bring in joint tort-feasor for purpose of asserting right of contribution, 11 ALR2d 228; 95 ALR2d 1096.

Appealability of order with respect to motion for joinder of additional parties, 16 ALR2d 1023.

Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom article was procured, 24 ALR2d 913.

Claim for contribution or indemnification from another tort-feasor as within provisions of statute or ordinance requir-

ing notice of claim against municipality, 93 ALR2d 1385.

Tort claim against which period of statute of limitations has run as subject of

setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 ALR3d 1065.

9-11-15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or

occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. (Ga. L. 1966, p. 609, § 15; Ga. L. 1968, p. 1104, § 4; Ga. L. 1972, p. 689, § 6.)

Cross references. — Effect of negligence or delay by party applying for leave to amend pleadings, § 9-10-134. Provision that amendment of pleadings pursuant to court order does not constitute waiver of objection to order, § 9-10-135.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 15, see 28 U.S.C.

Law reviews. — For article discussing flexibility necessary for operation of amendment statutes, see 12 Ga. B.J. 127 (1949). For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957). For article, “Synopsis of 1968 Amendments of the Appellate Procedure Act and Georgia Civil Practice Act,” see 4 Ga. St. B.J. 503 (1968). For article discussing the historical background of the doctrine of tender and the application

in Georgia of tender requirements, and proposing reforms, see 21 Mercer L. Rev. 413 (1969). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 3 Mercer L. Rev. 109 (1981). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For annual survey article on legal ethics, see 56 Mercer L. Rev. 315 (2004). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

For comment on *Leniston v. Bonfiglio*, 138 Ga. App. 151, 226 S.E.2d 1 (1976), see 28 Mercer L. Rev. 559 (1977).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AMENDMENTS, GENERALLY

1. IN GENERAL

2. NAME OR CAPACITY OF PARTY; NEW PARTIES

AMENDMENTS AFTER VERDICTS OR JUDGMENT

AMENDMENTS TO CONFORM TO EVIDENCE

RELATION BACK OF AMENDMENTS

1. IN GENERAL

2. AMENDMENTS CHANGING OR ADDING PARTIES

SUPPLEMENTAL PLEADINGS

General Consideration

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Code 1910, § 5681, former Code 1933, § 81-1301, and former Code 1933, Ch. 13, T. 81, are included in the annotations for this Code section.

Pleadings are a means, not an end.

— This section is one of the most important that deal with pleadings; it reempha-

sizes and assists in attaining the objective of the rules on pleadings: that pleadings are not an end in themselves, but only a means to the proper presentation of a case, and that at all times pleadings are to assist, not deter, disposition of litigation on the merits. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Construction with § 50-21-35. — Absent evidence that the Department of

Transportation demonstrated actual prejudice from a surviving spouse's failure to comply with O.C.G.A. § 50-21-35 by failing to timely amend a damages complaint with a certificate showing service upon the attorney general, a dismissal order was vacated, and the case was remanded. *Ingram v. DOT*, 286 Ga. App. 220, 648 S.E.2d 729 (2007).

Not applicable to claims under Georgia's Workers' Compensation Act. — O.C.G.A. § 9-11-15(c) has not been incorporated into the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *McLendon v. Advertising That Works*, 292 Ga. App. 677, 665 S.E.2d 370 (2008).

Amendment of complaint before service. — In a personal injury action, the plaintiff could amend the complaint before the defendant was served, could serve the "recast complaint" without serving a copy of the original complaint, and, therefore, timely served the defendant. *Kennedy v. Porter*, 213 Ga. App. 398, 444 S.E.2d 818 (1994).

Complaint signed by unlicensed attorney was not void but merely voidable, and the defect was properly cured by amendment. *McCormick v. Acree*, 232 Ga. App. 834, 503 S.E.2d 88 (1998).

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).

Amendment to objection to probate. — It was error to dismiss an amended objection to the probate of a will on the ground that the original objection was legally insufficient, as an amendment to a caveat was permitted even when it was the amendment that sustained the validity of the caveat; the original objection put the proponent on notice of the objection, and its amendment the next day to include the grounds of undue influence and mental incapacity was proper under O.C.G.A. §§ 9-11-15 and 15-9-89. *Deering v. Keever*, 282 Ga. 161, 646 S.E.2d 262 (2007).

Mechanic's liens. — This section, providing for amendment of "pleadings," does

not apply to a mechanic's lien because such lien is nothing more than a matter of proof. *Shirah Contracting Co. v. Waite*, 143 Ga. App. 355, 238 S.E.2d 728 (1977).

Recovery of future rents. — In the absence of an amendment to the complaint, supplemental pleadings, or trial of the claims for accrued rents by the express or implied consent of the parties, the trial court was not authorized to enter judgment for the landlord for rents that became due after commencement of the action. *Dwyer v. Anand*, 210 Ga. App. 419, 436 S.E.2d 532 (1993).

Implied consent to amendment of defendant's counterclaim in landlord/tenant situation. — Although a trial court erred in awarding a tenant attorney fees under O.C.G.A. § 13-6-11 because the tenant's counterclaim was not independent or viable, the error was harmless since attorney fees were authorized under an amended lease provision allowing attorney fees to the prevailing party. The landlord was not misled or denied the opportunity to defend or offer evidence on the issue because at the first trial, the tenant asserted that the tenant was seeking attorney fees as the prevailing party, and at the second trial, the tenant stated in the tenant's opening statement that in addition to seeking attorney fees under § 13-6-11, it was seeking and introducing evidence of attorney fees as recoverable under the lease provision, and having failed to make a contemporaneous objection when the arguments were raised and the evidence introduced, the landlord implicitly consented to the amendment of the pleadings to include the claim and waived any objections thereto. *Sugarloaf Mills Ltd. P'ship v. Record Town, Inc.*, 306 Ga. App. 263, 701 S.E.2d 881 (2010).

Jury trial. — Demand for jury trial must be made at time of original answer, and the defendant cannot later make such request. *Williams v. Leonard Heating & Air Conditioning Co.*, 137 Ga. App. 16, 223 S.E.2d 2 (1975).

Waiver of right to jury trial is not within purview of this section. *Marler v. Citizens & S. Bank*, 139 Ga. App. 851, 229 S.E.2d 786 (1976), *aff'd*, 239 Ga. 342, 236 S.E.2d 590 (1977). But see *Gregson & Assocs.*,

General Consideration (Cont'd)

Inc. v. Webb, 143 Ga. App. 276, 238 S.E.2d 274 (1977).

When a third-party defendant had not been served as a party to the main action, there could be no judgment entered in the main action by the trial court against the third-party defendant. *Stone Mountain Aviation, Inc. v. Rollins Leasing Corp.*, 174 Ga. App. 35, 329 S.E.2d 247 (1985).

Evidence of additional damages in trial de novo. — When the plaintiff appealed to the state court from a magistrate court's decision dismissing the plaintiff's claim and awarding damages to the defendant on its counterclaim, and 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).

No waiver of defenses. — Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Action for breach of fiduciary duty against a conservator was tried by implied consent although it was not pled. — Although the record showed that a conservator did not bring a claim pursuant to O.C.G.A. § 29-5-93(a)(4) in writing, but sought only an accounting pursuant to O.C.G.A. § 29-5-81, the conservator did not object when the administrator raised the issue at the hearing. As a result, the issue of whether the conservator breached

the conservator's fiduciary duty was litigated by the implied consent of the parties pursuant to O.C.G.A. § 9-11-15(b). *In re Hudson*, 300 Ga. App. 340, 685 S.E.2d 323 (2009).

Grandparents' visitation deemed tried by consent when parent did not object. — Because a parent's only objection to the grandparents' visitation raised at the hearing was the parent's concern for advance notice by the grandparents before scheduling a visit, the parent failed to preserve any objection that the grandparents had failed to intervene in the action as contemplated by O.C.G.A. § 19-7-3(c), pursuant to O.C.G.A. § 9-11-15(b). *Grove v. Grove*, 296 Ga. 435, 768 S.E.2d 453 (2015).

Cited in *YMCA of Metro. Atlanta, Inc. v. Bailey*, 107 Ga. App. 417, 130 S.E.2d 242 (1963); *Ward v. National Dairy Prods. Corp.*, 224 Ga. 241, 161 S.E.2d 305 (1968); *Hirsch's v. Adams*, 117 Ga. App. 847, 162 S.E.2d 243 (1968); *City of Atlanta v. Fuller*, 118 Ga. App. 563, 164 S.E.2d 364 (1968); *Johnson v. Myers*, 118 Ga. App. 773, 165 S.E.2d 739 (1968); *Whaley v. Disbrow*, 225 Ga. 145, 166 S.E.2d 343 (1969); *Cohen v. Garland*, 119 Ga. App. 333, 167 S.E.2d 599 (1969); *Smith v. Smith*, 119 Ga. App. 619, 168 S.E.2d 609 (1969); *Kelley v. Carson*, 120 Ga. App. 450, 171 S.E.2d 150 (1969); *Black v. Aultman*, 120 Ga. App. 826, 172 S.E.2d 336 (1969); *Bearden v. GMAC*, 122 Ga. App. 180, 176 S.E.2d 652 (1970); *Neal v. Smith*, 226 Ga. 96, 172 S.E.2d 684 (1970); *Hogan v. Maxey*, 121 Ga. App. 490, 174 S.E.2d 208 (1970); *Mull v. Aetna Cas. & Sur. Co.*, 226 Ga. 462, 175 S.E.2d 552 (1970); *Dowdney v. Shadix*, 122 Ga. App. 119, 176 S.E.2d 512 (1970); *Montgomery v. Richards Bldg. Materials, Inc.*, 122 Ga. App. 472, 177 S.E.2d 507 (1970); *Robinson v. Bomar*, 122 Ga. App. 564, 177 S.E.2d 815 (1970); *Howard v. Smith*, 226 Ga. 850, 178 S.E.2d 159 (1970); *Edwards v. Simpson*, 123 Ga. App. 44, 179 S.E.2d 266 (1970); *Perkins v. Perkins*, 227 Ga. 177, 179 S.E.2d 518 (1971); *Harrison v. Harrison*, 228 Ga. 126, 184 S.E.2d 147 (1971); *Thornton v. North Am. Acceptance Corp.*, 228 Ga. 176, 184 S.E.2d 589 (1971); *Rogers v. Eavenson*, 124 Ga. App. 230, 183 S.E.2d 498 (1971); *Rushing v. Ellis*, 124 Ga. App. 621, 184

S.E.2d 667 (1971); Savannah Bank & Trust Co. v. Keane, 126 Ga. App. 53, 189 S.E.2d 702 (1972); Seaboard Coast Line R.R. v. Metzger, 126 Ga. App. 178, 190 S.E.2d 156 (1972); First Nat'l Bank v. Langford, 126 Ga. App. 325, 190 S.E.2d 803 (1972); Shure v. Willner & Millkey, 126 Ga. App. 368, 190 S.E.2d 620 (1972); McDonald v. Rogers, 229 Ga. 369, 191 S.E.2d 844 (1972); O'Quinn v. James, 127 Ga. App. 94, 192 S.E.2d 507 (1972); Whitley v. Whitley Constr. Co., 127 Ga. App. 68, 192 S.E.2d 563 (1972); Johnson v. Caldwell, 229 Ga. 548, 192 S.E.2d 900 (1972); Darnell v. Betty's Creek Baptist Church, 230 Ga. 461, 197 S.E.2d 714 (1973); Anken Constr. Co. v. Artistic Ornamental Iron Co., 129 Ga. App. 32, 198 S.E.2d 389 (1973); Murray Chevrolet Co. v. Godwin, 129 Ga. App. 153, 199 S.E.2d 117 (1973); Rowe v. Citizens & S. Nat'l Bank, 129 Ga. App. 251, 199 S.E.2d 319 (1973); Pinkerton & Laws Co. v. Robert & Co. Assocs., 129 Ga. App. 881, 201 S.E.2d 654 (1973); Knickerbocker Tax Sys. v. Texaco, Inc., 130 Ga. App. 383, 203 S.E.2d 290 (1973); Giordano v. Stubbs, 356 F. Supp. 1041 (N.D. Ga.), *aff'd*, 483 F.2d 1395 (5th Cir. 1973); Baitcher v. Louis R. Clerico Assocs., 132 Ga. App. 219, 207 S.E.2d 698 (1974); Kingston Dev. Co. v. Kenerly, 132 Ga. App. 346, 208 S.E.2d 118 (1974); Rodriguez v. Newby, 131 Ga. App. 651, 206 S.E.2d 585 (1974); Pate v. Milford A. Scott Real Estate Co., 132 Ga. App. 49, 207 S.E.2d 567 (1974); Brer Rabbit Mobile Home Sales, Inc. v. Perry, 132 Ga. App. 128, 207 S.E.2d 578 (1974); Board of Comm'rs v. Allgood, 234 Ga. 9, 214 S.E.2d 522 (1975); Ayala v. Sherrer, 234 Ga. 112, 214 S.E.2d 548 (1975); Barrett v. Simmons, 235 Ga. 600, 221 S.E.2d 25 (1975); McLanahan v. Keith, 135 Ga. App. 117, 217 S.E.2d 420 (1975); Thomas v. Davis, 235 Ga. 32, 218 S.E.2d 787 (1975); Monumental Properties, Inc. v. Johnson, 136 Ga. App. 39, 220 S.E.2d 55 (1975); Bell v. Loosier of Albany, Inc., 137 Ga. App. 50, 222 S.E.2d 839 (1975); Cook v. Computer Listings, 137 Ga. App. 526, 224 S.E.2d 501 (1976); Smith v. Emory Univ., 137 Ga. App. 785, 225 S.E.2d 63 (1976); Phillips v. Williams, 137 Ga. App. 578, 224 S.E.2d 515 (1976); McKibben v. Thomas, 138 Ga. App. 544, 227 S.E.2d 87 (1976); Pendley v. Hunter, 138 Ga. App. 864, 227 S.E.2d 857 (1976); Greer v. State Farm Fire & Cas. Co., 139 Ga. App. 74, 227 S.E.2d 881 (1976); Smith v. Security Mtg. Investors, 139 Ga. App. 635, 229 S.E.2d 115 (1976); Filsoof v. West, 235 Ga. 818, 221 S.E.2d 811 (1976); Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436 (1976); Belt v. Allstate Ins. Co., 140 Ga. App. 740, 231 S.E.2d 831 (1976); Logan Paving Co. v. Liles Constr. Co., 141 Ga. App. 81, 232 S.E.2d 575 (1977); Security Ins. Co. v. Gill, 141 Ga. App. 324, 233 S.E.2d 278 (1977); Nelson v. Bloodworth, 238 Ga. 264, 232 S.E.2d 547 (1977); Kimball Bridge Rd. v. Everest Realty Corp., 141 Ga. App. 835, 234 S.E.2d 673 (1977); Cleary v. Southern Motors of Savannah, Inc., 142 Ga. App. 163, 235 S.E.2d 623 (1977); Joyner v. William J. Butler, Inc., 143 Ga. App. 219, 237 S.E.2d 685 (1977); Wagner v. Wagner, 238 Ga. 404, 233 S.E.2d 379 (1977); Buck v. Buck, 238 Ga. 540, 233 S.E.2d 792 (1977); Klovville, Inc. v. Kinsler, 239 Ga. 569, 238 S.E.2d 344 (1977); Summerlot v. Crain-Daly Volkswagen, Inc., 238 Ga. 546, 233 S.E.2d 749 (1977); Mundy v. Cincinnati Ins. Co., 141 Ga. App. 106, 232 S.E.2d 621 (1977); Perry v. Dudley, 141 Ga. App. 455, 233 S.E.2d 849 (1977); Mattair v. St. Joseph's Hosp., 141 Ga. App. 597, 234 S.E.2d 537 (1977); Ellington v. Tolar Constr. Co., 142 Ga. App. 218, 235 S.E.2d 729 (1977); Downs v. Jones, 142 Ga. App. 316, 235 S.E.2d 760 (1977); Chastain v. Simmons, 142 Ga. App. 615, 236 S.E.2d 678 (1977); Brown v. Jackson, 142 Ga. App. 780, 237 S.E.2d 13 (1977); Strother Ford, Inc. v. Bullock, 142 Ga. App. 843, 237 S.E.2d 208 (1977); Gregson & Assocs., Inc. v. Webb, 143 Ga. App. 276, 238 S.E.2d 274 (1977); Holt v. Rickett, 143 Ga. App. 337, 238 S.E.2d 706 (1977); Mullinax v. Shaw, 143 Ga. App. 657, 239 S.E.2d 547 (1977); Richman Bros. Lumber & Supply Co. v. Martin, 144 Ga. App. 39, 240 S.E.2d 308 (1977); Genins v. Geiger, 144 Ga. App. 244, 240 S.E.2d 745 (1977); Space Leasing Assocs. v. Atlantic Bldg. Sys., 144 Ga. App. 320, 241 S.E.2d 438 (1977); Griffin-Spalding County Hosp. Auth. v. Radio Station WKEU, 240 Ga. 444, 241 S.E.2d 196 (1978); Lanier Petro., Inc. v. Hyde, 144 Ga. App. 441, 241 S.E.2d 62 (1978); Weiss v. Gunter, 144 Ga. App. 513,

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241 S.E.2d 623 (1978); Tuggle v. State, 145 Ga. App. 603, 244 S.E.2d 131 (1978); Dalton Am. Truck Stop, Inc. v. ADBE Distrib. Co., 146 Ga. App. 8, 245 S.E.2d 346 (1978); Grizzard v. Petkas, 146 Ga. App. 318, 246 S.E.2d 375 (1978); Dunn v. McIntyre, 146 Ga. App. 362, 246 S.E.2d 398 (1978); Clover Realty Co. v. J.L. Todd Auction Co., 146 Ga. App. 576, 246 S.E.2d 695 (1978); Diaz v. First Nat'l Bank, 144 Ga. App. 582, 241 S.E.2d 467 (1978); Rude v. Rude, 241 Ga. 454, 246 S.E.2d 311 (1978); Farmers Mut. Exch. of Baxley, Inc. v. Dixon, 146 Ga. App. 663, 247 S.E.2d 124 (1978); Madison, Ltd. v. Price, 146 Ga. App. 837, 247 S.E.2d 523 (1978); Star Jewelers, Inc. v. Durham, 147 Ga. App. 68, 248 S.E.2d 51 (1978); Nelson v. Fulton County Bank, 147 Ga. App. 98, 248 S.E.2d 173 (1978); Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483; 436 U.S. 921, 98 S. Ct. 2272, 56 L. Ed. 2d 764 (1978); International Ass'n of Bridge Ironworkers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438 (1979); Jackson v. Jackson, 243 Ga. 338, 253 S.E.2d 758 (1979); Good Housekeeping Shops v. Hines, 150 Ga. App. 240, 257 S.E.2d 205 (1979); Peachtree-Piedmont Assocs. v. Tower Place Billjohn, Inc., 150 Ga. App. 292, 257 S.E.2d 362 (1979); Marshall v. Fulton Nat'l Bank, 152 Ga. App. 121, 262 S.E.2d 448 (1979); Ingram v. Warren, 244 Ga. 189, 259 S.E.2d 448 (1979); Motor Fin. Co. v. Harris, 150 Ga. App. 762, 258 S.E.2d 628 (1979); Harrison Co. v. Code Revision Comm'n, 244 Ga. 325, 260 S.E.2d 30 (1979); Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979); West v. National Bank, 155 Ga. App. 178, 270 S.E.2d 245 (1980); Unicover, Inc. v. East India Trading Co., 154 Ga. App. 161, 267 S.E.2d 786 (1980); McCoy Enters. v. Vaughn, 154 Ga. App. 471, 268 S.E.2d 764 (1980); West v. National Bank, 155 Ga. App. 178, 270 S.E.2d 245 (1980); Four Oaks Properties, Inc. v. Carusi, 156 Ga. App. 422, 274 S.E.2d 783 (1980); Cotton v. Federal Land Bank, 246 Ga. 188, 269 S.E.2d 422 (1980); Randall & Blakely, Inc. v. Krantz, 155 Ga. App. 238, 270 S.E.2d 265 (1980); Four Oaks Properties, Inc. v. Carusi, 156 Ga. App. 422, 274 S.E.2d 783 (1980); City of

Douglas v. Johnson, 157 Ga. App. 618, 278 S.E.2d 160 (1981); Dorsey v. DOT, 248 Ga. 34, 279 S.E.2d 707 (1981); H.R. Kaminsky & Sons v. Yarbrough, 158 Ga. App. 523, 281 S.E.2d 289 (1981); Bituminous Cas. Corp. v. United Servs. Auto. Ass'n, 158 Ga. App. 739, 282 S.E.2d 198 (1981); Grier v. Employees Fin. Servs., 158 Ga. App. 813, 282 S.E.2d 342 (1981); Plaza Pontiac, Inc. v. Shaw, 158 Ga. App. 799, 282 S.E.2d 383 (1981); Caldwell v. Hunnicutt, 159 Ga. App. 102, 282 S.E.2d 665 (1981); Henry v. Hemingway, 159 Ga. App. 375, 283 S.E.2d 341 (1981); Auto Rental & Leasing, Inc. v. Blizzard, 159 Ga. App. 533, 284 S.E.2d 47 (1981); Edwards v. Davis, 160 Ga. App. 122, 286 S.E.2d 301 (1981); Griffin v. Griffin, 248 Ga. 743, 285 S.E.2d 710 (1982); Godfrey v. Kirk, 161 Ga. App. 474, 288 S.E.2d 301 (1982); Martin v. Newman, 162 Ga. App. 725, 293 S.E.2d 18 (1982); Atlanta Window Co. v. Haskell Assocs., 162 Ga. App. 789, 293 S.E.2d 51 (1982); Brown v. Banks, 162 Ga. App. 808, 293 S.E.2d 69 (1982); Benson v. Sullivan, 162 Ga. App. 829, 293 S.E.2d 380 (1982); Frates v. Sutherland, Asbill & Brennan, 164 Ga. App. 243, 296 S.E.2d 788 (1982); Concert Promotions, Inc. v. Haas & Dodd, Inc., 169 Ga. App. 711, 314 S.E.2d 720 (1984); Franklyn Gesner Fine Paintings, Inc. v. Ketcham, 252 Ga. 537, 314 S.E.2d 903 (1984); Blalock v. Central Bank, 170 Ga. App. 140, 316 S.E.2d 474 (1984); DeBerry v. Knowles, 172 Ga. App. 101, 321 S.E.2d 824 (1984); Brown v. Commercial Credit Equip. Corp., 172 Ga. App. 568, 323 S.E.2d 822 (1984); Clonts v. Scholle, 172 Ga. App. 721, 324 S.E.2d 496 (1984); McCall v. Wyman, 173 Ga. App. 131, 325 S.E.2d 629 (1984); Graham v. Newsome, 174 Ga. App. 351, 330 S.E.2d 98 (1985); Fussell Sheet Metal, Inc. v. Artistic Constr. & Landscaping, Inc., 174 Ga. App. 618, 330 S.E.2d 813 (1985); Bandy v. Hospital Auth., 174 Ga. App. 556, 332 S.E.2d 46 (1985); C & W Land Dev. Corp. v. Kaminsky, 175 Ga. App. 774, 334 S.E.2d 362 (1985); Edelschick v. Blanchard, 177 Ga. App. 410, 339 S.E.2d 628 (1985); Shedd v. Goldsmith Chevrolet, 178 Ga. App. 554, 343 S.E.2d 733 (1986); American Game & Music Serv., Inc. v. Knighton, 178 Ga. App. 745, 344 S.E.2d 717 (1986); Henderson v. Easters, 178 Ga. App. 867,

345 S.E.2d 42 (1986); Citizens Jewelry Co. v. Walker, 178 Ga. App. 897, 345 S.E.2d 106 (1986); In re C.M., 179 Ga. App. 508, 347 S.E.2d 328 (1986); Jenkins v. State, 180 Ga. App. 583, 349 S.E.2d 774 (1986); Bank S. v. Harrell, 181 Ga. App. 64, 351 S.E.2d 263 (1986); Rothstein v. L.F. Still & Co., 181 Ga. App. 113, 351 S.E.2d 513 (1986); Abernethy v. Cates, 182 Ga. App. 456, 356 S.E.2d 62 (1987); Thornton v. Ellis, 184 Ga. App. 884, 363 S.E.2d 584 (1987); Rose v. Kosilla, 185 Ga. App. 217, 363 S.E.2d 623 (1987); Atlanta Fire Sys. v. Alexander Underwriters Gen. Agency, Inc., 185 Ga. App. 873, 366 S.E.2d 197 (1988); Black & White Constr. Co. v. Bolden Contractors, 187 Ga. App. 805, 371 S.E.2d 421 (1988); MacDonald v. Vasselin, 188 Ga. App. 467, 373 S.E.2d 221 (1988); Bohannon v. Futrell, 189 Ga. App. 340, 375 S.E.2d 637 (1988); Calhoun v. Somogyi, 190 Ga. App. 502, 379 S.E.2d 595 (1989); Barnes v. GMAC, 191 Ga. App. 201, 381 S.E.2d 146 (1989); W.M. Griffin Family Farms, Inc. v. Northrup King & Co., 191 Ga. App. 304, 381 S.E.2d 441 (1989); Stuckey Health Care, Inc. v. State, 193 Ga. App. 771, 389 S.E.2d 349 (1989); Banks County Sch. Dist. v. Blackwell, 194 Ga. App. 50, 389 S.E.2d 782 (1989); Price v. Age, Ltd., 194 Ga. App. 141, 390 S.E.2d 242 (1990); Utica Mut. Ins. Co. v. Chasen, 195 Ga. App. 875, 395 S.E.2d 40 (1990); Blackerby v. Henson, 201 Ga. App. 316, 411 S.E.2d 91 (1991); Wade v. Polytech. Indus., Inc., 202 Ga. App. 18, 413 S.E.2d 468 (1991); Peterson v. P.C. Towers, L.P., 206 Ga. App. 591, 426 S.E.2d 243 (1992); Paino v. Connell, 207 Ga. App. 553, 428 S.E.2d 446 (1993); Dowden v. American Tel. & Tel. Co., 211 Ga. App. 96, 438 S.E.2d 652 (1993); Teel v. Trust Co. Bank, 216 Ga. App. 493, 455 S.E.2d 312 (1995); Stuckey v. Storms, 265 Ga. 491, 458 S.E.2d 344 (1995); Staffing Resources, Inc. v. Nash, 218 Ga. App. 525, 462 S.E.2d 401 (1995); Shiver v. Norfolk-Southern Ry., 220 Ga. App. 483, 469 S.E.2d 769 (1996); Jayson v. Gardocki, 221 Ga. App. 455, 471 S.E.2d 545 (1996); Bonner v. Smith, 226 Ga. App. 3, 485 S.E.2d 214 (1997); Brown v. Little, 227 Ga. App. 484, 489 S.E.2d 596 (1997); Milburn v. Nationwide Ins. Co., 228 Ga. App. 398, 491 S.E.2d 848 (1997); United States Fid. & Guar. Co. v. Paul Assocs.,

230 Ga. App. 243, 496 S.E.2d 283 (1998); Greer v. Davis, 244 Ga. App. 317, 534 S.E.2d 853 (2000); Reese v. City of Atlanta, 247 Ga. App. 701, 545 S.E.2d 96 (2001); Associated Doctors of Warner Robins, Inc. v. U.S. Foodservice of Atlanta, Inc., 250 Ga. App. 878, 553 S.E.2d 310 (2001); Sullivan v. Fredericks, 251 Ga. App. 790, 554 S.E.2d 809 (2001); Donald Azar, Inc. v. City of Atlanta, 254 Ga. App. 531, 562 S.E.2d 831 (2002); Williamson v. Dep't of Human Res., 258 Ga. App. 113, 572 S.E.2d 678 (2002); Giles v. Vastakis, 262 Ga. App. 483, 585 S.E.2d 905 (2003); Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003); Imperial Foods Supply, Inc. v. Purvis, 260 Ga. App. 614, 580 S.E.2d 342 (2003); M.J.E.S. Enters. v. Martin, 265 Ga. App. 652, 595 S.E.2d 367 (2004); Liberty v. Storage Trust Props., L.P., 267 Ga. App. 905, 600 S.E.2d 841 (2004); Backensto v. Ga. DOT, 284 Ga. App. 41, 643 S.E.2d 302 (2007); Wright v. Piedmont Prop. Owners Ass'n, 288 Ga. App. 261, 653 S.E.2d 846 (2007); Brito v. Gomez Law Group, LLC, 289 Ga. App. 625, 658 S.E.2d 178 (2008); Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165 (2009), *aff'd*, 287 Ga. 406, 696 S.E.2d 640 (2010); Weaver v. State, 299 Ga. App. 718, 683 S.E.2d 361 (2009); Pinnacle Benning, LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 724 S.E.2d 894 (2012); Macfarlan v. Atlanta Gastroenterology Assocs., 317 Ga. App. 887, 732 S.E.2d 292 (2012); Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013); Kennedy Dev. Co. v. Newton's Crest Homeowners' Ass'n, 322 Ga. App. 39, 743 S.E.2d 600 (2013); Wright v. Safari Club Int'l, Inc., 322 Ga. App. 486, 745 S.E.2d 730 (2013); Babies Right Start v. Ga. Dep't of Pub. Health, 293 Ga. 553, 748 S.E.2d 404 (2013).

Amendments, Generally

1. In General

Right to amend is very broad. Moore v. Bryan, 52 Ga. App. 272, 183 S.E. 117 (1935) (decided under former Code 1933, § 81-1301); Dalton Carpet Indus., Inc. v. Chilivis, 137 Ga. App. 266, 223 S.E.2d 460 (1976); McRae v. Britton, 144 Ga. App.

Amendments, Generally (Cont'd)**1. In General** (Cont'd)

340, 240 S.E.2d 904 (1977); *Cooper v. Mason*, 151 Ga. App. 793, 261 S.E.2d 738 (1979).

Right to amend is very broad, and the practice of allowing amendments is very liberal. *Wright v. Horne*, 123 Ga. 86, 51 S.E. 30 (1905) (decided under former Code 1910, § 5681); *Cox v. Georgia R.R. & Banking Co.*, 139 Ga. 532, 77 S.E. 574 (1913) (decided under former Code 1910, § 5681); *Jenkins v. Lane*, 154 Ga. 454, 115 S.E. 126 (1922) (decided under former Code 1910, § 5681); *Richardson v. Hairried*, 202 Ga. 610, 44 S.E.2d 237 (1947) (decided under former Code 1933, § 81-1301).

This state has a very liberal policy with regard to amendments. *Taylor v. Georgia Power Co.*, 129 Ga. App. 89, 198 S.E.2d 701 (1973); *McRae v. Britton*, 144 Ga. App. 340, 240 S.E.2d 904 (1977).

Insurer had a duty to provide a defense to the insurer's insured because a fact issue existed as to whether the insured's actions in the underlying incident were criminal and/or intentional; although a cross-appellant originally alleged an intentional act on the part of the insured, the cross-appellant removed all factual allegations of intentional conduct and amended the complaint to allege only negligence and gross negligence. In Georgia, a party's right to amend a complaint pursuant to O.C.G.A. § 9-11-15(a) was very liberal. *Nationwide Mut. Fire Ins. Co. v. Kim*, 294 Ga. App. 548, 669 S.E.2d 517 (2008).

Discretion of court. — Right of amendment is very broad, as is discretion of trial court in controlling it, and unless there is a manifest abuse of the court's discretion it will not be controlled. *Walker v. Sheehan*, 80 Ga. App. 606, 56 S.E.2d 628 (1949) (decided under former Code 1933, §§ 81-1301 and 81-1302).

Trial court did not abuse the court's discretion in allowing a bank to reinstate the bank's claim for attorney fees and litigation expenses in an action against a property owner, seeking to re-establish its priority lien on the owner's property, as the bank had initially withdrawn that

claim in order to expedite litigation and also based on the owner's promise to pursue expeditious litigation, wherein both parties agreed to avoid questioning a witness regarding bad faith, but the owner continued to pursue the questioning; further, such amendment was to be liberally allowed, the bank's intent to seek such an award was clear, and the owner was unable to show surprise or prejudice by allowance of the amendment. *Schowalter v. Washington Mut. Bank*, 275 Ga. App. 182, 620 S.E.2d 437 (2005).

Trial court's denial of the first insurer's motion for a directed verdict, pursuant to O.C.G.A. § 9-11-50, in the second insurer's declaratory judgment action regarding contested motor vehicle coverage, was proper as the second insurer met the three-step requirement for institution of a declaratory judgment action because there was no suit pending that could have gone into default or been prejudiced, the declaratory judgment action was timely filed, and it provided a reservation-of-rights letter which listed the insured's lack of cooperation as the basis for questioning coverage; although the second insurer later provided four additional reasons in the declaratory judgment action, including fraud and misrepresentation which was found by the jury, such additional reasons did not have to be set forth in the reservation-of-rights letter as amendments under O.C.G.A. § 9-11-15(a) were permissible. *Gov't Emples. Ins. Co. v. Progressive Cas. Ins. Co.*, 275 Ga. App. 872, 622 S.E.2d 92 (2005).

Trial court did not abuse the court's discretion by amending a pretrial order to allow for bifurcation of a trial, upon the motion of the defendants, because at the hearing on the motion to amend, the plaintiff never objected on the grounds that the timing of the motion to bifurcate caused any injustice; therefore, no reversible error occurred with regard to the plaintiff's timing argument. *Bolden v. Ruppenthal*, 286 Ga. App. 800, 650 S.E.2d 331 (2007), cert. denied, 2007 Ga. LEXIS 756 (Ga. 2007).

Subsection (a) is to be liberally construed in favor of allowance of amendments, particularly when the opposing

party is not prejudiced thereby. *MCG Dev. Corp. v. Bick Realty Co.*, 140 Ga. App. 41, 230 S.E.2d 26 (1976); *Bourquine v. City of Patterson*, 151 Ga. App. 232, 259 S.E.2d 214 (1979).

Cross-claim by codefendant. — Pleadings must be treated as if amended to include cross-claiming codefendant's plea and prayer for compensation when the issue was tried by express or implied consent of the parties. *Privitera v. Addison*, 190 Ga. App. 102, 378 S.E.2d 312, cert. denied, 190 Ga. App. 898, 378 S.E.2d 312 (1989).

Decisions to be made on merits, not technicalities. — Ga. L. 1967, p. 226, § 8 (see now O.C.G.A. § 9-11-8(f)), providing that pleadings be construed to do substantial justice, taken in conjunction with Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15), requires that decisions be made on the merits, not upon the niceties of pleadings. *Owens v. Cobb County*, 230 Ga. 707, 198 S.E.2d 846 (1973).

When the trial court denied a motion to amend a pretrial order strictly on the basis of delay, finding the case was scheduled for trial and had been on prior trial calendars, the court had to reconsider the motion under the proper balancing test. *Total Car Franchising Corp. v. Squire*, 259 Ga. App. 114, 576 S.E.2d 90 (2003).

Amendment is a resource against waste. *McRae v. Britton*, 144 Ga. App. 340, 240 S.E.2d 904 (1977).

If an amendment is germane to cause of action, the amendment should be allowed. *McRae v. Britton*, 144 Ga. App. 340, 240 S.E.2d 904 (1977).

New cause of action. — There is no prohibition against pleading a new cause of action by amendment. *Dalton Carpet Indus., Inc. v. Chilivis*, 137 Ga. App. 266, 223 S.E.2d 460 (1976); *McRae v. Britton*, 144 Ga. App. 340, 240 S.E.2d 904 (1977); *Cooper v. Mason*, 151 Ga. App. 793, 261 S.E.2d 738 (1979); *Peterson v. American Int'l Life Assurance Co.*, 203 Ga. App. 745, 417 S.E.2d 402, cert. denied, 203 Ga. App. 907, 417 S.E.2d 402 (1992).

Nothing in O.C.G.A. § 9-11-9.1 or O.C.G.A. § 9-11-15 prohibited clients who sued a law firm and several attorneys, alleging legal malpractice, from amending the clients' complaint after the clients'

claim was dismissed for failure to file the expert's affidavit required by O.C.G.A. § 9-11-9.1, in an effort to add claims sounding in something other than professional negligence. *Smith v. Morris, Manning & Martin, LLP*, 264 Ga. App. 24, 589 S.E.2d 840 (2003).

O.C.G.A. § 9-11-15(a) permits, but does not require, a party to respond to an amended pleading, and allegations in an amended petition are "deemed denied or avoided" even in the absence of an answer; a trial court erred in holding that a director was required to plead a conversion of stock counterclaim "upon receipt of the amended complaint." *Sampson v. Haywire Ventures, Inc.*, 278 Ga. App. 525, 629 S.E.2d 515 (2006).

Striking original pleadings. — Nothing in subsection (a) of this section prohibits amendment of the complaint by striking all the original pleadings. *Stith v. Hudson*, 231 Ga. 520, 202 S.E.2d 392 (1973).

When less than all of plaintiff's claims are added or dropped, the additions and deletions are not dismissals and renewals governed by O.C.G.A. §§ 9-2-61(a) and 9-11-41(a), but simply amendments governed by the liberal amendment rules of subsections (a) and (c) of O.C.G.A. § 9-11-15. *Young v. Rider*, 208 Ga. App. 147, 430 S.E.2d 117 (1993).

Amendment to correct error in filing answer. — Trial court did not abuse the court's discretion by striking the claimants' answers to the complaint in a forfeiture proceeding because the claimants were permitted by law to amend the claimants' answers to correct the lack of verification, but never did so and, although the claimants' claim that the trial court failed to afford the claimants an opportunity to amend the claimants' pleadings, the claimants failed to show that the trial court refused to consider such an amendment or did anything to preclude or bar the filing thereof. *Howard v. State of Ga.*, 321 Ga. App. 881, 743 S.E.2d 540 (2013).

After remand from appellate court. — After a trial court's summary judgment ruling was reversed by the appellate court and the case was remanded, the trial court did not err in allowing the defendant

Amendments, Generally (Cont'd)**1. In General** (Cont'd)

to amend the answer and the counterclaim under O.C.G.A. § 9-11-15 to add claims for compensatory and punitive damages as the action had not been fully adjudicated and claims remained after remand. *Kace Invs., L.P. v. Hull*, 278 Ga. App. 477, 629 S.E.2d 26 (2006).

Facts upon which court's venue depends may be added by amendment. *Middlebrooks v. Daniels*, 129 Ga. App. 790, 201 S.E.2d 338 (1973).

Legal guardians were entitled to amend the guardians' complaints to allege additional facts supporting venue in the county since the guardians initially filed their complaints, even after their cases had been moved to the trial court in a second county based on the fact that they initially only pled that venue was supported in the first county because that was where the truck collision occurred. However, their initial complaints were sufficient to support venue and their amended complaints added that the legal guardians learned that the truck owner had an office and transacted business in the initial county of filing and since that allegation was added to challenge the truck owner's assertions that venue was based solely on where the accident occurred and that there was an entitlement to move the lawsuits to the county where the owners had their principal place of business. *Mohawk Indus. v. Clark*, 259 Ga. App. 26, 576 S.E.2d 16 (2002).

Application of relation back statute to venue. — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the spouse to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the spouse were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A.

§§ 9-10-91 and 9-10-93. *Cartwright v. Fuji Photo Film U.S.A., Inc.*, 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. 2012).

Complaint may be amended so as to validate service of process. *Leniston v. Bonfiglio*, 138 Ga. App. 151, 226 S.E.2d 1 (1976). For comment, see 28 Mercer L. Rev. 559 (1977).

Omission to give court jurisdiction in the pleadings is amendable. *Southern Grocery Stores, Inc. v. Kelly*, 52 Ga. App. 551, 183 S.E. 924 (1936) (decided under former Code 1933, § 81-1309).

Amendment by substitution of affidavit permissible. — When the plaintiff filed a valid affidavit as a substitute for a defective one before the court ruled on the defendant's motion to dismiss, this amendment by substitution was as permissible as an amendment by striking from or adding to the contents of the paper which it is sought to amend. *Phoebe Putney Mem. Hosp. v. Skipper*, 235 Ga. App. 534, 510 S.E.2d 101 (1998).

Allowing amendment of complaint to seek damages was not an abuse of discretion by the court. *Glynn-Brunswick Mem. Hosp. Auth. v. Gibbons*, 243 Ga. App. 341, 530 S.E.2d 736 (2000).

No requirement to answer amended complaint. — Allegations of an amended complaint were deemed denied by operation of law, and because the holding in Division 1 of *Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee*, 249 Ga. 418, 420, 291 S.E.2d 698 (Ga. 1982), and its progeny, e.g., *Wilson Welding Service v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168 (Ga. Ct. App. 1998), conflicted with that rule of law, those decisions were overruled; a trial court erred in holding that a defendant was required to answer an amended complaint to avoid a default and in defaulting a defendant upon a failure to answer an amended complaint. *Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006).

Amendment of admissions not a pleading. — Response to requests for admission is not a pleading as pleadings are defined as seven specific filings, including a complaint and an answer and case law distinguishes an amendment of a

complaint from the withdrawal or amendment of admissions, which are governed by different statutory procedures and schemes. *Brougham Casket & Vault Co., LLC v. DeLoach*, 323 Ga. App. 701, 747 S.E.2d 707 (2013).

Venue of affidavit. — When heading of venue of an affidavit was by mistake incorrectly stated to be in a state and county other than the state and county where it was actually signed and sworn to, but it appeared from the jurat that it was signed and sworn to in the proper jurisdiction, the judge did not err in allowing the affidavit to be amended by inserting proper venue. *Southern Grocery Stores, Inc. v. Kelly*, 52 Ga. App. 551, 183 S.E. 924 (1936) (decided under former Code 1933, § 81-1309).

Reduction of amount claimed to jurisdictional limitation of court. — Cross-action may be amended to reduce amount claimed to a sum within the jurisdictional limitation of the court. *Allied Enters., Inc. v. Brooks*, 93 Ga. App. 832, 93 S.E.2d 392 (1956) (decided under former Code 1933, § 81-1301).

Amendment pleading law of foreign state. — Original complaint seeking recovery for wrongful death of spouse sufficiently stated cause of action as measured by standards of notice pleading, and an amendment pleading the applicable law of North Carolina was allowable and would relate back to the filing of the original complaint. *Atlanta Newspapers, Inc. v. Shaw*, 123 Ga. App. 848, 182 S.E.2d 683 (1971).

Failure to verify, if required, is an amendable defect. *Rigby v. Powell*, 233 Ga. 158, 210 S.E.2d 696 (1974), overruled on other grounds, *Wilson v. Nichols*, 253 Ga. 84, 316 S.E.2d 752 (1984); *MCG Dev. Corp. v. Bick Realty Co.*, 140 Ga. App. 41, 230 S.E.2d 26 (1976).

Condemnation proceedings. — Amendment with regard to condemnation proceedings is perfectly proper when the amendment's allowance does not adversely and substantially affect the condemnee's rights. *Taylor v. Georgia Power Co.*, 129 Ga. App. 89, 198 S.E.2d 701 (1973).

Amendment in condemnation proceedings, effect of which was to limit condem-

nor's use of the land condemned, did not amount to abandonment, nor to a substantial change such as would require that it be stricken, and until final judgment was reached, there was no impediment to such amendment. *Taylor v. Georgia Power Co.*, 129 Ga. App. 89, 198 S.E.2d 701 (1973).

Forfeiture proceedings. — Since the claimant contesting the forfeiture of property was authorized to amend the claimant's answer to a forfeiture complaint, the court erred in granting the state's motion to strike the amendment. *Jackson v. State*, 231 Ga. App. 320, 498 S.E.2d 159 (1998).

Garnishment proceedings. — Prior to judgment thereon, a motion filed to modify and reduce a garnishment judgment under O.C.G.A. § 18-4-91 may be retroactively amended to substitute the name and signature of a licensed Georgia attorney pursuant to O.C.G.A. § 9-11-15. *North Ga. Medical Ctr. v. Food Lion, Inc.*, 238 Ga. App. 78, 517 S.E.2d 799 (1999).

Amendment to add defense. — In an action for breach of a lease agreement, the trial court did not abuse the court's discretion in denying the defendants' attempt to amend the defendants' answer to add a defense of condemnation. *Ford's & Gantt Co. v. Wallace*, 249 Ga. App. 273, 548 S.E.2d 31 (2001).

Affirmative defenses. — While bringing in affirmative defense of denial of performance or occurrence of conditions precedent 15 months after filing of an original answer is not beneficial to the orderly disposition of a case, it is nevertheless permitted. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Trial court did not abuse the court's discretion in granting the defendant's motion to amend a pretrial order for the purpose of adding the affirmative defenses of unconscionability, illegality, and fraud because the defendant had raised the defenses on motion for summary judgment and there was neither prejudice arising out of surprise nor waiver as a matter of law. *Driggers v. Campbell*, 247 Ga. App. 300, 543 S.E.2d 787 (2000).

Amendment a matter of right before entry of pretrial order. — Subsection (a) of this section allows amendment

Amendments, Generally (Cont'd)**1. In General** (Cont'd)

as a matter of right before entry of a pretrial order. *Clover Realty Co. v. Todd*, 237 Ga. 821, 229 S.E.2d 649 (1976).

Amendments may be filed at any time before entry of a pretrial order without permission of the court. *Newbern v. Chapman Funeral Chapel*, 158 Ga. App. 790, 282 S.E.2d 379 (1981).

Because the trial court had not entered a pretrial order, a patient's spouse was entitled to amend a medical malpractice complaint after the patient's death to add a wrongful death claim as a matter of course and without leave of court. *Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson*, 286 Ga. App. 881, 650 S.E.2d 387 (2007), cert. denied, 2007 Ga. LEXIS 820 (Ga. 2007).

Trial court did not err in considering the claims that a plaintiff asserted in two amendments to a petition, although the amendments were filed after an order granting dissolution of a limited liability company was entered, because the judgment on the dissolution petition was not a final judgment, the defendant's counterclaim had yet to be heard, and no pretrial order had been filed at the time the amendments were made. *Moses v. Pennebaker*, 312 Ga. App. 623, 719 S.E.2d 521 (2011).

Amendment compromising class action not allowed as matter of right.

— General rule permitting amendment as a matter of course and without leave of court before entry of pretrial order has no application in respect to a class action, if the proposed amendment would have the effect of compromising the claim. *Murphy v. Hope*, 229 Ga. 836, 195 S.E.2d 24 (1972).

Amendments allowed before pretrial order in special statutory proceedings. — State should have been allowed to amend the action to make the Code section conform to the allegations contained in the condemnation action since the property seized was a result of a gambling offense, not a drug offense and although these offenses are special statutory proceedings, the Civil Practice Act, O.C.G.A. Ch. 11. T. 9, is applicable. *State*

v. Walls, 202 Ga. App. 899, 415 S.E.2d 921 (1992).

Expert affidavits in malpractice actions. — Expert affidavits, which the plaintiffs had filed in an earlier action against the defendants for medical malpractice, functioned as an amendment to the plaintiffs' complaint in a subsequent action against the defendants since the affidavits were attached to the plaintiffs' response to the defendants' motion to dismiss. *Bell v. Figueredo*, 259 Ga. 321, 381 S.E.2d 29 (1989).

Failure to attach supporting affidavit to professional malpractice complaint was an amendable defect under subsection (a) of O.C.G.A. § 9-11-15 since the plaintiffs had obtained the affidavit before filing suit and had simply neglected to file the affidavit with the plaintiffs' complaint. *St. Joseph's Hosp. v. Nease*, 259 Ga. 153, 377 S.E.2d 847 (1989).

Failure to file an expert's affidavit with a complaint for professional malpractice, as required by O.C.G.A. § 9-11-9.1, is an amendable defect, at least when the plaintiff has obtained the affidavit prior to filing the complaint and the failure to file the affidavit was the result of a mistake. *Reid v. Brazil*, 193 Ga. App. 1, 387 S.E.2d 1, cert. denied, 193 Ga. App. 910, 387 S.E.2d 1 (1989).

Malpractice plaintiffs' purported amendment did not remedy the deficiency in the plaintiffs' complaint concerning the plaintiffs' failure to file the expert affidavit required by O.C.G.A. § 9-11-9.1. *Anderson v. Navarro*, 227 Ga. App. 184, 489 S.E.2d 40 (1997).

Trial court did not err in denying dismissal of a patient's medical malpractice complaint against the physicians and their employers, based on the physicians' claim that the patient failed to file a timely expert affidavit which raised the claim of lack of informed consent, as required by O.C.G.A. § 9-11-9.1, as the patient's initial complaint had an expert affidavit timely filed, and thereafter, an amended affidavit asserting the lack of informed consent was filed pursuant to O.C.G.A. § 9-11-15; dismissal was not warranted unless an expert affidavit was never initially filed in a timely manner. *Bhansali v. Moncada*, 275 Ga. App. 221, 620 S.E.2d 404 (2005).

Trial court erred in dismissing a client's amended legal malpractice complaint, which included fraud and breach of fiduciary duty, as the client's failure to file an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 did not result in an automatic adjudication on the merits or preclude amendment after the expiration of the relevant statute of limitation; further, the appeals court disagreed that the client's fraud and breach of fiduciary duty claims were barred because those claims arose from the same factual allegations, as the original claim for professional negligence, and because the fraud claim was grounded in intentional conduct, the claim did not need to be accompanied by an expert affidavit. *Shuler v. Hicks, Massey & Gardner, LLP*, 280 Ga. App. 738, 634 S.E.2d 786 (2006).

Amendment of complaint in medical malpractice action to cure defective affidavit allowed. — In a professional malpractice action, when a plaintiff files a complaint accompanied by an affidavit from a person not competent to testify as an expert in the action, O.C.G.A. § 9-11-9.1(e) permits the plaintiff to cure that defect by filing an amended complaint with the affidavit of a second, competent expert. *Gala v. Fisher*, 770 S.E.2d 879, No. S14G0919, 2015 Ga. LEXIS 198 (2015).

Amendment of medical malpractice complaint to include statement regarding failure to attach affidavit. — When a medical malpractice complaint, filed within 10 days of the expiration of the statute of limitations, stated that an affidavit would be filed within the extended filing time, and the affidavit was filed within that time, the plaintiff could amend the complaint to include the required language that the affidavit could not be prepared because of time constraints. *Glisson v. Hospital Auth.*, 224 Ga. App. 649, 481 S.E.2d 612 (1997).

O.C.G.A. § 9-11-15 allows a plaintiff to amend the complaint to comply with O.C.G.A. § 9-11-9.1(b) (now (e)) within 45 days of filing and thereby trigger the automatic extended filing period. *Peterson v. Columbus Med. Ctr. Found., Inc.*, 243 Ga. App. 749, 533 S.E.2d 749 (2000).

Amendment during pretrial conference. — State has right to amend as

matter of right during the pretrial conference, which is delineating the issues and contentions of the parties, but prior to the taking of the evidence. *State v. Croom*, 168 Ga. App. 145, 308 S.E.2d 427 (1983).

Pretrial proceedings end with final commencement. — Reasonable intentment of O.C.G.A. § 9-11-15 is that after the time for a pretrial conference has passed and neither the court nor the parties have insisted upon the entry of a pretrial order and no such order is entered, pretrial proceedings end with the commencement of the trial proper and the taking of evidence. The unfettered right to amend ceases and a party may amend a party's pleading only by leave of court or by the consent of the adverse party. *Black v. Lowry*, 159 Ga. App. 57, 282 S.E.2d 700 (1981).

Once pretrial order has been entered, party may not amend without leave of court or consent of the opposite party as entry of such order limits the issues for trial to those not disposed of by admissions and agreement of counsel, and controls the subsequent course of the action, unless modified at trial to prevent manifest injustice. *Gaul v. Kennedy*, 246 Ga. 290, 271 S.E.2d 196 (1980).

Prior to 1968, Georgia practice permitted a very liberal right of amendment to the pleadings, the genesis of which is apparently in Ga. L. 1853-54, pp. 48-49, authorizing amendment in any stage of the cause; however, as amended in 1968, subsection (a) of this section now provides that amendments, except to conform to the evidence, are permitted after entry of a pretrial order only by leave of court or written consent of the adverse party. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974).

Entry or pretrial order determinative. — Under subsection (a) of this section, it is the entry of a pretrial order, not the pretrial conference, which is determinative of when an amendment is proper as a matter of course. *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976).

Pretrial order not modified on trial date. — Trial court did not err in refusing to modify a pretrial order when the motion was not made until the date set for trial.

Amendments, Generally (Cont'd)**1. In General** (Cont'd)

Ostroff v. Coyner, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

Amendment prior to pretrial order seeking sum then overdue. — Trial court did not err in granting judgment for the sums prayed for in the first amendment when the first amendment to the dispossessory action was filed pursuant to O.C.G.A. § 9-11-15 before any pretrial order was issued, and it sought judgment for rent installments that were then overdue. *Peterson v. American Int'l Life Assurance Co.*, 203 Ga. App. 745, 417 S.E.2d 402, cert. denied, 203 Ga. App. 907, 417 S.E.2d 402 (1992).

Amendments after entry of pretrial order are to be liberally granted by the court as justice requires. *Midtown Properties, Inc. v. George F. Richardson, Inc.*, 139 Ga. App. 182, 228 S.E.2d 303 (1976).

In considering belated motions to amend pleadings, a judge must freely allow amendment when justice so requires. *Leslie, Inc. v. Solomon*, 141 Ga. App. 673, 234 S.E.2d 104 (1977).

Amendment allowed when evidence, no pretrial order. — When there was evidence in the record to support the plaintiff's claim, and when no pretrial order had been entered, the court erred in refusing to allow the plaintiff to amend the plaintiff's complaint to include the claim. *Carpet Cent., Inc. v. Johnson*, 222 Ga. App. 26, 473 S.E.2d 569 (1996).

Effect on judicial admissions. — If the party amended the party's pleadings to withdraw the party judicial admissions, the party could introduce evidence contravening the admissions, and if such contradictory evidence was admitted, even over the objection of the other party, then under O.C.G.A. § 9-11-15(b), such evidence could be deemed to amend the pleadings to withdraw the admissions. *SAKS Assocs., LLC v. Southeast Culvert, Inc.*, 282 Ga. App. 359, 638 S.E.2d 799 (2006).

Amendment to conform to evidence. — Because it was undisputed that the ultimate issue for trial was whether an option contract between the decedent and the decedent's son covered all, or only

some, of the decedent's land, and considerable evidence was presented on that issue at trial, the son's amended pleading to conform to that evidence was properly allowed in order to subserve the presentation of the merits of the action, and the estate failed to show that the estate was prejudiced by the allowance. *Morris v. Morris*, 282 Ga. App. 127, 637 S.E.2d 838 (2006).

In exercising discretion to allow amendment, judge should balance possible prejudice to nonmoving party with moving party's reason for delay. *Leslie, Inc. v. Solomon*, 141 Ga. App. 673, 234 S.E.2d 104 (1977); *Patterson v. Duron Paints of Ga., Inc.*, 144 Ga. App. 123, 240 S.E.2d 603 (1977); *Bourquine v. City of Patterson*, 151 Ga. App. 232, 259 S.E.2d 214 (1979).

Mere delay in seeking leave to amend is not sufficient reason for denial. *MCG Dev. Corp. v. Bick Realty Co.*, 140 Ga. App. 41, 230 S.E.2d 26 (1976); *Patterson v. Duron Paints of Ga., Inc.*, 144 Ga. App. 123, 240 S.E.2d 603 (1977).

Diligence of party not irrelevant. — Subsection (a) of this section does not mean that amendments will be allowed regardless of the diligence of a party. *Blount v. Kicklighter*, 125 Ga. App. 159, 186 S.E.2d 543 (1971).

Court abuses the court's discretion in refusing to allow a party leave to amend when that party sought in good faith to correct an inadvertent oversight on behalf of its counsel and there was no prejudice to the opposing party. *MCG Dev. Corp. v. Bick Realty Co.*, 140 Ga. App. 41, 230 S.E.2d 26 (1976).

Grant of divorce on motion for judgment on pleadings is not pretrial order which terminates unrestricted right to amend pleadings. *Price v. Price*, 243 Ga. 4, 252 S.E.2d 402 (1979).

Leave required for amendment after order adopting findings of special master. — Entry of order making special master's findings of fact that the judgment of the court is an event which requires leave of court or consent of the adverse party to file an amendment. *Gauker v. Eubanks*, 230 Ga. 893, 199 S.E.2d 771 (1973).

Denial of motion to strike amend-

ment is tantamount to leave of court to file such amendment. *Brookshire v. J.P. Stevens Co.*, 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Denial of summary judgment as implicit approval of amendment. — Although personal injury plaintiff never sought leave of court to add defendants, the trial court's denial of patron-defendant's motion for summary judgment, made on the ground that no motion for leave to amend was filed, amounted to an implicit approval of the plaintiff's amendment. *Good Ol' Days Downtown, Inc. v. Yancey*, 209 Ga. App. 696, 434 S.E.2d 740 (1993).

Defendant did not waive the statute of limitation defense by failing to assert the defense in the defendant's original answer, when such defense was properly asserted by the defendant's amendment to the defendant's answer. *Gober v. Hospital Auth.*, 191 Ga. App. 498, 382 S.E.2d 106 (1989).

Waiver of statute of limitation if not raised prior to pretrial order. — Although statute of limitation is waivable, it may be raised by amendment; but such defense is waived by failure to raise the issue prior to a pretrial order. *Gaul v. Kennedy*, 246 Ga. 290, 271 S.E.2d 196 (1980).

Grant of new trial is a de novo proceeding insofar as the right to amend by supplying additional germane allegations of fact is concerned. *Sirmans v. Citizens & S. Nat'l Bank*, 132 Ga. App. 894, 209 S.E.2d 697 (1974).

Certification of service of amendment. — Under subsection (a) of Ga. L. 1968, p. 1104, § 4 (see now O.C.G.A. § 9-11-15) and Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5), party amending a pleading need only certify service of the amendment on the other party's counsel by mail contemporaneous with filing of the amendment. *Locklear v. Morgan*, 127 Ga. App. 326, 193 S.E.2d 208 (1972).

Response to amendment not required. — This section allows a response to an amended pleading, but does not require such a response. *Building Assocs. v. Crider*, 141 Ga. App. 825, 234 S.E.2d 666 (1977).

Amendment to reflect partnership status. — When the complaint was brought in a name which indicated a corporate entity, the trial court erred in dismissing the complaint and denying the plaintiffs' motion to amend the plaintiffs' complaint to declare its true status as a partnership. *Holliday Constr. Co. v. Higginbotham*, 170 Ga. App. 114, 316 S.E.2d 560 (1984).

Failure to attach exemplified copy of foreign divorce decree is amendable defect. A former wife's failure to verify and attach an exemplified copy of a foreign divorce decree to her petition against her former husband for modification of child support was an amendable defect; her petition was amendable as a matter of right prior to entry of a pretrial order. *Hutto v. Plagens*, 254 Ga. 512, 330 S.E.2d 341 (1985).

Specifying correct court in petition. — Failure to address a petition to a specific court is an amendable defect. *Mincey v. Stamper*, 253 Ga. 301, 319 S.E.2d 857 (1984).

Even though the original petition was never formally amended to cure a failure to specify a court, the defect was not a ground for dismissal when the defendant admitted service of the petition and answered the petition in the correct court. *Mincey v. Stamper*, 253 Ga. 301, 319 S.E.2d 857 (1984).

Verification of pleadings. — When verification of pleadings is required by statute, the lack thereof has been considered to be a mere procedural defect in the form of the pleading and readily amendable pursuant to subsection (a) of O.C.G.A. § 9-11-15. *Ballard v. Frey*, 179 Ga. App. 455, 346 S.E.2d 893 (1986).

Delay in ruling on motion to amend until after commencement of trial. — When appellees' motion to amend was made prior to commencement of trial, but was not ruled upon until trial had progressed somewhat, there was no error in permitting amendment at that time, inasmuch as the appellees had an unfettered right to amend their answer when the motion was made. *Slater v. Jackson*, 163 Ga. App. 342, 294 S.E.2d 557 (1982).

Timeliness of amendment. — When a motion to amend was filed on the last business day prior to beginning of trial which was more than six months after the

Amendments, Generally (Cont'd)**1. In General** (Cont'd)

date of the pretrial order, and when the record contained no showing of a lack of laches or inexcusable delay, there was no abuse of the trial court's discretion in the court's denial of the plaintiff's motion to amend. *Mulkey v. GMC*, 164 Ga. App. 752, 299 S.E.2d 48 (1982), rev'd on other grounds, 251 Ga. 32, 302 S.E.2d 550 (1983).

Since there was no pretrial order issued in the case, the amended complaint, supported by the affidavit which was filed and served on the day preceding the hearing, could not properly be disallowed based upon untimeliness under the local rule. *Gilbert v. Decker*, 165 Ga. App. 11, 299 S.E.2d 65 (1983).

When the plaintiffs amended the plaintiffs' complaint to plead special damages by dollar amount pursuant to a court order which gave no deadline for compliance, the amendment, filed prior to the entry of a pretrial order, was proper and timely and should have been considered by the trial court. *Torok v. Yost*, 194 Ga. App. 94, 389 S.E.2d 793, cert. denied, 194 Ga. App. 912, 389 S.E.2d 793 (1989).

Buyer's request to amend the buyer's complaint to seek reformation of two installment contracts for the purchase of certain land was timely since the request was made in the absence of a pre-trial order and prior to the taking of any evidence at trial. *L.S. Land Co. v. Burns*, 275 Ga. 454, 569 S.E.2d 527 (2002).

Expired lien claim. — O.C.G.A. § 9-11-15 does not allow for the amendment of an expired claim of lien pursuant to the three month limitations period of O.C.G.A. § 44-14-361.1(a)(2). *Tri-City Constr. Co. v. Sandy Plains Partnership*, 206 Ga. App. 506, 426 S.E.2d 57 (1992).

When time for pretrial conference has passed and neither the court nor a party has insisted upon the entry of a pretrial order and no such order had been issued, a party's unfettered right to amend ceases upon the commencement of the trial proper and the taking of evidence, but when an amendment was filed and served the morning of trial, since no pretrial order had been issued and the

plaintiff's amendment was filed and served prior to the commencement of trial, the amendment should have been permitted as a matter of right. *Jackson v. Paces Ferry Dodge, Inc.*, 183 Ga. App. 502, 359 S.E.2d 412 (1987).

New defendant must be served. — While subsection (a) of O.C.G.A. § 9-11-15, in conjunction with O.C.G.A. § 9-11-21, is authority for a trial court to grant a motion to add a party to a pending action, the grant of such a motion does not dispense with the requirement that a new defendant be served. *Gaskins v. A.B.C. Drug Co.*, 183 Ga. App. 518, 359 S.E.2d 364 (1987).

Amendment of action for equitable partition of real property was properly allowed to include a claim for wrongful foreclosure based on events that happened after the filing of the action. *Blanton v. Duru*, 247 Ga. App. 175, 543 S.E.2d 448 (2000).

Mandatory amendment of pretrial order. — Rule relating to the mandatory amendment of a pretrial order (as a pleading) when no objection is made to the introduction of evidence on an issue that is excluded from a pretrial order applies even more emphatically when the issue is raised in the pleadings, is tried by express or implied consent, and is sought to be preserved by amendment of a pretrial order. *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).

Amendment of complaint after reversal. — Complaint cannot be amended under subsection (a) of O.C.G.A. § 9-11-15 in a new trial after a reversal without leave of the court or the written consent of an adverse party when a pretrial order was entered in the first trial. *Kirkland v. Southern Disct. Co.*, 187 Ga. App. 453, 370 S.E.2d 640 (1988), cert. denied, 187 Ga. App. 453, 370 S.E.2d 640 (1989).

Failure on appeal to show that trial court prevented amendment. — Chief executive officer's (CEO) claim that the trial court should have allowed the CEO to amend the complaint was rejected as the CEO failed to show that the trial court prevented the CEO from amending the complaint. *Tidikis v. Network for Med.*

Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Amendment of habeas petition before hearing allowed. — Habeas court severed count one of a state habeas corpus petition and, following a hearing, granted relief on this count. When the order granting relief on count one was reversed on appeal, all the other issues in the petition remained “still pending,” and the defendant was entitled to amend the defendant’s petition as of right at any time before the hearing on these remaining issues. *Nelson v. Zant*, 261 Ga. 358, 405 S.E.2d 250 (1991).

Amendment after party repositioned as plaintiff. — When a debtor who filed counterclaims against a collection agency was repositioned as the plaintiff after the agency’s complaint was dismissed, the debtor was free to add additional claims under O.C.G.A. § 9-11-15(a). *1st Nationwide Collection Agency, Inc. v. Werner*, 288 Ga. App. 457, 654 S.E.2d 428 (2007).

Effect on removal. — Because an employer should not have removed an employee’s discrimination case until the state court had ruled on the employee’s motion to amend the complaint to add federal claims, there was no basis for removal under 28 U.S.C. § 1446, and removal was premature, requiring remand to state court under 28 U.S.C. § 1447(c). Even though O.C.G.A. § 9-11-15(a) allowed amendment as a matter of course without leave of court, the record did not contain a copy of the amended complaint and there was no indication as to whether a pretrial order or consent agreement limiting the time for amendments to pleadings existed. *Jackson v. Bluecross & Blueshield of Ga., Inc.*, No. 4:08-CV-49 (CDL), 2008 U.S. Dist. LEXIS 91036 (M.D. Ga. Nov. 10, 2008).

Consent to implied amendment of pleadings. — By failing to make a contemporaneous objection to documentary evidence and testimony of a landlord’s principal, a tenant consented under O.C.G.A. § 9-11-15(b) to the implied amendment of the pleadings to include a claim for the additional unpaid rent; it was not until closing argument that the tenant objected and raised for the first

time the issue of whether the landlord could seek rent that had become overdue after the filing of the complaint. *Westmoreland v. JW, LLC*, 313 Ga. App. 486, 722 S.E.2d 102 (2012).

2. Name or Capacity of Party; New Parties

Section in pari materia with § 9-11-21. — When a party seeks to add a new party by amendment, O.C.G.A. § 9-11-15 must be read in pari materia with O.C.G.A. § 9-11-21, which allows the dropping and adding of parties only “by order of the court on motion of any party.” When no such motion or leave of court was granted, the trial court improperly denied the “amended” defendant’s motion to dismiss. *Dollar Concrete Constr. Co. v. Watson*, 207 Ga. App. 452, 428 S.E.2d 379 (1993).

In a personal injury action, and by reading O.C.G.A. § 9-11-15(a) in pari materia with O.C.G.A. § 9-11-21, because a plaintiff sued two parties, but substituted only one, the partnership originally sued was not required to file an answer absent an order from the court to do so, and hence could not be found in default; as a result, the trial court correctly found a proper case was made for the default to be opened. *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

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).

When O.C.G.A. § 9-11-21 does not apply. — When there is a substitution by amendment of a “John Doe” or “Jane Doe” named in the original complaint for the real defendant, O.C.G.A. § 9-11-21 does not apply and subsection (c) of O.C.G.A. § 9-11-15 is applicable; therefore, leave of court is not necessary for the substitution.

Amendments, Generally (Cont'd)**2. Name or Capacity of Party; New Parties** (Cont'd)

Smith v. Vencare, Inc., 238 Ga. App. 621, 519 S.E.2d 735 (1999).

Although a borrower failed to obtain the state court's leave before filing a third amended complaint, as required by O.C.G.A. § 9-11-21, the amended complaint was not ineffective to add a non-diverse attorney and law firm, and the federal district court was able to consider the attorney and law firm in determining the existence of diversity jurisdiction for purposes of the borrower's motion for remand under 28 U.S.C. § 1447; because the attorney and law firm were substituted for John Does named in the original complaint, O.C.G.A. § 9-11-21 did not apply, rather, O.C.G.A. § 9-11-15(c), which allowed for the substitution by amendment of a John Doe without the state court's leave applied; accordingly, the amendment became effective when the amendment was filed, meaning complete diversity of citizenship did not exist, and remand of the matter to the state court was appropriate. Peachtree/Stratford, L.P. v. Phoenix Home Life Ins. Co., No. 1:06-CV-0514-RWS, 2006 U.S. Dist. LEXIS 28840 (N.D. Ga. May 2, 2006).

Signed amended answer cured failure to sign original answer. — Trial court properly found that a client's failure to sign the original answer to a law firm's complaint on an open account was an amendable defect which was cured by subsequently-filed signed and verified amended answers under O.C.G.A. § 9-11-15(a) because the amended answers were filed before the entry of any pretrial order and the firm did not show that the firm's case was prejudiced; the original answer was not a nullity under O.C.G.A. § 9-11-1(a) because the client's name on the signature line, placed there at the client's request by an attorney who represented the client in a divorce, evinced the client's intent to answer the complaint. Edenfield & Cox, P.C. v. Mack, 282 Ga. App. 816, 640 S.E.2d 343 (2006).

Name of either plaintiff or defendant may be corrected by amendment

prior to judgment, so long, at least, as the name by which the originally designated party is described imports a person, firm, or corporation, even though it is in fact not so. Locklear v. Morgan, 127 Ga. App. 326, 193 S.E.2d 208 (1972).

Section controls over § 9-10-132 in case of misnomer. — To the extent that O.C.G.A. §§ 9-10-132 and 9-11-15 are inconsistent, the latter expression of the legislature, O.C.G.A. § 9-11-15, controls. When a party named in a complaint is reasonably recognizable as a misnomer for the real party in interest, the misnomer may be corrected by amendment to the pleadings pursuant to O.C.G.A. § 9-11-15. United States Xpress, Inc. v. W. Timothy Askey & Co., 194 Ga. App. 730, 391 S.E.2d 707 (1990).

Misnomer in name of corporation can be corrected by amendment. Patterson v. Duron Paints of Ga., Inc., 144 Ga. App. 123, 240 S.E.2d 603 (1977).

When the party plaintiff named in a complaint is not a legal entity but is reasonably recognizable as a misnomer for a legal entity which is the real party plaintiff, the misnomer may be corrected by amendment. Block v. Voyager Life Ins. Co., 251 Ga. 162, 303 S.E.2d 742 (1983).

Because the named corporation should have known that there was a mistake in the corporate identity, so that the mistake should not have delayed the trial, dismissal of the entire case as to all parties was an abuse of discretion. Smith v. Vencare, Inc., 238 Ga. App. 621, 519 S.E.2d 735 (1999).

Correction of misnomer did not constitute substitution of parties under O.C.G.A. § 9-10-132 or amendment of complaint under O.C.G.A. § 9-11-15(a). — Consumer's lawsuit against a telecommunications company was improperly dismissed because the consumer had effected service, but had wrongly named the company, and correction of the misnomer did not constitute a substitution of the parties under O.C.G.A. § 9-10-132 or an amendment of the complaint under O.C.G.A. § 9-11-15(a); thus, the consumer should not have been required to effect service on the company a second time. Mathis v. BellSouth Telecomms., Inc., 301 Ga. App. 881, 690 S.E.2d 210 (2010).

Amendment to correct party name.

— Erroneous name of a defendant may be amended to correct the name, even after the statute of limitations has run. *London Iron & Metal Co. v. Logan*, 133 Ga. App. 692, 212 S.E.2d 21 (1975).

When real defendant has been properly served, the plaintiff has right to amend in order to correct a misnomer; correction of a misnomer involves no substitution of parties and does not add a new and distinct party. *London Iron & Metal Co. v. Logan*, 133 Ga. App. 692, 212 S.E.2d 21 (1975).

Plaintiff who has sued the wrong defendant may move to amend the plaintiff's pleading after the statute of limitation has run and that amendment will relate back to the time of the original pleading if the proper defendant has received actual notice and knew or should have known that, but for the plaintiff's mistake, it would have been the party sued. *Ciprotti v. United Inns, Inc.*, 209 Ga. App. 457, 433 S.E.2d 585 (1993).

Correction of a misnomer involves no substitution of parties and does not add a new and distinct party. *Khawaja v. Lane Co.*, 239 Ga. App. 93, 520 S.E.2d 1 (1999).

Defendant must have notice before amendment to correct misnomer.

— After the plaintiff named the wrong corporate defendant in the plaintiff's original complaint and, after expiration of the statute of limitations, served an amended complaint on the proper company, such service did not meet the requirements of O.C.G.A. § 9-11-15 because the plaintiff failed to contradict evidence that the company was unaware of and had no notice of the action until the company was served with the amended complaint. *American Transp., Inc. v. Thompson*, 218 Ga. App. 54, 460 S.E.2d 298 (1995).

Capacity of plaintiff. — Amendment changing capacity in which the plaintiff brings an action is permissible even after the statute of limitations has run, and since such amendment does not change the parties before the court, the amendment should be liberally granted. *Atlanta Newspapers, Inc. v. Shaw*, 123 Ga. App. 848, 182 S.E.2d 683 (1971); *C & S Land, Transp. & Dev. Corp. v. Yarbrough*, 153 Ga. App. 644, 266 S.E.2d 508 (1980).

Complaints may be amended to change the capacity of the plaintiff, as well as to add new plaintiffs. *Morris v. Chewning*, 201 Ga. App. 658, 411 S.E.2d 891 (1991).

Although an estate's malpractice action was not initially brought by the real party in interest — the estate's administrator — the administrator was timely substituted as the plaintiff in the action by amendment which, under O.C.G.A. § 9-11-17(a), had the same effect as if the action had been commenced by the real party in interest. Thus, the suit was not time-barred by O.C.G.A. § 9-3-71(b)'s five-year repose period, and a doctor and the health care facilities were not entitled to summary judgment. *Memar v. Styblo*, 293 Ga. App. 528, 667 S.E.2d 388 (2008).

Subsection (a) to be read in pari materia with § 9-11-21 when new party added.

— When a party seeks to add a new party by amendment, subsection (a) of Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15) must be read in pari materia with Ga. L. 1966, p. 609, § 21 (see now O.C.G.A. § 9-11-21), which allows dropping and adding of parties only by order of the court on motion. *Clover Realty Co. v. Todd*, 237 Ga. 821, 229 S.E.2d 649 (1976), cert. denied, 198 Ga. App. 898, 400 S.E.2d 388 (1991); *Slater v. Brigadier Homes, Inc.*, 198 Ga. App. 67, 400 S.E.2d 338 (1990).

Adding or dropping parties. — In order for an additional party to be added to an existing suit by amendment, leave of court must first be sought and obtained pursuant to O.C.G.A. § 9-11-21. Among the factors to be considered by the trial court in determining whether to allow the amendment are whether the new party will be prejudiced thereby and whether the movant has some excuse or justification for having failed to name and serve the new party previously. *Aircraft Radio Systems, Inc. v. Von Schlegell*, 168 Ga. App. 109, 308 S.E.2d 211 (1983).

Court order is required to add or drop parties under O.C.G.A. § 9-11-21, and even the liberal amendment provisions of O.C.G.A. § 9-11-15 are limited by this requirement. *Young v. Rider*, 208 Ga. App. 147, 430 S.E.2d 117 (1993).

In an action arising from an automobile accident the injured persons met the re-

Amendments, Generally (Cont'd)**2. Name or Capacity of Party; New Parties (Cont'd)**

quirements for effecting an amendment under O.C.G.A. § 9-11-15(c) to add the driver's employer because the amendment arose out of the same occurrence as the original complaint, the employer, a wholly-owned subsidiary of the named defendant, had notice of the action, was not prejudiced, and knew or should have known it would have been named a defendant but for a mistake, the trial court abused the court's discretion in denying the motion for leave to amend. *Rasheed v. Klopp Enters.*, 276 Ga. App. 91, 622 S.E.2d 442 (2005).

In a personal injury action, a trial court did not abuse the court's discretion by refusing to permit the plaintiff to add a defendant because, under these circumstances, the plaintiff identified the additional party in the plaintiff's amended complaint as a negligent party nearly four months before the expiration of the statute of limitations; the proposed added party met the burden of showing that there was no mistake concerning the proposed added party's identity and that O.C.G.A. § 9-11-15(c) was inapplicable. *Steed v. Wellington Healthcare Servs., LLC*, 285 Ga. App. 446, 646 S.E.2d 517 (2007), cert. denied, 2007 Ga. LEXIS 690 (Ga. 2007).

In a suit by appellants, a company and the company's president, against a law firm, the trial court properly denied a motion to add a partner as a party defendant under O.C.G.A. §§ 9-11-15(c) and 9-11-21 when the appellants claimed that the partner had violated the attorney-client privilege. Appellants did not assert that the partner ever personally represented the appellants or any related entities; accordingly, any attorney-privilege implicated in the fax would be that between the appellants and the law firm, and not between the appellants and the partner individually. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Marketing network properly removed the distributors' action under 28 U.S.C. §§ 1332 and 1441 because the case was

not removable until a first amended complaint was filed adding substantially different claims and causing the likely amount in controversy to surpass the jurisdictional amount. Thus, removal was timely under 28 U.S.C. § 1446(b), and the adding of a non-diverse distributor as plaintiff was improper without a court order pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21, making the matter completely diverse. *Campbell v. Quixtar, Inc.*, No. 2:08-CV-0044-RWS, 2008 U.S. Dist. LEXIS 46567 (N.D. Ga. June 13, 2008).

Passenger's motion to amend a complaint to include the driver of a car as a defendant in a suit arising from a traffic accident was properly denied because the passenger was unable to establish the third condition of O.C.G.A. § 9-11-15(c); there was no evidence that the passenger was mistaken about the driver's identity as the negligent operator who caused the collision. At a deposition, the passenger testified that the vehicle in which the passenger was riding was hit by a young woman who had spoken to the passenger at the scene immediately following the collision, and that the passenger had no reason to believe that the owner was driving the car at the time of the accident. *Valentino v. Matara*, 294 Ga. App. 776, 670 S.E.2d 480 (2008).

Trial court did not abuse the court's discretion by denying a student's motion for leave to amend the complaint to substitute parties under O.C.G.A. § 9-11-21 as the student did not offer an acceptable excuse or justification for failing to name the proper parties that would warrant the conclusion that the trial court ruled inappropriately. *Riding v. Ellis*, 297 Ga. App. 740, 678 S.E.2d 178 (2009).

Trial court properly dismissed certain parties because no motion was filed pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21 to add the parties and no leave of court was granted to add the parties. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011), cert. denied, No. S12C0399, 2012 Ga. LEXIS 561 (Ga. 2012).

Name of plaintiff or defendant may be corrected by amendment prior to judgment so long, at least, as the name by which the originally designated party is described imports a person, firm, or corpo-

ration, even though it is in fact not so. *Parker v. Kilgo*, 109 Ga. App. 698, 137 S.E.2d 333 (1964) (decided under former Code 1933, § 81-1303).

Leave of court required to add a party. — Because the claimants never sought leave of court to add a former county commissioner as a party in the commissioner's individual capacity, any unilateral attempt by the claimants to amend the claimants' complaint in this regard through allegations in an appellate brief was ineffective under O.C.G.A. §§ 9-11-15 and 9-11-21. *Bd. of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

When the individual members of a city board of education were purportedly parties to an action by amendment and by acknowledgment of service, a trial court's order of substitution was required to make the proper defendant, a city school district, a party substituted in their place; accordingly, the complaining party's attempt to name the school district a defendant by mere amendment was ineffective and the school district was therefore never served as required by statute. *Foskey v. Vidalia City Sch.*, 258 Ga. App. 298, 574 S.E.2d 367 (2002).

Intervention distinguished. — Intervention involves not a mistake in pleading but the injection of a third person uncontrolled by the parties; should an intervenor seek to litigate issues different from those already pending between the parties, to claim additional damages, or to raise additional defenses, the ability to raise these matters would be controlled by O.C.G.A. §§ 9-11-15(c) and 9-11-21. *AC Corp. v. Myree*, 221 Ga. App. 513, 471 S.E.2d 922 (1996).

Amendment alleging legal status. — When name of defendant does not import a legal entity, but in fact the defendant is a corporation or partnership, such defect may be cured by amendment alleging the legal status. *Mauldin v. Stogner*, 75 Ga. App. 663, 44 S.E.2d 274 (1947) (decided under former Code 1933, § 81-1301 et seq.).

Representative capacity of administrator. — Suit by administrator may be amended by inserting additional words to describe the administrator's representa-

tive character. *Dorsey v. Georgia R.R. Bank & Trust*, 82 Ga. App. 237, 60 S.E.2d 828 (1950) (decided under former Code 1933, § 81-1308).

Petition brought against corporation may be amended by adding word "incorporated," so as to state correct name of the corporation. *Ernest G. Beaudry, Inc. v. Freenan*, 73 Ga. App. 736, 38 S.E.2d 40 (1946) (decided under former Code 1933, § 81-1303).

Naming individual doing business under trade name. — When suit is brought against defendant in a trade name, the petition is amendable by inserting the name of the individual doing business under that trade name. *Mauldin v. Stogner*, 75 Ga. App. 663, 44 S.E.2d 274 (1947) (decided under former Code 1933, § 81-1301 et seq.).

Grant of motion to correct a misnomer in corporate name inappropriate. — In a negligence suit brought by a pedestrian against an originally named company in the complaint, the trial court abused the court's discretion by granting the pedestrian's motion to correct a misnomer thereby changing the name of the defendant in the action to a limited partnership as the limited partnership was never served with the complaint, delivery of the summons and complaint to the limited partnership's registered agent was insufficient for service as the originally named company was used in the pleadings and the registered agent did not represent that originally named company, and the name change was not a mere correction but more of a party substitution. *Nat'l Office Partners, L.P. v. Stanley*, 293 Ga. App. 332, 667 S.E.2d 122 (2008).

Addition of child as plaintiff in wrongful death action. — Petition for homicide of wife and mother, brought by husband for himself and as next friend for all surviving children except one, is amendable by making omitted child a party plaintiff. *Wallace v. Brannen*, 56 Ga. App. 856, 193 S.E. 901 (1937) (decided under former Code 1933, § 81-1303).

When original petition for homicide of wife and mother was brought within the period of limitations, failure with such period to make all surviving children parties plaintiff did not bar such action, as an

Amendments, Generally (Cont'd)**2. Name or Capacity of Party; New Parties** (Cont'd)

amendment adding an additional child as the plaintiff related to the bringing of the suit. *Wallace v. Brannen*, 56 Ga. App. 856, 193 S.E. 901 (1937) (decided under former Code 1933, § 81-1303).

Suit brought for and in minor's behalf may be amended to show it is one by the minor by next friend. *Crabb v. Stone*, 106 Ga. App. 65, 126 S.E.2d 284 (1962) (decided under former Code 1933, § 81-1303).

Substitution of one administrator for another. — One suing as administrator may amend by substituting another suing as administrator. *Citizens & S. Nat'l Bank v. Mize*, 56 Ga. App. 327, 192 S.E. 527 (1937) (decided under former Code 1933, § 81-1307).

New plaintiff, suing for the use of former plaintiff, may be made by amendment. *Sybilla v. Connally*, 66 Ga. App. 678, 18 S.E.2d 783 (1942) (decided under former Code 1933, § 81-1307).

Amendments After Verdicts or Judgment**No right to amend after judgment.**

— While right to amend is very broad, it may not be exercised after case has been tried and judgment rendered therein which has not been set aside or vacated. *Felker v. Johnson*, 56 Ga. App. 659, 193 S.E. 472 (1937) (decided under former Code 1933, § 81-1301).

This section does not allow amendment after judgment, has been rendered unless the judgment has been reversed or set aside, has been rendered. *Christopher v. McGehee*, 124 Ga. App. 310, 183 S.E.2d 624, *aff'd*, 228 Ga. 466, 186 S.E.2d 97 (1971).

While the right to amend is very broad, the right may not be exercised after the case has been tried and judgment rendered therein. *Hunt v. Henderson*, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Once judgment on the pleadings was entered in favor of the owner of a car on the personal injury claims of a driver injured in a collision that involved the owner's car while the car was being driven

by another person, the driver could not amend the complaint to add additional claims against the owner. *Fredrick v. Hinkle*, 297 Ga. App. 101, 676 S.E.2d 415 (2009).

Trial court did not abuse the court's discretion in dismissing a parent's third amended petition for mandamus, which was filed after judgment had been entered, because the plaintiff did not obtain leave of the court to amend the complaint, and the defendant expressly opposed all post-judgment filings. *R.A.F. v. Robinson*, 286 Ga. 644, 690 S.E.2d 372 (2010).

Too late to amend after verdict or directed verdict. — Once issues are narrowed for trial, the complaint stands only upon those facts adduced at trial by the plaintiff, and after the verdict is returned or a motion for directed verdict is sustained, it is too late to amend, even pending remittitur. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974).

After affirmance by appellate court.

— When the entire tax case was tried on the case's merits by the superior court, affirmance of the court's judgment by the Court of Appeals on the merits, without condition of direction, left the trial court without jurisdiction to pass on amendments tendered after receipt of the remittitur but before the judgment of the higher court was by formal order made the judgment of the lower court. *Forrester v. Pullman Co.*, 66 Ga. App. 745, 19 S.E.2d 330 (1942) (decided under former Code 1933, Ch. 13, T. 81).

Amended answer stricken after ruling by appellate court. — As an appellate court's prior ruling was determinative of all claims, the trial court did not err in striking the appellants' amended answer raising, for the first time, a statute of limitations defense. *Falanga v. Kirschner & Venker, P.C.*, 298 Ga. App. 672, 680 S.E.2d 419 (2009).

Amendments did not alter who prevailing party was in litigation. — In a wrongful death and breach of contract action wherein the plaintiff did not prevail, the trial court erred by awarding the plaintiff attorney fees under an aircraft purchase agreement (APA) because the defendant was the prevailing party and

under the fee-shifting clause of the agreement, the prevailing party was entitled to an award of attorney fees and plaintiff's amendments to the complaint to remove references relying on the APA for liability did not alter that the APA governed the parties' transaction. *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 740 S.E.2d 439 (2013).

Amendments to Conform to Evidence

Pleadings may in effect be amended by evidence adduced upon trial. *Juneau v. Juneau*, 98 Ga. App. 330, 105 S.E.2d 913 (1958) (decided under former Code 1933, § 81-1301).

Parties may, by express consent or by introduction of evidence without objection, amend pleadings at will. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978); *Carreras v. Austell Box Bd. Corp.*, 154 Ga. App. 135, 267 S.E.2d 792 (1980).

In an action for fraud, although claims of breach of contract and forgery were not expressly averred in the complaint, when evidence as to those issues was introduced at trial without objection on grounds that it was beyond the scope of the pleadings, the pleadings were amended implicitly pursuant to subsection (b) of O.C.G.A. § 9-11-15. *Rockdale Body Shop, Inc. v. Thompson*, 222 Ga. App. 821, 476 S.E.2d 22 (1996).

Issue of actual damages, having been litigated by the implied consent of the parties, was not foreclosed because of its absence from the complaint. *Conner v. Conner*, 269 Ga. 112, 499 S.E.2d 54 (1998).

Application of subsection (b). — Subsection (b) of O.C.G.A. § 9-11-15 applies when issues not raised by the pleadings are tried by express or implied consent of the parties. *Borenstein v. Blumenfeld*, 250 Ga. 606, 299 S.E.2d 727 (1983).

Guardian of the property testified that the guardian was in court to explain to the court what the documentation in the court file showed had occurred, to explain further with some facts that were not in the file, and to respond to the answer of the guardian ad litem; the guardian testified about the grounds for the guardian's revo-

cation, later considered by the court in the court's revocation order, and it followed that the guardian expressly or by implication consented to the consideration of those grounds in the order revoking the guardian's letters. *In re Longino*, 281 Ga. App. 599, 636 S.E.2d 683 (2006), cert. denied, 2007 Ga. LEXIS 92 (Ga. 2007).

Beneficiaries of a will sued the decedent's grandchild for conversion of stock the beneficiaries alleged was intended to be part of the decedent's estate. The grandchild's claim that fraud had not been pled or proven was unavailing as the trial court amended the pleadings under O.C.G.A. § 9-11-15(b) to conform to the evidence and charged the jury on fraud; and the jury found by special verdict that the grandchild, with intent to commit fraud, converted the stock. *Bunch v. Byington*, 292 Ga. App. 497, 664 S.E.2d 842 (2008).

Subsection (b) is not permissive in terms: the subsection provides that issues tried by express or implied consent shall be treated as if raised by the pleadings. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Construction of § 9-11-16 in light of subsection (b) of this section. — Ga. L. 1968, p. 1104, § 5 (see now O.C.G.A. § 9-11-16), relating to pretrial procedure, must always be considered in light of the mandatory provisions of subsection (b) of Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15), and the test of implied amendment of pleadings should always be whether the opposing party had a fair opportunity to defend and offer evidence or was misled. *Carreras v. Austell Box Bd. Corp.*, 154 Ga. App. 135, 267 S.E.2d 792 (1980).

Subsection (b) does not overlap with § 9-11-60. — Subsection (b) of Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15) concerns only amendments to conform to the evidence, and in no respect overlaps with Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60(d)), relating to relief from judgments. *Moore v. American Fin. Sys.*, 236 Ga. 610, 225 S.E.2d 17 (1976).

Subsection (b) is applicable to defenses as well as to claims, and to the extent to which the subsection applies, the

Amendments to Conform to Evidence (Cont'd)

subsection operates as an exception to the rule that defenses not pled are waived. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Evidence supporting affirmative defense. — Subsection (b) of O.C.G.A. § 9-11-15 provides that, at trial, the pleadings are deemed automatically amended to conform to the evidence that has been admitted without objection; therefore, an affirmative defense may be asserted for the first time at trial. *Brackett v. Cartwright*, 231 Ga. App. 536, 499 S.E.2d 905 (1998).

"Prejudice," under subsection (b), means undue difficulty in prosecuting a law suit, as a result of a change of tactics or theories on the part of the other party. *Munsford Co. v. Klingenberg*, 138 Ga. App. 791, 227 S.E.2d 507 (1976).

Evidence received without objection amends pleadings by operation of law. *McLendon Elec. Co. v. McDonough Constr. Co.*, 149 Ga. App. 115, 253 S.E.2d 772 (1979); *Sambo's of Ga., Inc. v. First Am. Nat'l Bank*, 152 Ga. App. 899, 264 S.E.2d 330 (1980).

Trial court did not err by granting the former husband reimbursement of pension benefits despite the former husband's failure to request that relief in the pleadings; pursuant to O.C.G.A. § 9-11-15(b), the issue was treated as if the issue had been raised because the former wife permitted the issue to be litigated without objection. *Howington v. Howington*, 281 Ga. 242, 637 S.E.2d 389 (2006).

Formal pleading of defenses unnecessary when tried by consent. — Fact that a defense, even an affirmative defense, has not been formally pled is immaterial if the issue was tried by express or implied consent; lack of an amendment does not affect the judgment in any way. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

In a suit on a promissory note, the trial court did not err by considering the affirmative defense of failure of consideration, which the maker had not pled, since the payee failed to object when the maker's counsel argued failure of consideration in

the maker's opening statement and in the maker's motion for directed verdict; this issue was thus tried by the implied consent of the parties under O.C.G.A. § 9-11-15(b). *Drake v. Wallace*, 259 Ga. App. 111, 576 S.E.2d 87 (2003).

Issues tried by consent are treated as if pled. — If an issue not raised by the pleadings is tried by express or implied consent, it is to be treated as if made by the pleadings. *Iowa Sheet Metal Contractors v. Jenkins*, 119 Ga. App. 162, 166 S.E.2d 599 (1969).

Construction of pleading to uphold verdict. — Absent amendment, when no objection is interposed, pleading will be considered to have been amended so as to uphold the verdict. *Thompson v. Frost*, 125 Ga. App. 753, 188 S.E.2d 905 (1972).

Counterclaim not automatically amended to conform to evidence. — Provisions of O.C.G.A. § 9-11-15 will not operate to amend automatically a counterclaim to conform to evidence introduced in a deposition taken during the discovery process and prior to trial. *Feely v. First Am. Bank*, 206 Ga. App. 53, 424 S.E.2d 345 (1992).

Pleadings not amended by evidence absent litigation of issue and opportunity to defend. — Provisions of the Civil Practice Act (see nw O.C.G.A. Ch. 11, T. 9) respecting amendment of pleadings by introduction of evidence and grant of relief in accordance with such evidence have no application when propriety of such relief was not litigated and the opposing party had no opportunity to assert defenses to such relief. *Cross v. Cross*, 230 Ga. 91, 195 S.E.2d 439 (1973).

Withdrawal of admission by amendment of pleadings. — In an action against a negligent driver's father, the father's initial admission that the vehicle was a family purpose vehicle was made regarding a legal opinion, i.e., agency under the family purpose doctrine, and, therefore, it could not be an admission in *judicio* or an admission against interest because it was a legal opinion or conclusion that had been withdrawn by amendment from the pleadings. *Wahnschaff v. Erdman*, 232 Ga. 77, 502 S.E.2d 246 (1998).

It was incumbent upon the plaintiff to put the defendant on notice prior to

the close of evidence of the plaintiff's contention that an additional issue was being placed before the jury for resolution. *Smith v. Smith*, 235 Ga. 109, 218 S.E.2d 843 (1975).

Whether issue has been tried by implied consent is a question of fact, and a decision on this question is generally considered to be within the sound discretion of the trial court. *Smith v. Smith*, 235 Ga. 109, 218 S.E.2d 843 (1975); *Andean Motor Co. v. Mulkey*, 251 Ga. 32, 302 S.E.2d 550 (1983).

Implied consent usually is found when one party raises an issue material to the other party's case, or when evidence is introduced without objection. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978); *Carreras v. Austell Box Bd. Corp.*, 154 Ga. App. 135, 267 S.E.2d 792 (1980); *All Risk Ins. Agency, Inc. v. Southern Bell Tel. & Tel. Co.*, 182 Ga. App. 190, 355 S.E.2d 465 (1987); *McCullum v. Doe*, 190 Ga. App. 444, 379 S.E.2d 233 (1989); *Mortgage Sav. Co. v. KKFB Inv. Co.*, 196 Ga. App. 283, 396 S.E.2d 16 (1990); *Bowers v. Howell*, 203 Ga. App. 636, 417 S.E.2d 392 (1992).

Consent not implied absent indication of new issue. — When evidence claimed to show that an issue was tried by consent was relevant to an issue already in the case as well as to the issue that was the subject matter of the amendment, and there was no indication at trial that the party who introduced the evidence was seeking to raise a new issue, pleadings would not be deemed amended under subsection (b) of this section. *Smith v. Smith*, 235 Ga. 109, 218 S.E.2d 843 (1975).

When the evidence offered is relevant to an issue before the court, consent to an amendment of the pleadings will not be implied absent a clear indication that the party introducing the evidence was attempting to raise a new issue. *Southern Dist. Co. v. Kirkland*, 181 Ga. App. 263, 351 S.E.2d 685 (1986).

When the defendant argued that the pleadings should be amended to set forth failure of consideration and breach of warranty issues, and insisted that the issues were tried with implied consent, but did not argue that the pleadings should be amended in the interest of justice even

though the plaintiff objected to the failure of consideration and breach of warranty evidence, the defendant would not be heard on appeal to argue that the trial court should have granted the written motion to amend the pleadings in spite of the plaintiff's objection to the failure of consideration and breach of warranty evidence. *Avery v. Chrysler Credit Corp.*, 194 Ga. App. 682, 391 S.E.2d 410, cert. denied, 194 Ga. App. 911, 391 S.E.2d 410 (1990).

Trial court did not err by prohibiting a former insurance agent from presenting to the jury a claim of slander per se with respect to statements made by a competing insurance agent in front of the former insurance agent's home and before the former insurance agent's spouse as the complaint did not claim as a separate basis for recovery the statements made at the house, rather, it only addressed statements purportedly made to customers. Thus, the trial court was authorized to find that the issue was not tried by the implied consent of the parties since the competing insurance agent had no notice of such allegations and, therefore, the trial court did not abuse the court's discretion by disallowing the statements from being presented to the jury as a separate claim of slander per se. *Am. Southern Ins. Group, Inc. v. Goldstein*, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. 2008).

If adverse party objects, new claims should not be considered. — When defendants made a clear objection to admission of evidence of additional claims, not raised in the pleadings, such claims were not tried with the defendants express or implied consent, and absent an amendment to the pleadings, the court was not authorized to admit evidence or enter judgment for claims based on such evidence. *Burger King Corp. v. Garrick*, 149 Ga. App. 186, 253 S.E.2d 852 (1979); *Bland v. Graham*, 249 Ga. App. 856, 549 S.E.2d 809 (2001).

Consent not implied by adverse party's absence from trial. — Consent to introduce evidence relating to a party and cause of action not within the framework of the lawsuit cannot be implied from the absence of the other party on the

Amendments to Conform to Evidence (Cont'd)

trial of the case. *Burgess v. Nabers*, 122 Ga. App. 445, 177 S.E.2d 266 (1970).

Amendment permitted absent prejudice to objecting party. — Defendant was properly permitted, over the plaintiff's repeated objections, to introduce evidence of certain expenses not specifically included in the defendant's counterclaim when the plaintiff did not satisfy the trial court that admission of the evidence would prejudice the plaintiff. *Kim v. McCullom*, 222 Ga. App. 439, 474 S.E.2d 654 (1996).

When an issue is raised by evidence, charge on subject is authorized, notwithstanding failure of the pleadings to present such issue. *Sligh v. Western Elec. Co.*, 152 Ga. App. 80, 262 S.E.2d 245 (1979).

Amendments may be filed to conform to the evidence, even though the amendments technically change the theory of the cause of action. *Thompson v. Frost*, 125 Ga. App. 753, 188 S.E.2d 905 (1972).

Pleading may be amended after judgment only insofar as to make the pleading conform to the evidence. *Buffington v. Nalley Dist. Co.*, 117 Ga. App. 820, 162 S.E.2d 212 (1968).

Plaintiff not required to amend in every case. — Fact that this section contains liberal provisions making it possible to amend pleadings during the course of trial does not require the plaintiff to so amend in every case in which the plaintiff might do so. *Whitley Constr. Co. v. Whitley*, 134 Ga. App. 245, 213 S.E.2d 909 (1975).

Failure to amend does not affect result of trial. — While amendments to conform to the evidence are authorized, failure to amend does not affect result of the trial of an issue not made specifically by the pleadings. *Iowa Sheet Metal Contractors v. Jenkins*, 119 Ga. App. 162, 166 S.E.2d 599 (1969).

Verdict and judgment supported by evidence will stand. — Notwithstanding mandate of subsection (b) of this section to amend the pleadings to conform to the evidence, if the verdict and judgment

are supported by evidence received without objection, the verdict and judgment will stand even without amendment. *Jolly v. Jolly*, 137 Ga. App. 625, 224 S.E.2d 807 (1976).

Amendment jeopardizing or overthrowing judgment not authorized. — Party cannot shift ground and try a new theory of recovery through a proposed amendment, effect of which would be not to conform the pleadings to a judgment the party had won, but to jeopardize and perhaps overthrow a judgment the party has lost; the dividing line is drawn between this use of amendment and those uses aimed at conformity. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974).

Irrelevant testimony need not be admitted. — While the trial court is permitted to admit evidence by allowing pleadings to be amended, and may grant a continuance to enable the objecting party an opportunity to prepare a defense, this section does not require the court to admit testimony that is irrelevant and outside the pleadings. *Madaris v. Madaris*, 224 Ga. 577, 163 S.E.2d 745 (1968).

Evidence of failure of conditions precedent. — When, at trial, specific evidence showing that all conditions precedent had not occurred was introduced by the defendant without objection, this evidence amended the pleadings by operation of law. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978).

Divorce petition giving no indication that spouse is seeking alimony cannot be amended by introduction of evidence if the other spouse has filed no pleadings and does not litigate the issues at the trial. *Lambert v. Gilmer*, 228 Ga. 774, 187 S.E.2d 855 (1972).

When complaint for divorce did not affirmatively allege residence, so as to show legal jurisdiction of the court over the subject matter, such issue may be raised by the evidence, and if so raised is tantamount to an amendment of the pleadings to that effect. *Tanis v. Tanis*, 240 Ga. 718, 242 S.E.2d 71 (1978).

Recovery on quantum meruit in contract action. — Rule that one may not recover on quantum meruit, if evi-

dence so warrants, in a contract action no longer obtains, under subsection (b) of this section. *Thompson v. Frost*, 125 Ga. App. 753, 188 S.E.2d 905 (1972); *Lake Lanier Cottage Owners Ass'n v. BMS Enters., Inc.*, 194 Ga. App. 858, 392 S.E.2d 312 (1990).

Probate proceedings. — Despite an administrator's claim that the probate court's order did not conform to the issues pled, and specifically, that the court erred in resolving conflicting claims to alleged property of the estate and ordering reimbursement: (1) the probate court did not resolve conflicting claims to alleged property of the estate; (2) the administrator impliedly consented to adjudicating the issues; and (3) as the question of the legitimacy of the transactions was properly before the court, the court did not err in addressing the issue or in granting the relief necessary to protect the estate. *Ray v. Nat'l Health Investors, Inc.*, 280 Ga. App. 44, 633 S.E.2d 388 (2006).

Grant of equitable relief not prayed for. — Under Ga. L. 1966, p. 609, § 54 and Ga. L. 1968, p. 1104, § 4 (see now O.C.G.A. §§ 9-11-15 and 9-11-54), rule that equitable relief is limited to that alleged and prayed for is no longer applicable. *DeRose v. Holcomb*, 226 Ga. 289, 174 S.E.2d 410 (1970).

Under Ga. L. 1966, p. 609, § 54 and Ga. L. 1968 p. 1104, § 4 (see now O.C.G.A. §§ 9-11-15 and 9-11-54), when the issue is raised, the trial court is authorized to grant equitable relief, though not specifically prayed for. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

In absence of transcript the appellate court must assume that evidence amended pleadings under O.C.G.A. § 9-11-15 and authorized the verdict rendered. *Hopkins v. Hopkins*, 168 Ga. App. 144, 308 S.E.2d 426 (1983).

Although a prospective property purchaser initially asserted a claim for specific performance based only on a right of first refusal in a contract between the purchaser and the property owner, for which relief was denied, and the purchaser thereafter purportedly amended the complaint to add a claim for the existence of a separate contract for the sale of the property at issue, because the pur-

chaser did not include a transcript from the hearing after the amendment, wherein the trial court indicated that the court's prior order was a final judgment on the merits, there was nothing to support the purchaser's claim on appeal that the additional contract claim was raised at that hearing by consent of the parties, pursuant to O.C.G.A. § 9-11-15(b); the appellate court had to assume the trial court's judgment was correct and affirm, absent the transcript. *Bay Meadow Corp. v. Hart*, 276 Ga. App. 133, 622 S.E.2d 478 (2005).

Father failed to show reversible error because, although the father argued that the trial court's order improperly modified the father's custodial rights since there were no pleadings or motions pending in the action that would allow modification of the custodial rights, without a transcript, the court of appeals had no information about how the issue was treated at trial, and the issue could have been tried by express or implied consent of the parties. *Johnson v. Ware*, 313 Ga. App. 774, 723 S.E.2d 18 (2012).

Pleadings are deemed automatically amended to conform to evidence presented at trial. *Gresham v. White Repair & Contracting Co.*, 158 Ga. App. 235, 279 S.E.2d 528 (1981).

Pleadings amended to include claim for engineer services. — Even though the defendant's claim for engineer services or cost thereof was not included in the defendant's counterclaim, since the evidence of such claim was received without objection, the defendant's counterclaim was amended by operation of law. *Fruin-Colnon Corp. v. Air Door, Inc.*, 157 Ga. App. 804, 278 S.E.2d 708 (1981).

When a landlord raised the issue of compliance with lease terms, though such issue was not raised in the pleadings, the landlord could not complain when the defendant lessee sought to challenge the landlord's position of compliance. *May v. Poole*, 174 Ga. App. 224, 329 S.E.2d 561 (1985).

Trial court did not err in failing to submit this issue to the jury as the issue of express warranty was not tried by implied consent; the parties viewed the service contract evidence as relevant to whether

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the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., which formed the basis of the buyer's implied warranty claim, applied to the case and the evidence, therefore, related to an issue originally raised in the complaint but the record contained no suggestion that the buyer introduced the service contract evidence as part of an express warranty claim. *Dildine v. Town & Country Truck Sales, Inc.*, 259 Ga. App. 732, 577 S.E.2d 882 (2003).

Defaulting defendant, not put on notice, did not "consent" to punitive damages. — Defendant, who was in default and had been put on notice that the plaintiff considered the defendant's conduct in repairing the plaintiff's roof to be merely negligent, could not be held to have consented to an amendment of the pleadings to support an award of punitive damages. *Ticor Constr. Co. v. Brown*, 255 Ga. 547, 340 S.E.2d 923 (1986).

Amendment after commencement of trial. — Trial court did not err by granting a builder leave to file an amended complaint that included a claim for attorney fees after the commencement of the trial because homeowners could not show that the homeowners were prejudiced by the filing of the amended complaint of which the homeowners had prior notice and to which the homeowners had already consented; while the builder was required to obtain leave of court because the pleading had not been filed prior to the commencement of trial, under O.C.G.A. § 9-11-15(a), leave was to be freely given when justice so required. *Harris v. Tutt*, 306 Ga. App. 377, 702 S.E.2d 707 (2010).

Post-judgment amendment to add a claim for attorney fees would have been proper if the issue of such fees had been tried by express or implied consent of the parties; when this was not the case, the court erred in admitting evidence regarding attorney fees. *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).

Relation Back of Amendments

1. In General

Subsection (c) duplicates federal rule. — Subsection (c) of this section, as amended in 1972, is an exact duplicate of Fed. R. Civ. P. 15(c), as amended in 1966. *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Scope of subsection (c). — Scope of subsection (c) of this section is not limited only to cases involving statutes of limitation. *A.H. Robins Co. v. Sullivan*, 136 Ga. App. 533, 221 S.E.2d 697 (1975).

Narrow, technical reading of subsection (c) would defeat purposes for which it was designed. *Rich's, Inc. v. Snyder*, 134 Ga. App. 889, 216 S.E.2d 648 (1975); *Samples v. Barnes Group, Inc.*, 175 Ga. App. 253, 333 S.E.2d 147 (1985).

"Original pleading" as used in subsection (c) of O.C.G.A. § 9-11-15 means the pleading being amended. *Speer, Inc. v. Manis*, 164 Ga. App. 460, 297 S.E.2d 374 (1982).

Aim of relation back rule is to ameliorate impact of statute of limitation. See *Rich's, Inc. v. Snyder*, 134 Ga. App. 889, 216 S.E.2d 648 (1975); *Maelstrom Properties, Inc. v. Holden*, 158 Ga. App. 345, 280 S.E.2d 383 (1981); *Suwannee Swifty Stores, Inc. v. NationsBank, N.A.*, 245 Ga. App. 198, 536 S.E.2d 299 (2000).

Effect on running of limitations. — When the requirements of subsection (c) of O.C.G.A. § 9-11-15 are met, even the running of the statute of limitation does not control. Of course, amendment after judgment is not permitted. *Hennessy Cadillac v. Pippin*, 197 Ga. App. 448, 398 S.E.2d 725 (1990).

When the defendant admitted the defendant was a sister corporation of the original defendant in an action filed on the last day of the limitation period, and that the defendant knew or should have known the action would have been brought against the defendant, the valid service on the original defendant, after the expiration of the statute of limitations, was timely notice of the action. *Tanner's Rome, Inc. v. Ingram*, 236 Ga. App. 275, 511 S.E.2d 617 (1999).

Motor carrier's motion for permission to file a permissive counterclaim against a shipping broker in a federal action did not satisfy the 18-month statute of limitations in 49 U.S.C. § 14705(a) for bringing a state action against the broker as the motion for leave to file the counterclaim had been denied in the federal action and the notice required under O.C.G.A. § 9-11-15(c) was notice of the institution of the action (i.e., notice of the lawsuit itself) and not merely notice of the incidents giving rise to such action. *Exel Transp. Servs. v. Sigma Vita, Inc.*, 288 Ga. App. 527, 654 S.E.2d 665 (2007).

Trial court did not err in denying a doctor's motion to dismiss an administrator's professional negligence claim because the new professional negligence claim related back to the date of the original complaint and was not barred by the two-year statute of limitation as both the original complaint and the amended complaint set forth allegations based upon the decedent's surgery, emergency room visit, and discharge relating to the care received from the doctor following the laparoscopic gallbladder surgery the doctor performed. *Jensen v. Engler*, 317 Ga. App. 879, 733 S.E.2d 52 (2012).

Primary question for consideration under subsection (c) of this section is whether allowance of the plaintiff's proposed amendment will work an injustice upon the defendant, and timeliness of the motion for leave to amend is one of the elements to be considered. *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Requirement of substantial similarity. — Employee could not use the amendment provisions of O.C.G.A. § 9-11-15(c) to add claims for unjust enrichment and quantum meruit to a renewal action against the employer's estate because the claims were not substantially similar to the claims in the original action. *Burns v. Dees*, 252 Ga. App. 598, 557 S.E.2d 32 (2001).

Sexual assault, battery, and loss of consortium claims which were filed as part of the patient and husband's renewed complaint were not "substantially similar" to claims included in their original complaint and since those actions were other-

wise barred because the applicable statute of limitations had run regarding those claims, the trial court should have granted the psychologist's and clinic's motion for judgment on the pleadings as to those claims. *Blier v. Greene*, 263 Ga. App. 35, 587 S.E.2d 190 (2003).

Burden is on the party seeking amendment to show lack of unexcusable delay or laches. *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Untimeliness alone not sufficient to bar amendment. — Objection that motion to amend under subsection (c) of this section was not timely is not sufficient alone to bar the amendment. *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Amendment to complaint, increasing damages sought, properly relates back to date of original pleading. *Pardue Constr. Co. v. Toccoa*, 147 Ga. App. 132, 248 S.E.2d 199 (1978).

Although an original complaint sought only money damages, an amendment seeking equitable relief against the property in question related back so as to provide justification for defendants' filing and pursuing *lis pendens*. *Backman v. Packwood Indus., Inc.*, 227 Ga. App. 416, 489 S.E.2d 135 (1997).

Amendment seeking jury trial. — When amendment to original answer, asking for a jury trial, was filed before entry of a pretrial order, the amendment would relate back to the original date of filing. *Marler v. C & S Bank*, 239 Ga. 342, 236 S.E.2d 590 (1977).

Assertion of new cause of action. — Strict rule that amendment asserting a new cause of action will not relate back to the time of filing of the original complaint is no longer applicable, unless the causes of action are not only different but arise out of wholly different facts. *Sam Finley, Inc. v. Interstate Fire Ins. Co.*, 135 Ga. App. 14, 217 S.E.2d 358 (1975).

Relation back doctrine did not apply to an employee's second amended complaint filed against an employer's shareholder because the employee personally characterized the action to enforce a judgment as wholly separate and distinct from the claims asserted against the employer; fur-

Relation Back of**Amendments** (Cont'd)**1. In General** (Cont'd)

ther, the court found unpersuasive the argument that the employee was unaware of the shareholder's identity as the employer's alter ego and that the employee mistakenly believed that the employer and the shareholder were separate entities and that the shareholder was protected by the corporate form. *Pazur v. Belcher*, 272 Ga. App. 456, 612 S.E.2d 481 (2004).

Amendment not asserting new cause of action. — When plaintiff's original complaint, based on 42 U.S.C. § 1983 violations, was filed within two years after the injury, and the plaintiff asserted a First Amendment claim in an amendment, even though the First Amendment expression arose out of the plaintiff's prior activities, the plaintiff's claim for violation of such right arose out of defendant's acts which were the basis of the § 1983 claim and related back to the date of the original complaint. *Blue Ridge Mt. Fisheries, Inc. v. Department of Natural Resources*, 217 Ga. App. 89, 456 S.E.2d 651 (1995).

Counts III and IV of the amended complaint related back to the original complaint, filed within the statutory period, when the courts merely specified facts underlying the indebtedness claimed in the original complaint. *Herndon v. Heard*, 262 Ga. App. 334, 585 S.E.2d 637 (2003).

Amendment validating service of process. — Amendment may relate back to the original complaint, thereby validating service of process. *Leniston v. Bonfiglio*, 138 Ga. App. 151, 226 S.E.2d 1 (1976). For comment, see 28 *Mercer L. Rev.* 559 (1977).

Allegation of conditions precedent. — Rule as to relation back applies to allegation of facts which are conditions precedent to existence of a right of action. *Middlebrooks v. Daniels*, 129 Ga. App. 790, 201 S.E.2d 338 (1973).

Statute of limitation was not tolled while a motion to add the defendants was under advisement by the court; thus, subsection (c) of O.C.G.A. § 9-11-15 applied to determine whether the action was timely

commenced against the additional defendants. *Doyle Dickerson Tile Co. v. King*, 210 Ga. App. 326, 436 S.E.2d 63 (1993).

Amendment alleging separate publication of same libelous statement alleged in original complaint does not state a claim arising out of the conduct, transaction, or occurrence set forth in the original pleading. *Cole v. Atlanta Gas Light Co.*, 144 Ga. App. 575, 241 S.E.2d 462 (1978).

Failure to file exceptions to auditor's report within the statutory time period of former Code 1933, § 10-301 (see now O.C.G.A. § 9-7-14) cannot be cured by later amendments made after expiration of such time period as application of subsection (c) of Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15) under these circumstances would frustrate the purpose of the limitation period and allow a party to do indirectly what cannot be done directly. *Wise, Simpson, Aiken & Assoc. v. Rosser White Hobbs Davidson McClellan Kelly, Inc.*, 146 Ga. App. 789, 247 S.E.2d 479 (1978).

Amendment held not to relate back. — Later amendment cannot relate back under O.C.G.A. § 9-11-15 so as to cure a defect and affect vesting of title as of date original declaration petition was filed. *Dorsey v. DOT*, 248 Ga. 34, 279 S.E.2d 707 (1981).

Count V of the amended complaint did not relate back to the original complaint since the count set forth the new claim of theft by deception, which had not been previously alleged in the almost six years that the suit had been pending. *Herndon v. Heard*, 262 Ga. App. 334, 585 S.E.2d 637 (2003).

Renewal action. — Amendment to a complaint in a renewal action relates back to the date of the complaint in the renewal action and not the date of the original complaint which was dismissed. *Speer, Inc. v. Manis*, 164 Ga. App. 460, 297 S.E.2d 374 (1982).

Action to enforce lien. — Subsection (c) of O.C.G.A. § 9-11-15, which permits amendments to relate back to the time of the original pleading, applies to actions to foreclose liens. *Coe & Payne Co. v. Foster & Kleiser, Inc.*, 258 Ga. 161, 366 S.E.2d 292 (1988).

Action against former land manager. — Claim by a partnership against its former managing partner related back because the claim arose from the same conduct on which the original action was based. *Cochran Mill Assocs. v. Stephens*, 286 Ga. App. 241, 648 S.E.2d 764 (2007).

Assault and battery claim added to medical malpractice complaint was not time barred since it could not be said that the alleged malpractice and alleged unauthorized touching involved in the operation arose from different facts and, therefore, the amendment related back to the original complaint. *Smith v. Wilfong*, 218 Ga. App. 503, 462 S.E.2d 163 (1995).

Federal civil rights claim grounded on allegations of a malicious conspiracy between the defendants and the judge who issued a restraining order, brought three years after the accrual of the cause of action and after the original claim for breach of contract, tortious interference with contractual rights, and indemnity did not relate back and was barred by the statute of limitation. *Henson v. American Family Corp.*, 171 Ga. App. 724, 321 S.E.2d 205 (1984).

Amendment to complaint changing the date of the alleged injury properly relates back to the date of the original pleading when change apparently was necessary due to a typographical error in the original complaint. *Wilson v. Commercial Cold Storage, Inc.*, 179 Ga. App. 260, 346 S.E.2d 6 (1986).

Intervenor's claim for pain and suffering was a claim arising out of the conduct, transaction, or occurrence set forth in the original complaint and could be treated as an amendment by a party plaintiff relating back to the date of the original complaint for statute of limitation purposes. *P. F. Moon & Co. v. Payne*, 256 Ga. App. 191, 568 S.E.2d 113 (2002).

Defect in answer cured. — Because a corporation answered a complaint through a nonattorney corporate principal, the defect in the answer was cured by the filing of an answer by a licensed attorney, and the properly filed answer related back to the date of the original answer, pursuant to O.C.G.A. § 9-11-15(c); accordingly, it was error to enter a default judgment against the corporation pursuant to

O.C.G.A. § 9-11-55. *Rainier Holdings, Inc. v. Tatum*, 275 Ga. App. 878, 622 S.E.2d 86 (2005).

In a tort action, venue over a defendant was assessed based upon the facts existing at the time the action was originally filed because the defendant was added as a party to a lawsuit under the relation back provision of O.C.G.A. § 9-11-15(c). Thus, venue under O.C.G.A. § 14-2-510 was proper based on the defendant's having had an office and transacted business in the county at the time the suit was originally filed. *HD Supply, Inc. v. Garger*, 299 Ga. App. 751, 683 S.E.2d 671 (2009).

Amendment related back to answer. — Seller's answer was timely and legally sufficient because the seller, which was a corporation, filed an amended answer by and through an attorney of record before the entry of a pre-trial order. Therefore, the amended answer related back to the filing of the seller's answer pursuant to O.C.G.A. § 9-11-15(c). *Murray v. DeKalb Farmers Mkt., Inc.*, 305 Ga. App. 523, 699 S.E.2d 842 (2010).

Implicit approval to amendment to complaint's requested amount of damages. — Although a condominium association's own documents, including an account ledger, the complaint, and a motion for summary judgment, all showed different amounts due to the association from an owner, there was no issue of fact. The trial court's grant of the association's motion for summary judgment seeking damages which accrued after the date the association's complaint was filed implicitly approved an amendment to the complaint under O.C.G.A. § 9-11-15(b). *Ellington v. Gallery Condo. Ass'n*, 313 Ga. App. 424, 721 S.E.2d 631 (2011).

2. Amendments Changing or Adding Parties

Relation back occurs both as to plaintiff and defendant under subsection (c) of this section when new and old parties have such identity of interest that relation back is not prejudicial, and when new cause of action arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, provided other requirements are also met. *Gordon v. Gillespie*, 135 Ga. App.

Relation Back of**Amendments (Cont'd)****2. Amendments Changing or Adding Parties (Cont'd)**

369, 217 S.E.2d 628 (1975).

Examples of proper changes in parties contemplated and permitted by subsection (c) of this section are: substituting a party for a "John Doe" defendant who has been identified and served; changing capacity of a party plaintiff; changing a misnomer; changing named corporate defendant to reflect true corporation; and adding other survivors of decedent as parties plaintiff. *A.H. Robins Co. v. Sullivan*, 136 Ga. App. 533, 221 S.E.2d 697 (1975).

Added parties need not be "necessary parties". — There is nothing in language of subsection (c) of this section which requires that in order to add parties whose claims relate back to filing of the original complaint added parties must be necessary parties. *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Addition of strangers to suit not contemplated. — Addition of parties who are altogether strangers to the original suit, insofar as notice and knowledge thereof, was not intended to be encompassed within the word "changing." *A.H. Robins Co. v. Sullivan*, 136 Ga. App. 533, 221 S.E.2d 697 (1975).

Addition of totally new parties by amendment does not relate back to filing of original suit for purposes of determining whether a prior pending suit exists. *A.H. Robins Co. v. Sullivan*, 136 Ga. App. 533, 221 S.E.2d 697 (1975).

Subsection (c) of O.C.G.A. § 9-11-15 negates any idea that the provisions can be used to add parties who are altogether strangers to the action or that, by "relating back" that addition, the plaintiff can escape an expired limitation. *Beaver v. Steinichen*, 182 Ga. App. 303, 355 S.E.2d 698 (1987).

Complaint amended to add additional plaintiff relates back to the date of the original pleading if the defendant was given notice of the additional plaintiff's claim and if that claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading.

Downs v. Jones, 140 Ga. App. 752, 231 S.E.2d 816 (1976), vacated on other grounds, 142 Ga. App. 316, 235 S.E.2d 760 (1977).

Substitution of proper plaintiff when suit brought by beneficiary. —

When suit is brought by one who has no legal right to maintain the suit, but who has a beneficial interest in the subject matter of the action, substitution of a proper plaintiff will relate back to the time of filing of the original action. *Atlanta Newspapers, Inc. v. Shaw*, 123 Ga. App. 848, 182 S.E.2d 683 (1971).

Meaning of "changing party against whom claim is asserted." — Because from the viewpoint of the party sought to be added belatedly, it makes no difference whether the party was originally designated as John Doe and not served or originally neither named nor served because another person was erroneously thought to be the correct defendant, both situations are encompassed by reference in subsection (c) of this section to "changing the party against whom a claim is asserted." *Thomas v. Home Credit Co.*, 133 Ga. App. 602, 211 S.E.2d 626 (1974).

Requirements for relation back of amendment changing defendant. —

Amendment to a complaint changing the party defendant relates back to the date of the original pleadings and prevents bar of the statute of limitation if the following requirements are met: (1) suit was commenced within the lawful period; (2) the claim arose out of the conduct, transaction, or occurrence in the original complaint; (3) the new defendant received notice of original filing of the action within the period provided by law for commencing the action against the defendant; (4) notice is such that the defendant will not be prejudiced in maintaining the defendant's defense on the merits; and (5) the new defendant knew or should have known that, but for a mistake concerning identity of the proper party, the action would have been brought against the defendant. *Rich's, Inc. v. Snyder*, 134 Ga. App. 889, 216 S.E.2d 648 (1975).

Subsection (c) of O.C.G.A. § 9-11-15 permits an amendment changing the parties to relate back to the date of filing the original petition provided that the amend-

ment arises out of the same facts as the original complaint, that the new defendant has sufficient notice of the action, and that the defendant knew or should have known that, but for a mistake concerning the defendant's identity as a proper party, the action would have been brought against the defendant. *Trillium Nursing Home, Inc. v. Thebaut*, 189 Ga. App. 411, 375 S.E.2d 888 (1988).

Amendment to add a new party defendant was authorized when the amendment adding the new defendant arose out of the same facts as the original complaint, the new defendant had sufficient notice of the action, and the new defendant knew or should have known that, but for a mistake concerning the defendant's identity as a proper party, the action would have been brought against the defendant. *Robinson v. Piggly Wiggly of Calhoun, Inc.*, 193 Ga. App. 675, 388 S.E.2d 754 (1989); *Ford v. Olympia Skate Ctr., Inc.*, 213 Ga. App. 600, 445 S.E.2d 362 (1994).

Relation back when defendant has notice of cause of action and is not prejudiced. — When defendant is clearly on notice of the "cause of action" sought to be asserted, and is not prejudiced for lack of such notice, amendment by the plaintiff under subsection (c) of this section to add parties will relate back. *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Required notice of institution of the action may be formal or informal. *Thomas v. Home Credit Co.*, 133 Ga. App. 602, 211 S.E.2d 626 (1974).

Notice of incidence giving rise to litigation does not satisfy requirement of subsection (c) of this section that party sought to be added must have notice of institution of action. *Hall v. Hatcher Sales Co.*, 149 Ga. App. 133, 253 S.E.2d 812 (1979); *Harrison v. Golden*, 219 Ga. App. 772, 466 S.E.2d 890 (1995).

Fair notice as protection intended by statute of limitation. — Subsection (c) of this section is based on idea that party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of

the rights sought to be enforced; hence, if original pleading gives fair notice of the general fact situation out of which the claim arises, the defendant will not be deprived of any protection which the statute of limitations was designed to afford the defendant. *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Statute of limitation will bar relation back when original complaint did not fairly notify defendant. *Downs v. Jones*, 140 Ga. App. 752, 231 S.E.2d 816 (1976), vacated on other grounds, 142 Ga. App. 316, 235 S.E.2d 760 (1977); *Swan v. Johnson*, 219 Ga. App. 450, 465 S.E.2d 684 (1995); *Harding v. Godwin*, 238 Ga. App. 432, 518 S.E.2d 910 (1999); *Deleo v. Mid-Towne Home Infusion, Inc.*, 244 Ga. App. 683, 536 S.E.2d 569 (2000); *Stephens v. McDonald's Corp.*, 245 Ga. App. 109, 536 S.E.2d 566 (2000).

There was no error in dismissing the petitioner's civil rights complaint without prejudice and with leave to amend and the petitioner's subsequent motion to reconsider because the petitioner did not identify any legal standards or procedures the judge improperly applied, manifest errors in fact-finding by the judge, or newly discovered evidence; the petitioner erroneously argued the dismissal was tantamount to a dismissal with prejudice. *McFarlin v. Douglas County*, No. 13-15115, 2014 U.S. App. LEXIS 18700 (11th Cir. Sept. 30, 2014) (Unpublished).

Statute of limitations bars addition of new parties in renewal action. — Interaction of the renewal statute (O.C.G.A. § 9-2-61) with the amendment provisions of subsection (c) of O.C.G.A. § 9-11-15 does not permit the addition of a new party to a second lawsuit which is filed within the six-month renewal period but outside the statute of limitations. *Wagner v. Casey*, 169 Ga. App. 500, 313 S.E.2d 756 (1984).

Requirements for adding party by amendment not satisfied. See *Estate of Thurman v. Dodaro*, 169 Ga. App. 531, 313 S.E.2d 722 (1984); *Doyle Dickerson Tile Co. v. King*, 210 Ga. App. 326, 436 S.E.2d 63 (1993).

Trial court properly denied the plaintiffs' motion to amend their medical malpractice complaint against the state enti-

Relation Back of**Amendments (Cont'd)****2. Amendments Changing or Adding Parties (Cont'd)**

ties in order to “correct an alleged misnomer,” pursuant to O.C.G.A. § 9-10-132, as the plaintiffs sought to add two party defendants, who were new and distinct and who had not been served with process; there was no showing that the parties sought to be added had actual notice of the litigation, pursuant to O.C.G.A. § 9-11-15(c), for purposes of amendment under the relation back doctrine. *Green v. Cent. State Hosp.*, 275 Ga. App. 569, 621 S.E.2d 491 (2005).

Trial court’s denial of summary judgment to a hotel limited liability corporation (LLC) in a personal injury action by an injured patron was error as the action was originally brought against a different entity, the patron attempted to add the LLC and then dismissed that action and brought a new action after expiration of the limitations period under O.C.G.A. § 9-3-33 against the LLC based on the renewal statute pursuant to O.C.G.A. § 9-2-61, but the patron never sought or obtained court permission to add the LLC as a party, as required by O.C.G.A. §§ 9-11-15(a) and 9-11-21; as the amendment to add the LLC was more than a correction of a misnomer because the two named defendants were separate entities, O.C.G.A. § 9-11-10(a) was inapplicable and leave of court was required in order to add the LLC. *Valdosta Hotel Props., LLC v. White*, 278 Ga. App. 206, 628 S.E.2d 642 (2006).

In an injured party’s direct action against an insurer, because the injured party failed to seek leave of court to add the insurer’s insured as a party, and the relation back doctrine did not apply, the insurer and the insured were properly dismissed from the injured party’s lawsuit. *Crane v. State Farm Ins. Co.*, 278 Ga. App. 655, 629 S.E.2d 424, cert. denied, 2006 Ga. LEXIS 544 (2006).

In a worker’s personal injury suit, the trial court properly denied the worker’s motion to add a franchisor as a defendant under O.C.G.A. § 9-11-15(c). The franchisor had not received timely notice of the

lawsuit, and the mere fact that the franchisor was a subsidiary of a defendant corporation was insufficient, in and of itself, to impute the corporation’s notice of the lawsuit to the franchisor. *Matson v. Noble Inv. Group, LLC*, 288 Ga. App. 650, 655 S.E.2d 275 (2007).

Parking lot owner was entitled to dismissal of a plaintiff’s negligence action because the amended complaint adding the owner as a defendant did not relate back under O.C.G.A. § 9-11-15(c) and, thus, was barred by the statute of limitations because the mere fact that the owner’s attorney worked in the same firm as the original defendants’ attorney did not impute knowledge of the lawsuit to the owner. *LAZ Parking/Georgia, Inc. v. Jones*, 294 Ga. App. 122, 668 S.E.2d 547 (2008).

Trial court did not err in denying a motion to substitute parties made by plaintiffs in their negligence suit against a defendant for fire damage because the plaintiffs had known of the existence and potential liability of the corporation the plaintiffs sought to add as a party for more than five years, and the statute of limitations had run. *Barrs v. Acree*, 302 Ga. App. 521, 691 S.E.2d 575 (2010).

Request by a deceased patient’s widow to add the treating physician’s employer to the widow’s medical malpractice action was properly denied as the widow failed to show that the employer had notice of the institution of the lawsuit prior to the expiration of the statute of limitations; notice to the hospital and the physician of the institution of litigation did not constitute notice to the employer, even though they were all insured by the same carrier. *Hunter v. Emory-Adventist, Inc.*, 323 Ga. App. 537, 746 S.E.2d 734 (2013).

Party offering amendment must demonstrate no inexcusable delay. — Party offering the amendment adding a new party must demonstrate that the party has not been guilty of inexcusable delay. *Horne v. Carswell*, 167 Ga. App. 229, 306 S.E.2d 94 (1983).

Refusal to add and change designation of third-party defendants. — Trial court did not err in denying the plaintiff’s motion to add and change the designation of third-party defendants, when the

third-party defendants were aware of the plaintiff's charges against the defendants and were defending against the defendants' claims before the statute of limitations had expired, and the plaintiff offered no excuse for the delay in attempting to add third-party defendants. *Hall v. Scott USA, Ltd.*, 198 Ga. App. 197, 400 S.E.2d 700 (1990).

Movant may establish lack of prejudice in amendment by showing "identity of interest" between the old and the new parties. *Horne v. Carswell*, 167 Ga. App. 229, 306 S.E.2d 94 (1983).

Amendment seeking to add insurer, who had subrogation rights in plaintiff's original cause, as party plaintiff was proper and related back to the original petition. *Dover Place Apts. v. A & M Plumbing & Heating Co.*, 167 Ga. App. 732, 307 S.E.2d 530 (1983), *aff'd*, 255 Ga. 27, 335 S.E.2d 113 (1985).

Relation back provisions of subsection (c) do not apply to service of uninsured motorist carrier. — Relation back provisions of O.C.G.A. § 9-11-15(c) do not apply to situations involving service of an uninsured motorist carrier, if for no other reason than simply because such service does not necessarily result in the insurer becoming a party to the action. *State Auto Ins. Co. v. Reese*, 191 Ga. App. 818, 383 S.E.2d 157, cert. denied, 191 Ga. App. 923, 383 S.E.2d 157 (1989).

Court did not abuse discretion in denying plaintiff's motion to add plaintiff's spouse as a party since the suit had been pending and active for over seven years and the party to be added knew of the suit (as did the party seeking the spouse's addition) and the new party was asserting an independent claim and offered no justification for delaying entry into the lawsuit. *Maitlen v. Derst*, 178 Ga. App. 305, 342 S.E.2d 777 (1986).

Action against unknown defendant when service not had prior to running of statute. — When a complaint is filed against one designated by a fictitious name, as allowed by Ga. L. 1967, p. 226, § 47 (see now O.C.G.A. § 9-11-10(a)), but no service on that defendant is made prior to the running of the statute of limitation, and after running of the statute it is

desired to substitute name of and serve actual defendant, that substitution and service constitute "changing the party against whom a claim is asserted" within the meaning of subsection (c) of Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15), and the requirements thereof must be met before such substitution may be made. *Sims v. American Cas. Co.*, 131 Ga. App. 461, 206 S.E.2d 121, *aff'd* sub nom. *Providence Wash. Ins. Co. v. Sims*, 232 Ga. 787, 209 S.E.2d 61 (1974); *Moulden Supply Co. v. Rojas*, 135 Ga. App. 229, 217 S.E.2d 468 (1975); *Larson v. C.W. Matthews Contracting Co.*, 182 Ga. App. 356, 356 S.E.2d 35 (1987).

In cases involving "John Doe" or unknown defendant as allowed by Ga. L. 1967, p. 226, § 47 (see now O.C.G.A. § 9-11-10(a)), when there is no service on the entity intended prior to the running of the statute of limitation, limitation plea is good, unless there has been prior notice of institution of the action or its equivalent so as to bring the case within the exception stated within subsection (c) of Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15). *Vaughn v. Collum*, 136 Ga. App. 677, 222 S.E.2d 37 (1975), *aff'd*, 236 Ga. 582, 224 S.E.2d 416 (1976).

When an unidentified party is sued as "John Doe" and service as to the unknown party is successful within the statute of limitations, an amendment to the complaint relates back to the filing of the original complaint. When service has not been effected successfully on the John Doe party within the statutory time of limitations, the test of subsection (c) of O.C.G.A. § 9-11-15 applies. *Bailey v. Kemper Group*, 182 Ga. App. 604, 356 S.E.2d 695 (1987).

When one has filed a complaint naming a "John Doe" defendant, the requirements of subsection (c) of O.C.G.A. § 9-11-15 must be met before the amendment substituting the named party will relate back to the date of the complaint if service has not been effected before the expiration of the statute of limitations. *Harper v. Mayor of Savannah*, 190 Ga. App. 637, 380 S.E.2d 78 (1989).

Action against unknown defendant and service within limitations period. — In a personal injury action, a

Relation Back of**Amendments (Cont'd)****2. Amendments Changing or Adding Parties (Cont'd)**

trucking company and an insurance company that were originally sued in a timely manner as "John Doe" and were notified within the applicable limitations period that the companies would be sued as regular parties were not entitled to dismissal as the second complaint related back. *McNeil v. McCollum*, 276 Ga. App. 882, 625 S.E.2d 10 (2005).

Leave and order of court to make new party defendant. — Plaintiff must obtain leave of court for filing an amendment seeking to make a new party defendant, and obtain an order to that effect. *Pascoe Steel Corp. v. Turner County Bd. of Educ.*, 139 Ga. App. 87, 227 S.E.2d 887 (1976).

In order for an additional party to be added to an existing suit by amendment pursuant to O.C.G.A. § 9-11-15, leave of court must first be sought and obtained pursuant to O.C.G.A. § 9-11-21. *Horne v. Carswell*, 167 Ga. App. 229, 306 S.E.2d 94 (1983).

Prior to adoption of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), failure to name necessary party defendants was nonamendable and required dismissal. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

When amended complaint to add a party defendant was filed within statutory period, the fact that service was perfected upon added party defendant one day after two-year limitation period did not bar the amended complaint. *Humble Oil & Ref. Co. v. Fulcher*, 128 Ga. App. 606, 197 S.E.2d 416 (1973).

That amendment might relate back and bar statute of limitation is not prejudice such as to bar the amendment to add a party. *Dover Place Apts. v. A & M Plumbing & Heating Co.*, 167 Ga. App. 732, 307 S.E.2d 530 (1983), *aff'd*, 255 Ga. 27, 335 S.E.2d 113 (1985).

Amendment adding or changing a party may be allowed even though a separate action by or against that party would be barred by the statute of limitation. *Horne v. Carswell*, 167 Ga. App. 229, 306 S.E.2d

94 (1983); *Harper v. DOT*, 195 Ga. App. 602, 394 S.E.2d 398 (1990).

Since the statute of limitation had not run at the time plaintiffs filed their first amendments adding a new party defendant it was within the trial court's discretion to grant later motions to amend, although filed after the statute of limitations had run, and have the amendments relate back to the date the original complaints were filed when the occurrence, conduct, or transaction in the original pleadings were the same as that set forth in the amendments; the added party would not be prejudiced in maintaining its defense on the merits; and the added party knew or should have known that the actions would have been brought against it. *Bil-Jax, Inc. v. Scott*, 183 Ga. App. 516, 359 S.E.2d 362, cert. denied, 183 Ga. App. 905, 359 S.E.2d 362 (1987).

Addition of new party not allowed when statute of limitations has run.

— When husband and wife sought an order permitting them to amend their complaint to add, as a defendant, a probation officer responsible for supervising the juvenile who beat the husband, but the order was sought after the statute of limitations had run and the two submitted no excuse for having failed to name and serve the proposed new party, the trial court was correct in not allowing the complaint to be amended. *Sargent v. Department of Human Resources*, 202 Ga. App. 874, 415 S.E.2d 918 (1992).

Georgia renewal statute, O.C.G.A. § 9-2-61, could not have been used to suspend the running of the statute of limitation as to defendants different from those originally sued; the trial court did not err in dismissing a premises liability complaint when the injured person originally sued an incorrect defendant, then later sued the store owner after the statute of limitations had expired, then, after that case was dismissed again sued the original incorrect defendant, and finally amended the complaint to include the store owner. *Brown v. J. H. Harvey Co.*, 268 Ga. App. 322, 601 S.E.2d 808 (2004).

Because a belated claim filed against an alleged homebuilder's partner did not relate back to the date of the original complaint, as required by O.C.G.A.

§ 9-11-15(c), summary judgment in favor of the homebuilder was correctly granted based on the expiration of the six-year limitation period under O.C.G.A. § 9-3-24. *Wallick v. Lamb*, 289 Ga. App. 25, 656 S.E.2d 164 (2007).

Dropping of unintended party. — When a person served with process intended for another answers by denying that the person is the intended defendant, and counterclaims for malicious use of process, the plaintiff could have moved the court, upon learning of the error, to drop the unintended party pursuant to O.C.G.A. § 9-11-15. *Bank South, N.A. v. Tate*, 190 Ga. App. 248, 378 S.E.2d 486, cert. denied, 190 Ga. App. 897, 378 S.E.2d 486 (1989).

Addition of party authorized. — Trial court did not abuse the court's discretion in granting the plaintiffs' eleventh-hour motion to amend and add the defendant as a party. *Little Tree, Inc. v. Fields*, 240 Ga. App. 12, 522 S.E.2d 509 (1999).

Because an administratrix amended a wrongful death complaint to reflect that such was filed in both a capacity as the administratrix of the decedent's estate and as next friend of the decedent's minor children, and there was a direct connection between the old and new parties, the complaint, as amended, related back to the original complaint; further, because the record showed that the decedent's children reached their majority after the complaint was filed, the trial court did not err in adding the children as real parties in interest. *Rockdale Health Sys. v. Holder*, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

Trial court did not err in finding that the relation-back statute, O.C.G.A. § 9-11-15(c), applied and that the amendment to a corporation's complaint adding the corporation's president and the president's spouse related back to the brokers' original filing of the lawsuit because all of the relevant claims in the case arose out of the same facts, conduct, transaction, or occurrence pursuant to O.C.G.A. § 9-11-15(c); the brokers' original complaint, the corporation's counterclaim, and the corporation's amended complaint against both the brokers and the president and the spouse all asserted claims

that arose directly from an alleged oral agreement and the subsequent written broker agreement between the corporation and the brokers. *Cartwright v. Fuji Photo Film U.S.A., Inc.*, 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. 2012).

Motion to add related corporation authorized. — Even though the plaintiff did not move to amend the plaintiff's complaint to add the proper corporation as a defendant until nine months after receiving the originally named defendant's answer and 10 months after the expiration of the statute of limitations, because the plaintiff's motion to amend conforms to the requirements of subsection (c) of O.C.G.A. § 9-11-15 and was not prejudicial, the trial court abused the court's discretion in denying the motion. *Fontaine v. Home Depot, Inc.*, 250 Ga. App. 123, 550 S.E.2d 691 (2001).

Parents of injured children and one deceased child who sued a car distributor were entitled to add the car manufacturer as a party to the parents' personal injury and wrongful death actions under the relation back doctrine of O.C.G.A. § 9-11-15(c) as the car distributor was the wholly owned subsidiary of the car manufacturer, the distributor and the manufacturer had common officers, the same law firm represented the distributor and the manufacturer, the manufacturer was aware of the lawsuits from the beginning, the claims against the manufacturer arose out of the same events as the claims against the distributor, and the manufacturer would not be prejudiced by the action. *Parks v. Hyundai Motor Am., Inc.*, 258 Ga. App. 876, 575 S.E.2d 673 (2002).

Addition of mortgagee in foreclosure proceeding. — Amendment to add the mortgagee as copetitioner to an application to confirm a foreclosure sale would be effective under the relation-back rule even though the thirty-day period imposed by O.C.G.A. § 44-14-161 for reporting the sale and obtaining confirmation on the sale expired by the time the mortgagee moved to be added as a party. *Small Bus. Admin. v. Desai*, 193 Ga. App. 852, 389 S.E.2d 372, cert. denied, 193 Ga. App. 911, 389 S.E.2d 372 (1989).

Relation Back of**Amendments (Cont'd)****2. Amendments Changing or Adding Parties (Cont'd)**

Answer to amendment adding party not required. — Construing the pertinent provisions of O.C.G.A. §§ 9-11-7, 9-11-8, 9-11-12, 9-11-15, and 9-11-21 in pari materia, it is clear that the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, authorizes the addition of parties, by order of the court, and that an “amended complaint” effecting such an addition does not require a responsive pleading, unless the trial court orders a reply thereto. *Chan v. W-East Trading Corp.*, 199 Ga. App. 76, 403 S.E.2d 840, cert. denied, 199 Ga. App. 905, 403 S.E.2d 840 (1991).

O.C.G.A. § 9-11-21 does not apply when the plaintiff seeks to substitute a named defendant for a “John Doe”; the applicable procedure is that set forth in subsection (c) of O.C.G.A. § 9-11-15. *Bishop v. Farhat*, 227 Ga. App. 201, 489 S.E.2d 323 (1997).

Relation back not authorized. — Because the evidence showed that a corporation clearly did not have notice of the institution of the action until after expiration of the statute of limitation, relation back of the complaint to add the corporation was not authorized under subsection (c) of O.C.G.A. § 9-11-15. *Khawaja v. Lane Co.*, 239 Ga. App. 93, 520 S.E.2d 1 (1999).

Because there was no mistake concerning the identity of two motorists involved in a traffic accident with an injured person, the trial court properly held that the injured person’s amended complaint adding a claim against a second motorist did not relate back to the original filing; the injured person’s complaint identified the second motorist as a possible defendant, showing that there was no mistake concerning identity. *Dean v. Hunt*, 273 Ga. App. 552, 615 S.E.2d 620 (2005).

Supplemental Pleadings

Supplemental pleading allowable only in court’s discretion. — Supplemental pleading pursuant to subsection (d) of this section is allowable not as a matter of right or duty, but only upon motion and at the discretion of the trial

judge. *Whitley Constr. Co. v. Whitley*, 134 Ga. App. 245, 213 S.E.2d 909 (1975).

When a supplemental proceeding was filed without permission, no harmful error occurred because the adverse party was later given an opportunity to appear before the trial court and argue against the supplement. *Tyson v. McPhail Properties, Inc.*, 223 Ga. App. 683, 478 S.E.2d 467 (1996).

Opposite party to be afforded notice and opportunity for hearing. — Provision in subsection (d) of this section for reasonable notice to the opposite party before filing of a supplemental pleading is allowed is designed to afford notice and an opportunity to be heard on the merits. *Department of Agric. v. Country Lad Foods, Inc.*, 226 Ga. 631, 177 S.E.2d 38 (1970).

Lack of prior notice not harmful when rule nisi issued. — When a supplemental pleading is allowed without prior notice to the opposite party, but a rule nisi for hearing thereon on a day certain is issued and served, and hearing is thereafter had on the merits, failure to afford prior notice, while irregular, did not constitute harmful error. *Department of Agric. v. Country Lad Foods, Inc.*, 226 Ga. 631, 177 S.E.2d 38 (1970).

When corporation, after filing answer, assigns various instruments to the corporation’s wholly owned subsidiary, and amends the corporation’s counterclaim by adding claims based on these assignments, these additional causes of action do not constitute compulsory counterclaims which the corporation was required to assert at the time the corporation filed the corporation’s original answer, when there is no evidence that the subsidiary is a sham, or that it is being used to defeat a public convenience, to justify a wrong, protect fraud, defend crime, or any other reason which in equity and good conscience would justify the disregard of its separate entity. *Bass v. Citizens & S. Nat’l Bank*, 168 Ga. App. 668, 309 S.E.2d 850 (1983).

Failure to allow amendment not shown. — Trial court did not err in dismissing the tort claims filed by a president, instead of allowing the president leave to amend, as the trial court did not

prevent the president from amending the complaint; further, the president did not show that the trial court refused to permit an amendment. *Tidikis v. Network for Med. Communs. & Research, LLC*, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Additional claims to interest in garnishment suit not tied to consent. — Because, in a garnishment suit brought against an insurer, the insurer made a clear objection to the plaintiffs' additional claims to interest under a consent judgment with its insured, it could not be said that the claims were tried with the insurer's express or implied consent under O.C.G.A. § 9-11-15(b). *St. Paul Reinsurance Co. v. Ross*, 276 Ga. App. 135, 622 S.E.2d 374 (2005).

New theory of recovery. — Trial court did not err in entering summary judgment in favor of a grantor's grandsons

in an action filed by the grantor's wife, daughter, and granddaughter challenging the validity of a quitclaim deed because *res judicata* compelled summary judgment on the counts alleging a cloud on the title, undue influence, and mistake of fact since there was an identity of the parties, a decision of the court of appeals in a prior appeal upholding the trial court's grant of summary judgment constituted an adjudication on the merits, and the causes of action raised in the amended complaint were matters put in issue or which under the rules of law could have been put in issue in the original complaint; restyling the complaint in terms of a theory of recovery ascertainable in the original case will not revive a cause of action that was defeated on appeal from a summary judgment ruling. *Smith v. Lockridge*, 288 Ga. 180, 702 S.E.2d 858 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d, Limitation of Actions, §§ 239, 240, 241, 391. 59 Am. Jur. 2d, Parties, § 402 et seq. 61A Am. Jur. 2d, Pleading, §§ 662 et seq., 693 et seq. 61B Am. Jur. 2d, Pleading, § 737 et seq.

Am. Jur. Pleading and Practice Forms. — 19B Am. Jur. Pleading and Practice Forms, Pleading, §§ 151, 184.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 173, 290, 313 et seq., 330 et seq. 35B C.J.S., Federal Civil Procedure, §§ 1058, 1136. 36 C.J.S., Federal Courts, §§ 614 et seq. 639 et seq. 71 C.J.S., Pleading, § 279 et seq.

ALR. — Effect of proving case not pleaded where amendment cannot be made, 29 ALR 638.

Amendment of pleading to correct designation of court or judge, 65 ALR 709.

Amendment of process or pleading by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa, 121 ALR 1325.

Amendment of process or pleading by changing or correcting mistake in name of party, 124 ALR 86.

Variance between pleading and proof in suit for specific performance of oral agreement of decedent to leave property at death, 130 ALR 231.

Substitution of plaintiff as proper subject for amendment of complaint, 135 ALR 325.

Amendment of pleading after limitation period changing from allegation of negligence to allegation of fraud, or vice versa, 141 ALR 1363.

Amendment of petition or complaint after statute of limitations has run, by reinstating codefendant who had been dismissed from the action otherwise than upon merits, 143 ALR 1182.

Power of court to award alimony or property settlement in divorce suit as affected by failure of pleading or notice to make a claim therefor, 152 ALR 445.

Change in party after statute of limitations has run, 8 ALR2d 6.

Admissibility, in vehicle accident case, of evidence of opposing party's intoxication where litigant's pleading failed to allege such fact, 26 ALR2d 359.

Amendment of pleadings to assert statute of limitations, 59 ALR2d 169.

Failure to give notice of application for default judgment where notice is required only by custom, 28 ALR3d 1383.

Amendment, after expiration of time for filing motion for new trial in civil case, of motion made in due time, 69 ALR3d 845.

Medical malpractice: amendment pur-

porting to change the nature of the action or theory of recovery, made after statute of limitations has run, as relating back to filing of original complaint, 70 ALR3d 82.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 ALR3d 933.

Relation back of amended pleading substituting true name of defendant for fictitious name used in earlier pleading so as to avoid bar of limitations, 85 ALR3d 130.

Amendment of pleading after limitation has run, so as to set up subsequent appointment as executor or administrator or plaintiff who professed to bring the action in that capacity without previous valid appointment, 27 ALR4th 198.

Rule 15(c), Federal Rules of Civil Procedure, or state law as governing relation back of amended pleading, 100 ALR Fed. 880.

9-11-16. Pretrial procedure; formulating issues; order; calendar.

(a) Upon the motion of any party, or upon its own motion, the court shall direct the attorneys for the parties to appear before it for a conference to consider:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses; and
- (5) Such other matters as may aid in the disposition of the action.

(b) The court shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. The order, when entered, controls the subsequent course of the action unless modified at the trial to prevent manifest injustice. After entry of the pretrial order, it shall be within the discretion of the court to permit or disallow the presentation of testimony from any expert witness whose name is not contained in the pretrial order; provided, however, that if the additional expert witness is permitted to testify, any opposing party shall be permitted reasonable time to take the deposition of the additional expert witness. The court, in its discretion, may establish by rule a pretrial calendar on which actions may be placed for consideration as provided in subsection (a) of this Code section and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions. (Ga. L. 1966, p. 609, § 16; Ga. L. 1967, p. 226, § 10; Ga. L. 1968, p. 1104, § 5; Ga. L. 1993, p. 91, § 9; Ga. L. 2002, p. 1244, § 1.1.)

Cross references. — Pre-trial conferences, Uniform Superior Court Rules, Rule 7. Civil jury trial calendar, Uniform Superior Court Rules, Rule 8. Pre-trial

conferences in probate court proceedings, Uniform Rules for the Probate Courts, Rule 7.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 16, see 28 U.S.C.

Law reviews. — For article, “Pre-Trial Conference,” see 4 Mercer L. Rev. 302 (1953). For article, “Synopsis of 1968 Amendments to the Appellate Procedure

Act and Georgia Civil Practice Act,” see 4 Ga. St. B.J. 503 (1968). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For annual survey of trial practice and procedure, see 40 Mercer L. Rev. 423 (1988). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ISSUES
WITNESSES

General Consideration

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1953, p. 269, §§ 1, 2, are included in the annotations for this Code section.

Construction with § 9-11-15(b). — Ga. L. 1968, p. 1104, § 5 (see now O.C.G.A. § 9-11-16) must always be considered in light of the mandatory provisions of Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15(b)), relating to amendments to conform to the evidence, and the test of implied amendment of pleadings should always be whether the opposing party had a fair opportunity to defend and offer evidence or was misled. *Carreras v. Austell Box Bd. Corp.*, 154 Ga. App. 135, 267 S.E.2d 792 (1980); *Rockdale Body Shop, Inc. v. Thompson*, 222 Ga. App. 821, 476 S.E.2d 22 (1996); *Walker v. Sutton*, 222 Ga. App. 638, 476 S.E.2d 34 (1996).

Construction with O.C.G.A. § 9-11-16. — Defendant did not waive the issue of attorney’s fees by failing to include the issue in the parties’ pretrial order under O.C.G.A. § 9-11-16 because a motion for attorney’s fees under O.C.G.A. § 9-15-14 could be, according to the language of the statute, made at any time during the action but not later than 45 days after judgment. *McClure v. McCurry*, 329 Ga. App. 342, 765 S.E.2d 30 (2014).

Manifest injustice. — To prevent ambushing opposing counsel with an unfamiliar witness, Ga. Unif. Super. Ct. R.

7.2(19) provides for mutual disclosure in the pretrial order of all of those who either “will” or “may” be called; as a sanction for non-disclosure, O.C.G.A. § 9-11-16(b) does not allow the calling of an unlisted witness unless the party can show that it is necessary “to prevent manifest injustice.” *Ballard v. Meyers*, 275 Ga. 819, 572 S.E.2d 572 (2002).

No authority to set aside valid proceedings. — This section does not confer authority upon the court to set aside valid proceedings pending in the cause. *Riden v. Commercial Credit Plan*, 136 Ga. App. 191, 220 S.E.2d 746 (1975).

Judge not authorized to vacate, modify, or set aside valid proceedings. — Georgia Laws 1953, p. 269, §§ 1 and 2 did not, directly or by inference, confer upon judge of the superior court any power to vacate, modify, or set aside valid proceedings pending in the cause in which a pretrial conference is set by the court. *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961), overruled on other grounds, *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982).

Withdrawal or amendment of admissions. — Attempt to withdraw or amend admissions must be accompanied by a showing that the merits of the case will be subserved. *Yarbrough v. Magbee Bros. Lumber & Supply Co.*, 189 Ga. App. 299, 375 S.E.2d 471 (1988).

Trial court did not err in allowing the withdrawal of admissions made by operation of law pursuant to

General Consideration (Cont'd)

O.C.G.A. § 9-11-36(b) because O.C.G.A. § 9-11-16(b), governing pretrial orders, did not apply to limit the trial court's discretion to permit withdrawal of the disputed admissions when the trial court's June 5 scheduling order was not intended as a pretrial order. *Velasco v. Chambless*, 295 Ga. App. 376, 671 S.E.2d 870 (2008).

Mandatory nature of pretrial procedures. — Pretrial rule in this state differs from the federal rule in that, among other things, pretrial procedures are mandatory in this state if sought by a party or the court, but both rules make the pretrial order itself mandatory. *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970).

It is error for court to refuse to grant pretrial hearing and order when a timely motion to this effect has been entered. *Kickasola v. Jim Wallace Oil Co.*, 144 Ga. App. 758, 242 S.E.2d 483, cert. denied, 436 U.S. 921, 98 S. Ct. 2272, 56 L. Ed. 2d 764 (1978).

Mandate of pretrial conference. — It is error for trial court to ignore the mandate of this section requiring a 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).

Failure to enter pretrial order is error. — It is error for trial court to ignore mandate of this section to make an order. *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970).

Mandatory language of this section makes failure to enter pretrial order error, and the only question remaining is whether the error is harmful. *Sheet Metal Workers Int'l Ass'n v. Carter*, 144 Ga. App. 48, 240 S.E.2d 569 (1977), rev'd on other grounds, 241 Ga. 220, 244 S.E.2d 860 (1978).

Omission of an issue from a pretrial order is not controlling if evidence pertaining to the issue is introduced without objection, the opposing party is not unfairly surprised, and the issue is actually litigated. *Dunkin' Donuts of Am., Inc. v. Gebar, Inc.*, 202 Ga. App. 450, 414 S.E.2d 683 (1992).

Consolidated pretrial order submitted

by the parties but unsigned by the court, which failed to raise a defense mentioned in the answer, did not preclude the defendant from pursuing the defense in a motion prior to trial. *Swanson v. State Farm Mut. Auto Ins.*, 242 Ga. App. 616, 530 S.E.2d 516 (2000).

Failure to submit portion of order.

— Because the sole reason why an equitable division matter went to trial without the consolidated pretrial order required by O.C.G.A. § 9-11-16, was the party's failure to submit the party's part of the pretrial order, the party could not be heard to complain of a judgment that the party's own procedure or conduct procured or aided in causing. *Graham v. Graham*, 291 Ga. 1, 727 S.E.2d 101 (2012).

Order not complete. — Record showed only that the defendant's portion of a proposed consolidated pretrial order was filed, however, it was not a complete pretrial order, or even an order, within the meaning of subsection (b) of O.C.G.A. § 9-11-16, having not been made or signed by the judge. *Applied Ecological Sys. v. Weskem, Inc.*, 212 Ga. App. 65, 441 S.E.2d 279 (1994).

Judge not required to sign order. — Neither O.C.G.A. § 9-11-16 nor Rule 7.2 of the Uniform Superior Court Rules requires the judge to sign a pretrial order proposed by the parties. *Swanson v. State Farm Mut. Auto Ins.*, 242 Ga. App. 616, 530 S.E.2d 516 (2000).

Fact that parties failed to reach any agreements, which trial court stated for the record as the reason for failing to make a pretrial order, affords no legal justification to ignore the mandate to enter such order. *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970).

Harmless failure to enter pretrial order. — Harmless error doctrine applicable to this section is not to be extended loosely; it must clearly appear from the record that failure to enter pretrial order was harmless for the judgment to stand. *Sheet Metal Workers Int'l Ass'n v. Carter*, 144 Ga. App. 48, 240 S.E.2d 569 (1977), rev'd on other grounds, 241 Ga. 220, 244 S.E.2d 860 (1978).

Pretrial order controls subsequent trial, unless objected to. *Brumby v. Brooks*, 140 Ga. App. 210, 230 S.E.2d 359

(1976); *Hawkins v. Richardson-Merrell, Inc.*, 147 Ga. App. 481, 249 S.E.2d 286 (1978).

Stipulation by counsel contained in a pretrial order is binding not only as a part of the pretrial order, but also, so long as it is before the court, it is binding because it is a stipulation by the parties upon which a resolution of the issue is to be made, and is binding even though it might in some manner contradict or conflict with the pleadings. *Goolsby v. Allstate Ins. Co.*, 130 Ga. App. 881, 204 S.E.2d 789 (1974).

Evidence contrary to stipulation by counsel in a pretrial order is not admissible; since such stipulation is binding, it may not be disproved. *Goolsby v. Allstate Ins. Co.*, 130 Ga. App. 881, 204 S.E.2d 789 (1974).

No amendment of pretrial order without leave of court or consent of adverse party. — Once a pretrial order has been entered, a party may not amend without leave of court or consent of the opposite party; such order, when entered, limits the issues for trial to those not disposed of by admissions and agreement of counsel, and controls the subsequent course of the action, unless modified at trial to prevent manifest injustice. *Gaul v. Kennedy*, 246 Ga. 290, 271 S.E.2d 196 (1980).

If litigant desires modification of pretrial order, application should be made to the trial judge either before or during the trial for such modification. *Gilbert v. Meason*, 145 Ga. App. 662, 244 S.E.2d 601 (1978).

Timeliness of motion to amend pretrial order filed at trial. — Motion to amend pretrial order and proffered amendment filed at trial cannot, as a matter of law, be untimely. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

Objection to expert witnesses not timely filed. — In a tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured by soot emitted from the apartment's heating system, the trial court properly refused to exclude expert opinions on behalf of the tenant on the ground that the opinions were inadmissible under former O.C.G.A. § 24-9-67.1 (see

now O.C.G.A. § 24-7-702); although the agent had notice that the tenant intended to rely on the experts' opinions, the agent did not assert the agent's claim until the last business day before the trial and therefore failed to seek a timely ruling no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16 as required by former § 24-9-67.1(d). *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Pre-trial order did not preclude defendant's challenging fraud claim. — Trial court did not err in denying the plaintiff's motion to preclude the defendants from contesting the merits of a fraud claim under the doctrines of res judicata and collateral estoppel because the bankruptcy court's discussion of the fraud issue was in the context of the court's ruling on whether the automatic stay should be modified so that the pending state court litigation could proceed and was not entitled to preclusive effect. *Gajaanan Inv., LLC v. Shahil & Sohail Corp.*, 323 Ga. App. 694, 747 S.E.2d 713 (2013).

Modification or amendment of pretrial order at trial in court's discretion. — Discretion is reposed in trial judge as to whether to allow modification or amendment of pretrial order at the trial. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973); *Khoury Constr. Co. v. Earhart*, 191 Ga. App. 562, 382 S.E.2d 392 (1989).

In the absence of an abuse of discretion, a trial court's action in creating, enforcing, and modifying a pretrial order will not be disturbed on appeal. Although the words "borrowed servant" did not appear in a crane company's answer to a complaint alleging its employee was negligent or in the pretrial order, the issue was raised through the company's motion for summary judgment; permitting the company to amend the pretrial order led to neither prejudice arising out of surprise nor waiver as a matter of law, so there was no abuse of discretion in the trial court allowing the company to amend the pretrial order. *Gibson v. Tim's Crane & Rigging, Inc.*, 266 Ga. App. 42, 596 S.E.2d 215 (2004).

Modification of pretrial order as to damages. — Since a pretrial order stated

General Consideration (Cont'd)

that the damages cap in the Tort Claims Act, O.C.G.A. § 50-21-20 et seq., would apply, the trial court abused the court's discretion by implicitly modifying the pre-trial order to support a judgment in excess of the cap. *Dep't of Human Resources v. Phillips*, 268 Ga. 316, 486 S.E.2d 851 (1997).

To disallow proffered amendment and construe pretrial order as preventing support of case by evidence works a manifest injustice on the party moving for such amendment. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

Rescission of pretrial order on court's motion not authorized. — This section does not provide any authority for a trial judge to rescind a pretrial order on the judge's own motion. *Smith v. Billings*, 132 Ga. App. 201, 207 S.E.2d 683 (1974).

It must lie within court's power to impose appropriate sanctions to make effective court's pretrial orders. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

No harsher sanctions to ensure effectiveness of pretrial orders should be imposed than are necessary to vindicate court's authority. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

"Calendar Call of Inactive Cases" is an order of court when properly drawn and signed by the judge, and upon proof of mailing to counsel's last known address, court is authorized to dismiss cases listed for want of prosecution. *Roark v. Northeast Sales Distrib. Co.*, 124 Ga. App. 10, 183 S.E.2d 83 (1971).

Motion in limine is similar in purpose and function to a preliminary ruling on evidence at a pretrial conference, controlling the subsequent course of the action, unless modified at trial to prevent manifest injustice; it is an interlocutory ruling, appealable with the final judgment. *Harley-Davidson Motor Co. v. Daniel*, 244 Ga. 284, 260 S.E.2d 20 (1979).

Trial court did not abuse the court's discretion in denying a county's motion in limine concerning an order of the Environmental Protection Division of the Georgia Natural Resources Department, and or-

ders in a prior administrative action, because the documents were evidence that the county had an ownership interest in the dam at issue in the case; if the trial court's rulings concerning evidence that went to the ownership of the dam were erroneous, those errors were rendered harmless by the trial court's direction of a verdict against the county on the issue of ownership. *Forsyth County v. Martin*, 279 Ga. 215, 610 S.E.2d 512 (2005).

Dismissal of party not authorized. — While the pretrial procedure under O.C.G.A. § 9-11-16 has broad general application, the method for dismissing an action is specifically provided under O.C.G.A. § 9-11-41, and the dismissal of a party is not within the purview of the pretrial procedure. *Georgia Am. Ins. Co. v. Mills*, 183 Ga. App. 707, 359 S.E.2d 697 (1987).

Dismissal of claim for failure to include too harsh a sanction when no prejudice. — Trial court erred by denying a contractor's motion to amend the final pre-trial order by refusing to consider evidence admitted in support of the contractor's breach of contract claim, and by dismissing the claim based on the contractor's failure to submit the contractor's portion of a pre-trial order as required by O.C.G.A. § 9-11-16(b); a lesser sanction was appropriate, given there was no prejudice to the owner. *Lee Haddock & Assocs., LLC v. Barlow*, 328 Ga. App. 279, 759 S.E.2d 622 (2014).

Petition couched in loose pleading could be remedied by motion to strike the improper or irrelevant portion, and pretrial conference and order outlining the issues to be tried. *Wallace v. Bleakman*, 131 Ga. App. 856, 207 S.E.2d 254 (1974) (decided under Ga. L. 1953, p. 269, §§ 1, 2).

Pretrial order not required if no pretrial conference. — Trial court was not required, under O.C.G.A. § 9-11-16(b), to issue a pretrial order when no pretrial conference was held. *Rolleston v. Estate of Sims*, 253 Ga. App. 182, 558 S.E.2d 411 (2001), cert. denied, 537 U.S. 1030, 123 S. Ct. 560, 154 L. Ed. 2d 445 (2002).

Pretrial order controlling absent modification. — Pretrial order limiting

issues for trial and reciting agreements made by the parties as to any of the matters considered, when entered, controls the subsequent course of the action and determines the issues on which the case is submitted to the jury, unless modified at the trial, pursuant to an application therefor made before or during trial, to prevent manifest injustice. *Tolbert v. Free*, 111 Ga. App. 811, 143 S.E.2d 440 (1965) (decided under Ga. L. 1953, p. 269, §§ 1, 2).

Pretrial order, limiting issues for trial, controls subsequent course of the action unless modified at the trial. *Metropolitan Transit Sys. v. Barnette*, 115 Ga. App. 17, 153 S.E.2d 656 (1967) (decided under Ga. L. 1953, p. 269, §§ 1, 2).

Agreement of the parties at a pretrial conference limits issues for trial to those not disposed of by agreement. *Polk v. Fulton County*, 96 Ga. App. 733, 101 S.E.2d 736 (1957) (decided under Ga. L. 1953, p. 269, §§ 1, 2).

Stipulation binding unless modified. — Stipulation at pretrial conference, whereby the plaintiff admitted the truth of certain allegations, which was made part of the record, became binding between the parties when the stipulation was not modified by any subsequent order of the court, and the course of action on trial of the case on that issue was governed and controlled by that stipulation. *Bank of Ga. v. Aiken*, 98 Ga. App. 782, 106 S.E.2d 817 (1958) (decided under Ga. L. 1953, p. 269, §§ 1, 2).

If litigant desires modification of a pretrial order, application should be made to the trial judge, either before or during the trial, for such modification. *Dumas v. Beasley*, 218 Ga. 349, 128 S.E.2d 59 (1962) (decided under Ga. L. 1953, p. 269, §§ 1, 2).

Pretrial conference motion properly denied. — Motion for a pretrial conference that was not filed until after the case was placed on a ready list for trial was properly denied as untimely. *Trustees of Trinity College v. Ferris*, 228 Ga. App. 476, 491 S.E.2d 909 (1997).

Trial court did not abuse the court's discretion in refusing to admit the construction company's transaction reports, which were created two months before the

trial court's pretrial order was filed, as the reports were not listed in the pretrial order despite the fact that the reports could have been produced well in advance of trial and the construction company's bookkeeper was permitted to testify concerning their contents to rehabilitate the bookkeeper's credibility and the data contained in the reports was included in summary form in job cost reports that had been introduced into evidence. *Sunflower Props. v. Yocum*, 261 Ga. App. 142, 581 S.E.2d 648 (2003).

Cited in *Hirsch's v. Adams*, 117 Ga. App. 847, 162 S.E.2d 243 (1968); *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968); *State Hwy. Dep't v. Peters*, 121 Ga. App. 167, 173 S.E.2d 253 (1970); *Cohn v. Combs*, 126 Ga. App. 292, 190 S.E.2d 546 (1972); *Yeomans v. Smith*, 130 Ga. App. 574, 203 S.E.2d 926 (1974); *Sims v. American Cas. Co.*, 131 Ga. App. 461, 206 S.E.2d 121 (1974); *Cooper v. Rosser*, 232 Ga. 597, 207 S.E.2d 513 (1974); *Mays v. Citizens & S. Nat'l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974); *Howland v. Weeks*, 133 Ga. App. 843, 212 S.E.2d 487 (1975); *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 224 S.E.2d 76 (1976); *White v. Georgia Power Co.*, 237 Ga. 341, 227 S.E.2d 385 (1976); *Milton Inn, Inc. v. Spiva*, 138 Ga. App. 843, 227 S.E.2d 525 (1976); *Hogan v. City-County Hosp.*, 138 Ga. App. 906, 227 S.E.2d 796 (1976); *Pilkenton v. Eubanks*, 139 Ga. App. 673, 229 S.E.2d 146 (1976); *Edwards v. Delvero*, 139 Ga. App. 880, 229 S.E.2d 763 (1976); *Joyner v. William J. Butler, Inc.*, 143 Ga. App. 219, 237 S.E.2d 685 (1977); *Mullinax v. Shaw*, 143 Ga. App. 657, 239 S.E.2d 547 (1977); *Wise, Simpson, Aiken & Assoc. v. Rosser White Hobbs Davidson McClellan Kelly, Inc.*, 146 Ga. App. 789, 247 S.E.2d 479 (1978); *Price v. Price*, 243 Ga. 4, 252 S.E.2d 402 (1979); *Cielock v. Munn*, 244 Ga. 810, 262 S.E.2d 114 (1979); *Marshall v. Fulton Nat'l Bank*, 152 Ga. App. 121, 262 S.E.2d 448 (1979); *Darwin v. Metropolitan Atlanta Rapid Transit Auth.*, 158 Ga. App. 635, 281 S.E.2d 361 (1981); *Gosnell v. Waldrup*, 158 Ga. App. 685, 282 S.E.2d 168 (1981); *Graham Bros. Constr. Co. v. C.W. Matthews Contracting Co.*, 159 Ga. App. 546, 284 S.E.2d 282 (1981); *Edwards v.*

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Davis, 160 Ga. App. 122, 286 S.E.2d 301 (1981); Phillips v. Marcin, 162 Ga. App. 202, 290 S.E.2d 546 (1982); Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 291 S.E.2d 6 (1982); Tyner v. Sheriff, 164 Ga. App. 360, 297 S.E.2d 114 (1982); Mulkey v. GMC, 164 Ga. App. 752, 299 S.E.2d 48 (1982); Hasty v. Russell, 165 Ga. App. 276, 300 S.E.2d 317 (1983); McGuire v. Winkler, 167 Ga. App. 104, 306 S.E.2d 70 (1983); State v. Croom, 168 Ga. App. 145, 308 S.E.2d 427 (1983); Michaels v. Kroger Co., 172 Ga. App. 280, 322 S.E.2d 903 (1984); National Old Line Ins. Co. v. Lane, 172 Ga. App. 519, 323 S.E.2d 707 (1984); Worth v. Georgia Farm Bureau Mut. Ins. Co., 174 Ga. App. 194, 330 S.E.2d 1 (1985); D. Jack Davis Corp. v. Karp, 175 Ga. App. 482, 333 S.E.2d 685 (1985); John H. Smith, Inc. v. Teveit, 175 Ga. App. 565, 333 S.E.2d 856 (1985); Jacobsen v. Muller, 181 Ga. App. 382, 352 S.E.2d 604 (1986); Estate of Norton v. Hinds, 182 Ga. App. 35, 354 S.E.2d 663 (1987); Dixon v. Borg-Warner Acceptance Corp., 186 Ga. App. 843, 368 S.E.2d 800 (1988); Ostroff v. Coyner, 187 Ga. App. 109, 369 S.E.2d 298 (1988); Atlanta Gas Light Co. v. Redding, 189 Ga. App. 190, 375 S.E.2d 142 (1988); Sweetheart Prods., Inc. v. Cohen, 198 Ga. App. 684, 402 S.E.2d 547 (1991); Nelson v. Zant, 261 Ga. 358, 405 S.E.2d 250 (1991); City of Monroe v. Jordan, 201 Ga. App. 332, 411 S.E.2d 511 (1991); Southern Cellular Telecom, Inc. v. Banks, 208 Ga. App. 286, 431 S.E.2d 115 (1993); Bridges v. DOT, 209 Ga. App. 33, 432 S.E.2d 634 (1993); Welch v. Welch, 244 Ga. App. 685, 536 S.E.2d 583 (2000); Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006); McKesson Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457 (2007); Ford Motor Co. v. Gibson, 283 Ga. 398, 659 S.E.2d 346 (2008); Grot v. Capital One Bank (USA), N. A., 317 Ga. App. 786, 732 S.E.2d 305 (2012); Eagle Jets, LLC v. Atlanta Jet, Inc., 321 Ga. App. 386, 740 S.E.2d 439 (2013); Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

Issues

Formulation and simplification of the issues are two purposes of the

pretrial procedures established by this section. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973); *Godfrey v. Kirk*, 161 Ga. App. 474, 288 S.E.2d 301 (1982).

Duty of court to formulate issues to show real contentions. — It is the duty of the court, to the extent practicable and possible, to eliminate uncontroversial issues and formulate remaining issues to show the real contentions of the parties. *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970).

Any issue not raised in agreed pre-trial order expressly superseding pleadings is waived. *Keeley v. Cardiovascular Surgical Assocs.*, 236 Ga. App. 26, 510 S.E.2d 880 (1999).

Issue clearly outside scope of pre-trial order is generally not viable issue in the trial of the case. *Ackley v. Strickland*, 173 Ga. App. 784, 328 S.E.2d 549 (1985); *Tahamtan v. Tahamtan*, 204 Ga. App. 680, 420 S.E.2d 363 (1992), overruled on other grounds, *Holland v. Caviness*, 292 Ga. 332, 737 S.E.2d 669 (2013).

Preservation of issues. — Plaintiff preserved the issue of litigation expenses by including in the proposed verdict form (which was part of the pretrial order) a finding of attorneys' fees based on stubborn litigiousness. *Parks v. Breedlove*, 241 Ga. App. 72, 526 S.E.2d 137 (1999).

Issue not raised in pretrial order considered on appeal. — After minority shareholders brought direct and derivative claims against the president of a corporation for breach of fiduciary duty, even though the defendant did not raise the propriety of the plaintiffs' direct claim in the pretrial order, nor raise the issue until the plaintiff's motion for directed verdict after the close of the evidence, the issue would be considered, since interests other than those of the defendant were at stake, i.e., the rights of corporate creditors and possibly shareholders not parties to the action. *Dunaway v. Parker*, 215 Ga. App. 841, 453 S.E.2d 43 (1994).

Failure to raise insufficiency of process waives issue. — While the better practice in proceedings under O.C.G.A. § 9-11-16 is to make specific reference as to the disposition of preliminary matters such as those raised pursuant to O.C.G.A.

§ 9-11-12(b) (defenses), the trial court does not abuse the court's discretion in concluding that the defendant who knows that the service of process upon the defendant is insufficient from the time the defendant's answer is filed but, nevertheless, purposefully neglects to pursue this issue at the pretrial conference, waives the insufficiency of service of process defense and thus consents to the jurisdiction of the trial court. *Georgia Power Co. v. O'Bryant*, 169 Ga. App. 491, 313 S.E.2d 709 (1983).

Issue of damages not waived. — When a nuisance claim was made in the initial complaint, the defense was not prejudiced by the failure to specify a recovery for damages under the theory of nuisance because nuisance was a central theory of recovery from the outset of the case and, therefore, the trial court erred in finding that the plaintiffs waived the issue. *Baumann v. Snider*, 243 Ga. App. 526, 532 S.E.2d 468 (2000).

Since the pre-trial order specified that a company's damage recovery was limited to the theory of lost profits, alternate recovery theories could not be considered, even though the theory of lost profits was too speculative to allow any recovery. *SMD, L.L.P. v. City of Roswell*, 252 Ga. App. 438, 555 S.E.2d 813 (2001).

Filing of pretrial memorandums by counsel for both parties did not eliminate necessity for a pretrial order pursuant to this section, since such memorandums did not resolve all of the issues which arose during the trial, and they lacked the authoritative and binding effect which only the judge's order could have, providing an advance ruling on the admissibility of certain evidence. *Malcolm v. Cotton*, 128 Ga. App. 699, 197 S.E.2d 760 (1973).

Pretrial order should be liberally construed to allow consideration of all questions fairly within the ambit of contested issues. *Echols v. Bridges*, 239 Ga. 25, 235 S.E.2d 535 (1977); *Fussell v. Carl E. Jones Dev. Co.*, 207 Ga. App. 521, 428 S.E.2d 426 (1993).

Discretion to preclude issues. — Question of precluding issues is within discretion of the trial judge. *Echols v. Bridges*, 239 Ga. 25, 235 S.E.2d 535 (1977).

Testimony of witness not named in pretrial order. — Decision whether to allow a party to introduce at trial (either in the case-in-chief or in rebuttal) the testimony of a witness not named in the pretrial order is a matter within the discretion of the trial court. *Nease v. Buelvas*, 198 Ga. App. 302, 401 S.E.2d 320 (1991).

When, in a personal injury action, the issue of "serious injury" was not contained in the pretrial order, but the order provides that the extent of the plaintiff's injuries and damages is the sole question for determination by the jury, the "serious injury" issue is obviously a part of this general issue relating to injuries and damages, and the pretrial order and subsection (b) of O.C.G.A. § 9-11-16 did not prevent submission of that issue to the jury. *Fleet Transp. Co. v. Holland*, 166 Ga. App. 337, 304 S.E.2d 76 (1983).

Party cannot object for the first time on appeal to specification of issues contained in pretrial order. *Brumby v. Brooks*, 140 Ga. App. 210, 230 S.E.2d 359 (1976); *Hawkins v. Richardson-Merrell, Inc.*, 147 Ga. App. 481, 249 S.E.2d 286 (1978).

Failure to include defense in order is waiver. — When the defendant seasonably asserted the defense of insufficient service of process in the defendant's answer, but a pretrial conference order subsequently entered after the submission of the other parties' pretrial statements made no reference to this defense, the failure to list the defense in the pretrial order as one of the issues to be resolved in the case waived the previously asserted objection. *Long v. Marion*, 257 Ga. 431, 360 S.E.2d 255 (1987); *Rice v. Cropsey*, 203 Ga. App. 272, 416 S.E.2d 786, cert. denied, 203 Ga. App. 907, 416 S.E.2d 786 (1992).

Pretrial order did not preclude bad faith recovery. — Jury was properly charged on bad faith as an avenue for attorney fees pursuant to O.C.G.A. § 13-6-11 as a pretrial order did not exclude bad faith as an avenue of recovery; the trial court did not err in charging the jury that the jury could award attorney fees if the defendants had acted in bad faith, had been stubbornly litigious, or had caused the client unnecessary trouble and expense. As the trial court did not err

Issues (Cont'd)

in charging on bad faith, the trial court did not compound the error or commit reversible error by charging the jury that "where a jury (was) authorized to find fraud, it (was) authorized to find bad faith." *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

Addition of claim not an abuse of trial court's discretion. — In a breach of contract suit involving a construction contract, the trial court did not abuse the court's discretion by allowing a modification of a pretrial order to include a theory of recovery for negligent construction because the order was subject to modification to conform to the evidence that was admitted. *Fields Bros. Gen. Contrs., Inc. v. Ruecksties*, 288 Ga. App. 674, 655 S.E.2d 282 (2007).

Witnesses

Use of witness not listed in pretrial order. — Of itself, this section does not prohibit use of a witness not listed in the pretrial order. *Ambler v. Archer*, 230 Ga.

281, 196 S.E.2d 858 (1973).

On appeal, party may not argue the merits of issues excluded from consideration on the trial of the case. *Hawkins v. Richardson-Merrell, Inc.*, 147 Ga. App. 481, 249 S.E.2d 286 (1978).

Even when pretrial order limits witnesses to those whose names are furnished to the opposite side prior to trial, the judge in exercising the judge's discretion as to the allowance of witnesses not so named should take into serious consideration whether such testimony is acceptable for purposes of rebuttal, and whether a sanction less serious than forbidding use of the witnesses should be applied. *Allstate Ins. Co. v. Reynolds*, 138 Ga. App. 582, 227 S.E.2d 77 (1976).

Sanction too harsh. — Refusal of court to permit counsel for caveators to will to call any witness other than themselves was too harsh a sanction to impose on account of failure of their counsel to attend second pretrial hearing or to formulate, in cooperation with opposing counsel, a pretrial order embodying a list of proposed witnesses. *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, §§ 10, 197. 62 Am. Jur. 2d, Pretrial Conference and Procedure, §§ 1, 2, 7 et seq.

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Pretrial Conference and Procedure, § 1.

C.J.S. — 35B C.J.S., Federal Civil Procedure, § 926 et seq. 88 C.J.S., Trial, §§ 7, 8, 53 et seq.

ALR. — Effect upon disposition of the cause of the insufficiency of the agreed statement of facts to warrant a judgment for the party having the affirmative, 97 ALR 301.

Judicial stipulation or formal admission of facts by counsel as available upon a subsequent trial, 100 ALR 775.

Pretrial conference procedure as affecting right to discovery, 161 ALR 1151.

Power of court to adopt general rule requiring pretrial conference as distin-

guished from exercising its discretion in each case separately, 2 ALR2d 1061.

Binding effect of court's order entered after pretrial conference, 22 ALR2d 599.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Propriety and effect of permitting counsel having burden of issues in civil case to argue new matter or points in his closing summation, 93 ALR2d 273.

Trial court's appointment, in civil case, of expert witness, 95 ALR2d 390.

Appealability of order entered in connection with pretrial conference, 95 ALR2d 1361.

Validity and construction of state court's pretrial order precluding publicity or comment about pending case by counsel, parties, or witnesses, 33 ALR3d 1041.

Assertion of privilege in pretrial discovery proceedings as precluding waiver of privilege at trial, 36 ALR3d 1367.

Failure of party or his attorney to appear at pretrial conference, 55 ALR3d 303.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 ALR4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 ALR4th 712.

ARTICLE 4

PARTIES

9-11-17. Real party in interest; capacity.

(a) **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, an administrator, a guardian, a bailee, a trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may bring an action in his own name without joining with him the party for whose benefit the action is brought; and, when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) **Capacity to bring or defend an action.** The capacity of an individual, including one acting in a representative capacity, to bring or defend an action shall be determined by the law of this state. The capacity of a corporation to bring or defend an action shall be determined by the law under which it was organized, unless a statute of this state provides to the contrary.

(c) **Infants or incompetent persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may bring or defend an action on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may bring an action by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. No next friend shall be permitted to receive the proceeds of any personal action, in the name and on behalf of an infant, or incompetent person, until such next friend shall have

entered into a sufficient bond to the Governor, for the use of the infant and the infant's representatives, conditioned well and fully to account for and concerning such trust, which bond may be sued on by order of the court in the name of the Governor and for the use of the infant. Such bond shall be approved by the court in which the action is commenced and such approval shall be filed in such clerk's office. (Ga. L. 1966, p. 609, § 17; Ga. L. 1968, p. 1104, § 6; Ga. L. 1985, p. 656, § 1.)

Cross references. — Appointment of guardian for incompetent person by judge of probate court generally, Ch. 5, T. 29. Appointment of guardians ad litem in probate proceedings, § 53-3-19.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 17, see 28 U.S.C.

Law reviews. — For article, "Synopsis of 1968 Amendments to the Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article, "The Child as a Party in Interest in Custody Proceedings," see 10 Ga. St. B.J. 577 (1974). For article discussing *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976), holding Georgia's notice requirement for year's support unconstitutional

prior to 1977 revision, see 13 Ga. St. B.J. 85 (1976). For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For article, "Georgia's 'Door-Closing' Statute: Who Bears the Burden?," see 24 Ga. St. B.J. 141 (1988). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REAL PARTY IN INTEREST

INFANTS OR INCOMPETENT PERSONS

General Consideration

Purpose of section. — Function of O.C.G.A. § 9-11-17 is simply to protect the defendant against a subsequent action by the party actually entitled to recover. *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 459, 288 S.E.2d 711 (1982); *North Am. Life & Cas. Co. v. Riedl*, 209 Ga. App. 883, 434 S.E.2d 820 (1993), rev'd on other grounds, 264 Ga. 395, 444 S.E.2d 736 (1994).

Failure to name legal entity as party. — This section does not control when there is a failure to name a legal entity as a party plaintiff. *Cook v. Computer Listings*, 137 Ga. App. 526, 224 S.E.2d 501 (1976).

Finding that plaintiff, a joint venture contractor, was not a legal entity did not

authorize dismissal of the case. Pursuant to O.C.G.A. § 9-11-17, reasonable opportunity should have been allowed for the legal entities composing the joint venture to ratify or join the action, or for the real parties in interest to be joined or substituted in accordance with O.C.G.A. § 9-11-19. *Watson/Winter Joint Venture v. Milledge*, 224 Ga. App. 395, 480 S.E.2d 389 (1997).

Realignment of defendant as plaintiff. — Order of court is required under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to realign a defendant as a plaintiff. *Thomas v. Jackson*, 238 Ga. 90, 231 S.E.2d 50 (1976).

When suit is brought in name which is neither that of natural person, nor corporation, nor partnership, the suit is a mere nullity, and there-

fore, with no party plaintiff, there is no case in court, and consequently nothing to amend by. *Mathews v. Cleveland*, 159 Ga. App. 616, 284 S.E.2d 634 (1981).

Even action brought in name of improper party is amendable. *El Chico Restaurants, Inc. v. Transportation Ins. Co.*, 235 Ga. App. 427, 509 S.E.2d 681 (1998).

Plaintiff properly allowed to remain party despite plaintiff's dissolution at time suit filed. — Court of appeals of Georgia found no merit to the appealing accountants' claim that the trial court erred when the court allowed one of its clients to remain as a party to the litigation because the plaintiff had been administratively dissolved at the time the plaintiff filed suit against the accountants as: (1) the accountants never moved to dismiss that client as a party plaintiff; (2) any issue as to their presence in the suit was not preserved for review; and (3) even if the claim was preserved, the trial court properly concluded that the Florida corporation's reinstatement related back to the time of the plaintiff corporation's dissolution *nunc pro tunc*. *Fowler v. Atlanta Napp Deady, Inc.*, 283 Ga. App. 331, 641 S.E.2d 573 (2007).

Motion to dismiss when prosecution is by improper plaintiff. — When a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(6) is made insofar as the motion is based on the prosecution of a suit by one not the proper party plaintiff, such a motion is to be treated like a matter in abatement in that the erring party, rather than having judgment entered against the party, is now simply precluded from proceeding with the suit until the error has been corrected by the substitution of the proper party plaintiff. *Amica Mut. Ins. Co. v. Fleet Multi Fuel Corp.*, 178 Ga. App. 859, 344 S.E.2d 742 (1986).

Section applies to special statutory proceedings. — O.C.G.A. § 9-11-17 applies to special statutory proceedings such as an appeal from the board of equalization to superior court. *Spencer v. Lamar County Bd. of Tax Assessors*, 202 Ga. App. 742, 415 S.E.2d 332 (1992).

When the individual members of a city board of education were purportedly parties to an action by amend-

ment and by acknowledgment of service, a trial court's order of substitution was required to make the proper defendant, a city school district, a party substituted in their place; accordingly, the plaintiff's attempt to name the school district a defendant by mere amendment was ineffective and the school district was therefore never served as required by statute. *Foskey v. Vidalia City Sch.*, 258 Ga. App. 298, 574 S.E.2d 367 (2002).

Institute was a real party in interest. — Trial court did not err in finding that an institute was a real party in interest in an action on a promissory note and on account because the institute provided some evidence that the institute was the real party in interest when the institute produced and authenticated the institute's statement of the debtor's account showing that the debtor owed the institute, and not any other party, the principal sum of \$11,142.92, and the debtor did not provide any evidence that the account had been assigned to a specific third party. *Bogart v. Wis. Inst. for Torah Study*, 321 Ga. App. 492, 739 S.E.2d 465 (2013).

Cited in *Lewis v. Storch*, 120 Ga. App. 85, 169 S.E.2d 726 (1969); *Robinson v. Reward Ceramic Color Mfg., Inc.*, 120 Ga. App. 380, 170 S.E.2d 724 (1969); *Outlaw v. Outlaw*, 121 Ga. App. 284, 173 S.E.2d 459 (1970); *Hogan v. Maxey*, 121 Ga. App. 490, 174 S.E.2d 208 (1970); *Smith v. Singleton*, 124 Ga. App. 394, 184 S.E.2d 26 (1971); *Durham v. Spence*, 228 Ga. 525, 186 S.E.2d 723 (1972); *Walker v. Joanna M. Knox & Assocs.*, 132 Ga. App. 12, 207 S.E.2d 570 (1974); *Southeast Transp. Corp. v. Hogan Livestock Co.*, 133 Ga. App. 825, 212 S.E.2d 638 (1975); *Barone v. Adcox*, 235 Ga. 588, 221 S.E.2d 6 (1975); *Walsey v. Lockhart*, 136 Ga. App. 624, 222 S.E.2d 141 (1975); *J.C. Penney Co. v. West*, 140 Ga. App. 110, 230 S.E.2d 66 (1976); *Billas v. Dwyer*, 140 Ga. App. 774, 232 S.E.2d 102 (1976); *Kimball Bridge Rd. v. Everest Realty Corp.*, 141 Ga. App. 835, 234 S.E.2d 673 (1977); *Colodny v. Dominion Mtg. & Realty Trust*, 142 Ga. App. 730, 236 S.E.2d 917 (1977); *Clark v. Board of Dental Exmrs.*, 240 Ga. 289, 240 S.E.2d 250 (1977); *Central Mut. Ins. Co. v. Wofford*, 145 Ga. App. 836, 244 S.E.2d 899

General Consideration (Cont'd)

(1978); *Star Jewelers, Inc. v. Durham*, 147 Ga. App. 68, 248 S.E.2d 51 (1978); *Commercial Union Ins. Co. v. Ed V. Collins Contracting, Inc.*, 147 Ga. App. 183, 248 S.E.2d 220 (1978); *Rives E. Worrell Co. v. Key Sys.*, 147 Ga. App. 383, 248 S.E.2d 686 (1978); *E.C. Long, Inc. v. Brennan's of Atlanta, Inc.*, 148 Ga. App. 796, 252 S.E.2d 642 (1979); *Shield Ins. Co. v. Hutchins*, 149 Ga. App. 742, 256 S.E.2d 108 (1979); *Mathews v. Saniway Distribs. Serv.*, 152 Ga. App. 286, 262 S.E.2d 494 (1979); *Frady v. Irvin*, 245 Ga. 307, 264 S.E.2d 866 (1980); *Unicover, Inc. v. East India Trading Co.*, 154 Ga. App. 161, 267 S.E.2d 786 (1980); *Medlin v. Church*, 157 Ga. App. 876, 278 S.E.2d 747 (1981); *Foy v. Lewis*, 248 Ga. 234, 282 S.E.2d 295 (1981); *Troup v. Troup*, 248 Ga. 662, 285 S.E.2d 19 (1981); *Jordan v. Goff*, 160 Ga. App. 636, 287 S.E.2d 640 (1981); *Dorsey Heating & Air Conditioning Co. v. Gordon*, 162 Ga. App. 608, 292 S.E.2d 452 (1982); *Equitable Life Assurance Soc'y v. Tinsley Mill Village*, 249 Ga. 769, 294 S.E.2d 495 (1982); *Loftis v. Johnson*, 249 Ga. 794, 294 S.E.2d 511 (1982); *Block v. Voyager Life Ins. Co.*, 251 Ga. 162, 303 S.E.2d 742 (1983); *Dover Place Apts. v. A & M Plumbing & Heating Co.*, 167 Ga. App. 732, 307 S.E.2d 530 (1983); *Bowen v. Waters*, 170 Ga. App. 65, 316 S.E.2d 497 (1984); *Krawagna v. H & S Liquor, Inc.*, 176 Ga. App. 816, 338 S.E.2d 284 (1985); *Strauss Fuchs Org., Inc. v. LaFitte Invs., Ltd.*, 177 Ga. App. 891, 341 S.E.2d 873 (1986); *Gibbs v. Green Tree Acceptance, Inc.*, 188 Ga. App. 633, 373 S.E.2d 637 (1988); *Smeltzer v. Bank of Fitzgerald*, 192 Ga. App. 747, 386 S.E.2d 406 (1989); *Dover Realty, Inc. v. Butts County Bd. of Tax Assessors*, 202 Ga. App. 787, 415 S.E.2d 666 (1992); *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 423 S.E.2d 235 (1992); *Bundrage v. Standard Guar. Ins. Co.*, 211 Ga. App. 288, 439 S.E.2d 92 (1993); *Johnson v. Hardwick*, 212 Ga. App. 44, 441 S.E.2d 450 (1994); *Allanz Life Ins. Co. v. Riedl*, 264 Ga. 395, 444 S.E.2d 736 (1994); *Hall v. Hall*, 241 Ga. App. 690, 527 S.E.2d 288 (1999); *Sudler v. Campbell*, 250 Ga. App. 537, 550 S.E.2d 711 (2001); *Moon v. Mer-*

cury Ins. Co. of Ga., 253 Ga. App. 506, 559 S.E.2d 532 (2002); *Blair v. Bishop*, 290 Ga. App. 721, 660 S.E.2d 35 (2008); *Powers v. CDSaxton Props., LLC*, 285 Ga. 303, 676 S.E.2d 186 (2009); *In the Interest of W. L. H.*, 314 Ga. App. 185, 723 S.E.2d 478 (2012); *Sampson v. Ga. Dep't of Juvenile Justice*, 328 Ga. App. 733, 760 S.E.2d 203 (2014).

Real Party in Interest

Similarity to defense in O.C.G.A. § 9-11-19. — Real-party-in-interest objection is similar to the defense of failure to join an indispensable party under O.C.G.A. § 9-11-19. *North Am. Life & Cas. Co. v. Riedl*, 209 Ga. App. 883, 434 S.E.2d 820 (1993), *rev'd on other grounds*, 264 Ga. 395, 444 S.E.2d 736 (1994).

If appellant's summary judgment motion is considered as raising a real party in interest defense, the motion was properly denied. An objection on this ground may be made at any time up to and including a trial on the merits, which the appellant did in the appellant's motion in limine and motion for a directed verdict. No case, however, should be dismissed for this reason until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Accordingly, if the appellant renews this objection, the trial court should consider this issue under O.C.G.A. § 9-11-43(b). *Golden Pantry Food Stores, Inc. v. Lay Bros., Inc.*, 266 Ga. App. 645, 597 S.E.2d 659 (2004).

Time for bringing objection to party. — Real-party-in-interest objection may be made at any time up to and including a trial on the merits. *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 459, 288 S.E.2d 711 (1982); *Allman v. Hope*, 200 Ga. App. 137, 407 S.E.2d 107 (1991).

Dismissal inappropriate following appointment of administrator. — Even though the plaintiff was not the administrator of the plaintiff's spouse's estate at the time the plaintiff filed the complaint, a motion to dismiss should not have been granted since the plaintiff had been appointed administrator at the time the defendants brought the motion. *Gor-*

don v. Walker, 224 Ga. App. 861, 482 S.E.2d 489 (1997).

Action not to be brought by one with derivative interest. — This section requires that an action be brought in the name of the real party in interest, rather than by one whose right is derivative. *Rose Hall, Ltd. v. Holiday Inns, Inc.*, 146 Ga. App. 709, 247 S.E.2d 173 (1978).

Failure to establish. — Appellees failed to present any evidence establishing their status as the current holders of an interest in the contract at issue, despite the appellant's allegation that the contract between them has since been assigned by appellees to a third party; therefore, since the appellant's objection that appellees are not the real parties in interest had yet to be addressed, the trial court erred in granting the appellees' motion for summary judgment. *Sawgrass Bldrs., Inc. v. Key*, 212 Ga. App. 138, 441 S.E.2d 99 (1994).

Spouse's claim that the spouse had standing as a real party in interest to bring a nuisance claim because the spouse shared an equitable interest in a mobile home park on the damaged property based on the improvements and repairs the spouse had made to the property during the time the spouse had been married to the plaintiff was rejected as no property rights were created in the assets of the marriage while the parties were still married and a trial court's ability to determine the equitable interests of spouses in real property was based on the ancillary jurisdiction the court specifically maintained in divorce actions. *Reidling v. City of Gainesville*, 280 Ga. App. 698, 634 S.E.2d 862 (2006).

Plaintiffs, purported members of a church's board of directors, filed suit to terminate the pastor's employment. As plaintiffs had five months' notice from the trial court that the plaintiffs had the burden to prove that the plaintiffs had the capacity to bring the suit, the plaintiffs suit was properly dismissed when the plaintiffs failed to meet the plaintiffs' burden. *Victory Drive Deliverance Temple, Inc. v. Jackson*, 298 Ga. App. 563, 680 S.E.2d 588 (2009).

Trial court erred in granting an assignee summary judgment in an action

against a debtor to collect the amount owed on a credit card account agreement the debtor allegedly entered into with an assignor because the assignee failed to show that the assignee was entitled to file suit to recover the outstanding debt against the debtor pursuant to O.C.G.A. § 9-11-17(a); the assignee relied on the affidavit of the assignee's agent and business records custodian of its credit card accounts to show that the assignor transferred to the assignee all rights and interests to the debtor's account, but the affidavit failed to refer to or attach any written agreements that could complete the chain of assignment from the assignor to the assignee, and although the assignee contended that the debtor did not raise the assignee's failure to present a valid assignment in the trial court, the record reflected that that issue was squarely before the trial court because the assignee directly addressed the debtor's defense under § 9-11-17 in the assignee's motion for summary judgment, referring to the affidavit to show that it was the assignee. *Wirth v. Cach, LLC*, 300 Ga. App. 488, 685 S.E.2d 433 (2009).

Prosecution of action by assignee. — When a transfer of interest, such as an assignment, takes place prior to commencement of an action, this section controls and requires that the action shall be prosecuted in the name of the real party in interest. *Employers' Liab. Assurance Corp. v. Keelin*, 132 Ga. App. 459, 208 S.E.2d 328 (1974).

An assignment for valuable consideration, with notice to the debtor, imposes on the debtor an equitable and moral obligation to pay the assignee. Thus, an insurance company which had notice of an assignment of proceeds but nevertheless paid all benefits to the insureds, rather than the assignee, was liable to the assignee. *Santiago v. Safeway Ins. Co.*, 196 Ga. App. 480, 396 S.E.2d 506, cert. denied, 196 Ga. App. 909, 396 S.E.2d 506 (1990).

Assignment not established. — Trial court erred in dismissing an employee's breach of contract complaint against an employer on the ground that the employee was not a real party in interest under O.C.G.A. § 9-11-17(a) because there was no showing that the employee assigned

Real Party in Interest (Cont'd)

the employee's right, title, and interest in the parties' employment contract to a limited liability company (LLC); the employee assigned payment under the agreement to the LLC but did not assign the employee's right, title, and interest under the employment agreement, and for the contract to be enforced by the LLC, the assignment would have to be in writing. *Phillips v. Selecto Sci.*, 308 Ga. App. 412, 707 S.E.2d 615 (2011).

Failure to name county as party. — Appellate court could not address complaints about a county when the county was not a named party to the case, and the plaintiff did not seek to join the county in the proceedings below. *Strykr v. Long County Bd. of Comm'rs*, 277 Ga. 624, 593 S.E.2d 348 (2004).

Foreign corporations. — Foreign corporation which has been dissolved pursuant to the law of its state of incorporation may assert a cause of action in Georgia after it has been dissolved, depending upon the governing strictures of the foreign state. *Tillett Bros. Constr. Co. v. DOT*, 210 Ga. App. 84, 435 S.E.2d 241 (1993).

Bankruptcy trustee real party in interest. — Bankruptcy trustee was the real party in interest regarding a tort action of the debtor regardless of the trustee's purported assignment to the debtor of the right to prosecute the action while the trustee retained legal title to it. *United Techs. Corp. v. Gaines*, 225 Ga. App. 191, 483 S.E.2d 357 (1997).

Trial court erred in finding that a Chapter 7 trustee was not the real party in interest in a legal malpractice action, which arose before a client's Chapter 7 bankruptcy case was commenced and was therefore property of the bankruptcy estate; on remand, the case was not to be dismissed until the client was given a reasonable amount of time to secure an abandonment by the Chapter 7 trustee or to substitute the Chapter 7 trustee as the plaintiff. *Gingold v. Allen*, 272 Ga. App. 653, 613 S.E.2d 173 (2005).

Receiver of a bank in receivership was the real party in interest under O.C.G.A. § 9-11-17(a) to enforce a bond insuring misconduct by the bank's em-

ployees, even though the bond was issued in the name of a bankruptcy debtor which was the parent company of the bank, since the bankruptcy trustee did not allege any harm to the debtor from the alleged misconduct of bank employees, and the bond was properly reformed to add the bank as an intended named insured. *Lubin v. Cincinnati Ins. Co.*, No. 1:09-CV-2985-RWS, 2010 U.S. Dist. LEXIS 133794 (N.D. Ga. Dec. 17, 2010), *aff'd*, 677 F.3d 1039 (11th Cir. 2012).

Section silent as to who may present order or pleading for party. — This section requires that civil actions be brought in the name of the real parties in interest, but does not touch upon the question of who may present an order or pleading to the court on behalf of one of the parties. *Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co.*, 235 Ga. 503, 220 S.E.2d 130 (1975).

Subsection (a) precludes dismissal until reasonable time is allowed after objection to show the real party by ratification, joinder, or substitution, which shall have the same effect as if the action had been commenced in the name of the real party in interest. *Wilson Marine Sales & Serv., Inc. v. Fireman's Funds Ins. Co.*, 133 Ga. App. 220, 211 S.E.2d 145 (1974).

Before trial court can dismiss, based on motion, for failure to join an indispensable party under subsection (a) of this section, a reasonable time must be allowed after hearing of the motion for joinder or substitution. *Henry v. Moister*, 155 Ga. App. 462, 271 S.E.2d 40 (1980).

When the plaintiff is not the real party at interest, in hearing the preliminary defense the court should make a determination under this section; if the indispensable party can be joined, the court should ordinarily permit the joinder, and should not dismiss but take such other action as may be required. *Sherwood Mem. Park v. Bryan*, 142 Ga. App. 664, 236 S.E.2d 903 (1977).

Appellees' claim that the administrator of the estate of a property owner's mother, as legal title holder to the devised property at the time a suit challenging the grant of a special exception was filed, was the proper party to bring the action was

waived as the appellees did not move to dismiss the action on the ground, and no action was to be dismissed on the ground that it was not prosecuted in the name of the real party in interest until a reasonable time had been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. *Hollberg v. Spalding County*, 281 Ga. App. 768, 637 S.E.2d 163 (2006).

Section contemplates substitution of party, not creation of action. —

Subsection (a) of O.C.G.A. § 9-11-17 contemplates that an “action” must already have been commenced prior to substituting as the plaintiff therein the real party in interest. Thus, the statute envisions the substitution of the real party at interest as the plaintiff in an “action” not the initial creation of the “action” itself. *Mathews v. Cleveland*, 159 Ga. App. 616, 284 S.E.2d 634 (1981).

Substitution not limited to § 9-11-25 situations. — “Substitution” as used in subsection (a) of O.C.G.A. § 9-11-17 is not limited to those instances enumerated in O.C.G.A. § 9-11-25. *Franklyn Gesner Fine Paintings, Inc. v. Ketcham*, 252 Ga. 537, 314 S.E.2d 903 (1984).

Real party in interest objection is a matter in abatement and does not go to the merits of the action. *Hodgskin v. Markatron, Inc.*, 185 Ga. App. 750, 365 S.E.2d 494 (1988).

Summary judgment improper. — Summary judgment cannot properly be granted to a defendant on the basis of a real-party-in-interest objection. *Warshaw Properties v. Lackey*, 170 Ga. App. 101, 316 S.E.2d 482 (1984); *Georgia Dep’t of Human Resources ex rel. Holland v. Holland*, 263 Ga. 885, 440 S.E.2d 9 (1994); *Brian Realty Corp. v. DeKalb County*, 229 Ga. App. 209, 493 S.E.2d 595 (1997).

Since a real-party-in-interest objection is a matter in abatement and does not go to the merits of an action, such an objection cannot be disposed of by means of summary judgment but is properly disposed of pursuant to a motion to dismiss. *Fleming v. Caras*, 170 Ga. App. 579, 317 S.E.2d 600 (1984).

Trial court erred in granting summary

judgment pursuant to O.C.G.A. § 9-11-56 to a boat owner in an action arising from a boat/jet ski accident; although the plaintiffs were not proper parties to the action, as the plaintiffs did not own the jet ski and did not hold any valid subrogation claim, a real party in interest defense pursuant to O.C.G.A. § 9-11-17 was not a proper subject for summary judgment, and the trial court should have dismissed the action. *Franco v. Cox*, 265 Ga. App. 514, 594 S.E.2d 717 (2004).

Because the trial court’s order was best viewed as an order dismissing the plaintiffs’ complaint for failure to comply with the requirements of O.C.G.A. § 9-11-17, and summary judgment could not properly be granted to a defendant on the basis of a real-party-in-interest objection, absent any evidence that an exception to the final judgment rule applied, the appeal from the trial court’s order had to be dismissed. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Although an estate’s malpractice action was not initially brought by the real party in interest — the estate’s administrator — the administrator was timely substituted as the plaintiff in the action by amendment which, under O.C.G.A. § 9-11-17(a), had the same effect as if the action had been commenced by the real party in interest. Thus, the suit was not time-barred by O.C.G.A. § 9-3-71(b)’s five-year repose period, and a doctor and the health care facilities were not entitled to summary judgment. *Memar v. Styblo*, 293 Ga. App. 528, 667 S.E.2d 388 (2008).

Pursuant to the condominium declaration, a condominium association lacked standing to sue the defendants for damages based on defects in the construction of common areas of the condominium. But under O.C.G.A. § 9-11-17(a), the trial court erred by granting the defendants summary judgment before considering the association’s motion to substitute the individual condominium unit owners as real parties in interest. *Phoenix on Peachtree Condo. Ass’n v. Phoenix on Peachtree, LLC*, 294 Ga. App. 447, 669 S.E.2d 229 (2008).

Consideration of matters outside the pleadings. — When it is necessary to

Real Party in Interest (Cont'd)

consider matters outside the pleadings in ruling on a motion to dismiss for failure to prosecute the action in the name of the real party in interest, this should be done under the provisions of O.C.G.A. § 9-11-43(b), relating to evidence on motions, and not by way of a motion for summary judgment under O.C.G.A. § 9-11-56. *Warshaw Properties v. Lackey*, 170 Ga. App. 101, 316 S.E.2d 482 (1984).

When it is necessary to consider matters outside the pleadings in ruling on a motion to dismiss for failure to prosecute the action in the name of the real party-in-interest, this may be done under the provisions of O.C.G.A. § 9-11-43(b). *Hodgskin v. Markatron, Inc.*, 185 Ga. App. 750, 365 S.E.2d 494 (1988).

Joinder of real party by appellate court. — Matter of joinder of an indispensable party or the real party in interest is so vital that an appellate court, sua sponte if necessary, may consider it, even though the point was not raised in the trial court and if the indispensable party can be joined, the court should ordinarily permit the joinder and not dismiss the action. *S.D.H. Co. v. Stewart*, 135 Ga. App. 505, 218 S.E.2d 268 (1975).

Loan receipt given to insurer preserves right of action in the insured, which may bring suit in the insured's own name. *General Ins. Co. of Am. v. Bowers*, 139 Ga. App. 416, 228 S.E.2d 348 (1976).

Standing after assigning cause to insurer. — Party plaintiff who in the course of litigation has been discovered to have assigned its cause of action pursuant to a subrogation clause in its policy of insurance to its insurer has standing to move the trial court to substitute its insurer in the case as the real party in interest. *Dover Place Apts. v. A & M Plumbing & Heating Co., Inc.*, 176 Ga. App. 805, 338 S.E.2d 44 (1985), overruling *Stacey v. Fleet Multi Fuel Corp.*, 166 Ga. App. 684, 305 S.E.2d 424 (1983).

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).

Assignment of lease. — Trial court erred in granting summary judgment to financing corporation after the financing corporation brought suit against the automobile dealership following the automobile dealership's lease of a vehicle to a person who later defaulted on a lease that the person had forged in the person's mother's name as the record showed that the financing corporation had assigned the lease to another entity and, thus, the other entity, and not the financing corporation, was the real party in interest who was required to file the suit. *Town & Country Dodge, Inc. v. World Omni Fin. Corp.*, 261 Ga. App. 503, 583 S.E.2d 182 (2003).

Subrogation of insurer. — Insured who has transferred the insured's right to maintain action by execution of a full subrogation agreement prior to the time suit is brought is in no position to bring or maintain the suit. *Employers' Liab. Assurance Corp. v. Keelin*, 132 Ga. App. 459, 208 S.E.2d 328 (1974).

While, under the ordinary insurance contract, the insurer is subrogated to the insured's claims and can pursue an action to recover for the sums paid to the insured, the parties may render inoperative this provision of the insurance contract. When this happens, this provision of the insurance contract should not be admitted into evidence in order to prove that the insured who brings the action is not the "real party in interest." *Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc.*, 167 Ga. App. 532, 307 S.E.2d 13 (1983).

Party plaintiff, who in the course of litigation had been discovered to have assigned the plaintiff's cause of action pursuant to a subrogation clause in the plaintiff's policy of insurance to the plaintiff's insurer, had standing to move the trial court to substitute the plaintiff's insurer in the case as the real party in interest. *West v. DOT*, 176 Ga. App. 806, 338 S.E.2d 45 (1985), overruling *Stacey v. Fleet Multi Fuel Corp.*, 166 Ga. App. 684,

305 S.E.2d 424 (1983).

Joinder of uninsured motorist insurer. — Even though an uninsured motorist insurer could not bring a subrogation action in its own name, it should have been permitted to join the action pursuant to O.C.G.A. § 9-11-17, or be joined or substituted in accordance with O.C.G.A. § 9-11-19. *State Farm Mut. Auto. Ins. Co. v. Cox*, 233 Ga. App. 296, 502 S.E.2d 778 (1998), *aff'd*, 271 Ga. 77, 515 S.E.2d 832 (1999).

Reassignment back to insured. — In an action by an insured against an insurer, the insured's previous assignment of policy benefits to a chiropractor did not require dismissal of the action on the basis that the insured was not the real party in interest if there was a valid reassignment by the chiropractor to the insured. *Jones v. State Farm Mut. Auto. Ins. Co.*, 228 Ga. App. 347, 491 S.E.2d 830 (1997).

Damage to condominium property. — When rights sought to be enforced were right to recover for damages to property and the right to have that property protected against continuance of a nuisance, such rights belonged to owners of the property damaged, and unincorporated condominium association, which had no right to possession of any of the property claimed to have been damaged, lacked standing to maintain an action. *Equitable Life Assurance Soc'y v. Tinsley Mill Village*, 249 Ga. 769, 294 S.E.2d 495 (1982).

Amenability of insurer to suit by injured party. — Absent policy provisions to the contrary, one who suffers injury is not in privity of contract with the insurer under a liability insurance policy, and cannot reach policy proceeds for payment of one's claim by an action directly against the insurer. *Lee v. Petty*, 133 Ga. App. 201, 210 S.E.2d 383 (1974).

Ejectment action brought in the fictitious form is subject to substitution of the real party in interest or dismissal. *Roe v. Doe*, 246 Ga. 138, 268 S.E.2d 901 (1980).

Action against corporation involved in merger. — When former Code 1933, § 22-1007 (see now O.C.G.A. § 14-2-1401 et seq.), relating to prosecution of claims by or against corporations involved in a merger or consolidation, ap-

plied, an action could proceed against a former corporation as if a merger had never taken place, or the surviving corporation can be substituted as a defendant. *Employers' Liab. Assurance Corp. v. Keelin*, 132 Ga. App. 459, 208 S.E.2d 328 (1974).

Action on contract between highway department and construction company by injured third party. — Contract between state highway department (now Department of Transportation) and construction company, by which company undertakes to provide for safety of the public during construction of a project, inures to the benefit of the public, and a member of the public injured as a result of the company's negligence may sue the company directly. *Lee v. Petty*, 133 Ga. App. 201, 210 S.E.2d 383 (1974).

Defendant's burden to prove facts necessary to support dismissal. — When a motor company filed a tort action against four boys and their parents for damages sustained when the boys allegedly vandalized and destroyed two vehicles while the vehicles were in the company's possession, the trial court erred in placing the burden on the company to establish the company's right to bring the action because in arguing that the company was a real party in interest, the boys and their parents had the burden of proving the facts necessary to support the judgment of dismissal. *Jones Motor Co. v. Anderson*, 258 Ga. App. 161, 573 S.E.2d 429 (2002).

Determination of appropriate party in landowner dispute. — Defendant objected contending that the defendant was not a proper party against whom relief could be sought because the defendant did not own the real property at issue, having transferred title to a spouse; however, the defendant's argument was without merit as the plaintiff alleged that the defendant had trespassed by intentionally damaging the sewer line on the plaintiff's property, among other things. These allegations were sufficient to show that the defendant could have been joined as a proper party if the defendant had not been so named originally. *Dover v. Bowcock*, 259 Ga. App. 852, 578 S.E.2d 559 (2003).

Real Party in Interest (Cont'd)

Proper plaintiff is new property owner who became “grantor”. — Former property owner lacked standing to bring an action for statutory damages and attorney fees under O.C.G.A. § 44-14-3(c) against a lender that failed to cancel the lender’s security deed on the property after receiving a payoff of the loan as the owner no longer had an interest in the property at the time that the complaint was filed and, accordingly, the owner was not the real party in interest under O.C.G.A. § 9-11-17(a); the new purchaser of the property became “the grantor” that had the capacity to prosecute the claim pursuant to O.C.G.A. § 44-14-3(a)(4). *Associated Credit Union v. Pinto*, 297 Ga. App. 605, 677 S.E.2d 789 (2009).

Time limit to amend complaint to name real party in interest. — Decedent’s sibling, as the purported representative of the decedent’s spouse, filed a wrongful death suit against medical providers within five years of the alleged negligent acts and, within a reasonable time after the providers objected to the sibling’s standing, filed a motion to amend the complaint to name the decedent’s spouse as the real party in interest. As the proposed amendment did not “initiate” a new claim, the medical malpractice statute of repose, O.C.G.A. § 9-3-71(b), did not prevent amendment of the complaint even though the motion to amend was filed more than five years after the alleged negligence. *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008).

Infants or Incompetent Persons

Discretion in appointment of guardian ad litem. — Subsection (c) of this section intends that trial court be given discretion in appointment of a guardian ad litem. *O’Neil v. Moore*, 118 Ga. App. 424, 164 S.E.2d 328 (1968); *Lanier v. Foster*, 133 Ga. App. 149, 210 S.E.2d 326 (1974).

Guardian ad litem unnecessary absent conflicting interests. — Appoint-

ment of a guardian ad litem was not mandatory because the parent had lawful authority to act on behalf of the parent’s children in regard to their property rights, and because there was no evidence that the parent’s interests in the matters at issue were adverse to that of the children. *Dee v. Sweet*, 224 Ga. App. 285, 480 S.E.2d 316 (1997).

Minor’s adversary has no legitimate interest in selection of representative. — Selection of an individual to represent a minor’s interest is a matter which peculiarly lends itself to the discretion of the trial court, and is not ordinarily the type of matter in which the minor’s adversary has a legitimate interest. *Lanier v. Foster*, 133 Ga. App. 149, 210 S.E.2d 326 (1974).

Minor’s next friend has no authority to forfeit minor’s claim by lack of prosecution, except by leave of court. *Mosley v. Lankford*, 244 Ga. 409, 260 S.E.2d 322 (1979).

Protection of minor’s interest when next friend fails to appear. — It is error to dismiss with prejudice a complaint brought on behalf of a minor by the next friend, for lack of prosecution, without further hearing and determination that dismissal should be with prejudice; hence, when the minor was not represented at the call of the case, it was incumbent upon the trial court to appoint a guardian ad litem or make such other order as the court deemed proper for the protection. *Mosley v. Lankford*, 244 Ga. 409, 260 S.E.2d 322 (1979).

Guardian ad litem appointed for parent. — Juvenile court did not err by sua sponte evaluating a parent’s competency in a termination of parental rights proceeding as another court had already found the parent mentally incompetent and the parent’s rights were terminated based upon findings independent of that mental competency; thus, no harm was shown by the juvenile court’s failure to hold a competency hearing. As a safeguard, the juvenile court appointed a guardian ad litem for the parent. In the *Interest of N. S. E.*, 293 Ga. App. 171, 666 S.E.2d 587 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Associations and Clubs, § 49 et seq. 18 Am. Jur. 2d, Cooperative Associations, § 3. 18 Am. Jur. 2d, Corporations, § 2. 39 Am. Jur. 2d, Guardian and Ward, § 186 et seq. 42 Am. Jur. 2d, Infants, §§ 24, 25, 146 et seq. 48 Am. Jur. 2d, Labor and Labor Relations, § 623 et seq. 59 Am. Jur. 2d, Parties, § 22 et seq. 59A Am. Jur. 2d, Partnership, § 294 et seq.

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Guardian, § 494. 19 Am. Jur. Pleading and Practice Forms, Parties, § 2 et seq.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 56 et seq. 39 C.J.S., Guardian and Ward, § 264. 43 C.J.S., Infants, §§ 395, 396. 57 C.J.S., Mental Health, § 374 et seq. 67A C.J.S., Parties, §§ 7 et seq., 36.

ALR. — Right of husband and wife to maintain joint action for wrongs directly affecting both arising from same act, 25 ALR 743.

Right of attorney, parent, guardian ad litem, or next friend to remit from verdict or judgment in favor of infant, 30 ALR 1111.

Duty of one learning of action instituted in his name without authority, 63 ALR 1068.

Corporation which pays tax wrongfully exacted upon shares of its stock as proper party to maintain action for its recovery, 84 ALR 107.

Proper party plaintiff to action against tort-feasor for damage to insured property where insurer is entitled to subrogation to extent of loss paid by it, 96 ALR 864; 157 ALR 1242.

Principal contractor as necessary party to suit to enforce mechanic's lien of subcontractor, laborer, or materialman, 100 ALR 128.

Water user as necessary or proper party to litigation involving the right of ditch or canal company or irrigation or drainage district from which he takes water, 100 ALR 561.

Marital or parental relationship between plaintiff and member of partnership as affecting right to maintain action

in tort against partnership, 101 ALR 1231.

Right of ward to maintain action independent from his general guardian, on contracts or other obligations entered into by the guardian on ward's behalf, 102 ALR 269.

Remedy for conservation of property of alleged incompetent prior to his adjudication as such, 107 ALR 1392.

Guardianship of incompetent or infant as affecting venue of action, 111 ALR 167.

By and in whose name suit to annul infant's marriage must be brought, 150 ALR 609.

Suits and remedies against alien enemies, 152 ALR 1451; 153 ALR 1419; 155 ALR 1451; 156 ALR 1448, 157 ALR 1449.

Proper party plaintiff to action against tort-feasor for damage to insured property where insurer is entitled to subrogation to extent of loss paid by it, 157 ALR 1242.

Appearance by guardian ad litem without service of summons, 164 ALR 529.

May proceedings to have a person declared insane and to appoint a conservator or committee of his person or estate rest upon substituted or constructive service of process, 175 ALR 1324.

Right of mother of illegitimate child to appeal from order or judgment entered in bastardy proceedings, 13 ALR2d 948.

Conflict of laws as to right of injured person to maintain direct action against tort-feasor's automobile liability insurer, 16 ALR2d 881.

Right of individual employee to enforce collective labor agreement against employer, 18 ALR2d 352.

Joinder of insurer and insured under policy of compulsory indemnity or liability insurance in action by injured third person, 20 ALR2d 1097.

Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer, 21 ALR2d 1048.

Liability of incompetent's estate for torts committed by guardian, committee, or trustee in managing estate, 40 ALR2d 1103.

What law governs as to proper party plaintiff in contract action, 62 ALR2d 486.

Federal Civil Procedure Rule 17(c), relating to representation of infants or incompetent persons, 68 ALR2d 752.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 ALR2d 1247.

Right of insurance agent to sue in his own name for unpaid premium, 90 ALR2d 1291.

Capacity of guardian to sue or to be sued outside state where appointed, 94 ALR2d 162.

Liability of corporation for torts of subsidiary, 7 ALR3d 1343.

Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where insured has paid part of loss, 13 ALR3d 140.

Proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where loss is entirely covered by insurance, 13 ALR3d 229.

Right of pledgor of commercial paper to

maintain action thereon in his own name, 43 ALR3d 824.

Liability of insane person for his own negligence, 49 ALR3d 189.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636.

Standing to contest award of, or acquisition of right to operate, cable TV certificate, license, or franchise in state court action, 78 ALR3d 1255.

Tolling of state statute of limitations in favor of one commencing action despite existing disability, 30 ALR4th 1092.

Joint venture's capacity to sue, 56 ALR4th 1234.

Standing to bring action relating to real property of condominium, 74 ALR4th 165.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records--modern status, 87 ALR Fed. 177.

9-11-18. Joinder of claims and remedies.

(a) **Joinder of claims.** A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(b) **Joinder of remedies; fraudulent conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him without first having obtained a judgment establishing the claim for money. (Ga. L. 1966, p. 609, § 18; Ga. L. 1968, p. 1104, § 7.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 18, see 28 U.S.C.

Law reviews. — For article discussing counterclaims and cross-claims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article, "Synopses of

1968 Amendments to the Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article, "Georgia's Constitutional Scheme for State Appellate Jurisdiction," see 6 Ga. St. B.J. 24 (2001).

JUDICIAL DECISIONS

Constitutional venue provisions may not be changed by the legislature or the courts, and the adoption of procedural devices for adjudicating claims of various parties in the same action does not effect a change in the venue requirements of the Constitution. *Haley v. Citizens & S. Nat'l Bank*, 141 Ga. App. 13, 232 S.E.2d 362 (1977).

Venue for counterclaim proper. — Hospital's home court did not err in transferring the remaining counterclaim to a patient's home court for trial as the hospital consented to the patient's home court trying the patient's counterclaim against the hospital for the improper release of the patient's mental health records when the hospital invoked the jurisdiction of that court to pursue the hospital's suit against the patient for non-payment for medical services when: (1) both claims arose out of the contractual relationship between the hospital and the patient; (2) the common nexus between the claims was the mental health treatment the hospital gave to the patient; (3) the hospital sought to recover monies due for the treatment at issue in the patient's counterclaim; and (4) this commonality met the broad similarity or connectedness test, as well as the arising out of the same transaction or occurrence test used for determining whether a counterclaim was compulsory under O.C.G.A. § 9-11-13(a). *Kennestone Hosp., Inc. v. Hopson*, 264 Ga. App. 123, 589 S.E.2d 696 (2003).

Both legal and equitable claims may be set forth in the same complaint under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Miller v. Turner*, 228 Ga. 701, 187 S.E.2d 688 (1972).

Joinder of contract and tort actions permitted. — There is now no inhibition to joinder of actions ex contractu and those ex delicto. *Continental Ins. Co. v. Mercer*, 130 Ga. App. 339, 203 S.E.2d 297 (1973).

Joinder not mandatory. — Even though the multiple claims might be permissively joined, a party is not forced to judgment on all possible causes of action in one suit. *Stapleton v. Palmore*, 162 Ga. App. 525, 291 S.E.2d 445, *aff'd*, 250 Ga.

259, 297 S.E.2d 270 (1982); *Nationwide-Penncraft, Inc. v. Royal Globe Ins. Co.*, 162 Ga. App. 555, 291 S.E.2d 760, *cert. denied*, 249 Ga. App. 687, 294 S.E.2d 529 (1982).

Clear implication of O.C.G.A. § 9-11-18 is that party asserting claim to relief is not required to join independent claims the party has against opposing party. *Nationwide-Penncraft, Inc. v. Royal Globe Ins. Co.*, 249 Ga. 687, 294 S.E.2d 529 (1982).

As to joinder of third-party claim of secondary liability with direct damage claim against third-party defendant under O.C.G.A. § 9-11-18 and Federal Rule of Civil Procedure 18, see *Cohen v. McLaughlin*, 250 Ga. 661, 301 S.E.2d 37 (1983).

Joinder of direct claim by amendment of third-party complaint. — In an action against the defendant for injuries caused by an automobile collision, when the defendant brought a third-party complaint for indemnity and contribution against a brake repair shop, the defendant's claim for damages to the defendant's own car was properly joined by amendment of the third-party complaint. *Shleifer v. Bridgestone-Firestone, Inc.*, 223 Ga. App. 256, 477 S.E.2d 405 (1996).

Impermissible to seek damages against grantee of fraudulent conveyance. — In the context of a divorce action, it is impermissible for the plaintiff to seek damages against the grantee of an alleged fraudulent conveyance by the defendant. *Shah v. Shah*, 270 Ga. 649, 513 S.E.2d 730 (1999).

Cited in *King v. King*, 225 Ga. 142, 166 S.E.2d 347 (1969); *State Farm Mut. Auto. Ins. Co. v. Black*, 120 Ga. App. 151, 169 S.E.2d 742 (1969); *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 183 S.E.2d 586 (1971); *Thornton v. North Am. Acceptance Corp.*, 228 Ga. 176, 184 S.E.2d 589 (1971); *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974); *Carter v. Harrell*, 132 Ga. App. 148, 207 S.E.2d 648 (1974); *Chupp v. Henderson*, 134 Ga. App. 808, 216 S.E.2d 366 (1975); *C & S Land, Transp. & Dev. Corp. v. Grubbs*, 141 Ga. App. 393, 233 S.E.2d 486 (1977); *Tingle v.*

Georgia Power Co., 147 Ga. App. 775, 250 S.E.2d 497 (1978); Singleton v. Airco, Inc., 80 F.R.D. 467 (D. Ga. 1978); Georgia Power Co. v. Busbin, 159 Ga. App. 416, 283 S.E.2d 647 (1981); Greyhound Lines v. Cobb County, 681 F.2d 1327 (11th Cir. 1982); McNeal v. Paine, Webber, Jackson & Curtis, Inc., 249 Ga. 662, 293 S.E.2d 331 (1982); Hughes v. Hughes, 193 Ga.

App. 72, 387 S.E.2d 29 (1989); Lawson v. Watkins, 261 Ga. 147, 401 S.E.2d 719 (1991); Satilla Cmty. Serv. Bd. v. Satilla Health Servs., 275 Ga. 805, 573 S.E.2d 31 (2002); Walker v. Walker, 293 Ga. App. 872, 668 S.E.2d 330 (2008); Sentinel Offender Svcs., LLC v. Glover, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, § 96 et seq. 37 Am. Jur. 2d, Fraudulent Conveyances, §§ 129, 133. 65 Am Jur. 2d, Receivers, § 101.

C.J.S. — 1A C.J.S., Actions, § 108 et seq. 35A C.J.S., Federal Civil Procedure, § 43 et seq. 67A C.J.S., Parties, § 78 et seq.

ALR. — Joinder of cause of action against party causing injury with cause of action against latter's insurer or indemnitor, 7 ALR 1003.

Joinder of cause of action for breach of a contract with cause of action for fraud inducing the contract, 10 ALR 756.

Different benefits or claims of benefit under a policy of insurance as constituting a single cause of action or separate causes, 69 ALR 889; 159 ALR 563.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability, 91 ALR 759.

Inclusion in bill for divorce or annulment of allegations and prayer to impress trust upon property or otherwise settle property rights, 93 ALR 327.

Joinder in one action of sureties on different bonds relating to same matter, 106 ALR 90; 137 ALR 1044.

Concerted action or agreement to resist enforcement of a statute because of doubt as to its constitutionality or construction as ground for joinder of defendants in action or suit by governmental authorities, 107 ALR 670.

Joinder of claims to separate parcels in

suit to quiet or to remove cloud on title, or to determine adverse claims to land, 118 ALR 1400.

Acquisition or perfection after commencement of action of right or title to claim or property which is the subject of action or counterclaim, 125 ALR 612.

Right of one to recover for personal injury to himself and for death of another killed in the same accident as giving rise to a single cause of action or to separate causes of action, 161 ALR 208.

Right of wife or child by virtue of right to support to maintain action to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment, 164 ALR 524.

Joinder in defamation action, of denial and plea of truth of statement, 21 ALR2d 813.

Construction, application, and effect of Federal Civil Procedure Rule 18(b) and like state rules or statutes pertaining to joinder in a single action of two claims although one was previously cognizable only after the other had been prosecuted to a conclusion, 61 ALR2d 688.

Propriety of consolidation for trial of actions for personal injuries, death, or property damages arising out of same accident, 68 ALR2d 1372.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

When loss-of-consortium claim must be joined with underlying personal injury claim, 60 ALR4th 1174.

9-11-19. Joinder of persons needed for just adjudication.

(a) **Persons to be joined if feasible.** A person who is subject to service of process shall be joined as a party in the action if:

(1) In his absence complete relief cannot be afforded among those who are already parties; or

(2) He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(A) As a practical matter impair or impede his ability to protect that interest; or

(B) Leave any of the persons who are already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) **Determination by court whenever joinder not feasible.** If a person, as described in paragraphs (1) and (2) of subsection (a) of this Code section, cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include:

(1) To what extent a judgment rendered in the person's absence might be prejudicial to him or to those already parties;

(2) The extent to which, by protective provisions in the judgment, by the shaping of relief, or by other measures, the prejudice can be lessened or avoided;

(3) Whether a judgment rendered in the person's absence will be adequate;

(4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder; and

(5) Whether and by whom prejudice might have been avoided or may, in the future, be avoided.

(c) **Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons, as described in paragraphs (1) and (2) of subsection (a) of this Code section, who are not joined and the reasons why they are not joined.

(d) **Exception of class actions.** This Code section shall be subject to Code Section 9-11-23. (Ga. L. 1966, p. 609, § 19; Ga. L. 1972, p. 689, § 7.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 19, see 28 U.S.C.

Law reviews. — For article discussing counterclaims and cross-claims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article, “The Child as a Party in Interest in Custody Proceedings,” see 10 Ga. St. B.J. 577 (1974). For annual survey on trial practice and procedure, see 42 Mercer L. Rev. 469 (1990). For article, “Trial Practice and Procedure,” see 53 Mercer L. Rev. 475 (2001). For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 223 (2003). For annual survey on trial practice and procedure, see 65 Mercer L. Rev. 277 (2013).

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JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REQUESTS FOR AND OBJECTIONS TO JOINDER INDISPENSABILITY

1. IN GENERAL
2. INDISPENSABLE PARTIES

JOINDER WARRANTED

General Consideration

Designation of joined parties. — O.C.G.A. § 9-11-19 contemplates that the party joined should be designated as a plaintiff or a defendant. *Spivey v. Rogers*, 173 Ga. App. 233, 326 S.E.2d 227 (1984).

Failure to name the proper parties is an amendable defect, correctable by the parties or upon the court’s own motion. *Hanson v. Wilson*, 257 Ga. 5, 354 S.E.2d 126 (1987).

Failure to join indispensable parties. — Should it appear that indispensable parties were not joined, the remedy would not be dismissal but corrective action as provided by O.C.G.A. § 9-11-19. *Applied Ecological Sys. v. Weskem, Inc.*, 212 Ga. App. 65, 441 S.E.2d 279 (1994).

Failure to join necessary parties. — Although a great aunt and great step-uncle claimed that the trial court failed to join necessary parties in a custody case, the record failed to reveal that this issue was properly presented to the trial court; therefore, this defense was waived. *Wiepert v. Stover*, 298 Ga. App. 683, 680 S.E.2d 707 (2009), overruled on other grounds, *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013) (decided under former O.C.G.A. § 15-11-28).

Failure to consider factors of O.C.G.A. § 9-11-19(b). — Trial court

erred in dismissing a customer’s action against an organization on the ground that the customer failed to join a corporation as a party because the order did not show that the trial court considered the factors listed in O.C.G.A. § 9-11-19(b), and the corporation was doing business in the state sufficient to confer jurisdiction under O.C.G.A. § 9-10-91(1). *Wright v. Safari Club Int’l*, 307 Ga. App. 136, 706 S.E.2d 84 (2010).

Merger of legal identities. — Since there was a merger of the legal identity of the parties into one legal entity, a defense under O.C.G.A. § 9-11-19 was not available because there was no longer a bank to be an indispensable party or a real party in interest. *NationsBank v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998).

Right to elect defendant. — When complainant has right of election as to which defendants the complainant will proceed against, this section has no application. *Smith v. Foster*, 230 Ga. 207, 196 S.E.2d 431 (1973).

This section, which allows joinder of parties needed for just adjudication, has no application when there is a right of election as to which defendants a plaintiff will proceed against. *Adcock v. First Nat’l Bank*, 144 Ga. App. 394, 241 S.E.2d 289 (1977).

O.C.G.A. § 9-11-19 has no application when liability is joint and several and the

plaintiff has a right of election as to which defendants a plaintiff will proceed against. *Sloan v. Southern Floridabanc Fed. Sav. & Loan Ass'n*, 197 Ga. App. 601, 398 S.E.2d 720 (1990).

Defendant was not estopped from asserting the improper party defense on grounds that the defendant did not comply with O.C.G.A. §§ 9-11-9 and 9-11-19, since those sections, which govern the issue of legal capacity and joinder of parties, have no bearing on this matter. *Benschoter v. Shapiro*, 204 Ga. App. 56, 418 S.E.2d 381, cert. denied, 204 Ga. App. 921, 418 S.E.2d 381 (1992).

Defense similarity to real-party-in-interest objection. — Real-party-in-interest objection under O.C.G.A. § 9-11-17 is similar to the defense of failure to join an indispensable party under O.C.G.A. § 9-11-19. *North Am. Life & Cas. Co. v. Riedl*, 209 Ga. App. 883, 434 S.E.2d 820 (1993), rev'd on other grounds, 264 Ga. 395, 444 S.E.2d 736 (1994).

Section inapplicable to one not subject to court's jurisdiction. — In action at law for recovery of commissions due under contract, subsection (b) of this section had no application to an individual of another county, who was not subject to the jurisdiction of the court. *Midland Nat'l Life Ins. Co. v. Emerson*, 121 Ga. App. 427, 174 S.E.2d 211 (1970).

No provision to require person to maintain action. — While subsection (a) of this section permits a plaintiff, under proper circumstances, to require another person or persons to join with the plaintiff, the subsection makes no provision for a plaintiff to require another person to maintain an action vested solely in such other person, even though its maintenance might result in benefit to the plaintiff. *Lawrence v. Whittle*, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

No obligation to assert claim. — O.C.G.A. § 9-11-19 does not require a party who is joined as an indispensable party to assert a claim and submit that claim to the trial court for ruling on the merits. *United Servs. Auto. Ass'n v. Millikan*, 231 Ga. App. 327, 498 S.E.2d 171 (1998).

Addition of party on motion or by court. — When there has been a

nonjoinder of a necessary party, such party may be added on motion of any party or by the court on the court's own initiative. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

Joinder of uninsured motorist insurer. — Even though an uninsured motorist insurer could not bring a subrogation action in the insurer's own name, the insurer should have been permitted to join the action pursuant to O.C.G.A. § 9-11-17, or be joined or substituted in accordance with O.C.G.A. § 9-11-19. *State Farm Mut. Auto. Ins. Co. v. Cox*, 233 Ga. App. 296, 502 S.E.2d 778 (1998), aff'd, 271 Ga. 77, 515 S.E.2d 832 (1999).

When parties may be changed. — Parties may be dropped or added by order of court, on motion of any party, or of the court's own initiative, at any stage of the action, including appeal, and on such terms as are just. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978); *Zappa v. Automotive Precision Mach., Inc.*, 205 Ga. App. 584, 423 S.E.2d 286 (1992).

Joinder by appellate court. — Joinder of an indispensable party or real party in interest is so vital that an appellate court, sua sponte if necessary, may consider it, even though the point was not raised in the trial court; and if the indispensable party can be joined, the court should ordinarily permit joinder and not dismiss the action. *S.D.H. Co. v. Stewart*, 135 Ga. App. 505, 218 S.E.2d 268 (1975).

Failure to name party as cause for dismissal. — While failure to name a party might be the basis for corrective action as prescribed in this section, it is not cause for dismissal of the complaint under the grounds of failure to state a claim upon which relief can be granted. *Empire Banking Co. v. Martin*, 133 Ga. App. 115, 210 S.E.2d 237 (1974).

Ordinarily, it is error to dismiss a complaint for failure to join an indispensable party; such party should be joined so the case can be considered on its merits. *Dismuke v. Stynchcombe*, 237 Ga. 420, 228 S.E.2d 817 (1976).

Tennessee Valley Authority (TVA) was an indispensable party in the landowner's action for equitable partition since the determination of where the lots began was

General Consideration (Cont'd)

a matter of great interest to TVA and any judgment rendered in the absence of TVA would have been inadequate and could have been prejudicial to TVA; thus, the fact that TVA was a wholly-owned corporate agency and instrumentality of the United States over which the federal district court had jurisdiction in civil actions precluded TVA from being joined and dismissal was proper. *Dixon v. Cole*, 277 Ga. 353, 589 S.E.2d 94 (2003).

Reasonable time to be allowed for joinder or substitution. — Before trial court can dismiss, based on motion, for failure to join an indispensable party, reasonable time must be allowed after motion is heard and before dismissal for joinder or substitution. *Henry v. Moister*, 155 Ga. App. 462, 271 S.E.2d 40 (1980).

Summary judgment in same order as adjudication of indispensability improper. — It is not proper for the trial court to grant summary judgment against a plaintiff for failure to join an individual as an indispensable party in the same order in which the court adjudicates that individual to be indispensable. *Frady v. Irvin*, 245 Ga. 307, 264 S.E.2d 866 (1980).

Motion to dismiss must be raised. — When not specifically raised, failure to name an indispensable party will not subject a claim to a motion to dismiss. *Empire Banking Co. v. Martin*, 133 Ga. App. 115, 210 S.E.2d 237 (1974).

Treatment of question of indispensable party on review. — When question of an indispensable party is expressly passed upon by the trial court, it will be held on review that the plaintiff had the necessary opportunity to seek the addition of such party, but in the absence of any disclosure by the record of an intent to raise or pass upon such question in the trial court, such defect will be deemed an amendable defect. *Smith v. Merchants & Farmers Bank*, 226 Ga. 715, 177 S.E.2d 249 (1970); *King v. King*, 228 Ga. 818, 188 S.E.2d 502 (1972); *Gray v. Hall*, 233 Ga. 244, 210 S.E.2d 766 (1974); *Eder v. American Express Co.*, 138 Ga. App. 168, 225 S.E.2d 737 (1976); *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

Different statutes of limitation. — Joinder of causes of action having differ-

ent statutes of limitation is not authorized. *Stapleton v. Palmore*, 162 Ga. App. 525, 291 S.E.2d 445, aff'd, 250 Ga. 259, 297 S.E.2d 270 (1982).

Joinder of separate personal injury and loss of consortium claims was properly granted by the trial court. *Miller v. Crumbley*, 249 Ga. App. 403, 548 S.E.2d 657 (2001).

Consolidation of wrongful death and survivors' actions. — Rule stated in *Stapleton v. Palmore*, 250 Ga. 259, 297 S.E.2d 270 (1982), requiring consolidation of wrongful death and survivors' actions arising out of the same accident, is limited to mandate joinder, on the defendant's motion, of all claims which derive from personal injuries sustained by a single individual. *Stenger v. Grimes*, 260 Ga. 838, 400 S.E.2d 318 (1991).

Joined party may contest venue. — If a motion to join is granted and a defendant-in-counterclaim is thereafter served, then the actually "joined [rather than potentially joinable] party" may contest venue by filing a motion to dismiss, which is to be treated by the trial court as a motion to transfer pursuant to Uniform Superior Court Rule 19. If venue is shown to be proper elsewhere, it would then be incumbent upon the trial court to enter an appropriate order. Such an appropriate order might sever the counterclaim for separate trial pursuant to O.C.G.A. § 9-11-42(b) and transfer only the severed counterclaim, while retaining jurisdiction and venue over the main action. *McCabe v. Lundell*, 199 Ga. App. 639, 405 S.E.2d 693 (1991).

Owners not indispensable parties in rezoning case. — Owners of property that was being rezoned were not indispensable parties under O.C.G.A. § 9-11-19. The owners were selling the property to the rezoning applicants, who were parties; thus, the case could be decided on the merits without prejudicing the rights of the owners. *Stendahl v. Cobb County*, 284 Ga. 525, 668 S.E.2d 723 (2008).

Cited in *Andrews v. Pollard*, 121 Ga. App. 69, 172 S.E.2d 857 (1970); *Lowe v. Loftus*, 314 F. Supp. 620 (S.D. Ga. 1970); *Empire Shoe Co. v. Regal Shoe Shops*, 123 Ga. App. 796, 182 S.E.2d 796 (1971);

Lewis v. Lanigan, 125 Ga. App. 437, 188 S.E.2d 148 (1972); Board of Comm'rs v. Department of Pub. Health, 229 Ga. 173, 190 S.E.2d 39 (1972); McGee v. Haynes, 128 Ga. App. 709, 197 S.E.2d 767 (1973); Harris v. Hill, 129 Ga. App. 403, 199 S.E.2d 847 (1973); Frank B. Wilder & Assoc. v. St. Joseph's Hosp., 132 Ga. App. 373, 208 S.E.2d 145 (1974); Burkhead v. Trustees, Firemen's Pension Fund, 133 Ga. App. 41, 209 S.E.2d 651 (1974); Adamson v. James, 233 Ga. 130, 210 S.E.2d 686 (1974); McMichael v. Georgia Power Co., 133 Ga. App. 593, 211 S.E.2d 632 (1974); Coop Mtg. Invs. Assocs. v. Pendley, 134 Ga. App. 236, 214 S.E.2d 572 (1975); Jernigan v. Collier, 234 Ga. 837, 218 S.E.2d 556 (1975); Pendley v. Hunter, 138 Ga. App. 864, 227 S.E.2d 857 (1976); Thomas v. Jackson, 238 Ga. 90, 231 S.E.2d 50 (1976); Little v. Home Transp. Co., 142 Ga. App. 30, 234 S.E.2d 833 (1977); Johnson v. First Nat'l Bank, 143 Ga. App. 384, 238 S.E.2d 747 (1977); Department of Human Resources v. Bagley, 240 Ga. 306, 240 S.E.2d 867 (1977); Lambert v. Allen, 146 Ga. App. 617, 247 S.E.2d 200 (1978); Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals, 147 Ga. App. 128, 248 S.E.2d 196 (1978); Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E.2d 822 (1979); First Nat'l Bank v. Centennial Equities Corp., 245 Ga. 121, 263 S.E.2d 155 (1980); Lakeview Estates Homeowners Corp. v. Hilltop Enters. of Ga., Inc., 153 Ga. App. 323, 265 S.E.2d 120 (1980); Kennedy v. Hannans, 246 Ga. 55, 268 S.E.2d 646 (1980); First Bank & Trust Co. v. Insurance Serv. Ass'n, 154 Ga. App. 697, 269 S.E.2d 527 (1980); Fuller v. Moister, 246 Ga. 397, 271 S.E.2d 622 (1980); State Farm Mut. Auto. Ins. Co. v. Hubbell Metals, Inc., 161 Ga. App. 275, 287 S.E.2d 726 (1982); Dorsey Heating & Air Conditioning Co. v. Gordon, 162 Ga. App. 608, 292 S.E.2d 452 (1982); McNeal v. Paine, Webber, Jackson & Curtis, Inc., 249 Ga. 662, 293 S.E.2d 331 (1982); Nixon v. Gwinnett County Bd. of Realtors, Inc., 249 Ga. 862, 295 S.E.2d 78 (1982); Partridge v. Partridge, 167 Ga. App. 716, 307 S.E.2d 524 (1983); First of Ga. Underwriters Co. v. Beck, 170 Ga. App. 68, 316 S.E.2d 519 (1984); Tarver v. Martin, 175 Ga. App. 689, 334 S.E.2d 18 (1985); Coker

v. Casey, 178 Ga. App. 682, 344 S.E.2d 662 (1986); Grissett v. Wilson, 181 Ga. App. 727, 353 S.E.2d 621 (1987); Solid Rock Baptist Church, Inc. v. Freight Terms., Inc., 184 Ga. App. 111, 361 S.E.2d 200 (1987); Dodd v. Simpson, 191 Ga. App. 369, 381 S.E.2d 585 (1989); Dunwoody Homeowners Ass'n v. DeKalb County, 887 F.2d 1455 (11th Cir. 1989); Harper v. DOT, 195 Ga. App. 602, 394 S.E.2d 398 (1990); Kubler v. Goerg, 197 Ga. App. 667, 399 S.E.2d 229 (1990); Hoffman Elec. Co. v. Chiyoda Int'l Corp., 203 Ga. App. 731, 417 S.E.2d 371 (1992); Bundrage v. Standard Guar. Ins. Co., 211 Ga. App. 288, 439 S.E.2d 92 (1993); Banca Nazionale Del Lavoro v. SMS Hasenclever, 211 Ga. App. 360, 439 S.E.2d 502 (1993); Aldalassi v. Drummond, 223 Ga. App. 192, 477 S.E.2d 372 (1996); Altama Delta Corp. v. Howell, 225 Ga. App. 78, 483 S.E.2d 127 (1997); Industrial Mechanical, Inc. v. Siemens Energy & Automation, Inc., 230 Ga. App. 1, 495 S.E.2d 103 (1998); Fulton County Tax Comm'r v. GMC, 234 Ga. App. 459, 507 S.E.2d 772 (1998); J.M. Huber Corp. v. Georgia Marble Co., 239 Ga. App. 271, 520 S.E.2d 296 (1999); Mimick Motor Co. v. Moore, 248 Ga. App. 297, 546 S.E.2d 533 (2001); S. Heritage Ins. Co. v. Greene Ins. Agency, 249 Ga. App. 749, 549 S.E.2d 743 (2001); Marwede v. EQR/Lincoln L.P., 284 Ga. App. 404, 643 S.E.2d 766 (2007); U.S. A. Gas, Inc. v. Whitfield County, 298 Ga. App. 851, 681 S.E.2d 658 (2009); Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634 (2011); Kammerer Real Estate Holdings, LLC v. PLH Sandy Springs, LLC, 319 Ga. App. 393, 740 S.E.2d 635 (2012), overruled on other grounds, 322 Ga. App. 859 (2013).

Requests for and Objections to Joinder

Defendant's duty to request joinder. — Action by spouse for loss of consortium will not be dismissed for failure to join with other spouse's prior negligence action arising out of the same occurrence when the defendant did not request joinder in the earlier action. Stapleton v. Palmore, 250 Ga. 259, 297 S.E.2d 270 (1982), cert. denied, 467 U.S. 1226, 104 S. Ct. 2679, 81 L. Ed. 2d 874 (1984).

Despite the claim by the owners of a

Requests for and Objections to Joinder (Cont'd)

corporation that the trial court erred in refusing to allow the owners to intervene in the case as the true owners of the property in question, because the owners never properly filed or asserted a motion to intervene, no error resulted; moreover, the owners' argument that the trial court erred in refusing to allow the owners to file the owners' motion to intervene also provided no basis for relief. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Time for bringing objection. — Defense of failure to join an indispensable party may be made at any time up to and including a trial on the merits. *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 459, 288 S.E.2d 711 (1982).

Reasonable time allowed for joinder. — Parties are entitled to a reasonable opportunity to join the indispensable party after the trial court made the court's determination that the party was indispensable. *Coe v. Greenville Credit & Inv. Co.*, 164 Ga. App. 521, 298 S.E.2d 36 (1982).

Joinder not required. — Trial court did not err in denying a motion for joinder in that, to the extent that the addition of the principals of a real estate developer to the movant's counterclaim was sought because the principals were joint tortfeasors with the developer, no joinder was required. *Chaney v. Harrison & Lynam, LLC*, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

Indispensability

1. In General

Test as to whether party indispensable. — There are two essential tests of an indispensable party: (1) Can relief be afforded the plaintiff without the presence of the other party? (2) Can the case be decided on its merits without prejudicing the rights of the other party? *Pickett v. Paine*, 230 Ga. 786, 199 S.E.2d 223 (1973).

Adequacy of judgment as primary consideration. — Primary consideration concerning joinder or nonjoinder is

whether any judgment that might be rendered will be adequate in the absence of the parties sought to be joined. *Peoples Bank v. North Carolina Nat'l Bank*, 230 Ga. 389, 197 S.E.2d 352 (1973).

Interest in controversy. — Principles applicable to determination of whether party is merely proper or should be joined as a necessary or indispensable party are comparatively simple, and revolve around the question of interest in the controversy. *North Carolina Nat'l Bank v. Peoples Bank*, 127 Ga. App. 372, 193 S.E.2d 571 (1972), aff'd, 230 Ga. 389, 197 S.E.2d 352 (1973).

Co-executors of a husband's deceased parents were improperly joined in a wife's action for alimony, and the wife's reliance on the concept of complete relief as a basis for joinder was misplaced, because: (1) even if the wife were to be awarded some interest in the estate, whether the wife would have to enforce that right by litigation was entirely speculative; and (2) if further litigation were to prove necessary, the issues and subject matter of litigation attempting to force a distribution from the estate would not be the same as the issues and subject matter in the wife's present action, which involved the entitlement, as a consequence of the marriage, to support from the husband; thus, the absence of the co-executors from the present litigation would not render the relief afforded the wife partial or hollow because the wife would obtain an interest as full and complete as that presently held by the husband. *Searcy v. Searcy*, 280 Ga. 311, 627 S.E.2d 572 (2006).

If there are no compelling reasons for joinder of third parties, the third parties are not indispensable to the action, and it is not necessary to join the third parties as parties defendant for a just adjudication of the merits of the action between the original parties. *Peoples Bank v. North Carolina Nat'l Bank*, 230 Ga. 389, 197 S.E.2d 352 (1973).

Appellate court, upon remand, ordered trial court to address indispensability of party in motion to dismiss. — Although dismissal of a complaint was reversed on appeal, because the appeals court was unable to determine whether the trial court had

considered the remaining ground of the motion to dismiss for failure to join an indispensable party, the trial court was ordered on remand to make the appropriate findings, if any, with regard to that ground. *OFC Capital v. Schmidlein Elec., Inc.*, 289 Ga. App. 143, 656 S.E.2d 272 (2008).

Finding as to whether a second responsible party was necessary party in tax refund action was required. — In an assessment action under O.C.G.A. § 48-2-52, the Georgia Court of Appeals erred by concluding that because the Georgia Department of Revenue voluntarily refunded a tax payment made by a majority owner of a restaurant, the Department could not seek payment from a second responsible party as the voluntary payment doctrine applied to contracts, not tax indebtedness; it was necessary to remand the case to see if the second responsible party was a necessary party to the majority owner's refund action. *Ga. Dep't of Revenue v. Moore*, 294 Ga. 20, 751 S.E.2d 57 (2013).

2. Indispensable Parties

When additional defendant is essential for just adjudication among existing parties to the original suit, and the additional defendant could have been joined originally, upon proper motion the trial court should grant joinder. *Smith v. Foster*, 230 Ga. 207, 196 S.E.2d 431 (1973).

Dismissal for failure to add indispensable party. — Trial court erred in dismissing the siblings' action for failure to add an indispensable party pursuant to O.C.G.A. § 9-11-19(a) because the court did not engage in the analysis required pursuant to § 9-11-19; nothing in the record established that even with the siblings, who were already in the case, at least one of the three identified in the trial court's order, the spouse of a deceased sibling, a duly appointed representative of the spouse's estate, or all of the spouse's proven heirs at law, was in fact indispensable under § 9-11-19. *Wilcher v. Way Acceptance Co.*, 316 Ga. App. 862, 730 S.E.2d 577 (2012).

Trial court did not abuse the court's discretion by dismissing a suit for failure

to join indispensable parties because the trial court could not exercise personal jurisdiction over the limited liability company members not joined, and after considering all five factors set forth in O.C.G.A. § 9-11-19(b), the trial court concluded that the case involved a dispute between all the members of the company and that the company could not be afforded complete relief in the absence of the other members. *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013).

Joint tortfeasors are not indispensable or necessary to an action against one of their number because their liability is both joint and several. *North Carolina Nat'l Bank v. Peoples Bank*, 127 Ga. App. 372, 193 S.E.2d 571 (1972), *aff'd*, 230 Ga. 389, 197 S.E.2d 352 (1973).

Joint tortfeasors are not indispensable parties in action against one of them because their liability is both joint and several. *Freeman v. Low X-Ray Corp.*, 130 Ga. App. 856, 204 S.E.2d 803 (1974).

It is not required that all joint tortfeasors be joined together in an action against one, their liability being joint and several. *Sheet Metal Workers Int'l Ass'n v. Carter*, 144 Ga. App. 48, 240 S.E.2d 569 (1977), *rev'd on other grounds*, 241 Ga. 220, 244 S.E.2d 860 (1978).

When the plaintiff sued a billboard company for fraud the plaintiff's motion to join the company's president under O.C.G.A. § 9-11-19(a)(1)(A) was properly denied. If, as the plaintiff alleged, the president acted fraudulently, the president could, at most, be held liable as a joint tortfeasor with the company and thus was not an indispensable party. *Merritt v. Marlin Outdoor Adver., LTD.*, 298 Ga. App. 87, 679 S.E.2d 97 (2009).

Persons who may be joined because of an interest in question of law or fact are proper parties, but they are not necessary or indispensable. *North Carolina Nat'l Bank v. Peoples Bank*, 127 Ga. App. 372, 193 S.E.2d 571 (1972), *aff'd*, 230 Ga. 389, 197 S.E.2d 352 (1973).

Parties defendant in zoning contest. — Suit in equity is maintainable against governing zoning authority to contest the validity of a rezoning resolution, with the governing authority as the defen-

Indispensability (Cont'd)**2. Indispensable Parties** (Cont'd)

dant against which substantial relief is prayed, and the successful rezoning applicant as a party defendant. *Riverhill Community Ass'n v. Cobb County Bd. of Comm'rs*, 236 Ga. 856, 226 S.E.2d 54 (1976).

Successful rezoning applicant in a zoning contest is a proper, even indispensable, party, and should be joined to obtain complete relief in equity. *Riverhill Community Ass'n v. Cobb County Bd. of Comm'rs*, 236 Ga. 856, 226 S.E.2d 54 (1976).

Fact that suit for declaratory judgment might be maintained against zoning authority without making rezoning applicant a party does not overcome due process requirement that successful rezoning applicant be afforded notice and opportunity to be heard in a suit contesting the rezoning. *Riverhill Community Ass'n v. Cobb County Bd. of Comm'rs*, 236 Ga. 856, 226 S.E.2d 54 (1976).

Action to enforce zoning provision.

— County was not indispensable party to landowner's action against neighboring landowner seeking removal of two manufactured homes from commercially zoned land, plus damages; moreover, even if the county were indispensable, a court is to allow reasonable time for joinder before dismissing for nonjoinder, so the court properly denied the defendant's motion for dismissal based on failure to join the county as an indispensable party. *Hall v. Trubey*, 269 Ga. 197, 498 S.E.2d 258 (1998).

Assignee of interest in note. — When the holder of a note assigned the holder's entire interest therein to a third person to secure a lesser indebtedness, the assignee held full legal title to the chose in action and was the proper party to bring suit on the note; thus, the assignee's executor was an indispensable party in a suit on note brought by the assignor's trustee in bankruptcy. *Henry v. Moister*, 155 Ga. App. 462, 271 S.E.2d 40 (1980).

In action for breach of warranty of title brought by last grantee in chain of title against a remote grantor, it is improper to require joinder of intermediate

warrantors as parties defendant or as involuntary plaintiffs. *Smith v. Smith*, 129 Ga. App. 618, 200 S.E.2d 504 (1973).

In a dispute between adjoining landowners over title to approximately six acres of land, the trial court properly denied the adjoining neighbors' motion to implead additional third parties, and motion to add those parties as indispensable third parties under O.C.G.A. § 9-11-19(a), because those individuals had no legal interest in the disputed property at the time the neighbors sought to add them. *Pirkle v. Turner*, 281 Ga. 846, 642 S.E.2d 849 (2007).

In an action by a tenant against a sublessee, the tenant's landlord should have been joined as a party with an interest relating to the subject of the action. *RJV Corp. v. SuperValu, Inc.*, 223 Ga. App. 585, 478 S.E.2d 592 (1996).

Reformation of deed. — For purposes of this section, an action to reform a deed is a very different thing from a breach of warranty action, and in such action all who are interested adversely in the reformation should be joined as parties. *Smith v. Smith*, 29 Ga. App. 618, 200 S.E.2d 504 (1973).

Home-buyer was not an indispensable party in an action by the home builder seeking to enjoin a home inspector from trespassing on the builder's properties. *Pope v. Pulte Home Corp.*, 246 Ga. App. 120, 539 S.E.2d 842 (2000).

Holder of interest in property not indispensable. — In a declaratory judgment action by a city against the owner of an undivided interest in property, and the sole occupant thereof, seeking access to the property in order to conduct a pre-condemnation survey and appraisal, a party holding an interest in the property at issue was not an indispensable party defendant. *Aponte v. City of Columbus*, 246 Ga. App. 646, 540 S.E.2d 617 (2000).

In action by grantee of junior security deed for surplus funds held by the defendant after exercise of the power of sale under a superior security deed, it was not reversible error for the court to deny the plaintiff judgment on the pleadings, sustain the defense that the grantor was a necessary party, and require the plaintiff to make the grantor a party to the action.

Leon Inv. Co. v. Independent Life & Accident Ins. Co., 123 Ga. App. 668, 182 S.E.2d 151 (1971).

Relief from foreclosure. — To the extent a property owner sought relief from foreclosure, the property owner was obligated to bring such claims against the security deed holder rather than the law firm that handled the foreclosure, and thus the holder was an indispensable party in any dispute concerning sums awarded during the foreclosure. *McCalla, Raymer, Padrick, Cobb, Nichols & Clark v. C.I.T. Fin. Servs., Inc.*, 235 Ga. App. 95, 508 S.E.2d 471 (1998).

Holders of a purported security deed on property that was the subject of an action for equitable partition of real property were appropriate parties to the lawsuit. *Blanton v. Duru*, 247 Ga. App. 175, 543 S.E.2d 448 (2000).

Executor indispensable in suit against estate. — Executor of an estate is an indispensable party in a suit against the estate. *Estate of Thurman v. Dodaro*, 169 Ga. App. 531, 313 S.E.2d 722 (1984).

Distribution of estate. — Heirs at law, while the heirs might be proper parties, were not necessary or indispensable parties to an action on the distribution of a decedent's estate since there was an administrator selected under former Code 1933, § 113-1202 (see now O.C.G.A. § 53-6-24) and since there were no compelling reasons to join them as parties defendant. *Davenport v. Idlett*, 234 Ga. 864, 218 S.E.2d 577 (1975).

When heirs who possessed two unprobated wills sued in a dispute over land, the court had authority to determine that an executor was a party necessary for a just adjudication of the case. *Morrison v. Stewart*, 243 Ga. 456, 254 S.E.2d 840 (1979).

Tax commissioner is indispensable party to action challenging tax statute when, in the commissioner's absence, the remaining defendants would be subject to a substantial risk of incurring inconsistent obligations because of the commissioner's authority to enforce the challenged statute. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

Party not indispensable. — Trial court did not err in adjudicating the valid-

ity of a memorandum of agreement on the ground that a county board of tax assessors was an indispensable party to the litigation under O.C.G.A. § 9-11-19(a) because the board did not seek an interest in the action and was not so situated that the disposition of the proceeding, in its absence, could impair or impede the board's ability to protect its interest or leave any of the other parties subject to substantial risk of incurring multiple or inconsistent obligations. *Sherman v. Dev. Auth.*, No. A12A0587, 2012 Ga. App. LEXIS 624 (July 5, 2012).

County indispensable party in case claiming improper abandonment of public road because only county had standing to challenge claim. — Because a landowner dismissed all the claims alleged against a county, a claim that the county improperly abandoned a public road due to the county's failure to comply with O.C.G.A. § 32-7-4 had also been relinquished. Moreover, pursuant to O.C.G.A. § 9-11-19, the trial court properly recognized that this issue could not be justly adjudicated without the county's participation as a party because only the county had standing to challenge the landowner's claim that the road was a public road. *McRae v. SSI Dev., LLC*, 283 Ga. 92, 656 S.E.2d 138 (2008).

Agent of defendant insurance company was an indispensable party since the agent was the agent with whom the plaintiff dealt and was the initiating agent on all policies issued to the plaintiff. *Southern Farm Bureau Life Ins. Co. v. Douglas*, 193 Ga. App. 476, 388 S.E.2d 67 (1989).

In a shareholder derivative action, the trial court erred in dismissing the stockholder's complaint for failing to join the corporation as an indispensable party without allowing a reasonable time for joinder. *Kilburn v. Young*, 244 Ga. App. 743, 536 S.E.2d 769 (2000).

Joinder Warranted

Corporations and stockholders. — When the defendant alleged she and former husband had formed a business in which they were to be partners, a significant portion of the business capital came from her separate property and that for-

Joinder Warranted (Cont'd)

mer husband and stockholder fraudulently caused all stock to be issued in their names, the defendant was entitled to have the stockholder and corporation added as parties in order that complete relief might be afforded and the trial court's failure to add these parties was error. *DeGarmo v. DeGarmo*, 269 Ga. 480, 499 S.E.2d 317 (1998).

In an action for divorce pursuant to O.C.G.A. § 19-5-1, the trial court properly granted the wife's motion pursuant to O.C.G.A. §§ 9-11-13(h) and 9-11-19(a)(1) to join two corporations as defendants by counterclaim because, by the husband's own design, any property that could be determined to be marital property was inextricably commingled with the property of the corporations and, thus, joinder of the corporations was proper to ensure a just division of marital assets. *Gardner v. Gardner*, 276 Ga. 189, 576 S.E.2d 857 (2003).

Grantor and first taker of stock not indispensable parties. — In a fraudulent conveyance action against the grantee of stock brought by a divorced wife who was awarded the stock in the divorce proceeding, the grantor, husband, and first taker, a corporation, were not indispensable parties since neither was necessary for a just adjudication of the merits of the action, and neither was required for complete relief. *Halta v. Bailey*, 219 Ga. App. 178, 464 S.E.2d 614 (1995).

Failure to join indispensable party is defense which may be raised by motion. *Guhl v. Tuggle*, 242 Ga. 412, 249 S.E.2d 219 (1978).

Joint obligors. — Joint obligor is an indispensable party to a suit based on breach of contract, and when joint obligors to a contract are not joined, the case must be dismissed. *Turner Outdoor Adv., Ltd. v. Old S. Corp.*, 185 Ga. App. 582, 365 S.E.2d 149 (1988).

If for lack of jurisdiction, or any other reason, the joint obligor cannot be joined as a party to the action, then the trial court must determine, by considering the factors set forth in subsection (b) of O.C.G.A. § 9-11-19, if the necessary party is also an indispensable party without

whom the action should not proceed. *Turner Outdoor Adv., Ltd. v. Old S. Corp.*, 185 Ga. App. 582, 365 S.E.2d 149 (1988).

Cosureties who had set forth in different instruments their separate promises to pay the debt of their principal were not joint contractors or obligors, and one cosurety was not a necessary party in a creditor's action against the other cosurety to recover a debt. *Floyd Davis Sales, Inc. v. Central Mtg. Corp.*, 197 Ga. App. 532, 398 S.E.2d 820 (1990).

Attorney could not be held solely liable to a court reporting service for \$851.10, representing court reporting fees owed as the clients the attorney was representing at the time the services were rendered should have been joined in the litigation, pursuant to both O.C.G.A. §§ 9-11-14(a) and 9-11-19(a), given that: (1) the clients could have been liable to the attorney for all or part of the court reporting fees; and (2) the attorney's claim that the clients made partial payment for the court reporting services also rendered the clients necessary parties for adjudication of this dispute. *Free v. Lankford & Assocs., Inc.*, 284 Ga. App. 328, 643 S.E.2d 771 (2007), cert. denied, 2007 Ga. LEXIS 560 (Ga. 2007).

In action to enjoin expenditure of public funds, the entity or official appropriating the funds is an indispensable party. *Peacock v. Georgia Mun. Ass'n*, 247 Ga. 740, 279 S.E.2d 434 (1981).

Mother indispensable in action for wrongful death of child. — In a wrongful death action brought by a father for the death of his child, the mother was an indispensable party so that issues concerning her negligent supervision of the child could be litigated. *Winding River Village Condominium Ass'n v. Barnett*, 218 Ga. App. 35, 459 S.E.2d 569 (1995).

Insured parent was not an indispensable party in a declaratory judgment action by an insurer against the parent and other insureds to determine a coverage question since relief could be afforded to the current parties, dismissal would leave the insurer with uncertainty regarding its obligations to other insureds, and the parent could have avoided prejudice from nonjoinder by allowing service to be perfected. *Glover v. Allstate Ins.*

Co., 229 Ga. App. 235, 493 S.E.2d 612 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Injunctions, § 225. 59 Am. Jur. 2d, Parties, § 108 et seq.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 129 et seq, 212, 213. 67A C.J.S., Parties, §§ 28 et seq., 46 et seq.

ALR. — Joinder, in one action at law, of persons not jointly liable, one or the other of whom is liable to the plaintiff, 41 ALR 1223.

Joinder of grantees or transferees in different conveyances or transfers in suit to avoid them as in fraud of creditors, 69 ALR 229.

Right of one to notice and hearing motion to add him as a party, or substitute him for an original party, to pending action or proceeding, 69 ALR 1247.

Conflict of laws as to joinder of defendants, or as to the character of liability as joint or several, or joint and several, 77 ALR 1108.

Right of one brought into action as a party by original defendant upon the ground that he is or may be liable to the latter in respect of the matter in suit, to raise or contest issues with plaintiff, 78 ALR 327.

Right of defendant in action for personal injury or death to bring in a joint tort-feasor not made a party by plaintiff, 78 ALR 580; 132 ALR 1424.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability, 91 ALR 759.

Right under or in view of statute to join in tort action at law parties who are severally but not jointly liable to plaintiff, 94 ALR 539.

Right to join master and servant as defendants in action based on wrongful or negligent act of servant, where master's liability rests on doctrine of respondeat superior, 98 ALR 1057; 59 ALR2d 1066.

Principal as necessary or proper party to suit between cosureties or coguarantors for contribution, 99 ALR 640.

Pendency of representative or class suit as ground of abatement of subsequent

action by member of class represented, 101 ALR 574.

Concerted action or agreement to resist enforcement of a statute because of doubt as to its constitutionality or construction as ground for joinder of defendants in action or suit by governmental authorities, 107 ALR 670.

Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article, 119 ALR 1356.

Intervention or subsequent joinder of parties as affecting jurisdiction of federal court based upon diversity of citizenship, 134 ALR 335.

Remaindermen as necessary or proper parties to action or proceeding between life tenant and trustee, 136 ALR 696.

Judgment in favor of tort-feasor's insurer in an action by injured person as res judicata in similar action by another person injured in same accident, 137 ALR 1016.

Right of one to recover for personal injury to himself and for death of another killed in the same accident as giving rise to a single cause of action or to separate causes of action, 161 ALR 208.

Mortgagee or lienholder as a proper or necessary party to suit in respect of contract for sale of mortgaged property, 164 ALR 1044.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge, 1 ALR2d 160.

Joinder as defendants, in tort action based on condition of sidewalk or highway of municipal corporation and abutting property owner or occupant, 15 ALR2d 1293.

Appealability of order with respect to or motion for joinder of additional parties, 16 ALR2d 1023.

Joinder of insurer and insured under policy of compulsory indemnity or liability insurance in action by injured third person, 20 ALR2d 1097.

Corporation as necessary or proper

party defendant in proceedings to determine validity of election or officer, 21 ALR2d 1048.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 ALR2d 395.

Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom article was procured, 24 ALR2d 913.

One party to intended sale of land as necessary or indispensable defendant in action by the other party to recover deposit from broker or agent, 33 ALR2d 1090.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

Spouse of living co-owner of interest in property as necessary or proper party to partition action, 57 ALR2d 1166.

Right to join master and servant as

defendants in tort action based on respondeat superior, 59 ALR2d 1066.

Diversity of citizenship, for purposes of federal jurisdiction, in stockholders' derivative action, 68 ALR2d 824.

Waiver of, by failure to promptly raise, objection to splitting cause of action, 40 ALR3d 108.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation, 63 ALR3d 373.

Propriety of state court class action by holders of bonds against indenture trustee, 73 ALR3d 880.

Necessary or proper parties to suit or proceeding to establish private boundary line, 73 ALR3d 948.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

Venue of wrongful death action, 58 ALR5th 535.

9-11-20. Permissive joinder of parties.

(a) **Permissive joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more of the defendants according to their respective liabilities.

(b) **Separate trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him and may order separate trials or make other orders to prevent delay or prejudice. (Ga. L. 1966, p. 609, § 20.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 20, see 28 U.S.C.

Law reviews. — For comment advo-

cating joinder of insured and insurer in the same action in Georgia, in light of *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), see 21 Mercer L. Rev. 351 (1969).

JUDICIAL DECISIONS

Subsection (b) of O.C.G.A. § 9-11-20 has little significance, aside from emphasizing the availability of separate trials, inasmuch as the power granted the court therein also is provided by the much broader grant of discretion set forth in O.C.G.A. § 9-11-42(b). *Vitner v. Funk*, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Constitutional venue provisions may not be altered or changed by the legislature or the courts; hence, adoption of procedural devices for adjudicating claims of various parties in the same action does not effect a change in the venue requirements of the Constitution. *Haley v. Citizens & S. Nat'l Bank*, 141 Ga. App. 13, 232 S.E.2d 362 (1977).

Essentially independent claim must satisfy venue requirements. — If claim asserted against the codefendants or the third parties is essentially independent, rather than one ancillary to the main action, it must satisfy within itself the constitutional venue requirements. *Southern Guar. Ins. Co. v. Johnson*, 126 Ga. App. 134, 190 S.E.2d 136 (1972).

Indispensable prerequisite to joining a nonresident in an equity suit is a prayer for substantial equitable relief which is common to the resident and non-resident defendants. *Madray v. Ogden*, 225 Ga. 806, 171 S.E.2d 560 (1969).

Joinder is at plaintiff's option; joinder cannot be demanded as a matter of right by the defendant. *North Carolina Nat'l Bank v. Peoples Bank*, 127 Ga. App. 372, 193 S.E.2d 571 (1972), *aff'd*, 230 Ga. 389, 197 S.E.2d 352 (1973).

One is not required to join all joint tortfeasors in one suit to recover the damage sustained, and there is no right on the part of one joint tortfeasor who is sued for the joint tort to compel the plaintiff to bring in other tortfeasors. *North Carolina Nat'l Bank v. Peoples Bank*, 127 Ga. App. 372, 193 S.E.2d 571 (1972), *aff'd*, 230 Ga. 389, 197 S.E.2d 352 (1973).

Permissive joinder rule will not allow defendant tortfeasor to join joint tortfeasor without plaintiff's consent when the alleged joint tortfeasor objects to joinder. *Freeman v. Low X-Ray Corp.*, 130 Ga. App. 856, 204 S.E.2d 803 (1974).

Joinder of successive tortfeasors not permitted. — After the plaintiff was injured in two separate motor vehicle accidents four months apart, joinder in one action of the owners of the vehicles involved was improper since the defendants were not joint, but successive tortfeasors; the two accidents were insufficiently connected to constitute a "series of occurrences" giving rise to the plaintiff's claims. *Brinks, Inc. v. Robinson*, 215 Ga. App. 865, 452 S.E.2d 788 (1994); *Ferguson v. Carver*, 257 Ga. App. 849, 572 S.E.2d 700 (2002).

Joinder of claims arising out of "similar" transactions not authorized. — Fact that evidence of a similar transaction is admissible does not authorize joinder of claims involving the similar transaction. *Howard Motor Co. v. Swint*, 214 Ga. App. 682, 448 S.E.2d 713 (1994).

Because the numerous claims involving the various plaintiffs did not arise out of the same transaction, occurrence, or series of transactions or occurrences, but the claims were merely similar, involving common questions of law and fact, and thus could have been consolidated in accordance with O.C.G.A. § 9-11-42(a), the trial court erred in denying the defendants' motion to sever those claims. *Lincoln Elec. Co. v. Gaither*, 286 Ga. App. 558, 649 S.E.2d 823 (2007).

Rule against apportionment of damages among tortfeasors. — Georgia follows common-law rule against apportionment of damages among joint and several tortfeasors, notwithstanding the language of subsection (a) of this section, except when the statute law sanctions such apportionment in cases involving trespasses. *Craven v. Allen*, 118 Ga. App. 462, 164 S.E.2d 358 (1968).

Joinder of tort and contract actions permitted. — There is now no inhibition to the joinder of actions *ex contractu* and those *ex delicto*. *Continental Ins. Co. v. Mercer*, 130 Ga. App. 339, 203 S.E.2d 297 (1973).

Fraudulent misjoinder did not occur. — In a removed action seeking a declaration by former distributors as to the enforceability of non-compete and non-solicitation provisions in their respec-

tive distributorship agreements, a non-diverse corporation was not fraudulently misjoined under Fed. R. Civ. P. 20 or O.C.G.A. § 9-11-20(a), warranting a remand pursuant to 28 U.S.C. § 1447, because the court could not say with certainty that its claims did not arise out of the same series of transactions. *Campbell v. Quixtar, Inc.*, No. 2:08-CV-0045-RWS, 2008 U.S. Dist. LEXIS 46507 (N.D. Ga. June 13, 2008).

Cited in *Peacock Constr. Co. v. Turner Concrete, Inc.*, 116 Ga. App. 822, 159 S.E.2d 114 (1967); *New Orleans & N.E.R.R. v. Pioneer Plastics Corp.*, 224 Ga. 228, 161 S.E.2d 294 (1968); *Bloodworth v. Bloodworth*, 225 Ga. 379, 169 S.E.2d 150 (1969); *Elliott v. Leavitt*, 122 Ga. App. 622, 178 S.E.2d 268 (1970); *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 183 S.E.2d 586 (1971); *Gill v. Myrick*, 228 Ga. 253, 185 S.E.2d 72 (1971); *Gamble v. Reeves Transp. Co.*, 126 Ga. App. 161, 190 S.E.2d 95 (1972); *Bibb County v. McDaniel*, 127 Ga. App. 129, 192 S.E.2d 544 (1972); *Karlan v. Enloe*, 129 Ga. App. 1, 198 S.E.2d 331 (1973); *Decker v. Hope*, 129 Ga. App. 553, 200 S.E.2d 290 (1973);

Atlanta Air Fleet, Inc. v. Insurance Co. of N. Am., 130 Ga. App. 15, 202 S.E.2d 192 (1973); *Coop Mtg. Invs. Assocs. v. Pendley*, 134 Ga. App. 236, 214 S.E.2d 572 (1975); *City of Claxton v. Claxton Poultry Co.*, 134 Ga. App. 679, 215 S.E.2d 718 (1975); *Georgia Ports Auth. v. Central of Ga. Ry.*, 135 Ga. App. 859, 219 S.E.2d 467 (1975); *Pendley v. Hunter*, 138 Ga. App. 864, 227 S.E.2d 857 (1976); *C & S Land, Transp. & Dev. Corp. v. Grubbs*, 141 Ga. App. 393, 233 S.E.2d 486 (1977); *Bernath v. Malloy*, 238 Ga. 584, 234 S.E.2d 502 (1977); *Farmers Mut. Exch. of Baxley, Inc. v. Dixon*, 146 Ga. App. 663, 247 S.E.2d 124 (1978); *Commercial Union Ins. Co. v. Ed V. Collins Contracting, Inc.*, 147 Ga. App. 183, 248 S.E.2d 220 (1978); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 249 Ga. 662, 293 S.E.2d 331 (1982); *Grissett v. Wilson*, 181 Ga. App. 727, 353 S.E.2d 621 (1987); *Washburn v. Sardi's Restaurants*, 191 Ga. App. 307, 381 S.E.2d 750 (1989); *Harper v. DOT*, 195 Ga. App. 602, 394 S.E.2d 398 (1990); *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007); *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 755 S.E.2d 683 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parties, §§ 1, 5, 6, 124 et seq. 75 Am. Jur. 2d, Trial, §§ 92, 93.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 129 et seq. 67A C.J.S., Parties, § 36 et seq. 88 C.J.S., Trial, § 21 et seq.

ALR. — Right of husband and wife to maintain joint action for wrongs directly affecting both arising from same act, 25 ALR 743.

Right to enjoin enforcement of illegal tax, local assessment, or license fee, upon joinder of several affected thereby, 32 ALR 1266; 156 ALR 319.

Joinder of grantees or transferees in different conveyances or transfers in suit to avoid them as in fraud of creditors, 69 ALR 229.

Right of one to notice and hearing on motion to add him as a party, or substitute him for an original party, to pending action or proceeding, 69 ALR 1247.

Right of one brought into action as a party by original defendant upon the

ground that he is or may be liable to the latter in respect of the matter in suit, to raise or contest issues with plaintiff, 78 ALR 327.

Right of defendant in action for personal injury or death to bring in a joint tort-feasor not made a party by plaintiff, 78 ALR 580; 132 ALR 1424.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability, 91 ALR 759.

Intervention or subsequent joinder of parties as affecting jurisdiction of federal court based upon diversity of citizenship, 134 ALR 335.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge, 1 ALR2d 160.

Joinder as defendants, in tort action based on condition of sidewalk or highway, of municipal corporation and abutting property owner or occupant, 15 ALR2d 1293.

Appealability of order with respect to motion for joinder of additional parties, 16 ALR2d 1023.

Joinder of insurer and insured under policy of compulsory indemnity or liability insurance in action by injured third person, 20 ALR2d 1097.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 ALR2d 395.

Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom article was procured, 24 ALR2d 913.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 ALR2d 409.

Joinder of cause of action for pain and suffering of decedent with cause of action for wrongful death, 35 ALR2d 1377.

Joinder, in injunction action to restrain or abate nuisance, of persons contributing thereto through separate and independent acts, 45 ALR2d 1284.

Diversity of citizenship, for purposes of federal jurisdiction, in stockholders' derivative action, 68 ALR2d 824.

Intervenor's right to disqualify judge, 92 ALR2d 1110.

Right of plaintiff suing jointly with others to separate trial or order of severance, 99 ALR2d 670.

Contribution or indemnity between joint tort-feasors on basis of relative fault, 53 ALR3d 184.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation, 63 ALR3d 373.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

9-11-21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately. (Ga. L. 1966, p. 609, § 21.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 21, see 28 U.S.C.

Law reviews. — For article surveying

Georgia cases in the area of trial practice and procedure from June 1979 through May 1980, see 32 Mercer L. Rev. 225 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ADDING OR DROPPING PARTIES
MISNOMERS

General Consideration

Purpose of this section is to give relief to a plaintiff who sues too many or too few parties; the statute was not intended to correct the mistake of suing the wrong party. *Lamas Co. v. Baldwin*, 120 Ga. App. 149, 169 S.E.2d 638 (1969), later appeal, 140 Ga. App. 37, 230 S.E.2d 13 (1976).

Procedural nature of section. —

This section concerns misjoinder and nonjoinder of parties, and merely provides a procedural method to cure joinder errors. *Freeman v. Low X-Ray Corp.*, 130 Ga. App. 856, 204 S.E.2d 803 (1974).

Substantive correctness of joinder is to be tested under other pertinent rules including Ga. L. 1966, p. 609, § 19 (see now O.C.G.A. § 9-11-19). *Freeman v.*

General Consideration (Cont'd)

Low X-Ray Corp., 130 Ga. App. 856, 204 S.E.2d 803 (1974).

Discretion to realign parties. — Trial court has the discretion, “at any stage of the action and on such terms as are just,” to realign the parties. *Cawthon v. Waco Fire & Cas. Ins. Co.*, 259 Ga. 632, 386 S.E.2d 32 (1989).

Trial court did not abuse the court’s broad discretion in realigning two parties, plaintiffs in the consolidated third-party action as parties plaintiff for the purpose of allocating peremptory challenges. *Naimat v. Shelbyville Bottling Co.*, 240 Ga. App. 693, 524 S.E.2d 749 (1999).

Trial court did not err under O.C.G.A. § 9-11-21 in realigning the parties to cause the husband, who initially filed the divorce action, to be the defendant and to cause the wife to be the plaintiff; the wife’s burden of proof was significantly heavier than the husband’s, as the wife had the burden on a claim of fraudulent transfers and on requests for alimony, adultery, and attorney’s fees, so the wife was entitled to the procedural rights of a plaintiff, such as those rights to opening and closing statements granted under O.C.G.A. § 9-10-186. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

Distinction between O.C.G.A. §§ 9-11-21 and 9-11-42(b). — Severance under O.C.G.A. § 9-11-21 may be principally directed to the separation of claims within multicclaim litigation because of the peculiar relationship or status of parties with respect to particular claims. O.C.G.A. § 9-11-42(b), on the other hand, appears to be devoted to the convenience of adjudication, the avoidance of prejudice and the interests of expedition and economy as dictated by the characteristics and elements of proof of the claims themselves. *Vitner v. Funk*, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Statute makes no distinction as to parties plaintiff and parties defendant. *Paine v. Thomas*, 228 Ga. 519, 186 S.E.2d 737 (1972).

Substitution of parties not authorized by statute. — Substitution of a party is not authorized by provisions of Ga. L. 1969, p. 979, § 1 (see now O.C.G.A.

§ 9-11-14) regarding bringing in a third party, or by provisions of Ga. L. 1966, p. 609, § 21 (see now O.C.G.A. § 9-11-21) regarding adding or dropping of parties. *Nelson v. Sing Oil Co.*, 122 Ga. App. 19, 176 S.E.2d 227 (1970).

Improper joinder of joint tort-feasor not authorized hereunder.

— Ga. L. 1966, p. 609, § 21 (see now O.C.G.A. § 9-11-21) provides no authority for a court’s order that another party be joined as a joint tort-feasor when such joinder is incorrect under Ga. L., p. 689, § 7 (see now O.C.G.A. § 9-11-19). *Freeman v. Low X-Ray Corp.*, 130 Ga. App. 856, 204 S.E.2d 803 (1974).

Failure to name the proper parties is an amendable defect, correctable by the parties or upon the court’s own motion. *Hanson v. Wilson*, 257 Ga. 5, 354 S.E.2d 126 (1987).

When the individual members of a city board of education were purportedly parties to an action by amendment and by acknowledgment of service, a trial court’s order of substitution was required to make the proper defendant, a city school district, a party substituted in their place; accordingly, the plaintiff’s attempt to name the school district a defendant by mere amendment was ineffective and the school district was therefore never served as required by statute. *Foskey v. Vidalia City Sch.*, 258 Ga. App. 298, 574 S.E.2d 367 (2002).

New defendant must be served. — While O.C.G.A. § 9-11-15(a), in conjunction with O.C.G.A. § 9-11-21, is authority for a trial court to grant a motion to add a party to a pending action, the granting of such a motion does not dispense with the requirement that a new defendant be served. *Gaskins v. A.B.C. Drug Co.*, 183 Ga. App. 518, 359 S.E.2d 364 (1987).

Party added for limited purposes not governed by cross-claim provisions. — When a party is added by the court for limited purposes (such as to protect certain funds) and has not been designated a plaintiff or defendant by the court, the provisions of O.C.G.A. § 9-11-13 governing cross-claims do not apply to that party. *Spivey v. Rogers*, 173 Ga. App. 233, 326 S.E.2d 227 (1984).

When a third-party defendant had not been served as a party to the main action, there could be no judgment en-

tered in the main action by the trial court against the third-party defendant. *Stone Mountain Aviation, Inc. v. Rollins Leasing Corp.*, 174 Ga. App. 35, 329 S.E.2d 247 (1985); *CMT Inv. Co. v. Automated Graphics Unlimited, Inc.*, 175 Ga. App. 353, 333 S.E.2d 196 (1985).

Order of service in habeas corpus proceeding. — In a habeas corpus proceeding in which a father seeks to regain custody of the minor children, who had previously been awarded to the mother in a divorce action, in which the writ is directed against the mother's parents, when no service has been had on the mother, the trial judge has the authority to pass an order for service upon her. *Nichols v. Love*, 227 Ga. 659, 182 S.E.2d 439 (1971).

Cited in *Waldrop v. Bettis*, 223 Ga. 715, 157 S.E.2d 870 (1967); *Peacock Constr. Co. v. Turner Concrete, Inc.*, 116 Ga. App. 822, 159 S.E.2d 114 (1967); *Smith v. Merchants & Farmers Bank*, 226 Ga. 715, 177 S.E.2d 249 (1970); *Leon Inv. Co. v. Independent Life & Accident Ins. Co.*, 123 Ga. App. 668, 182 S.E.2d 151 (1971); *Crews v. Blake*, 52 F.R.D. 106 (S.D. Ga. 1971); *King v. King*, 228 Ga. 818, 188 S.E.2d 502 (1972); *Atlanta Air Fleet, Inc. v. Insurance Co. of N. Am.*, 130 Ga. App. 15, 202 S.E.2d 192 (1973); *Steenhuis v. Todd's Constr. Co.*, 231 Ga. 709, 203 S.E.2d 530 (1974); *Southern Mut. Inv. Corp. v. Thornton*, 131 Ga. App. 765, 206 S.E.2d 846 (1974); *Gray v. Hall*, 233 Ga. 244, 210 S.E.2d 766 (1974); *Jahncke Serv., Inc. v. Department of Transp.*, 134 Ga. App. 106, 213 S.E.2d 150 (1975); *S.D.H. Co. v. Stewart*, 135 Ga. App. 505, 218 S.E.2d 268 (1975); *Barnum v. Martin*, 135 Ga. App. 712, 219 S.E.2d 341 (1975); *Mathews v. Brown*, 235 Ga. 454, 219 S.E.2d 701 (1975); *A.H. Robins Co. v. Sullivan*, 136 Ga. App. 533, 221 S.E.2d 697 (1975); *Vaughn v. Collum*, 136 Ga. App. 677, 222 S.E.2d 37 (1975); *Phillips v. Williams*, 137 Ga. App. 578, 224 S.E.2d 515 (1976); *Pendley v. Hunter*, 138 Ga. App. 864, 227 S.E.2d 857 (1976); *Thomas v. Jackson*, 238 Ga. 90, 231 S.E.2d 50 (1976); *Jesup Carpet Factory Outlet, Inc. v. Ken Carpets of LaGrange, Inc.*, 142 Ga. App. 301, 235 S.E.2d 684 (1977); *Seymour v. Presley*, 239 Ga. 572, 238 S.E.2d 347 (1977); *Diaz v. First Nat'l Bank*, 144

Ga. App. 582, 241 S.E.2d 467 (1978); *Star Jewelers, Inc. v. Durham*, 147 Ga. App. 68, 248 S.E.2d 51 (1978); *Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals*, 147 Ga. App. 128, 248 S.E.2d 196 (1978); *C & S Land, Transp. & Dev. Corp. v. Yarbrough*, 153 Ga. App. 644, 266 S.E.2d 508 (1980); *Unicover, Inc. v. East India Trading Co.*, 154 Ga. App. 161, 267 S.E.2d 786 (1980); *Deller v. Smith*, 250 Ga. 157, 296 S.E.2d 49 (1982); *Horne v. Carswell*, 167 Ga. App. 229, 306 S.E.2d 94 (1983); *Dover Place Apts. v. A & M Plumbing & Heating Co.*, 167 Ga. App. 732, 307 S.E.2d 530 (1983); *Ketcham v. Franklyn Gesner Fine Paintings, Inc.*, 169 Ga. App. 329, 312 S.E.2d 639 (1983); *Estate of Thurman v. Dodaro*, 169 Ga. App. 531, 313 S.E.2d 722 (1984); *Franklyn Gesner Fine Paintings, Inc. v. Ketcham*, 252 Ga. 537, 314 S.E.2d 903 (1984); *Strauss Fuchs Org., Inc. v. LaFitte Invs., Ltd.*, 177 Ga. App. 891, 341 S.E.2d 873 (1986); *Maitlen v. Derst*, 178 Ga. App. 305, 342 S.E.2d 777 (1986); *Reed v. Adventist Health Systems/Sunbelt*, 181 Ga. App. 750, 353 S.E.2d 523 (1987); *Republic Ins. Co. v. Martin*, 182 Ga. App. 390, 355 S.E.2d 694 (1987); *Memorial Medical Ctr., Inc. v. Moore*, 184 Ga. App. 176, 361 S.E.2d 49 (1987); *Washburn v. Sardi's Restaurants*, 191 Ga. App. 307, 381 S.E.2d 750 (1989); *Harper v. DOT*, 195 Ga. App. 602, 394 S.E.2d 398 (1990); *Utica Mut. Ins. Co. v. Chasen*, 195 Ga. App. 875, 395 S.E.2d 40 (1990); *Smitherman v. Mary House Ministries, Inc.*, 200 Ga. App. 116, 407 S.E.2d 58 (1991); *Robinson v. Georgia Hous. & Fin. Auth.*, 244 Ga. App. 653, 536 S.E.2d 548 (2000); *Morton v. Fuller*, 264 Ga. App. 799, 592 S.E.2d 460 (2003); *M.J.E.S. Enters. v. Martin*, 265 Ga. App. 652, 595 S.E.2d 367 (2004); *Bobick v. Cmty. & S. Bank*, 321 Ga. App. 855, 743 S.E.2d 518 (2013).

Adding or Dropping Parties

Section 9-11-15(a) in pari materia with this section. — When a party seeks to add a new party by amendment, Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15(a)) must be read in pari materia with Ga. L. 1966, p. 609, § 21 (see now O.C.G.A. § 9-11-21), which allows dropping and adding of parties only by order of the court on motion of any party. *Clover*

Adding or Dropping Parties (Cont'd)

Realty Co. v. Todd, 237 Ga. 821, 229 S.E.2d 649 (1976), cert. denied, 198 Ga. App. 898, 400 S.E.2d 388 (1991); Slater v. Brigadier Homes, Inc., 198 Ga. App. 67, 400 S.E.2d 338 (1990).

Court order is required to add or drop parties under O.C.G.A. § 9-11-21, and even the liberal amendment provisions of O.C.G.A. § 9-11-15 are limited by this requirement. Young v. Rider, 208 Ga. App. 147, 430 S.E.2d 117 (1993).

In a personal injury action, and by reading O.C.G.A. § 9-11-15(a) in pari materia with O.C.G.A. § 9-11-21, because a plaintiff sued two parties, but substituted only one, the partnership originally sued was not required to file an answer absent an order from the court to do so, and hence could not be found in default; as a result, the trial court correctly found a proper case was made for the default to be opened. Marwede v. EQR/Lincoln L.P., 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

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).

Section inapplicable when substitutions named defendant for “John Doe.” — O.C.G.A. § 9-11-21 does not apply when the plaintiff seeks to substitute a named defendant for a “John Doe”; the applicable procedure is that set forth in O.C.G.A. § 9-11-15(c), by which the trial court determines whether the amended complaint relates back to a filing within the statute of limitations. Bishop v. Farhat, 227 Ga. App. 201, 489 S.E.2d 323 (1997).

Although a borrower failed to obtain the state court’s leave before filing a third amended complaint, as required by O.C.G.A. § 9-11-21, the amended complaint was not ineffective to add a

non-diverse attorney and law firm, and the federal district court was able to consider the attorney and law firm in determining the existence of diversity jurisdiction for purposes of the borrower’s motion for remand under 28 U.S.C. § 1447; because the attorney and law firm were substituted for John Does named in the original complaint, O.C.G.A. § 9-11-21 did not apply; rather, O.C.G.A. § 9-11-15(c), which allowed for the substitution by amendment of a John Doe without the state court’s leave applied. Peachtree/Stratford, L.P. v. Phoenix Home Life Ins. Co., No. 1:06-CV-0514-RWS, 2006 U.S. Dist. LEXIS 28840 (N.D. Ga. May 2, 2006).

Parties may be dropped or added by order of court, on motion of any party or of the court’s own initiative, at any stage of the action and on such terms as are just. This includes appeal. Guhl v. Tuggle, 242 Ga. 412, 249 S.E.2d 219 (1978); Zappa v. Automotive Precision Mach., Inc., 205 Ga. App. 584, 423 S.E.2d 286 (1992); Altama Delta Corp. v. Howell, 225 Ga. App. 78, 483 S.E.2d 127 (1997).

In order for an additional party to be added to an existing suit by amendment pursuant to O.C.G.A. § 9-11-15, leave of court must first be sought and obtained pursuant to O.C.G.A. § 9-11-21. Among the factors to be considered by the trial court in determining whether to allow the amendment are whether the new party will be prejudiced thereby and whether the movant has some excuse or justification for having failed to name and serve the new party previously. Aircraft Radio Systems, Inc. v. Von Schlegell, 168 Ga. App. 109, 308 S.E.2d 211 (1983).

O.C.G.A. § 9-11-21 permits the court to add parties on the court’s own initiative, and this may be done at any stage in the proceedings. Black & White Constr. Co. v. Bolden Contractors, 187 Ga. App. 805, 371 S.E.2d 421 (1988).

Misjoinder of parties may be cured by amendment, by dropping or adding parties on motion of any party or on the court’s own motion. McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373 (1974).

Adding or dropping of parties requires exercise of discretion by the court. Humble Oil & Ref. Co. v. Fulcher,

128 Ga. App. 606, 197 S.E.2d 416 (1973); *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

When the court had not approved the dropping of certain defendants in a multi-party case before other defendants filed amendments to their answer asserting cross-claims against the former, the trial court erred by finding that the case had been dismissed as to the former defendants before the cross-claims were filed. *Manning v. Robertson*, 223 Ga. App. 139, 476 S.E.2d 889 (1996), overruling *Smithloff v. Benson*, 173 Ga. App. 870, 328 S.E.2d 759 (1985).

Plaintiff's attempted dismissal of one defendant was ineffective in the absence of a ruling by the trial court. *Flemister v. Hopko*, 230 Ga. App. 93, 495 S.E.2d 342 (1998).

Addition of party or change of status must be by leave of court. — Plaintiff may add a new party or change the status of one who is a third-party defendant by making one a party to the original complaint only by leave of court. *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).

Plaintiff must obtain leave of court for filing an amendment seeking to make a new party defendant, and obtain an order to that effect. *Pascoe Steel Corp. v. Turner County Bd. of Educ.*, 139 Ga. App. 87, 227 S.E.2d 887 (1976).

Trial court's denial of summary judgment to a hotel limited liability corporation (LLC) in a personal injury action by an injured patron was error as the action was originally brought against a different entity, the patron attempted to add the LLC and then dismissed that action and brought a new action after expiration of the limitations period under O.C.G.A. § 9-3-33 against the LLC based on the renewal statute pursuant to O.C.G.A. § 9-2-61, but the patron never sought or obtained court permission to add the LLC as a party, as required by O.C.G.A. §§ 9-11-15(a) and 9-11-21; as the amendment to add the LLC was more than a correction of a misnomer because the two named defendants were separate entities,

O.C.G.A. § 9-11-10(a) was inapplicable and leave of court was required in order to add the LLC. *Valdosta Hotel Props., LLC v. White*, 278 Ga. App. 206, 628 S.E.2d 642 (2006).

Marketing network properly removed the distributors' action under 28 U.S.C. §§ 1332 and 1441 because the case was not removable until a first amended complaint was filed adding substantially different claims and causing the likely amount in controversy to surpass the jurisdictional amount. Thus, removal was timely under 28 U.S.C. § 1446(b), and the adding of a non-diverse distributor as plaintiff was improper without a court order pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21, making the matter completely diverse. *Campbell v. Quixtar, Inc.*, No. 2:08-CV-0044-RWS, 2008 U.S. Dist. LEXIS 46567 (N.D. Ga. June 13, 2008).

Because the claimants never sought leave of court to add a former county commissioner as a party in the commissioner's individual capacity, any unilateral attempt by the claimants to amend the claimants' complaint in this regard through allegations in an appellate brief was ineffective under O.C.G.A. §§ 9-11-15 and 9-11-21. *Bd. of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

Trial court properly dismissed certain parties because no motion was filed pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21 to add the parties and no leave of court was granted to add the parties. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011), cert. denied, No. S12C0399, 2012 Ga. LEXIS 561 (Ga. 2012).

Trial court abuses the court's discretion to add a party if the party denies the addition of a party based on delay alone. *Shiver v. Norfolk-Southern Ry.*, 220 Ga. App. 483, 469 S.E.2d 769 (1996).

Because no mistake as to identity was demonstrated and since neither of two defendants was added prior to the expiration of the statute of limitation for malpractice, the trial court did not abuse the court's discretion in denying the motion to add parties or in denying reconsideration of that motion. *Deleo v. Mid-Towne Home Infusion, Inc.*, 244 Ga. App. 683, 536 S.E.2d 569 (2000).

Adding or Dropping Parties (Cont'd)

Addition of party authorized. — Trial court did not abuse the court's discretion in granting plaintiffs' eleventh-hour motion to amend and add the defendant as a party. *Little Tree, Inc. v. Fields*, 240 Ga. App. 12, 522 S.E.2d 509 (1999).

Addition of party not authorized. — In an injured party's direct action against an insurer, because the injured party failed to seek leave of court to add the insurer's insured as a party, and the relation back doctrine did not apply, the insurer and the insured were properly dismissed from the injured party's lawsuit. *Crane v. State Farm Ins. Co.*, 278 Ga. App. 655, 629 S.E.2d 424, cert. denied, 2006 Ga. LEXIS 544 (2006).

In an action for declaratory judgment filed by co-administrators and another against an individual who made a claim against an estate, the co-administrators' motion to add three new defendants was properly denied. Granting the motion would result in prejudice to the potential new defendants, who were not related to the individual and who had no reason to know that the defendants would be brought in as parties to the action; moreover, the co-administrators had been aware of the three and the potential claims against those three for many months. *Ellison v. Hill*, 288 Ga. App. 415, 654 S.E.2d 158 (2007), cert. denied, 2008 Ga. LEXIS 282 (Ga. 2008).

In a suit by appellants, a company and the company's president, against a law firm, the trial court properly denied a motion to add a partner as a party defendant under O.C.G.A. §§ 9-11-15(c) and 9-11-21 when the appellants claimed that the partner had violated the attorney-client privilege. Appellants did not assert that the partner ever personally represented the appellants or any related entities; accordingly, any attorney-privilege implicated in the fax would be that between the appellants and the law firm, and not between the appellants and the partner individually. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Trial court did not abuse the court's

discretion by denying a plaintiff's motion for leave to amend the complaint to substitute parties under O.C.G.A. § 9-11-21 as the plaintiff did not offer an acceptable excuse or justification for failing to name the proper parties that would warrant the conclusion that the trial court ruled inappropriately. *Riding v. Ellis*, 297 Ga. App. 740, 678 S.E.2d 178 (2009).

Trial court did not err in denying a motion to substitute parties made by plaintiffs in their negligence suit against a defendant for fire damage because the plaintiffs had known of the existence and potential liability of the corporation the plaintiffs sought to add as a party for more than five years, and the statute of limitations had run. *Barrs v. Acree*, 302 Ga. App. 521, 691 S.E.2d 575 (2010).

Intervention distinguished. — Intervention involves not a mistake in pleading but the injection of a third person uncontrolled by the parties; should an intervenor seek to litigate issues different from those already pending between the parties, to claim additional damages, or to raise additional defenses, the ability to raise these matters would be controlled by O.C.G.A. §§ 9-11-15(c) and 9-11-21. *AC Corp. v. Myree*, 221 Ga. App. 513, 471 S.E.2d 922 (1996).

Motion to add or drop parties must be timely; otherwise, there is no abuse of discretion to deny the motion. *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

Reasonable opportunity should be given to add any essential party in a case before that case is dismissed with prejudice for nonjoinder. *Gray v. Hall*, 233 Ga. 244, 210 S.E.2d 766 (1974).

Statute does not require that proposed new party be given notice of hearing to rule on motion for addition of such party. *Humble Oil & Ref. Co. v. Fulcher*, 128 Ga. App. 606, 197 S.E.2d 416 (1973).

Since statute of limitation had not run at the time plaintiffs filed the plaintiffs' first amendments adding a new party defendant it was within the trial court's discretion to grant later motions to amend, although filed after the statute of limitations had run, and have the amendments relate back to the date the original

complaints were filed since the occurrence, conduct, or transaction in the original pleadings were the same as that set forth in the amendments; the added party would not be prejudiced in maintaining its defense on the merits; and the added party knew or should have known that the actions would have been brought against it. *Bil-Jax, Inc. v. Scott*, 183 Ga. App. 516, 359 S.E.2d 362, cert. denied, 183 Ga. App. 905, 359 S.E.2d 362 (1987).

Answer to amendment adding party not required. — Construing the pertinent provisions of O.C.G.A. §§ 9-11-7, 9-11-8, 9-11-12, 9-11-15, and 9-11-21 in pari materia, it is clear that the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, authorizes the addition of parties, by order of the court, and that an “amended complaint” effecting such an addition does not require a responsive pleading, unless the trial court orders a reply thereto. *Chan v. W-East Trading Corp.*, 199 Ga. App. 76, 403 S.E.2d 840, cert. denied, 199 Ga. App. 905, 403 S.E.2d 840 (1991).

Voluntary dismissal without prejudice. — Claim did not remain pending after the plaintiff filed a voluntary dismissal without prejudice under O.C.G.A. § 9-11-41, although the party failed to move the court to drop the party pursuant to O.C.G.A. § 9-11-21. *Smith v. Memorial Medical Ctr., Inc.*, 208 Ga. App. 26, 430 S.E.2d 57 (1993).

Minor appellants who dropped out of an action, thereby dismissing the only claims the appellants had, took a voluntary dismissal of their actions which was effective without court order pursuant to O.C.G.A. § 9-11-41(a), rather than a dropping of parties requiring a court order pursuant to O.C.G.A. § 9-11-21 and thus their attempt to reinstate their actions could have been dismissed. *Young v. Rider*, 208 Ga. App. 147, 430 S.E.2d 117 (1993).

Plaintiff’s renewal action brought under the renewal statute, O.C.G.A. § 9-2-61(a), was timely because the six-month period was calculated not from the time the plaintiff dismissed some of the defendants, but from the date of the trial court’s order granting the voluntary dismissal without prejudice as to all but one of the defendants. Had the plaintiff dismissed all the defendants, no court

order would have been required, and the voluntary dismissal would have been effective. *Gresham v. Harris*, 329 Ga. App. 465, 765 S.E.2d 400 (2014).

Denial of summary judgment as implicit approval of amendment. — Although personal injury plaintiff never sought leave of court to add defendants, the trial court’s denial of patron-defendant’s motion for summary judgment, made on the ground that no motion for leave to amend was filed, amounted to an implicit approval of plaintiff’s amendment. *Good Ol’ Days Downtown, Inc. v. Yancey*, 209 Ga. App. 696, 434 S.E.2d 740 (1993).

Dismissal of party proper after settlement with plaintiff. — When plaintiffs, a worker and his wife, sued defendants, the owner, designer, and builder of a staircase and platform which fell on the worker, for personal injuries, and intervenors, the worker’s employer and its insurer, intervened to enforce a subrogation lien, the trial court did not abuse the court’s discretion by giving the court’s approval under O.C.G.A. § 9-11-21 to the plaintiffs’ dismissals of the builder and the designer over the intervenors’ objections after the plaintiffs settled with the builder and the designer because, although O.C.G.A. § 34-9-11.1(b) gave the employer and the insurer the right to intervene to enforce a subrogation lien, the statute did not allow them to take away plaintiffs’ power to direct their own lawsuit against the defendants or to settle with one or more of the defendants. *Int’l Maint. Corp. v. Inland Paper Bd. & Packaging, Inc.*, 256 Ga. App. 752, 569 S.E.2d 865 (2002).

Trial court did not err in not voluntarily dismissing the motorist and the passenger’s action, initially against the second possible driver and then against the first possible driver, as a motion to dismiss less than all the parties from an action, even while the case was on appeal, required that such action be done by order of the court, and the motorist and the passenger did not obtain such an order that would have made the attempted voluntary dismissals effective; accordingly, the first possible motorist and second possible motorist’s appeal of the denial of their sum-

Adding or Dropping Parties (Cont'd)

mary judgment motion was not moot. *Rosales v. Davis*, 260 Ga. App. 709, 580 S.E.2d 662 (2003).

Filing of duplicate complaint not an amendment adding a party. — Trial court erred in concluding that the filing of a duplicate complaint was an amendment to add a new party requiring the purchaser to file a motion under O.C.G.A. § 9-11-21 of the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, because the filing was not an amendment adding the home inspector as a party to the lawsuit; the inspector was named a defendant in the original filing and, at most, the duplicate filing was a vehicle for obtaining a summons for the home inspector. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Misnomers

Correction of misnomer. — When the real defendant has been properly

served, the plaintiff has the right to amend in order to correct a misnomer in the description of the defendant contained in the complaint; correction of a misnomer involves no substitution of parties and does not add a new and distinct party. *London Iron & Metal Co. v. Logan*, 133 Ga. App. 692, 212 S.E.2d 21 (1975).

Erroneous name of defendant may be amended to correct the defendant's name, even after the statute of limitations has run. *London Iron & Metal Co. v. Logan*, 133 Ga. App. 692, 212 S.E.2d 21 (1975).

Allowing the substitution of a corporation's correct name was not an abuse of discretion when opposing parties showed no harm to themselves. *Kelley v. R S & H of N.C., Inc.*, 197 Ga. App. 236, 398 S.E.2d 213 (1990).

Correction of a misnomer involves no substitution of parties and does not add a new and distinct party. *Abbott v. Gill*, 197 Ga. App. 245, 398 S.E.2d 225 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Injunctions, § 225. 59 Am. Jur. 2d, Parties, §§ 124 et seq., 371 et seq., 382 et seq. 75 Am. Jur. 2d, Trial, §§ 92, 93.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 205 et seq. 35B C.J.S., Federal Civil Procedure, §§ 802, 823. 67A C.J.S., Parties, § 143 et seq.

ALR. — Joinder, in one action at law, of persons not jointly liable, one or the other

of whom is liable to the plaintiff, 41 ALR 1223.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action, 56 ALR2d 1238.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation, 63 ALR3d 373.

9-11-22. Interpleader.

(a) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. This Code section supplements and does not in any way limit the joinder of parties permitted in Code Section 9-11-20.

(b) The remedy provided in this Code section is in addition to and in no way supersedes or limits the remedy of equitable interpleader provided for in Code Sections 23-3-90 through 23-3-92. (Ga. L. 1966, p. 609, § 22; Ga. L. 1967, p. 226, § 11.)

Cross references. — Form of complaint for interpleader, § 9-11-118. Form of counterclaim by defendant for interpleader, § 9-11-121. Procedure upon conflicting claims to goods in possession of bailee which are covered by document of title, § 11-7-603. Equitable interpleader, § 23-3-90 et seq.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 22, see 28 U.S.C.

Law reviews. — For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION MERIT OF CLAIMS

General Consideration

Purpose. — Only purpose of this section is to provide for the bringing in of additional parties in a law action in the one instance when there is a possibility of double liability as to a party defendant or plaintiff who is made a party to an already pending law action. *Alder v. Ormond*, 117 Ga. App. 600, 161 S.E.2d 435 (1968).

Purpose of this section is to bring in additional parties in an action at law in the one instance when there is a possibility of double liability as to a party plaintiff or defendant. *Midland Nat'l Life Ins. Co. v. Emerson*, 121 Ga. App. 427, 174 S.E.2d 211 (1970).

Technical rules no longer applicable. — Statute has broadened and liberalized rules relating to interpleader so as to render the technicalities formerly associated with the equitable remedy of a strict bill of interpleader no longer applicable to complaints tried hereunder. *Algernon Blair, Inc. v. Trust Co.*, 224 Ga. 118, 160 S.E.2d 395 (1968); *Stone v. Davis*, 242 Ga. 17, 247 S.E.2d 756 (1978).

Liberal construction. — Interpleader provisions are remedial in nature and should therefore be liberally construed in order that the provisions' utilitarian purposes may be best effectuated. *Algernon Blair, Inc. v. Trust Co.*, 224 Ga. 118, 160 S.E.2d 395 (1968).

Equitable interpleader is available as well as interpleader under former Code 1933, § 37-1503 et seq. (see now O.C.G.A. § 9-11-22). Interpleader actions may be instituted in this state in either strict equity practice under former Code 1933, § 37-1503 et seq. (see now O.C.G.A. § 23-3-90 et seq.) or under Ga. L. 1967, p. 266, § 11 (see now O.C.G.A. § 9-11-22). *Stone v. Davis*, 242 Ga. 17, 247 S.E.2d 756 (1978).

In order to invoke remedy of interpleader, stakeholder need only show that it is or may be exposed to double or multiple liability. *Kelly v. Citizens & S. Nat'l Bank*, 160 Ga. App. 405, 287 S.E.2d 343 (1981).

Stakeholder's good-faith fear of adverse claims determinative. — Right to interpleader should depend merely upon the stakeholder's good-faith fear of adverse claims, regardless of the merits of those claims on what the stakeholder bona fide believes the merits to be. *Algernon Blair, Inc. v. Trust Co.*, 224 Ga. 118, 160 S.E.2d 395 (1968); *Insurance Co. of N. Am. v. Citizens Bank*, 225 Ga. 347, 168 S.E.2d 578 (1969); *Gill v. Myrick*, 228 Ga. 253, 185 S.E.2d 72 (1971); *Kelly v. Citizens & S. Nat'l Bank*, 160 Ga. App. 405, 287 S.E.2d 343 (1981).

Summary judgment denied when claims were not adverse. — Successor trustee that brought an interpleader ac-

General Consideration (Cont'd)

tion against the original trustee and a broker, involving \$60,000 in compensation which the original trustee was entitled to under a court order, was not entitled to summary judgment. The claims of the two interpled parties were not adverse or competing. The original trustee only claimed compensation under the court order as a trustee, not in any other capacity, while the broker only claimed a fee as a broker. *Trust Co. Bank v. Citizens & S. Trust Co.*, 260 Ga. 124, 390 S.E.2d 589 (1990).

Use of interpleader does not affect constitutional venue provisions. — Use of interpleader does not effect a change of the provisions of the Constitution (Ga. Const. 1983, Art. VI, Sec. II) relating to the venue of civil cases. *Kelly v. Citizens & S. Nat'l Bank*, 160 Ga. App. 405, 287 S.E.2d 343 (1981).

Venue in an action where there is counterclaim, cross-claim, or third-party claim for interpleader is proper only in the county of residence where one of the claimants resides. *Kelly v. Citizens & S. Nat'l Bank*, 160 Ga. App. 405, 287 S.E.2d 343 (1981).

Extent that authorization of interpleader effects discharge from liability. — See *Thompson v. Bank of S.*, 172 Ga. App. 579, 323 S.E.2d 877 (1984).

When claims asserted against a broker were not based on the broker's status as a mere stakeholder of the funds in question, but on the broker's allegedly improper actions in transferring such funds out of the plaintiff's account without permission, the mere fact that the broker, after creating the controversy, disclaimed any personal interest in the funds and sought to interplead the funds in the broker's possession did not relieve the broker from liability for the broker's allegedly wrongful actions in transferring the funds without permission. *Glisson v. Freeman*, 243 Ga. App. 92, 532 S.E.2d 442 (2000).

Appealability of order. — An order which holds that interpleader is a viable remedy and which dismisses the instigating stakeholder is not directly appealable unless the trial court clearly directs the entry of final judgment under O.C.G.A. § 9-11-54(b). *Custom One-Hour Photo of*

Ga., Inc. v. Citizens & S. Bank, 179 Ga. App. 70, 345 S.E.2d 147 (1986).

Motion for judgment on pleadings properly treated as motion for summary judgment. — In an interpleader action involving a dispute over the payment of health insurance benefits, the trial court properly granted the hospital's motion for a judgment on the pleadings as there was no genuine issue of fact that the hospital was owed the amount for the medical expenses at issue and the trial court found that a purported settlement agreement between the employee's counsel and the hospital for less than the full amount was unenforceable as the agreement lacked consideration. The employee agreed to waive oral argument on all motions pending before the trial court and, therefore, acquiesced in the trial court's procedure of treating the hospital's motion for judgment on the pleadings as one for summary judgment, therefore, the trial court did not err in treating the hospital's motion as such without providing formal notice or in failing to hold a hearing on that motion. *Lamb v. Fulton-DeKalb Hosp. Auth.*, 297 Ga. App. 529, 677 S.E.2d 328 (2009).

Cited in *Bauknight v. Hanover Ins. Co.*, 122 Ga. App. 701, 178 S.E.2d 695 (1970); *Leon Inv. Co. v. Independent Life & Accident Ins. Co.*, 123 Ga. App. 668, 182 S.E.2d 151 (1971); *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973); *Farris v. United States*, 230 Ga. 862, 199 S.E.2d 782 (1973); *C & S Land, Transp. & Dev. Corp. v. Grubbs*, 141 Ga. App. 393, 233 S.E.2d 486 (1977); *Lambert v. Allen*, 146 Ga. App. 617, 247 S.E.2d 200 (1978); *Johnson v. Mayor of Carrollton*, 24 Ga. 173, 288 S.E.2d 565 (1982); *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 755 S.E.2d 683 (2014).

Merit of Claims

Relative merit of claims not determinative. — In the very nature of interpleader, when the total claims presented to the stakeholder exceed the amount of the fund, some claims will be found either to be lacking in merit or to be subordinate, but the fact that this appears on the face of the stakeholder's petition should not operate to deny the stake-

holder the relief the stakeholder seeks, that is, relief from the threat of vexatious multiple litigation. *Algernon Blair, Inc. v. Trust Co.*, 224 Ga. 118, 160 S.E.2d 395 (1968); *Insurance Co. of N. Am. v. Citizens Bank*, 225 Ga. 347, 168 S.E.2d 578 (1969); *Gill v. Myrick*, 228 Ga. 253, 185 S.E.2d 72 (1971).

While the assertions of one or more of the claimants will be lacking in merit, that fact alone does not relieve a stakeholder of the substantial risk of vexatious litigation. *Algernon Blair, Inc. v. Trust Co.*, 224 Ga. 118, 160 S.E.2d 395 (1968).

Complainant's offer to deposit disputed fund into the registry of the court and to be discharged from the litigation should not be denied merely because claim advanced by one of the claimants is weak or rests on tenuous grounds. *Algernon Blair, Inc. v. Trust Co.*, 224 Ga. 118, 160 S.E.2d 395 (1968).

Sufficiency of a counterclaim for interpleader does not turn on whether there is any merit in the claims asserted against the stakeholder. *Insurance Co. of N. Am. v. Citizens Bank*, 225 Ga. 347, 168 S.E.2d 578 (1969).

Right to interpleader depends upon the stakeholder's good faith fear of adverse claims, regardless of the merits of those claims or what the stakeholder in good faith believes the merits to be; thus, a stakeholder's offer to deposit disputed funds into the registry of the court in order to be discharged from potential litigation should not be denied merely because a claimant's case is weak or rests on tenuous grounds. *Gilbert v. Montlick & Assocs., P.C.*, 248 Ga. App. 535, 546 S.E.2d 895 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 44B Am. Jur. 2d, Interpleader, §§ 1, 2, 4, 5.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 127, 367. 48 C.J.S., Interpleader, §§ 6, 17. 67A C.J.S., Parties, §§ 63, 64.

ALR. — Right of judgment debtor to interplead, 48 ALR 966.

Right of escrow holder to interplead conflicting claimants, 60 ALR 638.

Right of bank to interplead rival claimants to deposit, 60 ALR 719.

Right of owner to maintain bill of interpleader against contractor and lien claimants and others in respect of fund arising from construction contracts, 70 ALR 515.

Interpleader where one claimant asserts an adverse and paramount title, 97 ALR 996.

Warehouseman's right to interplead rival claimants to goods stored or their proceeds, 100 ALR 425.

When insurance company deemed to be a disinterested stakeholder for purposes of bill of interpleader, 108 ALR 267.

Right to interpleader by obligor in bond or other contract the obligation or benefit of which extends to a class, 108 ALR 1250.

Danger of being subjected to double liability in respect of the same obligation as ground for abatement of, or injunction against, action by one claimant pending an action, otherwise in personam, by a rival claimant, 115 ALR 346.

Bill of interpleader as affected by fact that same person, in different capacities, is both stakeholder and one of the rival claimants, 144 ALR 1174.

Right of trustee, executor, or administrator to maintain interpleader, 152 ALR 1122.

Insurance: facility of payment clause, 166 ALR 10.

Appealability of order with respect to motion for joinder of additional parties, 16 ALR2d 1023.

Corporation's right to interplead claimants to dividends, 46 ALR2d 980.

Allowance of attorneys' fees to party interpleading claimants to funds or property, 48 ALR2d 190.

Intervenor's right to disqualify judge, 92 ALR2d 1110.

Stakeholder's liability for loss of interpleaded funds after they leave stakeholder's control, 7 ALR5th 976.

9-11-23. Class actions.

(a) One or more members of a class may sue or be sued as representative parties on behalf of all only if:

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) There are questions of law or fact common to the class;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) The representative parties will fairly and adequately protect the interests of the class.

(b) An action may be maintained as a class action if the prerequisites of subsection (a) of this Code section are satisfied, and, in addition:

- (1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

- (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

- (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) The difficulties likely to be encountered in the management of a class action.

(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under paragraph (3) of subsection (b) of this Code section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(A) The court will exclude the member from the class if the member so requests by a specified date;

(B) The judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) Any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under paragraph (1) or (2) of subsection (b) of this Code section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph (3) of subsection (b) of this Code section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph (2) of subsection (b) of this Code section was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(A) An action may be brought or maintained as a class action with respect to particular issues; or

(B) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in

such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) Imposing conditions on the representative parties or on intervenors; and

(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.

The orders may be combined with other orders, and may be altered or amended by the court as may be desirable from time to time.

(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f)(1) After the commencement of an action in which claims or defenses are purported to be asserted on behalf of or against a class, the court shall hold a conference among all named parties to the action for the purpose of establishing a schedule for any discovery germane to the issue of whether the requested class should or should not be certified. At this conference, the court shall set a date for a hearing on the issue of class certification. Except for good cause shown, such hearing may not be set sooner than 90 days nor later than 180 days after the date on which the court issues its scheduling order pursuant to the conference. If evidence is presented by affidavit, the parties shall have an opportunity to cross-examine affiants as to such testimony offered by affidavit.

(2) Except for good cause shown, the court shall stay all discovery directed solely to the merits of the claims or defenses in the action until the court has issued its written decision regarding certification of the class.

(3) When deciding whether a requested class is to be certified, the court shall enter a written order addressing whether the factors required by this Code section for certification of a class have been met and specifying the findings of fact and conclusions of law on which the court has based its decision with regard to whether each such factor has been established. In so doing, the court may treat a factor as having been established if all parties to the action have so stipulated on the record.

(4) Nothing in this Code section shall affect, or be construed to affect, any provision of Code Section 9-11-12 or Code Section 9-11-56.

(g) A court's order certifying a class or refusing to certify a class shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action. The appellate courts shall expedite resolution of any appeals taken under this Code section. Such appeal may only be filed within 30 days of the order certifying or refusing to certify the class. During the pendency of any such appeal, the action in the trial court shall be stayed in all respects. (Ga. L. 1966, p. 609, § 23; Ga. L. 1989, p. 946, § 75; Ga. L. 1996, p. 1203, § 1; Ga. L. 2003, p. 820, § 3; Ga. L. 2005, p. 303, § 1/SB 19.)

Editor's notes. — Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act “shall apply to all civil actions filed on or after July 1, 2003.”

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 23, see 28 U.S.C.

Law reviews. — For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For article discussing class actions in Georgia, particularly in light of *Georgia Inv. Co. v. Norman*, 229 Ga. 160, 190 S.E.2d 48 (1972), see 24 Mercer L. Rev. 447 (1973). For article discussing the effect of the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) upon class actions, see 27 Mercer L. Rev. 1111 (1976). For article, “Mass Torts and Litigation Disasters,” see 20 Ga. L. Rev. 429 (1986). For article, “A Comment on Mass Torts and Litigation Disasters,” see 20 Ga. L. Rev. 455 (1986). For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U.L. Rev. 70 (1996). For article, “Class Action Law in Georgia: Emerging Trends in Litigation, Certification, and Settlement,” see 49 Mercer L. Rev. 39 (1997). For article, “When Reform is not Enough: Assuring More Than Merely ‘Adequate’ Representation in Class Actions,” see 38 Ga. L. Rev. 927 (2004). For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004). For article,

“The 2003 Amendment to the Georgia Class Action Statute: A New Day for Georgia Class Actions?,” see 10 Ga. St. B.J. 26 (No. 2, 2004). For article, “Class Actions,” see 56 Mercer L. Rev. 1219 (2005). For annual survey of class action law, see 57 Mercer L. Rev. 1031 (2006). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on insurance, see 61 Mercer L. Rev. 179 (2009). For annual survey of law on class actions, see 61 Mercer L. Rev. 1015 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, “Georgia’s New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation,” see 64 Mercer L. Rev. 1 (2012). For article, “Division of Labor: The Modernization of the Supreme Court of Georgia and Concomitant Workload Reduction Measures in the Court of Appeals,” see 30 Ga. St. U.L. Rev. 925 (2014).

For note discussing class actions under this Code section, see 11 Ga. L. Rev. 546 (1977). For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

For comment, “Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants,” see 40 Emory L.J. 611 (1991). For comment, “Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case,” see 40 Emory L.J. 665 (1991).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
 REPRESENTATION AND CERTIFICATION
 SECONDARY ACTION BY SHAREHOLDERS
 DISMISSAL OR COMPROMISE

General Consideration

Construed with other statutes. — Fact that class actions were authorized for identity fraud claims under O.C.G.A. § 16-9-130(a) did not obviate the need to comply with the requirements of O.C.G.A. § 9-11-23(b), such that class certification was properly denied in a former employee's suit alleging identity fraud and other matters due to the former employer's submission of subagent license applications without employee authorization; individualized issues regarding employee signatures and authorizations predominated over common issues. *Perez v. Atlanta Check Cashers, Inc.*, 302 Ga. App. 864, 692 S.E.2d 670 (2010).

Applicability to federal Class Action Fairness Act of 2005. — Remand was required because a customer sought certification under O.C.G.A. § 9-11-23(b)(2) of a class of Georgia customers of a bank that purchased benefits for which the customers were ineligible. Thus, the bank failed to meet the bank's burden under the Class Action Fairness Act of 2005 and 28 U.S.C. §§ 1332(d) and 1446 to show the amount in controversy satisfied the jurisdictional requirements, and there was no other basis for jurisdiction under 28 U.S.C. § 1453. *Thomas v. Bank of Am. Corp.*, No. 3:08-CV-68 (CDL), 2009 U.S. Dist. LEXIS 5404 (M.D. Ga. Jan. 12, 2009), *aff'd*, 570 F.3d 1280 (11th Cir. 2009).

Class actions at law or in equity. — Statute provides for class actions when the statute's requirements are met either at law or in equity depending upon the type of relief sought. *Herring v. Ferrell*, 234 Ga. 620, 216 S.E.2d 862 (1975).

Georgia insured, who had been specifically excluded from an Alabama class action, lacked standing to challenge the Alabama settlement, either in an individual capacity or a representative capacity; an

injunction that was granted at the insured's request was invalid as the insured lacked a legal right to relief and the insurers could not be held in contempt for violating the injunction. *Am. Med. Sec., Inc. v. Parker*, 279 Ga. 201, 612 S.E.2d 261 (2005).

Particularity required in specification of parties injured. — When, in an action brought by the plaintiffs for themselves and other condominium unit owners against the developers, contractors, and architects for the project, the trial court was faced with a failure of plaintiffs' counsel to obey an order of the court to furnish sufficient particularity in pleading in order to allow the court to determine if only particular unit owners were injured, how those owners were injured, and to what apparent extent were those owners injured, or whether indeed an entire class had suffered damages of a determinable and specific nature, the trial court was warranted in concluding that the pleaders could prove no set of facts in support of the pleaders' claim either as a class or as individuals which would entitle the pleaders to relief. *Graham v. Development Specialists, Inc.*, 180 Ga. App. 758, 350 S.E.2d 294 (1986).

Trial court erred in denying class certification to a facsimile machine owner who alleged a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, in the transmission of an unsolicited advertisement since the potential class included 73,500 members. *Hammond v. Carnett's, Inc.*, 266 Ga. App. 242, 596 S.E.2d 729 (2004).

Court's discretion in determining common issues among parties. — Trial court's decision that the landowners would not share common issues with other putative class members who voted for the amendment or did not protest the transfer fee at closing, and that litigation of the claims of other proposed class mem-

bers would involve other issues not relevant to the landowners' claim, was within the trial court's discretion. *Duffy v. Landings Ass'n*, 254 Ga. App. 506, 563 S.E.2d 174 (2002).

Judgment failed to describe class members. — In a class action litigation by a facsimile recipient against the sender, the trial court judgment in favor of the recipient did not comply with the statutory requirements because the judgment did not describe the members of the class; recipients who were excluded from the class had to be determined and excluded. *Am. Home Servs. v. A Fast Sign Co.*, 322 Ga. App. 791, 747 S.E.2d 205 (2013).

Court's failure to specify conditions met. — Despite the fact that it appeared from the record that a group of landowners raised several issues of fact common to all to support a nuisance claim, the trial court's order of certification was vacated, as the court failed to specify, either orally or in writing, whether each of the five prerequisites under O.C.G.A. § 9-11-23 was presented. *Griffin Indus., Inc. v. Green*, 280 Ga. App. 858, 635 S.E.2d 231 (2006).

Reliance on deposition excerpts in considering class certification motion proper. — In considering a motion for class certification, the trial court did not err in relying upon excerpts of deposition testimony attached to the motion; after asking the plaintiff to file the depositions, the defendant had not objected below to the plaintiff's failure to do so and had made no further effort to have them added to the record before the trial court issued the certification order, and case law specifically allowed a trial court to rely on deposition excerpts filed by a party in support of a motion. *Village Auto Ins. Co. v. Rush*, 286 Ga. App. 688, 649 S.E.2d 862 (2007), cert. denied, 2008 Ga. LEXIS 72 (Ga. 2008).

Fraud. — If fraud based upon oral misrepresentations, as opposed to written misrepresentations, is the gravamen of the complaint, the matter is not appropriate for class action treatment. This is so because of the necessity for individual proof of detrimental reliance. *Stevens v. Thomas*, 257 Ga. 645, 361 S.E.2d 800 (1987).

Addition of intervenor plaintiffs after entry of default judgment. — In a class action, when discovery of all persons in the class is required to be made of defendant and discovery is unduly delayed by failure of the defendant to comply with an order of the court, addition to intervenor plaintiffs, after imposition of authorized sanction of default judgment, is authorized in the discretion of the trial court. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Jurisdiction of appeals in class actions brought pursuant to this section is to be determined by the nature of the relief sought and the questions raised on appeal. *Herring v. Ferrell*, 234 Ga. 620, 216 S.E.2d 862 (1975).

Exhaustion of administrative remedies. — In a tax refund class action under O.C.G.A. § 48-5-380, the named attorneys satisfied the administrative exhaustion requirement for an entire class of attorneys; the named attorneys acted for the entire class pursuant to former O.C.G.A. § 9-11-23 by giving the City of Atlanta notice of the tax constitutionality claim by filing administrative and civil actions, and permitting recovery only to those attorneys with the foresight to have demanded a refund was untenable in a case such as the instant one that involved a matter of constitutional import and an unconstitutional ordinance that had been relied upon to improperly collect taxes. *Barnes v. City of Atlanta*, 281 Ga. 256, 637 S.E.2d 4 (2006).

Actions to validate and confirm hospital revenue anticipation certificates. — Statutory right, created in O.C.G.A. § 31-7-81(b), of private citizens to intervene in actions to validate and confirm hospital revenue anticipation certificates does not create a statutory class action. *Cheely v. State*, 165 Ga. App. 755, 302 S.E.2d 435 (1983).

Attorney fees. — Because the delay in giving the opt-out notice in the class action tax refund case was not prohibited by O.C.G.A. § 9-11-23 and did not prejudice the attorneys who were class members, requiring the attorneys to pay for the work of class counsel for the common benefit did not unduly burden the right to opt out. *Barnes v. City of Atlanta*, 281 Ga.

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256, 637 S.E.2d 4 (2006).

Challenge to certification order untimely. — Any challenge to the trial court's certification order was barred as untimely because, pursuant to O.C.G.A. § 9-11-23(g), if a private water system owner believed the order certifying the class was legally deficient, the owner had to file a separate appeal within 30 days after that order was entered; the owner could not wait until after entry of final judgment in the underlying case to raise such a challenge. *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Appellate review. — As a trial court certified a class of area residents who were evacuated after an accidental chemical release upon finding that the requirements of O.C.G.A. § 9-11-23(a) and (b)(3) were satisfied, rather than based upon a letter agreement regarding certification that the parties had previously entered into, review of the agreement was not warranted on appeal. *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 710 S.E.2d 569 (2011).

Cited in *Strickland v. Crutcher*, 229 Ga. 310, 191 S.E.2d 55 (1972); *North Carolina Nat'l Bank v. Peoples Bank*, 127 Ga. App. 372, 193 S.E.2d 571 (1972); *Mathews v. Massell*, 356 F. Supp. 291 (N.D. Ga. 1973); *Anderson v. Blackmon*, 232 Ga. 4, 205 S.E.2d 250 (1974); *Davis v. Ben O'Callaghan Co.*, 238 Ga. 218, 232 S.E.2d 53 (1977); *Rose Hall, Ltd. v. Holiday Inns, Inc.*, 146 Ga. App. 709, 247 S.E.2d 173 (1978); *Hasty v. Randall*, 152 Ga. App. 365, 262 S.E.2d 626 (1979); *Williams v. Cox Enters., Inc.*, 159 Ga. App. 333, 283 S.E.2d 367 (1981); *Lee v. Criterion Ins. Co.*, 659 F. Supp. 813 (S.D. Ga. 1987); *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 537 S.E.2d 468 (2000); *Garmon v. State*, 317 Ga. App. 634, 732 S.E.2d 289 (2012); *Sentinel Offender Svcs., LLC v. Glover*, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

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Factors as to certification. — Factors which the trial court must take into ac-

count in determining whether to certify a class action include: the number of class members; the financial ability of the plaintiff; and whether individual questions of law or fact as between the defendant and the individual class plaintiffs would yet predominate. *Ford Motor Credit Co. v. London*, 175 Ga. App. 33, 332 S.E.2d 345 (1985).

Class action is inappropriate when the resolution of individual questions plays too integral a part in the determination of liability, such as a suit on behalf of hospital patients to recover damages for the hospital's alleged failure to refund overpayments made by the patients for medical expenses incurred at the hospital, since resolution would be made only by examining each patient's account. *Winfrey v. Southwest Community Hosp.*, 184 Ga. App. 383, 361 S.E.2d 522, cert. denied, 184 Ga. App. 911, 361 S.E.2d 522 (1987).

Trial court abused the court's discretion in certifying a class without holding a hearing on a motion requesting a hearing as the court failed to comply with O.C.G.A. § 9-11-23, requiring the court to make findings of fact and conclusions of law that the prerequisites supporting class certification were met. *McDonald Oil Co. v. Cianocchi*, 285 Ga. App. 829, 648 S.E.2d 154 (2007).

Because the trial court erred in finding that the requirements of class certification under O.C.G.A. § 9-11-23 were moot, concluding that there was no merit to the action, the finding was reversed; further, the case was remanded based on the court's failure to satisfy the specific provisions of § 9-11-23(f)(3) and due to an improper reference to a pending motion for attorney fees under O.C.G.A. § 9-15-14 and unspecified potential conflicts of interest. *Gay v. B. H. Transfer Co.*, 287 Ga. App. 610, 652 S.E.2d 200 (2007).

In a suit challenging private probation services, the trial court's orders conditionally certifying class actions on behalf of misdemeanor probationers were reversed and the cases remanded to the trial court for reconsideration of the class certification issues in light of the Georgia Supreme Court's opinion and its requirement that the trial court carefully

consider issues of justiciability with respect to the scope of any class certified and the relief available to potential class members. *Sentinel Offender Services, LLC v. Glover*, 296 Ga. 315, 766 S.E.2d 456 (2014).

Former paragraph (a)(1) merely stated the rule of procedure that a class action may be brought when the right sought to be enforced is secondary; whether such a derivative right exists is a matter of substantive law. *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976).

First issue is not merits of claim. — In determining propriety of a class action, first issue to be resolved is not whether plaintiffs have stated a cause of action or may ultimately prevail on the merits, but whether requirements of this section have been met. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975); *IBM v. Kemp*, 244 Ga. App. 638, 536 S.E.2d 303 (2000).

Common character of right to be enforced. — Class action may be filed when character of right to be enforced is common, even though such right is neither joint, nor derivative, nor several and the object of the litigation is not the adjudication of claims which do or may affect specific property involved in the action. *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), rev'd on other grounds, 503 F.2d 1319 (5th Cir. 1974), cert. denied, 422 U.S. 1057, 95 S. Ct. 2680, 45 L. Ed. 2d 709 (1975).

Common questions involved and common relief sought. — Statute permits class actions when the rights of the alleged class are not derivative or joint rights, but are merely common in that there are common questions of law or fact involved and common relief is sought. *Georgia Inv. Co. v. Norman*, 229 Ga. 160, 190 S.E.2d 48 (1972).

When common questions of law and fact predominate, action is on behalf of purchasers from a common source, and common relief is sought, a class action is authorized. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Trial court properly certified a class consisting of all similarly situated bank-

rupt mortgagors who had been assessed inspection and attorney fees by a mortgagee without prior notice or approval by the bankruptcy court. Common questions of law—whether the mortgagee's security agreements gave it the right to engage in the conduct at issue—predominated over individual questions, the class members were similarly situated, and the members' claims were typical as the plaintiff mortgagor alleged that the mortgagee's conduct constituted breach of contract, fraud, theft, and conversion. *Liberty Lending Servs. v. Canada*, 293 Ga. App. 731, 668 S.E.2d 3 (2008).

Common facts make class certification possible. — Appellate court found that class certification was proper because common issues predominated over individual issues since the operation of a computer program concerning post-mortem interest was a common fact applicable to the entire class. *UNUM Life Ins. Co. of Am. v. Crutchfield*, 256 Ga. App. 582, 568 S.E.2d 767 (2002).

Trial court properly certified a group of faculty members, who were under contract, suing over the arbitrariness of the Board of Regents' differing classification of similar faculty, when there were common factual circumstances, legal issues, and factors relevant to each class member's damage claim. *Bd. of Regents of the Univ. Sys. v. Rux*, 260 Ga. App. 760, 580 S.E.2d 559 (2003).

As the trial court found on an undisputed record that every insurance policy issued by an insurer to a class of insureds in its credit insurance policies provided that the insurer would return the unearned premium if the debt was paid off before the policy period expired, an individual insured's claim for premiums, and the like claims of the represented class, were one and the same, and the trial court did not abuse the court's discretion in finding that the proposed class met the typicality requirement. *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 634 S.E.2d 123 (2006).

Commonality requirement met. — In an action filed under the Telephone Consumer Protection Act of 1991, specifically 47 U.S.C. § 227, when the proposed class explicitly excluded all parties with

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whom an advertiser had any records or knowledge of having an “established business relationship,” and in addition should the advertiser obtain records or knowledge of having an established business relationship with additional parties, the trial court explicitly noted that the court retained the right to modify or amend the class; thus, the trial court did not abuse the court’s discretion in rejecting a claim that the proposed certified class failed to satisfy the commonality requirement under O.C.G.A. § 9-11-23(a)(2). *Am. Home Servs. v. A Fast Sign Co.*, 287 Ga. App. 161, 651 S.E.2d 119 (2007), cert. denied, 2007 Ga. LEXIS 825 (Ga. 2007).

In a suit brought by various insureds, alleging that an insurance company and the company’s related entities engaged in fraud with regard to allegedly fraudulently representing that the insureds were being provided group medical insurance coverage, the trial court did not abuse the court’s discretion by certifying the insureds as a class as the reliance of the insureds was based on a uniform renewal document all received, which satisfied the commonality requirement, and differing defenses that they may have did not defeat certification since common questions of law predominated. The reviewing court was satisfied that the trial court exercised the court’s discretion in ruling that the computation of individual damages would not be so complex or fact-specific so as to bar certification. *Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 683 S.E.2d 4 (2009), cert. denied, No. S09C1992, 2010 Ga. LEXIS 48 (Ga. 2010).

Property owners filed a class action alleging that a county had improperly recalculated property taxes without affording taxpayers the notice required by O.C.G.A. § 48-5-306 and the opportunity to appeal as provided in O.C.G.A. § 48-5-311. Since the class of taxpayers was certified solely to consider a common procedural issue—whether the county had to provide class members with statutory notice of and the right to appeal the recalculations—the trial court properly found commonality under O.C.G.A. § 9-11-23(a)(2). *Fulton*

County Bd. of Tax Assessors v. Marani, 299 Ga. App. 580, 683 S.E.2d 136 (2009), cert. denied, No. S09C2072, 2010 Ga. LEXIS 18 (Ga. 2010).

Commonality requirement not met.

— Trial court’s grant of class certification was not authorized since the court erred by determining that New York law applied to the fraud and contract claims of all potential class members. *IBM v. Kemp*, 244 Ga. App. 638, 536 S.E.2d 303 (2000).

Trial court did not err in denying a motion for class certification relying on the ground that the commonality requirement of Georgia’s class action statute, O.C.G.A. § 9-11-23, had not been met; federal regulations regarding the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), allowed unsolicited faxes to be sent to a person or entity without violating the TCPA if the sender and the person or entity had an “established business relationship,” but the proposed class representative did not meet the representative’s burden of showing how many proposed class members qualified under that exception. *Carnett’s, Inc. v. Hammond*, 279 Ga. 125, 610 S.E.2d 529 (2005).

Trial court abused the court’s discretion in granting class certification to an insured in a breach of contract and fraud action against an insurer as the common questions of law and fact did not predominate over the class members’ individual questions, the insured’s claims were not typical of other members, and the insured was not an adequate representative; the other class members had different types of coverage and in different locations, which made each claim unique as to the individual facts and circumstances for purposes of the statutory requirements under O.C.G.A. § 9-11-23(a). *Life Ins. Co. v. Meeks*, 274 Ga. App. 212, 617 S.E.2d 179 (2005).

Trial court did not abuse the court’s discretion in determining that an alleged class representative’s claims were not suitable for class certification as individual fact issues predominated over any common issues shared by the putative class. *R.S.W. v. Emory Healthcare, Inc.*, 290 Ga. App. 284, 659 S.E.2d 680 (2008).

Trial court did not err in denying a homeowner’s motion for class certification

in the homeowner's action seeking a declaratory judgment that adjacent lot owners had an irrevocable easement or implied covenant in a golf club's golf course and an injunction restricting the use of the property to golf course purposes only because there was evidence that a homeowner failed to show commonality, i.e., questions of law and fact common to the class members, as required by O.C.G.A. § 9-11-23(a)(2); the trial court was authorized to find that resolution of the issues would require individual determinations and an analysis of the representations made to each homeowner and the extent to which each homeowner relied upon the representations because the lots purchased by the prospective class members were not developed and sold in a single, comprehensive subdivision but arose out of multiple projects by different developers and resulted in different subdivisions with separate sections, and different realtors had been involved in the subdivision sales. *Peck v. Lanier Golf Club, Inc.*, 304 Ga. App. 868, 697 S.E.2d 922 (2010).

Trial court abused the court's discretion in granting a motion for class certification because many individual suits would be necessary even if the one or two common issues were resolved class-wide; the qualitative analysis necessary to show liability for injuries such as loss of consortium, anxiety, and emotional distress demonstrated that common questions vital to proving causation had to be answered on a highly individualized basis, and proving causation for claims based on injuries such as anxiety, loss of consortium, and emotional distress was inherently specific to the individuals affected. *Doctors Hosp. Surgery Ctr., LP v. Webb*, 307 Ga. App. 44, 704 S.E.2d 185 (2010).

Because proof in the customers' misrepresentation action against a funeral home would require an inquiry of every class member to determine whether the members were told that an obituary fee included a logo charge and/or whether the class would have declined to include the logo if given such information, the proposed class failed to meet the commonality requirement of O.C.G.A. § 9-11-23(a)(2) for certification. *Ardis v. Fairhaven Funeral Home & Crematory,*

Inc., 312 Ga. App. 482, 718 S.E.2d 843 (2011).

Trial court erred in finding that a customer and the proposed class shared common questions of law and fact and that the customer was a sufficiently typical representative of that class under O.C.G.A. § 9-11-23(a)(2) and (a)(3) because the customer did not suffer any actual financial or physical injury as a result of a pharmacy's sale of the customer's medication information to another pharmacy; there was no evidence of any "public" disclosure of the customer's data, and such cases were bound to turn on individual rather than common questions. *Rite Aid of Ga., Inc. v. Peacock*, 315 Ga. App. 573, 726 S.E.2d 577 (2012).

Minor variations in amount of damages or location within state does not destroy class when legal issues are common. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Denial of certification when individual questions predominate. — Although class actions are permissible when the right sought to be enforced is "common" to the members of the class, albeit neither joint, nor derivative, nor one affecting specific property, the trial court may deny certification when granted a common right, individual questions of law or fact as between the defendant and individual class plaintiffs would yet predominate. *Hill v. General Fin. Corp.*, 144 Ga. App. 434, 241 S.E.2d 282 (1977).

Because individual factual issues predominated over issues common to all class members, it was error to grant class certification as to damages to customers claiming that companies had improperly provided termite inspections. The action would require individualized inquiries as to what inspectors did at particular properties, whether individual customer signatures were forged, and whether individual customers had met affirmative contractual duties; furthermore, resolution of the class representatives' claims would not necessarily prove one or more elements of the other class members' claims. *Rollins, Inc. v. Warren*, 288 Ga. App. 184, 653 S.E.2d 794 (2007), cert. denied, 2008 Ga. LEXIS 216 (Ga. 2008).

Trial court properly denied class certifi-

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cation requested by a plaintiff in a suit asserting breach of contract and other claims involving the purchase of a truck that was equipped with a base radiator instead of an upgrade version because the plaintiff failed to establish even one of the factors required of O.C.G.A. § 9-11-23(f)(3) in that there were too many individual issues existing for each purported class member with regard to each purchase made. Individual issues existed as to whether a purported class member actually paid for an upgraded radiator not received; whether each class member gave the defendant, the manufacturer, a reasonable opportunity to repair the defect; and whether injury was caused by such a defect. *Roland v. Ford Motor Co.*, 288 Ga. App. 625, 655 S.E.2d 259 (2007), cert. denied, 2008 Ga. LEXIS 270 (Ga. 2008).

Class certification under O.C.G.A. § 9-11-23(b)(3) was properly denied in a former employee's suit alleging that the former employer submitted subagent license applications without employee authorization because individual issues regarding whether employee signatures were forged and whether employee authorizations were obtained predominated over common issues. *Perez v. Atlanta Check Cashers, Inc.*, 302 Ga. App. 864, 692 S.E.2d 670 (2010).

Cases involving franchises have been approved as class actions when the same licensing agreement was used. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Actions on behalf of defrauded securities purchasers present a particularly desirable situation for a class action. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Class action on behalf of purchasers of securities, alleged to have been defrauded by a common course of dealing on the part of the defendants, satisfies requisites of the statute. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Purchasers of unregistered securities were properly certified as a class even

though the purchasers asserted causes of action based on fraud in addition to those based on violations of securities laws. *Trend Star Continental, Ltd. v. Branham*, 220 Ga. App. 781, 469 S.E.2d 750 (1996).

Discretion of trial judge in certifying or refusing to certify a class action is to be respected upon appeal in all cases when not abused. *Hill v. General Fin. Corp.*, 144 Ga. App. 434, 241 S.E.2d 282 (1977).

Whether to allow a case to proceed as a class action in Georgia is a matter of discretion with the trial judge. *Ford Motor Credit Co. v. London*, 175 Ga. App. 33, 332 S.E.2d 345 (1985).

Refusal to certify not grounds for dismissal of complaint. — Determination by court that action brought as a class action should not be so maintained did not afford a basis for dismissing the complaint, but rather, would mean that the action would be stripped of its character as a class action and would proceed as a nonclass action. *Dillingham v. Doctors Clinic*, 138 Ga. App. 41, 225 S.E.2d 500 (1976).

Refusal to certify proper when no motion filed. — Trial court does not abuse the court's discretion in failing to certify, as a class action, a cause of action in which the plaintiffs do not file a motion to have the action so certified. *Estate of Seamans v. True*, 247 Ga. 721, 279 S.E.2d 447 (1981).

No error in bifurcating issues. — When automobile insurance policyholders sought damages and declaratory and injunctive relief in a dispute over the scope of physical damage coverage, the trial court did not err in bifurcating the issues and certifying a class for declaratory and injunctive relief only. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001).

Class member had standing to represent class. — In subscribers' class action suit against an Internet access provider, one of the subscribers did not lack standing to represent the class due to the subscriber's failure to pay the provider an allegedly illegal early termination fee, which was the gravamen of the lawsuit. The provider charged the fee to the subscriber's credit card, and refused to disclaim the right to collect the fee from the

subscriber. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 666 S.E.2d 420 (2008).

Litigants and trial court share obligation to ensure that certification question timely resolved. — Trial court erred in denying a motion for class certification because the court did not engage in the required analysis in determining whether the motion had to be denied as untimely or make any factual findings supporting the court's decision; O.C.G.A. § 9-11-23 places a shared obligation upon the litigants and the court to ensure that the question of class certification is timely resolved, and it neither directs a plaintiff to move for class certification within a specified time, nor does it prevent a defendant from requesting an order denying class certification or a court from acting on the court's own initiative. *Fuller v. Heartwood 11, LLC*, 301 Ga. App. 309, 687 S.E.2d 287 (2009), cert. denied, No. S10C0573, 2010 Ga. LEXIS 361 (Ga. 2010).

Failure to describe members of class. — Order of final judgment was vacated and a class action was remanded for entry of an order that included a description of the class members as identified in the trial court's order naming the class. The order of final judgment failed to comply with O.C.G.A. § 9-11-23(c)(3) since the order did not describe the members of the class as previously identified by the trial court in the court's order naming the class. *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Failure to consider factors. — Order denying a homeowner's petition for class certification of a declaratory judgment action was improper because the trial court erred in addressing only the merits of the underlying claim and not making the required findings and conclusions with regard to whether each factor required by O.C.G.A. § 9-11-23 had been established; contrary to the trial court's order which assumed that the homeowner was traveling under § 9-11-23(b)(3), the homeowner was asking for a declaratory judgment and proceeding under § 9-11-23(b)(2). The trial court's order did not analyze all of the factors under § 9-11-23(a) and those the court did discuss were dealt with solely

under the guise of the substantive claim. *Peck v. Lanier Golf Club, Inc.*, 298 Ga. App. 555, 680 S.E.2d 595 (2009).

Requirements for deciding whether motion for class certification is untimely. — When deciding whether to deny a motion for class certification as untimely, the trial court, in the exercise of the court's sound discretion, must consider the purposes served by O.C.G.A. § 9-11-23, balancing any actual prejudice to the litigants or the class against any legitimate reasons for the delay, and in the absence of a local rule governing the timely filing of a motion for class certification, a trial court may not deny an otherwise proper motion solely on the basis that the motion was untimely; rather, the trial court must determine, considering the relevant factors, whether the delay resulted in any actual prejudice to the litigants or to the class. Then, in the court's order on the motion for class certification, the trial court shall set forth in writing factual findings supporting the court's decision. *Fuller v. Heartwood 11, LLC*, 301 Ga. App. 309, 687 S.E.2d 287 (2009), cert. denied, No. S10C0573, 2010 Ga. LEXIS 361 (Ga. 2010).

Because district courts are required to conduct a "rigorous analysis" into whether the prerequisites of Fed. R. Civ. P. 23 are met before certifying a class, that rigorous analysis should also apply to a trial court's decision under O.C.G.A. § 9-11-23(f)(1)(3) concerning whether the parties or the class have been prejudiced by an untimely motion for class certification. *Fuller v. Heartwood 11, LLC*, 301 Ga. App. 309, 687 S.E.2d 287 (2009), cert. denied, No. S10C0573, 2010 Ga. LEXIS 361 (Ga. 2010).

Interpretation of a form agreement proper for class action. — Trial court properly certified a class of individuals who purchased credit life or credit disability insurance from an insurer and who may be owed a refund from the insurer for unearned premiums on those policies. The interpretation of a form agreement presented a classic case of a common question of law appropriate for class adjudication. *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 698 S.E.2d 19 (2010).

Class certification held proper. — Trial court properly granted class certifi-

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cation in an action after an insurance company customer alleged that the customers and others had been inappropriately charged premiums and billing fees related to the defendant's "automobile club"; the claims involved standard sales methods and practices common to class members, the customer as a recent "past insured" was not an inadequate representative, and it was not appropriate at the certification stage to consider whether the customer could prevail on the customer's claims. *Village Auto Ins. Co. v. Rush*, 286 Ga. App. 688, 649 S.E.2d 862 (2007), cert. denied, 2008 Ga. LEXIS 72 (Ga. 2008).

Subscribers sued an internet access provider alleging an early termination fee provision in their contracts was unenforceable. The need for individual damage calculations did not defeat class certification under O.C.G.A. § 9-11-23 since the subscribers sought remedies that would be standard and formulaic: a refund for those who paid the fee, and an injunction against enforcing the fee for those who did not. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 666 S.E.2d 420 (2008).

Trial court properly certified a class consisting of all similarly situated bankrupt mortgagors who had been assessed inspection and attorney fees by a mortgagee without prior notice or approval by the bankruptcy court. The claims of theft by conversion, theft by deception, and violations of Georgia RICO (O.C.G.A. § 16-14-4) did not require proof of reliance by each class member, thus making a class action unmanageable; as similar written representations were common to all the security agreements at issue, circumstantial evidence could be used to show that reliance was also common to the whole class. *Liberty Lending Servs. v. Canada*, 293 Ga. App. 731, 668 S.E.2d 3 (2008).

Trial court did not err in failing to ensure that a class notice included the information specified in O.C.G.A. § 9-11-23(b)(3) because the trial court's order certifying the class showed that the court found class certification appropriate under § 9-11-23(b)(2); the notice to poten-

tial class members was not subject to the requirements of § 9-11-23(c)(2). *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Denial of class certification proper.

— Trial court properly denied a motion for class certification that was filed by a Florida resident who claimed that a Georgia limited liability company (LLC) violated the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, when the LLC authorized another company to send unsolicited fax transmissions because the resident received a transmission from a residence located in the same area code, and not from a telephone number that belonged to the Georgia LLC or the LLC's agents, and because the Florida resident had a prior business relationship with the LLC. *McGarry v. Cingular Wireless, L.L.C.*, No. A03A2575, 2004 Ga. App. LEXIS 423 (Mar. 24, 2004).

Students were not entitled to class certification in a suit alleging fraud by a university and the university's parent company because the students failed to establish the O.C.G.A. § 9-11-23(b)(3) requirement of predominance since individualized proof was required to show if class members had relied to their detriment on the alleged fraud. *Diallo v. Am. Intercontinental Univ., Inc.*, 301 Ga. App. 299, 687 S.E.2d 278 (2009).

Trial court abused the court's discretion in granting certification under O.C.G.A. § 9-11-23(b)(2) based on a claim for medical monitoring because the recovery of monetary damages was at the core of the dispute between a patient, the patient's spouse, and a hospital; the trial court's order bifurcating the liability and damages phases, trying damages separately to a jury if necessary, demonstrated that the damages claims in the complaint overwhelmed the injunctive relief sought and were not merely incidental thereto. *Doctors Hosp. Surgery Ctr., LP v. Webb*, 307 Ga. App. 44, 704 S.E.2d 185 (2010).

Typicality. — Trial court properly adopted a special master's determination that certification of a class of evacuated residents following an accidental chemical release was warranted under O.C.G.A. § 9-11-23(a) as to all but one representative as the prerequisites of numerosity,

commonality, typicality, and adequacy of representation were satisfied; however, as one class representative had settled that representative's claims against the chemical company, although the representative disputed whether the settlement was fair, the representative did not satisfy the typicality requirement. *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 710 S.E.2d 569 (2011).

Trial court erred in finding that a customer and the proposed class shared common questions of law and fact and that the customer was a sufficiently typical representative of that class under O.C.G.A. § 9-11-23(a)(2) and (a)(3) because the customer failed to prove that the response to the closing of the pharmacy was shared by other members of the class; given the customer's lack of actual injury, the customer was unlikely to vigorously litigate the action on behalf of the class. *Rite Aid of Ga., Inc. v. Peacock*, 315 Ga. App. 573, 726 S.E.2d 577 (2012).

Number requirement not met. — Trial court erred in granting the customer's request for class certification because the class of nine was insufficient to meet the requirements of O.C.G.A. § 9-11-23(a)(1), and the customer failed to show the existence of other significant factors to warrant satisfaction of that requirement when, inter alia, the customer was capable of identifying all putative class members and there were no geographic constraints. *Am. Debt Found., Inc. v. Hodzic*, 312 Ga. App. 806, 720 S.E.2d 283 (2011).

Secondary Action by Shareholders

Allegation of status as shareholder at time of amendment insufficient. — Amended complaint in a derivative action alleging merely that the plaintiff was a shareholder at the time the amended complaint was filed did not meet requirements of law, and absent a substantial allegation that the plaintiff was a shareholder at the time the alleged transgressions occurred, the plaintiff could not maintain such an action. *Haldi v. Continental Inv. Corp.*, 50 F.R.D. 275 (N.D. Ga. 1970).

Dismissal or Compromise

Proposed amendment which would compromise claim. — General rule per-

mitting amendment as a matter of course and without leave of court before the entry of a pretrial order has no application in respect to a class action if the proposed amendment is one which would have the effect of compromising the claim. *Murphy v. Hope*, 229 Ga. 836, 195 S.E.2d 24 (1972).

Voluntary dismissal without leave of court ineffective. — Voluntary dismissal of a class action, without leave of court, is ineffectual. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

Showing of absence of harm before voluntary withdrawal. — Voluntary withdrawal of one count without a showing of absence of harm raises doubt that the rights of some or all of the absentees would be protected adequately in a class action. *Graham v. Development Specialists, Inc.*, 180 Ga. App. 758, 350 S.E.2d 294 (1986).

Interlocutory order certifying class was directly appealable. — Employee's motion to dismiss an appeal for lack of jurisdiction was denied as the trial court's interlocutory order certifying the class was directly appealable pursuant to O.C.G.A. § 9-11-23(g). *McDonald Oil Co. v. Cianocchi*, 285 Ga. App. 829, 648 S.E.2d 154 (2007).

Removal improper. — Because a customer's class action complaint brought pursuant to O.C.G.A. § 9-11-23 provided no information indicating the amount in controversy or the number of individuals in alternative classes, a bank and an affiliated credit card service improperly removed the action pursuant to 28 U.S.C. § 1332(d) of the Class Action Fairness Act of 2005 and 28 U.S.C. § 1446. *Thomas v. Bank of Am. Corp.*, 570 F.3d 1280 (11th Cir. 2009).

Dismissal of complaint erroneous. — Trial court's dismissal of a homeowner's complaint seeking a declaratory judgment that adjacent lot owners had an irrevocable easement or implied covenant in a golf club's golf course and an injunction restricting the use of the property to golf course purposes only was erroneous because after denying the homeowner's motion for class certification, the trial court was required to allow a reasonable time for joinder of the proper plaintiffs before

Dismissal or Compromise (Cont'd)

dismissing the action. *Peck v. Lanier Golf*

Club, Inc., 304 Ga. App. 868, 697 S.E.2d 922 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 1674 et seq. 24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, § 21. 59 Am. Jur. 2d, Parties, § 45 et seq.

Am. Jur. Pleading and Practice Forms. — 16 Am. Jur. Pleading and Practice Forms, Labor and Labor Relations, § 232.

C.J.S. — 18 C.J.S., Corporations, § 658 et seq. 35A C.J.S., Federal Civil Procedure, §§ 85 et seq., 336, 772 et seq., 822. 67A C.J.S., Parties, §§ 18 et seq., 25 et seq.

ALR. — Right of plaintiff to dismiss an action brought on behalf of himself and other persons, 8 ALR 950; 91 ALR 587.

Right to enjoin enforcement of illegal tax, local assessment, or license fee, upon joinder of several affected thereby, 32 ALR 1266; 156 ALR 319.

Legal rights and remedies in respect of funds raised by voluntary committee for public or quasi public purpose, 53 ALR 1237.

Pendency of representative or class suit as ground of abatement of subsequent action by member of class represented, 101 ALR 574.

Reinstatement, after expiration of term, of case which has been voluntarily withdrawn, dismissed, or nonsuited, 111 ALR 767.

Identity or community of interests essential to class or representative suit, 132 ALR 749.

Value of property or right involved in class suit, value or interest of individuals in whose name suit is brought, or value of aggregate interests of members of class, as criterion of jurisdictional amount, 141 ALR 569.

Rights of stockholder of one corporation to maintain derivative action in right of another corporation stock of which is owned by the former corporation ("double derivative suit"), 154 ALR 1295.

Diversity of citizenship, for purposes of federal jurisdiction, in stockholders' derivative action, 68 ALR2d 824.

Maintenance of second or successive stockholder's derivative action, 70 ALR2d 1305.

Intervenor's right to disqualify judge, 92 ALR2d 1110.

Maintainability in state court of class action for relief against air or water pollution, 47 ALR3d 769.

Circumstances excusing demand upon other shareholders which is otherwise prerequisite to bringing of stockholder's derivative suit on behalf of corporation, 48 ALR3d 595.

Consumer class actions based on fraud or misrepresentation, 53 ALR3d 534.

Appealability of order denying right to proceed in form of class action — state cases, 54 ALR3d 595.

Allowance of punitive damages in stockholder's derivative action, 67 ALR3d 350.

Propriety of class action in state courts to assert tenants' rights against landlord, 73 ALR3d 852.

Propriety of state court class action by holders of bonds against indenture trustee, 73 ALR3d 880.

Maintenance of class action against governmental entity as affected by requirement of notice of claim, 76 ALR3d 1244.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

Absent or unnamed class members in class action in state court as subject to discovery, 28 ALR4th 986.

Propriety of attorney acting as both counsel and class member or representative, 37 ALR4th 751.

Inverse condemnation state court class actions, 49 ALR4th 618.

Defamation of class or group as actionable by individual member, 52 ALR4th 618.

Class actions in state mass tort suits, 53 ALR4th 1220.

Standing to bring action relating to real property of condominium, 74 ALR4th 165.

Application of full faith and credit prin-

ciples to class-action litigation and judgments, 50 ALR6th 281.

Propriety of allowing class member to opt out in class action certified under paragraph (b)(1) or (b)(2) of Rule 23 of Federal Rules of Civil Procedure, 146 ALR Fed. 563.

Propriety, under rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action seeking

relief against pollution of environment, 19 ALR Fed. 2d 303.

Appealability of determination regarding confirmation of action as class action under Federal Rule of Civil Procedure Rule 23 and its enabling legislation (28 U.S.C.S. § 1292(e)), 22 ALR Fed. 2d 303.

Satisfaction of numerosity requirement in ERISA class actions, 26 ALR Fed. 2d 381.

9-11-24. Intervention.

(a) **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action:

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common.

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Code Section 9-11-5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. (Ga. L. 1966, p. 609, § 24; Ga. L. 1967, p. 226, § 12; Ga. L. 1968, p. 1104, § 8.)

Cross references. — Form of motion to intervene as defendant, § 9-11-123. Interposing of third-party claims in attachment proceedings, § 18-3-50 et seq.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 24, see 28 U.S.C.

Law reviews. — For article, "Synopsis of 1968 Amendments to the Appellate Pro-

cedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article, "The Child as a Party in Interest in Custody Proceedings," see 10 Ga. St. B.J. 577 (1974).

For note on permissive intervention of grandparents in divorce proceedings, see 26 Ga. L. Rev. 787 (1992).

For comment on *Rogers v. Medical*

Ass'n, 244 Ga. 151, 259 S.E.2d 85 (1979), as to unconstitutional delegation of legis-

lative authority to a private organization, see 29 Emory L.J. 1183 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INTERVENTIONS OF RIGHT
PERMISSIVE INTERVENTION
TIME OF INTERVENTION

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, Title 81 are included in the annotations for this Code section.

Construction with other law. — Because the Georgia Business Corporation Code, O.C.G.A. Ch. 2, T. 14, does not provide any specific mechanism concerning the intervention of parties in derivative actions, courts apply the general intervention statute, O.C.G.A. § 9-11-24, to motions to intervene in that context. *Stephens v. McGarrity*, 290 Ga. App. 755, 660 S.E.2d 770 (2008).

It is not the right of a stranger to a pending cause to intervene therein, unless it is necessary to the stranger's protection that the stranger be allowed to become a party to the litigation, and thus be afforded an opportunity to resist the rendition of a judgment which would operate to the stranger's prejudice. *Clark v. Harrison*, 182 Ga. 56, 184 S.E. 620 (1936); *Walker v. Hartford Accident & Indem. Co.*, 196 Ga. 361, 26 S.E.2d 695 (1943) (decided under former Code 1933, T. 81).

Criteria for exceptions to general rule precluding intervention at common law. — General rule at common law is that persons who are not parties to a suit cannot file an intervention therein; however, there are some exceptions to this rule as when an intervenor sets up some right that would be directly affected by the judgment, but in such a case the interest of the intervenor must be of such a direct and immediate character that the intervenor will either gain or lose by the direct effect of the judgment, and such interest must be created by the claim in suit, or a claim to a lien upon the property, or some

part thereof, which is the subject matter of the litigation. *Walker v. Hartford Accident & Indem. Co.*, 196 Ga. 361, 26 S.E.2d 695 (1943) (decided under former Code 1933, T. 81).

While the general rule is that intervenors *pro interesse suo* (according to his interest) are not known in common-law suits, an exception to the general rule is when the intervenor sets up some right which would be directly affected by the judgment; to come within such exception the interest of the intervenor must be of such a direct and immediate character that the intervenor will either gain or lose by the direct effect of the judgment, and must be created by the claim in suit, or a claim to a lien upon the property, or some part thereof, which is the subject matter of the litigation. *Sampson v. Vann*, 203 Ga. 612, 48 S.E.2d 293 (1948) (decided under former Code 1933, § 81-1303).

One who had full knowledge of the pendency of a case in which one had a direct pecuniary interest, and neither sought to become a party thereto nor made any effort to intervene therein so as to protect one's rights, could not, after rendition of a judgment in plaintiff's favor, maintain an equitable petition to set such judgment aside or restrain the judgment's enforcement. *Hurt Bldg., Inc. v. Atlanta Trust Co.*, 181 Ga. 274, 182 S.E. 187 (1935) (decided under former Code 1933, T. 81).

Compliance with § 9-11-5 required. — Intervenor attempting to intervene pursuant to the right of intervention must comply with O.C.G.A. § 9-11-5. *State v. Shearson Lehman Bros.*, 188 Ga. App. 120, 372 S.E.2d 276 (1988).

Intervention procedure not required. — O.C.G.A. § 36-82-23, relating to bond validation hearings, does not pro-

vide for intervention by third parties; thus, becoming a party does not require mandatory compliance with the procedure of O.C.G.A. § 9-11-24. *Hay v. Development Auth.*, 239 Ga. App. 803, 521 S.E.2d 912 (1999), appeal dismissed sub nom. *Hay v. Newton County*, 246 Ga. App. 44, 538 S.E.2d 181 (2000).

Intervention in receivership case not required. — Order assigning a case to another judge pursuant to Ga. Unif. Super. Ct. R. 3.3 did not violate O.C.G.A. §§ 9-8-1, 9-8-5, and 9-11-24 as: (1) neither O.C.G.A. § 9-11-24 nor O.C.G.A. § 9-8-1 applied to the assignment; (2) the receiver transferred the property to a corporation before the property was sold to a limited liability company (LLC), and the receiver was not named as a defendant; (3) the appellate court was unable to determine the extent that the property remained subject to orders in the receiver case, and equitable remedies affected the rights of the receiver; (4) the LLC's action was against the corporation and the LLC's managing declarant, not the receiver, and included claims for monetary damages; and (5) the managing declarant failed to show a legal or factual basis for questioning the assigned judge's staffing to support the complex litigation. *Leventhal v. Cumberland Dev., LLC*, 267 Ga. App. 886, 600 S.E.2d 616 (2004).

When right to pursue independent remedy remains, no interest needs protecting by intervention. — If individual who seeks to intervene will still be left with right to pursue the individual's own independent remedy against the parties, regardless of the outcome of the pending case, the individual has no interest that needs protecting by intervention, and should not be allowed to intervene over objection. *Gregory v. Tench*, 138 Ga. App. 219, 225 S.E.2d 753 (1976).

County soil and water conservation district could not intervene as of right in an action by a landowner against a construction company, even though it had an interest in the action, when the district failed to make any argument or showing with respect to the potential of the ultimate disposition of the action to impair or impede its prosecution of an independent cause of action against the company. *Ste-*

phens County Soil & Water Conservation Dist. v. Wright Bros. Constr. Co., 215 Ga. App. 352, 451 S.E.2d 802 (1994).

Third party is not prohibited from intervention in probate court guardianship proceeding. *Kipp v. Rawson*, 193 Ga. App. 532, 388 S.E.2d 409 (1989).

Motion not required in guardianship proceeding. — It was not error for the probate court to permit the Department of Human Resources to intervene in guardianship proceedings without requiring the Department to file a motion to intervene. *In re Martin*, 218 Ga. App. 79, 460 S.E.2d 304 (1995).

Order allowing intervention required. — Implicit in the requirements of this section is the requirement of an order allowing intervention. *Thomas v. Jackson*, 238 Ga. 90, 231 S.E.2d 50 (1976).

Motion to intervene may not be allowed ex parte. *Gregory v. Tench*, 138 Ga. App. 219, 225 S.E.2d 753 (1976).

Status of intervenors. — When intervenors have been allowed by order of the court to file intervention and to become parties defendant under this section, the intervenors thereafter, for all intents and purposes, original parties, and may file any pleading in the case that original parties could have filed, just as though the intervenors had been named parties defendant in the complaint. *Woodward v. Lawson*, 225 Ga. 261, 167 S.E.2d 660, cert. denied, 396 U.S. 889, 90 S. Ct. 175, 24 L. Ed. 2d 163 (1969).

In an action by a wife against her former husband seeking permanent injunction of the husband's assignment of receivables owned by his employer, after the trial court had determined that the wife's lien was superior to any alleged interest by the husband's assignee and that a conveyance to the assignee was null and void, the court erred in granting the assignee's motion to intervene. *Zinser v. Tormenta*, 213 Ga. App. 824, 446 S.E.2d 249 (1994).

Grandparents' intervention in custody proceeding. — Since the intervention of grandparents into a custody proceeding and an order granting the grandparents temporary custody had already occurred, the later adult adoption of the child's father did not extinguish the

General Consideration (Cont'd)

legal status that the grandparents held; the trial court's subsequent order dismissing the intervention of the grandparents and setting aside the award of temporary custody to the grandparents was reversed. *Walls v. Walls*, 278 Ga. 206, 599 S.E.2d 173 (2004).

Appeal. — Denial of a motion to intervene is not a final judgment and, thus, is reviewable under the interlocutory appeal procedure. *Morman v. Board of Regents*, 198 Ga. App. 544, 402 S.E.2d 320 (1991).

Although an appeal from the denial of a motion to intervene usually requires an application for interlocutory appeal, when the denial of a party's motion to intervene was a final judgment, direct appeal was therefore proper. *Burruss v. Ferdinand*, 245 Ga. App. 203, 536 S.E.2d 555 (2000).

Appellate court denied a corporation and board of directors' motion to dismiss a shareholder's appeal of the trial court's denial of a motion to intervene in an underlying shareholder derivative action, pursuant to O.C.G.A. § 9-11-24, as the shareholder had standing to appeal that denial even if the denial was based on a lack of standing to become a party to the underlying action. *Leventhal v. Post Props.*, 276 Ga. App. 742, 624 S.E.2d 223 (2005).

Cited in *Coogler v. Berry*, 117 Ga. App. 614, 161 S.E.2d 428 (1968); *United Servs. Auto. Ass'n v. Logue*, 117 Ga. App. 717, 162 S.E.2d 12 (1968); *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969); *Bulloch County Bank v. Dodd*, 226 Ga. 773, 177 S.E.2d 673 (1970); *Lowe v. Lowe*, 123 Ga. App. 525, 181 S.E.2d 715 (1971); *Summerlin v. S & K of Statesboro, Inc.*, 124 Ga. 25, 183 S.E.2d 92 (1971); *Autry v. Palmour*, 124 Ga. App. 407, 184 S.E.2d 15 (1971); *Berry v. Slappey*, 229 Ga. 109, 189 S.E.2d 394 (1972); *Liberty Mut. Ins. Co. v. Coburn*, 129 Ga. App. 520, 200 S.E.2d 146 (1973); *Liberty Nat'l Bank & Trust Co. v. Diamond*, 231 Ga. 321, 201 S.E.2d 400 (1973); *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974); *Richmond County v. Jackson*, 234 Ga. 717, 218 S.E.2d 11 (1975); *Osteen v. GECC*, 137 Ga. App. 546, 224 S.E.2d 453 (1976); *Coursin v. Harper*, 236 Ga. 729, 225 S.E.2d 428 (1976); *Heath*

v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); *C & S Land, Transp. & Dev. Corp. v. Grubbs*, 141 Ga. App. 393, 233 S.E.2d 486 (1977); *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98 (1977); *Coxwell v. Coxwell*, 240 Ga. 46, 239 S.E.2d 371 (1977); *Paulding County v. City of Hiram*, 240 Ga. 220, 240 S.E.2d 71 (1977); *Worthen v. Jones*, 240 Ga. 388, 240 S.E.2d 842 (1977); *Braddy v. Dessau Realty & Ins. Co.*, 148 Ga. App. 589, 252 S.E.2d 10 (1978); *Morton v. Skrine*, 242 Ga. 844, 252 S.E.2d 408 (1979); *Sawyer v. Allison*, 151 Ga. App. 334, 259 S.E.2d 721 (1979); *DeKalb County v. Post Properties, Inc.*, 245 Ga. 214, 263 S.E.2d 905 (1980); *McMahan v. Koppers Co.*, 654 F.2d 380 (5th Cir. 1981); *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 248 Ga. 703, 285 S.E.2d 920 (1982); *Smith v. Hartford Fire Ins. Co.*, 162 Ga. App. 26, 289 S.E.2d 520 (1982); *Atkinson v. Atkinson*, 249 Ga. 247, 290 S.E.2d 423 (1982); *Shoemaker v. Woodland Equities, Inc.*, 252 Ga. 389, 313 S.E.2d 689 (1984); *404 Music Group v. Bass*, 170 Ga. App. 113, 316 S.E.2d 558 (1984); *Polston v. Levine*, 171 Ga. App. 893, 321 S.E.2d 350 (1984); *Virginia Highland Assocs. v. Allen*, 174 Ga. App. 706, 330 S.E.2d 892 (1985); *Larkin v. Laster*, 254 Ga. 716, 334 S.E.2d 158 (1985); *GMC v. Rasmussen*, 255 Ga. 544, 340 S.E.2d 586 (1986); *Button Gwinnett Landfill, Inc. v. Gwinnett County*, 256 Ga. 818, 353 S.E.2d 328 (1987); *Pope v. Department of Human Resources*, 209 Ga. App. 835, 434 S.E.2d 731 (1993); *Hulsey v. Hulsey*, 212 Ga. App. 269, 441 S.E.2d 477 (1994); *Rynerson v. Schat*, 215 Ga. App. 250, 449 S.E.2d 901 (1994); *Int'l Maint. Corp. v. Inland Paper Bd. & Packaging, Inc.*, 256 Ga. App. 752, 569 S.E.2d 865 (2002); *Buckler v. DeKalb County*, 290 Ga. App. 190, 659 S.E.2d 398 (2008); *In re Estate of Nesbit*, 299 Ga. App. 496, 682 S.E.2d 641 (2009); *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011); *Sherman v. City of Atlanta*, 293 Ga. 169, 744 S.E.2d 689 (2013); *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 755 S.E.2d 683 (2014).

Interventions of Right

Requirements for intervention. — Individual will not be permitted to inter-

vene in an action unless the individual can establish: (1) an interest relating to the property or transaction which is the subject matter of the action; (2) an impairment of the individual's interest which may result from an unfavorable disposition of the lawsuit; and (3) inadequate representation of this interest by the parties already involved. *Brown v. Truluck*, 239 Ga. 105, 236 S.E.2d 60 (1977).

Issue of adequacy of representation is a question of fact, which must be ruled on by the trial court in considering an application for intervention. *Southwest Ga. Prod. Credit Ass'n v. Wainwright*, 241 Ga. 355, 245 S.E.2d 306 (1978).

Generally no right to intervene in action at law. — As a general rule, there is no right to intervene in an ordinary action at law. *Gregory v. Tench*, 138 Ga. App. 219, 225 S.E.2d 753 (1976).

Error to refuse intervention prior to judgment by necessary party. — When, prior to judgment, intervention is sought by a necessary party who should have been named and served in the original complaint, such intervention should be allowed, and failure to do so amounts to an abuse of discretion. *State v. Bruce*, 231 Ga. 783, 204 S.E.2d 106 (1974).

When interests of intervenor and governmental body or officer who is a named party are identical, it will be assumed that the intervenor's interests are adequately represented, absent a concrete showing of circumstances in the particular case that make representation inadequate. *DeKalb County v. Post Properties, Inc.*, 245 Ga. 214, 263 S.E.2d 905 (1980).

In a derivative action wherein a settlement was proposed for approval. — In a derivative action suit, a trial court abused the court's discretion by denying a minority shareholder's motion to intervene since the motion was timely and the minority shareholder established that the minority shareholder's interests were not adequately represented by the suing shareholder based on the large investment the minority shareholder had in the corporation and the fact that the settlement reached in the action would impact the minority shareholder's direct claims against the corporation. Further,

the minority shareholder was entitled to a determination that the suing shareholder had adequately represented the corporation's interests up to and including the reaching of the settlement. *Stephens v. McGarrity*, 290 Ga. App. 755, 660 S.E.2d 770 (2008).

In an action against a nonprofit corporation that operated a school and its president, a director of the corporation and its president established a right of intervention based on evidence that the interests of the corporation and the state were not adequately represented. *Ebon Found., Inc. v. Oatman*, 269 Ga. 340, 498 S.E.2d 728 (1998).

In divorce against husband when creditor bank filed action claiming equitable interest in property titled in husband, the trial court did not abuse the court's discretion in allowing the wife's intervention and consolidating the two cases as the bank's equitable lien prejudiced the wife's potential interest in the marital estate. *First Nat'l Bank v. Blackburn*, 254 Ga. 379, 329 S.E.2d 897 (1985).

No interest in child's adoption by relatives when parent alive. — Relatives of child may not file objections to the child's adoption as long as one natural parent is living and has consented, nor may the relatives intervene in the action, as the relatives lack the required interest therein. *Lockey v. Bennett*, 244 Ga. 339, 260 S.E.2d 56 (1979).

Agency and adoptive parents had interest, as legal custodians of child, in petition for father to legitimate the child and when their rights were not represented, the agency and adoptive parents had a right to intervene. *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982).

In an adoption proceeding, the trial court erred in allowing the Georgia Department of Human Resources to intervene since, even if it had an interest as temporary custodian of the child, there was no evidence that such interest would be impaired by the disposition of the case. *In re Stroh*, 240 Ga. App. 835, 523 S.E.2d 887 (1999).

County Department of Family and Children Services was properly permitted to intervene with regard to a couple's peti-

Interventions of Right (Cont'd)

tion seeking to adopt a child as the child was adjudicated deprived and placed in the temporary custody of the Department. While the biological parents' surrenders of their parental rights was the basis for the adoption petition in the superior court, the Department remained the temporary legal custodian of the child pursuant to the juvenile court's deprivation order and, given that the Department's interest in the child as the temporary legal custodian was unrepresented in the adoption proceedings and at risk of impairment, the juvenile court did not err by allowing the Department to intervene through its objection to the adoption. *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

Garnishment proceedings. — Secured creditor's claim to commissions and fees at issue in garnishment proceeding provided interest in subject matter of proceeding sufficient to grant the creditors motion to intervene. *Perry v. Freeman*, 163 Ga. App. 186, 293 S.E.2d 381 (1982).

Workers' compensation insurer. — Both O.C.G.A. §§ 9-11-24 and 34-9-11.1, creating a subrogation lien on behalf of workers' compensation employers and insurers, granted a workers' compensation insurer the right to intervene in a personal injury case against third parties and their insurers brought by a claimant to whom the insurer had paid benefits. *Department of Admin. Servs. v. Brown*, 219 Ga. App. 27, 464 S.E.2d 7 (1995).

Settlement extinguished subrogation rights in workers' compensation case. — Since an employee settled the employee's lawsuit and released third-party tortfeasors prior to receiving workers' compensation payment, the settlement and release extinguished subrogation rights asserted by the employer and the employer's insurer. It was irrelevant that the tortfeasors settled with the employee after receiving notice of the pending workers' compensation claim. *Georgia Star Plumbing, Inc. v. Bowen*, 225 Ga. App. 379, 484 S.E.2d 26 (1997).

No interest in tax foreclosure proceeding. — Party whose interest in property derived from a deed under power

from a party who was the holder of a deed to secure debt from the record owner of the property was not an "interested party" under O.C.G.A. § 48-4-77(1) and that party had no right under subsection (a) of O.C.G.A. § 9-11-24 to intervene in an in rem judicial tax foreclosure proceeding. *Burruss v. Ferdinand*, 245 Ga. App. 203, 536 S.E.2d 555 (2000).

Judgment creditor had no right to intervene in action for reformation of a deed. — Trial court abused the court's discretion in allowing a borrower's judgment creditor to intervene as a matter of right pursuant to O.C.G.A. § 9-11-24 in the borrower's action against the lender for reformation of a deed pursuant to O.C.G.A. § 23-2-25. The creditor had no interest directly relating to the subject matter of the suit and had other remedies. *Potter's Props., LLC v. VNS Corp.*, 306 Ga. App. 621, 703 S.E.2d 79 (2010).

Intervention in bond validation proceeding. — Challenger in an action validating and confirming taxable revenue bonds lacked standing to intervene in the action as a result of failing to comply with the intervention procedures set forth in O.C.G.A. § 9-11-24(c); and, because the challenger lacked standing to become a party in the trial court, the challenger also lacked standing to appeal the trial court's judgment, therefore, the appeal was dismissed. *Sherman v. Dev. Auth.*, 324 Ga. App. 23, 749 S.E.2d 29 (2013).

County boundary dispute action. — Trial court abused the court's discretion by denying a county's motion to intervene in a boundary dispute action that effected the county's boundary since the county was not provided notice of the mandamus action and it promptly sought intervention upon discovery of the action. *Bibb County v. Monroe County*, 294 Ga. 730, 755 S.E.2d 760 (2014).

Permissive Intervention

Most important factor is whether intervention will prejudice existing parties in the case. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Determination of undue delay or prejudice crucial. — When intervention is permissive, the crucial determination to

be made by the trial court, in the court's discretion, is whether the counterclaim will unduly delay or prejudice the existing parties. *Ryder Truck Rental, Inc. v. Mayo*, 120 Ga. App. 495, 171 S.E.2d 542 (1969).

When a trial court is exercising the court's discretion in determining whether to allow intervention, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and other relevant circumstances such as the degree to which the intervenor would be affected by the outcome in the underlying case. *Branch v. Maxwell*, 203 Ga. App. 553, 417 S.E.2d 176, cert. denied, 203 Ga. App. 905, 417 S.E.2d 176 (1992).

Undue delay or prejudice not only factors. — While trial court must consider whether intervention will unduly delay or prejudice adjudication of the rights of the original parties, the court is not limited to considering these factors alone. *Allgood v. Georgia Marble Co.*, 239 Ga. 858, 239 S.E.2d 31 (1977).

Common question not an automatic entitlement to intervention. — Fact that intervenor meets requirements of a common question of law or fact does not automatically entitle the intervenor to be made a party. *Ryder Truck Rental, Inc. v. Mayo*, 120 Ga. App. 495, 171 S.E.2d 542 (1969).

Intervention in legitimation proceeding. — Trial court erred in granting a putative biological father's legitimation petition while a husband's timely, meritorious motion to intervene of right under O.C.G.A. § 9-11-24(a) was pending because when the husband moved to intervene in the legitimation proceeding he was the child's legal father and had parental and custodial rights to the child, and the husband clearly had an interest in the legitimation proceeding; the husband's interest as the child's legal father would be impaired by a decision of the trial court that was unfavorable to him, and his interest was not adequately represented by the parties to the action since the child's mother consented to the legitimation action. *Baker v. Lankford*, 306 Ga. App. 327, 702 S.E.2d 666 (2010).

Discretion of court. — Whether permissive intervention should be granted is

a question addressed to the sound discretion of the trial court. *Allgood v. Georgia Marble Co.*, 239 Ga. 858, 239 S.E.2d 31 (1977).

Whether permissive intervention is granted is addressed to the sound discretion of the trial judge, and a decision on this issue will not be reversed unless there is an abuse of discretion. *Sloan v. Southern Floridabanc Fed. Sav. & Loan Ass'n*, 197 Ga. App. 601, 398 S.E.2d 720 (1990).

If there is intervention before final judgment, if the rights of the intervening parties have not been protected, and if the denial of intervention would dispose of the intervening parties' cause of action, intervention should be allowed and the failure to do so amounts to an abuse of discretion. *Payne v. Dundee Mills, Inc.*, 235 Ga. App. 514, 510 S.E.2d 67 (1998).

Intervention was properly allowed when the intervenor filed a motion to intervene and served the parties as required by subsection (c) of O.C.G.A. § 9-11-24, and when the motion sought no further relief than that which the plaintiff already sought against the defendants. *AC Corp. v. Myree*, 221 Ga. App. 513, 471 S.E.2d 922 (1996).

When signatories to contribution agreement sought a judgment declaring the rights and obligations of the parties to the agreement, the bank president was properly allowed to intervene under O.C.G.A. § 9-11-24(b)(2) to claim unpaid salary; as the bank was to be organized under the agreement, signatories of which also guaranteed employment contract, there were questions of law or fact in common, and no undue delay or prejudice to rights of original parties had been shown. *Ervin v. Turner*, 291 Ga. App. 719, 662 S.E.2d 721 (2008), cert. denied, 2008 Ga. LEXIS 773, 774, 794 (Ga. 2008).

Because the trial court applied the correct legal standard in O.C.G.A. § 19-7-1(b.1) in finding that the natural parent presumption was rebutted and that awarding custody to the grandparents was in the child's best interests, and because the grandparents were properly permitted to intervene under O.C.G.A. § 9-11-24(a)(2), the mother was not entitled to appellate relief. *Trotter v. Ayres*, 315 Ga. App. 7, 726 S.E.2d 424 (2012),

Permissive Intervention (Cont'd)

cert. denied, No. S12C1206, 2012 Ga. LEXIS 666 (Ga. 2012).

Grant or denial of intervention not reversed absent abuse. — Appellate court will not reverse grant or denial of permissive intervention unless there is an abuse of discretion. *Allgood v. Georgia Marble Co.*, 239 Ga. 858, 239 S.E.2d 31 (1977); *Branch v. Maxwell*, 203 Ga. App. 553, 417 S.E.2d 176, cert. denied, 203 Ga. App. 905, 417 S.E.2d 176 (1992).

When permissive intervention is sought, subsection (b) of this section confers discretion upon the trial court, and such discretion will not be controlled unless the discretion is manifestly abused. *Barber & Barber, Inc. v. Board of Comm'rs*, 231 Ga. 574, 203 S.E.2d 192 (1974); *Mt. Paran Area Civic Ass'n v. Cates*, 240 Ga. 191, 240 S.E.2d 7 (1977).

Absent clear showing that the trial judge acted arbitrarily, the appellate court should not control the trial judge's discretion in determining whether a permissive motion to intervene would unduly delay or prejudice the adjudication of rights of the original parties. *Ryder Truck Rental, Inc. v. Mayo*, 120 Ga. App. 495, 171 S.E.2d 542 (1969).

Grandson did not have the right to intervene in proceedings by children for the appointment of a guardian for their mother. *White v. Heard*, 225 Ga. App. 351, 484 S.E.2d 12 (1997).

Party not allowed to appear in caption effectively denied motion to intervene. — Trial court's order allowing an insurer to intervene under O.C.G.A. § 9-11-24(a)(2) in the insured homeowner's action against a vehicle manufacturer for fire damage to the insured's home when the vehicle spontaneously caught fire was contradictory because the order did not allow the insurer to appear in the caption of the action or participate in the main action, amounting to a denial of the motion. Therefore, remand was required. *Andrews v. Ford Motor Co.*, 310 Ga. App. 449, 713 S.E.2d 474 (2011).

Law firm not entitled to intervene in former client's case. — Trial court did not abuse the court's discretion in denying a law firm's motion under

O.C.G.A. § 9-11-24(a)(2) to intervene in a former client's case because the firm was discharged from the case and filed the firm's lien pursuant to O.C.G.A. § 15-19-14(b) before the settlement, and the firm knew when the client had reached a settlement agreement but did not move to intervene as a party until over a month later; the firm was allowed to prosecute the firm's fee lien to the jury as a party, making opening statements, calling witnesses, introducing evidence, and arguing in closing. *Jones, Martin, Parriz & Tessener Law Offices, PLLC v. Westrex Corp.*, 310 Ga. App. 192, 712 S.E.2d 603 (2011).

Employer was entitled to intervene in a workers' compensation action pursuant to O.C.G.A. § 9-11-24(a)(2) because the employer claimed an interest in the property or transaction that was the subject to the suit because the employer's subrogation rights were not protected by the existing parties to the employee's suit, and because the trial court's denial of the employer's motion to intervene disposed of the only legal remedy for that claim. *Kroger v. Taylor*, 320 Ga. App. 298, 739 S.E.2d 767 (2013).

Intervention by subsequently named corporation denied. — 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).

Intervention denied. — Trial court did not abuse the court's discretion in denying a shareholder's motion to intervene, pursuant to O.C.G.A. § 9-11-24, in pending shareholder derivative actions that had been consolidated as the shareholder lacked standing to assert derivative claims in the shareholder's own non-consolidated action without the representation of counsel, and the claims that the shareholder asserted belonged to the corporation; there was no showing that

the shareholder had an interest relating to the property or transaction that was the subject matter of the pending action, pursuant to the requirement of § 9-11-24(2). *Leventhal v. Post Props.*, 276 Ga. App. 742, 624 S.E.2d 223 (2005).

Despite the claim by the owners of a corporation that the trial court erred in refusing to allow the owners to intervene in the case as the true owners of the property in question because the owners never properly filed or asserted a motion to intervene, no error resulted; moreover, the owners' argument that the trial court erred in refusing to allow the owners to file the owners' motion to intervene also provided no basis for relief. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Time of Intervention

Order granting intervention ex parte and without timely notice properly vacated. — Under Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6(d)), written motions, other than one which may be heard ex parte, and notice of the hearing, shall be served not later than five days before the time specified for the hearing, and if service is by mail, three extra days shall be added; hence, an order granting intervention ex parte, albeit subject to objection of the parties, without the giving of timely notice, was properly vacated by the trial court. *Gregory v. Tench*, 138 Ga. App. 219, 225 S.E.2d 753 (1976).

Intervention must be timely, whether asserted as a right or as a matter of discretion. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Timeliness and sufficiency of showing within discretion of court. — Decision whether application for intervention is timely and the showing sufficient are matters within the sound discretion of the trial court. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Decisions whether intervention is

timely and the showing sufficient are matters within the sound discretion of the trial court and will not be controlled absent an abuse of discretion. *Doe v. Garcia*, 177 Ga. App. 61, 338 S.E.2d 710 (1985).

Whether an intervention is timely is a matter within the sound discretion of the court, and that decision will not be controlled absent an abuse of discretion. *Wigley v. Hambrick*, 193 Ga. App. 903, 389 S.E.2d 763, cert. denied, 193 Ga. App. 911, 389 S.E.2d 763 (1989).

Motion to intervene not timely. — When notice of the motion to intervene is personally served two days prior to a confirmation hearing, the plaintiff's objection to such motion for lack of proper notice is well taken since the motion to intervene is not timely; such motion cannot, in view of the objection, be taken up until a day subsequent to the confirmation hearing date. *Greer v. Federal Land Bank*, 158 Ga. App. 60, 279 S.E.2d 308 (1981).

Intervention after judgment is not usually permitted, and to justify intervention requires a strong showing. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Intervention may be allowed after final judgment to preserve some right which cannot otherwise be protected. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Addition of intervenor plaintiffs after judgment when not properly represented. — When intervenor plaintiffs have not been properly represented in an original action, the intervenors may be added after the judgment. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

In a class action when discovery of all persons in the class is required to be made of the defendant and discovery is unduly delayed by failure of the defendant to comply with an order of the court, addition of intervenor plaintiffs, after imposition of authorized sanction of default judgment, is authorized in the discretion of the trial court. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parties, § 144 et seq.

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Practice Forms, Parties, § 130.

C.J.S. — 35A C.J.S., Federal Civil Procedure, § 162 et seq. 67A C.J.S., Parties, §§ 63, 64.

ALR. — Right of nonparties to move for the vacation of a judgment and to intervene in action or proceeding in respect of a matter in which they have an interest common with or similar to that of the parties, 112 ALR 434.

Right of attorney to intervene in an action or proceeding so that he may refute or deny charges of fraud or other professional misconduct relating to the matter involved, 128 ALR 581.

Intervention or subsequent joinder of parties as affecting jurisdiction of federal court based upon diversity of citizenship, 134 ALR 335.

Right of one covered by a fidelity bond to intervene in action by obligee against obligor, 157 ALR 159.

Demurring to complaint or petition in intervention as waiver of right to stand upon motion to strike, 163 ALR 917.

Right to intervene in suit to determine validity or construction of law or governmental regulations, 169 ALR 851.

Who may intervene in suit to quiet title, 170 ALR 149.

Right of correspondent to intervene in suit for divorce, 170 ALR 161.

Assertion of fiduciary status of party to litigation as basis for intervention by one claiming interest in fruits thereof as trust beneficiary, 2 ALR2d 227.

Appealability of order granting or denying right of intervention, 15 ALR2d 336.

Intervention by stockholder for purpose of interposing defense for corporation, 33 ALR2d 473.

Time within which right to intervene may be exercised, 37 ALR2d 1306.

When is representation of applicant's interest by existing parties inadequate and applicant bound by judgment so as to be entitled to intervention as of right under Federal Rule 24(a)(2) and similar state statutes or rules, 84 ALR2d 1412.

Intervenor's right to disqualify judge, 92 ALR2d 1110.

Who may intervene in action between union and union member, 93 ALR2d 1037.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation, 63 ALR3d 373.

Right of insurer issuing "uninsured motorist" coverage to intervene in action by insured against uninsured motorist, 35 ALR4th 757.

Right to intervene in court review of zoning proceeding, 47 ALR6th 439.

Right to intervene in federal hazardous waste enforcement action, 100 ALR Fed. 35.

When is intervention as matter of right appropriate under Rule 24(a)(2) of Federal Rules of Civil Procedure in civil rights action, 132 ALR Fed. 147.

9-11-25. Substitution of parties.**(a) Death.**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representative of the deceased party and, together with the notice of the hearing, shall be served on the parties as provided in Code Section 9-11-5 and upon persons not parties in the manner provided in Code Section 9-11-4 for the service of a summons. Unless the motion for substitution is made not later than 180 days after the death is suggested upon the record by service of a statement of the

fact of the death, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court, upon motion served as provided in subsection (a) of this Code section, may allow the action to be continued by or against his representative.

(c) **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party unless the court, upon motion, directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a) of this Code section.

(d) **Public officers; death or separation from office.**

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate, and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer brings or defends an action in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added. (Ga. L. 1966, p. 609, § 25.)

Cross references. — Time for appeal by representative of party who dies after trial, § 5-6-16. Authority of court to allow successor to public office to appear, plead, or otherwise proceed with action against previous holder of office, § 45-1-2. Actions on bonds of public officers generally, § 45-4-25. Manner, effect, etc., of vacating public offices generally, T. 45, C. 5. Survival of actions against joint administrators or executors, § 53-7-43. Substitution

of new administrator in actions pending for or against removed executor or administrator, § 53-7-44.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 25, see 28 U.S.C.

Law reviews. — For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
 DEATH OF PARTY
 TRANSFER OF INTEREST
 PUBLIC OFFICERS

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 3-402 are included in the annotations for this Code section.

Substitution of parties under O.C.G.A. § 9-11-25 is not limited to those instances listed herein. *Franklyn Gesner Fine Paintings, Inc. v. Ketcham*, 252 Ga. 537, 314 S.E.2d 903 (1984).

Substitution accomplished on motion and notice. — Substitution of parties upon the parties' death or when there is a transfer of interest is accomplished upon proper motion and notice to the parties. *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

Valid substitution from voluntary appearance and acquiescence. — When executor of a deceased party appears voluntarily and pleads as a party in the case, and the opposite party indicates in any manner of record the party's acquiescence to the substitution, a valid substitution will take place. *Eubank v. Barber-Colman Co.*, 115 Ga. App. 217, 154 S.E.2d 638 (1967) (decided under former Code 1933, § 3-402).

Trial court did not err in dismissing a passenger's O.C.G.A. § 9-2-61 renewal action entirely as being void ab initio and in denying the passenger's request to substitute parties under O.C.G.A. § 9-11-25 because the passenger's renewed complaint was filed after the driver's death, and the passenger never attempted to substitute a new defendant before a hearing on a motion to dismiss. *Cox v. Progressive Bayside Ins. Co.*, 316 Ga. App. 50, 728 S.E.2d 726 (2012).

Failure to challenge substitution. — Trial court did not err by finding a bank had the power to enforce a note because the defendants did not object or respond to the motion to substitute the bank as the

real party in interest; thus, the issue was waived. *HWA Props., Inc. v. Cmty. & S. Bank*, 322 Ga. App. 877, 746 S.E.2d 609 (2013).

Substitution on consent could not be challenged on appeal. — Debtor could not challenge a judgment entered on remittitur by raising arguments regarding an assignee's payment of consideration for a judgment entered against the debtor, although the issue was not within the scope of the prior appeal as the debtor had consented to the assignee's substitution into the action in place of the bank as well as the assignment of the judgment to it. *Martin v. Hamilton State Bank*, 323 Ga. App. 185, 746 S.E.2d 750 (2013).

Invited error precluded objection on appeal. — Former director's putative transferee could not argue on appeal that it was error to substitute an assignee in place of a creditor in the creditor's fraudulent transfer action as the transferee advised the trial court that the transferee had no objection to the substitution at the time. *Am. Nat'l Holding Corp. v. EMM Credit, LLC*, 323 Ga. App. 655, 748 S.E.2d 683 (2013).

Cited in *Fuller v. Booth*, 118 Ga. App. 685, 165 S.E.2d 318 (1968); *Nelson v. Sing Oil Co.*, 122 Ga. App. 19, 176 S.E.2d 227 (1970); *Burgess v. Nabers*, 122 Ga. App. 445, 177 S.E.2d 266 (1970); *Pendley v. Hunter*, 138 Ga. App. 864, 227 S.E.2d 857 (1976); *Continental Ins. Co. v. Weekes*, 140 Ga. App. 791, 232 S.E.2d 80 (1976); *Central Mut. Ins. Co. v. Wofford*, 145 Ga. App. 836, 244 S.E.2d 899 (1978); *Rives E. Worrell Co. v. Key Sys.*, 147 Ga. App. 383, 248 S.E.2d 686 (1978); *Anderson v. Southeastern Capital Corp.*, 148 Ga. App. 164, 251 S.E.2d 55 (1978); *Tabernacle Baptist Church v. Dorsey*, 247 Ga. 675, 278 S.E.2d 378 (1981); *Omark Indus., Inc. v. Alewine*, 164 Ga. App. 397, 298 S.E.2d 259 (1982); *Canada W., Ltd. v. City of Atlanta*, 169 Ga. App. 907, 315 S.E.2d 442 (1984); *Heslen v.*

Heslen, 199 Ga. App. 271, 404 S.E.2d 592 (1991); NationsBank v. Peavy, 227 Ga. App. 137, 488 S.E.2d 699 (1997); Blanton v. Duru, 247 Ga. App. 175, 543 S.E.2d 448 (2000); Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683 (2014); State ex rel. Hudgens v. Sun States Insurance Group, Inc., 770 S.E.2d 43, No. A14A2120, 2015 Ga. App. LEXIS 214 (2015).

Death of Party

Substitution of personal representatives. — Substitution of personal representatives of decedent pursuant to subsection (a) of O.C.G.A. § 9-11-25 in an action involving the decedent's negligence claim against the defendant did not result in addition of a new party or a new cause of action to the litigation. Pope v. GoodGame, 223 Ga. App. 672, 478 S.E.2d 636 (1996).

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).

Substitution does not divest court of venue. — Because the executor stands in the shoes of the decedent, in essence keeping the suit and claims against the decedent alive, the substitution of a non-resident executor is, for purposes of venue, qualitatively the same as when a resident defendant moves out of the county; therefore, a party's death and the substitution of executors did not divest the superior court of venue. Abrams v. Massell, 262 Ga. App. 761, 586 S.E.2d 435 (2003).

Order making administrator of defendant who died before being served a defendant is not a substitution but the commencement of a new suit. Rowe v. Citizens & S. Nat'l Bank, 129 Ga. App. 251, 199 S.E.2d 319 (1973).

Procedure for suggestion of death is for protection of prospective respondent to motion for substitution of parties, and is for the purpose of enabling the respondent to place a limitation upon

the period of time during which the movant may seek substitution of the parties. Anderson v. Southeastern Capital Corp., 243 Ga. 498, 255 S.E.2d 12 (1979); Berry v. Morton, 152 Ga. App. 117, 262 S.E.2d 263 (1979); Binns v. Binns, 193 Ga. App. 554, 388 S.E.2d 385 (1989).

Statement sufficient to suggest death. — Statement of fact of death, which includes name of deceased and date of death, is a sufficient suggestion of death as contemplated by paragraph (a)(1) of this section to trigger the 180-day period allowed for filing a motion for substitution. Mullis v. Bone, 143 Ga. App. 407, 238 S.E.2d 748 (1977).

Movant seeking substitution not required to suggest death. — Nothing in the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) requires movant seeking substitution of a party to make a suggestion of death as a prerequisite or condition to filing motion for substitution. Anderson v. Southeastern Capital Corp., 243 Ga. 498, 255 S.E.2d 12 (1979).

Movant seeking to substitute proper party is not required to make the suggestion of death, although the movant is permitted to do so; the movant's making of suggestion of death is anomalous, unnecessary, and gratuitous, since the effect of its filing is to limit time within which the motion for substitution could be made. Berry v. Morton, 152 Ga. App. 117, 262 S.E.2d 263 (1979).

If executor of deceased party desires protection of the 180-day limitation period, the executor can file a suggestion of death on the record and serve it on the other party's counsel. Having failed to so act, the executor cannot complain of lack of diligence on the part of the other party. Dubberly v. Nail, 166 Ga. App. 378, 304 S.E.2d 504 (1983).

Limitation period does not run until suggestion of death personally served. — The 180 day limitation contained in paragraph (a)(1) of O.C.G.A. § 9-11-25 is not triggered when the surviving party to an action initiates the suggestion of death until personal service of the suggestion of death is made upon the nonparty representative of the deceased litigant's estate. Dubberly v. Nail, 166 Ga. App. 378, 304 S.E.2d 504 (1983);

Death of Party (Cont'd)

Ridley v. Polk Bros. Constr. Co., 170 Ga. App. 349, 317 S.E.2d 326 (1984).

When the plaintiff brought a medical malpractice action against the defendants and thereafter the plaintiff's attorney notified the court and all parties that the plaintiff had died but no motion for substitution of parties was made within the next 180 days, since the record showed no personal service of the suggestion of death upon the nonparty representative of the plaintiff's estate, the 180-day limitation of paragraph (a)(1) never commenced, and the trial court erred in dismissing the action. *Ludy v. Giddens*, 182 Ga. App. 111, 354 S.E.2d 703 (1987).

The 180-day limitation of paragraph (a)(1) of O.C.G.A. § 9-11-25 does not commence until the non-party representative of the estate has been served with the suggestion of death. *Binns v. Binns*, 193 Ga. App. 554, 388 S.E.2d 385 (1989).

Burden is upon representative of the deceased, not upon movant, to invoke limitation within which motion for substitution of parties may be made. *Berry v. Morton*, 152 Ga. App. 117, 262 S.E.2d 263 (1979).

No time limit for substitution until notice of death given. — There is no time limit for substitution for death of a party until notice has been given, and even this time limit is subject to enlargement for good cause shown, in the discretion of the court. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974).

Service of suggestion of death on non-party as prerequisite to running.

— O.C.G.A. § 9-11-25 requires that the record reflect that the suggestion of death has been served upon all necessary parties, including the non-party representative of the estate, before the 180-day limitation begins to run. Until the record as to service is perfected, there is no duty to substitute; an acknowledgment of service for this purpose does not relate back to the day of service but starts the limitation period when the acknowledgment is filed. *Northside Corp. v. Mosby*, 214 Ga. App. 806, 449 S.E.2d 6 (1994).

Substitution to be within 180 days of suggestion of death. — Time restric-

tion provided in paragraph (a)(1) of this section is merely that if there is a suggestion of death in the record, then the movant who wishes to substitute must do so within 180 days of service of suggestion of death upon the movant. *Berry v. Morton*, 152 Ga. App. 117, 262 S.E.2d 263 (1979).

Action on a contract was properly dismissed when the pro se plaintiff failed to make a valid substitution of parties within 180 days after a suggestion of death was filed. *Maddox v. Wilson*, 219 Ga. App. 158, 464 S.E.2d 226 (1995).

Extension of period for substitution. — Court may extend period for substitution if request is made before expiration of 180-day period. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974).

Right of court to dismiss for failure to timely move for substitution. — Court has the right to dismiss under paragraph (a)(1) of this section, regardless of whether or not counsel for the deceased would be authorized to make a motion to dismiss. *Jernigan v. Collier*, 134 Ga. App. 137, 213 S.E.2d 495, *aff'd*, 234 Ga. 837, 218 S.E.2d 556 (1975).

Dismissal not mandatory. — Even if no motion for substitution is made within the 180-day period, dismissal of the action is not mandatory, despite the use of the word "shall" in paragraph (a)(1) of this section. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974).

Entry of order required. — Dismissal is not automatic under paragraph (a)(1) of this section, and entry of an order is required before dismissal can be effected. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974); *Jernigan v. Collier*, 234 Ga. 837, 218 S.E.2d 556 (1975).

No dismissal when no service of suggestion of death. — When there was no personal service of the suggestion of death upon the nonparty representative of the decedent's estate, the 180-day limitation of paragraph (a)(1) of O.C.G.A. § 9-11-25 was never commenced, and the trial court erred in dismissing the action. *Bledsoe v. Sutton*, 174 Ga. App. 248, 329 S.E.2d 589 (1985).

Late substitution within discretion of court on showing of excusable ne-

glect. — Court may in the court's discretion permit motion for substitution made more than 180 days after death is suggested of record when failure to file such motion was the result of excusable neglect. *Jernigan v. Collier*, 234 Ga. 837, 218 S.E.2d 556 (1975); *Anderson v. Southeastern Capital Corp.*, 243 Ga. 498, 255 S.E.2d 12 (1979).

Absent showing of excusable neglect dismissal proper. — When the plaintiff fails to make a timely motion for substitution, as required by paragraph (a)(1) of Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-25), a motion to dismiss pursuant to Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(b)) is in order, at the hearing of which motion the plaintiff may show excusable neglect under Ga. L. 1966, p. 609, § 6 (see now O.C.G.A. § 9-11-6(b)(2)), but upon the plaintiff's failure to satisfy requirements of that section, a motion to dismiss should be granted. *Jernigan v. Collier*, 234 Ga. 837, 218 S.E.2d 556 (1975).

Dismissal for untimely motion to substitute operates on the merits. — Dismissal for failure to make timely substitution operates as a dismissal on the merits. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974).

When the plaintiff has failed to timely move for substitution, and has had a hearing and adverse determination on the issue of excusable neglect, a dismissal is, as it should be, upon the merits. *Jernigan v. Collier*, 234 Ga. 837, 218 S.E.2d 556 (1975).

Absent specification to the contrary. — When no notice of substitution is made within 180 days after service of suggestion of death and defendant moves for dismissal on this ground, dismissal of the petition under Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) by the trial judge after notice and hearing, without specifying that it is "without prejudice," would bar any subsequent suit. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974).

Dismissal for want of prosecution distinguished. — Dismissal under paragraph (a)(1) of Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-25) is different from dismissal under Ga. L. 1966, p. 609,

§ 41 (see now O.C.G.A. § 9-11-41(e)) for want of prosecution, which is automatically obtained and does not operate as an adjudication on the merits. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974).

Right of voluntary dismissal not abridged by motion to dismiss hereunder. — Plaintiff may voluntarily dismiss the plaintiff's suit at any time before the verdict or oral announcement of judgment by the trial court under Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(a)), and this right is not abridged by filing a motion to dismiss based upon the plaintiff's failure to comply with Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-25(a)(1)). *Wofford v. Central Mut. Ins. Co.*, 242 Ga. 338, 249 S.E.2d 21 (1978).

Executor substituted after death of defendant not individually a party. — When pending an action, the defendant dies, and the defendant's executor is substituted as party defendant, as provided by this section, the executor is not individually a party to the action and may not appeal in an individual capacity from an adverse judgment. *Coogler v. Berry*, 117 Ga. App. 614, 161 S.E.2d 428 (1968).

Death of defendant does not create "lack of an indispensable party" within the meaning of Ga. L. 1972, p. 689, § 7 or Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-19 or O.C.G.A. § 9-11-41(b)). *Jernigan v. Collier*, 234 Ga. 837, 218 S.E.2d 556 (1975).

Deceased person cannot be party to legal proceedings. *Mathews v. Cleveland*, 159 Ga. App. 616, 284 S.E.2d 634 (1981).

Action commenced in name of deceased person is not brought in name of a "natural person," because a deceased person has no capacity to be a "proper" litigant in the courts of this state. If no legal party plaintiff was named in the pleadings and shown to exist, the action is a mere nullity. *Mathews v. Cleveland*, 159 Ga. App. 616, 284 S.E.2d 634 (1981).

When an action is brought in name of plaintiff who is dead, complaint may not be amended by substituting a plaintiff having capacity to sue. *Mathews v. Cleveland*, 159 Ga. App. 616, 284 S.E.2d 634 (1981).

Death of Party (Cont'd)

Second, untimely, motion for substitution of the temporary administrator of a decedent's estate should have been treated either as the equivalent of a meritorious motion for reconsideration of the denial of a timely filed first motion, based on the probate court's correction of its clerical error identifying the decedent, or as a permissible late filing based on excusable neglect. *Harvey v. Oliver*, 178 Ga. App. 63, 341 S.E.2d 917 (1986).

When an estate's representative dies during the pendency of the litigation, the successor representative must be substituted as a party; substitution of parties does not occur by operation of law but must be effected under O.C.G.A. § 9-11-25. *McCarley v. McCarley*, 246 Ga. App. 171, 539 S.E.2d 871 (2000).

Failure timely to seek substitution held not excusable neglect. — When there was no evidence from which the trial court could find excusable neglect as a matter of fact and, as a matter of law, plaintiff's explanation that counsel was confused as to the law in Georgia regarding substitution of an executor of a decedent's estate in place of a deceased defendant did not constitute excusable neglect, the trial court abused the court's discretion in denying the executor's motion to dismiss the plaintiff's suit for their failure to seek substitution of parties within the 180-day limitation period in paragraph (a)(1) of O.C.G.A. § 9-11-25. *King v. Green*, 189 Ga. App. 105, 375 S.E.2d 53, cert. denied, 189 Ga. App. 912, 375 S.E.2d 53 (1988).

Plaintiff's failure to make a timely substitution of parties was not excused based on the fact that a guardian was representing the decedent's interests in the case prior to the decedent's death. *Stephenson v. Ingram*, 239 Ga. App. 892, 522 S.E.2d 500 (1999).

Judgment obtained against a deceased defendant is void, and the trial court does not err in vacating the judgment, setting the judgment aside, and dismissing the action, when no party has been substituted since the suggestion of death and no reason has been shown that

the failure to act was the result of excusable neglect so as to allow an extension of time. *Franklin v. Collins*, 167 Ga. App. 596, 307 S.E.2d 66 (1983).

Judgment pending substitution void. — Summary judgment for the defendant, granted after the plaintiff's death and prior to substitution for the decedent, was void as to the decedent. *Allen v. City of Moultrie*, 162 Ga. App. 188, 290 S.E.2d 529 (1982).

Transfer of Interest

O.C.G.A. § 9-11-25 does not determine what actions shall survive transfer of interest by a party; the statute deals only with the mechanics of substitution in an action which does survive under the applicable substantive law. *Goodyear v. Trust Co. Bank*, 248 Ga. 407, 284 S.E.2d 6 (1981).

Transfer of interest during course of litigation contemplated. — Subsection (c) of this section, providing for substitution of the transferee of interest in the action, applies only when the transfer is made pending or during the course of litigation. *Employers' Liab. Assurance Corp. v. Keelin*, 132 Ga. App. 459, 208 S.E.2d 328 (1974).

Subsection (c) of O.C.G.A. § 9-11-25 vests discretion in the trial judge to allow the original plaintiff to continue suit either alone or joined by the interest transferee when the transfer of interest occurred after the filing of the suit. *Gene Thompson Lumber Co. v. Davis Parmer Lumber Co.*, 189 Ga. App. 573, 377 S.E.2d 15, cert. denied, 189 Ga. App. 912, 377 S.E.2d 15 (1988).

In an action for default on certain promissory notes in relation to a condominium investment, the trial court did not err in permitting the intervention of the FSLIC as a real party in interest, even though the FSLIC was abolished by a federal act reorganizing the savings and loan system. The trial court can substitute FSLIC's successor, the Resolution Trust Corporation, at any time. *Stovall v. FSLIC*, 260 Ga. 475, 396 S.E.2d 484 (1990).

From party to nonparty. — Subsection (c) of this section contemplates a transfer of interest, during litigation, from one who is a party to the case to one who

is not, not a purported transfer from one who is not a party to the litigation to one who is. *Commercial Union Ins. Co. v. Ed. V. Collins Contracting, Inc.*, 147 Ga. App. 183, 248 S.E.2d 220 (1978).

In an action for conversion, the trial court did not err in failing to direct a verdict in the defendant's favor on grounds that the plaintiff had assigned the plaintiff's interests in accounts receivable to another corporation, and thus was not the proper party to bring suit, when, for all this record showed, the plaintiff was the damaged party; the defendant did not prove otherwise, nor was the defendant the proper party to complain on behalf of the other corporation. *Privitera v. Addison*, 190 Ga. App. 102, 378 S.E.2d 312, cert. denied, 190 Ga. App. 898, 378 S.E.2d 312 (1989).

Continuance of original action not automatically authorized. — Subsection (c) of O.C.G.A. § 9-11-25, when operative, does not automatically authorize the continuance of an original action in all cases following the transfer of an interest. If a cause of action does not survive a subsequent transfer of interest, subsection (c), standing alone, would not revive the action. *Gene Thompson Lumber Co. v. Davis Parmer Lumber Co.*, 189 Ga. App. 573, 377 S.E.2d 15, cert. denied, 189 Ga. App. 912, 377 S.E.2d 15 (1988).

When transfer of interest, such as assignment, takes place prior to commencement of action, Ga. L. 1968, p. 1104, § 6, (see now O.C.G.A. § 9-11-17) controls and requires that the action shall be prosecuted in the name of the real party in interest. *Employers' Liab. Assurance Corp. v. Keelin*, 132 Ga. App. 459, 208 S.E.2d 328 (1974).

Action not surviving transfer of interest. — Action which sought to compel a party to do an affirmative act in regard to property in which the party no longer held an interest could not be continued, absent substitution of parties as provided in sub-

section (c) of O.C.G.A. § 9-11-25. *Georgia Power Co. v. Hunt*, 266 Ga. 331, 466 S.E.2d 846 (1996).

Effect of dissolution, merger, or consolidation of corporation. — After dissolution of a corporation in any manner other than by court decree, or the corporation's merger or consolidation with another corporation, any pending actions by such a corporation can proceed as if the dissolution, merger, or consolidation had never taken place. *Rosing v. Dwoskin Decorating Co.*, 141 Ga. App. 617, 234 S.E.2d 128 (1977).

Merging banks. — In a suit brought by mortgagors against the mortgagor bank that was taken over by a successor bank, the appellate court erred in dismissing the successor bank's appeal under O.C.G.A. § 9-11-25 for lack of standing based on the trial court's failure to add or substitute it as the defendant because the two corporations were deemed the same entity under federal and state law by virtue of their merger, thus, the claims originally filed by and against the mortgagee bank could continue. *Nat'l City Mortg. Co. v. Tidwell*, 293 Ga. 697, 749 S.E.2d 730 (2013).

Public Officers

Failure of complaint to show names of defendant public officers does not subject the complaint to dismissal. *McDowell v. Judges Ex Officio*, 235 Ga. 364, 219 S.E.2d 713 (1975).

Change of name of board after filing of complaint. — When action was filed by board under correct name provided by statute then in effect, fact that no motion was made in writing to substitute new name of the board when changed by the legislature did not subject the action to dismissal because subsection (c) of this section provides that such an action may be continued by the original party. *Clark v. Board of Dental Exmrs.*, 240 Ga. 289, 240 S.E.2d 250 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Abatement, Survival, and Revival, § 50 et seq.

Am. Jur. Pleading and Practice

Forms. — 19 Am. Jur. Pleading and Practice Forms, Parties, §§ 196, 243.

C.J.S. — 35A C.J.S., Federal Civil Pro-

cedure, § 192 et seq. 35B C.J.S., Federal Civil Procedure, §§ 788, 819. 67A C.J.S., Parties, § 53 et seq.

ALR. — Right of beneficiary to bring action under death statute where executor or administrator, who by the statute is a proper party to bring it, fails to do so, 101 ALR 840.

Substitution, or addition, as plaintiff, after limitation period, of assignee, or trustee in bankruptcy, in action commenced by assignor, or bankrupt, within limitation period, but after assignment or bankruptcy, 105 ALR 610.

Death of principal defendant as abating or dissolving garnishment or attachment, 131 ALR 1146.

Construction and application of statutory provision that, in case of transfer of subject matter of action *pendente lite*, the action may proceed in name of original party, or that the transferee may be substituted, 149 ALR 829.

Effect of death of party to divorce or annulment suit before final decree, 158 ALR 1205.

Right of substitution of successive per-

sonal 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.

Parties to action for specific performance of contract for conveyance of realty after death of party to the contract, 43 ALR2d 938.

Abatement or survival of action for attorney's malpractice or negligence upon death of either party, 65 ALR2d 1211.

Continuance of civil case because of illness or death of party, 68 ALR2d 470.

Construction of Federal Rule 25(a)(1) as permitting substitution, as a party, of personal representative of a nonresident decedent, 79 ALR2d 532.

Validity of exception for specific kind of tort action in survival statute, 77 ALR3d 1349.

Sufficiency of suggestion of death of party, filed under Rule 25(a)(1) of Federal Rules of Civil Procedure, governing substitutions of party after death, 105 ALR Fed. 816.

ARTICLE 5

DEPOSITIONS AND DISCOVERY

Cross references. — Securing attendance of witnesses and production and preservation of evidence generally, T. 24, C. 10. Discovery in civil actions, Uniform Superior Court Rules, Rule 5. Discovery and motions in juvenile court cases, Uniform Rules for the Juvenile Courts of Georgia, Rule 7.1 et seq. Discovery in probate court proceedings, Uniform Rules for the Probate Courts, Rule 5.

Law reviews. — For annual survey on torts law, see 66 Mercer L. Rev. 189 (2014).

For comment, "Jurisdictional, Procedural, and Economic Considerations for Non-Party Electronic Discovery," see 59 Emory L.J. 1339 (2010).

For note, "Electronic Discovery in Georgia: Bringing the State Out of the Typewriter Age," 26 Ga. St. U.L. Rev. 551 (2010).

JUDICIAL DECISIONS

Completion of discovery. — Uniform Superior Court Rule 5 does not require that a party be given six months in which to complete discovery. *Alexander v.*

Macon-Bibb County Urban Dev. Auth. & Urban Properties #47, 257 Ga. 181, 357 S.E.2d 62 (1987).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Basis for, and Grounds for Lifting, Work

Product Protection Against Discovery, 39 POF3d 1.

Am. Jur. Trials. — Discovery — Written Interrogatories, 4 Am. Jur. Trials 1.

Discovery — Oral Deposition, 4 Am. Jur. Trials 119.

Request for Admissions by Plaintiff, 4 Am. Jur. Trials 185.

Request for Admissions by Defendant, 4 Am. Jur. Trials 215.

Motions for Production and Inspection, 4 Am. Jur. Trials 223.

Use of Videotape in Civil Trial Preparation and Discovery, 23 Am. Jur. Trials 95.

Trial Court Restrictions on Evidence of Defendant's Wealth, 30 Am. Jur. Trials 711.

Unauthorized Disclosure of Confidential Patient Information, 32 Am. Jur. Trials 105.

Litigation Under the Freedom of Information Act, 50 Am. Jur. Trials 407.

Taking the Deposition of the Sexual Harassment Plaintiff, 65 Am. Jur. Trials 65.

Hidden and Multiple Defendant Tort Litigation, 68 Am. Jur. Trials 503.

How to Conduct International Discovery, 71 Am. Jur. Trials 1.

Surviving and Thriving in the Process

of Preparing a Witness for Deposition, 87 Am. Jur. Trials 1.

Litigating Toxic Mold Cases, 91 Am. Jur. Trials 113.

Voir Dire in Low Speed Collision Cases — Plaintiff's View, 96 Am. Jur. Trials 1.

Defending the Worker's Compensation Claim in the Trucking Industry, 99 Am. Jur. Trials 1.

Use of Discovery in Product-Related Burn Injury Cases, 99 Am. Jur. Trials 141.

ALR. — Photographs of civil litigant realized by opponent's surveillance as subject to pretrial discovery, 19 ALR4th 1236.

Absent or unnamed class members in class action in state court as subject to discovery, 28 ALR4th 986.

Discovery of identity of blood donor, 56 ALR4th 755.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial proceedings, 63 ALR4th 712.

Right of defendant in criminal contempt proceeding to obtain information by deposition, 33 ALR5th 761.

Discovery of deleted e-mail and other deleted electronic records, 27 ALR6th 565.

9-11-26. General provisions governing discovery.

(a) **Discovery methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subsection (c) of this Code section, the frequency of use of these methods is not limited.

(b) **Scope of discovery.** Unless otherwise limited by order of the court in accordance with this chapter, the scope of discovery is as follows:

(1) **In general.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will

be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence;

(2) **Insurance agreements.** A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement;

(3) **Trial preparation; materials.** Subject to paragraph (4) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subsection and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Paragraph (4) of subsection (a) of Code Section 9-11-37 applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a "statement previously made" is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded; and

(4) **Trial preparation; experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under paragraph (1) of this subsection and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may, through interrogatories, require any other party to identify each person whom the other party expects to call

as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may obtain discovery under Code Section 9-11-30, 9-11-31, or 9-11-34 from any expert described in this paragraph, the same as any other witness, but the party obtaining discovery of an expert hereunder must pay a reasonable fee for the time spent in responding to discovery by that expert, subject to the right of the expert or any party to obtain a determination by the court as to the reasonableness of the fee so incurred;

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in subsection (b) of Code Section 9-11-35 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means; and

(C) Unless manifest injustice would result:

(i) The court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery under subparagraph (B) of this paragraph; and

(ii) With respect to discovery obtained under division (ii) of subparagraph (A) of this paragraph, the court may require, and with respect to discovery obtained under subparagraph (B) of this paragraph the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective orders.** Upon motion by a party or by the person from whom discovery is sought and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the court;

(6) That a deposition, after being sealed, be opened only by order of the court;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Paragraph (4) of subsection (a) of Code Section 9-11-37 applies to the award of expenses incurred in relation to the motion.

(d) **Sequence and timing of discovery.** Unless the court, upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence; and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

(A) The identity and location of persons having knowledge of discoverable matters; and

(B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which:

(A) He knows that the response was incorrect when made; or

(B) He knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses. (Ga. L. 1966, p. 609, § 26; Ga. L. 1967, p. 226, § 13; Ga. L. 1972, p. 510, § 1; Ga. L. 1984, p. 22, § 9; Ga. L. 1987, p. 3, § 9; Ga. L. 1993, p. 91, § 9.)

Cross references. — Protection of communications between victim assistance personnel and victims, § 17-17-9.1. Expert opinion testimony in criminal cases, § 24-7-707. For further provisions regarding depositions, § 24-10-110 et seq.

Code Commission notes. — Pursuant to Code Section in 1985, a comma was inserted following “parties” in paragraph (e)(3).

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 26, see 28 U.S.C.

Law reviews. — For article, “Discovery Proceedings from the Defendant’s Point of View,” see 26 Ga. B.J. 143 (1963). For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For article, “Ex Parte Communications with an Opponent’s Employees and Expert Witnesses: Which Potential Witnesses Can a Lawyer Talk to Without Breaking the Rules?,” see 27 Ga. St. B.J. 6 (1990). For annual survey on trial practice and procedure, see 42 Mercer L. Rev. 469 (1990). For article, “Automatic Disclosure in Discovery — The Rush to Reform,” see

27 Ga. L. Rev. 1 (1992). For article, “In Defense of Automatic Disclosure in Discovery,” see 27 Ga. L. Rev. 655 (1993). For article, “In Defense of Experimentation with Automatic Disclosure,” see 27 Ga. L. Rev. 665 (1993). For annual survey article on evidence law, see 52 Mercer L. Rev. 263 (2000). For article, “Alleviating the Pain of Electronic Discovery: Prospective Consideration of the Zubulake Factors,” see 9 Ga. St. B.J. 24 (2004). For article, “Georgia’s New Expert Witness Rule: Daubert and More,” see 11 Ga. St. B.J. 16 (No. 2, 2005). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on torts law, see 66 Mercer L. Rev. 189 (2014).

For note discussing discovery and lawyer’s work product exemption, see 24 Ga. B.J. 548 (1962). For note discussing discovery proceedings available to creditors, see 12 Ga. L. Rev. 814 (1978). For note, “Preferential Treatment of the United States under Federal Civil Discovery Procedures,” see 13 Ga. L. Rev. 550 (1979). For note, “Conflicts of Interest in the Liability Insurance Setting,” see 13 Ga. L. Rev. 973 (1979).

For comment, “A Study of the Georgia Statutes Relating to Discovery of Documents in Civil Actions,” see 2 Ga. St. B.J. 361 (1966). For case comment, “Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-1101, and former Code 1933, Ch. 21, T. 38 are included in the annotations for this Code section.

Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this section was substantially the same as former Code 1933, § 38-2101. Hence, decisions based on this Code section prior to its 1972 amendment should be consulted with care.

For additional cases decided under this Code section prior to its amendment by Ga. L. 1972, p. 510, § 1, relating to the use of depositions, see annotations under § 9-11-32.

Georgia Laws 1972, p. 510, entirely superseded the former version of this section, the purpose being to conform the discovery provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to the 1970 amendments to the Federal Rules of Civil Procedure. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

Purpose of discovery. — Purpose of deposition-discovery procedure is not only to ascertain facts, but also to determine what the adverse party contends they are and what purpose they will serve so that the issues may be narrowed, the trial simplified, and time and expense conserved. *Setzers Super Stores of Ga., Inc. v. Higgins*, 104 Ga. App. 116, 121 S.E.2d 305 (1961) (decided under former Code 1933, Ch. 21, T. 38); *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

Discovery is specifically designed to fulfill a two-fold purpose: issue formulation and factual revelation. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972); *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 202 S.E.2d 540 (1973); *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Broad purpose of discovery rules is to enable parties to prepare for trial so that each party will know the issues and be fully prepared on the facts. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972); *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 202 S.E.2d 540 (1973); *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975).

Rules of discovery under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) are designed to narrow and clarify the issues and to remove the potential for secrecy and hiding of material that existed under the previous system; in particular, such rules are designed to provide parties with the opportunity to obtain material knowledge of all relevant facts thereby reducing the element of surprise at trial. *Hanna Creative Enters., Inc. v. Alterman Foods, Inc.*, 156 Ga. App. 376, 274 S.E.2d 761 (1980).

Broad construction of use of discovery. — Use of the discovery process has been held to be broadly construed. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972); *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 202 S.E.2d 540 (1973).

Broad use of discovery favors supplying a party with the facts underlying the opponent's case, without reference to whether the facts sought are admissible at trial. *Setzers Super Stores of Ga., Inc. v. Higgins*, 104 Ga. App. 116, 121 S.E.2d 305 (1961) (decided under former Code 1933, Ch. 21, T. 38).

In a hospital lien case, the trial court erred by granting a patient's motion to compel seeking discovery from a medical center as to the center's rate-setting agreements with insurers and the center's revenue and other information because the patient was uninsured and such discovery was not relevant nor reasonably calculated to lead to admissible evidence. *Med. Ctr., Inc. v. Bowden*, 327 Ga. App. 714, 761 S.E.2d 116 (2014).

Discovery by driver in default. — Even though the issue of liability was resolved by a driver's default, the question of damages remained; the driver was entitled to introduce evidence as to damages and the driver had the right to engage in

discovery. *Russaw v. Burden*, 272 Ga. App. 632, 612 S.E.2d 913 (2005).

Failure to initiate discovery. — Trial court did not err in dismissing the shareholder's derivative action filed by the shareholder as it was within the trial court's discretion to dismiss the action once the shareholder failed to initiate discovery to determine whether the report filed by the special litigation committee that responded to the shareholder's claims of corporate improprieties and which concluded that the shareholder's claims were meritless was made in good faith and properly concluded that pursuing a lawsuit against the corporation was not in the corporation's best interests. *Thompson v. Scientific Atlanta, Inc.*, 275 Ga. App. 680, 621 S.E.2d 796 (2005).

Denial of motion to compel proper. — Trial court did not abuse the court's discretion by denying a motion to compel discovery before ruling on an investor's motion for summary judgment because, although no express order was entered by the trial court denying the motion to compel discovery, it was not presumed that the trial court failed to consider the motion to compel before ruling on summary judgment, but rather, it was presumed that the trial court implicitly denied the motions to compel upon entering summary judgment; assuming the trial court properly exercised the court's discretion to delay the hearing on the motion for summary judgment and extend the time allowing a financial advisor to take depositions, there is no evidence that the advisor made any effort to schedule the depositions before the trial court rescheduled the hearing. *Tyler v. Thompson*, 308 Ga. App. 221, 707 S.E.2d 137 (2011).

Denial of motion to reopen discovery. — There was no abuse of discretion in the trial court's denial of a client's motion to reopen discovery given the length of time the case had been pending and the client's failure to specify the evidence the client hoped to obtain during discovery; the client did not detail any discovery the client needed to obtain. *Quarterman v. Cullum*, 311 Ga. App. 800, 717 S.E.2d 267 (2011), cert. denied, No. S12C0297, 2012 Ga. LEXIS 179 (Ga. 2012); cert. dismissed, U.S. , 133 S. Ct. 388, 184 L. Ed. 2d 10 (2012).

There is no territorial limitation in the discovery statutes as to location of witnesses, documents, assets, etc. *Thrift v. Vi-Vin Prods., Inc.*, 134 Ga. App. 717, 215 S.E.2d 709 (1975).

Nonresident who files a lawsuit in Georgia may, in the court's discretion, be compelled to give a deposition in Georgia. *Warehouse Home Furn. Distrib., Inc. v. Davenport*, 261 Ga. 853, 413 S.E.2d 195 (1992).

Wide latitude is given to make complete discovery possible. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972).

Powers of trial court as to depositions. — Trial court has the power under O.C.G.A. § 9-11-26 to control the details of time, place, scope, and financing of a deposition for the protection of the deponents and parties. *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 321 S.E.2d 383 (1984).

Attorney fees imposed. — Award of sanctions in the form of attorney fees against a heating system installer that failed to produce an officer for deposition, despite a court order, was proper under §§ 9-11-37(b)(2), as the sanctions were proper despite the fact that there was no order under § 9-11-37(a) or O.C.G.A. § 9-11-26(c), the failure to appear was not substantially justified, and the amount awarded was not excessive. *Carrier Corp. v. Rollins, Inc.*, 316 Ga. App. 630, 730 S.E.2d 103 (2012).

Discretion of trial judge not interfered with. — Policy of the appellate courts of this state is not to interfere with trial judge's broad discretion granted under the discovery provisions of this section. *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977).

Absent clear abuse. — Supreme Court will not reverse a trial court's decision on discovery matters absent a clear abuse of discretion. *Ambassador College v. Goetzke*, 244 Ga. 322, 260 S.E.2d 27 (1979), cert. denied, 444 U.S. 1079, 100 S. Ct. 1029, 62 L. Ed. 2d 762 (1980).

Availability of discovery in contempt case. — Discovery is available to the parties litigant in a contempt of court case. *Hill v. Bartlett*, 124 Ga. App. 56, 183 S.E.2d 80 (1971), overruled on other

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grounds, *In re Crane*, 253 Ga. 667, 324 S.E.2d 443 (1985).

Workers' compensation claims. — Statute is not applicable to workers' compensation claims unless made so by the statute pertaining specifically to workers' compensation claims. *National Biscuit Co. v. Martin*, 225 Ga. 198, 167 S.E.2d 140 (1969). But see § 34-9-102(d)(1), now providing that discovery procedures in hearings of such claims be governed by this chapter.

Surprise witness. — When testimony of purported "surprise" witness not named in discovery process was merely cumulative of other testimony adduced at trial, any error in allowing the witness to testify was harmless. *Glennville Hatchery, Inc. v. Thompson*, 164 Ga. App. 819, 298 S.E.2d 512 (1982).

Privilege against self-incrimination. — When a party asserts the privilege against self-incrimination concerning matters sought to be discovered, the party must respond to each question asked, asserting the privilege to those questions the party deems necessary. *Axson v. National Sur. Corp.*, 254 Ga. 248, 327 S.E.2d 732 (1985).

Defendant was properly held in civil contempt for violating a consent interlocutory injunction by failing to answer questions under oath in discovery proceedings because the defendant could not, by invoking the privilege against self-incrimination, prevent enforcement of the very order to which the defendant consented. *In re Purohit*, 213 Ga. App. 182, 444 S.E.2d 133 (1994).

Production of tape of sexual assault in civil suit was not criminalized. — In a civil premises liability action arising from a sexual assault on a minor, in which a manager sought production of a videotape of the assault made by the assailants, O.C.G.A. § 16-12-100(b)(5) did not criminalize the act of producing the tape in response to a court order or a request for discovery, and the trial court erred in holding otherwise. *Alexander Props. Group, Inc. v. Doe*, 280 Ga. 306, 626 S.E.2d 497 (2006).

Waiver of work product protection. — Record supported the trial court's judg-

ment that a corporation waived work product protection when the corporation shared documents with the Securities and Exchange Commission (SEC) during the SEC's investigation of allegations involving securities fraud, and the trial court did not err when the court granted a motion to compel discovery which was filed by parties who owned shares in the corporation, even though the corporation and the SEC had signed a confidentiality agreement. *McKesson Corp. v. Green*, 266 Ga. App. 157, 597 S.E.2d 447 (2004).

Majority of jurisdictions that have considered the issue have determined that the burden of proving a waiver of work-product protection lies on the party asserting the waiver; however, in an action by shareholders based on stock losses following corporate acquisition of another company, the trial court neither explicitly or implicitly placed the burden of showing non-waiver of the work-product protection on a buyer. *McKesson Corp. v. Green*, 279 Ga. 95, 610 S.E.2d 54 (2005).

Personnel records not privileged. — Asserted need to protect the privacy of the internally generated personnel records and evaluations of allegedly negligent employees is not sufficient to render the material privileged from discovery as a matter of law. *DeLoitte Haskins & Sells v. Green*, 187 Ga. App. 376, 370 S.E.2d 194, cert. denied, 187 Ga. App. 907, 370 S.E.2d 194 (1988).

Claims file of liability insurer. — Order requiring a liability insurer to produce the insurer's entire claims file was proper when privileged information was specifically excluded and the insurer did not contest the relevancy of the material. *International Indem. Co. v. Saia Motor Freight Line*, 223 Ga. App. 544, 478 S.E.2d 776 (1996).

Out-of-state order prohibiting unprivileged testimony. — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the full faith and credit clause did not require the federal district court in Georgia to give full effect to the Michigan Court order. *Williams v. GMC*, 147 F.R.D. 270 (S.D. Ga. 1993).

Out-of-state confidential settlement statement. — Trial court erred in concluding that a confidential settlement agreement, even if incorporated as another court's final order, can operate to preclude discovery by Georgia litigants of the parties to that confidential settlement agreement. *Barger v. Garden Way, Inc.*, 231 Ga. App. 723, 499 S.E.2d 737 (1998).

Parties not obliged to confer about discovery plan. — Motorist's suit was properly dismissed under O.C.G.A. § 9-11-37(d), as the motorist failed to attend any of three scheduled depositions that were properly noticed under O.C.G.A. § 9-11-30(b)(1), defense counsel was not required to address the motorist's proposed discovery plan, and counsel's failure to do so did not excuse the motorist's failure to attend the depositions. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

Cited in *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968); *Neal v. Smith*, 226 Ga. 96, 172 S.E.2d 684 (1970); *Herring v. R.L. Mathis Cert. Dairy Co.*, 121 Ga. App. 373, 173 S.E.2d 716 (1970); *Royal Globe Indem. Co. v. Thompson*, 123 Ga. App. 268, 180 S.E.2d 576 (1971); *Johnson v. O'Donnell*, 123 Ga. App. 375, 181 S.E.2d 291 (1971); *Ward v. Smith*, 228 Ga. 137, 184 S.E.2d 592 (1971); *Terminal Transp. Co. v. Burger Chef Sys.*, 127 Ga. App. 535, 194 S.E.2d 333 (1972); *Household Fin. Corp. v. Ensley*, 127 Ga. App. 876, 195 S.E.2d 236 (1973); *Ford Motor Co. v. Hanley*, 128 Ga. App. 311, 196 S.E.2d 454 (1973); *Rary v. Guess*, 129 Ga. App. 102, 198 S.E.2d 879 (1973); *Retail Credit Co. v. United Family Life Ins. Co.*, 130 Ga. App. 524, 203 S.E.2d 760 (1974); *Smith v. Bass*, 131 Ga. App. 557, 206 S.E.2d 541 (1974); *Thomas v. Home Credit Co.*, 133 Ga. App. 602, 211 S.E.2d 626 (1974); *Reams v. Composite State Bd. of Medical Exmrs.*, 233 Ga. 742, 213 S.E.2d 640 (1975); *Taylor v. Stapp*, 134 Ga. App. 468, 215 S.E.2d 23 (1975); *Kamensky v. Stacey*, 134 Ga. App. 530, 215 S.E.2d 294 (1975); *Marchman v. Head*, 135 Ga. App. 475, 218 S.E.2d 151 (1975); *Bell v. Fine Prods. Co.*, 139 Ga. App. 878, 229 S.E.2d 808 (1976); *Dyna-Comp Corp. v. Selig Enters., Inc.*, 143 Ga. App. 462, 238 S.E.2d 571 (1977);

Kimble v. Kimble, 240 Ga. 100, 239 S.E.2d 676 (1977); *Schneider v. Spivey*, 240 Ga. 468, 241 S.E.2d 224 (1978); *Woods v. Andersen*, 145 Ga. App. 492, 243 S.E.2d 748 (1978); *Harris v. Harris*, 242 Ga. 576, 250 S.E.2d 407 (1978); *Karp v. Friedman*, *Alpren & Green*, 148 Ga. App. 204, 250 S.E.2d 819 (1978); *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979); *Thornton v. Burson*, 151 Ga. App. 456, 260 S.E.2d 388 (1979); *Wetherington v. Koepenick & Horne, Inc.*, 153 Ga. App. 302, 265 S.E.2d 107 (1980); *Massengale v. Georgia Power Co.*, 153 Ga. App. 476, 265 S.E.2d 830 (1980); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980); *Georgia Gazette Publishing Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981); *Everson v. Franklin Disct. Co.*, 248 Ga. 811, 285 S.E.2d 530 (1982); *Sherrill v. Martin*, 161 Ga. App. 558, 288 S.E.2d 648 (1982); *Warmack v. Mini-Skools, Ltd.*, 164 Ga. App. 737, 297 S.E.2d 365 (1982); *Morgan v. Citizens & S. Nat'l Bank*, 165 Ga. App. 254, 299 S.E.2d 750 (1983); *Porter v. Eastern Air Lines*, 165 Ga. App. 152, 300 S.E.2d 525 (1983); *Portman v. Karsman*, 166 Ga. App. 398, 304 S.E.2d 399 (1983); *Osborne v. Bank of Delight*, 173 Ga. App. 322, 326 S.E.2d 523 (1985); *Anderberg v. Georgia Elec. Membership Corp.*, 175 Ga. App. 14, 332 S.E.2d 326 (1985); *Hankinson v. Rackley*, 177 Ga. App. 734, 341 S.E.2d 231 (1986); *Howell v. United States Fire Ins. Co.*, 185 Ga. App. 154, 363 S.E.2d 560 (1987); *Mag Mut. Ins. Co. v. Gatewood*, 186 Ga. App. 169, 367 S.E.2d 63 (1988); *Opatut v. Guest Pond Club, Inc.*, 188 Ga. App. 478, 373 S.E.2d 372 (1988); *Haugabrook v. Waco Fire & Cas. Ins. Co.*, 190 Ga. App. 815, 380 S.E.2d 347 (1989); *Lightwerk Studios, Inc. v. Door Units of Ga., Inc.*, 191 Ga. App. 756, 382 S.E.2d 699 (1989); *Singleton v. Eastern Carriers, Inc.*, 192 Ga. App. 227, 384 S.E.2d 202 (1989); *Black v. Georgia DOT*, 262 Ga. 342, 417 S.E.2d 655 (1992); *Austin v. Kaufman*, 203 Ga. App. 704, 417 S.E.2d 660 (1992); *Jones v. Abel*, 209 Ga. App. 889, 434 S.E.2d 822 (1993); *Gilbert v. Montlick & Assocs., P.C.*, 248 Ga. App. 535, 546 S.E.2d 895 (2001); *Thakkar v. St. Ives Country Club*, 250 Ga. App. 893, 553 S.E.2d 181 (2001); *Henry v. Swift, Currie, McGhee & Hiers, L.L.P.*, 254 Ga. App. 817,

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563 S.E.2d 899 (2002); *Ford Motor Co. v. Lawrence*, 279 Ga. 284, 612 S.E.2d 301 (2005); *Nanan v. State Farm Ins. Co.*, 286 Ga. App. 539, 650 S.E.2d 283 (2007); *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007); *Fulton DeKalb Hosp. Auth. v. Miller & Billips*, 293 Ga. App. 601, 667 S.E.2d 455 (2008); *In the Interest of B.H.*, 295 Ga. App. 297, 671 S.E.2d 303 (2008); *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009); *Patel v. Columbia Nat'l Ins. Co.*, 315 Ga. App. 877, 729 S.E.2d 35 (2012); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 746 S.E.2d 98 (2013).

Scope of Discovery

Discovery is available under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to any party, in any court, regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. *Morton v. Gardner*, 242 Ga. 852, 252 S.E.2d 413 (1979).

Discovery may be had from the opposite party in any case, legal or equitable, pending in any court; this is even more true today since the adoption of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Morton v. Gardner*, 242 Ga. 852, 252 S.E.2d 413 (1979).

Liberal allowance of discovery. — Rule that discovery is not limited to matters that are admissible in evidence at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence is to be given a liberal construction in favor of supplying a party with the facts underlying the opponent's case, without reference to whether the facts sought are admissible upon trial of the action. *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 256 S.E.2d 102 (1979).

Discovery procedure is to be given a liberal construction in favor of supplying a party with the facts without reference to whether the facts sought are admissible upon the trial of the action. *Bullard v. Ewing*, 158 Ga. App. 287, 279 S.E.2d 737 (1981).

It is not ground for objection that information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Bullard v. Ewing*, 158 Ga. App. 287, 279 S.E.2d 737 (1981).

Matters sought to be discovered need not be incapable of proof otherwise in order to maintain a bill of discovery. *Farmers Bank v. Harrison*, 182 Ga. 623, 186 S.E. 687 (1936) (decided under former Code 1933, § 38-1101).

Certain matters not discoverable. — Bill for discovery will not lie to determine matters not necessary, material, or relevant to the issue, or when it would seriously injure the party's business and the chance of benefit to the other party is small. *Farmers Bank v. Harrison*, 182 Ga. 623, 186 S.E. 687 (1936) (decided under former Code 1933, § 38-1101).

Overly broad requests not allowed. — Grant of requests for "all correspondence between the Internal Revenue Service and the defendant concerning the defendant's recent audit, and a copy of the IRS's audit result and/or report," and a "copy of the defendant's most current balance sheet with supporting schedules, ledgers, etc.," was an abuse of discretion. *Southern Outdoor Promotions, Inc. v. National Banner Co.*, 215 Ga. App. 133, 449 S.E.2d 684 (1994).

Request for production of "all other documents" intended for use at trial. — Production of "all other documents" intended for use at trial is outside the scope of O.C.G.A. § 9-11-34(a), delineated under paragraph (b)(1) of O.C.G.A. § 9-11-26 as "any matter . . . which is relevant to the subject matter involved in the pending action," without regard to whether or not that "matter" will be used as evidence at the trial of the action. *E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin*, 158 Ga. App. 796, 282 S.E.2d 381 (1981).

Scope of discovery under O.C.G.A. § 9-11-33 (interrogatories) is as broad as the scope of examination under subsection (b) of O.C.G.A. § 9-11-26. *Armstrong v. Strand*, 167 Ga. App. 723, 307 S.E.2d 528 (1983).

When information sought appears reasonably calculated to lead to dis-

covery of admissible evidence, and does not fall within any of the guidelines for entry of protective orders, it is not error to compel its discovery and to grant sanction for noncompliance therewith, even if such evidence might be inadmissible at trial. *Ambassador College v. Goetzke*, 244 Ga. 322, 260 S.E.2d 27 (1979), cert. denied, 444 U.S. 1079, 100 S.Ct. 1029, 62 L. Ed. 2d 762 (1980).

Any question calling for an answer may be asked any deponent regardless of the question being hearsay, immaterial, incompetent, or irrelevant, so long as the question is reasonably calculated to lead to the discovery of admissible evidence. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972).

Inquiring into the content of relevant documents is within the scope of discovery. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Discoverability of statements or reports obtained in regular course of business. — Discovery of statements or reports of objective facts obtained by a party during the course of an investigation conducted as a regular practice or as a normal part of the party's business should be allowed. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

Spouse's records. — There was some evidence in the record to support the conclusion that the wife's records were relevant to the subject matter of the husband's litigation or reasonably calculated to lead to the discovery of admissible evidence. *In re Callaway*, 212 Ga. App. 500, 442 S.E.2d 309 (1994).

Attorney's records. — Document an attorney creates is owned by the client and should be produced upon the client's request unless the attorney can cite "good cause" that would justify the attorney's refusal to turn over the document to the client, such as when the disclosure would violate an attorney's duty to a third party, when the document assesses the client personally, or when the document includes tentative preliminary impressions

of the legal or factual issues presented in the representation recorded primarily for the purpose of giving internal direction to facilitate performance of legal services entailed in that representation. *Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571, 581 S.E.2d 37 (2003).

Names and addresses of clinic patients were discoverable in an action by a clinic against a rival alleging a scheme by the latter to divert current and potential patients. *Gazelah v. Rome Gen. Practice, Inc.*, 232 Ga. App. 343, 502 S.E.2d 251 (1998).

Identity of witnesses not generally privileged. — Identity of witnesses or probable witnesses in a case is not, with certain exceptions, considered privileged, even in the hands of an attorney, and particularly when the facts were obtained by someone other than the attorney. *Jaynes v. Blake*, 119 Ga. App. 748, 168 S.E.2d 832 (1969) (decided under former Code 1933, § 38-2101).

Names and addresses of witnesses must be furnished. — Party must furnish information as to names and addresses of witnesses known to the party or to the party's attorney; this information is not a part of the work product. *Jaynes v. Blake*, 119 Ga. App. 748, 168 S.E.2d 832 (1969) (decided under former Code 1933, § 38-2101).

Designation of proposed witnesses not necessary. — While names of all witnesses as to matter to which interrogatory is addressed must be given, there is no requirement that the names of those who are to be called and sworn as witnesses be singled out; in answering it is simply required that the names, addresses, etc., of all having knowledge of any specific matters to which the interrogatory may be directed, be given, without designating which of them will be sworn as witnesses. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

While plaintiff is entitled to names and addresses of defendant's witnesses who have knowledge of relevant facts, the defendant is not required to state the specific names of those persons whom the defendant proposes to call as witnesses. *Grant v. Huff*, 122 Ga. App.

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783, 178 S.E.2d 734 (1970).

Plaintiff was not entitled to discover information concerning defendant's personal financial resources absent an evidentiary showing (by affidavit, discovery responses, or otherwise) that a factual basis existed for the plaintiff's punitive damage claim. *Holman v. Burgess*, 199 Ga. App. 61, 404 S.E.2d 144, cert. denied, 199 Ga. App. 906, 404 S.E.2d 144 (1991).

Income tax returns are not privileged and are subject to discovery. *Bailey v. Bruce*, 132 Ga. App. 782, 209 S.E.2d 135 (1974).

Income tax returns require more than de minimis showing of relevancy. — While income tax returns are not privileged, more than a de minimis showing of relevancy is required for discovery thereof. *Borenstein v. Blumenfeld*, 151 Ga. App. 420, 260 S.E.2d 377 (1979).

Although income tax returns are not privileged, the returns are not automatically discoverable upon a de minimis showing of relevancy. *Snellings v. Sheppard*, 229 Ga. App. 753, 494 S.E.2d 583 (1998).

Communications between psychiatrist and patient are privileged. *Bogges v. Aetna Life Ins. Co.*, 128 Ga. App. 190, 196 S.E.2d 172 (1973).

Trial court erred in requiring a passenger to produce any confidential communications made between the passenger and the passenger's mental-health-care providers because the passenger's handling of discovery, albeit troublesome, did not amount to a decisive and unequivocal waiver of the passenger's mental-health privilege as the law required; the passenger's arguably misleading responses to opposing counsel's questions regarding a previous diagnosis of depression did not amount to a "decisive" and "unequivocal" waiver of the mental-health privilege, and the passenger's decision to answer the deposition question posed to the passenger (whether the passenger suffered from a history of depression), rather than object to the question at the time the issue of depression was raised, did not constitute an explicit waiver of the privilege. *Mincey*

v. Ga. Dep't of Cmty. Affairs, 308 Ga. App. 740, 708 S.E.2d 644 (2011).

Names and addresses of similar patients. — Plaintiff's interrogatories seeking the names and addresses of patients upon whom the defendants had performed the same surgical procedure were not limited to those surgeries which had presented problems of any kind and the trial court, therefore, properly granted the defendants' motion for an order protecting them. *Reece v. Selmonosky*, 179 Ga. App. 718, 347 S.E.2d 649 (1986).

Deletion of privileged matter from document. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

O.C.G.A. § 45-9-1(c) does not prohibit discovery by tort plaintiff of liability insurance policies purchased by a government agency for the agency's employees. *Pate v. Caballero*, 253 Ga. 787, 325 S.E.2d 375 (1985).

Disclosure of insurance contract in negligence case grounds for mistrial. — In an ordinary negligence case, not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to the jury of the mere existence of such contract is ground for mistrial. *City Council v. Lee*, 153 Ga. App. 94, 264 S.E.2d 683 (1980).

Unless relevant for some acceptable reason. — While evidence of liability insurance for the benefit of one charged with negligence is usually refused on the rationale that it is irrelevant and prejudicial because it suggests to the jury that the wealth of the insurer is available to assuage the tort, nevertheless, when the existence of insurance becomes relevant for some other reason, evidence thereof should be admitted. *Sasser v. Lester*, 153 Ga. App. 220, 264 S.E.2d 728 (1980).

Objection to interrogations regarding defendant's ability to pay potential judgment properly sustained. — Interrogatories seeking information pertaining to gross pay, income, ownership of

property, limits of liability insurance policy, and financial ability of the defendant to pay a possible judgment against the defendant did not appear to be reasonably calculated to lead to the discovery of admissible evidence, and sustaining of the defendant's objections thereto was not error. *Grant v. Huff*, 122 Ga. App. 783, 178 S.E.2d 734 (1970).

Inquiry whether foreign judgment paid or released. — Inquiry as to whether or not the plaintiff's judgment against the defendant had been paid, in part or in whole, or if one of the tort-feasors had been released, or if one of the defendants had concluded an agreement to pay the judgment in whole or in part was relevant to an action for execution of a foreign judgment attempted to be domesticated in Georgia. *Armstrong v. Strand*, 167 Ga. App. 723, 307 S.E.2d 528 (1983).

Loan documents. — Trial court erred in denying plaintiffs' discovery request that sought the discovery of documents pertaining to a development loan in a lawsuit involving a dispute between joint venturers as the trial court should have applied the proper standard of relevancy set forth in O.C.G.A. § 9-11-26, as opposed to ruling that the plaintiffs simply had enough documents. *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 658 S.E.2d 619 (2008).

Confidential sources in defamation cases. — Trial court is obligated under O.C.G.A. § 9-11-26 to balance a defamation plaintiff's need for identities of confidential informants against the defendant newspaper's interest in protecting the privacy of the confidential informants and the freedom of the press in general. The trial court must require the plaintiff to specifically identify each and every purported statement asserted as libelous, determine whether the plaintiff can prove the statements were untrue, taking into account all the other available evidentiary sources, including the plaintiff's own admissions, and determine whether the statements can be proven false through the use of other evidence, thus eliminating the plaintiff's necessity for the requested discovery. If a plaintiff cannot succeed on a specific allegation of libel as a

matter of law, or if the plaintiff is able to prove a specific allegation through the use of available alternative means, then the trial court's balancing test should favor non-disclosure of confidential sources; however, if a specific allegation of libel is determined to be legally viable, or if it cannot be determined whether the allegation is legally viable given the current state of the record, and if the identity of the sources is either relevant and material in and of itself, or is the only available avenue to other admissible evidence, then the trial court's balancing test should favor disclosure of the confidential sources. *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 555 S.E.2d 175 (2001).

Workers' compensation cases. — There was no error in denying a workers' compensation claimant's motion to compel production of certain documents and correspondence from an employer's claims adjuster because the employer met the employer's burden of showing that the documents were prepared in anticipation of litigation and thus were not discoverable; the claimant failed to establish the claimant's substantial need for the material. *S&B Eng'rs & Constructors Ltd. v. Bolden*, 304 Ga. App. 534, 697 S.E.2d 260, cert. dismissed, No. S10C1789, 2010 Ga. LEXIS 912 (Ga. 2010).

Party seeking to examine jury regarding disqualifying ties must be permitted to pose questions before verdict. — Party seeking to examine the jury regarding disqualifying ties to insurance companies must be permitted to pose the questions before the verdict, and an error in that regard cannot be cured or deemed harmless after the verdict. *Ford Motor Co. v. Conley*, 294 Ga. 530, 757 S.E.2d 20 (2014).

Trial court did not abuse discretion in granting extraordinary motion for new trial based on misleading discovery responses. — Trial court did not abuse the court's discretion in granting the plaintiffs' extraordinary motion for new trial based on an auto company's misleading discovery responses with regard to liability insurance because the plaintiffs acted with due diligence to raise the plaintiffs' claim that the jury should have been qualified as to the auto compa-

Scope of Discovery (Cont'd)

ny's insurers and the failure to do so raised an un rebutted presumption that the plaintiffs were materially harmed. *Ford Motor Co. v. Conley*, 294 Ga. 530, 757 S.E.2d 20 (2014).

Trial Preparation Materials**Scope of work product exception.**

— Statute extends work product exception to parties and their representatives, such as attorneys, consultants, sureties, indemnitors, insurers, or agents. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Anticipation of litigation. — Material obtained or collected by a party is protected from discovery as work product even “before claim is instituted” if “reasonable grounds exist to believe that litigation is probable.” *Department of Transp. v. Hardaway Co.*, 216 Ga. App. 262, 454 S.E.2d 167 (1995).

Attorney-client privilege to be narrowly construed. — In determining whether statements are to have protection under the attorney-client privilege, such privilege should be confined to its narrowest permissible limits under the statute of its creation, for it is only in that way that discovery provisions can be afforded the liberal construction and interpretation that will enable them to accomplish the purpose for which they were intended. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

As with the attorney-client privilege, the work-product doctrine is not absolute, and attorneys cannot cloak themselves in its mantle when their mental impressions and opinions are directly at issue. Accordingly, the doctrine should not apply when a client, as opposed to some other party, seeks to discover an attorney's mental impressions because it cannot shield a lawyer's papers from discovery in a conflict of interest context anymore than can the attorney-client privilege. *Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons*

Waterfront, LLC, 317 Ga. App. 1, 730 S.E.2d 608 (2012).

Discovery of an attorney's work product will generally be withheld. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

No basis for refusal to appear for deposition. — Work product privilege contained in subsection (b) of O.C.G.A. § 9-11-26 pertains to “documents and tangible things” and provides no basis for a party, even a party exercising self-representation, to refuse to appear for a deposition. *Jarallah v. Pickett Suite Hotel*, 193 Ga. App. 325, 388 S.E.2d 333 (1989), cert. denied, 495 U.S. 936, 110 S. Ct. 2183, 109 L. Ed. 2d 512 (1990).

Purpose of doctrine of “work product” is to protect attorney's preparation for trial from discovery. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

Real purpose of the work product exception to the general broad scope of discovery is protection of the mental impressions, conclusions, and theories of persons engaged in preparing litigation. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Requirements necessary to constitute work product. — In order to escape discovery under paragraph (b)(3) of this section, documents and tangible things must have been prepared in anticipation of litigation or for trial by or for a party or by or for that party's representative and the materials must contain the mental impressions, conclusions, opinions, or legal theories of the person preparing them; if the items sought do not satisfy both requirements, they do not constitute work products, and may be freely discovered. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Work product exception cannot be proved by a general objection that interrogatories seek information concern-

ing efforts to prepare for trial. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Transcript of misdemeanor trial not work product. — Even though an accurate transcript of the testimony adduced at a misdemeanor trial may be available only because of the foresightedness of plaintiff's counsel, who hired the reporter with future civil litigation in mind or for other reasons, including an appeal in the event of conviction, it is nonetheless merely a record of the proceedings of a public trial, which is sought from the reporter, not the attorney, and is not privileged as the attorney's work product. *Robinson v. J.C. Penney Co.*, 124 Ga. App. 221, 183 S.E.2d 782 (1971).

Audit documents provided to SEC. — In an action in which the shareholders sued because of stock losses following corporate acquisition of another company, the trial court neither explicitly or implicitly placed the burden of showing non-waiver of the work-product protection on a buyer; the buyer waived work-product protection when the buyer provided certain audit documents to the United States Securities and Exchange Commission (SEC) because the buyer and the SEC were actual or potential adversaries when the documents were disclosed, and a confidentiality agreement did not ensure that the audit documents would remain confidential since it allowed the SEC to give the documents to others if it deemed that course of action to be in furtherance of its duties and responsibilities. *McKesson Corp. v. Green*, 279 Ga. 95, 610 S.E.2d 54 (2005).

Company's revenues and profits relevant. — Trial court erred in denying a partner's motion to compel the discovery of the financial records of a company a copartner formed because the revenues and profits of the company could very well have some relevance to the proper measure of damages; the trial court erred in concluding that the revenues and profits that the company earned from business opportunities lost by the partnership could not possibly be probative of the damages that the partner could be enti-

tled to recover and that the partner could not have any discovery of the finances of the company because some reasonable person could say that the revenues and profits the company earned from the same business opportunities could be a fair approximation of the revenues that the partnership would have earned from the opportunities and were, therefore, probative of the lost revenue and profit of the partnership. *McMillian v. McMillian*, 310 Ga. App. 735, 713 S.E.2d 920 (2011).

Investigations made and statements taken under attorney's supervision. — Once the attorney-client relationship obtains as to a particular matter, an attorney may have investigations made or statements taken under the attorney's direct instruction and supervision, and these may be deemed a part of what the attorney has done, and thus a part of the attorney's work product. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

Investigator's report to attorney. — Report of an investigator hired by the husband's attorney subsequent to the filing of an action for divorce and alimony by the wife, made directly to the attorney, is attorney's work product, and absent a showing of necessity and justification by wife, her discovery thereof must fail. *Smith v. Smith*, 223 Ga. 551, 156 S.E.2d 916 (1967) (decided under former Code 1933, § 38-2109).

Statement taken by insurer. — Statement of a party or other witness to an accident, if taken by an insurer in anticipation of a claim being filed against its insured, is considered a work product, even if taken before litigation is filed. *Copher v. Mackey*, 220 Ga. App. 43, 467 S.E.2d 362 (1996).

Not all statements taken by attorneys are work product. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Mere fact that statement is taken with an eye toward litigation does not automatically insulate the statement from discovery as work product. *Clarkson Indus., Inc. v. Price*, 135 Ga.

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App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Attorney-client privilege does not cover the identity of documents a party reviews to prepare for a deposition. *McKinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994).

Disclosure of document to testify-ing expert. — When a document is prepared in anticipation of litigation by a party's counsel and then disclosed to that party's testifying expert, the disclosure does not waive the work product protection that should be accorded the document and the document may only be discovered upon the showing of substantial need and of undue hardship to obtain the materials by other means. *McKinnon v. Smock*, 209 Ga. App. 647, 434 S.E.2d 92 (1993).

Witness statements. — In order for the statement of a witness to be exempt from the general scope of discovery, the statement must have been orally given to a party or the party's representative, who records the statement in anticipation of litigation or trial. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Written statement of witness own impressions and observations. — Written statement of a witness, whether prepared by the witness and later delivered to the party or the party's representative, or drafted by the party or the party's representative and adopted by the witness, is not properly considered the work product of a party or the party's representative as the statement records the mental impressions and observations of the witness personally and not those of the party or the party's representative. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Recordation of witness statement as part of work product. — Recordation made by a party or the party's represen-

tative of the oral statement of a witness is normally a part of the work product for it will include the party's analysis and impression of what the witness has told the party. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Since federal law under which an action was brought protected the plaintiff's access to co-employees for information relating to it, an attorney did not violate Standard 47 of the state bar rules by obtaining the recorded statements of co-employees; the statements were protected from discovery by paragraph (b)(3) of O.C.G.A. § 9-11-26. *Norfolk S. Ry. v. Thompson*, 208 Ga. App. 240, 430 S.E.2d 371 (1993).

Witness statement generated by plaintiff's and attorney's joint interview. — When an attorney and the plaintiff jointly interviewed a witness shortly before suit was filed and in contemplation of the litigation, the statement generated thereby comes within the definition of work product. *McMillan v. GMC*, 122 Ga. App. 855, 179 S.E.2d 99 (1970).

Written statements and memoranda in attorney's files. — Party is not entitled to discovery of written statements in the files of the attorney for the adverse party and of memoranda made by that attorney in anticipation of the litigation, absent a showing of necessity for production of such material or a demonstration that denial of production would cause hardship or injustice. *Setzers Super Stores of Ga., Inc. v. Higgins*, 104 Ga. App. 116, 121 S.E.2d 305 (1961) (decided under former Code 1933, Ch. 21, T. 38).

Failure to make proper inquiry on transcripts. — In a medical malpractice suit, the trial court erred by summarily determining that witness interview transcripts were not statutorily protected work product and ordered their production because the court failed to make any inquiry into the content of the transcripts and made no findings or conclusions with regard to the husband's need or hardship as required by O.C.G.A. § 9-11-26(b)(3). *Wellstar Health Sys. v. Jordan*, 293 Ga. 12, 743 S.E.2d 375 (2013).

Accident investigation. — Work product immunity is not extended to

statements obtained by claim agents or investigators, even though obtained under supervision of the defendant's counsel, when such statements are routinely obtained as a standard practice of investigating accidents in which it or its servants and agents may be involved while performing its functions. *Atlantic Coast Line R.R. v. Gause*, 116 Ga. App. 216, 156 S.E.2d 476 (1967) (decided under former Code 1933, § 38-2109).

In a suit based on an explosion and fire in a cold storage warehouse facility during the installation of a compressor engine, a contractor was entitled to disclosure of the facility owner's accident report, which was prepared after an accident investigation conducted by the owner's personnel because the report was not protected by the work-product doctrine under O.C.G.A. § 9-11-26(b)(3) since the report was not prepared in anticipation of litigation, but in the regular course of business in accordance with internal policies and applicable government regulations. *Alta Refrigeration, Inc. v. AmeriCold Logistics, LLC*, 301 Ga. App. 738, 688 S.E.2d 658 (2009).

Crash test documents from prior litigation. — In a negligence suit involving the death of an individual in an automobile collision, a trial court did not abuse the court's discretion by ordering the production of crash-test documents relating to prior litigation from an auto manufacturer as the plaintiff showed a substantial need for the requested documents since the requested evidence documented past car-to-car crash tests conducted by the auto manufacturer on a line of vehicles that included similar fuel tank locations and performance as the vehicle that was being driven by the decedent; the trial court properly concluded that the plaintiff could not obtain the substantial equivalent of the crash tests absent undue hardship since the plaintiff could not generate rear car-to-car crash tests that would have established the auto manufacturer's knowledge of dangers presented by the manufacturer's vehicle in rear car-to-car crashes; and the trial court ordered an in camera review of the documents with which the auto manufacturer refused to comply. *Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

Substantial and undue hardship. — In order to discover documents, statements, and other tangible items of evidence developed by one party in preparation for litigation, the moving party must show affirmatively that the moving party has a substantial need for such evidence in the preparation of the case and that it would cause an undue hardship upon the moving party to develop that evidence by means other than extraction from the files of the opposing party; if the trial court is satisfied that the required showing has been made, the court may order the production, after an in-camera examination (or other acceptable agreement between the parties) with a view toward protecting against the disclosure of mental impressions, conclusions, opinions, or legal theories. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

Documents, statements, and other tangible items of evidence developed by one party in preparation for litigation are discoverable by the other party only in carefully limited circumstances; the moving party must show affirmatively that the moving party has a substantial need for such evidence in the preparation of the case and that it would cause an undue hardship upon the moving party to develop that evidence by means other than extraction from the files of the opposing party. *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

In order to compel the production of trial preparation material developed in anticipation of litigation, the movant must show affirmatively that the movant has a substantial need for such evidence in the preparation of the movant's case and that it would cause an undue hardship upon the movant to develop that evidence by means other than extraction from the files of the opposing party. *Lowe's of Ga., Inc. v. Webb*, 180 Ga. App. 755, 350 S.E.2d 292 (1986).

Necessity must be shown. — Without some showing of necessity therefor, an attorney is not required to produce and make available to the attorney for the adverse party the attorney's "work product," including statements that the attorney may have obtained from witnesses or memoranda that the attorney may have

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made in anticipation of the litigation. *Setzers Super Stores of Ga., Inc. v. Higgins*, 104 Ga. App. 116, 121 S.E.2d 305 (1961) (decided under former Code 1933, Ch. 21, T. 38).

Party seeking discovery of work product must then show necessity or justification before being entitled to discovery. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

Burden on movant to make requisite showing. — In order to require production of a work product item, there must be a showing of more than “good cause”; a showing of “necessity and justification,” which is of a higher order than the good cause requirement, must be made, and the burden is on the movant to do so. *McMillan v. GMC*, 122 Ga. App. 855, 179 S.E.2d 99 (1970).

Burden on party claiming privilege. — Party wishing to claim protection of the work-product privilege has the burden of showing the document or other item was prepared in anticipation of litigation. *GMC v. Conkle*, 226 Ga. App. 34, 486 S.E.2d 180 (1997).

To avoid injustice or hardship. — Showing required for discovering any portion of attorney’s work product is of a higher order than that of “good cause” required in other instances, and should be such as to lead the court to conclude that only by allowing discovery may manifest injustice be averted or an intolerable hardship prevented. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2109).

In order to require production of a work product item, a movant must demonstrate that a denial of the movant’s motion will result in manifest injustice or intolerable hardship. *McMillan v. GMC*, 122 Ga. App. 855, 179 S.E.2d 99 (1970).

Failure of court to require establishment of substantial need and undue hardship. — When a party has carried the party’s burden of showing material sought was obtained in anticipation of litigation, it becomes incumbent upon the trial court to require the other

party to satisfy the second test established by the discovery statute; i.e., to show a substantial need and undue hardship in the development of the information sought. If the trial court does not do so, the judgment will be reversed and the record remanded to the trial court to add in the court’s order the court’s finding as to the second phase of the discovery of protected trial preparation material. *Lowe’s of Ga., Inc. v. Webb*, 180 Ga. App. 755, 350 S.E.2d 292 (1986).

Failure of court to decide whether work product doctrine applied. — In a discovery dispute with a corporation claiming that the work-product doctrine barred discovery of information, the trial court erred under O.C.G.A. § 9-11-26(b)(3) in ordering the corporation to provide information without first deciding whether the work-product doctrine or waiver applied. *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 562 S.E.2d 809 (2002).

Transcript of prior traffic court proceedings discoverable. — Personal injury action defendants were entitled to discovery of the transcript of prior traffic court proceedings in which the defendants testified and were cross-examined as to issues bearing vitally upon their alleged liability in the subsequent civil case. *Truitt v. Mason*, 189 Ga. App. 24, 374 S.E.2d 771, cert. denied, 189 Ga. App. 913, 374 S.E.2d 771 (1988).

Statements of employees to supervisor and insurance adjuster. — When a store owner showed that from the very beginning the owner was aware that an adversarial action was forthcoming, in the face of hotly disputed fault, it substantially established that the statements given by the owner’s employees to their supervisor and an insurance adjuster before suit was filed met the statutory criteria of having been taken in contemplation of litigation or trial. *Lowe’s of Ga., Inc. v. Webb*, 180 Ga. App. 755, 350 S.E.2d 292 (1986).

Conflict over availability of document. — When parties are unable to resolve a conflict concerning what portions of a document containing both facts and legal theories should be made available to an adverse party, the parties shall

submit the disputed document to the trial court along with their argument concerning which portions should be made available to the adverse party. The trial court shall then conduct an in camera inspection of the document and instruct the attorney claiming work product protection how the document should be altered for disclosure to the adverse party. *McKinnon v. Smock*, 209 Ga. App. 647, 434 S.E.2d 92 (1993).

Creation of issues. — Written claim and demand for payment outside the terms of the contract in response to a claim created the materials at issue. *Department of Transp. v. Hardaway Co.*, 216 Ga. App. 262, 454 S.E.2d 167 (1995).

Discovery of material through use of deposition barred. — In an action arising from an automobile accident, when the defendant failed to demonstrate that the defendant had a substantial need for a statement of the plaintiff taken by an adjuster for the plaintiff's insurance carrier and would face undue hardship in obtaining substantially equivalent information elsewhere, the defendant could not require production of the statement at a deposition, nor require the adjuster to testify during deposition as to the content of the statement. *Sturgill v. Garrison*, 219 Ga. App. 306, 464 S.E.2d 902 (1995).

File of previous attorney. — Attorney's contention that a former client's attorney's attempt to obtain documents directly related to the pending divorce action and prepared in anticipation thereof should have been brought in a separate legal action was rejected under O.C.G.A. § 9-11-26(b) as the file was sought for purposes of the same pending divorce action for which the file was compiled in the first place; the trial court made an express finding that the client and the client's new attorney needed possession of the file in order to adequately present the client's claim, which was ongoing and still within the jurisdiction of the trial court. *Mary A. Stearns, P.C. v. Williams-Murphy*, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

Attorney's defense to the trial court's order holding the attorney in contempt for the attorney's refusal to turn over a client's file challenging the underlying valid-

ity of the prior order requiring the attorney to turn over the file was a collateral attack that could be sustained under O.C.G.A. § 9-11-60(a) only if the prior order was void on the order's face. However, the trial court's prior order was not void on the order's face since: (1) the attorney was served with a motion to compel prior to the entry of the prior order; (2) the trial court had jurisdiction to issue an order to compel a nonparty to release necessary non-privileged documents specifically prepared in anticipation of a divorce action pending before the trial court under O.C.G.A. §§ 9-11-26(b), 9-11-34(c)(1), and 9-11-37(a); (3) the attorney willfully disregarded the prior order; and (4) the prior order was entered in a matter over which the trial court had subject matter jurisdiction, making disobedience of the order contempt of court. *Mary A. Stearns, P.C. v. Williams-Murphy*, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

Experts

Only general description of experts, not actors or observers, required. — As to expert witnesses who were not actors or observers, a very general summary of scientific or professional grounds is sufficient under subdivision (b)(4)(A)(i) of O.C.G.A. § 9-11-26, since the opponent has further discovery through full depositions and cross-examinations. *Candler Gen. Hosp. v. Joiner*, 180 Ga. App. 455, 349 S.E.2d 756 (1986).

In a medical malpractice action, subdivision (b)(4)(A)(i) of O.C.G.A. § 9-11-26 did not apply to physician witnesses whose knowledge and opinions arose from personal involvement with the decedent. *McNabb v. Landis*, 223 Ga. App. 894, 479 S.E.2d 194 (1996).

Applicability of O.C.G.A. § 9-11-26(b)(4)(A)(i). — In a medical malpractice case, when an expert's opinions arose from the expert's involvement as one of the patient's treating physicians, and not in anticipation of litigation, the expert's testimony did not fall within the ambit of O.C.G.A. § 9-11-26(b)(4)(A)(i). *Yang v. Smith*, 316 Ga. App. 458, 728 S.E.2d 794 (2012).

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Applicability of O.C.G.A. § 9-11-26(b)(4)(A)(ii). — O.C.G.A. § 9-11-26(b)(4)(A)(ii), relating to payment of fees for obtaining discovery from witnesses, applies to all discovery obtained from an expert in anticipation of litigation or trial. *Polston v. Levine*, 171 Ga. App. 893, 321 S.E.2d 350 (1984).

Deposing party to pay fees unless manifest injustice would result. — O.C.G.A. § 9-11-26(b)(4)(A)(ii) and (b)(4)(C)(ii), when read together, require that a party pay the reasonable fees of any expert it deposes or redeposes, unless doing so would create manifest injustice; in other words, a trial court is not entitled to shift the payment of the expert's fees to the other party unless the deposing party demonstrates that shifting the fees is necessary to avoid a manifest injustice. In order to determine whether the party seeking to shift fees has met the party's burden on this issue, the trial court needs to consider and weigh factors including the possible hardships imposed on the respective parties, the need for doing justice on the merits between the parties, whether a party is indigent, and the need for maintaining orderly and efficient procedural arrangements. *Barnum v. Coastal Health Servs.*, 288 Ga. App. 209, 653 S.E.2d 816 (2007), cert. denied, 2008 Ga. LEXIS 227 (Ga. 2008).

Continuing jurisdiction over fee controversies. — Controversies concerning expert-witness fees will be resolved by the trial court in proceedings ancillary to the litigation in which the fees arise, and the dismissal of the main action does not divest the trial court of jurisdiction to rule on a motion to compel payment. *Polston v. Levine*, 171 Ga. App. 893, 321 S.E.2d 350 (1984).

Accident investigator was not an "expert" with regard to the investigator's observations of the plaintiff in an automobile negligence case. *Jones v. Scarborough*, 194 Ga. App. 468, 390 S.E.2d 674 (1990).

Expert appraisal of condemned land not discoverable. — Discovery is not designed in land condemnation cases to force production of information relating

to a party's expert appraisal of the property to be condemned. *Thornton v. State Hwy. Dep't*, 113 Ga. App. 351, 148 S.E.2d 66 (1966) (decided under former Code 1933, §§ 38-2105 and 38-2108).

In a land condemnation case, a transportation department could not compel discovery from a landowner's former expert because the expert had withdrawn from the case, the landowner stipulated that the landowner would not use the expert's information, and the transportation department showed no exceptional circumstances warranting an order compelling discovery of the expert's information. *DOT v. Bacon Farms, L.P.*, 270 Ga. App. 862, 608 S.E.2d 305 (2004).

Statements of employee to city appraiser. — In a condemnation proceeding, when a city's witness not only directly supported the city's main contention, that a landowner's property could not be developed or removed from the flood plain, but the city's appraiser based a valuation on the witness's representations to that effect, the witness's testimony was critical, and the landowner had a right to interview the witness, check the facts to which the witness would testify, and, if indicated, arrange to secure rebuttal evidence or impeach the witness. *Shepherd Interiors v. City of Atlanta*, 263 Ga. App. 869, 589 S.E.2d 640 (2003).

Expert's testimony excluded for rules' violation. — Trial court did not abuse the court's discretion to impose the sanction of exclusion of an expert's testimony for the violation of the rules of discovery. *Heyde v. Xtraman, Inc.*, 199 Ga. App. 303, 404 S.E.2d 607, cert. denied, 199 Ga. App. 906, 404 S.E.2d 607 (1991).

Refusal to allow expert to testify when notice not given. — When defendants did not give the plaintiffs prior notice that an accident reconstruction expert would testify concerning the use of seat belts, the trial court did not abuse the court's discretion by refusing to allow the defendants' expert to testify concerning a subject matter not revealed to the plaintiffs. *Jones v. Livingston*, 203 Ga. App. 99, 416 S.E.2d 142 (1992).

Expert testimony admitted when on "may call" list. — In a medical malpractice action against a pediatrician and

a hospital, when the pediatrician settled and the hospital did not, experts subpoenaed to testify on behalf of the pediatrician could be called to testify on behalf of the hospital because the experts were listed by the hospital as “may call” witnesses on the pretrial order, pursuant to O.C.G.A. § 9-11-26(b)(4)(A)(i), there were no hard and fast rules about the discovery period in the case, and, having deposed these witnesses, the party objecting to the witnesses being called could not claim surprise from the witnesses’ testimony. *Gill v. Spivey*, 264 Ga. App. 723, 592 S.E.2d 132 (2003).

Correspondence from attorney to expert protected. — One seeking discovery of facts known and opinions held by an expert acquired or developed in anticipation of litigation or for trial may do so without exhibiting a substantial need for the material and without establishing that undue hardship will result should the seeker have to employ other means to develop the evidence. *McKinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994).

Discovery seeking facts known and opinions held by an expert is subject to the provision of subsection (b)(3) of O.C.G.A. § 9-11-26 against disclosure of mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation. Thus, correspondence from an attorney to an expert is protected from disclosure to the extent the correspondence contains the opinion work product of the attorney. *McKinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994).

Experts previously identified as fact witnesses. — Trial court did not err by admitting the testimony of four expert witnesses because the witnesses were previously identified as fact witnesses and the supplemental responses in discovery were in compliance with the express terms of the discovery requests, O.C.G.A. § 9-11-26, and a pretrial order. *LN West Paces Ferry Assocs., LLC v. McDonald*, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Expert testimony properly excluded. — Trial court did not err in excluding the testimony of a medical examiner because the testimony a decedent’s relatives sought to elicit went beyond the

matters the medical examiner personally performed or observed and into the area of opinion testimony based upon a hypothetical posed by the questioner; the relatives failed to disclose the proffered expert testimony in pretrial discovery, and the disputed expert testimony was cumulative of the opinion testimony of another expert witness. *Hewell v. Trover*, 314 Ga. App. 738, 725 S.E.2d 853 (2012).

Protective Orders

Protective orders may be obtained to avoid disclosure of trade secrets, prevent harassment, embarrassment, oppression, or limit the scope of discovery. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-2101).

Protective orders are intended to be protective, not prohibitive, and until such time as the court is satisfied by substantial evidence that bad faith or harassment motivates the discoverer’s action, the court should not intervene to limit or prohibit the scope of pretrial discovery. *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 202 S.E.2d 540 (1973); *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 256 S.E.2d 102 (1979).

Protective orders should not be entered to frustrate legitimate discovery. — Protective orders should not be entered when the effect is to frustrate and prevent legitimate discovery. *Snead v. Pay-Less Rentals, Inc.*, 134 Ga. App. 325, 214 S.E.2d 412 (1975); *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 256 S.E.2d 102 (1979).

Issuance of order as recognition of need to protect. — Issuance of a protective order is a recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting a party or person from annoyance, embarrassment, oppression, or undue burden. *Borenstein v. Blumenfeld*, 151 Ga. App. 420, 260 S.E.2d 377 (1979).

Good cause prerequisite to protective order. — Good cause required for grant of protective order must be clearly and specifically demonstrated; it will not

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appear from stereotyped and conclusory statements. *Millholland v. Oglesby*, 115 Ga. App. 715, 155 S.E.2d 672 (1967) (decided under former Code 1933, § 38-2105).

Good cause for the issuance of a protective order designed to frustrate discovery must be clearly demonstrated; such cause is not established by stereotyped or conclusory statements, bereft of facts. *Young v. Jones*, 149 Ga. App. 819, 256 S.E.2d 58 (1979).

Issuance of a protective order must be based on something other than a conclusory allegation by the state's attorney to the effect that any and all requested discovery would prejudice a criminal investigation. *Christopher v. State*, 185 Ga. App. 532, 364 S.E.2d 905 (1988).

Trial court did not abuse the court's discretion in determining that the defendants provided good cause entitling the defendants to a qualified protective order by arguing that the defendants should be granted the right to conduct ex parte interviews with the decedent's health care providers since the defendants were entitled to equal access to potential trial witnesses, the defendants would protect the attorney work-product, and would be more efficient and less costly than formal depositions or joint meetings with plaintiffs' counsel. *Harris v. Tenet Healthsystem Spalding, Inc.*, 322 Ga. App. 894, 746 S.E.2d 618 (2013).

Failure to obtain protective order. — Defendants' discovery violations were willful when the defendants withheld certain documents in order to "test their position," and as the defendants had not sought a protective order under O.C.G.A. § 9-11-26, but instead violated the trial court's orders compelling discovery by withholding the documents the defendants claimed were objectionable, the defendants' failure to comply with discovery orders was not excused; thus, it was a proper sanction under O.C.G.A. § 9-11-37 to strike the defendants' arbitration defenses. *Ga. Cash Am., Inc. v. Strong*, 286 Ga. App. 405, 649 S.E.2d 548 (2007), cert. denied, 2007 Ga. LEXIS 709 (Ga. 2007).

Duty to attend deposition despite request for protective order. — Merely

filing motions for a protective order did not relieve the plaintiffs from the duty to appear at the plaintiffs' depositions. Moreover, even if the plaintiffs could have prevailed on motions to compel more complete responses to their discovery efforts, this did not excuse the plaintiffs from the duty to attend the plaintiffs' depositions. It follows that the trial court correctly concluded that nothing the plaintiffs asserted in the plaintiffs' motions for a protective order provided a legal basis for the court to exercise the court's discretion to relieve the plaintiffs from the duty to appear at the plaintiffs' depositions. *Rice v. Cannon*, 283 Ga. App. 438, 641 S.E.2d 562 (2007).

Fifth Amendment claim denied. — Denial of an accused's motion for a protective order under O.C.G.A. § 9-11-26(c) was affirmed as the Fifth Amendment could not be used to justify a protective order to stay all discovery in the accused's civil forfeiture proceeding under O.C.G.A. § 16-14-7 pending the conclusion of the accused's criminal Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., case; while the privilege against self-incrimination extends to answers creating a "real and appreciable" danger of establishing a link in the chain of evidence needed to prosecute, the trial court has to determine if the answers could incriminate the witness, and if the trial court determines that the answers could not incriminate the witness, the witness has to testify or be subject to the court's sanction. *Chumley v. State of Ga.*, 282 Ga. App. 117, 637 S.E.2d 828 (2006).

Relevant records not subject to protection. — In an action against a personal care home alleging negligent supervision of a resident of the home, records of incidents and accidents involving other residents were relevant and the trial court properly denied the defendant's motion for a protective order covering the records. *Apple Inv. Properties, Inc. v. Watts*, 220 Ga. App. 226, 469 S.E.2d 356 (1996).

In a personal injury case, a trial court did not abuse the court's discretion by compelling a railway company to provide discovery of information on an event data recorder because the information was rel-

evant under O.C.G.A. § 9-11-26(b)(1), and a producing party could have been required to translate information into a reasonably usable form. The trial court did not abuse the court's discretion by failing to grant the protective order since there was no undue burden or expense given the crucial nature of the evidence; moreover, the cost of a license required to view the information was minor compared to the amount at stake in the lawsuit, and it was the railway company's decision to install the device. *Norfolk S. Ry. v. Hartry*, 316 Ga. App. 532, 729 S.E.2d 656 (2012).

Protective order under Health Insurance Portability and Accountability Act. — Trial court did not err in granting a hospital's motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), to conduct ex parte interviews with a patient's health care providers because the hospital complied with 45 C.F.R. § 164.512(e)(1)(ii)(B), and any ex parte interviews conducted pursuant to the qualified protective order would be permitted under HIPAA; because the order prohibited the use or disclosure of the patient's health information for purposes other than the litigation and required the return or destruction thereof at the conclusion of the proceedings, it constituted a qualified protective order as defined in § 164.512(e)(1)(v). *Baker v. Wellstar Health Sys.*, 288 Ga. 336, 703 S.E.2d 601 (2010).

Protective order permitting a hospital to conduct ex parte interviews with a patient's health care providers was too broad regarding the scope of information that could be disclosed because the order should have limited the hospital's inquiry to matters relevant to the medical condition the patient had placed at issue; under former O.C.G.A. § 24-9-40(a) (see now O.C.G.A. § 24-12-1), a litigant can waive the right to medical privacy under Georgia law only to the extent such information was relevant to the medical condition the litigant had placed in issue in the legal proceeding. *Baker v. Wellstar Health Sys.*, 288 Ga. 336, 703 S.E.2d 601 (2010).

Habeas proceeding. — To protect a habeas petitioner's constitutional right to effective assistance of counsel and against

compelled self-incrimination, the petitioner was entitled to a protective order limiting disclosure of the former counsel's files in the proceeding to persons needed to assist in rebutting the petitioner's claim of ineffectiveness. *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000).

Absent showing of need to protect witness from annoyance, embarrassment, or oppression, a trial court abuses the court's discretion in restricting the broad use of discovery. *Europa Hair, Inc. v. Browning*, 133 Ga. App. 753, 212 S.E.2d 862 (1975).

Burden is on party served with interrogatories to show why the interrogatories should not be answered. *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975), overruled on other grounds, *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985).

Application for protective order to avoid sanctions for failure to respond. — In order to avoid sanctions for not responding to interrogatories, one must apply for a protective order under subsection (c) of this section. *Sneider v. English*, 129 Ga. App. 638, 200 S.E.2d 469 (1973).

Expense and trouble not sufficient to avoid answering. — Fact that answering interrogatories will entail expense and trouble to witness or the witness's employer is not sufficient to escape the requirement of making answer; it is only when the court is satisfied that an undue burden will result that objections should be sustained on that basis. *Sorrells v. Cole*, 111 Ga. App. 136, 141 S.E.2d 193 (1965) (decided under former Code 1933, § 38-2106).

Extent of discovery and use of protective orders is generally within discretion of trial judge. *Bullard v. Ewing*, 158 Ga. App. 287, 279 S.E.2d 737 (1981).

Discretion of court. — Trial court has wide discretion in entering orders to prevent discovery which is oppressive, unreasonable, unduly burdensome or expensive, harassing, harsh, insulting, annoying, embarrassing, incriminating, or directed to wholly irrelevant and immaterial or privileged matter, or as to matter concerning which full information is already at

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hand. *Snead v. Pay-Less Rentals, Inc.*, 134 Ga. App. 325, 214 S.E.2d 412 (1975); *Young v. Jones*, 149 Ga. App. 819, 256 S.E.2d 58 (1979).

Trial court has wide discretion in entering orders to prevent oppressive, unreasonably and unduly burdensome, or harassing discovery by interrogatories. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972); *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 202 S.E.2d 540 (1973).

Trial judge should exercise sound and legal discretion in the grant or denial of protective orders under subsection (c) of this section. *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140, 202 S.E.2d 540 (1973); *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 256 S.E.2d 102 (1979).

Discretion to be based on evidence and good cause. — Extent of discovery and use of protective orders is generally with the discretion of the trial judge but this must be a sound and legal discretion based on evidence and a showing of good cause. *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 256 S.E.2d 102 (1979).

Court must be satisfied by substantial evidence. — Until such time as the court is satisfied by substantial evidence that bad faith or harassment motivates the discoverer's action, the court should not intervene to limit or prohibit the scope of pretrial discovery. *Bullard v. Ewing*, 158 Ga. App. 287, 279 S.E.2d 737 (1981).

When trial court passed upon merits of motion for protective order at a hearing, denying the motion, it must be assumed, in the absence of a transcript of that hearing, that the court properly exercised the court's discretion in refusing to issue the protective order. *Young v. Jones*, 149 Ga. App. 819, 256 S.E.2d 58 (1979).

Grant of protective order abuse of discretion. — Trial court abused the court's discretion in granting the mother's motion for a protective order, thereby prohibiting the father from taking the deposition of a female child the father was accused of molesting, under any circumstance because the child's testimony was

clearly relevant to the father's efforts to defend against the mother's motion for modification of custody. *Galbreath v. Braley*, 318 Ga. App. 111, 733 S.E.2d 412 (2012).

Interests of justice do not require production of tax returns, in the face of a motion for a protective order, when other discovery methods are available to obtain the same information. *Borenstein v. Blumenfeld*, 151 Ga. App. 420, 260 S.E.2d 377 (1979).

Protective order against state agency. — Trial court did not err in finding that the APA governed a declaratory judgment action filed against a state agency, and that sovereign immunity barred any further discovery, pursuant to O.C.G.A. § 50-13-10; hence, as a result, when plaintiff consultant failed to comply with § 50-13-10, the trial court could do no more than to grant the agency a protective order, and could not take any action beyond that, including declaring that the Department of Community Health's rules regarding health benefits could not be challenged. *Live Oak Consulting, Inc. v. Dep't of Cmty. Health*, 281 Ga. App. 791, 637 S.E.2d 455 (2006).

Time for applying for order. — Application or motion for a relieving or modifying order should be presented as soon as the party or deponent learns that such an order is needed. *Millholland v. Oglesby*, 115 Ga. App. 715, 155 S.E.2d 672 (1967) (decided under former Code 1933 § 38-2105).

Repetition of order unnecessary prior to imposing sanctions. — When a court orders one party to permit discovery pursuant to subsection (c) of O.C.G.A. § 9-11-26, upon that party's willful failure to comply with the court's order, the party seeking sanctions need not move the court pursuant to O.C.G.A. § 9-11-37(a) to repeat the court's order before proceeding to move the court pursuant to § 9-11-37(b) for the imposition of sanctions. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Motion improper for quashing or enforcement of notice to produce. — Motions pursuant to O.C.G.A. §§ 9-11-26, 9-11-34, and 9-11-37 for a protective order or sanctions were not proper vehicles for

the quashing or the enforcement of a notice to produce under former O.C.G.A. § 24-10-26 (see now O.C.G.A. § 24-13-27). *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Ex parte order without showing of cause unauthorized. — Court order that a deposition shall not be taken, entered without motion seasonably made, without notice, and without any cause shown by the plaintiff or the plaintiff's counsel, is an unauthorized order prejudicial to the preparation of the defendant's defense. *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961) (decided under former Code 1933, § 38-2105).

Trial court's refusal to enter a protective order was proper because the opponent of the discovery did not show any of the grounds for such a motion specified in O.C.G.A. § 9-11-26(c), but merely objected that the discovery was untimely. *Simmons v. Cmty. Renewal & Redemption, LLC*, 286 Ga. 6, 685 S.E.2d 75 (2009).

Appeal from denial of motion not to be made by one not involved in case below. — When appeal from denial of a motion for a protective order in regard to answering certain interrogatories and taking of a deposition in a civil suit is pursued by one who was neither a party to the case below nor the person from whom

discovery was sought, the appeal is properly dismissed for lack of standing. *State v. Upton*, 160 Ga. App. 442, 287 S.E.2d 263 (1981).

Supplementation of Responses

Failure to claim surprise from late supplemental response waives tardiness. — When an amended response to the condemnee's interrogatories was hand-delivered to the condemnee on the date of the trial, in which the condemnor updated the appraisal, surprising the condemnee, but the condemnee did not claim surprise at trial, but, instead, proceeded with the case, pointing out this last-minute change to the jury in opening remarks and vigorously and thoroughly cross-examined witnesses as to this updated appraisal, there was no reversible error. *Morrison v. DOT*, 166 Ga. App. 144, 303 S.E.2d 501 (1983).

Expert not required to supplement responses in deposition. — Defendant's expert in a products liability case was not required to supplement responses to question given in a deposition prior to trial since the expert had not been asked the specific discovery questions that were covered by the expert's testimony at the trial. *Murphy v. Concrete Placement Sys.*, 215 Ga. App. 284, 450 S.E.2d 312 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, §§ 1 et seq., 79 et seq. 210.

Am. Jur. Pleading and Practice Forms. — 8A Am. Jur. Pleading and Practice Forms, Depositions and Discovery, § 1 et seq. 20A Am. Jur. Pleading and Practice Forms, Pretrial Conference and Procedure, § 1.

C.J.S. — 26B C.J.S., Depositions, § 109 et seq. 27 C.J.S., Discovery, §§ 1, 2 et seq., 22, 68-71, 107-109, 114, 119, 120, 140. 35A C.J.S., Federal Civil Procedure, §§ 562, 563, 564, 572, 597, 598, 606, 611, 639, 643 et seq., 678, 679, 684, 695, 696, 711, 715, 739.

ALR. — Scope or extent, as regards books, records, or documents to be pro-

duced or examined, permissible in order for inspection, 58 ALR 1263.

Right to discovery as regards facts relating to amount of damages, 88 ALR 504.

Right of party under statute or rule of court to order for examination of, or to propose interrogatories to, adverse party in respect to matters within knowledge of former, 95 ALR 241.

Bill of discovery or statutory remedy for discovery as available for purpose of determining who should be sued, 125 ALR 861.

Attorney as agent within statute providing for discovery examination of party or his agent, 136 ALR 1502.

Production, in response to call therefor by adverse party, of document otherwise

inadmissible in evidence, as making it admissible, 151 ALR 1006.

Pretrial conference procedure as affecting right to discovery, 161 ALR 1151.

Discovery or inspection of trade secret, formula, or the like, 17 ALR2d 383.

Privilege of communications or reports between liability or indemnity insurer and insured, 22 ALR2d 659.

Court's power to determine, upon government's claim of privilege, whether official information contains state secrets or other matters disclosure of which is against public interest, 32 ALR2d 391.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Names and addresses of witnesses to accident or incident as subject of pretrial discovery, 37 ALR2d 1152.

In-camera trial or hearing and other procedures to safeguard trade secret or the like against undue disclosure in course of civil action involving such secret, 62 ALR2d 509.

Discovery and inspection of income tax returns in actions between private individuals, 70 ALR2d 240.

Right to copy of physician's report of pretrial examination where there is no specific statute or rule providing therefor, 70 ALR2d 384.

Construction and effect of Rules 30(b), (d), 31(d), of the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions, 70 ALR2d 685.

Qualifications of chemist or chemical engineer to testify as to effect of poison upon human body, 70 ALR2d 1029.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises, 74 ALR2d 876.

Testing qualifications of expert witness, other than handwriting expert, by objective tests or experiments, 78 ALR2d 1281.

Reports of treating physician delivered to litigant's own attorney as subject of

pretrial or other disclosure, production, or inspection, 82 ALR2d 1162.

Pretrial deposition-discovery of opinions of opponent's expert witnesses, 86 ALR2d 138; 33 ALR Fed. 403.

Propriety and effect of instructions in civil case on the weight or reliability of medical expert testimony, 86 ALR2d 1038.

Propriety of discovery interrogatories calling for continuing answers, 88 ALR2d 657.

Trial court's appointment, in civil case, of expert witness, 95 ALR2d 390.

Discovery, inspection, and copying of photographs of article or premises the condition of which gave rise to instant litigation, 95 ALR2d 1061.

Availability of mandamus or prohibition to compel or to prevent discovery proceedings, 95 ALR2d 1229.

Pretrial discovery of opponent's engineering reports, 97 ALR2d 770.

Discovery and inspection of articles and premises in civil actions other than for personal injury or death, 4 ALR3d 762.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Pretrial examination or discovery to ascertain from defendant in action for injury, death, or damages, existence and amount of liability insurance and insurer's identity, 13 ALR3d 822.

Scope of defendant's duty of pretrial discovery in medical malpractice action, 15 ALR3d 1446.

Discovery, in civil case, of material which is or may be designed for use in impeachment, 18 ALR3d 922.

Identity of witnesses whom adverse party plans to call to testify at civil trial, as subject of pretrial discovery, 19 ALR3d 1114.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Pretrial discovery of defendant's financial worth on issue of damages, 27 ALR3d 1375.

Development, since *Hickman v. Taylor*, of attorney's "work product" doctrine, 35 ALR3d 412; 27 ALR4th 568.

Personal representative's loss of rights

under dead man statute by prior institution of discovery proceedings, 35 ALR3d 955.

Medical malpractice: necessity and sufficiency of showing of medical witness' familiarity with particular medical or surgical technique involved in suit, 46 ALR3d 275.

Who has possession, custody, or control of corporate books or records for purposes of order to produce, 47 ALR3d 676.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death, 65 ALR3d 283.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses, 68 ALR3d 546.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 ALR3d 944.

Discovery or inspection of state bar records of complaints against or investigations of attorneys, 83 ALR3d 777.

Restricting public access to judicial records of state courts, 84 ALR3d 598.

Propriety of discovery order permitting "destructive testing" of chattel in civil case, 11 ALR4th 1245.

Work product privilege as applying to material prepared for terminated litigation or for claim which did not result in litigation, 27 ALR4th 568.

Abuse of process action based on misuse of discovery or deposition procedures after commencement of civil action without seizure of person or property, 33 ALR4th 650.

Protective orders limiting dissemination of financial information obtained by deposition or discovery in state civil actions, 43 ALR4th 121.

Discovery: right to ex parte interview with injured party's treating physician, 50 ALR4th 714.

Discovery of defendant's sales, earnings, or profits on issue of punitive damages in tort action, 54 ALR4th 998.

Insured-insurer communications as privileged, 55 ALR4th 336.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pre-trial discovery proceedings, 58 ALR4th 653.

Discovery, in civil proceeding, of records of criminal investigation by state grand jury, 69 ALR4th 298.

Discovery of trade secret in state court action, 75 ALR4th 1009.

Involuntary disclosure or surrender of will prior to testator's death, 75 ALR4th 1144.

Propriety and extent of state court protective order restricting party's right to disclose discovered information to others engaged in similar litigation, 83 ALR4th 987.

Discoverability of traffic accident reports and derivative information, 84 ALR4th 15.

Existence and nature of cause of action for equitable bill of discovery, 37 ALR5th 645.

Discoverability of metadata, 29 ALR6th 167.

Propriety and scope of protective order against disclosure of material already entered into evidence in federal court trial, 138 ALR Fed 153.

Taxation of costs associated with videotaped depositions under 28 U.S.C.A. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure, 156 ALR Fed. 311.

9-11-27. Depositions before action or pending appeal.

(a) Before action.

(1) **Petition.** A person who desires to perpetuate such person's own testimony or that of another person regarding any matter that may be cognizable in any court may file a verified petition in the superior court of the county where the witness resides. The petition shall be entitled in the name of the petitioner and shall show that the petitioner expects to be a party to litigation but is presently unable to bring it or cause it to be brought, the subject matter of the expected

action and the petitioner's interest therein, the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) **Notice and service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or outside the county in the manner provided for service of summons; but, if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise and shall appoint, for persons not served, an attorney who shall represent them and, in case they are not otherwise represented, shall cross-examine the deponent. The court may make such order as is just requiring the petitioner to pay a reasonable fee to an attorney so appointed. If any expected adverse party is a minor or an incompetent person and does not have a general guardian, the court shall appoint a guardian ad litem.

(3) **Order and examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken by a certified court reporter, or as otherwise provided by the rules of the Board of Court Reporting, in accordance with this chapter; and the court may make orders of the character provided for by Code Sections 9-11-34 and 9-11-35. For the purpose of applying this chapter to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) **Use of deposition.** If a deposition to perpetuate testimony is taken under this Code section or if, although not so taken, it would be otherwise admissible under the laws of this state, it may be used in any action involving the same parties and the same subject matter subsequently brought.

(b) **Pending appeal.** If an appeal has been taken from a judgment of a trial court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the trial court. In such case the party who desires to perpetuate the testimony may make a motion in the trial court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in the court. The motion shall show the names and addresses of persons to be examined, the substance of the testimony which the movant expects to elicit from each, and the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Code Sections 9-11-34 and 9-11-35; and thereupon the depositions may be taken before a certified court reporter, or as otherwise provided by the rules of the Board of Court Reporting, and used in the same manner and under the same conditions as are prescribed in this chapter for depositions taken in actions pending in court.

(c) **Perpetuation by action.** This Code section does not limit the power of a court to entertain an action to perpetuate testimony. (Ga. L. 1966, p. 609, § 27; Ga. L. 1993, p. 1315, § 2.)

Cross references. — Provisions regarding perpetuation of testimony, § 24-13-150 et seq.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 27, see 28 U.S.C.

JUDICIAL DECISIONS

Purpose of subsection (a) of O.C.G.A. § 9-11-27 is to provide for perpetuation of testimony in situations where, for one reason or another, testimony might be lost to a prospective litigant unless steps are taken immediately to preserve and protect such testimony. *Worley v. Worley*, 161 Ga. App. 44, 288 S.E.2d 854 (1982).

Precomplaint deposition not authorized. — O.C.G.A. § 9-11-27 does not authorize the grant of a petition to take a precomplaint deposition to acquire information for preparation of an affidavit required by O.C.G.A. § 9-11-9.1. *St. Joseph Hosp. v. Black*, 225 Ga. App. 139, 483 S.E.2d 290 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, §§ 4, 84 et seq.

C.J.S. — 26B C.J.S., Depositions, §§ 3 et seq., 59 et seq., 81 et seq., 109 et seq., 146. 27 C.J.S., Discovery, §§ 29 et seq., 54 et seq. 35A C.J.S., Federal Civil Procedure, § 607 et seq.

ALR. — Making copies of record or writings part of deposition, 59 ALR 530.

Taking deposition as judicial proceeding as regards law of privilege in libel and slander, 90 ALR 66.

Service of notice of time and place of examination of party witness as sufficient to require his attendance without subpoena for purposes of deposition, 112 ALR 449.

Introduction of deposition by party

other than the one at whose instance it was taken, 134 ALR 212.

Appearance by guardian ad litem without service of summons, 164 ALR 529.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 ALR2d 768.

Effect of death of appellant upon appeal from judgment of mental incompetence against him, 54 ALR2d 1161.

Right to take depositions in perpetual remembrance for use in pending action, where statute does not expressly grant or deny such right, 70 ALR2d 674.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Production and inspection of premises, persons, or things in proceeding to perpetuate testimony, 98 ALR2d 909.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Restricting access to records of disciplinary proceedings against attorneys, 83 ALR3d 749.

Discovery or inspection of state bar records of complaints against or investigations of attorneys, 83 ALR3d 777.

Accused's right to depose prospective witnesses before trial in state court, 2 ALR4th 704.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed. 924.

Construction and application of Fed. R. Civ. P. 27, 37 ALR Fed. 2d 573.

9-11-28. Persons before whom depositions may be taken; disqualification for interest; consent of parties.

(a) **Within the United States and its possessions.** Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or by the laws of the place where the examination is held or before a court reporter appointed by the court in which the action is pending or, if within this state, before a certified court reporter or as otherwise provided by the rules of the Board of Court Reporting. A person so appointed has power to administer oaths and take testimony.

(b) **In foreign countries.** In a foreign state or country depositions shall be taken on notice before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or by descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)."

(c) **Disqualification for interest.** No deposition shall be taken before a court reporter who is a relative, employee, attorney, or counsel

of any of the parties, or who is a relative or employee of such attorney or counsel, or who is financially interested in the action, excepting that a deposition may be taken before a court reporter who is a relative of a party or of an attorney or counsel of a party if all parties represented at the deposition enter their explicit consent to the same upon the record of the deposition. (Ga. L. 1966, p. 609, § 28; Ga. L. 1993, p. 1315, § 3; Ga. L. 1994, p. 1007, § 1; Ga. L. 1999, p. 848, § 1.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 28, see 28 U.S.C.

Law reviews. — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 58 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Contracts for reporting depositions. — Court reporter may enter into contracts for reporting depositions so long as the contract does not render the reporter an “employee” or “financially interested in the action”; however, charging different rates to various participants in a single deposition may constitute the charging of “unreasonable” fees and court

reporters may not provide kickbacks to a party. 1993 Op. Att’y Gen. No. 93-18.

Disclosure requirements. — Requirement of disclosing the complete arrangements includes disclosing the costs to be charged to the person making the arrangements for the court reporter’s services. 1995 Op. Att’y Gen. No. U95-10.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 80.

C.J.S. — 26B C.J.S., Depositions, §§ 21 et seq., 74 et seq. 35A C.J.S., Federal Civil Procedure, §§ 615, 632

ALR. — Right to revoke license of foreign corporation for bringing suit in, or removing suit to, federal court, 21 ALR 188.

Pleadings, depositions, testimony, or

statements in court as constituting a sufficient writing within the statute of frauds, 22 ALR 735.

Jurisdiction to require a nonresident party to an action to submit to adverse examination, 154 ALR 849.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

9-11-29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may, by written stipulation:

(1) Provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and, when so taken, may be used like other depositions; and

(2) Modify the procedures provided by this chapter for other methods of discovery. (Ga. L. 1966, p. 609, § 29; Ga. L. 1972, p. 510, § 2.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 29, see 28 U.S.C.

JUDICIAL DECISIONS

Waiver of objection to videotape of deposition. — Objection based on lack of court order allowing videotaping of deposition was waived since no objection to the videotaping was raised prior to trial. Even if the objection was timely made at trial, any error in the admission of the videotaped deposition was harmless since the videotaping was conducted in substantial compliance with required technical conditions and procedures. *DuBois v. Ray*, 177 Ga. App. 349, 339 S.E.2d 605 (1985).

Modification of discovery procedures. — Trial court did not err in granting summary judgment to a mortgagee on the mortgagors' claims for wrongful eviction and trespass because the mortga-

gors failed to adhere to O.C.G.A. § 9-11-36(a)(2) since the mortgagors never answered or objected to the mortgagees' requests for admission within the statutory time period, and thus, the requests were deemed admitted by the mortgagors; the mortgagor's reliance upon § 9-11-36(b) was misplaced under the circumstances because the parties modified the statutory discovery procedures by stipulation pursuant to O.C.G.A. § 9-11-29(2). *Ikomoni v. Exec. Asset Mgmt., LLC*, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 119.

C.J.S. — 26B C.J.S., Depositions, § 176. 27 C.J.S., Discovery, §§ 22, 53, 74, 95, 96, 97, 133. 35A C.J.S., Federal Civil Procedure, §§ 611, 617. 83 C.J.S., Stipulations, § 11.

ALR. — Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

9-11-29.1. When depositions and other discovery material must be filed with court; custodian until filing; retention of depositions and other discovery materials.

(a) Depositions and other discovery material otherwise required to be filed with the court under this chapter shall not be required to be so filed unless:

- (1) Required by local rule of court;
- (2) Ordered by the court;
- (3) Requested by any party to the action;

(4) Relief relating to discovery material is sought under this chapter and said material has not previously been filed under some other provision of this chapter, in which event copies of the material in dispute shall be filed by the movant contemporaneously with the motion for relief; or

(5) Such material is to be used at trial or is necessary to a pretrial or posttrial motion and said material has not previously been filed under some other provision of this chapter, in which event the portions to be used shall be filed with the clerk of court at the outset of the trial or at the filing of the motion, insofar as their use can be reasonably anticipated by the parties having custody thereof, but a party attempting to file and use such material which was not filed with the clerk at the outset of the trial or at the filing of the motion shall show to the satisfaction of the court, before the court may authorize such filing and use, that sufficient reasons exist to justify that late filing and use and that the late filing and use will not constitute surprise or manifest injustice to any other party in the proceedings.

(b) Until such time as discovery material is filed under paragraphs (1) through (5) of subsection (a) of this Code section, the original of all depositions shall be retained by the party taking the deposition and the original of all other discovery material shall be retained by the party requesting such material, and the person thus retaining the deposition or other discovery material shall be the custodian thereof.

(c) When depositions and other discovery material are filed with the clerk of court as provided in subsection (a) of this Code section, the clerk of court shall retain such original documents and materials until final disposition, either by verdict or appeal, of the action in which such materials were filed. The clerk of court shall be authorized thereafter to destroy such materials upon microfilming or digitally imaging such materials and maintaining such materials in a manner that facilitates retrieval and reproduction, so long as the microfilm and digital images meet the standards established by the Division of Archives and History of the University System of Georgia; provided, however, that the clerk of court shall not be required to microfilm or digitally image depositions that are not used for evidentiary purposes during the trial of the issues of the case in which such depositions were filed. (Code 1981, § 9-11-29.1, enacted by Ga. L. 1982, p. 2374, § 1; Ga. L. 2012, p. 599, § 1-1/HB 665; Ga. L. 2013, p. 594, § 2-1/HB 287.)

The 2013 amendment, effective July 1, 2013, substituted “Division of Archives and History of the University System of Georgia” for “Georgia Department of Archives and History” near the middle of the second sentence of subsection (c).

Law reviews. — For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For article, “On with the Old!,” see 24 Ga. St. B.J. 13 (1987).

JUDICIAL DECISIONS

Burden of timely filing deposition. and other discovery material with the trial court lies with the party which in-

tends to rely upon the materials. *Sheffield v. Zilis*, 170 Ga. App. 62, 316 S.E.2d 493 (1984); *Whisenant v. Fulton Fed. Sav. &*

Loan Ass'n, 194 Ga. App. 192, 390 S.E.2d 100 (1990).

Because depositions relied upon by a husband and wife in their personal injury and loss of consortium action were not filed prior to the time a motion for summary judgment was ruled upon, their reference to the testimony contained therein could not be considered, and their brief in opposition to the summary judgment motion citing the testimony was not proper evidence for opposing the motion. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

Paragraph (a)(5) of O.C.G.A. § 9-11-29.1 does not make certification a prerequisite to the use of discovery material in support of a motion. Rather, it is O.C.G.A. § 9-11-56(e) which requires sworn or certified copies of all papers or parts thereof referred to in an affidavit filed in support of or in opposition to a motion for summary judgment. *Jacobsen v. Muller*, 181 Ga. App. 382, 352 S.E.2d 604 (1986).

Excerpts from personnel file do not need to be certified. — Excerpts from plaintiff's personnel file did not have to be certified or be part of a sworn affidavit to be considered in support of the defendant's summary judgment motion since these excerpts were produced in response to the plaintiff's request for production of documents in accordance with O.C.G.A. § 9-11-34. *Glisson v. Morton*, 203 Ga. App. 77, 416 S.E.2d 134 (1992).

Untimeliness of filing discovery materials excused. — Plaintiff's filing of discovery materials at the summary judgment hearing, pursuant to Ga. Super. Ct. R. 6.5, was allowed although untimely under O.C.G.A. § 9-11-29.1, as it was within the trial court's discretion when it was shown that sufficient reasons existed to justify the lateness and that there was no surprise or manifest injustice caused to the defendant; the plaintiff had notified the defendant that the plaintiff was relying on the discovery materials in the plaintiff's summary judgment motion and the defendant did not complain that the documents had not been filed with the court in the defendant's summary judgment response.

Adams v. Adams, 260 Ga. App. 597, 580 S.E.2d 261 (2003).

Order denying an employer's motion for summary judgment as to a security guard's assault and battery claims was vacated, and the case was remanded with direction that the trial court consider a messenger's depositions in deciding the summary judgment motion as to the assault and battery claim issues regarding whether the messenger was an independent contractor or an employee and whether the messenger was acting within the scope of employment at the time the messenger attacked the guard; at the time the trial court held the court's hearing and signed the court's summary judgment order, the employer failed to comply with the employer's obligation under O.C.G.A. § 9-11-29.1(a)(3) to file the original deposition transcripts in the employer's custody as the guard requested. The trial court, which relied on the briefs that cited to and quoted from the depositions, could not review that deposition testimony when the guard cited to the depositions in the guard's trial court briefs, making a formal request that the employer, as custodian, file the original depositions, but the employer did not file the guard's deposition until after the trial court had signed the court's order and did not file the messenger's deposition until months after the appeal was filed. *Ga. Messenger Serv. v. Bradley*, 302 Ga. App. 247, 690 S.E.2d 888 (2010).

Filing of admissions as exhibits sufficient. — Since the guest filed the admissions as an exhibit to the guest's opposition to the defendants' motion for summary judgment, the guest was in compliance with O.C.G.A. § 9-11-29.1(a)(5) and the guest was not required to file the admissions again at trial. *Vis v. Harris*, 329 Ga. App. 129, 764 S.E.2d 156 (2014).

Cited in *Lee v. Fuerst & Davis*, 173 Ga. App. 362, 326 S.E.2d 482 (1985); *Connell v. Houser*, 189 Ga. App. 158, 375 S.E.2d 136 (1988); *Calhoun v. Bone*, 189 Ga. App. 396, 375 S.E.2d 871 (1988); *Allstate Ins. Co. v. Ackley*, 227 Ga. App. 104, 488 S.E.2d 85 (1997); *All Fleet Refinishing, Inc. v. W. Ga. Nat'l Bank*, 280 Ga. App. 676, 634 S.E.2d 802 (2006).

9-11-30. Depositions upon oral examination.

(a) **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under subsection (f) of Code Section 9-11-4, except that leave is not required if a defendant has served a notice of taking deposition or otherwise sought discovery or if special notice is given as provided in paragraph (2) of subsection (b) of this Code section. The attendance of witnesses may be compelled by subpoena as provided in Code Section 9-11-45. The deposition of a person confined in a penal institution may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice of examination.**

(1) **General requirements.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition, the means by which the testimony shall be recorded, and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person to be examined or the particular class or group to which he or she belongs. If a subpoena for the production of documentary and tangible evidence is to be served on the person to be examined, the designation of the materials to be produced, as set forth in the subpoena, shall be attached to, or included in, the notice.

(2) **Special notice.** Leave of court is not required for the taking of a deposition by plaintiff if the notice:

(A) States that the person to be examined is about to go out of the county where the action is pending and more than 150 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before expiration of the 30 day period; and

(B) Sets forth facts to support the statement.

The plaintiff's attorney shall sign the notice, and said attorney's signature constitutes a certification by him or her that, to the best of his or her knowledge, information, and belief, the statement and supporting facts are true. If a party shows that, when he or she was served with notice under this paragraph, he or she was unable through the exercise of diligence to obtain counsel to represent him or

her at the taking of the deposition, the deposition may not be used against such party.

(3) **Time requirements.** The court may, for cause shown, enlarge or shorten the time for taking the deposition.

(4) **Recording of deposition.** Unless the court orders otherwise, the testimony at a deposition must be recorded by stenographic means, and may also be recorded by sound or sound and visual means in addition to stenographic means, and the party taking the deposition shall bear the costs of the recording. A deposition shall be conducted before an officer appointed or designated under Code Section 9-11-28. Upon motion of a party or upon its own motion, the court may issue an order designating the manner of recording, preserving, and filing of a deposition taken by nonstenographic means, which order may include other provisions to assure that the recorded testimony will be accurate and trustworthy. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the methods specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. Notwithstanding the foregoing provisions of this paragraph, a deposition may be taken by telephone or other remote electronic means only upon the stipulation of the parties or by order of the court. For purposes of the requirements of this chapter, a deposition taken by telephone or other remote electronic means is taken in the state and at the place where the deponent is to answer questions.

(5) **Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Code Section 9-11-34 for the production of documents and tangible things at the taking of the deposition. The procedure of Code Section 9-11-34 shall apply to the request.

(6) **Deposition of organization.** A party may, in his or her notice, name as the deponent a public or private corporation or a partnership or association or a governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the

organization. This paragraph does not preclude taking a deposition by any other procedure authorized in this chapter.

(c) Examination and cross-examination; record of examination; oath; objections.

(1) Examination and cross-examination of witnesses may proceed as permitted at the trial under the rules of evidence. The authorized officer or court reporter before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the direction and in the presence of the authorized officer or court reporter, record the testimony of the witness.

(2) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and said party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(3) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain the record of each deposition until the later of (A) five years after the date on which the deposition was taken, or (B) two years after the date of final disposition of the action for which the deposition was taken and any appeals of such action. The officer may preserve the record through storage of the original paper, notes, or recordings or an electronic copy of the notes, recordings, or the transcript on computer disks, cassettes, backup tape systems, optical or laser disk systems, or other retrieval systems.

(d) Motion to terminate or limit examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition as provided in subsection (c) of Code Section 9-11-26. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Paragraph (4) of subsection (a) of Code Section 9-11-37 applies to the award of expenses incurred in relation to the motion.

(e) **Review by witness; changes; signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by paragraph (1) of subsection (f) of this Code section whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed. If the deposition is not reviewed and signed by the witness within 30 days of its submission to him or her, the officer shall sign it and state on the record that the deposition was not reviewed and signed by the deponent within 30 days. The deposition may then be used as fully as though signed unless, on a motion to suppress under paragraph (4) of subsection (d) of Code Section 9-11-32, the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) **Certification and filing by officer; inspection and copying of exhibits; copy of deposition.**

(1)(A) The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. The officer shall then securely seal the deposition in an envelope marked with the title of the action, the court reporter certification number, and "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or deliver it to the party taking the deposition, as the case may be, in accordance with Code Section 9-11-29.1.

(B) Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition and may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if he or she affords to all parties fair opportunity to verify the copies by comparison with the originals; and, if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(g) **Failure to attend or to serve subpoena; expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness, because of such failure, does not attend and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) **Form of presentation.** Except as otherwise directed by the court, a party offering deposition testimony may offer it in stenographic or nonstenographic form, but if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise. (Ga. L. 1966, p. 609, § 30; Ga. L. 1967, p. 226, § 14; Ga. L. 1972, p. 510, § 3; Ga. L. 1993, p. 1315, § 4; Ga. L. 1996, p. 266, § 1; Ga. L. 2000, p. 1225, § 3.)

Editor's notes. — Ga. L. 2000, p. 1225, § 8, not codified by the General Assembly, provides that the amendment to this Code section is applicable to civil actions filed on or after July 1, 2000.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 30, see 28 U.S.C.

Law reviews. — For article discussing the use of videotape for civil trial depositions, in light of *Mayor of Savannah v. Palmerio*, 135 Ga. App. 147, 217 S.E.2d

430 (1975), see 13 Ga. St. B.J. 87 (1976). For survey article on torts, see 34 Mercer L. Rev. 271 (1982). For article, "Use and Misuse of O.C.G.A. § 9-11-30(b)(6)," see 10 Ga. St. B.J. 12 (No. 4, 2004).

For note discussing possible uses of videotape and its admissibility as evidence, see 5 Ga. St. B.J. 393 (1969). For note, "Preferential Treatment of the United States Under Federal Civil Discovery Procedures," see 13 Ga. L. Rev. 550 (1979).

JUDICIAL DECISIONS

Editor's note. — In light of the similarity of the statutory provisions, decisions under former Code 1933, Ch. 21, T. 38 are included in the annotations for this Code section.

Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this section was substantially the same as former Code

1933, § 38-2105. Hence, decisions based on this section prior to its 1972 amendment should be consulted with care.

Powers of trial court. — Trial court has the power under O.C.G.A. § 9-11-30 to control the details of time, place, scope, and financing of a deposition for the protection of the deponents and parties. *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 321 S.E.2d 383 (1984).

Deposition of witness in opposing party's absence void. — When a physician in a worker's compensation case refused to give a deposition in front of the appellee, the appellant's election to proceed in the appellee's absence voided an otherwise valid procedure, and therefore the deposition was not erroneously excluded from consideration in making the award to the appellee. *Georgia Power Co. v. Brown*, 169 Ga. App. 45, 311 S.E.2d 236 (1983).

Videotaping of deposition permitted. — Under subsection (b)(4) of this section, the taking of a deposition by videotaping, when otherwise permitted by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), is proper. *Mayor of Savannah v. Palmerio*, 135 Ga. App. 147, 217 S.E.2d 430 (1975).

Testimony of a witness by videotape is a better substitute for actual live testimony than the reading of a stenographic transcript provided by a court reporter. *Mayor of Savannah v. Palmerio*, 135 Ga. App. 147, 217 S.E.2d 430 (1975).

Testimony by department's representative improperly excluded. — Georgia Department of Transportation (DOT) was permitted to present evidence through the department's representative of its breach of contract damages under O.C.G.A. § 13-6-2 on its counterclaim because an asphalt company's argument, that the damages calculations were too speculative because the DOT was unable to show the exact amount of hydrated lime in each lot of asphalt, was asserting an insufficiency in the evidence that was not appropriately resolved on the company's motion in limine. *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 470, 677 S.E.2d 699 (2009), appeal dismissed, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

Waiver of objection to videotape of deposition. — Objection based on lack of

court order allowing videotaping of deposition was waived since no objection to the videotaping was raised prior to trial. Even if the objection was timely made at trial, any error in the admission of the videotaped deposition was harmless because the videotaping was conducted in substantial compliance with required technical conditions and procedures. *DuBois v. Ray*, 177 Ga. App. 349, 339 S.E.2d 605 (1985).

Protective order barring video conference deposition proper. — Trial court did not abuse the court's discretion in granting an assistant professor's motion for a protective order to bar a video conference deposition because the Board of Regents of the University System of Georgia (BOR) did not seek a court order, and the professor did not stipulate to the taking of the deposition; the BOR did not demonstrate any harm as a result of the trial court's action. *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010).

As between parties, no subpoena is required or necessary for the taking of a deposition. *Millholland v. Oglesby*, 114 Ga. App. 745, 152 S.E.2d 761 (1966), rev'd on other grounds, 223 Ga. 230, 154 S.E.2d 194 (1967) (decided under former Code 1933, Ch. 21, T. 38).

Prompt notification of defect in notice required. — While proper notice is required for taking of a deposition, the opposing party must promptly notify the party giving the notice if the notice is technically deficient in any manner. *Republic Nat'l Bank v. Hodgson*, 124 Ga. App. 11, 183 S.E.2d 4 (1971).

Rationale for prompt objection to deficient notice. — Rationale of requirement that written objection to a deficient notice of deposition be made promptly, failing which the error or irregularity in the notice is deemed to have been waived, is the same as that for the requirement that objection to the evidence be made at the time of taking depositions. *Republic Nat'l Bank v. Hodgson*, 124 Ga. App. 11, 183 S.E.2d 4 (1971).

Tardy demand that deposition be signed. — When a deposition is taken for

the express purpose of being used as evidence at trial the next day, and the opposing party is well aware that by the time the transcript is prepared the witness will be unavailable to sign the transcript, but makes no demand for the witness's signature until it is clear that compliance will be impossible, and when there is no contention or indication that any of the testimony in the deposition is improperly transcribed, the trial court acts within the court's discretion in allowing the deposition to be used as evidence. *Spector v. Lankford*, 151 Ga. App. 397, 259 S.E.2d 654 (1979).

Deposition erroneously admitted because deponent not permitted to read and sign. — Because a former homeowner testified by affidavit that the former homeowner was never notified by the officer that a deposition transcript was available for examination and signature, and the defendants in the wrongful eviction action offered no testimony or evidence to rebut the former owner's affidavit, the trial court erred by admitting the former owner's deposition for purposes of summary judgment. However, admission of the deposition was harmless error because the operative evidence came in through the homeowner's and others' affidavits. *Steed v. Fed. Nat'l Mortg. Corp.*, 301 Ga. App. 801, 689 S.E.2d 843 (2009).

Harmless error to exclude deposition testimony. — Although the deposition of the former employer's agent in response to the former employee's request for a deposition under O.C.G.A. § 9-11-30(b)(6) was admissible under O.C.G.A. § 9-11-32(a), because the agent had no direct personal knowledge of the employee's contract or the contract's termination, the agent's deposition testimony had no probative value as to the matters for which the testimony was proffered, specifically for rebuttal and impeachment purposes; thus, it was harmless error to exclude the testimony. *Griffin v. Greene County Hosp. Auth.*, 260 Ga. App. 122, 578 S.E.2d 913 (2003).

Discretion of trial court. — Trial judge has broad control over the use and limitations of discovery procedures, and unless there is a clear abuse of this discretion the appellate courts will not inter-

fere. *Jackson v. Gordon*, 122 Ga. App. 657, 178 S.E.2d 310 (1970).

Direct examination of deposed witness. — What constitutes the direct examination of a witness whose testimony was initially taken for discovery cannot be determined until the trial, when one of the parties elects to use the testimony on one's own behalf; at that time, rules governing direct and cross-examination would apply. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972).

Transcription and copies. — Nondeposing party is entitled to have a deposition of the witness transcribed and to have a copy of the transcript, provided that the nondeposing party pays for the transcript, even though the deposing party decided, after taking the deposition, not to have the deposition transcribed, but merely to acquire the take-down notes from the reporter. *Sams v. Champion*, 184 Ga. App. 444, 361 S.E.2d 852 (1987).

Changes to deposition. — Witness may make any changes in form or substance which the witness desires, even if the changes contradict the original answers or even if the reasons for making the changes are unconvincing. *J.H. Harvey Co. v. Reddick*, 240 Ga. App. 466, 522 S.E.2d 749 (1999).

Errata sheet. — Because the certificate of an officer before whom a deposition was taken did not reflect when the deposition was submitted to the appellant and did not contain a statement that the appellant waived or otherwise failed to sign the deposition, the record did not positively reflect that the errata and the signature sheets were not part of the appellant's deposition and, therefore, the errata sheet was considered. *Young v. YMCA of Metro. Atlanta, Inc.*, 204 Ga. App. 224, 419 S.E.2d 97 (1992).

Attorney fees and expenses for non-attendance at a deposition are available only in the instance of the failure of the party taking the deposition to appear. *Ingram v. Star Touch Communications, Inc.*, 215 Ga. App. 329, 450 S.E.2d 334 (1994).

Suit properly dismissed due to party's failure to attend scheduled depositions that were properly noticed. — Motorist's suit was properly dismissed un-

der O.C.G.A. § 9-11-37(d) as the motorist failed to attend any of three scheduled depositions that were properly noticed under O.C.G.A. § 9-11-30(b)(1), defense counsel was not required to address the motorist's proposed discovery plan, and counsel's failure to do so did not excuse the motorist's failure to attend the depositions. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

Deposition improperly excluded because it was an unsigned copy. — In a parents' action against a care home arising out of the death of their adult son, the trial court erred in refusing to consider a copy of the deposition of the parents' expert because the deposition was not an original and had not been signed by the deponent; the copy contained the court reporter's signed certification that the transcript was a true and complete record of the evidence given by the expert. *Blake v. KES, Inc.*, 329 Ga. App. 742, 766 S.E.2d 138 (2014).

Cited in *Herring v. R.L. Mathis Cert. Dairy Co.*, 121 Ga. App. 373, 173 S.E.2d 716 (1970); *Hodges v. Youmans*, 122 Ga. App. 487, 177 S.E.2d 577 (1970); *Robinson v. J.C. Penney Co.*, 124 Ga. App. 221, 183 S.E.2d 782 (1971); *Thomas v. Home Credit Co.*, 133 Ga. App. 602, 211 S.E.2d 626 (1974); *Dalton v. Vanderkooi*, 134 Ga. App. 381, 214 S.E.2d 670 (1975); *Taylor v. Stapp*, 134 Ga. App. 468, 215 S.E.2d 23 (1975); *Commercial Union Ins. Co. v.*

Crews, 139 Ga. App. 521, 229 S.E.2d 14 (1976); *Rachel v. Simmons Co.*, 141 Ga. App. 236, 233 S.E.2d 56 (1977); *Sacks v. Bell Tel. Labs., Inc.*, 149 Ga. App. 799, 256 S.E.2d 87 (1979); *Atlanta Assocs. v. Westminster Properties, Inc.*, 155 Ga. App. 204, 270 S.E.2d 280 (1980); *Williams v. Church's Fried Chicken, Inc.*, 158 Ga. App. 26, 279 S.E.2d 465 (1981); *Sherrill v. Martin*, 161 Ga. App. 558, 288 S.E.2d 648 (1982); *Atlanta Coca-Cola Bottling Co. v. Rosser*, 250 Ga. 52, 295 S.E.2d 827 (1982); *Torok v. Mize*, 164 Ga. App. 357, 296 S.E.2d 738 (1982); *Georgia Farm Bldgs., Inc. v. Willard*, 170 Ga. App. 327, 317 S.E.2d 229 (1984); *Osborne v. Bank of Delight*, 173 Ga. App. 322, 326 S.E.2d 523 (1985); *Anderberg v. Georgia Elec. Membership Corp.*, 175 Ga. App. 14, 332 S.E.2d 326 (1985); *Abalene Pest Control Serv., Inc. v. Orkin Exterminating Co.*, 196 Ga. App. 463, 395 S.E.2d 867 (1990); *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 659 S.E.2d 905 (2008); *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008); *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008); *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008); *Yeary v. State*, 289 Ga. 394, 711 S.E.2d 694 (2011); *Estate of Pitts v. City of Atlanta*, 323 Ga. App. 70, 746 S.E.2d 698 (2013); *RLBB Acquisition, LLC v. Baer*, 329 Ga. App. 483, 765 S.E.2d 662 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this section was substantially the same as former Code 1933, § 38-2105. Hence, material based on this section prior to its 1972 amendment should be consulted with care.

Changes made under subsection (e) not limited. — Subsection (e) of O.C.G.A. § 9-11-30 places no limitations on the type of changes that may be made by a witness before signing a deposition. 1987 Op. Att'y Gen. No. 87-17.

No permanent record is required

for depositions and interrogatories; while depositions and interrogatories are required to be filed with the clerk, being evidence, depositions and interrogatories are not considered part of the permanent record of the trial court. 1970 Op. Att'y Gen. No. U70-232.

No filing or recording fee can be charged for depositions or interrogatories. 1970 Op. Att'y Gen. No. U70-232.

Contracts for reporting depositions. — Court reporter may enter into contracts for reporting depositions so long as the contract does not render the reporter an "employee" or "financially interested in the action"; however, charging

different rates to various participants in a single deposition may constitute the charging of “unreasonable” fees and court

reporters may not provide kickbacks to a party. 1993 Op. Att’y Gen. No. 93-18.

ADVISORY OPINIONS OF THE STATE BAR

Notice of deposition required. — O.C.G.A. § 9-11-45 provides that a subpoena shall issue for persons sought to be deposed and may command the person to produce documents. O.C.G.A. § 9-11-30(b)(1) requires notice to every

other party of all depositions. Reading §§ 9-11-30 and 9-11-45 together, it is obvious that before a subpoena can be issued, notice of the deposition must be given to all parties. Adv. Op. No. 84-40 (September 21, 1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 85 et seq.

C.J.S. — 26B C.J.S., Depositions, §§ 39, 48, 55, 59 et seq. 35A C.J.S., Federal Civil Procedure, §§ 562 et seq., 617, 626, 627, 629, 633 et seq., 643 et seq., 654, 666. 35B C.J.S., Federal Civil Procedure, §§ 1366, 1369, 1370.

ALR. — Withdrawal of paper after delivery to proper officer as affecting question whether it is filed, 37 ALR 670.

Making copies of record or writings part of deposition, 59 ALR 530.

Taking deposition as judicial proceeding as regards law of privilege in libel and slander, 90 ALR 66.

Service of notice of time and place of examination of party witness as sufficient to require his attendance without subpoena for purposes of deposition, 112 ALR 449.

Jurisdiction to require a nonresident party to an action to submit to adverse examination, 154 ALR 849.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Construction and effect of Rules 30(b), (d), 31(d), of the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or

terminating the taking of depositions, 70 ALR2d 685.

Statements of parties or witnesses as subject to pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Who is a “managing agent” of a corporate party (to civil litigation) whose discovery-deposition may be taken under Federal Rules of Civil Procedure or state counterparts, 98 ALR2d 622.

Discovery, in products liability case, of defendant’s knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Use of videotape to take deposition for presentation of civil trial in state court, 66 ALR3d 637.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorney’s fees, 68 ALR3d 209.

Permissibility and standards for use of audio recording to take deposition in state civil case, 13 ALR4th 775.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination, 32 ALR4th 212.

Taxation of costs associated with videotaped depositions under 28 U.S.C.A. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure, 156 ALR Fed. 311.

9-11-31. Depositions upon written questions.

(a) Serving questions; notice.

(1) After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon

written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Code Section 9-11-45. The deposition of a person confined in a penal institution may be taken only by leave of court on such terms as the court prescribes.

(2) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating the name and address of the person who is to answer them, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs and the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with paragraph (6) of subsection (b) of Code Section 9-11-30.

(3) Within 30 days after the notice and written questions are served, a party may serve cross-questions upon all other parties. Within ten days after being served with cross-questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross-questions upon all other parties. The court may, for cause shown, enlarge or shorten the time.

(b) **Officer to take responses and prepare record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by subsections (c), (e), and (f) of Code Section 9-11-30, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him. (Ga. L. 1966, p. 609, § 31; Ga. L. 1967, p. 226, § 15; Ga. L. 1972, p. 510, § 4.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 31, see 28 U.S.C.

JUDICIAL DECISIONS

Editor's notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this section was substantially the same as former Code 1933, § 38-2106. Hence, decisions based on this Code section prior to its 1972 amendment should be consulted with care.

In light of the similarity of the statutory

provisions, decisions under former Code 1933, Ch. 21, T. 38, are included in the annotations for this Code section.

As between parties, no subpoena is required or necessary for the taking of a deposition. *Millholland v. Oglesby*, 114 Ga. App. 745, 152 S.E.2d 761 (1966), rev'd on other grounds, 223 Ga. 230, 154 S.E.2d 194 (1967) (decided under former Code 1933, Ch. 21, T. 38).

Right to be present at taking of deposition. — When a deposition is taken upon written interrogatories, the opposing party or the opposing party's counsel have the right to be present, and their exclusion would void the procedure, even if otherwise valid. *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961), overruled on other grounds, *Scherer v.*

Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982) (decided under former Code 1933, § 38-2105).

Cited in *Walker v. Smith*, 439 F.2d 392 (5th Cir. 1971); *Atlanta Coca-Cola Bottling Co. v. Rosser*, 250 Ga. 52, 295 S.E.2d 827 (1982); *Munna v. Lewis*, 181 Ga. App. 860, 354 S.E.2d 181 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this Code section was substantially the same as former Code 1933, § 38-2106. Hence, material based on this Code section prior to its 1972 amendment should be consulted with care.

No permanent record is required

for depositions and interrogatories, as although depositions and interrogatories are required to be filed with the clerk, being evidence, depositions or interrogatories are not considered part of the permanent record of the trial court. 1970 Op. Att'y Gen. No. U70-232.

No filing or recording fee can be charged for depositions or interrogatories. 1970 Op. Att'y Gen. No. U70-232.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 101 et seq.

C.J.S. — 26B C.J.S., Depositions, §§ 49, 51 et seq., 55, 77, 107, 108. 27 C.J.S., Discovery, §§ 44, 62, 75 et seq. 35A C.J.S., Federal Civil Procedure, §§ 620 et seq., 626, 627.

ALR. — Pleadings, depositions, testimony, or statements in court as constituting a sufficient writing within the statute of frauds, 22 ALR 735.

Making copies of record or writings part of deposition, 59 ALR 530.

Taking deposition as judicial proceeding as regards law of privilege in libel and slander, 90 ALR 66.

Service of notice of time and place of

examination of party witness as sufficient to require his attendance without subpoena for purposes of deposition, 112 ALR 449.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Propriety of answer to interrogatory merely referring to other documents or sources of information, 96 ALR2d 598.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 ALR3d 389.

9-11-32. Use of depositions in court proceedings; effect of errors and irregularities in depositions.

(a) **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness;

(2) The deposition of a party or of anyone who, at the time of taking the deposition, was an officer, director, or managing agent or a person designated under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf of a public or private corporation, a partnership or association, or a governmental agency which is a party may be used by an adverse party for any purpose;

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) That the witness is dead;

(B) That the witness is out of the county, unless it appears that the absence of the witness was procured by a party offering the deposition;

(C) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(D) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena;

(E) That because of the nature of the business or occupation of the witness it is not possible to secure his personal attendance without manifest inconvenience to the public or third persons; or

(F) That the witness will be a member of the General Assembly and that the session of the General Assembly will conflict with the session of the court in which the case is to be tried;

(4) The deposition of a witness, whether or not a party, taken upon oral examination, may be used in the discretion of the trial judge, even though the witness is available to testify in person at the trial. The use of the deposition shall not be a ground for excluding the witness from testifying orally in open court; or

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) **Objections to admissibility.** Subject to paragraph (3) of subsection (d) of this Code section, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) **Effect of taking or using depositions.** A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition; but this shall not apply to the use by an adverse party of a deposition under paragraph (2) of subsection (a) of this Code section. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) **Effect of errors and irregularities in depositions.**

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) **As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) **As to taking of deposition.**

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Code Section 9-11-31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.

(4) **As to completion and return of deposition.** Errors and irregularities in the manner in which the testimony is transcribed or

the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Code Sections 9-11-30 and 9-11-31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. (Ga. L. 1966, p. 609, § 32; Ga. L. 1972, p. 510, § 5; Ga. L. 1984, p. 22, § 9.)

Cross references. — Granting of continuance for absence of witness, § 9-10-160.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 32, see 28 U.S.C.

Law reviews. — For article surveying

developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

USE OF DEPOSITIONS

CROSS-EXAMINATION

ERRORS AND OBJECTIONS

General Consideration

Editor's notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this section was substantially the same as former Code 1933, § 38-2107. Subsections (a) through (c) of this section, added by the 1972 amendment, now read substantially the same as did subsections (d) through (f) of § 9-11-26 prior to enactment of Ga. L. 1972, p. 510; hence, decisions under § 9-11-26 prior to its 1972 amendment relating to subject matter now covered by this Code section, are included in the annotations for this Code section.

In light of the similarity of the statutory provisions, decisions under former Code 1910, §§ 5910 and 5913 and former Code 1933, Ch. 21, T. 38 are included in the annotations for this Code section.

Federal interpretation not adopted. — Theory of representative cross-examination implicit in federal interpretation of Fed. R. Civ. P. Rule 32 is not adopted in Georgia. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981).

Relevant portions to be admitted

together. — Fairness demands that no less than all portions relevant to that interrogated about be introduced at the same time as a statement out of context and without accompanying explanatory matter may be unfairly damaging. Wells v. Alderman, 117 Ga. App. 724, 162 S.E.2d 18 (1968); City Council v. Youngblood, 120 Ga. App. 616, 171 S.E.2d 766 (1969); Brown v. Macheers, 249 Ga. App. 418, 547 S.E.2d 759 (2001).

Right to introduce remainder of deposition when portion admitted. —

When an attorney for the appellant introduces a portion of a deposition into evidence, the opposing party is entitled to introduce the remainder, or such portion thereof as was pertinent. 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).

Correctness of admission or exclusion of deposition is predicated on harmful error rule. North Ga. Deed & Poultry Co. v. Ultra-Life Labs., 118 Ga. App. 149, 162 S.E.2d 803 (1968).

Requiring reading of full deposition not tantamount to introducing evidence. — Defendants, who rested the

defendants' case without introducing any evidence, did not waive the defendants' right to make both opening and concluding arguments to the jury by exercising the defendants' right to require the introduction of the remaining relevant portions of the depositions from which the plaintiffs' counsel had read selected excerpts. *Thico Plan, Inc. v. Ashkouti*, 171 Ga. App. 536, 320 S.E.2d 604 (1984).

Loss of right to present opening and closing arguments. — In a personal injury case, when the defense read into the record portions of a deposition, parts of which the plaintiff previously read into the record, the defense lost the right to present opening and concluding closing argument because the parts of the deposition the defendant read into the record were not relevant to the parts of the deposition the plaintiff read into the record, so the defense made the deponent the defendant's witness and presented evidence under O.C.G.A. § 9-11-32(c). *Rouse v. Polott*, 274 Ga. App. 226, 617 S.E.2d 185 (2005).

Although physicians may not have appeared to testify in person, the physicians' deposition testimony was certainly not of a "weaker and inferior nature." *Meacham v. Barber*, 183 Ga. App. 533, 359 S.E.2d 424 (1987).

Cited in *Clayton County Bd. of Educ. v. Hooper*, 128 Ga. App. 817, 198 S.E.2d 373 (1973); *Carter v. Tatum*, 134 Ga. App. 345, 212 S.E.2d 439 (1975); *Kenney v. Piedmont Hosp.*, 136 Ga. App. 660, 222 S.E.2d 162 (1975); *New House Prods., Inc. v. Commercial Plastics & Supply Corp.*, 141 Ga. App. 199, 233 S.E.2d 45 (1977); *Strother Ford, Inc. v. Bullock*, 142 Ga. App. 843, 237 S.E.2d 208 (1977); *Harris v. Harris*, 242 Ga. 576, 250 S.E.2d 407 (1978); *International Ass'n of Bridge Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 254 S.E.2d 438 (1979); *Grant v. Bell*, 150 Ga. App. 141, 257 S.E.2d 12 (1979); *Stanfield v. Smith*, 152 Ga. App. 22, 262 S.E.2d 216 (1979); *Garrison v. Rich's*, 154 Ga. App. 663, 269 S.E.2d 513 (1980); *Ideal Pool Corp. v. Champion*, 157 Ga. App. 380, 277 S.E.2d 753 (1981); *Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981); *Associated Grocers Coop. v. Trust Co.*, 158 Ga. App. 115, 279 S.E.2d 248 (1981); *Williams*

v. Church's Fried Chicken, Inc., 158 Ga. App. 26, 279 S.E.2d 465 (1981); *Laughridge v. Moss*, 163 Ga. App. 427, 294 S.E.2d 672 (1982); *Mulkey v. GMC*, 164 Ga. App. 752, 299 S.E.2d 48 (1982); *Freeman v. Allstate Bus. Sys.*, 166 Ga. App. 249, 304 S.E.2d 97 (1983); *Sheats v. Tri-Cities Hosp. Auth.*, 167 Ga. App. 122, 306 S.E.2d 75 (1983); *Decker v. Decker*, 256 Ga. 513, 350 S.E.2d 434 (1986); *Stinson v. Pratt*, 182 Ga. App. 552, 356 S.E.2d 519 (1987); *Bryant v. Food Giant, Inc.*, 184 Ga. App. 155, 361 S.E.2d 38 (1987); *Davis v. Jones*, 189 Ga. App. 569, 377 S.E.2d 163 (1988); *State Farm Mut. Auto. Ins. Co. v. United States Fid. & Guar. Co.*, 190 Ga. App. 220, 378 S.E.2d 400 (1989); *Collins v. Newman Mach. Co.*, 190 Ga. App. 879, 380 S.E.2d 314 (1989); *Medlin v. Boyston Lumber & Bldg. Supply, Inc.*, 193 Ga. App. 608, 388 S.E.2d 861 (1989); *T.J. Morris Co. v. Dykes*, 197 Ga. App. 392, 398 S.E.2d 403 (1990); *Brand Banking Co. v. Roosman*, 199 Ga. App. 58, 404 S.E.2d 286 (1991); *Renew v. Edenfield*, 200 Ga. App. 484, 408 S.E.2d 499 (1991); *Morrison v. Koornick*, 201 Ga. App. 367, 411 S.E.2d 105 (1991); *James v. Tyler*, 215 Ga. App. 479, 451 S.E.2d 506 (1994).

Use of Depositions

Discretion of court. — Use of deposition of witness taken after notice to opposite party and with counsel for both parties present lies within the sound discretion of the court, and this remains true even if the witness may be present in court. *Pembroke Mgt., Inc. v. Cossaboon*, 157 Ga. App. 675, 278 S.E.2d 100 (1981); *Smoky, Inc. v. McCray*, 196 Ga. App. 650, 396 S.E.2d 794, cert. denied, 196 Ga. App. 650, 396 S.E.2d 794 (1990).

There was no abuse of discretion in admitting into evidence the deposition of a witness who was available to testify at trial, but had expected to be out of state for a new employer until after the trial, since the circumstances surrounding the taking of the deposition showed that the notice was not unreasonable and the plaintiff did not show how the plaintiff was harmed by admission of the deposition. *American Aluminum Prods. Co. v.*

Use of Depositions (Cont'd)

Binswanger Glass Co., 194 Ga. App. 703, 391 S.E.2d 688 (1990).

After an individual's deposition was taken in Florida, where the individual resided, and the individual walked out before the deposition was completed in an action by an estate administratrix, alleging negligent entrustment against a company, but the administratrix did not attempt to complete the deposition or take any other steps to obtain the discovery before the trial court ruled on a summary judgment motion, the trial court did not abuse the court's discretion in considering the deposition, pursuant to O.C.G.A. § 9-11-32. *Scott v. LaRosa & LaRosa, Inc.*, 275 Ga. App. 96, 619 S.E.2d 787 (2005).

Use of deposition under paragraph (a)(1). — Evidence of a witness's testimony at the witness's deposition was properly admissible under paragraph (a)(1) of O.C.G.A. § 9-11-32, particularly as the witness had difficulty with memory at the time of trial and conceded the deposition was closer in time to the events in question. *Lawson v. Athens Auto Supply & Elec., Inc.*, 200 Ga. App. 609, 409 S.E.2d 60, cert. denied, 200 Ga. App. 895, 409 S.E.2d 60 (1991).

Relationship of paragraphs (a)(2) and (a)(3). — Paragraph (a)(2) of this section clearly applies to the deposition of an adverse party, while paragraph (a)(3) of this section does not; hence, paragraph (a)(3) is an expansion of the provisions of paragraph (a)(2), rather than a contradictory restriction. *Head v. H.J. Russell Constr. Co.*, 152 Ga. App. 864, 264 S.E.2d 313 (1980).

Right to use deposition not absolute. — Right to use the deposition in place of a witness or party who is present in court is not absolute. *Millholland v. Neal*, 118 Ga. App. 566, 164 S.E.2d 451 (1968).

Against whom deposition may be used. — Deposition, to the extent admissible under the rules of evidence, may be used against any party present or represented at the taking or having due notice thereof, in accordance with any one of the enumerated provisions. *Colbert Co. v. Newsom*, 125 Ga. App. 571, 188 S.E.2d 266 (1972).

Use of deposition under paragraph (a)(4) in discretion of court.

— When the deposition of a witness was taken after notice to the defendants and with counsel of record for all parties present, the use thereof was in the discretion of the trial judge. *Ricketts v. Liberty Mut. Ins. Co.*, 127 Ga. App. 483, 194 S.E.2d 311 (1972).

Deposition of a witness, whether or not a party, taken upon oral examination, may be used in the discretion of the trial judge, even though the witness is available to testify in person at the trial. *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970).

Decision by the trial court to admit into evidence a deposition taken upon oral examination when the witness is available shall be reversed only when the party objecting to admission of the deposition shows that the trial court abused the court's discretion. *Atlanta Coca-Cola Bottling Co. v. Rosser*, 250 Ga. 52, 295 S.E.2d 827 (1982).

Use of deposition of witness present during trial but later excused without the knowledge of the other party is a matter within the sound discretion of the trial court. *Watson v. Elberton-Elbert County Hosp. Auth.*, 229 Ga. 26, 189 S.E.2d 66 (1972).

Showing that deposition was taken in connection with former litigation on the same subject matter between the same parties, as well as others, in the same court, supported the trial judge in allowing the plaintiff to use the deposition. *Colbert Co. v. Newsom*, 125 Ga. App. 571, 188 S.E.2d 266 (1972).

Use of deposition from prior action on motion for summary judgment. — Trial court's consideration, on motion for summary judgment, of deposition given by moving party in a prior action between the same parties and concerning substantially the same issues, offered in the present action by the adverse party, was proper; there is no requirement that the deponent needed to be unavailable before the court could examine such deposition. *Clover Realty Co. v. J.L. Todd Auction Co.*, 146 Ga. App. 576, 246 S.E.2d 695 (1978); *Mitchell v. Southern Gen. Ins. Co.*, 194 Ga. App. 218, 390 S.E.2d 79 (1990), cert.

denied, 194 Ga. App. 912, 390 S.E.2d 79 (1990).

Physician's deposition. — Rule as to admissibility is the same when a deposition of a physician is offered as when the physician testifies upon a trial. *Sapp v. Kitchens*, 124 Ga. App. 764, 186 S.E.2d 121 (1971).

Attorney as unavailable witness. — When a witness subpoenaed by the plaintiffs was an attorney who, at the time of this trial, was compelled to attend the trial of the attorney's own client's case in another county, the trial court did not err in ruling that the witness was unavailable to appear at trial and in permitting the attorney's testimony to be presented by deposition. *Jet Air, Inc. v. EPPS Air Serv., Inc.*, 194 Ga. App. 829, 392 S.E.2d 245, cert. denied, 194 Ga. App. 911, 392 S.E.2d 245 (1990).

Statement of attorney of witness' unavailability. — As an attorney is an officer of the court, whose statement to the court in the attorney's place is considered prima facie true and needs no further verification unless required by the court or the opposing party, use of the deposition based on the statement of an attorney in the attorney's place that the witness was unavailable for testimony was proper. *Sheffield v. Lockhart*, 151 Ga. App. 551, 260 S.E.2d 416 (1979); *Wright v. Millines*, 217 Ga. App. 464, 458 S.E.2d 488 (1995).

There was no error in allowing the use of a caveator's deposition at trial in place of the caveator's testimony as counsel had made a statement as to the caveator's unavailability due to a medical condition. *Odom v. Hughes*, 293 Ga. 447, 748 S.E.2d 839 (2013).

Out-of-state witness. — Trial court could properly admit the deposition of a witness who was out-of-state. *Lil Champ Food Stores, Inc. v. DOT*, 230 Ga. App. 715, 498 S.E.2d 94 (1998).

In a medical malpractice action against a pediatrician and a hospital, when the pediatrician settled and the hospital did not, the deposition of an out of state expert on the pediatrician's witness list was properly admitted by the trial court, even though the deposition was taken for discovery purposes only, as the witness was unavailable, under O.C.G.A.

§ 9-11-32(a)(3)(B), because the witness resided out of state, and the admission of the witness's deposition was within the trial court's discretion. *Gill v. Spivey*, 264 Ga. App. 723, 592 S.E.2d 132 (2003).

Physician as unavailable witness. — Refusal of the probate court to find that the nature of a physician's occupation would cause manifest inconvenience to others if the physician's attendance as a witness was required was not error; even though the evidence would have authorized such finding, it was not required. *Collins v. Kiah*, 218 Ga. App. 484, 462 S.E.2d 158 (1995).

New trial for improper ruling on admission of deposition. — When a ruling of the trial court on the introduction of a deposition showed that no discretion was exercised and the judgment rendered was based upon an erroneous view of the law, a new trial would be granted. *Watson v. Elberton-Elbert County Hosp. Auth.*, 229 Ga. 26, 189 S.E.2d 66 (1972).

Adoption of deponent's testimony by introduction at trial. — Testimony of deponent obtained through discovery does not belong to or bind either party until such testimony is introduced in evidence at the trial of the case, whereupon the party introducing the testimony adopts the testimony and is bound by the testimony. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972).

Admission in subsequent trial. — Specific and limited provision for admission into evidence in subsequent trial of depositions taken in prior action was made by paragraph (a)(5) of O.C.G.A. § 9-11-32. All other issues relating to the admission into evidence in a subsequent trial of testimony taken in connection with a prior action must be resolved under former O.C.G.A. § 24-3-10 (see now O.C.G.A. § 24-8-804). *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

Trial court did not abuse the court's discretion in excluding the deposition testimony from two prior unrelated proceedings because it was clear that the prior actions did not involve the same parties and the property owner failed to point to any evidence demonstrating that those

Use of Depositions (Cont'd)

cases involved the same subject matter. *Tharp v. Vesta Holdings I, LLC*, 276 Ga. App. 901, 625 S.E.2d 46 (2005).

Use of deposition absent a finding of witness's unavailability. — Although O.C.G.A. § 9-11-32 plainly requires a finding of unavailability before the deposition of a witness, whether or not a party, may be used for any purpose, the violation of this mandate does not demand reversal if the testimony of the witness is not material to the verdict rendered by the jury. *Elder v. Metropolitan Atlanta Rapid Transit Auth.*, 160 Ga. App. 78, 286 S.E.2d 315 (1981), overruled on other grounds, *Chadwick v. Miller*, 169 Ga. App. 338, 312 S.E.2d 835 (1983).

Objection to use of party's deposition after party's voluntary absence. — It would be a fraud on the court to permit a party to voluntarily absent oneself from the party's own trial and then for any reason claim the party's deposition could not be used. *Fisher Scientific Co. v. McCorkle*, 163 Ga. App. 613, 295 S.E.2d 366 (1982).

Use of portion of videotaped deposition. — Trial court did not err in allowing only a portion of a video deposition to be used because under O.C.G.A. § 9-11-32 the individual who gave the deposition was both an adverse party and an officer of the corporation named in the promissory estoppel lawsuit. *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

Recent tonsillectomy was "illness or infirmity." — Witness's deposition testimony that as a result of a recent tonsillectomy the witness was very weak and physically unable to attend the trial was sufficient to show that the witness was unavailable due to illness or infirmity under O.C.G.A. § 9-11-32, and the trial court did not err in admitting the witness's deposition at trial. *Rescigno v. Vesali*, 306 Ga. App. 610, 703 S.E.2d 65 (2010).

It is within the discretion of the court to allow a deposition to be read even though the party is present and testifies. *Parker & Co. v. Glenn*, 90 Ga. App. 500, 83 S.E.2d 263 (1954) (decided

under former Code 1933, § 38-2103).

Reading of deposition during trial. — When depositions of a witness are taken for use in a cause then pending, at trial the deposition so taken may, in the discretion of the court, be read in evidence notwithstanding the presence of the witness at the trial. *Western & A.R.R. v. Bussey*, 95 Ga. 584, 23 S.E. 207 (1894); *Southern Ry. v. Dickson*, 138 Ga. 371, 75 S.E. 462 (1912).

Harmless error to exclude deposition testimony. — Although the deposition of the former employer's agent in response to the former employee's request for a deposition under O.C.G.A. § 9-11-30(b)(6) was admissible under O.C.G.A. § 9-11-32(a), because the agent had no direct personal knowledge of the employee's contract or the contract's termination, the agent's deposition testimony had no probative value as to the matters for which the testimony was proffered, specifically for rebuttal and impeachment purposes; thus, it was harmless error to exclude the testimony. *Griffin v. Greene County Hosp. Auth.*, 260 Ga. App. 122, 578 S.E.2d 913 (2003).

Taking of discovery documents into jury room. — Rule that interrogatories and depositions should not be taken into the jury room does not apply to documents which are introduced as documents and not orally, under the best evidence rule. *Dunagan v. Elder*, 154 Ga. App. 728, 270 S.E.2d 18 (1980) (decided under former Code 1933, § 38-2101).

Imprisonment of deponent. — Trial court did not err pursuant to O.C.G.A. § 9-11-32 by admitting the testimony of a plumbing contractor by way of deposition because the contractor was imprisoned at the time of the trial. Furthermore, the opposing party had the opportunity to cross-examine the contractor at the deposition. *LN West Paces Ferry Assocs., LLC v. McDonald*, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Cross-Examination

Excluding deposition testimony adduced on cross-examination. — There is no specific basis for excluding deposition testimony adduced on cross-examination. *Colbert Co. v.*

Newsom, 125 Ga. App. 571, 188 S.E.2d 266 (1972).

Right to cross-examine not abridged. — Allowing plaintiff's attorney to read into evidence, along with the attorney's own examination of deponent, those portions of proffered deposition consisting of examination of the witness by the defendant's attorney did not abridge the defendant's right to cross-examine. *Kamman v. Seabolt*, 149 Ga. App. 167, 253 S.E.2d 842 (1979).

Refusal to admit deposition harmless when deponent cross-examined extensively. — When deponent spent considerable time on the witness stand and was cross-examined extensively and thoroughly by opposing counsel, including the use of the deponent's deposition for impeachment purposes, the court's refusal to admit the deposition as evidence constituted at most harmless error. *Marathon Oil Co. v. Hollis*, 167 Ga. App. 48, 305 S.E.2d 864 (1983).

Admission of depositions for impeachment purposes. — When the defendant was cross-examined by deposition and later testified on the trial, the deposition was admissible for impeachment purposes, there being some variance between the testimony contained in the deposition and that delivered on the trial. *Parker & Co. v. Glenn*, 90 Ga. App. 500, 83 S.E.2d 263 (1954) (decided under former Code 1933, § 38-2103).

When it appears that the witness was questioned about the depositions while the witness was on the stand, and that the witness testified, as to certain matters, somewhat at variance from the depositions, it was not an abuse of discretion for the court to allow the depositions in evidence for the purpose of impeachment. *Parker & Co. v. Glenn*, 90 Ga. App. 500, 83 S.E.2d 263 (1954) (decided under former Code 1933, § 38-2103).

Making witness one's own. — Trial court was authorized to find that, by insisting that a part of a deposition which contained a reference to the supposed excellence of the former employee of the defendant be read to the jury, the defendant had made the witness the defendant's own, when the portion of the deposition was not relevant to those parts of

the deposition submitted by the plaintiff. *Orkin Exterminating Co. v. Carder*, 258 Ga. App. 796, 575 S.E.2d 664 (2002) (Unpublished).

Errors and Objections

Prompt notification of defect in notice of deposition. — While proper notice is required for taking a deposition, the opposing party must promptly notify the party giving the notice if the notice is technically deficient in any manner. *Republic Nat'l Bank v. Hodgson*, 124 Ga. App. 11, 183 S.E.2d 4 (1971).

Rationale for requiring prompt notice. — Rationale of requiring that written objection to a deficient notice of a deposition be made promptly, failing which the error or irregularity in the notice is deemed to have been waived, is the same as that for the requirement that objections to the evidence be made as of the time of taking the deposition. *Republic Nat'l Bank v. Hodgson*, 124 Ga. App. 11, 183 S.E.2d 4 (1971).

Raising an issue on appeal is not "reasonable promptness" as required by paragraph (d)(4) of this section. *Building Assocs. v. Crider*, 141 Ga. App. 825, 234 S.E.2d 666 (1977).

Waiver of error which might have been obviated. — Error or irregularity in the taking of a deposition in connection with a workers' compensation claim which might have been obviated, removed, or cured is waived unless seasonable objection thereto is made at the taking of the deposition. *Royal Globe Indem. Co. v. Thompson*, 123 Ga. App. 268, 180 S.E.2d 576 (1971).

When no objection was made during the deposition to the form of the question or to the responsiveness of the answer, although any such alleged error could have been obviated, removed, or cured if promptly presented, failure to so object constitutes a waiver. *Haynes v. McCambry*, 203 Ga. App. 464, 416 S.E.2d 893 (1992).

Waiver of objections to use of depositions at trial. — In appeals filed by both former spouses from a trial court order modifying visitation and child support provisions in their final judgment and decree of divorce, they waived their

Errors and Objections (Cont'd)

claims that the trial court abused the court's discretion in conducting the final hearing by taking most testimony only by deposition and restricting the amount of time that each party could testify under O.C.G.A. § 9-11-32(a)(4); the record was devoid of objections by either party to the trial court's announced procedure for conducting the final hearing, either at the hearing or in response to the trial court's written orders setting forth the process. *Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

Objection of competency to testify properly sustained. — Trial court did not err in sustaining an objection raised at trial as to the competency of plaintiff husband to testify regarding an oral contract with the plaintiff's deceased wife, despite the plaintiff's contention that the issue of the plaintiff's competency to testify was waived by the defendants by the taking of a deposition since the deposition itself showed that the parties reserved the right to object to the evidence when presented at trial. *Rigby v. Powell*, 236 Ga. 687, 225 S.E.2d 48 (1976).

Defaulted case not reinstated by failure to object to notice of deposition. — Party's failure to object to notice of intent to take the party's deposition on the ground that the case was in default would not of itself be sufficient to reinstate the case. *Minnesota Mut. Life Ins. Co. v. Love*, 120 Ga. App. 502, 171 S.E.2d 361 (1969).

Waiver of objection to competency of expert witness. — If the plaintiff had objected during the deposition to the absence of proof of the witness's competency to testify as an expert, defense counsel might have been able to cure this ground of objection by proof of the witness's qualifications; since the plaintiff did not, the plaintiff waived the right to raise this objection under subparagraph (d)(3)(A) of O.C.G.A. § 9-11-32. *Andean Motor Co. v. Mulkey*, 251 Ga. 32, 302 S.E.2d 550 (1983); *Jones v. Scarborough*, 194 Ga. App. 468, 390 S.E.2d 674 (1990).

Waiver of objection to videotape of deposition. — Objection based on lack of court order allowing videotaping of depo-

sition was waived since no objection to the videotaping was raised prior to trial. Even if the objection was timely made at trial, any error in the admission of the videotaped deposition was harmless because the videotaping was conducted in substantial compliance with required technical conditions and procedures. *DuBois v. Ray*, 177 Ga. App. 349, 339 S.E.2d 605 (1985).

No waiver of objection to deposition testimony. — In a medical malpractice case, the trial court committed reversible error by finding that the patient waived a hearsay objection as to a defense pathologist's deposition testimony because the patient had the right to object to the testimony at trial and the testimony was inadmissible hearsay entitling the patient to a new trial since it was not harmless error in that the evidence was critical in the case because the evidence directly addressed the core disputed issue of whether the clinic's neurosurgeon left an excessive amount of cotton in the patient's brain. *Thomas v. Emory Clinic, Inc.*, 321 Ga. App. 457, 739 S.E.2d 138 (2013).

Waiver of objections affecting formal development of evidence. — Objections which must be made at the taking of depositions or will otherwise be considered to be waived are restricted to those affecting the formal development of the evidence. *Hamilton v. Pulaski County*, 86 Ga. App. 705, 72 S.E.2d 487 (1952) (decided under former Code 1933, § 38-2304).

Time for objections to competency and relevance. — Objections as to competency and relevance of evidence need not be made at the taking of depositions. *Hamilton v. Pulaski County*, 86 Ga. App. 705, 72 S.E.2d 487 (1952) (decided under former Code 1933, § 38-2304).

Objections which should be made at taking depositions are formal objections to the testimony or to the competency of the witness, so far as are then known to the objecting party, and the fact that at the taking of the deposition the party did not make objection to the testimony did not prevent the party at trial from objecting to the testimony upon substantial grounds, such as irrelevancy or incompetency, as to

which the law does not require objection to be made at the time the witness is offered. *Georgia Ry. & Elec. Co. v. Bailey*, 9 Ga. App. 106, 70 S.E. 607 (1911).

When depositions of a witness were taken and certain objections to parts of the testimony were made and noted, this did not preclude the party against whom

the evidence was offered from objecting, at trial, to certain parts of the testimony on the ground that they were hearsay and secondary in character, although such objections were not noted on the examination. *Erk v. Simpson*, 137 Ga. 608, 73 S.E. 1065 (1912).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 104 et seq.

C.J.S. — 26B C.J.S., Depositions, §§ 19, 116 et seq., 142. 27 C.J.S., Discovery, §§ 12, 13, 44, 94-97, 115-117. 35A C.J.S., Federal Civil Procedure, §§ 592 et seq., 607 et seq., 631, 632, 634, 647, 648, 666 et seq., 702.

ALR. — Pleadings, depositions, testimony, or statements in court as constituting a sufficient writing within the statute of frauds, 22 ALR 735.

Rule against conviction of perjury upon contradictory statements as affected by defendant's admission in second statement, 25 ALR 416.

Effect of prosecuting attorney's consent to taking of deposition without complying with conditions prescribed by statute, 27 ALR 1041.

Making copies of record or writings part of deposition, 59 ALR 530.

Introduction of deposition by party other than the one at whose instance it was taken, 134 ALR 212.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 ALR2d 768.

Propriety and effect of jury in civil case taking depositions to jury room during deliberations, 57 ALR2d 1011.

Identity of subject matter or of issues as

condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 ALR2d 494.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Propriety of answer to interrogatory merely referring to other documents or sources of information, 96 ALR2d 598.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 ALR3d 1075.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 ALR3d 1312.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 ALR3d 389.

Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 ALR Fed. 537.

9-11-33. Interrogatories to parties.

(a) Availability; procedures for use.

(1) Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the

action and upon any other party with or after service of the summons and complaint upon that party; provided, however, that no party may serve interrogatories containing more than 50 interrogatories, including subparts, upon any other party without leave of court upon a showing of complex litigation or undue hardship incurred if such additional interrogatories are not permitted.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under subsection (a) of Code Section 9-11-37 with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; use at trial.

(1) Interrogatories may relate to any matters which can be inquired into under subsection (b) of Code Section 9-11-26, and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or to the application of law to fact; but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. (Ga. L. 1966, p. 609, § 33; Ga. L. 1972, p. 510, § 6; Ga. L. 1980, p. 938, § 1.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 33, see 28 U.S.C.

Law reviews. — For article, “On with the Old!,” see 24 Ga. St. B.J. 13 (1987).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ANSWERS

OBJECTIONS

General Consideration

Editor’s notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this Code section was substantially the same as former Code 1933, § 38-2108. Hence, decisions based on this Code section prior to its 1972 amendment should be consulted with care.

In light of the similarity of the statutory provisions, decisions under former Code 1910, § 5886 and former Code 1933, Ch. 21, T. 38 are included in the annotations for this Code section.

Interrogatories serve two purposes: first, to ascertain facts and procure evidence or to secure information as to which it obtains; and, second, to narrow the issues. *Thornton v. State Hwy. Dep’t*, 113 Ga. App. 351, 148 S.E.2d 66 (1966) (decided under former Code 1933, §§ 38-2105 and 38-2108).

Scope of discovery as broad as general discovery provision. — Scope of discovery under O.C.G.A. § 9-11-33 is as broad as the scope of examination under O.C.G.A. § 9-11-26(b) (general discovery provision). *Armstrong v. Strand*, 167 Ga. App. 723, 307 S.E.2d 528 (1983).

Scope same as for request to produce. — Scope of permissible discovery by interrogatories under O.C.G.A. § 9-11-33 is the same as by request to produce under O.C.G.A. § 9-11-34(a). *E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin*, 158 Ga. App. 796, 282 S.E.2d 381 (1981).

Interrogatories are addressed to the opposite party, not to counsel, and counsel cannot be ineluctably bound to use all witnesses whose names are given, or precluded from the using of others whose existence may later be discovered.

Nathan v. Duncan, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

Trial court is authorized to determine that the number of interrogatories, including subparts, is within the number authorized by O.C.G.A. § 9-11-33. *Shannon v. Toronto-Dominion Bank*, 168 Ga. App. 279, 308 S.E.2d 682 (1983).

Number of interrogatories allowed. — Without leave of court, a party may not serve a total of more than 50 interrogatories and such limit is a cumulative, not a “per set” limit. *Copher v. Mackey*, 220 Ga. App. 43, 467 S.E.2d 362 (1996).

Discretion of trial court. — Trial judge has broad control over the use and limitations of discovery procedures, and unless there is a clear abuse of this discretion, the appellate courts will not interfere. *Jackson v. Gordon*, 122 Ga. App. 657, 178 S.E.2d 310 (1970).

It is not necessary to cite authority for propounding of interrogatories in the instrument propounding them. *Sparks Specialty Co. v. Moss*, 110 Ga. App. 585, 139 S.E.2d 345 (1964) (decided under former Code 1933, § 38-2108).

Taking of discovery documents into jury room. — Rule that interrogatories and depositions should not be taken into the jury room does not apply to documents which are introduced as documents and not orally, under the best evidence rule. *Dunagan v. Elder*, 154 Ga. App. 728, 270 S.E.2d 18 (1980) (decided under former Code 1933, § 38-2101).

Appellate court will be slow to find error in requiring attendance of a witness instead of permitting the witness’s interrogatories to be read. *Baker v. Lyman*, 53 Ga. 339 (1874).

Taking of interrogatories is limited to service on an adverse party, to be an-

General Consideration (Cont'd)

swered by the party served, and cannot be construed as conferring on the plaintiff the absolute right to establish the plaintiff's case by the plaintiff's own written interrogatories. *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961), overruled on other grounds, *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982) (decided under former Code 1933, § 38-2108).

Interrogatories should be sufficiently specific as to require specific answer. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

Scope and usage of interrogatories formerly broader. — Prior to the 1972 amendment to this section, the scope and usage of interrogatories was much broader. *Carter v. Tatum*, 134 Ga. App. 345, 212 S.E.2d 439 (1975).

Request for "all documentary evidence to be introduced at trial" too broad. — Interrogatories requesting the listing of all documents relied upon to demonstrate and support facts relevant to the litigation would be within the permissible scope of discovery under O.C.G.A. § 9-11-33, but one requesting "all documentary evidence which will be introduced at trial" would not. *E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin*, 158 Ga. App. 796, 282 S.E.2d 381 (1981).

Dismissal or default judgment appropriate following failure to answer or object. — Failure of a party to file answers or objections to interrogatories within the statutory period may itself constitute justification for such harsh sanctions as dismissal of the offending party's pleadings or entry of default judgment in favor of the party seeking discovery. *Ross v. White*, 175 Ga. App. 791, 334 S.E.2d 371 (1985).

Trial court did not err in entering a default judgment against sellers pursuant to O.C.G.A. § 9-11-37(b)(2) without conducting a hearing on willfulness because the sellers did not file answers to a broker's request for interrogatories and production of documents within the time period prescribed by O.C.G.A. §§ 9-11-33(a)(2) and 9-11-34(b)(2), and the sellers only filed a response to the

request after the trial court's grant of the broker's initial motion to compel and for sanctions. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

Propounding party not entitled to names of those to be called as witnesses at trial. — While the party who propounds interrogatories is entitled to the names and addresses of the other party's witnesses who have knowledge of relevant facts, the party is not entitled to the specific names of those persons who will be called as witnesses at the trial of the case. *E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin*, 158 Ga. App. 796, 282 S.E.2d 381 (1981).

Sanctions proper. — In a negligence case, a trial court did not abuse the court's discretion by striking the defendants' joint answer and counterclaim as a sanction for discovery abuse because the evidence established that the defendants intentionally and in bad faith concealed damaging evidence by repairing the tractor trailer and destroying information from the computer units involved in the accident, provided false answers to interrogatories, and the plaintiff was prejudiced by the misconduct. *Howard v. Alegria*, 321 Ga. App. 178, 739 S.E.2d 95 (2013).

Cited in *Hodges v. Youmans*, 122 Ga. App. 487, 177 S.E.2d 577 (1970); *Hopkins v. Allen*, 123 Ga. App. 330, 180 S.E.2d 919 (1971); *Johnson v. O'Donnell*, 123 Ga. App. 375, 181 S.E.2d 291 (1971); *Smith v. Byess*, 127 Ga. App. 39, 192 S.E.2d 552 (1972); *HFC v. Ensley*, 127 Ga. App. 876, 195 S.E.2d 236 (1973); *Smith v. Bass*, 131 Ga. App. 557, 206 S.E.2d 541 (1974); *Swindell v. Swindell*, 233 Ga. 854, 213 S.E.2d 697 (1975); *Snead v. Pay-Less Rentals, Inc.*, 134 Ga. App. 325, 214 S.E.2d 412 (1975); *Lee v. Morrison*, 138 Ga. App. 332, 226 S.E.2d 124 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols*, 138 Ga. App. 593, 226 S.E.2d 742 (1976); *Shannon Co. v. Heneveld*, 138 Ga. App. 756, 227 S.E.2d 412 (1976); *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976); *Fountain v. Marta*, 147 Ga. App. 465, 249 S.E.2d 296 (1978); *Record Shack of Atlanta, Inc. v. Daugherty*, 147 Ga. App. 753, 250 S.E.2d 154 (1978); *Interstate Fire Ins. Co. v. Mayer*, 147 Ga. App. 751, 250 S.E.2d 158

(1978); *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979); *Wetherington v. Koepenick & Horne, Inc.*, 153 Ga. App. 302, 265 S.E.2d 107 (1980); *Massengale v. Georgia Power Co.*, 153 Ga. App. 476, 265 S.E.2d 830 (1980); *Rucker v. Blakey*, 157 Ga. App. 615, 278 S.E.2d 158 (1981); *Bullard v. Ewing*, 158 Ga. App. 287, 279 S.E.2d 737 (1981); *Eunice v. Citicorp Homeowners, Inc.*, 167 Ga. App. 335, 306 S.E.2d 395 (1983); *Danger v. Strother*, 171 Ga. App. 607, 320 S.E.2d 613 (1984); *Ross v. White*, 175 Ga. App. 791, 334 S.E.2d 371 (1985); *Albers v. Brown*, 177 Ga. App. 620, 340 S.E.2d 260 (1986); *Hiney v. Bennaman*, 177 Ga. App. 753, 341 S.E.2d 284 (1986); *Riches to Rags, Inc. v. McAlexander & Assocs.*, 249 Ga. App. 649, 549 S.E.2d 474 (2001); *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 562 S.E.2d 809 (2002).

Answers

Full answer to question asked required. — In making an answer, the party to whom interrogatories are directed is required to go no further than is required in making a full answer to the questions asked. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

Party making answer is bound to give truthful answers to the interrogatories, and must see to it that its answers are truthful as of the time of trial as well as of the time of answering the interrogatories. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

Promptly supplement where necessary. — Subsequently acquired information that should be given in a supplemental answer should be supplied promptly, as the purpose and spirit of this discovery procedure is to eliminate the element of surprise. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

Supplementation of list of witnesses to occurrence. — Interrogatory may seek the names, addresses, occupations, places of employment, etc., of all witnesses to an occurrence, and if the party to whom this interrogatory is di-

rected learns of other witnesses to the occurrence after making an answer, the party should promptly supply that information by way of a supplemental answer, regardless of whether the interrogatories are specifically made continuing. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

Compelling party to answer interrogatories and produce requested documents did not constitute an unauthorized commingling of discovery procedures since there was a clear delineation as to each discovery procedure and the law applicable to each procedure was cited. *Whisenaut v. Gray*, 189 Ga. App. 314, 375 S.E.2d 619, cert. denied, 189 Ga. App. 913, 375 S.E.2d 619 (1988).

Interrogatories are not pleadings, and counsel cannot answer the interrogatories. *Gregory v. King Plumbing, Inc.*, 127 Ga. App. 512, 194 S.E.2d 271 (1972).

Personal answer under oath required. — Plain and unambiguous terms of this section require a party to answer personally a party opponent's interrogatories under oath. *Gregory v. King Plumbing, Inc.*, 127 Ga. App. 512, 194 S.E.2d 271 (1972).

Separately and fully in writing. — Interrogatories served on a party must be answered by the party separately and fully in writing under oath. *Gregory v. King Plumbing, Inc.*, 127 Ga. App. 512, 194 S.E.2d 271 (1972).

Unsworn writing by counsel does not constitute an answer to an interrogatory. *Williamson v. Lunsford*, 119 Ga. App. 240, 166 S.E.2d 622 (1969).

Stipulation for admission of answers without signature. — When defendant's attorney stipulated that answers to interrogatories signed by the attorney but not by the defendant were presented "for the reliance of all concerned," it was not error for the court to construe this as a stipulation that the answers could be used in evidence without the formality of the deponent's signature under oath. *Woodson v. Burton*, 241 Ga. 130, 243 S.E.2d 885 (1978).

Party may answer or object. — Party has the choice of answering an

Answers (Cont'd)

interrogatory or making objection in the manner set forth. *Aetna Life Ins. Co. v. Greene*, 116 Ga. App. 783, 159 S.E.2d 87 (1967) (decided under former Code 1933, § 38-2108).

Each interrogatory must be either answered or objected to, and the reason for the objection must be stated; a blanket statement referring without explanation to all questions indifferently is not a compliance with this requirement. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Answers to interrogatories are hearsay and inadmissible at the trial unless the answers fall within some recognized exception to the hearsay rule. *Carter v. Tatum*, 134 Ga. App. 345, 212 S.E.2d 439 (1975).

Answers to interrogatories are not evidence unless introduced. — Answers to interrogatories are not considered evidence unless introduced as such at the trial. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976).

When answers to interrogatories admissible. — Answers to interrogatories are admissible for purposes of impeaching the testimony of the person making them, or as an admission of the person making them (as interrogatories are always answered by a party) or as an admission of another party if the party making the answers is the party's agent or servant. *Carter v. Tatum*, 134 Ga. App. 345, 212 S.E.2d 439 (1975).

Admission of answers to establish loss impermissible. — Admission of plaintiff's answers to questions asked by third party defendant, offered in an attempt to establish the loss incurred by the plaintiff and a statement relating to what was told to the plaintiff by another person, when the plaintiff personally was not present at the trial, would violate both the purpose and intent of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Carter v. Tatum*, 134 Ga. App. 345, 212 S.E.2d 439 (1975).

Inconsistent testimony not barred. — Although the rules of evidence would allow use of answers to interrogatories for impeachment purposes, the rules would

not necessarily estop introduction of inconsistent testimony. *Benn v. McBride*, 140 Ga. App. 698, 231 S.E.2d 438 (1976).

Position taken in an answer to an interrogatory should not be a bar to taking a different position at the trial. *Benn v. McBride*, 140 Ga. App. 698, 231 S.E.2d 438 (1976).

Fact that answers are in opinion form does not affect admissibility. — When the defendant did not object to the questions, as provided in O.C.G.A. § 9-11-33, but attempted to answer the questions, the answers are admissible as admissions of a party-opponent. The fact that the questions may be in opinion form does not change this result. *Everson v. Franklin Dist. Co.*, 248 Ga. 811, 285 S.E.2d 530 (1982).

Signature at end of interrogatories sufficient. — Literal interpretation of paragraph (a)(2) of O.C.G.A. § 9-11-33 mandates that each answer be signed, but the reasonable and logical interpretation suggests and practice demands only that the deponent sign at the end of the interrogatory. *Atlanta Cas. Co. v. Flewellen*, 164 Ga. App. 885, 300 S.E.2d 166 (1982), rev'd on other grounds, 250 Ga. 709, 300 S.E.2d 673 (1983).

Party may not give an evasive answer to an interrogatory and later, on motion by the adverse party to require a proper answer, raise an objection which the party should have earlier raised to the original interrogatory. *Aetna Life Ins. Co. v. Greene*, 116 Ga. App. 783, 159 S.E.2d 87 (1967) (decided under former Code 1933, § 38-2108).

No provision for striking of answers. — Rules on depositions and discovery contain no provision for striking answers to interrogatories prior to tender in evidence at trial. *Harden v. Clarke*, 123 Ga. App. 142, 179 S.E.2d 667 (1970).

Dismissal of action for plaintiff's failure to answer interrogatories within the requisite time limits was not an abuse of the trial court's discretion. *Morton v. Retail Credit Co.*, 124 Ga. App. 728, 185 S.E.2d 777 (1971), later appeal, 128 Ga. App. 446, 196 S.E.2d 902 (1973).

Use of unverified responses in finding triable issue of fact. — Appellate court's reliance on the appellant's unverified

fied responses to interrogatories to establish that a triable issue existed in an appeal of a summary judgment motion did not constitute error as a matter of law on the grounds that the invalid responses were inadmissible as evidence. An unverified response to interrogatories is not so evasive and incomplete as to be treated as a complete failure to enter. Therefore, a mere technical failure to comply with an order compelling discovery, or an inadequate discovery response after entry of such an order, does not justify the extreme sanction of default or dismissal of the complaint. *Kemp v. Rouse-Atlanta, Inc.*, 207 Ga. App. 876, 429 S.E.2d 264 (1993).

Response to discovery requests inappropriate. — Trial court did not abuse the court's discretion by granting the plaintiff's motion to compel because the court properly determined that the production of over 156,000 pages of documents with insufficient organization, coupled with the failure of the defendants to identify which documents were responsive to which of the plaintiff's requests for production of documents, was inconsistent with the defendants' discovery obligations. *Hull v. WTI, Inc.*, 322 Ga. App. 304, 744 S.E.2d 825 (2013).

Objections

Factors to be considered on objections to interrogatories. — In exercising discretion on consideration of objec-

tions to interrogatories, the trial court may consider such factors as the relevancy of the questions propounded, whether or not the interrogatories are timely filed, whether prejudice would result, and whether such interrogatories were filed for purposes other than a bona fide effort of discovery. *Jackson v. Gordon*, 122 Ga. App. 657, 178 S.E.2d 310 (1970).

Mere duplication not grounds for objection. — Though repetitiousness and redundancy in interrogatories has been deemed objectionable, the fact that some questions are somewhat duplicative, without more, does not subject the questions to objection. *Munn v. Munn*, 116 Ga. App. 297, 157 S.E.2d 77 (1967) (decided under former Code 1933, § 38-1201).

Waiver for failure to object. — When timely objection is not made to interrogatories, right to object is waived. *Aetna Life Ins. Co. v. Greene*, 116 Ga. App. 783, 159 S.E.2d 87 (1967) (decided under former Code 1933, § 38-2108).

Failure to file timely objections to interrogatories constitutes waiver of the right to object. *Drew v. Hagy*, 134 Ga. App. 852, 216 S.E.2d 676 (1975).

When a party fails to file any answer or objection to interrogatories within the 30 days permitted for answering, the party waives the right to object to the interrogatories. *Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.*, 166 Ga. App. 506, 305 S.E.2d 14 (1983).

OPINIONS OF THE ATTORNEY GENERAL

Recording not required. — Interrogatories and answers to interrogatories are matters of proof or evidence and as such

are not required to be recorded. 1981 Op. Att'y Gen. No. U81-50.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 116 et seq.

C.J.S. — 26B C.J.S., Depositions, §§ 47 et seq., 116 et seq. 27 C.J.S., Discovery, §§ 44, 62, 74 et seq., 86 et seq., 104, 105. 35A C.J.S., Federal Civil Procedure, §§ 573, 574, 611, 678 et seq., 697 et seq., 733, 736.

ALR. — Statute providing for examination before trial of party to action or an-

ticipated action as applicable to corporation party, 66 ALR 1269.

Attorney as agent within statute providing for discovery examination of party or his agent, 136 ALR 1502.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Time for filing and serving discovery interrogatories, 74 ALR2d 534.

Propriety of discovery interrogatories calling for continuing answers, 88 ALR2d 657.

Propriety of answer to interrogatory merely referring to other documents or sources of information, 96 ALR2d 598.

Production and inspection of premises, persons, or things in proceeding to perpetuate testimony, 98 ALR2d 909.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 ALR3d 1312.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 ALR3d 389.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 ALR3d 1109.

Answers to interrogatories as limiting answering party's proof at state trial, 86 ALR3d 1089.

Admissibility of computerized private business records, 7 ALR4th 8.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions, 30 ALR4th 9.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed. 924.

9-11-34. Production of documents and things and entry upon land for inspection and other purposes; applicability to nonparties; confidentiality.

(a) **Scope.** Any party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of subsection (b) of Code Section 9-11-26 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of subsection (b) of Code Section 9-11-26.

(b) **Procedure.**

(1) The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category

with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under subsection (a) of Code Section 9-11-37 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Applicability to nonparties.

(1) This Code section shall also be applicable with respect to discovery against persons, firms, or corporations who are not parties, in which event a copy of the request shall be served upon all parties of record; or, upon notice, the party desiring such discovery may proceed by taking the deposition of the person, firm, or corporation on oral examination or upon written questions under Code Section 9-11-30 or 9-11-31. The nonparty or any party may file an objection as provided in subsection (b) of this Code section. If the party desiring such discovery moves for an order under subsection (a) of Code Section 9-11-37 to compel discovery, he or she shall make a showing of good cause to support his or her motion. The party making a request under this Code section shall, upon request from any other party to the action, make all reasonable efforts to cause all information produced in response to the nonparty request to be made available to all parties. A reasonable document copying charge may be required.

(2) This Code section shall also be applicable with respect to discovery against a nonparty who is a practitioner of the healing arts or a hospital or health care facility, including those operated by an agency or bureau of the state or other governmental unit. Where such a request is directed to such a nonparty, a copy of the request shall be served upon the person whose records are sought by certified mail or statutory overnight delivery, return receipt requested, or, if known, that person's counsel, and upon all other parties of record in compliance with Code Section 9-11-5; where such a request to a nonparty seeks the records of a person who is not a party, a copy of the request shall be served upon the person whose records are sought by certified

mail or statutory overnight delivery, return receipt requested, or, if known, that person's counsel by certified mail or statutory overnight delivery, return receipt requested, and upon all parties of record in compliance with Code Section 9-11-5; or, upon notice, the party desiring such discovery may proceed by taking the deposition of the person, firm, or corporation on oral examination or upon written questions under Code Section 9-11-30 or 9-11-31. The nonparty, any party, or the person whose records are sought may file an objection with the court in which the action is pending within 20 days of service of the request and shall serve a copy of such objection on the nonparty to whom the request is directed, who shall not furnish the requested materials until further order of the court, and on all other parties to the action. Upon the filing of such objection, the party desiring such discovery may move for an order under subsection (a) of Code Section 9-11-37 to compel discovery and, if he or she shall make a showing of good cause to support his or her motion, discovery shall be allowed. If no objection is filed within 20 days of service of the request, the nonparty to whom the request is directed shall promptly comply therewith.

(3) For any discovery requested from a nonparty pursuant to paragraph (2) of this subsection or a subpoena requesting records from a nonparty pursuant to Code Section 9-11-45, when the nonparty to whom the discovery request is made is not served with an objection and the nonparty produces the requested records, the nonparty shall be immune from regulatory, civil, or criminal liability or damages notwithstanding that the produced documents contained confidential or privileged information.

(d) **Confidentiality.** The provisions of this Code section shall not be deemed to repeal the confidentiality provided by Code Sections 37-3-166 concerning mental illness treatment records, 37-4-125 concerning developmental disability treatment records, 37-7-166 concerning alcohol and drug treatment records, 24-12-20 concerning the confidential nature of AIDS information, and 24-12-21 concerning the disclosure of AIDS information; provided, however, that a person's failure to object to the production of documents as set forth in paragraph (2) of subsection (c) of this Code section shall waive any right of recovery for damages as to the nonparty for disclosure of the requested documents. (Ga. L. 1966, p. 609, § 34; Ga. L. 1967, p. 226, § 16; Ga. L. 1972, p. 510, § 7; Ga. L. 1979, p. 1041, § 1; Ga. L. 1986, p. 1277, § 1; Ga. L. 1988, p. 375, § 1; Ga. L. 1998, p. 152, § 1; Ga. L. 2006, p. 494, § 2/HB 912; Ga. L. 2015, p. 385, § 4-18/HB 252.)

The 2015 amendment, effective July 1, 2015, substituted "developmental disability" for "mental retardation" in the middle of subsection (d).

Cross references. — Form of motion for production of documents, § 9-11-124. Production of transcript of books and other documents sought by subpoena,

§ 24-13-5 et seq. Subpoena tangible for production of documentary evidence, § 24-13-23. Notice to produce, § 24-13-27. Compelling production of books or records upon request of state revenue commissioner, § 48-2-53.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, “subsection (a)” was substituted for “paragraph (a)” in paragraphs (c)(1) and (c)(2).

Pursuant to Code Section 28-9-5, in 2013, in subsection (d), “24-12-20” was substituted for “24-9-40.1” and “24-12-21” was substituted for “24-9-47”.

Editor’s notes. — Ga.L. 1998, p. 152, § 2, not codified by the General Assembly, provides that the amendment to this section is applicable to requests made on or after July 1, 1998.

Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: “This Act shall be known and

may be cited as the ‘J. Calvin Hill, Jr., Act.’”

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 34, see 28 U.S.C.

Law reviews. — For annual survey article on evidence law, see 52 Mercer L. Rev. 263 (2000). For article, “The Medical Records Custodian’s Perspective,” see 6 Ga. St. B.J. 8 (2001). For article, “The Absolute Privilege Between Patient and Psychiatrist in Civil Cases,” see 6 Ga. St. B.J. 14 (2001). For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009).

For note, “Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act,” see 7 Ga. St. B.J. 385 (1971).

For comment, “A Study of the Georgia Statutes Relating to Discovery of Documents in Civil Actions,” see 2 Ga. St. B.J. 361 (1966).

JUDICIAL DECISIONS

Editor’s notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain sections of this chapter dealing with discovery. Prior to the 1972 amendment, this Code section was substantially the same as former Code 1933, § 38-2109. Hence, decisions based on this Code section prior to its 1972 amendment should be consulted with care.

In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-2109 are included in the annotations for this Code section.

Notice to produce may be served on the opposite party to any proceeding, requiring the production of records, documents, books, etc., which contain evidence pertinent to the cause in question. *Horton v. Huie*, 113 Ga. App. 166, 147 S.E.2d 669 (1966) (decided under former Code 1933, § 38-2109).

Scope of permissible discovery by interrogatories under O.C.G.A. § 9-11-33 is, in essence, the same as by request to produce under subsection (a) of O.C.G.A. § 9-11-34. *E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin*, 158 Ga. App. 796, 282 S.E.2d 381 (1981).

Access to workers’ compensation records limited. — In a suit to recover

for personal injuries and property damage arising out of an automobile collision, the defendants served the State Board of Workers’ Compensation (board) with a request for the production of any and all claims by the plaintiff for workers’ compensation benefits including, but not limited to, all medical records, reports, and narratives. The trial court did not err in denying this motion as the board is not a general repository of discoverable material for defendants in civil actions, and access to the board’s records is properly limited to those parties who have a specific interest in the workers’ compensation claim in connection with which the records are maintained by the board. Insofar as the plaintiff’s actual medical records were concerned, the defendants could have pursued the usual means of discovery that were available to any defendant in a civil action. *Farrell v. Dunn*, 199 Ga. App. 631, 405 S.E.2d 731 (1991).

Discovery not a substitute for execution and levy. — Discovery procedures may be utilized to assist in the collection of judgments, but those procedures are not a substitute for execution and levy. *Fagala v. Morrison*, 161 Ga. App. 655, 289 S.E.2d 528 (1982).

Notice to produce should be specific enough in its demands to relate the documents sought to the questions at issue. *Horton v. Huie*, 113 Ga. App. 166, 147 S.E.2d 669 (1966) (decided under former Code 1933, § 38-2109).

Conversion of notice to produce into request for production improper. — Trial court did not have the discretion to hold that a notice to produce under former O.C.G.A. § 24-10-26 (see now O.C.G.A. § 24-13-27) had been converted into a request for production under O.C.G.A. § 9-11-34. *Bergen v. Cardiopul Medical, Inc.*, 175 Ga. App. 700, 334 S.E.2d 28 (1985).

Compelling party to answer interrogatories and produce requested documents did not constitute an unauthorized commingling of discovery procedures since there was a clear delineation as to each discovery procedure and the law applicable to each procedure was cited. *Whisenaut v. Gray*, 189 Ga. App. 314, 375 S.E.2d 619, cert. denied, 189 Ga. App. 913, 375 S.E.2d 619 (1988).

Request for production of “all other documents” intended for use at trial. — Production of “all other documents” intended for use at trial is outside the scope of subsection (a) of O.C.G.A. § 9-11-34, delineated under O.C.G.A. § 9-11-26(b)(1) as “any matter . . . which is relevant to the subject matter involved in the pending action,” without regard to whether or not that “matter” will be used as evidence at the trial of the action. *E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin*, 158 Ga. App. 796, 282 S.E.2d 381 (1981).

Names of witnesses. — While the party who propounds interrogatories is entitled to the names and addresses of the other party’s witnesses who have knowledge of relevant facts, the propounding party is not entitled to the specific names of those persons who will be called as witnesses at the trial of the case. *E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin*, 158 Ga. App. 796, 282 S.E.2d 381 (1981).

Motion improper for quashing or enforcement of notice to produce. — Motions pursuant to O.C.G.A. §§ 9-11-26, 9-11-34, and 9-11-37 for a protective order

or sanctions were not proper vehicles for the quashing or the enforcement of a notice to produce under former O.C.G.A. § 24-10-26 (see now O.C.G.A. § 24-13-27). *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Unless plaintiff’s notice to produce was somehow converted into a request to produce, the trial court’s original order requiring the production of the documents and subsequent order imposing sanctions would be clearly erroneous, the trial court properly converted the notice when the notice to produce did set forth the time, place, and manner of making the inspection and thus fully complied with the statutory requirements of paragraph (b)(1) of O.C.G.A. § 9-11-34. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Indispensability of actual business records. — In cases involving production of business records in the sole possession of the opposing party, the actual record of figures and technical details of business transactions may well be indispensable because the necessary information cannot be satisfactorily discovered by interrogatories and depositions. *Leonard Bros. Trucking Co. v. Crymes Transps., Inc.*, 123 Ga. App. 424, 181 S.E.2d 296, later appeal, 124 Ga. App. 341, 183 S.E.2d 773 (1971).

Privileged matter not discoverable. — Patient’s failure to object within 10 days to a request for nonprivileged matter under a nonparty document production request did not amount to an affirmative waiver of privileged communications with the patient’s psychiatrist. *Hopson v. Kennestone Hosp.*, 241 Ga. App. 829, 526 S.E.2d 622 (1999), *aff’d*, 273 Ga. 145, 538 S.E.2d 742 (2000).

Cell phone records not discoverable. — Trial court did not abuse the court’s discretion in quashing a subpoena for the appellee’s cell phone records as those records were not reasonably calculated to lead to the discovery of admissible evidence under former O.C.G.A. § 24-10-22 (see now O.C.G.A. § 24-13-23) or information relevant to the intrusive nature of the behavior alleged to be tortious. *Anderson v. Mergenhagen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007).

Financial records of law firm against which punitive damages sought. — When the trial court determined that jury issues remained as to a claim for punitive damages against a law firm, the trial court abused the court's discretion in denying production of any of the law firm's financial records until after the jury rendered the jury's verdict. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

No burden on movant to negate privilege. — There is no burden upon the movant to show that items sought under a motion to produce are not privileged or not within the attorney's work product. *Gooch v. Seaboard Coast Line R.R.*, 121 Ga. App. 14, 172 S.E.2d 435 (1970).

Broad discretionary power is given to the judges by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to assure safeguards against oppressive and unfair questions and demands; conversely, very broad discretion is granted judges in applying sanctions against disobedient parties in order to assure compliance with orders of courts. *Dean v. Gainesville Stone Co.*, 120 Ga. App. 315, 170 S.E.2d 348 (1969).

Deletion of privileged material. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. *Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Application to criminal proceedings. — Motion by a criminal defendant under O.C.G.A. § 9-11-34 for the production of documents was not a proper method of obtaining the documents. *Jackson v. State*, 227 Ga. App. 847, 490 S.E.2d 430 (1997).

Application to divorce proceedings. — Attorney's defense to the trial court's order holding the attorney in contempt for the attorney's refusal to turn over a client's file challenging the underlying validity of the prior order requiring the attorney to turn over the file was a collateral attack that could be sustained under O.C.G.A. § 9-11-60(a) only if the prior order was void on its face. However, the

trial court's prior order was not void on its face since: (1) the attorney was served with a motion to compel prior to the entry of the prior order; (2) the trial court had jurisdiction to issue an order to compel a nonparty to release necessary non-privileged documents specifically prepared in anticipation of a divorce action pending before the trial court under O.C.G.A. §§ 9-11-26(b), 9-11-34(c)(1), and 9-11-37(a); (3) the attorney willfully disregarded the prior order; and (4) the prior order was entered in a matter over which the trial court had subject matter jurisdiction, making the order's disobedience contempt of court. *Mary A. Stearns, P.C. v. Williams-Murphy*, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

Default judgment appropriate following failure to answer. — Trial court did not err in entering a default judgment against sellers pursuant to O.C.G.A. § 9-11-37(b)(2) without conducting a hearing on willfulness because the sellers did not file answers to a broker's request for interrogatories and production of documents within the time period prescribed by O.C.G.A. §§ 9-11-33(a)(2) and 9-11-34(b)(2), and the sellers only filed a response to the request after the trial court's grant of the broker's initial motion to compel and for sanctions. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

Cost associated with production. — In a personal injury case, a trial court did not abuse the court's discretion by compelling a railway company to provide discovery of information on an event data recorder because the information was relevant under O.C.G.A. § 9-11-26(b)(1), and a producing party could have been required to translate information into a reasonably usable form. The trial court did not abuse the court's discretion by failing to grant the protective order since there was no undue burden or expense given the crucial nature of the evidence; moreover, the cost of a license required to view the information was minor compared to the amount at stake in the lawsuit, and it was the railway company's decision to install the device. *Norfolk S. Ry. v. Hartry*, 316 Ga. App. 532, 729 S.E.2d 656 (2012).

Denial of discovery based on grant of summary judgment improper. — In

a case where the plaintiff alleged an ownership interest in and an employment agreement with the company, the defendants' summary judgment motion was improperly granted and the plaintiff's motion to compel was improperly denied as moot because the plaintiff's discovery requests from the accountant regarding the accountant's knowledge of the contract negotiations and all documents related to that process and from the company's president regarding all evidence relating to the plaintiff's association with the company appeared reasonably calculated to lead to the discovery of admissible, relevant evidence. *Dodson v. Sykes Indus. Holdings, LLC*, 324 Ga. App. 871, 752 S.E.2d 45 (2013).

Sanctions proper. — In a negligence case, a trial court did not abuse the court's discretion by striking the defendants' joint answer and counterclaim as a sanction for discovery abuse because the evidence established that the defendants intentionally and in bad faith concealed damaging evidence by repairing the tractor trailer and destroying information from the computer units involved in the accident, provided false answers to interrogatories, and the plaintiff was prejudiced by the misconduct. *Howard v. Alegria*, 321 Ga. App. 178, 739 S.E.2d 95 (2013).

Cited in *Hohlstein v. White*, 117 Ga. App. 207, 160 S.E.2d 232 (1968); *White v.*

Gulf States Paper Corp., 119 Ga. App. 271, 166 S.E.2d 910 (1969); *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 183 S.E.2d 586 (1971); *DOT v. Livaditis*, 129 Ga. App. 358, 199 S.E.2d 573 (1973); *DeWes Enters. Inc. v. Town & Country Carpets, Inc.*, 130 Ga. App. 610, 203 S.E.2d 867 (1974); *Smith v. Bass*, 131 Ga. App. 557, 206 S.E.2d 541 (1974); *Johnson v. Martin*, 137 Ga. App. 312, 223 S.E.2d 465 (1976); *Shannon Co. v. Heneveld*, 138 Ga. App. 756, 227 S.E.2d 412 (1976); *Dyna-Comp Corp. v. Selig Enters. Inc.*, 143 Ga. App. 462, 238 S.E.2d 571 (1977); *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980); *Merritt v. Citizens Trust Bank*, 164 Ga. App. 716, 298 S.E.2d 264 (1982); *Browning v. Powell*, 165 Ga. App. 315, 301 S.E.2d 52 (1983); *White v. Dilworth*, 178 Ga. App. 226, 342 S.E.2d 709 (1986); *Carey Can., Inc. v. Hinely*, 181 Ga. App. 364, 352 S.E.2d 398 (1986); *Munna v. Lewis*, 181 Ga. App. 860, 354 S.E.2d 181 (1987); *Emory Univ. v. Houston*, 185 Ga. App. 289, 364 S.E.2d 70 (1987); *McFarlin v. Taylor*, 187 Ga. App. 54, 369 S.E.2d 330 (1988); *Glisson v. Morton*, 203 Ga. App. 77, 416 S.E.2d 134 (1992); *Jones v. Abel*, 209 Ga. App. 889, 434 S.E.2d 822 (1993); *Sechler Family P'ship v. Prime Group, Inc.*, 255 Ga. App. 854, 567 S.E.2d 24 (2002); *Nanan v. State Farm Ins. Co.*, 286 Ga. App. 539, 650 S.E.2d 283 (2007); *Haughton v. Canning*, 287 Ga. App. 28, 650 S.E.2d 718 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, *Depositions and Discovery*, § 146 et seq.

C.J.S. — 27 C.J.S., *Discovery*, § 104 et seq.

ALR. — Scope or extent, as regards books, records, or documents to be produced or examined, permissible in order for inspection, 58 ALR 1263.

Right of beneficiary or claimant of estate to inspect books and papers in hands of trustee, executor, administrator, or guardian, and conditions of such right, 118 ALR 269.

Production, in response to call therefor by adverse party, of document otherwise inadmissible in evidence, as making it admissible, 151 ALR 1006.

Necessity and sufficiency, under stat-

utes and rules governing modern pretrial discovery practice, of "designation" of documents in application or motion, 8 ALR2d 1134.

Discovery and inspection of article or premises the condition of which is alleged to have caused personal injury or death, 13 ALR2d 657.

Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents, 23 ALR2d 862.

Discovery and inspection of income tax returns in actions between private individuals, 70 ALR2d 240.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises, 74 ALR2d 876.

Time and place, under pretrial discovery procedure, for inspection and copying of opposing litigant's books, records, and papers, 83 ALR2d 302.

Discovery, inspection, and copying of photographs of article or premises the condition of which gave rise to instant litigation, 95 ALR2d 1061.

Production and inspection of premises, persons, or things in proceeding to perpetuate testimony, 98 ALR2d 909.

Discovery and inspection of articles and premises in civil actions other than for personal injury or death, 4 ALR3d 762.

Discovery and inspection: compelling party to disclose information in hands of affiliated or subsidiary corporation, or independent contractor, not made party to suit, 19 ALR3d 1134.

Who has possession, custody, or control

of corporate books or records for purposes of order to produce, 47 ALR3d 676.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636.

Photographs of civil litigant realized by opponent's surveillance as subject to pretrial discovery, 19 ALR4th 1236.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Discoverability of metadata, 29 ALR6th 167.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed. 924.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records--modern status, 87 ALR Fed. 177.

9-11-34.1. Civil actions for evidence seized in criminal proceedings.

Notwithstanding the provisions of Code Section 9-11-34, in any civil action based upon evidence seized in a criminal proceeding involving any violation of Part 2 of Article 3 of Chapter 12 of Title 16, a party shall not be permitted to copy any books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof. (Code 1981, § 9-11-34.1, enacted by Ga. L. 2008, p. 829, § 1/HB 1020.)

9-11-35. Physical and mental examination of persons.

(a) **Order for examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician or to submit to a mental examination by a physician or a licensed psychologist or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of examining physician or psychologist.**

(1) If requested by the party against whom an order is made under subsection (a) of this Code section or by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition.

(2) Any party shall be entitled, upon request, to receive from the party whose physical or mental condition is in issue, or who is in control of, or has legal custody of, a person whose physical or mental condition is in issue, a report of any and every examination, previously or thereafter made, of the condition in issue, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it.

(3) The court, on motion, may make an order against a party requiring delivery of a report under paragraph (1) or (2) of this subsection on such terms as are just; and, if a physician or psychologist fails or refuses to make a report, the court may exclude his testimony if offered at the trial.

(4) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action, or any other action involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

(5) Paragraphs (1) through (4) of this subsection apply to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. Paragraphs (1) through (4) of this subsection do not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with any other Code section of this chapter. (Ga. L. 1966, p. 609, § 35; Ga. L. 1972, p. 510, § 8; Ga. L. 2001, p. 808, § 1.)

Cross references. — Disclosure of medical records, § 24-12-10 et seq. Appointment of physicians and surgeons for examination of employees filing claim for workers' compensation, § 34-9-101. Examination of employee upon request by employer, and as to effect of refusal of examination, § 34-9-202.

U.S. Code. — For provisions of Federal

Rules of Civil Procedure, Rule 35, see 28 U.S.C.

Law reviews. — For article, "Ex Parte Communications with an Opponent's Employees and Expert Witnesses: Which Potential Witnesses Can a Lawyer Talk to Without Breaking the Rules?," see 27 Ga. St. B.J. 6 (1990).

For note, "Default Judgments Under

the Federal Rules of Civil Procedure and the Georgia Civil Practice Act," see 7 Ga. St. B.J. 385 (1971).

For comment on *Rider v. Rider*, 110 Ga. App. 382, 138 S.E.2d 621 (1964), see 16 Mercer L. Rev. 461 (1965).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION GOOD CAUSE

General Consideration

Editor's notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain Code sections of this chapter dealing with discovery. Prior to the 1972 amendment, this Code section was substantially the same as former Code 1933, § 38-2110. Hence, decisions based on this Code section prior to its 1972 amendment should be consulted with care.

In light of the similarity of the statutory provisions, decisions under former Code 1933, Ch. 21, T. 38 are included in the annotations for this Code section.

Condition placed in controversy by plaintiff in personal injury case. — Plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy, and provides the defendant with good cause for examination to determine the existence and the extent of such asserted injury. *Crider v. Sneider*, 243 Ga. 642, 256 S.E.2d 335 (1979).

Defendant asserting condition as defense. — Defendant who asserts the defendant's mental or physical condition as a defense to a claim, such as, for example, asserting insanity as a defense to a divorce action, places the defendant's mental or physical condition in controversy, and provides the plaintiff with good cause for an examination. *Crider v. Sneider*, 243 Ga. 642, 256 S.E.2d 335 (1979).

Order is permissive, not mandatory. — Granting of order for physical examination is permissive, not mandatory, and may be entered only for "good cause shown." *Bradford v. Parrish*, 111 Ga. App. 167, 141 S.E.2d 125 (1965); *Metropolitan Life Ins. Co. v. Lehmann*, 125 Ga. App. 539, 188 S.E.2d 393 (1972) (decided under former Code 1933, Ch. 21, T. 38).

No absolute right to order requiring examination. — Presence of discretionary power in trial court precludes the assumption that a party has an absolute right to secure an order requiring the opposite party to undergo a physical examination. *Bradford v. Parrish*, 111 Ga. App. 167, 141 S.E.2d 125 (1965) (decided under former Code 1933, Ch. 21, T. 38).

Discretion of trial court to grant or deny motion. — Grant or denial of a motion for mental and physical examination rests in the sound discretion of the trial court. *Crider v. Sneider*, 243 Ga. 642, 256 S.E.2d 335 (1979).

Trial court did not abuse the court's broad discretion in denying the defendant's motion for an order permitting one of the defendant's expert witnesses to examine the plaintiff since the order denying the defendant's motion showed that the order was based in part on a finding that the information sought under the motion for examination could be obtained from other available sources. *Prevost v. Taylor*, 196 Ga. App. 368, 396 S.E.2d 17 (1990), overruled on other grounds, *Johnson v. Riverdale Anesthesia Assocs., P.C.*, 275 Ga. 240, 563 S.E.2d 431 (2002).

Relevant factors in determining whether to grant a motion for examination are the ability of the movant to obtain the desired information by other means, the timeliness of the motion and the events leading up to the motion. *Metropolitan Life Ins. Co. v. Lehmann*, 125 Ga. App. 539, 188 S.E.2d 393 (1972).

Failure to invoke procedure not subject to unfavorable inferences. — Use of physical examination procedure is discretionary with counsel, and its utilization is in no sense mandatory; hence, counsel's failure to invoke a physical examination subjects the counsel's cause to no unfavorable inferences. *Bradford v.*

General Consideration (Cont'd)

Parrish, 111 Ga. App. 167, 141 S.E.2d 125 (1965), (decided under former Code 1933, Ch. 21, T. 38).

Blood tests of mother and children in paternity suit. — When the defendant denies paternity in a suit by minors for upkeep, maintenance, and education and moves that court order minor plaintiffs and their mother to submit to a blood test to determine paternity, the trial judge is authorized in the judge's discretion to order a physical examination of the parties. *Rider v. Rider*, 110 Ga. App. 382, 138 S.E.2d 621 (1964). For comment, see 16 Mercer L. Rev. 461 (1965).

Defendant entitled to mental examination of plaintiff. — Because the plaintiff claimed mental injury as a result of an assault in the defendant hotel's parking lot, the defendant was entitled to conduct an independent mental examination of the plaintiff, and deposing the plaintiff's treating psychiatrist could not be deemed the equivalent of an independent evaluation. *Roberts v. Forte Hotels, Inc.*, 227 Ga. App. 471, 489 S.E.2d 540 (1997).

Evaluation by psychologist. — Since a psychologist is not a physician, the trial court had no authority to order the plaintiff to submit to an examination by a psychologist. *Roberts v. Forte Hotels, Inc.*, 227 Ga. App. 471, 489 S.E.2d 540 (1997).

Patient-psychiatrist privilege does not apply to a psychiatric examination under O.C.G.A. § 9-11-35. *Roberts v.*

Forte Hotels, Inc., 227 Ga. App. 471, 489 S.E.2d 540 (1997).

Cited in *Hurd v. State*, 125 Ga. App. 353, 187 S.E.2d 545 (1972); *Doe v. Roe*, 235 Ga. 318, 219 S.E.2d 700 (1975); *Johnson v. Martin*, 137 Ga. App. 312, 223 S.E.2d 465 (1976); *Clements v. Toombs County Hosp. Auth.*, 175 Ga. App. 651, 334 S.E.2d 188 (1985); *Morris v. Turnkey Med. Eng'g, Inc.*, 317 Ga. App. 295, 729 S.E.2d 665 (2012).

Good Cause

For meaning of "good cause," see *Crider v. Sneider*, 243 Ga. 642, 256 S.E.2d 335 (1979).

Greater showing of need required. — Good cause requirement indicates there must be a greater showing of need than under the other discovery rules. *Sorrells v. Cole*, 111 Ga. App. 136, 141 S.E.2d 193 (1965) (decided under former Code 1933, Ch. 21, T. 38).

Discretion of court. — What is sufficient to fulfill "good cause" criterion rests in the broad discretion of the trial judge. *Bradford v. Parrish*, 111 Ga. App. 167, 141 S.E.2d 125 (1965) (decided under former Code 1933, Ch. 21, T. 38); *Metropolitan Life Ins. Co. v. Lehmann*, 125 Ga. App. 539, 188 S.E.2d 393 (1972); *Sheffield v. Lockhart*, 151 Ga. App. 551, 260 S.E.2d 416 (1979).

Burden of movant to establish good cause. — This section places the burden upon the movant to establish "good cause." *Sheffield v. Lockhart*, 151 Ga. App. 551, 260 S.E.2d 416 (1979).

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Commission without authority to compel medical examination. — Neither the Professional Practices Commission nor a local board of education is a "court of record" for purposes of the Civil Practice Act (see now O.C.G.A. Ch. 11, T.

9) and, therefore, such commission is without authority to compel a party to a proceeding before it to submit to a medical examination pursuant to this section. 1977 Op. Att'y Gen. No. 77-48.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 168 et seq.

C.J.S. — 27 C.J.S., Discovery, §§ 160,

161. 35B C.J.S., Federal Civil Procedure, §§ 727, 739 et seq., 1063.

ALR. — Power to require plaintiff to

submit to physical examination, 51 ALR 183; 108 ALR 142.

Nature, extent, and conduct of physical examination of party to action or proceeding to recover for personal injury or disability, 135 ALR 883.

Federal Rule of Civil Procedure 35 (b) (1) and (2) and similar state statutes and rules pertaining to reports of physician's examination, 36 ALR2d 946.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Power to require physical examination of injured person in action by his parent or spouse to recover for his injury, 62 ALR2d 1291.

Right to copy of physician's report of pretrial examination where there is no specific statute or rule providing therefor, 70 ALR2d 384.

Court's power to order physical examination of personal injury plaintiff as affected by distance or location of place of examination, 71 ALR2d 973.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 ALR2d 12.

Availability of writ of prohibition to prevent illegal or unauthorized taking of depositions, 73 ALR2d 1169.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 ALR2d 1001.

Production and inspection of premises, persons, or things in proceeding to perpetuate testimony, 98 ALR2d 909.

Right of party to have his attorney or

physician, or a court reporter, present during his physical or mental examination by a court-appointed expert, 7 ALR3d 881.

Timeliness of application for compulsory physical examination of injured party in personal injury action, 9 ALR3d 1146.

Requiring complaining witness in prosecution for sex crime to submit to psychiatric examination, 18 ALR3d 1433.

Right of defendant in personal injury action to designate physician to conduct medical examination of plaintiff, 33 ALR3d 1012.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Discovery: right to ex parte interview with injured party's treating physician, 50 ALR4th 714.

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party, 84 ALR4th 558.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 ALR5th 577.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 ALR5th 529.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 ALR Fed. 924.

9-11-36. Requests for admission.

(a) Scope; service; answer or objection; motion to determine sufficiency.

(1) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of subsection (b) of Code Section 9-11-26 which are set forth in the request and that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney; but unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission; and, when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to subsection (c) of Code Section 9-11-37, deny the matter or set forth reasons why he cannot admit or deny it.

(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this subsection, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. Paragraph (4) of subsection (a) of Code Section 9-11-37 shall apply to the award of expenses incurred in relation to the motion.

(b) **Effect of admission.** Any matter admitted under this Code section is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission. Subject to Code Section 9-11-16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the

action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this Code section is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding. (Ga. L. 1966, p. 609, § 36; Ga. L. 1967, p. 226, §§ 17, 18A; Ga. L. 1972, p. 510, § 9.)

Cross references. — Form of request for admission, § 9-11-125. Admissions generally, § 24-8-821 et seq.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 36, see 28 U.S.C.

Law reviews. — For article surveying Georgia cases in the area of trial practice and procedure from June 1979 through

May 1980, see 32 Mercer L. Rev. 225 (1980). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

For note, "Preferential Treatment of the United States under Federal Civil Discovery Procedures," see 13 Ga. L. Rev. 550 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ANSWERS AND OBJECTIONS

1. IN GENERAL
2. INSUFFICIENT AND EVASIVE RESPONSES
3. FAILURE TO ANSWER OR OBJECT
4. EXTENSION OF TIME

WITHDRAWAL OR AMENDMENT OF ADMISSION

USE OF ADMISSIONS

SUMMARY JUDGMENT

General Consideration

Editor's notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain Code sections of this chapter dealing with discovery. Prior to the 1972 amendment, this Code section was substantially the same as Ga. L. 1953, p. 224, § 1, and Ga. L. 1959, p. 314, § 1. Hence, decisions based on this Code section prior to its 1972 amendment should be consulted with care.

In light of the similarity of the statutory provisions, decisions under Ga. L. 1953, p. 224, § 1 and Ga. L. 1959, p. 314, § 1, are included in the annotations for this Code section.

Purpose. — Purpose of rule as to request for admissions is to expedite trial and to relieve the parties of the cost and labor of proving facts which will not be disputed on the trial and the truth of

which can be ascertained by reasonable inquiry. *Hobbs v. New England Ins. Co.*, 212 Ga. 513, 93 S.E.2d 653 (1956) (decided under Ga. L. 1953, p. 224, § 1).

Clear intent of this section is to give the trial court discretion to permit parties to respond accurately and truthfully to requests for admissions with a view toward establishing uncontested facts that go to the merits of the case. *Mote v. Tomlin*, 136 Ga. App. 616, 222 S.E.2d 57 (1975).

Purpose of O.C.G.A. § 9-11-36 is facilitation of proof at trial. *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981).

Purpose of the 1972 amendment (Ga. L. 1972, p. 510, § 9) was to conform discovery provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to the 1970 amendments to the Federal Rules of Civil Procedure. *Cielock v. Munn*, 244 Ga.

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

Strict and literal compliance with section necessary. — Party responding to a request for admissions must comply strictly and literally with the terms of this section, on peril of having the party's response construed to be an admission. *Walker Enters. Inc. v. Mullis*, 124 Ga. App. 305, 183 S.E.2d 534 (1971).

Admissions are not part of the pleadings but are in the nature of evidence relating to the proof, and must be introduced in evidence before the admissions can be considered by the trier of fact. *Brooks v. Roley & Roley Eng'rs, Inc.*, 144 Ga. App. 101, 240 S.E.2d 596 (1977); *National Bank v. Hill*, 148 Ga. App. 688, 252 S.E.2d 192 (1979).

Requests for admissions and responses thereto are not pleadings. *Ross & Ross Auctioneers v. Testa*, 96 Ga. App. 821, 101 S.E.2d 767 (1958); *Forsyth v. Peoples, Inc.*, 114 Ga. App. 726, 152 S.E.2d 713 (1966) (decided under Ga. L. 1953, p. 224, § 1).

Requests for admissions and responses thereto constitute matters of proof and of evidence, and before the admissions can be considered by the trier of fact the admissions must be introduced in evidence. *Forsyth v. Peoples, Inc.*, 114 Ga. App. 726, 152 S.E.2d 713 (1966) (decided under Ga. L. 1959, p. 314, § 1).

Requests for admissions and responses thereto constitute matters of proof and of evidence. *Brooks v. Roley & Roley Eng'rs, Inc.*, 144 Ga. App. 101, 240 S.E.2d 596 (1977).

In "notice pleading" plaintiff need not spread out the plaintiff's evidence in the plaintiff's complaint, but may wait and place the evidence into the record by discovery and other pretrial procedures. *McDaniel v. Pass*, 130 Ga. App. 614, 203 S.E.2d 903 (1974).

Party may not treat discovery request as nullity. — Civil Practice Act, O.C.G.A. Ch. 11, T. 9, contains no provision whereby a party may treat a discovery request by the opposing party as a nullity. Under paragraph (a)(2) of O.C.G.A. § 9-11-36, a party must either respond to or object to a request for admission within 30 days or the request is

deemed admitted. *Concert Promotions, Inc. v. Haas & Dodd, Inc.*, 167 Ga. App. 883, 307 S.E.2d 763 (1983).

Judicial rather than evidentiary admissions. — In form and substance admission under O.C.G.A. § 9-11-36 is comparable to admission in pleadings or stipulation of facts and as such is generally regarded as a judicial admission rather than an evidentiary admission of a party. *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981); *Williams v. Calhoun*, 175 Ga. App. 332, 333 S.E.2d 408 (1985).

Admissions requiring opinions or conclusions of law. — Requests for admission under subsection (a) of O.C.G.A. § 9-11-36 are not objectionable even if the admissions require opinions or conclusions of law as long as the legal conclusions relate to the facts of the case. *G.H. Bass & Co. v. Fulton County Bd. of Tax Assessors*, 268 Ga. 327, 486 S.E.2d 810 (1997), reversing *G.H. Bass & Co. v. Fulton County Bd. of Tax Assessors*, 222 Ga. App. 118, 473 S.E.2d 253 (1996).

Admission in judicio against own interests. — Claimant's admission in judicio against the claimant's own interests was binding upon the claimant since a solemn admission in judicio is conclusive as a matter of law on the matter stated and cannot be contradicted by other evidence unless it is withdrawn or amended on formal motion. *Piedmont Aviation, Inc. v. Washington*, 181 Ga. App. 730, 353 S.E.2d 847 (1987); *Britt v. West Coast Cycle*, 198 Ga. App. 525, 402 S.E.2d 121 (1991); *Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc.*, 230 Ga. App. 455, 496 S.E.2d 546 (1998); *McCoy v. West Bldg. Materials of Ga., Inc.*, 232 Ga. App. 620, 502 S.E.2d 559 (1998).

Admissions not binding on coparty. — Even though un-withdrawn or unamended admissions are conclusively established, such admissions are not binding on a coparty. *Batchelor v. State Farm Mut. Auto. Ins. Co.*, 240 Ga. App. 366, 526 S.E.2d 68 (1999); *Ferguson v. Duron, Inc.*, 244 Ga. App. 19, 534 S.E.2d 142 (2000).

Discovery admission treated as judicial admission. — Admission under discovery procedure is generally regarded as a judicial admission (and thus conclu-

sive unless allowed by the court to be withdrawn) rather than an evidentiary admission (which may be contradicted or explained). *Stone v. Lenox Enters., Inc.*, 176 Ga. App. 696, 337 S.E.2d 451 (1985).

Discretion of court. — Court has discretion under subsection (a) of this section only when a party moves to determine the sufficiency of the answers or objections filed to the request. *Mountain View Enters. Inc. v. Diversified Sys.*, 133 Ga. App. 249, 211 S.E.2d 186 (1974).

Form of request for admission. — Form of a request for admission should take on the appearance of a pleading as illustrated in Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-125). *A & D Barrel & Drum Co. v. Fuqua*, 132 Ga. App. 827, 209 S.E.2d 272 (1974).

Denial of overbroad request for admissions. — If proper objection is made to a request for admissions which is so broad that the admission covers the whole case, the request for admissions will not be permitted. *Walker Enters. Inc. v. Mullis*, 124 Ga. App. 305, 183 S.E.2d 534 (1971).

Requests for admission as evidence. — Requests for admissions and responses thereto constitute matters of proof and of evidence, and before they can be considered by the trier of fact they must be introduced in evidence. *Moore v. Hanson*, 224 Ga. 482, 162 S.E.2d 429 (1968).

Cited in *Stubbs v. State Farm Mut. Auto. Ins. Co.*, 120 Ga. App. 750, 172 S.E.2d 441 (1969); *Getz Exterminators, Inc. v. Walsh*, 124 Ga. App. 402, 184 S.E.2d 358 (1971); *Baranan v. Kazakos*, 125 Ga. App. 19, 186 S.E.2d 326 (1971); *Turner v. Bank of Zebulon*, 128 Ga. App. 404, 196 S.E.2d 668 (1973); *Smith v. Billings*, 132 Ga. App. 201, 207 S.E.2d 683 (1974); *Osceola Inns v. State Hwy. Dep't*, 133 Ga. App. 736, 213 S.E.2d 27 (1975); *Contract Mgt. Consultants, Inc. v. Huddle House, Inc.*, 134 Ga. App. 566, 215 S.E.2d 326 (1975); *Salem v. Lawyers Coop. Publishing Co.*, 137 Ga. App. 536, 224 S.E.2d 502 (1976); *Strickland v. Citizens & S. Nat'l Bank*, 137 Ga. App. 538, 224 S.E.2d 504 (1976); *Reid v. Minter*, 137 Ga. App. 799, 224 S.E.2d 849 (1976); *Ideal Paint Contractors, Inc. v. Home Mart Bldg. Ctrs.*

Inc., 141 Ga. App. 830, 234 S.E.2d 670 (1977); *Crider v. Pepsi Cola Bottlers*, 142 Ga. App. 304, 235 S.E.2d 683 (1977); *E.K. Wright Constr. Co. v. Dixie Metal Co.*, 143 Ga. App. 14, 237 S.E.2d 414 (1977); *Post-Tensioned Constr., Inc. v. VSL Corp.*, 143 Ga. App. 148, 237 S.E.2d 618 (1977); *Herring v. Herring*, 143 Ga. App. 286, 238 S.E.2d 240 (1977); *Bramblett v. Whitfield Fin. Co.*, 143 Ga. App. 853, 240 S.E.2d 230 (1977); *In re Boswell*, 242 Ga. 313, 249 S.E.2d 13 (1978); *Shell v. Brownlow*, 242 Ga. 475, 249 S.E.2d 618 (1978); *Record Shack of Atlanta, Inc. v. Daugherty*, 147 Ga. App. 753, 250 S.E.2d 154 (1978); *Master v. Savannah Sur. Assocs.*, 148 Ga. App. 678, 252 S.E.2d 186 (1979); *Booker v. Southern Steel & Aluminum Prods., Inc.*, 150 Ga. App. 306, 257 S.E.2d 375 (1979); *Kersey v. American Fed. Sav. & Loan Ass'n*, 150 Ga. App. 445, 258 S.E.2d 65 (1979); *Cable Masters, Inc. v. Shaw*, 151 Ga. App. 153, 259 S.E.2d 157 (1979); *Cielock v. Munn*, 244 Ga. 810, 262 S.E.2d 114 (1979); *ETI Corp. v. Hammett*, 152 Ga. App. 1, 262 S.E.2d 211 (1979); *Peppers v. Siefferman*, 153 Ga. App. 206, 265 S.E.2d 26 (1980); *Cielock v. Munn*, 153 Ga. App. 275, 266 S.E.2d 806 (1980); *Young v. Brown*, 154 Ga. App. 452, 268 S.E.2d 729 (1980); *Williams v. Coca-Cola Co.*, 158 Ga. App. 139, 279 S.E.2d 261 (1981); *National Bank v. Hill*, 161 Ga. App. 499, 288 S.E.2d 365 (1982); *Smith v. Hartford Fire Ins. Co.*, 162 Ga. App. 26, 289 S.E.2d 520 (1982); *Ashburn Motor Inn, Inc. v. White Adv. Int'l*, 164 Ga. App. 438, 296 S.E.2d 220 (1982); *Spires v. Relco, Inc.*, 165 Ga. App. 4, 299 S.E.2d 58 (1983); *Eunice v. Citicorp Homeowners, Inc.*, 167 Ga. App. 335, 306 S.E.2d 395 (1983); *Laurens County Convalescent Ctr. Inc. v. Ernest Jones & Assocs.*, 168 Ga. App. 705, 310 S.E.2d 282 (1983); *Battle v. Strother*, 171 Ga. App. 418, 319 S.E.2d 887 (1984); *Carr v. Nodvin*, 178 Ga. App. 228, 342 S.E.2d 698 (1986); *Hamrick v. Greenway*, 257 Ga. 287, 357 S.E.2d 580 (1987); *Shankweiler v. McCall Procter/Densham, Ltd.*, 183 Ga. App. 257, 358 S.E.2d 657 (1987); *Amason, Inc. v. Metromont Materials Corp.*, 185 Ga. App. 509, 364 S.E.2d 637 (1988); *Behar v. Aero Med Int'l, Inc.*, 185 Ga. App. 845, 366 S.E.2d 223 (1988); *Waits v. Makowski*, 191 Ga. App. 794, 383 S.E.2d

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175 (1989); Cincinnati Ins. Co. v. Perimeter Tractor & Trailer Repair, Inc., 192 Ga. App. 243, 384 S.E.2d 449 (1989); Southern Int'l Pictures, Inc. v. Friedman, 201 Ga. App. 87, 410 S.E.2d 51 (1991); Goins v. Howell, 201 Ga. App. 237, 410 S.E.2d 755 (1991); F.P.I. Atlanta Ltd. v. Price, 211 Ga. App. 634, 440 S.E.2d 63 (1994); Morrison v. Georgia N.E.R.R., 217 Ga. App. 253, 456 S.E.2d 731 (1995); Dean v. NationsBank, 226 Ga. App. 370, 486 S.E.2d 647 (1997); Milburn v. Nationwide Ins. Co., 228 Ga. App. 398, 491 S.E.2d 848 (1997); Mazdak Auto Towing & Serv., Inc. v. Midcontinental Group, Inc., 231 Ga. App. 859, 501 S.E.2d 44 (1998); Neal v. State Farm Fire & Cas. Co., 300 Ga. App. 68, 684 S.E.2d 132 (2009).

Answers and Objections**1. In General**

Written answer or objection required addressed to the matter, signed by the party or by the party's attorney. Hilton Hotels Corp. v. Withrow Travel Serv., Inc., 150 Ga. App. 435, 258 S.E.2d 59 (1979).

Oath not required. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) does not require responses to requests for admission to be made under oath. Mundt v. Olson, 155 Ga. App. 145, 270 S.E.2d 344 (1980); as to necessity of sworn answers under this section prior to amendment by Ga. L. 1972, p. 510, § 9, see Abbott-Bridges Wood Prods., Inc. v. Argonaut Ins. Co., 131 Ga. App. 754, 206 S.E.2d 722 (1974) and Burge v. High, 147 Ga. App. 267, 248 S.E.2d 546 (1978), overruled on other grounds, Hilton Hotels Corp. v. Withrow Travel Serv., Inc., 150 Ga. App. 435, 258 S.E.2d 59 (1979).

Deposition is not response to request for admission. — Deposition of the defendant taken by the plaintiff and not placed in the record is not an objection or response to a request for an admission to avoid being bound by a failure to answer. Shepherd v. Shepherd, 164 Ga. App. 185, 296 S.E.2d 151 (1982).

Party may contradict the party's previous answer to an interrogatory. Albitus v. F & M Bank, 159 Ga. App. 406,

283 S.E.2d 632 (1981).

Subsequent answers to interrogatories do not affect matters previously admitted. — Party's late response to request for admission constituted conclusive admission of all matters contained in the request, regardless of fact of timely answering of interrogatories which tended to contradict the matters deemed admitted. Stone v. Lenox Enters., Inc., 176 Ga. App. 696, 337 S.E.2d 451 (1985).

2. Insufficient and Evasive Responses

General statement of inability to admit or deny. — General statement that the answering party can neither admit nor deny, unaccompanied by reasons, will be held an insufficient response, and the court may either take the matter as admitted or order a further answer. Gregory v. Vance Publishing Corp., 130 Ga. App. 118, 202 S.E.2d 515 (1973). But see Clements v. Toombs County Hosp. Auth., 175 Ga. App. 651, 334 S.E.2d 188 (1985).

Insufficient answer may be deemed an admission by the court only after the requesting party has questioned by motion the sufficiency of the answers and a hearing on the motion has been held. Clements v. Toombs County Hosp. Auth., 175 Ga. App. 651, 334 S.E.2d 188 (1985).

Corporation gave unresponsive answers to the requests for admission and thus admitted the matters therein; the husband made a proper request when asking the corporation to admit that the corporation had a duty to the public to provide health care providers who were duly licensed to render the particular level of health care provided. Wellstar Health Sys. v. Green, 258 Ga. App. 86, 572 S.E.2d 731 (2002).

Motion and hearing required prior to treating insufficient answer as admission. — Court overruled that portion of Gregory v. Vance Pub. Co. RP., 130 Ga. App. 118, 202 S.E.2d 515 (1973) which permits a trial court sua sponte to deem an insufficient answer to be an admission, and reaffirmed the holding in Smith v. Billings, 132 Ga. App. 201, 207 S.E.2d 683 (1974), to the effect that a motion to determine in a hearing the sufficiency of answers is necessary before responses to a

request for admissions may be deemed insufficient and deemed admitted. *Clements v. Toombs County Hosp. Auth.*, 175 Ga. App. 651, 334 S.E.2d 188 (1985).

“For want of sufficient information.” — It is not sufficient to limit answer to “for want of sufficient information.” *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 202 S.E.2d 515 (1973). But see *Clements v. Toombs County Hosp. Auth.*, 175 Ga. App. 651, 334 S.E.2d 188 (1985).

Evasive response. — Response which is ambiguous or evasive may be declared an unqualified admission if the opposing party makes a motion that a determination of sufficiency be made, but in the absence of such a motion, the trial court is not authorized to declare a response an unqualified admission. *Match Point, Ltd. v. Adams*, 148 Ga. App. 673, 252 S.E.2d 90 (1979), overruled on other grounds, *Mock v. Canterbury Realty Co.*, 152 Ga. App. 872, 264 S.E.2d 489 (1980).

Answer denying liability is not evasive. — When the plaintiff contended that the defendant's answer to the complaint and to discovery was evasive and should be treated as an admission, the Court of Appeals did not agree, as the defendant's answers consistently denied any liability on the defendant's part, hardly an evasion under the circumstances. *Johns v. Leaseway of Ga., Inc.*, 166 Ga. App. 472, 304 S.E.2d 555 (1983).

3. Failure to Answer or Object

Effect of failure to answer or object. — Request for admission to which the plaintiff makes no objection and does not otherwise answer within the time designated stands admitted; no order of court declaring this to be so is necessary. *Hudgins & Co. v. Southland Ice Co.*, 104 Ga. App. 150, 121 S.E.2d 193 (1961) (decided under Ga. L. 1959, p. 314, § 1).

One who has not, within the time allowed for answering or objecting to requests for admissions, answered, objected to, or moved for and obtained an extension of time for responding to such requests, shall be deemed to have admitted the requests, subject only to such remedy as may be afforded to the person on motion under subsection (b) of this section. Na-

tional Bank v. Merritt, 130 Ga. App. 85, 202 S.E.2d 193 (1973); *Porter v. Murlas Bros. Commodities*, 134 Ga. App. 96, 213 S.E.2d 190 (1975).

Unless a proper response to requests for admissions is timely filed, the requests are admitted as a matter of law. *Hammett v. Bailey*, 147 Ga. App. 105, 248 S.E.2d 180 (1978).

Absence of timely answers has effect of establishing conclusively facts and documents referred to in request for admissions, when no motion is made seeking permission for late filing of answers and no motion is made seeking permission to withdraw admissions resulting from failure to serve answers in the limited time. *Burge v. High*, 147 Ga. App. 267, 248 S.E.2d 546 (1978).

When requests for admission are filed and served, the opposite party must either answer or state an objection to the requests, upon penalty of being taken to admit the subject matter thereof. *Thompson v. Berman*, 147 Ga. App. 740, 250 S.E.2d 190 (1978).

When the defendant failed to answer requests for admissions, the matters contained in the requests were admitted to this section. *National Bank v. Hill*, 148 Ga. App. 688, 252 S.E.2d 192 (1979).

When a party served with a request for admission does not serve an answer or objection and does not move for an extension of time or to withdraw the admissions resulting from a failure to answer, the matter stands admitted. *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981).

In an action which an insured filed against an insurance company, seeking recovery of excessive premiums and punitive damages based on a claim of fraud, the trial court correctly granted the insurance company's motion in limine to strike the insured's demand for punitive damages because the insured did not answer a request for admission which the company served on the insured. *Vaughn v. Metro. Prop. & Cas. Ins. Co.*, 260 Ga. App. 573, 580 S.E.2d 323 (2003).

Because the pool installers failed to respond to a pool purchaser's request for admissions, pursuant to O.C.G.A. § 9-11-36(a), those admissions were

Answers and Objections (Cont'd)**3. Failure to Answer or****Object (Cont'd)**

deemed admitted and were sufficient to establish the purchaser's claims of fraud and conspiracy to defraud, and accordingly, summary judgment was properly granted to the purchaser on those claims; however, summary judgment to the purchaser was error on the purchaser's claim that the installers violated the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as there was no evidence that the actions by the installers were introduced into the stream of commerce or were reasonably intended to impact on any market other than on the purchaser, and the commensurate awards of attorney fees and treble damages, pursuant to O.C.G.A. § 10-1-399(c) and (d), were vacated. *Brown v. Morton*, 274 Ga. App. 208, 617 S.E.2d 198 (2005).

Trial court did not err when the court granted a landlord's summary judgment motion as to liability and damages in a conversion of collateral suit after a tenant failed to respond to the landlord's requests for admission; the landlord established the existence and enforceability of a security agreement, the value of the collateral described therein, and the tenant's conversion of that collateral. *Von Tonder v. Payne*, 275 Ga. App. 28, 619 S.E.2d 730 (2005).

Trial court erred in denying the relatives' motion for summary judgment against the uncle on the relatives' claims for ejectment and fraud in connection with real property once owned by the uncle because the uncle's failure to respond to the relatives' request for admissions had the effect of admitting the matters covered therein and the failure to respond to the relatives summary judgment motion meant that there were no remaining issues for trial against the uncle. *Bowman v. Century Funding, Ltd.*, 277 Ga. App. 540, 627 S.E.2d 73 (2006).

In a finance corporation's suit to recover a deficiency balance on an installment sales contract for a log loader, the trial court properly granted the corporation summary judgment upon concluding that no genuine issues of material fact existed

based on the defending trucking company and the company's president failing to answer the requests for admissions that were served simultaneously with the complaint. By failing to respond and never challenging the trial court's denial of the motion to withdraw the admissions filed by the trucking company and the company's president, the following allegations were deemed admitted: that true and correct copies of the relevant documents, including the demand for payment were received; that the president executed the installment sales contract and the guaranty; that the president failed to make payments thereunder; that the principal balance due under the contract and guaranty was \$ 34,442.44 as of a certain date; and that the money was owed to the finance corporation. *JJM Trucking, Inc. v. Caterpillar Fin. Servs. Corp.*, 295 Ga. App. 560, 672 S.E.2d 529 (2009).

Debtor's failure to respond to requests for admission served after the debtor objected to improper venue was not excused by the objection to venue and, after a transfer of venue, the transferee trial court properly granted summary judgment to the creditor based on the debtor's admissions in the transferor court, pursuant to O.C.G.A. § 9-11-36. *Jackson v. Nemdegelt, Inc.*, 302 Ga. App. 767, 691 S.E.2d 653 (2010).

Trial court did not err in granting summary judgment to a mortgagee on the mortgagors' claims for wrongful eviction and trespass because the mortgagors failed to adhere to O.C.G.A. § 9-11-36(a)(2) since the mortgagors never answered or objected to the mortgagees' requests for admission within the statutory time period, and thus, the requests were deemed admitted by the mortgagors; the mortgagor's reliance upon § 9-11-36(b) was misplaced under the circumstances because the parties modified the statutory discovery procedures by stipulation pursuant to O.C.G.A. § 9-11-29(2). *Ikomoni v. Exec. Asset Mgmt., LLC*, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

In an employment dispute, the trial court was authorized to find that the employer was served with requests for admissions, based on the employee's coun-

sel's assertion, pursuant to O.C.G.A. § 9-11-5(b), and therefore partial summary judgment based on matters deemed admitted was proper. *Am. Radiosurgery, Inc. v. Rakes*, 325 Ga. App. 161, 751 S.E.2d 898 (2013).

Failure to admit or deny genuineness. — Failure of the defendant to reply to the plaintiff's request for an admission of the genuineness of documents established the documents' genuineness, but not the documents' accuracy. *Stalvey v. Osceola Indus., Inc.*, 124 Ga. App. 708, 185 S.E.2d 629 (1971).

When a litigant relied upon the legal effect of failure to respond to requests for admission and the nonresponding party did not move to withdraw admissions or avail itself of any of the variety of responses available under O.C.G.A. § 9-11-36 and chose not to seek the liberal remedies afforded to parties under the statute to avoid the consequences of a failure to respond, the subject matter of the requests for admission stood admitted. *Solis v. Lamb*, 244 Ga. App. 8, 534 S.E.2d 582 (2000); *Mays v. Ed Voyles Chrysler-Plymouth, Inc.*, 255 Ga. App. 357, 565 S.E.2d 515 (2002).

Facts admitted by failure to answer may not be controverted. — Facts admitted by failure to timely answer a request for admissions may not be controverted by statement of counsel at a summary judgment hearing. *Eti Corp. v. Hammett*, 140 Ga. App. 618, 231 S.E.2d 545 (1976).

Evidence is not admissible to controvert matters deemed to have been admitted by failure to answer requests for admission even though the substance of the matter deemed admitted has been denied in the answer to the complaint. *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981).

Waiver of objections. — Failure to serve the opposing party with objections and failure to request a hearing on objections prior to the call of the case for the trial were sufficient grounds to authorize the trial court to find that the defendant waived the defendant's objections. *Ehlers v. Butler*, 127 Ga. App. 9, 192 S.E.2d 398 (1972).

Failure of general objection. — When a general objection is made to a

pleading or evidence as a whole, part of which is not subject to the objection, the entire objection fails in its office as a critic. *McDaniel v. Pass*, 130 Ga. App. 614, 203 S.E.2d 903 (1974).

Pro se defendants did not fail to respond to requests for admission. —

It was error to find that pro se defendants failed to respond to requests for admission under O.C.G.A. § 9-11-36(b). Although the defendants stated that the defendants were answering the complaint, it was clear from the number and the content of the responses that the defendants were responding to the requests for admission rather than to the complaint; furthermore, a reasonable interpretation of the statement with which all three defendants' answers concluded was not that the defendants were not responding to any discovery requests, but that having responded to the requests for admission, the defendants would not be responding to the remaining discovery requests. *Robinson v. Global Res., Inc.*, 300 Ga. App. 139, 684 S.E.2d 104 (2009).

4. Extension of Time

Authority of court to extend time for answering. — Trial judge has authority under Ga. L. 1967, p. 226, §§ 5

and 6 (see now O.C.G.A. § 9-11-6(b)) to grant an extension of time for filing answers to a request for admissions of fact. *National Bank v. Great S. Bus. Enters. Inc.*, 130 Ga. App. 221, 202 S.E.2d 848 (1973).

Pursuant to O.C.G.A. § 9-11-36(b), a trial court properly granted a bank a one-day extension to respond to a request to admit after the bank served the bank's response one day late because the trial court found excusable neglect based on the bank's counsel's mistaken belief that the opposing party's counsel had granted a one-day extension in which to respond. *131 Ralph McGill Blvd., LLC v. First Intercontinental Bank*, 305 Ga. App. 493, 699 S.E.2d 823 (2010).

Because a party served the party's requests for admissions by mail, three days were added to the prescribed thirty-day response period pursuant to O.C.G.A. § 9-11-6(e). *Patel v. Columbia Nat'l Ins.*

Answers and Objections (Cont'd)**4. Extension of Time (Cont'd)**

Co., 315 Ga. App. 877, 729 S.E.2d 35 (2012).

Discretion of court. — Whether to allow responses to request for admissions after the statutory time for filing has passed is within the discretion of the trial judge, and the judge's decision will not be interfered with unless it clearly appears that this discretion has been abused. *Davenport v. Smith*, 157 Ga. App. 870, 278 S.E.2d 691 (1981).

Trial court did not err by granting summary judgment to an insurer on an insured's claim because the court was authorized to find that the facts were undisputed in that the insured's untimely response to requests for admissions which were submitted by the insurer constituted an admission of the facts and the insured did not seek to withdraw that admission in accordance with O.C.G.A. § 9-11-36(b). *Patel v. Columbia Nat'l Ins. Co.*, 315 Ga. App. 877, 729 S.E.2d 35 (2012).

Motion required after time expired.

— Within the time allowed under subsection (a) of this section for filing answers to a request for admissions, the judge may grant an extension with or without a motion; however, if such time has expired, there must be a motion to allow late filing. *National Bank v. Great S. Bus. Enters. Inc.*, 130 Ga. App. 221, 202 S.E.2d 848 (1973).

While the trial judge has authority to grant extensions of time for filing after the time for answering has expired, there must be a motion for withdrawal of the admissions under subsection (b) of Ga. L. 1972, p. 510, § 9 (see now O.C.G.A. § 9-11-36) or a motion to allow late filing under Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6(b)). *Custom Farm Servs., Inc. v. Faulk*, 130 Ga. App. 583, 203 S.E.2d 912 (1974).

Extension permitted for excusable neglect, absent prejudice to adverse party. — Court may allow additional time when the failure to respond is due to excusable neglect, and is not prejudicial to the party requesting admissions. *Coolik v. Hawk*, 133 Ga. App. 626, 212 S.E.2d 7 (1974).

Extension should not be allowed without reason.

— While this section places no restriction on the court's discretion to allow an extension after the time for reply has passed, such an extension should not be allowed without reason or when it will prejudice the opposing party. *Taylor v. Hunnicutt*, 129 Ga. App. 314, 199 S.E.2d 596 (1973).

Withdrawal or Amendment of Admission

Showing required. — Allowance of motion to withdraw admissions resulting from failure to answer request therefor should be decided by determination of whether preservation of the merits of the action would be subserved thereby; upon a determination that such will be the case, burden shifts to the opposite party to satisfy the court that depriving the party of the resulting default judgment will prejudice the party in maintaining an action on the merits. *Alexander v. H.S.I. Mgt., Inc.*, 155 Ga. App. 116, 270 S.E.2d 325 (1980).

Consideration of a motion to withdraw admissions must be on the basis of whether the presentation of the merits of the action will be subserved thereby and whether the respondent can satisfy the court that withdrawal or amendment will prejudice the respondent in maintaining an action on the merits. *Wells v. Whitemarsh Contractors*, 160 Ga. App. 176, 286 S.E.2d 752 (1981), rev'd on other grounds, 249 Ga. 194, 288 S.E.2d 198 (1982).

An attempt to withdraw or amend admissions must be accompanied by a showing that the merits of the case will be subserved. *Yarbrough v. Magbee Bros. Lumber & Supply Co.*, 189 Ga. App. 299, 375 S.E.2d 471 (1988).

In a negligence case, the trial court did not abuse the court's discretion by denying the defendants' motion to withdraw the defendants' admission that the defendants performed some repairs on the tractor trailer five days after the collision because the trial court concluded that the evidence produced by the defendants to support the defendant's motion to withdraw was not credible; thus, the defendants failed to meet the defendants' bur-

den of showing that the defendants' admission would have been refuted at trial by admissible evidence having a modicum of credibility. *Howard v. Alegria*, 321 Ga. App. 178, 739 S.E.2d 95 (2013).

Merits of action subserved by withdrawal. — Trial court did not err in allowing the withdrawal of admissions when, although no parties presented evidence, a review of the record revealed that the admissions could be refuted by admissible evidence. *Saleem v. Snow*, 217 Ga. App. 883, 460 S.E.2d 104 (1995).

Burden of party moving to withdraw admission. — Party moving to withdraw must show that admitted request for admission either can be refuted by admissible evidence having a modicum of credibility or is incredible on its face, and that the denial is not offered solely for purposes of delay. *Johnson v. City Wide Cab, Inc.*, 205 Ga. App. 502, 422 S.E.2d 912 (1992).

In a wrongful foreclosure proceeding, a motion to withdraw admissions instituted by a buyer and another was properly denied because they failed to meet their burden of demonstrating that the merits of the action would have been served by the withdrawal of the admissions since they did not provide even a slight showing that the denials were supported by admissible evidence. *Ledford v. Darter*, 260 Ga. App. 585, 580 S.E.2d 317 (2003).

Trial court committed no error in determining that a company's original responses to the requests for admission were defective and should be stricken and that the requests for admission were deemed admitted by operation of law because the company failed to move to withdraw or amend the admissions, which left no genuine issue of material fact in dispute and the creditor was entitled to judgment as a matter of law on the open account claim against the company. *Brougham Casket & Vault Co., LLC v. DeLoach*, 323 Ga. App. 701, 747 S.E.2d 707 (2013).

No showing of "providential cause" or "excusable neglect" required. — Applicant in a motion to withdraw admissions is not required to show "providential cause" or "excusable neglect," but the trial court should follow the language of the

statute in making the court's determination. *Moore Ventures Ltd. Partnership v. Stack*, 153 Ga. App. 215, 264 S.E.2d 725 (1980); *Whitemarsh Contractors v. Wells*, 249 Ga. 194, 288 S.E.2d 198 (1982).

Presentation of merits of action subserved by withdrawal. — Denial of an individual's motion to withdraw admissions was error, and a summary judgment in favor of a lessor based on the admission was error, since presentation of the merits of the action by the lessor against the individual to recover on a lease would be subserved by permitting the individual to withdraw the admissions, and the lessor failed to show that withdrawal would prejudice the lessor in maintaining the lessor's action on the merits. *Bailey v. Chase Third Century Leasing Co.*, 211 Ga. App. 60, 438 S.E.2d 172 (1993).

Trial court did not abuse the court's discretion in allowing the defendant to withdraw admissions after the defendant produced evidence negating the admissions, including affidavits and depositions, and the court determined that the plaintiff would not be prejudiced in maintaining the action on the merits. *Rowland v. Tsay*, 213 Ga. App. 679, 445 S.E.2d 822 (1994); *U.B. Vehicle Leasing, Inc. v. Vision Int'l, Inc.*, 224 Ga. App. 611, 481 S.E.2d 597 (1997).

Burden to move for withdrawal or amendment. — Under this section, the burden is on the one who has failed to answer to be bound by the resulting "admissions" unless the person takes the initiative and files a motion under subsection (b) of this section and succeeds in defeating such admissions. *National Bank v. Merritt*, 130 Ga. App. 85, 202 S.E.2d 193 (1973); *Meadows v. Dalton*, 153 Ga. App. 568, 266 S.E.2d 235 (1980); *Taylor v. Cameron & Barkley Co.*, 161 Ga. App. 750, 289 S.E.2d 820 (1982); *Atlanta Cas. Co. v. Goodwin*, 205 Ga. App. 421, 422 S.E.2d 76 (1992).

Party who fails to answer within the required time may seek to withdraw the party's admissions, but the party must take the initiative and file a motion or otherwise the party is bound thereby. *National Bank v. Great S. Bus. Enters. Inc.*, 130 Ga. App. 221, 202 S.E.2d 848 (1973).

Failure to object to or respond to re-

Withdrawal or Amendment of Admission (Cont'd)

requests for admissions constitutes an admission of the requests, to avoid being bound by which the one who fails to answer must move to withdraw such admissions, and when such party makes no such motion, the admissions made by the failure to timely respond to the requests are binding. *Tyson v. Automotive Controls Corp.*, 147 Ga. App. 409, 249 S.E.2d 99 (1978).

Burden is on the one failing to answer to take the initiative and file a motion under subsection (b) of O.C.G.A. § 9-11-36 to withdraw or amend the admissions. *Karat Enters. v. Marriott Corp.*, 196 Ga. App. 769, 397 S.E.2d 44 (1990).

Burden of party opposing motion. — Party opposing motion to withdraw has burden of establishing prejudice in maintaining the party's action or defense on the merits from withdrawal or amendment to the answers. *Moore Ventures Ltd. Partnership v. Stack*, 153 Ga. App. 215, 264 S.E.2d 725 (1980); *Dorfman v. Lederman*, 154 Ga. App. 473, 268 S.E.2d 767 (1980).

Being compelled to try the merits of a case does not constitute the type of prejudice needed to warrant denial of a motion to withdraw admissions. *Johnson v. City Wide Cab, Inc.*, 205 Ga. App. 502, 422 S.E.2d 912 (1992).

Trial on the merits. — By being forced to try a case rather than take a default, a party is not prejudiced in trying the merits of the case. *Alexander v. H.S.I. Mgt., Inc.*, 155 Ga. App. 116, 270 S.E.2d 325 (1980).

Fact that a party's opponent relied on the admissions and expended time and resources on what appeared to be a well advised motion for summary judgment, and would have to try the case on the merits, was insufficient prejudice to warrant denying the party's motion to withdraw the admissions. *Riberglass, Inc. v. ECO Chem. Specialties, Inc.*, 194 Ga. App. 417, 390 S.E.2d 616, cert. denied, 194 Ga. App. 912, 390 S.E.2d 616 (1990).

Deprivation of default judgment not "prejudice." — Depriving a party of a judgment by default is not the kind of

prejudice envisioned by subsection (b) of this section. *Moore Ventures Ltd. Partnership v. Stack*, 153 Ga. App. 215, 264 S.E.2d 725 (1980); *Dorfman v. Lederman*, 154 Ga. App. 473, 268 S.E.2d 767 (1980); *Hanson v. Farmer*, 163 Ga. App. 561, 295 S.E.2d 343 (1982).

Since failure to move to have admissions withdrawn or amended forecloses remedial action requests for admission which were not answered or objected to are deemed admitted. *Hammett v. Bailey*, 147 Ga. App. 105, 248 S.E.2d 180 (1978); *Drummond v. Brown*, 149 Ga. App. 248, 253 S.E.2d 868 (1979).

Admission which would otherwise result from failure to make timely answer should be avoided when to do so will aid in the presentation of the merits of the action and will not prejudice the party who made the request. *Franks v. Reid*, 134 Ga. App. 94, 213 S.E.2d 193 (1975); *Moore Ventures Ltd. Partnership v. Stack*, 153 Ga. App. 215, 264 S.E.2d 725 (1980).

Failure to consider merits of motion to withdraw admissions. — When the trial court's order granting summary judgment to appellee and effectively denying the appellant's motion to withdraw admissions reflected that court's failure to consider the merits of the motion within the parameters of the two-pronged test of O.C.G.A. § 9-11-36, the case was reversed and remanded to the trial court for the presentation and consideration of evidence pertinent to the appellant's motion to withdraw admissions. *Watson v. McDowell & Son, Inc.*, 204 Ga. App. 635, 420 S.E.2d 88 (1992).

Motion to withdraw proper. — Doctors' withdrawal of admissions and submission of responses to the patient's discovery requests was properly permitted after the doctors presented responses to the patient's requests for admissions, as well as affidavits to show that their responses were meritorious and not interposed solely for the purposes of delay, and when the record supported a finding that the merits would be subserved by allowing withdrawal, and that the patient would not be prejudiced by the withdrawal. *Brankovic v. Snyder*, 259 Ga. App. 579, 578 S.E.2d 203 (2003).

Trial court did not err in allowing the withdrawal of admissions made by operation of law pursuant to O.C.G.A. § 9-11-36(b) because O.C.G.A. § 9-11-16(b), governing pretrial orders, did not apply to limit the trial court's discretion to permit withdrawal of the disputed admissions after the trial court's June 5 scheduling order was not intended as a pretrial order. *Velasco v. Chambliss*, 295 Ga. App. 376, 671 S.E.2d 870 (2008).

Trial court did not abuse the court's discretion in granting a lessee's motion to withdraw admissions that had been deemed admitted by virtue of the lessee's failure to respond to discovery because although the lessee's failure to respond to a lessor's request resulted in an admission that the lessee was jointly liable for the debts of a limited liability company (LLC), the lessee was not a party to nor a guarantor of the lease agreement, and that evidence was sufficient to refute the lessor's allegations that the lessee shared personal liability for the debts of the LLC and to further conclude that the lessee's denial of liability was not simply a delaying tactic; the lessor did not establish that the withdrawal would prejudice the lessor in maintaining the action on the merits. *ABA 241 Peachtree, LLC v. Brooken & McGlothen, LLC*, 302 Ga. App. 208, 690 S.E.2d 514 (2010).

As the evidence was sufficient to show that a business entity had refuted its admissions and that its motion to withdraw was not solely interposed for delay, and property owners did not show prejudice, the trial court did not abuse the court's discretion when the court allowed the entity to withdraw the entity's admissions. *Elrod v. Sunflower Meadows Dev., LLC*, 322 Ga. App. 666, 745 S.E.2d 846 (2013).

In a suit on open account, the customer's shareholders' motion to withdraw the shareholders' admissions on the basis that settlement negotiations had been ongoing and the parties had agreed to extend the discovery period until negotiations were complete, along with the shareholders' filing responses to the requests and the proponent's failure to show prejudice, supported the trial court's decision to allow withdrawal of the admissions. *Heath v.*

Color Imprints USA, Inc., 329 Ga. App. 605, 765 S.E.2d 751 (2014).

Order denying motion to withdraw assumed correct when no evidence presented. — As no evidence was provided showing that the presentation of the merits would have been subverted by allowing the withdrawal or amendment of admissions, no testimony having been offered, it was assumed on appeal that the order denying the motion to withdraw was correct. *Worth v. Alma Exch. Bank & Trust*, 171 Ga. App. 748, 320 S.E.2d 816 (1984).

When pro se defendant did not satisfy the defendant's burden of showing that the presentation of the merits would be subverted by allowing a withdrawal of the defendant's admissions, the trial court did not err in denying the motion. *Howell v. Styles*, 221 Ga. App. 781, 472 S.E.2d 548 (1996).

Counsel's "oversight" insufficient reason. — Court may grant a motion to withdraw: (1) when the presentation of the merits will be subverted thereby; and (2) the party obtaining the admission fails to satisfy the court that the withdrawal will prejudice maintaining the party's action or defense on the merits. If the movant satisfies the court on the first prong, the burden is on the respondent to satisfy the second prong. A party failed to satisfy the first prong of the test when the party only gave an explanation for not responding to the request that it was "due to oversight of counsel since the answer was prepared at the last minute." *Intersouth Properties, Inc. v. Contractor Exch., Inc.*, 199 Ga. App. 726, 405 S.E.2d 764 (1991).

Harmless error in applying excusable neglect. — As the trial court applied the correct legal principal concerning the second prong of the withdrawal test, any error resulting from applying "excusable neglect" as an additional basis for denying the motion to withdraw would constitute harmless error. *Marlowe v. Lott*, 212 Ga. App. 679, 442 S.E.2d 487 (1994).

Hearing. — Since no hearing was held on the appellant's motion to withdraw admissions, no evidence as to whether the merits of the action would be subverted by allowing withdrawal and whether with-

Withdrawal or Amendment of Admission (Cont'd)

drawal would prejudice appellee in maintaining an action were presented for the trial court's consideration, and the trial court's order granting summary judgment to appellee and effectively denying appellant's motion to withdraw admissions was reversed and remanded for presentation and consideration of evidence pertinent to the appellant's motion. *Hanson v. Farmer*, 163 Ga. App. 561, 295 S.E.2d 343 (1982).

Refusal to allow withdrawal of admissions was not an abuse of discretion. — In a purported widow's proceeding seeking an award of a year's support from a decedent's estate for her child and herself, the trial court did not abuse the court's discretion under O.C.G.A. § 9-11-36(b) in refusing to allow the purported widow to withdraw her admission that she was married to another man when she allegedly married the decedent as the trial court implicitly found that the probative value of the evidence which the widow submitted to show that she was not married to the other man when she married the decedent, including her self-serving affidavit and a passport application in which she identified herself as single, was inadequate to show that she could prove the validity of her marriage to the decedent by admissible evidence having a modicum of credibility if her motion was granted. *Crowther v. Estate of Crowther*, 258 Ga. App. 498, 574 S.E.2d 607 (2002).

Denial of a defendant's motion to withdraw admissions under O.C.G.A. § 9-11-36(b) was proper because the defendant failed to establish that presentation of the merits would have been subverted by permitting the withdrawal; the defendant's pleadings contained perfunctory denials and failed to present or refer to any admissible evidence. *Turner v. Mize*, 280 Ga. App. 256, 633 S.E.2d 641 (2006).

Trial court properly denied a real estate seller's motion to withdraw the seller's admissions. The trial court was authorized to construe the inconsistent statements of the seller's principal against the seller, absent a reasonable explanation to

explain the contradiction; moreover, the principal's contention that the parties expressly agreed to give the seller the authority to unilaterally increase the sales price without notice would vitiate the sales agreement. *Fox Run Props, LLC v. Murray*, 288 Ga. App. 568, 654 S.E.2d 676 (2007).

In a premises liability suit brought by the parents of a decedent, the trial court did not err in denying the parents' motion to withdraw their admissions. The parents failed to present evidence contradicting the admissions to be withdrawn, which helped establish that the decedent voluntarily entered into a violent fight with an acquaintance to resolve a personal money dispute. *Porter v. Urban Residential Dev. Corp.*, 294 Ga. App. 828, 670 S.E.2d 464 (2008).

It was not error, in a workers' compensation case, to deny the motion of an employer and insurer to withdraw or amend the employer's and insurer's deemed admissions to a worker's requests for admission because: (1) the employer and insurer did not answer the requests, resulting in the deemed admissions under O.C.G.A. § 9-11-36(a)(2) and (b); and (2) any error in denying the motion was harmless as the admissions were cumulative of other evidence showing the worker's disability. *Ready Mix USA, Inc. v. Ross*, 314 Ga. App. 775, 726 S.E.2d 90 (2012), cert. denied, No. S12C1202, 2012 Ga. LEXIS 664 (Ga. 2012).

Trial court did not abuse the court's discretion in denying a personal guarantor's request to withdraw the guarantor's admissions because the matters in the requests for admissions were admitted by operation of law, pursuant to O.C.G.A. § 9-11-36(a)(2), when the guarantor failed to answer the requests within 30 days of service. Moreover, the guarantor made no attempt in the trial court to show that the admissions were incredible on their face or to present admissible, credible evidence refuting the admissions. *Brooks v. Multibank 2009-1 RES-ADC Venture, LLC*, 317 Ga. App. 264, 730 S.E.2d 509 (2012).

Use of Admissions

Limitation on use of admissions. — Plain language of subsection (b) of

O.C.G.A. § 9-11-36 confines the use of admissions to the action in which the admissions are made and forbids the admissions' use in a subsequent or other action including a renewal action under O.C.G.A. § 9-2-61. *Mumford v. Davis*, 206 Ga. App. 148, 424 S.E.2d 306 (1992).

After movant creditor sought sanctions, pursuant to Fed. R. Bankr. P. 9011, against the debtor's counsel for alleged misconduct, the court would not consider new allegations that had not been noticed for 21 days, and would not consider admissions made by the debtor in a different proceeding, under O.C.G.A. § 9-11-36(b). *Schwindler v. Screen (In re Screen)*, 2004 Bankr. LEXIS 2655 (Bankr. S.D. Ga. June 4, 2004).

Under Georgia law, a matter admitted was conclusively established for the purpose of the state court action only and was not an admission by a debtor for purposes of a nondischargeability action in bankruptcy court. However, the statute did not bar the creditor's reliance on collateral estoppel. *Allen v. Morrow (In re Morrow)*, 508 B.R. 514 (Bankr. N.D. Ga. 2014).

Summary Judgment

When summary judgment proper.

— When a party fails to answer a request for admissions within the requisite time and admissions remove all issues of fact, the other party is entitled to the grant of a motion for summary judgment. *West v. Milner Enters., Inc.*, 162 Ga. App. 667, 292 S.E.2d 538 (1982).

By failing to respond to requests for admissions under O.C.G.A. § 9-11-36(a), a resident made admissions which left no material issue of triable fact on the resident's complaint, so the entry of summary judgment against the resident on the merits based on the failure to respond to discovery was proper. *Le v. Shepherd's Pond Homeowners Ass'n*, 280 Ga. App. 36, 633 S.E.2d 363 (2006).

In an insureds' suit against a construction company regarding the company's mold remediation work on the insureds' home, since the company had filed a counterclaim for unpaid rental fees, summary judgment in favor of the company was proper because the insureds' failure to respond to the company's requests for ad-

missions conclusively established the facts set out in the requests such that no genuine issues of material fact remained for resolution by a jury. *Stephens v. Alan V. Mock Construction Co., Inc.*, 302 Ga. App. 280, 690 S.E.2d 225, cert. denied, No. S10C1012, 2010 Ga. LEXIS 533 (Ga. 2010).

When summary judgment improper. — Because the trial court applied the wrong legal standard in refusing to allow the defendants to withdraw the defendants' admissions, and should have applied the standard set forth in O.C.G.A. § 9-11-36(b) and considered whether withdrawal would serve the presentation of the merits and whether it would prejudice the plaintiffs, summary judgment was improper; moreover, the trial court erroneously held that summary judgment was proper because the defendants had shown no excuse for the defendants' former counsel's failure to respond to the plaintiffs' request for admissions as the defendants were not required to make such a showing. *Sayers v. Artistic Kitchen Design, LLC*, 280 Ga. App. 223, 633 S.E.2d 619 (2006).

Treatment of matters not objected to or denied in considering summary judgment. — Trial judge was authorized to treat matters covered by request for admissions which were neither objected to nor denied as admitted in considering the plaintiff's motion for summary judgment. *Bailey v. Bailey*, 227 Ga. 55, 178 S.E.2d 864 (1970).

Untimely answers not considered in ruling on summary judgment. — When answers to requests for admission were in fact filed after expiration of the statutory time, but without permission for late filing and when there was no motion seeking permission to withdraw the admissions resulting from the failure to respond timely, the answers could not be considered by the trial court in ruling on a motion for summary judgment. *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981).

Failure to respond to request for admissions. — Supplier, which sought to collect amounts owed on an open account from a contractor and a guarantor, was entitled to summary judgment because

Summary Judgment (Cont'd)

the contractor's and the guarantor's failure to respond to a request for admissions resulted in the admission of all of the material facts supporting the supplier's claims under O.C.G.A. § 9-11-36(a)(2). *Powerhouse Custom Homes, Inc. v. 84 Lumber Co., L.P.*, 307 Ga. App. 605, 705 S.E.2d 704 (2011).

Trial court did not err in granting summary judgment to a surety on the issues of breach of contract and declaratory judgment because the Georgia Department of Corrections failed to respond to the requests for admissions; therefore, the claims were deemed admitted since the admissions covered all the essential claims presented in the surety's verified complaint. *State Dep't of Corr. v. Developers Sur. & Indem. Co.*, 324 Ga. App. 371, 750 S.E.2d 697 (2013).

Filing of motion to withdraw after hearing for summary judgment. — Motion to withdraw admissions, filed after hearing on motion for summary judgment but prior to entry of summary judgment, was timely. *Hanson v. Farmer*, 163 Ga. App. 561, 295 S.E.2d 343 (1982).

Failure to file pro se responses with court not grounds for summary judgment. — When the appellant timely

served unsworn pro se responses to requests for admission on appellee, and in support of the appellee's motion for summary judgment the appellee personally filed a copy of the responses with the court, the appellant's failure to file the responses with the court would not support summary judgment in the plaintiff's favor as such a result would not be consistent with principles of substantial justice. *Mundt v. Olson*, 155 Ga. App. 145, 270 S.E.2d 344 (1980).

When a request for admission merely asks the party to respond with an opinion and does not require the admission of a fact by the party, the party's response is not sufficient to support a summary judgment motion by the party submitting the request for admission. *American Cyanamid Co. v. Allrid*, 176 Ga. App. 831, 338 S.E.2d 14 (1985).

Service of responses. — Service of responses to requests to admit was timely as calculated pursuant to O.C.G.A. § 1-3-1(d)(3); therefore, the requests were not deemed admitted. The fact that the certificate of service was not filed with the clerk under Ga. Unif. Super. Ct. R. 5.2 until later did not impact the fact that service of the responses was timely. *Cruickshank v. Fremont Inv. & Loan*, 307 Ga. App. 489, 705 S.E.2d 298 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 181 et seq.

C.J.S. — 27 C.J.S., Discovery, § 163 et seq. 35A C.J.S., Federal Civil Procedure, §§ 684, 743, 744 et seq., 751. 36A C.J.S., Federal Courts, § 878.

ALR. — What constitutes a "denial" within Federal Rule of Civil Procedure 36 and similar state statutes and rules pertaining to admissions before trial, 36 ALR2d 1192.

Time for filing responses to requests for admissions; allowance of additional time, 93 ALR2d 757.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes

and rules, to respond to requests for admission of facts not within his personal knowledge, 20 ALR3d 756.

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 ALR3d 1430.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 ALR4th 489.

Propriety, under Rule 56 of the Federal Rules of Civil Procedure, of granting summary judgment when deponent contradicts in affidavit earlier admission of fact in deposition, 131 ALR Fed. 403.

9-11-37. Failure to make discovery; motion to compel; sanctions; expenses.

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending or, on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken;

(2) **Motion; protective order.** If a deponent fails to answer a question propounded or submitted under Code Section 9-11-30 or 9-11-31, or a corporation or other entity fails to make a designation under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31, or a party fails to answer an interrogatory submitted under Code Section 9-11-33, or if a party, in response to a request for inspection submitted under Code Section 9-11-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to subsection (c) of Code Section 9-11-26;

(3) **Evasive or incomplete answer.** For purposes of the provisions of this chapter which relate to depositions and discovery, an evasive or incomplete answer is to be treated as a failure to answer; and

(4) **Award of expenses of motion.**

(A) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the

motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by court in county where deposition is taken.

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this Code section or Code Section 9-11-35, the court in which the action is pending may make such orders in regard to the failure as are just and, among others, the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders, or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; or

(E) Where a party has failed to comply with an order under subsection (a) of Code Section 9-11-35 requiring him to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this paragraph, unless the party failing

to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders, or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Code Section 9-11-36 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that the request was held objectionable pursuant to subsection (a) of Code Section 9-11-36, or the admission sought was of no substantial importance, or the party failing to admit had reasonable ground to believe that he might prevail on the matter, or there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.**

(1) If a party or an officer, director, or managing agent of a party or a person designated under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf of a party fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers or objections to interrogatories submitted under Code Section 9-11-33, after proper service of the interrogatories, or fails to serve a written response to a request for inspection submitted under Code Section 9-11-34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just; and, among others, it may take any action authorized under subparagraphs (b)(2)(A) through (b)(2)(C) of this Code section. In lieu of any order, or in addition thereto, the court shall require the party failing to act or the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(2) The failure to act described in the provisions of this chapter which relate to depositions and discovery may not be excused on the ground that the discovery sought is objectionable unless the party

failing to act has applied for a protective order as provided by subsection (c) of Code Section 9-11-26. (Ga. L. 1966, p. 609, § 37; Ga. L. 1967, p. 226, § 18; Ga. L. 1970, p. 157, § 1; Ga. L. 1972, p. 510, § 10; Ga. L. 1984, p. 22, § 9; Ga. L. 1992, p. 6, § 9.)

Cross references. — Additional sanctions which may be imposed upon regulated utilities failing to comply with discovery requests of Public Service Commission, § 46-2-57. Failure to make discovery and motion to compel discovery in probate court proceedings, Uniform Rules for the Probate Courts, Rule 6.4.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 37, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For article, “Truth and Uncertainty: Legal Control of the Destruction of Evidence,” see 36 Emory L.J. 1085 (1987). For annual survey on trial practice and procedure, see 42 Mercer L. Rev. 469 (1990). For article, “Standing Orders: Filling the Gap Between the Civil Practice Act and the Practice,” see 9

Ga. St. B.J. 28 (2004). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

For note, “Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act,” see 7 Ga. St. B.J. 385 (1971). For note, “Preferential Treatment of the United States Under Federal Civil Discovery Procedures,” see 13 Ga. L. Rev. 550 (1979).

For comment on Millholland v. Oglesby, 223 Ga. 230, 154 S.E.2d 194 (1967), see 4 Ga. St. B.J. 392 (1968). For case comment, “Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ORDER COMPELLING DISCOVERY

FAILURE TO COMPLY WITH ORDER

EXPENSES ON FAILURE TO ADMIT

FAILURE TO RESPOND TO DISCOVERY REQUESTS

General Consideration

Editor’s notes. — Georgia Laws 1972, p. 510, made substantial revisions to certain Code sections of this chapter dealing with discovery. Prior to the 1972 amendment, this Code section was substantially the same as former Code 1933, § 38-2111. Hence, decisions based on this Code section prior to its 1972 amendment should be consulted with care.

In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 38-2108, 38-2109, and 38-2111 are included in the annotations for this Code section.

Purpose of 1972 amendment. — This section was amended in 1972 in order to bring the statute into conformity with the federal rule. Mayer v. Interstate Fire Ins.

Co., 243 Ga. 436, 254 S.E.2d 825 (1979).

More frequent sanctions encouraged. — The 1972 amendments to the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) are intended to encourage more frequent imposition of sanctions in cases in which there has been an abuse of the discovery rules. Mayer v. Interstate Fire Ins. Co., 243 Ga. 436, 254 S.E.2d 825 (1979).

Minimal court participation intended. — System provided by this section is designed to operate as efficiently as possible with minimal participation by the trial court. Mayer v. Interstate Fire Ins. Co., 243 Ga. 436, 254 S.E.2d 825 (1979).

Statute provides no remedy allowing court to strike answers to inter-

rogatories. *Bratten Apparel, Inc. v. Lyons Textile Mill, Inc.*, 129 Ga. App. 384, 199 S.E.2d 632 (1973).

Fifth Amendment privilege. — For a discussion of the procedure to be followed to compel discovery when a party raises Fifth Amendment privilege against matters sought to be discovered, see *Axson v. National Sur. Corp.*, 254 Ga. 248, 327 S.E.2d 732 (1985).

Denial of an accused's motion for a protective order under O.C.G.A. § 9-11-26(c) was affirmed as the Fifth Amendment could not be used to justify a protective order to stay all discovery in the accused's civil forfeiture proceeding under O.C.G.A. § 16-14-7 pending the conclusion of the accused's criminal Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., case; while the privilege against self-incrimination extends to answers creating a "real and appreciable" danger of establishing a link in the chain of evidence needed to prosecute, the trial court has to determine if the answers could incriminate the witness, and if the trial court determines that the answers could not incriminate the witness, the witness has to testify or be subject to the court's sanction. *Chumley v. State of Ga.*, 282 Ga. App. 117, 637 S.E.2d 828 (2006).

For what purposes sanctions are authorized. — Ordinarily, sanctions can be applied only for failure to comply with an order of court; the only exceptions to this scheme are subsection (d) of this section, which permits an immediate sanction for complete failure to respond to a notice of deposition, interrogatories, or a request for inspection, and subsection (c), which authorizes imposition of expenses for an unjustified failure to admit. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Sanction of dismissal for failure to comply with discovery provisions requires a conscious or intentional failure to act that is in fact willful, as distinguished from an accidental or involuntary non-compliance. *City of Griffin v. Jackson*, 239 Ga. App. 374, 520 S.E.2d 510 (1999).

In a medical malpractice case, when a patient did not reveal to the providers being sued or to the trial court, that the

patient's expert witness had withdrawn from the case, causing an unnecessary delay in the discovery process for 10 months, it was proper for the trial court to grant the providers' motion to dismiss the complaint, under O.C.G.A. § 9-11-37(b)(2), whether or not the trial court found the patient's conduct was willful because the evidence supported the trial court's ruling. *Flott v. Southeast Permanente Med. Group, Inc.*, 274 Ga. App. 622, 617 S.E.2d 598 (2005).

In a medical malpractice case, when a patient did not reveal to the providers being sued, or to the trial court, that the patient's expert witness had withdrawn from the case, causing an unnecessary delay in the discovery process for 10 months, it was proper for the trial court to grant the providers' motion to dismiss the complaint, under O.C.G.A. § 9-11-37(b)(2), whether or not the witness had been subpoenaed for a deposition. *Flott v. Southeast Permanente Med. Group, Inc.*, 274 Ga. App. 622, 617 S.E.2d 598 (2005).

In a medical malpractice case when the trial court dismissed a married couple's claims against two defendants because the court found that the couple abused the civil litigation process, O.C.G.A. § 9-11-37(b) did not support the trial court's action; the complaint had not been dismissed as a discovery sanction. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Total failure to respond to discovery results in immediate sanctions. — Party may seek immediate sanctions without the necessity of a motion to compel when there has been a total failure to respond to discovery. *Allison v. Wilson*, 320 Ga. App. 629, 740 S.E.2d 355 (2013).

Suit properly dismissed due to party's failure to attend scheduled depositions that were properly noticed. — Motorist's suit was properly dismissed under O.C.G.A. § 9-11-37(d) as the motorist failed to attend any of three scheduled depositions that were properly noticed under O.C.G.A. § 9-11-30(b)(1), defense counsel was not required to address the motorist's proposed discovery plan, and

General Consideration (Cont'd)

counsel's failure to do so did not excuse the motorist's failure to attend the depositions. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

Imposition of sanctions under subsections (b) and (d) distinguished. — There must be an order under subsection (a) of this section before sanctions are imposed under subsection (b), while under subsection (d) the party aggrieved may move directly for the imposition of sanctions. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Motion for a specific sanction is not required before a trial judge is authorized to give that sanction. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Under paragraph (b)(2) and subsection (d) of this section, motion to apply "sanctions as provided by law" vests discretion in the trial court in which the action is pending to make such orders in regard to the failure to answer interrogatories as are just, and although it may be the better practice to request a specific sanction, it is not necessary to do so. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Requirements for subsection (d) sanctions. — There need be no order to compel discovery as provided for in subsection (b) of O.C.G.A. § 9-11-37 as a basis to impose sanctions provided for in subsection (d) of this section. All that is required is a motion, notice, and a hearing. *Cook v. Lassiter*, 159 Ga. App. 24, 282 S.E.2d 680 (1981).

Although it is not necessary to issue an order compelling discovery as provided for in subsection (b) of O.C.G.A. § 9-11-37 prior to imposing the sanction of dismissal under subsection (d), a motion, notice, and hearing are required. *Barrego v. OHM Remediation Servs. Corp.*, 245 Ga. App. 389, 537 S.E.2d 774 (2000).

Willful failure formerly prerequisite to imposition of harsh sanctions. — Harsh sanctions of dismissal, default, or the striking of pleadings under this section prior to its amendment by Ga. L. 1972, p. 510, § 10, were applicable only upon a showing that the failure to make

discovery was willful, and dismissal could not operate as an adjudication on the merits unless the court found that the failure was willful. *Morton v. Retail Credit Co.*, 128 Ga. App. 446, 196 S.E.2d 902 (1973).

Failure to afford opportunity to be heard on sanctions motion. — In a professional negligence action, the trial court erred in striking the affidavit of the developer's counsel filed in support of the developer's motion to vacate or set aside the order of dismissal for an alleged discovery violation, thereby refusing to afford the developer an opportunity to be heard on the merits of the sanctions motion before deciding the motion. *N. Druid Dev., LLC v. Post, Buckley, Schuh & Jernigan, Inc.*, No. A14A1101, 2014 Ga. App. LEXIS 724 (Nov. 7, 2014).

Failure to conduct hearing on motion for sanctions or make finding failure to respond was willful. — Dismissal of the plaintiffs' negligence action with prejudice was not proper because there was no motion to compel prior to filing the motion for sanctions, there was no hearing on the motion for sanctions, and there was nothing in the record before the appellate court that demanded a finding that the plaintiffs' rescheduling of the plaintiffs' depositions and failure to respond to certain discovery was willful. *Taylor v. Marshall*, 321 Ga. App. 752, 743 S.E.2d 444 (2013).

Service of motion by mail. — Motion to impose sanction under Ga. L. 1972, p. 510, § 10 (see now O.C.G.A. § 9-11-37) may be properly served upon the defendant's attorney by mail pursuant to Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5(b)). *Phillips v. Peachtree Hous.*, 138 Ga. App. 596, 226 S.E.2d 616 (1976).

Broad discretionary power is given to courts by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to assure safeguards against oppressive and unfair questions and demands, and conversely, very broad discretion is granted in applying sanctions against disobedient parties, in order to assure compliance with the orders of the courts. *Dean v. Gainesville Stone Co.*, 120 Ga. App. 315, 170 S.E.2d 348 (1969).

Courts are specifically granted discre-

tion to dismiss complaints or render default judgments against disobedient parties, including parties disobeying an order to produce. *Dean v. Gainesville Stone Co.*, 120 Ga. App. 315, 170 S.E.2d 348 (1969).

Excusability of delay for discretion of court. — Decision whether or not there was legal excuse for delay is discretionary with the trial court. *Thompson v. Baker Motor Co.*, 122 Ga. App. 599, 178 S.E.2d 261 (1970).

Discretion of trial court not interfered with. — Policy of appellate courts of this state to refuse to interfere with the trial court's exercise of the court's discretion, in absence of abuse, applies to the trial judge's exercise of broad discretionary powers authorized under the discovery provisions of the Civil Practice Act (see *new O.C.G.A. Ch. 11, T. 9*). *Dean v. Gainesville Stone Co.*, 120 Ga. App. 315, 170 S.E.2d 348 (1969).

Historically, it has been the policy of the appellate courts to refuse to interfere with the exercise of a trial court's discretion except in cases of clear abuse; this policy is applicable to the exercise of the broad discretion granted a judge under the discovery provisions of the Civil Practice Act, *O.C.G.A. Ch. 11, T. 9*, and particularly *O.C.G.A. § 9-11-37*. *Rucker v. Blakey*, 157 Ga. App. 615, 278 S.E.2d 158 (1981).

Appellate court will not reverse a trial court's decision on discovery matters absent a clear abuse of discretion. *Nixon v. Sandy Springs Fitness Ctr., Inc.*, 167 Ga. App. 272, 306 S.E.2d 362 (1983).

Under the discovery provisions of the Civil Practice Act, *O.C.G.A. Ch. 11, T. 9*, the trial judge is granted broad discretion. Historically, it has been the policy of the Georgia appellate courts to refuse to interfere with a trial court's exercise of such discretion in the absence of abuse. *Freeman v. Ripley*, 177 Ga. App. 522, 339 S.E.2d 795 (1986).

Trial judges have broad discretion in controlling discovery, including imposition of sanctions, and appellate courts will not reverse a trial court's decision on such matters unless there has been a clear abuse of discretion. *Amaechi v. Somsino*, 259 Ga. App. 346, 577 S.E.2d 48 (2003).

In a medical malpractice suit, a trial court did not abuse the court's discretion

in denying the parents' *O.C.G.A. 9-11-37(a)(2)* motion to compel a doctor to answer a deposition question regarding why the doctor no longer delivered babies because the parents' did not comply with *Ga. Unif. Super. Ct. R. 6.4(B)* by conferring with opposing counsel in a good faith effort to resolve the discovery dispute, and the requested information was immaterial after the trial court dismissed the underlying breach of fiduciary claim. *Hooks v. Humphries*, 303 Ga. App. 264, 692 S.E.2d 845 (2010).

Preliminary sanctions authorized. — Trial court would be justified in imposing one or more of the sanctions available under *O.C.G.A. § 9-11-37* prior to the imposition of the ultimate sanction of striking pleadings and entering a default judgment. *Carter v. Data Gen. Corp.*, 162 Ga. App. 379, 291 S.E.2d 99 (1982).

Order awarding attorney fees not appealable. — 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).

Sanctions less severe than dismissal are preferred. — As a general rule, the trial court should attempt to compel compliance with the court's orders through the imposition of lesser sanctions than dismissal. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Motion improper for quashing or enforcement of notice to produce. — Motions pursuant to *O.C.G.A. §§ 9-11-26, 9-11-34, and 9-11-37* for a protective order or sanctions are not proper vehicles for the quashing or the enforcement of a *O.C.G.A. § 24-10-26* notice to produce. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Dismissal sanction applies to disobedience of order to produce. — Courts are specifically granted the discretion to dismiss complaints or to render

General Consideration (Cont'd)

default judgments against disobedient parties, and this applies to the disobeying of an order to produce. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987); *Champion Mgt. Ass'n v. McGahee*, 227 Ga. App. 895, 490 S.E.2d 215 (1997), overruled in part, *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (Ga. 2000); *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (2000).

If a party does not comply with a discovery order, the trial court may impose sanctions under O.C.G.A. § 9-11-37(b)(2), including dismissal of the complaint; the trial court may impose sanctions after giving the non-complying party an opportunity to be heard and determining that the party's failure to comply with the discovery order was willful. *Amaechi v. Somsino*, 259 Ga. App. 346, 577 S.E.2d 48 (2003).

Corporation was improperly prevented from exercising the corporation's right to dismiss the corporation's action as the corporation did not have prior knowledge that the action would be dismissed as requested in a limited liability partnership's motion for sanctions for alleged discovery abuses when the notice of voluntary dismissal was filed. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

No default judgment on pleadings. — Failure of a nonmoving party to file responsive material does not automatically entitle the moving party to judgment because there is no such thing as a default judgment on the pleadings. *Cameron v. Miles*, 311 Ga. App. 753, 716 S.E.2d 831 (2011).

Repetition of order unnecessary prior to imposing sanctions. — When a court orders one party to permit discovery pursuant to O.C.G.A. § 9-11-26(c), upon that party's willful failure to comply with the court's order, the party seeking sanctions need not move the court pursuant to subsection (a) of O.C.G.A. § 9-11-37 to repeat the court's order before proceeding

to move the court pursuant to subsection (b) for the imposition of sanctions. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705, 353 S.E.2d 548 (1987).

Once motion for sanctions has been filed, imposition cannot be precluded by a belated response made by the opposite party. *Bryant v. Nationwide Ins. Co.*, 183 Ga. App. 577, 359 S.E.2d 441 (1987) (dismissal of complaint not abuse of discretion); *Singleton v. Eastern Carriers, Inc.*, 192 Ga. App. 227, 384 S.E.2d 202 (1989).

Dismissal not invoked absent request therefor. — Sanctions which may be imposed by O.C.G.A. § 9-11-37 are to be awarded on motion, and when the complaining party does not request the sanction of dismissal, it is error for the court to invoke that sanction. *Citibank N.A. v. Hill*, 161 Ga. App. 186, 288 S.E.2d 258 (1982).

There is no authority for a codefendant to become the beneficiary of a dismissal under subsection (d) of O.C.G.A. § 9-11-37 merely because of a failure of the plaintiff to comply with the other co-defendant's discovery actions. *Singleton v. Eastern Carriers, Inc.*, 192 Ga. App. 227, 384 S.E.2d 202 (1989); *West v. Equifax Credit Info. Servs., Inc.*, 230 Ga. App. 41, 495 S.E.2d 300 (1998); *Barrego v. OHM Remediation Servs. Corp.*, 245 Ga. App. 389, 537 S.E.2d 774 (2000).

Trial court erred in finding two guarantors in contempt and ordering the guarantors' incarceration for failing to comply with a post-judgment discovery order without affording the guarantors notice and an opportunity to be heard, in violation of the grantors' due process rights. *Harrell v. Fed. Nat'l Payables, Inc.*, 284 Ga. App. 395, 643 S.E.2d 875 (2007).

Intentional false response in negligence action resulted in sanctions. — In a negligence suit wherein a train patron was attacked and raped while exiting a train station, a trial court properly struck a public transportation authority's answer for the authority's intentionally false response regarding the creation and maintenance of the documents that would have reflected the security officers' activities during the relevant shifts. The evi-

dence established that the authority intentionally destroyed the logs of the security officers then represented to the train patron and the trial court that the documents did not exist. *MARTA v. Doe*, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

False response equivalent to failure to respond and justified sanctions. — An intentionally false response to a document production request, particularly concerning a pivotal issue in the litigation, authorizes a trial court to impose the sanctions permitted by O.C.G.A. § 9-11-37 for a total failure to respond. *MARTA v. Doe*, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

Ex parte communications. — Because a patient provided an authorization form that did not in any way restrict discussions between defense counsel and the patient's former treating physicians, the trial court did not err by denying the patient's O.C.G.A. § 9-11-37 motion for sanctions based upon ex parte communications between the doctor's attorney and a cardiologist in violation of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq. *Hamilton v. Shumpert*, 299 Ga. App. 137, 682 S.E.2d 159 (2009).

No error in reopening discovery as a sanction. — Trial court did not err in reopening discovery as a sanction for a passenger's conduct pursuant to O.C.G.A. § 9-11-37 because it was well within the trial court's discretion to reopen discovery to provide the employer with an opportunity to fully explore the relevant aspects of the employer's defense; moreover, there was evidence to support the trial court's finding as to the lack of completeness and veracity in the passenger's deposition and discovery responses. *Mincey v. Ga. Dep't of Cmty. Affairs*, 308 Ga. App. 740, 708 S.E.2d 644 (2011).

Motion to compel arbitration properly denied. — In a class action suit seeking to hold a lender liable for payday loans, the trial court properly ruled that the lender could not compel arbitration and denying the lender's motion to compel as moot because the trial court's earlier ruling striking the lender's arbitration defense as a discovery violation sanction was an adjudication on the merits and

carried a res judicata effect. *Ga. Cash Am. v. Greene*, 318 Ga. App. 355, 734 S.E.2d 67 (2012).

Award of attorney fees proper when needless expenses incurred. — In awarding attorney fees to the appellees under O.C.G.A. §§ 9-11-37 and 9-15-14 after an appellant voluntarily dismissed the appellant's lawsuit, the trial court did not violate the legislative intent behind O.C.G.A. § 9-11-41(a). The appellees incurred needless expense because of the appellant's discovery violations, and the litigation was unnecessarily expanded prior to the appellant's voluntary dismissal. *Hart v. Redmond Reg'l Med. Ctr.*, 300 Ga. App. 641, 686 S.E.2d 130 (2009).

Cited in *Hunter v. A-1 Bonding Serv., Inc.*, 118 Ga. App. 498, 164 S.E.2d 246 (1968); *Williamson v. Lunsford*, 119 Ga. App. 240, 166 S.E.2d 622 (1969); *Siefferman v. Kirkpatrick*, 121 Ga. App. 161, 173 S.E.2d 262 (1970); *Elberton-Elbert County Hosp. Auth. v. Watson*, 121 Ga. App. 550, 174 S.E.2d 470 (1970); *Cochran v. Neely*, 123 Ga. App. 500, 181 S.E.2d 511 (1971); *Morton v. Retail Credit Co.*, 124 Ga. App. 728, 185 S.E.2d 777 (1971); *Terminal Transp. Co. v. Burger Chef Sys.*, 127 Ga. App. 535, 194 S.E.2d 333 (1972); *DOT v. Livaditis*, 129 Ga. App. 358, 199 S.E.2d 573 (1973); *DeWes Enters., Inc. v. Town & Country Carpets, Inc.*, 130 Ga. App. 610, 203 S.E.2d 867 (1974); *Prattes v. Southeast Ceramics, Inc.*, 132 Ga. App. 584, 208 S.E.2d 600 (1974); *Aldridge v. Mercantile Nat'l Bank*, 132 Ga. App. 788, 209 S.E.2d 234 (1974); *Johnson v. Martin*, 132 Ga. App. 813, 209 S.E.2d 256 (1974); *Thomas v. Home Credit Co.*, 133 Ga. App. 602, 211 S.E.2d 626 (1974); *Taylor v. Stapp*, 134 Ga. App. 468, 215 S.E.2d 23 (1975); *Herring v. Herring*, 234 Ga. 539, 216 S.E.2d 833 (1975); *Marchman v. Head*, 135 Ga. App. 475, 218 S.E.2d 151 (1975); *Johnson v. Martin*, 137 Ga. App. 312, 223 S.E.2d 465 (1976); *Fraser v. Sun Valley, Inc.*, 137 Ga. App. 392, 224 S.E.2d 80 (1976); *Kyle v. King*, 138 Ga. App. 612, 226 S.E.2d 767 (1976); *Shannon Co. v. Heneveld*, 138 Ga. App. 756, 227 S.E.2d 412 (1976); *Bell v. Fine Prods. Co.*, 139 Ga. App. 878, 229 S.E.2d 808 (1976); *Master v. Savannah Sur. Assocs.*, 143 Ga. App. 109, 237 S.E.2d

General Consideration (Cont'd)

599 (1977); Dyna-Comp Corp. v. Selig Enters., Inc., 143 Ga. App. 462, 238 S.E.2d 571 (1977); Buckley v. Thornwell, 143 Ga. App. 764, 240 S.E.2d 258 (1977); Savannah Sur. Assocs. v. Master, 240 Ga. 438, 241 S.E.2d 192 (1978); Dillard v. Allstate Ins. Co., 145 Ga. App. 755, 245 S.E.2d 30 (1978); Interstate Fire Ins. Co. v. Mayer, 147 Ga. App. 751, 250 S.E.2d 158 (1978); Karp v. Friedman, Alpren & Green, 148 Ga. App. 204, 250 S.E.2d 819 (1978); Bellcraft, Inc. v. Bennett, 147 Ga. App. 830, 251 S.E.2d 53 (1978); Ambassador College v. Goetzke, 244 Ga. 322, 260 S.E.2d 27 (1979); Thornton v. Burson, 151 Ga. App. 456, 260 S.E.2d 388 (1979); Wetherington v. Koepenick & Horne, Inc., 153 Ga. App. 302, 265 S.E.2d 107 (1980); Simpson v. Applegarth Supply Co., 153 Ga. App. 446, 265 S.E.2d 357 (1980); Ray v. Department of Human Resources, 155 Ga. App. 81, 270 S.E.2d 303 (1980); Copeland v. Levine, 157 Ga. App. 327, 277 S.E.2d 320 (1981); Troy v. City of Atlanta, 158 Ga. App. 496, 280 S.E.2d 892 (1981); E.H. Siler Realty & Bus. Broker, Inc. v. Sanderlin, 158 Ga. App. 796, 282 S.E.2d 381 (1981); Anton v. Garvey, 160 Ga. App. 157, 286 S.E.2d 493 (1981); Bouldin v. Aragona-Garcia Enters., Inc., 161 Ga. App. 396, 288 S.E.2d 673 (1982); Fagala v. Morrison, 161 Ga. App. 655, 289 S.E.2d 528 (1982); Cameron v. Cox, 162 Ga. App. 268, 291 S.E.2d 115 (1982); Brewer v. Brewer, 249 Ga. 517, 291 S.E.2d 696 (1982); Keese v. Brown, 250 Ga. 383, 297 S.E.2d 487 (1982); Porter v. Eastern Air Lines, 165 Ga. App. 152, 300 S.E.2d 525 (1983); Browning v. Powell, 165 Ga. App. 315, 301 S.E.2d 52 (1983); Morrison v. DOT, 166 Ga. App. 144, 303 S.E.2d 501 (1983); Freeman v. Allstate Bus. Sys., 166 Ga. App. 249, 304 S.E.2d 97 (1983); Georgia Power Co. v. Brown, 169 Ga. App. 45, 311 S.E.2d 236 (1983); Mathis v. Hegwood, 169 Ga. App. 547, 314 S.E.2d 122 (1984); Polston v. Levine, 171 Ga. App. 893, 321 S.E.2d 350 (1984); Porter v. Allstate Ins. Co., 172 Ga. App. 657, 324 S.E.2d 515 (1984); Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700, 334 S.E.2d 28 (1985); Clements v. Toombs County Hosp. Auth., 175 Ga. App. 651, 334 S.E.2d 188 (1985);

Georgia Communications Corp. v. Horne, 174 Ga. App. 69, 329 S.E.2d 192 (1985); Albers v. Brown, 177 Ga. App. 620, 340 S.E.2d 260 (1986); Gilbert v. E & W Constr. Co., 181 Ga. App. 281, 351 S.E.2d 523 (1986); Freeman v. Nodvin, 181 Ga. App. 663, 353 S.E.2d 546 (1987); Holbrook Contracting, Inc. v. Tyner, 181 Ga. App. 838, 354 S.E.2d 22 (1987); Guillebeau v. Jenkins, 182 Ga. App. 225, 355 S.E.2d 453 (1987); Cowley v. First Fed. Sav. & Loan Ass'n, 187 Ga. App. 278, 370 S.E.2d 36 (1988); Home Owners Warranty Corp. v. Pinewood Bldrs., Inc., 188 Ga. App. 324, 373 S.E.2d 34 (1988); Lightwerk Studios, Inc. v. Door Units of Ga., Inc., 191 Ga. App. 756, 382 S.E.2d 699 (1989); American Express Co. v. Baker, 192 Ga. App. 21, 383 S.E.2d 576 (1989); Jarallah v. Pickett Suite Hotel, 193 Ga. App. 325, 388 S.E.2d 333 (1989); McDonald v. Winn, 194 Ga. App. 459, 390 S.E.2d 890 (1990); Eason v. Bowie, 196 Ga. App. 199, 395 S.E.2d 600 (1990); Schrembs v. Atlanta Classic Cars, Inc., 197 Ga. App. 450, 398 S.E.2d 712 (1990); Green v. Snellings, 260 Ga. 751, 400 S.E.2d 2 (1991); In re Geraghty, 261 Ga. 260, 403 S.E.2d 788 (1991); Hendricks v. Emerson, 199 Ga. App. 208, 404 S.E.2d 279 (1991); C & S Indus. Supply Co. v. Proctor & Gamble Paper Prods. Co., 199 Ga. App. 197, 404 S.E.2d 346 (1991); Revels v. Wimberly, 223 Ga. App. 407, 477 S.E.2d 672 (1996); Roberts v. Forte Hotels, Inc., 227 Ga. App. 471, 489 S.E.2d 540 (1997); Snellings v. Sheppard, 229 Ga. App. 753, 494 S.E.2d 583 (1998); Great W. Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998); Gibbs v. Abiose, 235 Ga. App. 214, 508 S.E.2d 690 (1998); Sheppard v. Johnson, 255 Ga. App. 165, 564 S.E.2d 729 (2002); Cotting v. Cotting, 261 Ga. App. 370, 582 S.E.2d 527 (2003); In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008); Gibson Law Firm, LLC v. Miller Built Homes, Inc., 327 Ga. App. 688, 761 S.E.2d 95 (2014); 915 Indian Trail, LLC v. State Bank & Trust Co., 328 Ga. App. 524, 759 S.E.2d 654 (2014).

Order Compelling Discovery

Party "refuses to obey" an order simply by failing to comply therewith. Millholland v. Oglesby, 114 Ga. App. 745,

152 S.E.2d 761 (1966), rev'd on other grounds, 223 Ga. 230, 154 S.E.2d 194 (1967) (decided under former Code 1933, § 38-2111).

Motion to compel not required for sanctions. — Because the filing of a motion to compel is not a condition precedent for seeking sanctions under O.C.G.A. § 9-11-37(d)(1), the court did not abuse the court's discretion when the court granted the defendant's motion to dismiss based on the plaintiff's failure to produce the requested documents. *Deep South Constr., Inc. v. Slack*, 248 Ga. App. 183, 546 S.E.2d 302 (2001).

Factors in determining whether to enter order of production. — While admissibility is a matter to be determined when records, documents, etc., are tendered in evidence, and is not a test for determining whether an order requiring production should be entered, pertinence or relevance is. *Horton v. Huie*, 113 Ga. App. 166, 147 S.E.2d 669 (1966) (decided under former Code 1933, § 38-2109).

Refusal to order production of irrelevant material proper. — When it appears from an inspection of the notice to produce that the records and documents sought are not relevant to the issues before the court, it is not error to refuse an order for their production. *Horton v. Huie*, 113 Ga. App. 166, 147 S.E.2d 669 (1966) (decided under former Code 1933, § 38-2109).

Applicability of paragraph (a)(3) of this section is confusing, and renders the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) inconsistent with the federal rules. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

As to interpretation of Federal Rule 37(a)(3) to mean that trial court may order a complete answer if an evasive answer is given, just as if no answer were given, but not to authorize the entry of a penalty under Federal Rule 37(d) for an evasive answer, see *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

An inadequate response to an order to compel answers to interrogatories is not to be treated under O.C.G.A. § 9-11-37 as a total failure to respond under subsection (d) so as to authorize a

dismissal of the complaint under subsection (d). *Rivers v. Goodson*, 184 Ga. App. 70, 360 S.E.2d 740 (1987).

Treatment of partial or evasive answers. — Answering partially or giving evasive answers evidences a dispute between the parties, which is brought before the trial court by a motion under subsection (a) of this section to compel discovery, and is resolved through an order to compel answers or a protective order. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

When party answering interrogatories for corporation was not qualified to speak as its agent, the court could have issued an order under subsection (a) of this section, and it was error to strike the defendant's response and enter a default judgment, treating the defendant's inadequate answer as a total failure to make an initial response under subsection (d). *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

To prevent either party from frivolously propounding questions or giving evasive answers, the trial court must require the losing party to pay the expenses involved in obtaining the order, including attorney fees, unless the court feels that opposition to the motion was substantially justified or otherwise excused. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Expenses of motion. — Trial court had the power under subparagraph (a)(4)(A) of O.C.G.A. § 9-11-37 to award the attorney fees incurred by the plaintiffs as a result of the defendant's erroneous denial of the existence of relevant documents as though awarding attorney fees in connection with a successful motion to compel. *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

Award of expenses must have been made pursuant to paragraph (a)(4) of O.C.G.A. § 9-11-37 as "the reasonable expenses incurred in obtaining the order." *Department of Transp. v. Hardaway Co.*, 216 Ga. App. 262, 454 S.E.2d 167 (1995).

O.C.G.A. § 9-11-37 requires the court to give a party an opportunity to be heard before costs are imposed on a motion to compel. *Gomez v. Peters*, 221 Ga. App. 57, 470 S.E.2d 692 (1996).

Order Compelling Discovery (Cont'd)

Because the defendant claimed to not have items sought in a request for production, and then claimed to have the items and would produce the items, but then could not find the items, it was reasonable for the trial court to allow discovery to ascertain the fate of the items and to cast the costs on the defendant. *City of Griffin v. Jackson*, 239 Ga. App. 374, 520 S.E.2d 510 (1999).

Superior court did not err in failing to consider a wife's request for attorney fees and to award fees to the wife on the ground that the husband refused to comply with the discovery and/or there was a substantial disparity in the parties' financial circumstances because the wife did not pursue her motion to compel discovery but instead opted to obtain sought documents from third parties; therefore, an award of expenses for bringing the motion under O.C.G.A. § 9-11-37(a)(4) was not warranted. *Jones-Shaw v. Shaw*, 291 Ga. 252, 728 S.E.2d 646 (2012).

Trial court did not abuse the court's discretion by denying the plaintiff's motion for attorney fees, pursuant to O.C.G.A. § 9-11-37, because although the trial court denied the defendant's motion to compel, the parties entered into a consent order resolving their discovery disputes, and the trial court specifically found that the making of the defendant's motion to compel discovery was substantially justified and an award of expenses would be unjust. *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013).

Court did not abuse discretion in charging answering party \$100.00 in attorney's fees when the answering party returned interrogatories with some evasive and incomplete responses, notwithstanding the fact that the answering party was acting pro se and the defective answers were not purposeful, but were due to ineptness and ignorance of the law. *Stephens v. Howle*, 132 Ga. App. 92, 207 S.E.2d 632 (1974).

Post-judgment interrogatories. — Direct appeal of an order to respond to post-judgment interrogatories is improper since such an order is not final. It is appealable only by compliance with sub-

section (b) of O.C.G.A. § 5-6-34. *Cornelius v. Finley*, 204 Ga. App. 299, 418 S.E.2d 815 (1992).

Orders denying or requiring answers to interrogatories are reviewable on appeal after final judgment if the orders have affected the final judgment and are not moot. *Benefield v. Malone*, 110 Ga. App. 607, 139 S.E.2d 500 (1964), later appeal, 112 Ga. App. 408, 145 S.E.2d 732 (1965) (decided under former Code 1933, § 38-2111).

Order as final adjudication subject to review. — When the plaintiff contends that it is impossible for the plaintiff to comply with an order which stays the proceeding until the plaintiff appears in order to depose, such an order effectively terminates the plaintiff's right to trial and is a final adjudication subject to review. *Millholland v. Oglesby*, 223 Ga. 230, 154 S.E.2d 194 (1967) (decided under former Code 1933, § 38-2111). For comment, see 4 Ga. St. B.J. 392 (1968).

Order compelling discovery not condition precedent to sanctions. — When a defendant wilfully, knowingly, falsely, consistently, and unequivocally denies the existence of requested discoverable documents, the plaintiff is not required to obtain an order compelling discovery before seeking sanctions under O.C.G.A. § 9-11-37(d)(1). *Howard v. Alegria*, 321 Ga. App. 178, 739 S.E.2d 95 (2013).

Failure to Comply with Order

Discretion of court. — By subparagraph (b)(2)(C) of O.C.G.A. § 9-11-37, the courts are specifically granted the discretion to dismiss complaints or to render default judgments against disobedient parties, including those disobeying an order to produce. *Sellers v. Nodvin*, 207 Ga. App. 742, 429 S.E.2d 138 (1993).

Imposition of lesser sanctions than dismissal and default was not an abuse of discretion since there was no evidence that the defendant's failure to comply with the court's earlier orders compelling the defendant's complete response to the plaintiff's discovery requests was the result of intent or ill will. *Yarbrough v. Kirkland*, 249 Ga. App. 523, 548 S.E.2d 670 (2001).

In a negligence suit involving the death of an individual in an automobile collision, a trial court did not abuse the court's discretion by precluding an auto manufacturer from contesting certain issues at trial based on the auto manufacturer's failure to follow the trial court's order to produce crash tests results documentation from prior litigation as the trial court held a hearing in which the auto manufacturer had the opportunity to explain the continued refusal to produce the documents and, instead of imposing the ultimate sanction of dismissal or default judgment for failure to comply with discovery, the trial court instead concluded that the willful disobedience was subject to the lesser sanction of issue preclusion. *Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

Court may impose sanctions for failure to comply with post-judgment discovery orders, including contempt for not appearing at a deposition, notwithstanding the fact that the person to be deposed is a nonresident, although there is apparently no provision for the aggrieved party to move for a dismissal of an appeal. *Ostroff v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

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).

Attorney fees imposed. — Trial court did not err in ordering the non party object of post-judgment discovery to pay reasonable attorney fees as a sanction for the need to bring a motion to compel that post-judgment discovery after a paper hearing on the plaintiff's motion. *Esasky v. Forrest*, 231 Ga. App. 488, 499 S.E.2d 413 (1998).

Trial court did not abuse the court's

discretion in awarding an assistant professor attorney fees as prayed for in the professor's motion for a protective order because an award of fees was authorized by O.C.G.A. § 9-11-37(a)(4)(A). *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010).

Award of sanctions in the form of attorney fees against a heating system installer that failed to produce an officer for deposition, despite a court order, was proper under O.C.G.A. § 9-11-37(b)(2), as the sanctions were proper despite the fact that there was no order under O.C.G.A. § 9-11-37(a) or O.C.G.A. § 9-11-26(c), the failure to appear was not substantially justified, and the amount awarded was not excessive. *Carrier Corp. v. Rollins, Inc.*, 316 Ga. App. 630, 730 S.E.2d 103 (2012).

Court retained jurisdiction after remand. — Before an appellate court reversed the trial court's denial of summary judgment to the defendant, the trial court had found that the defendant had abused the discovery process; as the trial court had expressly reserved the issue of sanctions for later determination, the court had jurisdiction, after remand, to award the plaintiff's attorney's fees under O.C.G.A. § 9-11-37(d). *CSX Transp., Inc. v. Deen*, 278 Ga. App. 845, 630 S.E.2d 119 (2006).

Party "refuses to obey" an order simply by failing to comply therewith. *Millholland v. Oglesby*, 114 Ga. App. 745, 152 S.E.2d 761 (1966), rev'd on other grounds, 223 Ga. 230, 154 S.E.2d 194 (1967) (decided under former Code 1933, § 38-2111).

Court has discretion as to consequences to be imposed for failure to comply with discovery provisions. *Wilson v. Barrow*, 107 Ga. App. 555, 130 S.E.2d 812 (1963) (decided under former Code 1933, § 38-2111).

Subsection (b)(2) contains two standards — one general and one specific — that limit a trial court's discretion: first, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. *Carey*

Failure to Comply with Order (Cont'd)

Can., Inc. v. Hinely, 181 Ga. App. 364, 352 S.E.2d 398, rev'd on other grounds, 257 Ga. 150, 356 S.E.2d 202, cert. denied, 484 U.S. 898, 108 S. Ct. 233, 98 L. Ed. 2d 192 (1987).

Issuance of order compelling an answer is prerequisite to use of sanctions. Corbin v. Pilgrim Realty Co., 151 Ga. App. 102, 258 S.E.2d 758 (1979), overruled on other grounds, Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Before sanctions may be imposed under subsection (b) of O.C.G.A. § 9-11-37, the party seeking discovery must first obtain an order under subsection (a) of that section requiring the recalcitrant party to make discovery. Wills v. McAuley, 166 Ga. App. 4, 303 S.E.2d 26, cert. denied, 251 Ga. 41, 305 S.E.2d 120 (1983).

Time for compliance with order. — Absent a definite time for compliance, the 30-day period contemplated by Ga. L. 1972, p. 510, § 6 (see now O.C.G.A. § 9-11-33) should be the applicable time within which to comply with an order to respond to interrogatories. Massengale v. Georgia Power Co., 153 Ga. App. 476, 265 S.E.2d 830 (1980).

When the trial court ordered the defendant to pay the plaintiffs' attorney fees, necessitated by the defendant's failure to comply with discovery and causing a mistrial, the defendant could not wait until final judgment in the action to pay the fees and was properly held in contempt for failure to obey the court's order. Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

When a motion for sanctions is brought for a party's failure to comply with an order compelling answers to interrogatories, the existence or nonexistence of willfulness should be considered not only in the context of the time period prescribed in the order compelling answers, but in the context of the entire period beginning with service of interrogatories and ending with service of answers. Didio v. Chess, 218 Ga. App. 550, 462 S.E.2d 450 (1995).

Two-step remedial procedure. — Remedy available to a party whose discov-

ery efforts are frustrated by an opponent's refusal to submit to discovery is contained in the two-step procedure of this section: first, a motion for an order compelling discovery must be made, heard, and granted, affording the obstinate party another opportunity to provide discovery, and if the obstinate fails to do so, the second step is for the court to enter such order as is just, including the imposition of one or more of the sanctions set forth in paragraph (b)(2) of this section. Corbin v. Pilgrim Realty Co., 151 Ga. App. 102, 258 S.E.2d 758 (1979), overruled on other grounds, Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981); Thornton v. Burson, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Subsection (b) of this section gives the trial court a range of sanctions to be imposed when an order under subsection (a) is violated. Mayer v. Interstate Fire Ins. Co., 243 Ga. 436, 254 S.E.2d 825 (1979).

Paragraph (b)(2) of O.C.G.A. § 9-11-37 is designed to punish a willful failure or conscious disregard of an order. Brunswick Mfg. Co. v. Sizemore, 176 Ga. App. 838, 338 S.E.2d 288 (1985).

Mere technical failure to comply with an order will not justify extreme sanctions such as dismissal and default. Thornton v. Burson, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Hearing required for determination of failure to comply with order. — When the court enters an order that a party comply with discovery, that order cannot be self-executing, i.e., it cannot provide for the automatic imposition of the ultimate sanction of dismissal or default judgment upon the party's failure to file the responses. Rather, the court must first make a determination, following notice of an opportunity for a hearing, that the failure to comply with the order was willful. Hernandez v. State, 200 Ga. App. 368, 408 S.E.2d 160 (1991).

Trial court committed harmful error by denying a party's request to "make an offer of proof" at the hearing on a motion for sanctions. Loftin v. Gulf Contracting Co., 224 Ga. App. 210, 480 S.E.2d 604 (1997).

In a personal injury action, although the trial court stated in the court's dismissal order that an injured party's non-compliance with a court-ordered sanction was willful, because the appeals court could not make that determination from the record, and the injured party was not afforded a hearing prior to the imposition of attorney fees and dismissal, the order was reversed; however, the fact that the court-ordered sanction was erroneous did not excuse the injured party's failure to comply with it. *Cole v. Hill*, 286 Ga. App. 535, 649 S.E.2d 633 (2007).

Hearing not required. — In an action to recover unpaid legal fees, a law firm was not entitled to a hearing on a motion for discovery sanctions under O.C.G.A. § 9-11-37(d) against former clients because the trial court was not contemplating the ultimate sanction of dismissal or a default judgment and the clients did not willfully fail to comply as the clients did not receive the post-judgment interrogatories. *McFarland & McFarland, P.C. v. Holtzclaw*, 293 Ga. App. 663, 667 S.E.2d 874 (2008).

Inadequate response due to counsel's error. — Paragraph (b)(2) of O.C.G.A. § 9-11-37 is not designed to punish parties when their otherwise timely but partially inadequate response to discovery orders is the result of their counsel's erroneous misunderstanding of the full mandate thereof. *Brunswick Mfg. Co. v. Sizemore*, 176 Ga. App. 838, 338 S.E.2d 288 (1985).

Notice of hearing. — After the plaintiff claimed that the trial court erred in not holding an evidentiary hearing on the motion to dismiss for failure to comply with discovery, contending that, because the hearing was noticed by a "rule nisi" order, it could not be the mandated evidentiary hearing, it was held that while it is true that a rule nisi is generally used to notify parties of and compel the parties to appear at hearings for a determination of temporary or other interlocutory matters, it may also be used to notify a final hearing. *Smith v. National Bank*, 182 Ga. App. 55, 354 S.E.2d 678 (1987).

Willfulness required for harsh sanctions. — If failure is not willful, harsh sanctions of dismissal, default, or

the striking of pleadings have no application. *Leonard Bros. Trucking Co. v. Crymes Transps., Inc.*, 124 Ga. App. 341, 183 S.E.2d 773 (1971), overruled on other grounds, *Turner v. Harper*, 233 Ga. 483, 211 S.E.2d 742 (1975).

Replacement of the word "refusal" with the word "failure" in paragraph (b)(2) of this section by Ga. L. 1972, p. 510, § 10, was not intended to change the construction of the rule relating to a showing of willfulness prior to imposition of the harsher sanctions of subparagraph (b)(2)(C). *Swindell v. Swindell*, 233 Ga. 854, 213 S.E.2d 697 (1975).

Showing of willfulness is required in order to impose the sanction of default judgment upon a party. *McCane v. Cappett Corp.*, 151 Ga. App. 423, 260 S.E.2d 379 (1979).

Showing of willfulness is a predicate to imposition of the harsher sanctions. *Thornton v. Burson*, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Under subparagraph (b)(2)(C) or subsection (d) of O.C.G.A. § 9-11-37, a finding of willfulness is a prerequisite to dismissal. *Smith v. National Bank*, 182 Ga. App. 55, 354 S.E.2d 678 (1987).

Because the trial court failed to make an explicit finding of willfulness in the court's order dismissing the plaintiff's case for failure to comply with an order compelling discovery, the dismissal was reversed, and the case was remanded for a hearing on the issue. *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

Question of willfulness only relevant in selection of sanctions. — Failure to comply is the only requisite for finding of a violation, and "willfulness" is relevant only when selecting sanctions. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Showing of willfulness is a predicate to imposition of the harsher sanctions. — Trial court did not err in striking a party's pleadings and entering default judgment against the party since the party's conduct showed a willful failure to comply with the court's order. *Butler v. Biven Software, Inc.*, 238 Ga. App. 525, 522 S.E.2d 1 (1999).

Time period for which willfulness to be considered. — When a motion for

Failure to Comply with Order (Cont'd)

sanctions is brought under paragraph (b)(2) of this section for a party's failure to comply with an order compelling answers, the existence or nonexistence of willfulness should be considered not only in the context of the time period prescribed in the order compelling answers, but in the context of the entire period beginning with service of interrogatories and ending with service of answers; events transpiring during this entire time period are probative of whether a party acted with conscious indifference to the consequences of failure to comply with the order compelling answers. *Lee v. Morrison*, 138 Ga. App. 332, 226 S.E.2d 124 (1976); *Thurman v. Unicare, Inc.*, 151 Ga. App. 880, 261 S.E.2d 785 (1979); *City of Griffin v. Jackson*, 239 Ga. App. 374, 520 S.E.2d 510 (1999).

Relevant time frame for considering issue of willfulness. — In considering the issue of willfulness, the entire period beginning with service of the interrogatories and ending with the service of the answers must be considered, not just the period mandated by the order requiring answers. *Smith v. National Bank*, 182 Ga. App. 55, 354 S.E.2d 678 (1987).

Failure to cooperate with counsel as willful misconduct. — Failure to maintain contact and cooperate with counsel about pending litigation so that discovery can be made is willful misconduct; however, a party may claim that it was counsel who failed to communicate with the party. *Thurman v. Unicare, Inc.*, 151 Ga. App. 880, 261 S.E.2d 785 (1979).

Hearing on willfulness not always required. — Trial court need not conduct a hearing on the issue of willfulness in every case. Such a requirement serves no purpose when the court can otherwise determine willfulness on the part of the party against whom the sanctions are sought. *Schrembs v. Atlanta Classic Cars, Inc.*, 261 Ga. 182, 402 S.E.2d 723 (1991).

Since the trial court was authorized to find that a party intentionally and wilfully failed to comply with a court order compelling discovery, such finding could be made from the record, without the neces-

sity of conducting a separate hearing. *Johnson v. Lomas Mtg. USA, Inc.*, 201 Ga. App. 562, 411 S.E.2d 731, cert. denied, 201 Ga. App. 904, 411 S.E.2d 731 (1991).

Under subparagraph (b)(2)(D) of O.C.G.A. § 9-11-37, a hearing is not required before contempt may be found for the willful violation of an order compelling discovery. *Ryland Group, Inc. v. Daley*, 245 Ga. App. 496, 537 S.E.2d 732 (2000), overruled on other grounds, *John Thurmond & Assocs. v. Kennedy*, 284 Ga. 469, 668 S.E.2d 666 (2008).

Trial court properly dismissed an injured party's complaint as a sanction for violating a discovery order because the injured party failed to appear at a hearing on a driver's motion for a sanction of dismissal, despite being advised of the hearing several times; the injured party did not explain why the two-month delay in complying with the discovery order was excusable, but stated that the injured party's counsel had a "head cold virus" for three months; further, the trial court was not required to hold a hearing on the issue of willfulness. *Russaw v. Burden*, 272 Ga. App. 632, 612 S.E.2d 913 (2005).

Hearing on willfulness not required. — Trial court did not err in entering a default judgment against sellers pursuant to O.C.G.A. § 9-11-37(b)(2) without conducting a hearing on willfulness because the sellers did not file answers to a broker's request for interrogatories and production of documents within the time period prescribed by O.C.G.A. §§ 9-11-33(a)(2) and 9-11-34(b)(2), and the sellers only filed a response to the request after the trial court's grant of the broker's initial motion to compel and for sanctions. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

Dismissal without hearing on willfulness improper. — When a couple failed to attend their depositions, it was error to dismiss their personal injury case under O.C.G.A. § 9-11-37 without holding a hearing on the issue of willfulness; no motion to compel had been filed against the couple, no hearing of any type had been held previously, and the record would support a finding that the couple, who said later that they believed the depositions would be rescheduled because

they were still in the process of obtaining counsel, had acted negligently, not willfully. *McConnell v. Wright*, 281 Ga. 868, 644 S.E.2d 111 (2007).

Remand for willfulness issue when trial court failed to make explicit willfulness finding. — Because the trial court failed to explicitly make a finding of willfulness in the court's order dismissing the plaintiff's damages complaint for failure to comply with an order to compel, directing the plaintiff to fully and completely respond to the defendant's interrogatories and requests for production, and in any event, the court could not say that such a determination could be made from the record, the matter was remanded directing the trial court to conduct a hearing on the issue of willfulness. *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

Finding of willfulness authorized. — When there is no evidence that a party was unaware of the trial court's order requiring the party to attend a deposition, nor any evidence to indicate that the party made a good faith effort to comply with the order of the trial court, the court was authorized to find that the party's failure to attend the deposition was willful. *McCane v. Cappett Corp.*, 151 Ga. App. 423, 260 S.E.2d 379 (1979).

At least six instances of noncompliance demonstrated that the defendant not only intentionally refused to respond to discovery but also consciously disregarded a court discovery order. *Resource Network Int'l, Inc. v. Ritz-Carlton Hotel Co.*, 232 Ga. App. 242, 501 S.E.2d 573 (1998).

Trial court did not abuse the court's discretion in dismissing a complaint with prejudice after the plaintiff failed to comply with the trial court's order compelling discovery even after being advised of possible dismissal for failure to comply; the trial court found the plaintiff's testimony not credible and that the plaintiff willfully failed to comply with the order compelling the discovery. *Amaechi v. Somsino*, 259 Ga. App. 346, 577 S.E.2d 48 (2003).

Trial court did not err in imposing discovery sanctions against a credit life insurer in a class action involving 900,000 policies because the insurer failed to provide the requested information on the

insurer's policy-holders for over six years after the insurer was ordered to do so, and the information was available to the insurer. *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 698 S.E.2d 19 (2010).

Trial court did not abuse the court's discretion by granting the defendant's motion for sanctions and dismissing the complaint with prejudice because the plaintiff provided no explanation to the trial court for the plaintiff's failure even to begin work on collecting the documents at issue before the August 5 deadline; accordingly, the trial court did not abuse the court's discretion when the court concluded that the plaintiff's failure to comply with the court's order of July 22 was willful and in total disregard of that order. *RLBB Acquisition, LLC v. Baer*, 329 Ga. App. 483, 765 S.E.2d 662 (2014).

Recitation of willful misconduct in default order not necessary. — Court order imposing an authorized sanction of default judgment is not fatally defective if it does not contain a recitation of willful misconduct, when there is an adequate showing of failure to comply with a court order which equates to willful misconduct. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Paragraph (b)(2) of this section does not require a specific finding of willfulness in the court order, but only a showing of willfulness in the record on the transcript. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Condition precedent to dismissal. — Statute does not authorize the court to apply the sanction of dismissal of a pleading after purported answers to interrogatories have been served and filed unless the condition precedent has been fulfilled which requires the propounder to file a motion to compel answers and the order to compel has been disobeyed. *Bratten Apparel, Inc. v. Lyons Textile Mill, Inc.*, 129 Ga. App. 384, 199 S.E.2d 632 (1973).

Dismissal authorized for conscious or intentional failure to act. — Under subparagraph (b)(2)(C) of this section, a trial court may in the court's discretion dismiss an action as a sanction for the plaintiff's failure to comply with an order to provide discovery when the court finds a conscious or intentional failure to act as

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distinguished from an accidental or involuntary noncompliance. *Turner v. Gray*, 150 Ga. App. 714, 258 S.E.2d 905 (1979).

Trial court did not abuse the court's discretion in striking the appellants' answers and counterclaims, and in entering a default judgment against the appellants, as a sanction order was imposed against the appellants due to discovery misconduct, but the appellants refused to pay the sanction despite the fact that the appellants had sufficient funds to do so, and instead, the appellants continued to argue the propriety of the prior order compelling the appellants' appearance at a deposition and the payment of attorney fees; the appellants' failure to comply was deemed willful. *Mateen v. Dicus*, 275 Ga. App. 742, 621 S.E.2d 487 (2005), rev'd on other grounds, 281 Ga. 455, 637 S.E.2d 377 (2006); vacated in part, 286 Ga. App. 760, 650 S.E.2d 272 (2007).

Dismissal of complaint proper. — When there was nothing in the record to excuse the plaintiff's failure to serve answers as required by law, or to show that the plaintiff, through counsel, sought by authorized action to obtain a delay or extension of time in which to serve answers, the action of the trial judge in sustaining a motion to dismiss and dismissing the complaint was proper. *Morton v. Retail Credit Co.*, 124 Ga. App. 728, 185 S.E.2d 777 (1971).

There was no abuse of discretion in the trial court's granting the motion to dismiss predicated on the continued failure of the plaintiff to respond with documentation as to the plaintiff's medical treatment and expenses. *Lewis v. Evans*, 212 Ga. App. 49, 441 S.E.2d 425 (1994).

Because, at the time the trial court dismissed the plaintiff's complaint, the plaintiff's supplemental responses to the defendant's discovery request were still inadequate and evasive, and because of the fact-intensive nature of the claims, dismissal of the complaint was not an abuse of discretion. *Potter v. American Medicare Corp.*, 225 Ga. App. 343, 484 S.E.2d 43 (1997).

Court did not abuse the court's discre-

tion in dismissing the case when the plaintiff twice failed to attend the plaintiff's scheduled deposition. *Smith v. Adamson*, 226 Ga. App. 698, 487 S.E.2d 386 (1997).

Because an individual failed to attend depositions for which the individual was noticed, even after being ordered to do so by the trial court, and the individual did not respond to a motion for sanctions, the trial court's dismissal of the individual's complaint pursuant to O.C.G.A. § 9-11-37(b)(2) was not a clear abuse of discretion. *Woods v. Gatch*, 272 Ga. App. 642, 613 S.E.2d 187 (2005).

Trial court properly dismissed the plaintiffs' pro se complaint pursuant to O.C.G.A. § 9-11-37(d) on grounds that the plaintiffs wilfully failed to appear for the plaintiffs' depositions as the court's failure to rule on the plaintiffs' pending motions, including motions to compel, a motion for a more complete response, and a motion for protective order, did not excuse the plaintiffs' attendance; moreover, the grounds plaintiffs asserted in the plaintiffs' motion for protective order provided no basis for the trial court to order that the plaintiffs were not obligated to attend the depositions. *Rice v. Cannon*, 283 Ga. App. 438, 641 S.E.2d 562 (2007).

Trial court's dismissal of a suit brought by certain homeowners against an insurer for the homeowners' refusal to comply with various discovery orders of the trial court was upheld on appeal since by sworn affidavit, counsel for the insurer averred and sufficiently established that the homeowners never appeared for depositions; no hearing was required under O.C.G.A. § 9-11-37 for the trial court to determine the willfulness of the homeowners' noncompliance since the record established that hearings were held on the insurer's motions for sanctions. *Nanan v. State Farm Ins. Co.*, 286 Ga. App. 539, 650 S.E.2d 283 (2007), cert. denied, 555 U.S. 995, 129 S. Ct. 496, 172 L.Ed.2d 358 (2008).

Trial court properly dismissed the plaintiffs' complaint for failing to comply with a discovery order. Plaintiffs' counsel repeatedly misrepresented that counsel would provide discovery about an expert witness and counsel's failure to do so re-

sulted in more than one extension of the discovery period and also more than one continuance of the trial. *Freeman v. Foss*, 298 Ga. App. 498, 680 S.E.2d 557 (2009).

Striking of pleadings or entry of default for refusal to answer. — On refusal of a party to make answer after being directed to do so by the court, the court may strike the pleadings or render a judgment by default against the disobedient party. *Hatcher v. Scarboro*, 113 Ga. App. 103, 147 S.E.2d 361 (1966) (decided under former Code 1933, § 38-2111).

In an attorney disciplinary proceeding, the special master was authorized to strike the attorney's answer for the attorney's failure to produce documents. In re Washington, 270 Ga. 60, 504 S.E.2d 704 (1998).

Dismissal of answer improper. — When, in response to a court order, the defendant filed answers to all but seven of the interrogatories served on the defendant, it was improper for the court, on the same day and with no additional notice, to enter an order striking and dismissing the defendant's answer. *Delta Equities, Inc. v. Berry*, 127 Ga. App. 590, 194 S.E.2d 284 (1972).

Dismissal of complaint improper. — Because damages were presumed to flow from an alleged tortious act, a party alleging the commission of a tort was not required to provide the court with a detailed statement of damages. Thus, the trial court erred in dismissing the case for that party's failure to comply with such an order. *Wilson v. Home Depot USA, Inc.*, 288 Ga. App. 582, 654 S.E.2d 408 (2007), cert. denied, 2008 Ga. LEXIS 403 (Ga. 2008).

It was an abuse of discretion to dismiss a dog breeder's breach of contract suit under O.C.G.A. § 9-11-37 against a dog's co-owner due to the breeder's failure to comply with a court order to produce contracts with the breeder's other customers from over seven years earlier. There was no proof that such contracts existed, and even if the contracts did, the contracts' relevance to the lawsuit was questionable. *Anderson v. Silver*, 300 Ga. App. 1, 684 S.E.2d 73 (2009), cert. denied, No. S10C0134, 2010 Ga. LEXIS 214 (Ga. 2010).

Trial court erred in dismissing a client's claim against a surveying firm with prejudice under O.C.G.A. § 9-11-37(d) based on the client's failure to respond to discovery without first issuing an order compelling the client to comply with the discovery requests and without scheduling a hearing on the sanctions motion. *N. Druid Dev., LLC v. Post, Buckley, Schuh & Jernigan, Inc.*, 330 Ga. App. 432, 767 S.E.2d 29 (2014).

Default judgment improper. — In a product liability action, grant of a default judgment as to liability against the defendant was too severe a sanction for non-compliance with a discovery order because the defendant was entitled to a hearing on the motion for sanctions; there was no finding of willfulness, or bad faith, or a conscious indifference to the consequences of failure to comply and the evidence of what had transpired in the discovery process did not support the sanction. *GMC v. Conkle*, 226 Ga. App. 34, 486 S.E.2d 180 (1997).

Dismissal based on willful failure as adjudication on the merits. — Order of dismissal based on a finding of willful failure to comply with an order of the court can rightly have the effect of an adjudication on the merits; however, a dismissal which does not involve any finding of willfulness, but which is merely an automatic action following a certain lapse of time, falls within the "purely technical" rule of former Code 1933, § 110-503 (see now O.C.G.A. § 9-12-42) and cannot be considered an adjudication which would bar a subsequent action. *Maxey v. Covington*, 126 Ga. App. 197, 190 S.E.2d 448 (1972).

Prospective order imposing default not permitted. — Determination to invoke the penalty of default may not be made in a prospective, self-executing order as the court may not assume that a future failure will be unjustifiable; there must be an opportunity to explain the circumstances following the failure, with an express motion and notice to the party concerned. *Delta Equities, Inc. v. Berry*, 127 Ga. App. 590, 194 S.E.2d 284 (1972).

Language in order compelling responses, to the effect that "failing to comply with this order, defendant's answers to

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this complaint are ordered stricken," was invalid and unenforceable, as it had the effect of determining in advance that failure to respond to the order was willful or in conscious disregard of the order and such a determination cannot be made in a prospective, self-executing order. *Thornton v. Burson*, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Contempt as remedy. — Remedy for failure to answer, refusal to answer, or concealment of information is a citation for contempt. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966) (decided under former Code 1933, § 38-2108).

Attorney's defense to the trial court's order holding the attorney in contempt for the attorney's refusal to turn over a client's file challenging the underlying validity of the prior order requiring the attorney to turn over the file was a collateral attack that could be sustained under O.C.G.A. § 9-11-60(a) only if the prior order was void on its face. However, the trial court's prior order was not void on its face since: (1) the attorney was served with a motion to compel prior to the entry of the prior order; (2) the trial court had jurisdiction to issue an order to compel a nonparty to release necessary non-privileged documents specifically prepared in anticipation of a divorce action pending before the trial court under O.C.G.A. §§ 9-11-26(b), 9-11-34(c)(1), and 9-11-37(a); (3) the attorney willfully disregarded the prior order; and (4) the prior order was entered in a matter over which the trial court had subject matter jurisdiction, making its disobedience contempt of court. *Mary A. Stearns, P.C. v. Williams-Murphy*, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

To impose a contempt of court sanction there must be an order of court as is contemplated by subsection (b) of this section. *Kruger v. Kruger*, 146 Ga. App. 461, 246 S.E.2d 469 (1978).

Submission of untruthful answers as contempt of court. — Submission of untruthful answers to interrogatories is tantamount to a refusal to submit answers, and if made in defiance of a previ-

ous court order could be considered contempt. *Aetna Life Ins. Co. v. Greene*, 116 Ga. App. 783, 159 S.E.2d 87 (1967) (decided under former Code 1933, § 38-2111).

Jurisdiction of court for contempt purposes. — Contempt proceeding is not such a case as is contemplated by law in the provision that venue shall be in the county where an offense was committed or in the county of the residence of the respondent; in such cases, jurisdiction of the court trying the case in which evidence is taken by deposition extends to every person in the state whose testimony is being taken thereby, and to every county wherein such testimony is being taken. *Sorrells v. Cole*, 111 Ga. App. 136, 141 S.E.2d 193 (1965) (decided under former Code 1933, § 38-2111).

Under the look-through rule, a hypothetical coercive claim was the basis for federal jurisdiction over petitioner bank's Federal Arbitration Act petition, but petitioner payday loan companies' arbitration petition was precluded by a related underlying state court judgment holding the companies in contempt and striking the companies' arbitration defenses under O.C.G.A. § 9-11-37(b)(2) to respondent borrower's suit alleging violations of Georgia's usury statute, O.C.G.A. § 7-4-1 et seq.; Georgia's Industrial Loan Act, O.C.G.A. § 7-3-1 et seq.; and Georgia's Racketeer Influenced and Corrupt Organizations statute, O.C.G.A. § 16-14-1 et seq. *Cnty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011), cert. denied, U.S. , 133 S. Ct. 101, 184 L. Ed. 2d 22 (2012).

When the deponent appears and is deposed, but eventually refuses to answer further questions, the better practice is an order directing the deponent to continue the deposition and to answer all questions, rather than immediate sanctions under paragraph (b)(2) of this section. *King Orthopedic Appliances, Inc. v. Medical Funding Servs., Inc.*, 152 Ga. App. 544, 263 S.E.2d 485 (1979).

Objection to award of attorney fees without merit. — Party who fails to respond to interrogatories and does not apply for a protective order is in no position to object to the award of reasonable

attorney fees under subsection (b) of this section. *Sneider v. English*, 129 Ga. App. 638, 200 S.E.2d 469 (1973).

Addition of intervenor plaintiffs in class action after default imposed. — In a class action when discovery of all persons in the class is required to be made of the defendant, and discovery is unduly delayed by failure of the defendant to comply with an order of the court, addition of intervenor plaintiffs, after imposition of authorized sanction of default judgment, is authorized, in the discretion of the trial court. *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 216 S.E.2d 897 (1975).

Striking of answer reasonable sanction. — Failure to comply with the trial court's order compelling discovery is ample reason to impose the sanction of striking the answer. *Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.*, 166 Ga. App. 506, 305 S.E.2d 14 (1983).

When an insurer failed to produce documents after an order compelling production was obtained and after a trial court found that the refusal to comply with that order was wilful and in conscious disregard of the order, dismissal of the insurer's answer and entry of default judgment against the insurer was a proper sanction. *State Farm Mut. Auto. Ins. Co. v. Health Horizons, Inc.*, 264 Ga. App. 443, 590 S.E.2d 798 (2003).

Striking arbitration defenses proper. — Defendants' discovery violations were willful when the defendants withheld certain documents in order to "test their position," and as the defendants had not sought a protective order under O.C.G.A. § 9-11-26, but instead violated the trial court's orders compelling discovery by withholding the documents the defendants claimed were objectionable, the defendants' failure to comply with discovery orders was not excused; thus, it was a proper sanction under O.C.G.A. § 9-11-37 to strike the defendants' arbitration defenses. *Ga. Cash Am., Inc. v. Strong*, 286 Ga. App. 405, 649 S.E.2d 548 (2007), cert. denied, 2007 Ga. LEXIS 709 (Ga. 2007).

Inadequate, evasive and unresponsive answers. — After the court specifically found that answers served after the

motion to dismiss was filed were inadequate, evasive, and not responsive and this was amply supported by comparing the straightforward questions and the responses, this finding, along with the time period involved (one year and eight months, of which seven months elapsed between serving of interrogatories and filing of motion to compel answers) was without a doubt sufficient to uphold the exercise of discretion by the trial court in dismissing the complaint. *Smith v. National Bank*, 182 Ga. App. 55, 354 S.E.2d 678 (1987).

Entry of default judgment and striking of pleading erroneous. — After the defendant complied with that portion of the court's order directing the defendant to answer interrogatories but failed to pay the plaintiff's attorney fees incurred in obtaining the court order as directed by the court, the court erred in striking the defendant's pleading and entering a default judgment for the plaintiff without giving the defendant an opportunity to explain the failure. *Serwitz v. GECC*, 174 Ga. App. 747, 331 S.E.2d 95 (1985).

Rendering judgment by default and dismissal of counterclaim appropriate sanction. — Since the trial court had correctly followed the two-step procedure of O.C.G.A. § 9-11-37 and found the appellant to have repeatedly and willfully abused the discovery procedure, the court did not abuse the court's discretion by striking the appellant's answer, rendering judgment by default, and dismissing the counterclaim. *Rubin v. Cindyreal*, 171 Ga. App. 45, 318 S.E.2d 520 (1984).

Late request for sanctions. — Trial court was not justified in dismissing the plaintiff's lawsuit for failure to comply with a discovery order after the defendant made no motion to have sanctions imposed for some one and one-half months after the defendant received the plaintiff's affidavit and copies of the documents sought. *Sossenکو v. Michelin Tire Corp.*, 164 Ga. App. 201, 296 S.E.2d 754 (1982).

Failure to comply when order ambiguous and much of information already provided. — Trial court erred in dismissing lawsuit for failure to comply with a discovery order since the discovery

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order was ambiguous and did not require any specific items of information, there was full compliance with the portion of the order pertaining to a request for production of documents, much of the information sought was provided in response to other discovery requests, and counsel attempted unsuccessfully on several occasions to determine what further information was needed. *Harwood v. Great Am. Mgt. & Inv., Inc.*, 171 Ga. App. 488, 320 S.E.2d 269 (1984).

Prospective, self-executing order cannot be used by a trial court to invoke the drastic sanction of dismissal. *Steele v. Colbert*, 182 Ga. App. 680, 356 S.E.2d 736 (1987).

Imposition of a \$500 fine per day for past violations of the court's discovery order was an adjudication of criminal contempt, and the fine was therefore limited by O.C.G.A. § 15-7-4 to \$500. *Carey Can., Inc. v. Hinely*, 257 Ga. 150, 356 S.E.2d 202, cert. denied, 484 U.S. 898, 108 S. Ct. 233, 98 L. Ed. 2d 192 (1987).

Expenses. — Trial court is without authority to award expenses under subsection (b) of O.C.G.A. § 9-11-37 without some evidence upon which to base a determination that such expenses were "caused by the failure" of the party to comply with the discovery order. *Tandy Corp. v. McCrimmon*, 183 Ga. App. 744, 360 S.E.2d 70 (1987).

Payment of attorney's fees. — Defendant's willful failure to comply with an order requiring the payment of attorney's fees as reimbursement for the expenses incurred by the plaintiff in obtaining a discovery order authorizes the striking of defensive pleadings and the entry of default judgment pursuant to subdivision (b)(2)(C) of O.C.G.A. § 9-11-37. *Serwitz v. GECC*, 184 Ga. App. 632, 362 S.E.2d 439 (1987); *Toles v. G & K Servs., Inc.*, 230 Ga. App. 452, 496 S.E.2d 550 (1998).

Defendant's failure to make suitable arrangements to pay attorney's fees imposed as a discovery sanction warranted the sanction of dismissal. *Stokes v. Taco Bell Corp.*, 229 Ga. App. 558, 494 S.E.2d 355 (1998), overruled on other grounds,

Tenet Healthcare Corp. v. Louisiana Forum Corp., 538 S.E.2d 441 (Ga. 2000).

Because the trial court did not abuse the court's discretion in denying an employee's motions to compel and for sanctions on the ground that the employee did not satisfy the good faith requirement of Ga. Unif. Super. Ct. R. 6.4(B), the award of attorney fees to an employer as authorized by O.C.G.A. § 9-11-37(4)(B) was not improper. *Phillips v. Selecto Sci.*, 308 Ga. App. 412, 707 S.E.2d 615 (2011).

Trial court erred by awarding attorney fees under O.C.G.A. § 9-11-37(a)(4)(A) to a driver injured in a motor vehicle accident based on discovery violations of the car owner because the trial court erroneously believed that the court had issued a prior order compelling the car owner to provide information on locating and serving the car owner's nephew, who caused the rear-end collision. *Allison v. Wilson*, 320 Ga. App. 629, 740 S.E.2d 355 (2013).

Apportionment of expenses of motion. — When it was determined that some of the plaintiff company's discovery requests were not made with sufficient particularity and the plaintiff made a good faith effort to resolve the matter, the plaintiff was entitled to pursue a motion to compel and recover the plaintiff's fees under subparagraph (a)(4)(C) of O.C.G.A. § 9-11-37. *Mansell 400 Assocs., L.P. v. Entex Info. Servs., Inc.*, 239 Ga. App. 477, 519 S.E.2d 46 (1999).

Poverty as excuse or justification. — Proper time to offer one's poverty as an excuse or justification to the court for one's failure to comply with the court's discovery order is at the hearing on the imposition of sanctions. *Serwitz v. GECC*, 184 Ga. App. 632, 362 S.E.2d 439 (1987).

Sanctions imposed. — Since the plaintiff was in willful contempt of two judges' discovery orders, the plaintiff was properly assessed with attorney fees, court reporter costs, default judgment entered against the plaintiff and found in continuing contempt. *Jones v. Zezzo*, 162 Ga. App. 281, 290 S.E.2d 312 (1982).

Expenses on Failure to Admit

It is not necessary to compel admission by court order prior to award of attorney fees under subsection (c) of this

section. *Spencer v. Dupree*, 150 Ga. App. 474, 258 S.E.2d 229 (1979).

Amount of expenses awarded for failure to comply with an order for discovery or to admit the genuineness of a document or truth of any matter is within the discretion of the trial court. *Foster v. Morrison*, 177 Ga. App. 250, 339 S.E.2d 307 (1985).

Attorney fees properly denied. — Trial court properly rejected the hospital's claim for additional attorney fees under O.C.G.A. § 9-11-37(c) because the jury could have determined that the doctor simply did not remember signing a contract and the trial court did not err by finding that the doctor had not failed to admit the truth of the matter. *Whitaker v. Houston County Hosp. Auth.*, 272 Ga. App. 870, 613 S.E.2d 664 (2005).

Failure to Respond to Discovery Requests

Sanctions as enforcement of absolute duty to respond. — Party properly served has an absolute duty to respond, and the court may enforce this duty by imposing sanctions for the duty's violation. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979); *Suchnick v. Southern Gen. Ins. Co.*, 196 Ga. App. 687, 396 S.E.2d 609 (1990); *Cannon Air Transp. Servs. v. Stevens Aviation, Inc.*, 249 Ga. App. 514, 548 S.E.2d 485 (2001).

Order not required. — Prior to imposing the sanction of dismissal under subsection (d) of O.C.G.A. § 9-11-37, there need be no order to compel discovery as provided for in subsection (b) of § 9-11-37; all that is required is a motion, notice, and a hearing. *Stolle v. State Farm Mut. Auto. Ins. Co.*, 206 Ga. App. 235, 424 S.E.2d 807 (1992).

No contempt of court under subsection (d). — Since there will have been no court order in the situations to which subsection (d) of this section speaks, there can be no contempt of court thereunder. *Kruger v. Kruger*, 146 Ga. App. 461, 246 S.E.2d 469 (1978).

Attorney referred to in subsection (d) of O.C.G.A. § 9-11-37 is ordinarily the attorney advising the party at the time of the hearing on the motion to compel. *Nodvin v. Investguard, Ltd.*, 261

Ga. 805, 411 S.E.2d 708 (1992).

Notice of hearing on motion to compel required. — Whenever a party seeks sanctions under subsection (d) of O.C.G.A. § 9-11-37 against the other party's former counsel, the former counsel must be notified of the hearing on the motion to compel and must be given an opportunity to be heard. *Nodvin v. Investguard, Ltd.*, 261 Ga. 805, 411 S.E.2d 708 (1992).

Hearing required. — Because a trial court dismissed a healthcare network's breach of contract and fraud action for failure to comply with discovery under O.C.G.A. § 9-11-37(d) without holding a hearing on a hospital's motion to dismiss, the trial court abused the court's discretion. *ASAP Healthcare Network, Inc. v. Southwest Hosp. & Med. Ctr., Inc.*, 270 Ga. App. 76, 606 S.E.2d 98 (2004).

In a suit to confirm paternity and enforce a child support payment, a trial court abused the court's discretion in imposing sanctions against the father under O.C.G.A. § 9-11-37(b)(2) for his alleged failure to comply with production requests because the trial court failed to provide the father an opportunity to be heard prior to imposing sanctions. *Harrell v. Ga. Dep't of Human Res.*, 300 Ga. App. 497, 685 S.E.2d 441 (2009).

Because there was evidence that the defendants' failure to respond to discovery requests was negligent rather than wilful, with the defendants claiming not to have received the discovery requests, and defendants did respond to the discovery, albeit over a year later, the trial court erred in striking the defendants' answer as a sanction without a hearing as required by O.C.G.A. § 9-11-37(d). *Am. Radiosurgery, Inc. v. Rakes*, 325 Ga. App. 161, 751 S.E.2d 898 (2013).

Imposition of sanctions under subsections (b) and (d) distinguished. — Subsection (d) of this section deals with failure to make the initial response required, while subsections (a) and (b) provide a method of resolving differences between the parties and enforcing the court's determination; thus, there must be an order under subsection (a) before sanctions are imposed under subsection (b), while under subsection (d) the party aggrieved moves directly for the imposition

Failure to Respond to Discovery Requests (Cont'd)

of sanctions. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Immediate sanctions authorized under subsection (d). — Subsection (d) of this section permits the sanctions of subsection (b) to be imposed immediately for certain failures to act. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Serious or total failure to respond is prerequisite. — Authorization of immediate sanctions under subsection (d) of this section applies to nothing less than a serious or total failure to respond to interrogatories. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979); *Wetherington v. Koepenick & Horne, Inc.*, 153 Ga. App. 302, 265 S.E.2d 107 (1980); *Wills v. McAuley*, 166 Ga. App. 4, 303 S.E.2d 26, cert. denied, 251 Ga. 41, 305 S.E.2d 120 (1983).

Total failure to serve answers or objections constitutes a failure to respond under subsection (d) of this section, and subjects a party to immediate sanctions. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979); *Wills v. McAuley*, 166 Ga. App. 4, 303 S.E.2d 26, cert. denied, 251 Ga. 41, 305 S.E.2d 120 (1983).

Trial court did not abuse the court's discretion in dismissing the appellant's complaint after the appellant totally failed to answer, or properly object to, the appellee's interrogatories. *Tompkins v. McMickle*, 172 Ga. App. 62, 321 S.E.2d 797 (1984).

Upon being informed that the plaintiff still had failed totally to answer the interrogatories and to comply with the other proper and timely discovery, and considering the entire history of the proceeding, the trial court was authorized to impose immediately the ultimate sanction authorized by subsection (d) of O.C.G.A. § 9-11-37. *Vining v. Kimoto USA, Inc.*, 209 Ga. App. 296, 433 S.E.2d 342 (1993).

Former employee's federal claims against a former employer were barred by the doctrine of *res judicata*, even though the state court in the employee's prior action did not hold a hearing before dis-

missing the employee's complaint under O.C.G.A. § 9-11-37(d)(1), because the employee completely ignored the employer's discovery requests, failed to respond to the employer's properly served motion for sanctions, and failed to request a hearing on the motion; thus, the state court was not required to hold a hearing before imposing the sanction of dismissal. *Moten v. Alberici Constructors, Inc.*, 380 F. Supp. 2d 1355 (N.D. Ga. 2005).

Issuance of order not prerequisite to imposition of sanctions. — When a party entirely fails to respond to a set of interrogatories, sanctions may be imposed directly under subsection (d) of this section and a motion for an order compelling discovery under paragraph (a)(2) is not required. *Sneider v. English*, 129 Ga. App. 638, 200 S.E.2d 469 (1973).

Under subsection (d) of this section, failure of a party to appear for the taking of a deposition is grounds for the imposition of the sanctions contained therein, and unlike the similar sanctions found in subsection (b), there need be no order of court as a basis for imposition of the sanctions found in subsection (d). *Kruger v. Kruger*, 146 Ga. App. 461, 246 S.E.2d 469 (1978).

Order compelling discovery was not a condition precedent for the imposition of sanctions under O.C.G.A. § 9-11-37(d), and all that was required was a motion, notice, and a hearing; when a land owner presented no justification for the land owner's failure to respond to discovery and did not respond to motions to compel and for sanctions, the trial court did not err in dismissing the land owner's complaint due to a failure to respond to discovery. *Crane v. Darnell*, 268 Ga. App. 311, 601 S.E.2d 726 (2004).

Dismissal and default authorized without prior order. — Order dismissing the defendant's answer and rendering a judgment against the defendant as if in default is authorized under subsection (d) of this section without a prior order. *Carter v. Merrill Lynch, Pierce, Fenner & Smith*, 130 Ga. App. 522, 203 S.E.2d 766 (1974).

Order imposing sanctions of dismissing defensive pleadings and rendering default judgment for failure to make discovery

may be applied by the court without first ordering compliance. *Houston Gen. Ins. Co. v. Stein Steel & Supply Co.*, 134 Ga. App. 624, 215 S.E.2d 511 (1975).

Willfulness relevant in choice of sanction. — Any failure of the sort described in subsection (d) of this section permits invocation of the rule, regardless of the reason for the failure, but the court has discretion about the sanction to be imposed, and the presence or absence of willfulness remains relevant in the choice of sanction. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Dismissal proper for intentional failure to respond. — Plaintiff's failure to answer served interrogatories was the result of a conscious or intentional failure to act warranting dismissal, as distinguished from an accidental or involuntary noncompliance, since the interrogatories went unanswered for over eight months and were ultimately answered only after the defendant moved for sanctions. *Fidelity Enters., Inc. v. Heyman & Sizemore*, 206 Ga. App. 602, 426 S.E.2d 177 (1992).

Plaintiff's persistent failure to answer the interrogatories and to comply with other proper and timely discovery warranted dismissal of the complaint as authorized by subsection (d) of O.C.G.A. § 9-11-37. *Vining v. Kimoto USA, Inc.*, 209 Ga. App. 296, 433 S.E.2d 342 (1993).

Plaintiff's intentional failure to attend the plaintiff's deposition and answer discovery requests warranted dismissal of the complaint, and the fact that the defendant also failed to respond to discovery did not excuse the plaintiff's failure to comply with the rules. *West v. Equifax Credit Info. Servs., Inc.*, 230 Ga. App. 41, 495 S.E.2d 300 (1998).

Trial court could determine that the plaintiff's noncompliance was intentional based on evidence that the plaintiff failed to respond to requested discovery or to appear at the deposition without excuse or justification for the plaintiff's nonappearance. *Rivers v. Almand*, 241 Ga. App. 565, 527 S.E.2d 572 (1999).

Trial court's striking of the home owners' complaint in their civil action, arising from allegedly defective construction issues, was not an abuse of discretion pursuant to O.C.G.A. § 9-11-37(b)(2)(C) be-

cause the owners wilfully failed to comply with discovery requests, despite repeated warnings and orders over an ongoing period of time; there was a motion for sanctions, which allowed the owners an opportunity to be heard on the matter, and the parties had made more than one attempt to resolve the discovery disputes, pursuant to Ga. Unif. Super. Ct. R. 6.4. *Gropper v. STO Corp.*, 276 Ga. App. 272, 623 S.E.2d 175 (2005).

Finding of willful failure is necessary before trial judge is authorized to enter default judgment against a disobedient defendant. *Frady v. Irvin*, 245 Ga. 307, 264 S.E.2d 866 (1980).

Failure to make findings of willfulness not always reversible error. — Although it is the better practice to make a specific finding of willfulness, it is not reversible error for the trial court to fail to do so, particularly if the motion for sanctions alleges willful conduct. *Phillips v. Peachtree Hous.*, 138 Ga. App. 596, 226 S.E.2d 616 (1976).

Specific finding of willfulness in judgment not necessary. — Law authorizes the imposition of sanctions striking the defendant's pleadings when the failure to answer interrogatories is willful, but there is no requirement that the court make a specific finding in the court's judgment that such failure to answer was willful. *Smith v. Byess*, 127 Ga. App. 39, 192 S.E.2d 552 (1972).

Trial court's finding that the litigant's failure to answer was willful need not be explicitly stated in the court's order because it is implicit in the judgment itself that the court made such finding of willfulness. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols*, 138 Ga. App. 593, 226 S.E.2d 742 (1976).

Finding that the plaintiff not only failed to respond to the defendants' interrogatories in a timely fashion, but failed to seek an extension of time and failed even to contact the defendants concerning the problem, or even to respond to the defendants' motion to dismiss, was sufficient to authorize the trial court to dismiss the complaint. There is no requirement that the plaintiff display and the trial court find actual "willfulness," only a "conscious or intentional failure to act," as distin-

Failure to Respond to Discovery Requests (Cont'd)

guished from an accidental or involuntary noncompliance. *Bells Ferry Landing, Ltd. v. Wirtz*, 188 Ga. App. 344, 373 S.E.2d 50 (1988); *Roberts v. Maren Eng'g Corp.*, 225 Ga. App. 110, 483 S.E.2d 141 (1997).

There is no requirement that the plaintiff display and the trial court find actual willfulness. The sanction of dismissal for failure to comply with discovery provisions requires only a conscious or intentional failure to act as distinguished from an accidental or involuntary non-compliance. A conscious or intentional failure to act is in fact willful. *Dyer v. Spectrum Eng'g, Inc.*, 245 Ga. App. 30, 537 S.E.2d 175 (2000).

Sanctions not authorized despite false swearing. — When the defendant answered the interrogatories and appeared for the defendant's deposition, thereby making the initial response required by subsection (d) of O.C.G.A. § 9-11-37, the sanctions imposed, striking the defendant's answer and entering a default judgment finding the defendant liable, were not authorized, although the defendant's false swearing was found to have been deliberate, without an excuse, in an attempt to secrete facts from the court. *Wills v. McAuley*, 166 Ga. App. 4, 303 S.E.2d 26, cert. denied, 251 Ga. 41, 305 S.E.2d 120 (1983).

Willful attempt to conceal document. — In an action for breach of an employment contract, the trial court did not err by imposing the sanction of dismissal after the court found that the plaintiff willfully attempted to conceal a document which could have had a major impact on the litigation. *Santora v. American Combustion, Inc.*, 225 Ga. App. 771, 485 S.E.2d 34 (1997).

Willful failure to appear at deposition. — Trial court is authorized to impose sanctions under subsection (d) of O.C.G.A. § 9-11-37 when a party has willfully failed to appear at a deposition. *Cook v. Lassiter*, 159 Ga. App. 24, 282 S.E.2d 680 (1981); *Washington v. South Ga. Medical Ctr.*, 221 Ga. App. 640, 472 S.E.2d 328 (1996); *James v. Gray*, 229 Ga. App. 39, 494 S.E.2d 198 (1997); *King v. Board of*

Regentes of Univ. Sys. of Ga., 238 Ga. App. 4, 516 S.E.2d 581 (1999).

There is no requirement that a trial court expressly find willful noncompliance in order to impose sanctions under O.C.G.A. § 9-11-37(d). Furthermore, it is unnecessary to issue an order compelling discovery under O.C.G.A. § 9-11-37(b) as a condition to imposing sanctions. *Washington v. Harris*, 259 Ga. App. 705, 578 S.E.2d 286 (2003).

Late filing of answers. — Since the record showed that answers were not filed until 65 days after the interrogatories were filed and served by mail, long after the time for timely responses, the trial court did not abuse the court's discretion in striking the company's defenses in an action brought for toxic gas leaks. *Kemira, Inc. v. Amory*, 210 Ga. App. 48, 435 S.E.2d 236 (1993).

Late answers to interrogatories which are filed after propounder has filed motion seeking sanction of dismissal do not nullify the motion. To hold otherwise would completely nullify the effect of subsection (d) of O.C.G.A. § 9-11-37, for routine acceptance of late filing would have the effect of casting the procedure for sanctions for late filing under subsections (a), (b), and (c) of that section, requiring an order and that order's violation before sanctions could be imposed, and thereby precluding the sanctions of subsection (d) of that section and vitiating the discretion of the trial court. *Rucker v. Blakey*, 157 Ga. App. 615, 278 S.E.2d 158 (1981).

Dismissal under subsection (d) of this section is discretionary. *Old S. Inv. Co. v. Aetna Ins. Co.*, 124 Ga. App. 697, 185 S.E.2d 584 (1971).

Dismissal and default proper only in flagrant cases. — Drastic sanctions of dismissal and default cannot be invoked under subsection (d) of this section except in the most flagrant cases, when the failure is willful, in bad faith, or in conscious disregard of an order. *Delta Equities, Inc. v. Berry*, 127 Ga. App. 590, 194 S.E.2d 284 (1972).

Defendant's statement that the defendant would never obey an order of court requiring that the defendant divulge news sources, the defendant's consistent resort

to evasive and incomplete responses throughout the defendant's deposition, and the defendant's failure to offer a legal basis for the defendant's refusal to testify when invited to do so during the deposition, supported the trial court's conclusion that the defendant was not acting in good faith, and the court's dismissal of the defendant's defensive pleadings to the defamation action was proper. *Georgia Communications Corp. v. Horne*, 164 Ga. App. 227, 294 S.E.2d 725 (1982).

Pursuant to paragraph (d)(1) of O.C.G.A. § 9-11-37, the trial court may impose the immediate sanction of dismissal for the plaintiff's failure to respond to the defendant's discovery requests. *Evans v. East Coast Intermodal Sys.*, 191 Ga. App. 749, 382 S.E.2d 743 (1989).

Trial court did not abuse the court's discretion in striking the respondent's defensive pleadings and entering a default judgment in favor of her former husband in a paternity proceeding, after she willfully and without any legal justification refused to obey the court's order that she submit to a blood test. *Roderiguez v. Saylor*, 190 Ga. App. 742, 380 S.E.2d 339 (1989).

Trial court properly issued an order finding the plaintiff had willfully failed to comply with the court's earlier order and dismissing the plaintiff's complaint with prejudice, since the plaintiff failed to comply with the trial court's order by failing to serve complete responses to interrogatories, to pay attorney fees and costs as ordered by the court, and to appear for deposition. *Huff v. E.L. Davis Contracting Co.*, 195 Ga. App. 691, 394 S.E.2d 615 (1990).

Dismissal for conscious or intentional failure. — Harsh sanctions of dismissal or default provided in subsection (d) of this section against a party for willfully failing to appear before an officer for the taking of a deposition apply only when there is a conscious or intentional failure to appear as distinguished from an accidental or involuntary noncompliance. *Smith v. Mullinax*, 122 Ga. App. 833, 178 S.E.2d 909 (1970).

Accidental or involuntary noncompliance. — Sanction of dismissal for failure to comply with discovery provisions

requires a conscious or intentional failure to act as distinguished from an accidental or involuntary noncompliance. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols*, 138 Ga. App. 593, 226 S.E.2d 742 (1976).

When the only reason set forth by the party who failed to respond to discovery does not show the failure was accidental or involuntary, dismissal is appropriate. *Barron v. Spanier*, 198 Ga. App. 801, 403 S.E.2d 88 (1991).

Dismissal permitted for willful failure to answer. — Subsection (d) of this section allows the court to dismiss a complaint without first issuing an order to comply when a party has willfully failed to answer propounded interrogatories. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols*, 138 Ga. App. 593, 226 S.E.2d 742 (1976).

Mistrial declared. — When the defendant proffered evidence at trial that should have been disclosed during discovery, the trial court's declaration of a mistrial was proper. *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

Failure to cooperate with counsel as willful misconduct. — Failure to maintain contact and cooperate with counsel about pending litigation so that discovery can be made is willful misconduct for purposes of sanctions under subsection (d) of this section. *Phillips v. Peachtree Hous.*, 138 Ga. App. 596, 226 S.E.2d 616 (1976).

Willful failure to answer by attorney in fact. — When a nonresident defendant authorized the defendant's attorney to act as the defendant's attorney in fact to do all things necessary in defense of the law suit, the trial judge did not abuse the judge's discretion in finding willful failure to answer interrogatories and in imposing the harsh sanction of striking the defendant's answer and entering a default judgment. *Gregory v. King Plumbing, Inc.*, 127 Ga. App. 512, 194 S.E.2d 271 (1972).

An evasive answer does not authorize entry of penalties under subsection (d) of this section. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

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Dismissal of a complaint as a sanction for giving partial and evasive answers to certain interrogatories was an abuse of discretion when no order was ever entered requiring that the party provide more complete responses to the interrogatories. *Strejc v. Metropolitan Atlanta Rapid Transit Auth.*, 197 Ga. App. 88, 397 S.E.2d 501 (1990).

Imposition of penalties under subsection (d) of O.C.G.A. § 9-11-37 is limited to an absolute failure to respond. When an evasive or incomplete response is given, the proper remedy is a motion to compel resulting in a court order under subsection (a). *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

Inadequate response not equivalent to total failure. — Response to the order to compel, although inadequate, should not have been treated as a total failure to respond under subsection (d) of this section so as to authorize imposition of the ultimate sanction; the court, in ordering further discovery after finding answers insufficient, could have set forth with specificity the details the answering party was to furnish, and if, after being compelled to supply enumerated deficiencies, the answering party failed to respond either in a timely fashion or in exact accordance with the order, a subsequent order granting judgment by default would be justified. *Thornton v. Burson*, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Trial court abused the court's discretion in dismissing the plaintiff's complaint with prejudice after the defendant did not contend that the plaintiff had failed to respond to interrogatories but only that the answers given were insufficient. *Holt v. Brown*, 177 Ga. App. 823, 341 S.E.2d 486 (1986).

Entry of default for answer by one not qualified to act as agent error. — Since a party answering interrogatories for a corporation was not qualified to speak as the party's agent, the court could have issued an order under subsection (a) of this section, and it was error to strike the defendant's response and enter a de-

fault judgment, treating the defendant's inadequate answer as a total failure to make an initial response under subsection (d) of this section. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Since subsection (d) of this section is intended to enforce the duty to respond to interrogatories, imposition of sanctions thereunder was error when the defendant corporation attempted to respond to interrogatories, through an individual who was adjudged not qualified to speak as an agent of the corporation. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979).

Default not proper in face of pending motion for protective order. — When a motion for a protective order concerning interrogatories has not been ruled upon, entry of a default judgment for failure to answer under subsection (d) of this section is error. *Corey v. Renard*, 151 Ga. App. 584, 260 S.E.2d 538 (1979); *Dismuke v. Dismuke*, 195 Ga. App. 613, 394 S.E.2d 371 (1990), cert. denied, 1995 Ga. LEXIS 1050 (1995), cert. denied, 1999 Ga. LEXIS 39 (1999).

Nonspecific request for sanctions permissible. — Nonspecific request for sanctions to punish a failure to respond to interrogatories is permissible under subsection (d) of this section. *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 435, 254 S.E.2d 825 (1979).

No authority to impose subsection (d) sanctions if response filed. — Authority to apply sanctions under subsection (d) of this section for complete failure to respond to notice to produce and for failure to answer interrogatories is lost once response has been filed and interrogatories have been answered. *Rollins Communications, Inc. v. Henderson, Few & Co.*, 140 Ga. App. 504, 231 S.E.2d 412 (1976).

Right to seek sanctions is waived when answer filed. — Once answers to interrogatories are filed, even though filed late, the propounder waives the right to ask the court to apply sanctions under subsection (d) of this section. *Bratten Apparel, Inc. v. Lyons Textile Mill, Inc.*, 129 Ga. App. 384, 199 S.E.2d 632 (1973).

Absent timely motion, authority to ap-

ply sanctions enumerated in subsection (d) of this section is lost once answers to interrogatories are filed, even though the answers are filed late, because once such answers are filed the propounder waives the right to ask the court to apply sanctions under subsection (d). *Record Shack of Atlanta, Inc. v. Daugherty*, 147 Ga. App. 753, 250 S.E.2d 154 (1978).

Sanctions not precluded by late response after motion. — Once a motion for sanctions under subsection (d) of this section has been filed, the opposite party may not preclude their imposition by making a belated response at the hearing. *Houston Gen. Ins. Co. v. Stein Steel & Supply Co.*, 134 Ga. App. 624, 215 S.E.2d 511 (1975); *Wetherington v. Koepenick & Horne, Inc.*, 153 Ga. App. 302, 265 S.E.2d 107 (1980).

Once motion for sanctions has been filed, the opposite party may not preclude their imposition by making a belated response in the interim before the hearing or at the hearing itself. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols*, 138 Ga. App. 593, 226 S.E.2d 742 (1976).

Trial court did not lose the court's authority to impose sanctions due to the defendant's failure to respond to interrogatories simply because answers to the interrogatories were eventually filed following the motion for sanctions and prior to the hearing. *Danger v. Strother*, 171 Ga. App. 607, 320 S.E.2d 613 (1984).

Once a motion for sanctions is filed for failure to respond to interrogatories, sanctions may be entered under paragraph (d)(1) of O.C.G.A. § 9-11-37, even if responses are subsequently filed. *Gazelah v. Rome Gen. Practice, Inc.*, 232 Ga. App. 343, 502 S.E.2d 251 (1998).

Sanctions not avoided by attack on request. — Party who fails to respond to a set of interrogatories cannot avoid sanctions by contending that the request for interrogatories was improper or objectionable. *Sneider v. English*, 129 Ga. App. 638, 200 S.E.2d 469 (1973).

Failure to act in good faith supported award. — In a suit for breach of contract, trade secret misappropriations, and other business tort claims, the trial court did not abuse the court's discretion by ordering sanctions for discovery viola-

tions upon the defendants, including attorney fees, because the trial court concluded that the defendants did not act in good faith compliance with the protective order when the defendants marked more than 129,000 discovery documents confidential. *Hull v. WTI, Inc.*, 322 Ga. App. 304, 744 S.E.2d 825 (2013).

Refusal of sanctions as abuse of discretion. — Although the terms of subsection (d) of this section are discretionary, there may be circumstances when refusal of a party to appear for taking of depositions after proper notice is so flagrantly willful and productive of injury to the other side that it would be an abuse of discretion on the part of the trial court to refuse punitive action. *Hohlstein v. White*, 117 Ga. App. 207, 160 S.E.2d 232 (1968).

Trial court abused the court's discretion in denying the plaintiff's motion for sanctions after the defendant delayed in responding to the plaintiff's interrogatories for 14 months with no apparent justification, while placing on plaintiff the expense of responding to the defendant's own discovery and the expense and delay of moving for the court's intervention. *Vlasz v. Schweikhardt*, 178 Ga. App. 512, 343 S.E.2d 749 (1986).

Dismissal of earlier complaint justifies later summary judgment for same claim for relief. — Trial court did not err in granting a motion for summary judgment based upon the defense of res judicata, following dismissal of an earlier complaint, containing exactly the same material allegations and asserting the same claim for relief, for failure to answer interrogatories. *Brantley v. Sparks*, 167 Ga. App. 323, 306 S.E.2d 337 (1983).

Denial of a motion to apply sanctions was not an abuse of discretion since the evidence showed the failure to comply with interrogatories was caused by counsel being a considerable distance from the client and the fact that the client's occupation was a hindrance to the completion of the interrogatories before another lawyer who had similar scheduling problems. *Hiney v. Bennaman*, 177 Ga. App. 753, 341 S.E.2d 284 (1986).

Since the discovery sanction hearing was not transcribed, the appellate court assumed the trial court's action in

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imposing sanctions was supported by the record; there was no abuse of discretion in the striking of the city's answer and the entry of default judgment against the city as sanctions for the failure to fully comply with discovery requests. *City of Atlanta v. Paulk*, 274 Ga. App. 10, 616 S.E.2d 210 (2005).

Failure of party either to respond to interrogatories or to seek protective order authorizes the imposition of immediate sanctions without the preliminary necessity of an order to compel. *Bryant v. Nationwide Ins. Co.*, 183 Ga. App. 577, 359 S.E.2d 441 (1987) (dismissal of complaint not abuse of discretion).

Failure to verify answers. — Plaintiff's failure to verify the plaintiff's interrogatory answers does not constitute a willful total failure to respond and, therefore, did not justify the sanction of dismissing the defendant's complaint since the responses were submitted on behalf of two plaintiffs prior to the motion for sanctions and since the second signed and verified the answers. *Rivers v. Goodson*, 184 Ga. App. 70, 360 S.E.2d 740 (1987).

Plaintiff's failure to appear at a deposition and to pay certain court-ordered attorney fees warrants the extreme sanction of dismissal of the offending party's pleadings. *Peoples v. Yu*, 184 Ga. App. 252, 361 S.E.2d 244 (1987).

Response after filing of motion for sanctions. — Once a motion for sanctions has been filed, imposition of sanctions cannot be precluded by a belated response

made by the opposite party. *Rogers v. Sharpe*, 206 Ga. App. 353, 425 S.E.2d 391 (1992).

Assessment of reasonable expenses authorized. — Among the sanctions imposed by subsection (d) of this section is the assessment of reasonable expenses occasioned by the failure. *Kruger v. Kruger*, 146 Ga. App. 461, 246 S.E.2d 469 (1978).

Proof of damages after imposition of default sanction. — Although subsection (d) of Ga. L. 1970, p. 157, § 1 (see now O.C.G.A. § 9-11-37) is silent on the question of necessity of proof of damages when the sanction of judgment by default has been imposed against a disobedient party, the principles of Ga. L. 1967, p. 226, § 24 (see now O.C.G.A. § 9-11-55(a)) should apply to a judgment by default imposed under subsection (d) of Ga. L. 1970, p. 157, § 1. *House v. Hewett Studios, Inc.*, 125 Ga. App. 127, 186 S.E.2d 584 (1971); *Sterling Factors v. Whelan*, 245 B.R. 698 (N.D. Ga. 2000).

Sanctions proper for discovery abuse. — In a negligence case, a trial court did not abuse the court's discretion by striking the defendants' joint answer and counterclaim as a sanction for discovery abuse because the evidence established that the defendants intentionally and in bad faith concealed damaging evidence by repairing the tractor trailer and destroying information from the computer units involved in the accident, provided false answers to interrogatories, and the plaintiff was prejudiced by the misconduct. *Howard v. Alegria*, 321 Ga. App. 178, 739 S.E.2d 95 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 200 et seq.

C.J.S. — 27 C.J.S., Discovery, §§ 49, 98 et seq., 115-117, 180, 181. 35A C.J.S., Federal Civil Procedure, §§ 592 et seq., 674 et seq., 707, 709, 710, 738, 746, 753. 35B C.J.S., Federal Civil Procedure, §§ 788 et seq., 1164, 1330.

ALR. — Validity of statutory provision for attorneys' fees, 90 ALR 530.

Constitutionality, construction, and ap-

plication of statutes or rules of court which permit setting aside a plea and giving judgment by default, or dismissing suit, because of disobedience of order, summons, or subpoena duces tecum requiring production of documents, 144 ALR 372.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person, 175 ALR 234.

Granting relief not specifically de-

manded in pleading or notice in rendering default judgment in divorce or separation action, 12 ALR2d 340.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Taxation of costs and expenses in proceedings for discovery or inspection, 76 ALR2d 953.

Propriety of discovery interrogatories calling for continuing answers, 88 ALR2d 657.

Availability of mandamus or prohibition to compel or to prevent discovery proceedings, 95 ALR2d 1229.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636.

Failure of party or his attorney to appear at pretrial conference, 55 ALR3d 303.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 ALR3d 1109.

Tort or statutory liability for failure or refusal of witness to give testimony, 61 ALR3d 1297.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorney's fees, 68 ALR3d 209.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 ALR3d 944.

Award of damages for dilatory tactics in prosecuting appeal in state court, 91 ALR3d 661.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding, 8 ALR4th 1181.

Judgment in favor of plaintiff in state

court action for defendant's failure to obey request or order for production of documents or other objects, 26 ALR4th 849.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects, 27 ALR4th 61.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions, 30 ALR4th 9.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination, 32 ALR4th 212.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pre-trial discovery proceedings, 58 ALR4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 ALR4th 712.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 ALR5th 863.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records--modern status, 87 ALR Fed. 177.

Sanctions for failure to make discovery under Federal Civil Procedure Rule 37 as affected by defaulting party's good faith efforts to comply, 134 ALR Fed 257.

Federal district court's power to impose sanctions on non-parties for abusing discovery process, 149 ALR Fed. 589.

Propriety of exclusion of expert testimony as sanction under Federal Civil Procedure Rule 37 (b)(2)(B) for violation of discovery order, 151 ALR Fed. 561.

ARTICLE 6

TRIALS

9-11-38. Right to jury trial.

The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate. (Ga. L. 1966, p. 609, § 38.)

Cross references. — Right to trial by jury generally, Ga. Const. 1983, Art. I, Sec. I, Para. XI. Right to trial by jury in certiorari cases in superior court, § 5-4-11. Juries, T. 15, C. 12.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 38, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For article, “The Endangered Right of Jury Trials in Dispossessories,” see 24 Ga. St. B.J. 126 (1988).

For note, “Pre-Litigation Contractual Waivers of the Right to a Jury Trial Are Unenforceable Under Georgia Law,” see 46 Mercer L. Rev. 1565 (1995).

JUDICIAL DECISIONS

Right to jury trials in most cases. — Constitution of Georgia as well as the “Civil Practice Act” (see O.C.G.A. Ch. 11, T. 9) guarantees the right of a jury trial to civil litigants in most cases. *Raintree Farms, Inc. v. Stripping Ctr., Ltd.*, 166 Ga. App. 848, 305 S.E.2d 660 (1983).

Right to trial by jury not conferred in all cases. — Ga. L. 1966, p. 609, §§ 38 and 39 (see now O.C.G.A. §§ 9-11-38 and 9-11-39) cannot be interpreted to mean that a person has a right to trial by jury in all cases; in this state there is no constitutional right to a trial by jury in equity cases. *Duncan v. First Nat’l Bank*, 597 F.2d 51 (5th Cir. 1979).

Because the Seventh Amendment to the U.S. Constitution did not apply in state courts, and an insured’s right to a jury trial thereunder was not infringed when genuine issues of material fact were lacking and disposition of the matter was best handled by way of summary judgment, the insured’s Seventh Amendment right to a jury trial was not infringed; as a result, the insured failed to demonstrate any constitutional deprivation warranting a 42 U.S.C. § 1983 action. *Cuyler v. Allstate Ins. Co.*, 284 Ga. App. 409, 643 S.E.2d 783, cert. denied, 2007 Ga. LEXIS 510 (Ga. 2007).

Constitutional right to trial by jury

shall not be taken away in cases when the right existed when the Constitution was adopted in 1798. *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982).

Any right to jury trial in equitable proceedings must be statutory. — Interposition of juries in the trial of chancery (equity) cases is purely a matter of legislative regulation, and originated in this state in the Judiciary Act of 1799; it is not a constitutional right or one guaranteed by the Magna Charta. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

Since there is no constitutional right to a trial by jury in equitable proceedings, such a right can exist only in instances when the right is conferred by statute. *Duncan v. First Nat’l Bank*, 597 F.2d 51 (5th Cir. 1979).

Legislative restriction of right of trial by jury in equity cases would be constitutional. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

There is no statutory right to trial by jury in equity cases in general. *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982).

There is no right to a jury in a suit for injunction. *Turner Adv. Co. v. Garcia*, 251 Ga. 46, 302 S.E.2d 547 (1983).

There is no statutory right to a jury trial in garnishment proceedings. *Worsham Bros. Co. v. FDIC*, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

Although a trial court trying a suit for injunction may empanel a jury to render special verdicts, the court is not required to do so. *Turner Adv. Co. v. Garcia*, 251 Ga. 46, 302 S.E.2d 547 (1983).

Enforcement of equitable lien. — Case begun as an action to enforce an equitable lien on funds held by a defendant, and concluded as an interpleader action after the funds were paid into the registry of the court by the stakeholder, is a case in equity in which there is no right to a jury trial. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

Constitutional right to jury trial in law cases. — In a case at common law, a party has the constitutional right to have all questions of fact passed upon by a jury, and a legislative denial of that right is unconstitutional. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

Constitutional right to jury trial in dispossessory actions. — Georgia Constitution provides for the right of trial by jury in dispossessory actions. *Hill v. Levenson*, 259 Ga. 395, 383 S.E.2d 110 (1989).

Contracts. — Cases heard on contract, when an issuable defense is filed, require trial by jury unless waived. *Redding v. Commonwealth of Am., Inc.*, 143 Ga. App. 215, 237 S.E.2d 689 (1977).

If legal cause involved, jury trial available. — It makes no difference if the equitable cause clearly outweighs the legal cause so that the basic issue of the case taken as a whole is equitable; as long as any legal cause is involved, the jury rights, which it creates, control. *Duncan v. First Nat'l Bank*, 597 F.2d 51 (5th Cir. 1979).

Dismissal for failure to state cause not contravention of right to jury trial. — When a complaint fails to state a claim, dismissal of such claim is not error even if the complainant has made a demand for a jury trial, and does not contravene the provisions of Ga. L. 1966, p. 609, § 38 (see now O.C.G.A. § 9-11-38) or of Ga. L. 1967, p. 226, § 41 (see now O.C.G.A. § 9-11-40), nor of Ga. Const.,

Art. VI, Sec. XVI, Para. I (see now Ga. Const. 1983, Art. I, Sec. I, Para. XI), relating to the right to trial by jury. *Bush v. Morris*, 123 Ga. App. 497, 181 S.E.2d 503 (1971).

O.C.G.A. § 9-11-38 sets no time limit for demands for trial by jury, and if there is no time limit within which a demand for jury trial must be made, a demand may be made at any time before the case is called for trial, or upon the call for trial. *Carleton v. State*, 176 Ga. App. 399, 336 S.E.2d 333 (1985).

Local court rule requiring parties to timely appeal the adverse ruling of an arbitration board if the parties desired to pursue a jury trial did not deny the parties their constitutional right to a jury trial since the parties were given a reasonable opportunity to demand a jury trial and waived the parties' right to a jury trial by failing to file a timely demand. *Tippins v. Winn-Dixie Atlanta, Inc.*, 192 Ga. App. 172, 384 S.E.2d 199, cert. denied, 192 Ga. App. 903, 384 S.E.2d 199 (1989).

Trial de novo after nonbinding arbitration. — Local court rule provision that a trial de novo be available only upon demand after nonbinding arbitration did not deny the right to a jury trial. *Davis v. Gaona*, 260 Ga. 450, 396 S.E.2d 218 (1990).

Dismissed employee had no constitutional right to trial by jury on the employee's claim for back pay under the Georgia Equal Employment for the Handicapped Code, Ga. L. 1981, p. 1803. *Smith v. Milliken & Co.*, 189 Ga. App. 897, 377 S.E.2d 916 (1989).

Request for jury trial in suit involving cancellation of lis pendens notice denied. — See *Snow's Farming Enters., Inc. v. Carver State Bank*, 206 Ga. App. 661, 426 S.E.2d 158 (1992).

Prelitigation contractual waiver of the right to trial by jury is not enforceable in cases tried under the laws of Georgia. *Bank S. v. Howard*, 264 Ga. 339, 444 S.E.2d 799 (1994).

Implicit waiver of right to jury trial. — In an auto dealer's suit against a car buyer, the buyer's waiver of the right to a jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) and O.C.G.A. § 9-11-38 was implied by the buyer's fail-

ure to make a written demand for a jury trial or to object to the case being specially set for a bench trial at a hearing on the buyer's successful motion to vacate a judgment entered in favor of the dealer. *Cole v. ACR/Atlanta Car Remarketing, Inc.*, 295 Ga. App. 510, 672 S.E.2d 420 (2008).

Voluntary waiver required. — Waiver of jury trial provision in bank's guaranty agreement was not enforceable against the defendant since the defendant could not have knowingly and voluntarily given up the defendant's right to trial by jury since the defendant could not have been aware of the basis and circumstances of any future claim upon the guaranty. *Howard v. Bank S.*, 209 Ga. App. 407, 433 S.E.2d 625 (1993).

Husband did not waive right to jury trial. — Trial court erroneously denied 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).

Waiver of right to jury trial in contempt proceeding. — In a criminal contempt case, the trial court did not err in failing to submit the issue of financial inability to the jury because a business partner waived the partner's right to a jury trial on the issue of financial inability since the partner did not file a jury trial demand until after the evidentiary hearing had commenced and the partner had previously requested that the contempt hearing be placed on a non-jury calendar; a litigant may impliedly waive the statutory right to a jury trial by his or her

conduct. *Affatato v. Considine*, 305 Ga. App. 755, 700 S.E.2d 717 (2010).

Right to jury trial not infringed when no issue of material fact disputed. — Trial court did not violate a purchaser's right to a jury trial under the Georgia Constitution or O.C.G.A. § 9-11-38 by granting summary judgment to a lender because the right to a jury trial was not infringed when the jury would have no role since there were no issues of material fact in dispute. *Leone v. Green Tree Servicing, LLC*, 311 Ga. App. 702, 716 S.E.2d 720 (2011).

Waiver of right to jury trial in probate proceeding. — Trial court had subject matter jurisdiction to review the probate court's decision under Ga. Const. 1983, Art. VI, Sec. IV, Para. I and O.C.G.A. § 15-6-8(4)(E) to deny probate of the decedent's 1988 will and the parties' waiver of the statutory right to a jury trial did not deprive the trial court of subject matter jurisdiction to deny probate of the will. *Mosley v. Lancaster*, 770 S.E.2d 873, No. S14A1914, 2015 Ga. LEXIS 195 (2015).

Cited in *Jackson v. Jackson*, 234 Ga. 587, 216 S.E.2d 808 (1975); *Blanchard v. Taylor*, 136 Ga. App. 237, 220 S.E.2d 757 (1975); *Restler v. Haas & Dodd Realty Co.*, 142 Ga. App. 318, 235 S.E.2d 759 (1977); *Marler v. C & S Bank*, 239 Ga. 342, 236 S.E.2d 590 (1977); *First Nat'l Bank v. Baker*, 142 Ga. App. 870, 237 S.E.2d 233 (1977); *Financial Bldg. Consultants, Inc. v. American Druggists Ins. Co.*, 91 F.R.D. 62 (N.D. Ga. 1981); *York v. Miller*, 168 Ga. App. 849, 310 S.E.2d 577 (1983); *Leader Nat'l Ins. Co. v. Smith*, 177 Ga. App. 267, 339 S.E.2d 321 (1985); *Clements v. Continental Cas. Ins. Co.*, 730 F. Supp. 1120 (N.D. Ga. 1989); *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009).

OPINIONS OF THE ATTORNEY GENERAL

No right to a jury trial exists in a civil action for the establishment of paternity. 1997 Op. Att'y Gen. No. 97-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Jury, § 3 et seq. 75B Am. Jur. 2d, Trials, § 1622.

C.J.S. — 50A C.J.S., Juries, § 4 et seq.

ALR. — Constitutionality of statute requiring party demanding jury to pay jury fees or charges incidental to summoning or impaneling of jurors, 32 ALR 865.

Constitutionality, construction, and effect of statute providing for jury trial in disbarment proceedings, 78 ALR 1323.

Statutes in relation to subject-matter or form of instructions by court as impairing constitutional right to jury trial, 80 ALR 906.

Right to jury trial of issues as to personal judgment for deficiency in suit to foreclose mortgage, 112 ALR 1492.

Right to jury trial in suit to remove

cloud, quiet title, or determine adverse claims, 117 ALR 9.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 ALR 383.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

Right to a jury trial on motion to vacate judgment, 75 ALR3d 894.

Withdrawal or disregard of waiver of jury trial in civil action, 9 ALR4th 1041.

Validity of law or rule requiring state court party who requires jury trial in civil case to pay costs associated with jury, 68 ALR4th 343.

Contractual jury trial waivers in state civil cases, 42 ALR5th 53.

9-11-39. Consent to trial by court; jury trial on court order.

(a) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, may consent to trial by the court sitting without a jury.

(b) In all actions not triable of right by a jury, or where jury trial has been expressly waived, the court may nevertheless order a trial with a jury whose verdict will have the same effect as if trial by jury had been a matter of right or had not been waived. (Ga. L. 1966, p. 609, § 39.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 39, see 28 U.S.C.

Law reviews. — For annual survey article discussing waiver of jury trials, see 46 Mercer L. Rev. 95 (1994).

For note, “Pre-Litigation Contractual Waivers of the Right to a Jury Trial Are Unenforceable Under Georgia Law,” see 46 Mercer L. Rev. 1565 (1995).

JUDICIAL DECISIONS

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CONSENT TO TRIAL WITHOUT JURY

General Consideration

Local law to yield to this section. — Local law requiring a demand for jury trial on or before appearance day as a condition precedent to jury trial must

yield to contrary law set out in this section. *Servisco, Inc. v. R.B.M. of Atlanta, Inc.*, 147 Ga. App. 671, 250 S.E.2d 10 (1978).

Contract actions. — Cases heard on contract, when an issuable defense is

General Consideration (Cont'd)

filed, require trial by jury unless waived. *Redding v. Commonwealth of Am., Inc.*, 143 Ga. App. 215, 237 S.E.2d 689 (1977).

Equity cases. — Ga. L. 1966, p. 609, §§ 38 and 39 (see now O.C.G.A. §§ 9-11-38 and 9-11-39) cannot be interpreted to mean that a person has a right to trial by jury in all cases; in this state there is no constitutional right to a trial by jury in equity cases. *Duncan v. First Nat'l Bank*, 597 F.2d 51 (5th Cir. 1979).

Discretion of court. — Grant or denial of a jury trial is committed to the trial court's discretion with which the appellate courts normally refuse to interfere. *Nat'l Health Servs., Inc. v. Townsend*, 130 Ga. App. 700, 204 S.E.2d 299 (1974).

Court errs in ruling on issues after grant of partial summary judgment when jury trial requested. — When the defendant requested a jury trial and there was neither a written stipulation nor an oral stipulation made in open court and entered on the record, the trial court errs in ruling upon all of the issues remaining in the case after the grant of the defendant's motion for partial summary judgment. *Jackson v. Patton*, 157 Ga. App. 410, 277 S.E.2d 769 (1981).

Trial court trying a suit for injunction may empanel a jury to render special verdicts, but the court is not required to do so. *Turner Adv. Co. v. Garcia*, 251 Ga. 46, 302 S.E.2d 547 (1983), cert. denied, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984).

Paternity action defendant was entitled to jury trial since, although he made no written demand for a jury trial, he did file an answer raising issuable defenses to the paternity petition and did not consent by an express stipulation to a bench trial. *Stinson v. Pratt*, 182 Ga. App. 552, 356 S.E.2d 519 (1987).

Waiver of right to jury trial in probate proceeding. — Trial court had subject matter jurisdiction to review the probate court's decision under Ga. Const. 1983, Art. VI, Sec. IV, Para. I and O.C.G.A. § 15-6-8(4)(E) to deny probate of the decedent's 1988 will and the parties' waiver of the statutory right to a jury trial did not deprive the trial court of subject matter

jurisdiction to deny probate of the will. *Mosley v. Lancaster*, 770 S.E.2d 873, No. S14A1914, 2015 Ga. LEXIS 195 (2015).

Trial court authorized to strike jury trial demand from pleadings as sanction for refusal to participate in proceedings. — In a divorce proceeding, the trial court did not err in dismissing a husband's demand for a jury trial because the trial court was authorized to strike from the pleadings the husband's demand for a jury trial as a proper sanction for his willful refusal to participate in the proceedings; by his own admission, the husband deliberately chose not to attend the trial, and he presented no legitimate reason for that decision. *Kautter v. Kautter*, 286 Ga. 16, 685 S.E.2d 266 (2009).

Cited in *Bullock v. Bullock*, 234 Ga. 253, 215 S.E.2d 255 (1975); *Peoples Bank v. Northwest Ga. Bank*, 139 Ga. App. 264, 228 S.E.2d 181 (1976); *Restler v. Haas & Dodd Realty Co.*, 142 Ga. App. 318, 235 S.E.2d 759 (1977); *Gregson & Assocs., Inc. v. Webb*, 143 Ga. App. 276, 238 S.E.2d 274 (1977); *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982); *Utz v. Powell*, 160 Ga. App. 888, 288 S.E.2d 601 (1982); *Smith v. Smith*, 165 Ga. App. 532, 301 S.E.2d 696 (1983); *Worsham Bros. Co. v. FDIC*, 167 Ga. App. 163, 305 S.E.2d 816 (1983); *McElroy v. McElroy*, 252 Ga. 553, 314 S.E.2d 893 (1984); *Trans-State, Inc. v. Barber*, 170 Ga. App. 372, 317 S.E.2d 242 (1984); *Tigner v. Shearson-Lehman Hutton, Inc.*, 201 Ga. App. 713, 411 S.E.2d 800 (1991); *Matthews v. Matthews*, 268 Ga. 863, 494 S.E.2d 325 (1998); *Rose v. Waldrip*, 316 Ga. App. 812, 730 S.E.2d 529 (2012).

Consent to Trial Without Jury

Consent to nonjury trial. — Parties to an action may consent to a nonjury trial and, thereby, waive their rights to a jury trial under O.C.G.A. § 9-11-39. *Whitaker & Rambo Interior Designs, Inc. v. Prudential Property Cas. Ins. Co.*, 510 F. Supp. 97 (N.D. Ga. 1981).

Trial court did not deprive a homeowner of due process by dismissing a claim for damages at the conclusion of a hearing because the homeowner voluntarily participated in a consolidated non-jury hearing on the threshold issue of causation;

there was a consensus among the trial court and the litigants that the homeowner's prayer for a permanent injunction and the claim for damages would both fail unless the homeowner could establish that a county water authority's underground water line was causing pressure waves and vibrations on the homeowner's property. *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. 2010).

Presumption of waiver conflicts with section. — In general terms, the presumption of waiver in a local rule from failure to demand a jury trial within a certain time conflicts with the requirement of express waiver in O.C.G.A. § 9-11-39; more specifically, a conflict exists when the local rule requires a pretrial demand for jury trial, as that section provides for a jury trial as a matter of right unless the parties consent to a nonjury trial, which must be manifested by express stipulation or by voluntary participation in a nonjury trial. To the extent of the conflict, the local rule is void. *Raintree Farms, Inc. v. Stripping Ctr., Ltd.*, 166 Ga. App. 848, 305 S.E.2d 660 (1983).

Knowing and voluntary waiver. — Requirement of written stipulation before waiver of the right to trial by jury carries the implication that such waivers be knowing and voluntary, i.e., demonstrates full understanding of all circumstances surrounding relinquishment of the known right. *Howard v. Bank S.*, 209 Ga. App. 407, 433 S.E.2d 625 (1993).

Actions of party as waiver. — In exceptional circumstances, a party may waive the right to a jury trial by the party's actions. *York v. Miller*, 168 Ga. App. 849, 310 S.E.2d 577 (1983).

Requirement for waiver is paramount to any local rule of state court which imposes a stricter condition on the right to a jury trial; a local law which requires a demand for a jury trial as a condition precedent to obtaining a trial by jury must yield to contrary law as set forth in O.C.G.A. § 9-11-39. *Whitaker & Rambo Interior Designs, Inc. v. Prudential Property Cas. Ins. Co.*, 510 F. Supp. 97 (N.D. Ga. 1981).

Waiver requires stipulation. — When a party is entitled to trial by jury, waiver requires stipulation which is made part of the record. *Whitaker & Rambo Interior Designs, Inc. v. Prudential Property Cas. Ins. Co.*, 510 F. Supp. 97 (N.D. Ga. 1981).

Waiver in first trial applies to retrials. — When the parties in a case regarding the interpretation of a lease had waived the right to a jury trial and had participated in a bench trial, and then the trial court's ruling was appealed and partially reversed and the matter was remanded, the trial court did not err on remand in refusing to submit to a jury the issue which the appellate court had remanded for determination, despite the lessor's demand for a jury trial on remand, as the lessor's participation in the bench trial was a waiver of the right to a jury trial and the waiver of a jury trial in the first trial applied to the retrial after remand in the same case. *Barrow County Airport Auth. v. Romanair, Inc.*, 260 Ga. App. 887, 581 S.E.2d 402 (2003).

Statement in chambers not sufficient oral stipulation. — Statement by counsel in the judge's chambers does not satisfy requirement of this section that oral stipulation must be made in open court and entered in the record. *Blanchard v. Taylor*, 136 Ga. App. 237, 220 S.E.2d 757 (1975).

Husband did not waive right to jury trial. — Trial court erroneously denied 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).

Prelitigation contractual waiver of the right to trial by jury is not enforceable in cases tried under the laws of Georgia. *Bank S. v. Howard*, 264 Ga. 339, 444 S.E.2d 799 (1994).

Waiver of right to jury trial in contempt proceeding. — In a criminal contempt case, the trial court did not err in failing to submit the issue of financial inability to the jury because a business

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partner waived the partner's right to a jury trial on the issue of financial inability since the partner did not file a jury trial demand until after the evidentiary hearing had commenced and the partner had previously requested that the contempt hearing be placed on a non-jury calendar; a litigant may impliedly waive the statutory right to a jury trial by his or her

conduct. *Affatato v. Considine*, 305 Ga. App. 755, 700 S.E.2d 717 (2010).

Withdrawal of jury trial waiver. — As the grant of a mistrial was an appropriate remedy for surprise at trial caused by new claims raised by the plaintiff, the trial court was authorized by O.C.G.A. § 9-11-39(b) to terminate the bench trial and to allow the defendants to withdraw the defendants' jury waiver and demand a new trial by jury. *Griggs v. Fletcher*, 294 Ga. App. 60, 668 S.E.2d 521 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Jury, §§ 67, 86 et seq. 75B Am. Jur. 2d, Trials, § 1664.

Am. Jur. Pleading and Practice Forms. — 15A Am. Jur. Pleading and Practice Forms, Judicial Sales, § 86.

C.J.S. — 35B C.J.S., Federal Civil Procedure, § 1039 et seq. 50A C.J.S., Juries, § 169 et seq.

ALR. — Right of judge trying case without jury to base findings on result of personal observations, 97 ALR 335.

Waiver of right to jury trial as operative after expiration of term during which it was made, or as regards subsequent trial, 106 ALR 203.

Relief from stipulations, 161 ALR 1161.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 ALR2d 1162.

Sufficiency of waiver of full jury, 93 ALR2d 410.

Waiver, after not guilty plea, of jury trial in felony case, 9 ALR4th 695.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 ALR4th 1041.

Jury trial waiver as binding on later state civil trial, 48 ALR4th 747.

Contractual jury trial waivers in state civil cases, 42 ALR5th 53.

9-11-40. Time and place of trial.

(a) **Time of trial.** All civil cases, including divorce and other domestic relations cases, shall be triable any time after the last day upon which defensive pleadings were required to be filed therein; provided, however, that the court shall in all cases afford to the parties reasonable time for discovery procedures, subsequent to the date that defensive pleadings were required to be filed; provided, further, that, in divorce cases involving service by publication, service shall occur on the date of the first publication of notice following the order for service of publication pursuant to subparagraph (f)(1)(C) of Code Section 9-11-4, and such divorce cases shall be triable any time after 60 days have elapsed since the date of the first publication of notice.

(b) **Trial in chambers.** The judges of any courts of record may, on reasonable notice to the parties, at any time and at chambers in any county in the circuit, hear and determine by interlocutory or final judgment any matter or issue where a jury trial is not required or has been waived. However, nothing in this subsection shall authorize the trial of any divorce case by consent or otherwise until after the last day

upon which defensive pleadings were required by law to be filed therein.

(c) **Assignment of cases for trial.** The courts shall provide for the placing of actions upon the trial calendar:

- (1) Without request of the parties but upon notice to the parties; or
- (2) Upon request of a party and notice to the other parties.

Except for cause, cases shall be placed upon the calendar in chronological order in accordance with filing dates. Precedence shall be given to actions entitled thereto by any statute. (Ga. L. 1966, p. 609, § 40; Ga. L. 1967, p. 226, § 41; Ga. L. 1968, p. 1104, § 9; Ga. L. 1976, p. 1677, § 1; Ga. L. 1993, p. 91, § 9; Ga. L. 2000, p. 1225, § 4.)

Cross references. — Number of counsel who may argue case and be heard in conclusion, § 9-10-182. Ready list, Uniform Superior Court Rules, Rule 8.2. Trial calendar, Uniform State Court Rules, Rule 8.3.

Editor's notes. — Ga. L. 2000, p. 1225, § 8, not codified by the General Assembly, provides that the amendment to this Code

section is applicable to civil actions filed on or after July 1, 2000.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 40, see 28 U.S.C.

Law reviews. — For article, "Synopsis of 1968 Amendments to the Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968).

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GENERAL CONSIDERATION

TIME OF TRIAL

TRIAL IN CHAMBERS

ASSIGNMENT OF CASES FOR TRIAL

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 3-510 and 81-1003 are included in the annotations for this Code section.

Dismissal for failure to state claim. — When a complaint fails to state a claim, dismissal of such claim is not error even though the complainant has made a demand for a jury trial, and does not contravene this section. *Bush v. Morris*, 123 Ga. App. 497, 181 S.E.2d 503 (1971).

Reasonable notice required. — Power of superior courts to determine issues by final judgment at chambers in any county in the judicial circuit when a jury verdict is not required may be exercised only after reasonable notice to the parties. *Hinson v. Hinson*, 218 Ga. 447,

128 S.E.2d 487 (1962) (decided under former Code 1933, § 3-510).

Trial court abused the court's discretion in denying a motion to set aside a default judgment entered when a builder failed to appear for trial in a breach of contract action; a nonamendable defect was shown on the face of the record, which established that the builder had never received actual notice of the trial as the notice was sent to the wrong address and was returned. *Moore v. Davidson*, 292 Ga. App. 57, 663 S.E.2d 766 (2008).

Trial court not required to provide notice of trial date. — Superior court did not abuse the court's discretion in denying a stepson's motion under O.C.G.A. § 9-11-60(d) to set aside a judgment entered in favor of an administrator based on the claim that the stepson's

General Consideration (Cont'd)

attorney had no notice of the trial date because the superior court placed the case on the trial calendar upon the stepson's request; therefore, pursuant to O.C.G.A. § 9-11-40(c)(2), the superior court was not required to provide the stepson with notice of the trial date, and the stepson's attorney had a duty to attend court and look after the attorney's and the stepson's interests. *Bocker v. Crisp*, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Cited in *Tootle v. Player*, 225 Ga. 431, 169 S.E.2d 340 (1969); *Siefferman v. Kirkpatrick*, 121 Ga. App. 161, 173 S.E.2d 262 (1970); *Newton v. Newton*, 226 Ga. 440, 175 S.E.2d 543 (1970); *Bodrey v. Bodrey*, 122 Ga. App. 23, 176 S.E.2d 234 (1970); *Mitchell v. Mitchell*, 226 Ga. 678, 177 S.E.2d 89 (1970); *Harvey v. Lissner*, 124 Ga. App. 448, 184 S.E.2d 184 (1971); *Harris v. Harris*, 228 Ga. 562, 187 S.E.2d 139 (1972); *Touchton v. Stewart*, 229 Ga. 303, 190 S.E.2d 912 (1972); *Newman v. Greer*, 131 Ga. App. 128, 205 S.E.2d 486 (1974); *Johnson v. Cleveland*, 131 Ga. App. 560, 206 S.E.2d 704 (1974); *Bradberry v. Bradberry*, 232 Ga. 651, 208 S.E.2d 469 (1974); *Gibson v. Gibson*, 234 Ga. 528, 216 S.E.2d 824 (1975); *Hill v. Hill*, 234 Ga. 836, 218 S.E.2d 619 (1975); *Riden v. Commercial Credit Plan*, 136 Ga. App. 191, 220 S.E.2d 746 (1975); *Moss v. Bishop*, 235 Ga. 616, 221 S.E.2d 38 (1975); *Lawson v. Alvers*, 136 Ga. App. 801, 222 S.E.2d 203 (1975); *Hopkins v. Donaldson*, 137 Ga. App. 786, 224 S.E.2d 788 (1976); *Huber v. State*, 140 Ga. App. 148, 230 S.E.2d 105 (1976); *Cel-Ko Bldrs. & Developers, Inc. v. BX Corp.*, 140 Ga. App. 501, 231 S.E.2d 361 (1976); *Palmes v. Palmes*, 236 Ga. 115, 223 S.E.2d 86 (1976); *Moody v. Mendenhall*, 238 Ga. 689, 234 S.E.2d 905 (1977); *Grossman v. Glass*, 239 Ga. 319, 236 S.E.2d 657 (1977); *Kirk v. Hasty*, 239 Ga. 362, 236 S.E.2d 667 (1977); *Adair v. Adair*, 239 Ga. 494, 238 S.E.2d 46 (1977); *Spencer v. Taylor*, 144 Ga. App. 641, 242 S.E.2d 308 (1978); *Spyropoulos v. Linard Estate*, 148 Ga. App. 380, 251 S.E.2d 327 (1978); *Kiplinger v. Nature Island, Inc.*, 149 Ga. App. 103, 253 S.E.2d 569 (1979); *Pittman v. United States Shelter Corp.*, 150 Ga. App. 37, 256 S.E.2d 646 (1979);

Hancock v. Oates, 244 Ga. 175, 259 S.E.2d 437 (1979); *Jelks v. World of Realty, Inc.*, 153 Ga. App. 720, 266 S.E.2d 357 (1980); *Spyropoulos v. Linard Estate*, 154 Ga. App. 200, 267 S.E.2d 796 (1980); *Garner v. State*, 159 Ga. App. 244, 282 S.E.2d 909 (1981); *Havlik v. Tuftcraft, Inc.*, 162 Ga. App. 180, 290 S.E.2d 524 (1982); *Stewart v. Williams*, 164 Ga. App. 117, 296 S.E.2d 416 (1982); *Williams v. Calloway*, 171 Ga. App. 286, 319 S.E.2d 500 (1984); *Murray v. Stratford*, 181 Ga. App. 592, 353 S.E.2d 85 (1987); *Joint City-County Bd. of Tax Assessors v. Turoff*, 184 Ga. App. 322, 361 S.E.2d 528 (1987); *Collins v. Citizens & S. Trust Co.*, 258 Ga. 665, 373 S.E.2d 612 (1988); *Randall v. Randall*, 274 Ga. 107, 549 S.E.2d 384 (2001); *Prescott v. Builders Transp., Inc.*, 251 Ga. App. 280, 554 S.E.2d 241 (2001).

Time of Trial**Consent of parties inconsequential.**

— Under subsection (a) of this section, consent of the parties is inconsequential. *Bradberry v. Bradberry*, 232 Ga. 651, 208 S.E.2d 469 (1974).

Time for trial set by this section.

— After time for filing defensive pleadings expires, it is not error for permanent child custody hearing to be set by rule nisi less than 30 days later, as the time for trial is set by subsection (a) of Ga. L. 1976, p. 1677, § 1 (see now O.C.G.A. § 9-11-40), not Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56(c)). *Brand v. Brand*, 244 Ga. App. 124, 259 S.E.2d 133 (1979).

Upon reading the rules within the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) in para materia with Ga. Unif. Super. Ct. R. 24.6(B), the trial court was authorized to grant a divorce well after 30 days from the time an answer would have been due; hence, the trial court did not err in denying a wife's motion to set that judgment aside. *Hammack v. Hammack*, 281 Ga. 202, 635 S.E.2d 752 (2006).

Reasonable time for discovery required. — All that is required by subsection (a) of this section is reasonableness as to the time allowed for discovery. *Partain v. Mayor of Royston*, 246 Ga. 297, 271 S.E.2d 201 (1980).

Thirteen months sufficient time for discovery. — Passage of 13 months after

joinder of issue before trial was a sufficient period of time for purposes of discovery to satisfy the reasonableness requirement of subsection (a) of this section. *Puritan Fashions Corp. v. Naftel*, 138 Ga. App. 479, 226 S.E.2d 305 (1976).

Discretion of court as to limitation of discovery. — Trial court has broad discretion concerning the use of and limitations upon discovery procedure, and this discretion will not be disturbed on appeal in absence of abuse of that discretion. *Partain v. Mayor of Royston*, 246 Ga. 297, 271 S.E.2d 201 (1980).

Publication of trial calendar as notice. — Since the defendant had actual knowledge of the pendency of the defendant's case, the publication of the trial calendar in the county's legal organ constituted sufficient notice of the trial date so as to satisfy due process. *Carson v. Morris*, 164 Ga. App. 732, 297 S.E.2d 513 (1982).

Publication of the calendar of the state court in the official organ of the county is sufficient notice to parties of pending trials in that court. *Automated Medical Servs., Inc. v. Holland*, 166 Ga. App. 57, 303 S.E.2d 127 (1983).

Denial of motion to set aside a default judgment against a corporation was not an abuse of discretion as the trial was properly noticed by publication of the trial calendar in the county's legal gazette; publication of a court calendar in the county's legal organ of record was sufficient notice to the parties to appear. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Reasonable notice not given by the trial court. — Trial court lacked the authority to grant any equitable relief other than an accounting without giving notice, after one partner and the management company did not have notice that another partner was seeking, and the trial court was considering, the granting of a dissolution and injunction at the hearing for a pre-dissolution accounting, the trial court also failed to inform the parties that it would resolve requests for other equitable relief and the management company neither consented nor acquiesced to the trial court deciding any issue besides an accounting. *Williams v. Tritt*, 262 Ga. 173,

415 S.E.2d 285 (1992).

Failure to properly request continuance. — When the record did not support the defendant's contention that a written request for continuance had been made in that a copy of the motion did not show on the motions's face that the motion was ever filed, and when no oral request had been made, there was no abuse of discretion when the case was set for trial four months after the answer was filed. *Surgijet, Inc. v. Hicks*, 236 Ga. App. 80, 511 S.E.2d 194 (1999).

Trial in Chambers

Equity cases. — There is no constitutional right to trial by jury in equity cases. *Phillips v. Gladney*, 234 Ga. 399, 216 S.E.2d 297 (1975); *Duncan v. First Nat'l Bank*, 597 F.2d 51 (5th Cir. 1979).

Final judgment after interlocutory hearing when no issues of fact raised. — When no issues of fact are raised, a trial judge is authorized to enter a final judgment after an interlocutory hearing. *Consortium Mgt. Co. v. Mutual Am. Corp.*, 246 Ga. 346, 271 S.E.2d 488 (1980).

When the defendant filed the defensive pleadings which raised no issue of fact on the vital questions in the case, the trial judge was authorized to enter final judgment after hearing evidence presented at an interlocutory hearing. *Phillips v. Gladney*, 234 Ga. 399, 216 S.E.2d 297 (1975).

Ex parte hearings only proper in extraordinary cases. — Ex parte hearings are not sanctioned, except in the case of extraordinary matters such as temporary restraining orders and temporary injunctions; in other judicial hearings, both parties should be notified of the hearing and given an opportunity to attend and voice objections. *Anderson v. Fulton Nat'l Bank*, 146 Ga. App. 155, 245 S.E.2d 860 (1978); *Biggs v. Heriot*, 249 Ga. App. 461, 549 S.E.2d 131 (2001).

Action for modification not a "divorce case". — Action to modify the custody provisions of an earlier divorce decree is not a "divorce case" within the exception provided in subsection (b). *Adair v. Adair*, 239 Ga. 494, 238 S.E.2d 46 (1977).

Trial in Chambers (Cont'd)

Final judgment was prematurely entered at a temporary hearing in a divorce proceeding since 23 days remained during which defensive pleadings would have been required by law to be filed and both parties had filed timely demands for a jury trial. *Henderson v. Henderson*, 258 Ga. 205, 367 S.E.2d 40 (1988).

Assignment of Cases for Trial

Subsection (c) of Ga. L. 1968, p. 1104, § 9 (see now O.C.G.A. § 9-11-40) must be construed in pari materia with Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5(a)). *Newell Rd. Bldrs., Inc. v. Ramirez*, 126 Ga. App. 850, 192 S.E.2d 184 (1972).

Cases placed on calendar on court's motion or request of party. — While under subsection (c) of this section courts may place cases on the trial calendar on notice to the parties, courts must also do so upon request of a party. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978).

Notice of trial by publication of court calendar is adequate notice pursuant to subsection (c) of this section. *First Nat'l Bank v. Gorlin*, 243 Ga. 707, 256 S.E.2d 450 (1979).

When timely notice of the trial calendar, with the case style, case number, counsel of record, and pro se status is published in the legal organ of the county, such notice satisfies the notice requirements and is adequate under subsection (c) of O.C.G.A. § 9-11-40. *Davis v. Butler*, 240 Ga. App. 72, 522 S.E.2d 548 (1999).

Publication in official county newspaper sufficient. — Publication of trial calendar in official county newspaper is notice of trial pursuant to subsection (c) of this section. *Brown v. Citizens & S. Nat'l Bank*, 245 Ga. 515, 265 S.E.2d 791 (1980); *East India Co. v. Marsh & McLennan, Inc.*, 160 Ga. App. 529, 287 S.E.2d 574 (1981).

Publication of date and time of trial in the official organ of the county constitute sufficient notice under subsection (c) of this section. *Kleiner v. Blender*, 152 Ga. App. 426, 263 S.E.2d 232 (1979).

Requirements of paragraph (c)(1) are complied with by mailing notice that case will be on the trial calendar on a given date to the attorney for the litigant, when no question is raised that the notice was received in due course of mail. *Trice v. Howard*, 130 Ga. App. 895, 204 S.E.2d 808 (1974).

Notice of exact day of trial is not required. *Redding v. Raines*, 239 Ga. 865, 239 S.E.2d 32 (1977).

Lack of actual notice not determinative. — Even though the party may not have actual notice, if the requirements for giving notice are complied with, notice provisions of subsection (c) of this section are satisfied. *Holbrook v. Halpern Enters., Inc.*, 141 Ga. App. 648, 234 S.E.2d 187 (1977).

Notice to counsel presently of record sufficient. — Giving of notice to attorney who is counsel of record as of time the notice is mailed is sufficient compliance with subsection (c) of this section. *Tallman Pools of Ga., Inc. v. Napier*, 137 Ga. App. 500, 224 S.E.2d 426 (1976).

Notice to withdrawn counsel. — When party's original counsel of record, who withdraws from the case, receives notice of the trial date, the party is on notice as to the date in accordance with this section, despite the fact that the original counsel might not actually inform the party of the notice before withdrawing from representation. *McNally v. Stonehenge, Inc.*, 242 Ga. 258, 248 S.E.2d 653 (1978).

Default judgment set aside when notice sent to former counsel. — When the defendant's counsel withdraws from the case and notifies the court, but the only notice of the trial date is sent to the former counsel, who makes no effort to inform the former client, a motion to set aside a subsequently entered default judgment should be granted. *Georgia Hwy. Express, Inc. v. Whaley*, 166 Ga. App. 662, 305 S.E.2d 411 (1983).

Right to rely on compliance with notice requirements. — Parties have a right to rely that notice of trial assignments is given in compliance with court rules and this section. *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Especially in light of the requirements of O.C.G.A. § 9-11-40(c) and Ga. Unif. St. Ct. R. 8.3, regarding the trial calendar and notice to the parties, the defendant was entitled to rely on the trial court's written order specifically setting a trial date for October 22, 2001, and, therefore, the trial court erred in holding a bench trial in the defendant's absence on an earlier date without properly placing the earlier date on the trial calendar or giving proper notice. *Smith v. Williams*, 256 Ga. App. 664, 569 S.E.2d 598 (2002).

Presumption of performance of clerk's duty. — Trial court may properly take judicial notice of the presumption that the court clerk gave notice as required by law. *Trice v. Howard*, 130 Ga. App. 895, 204 S.E.2d 808 (1974).

Defendant entitled to day in court when notice lacking. — Defendant is entitled to the defendant's day in court on the main case if in fact the defendant proves the essential requirement of assignment notice has been overlooked or absent. *Wilkes v. Ricks*, 126 Ga. App. 266, 190 S.E.2d 603 (1972).

Failure to give proper notice of trial to adversary is reversible error. *Siano v. Spindel*, 136 Ga. App. 288, 220 S.E.2d 718 (1975).

Lack of notice as ground for setting aside judgment. — Lack of trial notice as required by subsection (c) of this section is ground for setting aside the judgment. *Redding v. Commonwealth of Am., Inc.*, 143 Ga. App. 215, 237 S.E.2d 689 (1977).

Failure to give proper notice of trial. — When the face of the record shows without contradiction that there was a total lack of notice to the defendant of the trial assignment of the defendant's case, the trial court erred in denying the motion to set aside the judgment. *Shelton v. Rodgers*, 160 Ga. App. 910, 288 S.E.2d 619 (1982).

Trial of counterclaim, as well as dismissal of the main claim, without proper notice having been given to opposing counsel was error and warranted reversal. *Health Images, Inc. v. Green*, 207 Ga. App. 455, 428 S.E.2d 378 (1993).

Discretion of court as to setting aside of judgment allegedly obtained

without notice. — Trial court must exercise discretion in determining whether under all the circumstances a judgment obtained in the absence of the party or the party's counsel, who contends to having no knowledge of the publication of the calendar or other notice of the calendar, should be set aside. *Grindle v. Eubanks*, 152 Ga. App. 58, 262 S.E.2d 235 (1979).

Notice of trial by publication of the court calendar in the *Fulton County Daily Report* is notice pursuant to subsection (c) of Ga. L. 1968, p. 1104, § 9 (see now O.C.G.A. § 9-11-40); however, this does not mean that the trial court is without authority to set aside the judgment or grant a new trial under Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60), if the circumstances warrant such relief. *Spyropoulos v. Linard Estate*, 243 Ga. 518, 255 S.E.2d 40 (1979).

Notice held adequate. — When negligence action is set for trial on September 11, and trial calendar for September 11 is published on August 31 in the official organ of the county, properly listing the case, the defendants received adequate notice of the trial date. *Martin v. Foxboro Co.*, 149 Ga. App. 719, 256 S.E.2d 34 (1979).

Defendant's claim that sufficient notice of the trial date was not provided was rejected as the record reflected that a scheduling order was issued by the trial court, the trial date was published on the trial calendar, and the defendant and the defendant's counsel were listed in the notice. It was clear that the defendant was aware of the trial calendar based on an email from the defendant's counsel. *Surles v. Cornell Corr. of Cal., Inc.*, 290 Ga. App. 260, 659 S.E.2d 683 (2008).

It was not error to refuse to set aside judgment for lack of notice under subsection (c) of this section since the court clerk testified that it is not the clerk's practice to fail to mail notice to any attorney, and when the deputy clerk testified the deputy mailed out the court calendar with a cover letter to all counsel, and that the letter had not been returned to the clerk's office undelivered. *Belle Interiors, Inc. v. Norman*, 130 Ga. App. 669, 204 S.E.2d 364 (1974).

Clerk's oversight in giving notice of assignment. — Trial court erred in deny-

Assignment of Cases for Trial (Cont'd)

ing the motion to set aside the judgment when the record in the case showed that there was a total lack of notice to the defendant of the assignment of the defendant's case to a trial calendar because of a clerical oversight in recognizing the defendant's change of address. *Taylor v. Chester*, 207 Ga. App. 217, 427 S.E.2d 582 (1993).

By failure to plead, the defendant waived notice of trial on the limited issue of the amount of damages, and there was no requirement to place the case on the trial calendar nor for the plaintiff to comply with the local court rule. *Newell Rd. Bldrs., Inc. v. Ramirez*, 126 Ga. App. 850, 192 S.E.2d 184 (1972).

Case placed on calendar with notice ripe for trial despite local rule. — When the trial court places a case on a calendar, with notice to the parties as required by this section, it is ripe for trial, notwithstanding any local rule stating that it could not be placed on a trial calendar without a pretrial. *Grindle v. Eubanks*, 152 Ga. App. 58, 262 S.E.2d 235 (1979).

Party chargeable with notice that case may be called. — Party or a party's counsel is chargeable with notice that the party's case, when ripe for trial, may be called for trial at any time during a term of court, and even out of its regular order on the docket, in the court's discretion, provided the case is placed on a calendar duly prepared and notice is given of the trial. *Grindle v. Eubanks*, 152 Ga. App. 58, 262 S.E.2d 235 (1979).

Placement of appeal from probate court on calendar. — As it was the express command of former Code 1933,

§ 6-601 (see now O.C.G.A. § 5-3-30) that appeals of probate proceedings be tried by a jury at the first term after entry of the appeal, it would appear to be the duty of the clerk to place the appeal upon the trial calendar for the first term after docketing; if it cannot be reached at that term, or should the court defer the matter, neither party should be penalized. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978).

No greater duty is placed upon counsel for a party appealing to the superior court to bring a case to trial than is placed upon counsel for the appellee, as while the appellant is the moving party as far as the appeal is concerned, once the appeal and the supporting record is docketed in the superior court, it is entitled to de novo treatment. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978).

Dismissal of appeal from probate court not warranted for failure to request placement on calendar. — In case appealed from probate court to superior court, when counsel for appellee requests that case be assigned for trial at the earliest available date and serves notice of this request upon counsel for appellant, it would be folly to require the appellant's counsel to also file a similar demand or suffer dismissal of the appellant's case on appeal. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978).

Dismissal in April 1978, of case appealed from probate court to superior court in September 1977, in which appellee had requested trial at the earliest possible date, on grounds that the appellant had taken no action to obtain a trial since entry of the appeal nor shown good cause for delay, was error. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Authority of nonresident superior court judge in chambers. — Former Code 1933, §§ 24-2613 and 24-2617 (see now O.C.G.A. § 15-6-12), when read in light of former Code 1933, § 24-2616 (see now O.C.G.A. § 15-6-9) and subsection (b) of Ga. L. 1968, p. 1104, § 9 (see now O.C.G.A. § 9-11-40) confers authority on

nonresident superior court judge in chambers in the judge's own circuit to hear and determine by interlocutory or final judgment, in accordance with subsection (b), any matter in a case from the originating superior court which arises while the originating superior court is in vacation. 1975 Op. Att'y Gen. No. U75-68.

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trial, §§ 6, 7, 11, 20, 21, 32, 35 et seq., 121, 122. 75B Am. Jur. 2d, Trial, §§ 1622, 1664.

C.J.S. — 35B C.J.S., Federal Civil Procedure, §§ 976, 977. 88 C.J.S., Trial, § 78 et seq.

ALR. — What constitutes bringing an action to trial or other activity in case

sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 ALR4th 840.

Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or transactions upon which prosecution is predicated — state cases, 37 ALR6th 511.

9-11-41. Dismissal of actions; recommencement within six months.

(a) Voluntary dismissal; effect:

(1) **By plaintiff; by stipulation.** Subject to the provisions of subsection (e) of Code Section 9-11-23, Code Section 9-11-66, and any statute, an action may be dismissed by the plaintiff, without order or permission of court:

(A) By filing a written notice of dismissal at any time before the first witness is sworn; or

(B) By filing a stipulation of dismissal signed by all parties who have appeared in the action.

(2) **By order of court.** Except as provided in paragraph (1) of this subsection, an action shall not be dismissed upon the plaintiff's motion except upon order of the court and upon the terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him or her of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(3) **Effect.** A dismissal under this subsection is without prejudice, except that the filing of a second notice of dismissal operates as an adjudication upon the merits.

(b) **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with this chapter or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine the facts and render judgment against the plaintiff or may decline to render any judgment until the close of all

the evidence. The effect of dismissals shall be as follows: (1) A dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits; and (2) Any other dismissal under this subsection and any dismissal not provided for in this Code section, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, does operate as an adjudication upon the merits unless the court in its order for dismissal specifies otherwise.

(c) **Dismissal of counterclaim, cross-claim, or third-party claim.** This Code section also applies to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) **Cost of previously dismissed action.** If a plaintiff who has dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the plaintiff shall first pay the court costs of the action previously dismissed.

(e) **Dismissal for want of prosecution; recommencement.** Any action in which no written order is taken for a period of five years shall automatically stand dismissed, with costs to be taxed against the party plaintiff. For the purposes of this Code section, an order of continuance will be deemed an order. When an action is dismissed under this subsection, if the plaintiff recommences the action within six months following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action. (Ga. L. 1966, p. 609, § 41; Ga. L. 1982, p. 784, §§ 1, 2; Ga. L. 1984, p. 597, § 2; Ga. L. 1985, p. 546, § 1; Ga. L. 1986, p. 816, § 1; Ga. L. 2003, p. 820, § 4.)

Cross references. — Dismissal and renewal of actions generally, § 9-2-60 et seq. Dismissal, Uniform Superior Court Rules, Rule 14. Dismissal of actions in probate court, Uniform Rules for the Probate Courts, Rule 12.

Editor's notes. — Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act “shall apply to all civil actions filed on or after July 1, 2003.”

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 41, see 28 U.S.C.

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For article surveying Georgia cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For annual survey on trial

practice and procedure, see 42 Mercer L. Rev. 469 (1990). For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on trial practice and procedure, see 65 Mercer L. Rev. 277 (2013). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

For note discussing the requirement that an adjudication be on the merits for the principles of res judicata to apply, see 11 Ga. L. Rev. 929 (1977). For note, “Dismissal with Prejudice for Failure to Prosecute: Visiting the Sins of the Attorney upon the Client,” see 22 Ga. L. Rev. 195 (1987). For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

For case comment, “Yost v. Torok and

Abusive Litigation: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

VOLUNTARY DISMISSAL

1. IN GENERAL
2. EFFECT OF PENDING COUNTERCLAIM
3. MULTIPLE DISMISSALS

INVOLUNTARY DISMISSAL

1. IN GENERAL
2. FOR FAILURE TO PROSECUTE
3. AFTER PRESENTATION OF PLAINTIFF’S EVIDENCE
4. EFFECT OF INVOLUNTARY DISMISSAL
5. DISMISSAL OF COUNTERCLAIMS, ETC.

COSTS OF PREVIOUS ACTION

AUTOMATIC DISMISSAL FOR WANT OF PROSECUTION

General Consideration

Editor’s notes — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 3-510 are included in the annotations for this Code section.

Inapplicable to criminal cases. — Civil Practice Act, O.C.G.A. Ch. 11, T. 9, under which O.C.G.A. § 9-11-41 is included provides for dismissals with prejudice of only civil cases, and the trial court had no authority to dismiss a charge of criminal trespass. *State v. Luttrell*, 207 Ga. App. 116, 427 S.E.2d 95 (1993).

Dismissal of party during pretrial procedure. — While the pretrial procedure under O.C.G.A. § 9-11-16 has broad general application, the method for dismissing an action is specifically provided under O.C.G.A. § 9-11-41, and the dismissal of a party is not within the purview of the pretrial procedure. *Georgia Am. Ins. Co. v. Mills*, 183 Ga. App. 707, 359 S.E.2d 697 (1987).

Dismissal without prejudice does not operate as an adjudication on the merits. *Gillis v. Goodgame*, 199 Ga. App. 413, 404 S.E.2d 815 (1991), rev’d on other grounds, 262 Ga. 117, 414 S.E.2d 197 (1992).

Options available to the court. — O.C.G.A. § 9-11-41 allows the court to dismiss the action and restrict the dis-

missal to one without prejudice; however, the trial court also may elect to go forward with the trial of the case, and the judgment that is entered following such a trial is not a dismissal, but an adjudication upon the merits. *Accolades Apts., L.P. v. Fulton County*, 242 Ga. App. 214, 528 S.E.2d 268 (2000).

Invited error. — When a corporation sought to dismiss an administrator’s wrongful death action because its caption bore the name of a nonexistent court, and the trial court later dismissed the action after the administrator filed a notice of voluntary dismissal, there was no basis for reversal; the trial court adopted the corporation’s reasoning as a basis for dismissal and thus any error was invited by the corporation. *Video Warehouse, Inc. v. Newsome*, 285 Ga. App. 786, 648 S.E.2d 124 (2007).

Adding or dropping less than all parties. — When less than all of the plaintiff’s claims are added or dropped, the additions and deletions are not dismissals and renewals governed by O.C.G.A. §§ 9-2-61(a) and 9-11-41(a), but simply amendments governed by the liberal amendment rules of O.C.G.A. § 9-11-15(a) and (c). *Young v. Rider*, 208 Ga. App. 147, 430 S.E.2d 117 (1993).

O.C.G.A. § 9-11-41 does not provide for the voluntary, unilateral dismissal of a party’s claims against some but not all of

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the parties to the action. *Manning v. Robertson*, 223 Ga. App. 139, 476 S.E.2d 889 (1996).

Plaintiff's attempted dismissal of one defendant was ineffective in the absence of a ruling by the trial court. *Flemister v. Hopko*, 230 Ga. App. 93, 495 S.E.2d 342 (1998).

Dismissal erroneously granted. — Trial court erred by dismissing a father's contempt action because the final consent order had not been entered within the five-year rule under O.C.G.A. § 9-2-60(b) because the legitimation, custody, and support matter had been resolved by consent and all that remained was entry of the order; thus, the case presented an exception to the five-year rule. *Ga. Dep't of Human Servs. v. Patton*, 322 Ga. App. 333, 744 S.E.2d 854 (2013).

Recovery of expenses. — Definition of court costs under O.C.G.A. § 9-11-41(d) does not include the witness fees, court reporting fees, and copying expenses that a prevailing party in a federal action is allowed to recover. *Prison Health Servs. v. Mitchell*, 256 Ga. App. 537, 568 S.E.2d 741 (2002).

Attorney fee award after voluntary dismissal proper. — In awarding attorney fees to the appellees under O.C.G.A. §§ 9-11-37 and 9-15-14 after an appellant voluntarily dismissed the appellant's lawsuit, the trial court did not violate the legislative intent behind O.C.G.A. § 9-11-41(a). The appellees incurred needless expense because of the appellant's discovery violations, and the litigation was unnecessarily expanded prior to the appellant's voluntary dismissal. *Hart v. Redmond Reg'l Med. Ctr.*, 300 Ga. App. 641, 686 S.E.2d 130 (2009).

Dismissal pursuant to five-year rule. — Trial court properly dismissed law clients' malpractice action pursuant to the "five-year rule," as there was no written order entered in the trial court for at least five years; that period was not tolled during the pendency of an appeal because the trial court had jurisdiction to proceed with at least part of the case. *Paul v. Smith, Gambrell & Russell*, 323 Ga. App. 447, 746 S.E.2d 739 (2013).

Dismissal erroneous for failure to pay fees. — Since the masseur did not dismiss the prior action against a defendant, but rather, the trial court granted summary judgment to the defendant in the prior action and then awarded the defendant attorney fees, the trial court erred in dismissing the instant complaint for failure to pay the fees awarded in the prior action pursuant to O.C.G.A. § 9-11-41(d). *Muhammad v. Massage Envy of Ga., Inc.*, 322 Ga. App. 380, 745 S.E.2d 650 (2013).

Cited in *Bailey v. Louisville & N.R.R.*, 117 Ga. App. 185, 160 S.E.2d 245 (1968); *Underwood v. United States Fid. & Guar. Co.*, 118 Ga. App. 847, 165 S.E.2d 874 (1968); *Lovett v. Lovett*, 225 Ga. 251, 167 S.E.2d 590 (1969); *Todd v. Waddell*, 120 Ga. App. 20, 169 S.E.2d 351 (1969); *Wilson v. Matthews*, 120 Ga. App. 284, 170 S.E.2d 346 (1969); *Cochran v. Cheney*, 121 Ga. App. 449, 174 S.E.2d 234 (1970); *Maslia v. Hall*, 121 Ga. App. 740, 175 S.E.2d 48 (1970); *Godfrey v. Ramsey*, 121 Ga. App. 767, 175 S.E.2d 127 (1970); *Carver v. Cranford*, 122 Ga. App. 100, 176 S.E.2d 272 (1970); *Norman v. Walker*, 123 Ga. App. 413, 181 S.E.2d 310 (1971); *Cook v. Peeples*, 227 Ga. 473, 181 S.E.2d 375 (1971); *McAfee v. Fickling & Walker Dev. Co.*, 123 Ga. App. 647, 182 S.E.2d 146 (1971); *Control Data Corp. v. Carley*, 124 Ga. App. 62, 183 S.E.2d 71 (1971); *Arrendale v. Arrendale*, 228 Ga. 295, 185 S.E.2d 83 (1971); *Morton v. Retail Credit Co.*, 124 Ga. App. 728, 185 S.E.2d 777 (1971); *Shonson v. Bottomy*, 126 Ga. App. 691, 191 S.E.2d 618 (1972); *Ben Nuckolls Fin. Co. v. Grubbs*, 127 Ga. App. 44, 192 S.E.2d 408 (1972); *Shonson v. Bottomy*, 230 Ga. 188, 196 S.E.2d 135 (1973); *Southern Concrete Prods. Co. v. Consolidated Equities Corp.*, 128 Ga. App. 698, 197 S.E.2d 798 (1973); *Zaun v. Nobles*, 128 Ga. App. 846, 198 S.E.2d 326 (1973); *Garrett v. Panacon Corp.*, 130 Ga. App. 641, 204 S.E.2d 354 (1974); *Baitcher v. Louis R. Clerico Assocs.*, 132 Ga. App. 219, 207 S.E.2d 698 (1974); *Dollar v. Webb*, 132 Ga. App. 811, 209 S.E.2d 253 (1974); *Rothstein v. Brooks*, 133 Ga. App. 52, 209 S.E.2d 674 (1974); *Empire Banking Co. v. Martin*, 133 Ga. App. 115, 210 S.E.2d 237 (1974); *Gulf Oil Corp. v. Pentecost*, 133

Ga. App. 651, 211 S.E.2d 908 (1975); Anderson v. Universal C.I.T. Credit Corp., 134 Ga. App. 931, 216 S.E.2d 719 (1975); Trulove v. Trulove, 233 Ga. 896, 213 S.E.2d 868 (1975); Moore v. Tootle, 134 Ga. App. 232, 214 S.E.2d 184 (1975); Jernigan v. Collier, 234 Ga. 837, 218 S.E.2d 556 (1975); Riden v. Commercial Credit Plan, 136 Ga. App. 191, 220 S.E.2d 746 (1975); American San. Servs. v. EDM of Texas, Inc., 136 Ga. App. 200, 221 S.E.2d 66 (1975); Culbreth v. Culbreth, 236 Ga. 583, 224 S.E.2d 417 (1976); Holcomb v. Trax, Inc., 138 Ga. App. 105, 225 S.E.2d 468 (1976); Positions, Inc. v. Steel Deck & Siding Co., 138 Ga. App. 200, 225 S.E.2d 769 (1976); Nix v. Nix, 138 Ga. App. 754, 227 S.E.2d 481 (1976); Hobgood v. Neely, 139 Ga. App. 135, 228 S.E.2d 30 (1976); Tri-State Culvert Mfg., Inc. v. Crum, 139 Ga. App. 448, 228 S.E.2d 403 (1976); American San. Servs., Inc. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136 (1976); McLanahan v. Keith, 140 Ga. App. 171, 230 S.E.2d 57 (1976); Patterson v. Professional Resources, Inc., 140 Ga. App. 315, 231 S.E.2d 88 (1976); Roach-Russell, Inc. v. A.B.R. Metals & Serv., Inc., 140 Ga. App. 307, 231 S.E.2d 114 (1976); Peachtree Mtg. Corp. v. Northside Realty Assocs., 140 Ga. App. 541, 231 S.E.2d 350 (1976); Logan Paving Co. v. Liles Constr. Co., 141 Ga. App. 81, 232 S.E.2d 575 (1977); Wilbanks v. Wilbanks, 238 Ga. 660, 234 S.E.2d 915 (1977); West v. Griggs, 144 Ga. App. 285, 241 S.E.2d 26 (1977); Tarpley v. Hawkins, 144 Ga. App. 598, 241 S.E.2d 480 (1978); Mercury Rising, Inc. v. Gwinnett Bank & Trust Co., 144 Ga. App. 502, 241 S.E.2d 620 (1978); Carter v. Carter, 241 Ga. 335, 245 S.E.2d 292 (1978); City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978); Brock v. Little, 241 Ga. 549, 246 S.E.2d 668 (1978); Dehco, Inc. v. State Hwy. Dep't, 147 Ga. App. 476, 249 S.E.2d 282 (1978); State v. Cooperman, 147 Ga. App. 556, 249 S.E.2d 358 (1978); Tingle v. Georgia Power Co., 147 Ga. App. 775, 250 S.E.2d 497 (1978); Keramidas v. Department of Human Resources, 147 Ga. App. 820, 250 S.E.2d 560 (1978); Mullins v. Oden & Sims Used Cars, Inc., 148 Ga. App. 250, 251 S.E.2d 65 (1978); Jones v. Atlanta Hous. Auth., 148 Ga. App. 605, 252 S.E.2d 19 (1979); Head v. Walker, 243 Ga. 108, 252 S.E.2d 440 (1979); Walsey v. American Fletcher Nat'l Bank & Trust Co., 151 Ga. App. 104, 258 S.E.2d 760 (1979); National Heritage Corp. v. Mount Olive Mem. Gardens, Inc., 244 Ga. 240, 260 S.E.2d 1 (1979); Parks v. Parks, 244 Ga. 479, 260 S.E.2d 873 (1979); Spurlock v. Commercial Banking Co., 151 Ga. App. 649, 260 S.E.2d 912 (1979); Berry v. Morton, 152 Ga. App. 117, 262 S.E.2d 263 (1979); Yield, Inc. v. City of Atlanta, 152 Ga. App. 171, 262 S.E.2d 481 (1979); Kellos v. Parker-Sharpe, Inc., 245 Ga. 130, 263 S.E.2d 138 (1980); Maolud v. Keller, 153 Ga. App. 268, 265 S.E.2d 86 (1980); Emery Enters., Inc. v. Automatic Fastners Div., 155 Ga. App. 24, 270 S.E.2d 261 (1980); Kessler v. Liberty Mut. Ins. Co., 157 Ga. App. 287, 277 S.E.2d 257 (1981); Corrosion Control, Inc. v. William Armstrong Smith Co., 157 Ga. App. 291, 277 S.E.2d 287 (1981); Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981); Davis v. Barnes, 158 Ga. App. 89, 279 S.E.2d 330 (1981); Ross v. Ross, 159 Ga. App. 144, 282 S.E.2d 759 (1981); Johnson v. Freeman, 160 Ga. App. 431, 287 S.E.2d 314 (1981); Griffin v. Griffin, 248 Ga. 743, 285 S.E.2d 710 (1982); Bouldin v. Aragona-Garcia Enters., Inc., 161 Ga. App. 396, 288 S.E.2d 673 (1982); Rigdon v. Walker Sales & Serv., Inc., 161 Ga. App. 459, 288 S.E.2d 711 (1982); Caswell v. Caswell, 162 Ga. App. 72, 290 S.E.2d 171 (1982); Stone v. Green, 163 Ga. App. 18, 293 S.E.2d 506 (1982); Freeman v. Criterion Ins. Co., 693 F.2d 1021 (11th Cir. 1982); Jones v. Christian, 165 Ga. App. 165, 300 S.E.2d 1 (1983); Dubberly v. Nail, 166 Ga. App. 378, 304 S.E.2d 504 (1983); Mathews v. City of Atlanta, 167 Ga. App. 168, 306 S.E.2d 3 (1983); Stevens v. FAA's Florist, Inc., 169 Ga. App. 189, 311 S.E.2d 856 (1983); Mote v. Helmly, 169 Ga. App. 475, 313 S.E.2d 493 (1984); Robinson v. Mullins, 169 Ga. App. 903, 315 S.E.2d 658 (1984); Davis v. First of Ga. Ins. Managers, Inc., 171 Ga. App. 347, 319 S.E.2d 517 (1984); Tuck v. Cummins Trucking Co., 171 Ga. App. 485, 320 S.E.2d 265 (1984); Polston v. Levine, 171 Ga. App. 893, 321 S.E.2d 350 (1984); Ferris v. Hill, 172 Ga. App. 599, 323 S.E.2d 895 (1984); Dempsey Bros. Dairies, Inc. v. Blalock, 173 Ga. App.

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7, 325 S.E.2d 410 (1984); Spivey v. Rogers, 173 Ga. App. 233, 326 S.E.2d 227 (1984); Plank v. Bourdon, 173 Ga. App. 391, 326 S.E.2d 571 (1985); Citizens Bank v. Hooks, 173 Ga. App. 865, 328 S.E.2d 755 (1985); Smithloff v. Benson, 173 Ga. App. 870, 328 S.E.2d 759 (1985); Copeland v. White, 178 Ga. App. 644, 344 S.E.2d 436 (1986); Coker v. Casey, 178 Ga. App. 682, 344 S.E.2d 662 (1986); Keith v. McLanahan, 147 Ga. App. 342, 249 S.E.2d 128 (1987); Smith v. National Bank, 182 Ga. App. 55, 354 S.E.2d 678 (1987); DOT v. Samuels, 185 Ga. App. 871, 366 S.E.2d 181 (1988); Ramos v. Vourtsanis, 187 Ga. App. 69, 369 S.E.2d 344 (1988); Taco Bell Corp. v. Calson Corp., 190 Ga. App. 481, 379 S.E.2d 6 (1989); Williams v. City of Peachtree City, 192 Ga. App. 121, 385 S.E.2d 680 (1989); Ruff v. Central State Hosp., 192 Ga. App. 631, 385 S.E.2d 734 (1989); Clover Cable of Ohio, Inc. v. Heywood, 260 Ga. 341, 392 S.E.2d 855 (1990); Jones v. Bienert, 197 Ga. App. 554, 398 S.E.2d 830 (1990); Hertz Corp. v. McCray, 198 Ga. App. 484, 402 S.E.2d 298 (1991); Fowler v. Vineyard, 261 Ga. 454, 405 S.E.2d 678 (1991); Mantegna v. Professional Auto Care, Inc., 204 Ga. App. 254, 419 S.E.2d 43 (1992); Health Images, Inc. v. Green, 207 Ga. App. 455, 428 S.E.2d 378 (1993); Bennett v. Bridgestone/Firestone, Inc., 208 Ga. App. 782, 431 S.E.2d 748 (1993); Greeson Homes Corp. v. Voss, 209 Ga. App. 14, 432 S.E.2d 271 (1993); Haehn v. Alheit, 212 Ga. App. 252, 441 S.E.2d 529 (1994); Sievers v. Espy, 264 Ga. 118, 442 S.E.2d 232 (1994); Ludi v. Van Metre, 221 Ga. App. 479, 471 S.E.2d 913 (1996); Brown v. Adams, 233 Ga. App. 813, 506 S.E.2d 135 (1998); Truitt v. Housing Auth., 235 Ga. App. 92, 507 S.E.2d 781 (1998); Lau v. Klinger, 46 F. Supp. 2d 1377 (S.D. Ga. 1999); Merchant v. Mitchell, 241 Ga. App. 173, 525 S.E.2d 710 (1999); Stephens v. Conyers Apostolic Church, 243 Ga. App. 170, 532 S.E.2d 728 (2000); Roth v. Gulf Atl. Media of Ga., Inc., 244 Ga. App. 677, 536 S.E.2d 577 (2000); Chambers v. Green, 245 Ga. App. 814, 539 S.E.2d 181 (2000); Browns Mill Dev. Co. v. Denton, 247 Ga. App. 232, 543 S.E.2d 65 (2000); Thomas v. Atlanta Cas. Co., 253

Ga. App. 199, 558 S.E.2d 432 (2001); Int'l Maint. Corp. v. Inland Paper Bd. & Packaging, Inc., 256 Ga. App. 752, 569 S.E.2d 865 (2002); Drake v. Wallace, 259 Ga. App. 111, 576 S.E.2d 87 (2003); Benson v. McMillan, 261 Ga. App. 78, 581 S.E.2d 707 (2003); Southwest Health & Wellness, LLC v. Work, 282 Ga. App. 619, 639 S.E.2d 570 (2006); Jenkins v. Crea, 289 Ga. App. 174, 656 S.E.2d 849 (2008); GMC Group, Inc. v. Harsco Corp., 293 Ga. App. 707, 667 S.E.2d 916 (2008); Vega v. La Movida, Inc., 294 Ga. App. 311, 670 S.E.2d 116 (2008); Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731 (2009); Meacham v. Franklin-Heard County Water Auth., 302 Ga. App. 69, 690 S.E.2d 186 (2009); Windsor v. City of Atlanta, 287 Ga. 334, 695 S.E.2d 576 (2010); Cmty. State Bank v. Strong, 651 F.3d 1241 (11th Cir. 2011); Montgomery v. Morris, 322 Ga. App. 558, 745 S.E.2d 778 (2013).

Voluntary Dismissal**1. In General**

Constitutionality — Subsection (a) of this section is not unconstitutional. Deal v. Seaboard Coast Line R.R., 236 Ga. 629, 224 S.E.2d 922 (1976).

Legislative intent behind enactment of subsection (a) of O.C.G.A. § 9-11-41 was to afford a plaintiff, faced with a contrary verdict or other untenable position, a second chance to litigate a plaintiff's suit despite the inconvenience and irritation to the defendant. Griggs v. Columbus Bank & Trust Co., 188 Ga. App. 741, 374 S.E.2d 347 (1988); Belco Elec., Inc. v. Bush, 204 Ga. App. 811, 420 S.E.2d 602 (1992).

Intent of the legislature in enacting subsection (a) of O.C.G.A. § 9-11-41 was to give a plaintiff an opportunity to escape from an "untenable position" and relitigate the case, and thus there is no "bad-faith exception" to the right to dismiss and later relitigate, despite inconvenience and irritation to the defendant. Lakes v. Marriott Corp., 264 Ga. 475, 448 S.E.2d 203 (1994).

Federal rule contrasted. — Although the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) is patterned generally after the Federal Rules of Civil Procedure, sub-

section (a) of this section represents a significant departure from Rule 41(a), F.R.C.P. *Giordano v. Stubbs*, 356 F. Supp. 1041 (N.D. Ga.), *aff'd*, 483 F.2d 1395 (5th Cir. 1973).

Construction with other law. — Upon a proper appeal from a final order, while neither former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refiling in another court constitutes “improper judge shopping,” obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007), *cert. denied*, No. S07C1602, 2007 Ga. LEXIS 656 (Ga. 2007).

Subsection (a) of O.C.G.A. § 9-11-41 was subject to former § 14-2-123(d) (see now O.C.G.A. § 14-2-744), relating to dismissal of shareholder’s derivative actions, and the plaintiff’s attempted dismissal of the shareholder’s derivative suit was ineffective when no approval of the trial court was sought prior to the attempted dismissal. *Reese v. Frazier*, 158 Ga. App. 237, 279 S.E.2d 529 (1981).

Substantial justice intended. — Subsection (a) of this section is to be interpreted so as to do substantial justice. *Worthen v. Jones*, 240 Ga. 388, 240 S.E.2d 842 (1977).

Statute provides a res judicata defense to any party against whom relief is being sought under the same claim which has been brought and voluntarily dismissed on three previous occasions. *Belco Elec., Inc. v. Bush*, 204 Ga. App. 811, 420 S.E.2d 602 (1992).

Voluntary dismissal terminates the action. *Mitchell v. Wyatt*, 192 Ga. App. 127, 384 S.E.2d 227 (1989); *Collier v. Evans*, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

In an action containing a counterclaim, the failure of a defendant to object

to a properly written and filed voluntary dismissal of the main action results in the counterclaim’s dismissal. *Hardwick-Morrison Co. v. Mayland*, 206 Ga. App. 426, 425 S.E.2d 416 (1992).

Trial court lacked jurisdiction to hold a former employee in contempt for an alleged violation of a settlement agreement because the employee’s former employer and a related entity had voluntarily dismissed their suit under O.C.G.A. § 9-11-41(a), which divested the trial court of jurisdiction and rendered null any subsequent trial court orders in the case. *Gallagher v. Fiderion Group, LLC*, 300 Ga. App. 434, 685 S.E.2d 387 (2009).

Voluntary dismissal as matter of right. — Plaintiff is entitled to voluntary dismissal as a matter of right when the plaintiff substantially complies with statutory conditions. *English v. Atlanta Transit Sys.*, 134 Ga. App. 621, 215 S.E.2d 304 (1975).

Voluntary dismissal is a matter of right and terminates the action. *Page v. Holiday Inns, Inc.*, 245 Ga. 12, 262 S.E.2d 783 (1980).

When the plaintiffs moved to dismiss the plaintiffs’ cause of action without prejudice after the plaintiffs had been permitted to reopen the case to call an additional witness, the plaintiffs were entitled to dismissal without prejudice before the plaintiffs rested the plaintiffs’ case. *Redman Homes, Inc. v. Voss*, 212 Ga. App. 404, 441 S.E.2d 792 (1994).

Right to dismiss when defendant not prejudiced or deprived of defense. — Plaintiff may always dismiss the plaintiff’s action if no right of the defendant is prejudiced thereby. *Palmer v. Palmer*, 212 Ga. 616, 94 S.E.2d 722 (1956) (decided under former Code 1933, § 3-510).

Plaintiff may dismiss any claim when such dismissal will not prejudicially affect the interests of the defendant, but the plaintiff will not be permitted to dismiss when by so doing the defendant’s rights will be prejudiced or the defendant will be deprived of any just defense. *Howard v. Housing Auth.*, 220 Ga. 640, 140 S.E.2d 880 (1965) (decided under former Code 1933, § 3-510).

When defendant’s answer is purely defensive, plaintiff may dismiss the

Voluntary Dismissal (Cont'd)**1. In General (Cont'd)**

plaintiff's action without leave or order of court, and after such dismissal there is no case in court and no decree can be rendered therein. *Davenport v. Hardman*, 184 Ga. 518, 192 S.E. 11 (1937) (decided under former Code 1933, § 3-510).

Plaintiff may dismiss an action after the defendant has filed an answer which is purely defensive in its nature and seeks no affirmative relief over against the plaintiff. *Seaboard Air Line R.R. v. Whitman*, 107 Ga. App. 375, 130 S.E.2d 272 (1963) (decided under former Code 1933, § 3-510).

Dismissal prejudicing defendant's affirmative rights not permitted. — While ordinarily the plaintiff may dismiss the plaintiff's action with or without an order of court, an entire cause cannot properly be dismissed over the defendant's objection when the defendant's affirmative rights under the pleadings would be prejudiced thereby. *Fender v. Hendley*, 196 Ga. 512, 26 S.E.2d 887 (1943) (decided under former Code 1933, § 3-510).

When the defendant's answer prays for affirmative relief, the plaintiff cannot dismiss the plaintiff's action so as to interfere with the defendant's prayers for affirmative relief, whether the claims set up therein are legal or equitable; the defendant has the right to a hearing and a trial on the defendant's cross action. *Griffin v. Lynn*, 214 Ga. 300, 104 S.E.2d 442 (1958) (decided under former Code 1933, § 3-510).

Plaintiff may not dismiss action if such dismissal would prejudice any right of the defendant. *GMC v. Jenkins*, 117 Ga. App. 527, 160 S.E.2d 906, rev'd on other grounds, 224 Ga. 699, 164 S.E.2d 224 (1968) (decided under former Code 1933, § 3-510).

Jurisdiction of court to dismiss actions with prejudice. — Contention that trial court's dismissal of actions with prejudice under O.C.G.A. § 9-11-41 was a nullity because the plaintiffs had already entered a voluntary dismissal was without merit since the court did nothing more than reduce to writing the legal effect

accomplished by operation of law with a third voluntary dismissal. *Zohoury v. Zohouri*, 218 Ga. App. 748, 463 S.E.2d 141 (1995).

Voluntary dismissal of a paternity complaint did not deprive the court of jurisdiction since, pursuant to O.C.G.A. § 19-7-48, the dismissal required the court's approval. *Patterson v. Whitehead*, 224 Ga. App. 636, 481 S.E.2d 621 (1997).

Summary judgment as to already-dismissed claim. — Trial court's entry of summary judgment with respect to a claim which had already been dismissed was improper since voluntary dismissal operated to divest the court of jurisdiction. *Smith v. Memorial Medical Ctr., Inc.*, 208 Ga. App. 26, 430 S.E.2d 57 (1993); *Lotman v. Adamson Contracting, Inc.*, 219 Ga. App. 898, 467 S.E.2d 224 (1996).

Prayer for temporary alimony is not one for affirmative relief such as would preclude the plaintiff from dismissing the divorce action. *Palmer v. Palmer*, 212 Ga. 616, 94 S.E.2d 722 (1956) (decided under former Code 1933, § 3-510).

No dismissal after plea filed without leave of court on terms. — While plaintiff may dismiss the plaintiff's action if the plaintiff shall not thereby prejudice any right of the defendant, the plaintiff may not dismiss the action after plea of setoff or otherwise is filed so as to interfere with that plea, unless by leave of court on sufficient cause shown, and on terms prescribed by the court. *Collier v. DeJarnette Supply Co.*, 194 Ga. 129, 20 S.E.2d 925 (1942) (decided under former Code 1933, § 3-510).

Plaintiff in any action may dismiss at any time, provided the plaintiff shall not prejudice any right of the defendant or interfere with the defendant's plea, unless by leave of court on sufficient cause shown and on terms prescribed by the court. *Riddle v. Riddle*, 216 Ga. 549, 118 S.E.2d 83 (1961) (decided under former Code 1933, § 3-510).

Dismissal erroneous and appealable when defendant sought relief and restitution. — When, as a condition for grant of an interlocutory injunction against interfering with possession of land, the plaintiff was required to file a

bond to indemnify the defendant for such rentals as might be due by the plaintiff, which injunction was reversed by the Supreme Court as being mandatory in character, and the defendant in the same proceeding sought restitution and other relief, dismissal of the entire cause on the plaintiff's motion and objection by the defendant was erroneous, and was a final judgment from which appeal would lie. *Fender v. Hendley*, 196 Ga. 512, 26 S.E.2d 887 (1943) (decided under former Code 1933, § 3-510).

When no defensive pleadings have been filed by defendant, none of the defendant's rights are prejudiced by the plaintiff's dismissal of the plaintiff's action. *Waldor v. Waldor*, 217 Ga. 496, 123 S.E.2d 660 (1962) (decided under former Code 1933, § 3-510).

Claims that were subject to dismissal because the claims were duplicative of prior pending actions and subject to dismissal under O.C.G.A. § 9-2-5 were not void, thus, voluntary dismissal without prejudice of such claims was a dismissal within the meaning of O.C.G.A. § 9-11-41. *Zohoury v. Zohouri*, 218 Ga. App. 748, 463 S.E.2d 141 (1995).

Dismissal of claims subject to consolidation. — Contention that dismissal of actions with prejudice under O.C.G.A. § 9-11-41 was improper because some or all of the actions should have been consolidated under O.C.G.A. § 9-11-42 was without merit since the consent of all parties is required for consolidation. *Zohoury v. Zohouri*, 218 Ga. App. 748, 463 S.E.2d 141 (1995).

There is no "bad faith" exception to the plaintiff's right to dismiss an action voluntarily pursuant to subsection (a) of O.C.G.A. § 9-11-41. *C & S Indus. Supply Co. v. Proctor & Gamble Paper Prods. Co.*, 199 Ga. App. 197, 407 S.E.2d 346 (1991).

Plaintiff's voluntary dismissal of a legal malpractice action did not violate O.C.G.A. § 9-11-41 or public policy since the intent of the legislature in enacting that section was to give the plaintiffs the opportunity to escape untenable positions and relitigate the case, and there is no bad faith exception to this right, despite whatever inconvenience and irritation this may cause the defendants. *Bunch v. Vin-*

cent, 234 Ga. App. 637, 507 S.E.2d 239 (1998).

When holders of an alleged easement filed an action in superior court for removal of an obstruction to the easement and then dismissed that action and filed a similar case in probate court, the holders were not guilty of improper "judge shopping," because O.C.G.A. § 9-11-41(a) allowed the holders to voluntarily dismiss the holders' superior court action without prejudice, and there was no "bad faith" exception to this right. *Morris v. Mullis*, 264 Ga. App. 428, 590 S.E.2d 823 (2003).

Right of dismissal not unlimited. — Subsection (a) of this section does not provide an unlimited and unfettered right of dismissal. *Housing Auth. v. Mercer*, 123 Ga. App. 38, 179 S.E.2d 275 (1970).

Dismissal is accomplished by plaintiff, not by court. — Dismissal pursuant to subsection (a) of O.C.G.A. § 9-11-41 is accomplished by the plaintiff, not by order of the trial court. *Swartzel v. Garner*, 193 Ga. App. 267, 387 S.E.2d 359, cert. denied, 193 Ga. App. 911, 387 S.E.2d 359 (1989).

Voluntary dismissal is not a judgment of the court, but it is an order in the case. *Page v. Holiday Inns, Inc.*, 245 Ga. 12, 262 S.E.2d 783 (1980).

Complainant may dismiss complaint without leave or order of court. *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937) (decided under former Code 1933, § 3-510); *Trusco Fin. Co. v. McGee*, 206 Ga. 382, 57 S.E.2d 184 (1950) (decided under former Code 1933, § 3-510).

When parties sign and file a formal dismissal, upon entry of the dismissal on the docket, the case is effectively dismissed, and no order of the judge is necessary to effect that result. *Minchew v. Minchew*, 222 Ga. 593, 151 S.E.2d 144 (1966) (decided under former Code 1933, § 3-510).

Dismissal subject to correction under § 9-11-60(g). — Voluntary dismissal is an "order" within the meaning of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60(g)), and is subject to correction as provided therein. *Page v. Holiday Inns, Inc.*, 245 Ga. 12, 262 S.E.2d 783 (1980).

Written notice filed by the plaintiff is required to effectuate the voluntary dis-

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missal of an action. *Swartzel v. Garner*, 193 Ga. App. 267, 387 S.E.2d 359, cert. denied, 193 Ga. App. 911, 387 S.E.2d 359 (1989).

When plaintiff's counsel informed the court of the plaintiff's intent to dismiss the case, signed a voluntary dismissal that day, and served the dismissal on defense counsel by mail, no voluntary dismissal occurred until the plaintiff actually filed a written notice thereof and the six-month renewal period did not begin until that date. *Carter v. Digby*, 244 Ga. App. 217, 535 S.E.2d 286 (2000).

Trial court did not err in not voluntarily dismissing the motorist and the passenger's action against the first possible driver and the second possible driver, as the motorist and the passenger's attempts to voluntarily dismiss their action, initially against the second possible driver and then against the first possible driver was ineffective to dismiss either of those parties, as the motorist and the passenger did not first obtain an order from or the permission of the court; accordingly, the first possible motorist and the second possible motorist's appeal of the denial of their summary judgment was not moot. *Rosales v. Davis*, 260 Ga. App. 709, 580 S.E.2d 662 (2003).

Order must be properly entered in record of court to toll five-year period. — As a jury selection notice sent by the trial court to the parties was not stamped by the clerk of court's office as "filed," and there was nothing else in the record to show that the notice was properly entered in the records of the court, the jury selection notice did not meet the requirements for a written order that tolled the five-year dismissal period of O.C.G.A. § 9-11-41(e). Therefore, the trial court erred in denying the defendants' motion to dismiss. *Pilz v. Thibodeau*, 293 Ga. App. 532, 667 S.E.2d 622 (2008).

Nunc pro tunc order could not be used to effectuate a voluntary dismissal since no written notice had ever been filed by the plaintiffs. *Swartzel v. Garner*, 193 Ga. App. 267, 387 S.E.2d 359, cert. denied, 193 Ga. App. 911, 387 S.E.2d 359 (1989).

Dismissal not on merits. — Dismissal under O.C.G.A. § 9-11-41 is not on the merits, and case may be refiled within six months of automatic dismissal. *Couch v. Wallace*, 249 Ga. 568, 292 S.E.2d 405 (1982).

Because the counterclaim-plaintiffs in the second-dismissed case were not plaintiffs in the first-dismissed case, the second dismissal did not operate as an adjudication upon the merits under O.C.G.A. § 9-11-41(a)(3). Consequently, O.C.G.A. § 9-12-40 did not preclude the instant action, and the trial court erred in dismissing the action on that ground. *Dillard Land Invs., LLC v. S. Fla. Invs., LLC*, 320 Ga. App. 209, 739 S.E.2d 696 (2013).

"Before the plaintiff rests his case" has reference to the actual trial of a case rather than to proceedings on pretrial motions. *Muhanna v. O'Kelley*, 185 Ga. App. 220, 363 S.E.2d 626 (1987); *Delta Air Lines v. Van Diviere*, 192 Ga. App. 207, 384 S.E.2d 272 (1989).

Involuntary dismissals not covered by subsection (a). — Interpretation of subsection (a) of this section as referring to involuntary dismissals not on the merits is probably precluded by the fact that subsection (b) of this section specifically deals with such dismissals. *Bowman v. Ware*, 133 Ga. App. 799, 213 S.E.2d 58 (1975).

Dismissal for failure to state claim. — Ruling which grants a motion to dismiss under Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12(b)(6)) for failure to state a claim is an adjudication on the merits of plaintiff's claim and is not equivalent to a voluntary dismissal under subsection (a) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41). *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

In an action in which the 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).

Dismissal of class action. — Voluntary dismissal of a Ga. L. 1966, p. 609,

§ 23 (see now O.C.G.A. § 9-11-23(a)(1)) class action without leave of court is ineffectual. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

Dismissal after challenge to jurisdiction. — Notice of voluntary dismissal filed after motions challenging jurisdiction of the person of defendant is not untimely. *Central Mut. Ins. Co. v. Wofford*, 145 Ga. App. 836, 244 S.E.2d 899, rev'd on other grounds, 242 Ga. 338, 249 S.E.2d 21 (1978).

Voluntary dismissal of magistrate court action was not res judicata. — Trial court erred by granting the debtors' motion to dismiss by applying res judicata to the voluntary dismissal of the prior magistrate court actions because of the Civil Practice Act, O.C.G.A. § 9-11-1 et seq., was inapplicable to magistrate courts, thus, the voluntary dismissal under O.C.G.A. § 9-11-41(a)(1) did not operate as an adjudication upon the merits of the case. *Target Nat'l Bank v. Luffman*, 324 Ga. App. 442, 750 S.E.2d 750 (2013).

Effect of motion to dismiss for failure to substitute parties. — Plaintiff may voluntarily dismiss action at any time before verdict or oral announcement of judgment by the trial court, and this right is not abridged by the filing of a motion to dismiss based upon the plaintiff's failure to comply with Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-25(a)(1)), relating to substitution of parties. *Wofford v. Central Mut. Ins. Co.*, 242 Ga. 338, 249 S.E.2d 21 (1978).

Plaintiffs right to dismiss voluntarily any time before the verdict is not abridged by the filing of a motion to dismiss based on plaintiff's failure to comply with Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-25(a)(1)), relating to substitution of parties. *Central Mut. Ins. Co. v. Wofford*, 145 Ga. App. 836, 244 S.E.2d 899, rev'd on other grounds, 242 Ga. 338, 249 S.E.2d 21 (1978).

Improper third-party claims were not void; thus, voluntary dismissal without prejudice of such claims was a dismissal within the meaning of O.C.G.A. § 9-11-41. *Zohoury v. Zohouri*, 218 Ga. App. 748, 463 S.E.2d 141 (1995).

Dismissal allowed when issues of liability and damages were bifur-

cated. — Plaintiff who brought a breach of contract action and was unable to adequately prove lost profits was entitled to voluntarily dismiss the plaintiff's case without prejudice, even though the issues of liability and damages had been bifurcated. *Pounds v. Hospital Auth.*, 197 Ga. App. 598, 399 S.E.2d 92 (1990).

Dismissal allowed before verdict. — Subsection (a) of this section allows dismissal at any time before verdict, not entry of judgment. *Stegar v. Northeast Foreign Car Serv., Inc.*, 143 Ga. App. 760, 240 S.E.2d 95 (1977).

Voluntary dismissal after motion for partial summary judgment. — Plaintiff's voluntary dismissal without prejudice was timely since the submission of the plaintiff's case for a ruling on a motion for partial summary judgment did not result in the plaintiff resting the plaintiff's entire case so as to terminate the plaintiff's statutory right to voluntarily dismiss without prejudice. *Bunch v. Vincent*, 234 Ga. App. 637, 507 S.E.2d 239 (1998).

Voluntary dismissal not permitted after judgment announced. — Plaintiff may not dismiss action after the verdict is published or after the plaintiff has knowledge that the jury has agreed on a verdict for the defendant, even if such verdict is not yet published. *Seaboard Air Line R.R. v. Whitman*, 107 Ga. App. 375, 130 S.E.2d 272 (1963) (decided under former Code 1933, § 3-510).

Once a judgment in a civil case has been announced, though not formally entered, attempted filing of a voluntary dismissal is not permissible and does not effect a dismissal. *Jones v. Burton*, 238 Ga. 394, 233 S.E.2d 367 (1977); *Kilby v. Keener*, 249 Ga. 667, 293 S.E.2d 318 (1982); *Mixon v. Trinity Servs., Inc.*, 176 Ga. App. 679, 337 S.E.2d 362 (1985).

Announcement by trial judge of a decision that will terminate a civil case, even though that decision has not been formally reduced to writing and entered, will preclude filing of a voluntary dismissal after such announcement but before the judgment is actually entered by the trial judge. *Jones v. Burton*, 238 Ga. 394, 233 S.E.2d 367 (1977); *Pizza Ring Enters., Inc. v. Mills Mgt. Sources, Inc.*, 154 Ga. App.

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45, 267 S.E.2d 487 (1980); *Smith v. Hartford Fire Ins. Co.*, 162 Ga. App. 26, 289 S.E.2d 520 (1982); *Johnson v. Wade*, 184 Ga. App. 675, 362 S.E.2d 469 (1987).

When wife initiated divorce litigation, invoked aid of the court in determining custody and temporary support, appeared at a hearing, and obtained partial relief in the form of the award of temporary custody of one of the three children, along with child support, the announcement of the trial court of the court's decision relative to temporary custody of the children constituted a "verdict" within the contemplation of subsection (a) of O.C.G.A. § 9-11-41, and the wife's subsequent voluntary dismissal resulting from dissatisfaction at not obtaining custody of all three children was ineffective in toto. *Groves v. Groves*, 250 Ga. 459, 298 S.E.2d 506 (1983).

Voluntary dismissal which was presented to the trial court for filing after plaintiff's counsel received notice that the jury was prepared to announce the jury's verdict, which the court initially declined to accept, but which, following the entry of the verdict for the defendants, the court did accept, backdating the court's decision to reflect an earlier filing, was not timely filed, and the judgment of the trial court was reversed with direction that the judgment be entered on the verdict. *Vanderbreggen v. Hodge*, 171 Ga. App. 868, 321 S.E.2d 218 (1984).

Regardless of the wording of subsection (a) of O.C.G.A. § 9-11-41, the right of a voluntary dismissal has always been subject to a judicially created limitation prohibiting its exercise, even prior to trial, when there has already been an announcement by the court of the court's intention to rule in favor of the defendant. *Bailey v. Austin*, 185 Ga. App. 831, 366 S.E.2d 214 (1988).

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 to O.C.G.A. § 5-6-48(c). *Schreck v. Standridge*, 273 Ga. App. 58, 614 S.E.2d 185 (2005).

Client's voluntary dismissal of the client's action against a magistrate judge for violation of the client's civil rights had no effect because prior to the client filing the voluntary dismissal, the trial court communicated the court's decision on the merits to the parties. *Wall v. Thurman*, 283 Ga. 533, 661 S.E.2d 549 (2008).

Dismissal prior to announcement of ruling adverse to plaintiff. — Plaintiffs were entitled to refile the plaintiffs' original action after a voluntary dismissal since, even though there had been an arbitration award in favor of the defendants, there was no announcement of an adverse ruling by the trial court. *Lakes v. Marriott Corp.*, 264 Ga. 475, 448 S.E.2d 203 (1994).

When the trial court never actually ruled on a citizen's motion for a directed verdict, the court properly allowed a police officer permission to voluntarily dismiss the police officer's personal injury action as the trial court never addressed whether the wilful and wanton misconduct exception to the Fireman's rule applied. *Mikkilineni v. Lawver*, 267 Ga. App. 558, 601 S.E.2d 128 (2004).

Although a plaintiff became aware through the plaintiff's litigation opponent's counsel's email, which acknowledged that the trial court had asked the opponent to draft an order on the court's summary judgment motion, that the trial court was probably going to rule against the plaintiff, the plaintiff could still dismiss the plaintiff's claims without prejudice pursuant to O.C.G.A. § 9-11-41(a)(1)(A). The trial court had not actually indicated which way the court was going to rule. *First Media Group, Inc. v. Doe*, 312 Ga. App. 84, 717 S.E.2d 277 (2011), cert. denied, No. S12C0342, 2012 Ga. LEXIS 483 (Ga. 2012).

Effect of vacation of oral grant of directed verdict. — Rule that an oral announcement of a ruling terminating the litigation will preclude voluntary dismissal under subsection (a) of O.C.G.A. § 9-11-41, even though the ruling is not reduced to writing, did not apply since,

prior to the voluntary dismissal, the trial court reconsidered and vacated the court's oral grant of a directed verdict without entering a final judgment. *Cecil T. Allgood, Inc. v. Stark Props., Inc.*, 244 Ga. App. 105, 534 S.E.2d 858 (2000).

Effect of motion for judgment notwithstanding mistrial. — When a mistrial has been declared due to the inability of the jury to reach a verdict and the defendant thereafter files a timely motion for judgment notwithstanding the mistrial, the plaintiff's right of voluntary dismissal is not restored unless and until that motion has been denied. *LeRoux v. Levine*, 194 Ga. App. 381, 390 S.E.2d 629 (1990).

After party has taken chance of litigation and knows the actual result reached in the action by the tribunal which is to pass upon it, the party cannot, by exercising the right of voluntary dismissal, deprive the opposite party of the victory thus gained. *Cooper v. Rosser*, 233 Ga. 388, 211 S.E.2d 303 (1974); *Bytell v. Paul*, 173 Ga. App. 83, 325 S.E.2d 451 (1984).

If verdict returned by jury is void, plaintiff's voluntary dismissal is timely and authorized prior to the return of a valid verdict. *McAfee v. Fickling & Walker Dev. Co.*, 123 Ga. App. 647, 182 S.E.2d 146 (1971).

Oral announcement of ruling on summary judgment constituted "verdict". — Complaint against real estate agents and purchaser of land alleging fraud against the seller of land could not be voluntarily dismissed and reinstated in another county against all parties except the purchaser when the trial court orally announced that the purchaser's motion for summary judgment would be granted since such an oral announcement amounted to a "verdict" permanently affecting the course of the litigation as to all of the parties, not first the purchaser. *Guillebeau v. Yeargin*, 254 Ga. 490, 330 S.E.2d 585 (1985).

When verdict has been received by the clerk of the court, and read at the direction of the judge, it has been published. A plaintiff may not thereafter dismiss a plaintiff's action unless it is void or for some lawful reason can be set aside.

Hannula v. Ramey, 177 Ga. App. 512, 339 S.E.2d 735 (1986).

Dismissal before intervention. — Plaintiff may dismiss petition for injunction, even though there may be persons who might intervene, when such dismissal is effected before such intervention. *Davenport v. Hardman*, 184 Ga. 518, 192 S.E. 11 (1937) (decided under former Code 1933, § 3-510).

Dismissal after evidence introduced. — When there was no prayer for nor facts pled in the defendant's answer justifying grant of affirmative relief to the defendant, the court did not err in permitting the plaintiff to dismiss the case after introduction of evidence and before the submission to the jury. *Christian v. McBryar*, 88 Ga. App. 74, 76 S.E.2d 25 (1953) (decided under former Code 1933, § 3-510).

Announcement in open court that case has been settled is equivalent to dismissal. *Jackson v. Taylor*, 169 Ga. 300, 150 S.E. 156 (1929) (decided under former Code 1933, § 3-510).

Ruling not disturbed if "any evidence". — Trial court's ruling on a motion under subsection (b) of O.C.G.A. § 9-11-41 for involuntary dismissal will not be disturbed if there is "any evidence" to support the ruling. *Magnus Homes, L.L.C. v. DeRosa*, 248 Ga. App. 31, 545 S.E.2d 166 (2001).

Dismissal after settlement agreement inappropriate. — Voluntary dismissal may not be filed after all parties announce a settlement agreement in open court and the trial court adopts the terms of the agreement in an oral order, even if the order is not reduced to writing until a later time. *Leary v. Julian*, 225 Ga. App. 472, 484 S.E.2d 75 (1997).

Filing of notice of interlocutory appeal acts as supersedeas, so as to prevent the plaintiff from dismissing the case while any issue is on appeal; to hold otherwise would subject the appellant to additional costs and possible harassment by an appellee who dismissed the pending action when faced with reversal on interlocutory appeal. *Steele v. Steele*, 243 Ga. 522, 255 S.E.2d 43 (1979).

Former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34) indicated the legisla-

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tive intent that after filing of notice of appeal, status quo was to be maintained, and mandated that once supersedeas attached, interlocutory order should have the same procedural status and dignity as a final judgment; therefore, since subsection (a) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) would not permit plaintiff-appellee to dismiss the case while a final judgment in the plaintiff-appellee's favor was on appeal, thereby robbing the defendant-appellant of an opportunity to seek reversal, neither would it permit plaintiff-appellee to do so in an interlocutory context. *Lawrence v. Whittle*, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

Service or notice required to effect dismissal. — Complaint is merely dormant after the plaintiff files a written notice of dismissal, and does not stand dismissed as of the date of filing of the notice unless and until the opposing party is served or has actual notice. *Jones v. Jones*, 230 Ga. 738, 199 S.E.2d 239 (1973).

Relegation of a notice of dismissal to a footnote within the body of a brief did not comply with the requirement in O.C.G.A. § 9-11-41 for filing a written notice of dismissal. *Wilson v. Barton & Ludwig, Inc.*, 163 Ga. App. 721, 296 S.E.2d 74 (1982).

Renewal of dismissed action. — When a case filed within the applicable statute of limitation is voluntarily dismissed by the plaintiff, the case may be recommenced either within the applicable limitation period or within six months after the dismissal, whichever is later pursuant to O.C.G.A. § 9-2-61. *Atkinson v. Holt*, 213 Ga. App. 427, 444 S.E.2d 838 (1994).

When the plaintiff voluntarily dismissed an action without prejudice and filed another complaint for damages, and the plaintiff did not perfect service by having the second complaint personally served on the defendant, the plaintiff failed to comply with the procedural prerequisites for renewal of the dismissed action. *Atkinson v. Holt*, 213 Ga. App. 427, 444 S.E.2d 838 (1994).

Trial court properly dismissed a plaintiff's renewal action regarding a personal injury suit because the plaintiff's original action was void in that the trial court had orally dismissed that suit for insufficiency of service and a lack of personal jurisdiction, and the renewal statute only applied to actions that were valid prior to dismissal. *Stephens v. Shields*, 271 Ga. App. 141, 608 S.E.2d 736 (2004).

Trial court correctly denied summary judgment to a corporation in an appellant's renewal action because the appellant was authorized to file a voluntary dismissal of the superior court appeal of a magistrate decision under O.C.G.A. § 9-11-41(a)(1)(A), which dismissed the appellant's case but did not dismiss the appeal, and because the renewal action was timely filed. *Long v. Greenwood Homes, Inc.*, 285 Ga. 560, 679 S.E.2d 712 (2009).

Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation based on a second driver's lack of diligence in serving the second driver's complaint in the second driver's voluntarily dismissed original action because the supreme court had previously held that inasmuch as diligence in perfecting service of process in an action properly refiled under O.C.G.A. § 9-2-61(a) had to be measured from the time of filing the renewed suit, any delay in service in a valid first action was not available as an affirmative defense in the renewal action; the first driver and corporation essentially sought the rewriting of an unambiguous statute, but their arguments were properly directed to the General Assembly because when the General Assembly wished to put a firm deadline on filing lawsuits, the legislature knew how to enact a statute of repose instead of a statute of limitation. *Robinson v. Boyd*, 288 Ga. 53, 701 S.E.2d 165 (2010).

O.C.G.A. § 9-11-41(a), the voluntary dismissal statute, could be exercised by either party in a de novo appeal filed in superior court following the entry of a judgment in magistrate court, regardless of which party appealed. Once a landlord filed the landlord's voluntary dismissal, the landlord was also entitled to file a renewal action pursuant to O.C.G.A.

§ 9-2-61(a). *Jessup v. Ray*, 311 Ga. App. 523, 716 S.E.2d 583 (2011).

Trial court erred by denying a debtor's refiling of an appeal as untimely because the six-month period for filing the debtor's renewal action under O.C.G.A. § 9-2-61(a) began the day after the debtor dismissed the original superior court action, and ran until December 6, 2012, based on the method of calculation under O.C.G.A. § 1-3-1(d)(3), thus, the refiling of the action on December 6 was timely. *Parsons v. Capital Alliance Fin., LLC*, 325 Ga. App. 884, 756 S.E.2d 14 (2014).

Plaintiff's renewal action brought under the renewal statute, O.C.G.A. § 9-2-61(a), was timely because the six-month period was calculated not from the time the plaintiff dismissed some of the defendants, but from the date of the trial court's order granting the voluntary dismissal without prejudice as to all but one of the defendants. Had the plaintiff dismissed all the defendants, no court order would have been required, and the voluntary dismissal would have been effective. *Gresham v. Harris*, 329 Ga. App. 465, 765 S.E.2d 400 (2014).

Civil renewal provisions apply in habeas corpus proceedings. — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refiling of a habeas corpus petition, and therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court's dismissal of a petition as untimely was reversed. *Phagan v. State*, 287 Ga. 856, 700 S.E.2d 589 (2010).

Trial court may not order complaint reinstated after the complaint has been voluntarily dismissed under subsection (a) of this section. *Matthews v. Riviera Equip., Inc.*, 152 Ga. App. 870, 264 S.E.2d 318 (1980); *Collier v. Evans*, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

Trial court is without authority to reinstate case dismissed by plaintiff's attorney. *Bufford v. Farmers & Merchants Bank*, 110 Ga. App. 393, 138 S.E.2d 609 (1964) (decided under former Code 1933, § 3-510).

Reinstatement may be refused. — Minor appellants who dropped out of an

action, thereby dismissing the only claims the appellants had, took a voluntary dismissal of the appellants' actions which was effective without court order pursuant to subsection (a) of O.C.G.A. § 9-11-41, rather than a dropping of parties requiring a court order pursuant to O.C.G.A. § 9-11-21 and thus the appellants' attempt to state the appellants' actions could have been dismissed. *Young v. Rider*, 208 Ga. App. 147, 430 S.E.2d 117 (1993).

Reinstatement and injunction against similar action error. — When the plaintiff in pending bail-trover action in which the defendant seeks no affirmative relief dismisses the action, it is error for the court, on the defendant's motion, to reinstate such case and enjoin the plaintiff from proceeding with a similar action in another court against a third party. *Trusco Fin. Co. v. McGee*, 206 Ga. 382, 57 S.E.2d 184 (1950) (decided under former Code 1933, § 3-510).

Consent order operated to vacate prior dismissal order, and placed the parties to the suit in the status the parties held before the dismissal order was entered, which allowed voluntary mutual dismissals without prejudice under subsection (a) of O.C.G.A. § 9-11-41. *Howell Mill/Collier Assocs. v. Gonzales*, 186 Ga. App. 909, 368 S.E.2d 831 (1988).

Voluntary dismissal carries entire case with it, including the answer to the extent of defensive matter. *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937).

When the defendant's answer is purely defensive, the plaintiff may dismiss, and after such dismissal, there is no case in court. *Trusco Fin. Co. v. McGee*, 206 Ga. 382, 57 S.E.2d 184 (1950) (decided under former Code 1933, § 3-510).

When no setoff or cross action pled. — Dismissal of bill in equity carries whole case out of court, including the defendant's answer, if that answer contains no setoff or other prayer for relief in the nature of a cross action. *Spence v. Dyal*, 202 Ga. 739, 44 S.E.2d 658 (1947) (decided under former Code 1933, § 3-510).

Further defensive pleading is null. — When pending case is dismissed by the plaintiff, such dismissal carries with it the

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defendant's answer, and further defensive pleading is a nullity. *Trusco Fin. Co. v. McGee*, 206 Ga. 382, 57 S.E.2d 184 (1950) (decided under former Code 1933, § 3-510).

After dismissal no decree may be rendered thereafter. — When suit in equity is dismissed, it is out of court and no decree can be rendered upon it. *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937) (decided under former Code 1933, § 3-510).

Voluntary dismissal terminates action. — When the plaintiff's dismissal deprived the trial court of jurisdiction over the case and left the parties in the same position as if the suit had never been filed, the trial court had no authority to enter judgment for the defendants in the original suit or in the refiled suit. *Lakes v. Marriott Corp.*, 264 Ga. 475, 448 S.E.2d 203 (1994).

Trial after dismissal is nugatory. — When the defendant's answer was purely defensive in nature and sought no affirmative collateral relief against the plaintiff as in a cross action, the superior court erroneously failed to give full effect to plaintiff's attempted dismissal, and all that took place subsequently in the resulting trial was nugatory. *Spence v. Dyal*, 202 Ga. 739, 44 S.E.2d 658 (1947) (decided under former Code 1933, § 3-510).

Cross action seeking affirmative relief. — Dismissal of action will not dismiss the defendant's cross action, if the defendant asks for affirmative relief on matters germane to the original petition. *Collier v. DeJarnette Supply Co.*, 194 Ga. 129, 20 S.E.2d 925 (1942) (decided under former Code 1933, § 3-510).

Right to proceed with cross action on dismissal of divorce action. — Dismissal of the plaintiff's divorce petition could not affect the wife's right to proceed for affirmative relief prayed for in the cross action. *Grinnell v. Grinnell*, 174 Ga. 904, 164 S.E. 681 (1932) (decided under former Code 1933, § 3-510).

Wife's right to proceed with cross action for alimony is unaffected by withdrawal or dismissal, for any reason, of original ac-

tion. *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953) (decided under former Code 1933, § 3-510).

When the husband sought a divorce against the wife, who thereafter personally served the answer and cross action upon the husband's attorney of record after issuance of process, and service was accomplished upon her, and husband then dismissed the case and moved out of state, the husband's motion to dismiss the answer and cross action for lack of personal service was without merit as cross action was still pending, the court having jurisdiction of both parties and the subject matter. *Wright v. Wright*, 217 Ga. 511, 123 S.E.2d 557 (1962) (decided under former Code 1933, § 3-510).

Defendant's right to hearing on equitable claims not interfered with. — When the defendant has set up equitable claims in the defendant's answer by way of setoff or otherwise, dismissal of the complaint does not interfere with the defendant's right to a hearing or trial of such claims. *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937) (decided under former Code 1933, § 3-510).

Defendant entitled to proceed with trial on prayers for affirmative relief. — In action for specific performance, when the defendant's answer denied material allegations, and by cross action asserted that the defendant was the sole owner of the property and that the plaintiff was unlawfully withholding possession and had committed waste thereon, the defendant's answer clearly involved a prayer for affirmative relief, and after dismissal of the plaintiff's petition the defendant was entitled to proceed with a trial on prayers for affirmative relief against the plaintiff. *Griffin v. Lynn*, 214 Ga. 300, 104 S.E.2d 442 (1958) (decided under former Code 1933, § 3-510).

Plaintiff was not entitled to a voluntary dismissal since the defendants sought affirmative relief in the defendants' amended answer. *Brown v. Liberty County*, 247 Ga. App. 562, 544 S.E.2d 738 (2001).

Dismissal extinguished attorney's lien. — Dismissal of the plaintiff's complaint in a personal injury action extinguished the attorney's lien. *Villani v. Ed-*

wards, 251 Ga. App. 293, 554 S.E.2d 184 (2001).

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 attorney’s 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 attorney’s fees was vacated and the case was remanded since 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).

2. Effect of Pending Counterclaim

Purpose of counterclaim limitation on voluntary dismissals is to prevent the plaintiff from invoking the jurisdiction of the court and then withdrawing when the defendant seeks affirmative relief from the plaintiff. *Worthen v. Jones*, 240 Ga. 388, 240 S.E.2d 842 (1977).

Standing. — In a wrongful death suit by an administrator against a corporation and the corporation’s alleged employee that was dismissed after the administrator filed a notice of voluntary dismissal, the corporation lacked standing to challenge the dismissal of a counterclaim filed by the alleged employee since the corporation was not a party to the counterclaim. *Video Warehouse, Inc. v. Newsome*, 285 Ga. App. 786, 648 S.E.2d 124 (2007).

Liberal construction of limitation. — Counterclaim limitation on voluntary dismissals has been liberally construed so as to do substantial justice when the plaintiff seeks to voluntarily dismiss in the face of affirmative relief being sought by the defendant. *Sandifer v. Lynch*, 244 Ga. 369, 260 S.E.2d 78 (1979).

Defendant’s right to hearing on counterclaims not to be precluded. — While dismissal of petition alone would carry answer with it to the extent of defensive matter, dismissal should not affect any counterclaims, and must not preclude the defendant’s right to a hearing or trial of such claims. *Fender v. Hendley*, 196 Ga. 512, 26 S.E.2d 887 (1943) (decided under former Code 1933, § 3-510).

Dropping of unintended party. —

When a person served with process intended for another answers denying that the person is the intended defendant, and counterclaims for malicious use of process, the plaintiff could have moved the court, upon learning of the error, to drop the unintended party pursuant to O.C.G.A. § 9-11-41. *Bank South, N.A. v. Tate*, 190 Ga. App. 248, 378 S.E.2d 486, cert. denied, 190 Ga. App. 897, 378 S.E.2d 486 (1989).

Counterclaim is not necessarily subject to dismissal because of dismissal of main complaint. *Weems v. Weems*, 225 Ga. 19, 165 S.E.2d 733 (1969); *Employers Liab. Assurance Corp. v. Berryman*, 123 Ga. App. 71, 179 S.E.2d 646 (1970).

Dismissal not permitted unless counterclaim can remain pending. —

If a counterclaim has been pled by the defendant prior to service upon the defendant of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court. *Stanley v. Stanley*, 244 Ga. 417, 260 S.E.2d 328 (1979).

Trial court, when considering a plaintiff’s motion to dismiss voluntarily when a counterclaim is pending, cannot limit the court’s review to the mere filing of defensive pleadings seeking affirmative relief, but must look further to consider whether the claim seeking that affirmative relief can remain pending for independent adjudication by the court once the main claim has been dismissed. *Avnet, Inc. v. Wyle Lab., Inc.*, 265 Ga. 716, 461 S.E.2d 865 (1995).

Counterclaim which presented only defensive matters would not prevent dismissal of a condemnation action. *Hinson v. Department of Transp.*, 230 Ga. 314, 196 S.E.2d 883 (1973).

Motion to intervene as defendant, accompanied by counterclaim, is sufficient to satisfy counterclaim requirement and preclude the plaintiff from voluntarily dismissing the action pending a decision on the motion to intervene. *Worthen v. Jones*, 240 Ga. 388, 240 S.E.2d 842 (1977).

Dismissal on failure of defendant to object. — Upon the defendant’s failure to

Voluntary Dismissal (Cont'd)**2. Effect of Pending****Counterclaim** (Cont'd)

object to the voluntary dismissal, the action, including the defendant's counterclaim, becomes dismissed. *Moore v. McNair*, 145 Ga. App. 888, 245 S.E.2d 25 (1978).

Defendant's failure to object to the plaintiff's voluntary dismissal waived any rights of the defendant to pursue the defendant's counterclaim, even if the defendant vigorously pursued matters relevant to the defendant's counterclaim and failed to acquiesce in the dismissal. *D.P.S. Indus., Inc. v. Safeco Ins. Co. of Am.*, 210 Ga. App. 289, 435 S.E.2d 762 (1993).

By virtue of the codefendant insurer's failure to object, the plaintiff's dismissal of the action against the insurer's codefendant terminated the entire action including the insurer's subrogation cross-claim. *Thomas v. Auto Owners Ins. Co.*, 221 Ga. App. 815, 472 S.E.2d 707 (1996).

In an action involving a promissory note, a trial court improperly granted summary judgment to a bank on the bank's counterclaim because a borrower had voluntarily dismissed the action under O.C.G.A. § 9-11-41(a)(1)(A) a few days prior to the hearing on the summary judgment motion and the bank had not filed any objections to the dismissal; therefore, the dismissal terminated the entire action, and the bank could not go forward with the bank's counterclaim. *Mize v. First Citizens Bank & Trust Co.*, 297 Ga. App. 6, 676 S.E.2d 402 (2009).

Defendant's partial summary judgment motion constituted sufficient objection within the meaning of subsection (a) of O.C.G.A. § 9-11-41 to prevent the automatic dismissal of the defendant's counterclaim pursuant to the plaintiff's filing of the plaintiff's voluntary dismissal. *Southern Elec. Distrib. v. Marsh*, 229 Ga. App. 821, 495 S.E.2d 43 (1998).

Objection to dismissal. — Defendant's position letter and brief filed in the probate court in opposition to the plaintiff's motion to dismiss the action constituted a timely objection to the voluntary dismissal which would effect the continued liability of the defendant's counter-

claim. *Johnson v. Hamilton*, 211 Ga. App. 268, 438 S.E.2d 715 (1993).

After a review of the record on appeal, given that the defendant neither dismissed nor waived a compulsory counterclaim, but instead objected to the dismissal of the plaintiff's suit a little more than two weeks after receiving actual notice of the dismissal, that counterclaim was preserved; thus, while the main action was properly dismissed, dismissal of the counterclaim was error. *Weaver v. Reed*, 282 Ga. App. 831, 640 S.E.2d 351 (2006).

Trial court did not err in refusing to allow voluntary dismissal of custody petition, when the request in the defendant's answer for custody of the children without interference was a prayer for affirmative relief. *Sandifer v. Lynch*, 244 Ga. 369, 260 S.E.2d 78 (1979).

When a voluntary dismissal is clearly shown to bear a certificate of service so that the defendant is served with notice of the voluntary dismissal prior to the defendant's attempt to initiate a counterclaim, there is no pending counterclaim which might permit the defendant to object to the voluntary dismissal, despite the fact that the defendant may not have received actual notice. *Young v. Johnson*, 167 Ga. App. 837, 307 S.E.2d 730 (1983).

Issues subjected to partial summary judgment. — Since the defendant did not initially file a counterclaim, but did seek affirmative relief in the defendant's answer that was the subject of discovery engaged in by the parties long before the dismissal by the plaintiff was sought, the plaintiff was not allowed to dismiss the complaint so as to deprive the court of jurisdiction over issues preserved by the court's order granting the plaintiff a partial summary judgment. *Moore v. Moore*, 253 Ga. 211, 317 S.E.2d 529 (1984).

Counterclaim for abusive litigation. — Plaintiff has the right to voluntarily dismiss an action without prejudice even though the defendant has filed a counterclaim for abusive litigation. It is not necessary in order to adjudicate an abusive litigation counterclaim that the underlying action be finally terminated in

the defendant's favor. The abusive litigation counterclaim may proceed to adjudication on the claim's merits based on all the relevant facts which have occurred to the point of dismissal, including the dismissal itself. *Moore v. Memorial Medical Ctr., Inc.*, 258 Ga. 696, 373 S.E.2d 204 (1988).

Wholly derivative third party claims. — Order striking a notice of voluntary dismissal was reversed as when a corporation filed the corporation's notice of voluntary dismissal, no counterclaims or other claims seeking affirmative relief were pending against the corporation; third-party claims did not seek affirmative relief from the corporation, so those claims could not be used to invoke the counterclaim limitation on voluntary dismissals. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

Counterclaim could not be renewed. — Defendant who voluntarily dismissed without prejudice a compulsory counterclaim could not renew the counterclaim as an original action under O.C.G.A. § 9-2-61 after the plaintiff had voluntarily dismissed with prejudice the main claim without objection by the defendant because renewal of the counterclaim was barred by res judicata. *Robinson v. Stokes*, 229 Ga. App. 25, 493 S.E.2d 5 (1997).

Pending motion for sanctions could not be used to prevent corporation from voluntarily dismissing action. — Corporation did not have prior knowledge that the action would be dismissed as requested in a limited liability partnership's motion for sanctions for alleged discovery abuses when the notice of voluntary dismissal was filed and the pending motion for sanctions was not a basis for invoking the counterclaim limitation on voluntary dismissals. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

Res judicata inapplicable. — Because a commercial landlord had dismissed the landlord's prior dispossession action against a tenant upon payment by the tenant pursuant to a settlement of the

amount due and owing and such dismissal did not indicate that the dismissal was with prejudice, the dismissal was deemed without prejudice and was accordingly not an adjudication on the merits pursuant to O.C.G.A. § 9-11-41(a); accordingly, it was error for the trial court to have barred the landlord's claim for common area maintenance charges in the landlord's second action on the ground of res judicata as the requirement of a previous adjudication on the merits of the claim was not met pursuant to O.C.G.A. § 9-12-40. *Rafizadeh v. KR Snellville, LLC*, 280 Ga. App. 613, 634 S.E.2d 406 (2006).

Right of voluntary dismissal to both parties. — It is apparent that O.C.G.A. § 9-11-41(c) simply extends the same right of voluntary dismissal afforded to plaintiffs by O.C.G.A. § 9-11-41(a) to parties that have filed counterclaims, cross-claims, or third-party claims; so just as the plaintiffs may voluntarily dismiss the plaintiffs' actions, defendants filing counterclaims, cross-claims, and third-party claims can voluntarily dismiss the defendants' respective claims; nothing in the plain language of O.C.G.A. § 9-11-41(c) extends the counterclaim limitation to wholly derivative third-party claims for contribution or indemnification so that such claims can be used to bar a plaintiff's voluntary dismissal of the plaintiff's action. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

3. Multiple Dismissals

Last sentence of subsection (a) refers to filing of a third notice of dismissal by one who has already filed two prior dismissals. *Bowman v. Ware*, 133 Ga. App. 799, 213 S.E.2d 58 (1975).

Only voluntary dismissals filed by plaintiff are to be counted for purposes of the last sentence of subsection (a) of O.C.G.A. § 9-11-41. *Reese v. Frazier*, 158 Ga. App. 237, 279 S.E.2d 529 (1981).

Only one of two prior dismissals was voluntary. — Because a plaintiff initially filed a personal injury suit in state court, voluntarily dismissed that case and re-filed the case in federal court, after which the federal court dismissed

Voluntary Dismissal (Cont'd)
3. Multiple Dismissals (Cont'd)

the federal claims asserted and refused to exercise jurisdiction over the state claims, resulting in the claims' dismissal as well, there was only one voluntary dismissal, and the trial court's dismissal of the later re-filing in state court under O.C.G.A. § 9-11-41(a)(3) was error. *Troup v. Chambers*, 280 Ga. App. 392, 634 S.E.2d 191 (2006).

First voluntary dismissal under subsection (a) is always without prejudice and does not operate as an adjudication on the merits. *Piper v. Piper*, 139 Ga. App. 19, 227 S.E.2d 842 (1976).

Second voluntary dismissal. — When plaintiff's first complaint was filed before July 1, 2003, the effective date of the amendment to O.C.G.A. § 9-11-41(a)(3), and the second and third complaints were filed after July 1, 2003, the 2003 amendment did not apply retroactively to make the voluntary dismissal of the second complaint act as an adjudication on the merits. *Davis v. Lugenbeel*, 283 Ga. App. 642, 642 S.E.2d 337 (2007), cert. denied, 2007 Ga. LEXIS 518 (Ga. 2007).

Trial court erred in dismissing a vehicle passenger's third complaint based on the amended O.C.G.A. § 9-11-41(a), which applied only to cases when the original complaint was filed on or after July 1, 2003. Because the first complaint was filed before July 1, 2003, the pre-amendment version of § 9-11-41(a) applied; accordingly, the passenger's second voluntary dismissal of the passenger's complaint did not operate as an adjudication on the merits. *Shy v. Faniel*, 292 Ga. App. 253, 663 S.E.2d 841 (2008).

"Renewal suit" filed by a limited liability company (LLC) and the company's manager against three corporations was properly dismissed under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as the LLC and manager's prior and nearly identical suit against the corporation had been dismissed and an appeal was pending. However, the second dismissal should have been without prejudice under O.C.G.A. § 9-11-41(b) as the corporation's plea in abatement did not challenge the merits of

that suit. *Sadi Holdings, LLC v. Lib Props., Ltd*, 293 Ga. App. 23, 666 S.E.2d 446 (2008).

Third voluntary dismissal. — O.C.G.A. § 9-11-41 provides that a third notice of dismissal from any court of an action based upon the same claim operates as an adjudication on the merits. *Harris v. Sampson*, 162 Ga. App. 241, 290 S.E.2d 165 (1982).

Third voluntary dismissal does not operate as an adjudication on the merits if any one of the previous actions is not based on or does not include the claim presented in the third action. *Southeastern Hose, Inc. v. Prudential Ins. Co. of Am.*, 167 Ga. App. 356, 306 S.E.2d 308 (1983).

If the same affirmative relief has been sought against a party three times previously and the action has been voluntarily dismissed on each occasion, the result is an "adjudication upon the merits" of the claims against the party and there can be no further attempt on the part of the plaintiff or other claimant to secure the affirmative relief from that party. *T.V. Tempo, Inc. v. T.V. Venture, Inc.*, 182 Ga. App. 198, 355 S.E.2d 76 (1987).

O.C.G.A. § 9-11-41, which provides a fourth-time defendant with a res judicata defense, cannot be construed as creating a conclusive and absolute right on the part of a three-time defendant to obtain affirmative relief for the defendant should the defendant subsequently choose to seek it as a plaintiff. *T.V. Tempo, Inc. v. T.V. Venture, Inc.*, 182 Ga. App. 198, 355 S.E.2d 76 (1987).

Defendant's set-off or recoupment sought affirmative relief against the plaintiff and, therefore was, in effect, a "counterclaim" rather than a "defense"; accordingly, the "defense" was barred as having been sought in three previously dismissed actions. *T.V. Tempo, Inc. v. T.V. Venture, Inc.*, 182 Ga. App. 198, 355 S.E.2d 76 (1987).

Promissory note maker's third voluntary dismissal adjudicated only the payee's nonliability as to the maker's claims arising from the note, and did not adjudicate the liability of the maker to the payee on the note itself. *T.V. Tempo, Inc. v. T.V. Venture, Inc.*, 182 Ga. App. 198, 355 S.E.2d 76 (1987).

In an action against an employee and an employer arising out of an automobile accident, the plaintiff's third dismissal of the plaintiff's claim against the employee acted as an adjudication on the merits and, therefore, the plaintiff was barred from recovery against the employer under the doctrine of respondeat superior. *Hospital Auth. v. Walker*, 224 Ga. App. 163, 480 S.E.2d 849 (1997).

After the homeowners brought three actions against the home builder and the builder's principal officer alleging construction defects and the homeowners voluntarily dismissed all three actions, the third dismissal, pursuant to the former provisions of O.C.G.A. § 9-11-41(a), constituted an adjudication against the homeowners; it was inconsequential that the third action resulted in an unconfirmed arbitration award in favor of the homeowners before the homeowners voluntarily dismissed that action and filed suit seeking confirmation of the arbitration award. *Ford v. Tycam Home Builders, Inc.*, 267 Ga. App. 581, 601 S.E.2d 133 (2004).

Adjudication on the merits in wrongful death claim. — Trial court recognized that the wrongful death claim had been voluntarily dismissed on three previous occasions, but held that each parent had a right to assert a wrongful death cause of action independent of the other so that an adjudication on the merits of the mother's claim would occur only after three such actions in which the mother was a plaintiff were voluntarily dismissed. Since she had brought and voluntarily dismissed the action only twice prior to filing the present action, the trial court found there was no adjudication on the merits. *Belco Elec., Inc. v. Bush*, 204 Ga. App. 811, 420 S.E.2d 602 (1992).

Multiple dismissals by parents in wrongful death action. — Trial court erred by denying the defendant's motion to dismiss since the present wrongful death action pending against the defendant was previously filed and voluntarily dismissed three times, once separately by the father, once by both parents consolidated action, and once separately by the mother. Accordingly, there was an adjudi-

cation on the merits. *Belco Elec., Inc. v. Bush*, 204 Ga. App. 811, 420 S.E.2d 602 (1992).

Prior actions in the form of third-party complaints were subject to the provisions that a third notice of dismissal based upon the same claim operates as an adjudication on the merits. *Zohoury v. Zohouri*, 218 Ga. App. 748, 463 S.E.2d 141 (1995).

Involuntary Dismissal

1. In General

Federal rule contrasted. — Subsection (b) of this section is not as specific as its federal rule counterpart, Rule 41(b) Fed. R. Civ. P., in providing for findings of fact. *Thomas v. Jackson*, 238 Ga. 90, 231 S.E.2d 50 (1976).

Construction of subsection (b). — Construction of subsection (b) of this section which will avoid dismissals of actions on technical grounds, to the end that all actions shall be tried on their merits, is consistent with the purposes of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *O'Kelley v. Alexander*, 225 Ga. 32, 165 S.E.2d 648 (1969).

Judge's options under subsection (b). — Motion to dismiss under subsection (b) of this section gives judge three possible courses: (1) do nothing until the defendant's evidence is in; (2) grant the motion, with a provision in the order that it was not upon the merits; or (3) determine the facts and sustain the motion, without providing in the order that it should not be upon the merits. *Lawyers Coop. Publishing Co. v. Bekins Moving & Storage Co.*, 135 Ga. App. 12, 217 S.E.2d 372 (1975).

Denial construed as deferral of judgment. — After the defendant moved for involuntary dismissal pursuant to subsection (b) of O.C.G.A. § 9-11-41, and the trial court neither granted the motion nor deferred judgment, given that the subsection does not provide for denial of such a motion and that the court went on to hear evidence from the defendant, the "denial" of the motion was construed as a deferral of judgment. *Market Place Shopping Ctr. v. Basic Bus. Alternatives, Inc.*, 227 Ga. App. 419, 489 S.E.2d 162 (1997).

Involuntary Dismissal (Cont'd)**1. In General (Cont'd)**

Motion for directed verdict in bench trial. — When there is a bench trial, technically a motion for directed verdict does not lie; instead, it is treated as a motion for involuntary dismissal under O.C.G.A. § 9-11-41. *Franklin v. Demico, Inc.*, 179 Ga. App. 775, 347 S.E.2d 718 (1986); *Emory Rent-All, Inc. v. Lisle Assocs. Gen. Contractor*, 212 Ga. App. 516, 441 S.E.2d 926 (1994).

Motion for directed verdict in a nonjury trial is procedurally incorrect, and the motion will be treated as one for involuntary dismissal under subsection (b) of O.C.G.A. § 9-11-41. *Chamlee v. DOT*, 182 Ga. App. 120, 354 S.E.2d 701 (1987); *Century 21 Mary Carr & Assocs. v. Jones*, 204 Ga. App. 96, 418 S.E.2d 435 (1992); *Grebel v. Prince*, 232 Ga. App. 361, 501 S.E.2d 538 (1998).

Failure to appear at pretrial hearing. — Authority of the trial court to dismiss the plaintiff's complaint for failure to appear at a pretrial hearing is clearly established by O.C.G.A. § 9-11-41. *Turner v. T & T Oldsmobile, Inc.*, 154 Ga. App. 228, 267 S.E.2d 833 (1980).

O.C.G.A. § 9-11-41 authorizes the trial court, upon motion, to dismiss any action for failure of the plaintiff to comply with a court order to appear at a pretrial hearing. *Weeks v. Weeks*, 243 Ga. 416, 254 S.E.2d 366 (1979); *Scott v. W.S. Badcock Corp.*, 161 Ga. App. 826, 289 S.E.2d 769 (1982).

Entry upon motion of plaintiff not authorized. — Entry of an involuntary dismissal was not authorized after the plaintiff introduced no evidence and there were no facts before the court from which the court could determine whether there was a right to relief, and when the dismissal was entered upon motion of the plaintiff, rather than the defendant. *Roberts v. Prakas*, 217 Ga. App. 397, 457 S.E.2d 688 (1995).

No authority to set aside dismissal after term expires. — Trial court has no jurisdiction to set aside dismissal and reinstate cause after expiration of the term at which the cause was dismissed; this rule was not changed by enactment of

the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) and applies with the same force. *Askren v. Allen*, 132 Ga. App. 292, 208 S.E.2d 165 (1974).

Summary judgment. — O.C.G.A. § 9-11-41 does not apply to calling of motion for summary judgment. *Holt v. Bray*, 159 Ga. App. 43, 282 S.E.2d 693 (1981).

Failure to appear. — Trial court abused the court's discretion when the court dismissed an appeal from a special master for failure to appear since the case was not in the first five cases on the published calendar and the appellant and the appellant's counsel were not required to be in court. *Broadwater v. City of Danville*, 184 Ga. App. 886, 363 S.E.2d 316 (1987).

Dismissal of a claim with prejudice for the plaintiff's failure to appear constituted a nonamendable defect on the face of the record, and the trial court erred in denying the plaintiff's motion to set aside the judgment. *Howard v. AMLI Realty Co.*, 226 Ga. App. 372, 486 S.E.2d 649 (1997).

Because an injured party's attorney did not obtain information about the time and location of a peremptory calendar call in the month after learning of it, and because the attorney had actual notice of the calendar call, the trial court properly dismissed the injured party's personal injury case without prejudice under Ga. Unif. Super. Ct. R. 20(A), 14, and O.C.G.A. § 9-11-41(b). *Hammonds v. Sherman*, 277 Ga. App. 498, 627 S.E.2d 110 (2006).

Failure of defense counsel to attend pretrial conference. — While the plaintiff's failure to appear at a pretrial hearing may result in the dismissal of the complaint at the motion of the defendant, who is statutorily entitled to such a remedy, a plaintiff does not have a similar statutory weapon and striking the defendant's answer and entering judgment against the defendant is too harsh a sanction to impose upon the defendant for defense counsel's failure to appear at a pretrial conference. *Boatright v. First Nat'l Bank*, 166 Ga. App. 167, 303 S.E.2d 506 (1983).

Failure to comply with order of court. — O.C.G.A. § 9-11-41 authorized

the trial court to dismiss an action for failure of the plaintiff to comply with the court's order to file an amended complaint. *Omni Express, Inc. v. Kennedy*, 216 Ga. App. 485, 455 S.E.2d 83 (1995).

When a trial court orders a plaintiff to make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to conform to the pleading requirements of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint under O.C.G.A. § 9-11-41(b), not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Dismissal of earlier complaint asserting same claim for relief. — Trial court did not err in granting a motion for summary judgment based upon the defense of res judicata, following dismissal of an earlier complaint, containing exactly the same material allegations and asserting the same claim for relief, for failure to answer interrogatories. *Brantley v. Sparks*, 167 Ga. App. 323, 306 S.E.2d 337 (1983).

Case is remanded when court fails to make findings of fact and conclusions of law in the court's dismissal order, and when neither party waives these findings and conclusions. *L & L Elec. Serv., Inc. v. L.K. Comstock & Co.*, 168 Ga. App. 780, 310 S.E.2d 557 (1983).

Motion for nonsuit. — Defendant's motion for a nonsuit made under former law which was specifically repealed by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) was construed as a motion for involuntary dismissal pursuant to

O.C.G.A. § 9-11-41. *National Carloading Corp. v. Security Van Lines*, 164 Ga. App. 850, 297 S.E.2d 740 (1982).

Trial court erred in granting defendant's motion to dismiss. See *McKellar v. Associates Fin. Servs.*, 168 Ga. App. 9, 308 S.E.2d 410 (1983).

In the absence of an explicit order in an executor's renewal action, O.C.G.A. § 9-2-61(a), requiring the executor to identify the executor's expert witnesses by a date certain, the executor's failure to do so did not warrant the extreme sanction of dismissal under O.C.G.A. § 9-11-41. *Porter v. WellStar Health Sys.*, 299 Ga. App. 481, 683 S.E.2d 35 (2009), cert. denied, No. S09C2031, 2010 Ga. LEXIS 80 (Ga. 2010).

Trial court erred in denying motion for involuntary dismissal. — See *Sentry Eng'g & Constr., Inc. v. American Olean Tile Co.*, 172 Ga. App. 769, 324 S.E.2d 591 (1984).

Dismissal of counterclaim was error when plaintiff voluntarily dismissed action. — When the defendant appeals the dismissal of the defendant's counterclaim following the plaintiff bank's voluntary dismissal without prejudice of the bank's suit for the collection of a debt incurred by a third party for whom the plaintiff mistook the defendant, and the defendant had answered and counterclaimed for malicious use and abuse of process, the trial court erred in dismissing the defendant's counterclaim on the basis that the voluntary dismissal without prejudice of the main action was not a "disposition" for the purposes of the claim for abusive litigation. *Roberson v. Central Fid. Bank*, 190 Ga. App. 382, 378 S.E.2d 698, cert. denied, 190 Ga. App. 898, 378 S.E.2d 698 (1989).

Dismissal of counterclaim for failure to allege facts entitling to relief. — When an attorney filed a motion to withdraw from the representation of a client, a court of law permitted the attorney's withdrawal, and the client acquiesced to the withdrawal, the client's allegations in the counterclaim for damages based upon the attorney's withdrawal, in a suit in which the attorney sought payment of attorney's fees, set forth no facts that could be construed to entitle the

Involuntary Dismissal (Cont'd)**1. In General (Cont'd)**

client to relief from the unpaid fees as the client was barred from collaterally attacking the withdrawal ruling by way of a counterclaim. Therefore, the trial court properly dismissed the client's counterclaim. *Patton v. Turnage*, 260 Ga. App. 744, 580 S.E.2d 604 (2003).

Trial court's dismissal of counterclaim with prejudice due to the defendants' failure to appear at the call of the case constituted a nonamendable defect on the face of the record, and thus, the trial court erred in denying the defendants' motion to set aside the judgment. *Bonner v. Green*, 263 Ga. 773, 438 S.E.2d 360 (1994).

Trial court's dismissal with prejudice of the defendant's counterclaim due to the defendant's failure to attend a pre-trial conference and the subsequent judgment in favor of the plaintiff on the complaint was an abuse of discretion. *Maupin v. Vincent*, 245 Ga. App. 635, 538 S.E.2d 529 (2000).

Appeal of denial of motion for involuntary dismissal. — One appealing the denial of a motion for involuntary dismissal under subsection (b) of O.C.G.A. § 9-11-41 may not raise for the first time on appeal a ground not specifically raised in the original motion. *Magnus Homes, L.L.C. v. DeRosa*, 248 Ga. App. 31, 545 S.E.2d 166 (2001).

Standard of review. — Dismissal pursuant to O.C.G.A. § 9-11-41 is not the same as a directed verdict in a jury trial, which may be upheld only if the evidence demands a particular outcome; it does not require the trial court to construe the evidence in the light most favorable to the non-moving party, and can only be reversed on appeal when the evidence demands a contrary finding. *Smith v. Georgia Kaolin Co.*, 269 Ga. 475, 498 S.E.2d 266 (1998).

Dismissal for lack of proper and timely service. — Since the plaintiff did not perfect service until after the running of the statute of limitations, the claim should have been dismissed without prejudice as there had been no adjudication of the claim on the claim's merits and the

court erred in dismissing the claim with prejudice. *Wilson v. Ortiz*, 232 Ga. App. 191, 501 S.E.2d 247 (1998).

Involuntary dismissal erroneously denied. — Because it appeared from the testimony that a widow's standard of living was improved after receiving an award of year's support after the decedent's death, and that the widow had the resources independent of the year's support to afford those improvements, the award was erroneously entered; thus, the trial court erred in denying a motion for involuntary dismissal filed by the decedent's only child. *Anderson v. Westmoreland*, 286 Ga. App. 561, 649 S.E.2d 820 (2007), cert. denied, 2007 Ga. LEXIS 676 (Ga. 2007).

Dismissal deemed without prejudice unless stated otherwise. — Superior court correctly held that a claim for attorney's fees under O.C.G.A. § 9-15-14 must be made by motion, not by answer or counterclaim. Neither was summary judgment error under a § 9-15-14 claim for the superior court's failure to specify that its dismissal of such claims was without prejudice. In this regard, the Georgia Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) makes it clear that any dismissal in which dismissal with prejudice is not specified is deemed to be a dismissal without prejudice under O.C.G.A. § 9-11-41(b). Thus, to the extent that the complained of counterclaims for abusive litigation rested on § 9-15-14, summary judgment thereon was not error for the superior court's failure to dismiss upon the word "dismissed" alone. *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Involuntary dismissal of declaratory action must be without prejudice. — Involuntary dismissal of a declaratory-judgment action for want of justiciability does not operate as an adjudication on the merits and is instead an issue of subject-matter jurisdiction. Accordingly, dismissal must be without prejudice. *Pinnacle Benning, LLC v. Clark Realty Capital, LLC*, 314 Ga. App. 609, 724 S.E.2d 894 (2012).

Dismissal of action without prejudice granted. — Even though the plaintiffs failed to show good cause for the plaintiffs' failure to serve the defendants

within the 120 day service period under Fed. R. Civ. P. 4(m) and failed to diligently serve the defendants after the expiration of the statute of limitations, the action was dismissed without prejudice because of the refiling opportunities accorded under O.C.G.A. § 9-2-61. *Lau v. Klinger*, 46 F. Supp. 2d 1377 (S.D. Ga. 1999).

When clients of a law firm twice filed legal malpractice complaints against the law firm and then twice voluntarily dismissed those complaints because the clients failed to attach an expert affidavit, as required in a legal malpractice case, the trial court properly dismissed the clients' third complaint, which did not have an affidavit, despite the plaintiffs' inclusion of a paragraph under O.C.G.A. § 9-11-41(b) that sought to justify the clients' failure to include an affidavit on grounds that the limitations period was about to expire because the paragraph in question was patently false and was a sham pleading. *Smith v. Morris, Manning & Martin, LLP*, 254 Ga. App. 355, 562 S.E.2d 725 (2002).

Motion for involuntary dismissal properly denied. — Superior court did not err in denying a land and development company's motion for involuntary dismissal pursuant to O.C.G.A. § 9-11-41(b) in a county's action under former O.C.G.A. § 24-8-1 (see now O.C.G.A. § 24-11-2) to establish a copy of an ordinance that had been lost because the superior court thoroughly reviewed the evidence upon which the court relied, including the testimony of the company's forensic expert and several witnesses who were county officials when the ordinance was enacted and their successors in office, as well as the dovetailing of subsequent amendments to the sections and subsections of the proffered copy; that evidence was sufficient to support the superior court's finding that the copy was a true and correct duplicate of the original ordinance adopted at the meeting of the county board of commissioners. *East Georgia Land & Dev. Co. v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

Involuntary dismissal of federal complaint. — Trial court erred when the court granted a nonresident's motion to dismiss a driver's third complaint because the complaint was not barred by O.C.G.A.

§ 9-2-61 since the driver never served the nonresident with the second federal complaint, and thus, it was void and could not amount to a renewal of the first complaint; the third complaint was intended as a renewal of the first complaint, which was voluntarily dismissed after the expiration of the applicable period of limitation, and the federal dismissal was not only involuntary but also dismissed without prejudice for lack of subject matter jurisdiction. *Crawford v. Kingston*, 316 Ga. App. 313, 728 S.E.2d 904 (2012).

Trial court erred when the court granted a nonresident's motion to dismiss a driver's third complaint because the dismissal of the driver's second federal complaint was involuntary under O.C.G.A. § 9-11-41(a)(2), rather than voluntary under O.C.G.A. § 9-11-41(a)(1), and could not operate as an adjudication on the merits under § 9-11-41(a)(3); even though the driver requested the dismissal of the federal action, the dismissal itself was by an order of the federal court for a failure of the federal court's own jurisdiction. *Crawford v. Kingston*, 316 Ga. App. 313, 728 S.E.2d 904 (2012).

2. For Failure to Prosecute

Applies only to cases awaiting disposition. — O.C.G.A. § 9-11-41(e) applies to cases awaiting disposition, not to cases already adjudicated by verdict or judgment. *Lott v. Arrington & Hollowell, P.C.*, 258 Ga. App. 51, 572 S.E.2d 664 (2002).

Stiff sanctions intended for failure to prosecute. — Purpose of subsection (b) of this section is to make available a stiff sanction against the plaintiffs who fail to prosecute claims in filed cases, although it remains within the discretion of the trial judge to provide in order of dismissal that it shall not operate as an adjudication on the merits. *Trice v. Howard*, 234 Ga. 189, 214 S.E.2d 907 (1975).

Power to dismiss for want of prosecution is an inherent power of the court, and subsection (b) of this section merely codifies this power in part. *Krasner v. Verner Auto Supply, Inc.*, 130 Ga. App. 892, 204 S.E.2d 770 (1974).

Court may dismiss on own initiative. — Although subsection (b) of this

Involuntary Dismissal (Cont'd)**2. For Failure to Prosecute (Cont'd)**

section speaks of a motion by the defendant for dismissal for want of prosecution, the court may also act on the court's own without a motion. *Krasner v. Verner Auto Supply, Inc.*, 130 Ga. App. 892, 204 S.E.2d 770 (1974).

Discretion of court. — Order of dismissal for failure to prosecute under subsection (b) of this section is discretionary and is subject to appellate review for abuse of discretion. *Hancock v. Oates*, 244 Ga. 175, 259 S.E.2d 437 (1979); *Mosley v. Lankford*, 244 Ga. App. 209, 260 S.E.2d 322 (1979).

All circumstances of case considered. — Dismissal with prejudice for failure to prosecute should not be based solely on absence, but on all circumstances of the case. *Hancock v. Oates*, 244 Ga. 175, 259 S.E.2d 437 (1979); *Maolud v. Keller*, 153 Ga. App. 268, 265 S.E.2d 86 (1980).

Failure of plaintiff in certiorari to see that timely proper answer is filed is a "failure to prosecute" within the meaning of subsection (b) of this section. *City of Atlanta v. Schaffer*, 245 Ga. 164, 264 S.E.2d 6 (1980).

Failure to be diligent in determining delay. — 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 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 it was the end of July. *Welch v. Welch*, 212 Ga. App. 667, 442 S.E.2d 857 (1994).

Res judicata effect of dismissal for failure to prosecute. — Dismissals for want of prosecution under subsection (b) of this section operate as an adjudication upon the merits, when the orders of dismissal do not otherwise specify, and are thus res judicata. *Askren v. Allen*, 132 Ga. App. 292, 208 S.E.2d 165 (1974).

When a dismissal for failure to prose-

cute is involuntary under subsection (b) of this section, and the trial court does not specify that such dismissal is without prejudice, the dismissed action is res judicata as to essentially the same action brought at a later time. *Krasner v. Verner Auto Supply, Inc.*, 130 Ga. App. 892, 204 S.E.2d 770 (1974).

Application of estoppel by judgment. — Under subsection (b) of this section, dismissal for want of prosecution both bars a subsequent action on the same claim and establishes facts to which an estoppel by judgment can be applied in subsequent litigation on a different claim. *Trice v. Howard*, 234 Ga. 189, 214 S.E.2d 907 (1975).

Alleging attorney's negligence. — Because negligence of a party's attorney did not appear on the face of the record, it was not a proper ground of a motion to set aside the trial court's order dismissing suit for failure to prosecute. *Lankford v. Karkotsky*, 171 Ga. App. 283, 319 S.E.2d 117 (1984).

Slight tardiness to trial not grounds for dismissal. — Trial court would not dismiss for failure to prosecute when the plaintiff showed up for trial one-half hour late. *Accurate Bonding Co. v. Ponder*, 176 Ga. App. 331, 335 S.E.2d 886 (1985).

Failure to appear at hearing. — Trial court exceeded the court's authority in adjudicating an appeal by an applicant for letters of administration of an estate based on the applicant's failure to appear at a scheduled hearing. *Boyd v. Crawford*, 231 Ga. App. 169, 498 S.E.2d 762 (1998).

Trial court erred in dismissing an application for confirmation of an arbitration award filed by an LLC against three individuals with prejudice for want of prosecution as the appeals court agreed with the movant LLC that it appeared for the only published hearing; moreover, dismissal of an action was restricted for failure to appear at the call of the case to one without prejudice. *Wolfpack Enters. v. Arrington*, 272 Ga. App. 175, 612 S.E.2d 35 (2005).

Attorney's motion to dismiss a contempt proceeding on grounds that no one physically appeared to present the charges was properly denied as Georgia law did not

require anyone to prosecute a contempt action, the conduct charged already occurred and was of record, and a trial judge could make a finding of contempt instant; the judge, sitting as the trier of fact and law in the proceeding, could review the evidence already in existence and make an order based thereon, and the attorney was free to present evidence in mitigation. *In re Scheib*, 283 Ga. App. 328, 641 S.E.2d 570 (2007).

Trial court did not err in dismissing the plaintiff's claims without prejudice for want of prosecution for failure to appear at a calendar call because the trial court rebutted the plaintiff's assertion that the plaintiff did not receive written notice of the no service/default calendar call; and counsel had a duty to keep informed as to the progress of the case as the trial court's docket, including dates and times of any calendar calls or hearings, was published on the clerk of court's website. *Atlanta Bus. Video, LLC v. FanTrace, LLC*, 324 Ga. App. 559, 751 S.E.2d 169 (2013).

Failure to attend hearing due to miscommunication. — Trial court abused the court's discretion in dismissing a father's petition for modification of child custody based on the failure of the father's attorney to attend a hearing after it was shown that such failure was due to miscommunication and a well-founded misunderstanding on the part of the attorney. *Wallace v. Laughlin*, 217 Ga. App. 444, 459 S.E.2d 556 (1995).

Courts without authority to dismiss with prejudice. — The 1982 amendment of subsection (b) of O.C.G.A. § 9-11-41, providing that dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits, removed from the courts the authority to dismiss with prejudice for failure of the plaintiff to prosecute. *Leach v. Aetna Cas. & Sur. Co.*, 172 Ga. App. 785, 324 S.E.2d 494 (1984), *aff'd*, 254 Ga. 265, 330 S.E.2d 596 (1985); *All South Mini Storage #2, Ltd. v. Woodcon Constr. Servs.*, 205 Ga. App. 393, 422 S.E.2d 282 (1992); *Century 21 Mary Carr & Assocs. v. Jones*, 204 Ga. App. 96, 418 S.E.2d 435 (1992).

When the trial court's order specifically stated that dismissal was for want of

prosecution, the court had no authority to further direct that the dismissal operate with prejudice. *Peachtree Winfrey Assocs. v. Gwinnett County Bd. of Tax Assessors*, 197 Ga. App. 226, 398 S.E.2d 253 (1990).

Pursuant to subsection (b) of O.C.G.A. § 9-11-41, a dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits; therefore, it follows that such a dismissal cannot be with prejudice. *Lloyd v. Whitworth*, 210 Ga. App. 714, 437 S.E.2d 636 (1993).

Because the court was unable to determine the trial court's grounds for granting a defendant's motion to dismiss with prejudice after the trial court announced during the hearing that the dismissal would be without prejudice, and appeared to indicate that the dismissal was for failure to prosecute, and because the court was unable to determine from the record whether that grant was error, remand was required for clarification. *Wilken Invs., LLC v. Plamondon*, 310 Ga. App. 146, 712 S.E.2d 576 (2011).

Trial court erred in dismissing a case with prejudice for failure to prosecute because a dismissal for failure to prosecute was not a ruling on the merits; nor, was there an adjudication on the merits under the voluntary dismissal rule of O.C.G.A. § 9-11-41(a)(3) because the dismissal was involuntary. *Chrysler Financial Services Americas, LLC v. Benjamin*, 325 Ga. App. 579, 754 S.E.2d 157 (2014).

Dismissal of a noncompulsory counterclaim for failure to prosecute does not operate as an adjudication on the merits under subsections (b) and (c) of O.C.G.A. § 9-11-41 and does not bar the later reassertion of the claim. *Idowu v. Lester*, 176 Ga. App. 713, 337 S.E.2d 386 (1985).

Failure to respond to jury calendar calls. — Appeals in the superior court from writs of possession granted by a magistrate court were properly dismissed for failure to prosecute since the orders dismissing the appeals recited that the actions were dismissed because neither the appellant nor counsel for the appellant responded to the jury calendar calls of those actions. *Westwind Corp. v. Washington Fed. Sav. & Loan Ass'n*, 195 Ga. App. 411, 393 S.E.2d 479 (1990).

Involuntary Dismissal (Cont'd)**2. For Failure to Prosecute (Cont'd)**

Dismissal of a complaint for want of prosecution was not an adjudication on the merits; thus, collateral estoppel and res judicata did not bar a subsequent complaint. *Valdez v. R. Constr., Inc.*, 285 Ga. App. 373, 646 S.E.2d 329 (2007).

Involuntary dismissal upheld and presumption of regularity attached.

— Because an individual who filed a negligence action against a driver failed to show that the judge who dismissed that action for want of prosecution lacked the authority to do so because the judge was not assigned to the case, and also failed to establish any reversible error, a presumption of regularity attached to the court's order which the individual was unable to overcome. *Ward v. Swartz*, 285 Ga. App. 788, 648 S.E.2d 114 (2007).

Dismissal improperly granted. — Trial court erroneously dismissed a litigant's petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely "housekeeping or administrative orders" that did not suspend the running of the five-year period under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if the orders were in writing, signed by the trial judge, and properly entered in the records of the trial court. *Zepp v. Brannen*, 283 Ga. 395, 658 S.E.2d 567 (2008).

No entitlement to attorney's fees. — Pursuant to O.C.G.A. § 9-11-41(b), since the dismissal of plaintiff individual's complaint was for failure to prosecute, such dismissal did not operate as an adjudication on the merits, and the defendant corporation was not a "prevailing party" for purposes of entitlement to attorney fees and costs under the parties' contract. *Floyd v. Logisticare, Inc.*, 255 Ga. App. 702, 566 S.E.2d 423 (2002).

3. After Presentation of Plaintiff's Evidence**Power of judge to decide merits on motion at close of plaintiff's evidence.**

— Subsection (b) of this section provides

that upon the defendant's motion to dismiss at the close of the plaintiff's evidence in a nonjury trial, the judge has the power to adjudicate the case on the merits. *Trump v. Scott Exterminating Co.*, 138 Ga. App. 866, 227 S.E.2d 859 (1976).

Under subsection (b) of this section, the trial judge in a nonjury case has express power to adjudicate the case on the merits at the conclusion of the plaintiff's case. *Pichulik v. Air Conditioning & Heating Serv. Co.*, 123 Ga. App. 195, 180 S.E.2d 286 (1971); *Kennerly v. Mosteller*, 133 Ga. App. 879, 212 S.E.2d 447 (1975).

Failure to establish right to relief.

— In a quiet title action, in order to show an unbroken chain of title, it was necessary for the plaintiff to show that the individuals who deeded the land were the heirs-at-law of the prior owner who had died intestate; because the plaintiff failed to establish this fact, the court was not required to find in the plaintiff's favor, and involuntary dismissal of the action was not in error. *Smith v. Georgia Kaolin Co.*, 269 Ga. 475, 498 S.E.2d 266 (1998).

Evidence need not be considered in light most favorable to plaintiff. — If trial judge has the power of adjudication of the facts upon motion for involuntary dismissal in a nonjury case, the judge must weigh the evidence; but there is no obligation in subsection (b) of this section that the judge, in determining the facts, must consider the plaintiff's evidence in the light most favorable to the plaintiff. *Pichulik v. Air Conditioning & Heating Serv. Co.*, 123 Ga. App. 195, 180 S.E.2d 286 (1971); *Kennerly v. Mosteller*, 133 Ga. App. 879, 212 S.E.2d 447 (1975); *Control, Inc. v. H-K Corp.*, 134 Ga. App. 349, 214 S.E.2d 588 (1975); *Chamlee v. DOT*, 189 Ga. App. 334, 375 S.E.2d 626, cert. denied, 189 Ga. App. 911, 375 S.E.2d 626 (1988); *Ivey v. Ivey*, 266 Ga. 143, 465 S.E.2d 434 (1996).

Dismissal of a case pursuant to O.C.G.A. § 9-11-41(b) is not tantamount to granting a directed verdict, and a trial court is not required to construe the evidence in the plaintiff's favor; the trial court in a bench trial was authorized to find that a decedent's sister lacked all of the facts when the sister initially agreed to compromise an insurance claim, and

that any alleged oral agreement resolving the parties' dispute was not enforceable. *Alexander v. Watson*, 271 Ga. App. 816, 611 S.E.2d 110 (2005).

Dismissal despite establishment of prima facie case. — On motion to dismiss under subsection (b) of this section, since the court determines the facts as well as the law, such motion may be sustained even though the plaintiff has established a prima facie case. *Pichulik v. Air Conditioning & Heating Serv. Co.*, 123 Ga. App. 195, 180 S.E.2d 286 (1971); *Bennett Iron Works, Inc. v. Underground Atlanta, Inc.*, 130 Ga. App. 653, 204 S.E.2d 331 (1974); *Kennerly v. Mosteller*, 133 Ga. App. 879, 212 S.E.2d 447 (1975).

Findings and conclusions required. — Ga. L. 1970, p. 170, § 1 (see now O.C.G.A. § 9-11-52(a)), requiring that in all actions in superior court tried upon the facts without a jury, with certain exceptions, the court shall find the facts specially and state separately the court's conclusions of law thereon upon entry of judgment, applies when the court enters an involuntary dismissal pursuant to subsection (b) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41). *Salvador v. Wals*, 139 Ga. App. 362, 228 S.E.2d 384 (1976).

Findings of judge analogous to jury verdict. — In an action tried without a jury, the trial judge sits as the trier of fact, and the judge's findings are analogous to the verdict of a jury and should not be disturbed if there is any evidence to support the findings. *Comtrol, Inc. v. H-K Corp.*, 134 Ga. App. 349, 214 S.E.2d 588 (1975); *Safeway Ins. Co. v. Holmes*, 194 Ga. App. 160, 390 S.E.2d 52, cert. vacated, 260 Ga. 164, 393 S.E.2d 477 (1990).

Treatment of motion for directed verdict as one for involuntary dismissal. — Motion for a directed verdict is procedurally incorrect in a nonjury case, but the court may nonetheless treat it as one for involuntary dismissal. *Pichulik v. Air Conditioning & Heating Serv. Co.*, 123 Ga. App. 195, 180 S.E.2d 286 (1971); *Kennerly v. Mosteller*, 133 Ga. App. 879, 212 S.E.2d 447 (1975).

When plaintiff is not allowed to complete the plaintiff's evidence, judgment of dismissal under subsection

(b) of this section must be reversed and remanded with direction that the plaintiff be allowed to present the plaintiff's case. *Lumpkin v. Guthrie*, 124 Ga. App. 50, 183 S.E.2d 84 (1971).

Failure of defendant to appear. — Defendant who failed to appear at trial was properly granted an involuntary dismissal by the court sua sponte because the defendant remained a party to the proceedings, and the plaintiff failed to make out a claim against the defendant or the codefendant. *Cramer, Inc. v. Southeastern Office Furn. Whsle. Co.*, 171 Ga. App. 514, 320 S.E.2d 223 (1984).

Motion for involuntary dismissal properly denied. — In a bench trial, the court properly denied a title insurer's O.C.G.A. § 9-11-41(b) motions for involuntary dismissal at the close of the insureds' case and at the close of evidence as the insureds had offered sufficient evidence of the diminishment in value of the insureds' property in support of the insureds' breach of contract claim. *Jimenez v. Chi. Title Ins. Co.*, 310 Ga. App. 9, 712 S.E.2d 531 (2011).

4. Effect of Involuntary Dismissal

Construction of phrase "dismissal for lack of jurisdiction". — Phrase "dismissal for lack of jurisdiction" should not be construed to limit its application only to those cases in which fundamental jurisdictional defects appear which would render a judgment void and subject to collateral attack, such as cases wherein it appears the court lacked jurisdiction over the defendants or of the subject matter of the action. *O'Kelley v. Alexander*, 225 Ga. 32, 165 S.E.2d 648 (1969).

Phrase "dismissal for lack of jurisdiction" is broad enough to encompass dismissals based on the plaintiff's failure to comply with a precondition requisite to the trial court's going forward with the determination of the merits of the plaintiff's substantive claim. *O'Kelley v. Alexander*, 225 Ga. 32, 165 S.E.2d 648 (1969).

Dismissal for failure to pay costs would be for "lack of jurisdiction," which by the language of subsection (b) of this section does not operate as an adjudication upon the merits. *Kalin v. Pfarnner*, 124 Ga. App. 816, 186 S.E.2d 365 (1971).

Involuntary Dismissal (Cont'd)**4. Effect of Involuntary****Dismissal (Cont'd)**

Dismissal for lack of jurisdiction exception contained in subsection (b) of this section is applicable to dismissal because of failure to pay costs of a previously dismissed action. *Teal v. Reeves*, 144 Ga. App. 666, 242 S.E.2d 328 (1978).

Intent of preclusive effect of involuntary dismissals. — Preclusive effect afforded dismissals under subsection (b) of this section was intended to apply to cases in which the defendant must incur the inconvenience of preparing to meet the merits of the plaintiff's claim because there is no initial bar to reaching the merits as there would be in case of defects in pleadings, failure to join necessary parties, lack of jurisdiction, or improper venue. *Old S. Inv. Co. v. Aetna Ins. Co.*, 124 Ga. App. 697, 185 S.E.2d 584 (1971).

Order of dismissal containing no language as to being "without prejudice" operates as an adjudication on the merits of the plaintiff's claim. *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Adjudication on merits with certain exceptions. — While, unless the court otherwise specifies, a dismissal operates as an adjudication on the merits, this does not apply to dismissal for lack of jurisdiction, for improper venue, or for lack of an indispensable party. *Rainwater v. Vazquez*, 133 Ga. App. 173, 210 S.E.2d 380 (1974).

As a general rule, involuntary dismissal under subsection (b) of this section and any involuntary dismissal not provided for therein other than a dismissal for lack of jurisdiction, improper venue, or lack of an indispensable party, operates as an adjudication upon the merits, unless the court in the court's order of dismissal states that the dismissal is without prejudice. *Douglas v. Douglas*, 238 Ga. 452, 233 S.E.2d 195 (1977).

Despite absence of phrase "with prejudice" in section. — Unless court in the court's order for dismissal specifies otherwise, dismissal under subsection (b) of this section and any dismissal not provided for in this section, other than a

dismissal for lack of jurisdiction, for improper venue, or for lack of an indispensable party, operates as an adjudication upon the merits, despite the fact that this section does not use the expression "with prejudice." *Teal v. Reeves*, 144 Ga. App. 666, 242 S.E.2d 328 (1978).

Dismissal with prejudice is as conclusive of parties' rights as if action had been prosecuted to final adjudication adverse to plaintiff; it is res judicata of all questions which might have been litigated, and is a final disposition, barring the plaintiff's right to bring or maintain another action on the same claim or cause. *Cranford v. Carver*, 124 Ga. App. 767, 186 S.E.2d 150 (1971), appeal dismissed, 228 Ga. 847, 188 S.E.2d 792 (1972).

Order of dismissal clearly stating that it is without prejudice is not an adjudication on the merits, and is not a bar to a second action. *Barkett v. Jones*, 142 Ga. App. 835, 237 S.E.2d 400 (1977).

Willfulness as criterion for determining effect of dismissal. — Order of dismissal based on finding of willful failure to comply with a court order can rightly have the effect of an adjudication on the merits, but a dismissal which does not involve any finding of willfulness and is merely an automatic action following a certain lapse of time cannot be considered an adjudication which would bar a subsequent action. *Maxey v. Covington*, 126 Ga. App. 197, 190 S.E.2d 448 (1972).

Willful failure to make discovery. — Order of dismissal stating that there was a "willful refusal to make discovery" operates as an adjudication on the merits, and acts as res judicata in a subsequent action between the same parties. *Boles v. Bannister*, 131 Ga. App. 318, 205 S.E.2d 531 (1974).

Involuntary dismissal for willful failure to make discovery operates as an adjudication on the merits and as res judicata, unless the trial court specifies that such dismissal is without prejudice. *North Am. Van Lines v. Hutton*, 142 Ga. App. 151, 235 S.E.2d 396 (1977).

Failure to answer interrogatories. — Dismissal of a complaint for failure to answer interrogatories operates as an adjudication on the merits under subsection

(b) of this section absent the trial court's specification to the contrary. *Old S. Inv. Co. v. Aetna Ins. Co.*, 124 Ga. App. 697, 185 S.E.2d 584 (1971).

Failure to obey order to appear at pretrial hearing. — When court order of dismissal did not otherwise specify, dismissal of the plaintiff's complaint for failure to comply with an order to appear at the pretrial hearing acted as an adjudication on the merits, and superseded any temporary orders issued in the case. *Weeks v. Weeks*, 243 Ga. 416, 254 S.E.2d 366 (1979).

Failure to appear on trial date. — When case is called on the date shown on the calendar as the trial date but the plaintiff is not present in person or by counsel, judgment entered up in favor of the defendant, under the provisions of subsection (b) of this section, operates as an adjudication on the merits. *Trice v. Howard*, 130 Ga. App. 895, 204 S.E.2d 808 (1974).

Failure to add party. — Dismissal of party under subsection (b) of this section for failure to obtain a court order adding a party to the pending action is without prejudice if the merits cannot be reached because of the failure of the plaintiff to satisfy a precondition. *Clover Realty Co. v. J.L. Todd Auction Co.*, 240 Ga. 124, 239 S.E.2d 682 (1977).

To obtain dismissal which operates as adjudication on merits, the defendant must move therefor under subsection (b) of this section; the defendant must take affirmative action and get an order of dismissal. *Kalin v. Pfarner*, 124 Ga. App. 816, 186 S.E.2d 365 (1971).

Petition to modify child support adjudication on the merits. — Superior court erred in attempting to recast the court's dismissal of a husband's first petition for modification of child support as "simply a sanction" and not an adjudication on the merits so as to render the dismissal outside the ambit of O.C.G.A. § 19-6-15(k)(2) because in dismissing the husband's first petition for modification, the superior court did not specify that the order was not an adjudication on the merits, and under O.C.G.A. § 9-11-41(b), the order was a final order on the claim for downward modification of child support.

Bagwell v. Bagwell, 290 Ga. 378, 721 S.E.2d 847 (2012).

5. Dismissal of Counterclaims, Etc.

Defendant's failure to pay into registry of court in accordance with court's order would not merit dismissal of the defendant's counterclaims. *Lawhorn v. Gaskin*, 153 Ga. App. 211, 264 S.E.2d 722 (1980).

Dismissal of counterclaim by defendant after involuntary dismissal of petition. — There is nothing in the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) that prohibits the defendant, after involuntary dismissal of the plaintiff's petition, from dismissing the defendant's counterclaim. *Myers v. Morris*, 225 Ga. 285, 168 S.E.2d 152 (1969).

Dismissal of cross-claim. — Trial court erred in dismissing the corporation's cross-claim against the mortgage seller for money it paid to the mortgage seller to purchase the mortgage as the trial court's erroneous ruling that the corporation's interest in a promissory note regarding the mortgage prevailed over the bank's security interest meant the trial court's ruling that the cross-claim was moot as a result was also erroneous. *Provident Bank v. Morequity, Inc.*, 262 Ga. App. 331, 585 S.E.2d 625 (2003).

Costs of Previous Action

Payment of costs is a condition precedent to right to renew original dismissed action. *Grier v. Wade Ford, Inc.*, 135 Ga. App. 821, 219 S.E.2d 43 (1975); *McLanahan v. Keith*, 140 Ga. App. 171, 230 S.E.2d 57 (1976), *aff'd*, 239 Ga. 94, 236 S.E.2d 52 (1977), *overruled* on other grounds, *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983); *Perry v. Landmark Fin. Corp.*, 141 Ga. App. 62, 232 S.E.2d 399 (1977); *Urrea v. Flythe*, 215 Ga. App. 212, 450 S.E.2d 266 (1994).

Payment of costs in the dismissed suit is a precondition to the filing of a second suit. *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983); *Tucker v. Mitchell*, 252 Ga. 545, 314 S.E.2d 896 (1984); *Shaw v. Lee*, 187 Ga. App. 689, 371 S.E.2d 187 (1988); *Kappelmeier v. Amoco Fabrics*, 192 Ga. App. 388, 385 S.E.2d 2, *cert. denied*, 192 Ga. App. 902, 385 S.E.2d 2 (1989).

Costs of Previous Action (Cont'd)

Ruling in *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983) that the payment of costs in a previous action under O.C.G.A. § 9-11-41 is a condition precedent to filing a second suit is not limited to prospective application. *Robinson v. Simpson*, 171 Ga. App. 302, 319 S.E.2d 126 (1984).

Requirement may be relaxed when the plaintiff shows a good faith effort to ascertain and pay the costs. *Butler v. Bolton Rd. Partners*, 222 Ga. App. 791, 476 S.E.2d 265 (1996).

Right to renew a previously dismissed action after the statute of limitation has expired is governed by O.C.G.A. § 9-2-61, which provides in part that when any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the case, the case may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by O.C.G.A. § 9-11-41(d); provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once. *Belcher v. Folsom*, 258 Ga. App. 191, 573 S.E.2d 447 (2002).

Trial court properly dismissed a third suit brought by a grandfather against a principal because the issues in all three suits were nearly identical, and attorney's fees awarded to the principal in the two earlier suits had not been paid by the grandfather; thus, the trial court was without jurisdiction regarding the third suit. *Crane v. Cheeley*, 270 Ga. App. 126, 605 S.E.2d 824 (2004).

Payment of costs is essential to valid and pending action. — It is essential that first action be dismissed and costs be paid before second action becomes a valid and pending action. *Perry v. Landmark Fin. Corp.*, 141 Ga. App. 62, 232 S.E.2d 399 (1977); *Gober v. Nisbet*, 186 Ga. App. 264, 367 S.E.2d 68, cert. denied, 186 Ga. App. 918, 367 S.E.2d 68 (1988).

Failure to pay costs of court is a defense which is not waivable. Pay-

ment of costs is not an affirmative defense but a jurisdictional matter which may never be waived. *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983); *Tucker v. Mitchell*, 252 Ga. 545, 314 S.E.2d 896 (1984); *Hilliard v. Edwards*, 169 Ga. App. 808, 315 S.E.2d 39 (1984).

State's failure to pay costs of a criminal bond forfeiture proceeding after the judgment was dismissed did not bar the trial court from entering judgment and issuing execution after a second forfeiture proceeding. *Daza v. State*, 224 Ga. App. 383, 480 S.E.2d 623 (1997).

Acceptance of check approved. — Payment of costs under subsection (d) of this section of a previously dismissed action in order to bring another action on the same cause may be by check if the clerk accepts the check without objection and the check is honored by the bank. *Brock v. Baker*, 128 Ga. App. 397, 196 S.E.2d 875 (1973).

Monetary sanction imposed under O.C.G.A. § 9-11-37(d) does not constitute a court cost under subsection (d) of O.C.G.A. § 9-11-41 which must be paid before a plaintiff refiles an action the plaintiff previously dismissed. *Allied Prods. Co. v. Green*, 175 Ga. App. 802, 334 S.E.2d 389 (1985).

Mistaken information from clerk that no costs due. — Costs which must be paid pursuant to O.C.G.A. § 9-11-41, as a precondition to the filing of a new suit, do not include costs unknown to the plaintiff after a good faith inquiry after the attorney was mistakenly informed by the clerk of the trial court that no costs were due on a previous action. But any unpaid costs in a previous action which are unknown after a good faith inquiry but discovered after the filing of a new action must be paid within a reasonable time in order to preserve jurisdiction. *Daugherty v. Norville Indus., Inc.*, 174 Ga. App. 89, 329 S.E.2d 202 (1985); *Michaels v. Kroger Co.*, 193 Ga. App. 40, 387 S.E.2d 2, cert. denied, 193 Ga. App. 910, 387 S.E.2d 2 (1989).

Unknown costs. — Costs which must be paid pursuant to subsection (d) of O.C.G.A. § 9-11-41 as a precondition to the filing of a new suit do not include costs unknown to the plaintiff after a good faith

inquiry. *Hiley v. McGoogan*, 177 Ga. App. 809, 341 S.E.2d 461 (1986).

Costs unknown to plaintiff's attorney. — Trial court did not err in finding that the plaintiff exhibited good faith when costs were unknown to the plaintiff's attorney before the second suit was filed. *Jeff Davis Hosp. Auth. v. Altman*, 203 Ga. App. 168, 416 S.E.2d 763, cert. denied, 203 Ga. App. 906, 416 S.E.2d 763 (1992).

Costs unknown to plaintiff's attorney. — Trial court concluded that a patient who filed a personal injury suit against a hospital was entitled to a relaxed application of the rule that a plaintiff in a renewal action must show that costs were paid in the prior action after the patient's attorney attached an affidavit, stating that the attorney met with the court clerk and unsuccessfully requested a copy of computerized dockets and payment records and that, according to counsel, it was impossible to obtain a certificate showing that no costs were due from the clerk's office, even though a cost payment for filing and service showed on the computer screen reflecting the time of the original filing. *Lunsford v. DeKalb Med. Ctr., Inc.*, 263 Ga. App. 394, 587 S.E.2d 859 (2003).

Non-payment of costs due in prior action is an amendable defect only if the existence of such costs remains unknown despite a good-faith inquiry made prior to the filing of the renewal action and if the deficiency is paid "within a reasonable time" after being discovered. *Cox v. Fillingim*, 184 Ga. App. 205, 361 S.E.2d 65 (1987).

Renewal action dismissed for non-payment. — Trial court did not err in dismissing the plaintiff's renewal action for failure to pay all costs of the previous action when there appeared to be no dispute that the attorney was aware of those costs long before institution of the renewal action. *Oseni v. Hambrick*, 207 Ga. App. 166, 427 S.E.2d 559 (1993).

Trial court did not err in declining to dismiss the Cobb County, Georgia, renewal suit for failure to pay costs in the Fulton County, Georgia, action because the defendant had not filed a motion for attorney fees in the original Fulton

County suit when the plaintiff filed the renewal suit in Cobb County. *Jarman v. Jones*, 327 Ga. App. 54, 755 S.E.2d 325 (2014).

Question of fact precludes summary judgment. — When in the plaintiff's affidavit, the plaintiff swore that the plaintiff "did investigate with the Costs Clerk of Fulton County Superior Court the incurred costs in the predecessor action" and that "[at] the time of filing [the renewal action], all the preliminary incurred costs were paid," giving the plaintiff the benefit of the doubt, a question of fact is raised whether the plaintiff's efforts to ascertain the costs owed before refiling the plaintiff's action amounted to a good faith inquiry which would prevent involuntary dismissal for failure to comply with subsection (d) of O.C.G.A. § 9-11-41. The trial court therefore properly denied the defendant's motion for summary judgment for failure to pay the costs of empanelling the jury in the prior action. *Kroger Co. v. Michaels*, 183 Ga. App. 626, 359 S.E.2d 698 (1987), *aff'd*, 193 Ga. App. 40, 387 S.E.2d 2 (1989).

Automatic Dismissal for Want of Prosecution

Options available to trial court. — Under either O.C.G.A. § 9-11-41 or Superior Court Rule 14, the court may dismiss an action without prejudice if the plaintiff fails to appear at the call of the case. Neither provision, however, exhausts the options available to the trial court under the court's authority to control the court's own docket and regulate the business of the court. *Kraft, Inc. v. Abad*, 262 Ga. 336, 417 S.E.2d 317 (1992).

Subsection (e) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) is neither in conflict nor contradictory to Ga. L. 1953, Nov.-Dec. Sess., p. 342, §§ 1 and 2 (see now O.C.G.A. § 9-2-60), and they reasonably can stand together by recognizing that Ga. L. 1953, Nov.-Dec. Sess., p. 342, §§ 1 and 2 (see now O.C.G.A. § 9-2-60) expands the coverage of the five-year nonaction bar. *Fulton County v. Corporation of Presiding Bishop*, 133 Ga. App. 847, 212 S.E.2d 451 (1975).

Automatic Dismissal for Want of Prosecution (Cont'd)

Local two-year rule conflicting. — Regardless of efficiency of local two-year want of prosecution rule, (for State Court of DeKalb County) the General Assembly has set forth a five-year rule for all actions of a civil nature in all courts whose practice and procedure is governed by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), so that for those courts a local two-year rule would be conflicting. *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976).

Dismissal for failure to substitute parties distinguished. — Dismissal under Ga. L. 1966, p. 609, § 25 (see now O.C.G.A. § 9-11-25(a)) for failure to substitute parties is different from dismissal under subsection (e) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41), which is automatically obtained and does not operate as an adjudication on the merits. *Jernigan v. Collier*, 131 Ga. App. 162, 205 S.E.2d 450 (1974).

Notices of attorney's leaves of absences insufficient to avoid application of statute. — Pursuant to O.C.G.A. §§ 9-2-60(b) and 9-11-41(e), because an individual's negligence suit sat dormant when the trial court failed to enter any orders for eight years, the suit was automatically dismissed for want of prosecution, and the individual could not overcome application of those statutes as notices of leaves of absence filed by the individual's attorney were insufficient to avoid application. *Ward v. Swartz*, 285 Ga. App. 788, 648 S.E.2d 114 (2007).

Subsection (e) of this section is not a statute of limitations as to cause of action or right to rebring a dismissed complaint. *Harris v. United States Fid. & Guar. Co.*, 134 Ga. App. 739, 216 S.E.2d 127 (1975).

Dual purpose of subsection (e). — Subsection (e) of this section has at least the dual purpose of preventing court records from becoming cluttered by unresolved and inactive litigation, and protecting litigants from dilatory counsel. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973); *Fulton County v. Corporation of Presiding Bishop*, 133 Ga. App. 847, 212 S.E.2d 451 (1975); *Jefferson v. Ross*, 250

Ga. 817, 301 S.E.2d 268 (1983).

Interest of public in removing inactive litigation from court records. — Enactment of subsection (e) of this section is a declaration of the General Assembly that it is in the public interest to remove from court records litigation which has been inactive for a period of five years. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Mandatory duty of plaintiff to obtain written order and have it entered in record. — "Five-year rule" under subsection (e) of this section is mandatory, and places squarely upon the plaintiff the duty to obtain a written order of continuance or other written order at some time during a five-year period and make sure the order is entered in the record. *Milam v. Mojonner Bros. Co.*, 135 Ga. App. 208, 217 S.E.2d 355 (1975).

To avoid operation of subsection (e) of this section and thus automatic dismissal, the plaintiff must obtain a written order and have the order entered or filed within five years. *Milam v. Mojonner Bros. Co.*, 135 Ga. App. 208, 217 S.E.2d 355 (1975).

Plaintiff who wishes to avoid automatic dismissal of the plaintiff's case by operation of law has a mandatory duty to obtain a written order of continuance or other written order at some time during a five-year period and to make sure the order is entered in the record. *Norton v. Brady*, 129 Ga. App. 753, 201 S.E.2d 188 (1973).

Order must be in writing. *Maroska v. Williams*, 146 Ga. App. 130, 245 S.E.2d 470 (1978).

Until an order is signed by judge it is ineffective for any purpose. *Majors v. Lewis*, 135 Ga. App. 420, 218 S.E.2d 130 (1975).

Orders are not complete until filed or recorded. *Georgia Power Co. v. Whitmire*, 146 Ga. App. 29, 245 S.E.2d 324 (1978).

No written order within five years resulted in dismissal. — Trial court properly dismissed a party's counterclaim for failure to prosecute under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). It was undisputed that there had been no written order entered in the case for a period of over five years; even if there was evidence

supporting the party's claim that the party had attempted to have the case placed on the trial calendar, the case the party relied upon had been reversed; and it had been held that the automatic dismissal statutes did not violate due process. *Roberts v. Eayrs*, 297 Ga. App. 821, 678 S.E.2d 535 (2009).

Printed signature on an instruction sheet is not an order for the purposes of subsection (e) of this section. *Majors v. Lewis*, 135 Ga. App. 420, 218 S.E.2d 130 (1975).

Unsigned carbon copy of letter to attorney delivered by judge to clerk is not an order within the meaning of this section. *Parkerson v. Indies Co.*, 148 Ga. App. 106, 251 S.E.2d 98 (1978).

Agreement between counsel ineffective to avoid dismissal. — Agreement between counsel to continue a case entered in the record prior to the lapse of five years was not sufficient to avoid the mandatory dismissal provisions of subsection (e) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) and Ga. L. 1953, Nov.-Dec. Sess., p. 342, §§ 1 and 2 (see now O.C.G.A. § 9-2-60) as the plaintiffs had the duty to obtain a written order of continuance and enter the order in the record. *Harris v. Moody*, 144 Ga. App. 656, 242 S.E.2d 321 (1978).

Dismissal is automatic on expiration of five-year period and cannot be waived by a party litigant. *Maroska v. Williams*, 146 Ga. App. 130, 245 S.E.2d 470 (1978).

Subsection (e) does not create a new five-year period starting with the date of its enactment for pending actions to be automatically dismissed if no written order was taken within a period of five years. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Five-year rule of subsection (e) is not limited to prospective application, since it does not take away or impair any vested right nor impose any new duty or liability, and therefore comes within the saving provision of Ga. L. 1968, p. 1104. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Five-year period is computed from date of filing. *Georgia Power Co. v. Whitmire*, 146 Ga. App. 29, 245 S.E.2d 324 (1978).

Action refiled more than six months after automatic dismissal was untimely. — Injured party's lawsuit against a business was automatically dismissed for want of prosecution pursuant to O.C.G.A. § 9-11-41(e) five years after the suit was filed, not on the date the trial court entered an order confirming the fact that the lawsuit was dismissed, and the trial court properly granted the business's motion for summary judgment after the injured party refiled a lawsuit because the injured party refiled that lawsuit more than six months after the lawsuit was automatically dismissed. *Brown v. Kroger Co.*, 278 Ga. 65, 597 S.E.2d 382 (2004).

As the plaintiff failed to show that any action in the original suit filed, within the meanings of O.C.G.A. §§ 9-2-60 and 9-11-41(e), occurred to bar dismissal of the suit, and failed to timely file a renewal action, the renewal action was properly dismissed. *Nelson v. Haugabrook*, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

Five-year period does not run during time case in federal court. — Although dismissal for want of prosecution is automatic on expiration of five years, the statutory five-year period does not run during the time the case is in federal court. When an action in a state court is removed to a federal district court, the jurisdiction of the state court is suspended until the case is remanded to the state court, at which time the case resumes the status the case occupied at the time of the removal. *Southern Bell Tel. & Tel. Co. v. Perry*, 168 Ga. App. 387, 308 S.E.2d 848 (1983).

Motion to reinstate was properly denied because the plaintiff did not refile the action but sought to revive or renew an existing action outside of the time period of five years and six months, which could not be done by the plaintiff. *Goodwyn v. Carter*, 252 Ga. App. 114, 555 S.E.2d 474 (2001).

Action of clerk of court in marking case dismissed is ministerial as dismissal is automatic on expiration of five years. *Norton v. Brady*, 129 Ga. App. 753, 201 S.E.2d 188 (1973).

Case completely lifeless from date of dismissal. — When a case stands automatically dismissed the case is com-

Automatic Dismissal for Want of Prosecution (Cont'd)

pletely lifeless for all purposes from the date of dismissal, not from the date on which the case was physically stricken from the docket. *Fulton County v. Corporation of Presiding Bishop*, 133 Ga. App. 847, 212 S.E.2d 451 (1975).

Subsequent order dismissing case with prejudice ineffective. — When no order was taken in a case within five years after the case was filed, the plaintiff's complaint was dismissed without prejudice by operation of law under subsection (e) of this section, and a subsequent order of the trial court dismissing the case with prejudice was error and was null and void. *First of Ga. Ins. Co. v. Georgia Power Co.*, 146 Ga. App. 756, 247 S.E.2d 574 (1978).

Power of a court of record to enter a judgment on a verdict is not extinguished by the passage of five years without entry of an order. *Jefferson v. Ross*, 250 Ga. 817, 301 S.E.2d 268 (1983).

Failure to take defendant's default to judgment. — When the defendant failed to answer and was in default, but judgment was not entered for more than five years, the case stood as if a jury verdict had been returned and was not subject to dismissal under the five-year rule. *Faircloth v. Cox Broadcasting Corp.*, 169 Ga. App. 914, 315 S.E.2d 434 (1984).

Leave of absence granted did not suffice to avoid operation of subsection (e) of O.C.G.A. § 9-11-41 since the order failed to identify the case at hand and was never entered in the record. It was not enough that the order granting the leave of absence was filed in the minutes of the superior court. *West v. DOT*, 174 Ga. App. 603, 330 S.E.2d 803 (1985).

Defense counsel's request for a formal leave of absence did not, standing alone, satisfy the five-year rule requirements for a written, signed, and entered order. *Prosser v. Grant*, 224 Ga. App. 6, 479 S.E.2d 775 (1996).

Intervening order prevents dismissal, even though subsequently revoked. — When the trial court's order revoking the grant of a continuance and dismissing the complaint was entered some three years after the entry of the

order granting the continuance—although after the expiration of over five years from the last written order prior to the continuance order—"manifest injustice" would result if that order revoking the continuance is affirmed, even though the continuation order had been entered in the absence of a written motion and without notice. *Simmerson v. Blanks*, 183 Ga. App. 863, 360 S.E.2d 422, cert. denied, 183 Ga. App. 907, 360 S.E.2d 422 (1987).

Automatic dismissal is not res adjudicata. *Kalin v. Pfarner*, 124 Ga. App. 816, 186 S.E.2d 365 (1971).

Action may be refiled within six months after automatic dismissal under subsection (e) of this section. *Brewer v. Thompson*, 135 Ga. App. 70, 217 S.E.2d 395 (1975).

Dismissal under subsection (e) is not on merits. — Dismissal under subsection (e) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) is not a dismissal on the merits pursuant to subsection (b) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41), and after such a dismissal the plaintiff had six months to refile the complaint, pursuant to former Code 1933, § 3-808 (see now O.C.G.A. § 9-2-61). *Allstate Ins. Co. v. Dobbs*, 134 Ga. App. 225, 213 S.E.2d 915 (1975); *Calloway v. Harms*, 135 Ga. App. 54, 217 S.E.2d 184 (1975); *First of Ga. Ins. Co. v. Georgia Power Co.*, 146 Ga. App. 756, 247 S.E.2d 574 (1978).

Original action must not be barred. — Plaintiff, under former Code 1933, § 3-808 (see now O.C.G.A. § 9-2-61), may refile an action within six months following automatic dismissal mandated by Ga. L. 1967, p. 557, § 1 (see now O.C.G.A. § 9-2-60) or subsection (e) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) when the original action was not barred by the statute of limitations. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

After six months, the plaintiff cannot refile if the statute of limitations has run. *First of Ga. Ins. Co. v. Georgia Power Co.*, 146 Ga. App. 756, 247 S.E.2d 574 (1978).

Claimant not deprived of day in court. — If the claimant has a remedy provided by law under which the claimant

can assert the claimant's claim within a reasonable time, the claimant has the claimant's "day in court," and if the claimant fails to assert the claim within such time, then the claimant, not the law, is at fault. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Hearing necessary before dismissal of minor's complaint with prejudice for lack of prosecution. — It is error to dismiss with prejudice a complaint brought on behalf of a minor by a next friend for lack of prosecution, without further hearing and determination that dismissal should be with prejudice. *Mosley v. Lankford*, 244 Ga. 409, 260 S.E.2d 322 (1979).

Issues raised by cross action. — Dismissal of action for want of prosecution, when the defendant has filed a cross action seeking equitable relief, does not dismiss issues raised by the cross action.

Winn v. Armour & Co., 184 Ga. 769, 193 S.E. 447 (1937) (decided under former Code 1933, § 3-510).

Appeal of denial of motion premature. — When five years have elapsed without any orders in action for indebtedness, but orders have been issued on accompanying action for receivership, an appeal from the denial of a motion for automatic dismissal on the action for indebtedness is premature. *Consolidated Pecan Sales Co. v. Savannah Bank & Trust Co.*, 121 Ga. App. 40, 172 S.E.2d 487 (1970).

Dismissal of a survivor's wrongful death suit was proper, and automatic, since five years had passed after the most recent court order, and no further action was documented thereafter. *Tate v. Ga. DOT*, 261 Ga. App. 192, 582 S.E.2d 162 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Condemnation proceedings. — Civil Procedure Act (see O.C.G.A. Ch. 11, T. 9) was controlling in the declaration of taking method of condemnation, and Ga. L.

1967, p. 557, § 1 (see now O.C.G.A. § 9-2-60) was controlling in an appeal from an award of assessors or a special master. 1970 Op. Att'y Gen. No. 70-138.

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Costs, § 95. 23 Am. Jur. 2d, Depositions and Discovery, § 227 et seq. 24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, §§ 7 et seq., 95 et seq.

C.J.S. — 27 C.J.S., Dismissal and Nonsuit, § 1 et seq. 35B C.J.S., Federal Civil Procedure, § 754 et seq. 88 C.J.S., Trial, §§ 499, 500.

ALR. — Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 2 ALR 200.

Right to voluntary dismissal of suit without prejudice before trial as affected by filing counterclaim after motion for dismissal, 71 ALR 1001.

Right of defendant to take voluntary dismissal of cross-bill or counterclaim, 74 ALR 587.

Stage of trial at which plaintiff may take voluntary nonsuit, dismissal, or discontinuance, 89 ALR 13; 126 ALR 284.

Right to dismissal of action for delay in prosecution as affected by filing of, or as affecting, cross complaint, counterclaim, intervention, and the like, 90 ALR 387.

Principal contractor as necessary party to suit to enforce mechanic's lien of subcontractor, laborer, or materialman, 100 ALR 128.

Water user as necessary or proper party to litigation involving the right of ditch or canal company or irrigation or drainage district from which he takes water, 100 ALR 561.

Reinstatement, after expiration of term, of case which has been voluntarily withdrawn, dismissed, or nonsuited, 111 ALR 767.

Amendment of petition or complaint after statute of limitations has run, by reinstating codefendant who had been dismissed from the action otherwise than upon merits, 143 ALR 1182.

Provision that judgment is "without

prejudice” or “with prejudice” as affecting its operation as *res judicata*, 149 ALR 553.

Delay in issuance or service of summons as requiring or justifying order discontinuing suit, 167 ALR 1058.

Dissolved corporation as an indispensable party to a stockholders’ derivative action, 172 ALR 691.

Voluntary dismissal or withdrawal of proceedings to probate or contest will, 173 ALR 959.

Effect of nonsuit, dismissal, or discontinuance of action on previous orders, 11 ALR2d 1407.

Punishment of civil contempt in other than divorce cases by striking pleading or entering default judgment or dismissal against contemner, 14 ALR2d 580.

Appellate review at instance of plaintiff who has requested, induced, or consented to dismissal or nonsuit, 23 ALR2d 664.

Dismissal of plaintiff’s case for want of prosecution as affecting defendant’s counterclaim, setoff, or recoupment, or intervenor’s claim for affirmative relief, 48 ALR2d 748.

Res judicata effect of judgment dismissing action or otherwise denying relief, for lack of jurisdiction or venue, 49 ALR2d 1036.

Dismissal of civil action for want of prosecution as *res judicata*, 54 ALR2d 473.

Raising defense of statute of limitations by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings, 61 ALR2d 300.

What dismissals preclude a further suit, under federal and state rules regarding two dismissals, 65 ALR2d 642.

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 ALR2d 1399.

Doctrine of *forum non conveniens*: assumption or denial of jurisdiction of contract action involving foreign elements, 90 ALR2d 1109.

Dismissal of appeal or writ of error for want of prosecution as bar to subsequent appeal, 96 ALR2d 312.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before “trial,” “commencement of trial,” “trial of the facts,” or the like, 1 ALR3d 711.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 ALR3d 545.

Statute permitting new action after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction, 6 ALR3d 1043.

Dismissal of action because of party’s perjury or suppression of evidence, 11 ALR3d 1153.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits, 13 ALR3d 848.

Effect of statute permitting new action to be brought within specified period after failure of original action other than on the merits to limit period of limitations, 13 ALR3d 979.

Right of one spouse, over objection, to voluntarily dismiss claim for divorce, annulment, or similar marital relief, 16 ALR3d 283.

Voluntary dismissal or replevin action by plaintiff as affecting defendant’s right to judgment for the return or value of the property, 24 ALR3d 768.

Right to voluntary dismissal of civil action as affected by opponent’s motion for summary judgment, judgment on the pleadings, or directed verdict, 36 ALR3d 1113.

Power of court sitting as trier of fact to dismiss at close of plaintiff’s evidence, notwithstanding plaintiff has made out *prima facie* case, 55 ALR3d 272.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 ALR3d 1109.

Power of trial court to dismiss prosecution as direct acquittal on basis of prosecutor’s opening statement, 75 ALR3d 649.

Appealability of order dismissing counterclaim, 86 ALR3d 944.

Award of damages for dilatory tactics in prosecuting appeal in state court, 91 ALR3d 661.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 ALR4th 840.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper, 34 ALR4th 778.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties, 3 ALR5th 237.

9-11-42. Consolidation; severance.

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, if the parties consent, the court may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate trials.** The court, in furtherance of convenience or to avoid prejudice, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. (Ga. L. 1966, p. 609, § 42.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 42, see 28 U.S.C.

Law reviews. — For article discussing counterclaims and crossclaims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article, "Synopsis of 1968 Amendments to the Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article discussing liability of corporate directors,

officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For article, "Mass Torts and Litigation Disasters," see 20 Ga. L. Rev. 429 (1986). For article, "A Comment on Mass Torts and Litigation Disasters," see 20 Ga. L. Rev. 455 (1986). For article, "Georgia Law of Alimony," see 4 Ga. St. B.J. 54 (1999).

JUDICIAL DECISIONS

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General Consideration

This section parallels § 9-11-24. — O.C.G.A. § 9-11-42 does not preclude consolidation of claims involving common questions of law or fact if the parties do not consent and, furthermore, that section parallels rather than limits O.C.G.A. § 9-11-24(b). *Branch v. Maxwell*, 203 Ga. App. 553, 417 S.E.2d 176, cert. denied, 203 Ga. App. 905, 417 S.E.2d 176 (1992).

O.C.G.A. § 9-11-42 seeks to further judicial convenience or avoid preju-

dice, not to circumvent the requirements of O.C.G.A. § 9-11-54. *Cable Holdings of Battlefield, Inc. v. Lookout Cable Serv., Inc.*, 173 Ga. App. 355, 326 S.E.2d 552 (1985).

Construction with O.C.G.A. § 9-11-20. — Because the numerous claims involving the various plaintiffs did not arise out of the same transaction, occurrence, or series of transactions or occurrences, but the claims were merely similar, involving common questions of

General Consideration (Cont'd)

law and fact, and thus could have been consolidated in accordance with O.C.G.A. § 9-11-42(a), the trial court erred in denying the defendants' motion to sever those claims. *Lincoln Elec. Co. v. Gaither*, 286 Ga. App. 558, 649 S.E.2d 823 (2007).

When the issues are not complex and are so closely related that essentially the same evidence would be presented in the trial of an original complaint and a counterclaim, judicial economy would dictate that the claim and counterclaim should be tried together. *Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc.*, 167 Ga. App. 532, 307 S.E.2d 13 (1983).

Jurisdiction over a third-party direct damage claim is not destroyed if the original action is settled or disposed of in some fashion before adjudication of such claim; but the court, in the exercise of the court's discretion, either may proceed with the claim or dismiss the claim. *Cohen v. McLaughlin*, 250 Ga. 661, 301 S.E.2d 37 (1983).

Being tried with a codefendant who has prior convictions that are made known to the jury does not result in prejudice requiring reversal. *Givens v. State*, 184 Ga. App. 498, 361 S.E.2d 830, cert. denied, 184 Ga. App. 909, 361 S.E.2d 830 (1987).

No application to motion for contempt. — O.C.G.A. § 9-11-42 did not apply to a party's motion for contempt because a motion for contempt was not an "action" within the meaning of the statute, and a trial court did not err in conducting a joint contempt hearing involving two parties without the consent of one of the parties. *Cook v. Smith*, 288 Ga. 409, 705 S.E.2d 847 (2010).

Cited in *New Orleans & N.E.R.R. v. Pioneer Plastics Corp.*, 224 Ga. 228, 161 S.E.2d 294 (1968); *Berry v. Cordell*, 120 Ga. App. 844, 172 S.E.2d 848 (1969); *Burgess v. Nabers*, 122 Ga. App. 445, 177 S.E.2d 266 (1970); *Atlantic Aluminum & Metal Distribs. v. Adams*, 123 Ga. App. 387, 181 S.E.2d 101 (1971); *Carter v. Witherspoon*, 228 Ga. 485, 186 S.E.2d 534 (1971); *Chrysler Credit Corp. v. Barnes*, 126 Ga. App. 444, 191 S.E.2d 121 (1972);

Bradford v. State, 126 Ga. App. 688, 191 S.E.2d 545 (1972); *Harris v. Hill*, 129 Ga. App. 403, 199 S.E.2d 847 (1973); *Atlanta Air Fleet, Inc. v. Insurance Co. of N. Am.*, 130 Ga. App. 15, 202 S.E.2d 192 (1973); *State Farm Mut. Auto. Ins. Co. v. Hillhouse*, 131 Ga. App. 524, 206 S.E.2d 627 (1974); *English v. Milby*, 233 Ga. 7, 209 S.E.2d 603 (1974); *Chupp v. Henderson*, 134 Ga. App. 808, 216 S.E.2d 366 (1975); *Rowland v. Kellos*, 236 Ga. 799, 225 S.E.2d 302 (1976); *Young v. Jones*, 140 Ga. App. 66, 230 S.E.2d 32 (1976); *Colodny v. Dominion Mtg. & Realty Trust*, 141 Ga. App. 139, 232 S.E.2d 601 (1977); *Pugh v. Pou*, 238 Ga. 450, 233 S.E.2d 198 (1977); *Cline v. Kehs*, 146 Ga. App. 350, 246 S.E.2d 329 (1978); *Plaza Pontiac, Inc. v. Shaw*, 158 Ga. App. 799, 282 S.E.2d 383 (1981); *Fidelity & Cas. Ins. Co. v. Massey*, 162 Ga. App. 249, 291 S.E.2d 97 (1982); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 249 Ga. 662, 293 S.E.2d 331 (1982); *Kaplan v. Krosco, Inc.*, 167 Ga. App. 197, 306 S.E.2d 88 (1983); *DOT v. Defoor*, 173 Ga. App. 218, 325 S.E.2d 863 (1984); *Moore v. Thompson*, 255 Ga. 236, 336 S.E.2d 749 (1985); *Summerlin v. Johnson*, 176 Ga. App. 336, 335 S.E.2d 879 (1985); *Keller Indus., Inc. v. Summers Roofing Co.*, 179 Ga. App. 288, 346 S.E.2d 99 (1986); *Grissett v. Wilson*, 181 Ga. App. 727, 353 S.E.2d 621 (1987); *Trust Co. Bank v. Shaw*, 182 Ga. App. 165, 355 S.E.2d 99 (1987); *Opatut v. Guest Pond Club, Inc.*, 188 Ga. App. 478, 373 S.E.2d 372 (1988); *Michaels v. Kessler*, 191 Ga. App. 103, 381 S.E.2d 103 (1989); *Fowler v. Vineyard*, 261 Ga. 454, 405 S.E.2d 678 (1991); *Shleifer v. Bridgestone-Firestone, Inc.*, 223 Ga. App. 256, 477 S.E.2d 405 (1996); *Bowen v. Hunter, Maclean, Exley & Dunn*, 241 Ga. App. 204, 525 S.E.2d 744 (1999); *Georgia Ports Auth. v. Harris*, 243 Ga. App. 508, 533 S.E.2d 404 (2000); *Hyman v. State*, 320 Ga. App. 106, 739 S.E.2d 395 (2013); *Sentinel Offender Svcs., LLC v. Glover*, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014); *Evans v. Sangster*, 330 Ga. App. 533, 768 S.E.2d 278 (2015).

Consolidation

Subsection (a) of O.C.G.A. § 9-11-42 applies to the consolidation of sepa-

rate actions, not the separation or bifurcation of claims or issues in one case. *Vitner v. Funk*, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Subsection (a) of O.C.G.A. § 9-11-42 applies to dual jury trials and other procedures that combine separate actions in joint court proceedings. *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226, 476 S.E.2d 565 (1996).

Trial court committed reversible error in ordering a dual jury trial without the consent of the parties. *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226, 476 S.E.2d 565 (1996).

Agreement through counsel to consolidate cases. — Trial court's finding that parties agreed through counsel to consolidate cases and that the cases have been treated as one since that time removes such consolidation from the prohibition of this section against consolidation without the parties' consent. *Wright v. Thompson*, 236 Ga. 655, 225 S.E.2d 226 (1976).

At a hearing on a motion for summary judgment in a declaratory judgment action brought by a beneficiary of a will, the executor's counsel acknowledged that the parties and issues between that case and the one filed by the executor were the same and agreed to the consolidation of the two cases. Counsel's agreement to the consolidation was sufficient to meet the consent requirement of O.C.G.A. § 9-11-42(a). *Bandy v. Henderson*, 284 Ga. 692, 670 S.E.2d 792 (2008).

Trial court did not err by consolidating brothers' action seeking to set aside quitclaim deeds their mother gave her daughter and grandson with a separate pending action in which the brothers sought to prove that a will the mother executed was invalid because the procedure the parties' agreed to did not amount to consolidation of the actions under O.C.G.A. § 9-11-42(a), and the daughter and grandson waived any claim that the actions were improperly consolidated without their consent; the daughter, grandson, and brothers entered into a consolidated pre-trial order, which controlled only the trial of the action seeking to invalidate the two quitclaim deeds, and on the day the trial commenced in that action, the trial

court entered an order stating that although the court had technically consolidated the two actions, with the agreement of the parties and with the trial court's approval, the two civil actions would be tried separately with the action seeking to invalidate the quitclaim deeds being tried first by a jury and the action concerning the will to be tried later by the trial court sitting without a jury. *Schaffer v. Fox*, 303 Ga. App. 584, 693 S.E.2d 852 (2010).

Trial court did not err by consolidating a creditor's two cases under O.C.G.A. § 9-11-42 because the creditor not only consented, but the creditor actually requested the consolidation at a hearing regarding a discovery dispute; the fact that the creditor later rescinded the consent did not render erroneous the trial court's failure to separate the cases. *Thomas v. Brown*, 308 Ga. App. 514, 707 S.E.2d 900 (2011).

When trial judge ordered consolidation of related actions without parties' consent, reversal on appeal is not required when the county superior court had jurisdiction and venue over party on counterclaim by reason of party's being made a codefendant in adoption suit. *Herring v. McLemore*, 248 Ga. 808, 286 S.E.2d 425 (1982).

Dismissal of actions under § 9-11-41. — Contention that dismissal of actions with prejudice under O.C.G.A. § 9-11-41 was improper because some or all of the actions should have been consolidated under O.C.G.A. § 9-11-42 was without merit since the consent of all parties is required for consolidation. *Zohoury v. Zohouri*, 218 Ga. App. 748, 463 S.E.2d 141 (1995).

Divorce action brought by wife and claim of equitable interest brought by bank pending before the court both involved competing claims relative to the husband's property; the court was correct to consolidate the two. *First Nat'l Bank v. Blackburn*, 254 Ga. 379, 329 S.E.2d 897 (1985).

Consolidation of a husband's and a wife's separate negligence lawsuits, though arising out of the same accident, required the consent of the parties, since the actions raised separate issues regarding comparative negligence. *Robinson v.*

Consolidation (Cont'd)

Hall, 177 Ga. App. 181, 338 S.E.2d 699 (1985). But see *Stenger v. Grimes*, 260 Ga. 838, 400 S.E.2d 318 (1991).

No consolidation of eminent domain proceedings. — It was undisputed that, although the condemnees were all related, the three parcels of property at issue were separately owned and differed in acreage. Thus, any consolidation would create an action involving distinct parties with distinct claims uniting against one party; therefore, O.C.G.A. § 9-11-42(a) applied and the condemnation petitions could not be consolidated without the company's consent. *Ga. Transmission Corp. v. Worley*, 312 Ga. App. 855, 720 S.E.2d 305 (2011).

Separate trials

Distinction between subsection (b) and § 9-11-21. — Severance under O.C.G.A. § 9-11-21 may be principally directed to the separation of claims within multicclaim litigation because of the peculiar relationship or status of parties with respect to particular claims. O.C.G.A. § 9-11-42(b), on the other hand, appears to be devoted to the convenience of adjudication, the avoidance of prejudice, and the interests of expedition and economy as dictated by the characteristics and elements of proof of the claims themselves. *Vitner v. Funk*, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Defendant may not be tried twice. — Separate trials cannot be justified when result is to require the defendant to try the same case twice. *Lincoln Land Co. v. Palfery*, 130 Ga. App. 407, 203 S.E.2d 597 (1973).

Discretion of trial judge. — As a general rule, question of severance is a matter of discretion for the trial judge. *Lansky v. Goldstein*, 141 Ga. App. 345, 233 S.E.2d 437 (1977).

Under subsection (b) of Ga. L. 1966, p. 609, § 42 (see now O.C.G.A. § 9-11-42), court has broad discretion in granting a motion for severance of a third-party claim, a counterclaim, or a cross-claim, and that discretion will not be interfered with unless the discretion appears to have been abused. *Southern Concrete Co. v.*

Carter Constr. Co., 121 Ga. App. 573, 174 S.E.2d 447 (1970); *Jackson v. International Harvester Co.*, 190 Ga. App. 765, 380 S.E.2d 306 (1989).

Granting of a separate trial as to any separate issue is a discretionary matter for the trial judge, and there will be no reversal thereof absent a clear and manifest abuse of that discretion. *Sollek v. Laseter*, 124 Ga. App. 131, 183 S.E.2d 86 (1971).

Severance to try a counterclaim separately or to hold a bifurcated trial on the issues of liability and damages is largely a matter of discretion for the trial judge, and absent clear and manifest abuse of that discretion, it will not be interfered with on appeal. *Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc.*, 167 Ga. App. 532, 307 S.E.2d 13 (1983).

Severance is largely a matter of discretion for the trial judge, and absent clear and manifest abuse of that discretion, it will not be interfered with on appeal. *Southern Guar. Ins. Co. v. Nixon*, 194 Ga. App. 398, 390 S.E.2d 638 (1990).

In an action against a physician for medical malpractice, fraud, and loss of consortium, the trial court did not abuse the court's discretion in severing the issue of professional negligence from the trial of issues of liability for, and amount of, punitive damages. *Hanie v. Barnett*, 213 Ga. App. 158, 444 S.E.2d 336 (1994).

Trial court did not abuse the court's discretion in trifurcating pharmaceutical malpractice case against pharmacist and respondeat superior case against pharmacy when the wrong medication was dispensed to the customer as the trial court had already found against the pharmacist on the issues of duty and breach of duty and against the pharmacy's potential respondeat superior liability; thus, trifurcation of the remaining issues involving causation, compensatory damages, and punitive damages was necessary to avoid improperly influencing the jury in the jury's deliberations. *Moresi v. Evans*, 257 Ga. App. 670, 572 S.E.2d 327 (2002).

Trial court's denial of a former supervisor's motion to sever a trial commenced by a former employee, alleging a variety of torts arising from the supervisor's alleged

improper touching of the employee, was not an abuse of discretion under O.C.G.A. § 9-11-42(b) as there was no showing that the supervisor's interest could not be adequately protected by a limiting instruction to the jury with respect to the liability of the former supervisor and the employer. *MARTA v. Mosley*, 280 Ga. App. 486, 634 S.E.2d 466 (2006).

Trial court did not err in denying a motion filed by owners of land to bifurcate a trespass action filed against the owners by a holder of an easement in light of the holder's failure to file a response to the motion; under O.C.G.A. § 9-11-42(b), whether to grant such a motion was a matter of discretion for the trial judge, the trial judge was not required to sever the trial solely because the owners requested it, and denial of the motion was not an abuse of discretion in that the parties' verified pleadings disputed the facts surrounding the holder's ownership, and the trial judge wished to resolve questions of fact regarding the easement's ownership. *Paine v. Nations*, 283 Ga. App. 167, 641 S.E.2d 180 (2006).

Trial court did not abuse the court's discretion by amending a pretrial order to allow for bifurcation of a trial, upon the motion of the defendants, because at the hearing on the motion to amend, the plaintiff never objected on the grounds that the timing of the motion to bifurcate caused any injustice; therefore, no reversible error occurred with regard to the plaintiff's timing argument. *Bolden v. Ruppenthal*, 286 Ga. App. 800, 650 S.E.2d 331 (2007), cert. denied, 2007 Ga. LEXIS 756 (Ga. 2007).

Trial court properly refused to transfer a dispossessory action wherein the landlord was granted a writ of possession from the county civil court to the superior court under O.C.G.A. § 15-10-45(d) based on the tenant filing a counterclaim as that statute only applied to magistrate courts, not the county civil court. Further, whether or not the trial court erred by failing to inquire as to whether the parties were willing to consent to consolidation of the claims could not be determined as the appealing tenant failed to provide a transcript of the bifurcated or dispossessory hearings. *Roberts v. Strong*, 293 Ga. App. 466, 667 S.E.2d 632 (2008).

Trial court was authorized to conclude, after extensive discussion with the parties, that bifurcation of an insured's breach of an insurance contract and bad faith failure to pay benefits claims was appropriate under O.C.G.A. § 9-11-42(b) because coverage turned on whether the insured's debilitating condition arose from an injury or sickness, and the discrete coverage issue had to be resolved first since bad faith was irrelevant absent coverage. *Saye v. Provident Life & Accident Ins. Co.*, 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011).

Discretion in severing issues raised by intervenors. — Language of this section is broad enough to permit the trial court discretion in granting severance to issues raised by intervening parties. *McGowan v. North Ga. Prod. Credit Ass'n*, 246 Ga. 135, 269 S.E.2d 25 (1980).

Refusal of court to allow trial of severed claim. — In an action related to utility rates, the trial court improperly deprived the plaintiffs of an opportunity to litigate the plaintiffs' claims for damages under RICO and the Sherman Act since the court granted the plaintiffs' motion to sever those claims from another claim based on the alleged unreasonableness of the rates charged, but then, after a trial on the latter claim, ruled that the plaintiffs had abandoned the plaintiffs' claims under RICO and the Sherman Act by not raising those claims during the trial. *Management By Design, Inc. v. Lakeview Utils., Inc.*, 233 Ga. App. 711, 505 S.E.2d 37 (1998).

When questions of law and fact are similar, but not the same, it is an abuse of the trial court's discretion to refuse severance upon timely motion. *Paulsen Street Investors v. EBCO Gen. Agencies*, 224 Ga. App. 507, 481 S.E.2d 246 (1997).

More than one defense. — There is no provision for severance when there is a single issue but more than one defense is presented. *Sheffield v. Lewis*, 246 Ga. 19, 268 S.E.2d 615 (1980).

Time for motion for severance. — Motion for severance because of the admission of evidence against a defendant that a second defendant believes is highly prejudicial to that defendant is untimely

Separate trials (Cont'd)

when the questionable evidence was listed in the pretrial order but the motion was not made until the trial. *Gorlin v. Halpern*, 184 Ga. App. 10, 360 S.E.2d 729 (1987), rev'd on other grounds sub nom. *Burgess & Brown v. Gorlin & Long*, 258 Ga. 127, 365 S.E.2d 405 (1988).

Denial of severance proper. — In a divorce case in which the paramour of the husband became a named party because the husband allegedly fraudulently transferred assets to the paramour, the paramour was not entitled to severance of the fraudulent conveyances claim under O.C.G.A. § 9-11-42(b) as the paramour could not demonstrate the requisite harm by showing prejudice to the husband, and the paramour was not prejudiced by the joint trial because the fact of the paramour's affair with the husband would have been admissible in a separate trial. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

No standing to raise prejudice. — Companies lacked standing to raise the issue of prejudice to a supervisor as a basis for their motion for bifurcation in an action brought by an employee against supervisor and companies for sexual harassment and negligent hiring when no harm was shown by the companies. *Troutman v. B.C.B. Co.*, 209 Ga. App. 166, 433 S.E.2d 73 (1993).

Separate trial on accord and satisfaction. — In an automobile collision case, it was not an abuse of discretion for the trial judge to grant the defendant's motion for a separate trial on the issue of defense of accord and satisfaction. *Sollek v. Laseter*, 124 Ga. App. 131, 183 S.E.2d 86 (1971).

Confusion between counterclaim and main action. — When a person served with process intended for another answers denying that the person is the intended defendant, and counterclaims for malicious use of process, the trial court can easily avoid any confusion between the separate trial of the counterclaim and the main action by ordering a separate trial of the counterclaim pursuant to subsection (b) of O.C.G.A. § 9-11-42. *Bank South, N.A. v. Tate*, 190 Ga. App. 248, 378

S.E.2d 486, cert. denied, 190 Ga. App. 897, 378 S.E.2d 486 (1989).

Counterclaim severed and transferred for venue purposes. — If a motion to join is granted and a defendant-in-counterclaim is thereafter served, then the actually "joined [rather than potentially joinable] party" may contest venue by filing a motion to dismiss, which is to be treated by the trial court as a motion to transfer pursuant to Uniform Superior Court Rule 19. If venue is shown to be proper elsewhere, it would then be incumbent upon the trial court to enter an appropriate order. Such an appropriate order might sever the counterclaim for separate trial pursuant to subsection (b) of O.C.G.A. § 9-11-42 and transfer only the severed counterclaim, while retaining jurisdiction and venue over the main action. *McCabe v. Lundell*, 199 Ga. App. 639, 405 S.E.2d 693, cert. denied, 199 Ga. App. 906, 405 S.E.2d 693 (1991).

Evidence of insurance in negligence action deemed prejudicial. — In a negligence action brought by a bicyclist against insureds and the insureds' insurance carrier for injuries incurred when allegedly struck by the insured's vehicle, the trial court erred by denying the insured's motion to bifurcate claims for the trial of the negligence claim and the bicyclist's claim for benefits under former no fault insurance statute; admission of evidence of insurance coverage was inherently prejudicial in a negligence action against the insureds. *Cincinnati Ins. Co. v. Reybitz*, 205 Ga. App. 174, 421 S.E.2d 767 (1992).

Vehicle collision cases. — Court does not abuse the court's discretion by bifurcating the liability and damages issues in vehicle collision cases. *Whitley v. Gwinnett County*, 221 Ga. App. 18, 470 S.E.2d 724 (1996).

Bifurcation of liability and damages issues in medical malpractice action avoided prejudice to the doctors and hospital based on the patient's lengthy suffering and eventual death and the emotional, as well as financial, damages imposed on the patient's spouse and children by it. *Cantrell v. Northeast Ga. Medical Ctr.*, 235 Ga. App. 365, 508 S.E.2d 716 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, § 110 et seq. 75 Am. Jur. 2d, Trial, §§ 58 et seq., 71, 75 et seq., 80 et seq., 92 et seq.

C.J.S. — 1A C.J.S., Actions, § 345 et seq. 35A C.J.S., Federal Civil Procedure, §§ 43, 44, 45, 47. 35B C.J.S., Federal Civil Procedure, § 956 et seq. 88 C.J.S., Trial, § 12 et seq.

ALR. — Availability as set-off or counterclaim of claim in favor of one alone of several defendants, 10 ALR 1252; 81 ALR 781.

Propriety of consolidation for trial of actions for personal injuries, death, or property damage arising out of same accident, 104 ALR 62; 68 ALR2d 1372.

Different benefits or claims of benefit under a policy of insurance as constituting a single cause of action or separate causes, 159 ALR 563.

Right of defendant sued jointly with

another or others in action for personal injury or death to separate trial, 174 ALR 734.

Separate trial of issues of liability and damages in tort, 85 ALR2d 9.

Right of plaintiff suing jointly with others to separate trial or order of severance, 99 ALR2d 670.

Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 ALR3d 456.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 ALR3d 696.

Intoxication of automobile driver as basis for awarding punitive damages, 33 ALR5th 303.

9-11-43. Evidence.

(a) **Evidence on trials.** In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by this chapter or by statute.

(b) **Evidence on motions.** When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions; provided, however, that this provision shall not limit the right of parties to use depositions where they would otherwise be entitled to do so.

(c) **Determination of the law of other jurisdictions.** A party who intends to raise an issue concerning the law of another state or of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining such law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence. The court's determination shall be treated as a ruling on a question of law. (Ga. L. 1966, p. 609, § 43; Ga. L. 1968, p. 1104, § 10.)

Cross references. — Authentication of laws of other jurisdictions, § 24-9-922.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 43, see 28 U.S.C.

Law reviews. — For article, "Synopsis of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga St. B.J. 503 (1968).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EVIDENCE ON MOTIONS
LAW OF OTHER JURISDICTIONS

General Consideration

Cited in Boyer v. King, 129 Ga. App. 690, 200 S.E.2d 906 (1973); Marger v. Miller, 129 Ga. App. 44, 198 S.E.2d 709 (1973); Rainwater v. Vazquez, 133 Ga. App. 173, 210 S.E.2d 380 (1974); Rainwater v. Vazquez, 135 Ga. App. 463, 218 S.E.2d 108 (1975); Eldon Indus., Inc. v. Paradies & Co., 397 F. Supp. 535 (N.D. Ga. 1975); White Farm Equip. Co. v. Jarrell & Clifton Equip. Co., 139 Ga. App. 632, 229 S.E.2d 113 (1976); Ellington v. Tolar Constr. Co., 142 Ga. App. 218, 235 S.E.2d 729 (1977); Orr v. Woodruff-Robinson, Inc., 142 Ga. App. 861, 237 S.E.2d 463 (1977); Parker v. Fidelity Bank, 146 Ga. App. 52, 245 S.E.2d 364 (1978); C.W. Matthews Contracting Co. v. Capital Ford Truck Sales, Inc., 149 Ga. App. 354, 254 S.E.2d 426 (1979); Primas v. Saulsberry, 152 Ga. App. 88, 262 S.E.2d 251 (1979); Cosby v. A.M. Smyre Mfg. Co., 158 Ga. App. 587, 281 S.E.2d 332 (1981); Camp v. Sellers & Co., 158 Ga. App. 646, 281 S.E.2d 621 (1981); Foy v. Lewis, 248 Ga. 234, 282 S.E.2d 295 (1981); Mid-Georgia Bandage Co. v. National Equip. Rental, Ltd., 164 Ga. App. 68, 296 S.E.2d 391 (1982); Ferron v. Anclote Psychiatric Ctr., Inc., 169 Ga. App. 699, 314 S.E.2d 714 (1984); City of Alma v. Benham, 170 Ga. App. 143, 316 S.E.2d 477 (1984); Saxon v. Covington, 178 Ga. App. 271, 342 S.E.2d 754 (1986); International Indem. Co. v. Coachman, 181 Ga. App. 82, 351 S.E.2d 224 (1986); Hodgskin v. Markatron, Inc., 185 Ga. App. 750, 365 S.E.2d 494 (1988); Behar v. Aero Med Int'l, Inc., 185 Ga. App. 845, 366 S.E.2d 223 (1988); Beasley v. Beasley, 260 Ga. 419, 396 S.E.2d 222 (1990); Wade v. Crannis, 209 Ga. App. 501, 433 S.E.2d 669 (1993); Pleats, Inc. v. OMSA, Inc., 211 Ga. App. 643, 440 S.E.2d 214 (1993); Hewett v. Kalish, 264 Ga. 183, 442 S.E.2d 233 (1994); Forest Lakes Home Owners Ass'n v. Green Indus., Inc., 218 Ga. App. 890,

463 S.E.2d 723 (1995); Rapps v. Cooke, 234 Ga. App. 131, 505 S.E.2d 566 (1998); Hipple v. Simpson Paper Co., 234 Ga. App. 516, 507 S.E.2d 156 (1998); Christensen v. State, 245 Ga. App. 165, 537 S.E.2d 446 (2000); City of Warner Robins v. Baker, 255 Ga. App. 601, 565 S.E.2d 919 (2002); Six Flags over Ga. II, L.P. v. Kull, 276 Ga. 210, 576 S.E.2d 880 (2003); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004); Cousins v. Maced. Baptist Church of Atlanta, 283 Ga. 570, 662 S.E.2d 533 (2008).

Evidence on Motions

Proffered evidence of negligence insufficient. — When the plaintiffs failed to tender a copy of the Manual on Uniform Traffic Control Devices (MUTCD) into evidence, even though the MUTCD was evidence of a minimum standard of care, the trial court could not determine if MUTCD created negligence per se. Donaldson v. DOT, 236 Ga. App. 411, 511 S.E.2d 210 (1999).

While portions of the Manual on Uniform Traffic Control Devices (MUTCD) were testified to by expert witnesses sufficient to establish a minimum standard of care for ordinary negligence purposes, such testimony was insufficient for either the trial or the appellate court to determine that such portion of MUTCD created negligence per se. Donaldson v. DOT, 236 Ga. App. 411, 511 S.E.2d 210 (1999).

Proper procedure in disposing of matters in abatement before trial is found in Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12(d)) and subsection (b) of Ga. L. 1968, p. 1104, § 10 (see now O.C.G.A. § 9-11-43). Ogden Equip. Co. v. Talmadge Farms, Inc., 232 Ga. 614, 208 S.E.2d 459 (1974); Kirkpatrick v. Mackey, 162 Ga. App. 876, 293 S.E.2d 461 (1982); Dawson v. McCart, 169 Ga. App. 434, 313 S.E.2d 135 (1984); Derbyshire v. United Bldrs. Supplies, Inc., 194 Ga. App. 840, 392 S.E.2d 37 (1990).

Motions in abatement are heard under the provisions of subsection (b) of O.C.G.A. § 9-11-43, which contemplates consideration of evidence not appearing on the face of the record. *Manufacturers Nat'l Bank v. Tri-State Glass, Inc.*, 201 Ga. App. 253, 410 S.E.2d 808 (1991).

If appellant's summary judgment motion is considered as raising a real party in interest defense, it was properly denied. An objection on this ground may be made at any time up to and including a trial on the merits, which the appellant did in the appellant's motion in limine and motion for a directed verdict. No case, however, should be dismissed for this reason until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Accordingly, if the appellant renews this objection, the trial court should consider this issue under O.C.G.A. § 9-11-43(b). *Golden Pantry Food Stores, Inc. v. Lay Bros., Inc.*, 266 Ga. App. 645, 597 S.E.2d 659 (2004).

Defendant was not entitled to a jury trial on a motion to set aside for lack of jurisdiction over the person as jurisdiction is a question for the court. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

Motion to dismiss for lack of jurisdiction of the defendant, when tried on affidavits pursuant to subsection (b) of O.C.G.A. § 9-11-43, does not become a motion for summary judgment. *Terrell v. Porter*, 189 Ga. App. 778, 377 S.E.2d 540 (1989).

Consideration of affidavit in motion to dismiss. — In a breach of contract action between a business and an advertiser, while the best evidence rule required the advertiser to produce the first affidavit provided by the advertiser's senior director of business affairs, and the trial court erred in considering the affidavit without requiring the affidavit's production, given that the second affidavit showed that the parties entered into the contract at issue, which included the forum selection clause, the trial court properly considered the affidavit to that effect to support the advertiser's motion to dismiss on personal jurisdiction grounds.

Consequently, when this second affidavit was not filed in violation of O.C.G.A. § 9-11-6(d), the trial court properly considered the second affidavit. *Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 660 S.E.2d 797 (2008).

Hearing on jurisdiction and venue defenses. — Preliminary hearing over defenses of lack of jurisdiction over the person or subject matter and improper venue, whether made in pleading or by motion, may be heard and determined before trial on the application of any party, and at such hearing factual issues shall be determined by the trial court; moreover, there is no reason why the same type of factual determination should not be made by the trial court in a motion to set aside. *Montgomery v. USS Agri-Chemical Div.*, 155 Ga. App. 189, 270 S.E.2d 362 (1980).

Procedural requirements for motion to dismiss complied with. — Order denying motion to dismiss which expressly referred to such motion and stated that ruling was made after oral argument on the issue and after consideration of the pleadings, affidavits, and deposition, comported with procedural requirements that motion to dismiss be determined in accordance with Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12(d)) and subsection (b) of Ga. L. 1968, p. 1104, § 10 (see now O.C.G.A. § 9-11-43). *Hart v. DeLowe Partners, Ltd.*, 147 Ga. App. 715, 250 S.E.2d 169 (1978).

Oral evidence on summary judgment motion not required. — While there maybe circumstances in which the court may, in the court's sound discretion, permit use of oral evidence at a hearing on a motion for summary judgment as, for example, when both parties agree, there is no requirement that the court do so. *Johnson v. Aetna Fin., Inc.*, 139 Ga. App. 452, 228 S.E.2d 299 (1976).

In hearing on motion for new trial, judge may direct that matter be heard on affidavits or partly on oral testimony or on depositions. *Johnson v. Johnson*, 244 Ga. 155, 259 S.E.2d 88 (1979).

Court to give notice and direction of oral hearing. — In order for motion to be heard orally, statute requires that court make such direction and give notice

Evidence on Motions (Cont'd)

thereof. *Johnson v. Aetna Fin., Inc.*, 139 Ga. App. 452, 228 S.E.2d 299 (1976).

Consideration of oral testimony. — Nothing in subsection (b) of O.C.G.A. § 9-11-43 precludes a court from considering oral testimony at a hearing on a motion to dismiss for insufficient service. *Franchell v. Clark*, 241 Ga. App. 128, 524 S.E.2d 512 (1999).

Reliance on affidavit justified. — When affidavit does not recite that the affidavit was based on personal knowledge, but the information therein is consistent with and cumulative of the documentary evidence, and it is uncontroverted by the counter-affidavit or other evidence, the court is entitled to rely on the affidavit. *Lott v. Liberty Mut. Ins. Co.*, 154 Ga. App. 474, 268 S.E.2d 686 (1980).

Trial court erred in dismissing a public employee's Georgia Whistle Blower Statute, O.C.G.A. § 45-1-4, suit as moot as: (1) the employer, the Georgia Department of Corrections, continued to employ grandfathered pharmacists according to an affidavit submitted under O.C.G.A. § 9-11-43; (2) the employee had been a grandfathered pharmacist while employed by the Department; and (3) the appellate court saw no reason, but for the alleged retaliatory action, that the employee would not remain employed as a pharmacist with the Department; the employee's retirement from the Department made the matter moot only if the employee did not want to return to work or could not because the employee was past the mandatory retirement age, but these facts were not apparent from the stipulation that the employee had retired. *Hughes v. Ga. Dep't of Corr.*, 267 Ga. App. 440, 600 S.E.2d 383 (2004).

Summary judgment motion improper. — When it is necessary to consider matters outside the pleadings in ruling on a motion to dismiss for failure to prosecute the action in the name of the real party-in-interest, this should be done under the provisions of subsection (b) of O.C.G.A. § 9-11-43 and not by way of a motion for summary judgment under O.C.G.A. § 9-11-56. *Warshaw Properties*

v. Lackey, 170 Ga. App. 101, 316 S.E.2d 482 (1984).

Motion to dismiss not converted to summary judgment. — Defendant's motion to dismiss for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process was not converted to a summary judgment motion upon consideration of matters outside the pleadings and, thus, dismissal was not directly appealable under the summary judgment statute. *Church v. Bell*, 213 Ga. App. 44, 443 S.E.2d 677 (1994).

Tender of evidence to support motion to set aside judgment. — Trial court shall give directions as to how evidence is to be presented, either by affidavit, deposition, oral testimony, or any combination, and notice of any hearing on the motion to set aside the judgment. *Herringdine v. Nalley Equip. Leasing, Ltd.*, 238 Ga. App. 210, 517 S.E.2d 571 (1999).

Law of Other Jurisdictions

Subsection (c) is equivalent to Federal Rule of Civil Procedure 44.1, and any construction given to the federal rule is applicable to that subsection. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

There are two separate and distinct parts in subsection (c) of this section, each of which has a separate and distinct function. *Souchak v. Close*, 132 Ga. App. 248, 207 S.E.2d 708 (1974).

First sentence of subsection (c) concerns notice, and requires any party who intends to raise an issue concerning the law of another state to give notice in that party's pleadings or other reasonable written notice; this is to give the court and the party's adversary an opportunity to prepare concerning it. *Souchak v. Close*, 132 Ga. App. 248, 207 S.E.2d 708 (1974).

Second sentence of subsection (c) presupposes compliance with first sentence. — Second sentence of subsection (c) of this section concerns determination of foreign law; it presupposes that first sentence, as to notice, has been complied with, and is conditional thereon. *Souchak v. Close*, 132 Ga. App. 248, 207 S.E.2d 708 (1974).

Notice requirement instituted by subsection (c). — On its face, subsection (c) of this section ends requirement that foreign law must be pled and proved, substituting instead the requirement that the party who wishes to introduce law of a foreign state or country must give reasonable written notice of that party's intention. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Notice of intention to rely on foreign law required. — Subsection (c) of this section requires that whoever would rely on foreign law must give notice of such intention to the other party. *Ramseur v. American Mgt. Ass'n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

When the first notice of intent to rely upon foreign law was made at a hearing on a motion for directed verdict, the notice was insufficient to provide the court and opposing counsel an opportunity to prepare. *Fortson v. Fortson*, 204 Ga. App. 827, 421 S.E.2d 106 (1992).

Notice of intent to rely on foreign law filed some two weeks before pre-trial conference is sufficient compliance with O.C.G.A. § 9-11-43. *Shannon v. Toronto-Dominion Bank*, 168 Ga. App. 279, 308 S.E.2d 682 (1983).

Oral notice by defendant given during argument in support of motion for directed verdict of the defendant's intention to rely on Alabama law was statutorily unsound and required reversal of directed verdict in the defendant's favor. *Plant v. Trust Co.*, 164 Ga. App. 387, 297 S.E.2d 37 (1982).

Responsibility on party wishing to raise foreign law issue. — Subsection (c) of this section places responsibility on the party who intends to raise an issue concerning the law of another state. *Souchak v. Close*, 132 Ga. App. 248, 207 S.E.2d 708 (1974).

Notice pleading philosophy of subsection (c) of this section places upon the party intending to rely upon laws of another state the responsibility of providing the opponent, as well as the court, with notice of such intent. *Berry v. Jeff Hunt Mach. Co.*, 148 Ga. App. 35, 250 S.E.2d 813 (1978).

Notice of intent is required to raise an

issue of foreign law, to establish such law by compliance with statutory means, or cause a duty to be imposed on a court to judicially recognize any relevant, existing foreign law. *Samay v. Som*, 213 Ga. App. 812, 446 S.E.2d 230 (1994).

Because a former president did not give adequate notice of the intention for Delaware law to apply to a corporation's misappropriation of corporate opportunity claim, the trial court did not err when the court applied Georgia law; the president did not raise the issue of the applicability of Delaware law until a post-trial motion. *Brewer v. Insight Tech., Inc.*, 301 Ga. App. 694, 689 S.E.2d 330 (2009), cert. denied, No. S10C0678, 2010 Ga. LEXIS 455 (Ga. 2010).

Trial court did not err in applying Georgia law in a bank's action against a limited liability company (LLC) and guarantors for breach of a promissory note and guaranty agreements because the LLC and guarantors failed to give proper notice that the guarantors intended to raise an issue concerning Mississippi law pursuant to O.C.G.A. § 9-11-43(c); in their written response to the motion for summary judgment, the LLC and guarantors relied exclusively on Georgia law. *Kensington Partners, LLC v. Beal Bank Nev.*, 311 Ga. App. 196, 715 S.E.2d 491 (2011).

Foreign statutes need not be pled in order to be relied upon. *Atlanta Newspapers, Inc. v. Shaw*, 123 Ga. App. 848, 182 S.E.2d 683 (1971).

Pleading and proof requirement. — Proof of law or regulations, other than the Official Code of Georgia and state regulations promulgated under the Administrative Procedure Act, O.C.G.A. Ch. 13, T. 50, must be pled and proved under O.C.G.A. § 9-11-43, because judicial notice cannot be taken of rules, regulations, and ordinances not authorized for publication. *Donaldson v. DOT*, 236 Ga. App. 411, 511 S.E.2d 210 (1999).

Georgia law applied in an action arising out of a Louisiana divorce decree because neither party met the requirements in O.C.G.A. §§ 9-11-43(c) and former 24-7-24 (see now O.C.G.A. § 24-9-922) that the parties give notice and thereafter prove the law of another state. *Davis v. Davis*, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Law of Other Jurisdictions (Cont'd)

Pleading and proof requirement discarded. — With enactment of subsection (c) of this section, requirement of pleading and proof of foreign law as a question of fact was discarded, along with attendant presumption of identity of common law. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

When law of South Carolina was not pled or proved, law of Georgia would be applied in interpreting and giving effect to custody judgment of such sister state. *Sandifer v. Lynch*, 244 Ga. 369, 260 S.E.2d 78 (1979).

Foreign law presumed same as Georgia law. — When no evidence as to Kentucky law was introduced, it will be presumed to be the same as Georgia law. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

When a question is raised whether or not service by certified mail in Georgia as to a foreign suit was proper under foreign law, in the absence of such proof, the law of this state obtains, and when the evidence before the trial court fails to disclose that the defendant in the foreign court was served according to the Georgia long-arm statute, the trial court errs in granting summary judgment in favor of the plaintiff. *Southeastern Metal Prods., Inc. v. Horger*, 166 Ga. App. 205, 303 S.E.2d 536 (1983).

Absent proper introduction and proof of the law of a sister state, it is presumed that such foreign law is the same as that of Georgia. *Abruzzino v. F & M Bank*, 168 Ga. App. 639, 309 S.E.2d 911 (1983).

In an action to domesticate a New York default judgment, the trial court properly applied Georgia law because the judgment debtor did not give notice pursuant to subsection (c) of O.C.G.A. § 9-11-43, nor did the debtor prove New York law as required by former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-922). *Giarratano v. Glickman*, 232 Ga. App. 75, 501 S.E.2d 266 (1998).

No judicial notice of foreign law absent notice or evidence thereof. — When party gave no notice in the party's pleadings or other reasonable written no-

tice of intent to raise issue of law of sister state, nor was any evidence adduced as to such law, the court could not take judicial notice thereof. *Lauer v. Bodner*, 137 Ga. App. 851, 225 S.E.2d 69 (1976).

Subsection (c) controls determination of substantive foreign law. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Subsection (c) of this section governs state courts' consideration of laws of other states, as well as other countries. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Subsection (c) of this section, as a whole, governs the determination of foreign law. *Ramseur v. American Mgt. Ass'n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

One objective of subsection (c) is to abandon fact characterization of foreign law and to make the process of determining alien law identical with the method of ascertaining domestic law to the extent possible. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Determination of foreign law as cooperative venture. — Notice requirement of subsection (c) of this section and mode of proof were deliberately left flexible and informal to encourage court and counsel to regard determination of foreign law as a cooperative venture requiring open and unstructured dialogue among all concerned; thus, judicial practice of automatically refusing to engage in research or to assist or direct counsel would be inconsistent with one of that subsection's basic premises. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Courts should take active role in process of ascertaining foreign law. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Whenever possible, foreign law issues should be resolved on their merits and on the basis of a full evaluation of the available materials. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Subsection (c) supersedes case law, precluding use of Southern Reporter as a relevant source of Florida law, if the

trial court so decides, irrespective of whether the Florida cases as therein reported are or are not “published by authority.” *Smith v. Davis*, 121 Ga. App. 704, 175 S.E.2d 28 (1970).

Tennessee “slip opinions” were not “published by authority” and were therefore not binding on the court, with or without introduction of proof. *Swafford v. Globe Am. Cas. Co.*, 187 Ga. App. 730, 371 S.E.2d 180, cert. denied, 187 Ga. App. 909, 371 S.E.2d 180 (1988).

Consideration of any relevant material permitted. — Subsection (c) of this section permits court to consider any material relevant to foreign law issue, whether submitted by counsel or unearthed by the court’s own research, without regard to the material’s admissibility under the rules of evidence. *Old Hickory Prods. Co. v. Hickory Specialties, Inc.*, 366 F. Supp. 913 (N.D. Ga. 1973).

Burden of proof of validity of foreign judgment in action to domesticate. — Although law which provides that judicial notice or recognition of foreign laws will not occur unless the foreign laws are produced to the court was modified by subsection (c) of this section, if the defendant defends an action to domesticate by making a collateral attack on the foreign judgment, the burden is not on the defendant to prove that the judgment is no good under the foreign law. *Ramseur v. American Mgt. Ass’n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

When collateral attack is made on a foreign judgment for lacking elements necessary for full faith and credit, the burden is on the party who wishes to have the judgment enforced to prove that the

judgment is good under the laws of the state where rendered. *Ramseur v. American Mgt. Ass’n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

When jurisdiction is neither alleged nor proved a foreign default judgment, the issue may be raised in this state in defense of an action on the judgment in a state court, but this does not shift the burden of proving lack of jurisdiction under foreign law to the defendant. *Ramseur v. American Mgt. Ass’n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

Mere proof or admission of fact of duly certified and attested foreign judgment is not prima facie proof of anything except that the judgment was rendered. *Ramseur v. American Mgt. Ass’n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

Foreign order found improperly certified in accordance with Georgia law. See *Southeastern Metal Prods., Inc. v. Horger*, 166 Ga. App. 205, 303 S.E.2d 536 (1983).

Intent to rely on federal law. — O.C.G.A. § 9-11-43(c) does not require notice of intent to rely on federal law. *Six Flags over Ga. II, L.P. v. Kull*, 276 Ga. 210, 576 S.E.2d 880 (2003).

Foreign law on common law marriages. — Wife’s reliance on Alabama law to support her claim of a common law marriage was necessary because the *lex loci* is the general rule adhered to by courts in questions of marriage; Georgia, like other states not generally recognizing common law marriages, will recognize as valid a common law marriage established under the laws of another state. *Norman v. Ault*, 287 Ga. 324, 695 S.E.2d 633 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Affidavits, §§ 6, 18, 19. 29 Am. Jur. 2d, Evidence, §§ 109 et seq., 258 et seq. 75 Am. Jur. 2d, Trial, § 248 et seq.

C.J.S. — 32 C.J.S., Evidence, § 842 et seq. 35B C.J.S., Federal Civil Procedure, § 978 et seq. 88 C.J.S., Trial, § 158 et seq. 98 C.J.S., Witnesses, § 437 et seq.

ALR. — Federal Rule 43(a) as applied to testimony concerning transaction or

conversation with person deceased, 170 ALR 1242.

Necessity and propriety of counteraffidavits in opposition to motion for new trial in civil case, 7 ALR3d 1000.

Pleading and proof of law of foreign country, 75 ALR3d 177.

Admissibility of oral testimony at state summary judgment hearing, 53 ALR4th 527.

Closed-circuit television witness examination, 61 ALR4th 1155.

9-11-44. Official records.

Reserved. Repealed by Ga. L. 2011, p. 99, § 10/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Ga. L. 1967, p. 226, § 20. motion made or hearing or trial commenced on or after January 1, 2013.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any **Law reviews.** — For article on the 2011 repeal of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

9-11-45. Subpoena for taking depositions; objections; place of examination.

(a)(1)(A) The clerk of the superior court of the county in which the action is pending or the clerk of any court of record in the county where the deposition is to be taken shall issue subpoenas for the persons sought to be deposed, upon request.

(B) Upon agreement of the parties, an attorney, as an officer of the court, may issue and sign a subpoena for the person sought to be deposed on behalf of a court in which the attorney is authorized to practice or a court for a venue in which a deposition is compelled by the subpoena, if the deposition pertains to an action pending in a court in which the attorney is authorized to practice.

(C) Subpoenas issued pursuant to this paragraph shall be issued and served in accordance with law governing issuance of subpoenas for attendance at court, except as to issuance by an attorney. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by subsection (b) of Code Section 9-11-26, but in that event the subpoena will be subject to subsection (c) of Code Section 9-11-26; or the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if it is unreasonable and oppressive, or condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(2) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the attorney designated in the subpoena written

objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition, provided that nothing in this Code section shall be construed as requiring the issuance of a subpoena to compel a party to attend and give his deposition or produce documents at the taking of his deposition where a notice of deposition under Code Section 9-11-30 has been given or a request under Code Section 9-11-34 has been served, such notice or request to a party being enforceable by motion under Code Section 9-11-37.

(b) A person who is to give a deposition may be required to attend an examination:

(1) In the county wherein he resides or is employed or transacts his business in person;

(2) In any county in which he is served with a subpoena while therein; or

(3) At any place which is not more than 30 miles from the county seat of the county wherein the witness resides, is employed, or transacts his business in person. (Ga. L. 1967, p. 226, § 19; Ga. L. 1972, p. 510, § 11; Ga. L. 1997, p. 457, § 1.)

Cross references. — Subpoenas and notices to produce generally, § 24-13-21 et seq.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 45, see 28 U.S.C.

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For

annual survey on trial practice and procedure, see 42 Mercer L. Rev. 469 (1990). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 16 (1997). For article, “Best Practices for Issuing Subpoenas Depositions of Georgia Residents in Cases Pending Out of State,” see 12 Ga. St. B.J. 12 (2007).

JUDICIAL DECISIONS

Non-resident who files a lawsuit in Georgia may, in the court’s discretion, be compelled to give a deposition in Georgia. *Warehouse Home Furn. Distrib., Inc. v. Davenport*, 261 Ga. 853, 413 S.E.2d 195 (1992).

Applicable to deponents who must be subpoenaed. — O.C.G.A. § 9-11-45 provides for treatment of deponents for whom subpoenas must be issued (i.e., witnesses) that is distinct from the treatment

of the deponents for whom only a notice of deposition must be given (i.e., parties). *Warehouse Home Furn. Distrib., Inc. v. Davenport*, 261 Ga. 853, 413 S.E.2d 195 (1992).

Geographic limits in subsection (b) do not apply to parties. — Holding in *Blanton v. Blanton*, 259 Ga. 622, 385 S.E.2d 672 (1989), concerning the geographic limitations of subsection (b) of O.C.G.A. § 9-11-45, is not applicable

when a notice of deposition has issued to a party in the lawsuit. *Warehouse Home Furn. Distrib., Inc. v. Davenport*, 261 Ga. 853, 413 S.E.2d 195 (1992).

Motorist's suit was properly dismissed under O.C.G.A. § 9-11-37(d) due to the motorist's failure to attend three scheduled depositions. That defense counsel's office was located more than 30 miles from where the motorist resided did not excuse the motorist from attending a properly noticed deposition as the geographical limitations of O.C.G.A. § 9-11-45(b) were not applicable because a notice of deposition was issued under O.C.G.A. § 9-11-30 to a party in the lawsuit. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

Out-of-state resident cannot be

compelled to come to Georgia for the purpose of taking a deposition. *Blanton v. Blanton*, 259 Ga. 622, 385 S.E.2d 672 (1989).

Subpoena properly quashed. — Trial court properly quashed a deposition subpoena to an arbitrator as the trial court was authorized to find that the court could determine whether the arbitrator acted in disregard of the law on the record; the deposition of the arbitrator was not needed. *Doman v. Stapleton*, 272 Ga. App. 114, 611 S.E.2d 673 (2005).

Cited in *Brown v. State*, 238 Ga. 98, 231 S.E.2d 65 (1976); *Norfolk S. Ry. v. Hartry*, 316 Ga. App. 532, 729 S.E.2d 656 (2012); *Howard v. Alegria*, 321 Ga. App. 178, 739 S.E.2d 95 (2013).

ADVISORY OPINIONS OF THE STATE BAR

When subpoenas should issue. — Subpoena issued pursuant to former O.C.G.A. § 24-10-22(a) (see now O.C.G.A. § 24-13-23) should only be issued for actual hearings and trials and should not be requested when in fact no hearing or trial had been scheduled. Likewise, a subpoena issued pursuant to O.C.G.A. § 9-11-45 of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) should be requested and issued only for depositions which have been actually scheduled by agreement between the parties or when a notice of deposition had been filed and served upon all parties, and should not be issued when

no deposition had been scheduled. Adv. Op. No. 84-40 (September 21, 1984).

Notice of deposition required. — O.C.G.A. § 9-11-45 provides that a subpoena shall issue for persons sought to be deposed and may command the person to produce documents. O.C.G.A. § 9-11-30(b)(1) requires notice to every other party of all depositions. Reading §§ 9-11-30 and 9-11-45 together, it is obvious that before a subpoena can be issued, notice of the deposition must be given to all parties. Adv. Op. No. 84-40 (September 21, 1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 203 et seq.

C.J.S. — 26A C.J.S., Depositions, §§ 59, 60, 61. 27 C.J.S., Discovery, §§ 63, 66, 67. 98 C.J.S., Witnesses, § 21 et seq.

ALR. — Subpoena duces tecum for production of items held by a foreign custodian in another country, 82 ALR2d 1403.

9-11-46. Exceptions unnecessary; objections to rulings or orders.

(a) Formal exceptions to rulings or orders of the court are unnecessary. For all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and

his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

(b) When motion for mistrial or other like relief is made, the question is thereby presented as to whether the moving party is entitled to the relief therein sought or to any lesser relief, and where such motion is denied in whole or in part, it shall not be necessary that the moving party thereafter renew his motion or otherwise seek further ruling by the court. (Ga. L. 1966, p. 609, § 46.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 46, see 28 U.S.C.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
OBJECTIONS
MISTRIALS

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1993, Title 81, are included in the annotations for this Code section.

Party cannot merely agree to trial procedure. — Although a party need not except to an unfavorable ruling, the party cannot merely agree to the procedure directed by the trial court; neither can the party engage in conduct or trial procedure which aids in fostering the ruling of which the party later seeks to complain. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

Cited in *Lane v. State*, 118 Ga. App. 688, 165 S.E.2d 474 (1968); *State Hwy. Dep't v. Cantrell*, 119 Ga. App. 241, 166 S.E.2d 604 (1969); *Georgia Power Co. v. Slappey*, 121 Ga. App. 534, 174 S.E.2d 361 (1970); *Davis v. Camp Concrete Prods. Co.*, 122 Ga. App. 551, 177 S.E.2d 798 (1970); *Seaboard Coast Line R.R. v. Wallace*, 123 Ga. App. 490, 181 S.E.2d 542 (1971); *Clyatt v. State*, 126 Ga. App. 779, 192 S.E.2d 417 (1972); *Moorehead v. Counts*, 130 Ga. App. 453, 203 S.E.2d 553 (1973); *Carter v. State*, 141 Ga. App. 464, 233 S.E.2d 856 (1977); *Waddill v. Waddill*,

143 Ga. App. 806, 240 S.E.2d 129 (1977); *Burce v. State*, 146 Ga. App. 383, 246 S.E.2d 412 (1978); *Georgia Power Co. v. Green*, 158 Ga. App. 717, 282 S.E.2d 145 (1981); *Gee v. Chattahoochee Tractor Sales, Inc.*, 172 Ga. App. 351, 323 S.E.2d 176 (1984); *Stone v. State*, 177 Ga. App. 750, 341 S.E.2d 280 (1986); *Oden v. Legacy Ford-Mercury, Inc.*, 222 Ga. App. 666, 476 S.E.2d 43 (1996).

Objections

Subsection (a) of this section does not exempt party from voicing some objection to remarks that have the effect of excluding certain evidence from the jury's consideration when such party has opportunity to object. *Sancken Assoc. v. Stokes*, 119 Ga. App. 282, 166 S.E.2d 924 (1969); *Stephenson v. Wildwood Farms, Inc.*, 194 Ga. App. 728, 391 S.E.2d 706 (1990).

Under subsection (a), objecting party may either make known to court action which the opposing party desires court to take, such as mistrial, or make known the party's objection to court's action and ground therefor. *Speagle v. Nationwide Mut. Fire Ins. Co.*, 138 Ga. App. 384, 226 S.E.2d 459 (1976), distinguishing *Seaboard Coast Line R.R.*

Objections (Cont'd)

v. Wallace, 227 Ga. 363, 180 S.E.2d 743 (1971), and Averette v. Oliver, 128 Ga. App. 54, 195 S.E.2d 925 (1973), as dealing with prejudicial argument and improper conduct of opposing counsel.

It is clear that, prior to enactment of subsection (a) of O.C.G.A. § 9-11-46, there were four, rather than three, recognized “available actions” which the trial court could be requested to take with regard to allegedly improper closing argument in either a civil or a criminal case; in addition to the present three “available actions”, counsel was also authorized merely to object on stated grounds and thereby implicitly request that the trial court acknowledge the impropriety of the closing argument by sustaining the objections thereto, however nothing in subsection (a) supports the conclusion that, contrary to this prior authority, a mere objection on stated grounds should no longer be considered a viable request for “available action” in civil cases. *Garner v. Victory Express, Inc.*, 264 Ga. 171, 442 S.E.2d 455 (1994).

Affidavit attached to brief as sufficient objection. — In a proceeding by a lessor for compensation for an easement on condemned property, the lessor’s affidavit in response to the condemnor’s motion for direction making known to the court that the issue before the court involved questions of law and fact was sufficient to raise the issue on appeal. *S & S Food Servs., Inc. v. DOT*, 222 Ga. App. 579, 475 S.E.2d 197 (1996).

Invocation of judicial ruling unnecessary on court’s erroneous expression of opinion. — When the error is an expression of opinion from the bench, the error has already been committed without necessity of invoking a judicial ruling to present a reviewable error. *Speagle v. Nationwide Mut. Fire Ins. Co.*, 138 Ga. App. 384, 226 S.E.2d 459 (1976), distinguishing *Seaboard Coast Line R.R. v. Wallace*, 227 Ga. 363, 180 S.E.2d 743 (1971), and *Averette v. Oliver*, 128 Ga. App. 54, 195 S.E.2d 925 (1973), as dealing with prejudicial argument and improper conduct of opposing counsel.

Relief available on objection to argument. — When there is objection to

argument, granting of the following forms of relief are available to the court: (1) an instruction or admonition to the jury to disregard the improper argument; or, if this is deemed inadequate to remove the harmful effect, (2) instruction or admonition of the jury plus a reprimand or rebuke of offending counsel; or, as a last resort, (3) mistrial. *Averette v. Oliver*, 128 Ga. App. 54, 195 S.E.2d 925 (1973).

Seaboard Coast Line R. Co., 227 Ga. 363, 180 S.E.2d 743 (1971) is overruled and *Hall v. State*, 180 Ga. App. 881, 350 S.E.2d 801 (1986), which sets forth the applicable requirements for the preservation of error in closing argument in a criminal case, is henceforth to be followed and applied in addressing an enumeration of error which relates to allegedly improper closing argument in a civil case. *Garner v. Victory Express, Inc.*, 264 Ga. 171, 442 S.E.2d 455 (1994).

Hearing on attorney’s fees. — Trial court erred in awarding a property owner \$7,515 in attorney fees under O.C.G.A. § 48-5-311(g)(4)(B)(ii) against a county board of tax assessors after a jury valued the property in question substantially lower than the board’s valuation; the record did not support the trial court’s conclusion that the property was returned for taxation by operation of law pursuant to O.C.G.A. § 48-5-20(a)(2), and the board did not waive the board’s objection to the fees, because the trial court did not hold a hearing on the issue of the attorney’s fees, pursuant to O.C.G.A. § 9-11-46(a), and the board therefore did not have an opportunity to object to the award. *Fulton County Bd. of Tax Assessors v. Butner*, 258 Ga. App. 68, 573 S.E.2d 100 (2002).

Directed verdicts. — When the trial court sua sponte grants a directed verdict, the party against whom the verdict was directed may challenge the grant by timely appeal notwithstanding the lack of either an objection or exception to the trial court’s ruling. *Wade v. Polytech. Indus., Inc.*, 202 Ga. App. 18, 413 S.E.2d 468 (1991).

To make an objection to evidence available in reviewing court, it must appear that the objection was made in trial court, and upon what grounds. *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313

(1957) (decided under former Code 1933, T. 81).

For appellate court to reverse judgment refusing to grant mistrial, it must affirmatively appear that a mistrial was essential to preserve the party's right to a fair trial. *Fievet v. Curl*, 96 Ga. App. 535, 101 S.E.2d 181 (1957) (decided under former Code 1933, T. 81).

Mistrials

Trial judge, in passing on motions for mistrial, has broad discretion, dependent on circumstances of each case, which will not be disturbed unless manifestly abused. *Houston v. Roberts*, 150 Ga. App. 350, 258 S.E.2d 34 (1979).

Corrective measure for improper admission of evidence in discretion of court. — When motion for mistrial is made on ground that inadmissible evidence was placed before the jury, corrective measure to be taken by the trial court is largely a matter of discretion, and when

proper corrective measures are taken and there is no abuse of discretion, refusal to grant a mistrial is not error. *Rutledge v. State*, 152 Ga. App. 755, 264 S.E.2d 244 (1979).

Mistrial for improper remarks of counsel on motion of either party. — Former Code 1933, § 81-1009 (see now O.C.G.A. § 9-10-185) had been modified by subsection (b) of Ga. L. 1966, p. 609, § 46 (see now O.C.G.A. § 9-11-46), so that the trial court in a civil case may, upon motion of either party, grant a mistrial for improper remarks of counsel. *Counts v. Moorehead*, 232 Ga. 220, 206 S.E.2d 40 (1974).

Disclosure of insurance policy as ground for mistrial. — In an ordinary negligence case, not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to the jury of mere existence of such contract is a ground for mistrial. *City Council v. Lee*, 153 Ga. App. 94, 264 S.E.2d 683 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trial, §§ 395 et seq., 483 et seq. 75B Am. Jur. 2d, Trial, §§ 1462, 1694, 1701, 1722 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 292, 315. 35B C.J.S., Federal Civil Procedure, § 963. 88 C.J.S., Trial, § 157.

ALR. — What constitutes accused's consent to court's discharge of jury or to

grant of state's motion for mistrial which will constitute waiver of former jeopardy plea, 63 ALR2d 782.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Right to withdraw motion for mistrial, 100 ALR2d 375.

9-11-47. Jurors.

(a) The parties may by written stipulation, filed of record, stipulate that the jury shall consist of any number less than that fixed by statute.

(b) The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror may be discharged. However, if the court deems it advisable, it may direct that one

or more of the alternate jurors be kept in the custody of one or more court officers, separate and apart from the regular jurors, until the jury has agreed upon a verdict. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates. (Ga. L. 1966, p. 609, § 47; Ga. L. 1967, p. 226, § 34; Ga. L. 1989, p. 243, § 1; Ga. L. 1993, p. 91, § 9.)

Cross references. — Trial by jury generally, Ga. Const. 1983, Art. I, Sec. I, Para. XI. For further provisions regarding selection of jurors in civil cases, § 15-12-122 et seq. Selection of juries, Uniform Superior Court Rules, Rule 11.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 47, see 28 U.S.C.

JUDICIAL DECISIONS

Twelve member juries in superior courts. — Under this state's Constitution and statutes, a jury in the superior courts must be composed of 12 members. First Fid. Ins. Corp. v. Busbia, 128 Ga. App. 485, 197 S.E.2d 396 (1973).

Equity jury requires 12 members. — When the trial court does authorize a jury trial in an equity case, the composition of the jury is governed by the law which controls those cases in which there is a right to a jury trial, and when such a right is neither waived nor stipulated against, the trial court may not proceed with less than a twelve-person jury. Hague v. Pitts, 262 Ga. 777, 425 S.E.2d 636 (1993).

Agreement to accept verdict by less than twelve jurors. — Since legislature has recognized that in civil cases there is nothing sacerdotal in the number 12 agreement to accept a verdict by less than 12 jurors is not contrary to public policy. Phillips v. Meadow Garden Hosp., 139 Ga. App. 541, 228 S.E.2d 714 (1976).

Cited in Cail v. Griffin, 224 Ga. 431, 162 S.E.2d 356 (1968); Pittman v. Pebbles, 148 Ga. App. 64, 251 S.E.2d 30 (1978); Bisno v. Biloan, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, State ex rel. McKenna v. McKenna, 253 Ga. 6, 315 S.E.2d 885 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Jury, § 108 et seq. 75B Am. Jur. 2d, Trials, §§ 1458 et seq., 1510 et seq., 1516, 1518.

Am. Jur. Proof of Facts. — Jury Misconduct Warranting New Trial, 24 POF2d 633.

Challenges for Cause in Jury Selection Process, 58 POF3d 395.

C.J.S. — 50A C.J.S., Juries, §§ 256, 257.

ALR. — Misconduct of juror which will authorize or require withdrawal of juror, 86 ALR 928.

Right to consent to trial of criminal case before less than twelve jurors; and effect

of consent upon jurisdiction to proceed with less than twelve, 105 ALR 1114.

Peremptory challenge after acceptance of juror, 3 ALR2d 499.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 ALR2d 1288; 15 ALR4th 1127; 88 ALR4th 711; 10 ALR Fed. 185; 115 ALR Fed. 381; 119 ALR Fed. 589.

Sufficiency of waiver of full jury, 93 ALR2d 410.

Proper procedure upon illness or other disability of civil case juror, 99 ALR2d 684.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

Religious belief, affiliation, or prejudice of prospective jurors as proper subject of inquiry or grounds for challenge on voir dire, 95 ALR3d 172.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction, 15 ALR4th 1127.

Propriety, under state statute or court rule, of substituting state trial juror with alternate after case has been submitted to jury, 88 ALR4th 711.

Jurors as within coverage of workers' compensation acts, 13 ALR5th 444.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 ALR5th 1.

Prejudicial effect of juror misconduct arising from internet usage, 48 ALR6th 135.

Substitution, under Rule 24c of Federal Rules of Criminal Procedure, of alternate juror for regular juror before jury retires to consider verdict in federal criminal case, 115 ALR Fed. 381.

9-11-48. Reserved.

9-11-49. Special verdicts.

(a) The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issues so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accordance with the judgment on the special verdict.

(b) Upon written request by any party made on or before the call of the case for trial, it shall be the duty of the court to require the jury to return only a special verdict, as provided in subsection (a) of this Code section, in any case involving equitable relief, mandamus, quo warranto, prohibition, a declaratory judgment, and in any other case or proceeding where special verdicts may be specifically required by law. The court shall prescribe the form of the questions for submission to the jury. (Ga. L. 1966, p. 609, § 49; Ga. L. 1967, p. 226, § 21; Ga. L. 1972, p. 689, § 8; Ga. L. 1993, p. 91, § 9.)

Cross references. — Submission to jury of issues of fact in proceedings pursuant to petition for declaratory judgment, §§ 9-4-5, 9-4-6.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 49, see 28 U.S.C.

Law reviews. — For article, "The Spe-

cial Verdict in Civil Cases,” see 6 Ga. B.J. 5 (1943). For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provi-

sions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

JUDICIAL DECISIONS

Discretion of court. — It is within the court’s discretion as to whether the court will require a special verdict under this section. *Christiansen v. Robertson*, 139 Ga. App. 423, 228 S.E.2d 350, rev’d on other grounds, 237 Ga. 711, 229 S.E.2d 472 (1976).

Because a special verdict form did not ask the jurors to determine whether the successor owed anything on a promissory note, pursuant to O.C.G.A. § 9-11-49(a), the issue was reserved for the trial court. *Compris Techs., Inc. v. Techwerks, Inc.*, 274 Ga. App. 673, 618 S.E.2d 664 (2005).

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 appellee insurer in appellant insurer’s declaratory judgment action, after the jury rendered a verdict pursuant to a special verdict form in favor of the appellant, 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 appellant; 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).

Submission for general rather than special verdict not reversible absent abuse of discretion. — This section provides that court “may” require jury to return a special verdict on written questions, and absent abuse of discretion, the appellate court would not reverse the trial judge in submitting the case for a general rather than a special verdict. *Pressley v. Jennings*, 227 Ga. 366, 180 S.E.2d 896 (1971); *Shivers v. Webster*, 224 Ga. App. 254, 480 S.E.2d 304 (1997).

Requirements of special verdict are not met by instructing jury orally as to questions which must be resolved by the jury in arriving at the verdict. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

When timely written request for special verdict is made in declaratory judgment proceedings, requirements of Ga. L. 1945, p. 137, § 3 (see now O.C.G.A. § 9-4-6), relating to submission of fact issues to jury, and of subsection (b) of Ga. L. 1972, p. 689, § 8 (see now O.C.G.A. § 9-11-49) are not satisfied by instructing jury orally as to questions which must be resolved by the jury in arriving at the verdict. *Frostgate Whses., Inc. v. Cole*, 244 Ga. 782, 262 S.E.2d 98 (1979).

Special verdict form agreed to by all parties. — There was no error in the court’s explanation to the jury of the special verdict form which previously had been agreed to by all parties, including the defendant, when the evidence required a finding of negligence on the part of at least one defendant, as this was not an incident that could have occurred in the absence of negligence. *Branch v. Maxwell*, 203 Ga. App. 553, 417 S.E.2d 176, cert. denied, 203 Ga. App. 905, 417 S.E.2d 176 (1992).

Absent specific and timely objection, party waives error relating to manner of submission of questions to jury. *Frostgate Whses., Inc. v. Cole*, 244 Ga. 782, 262 S.E.2d 98 (1979).

Appellant’s failure to object to special verdict form until after the jury had retired constituted a waiver of rights to do so. *Albert v. Albert*, 164 Ga. App. 783, 298 S.E.2d 612 (1982).

Charge on proximate cause not waived for failure to make request therefor. — Rule in subsection (a) of this section that matters not requested to be charged when special verdicts are submitted to the jury are waived obviously does not extend to an element so essential as

proximate cause in a negligence action because no jury can impose liability in such action without first determining that the plaintiff's injury proximately resulted from the defendant's negligence. *Cline v. Kehs*, 146 Ga. App. 350, 246 S.E.2d 329 (1978).

Trial court trying a suit for injunction may empanel a jury to render special verdicts. — but the court is not required to do so. *Turner Adv. Co. v. Garcia*, 251 Ga. 46, 302 S.E.2d 547 (1983), cert. denied, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984).

Acceptance of verdict with surplus findings. — When prior to submission to the jury the plaintiffs agreed to the form of the general verdict, and did not request a special verdict, the court could have accepted the initial verdict by disregarding the specific and gratuitous findings as surplusage. *Kemp v. Bell-View, Inc.*, 179 Ga. App. 577, 346 S.E.2d 923 (1986).

Attack on verdict rejected upon failure to seek remedy under statute. — Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that status; (2) the client failed to seek any remedy regarding the verdict entered, including submission of a verdict form per O.C.G.A. § 9-11-49; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of the publication on the client's web site, neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. *Milum v. Banks*, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

No error in court's refusal to submit special verdict form. — See *News Publishing Co. v. DeBerry*, 171 Ga. App. 787,

321 S.E.2d 112 (1984), cert. denied, 471 U.S. 1053, 105 S. Ct. 2112, 85 L. Ed. 2d 477 (1985); *Tri-Eastern Petro. Corp. v. Glenn's Super Gas, Inc.*, 178 Ga. App. 144, 342 S.E.2d 346 (1986); *Doctors Hosp. v. Bonner*, 195 Ga. App. 152, 392 S.E.2d 897 (1990).

Cited in *McLarty v. Springfield Life Ins. Co.*, 223 Ga. 707, 157 S.E.2d 735 (1967); *Allstate Ins. Co. v. Austin*, 120 Ga. App. 430, 170 S.E.2d 840 (1969); *Berry v. Cordell*, 120 Ga. App. 844, 172 S.E.2d 848 (1969); *Stevens v. Stevens*, 227 Ga. 410, 181 S.E.2d 34 (1971); *Harris v. Hardman*, 133 Ga. App. 941, 212 S.E.2d 883 (1975); *Lewis v. Williford*, 235 Ga. 558, 221 S.E.2d 14 (1975); *Nordmann v. International Follies, Inc.*, 147 Ga. App. 77, 250 S.E.2d 794 (1978); *Hurston v. Georgia Farm Bureau Mut. Ins. Co.*, 148 Ga. App. 324, 250 S.E.2d 886 (1978); *Weatherspoon v. K-Mart Enters. of Ga., Inc.*, 149 Ga. App. 424, 254 S.E.2d 418 (1979); *Miller v. Roses' Stores, Inc.*, 151 Ga. App. 158, 259 S.E.2d 162 (1979); *Nestle Co. v. J.H. Ewing & Sons*, 153 Ga. App. 328, 265 S.E.2d 61 (1980); *Rewis v. Browning*, 153 Ga. App. 352, 265 S.E.2d 316 (1980); *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981); *Southern Educators Assocs. v. Silver*, 245 Ga. 520, 284 S.E.2d 3 (1981); *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982); *Thorpe v. Benham*, 161 Ga. App. 116, 289 S.E.2d 275 (1982); *Borenstein v. Blumenfeld*, 250 Ga. 606, 299 S.E.2d 727 (1983); *C & W Land Dev. Corp. v. Kaminsky*, 175 Ga. App. 774, 334 S.E.2d 362 (1985); *Omni Express, Inc. v. Cleveland Express, Inc.*, 178 Ga. App. 42, 341 S.E.2d 911 (1986); *Union Camp Corp. v. Helmy*, 258 Ga. 263, 367 S.E.2d 796 (1988); *Hill v. Cochran*, 258 Ga. 473, 371 S.E.2d 94 (1988); *Graves v. United Servs. Auto. Ass'n*, 190 Ga. App. 690, 379 S.E.2d 638 (1989); *Mitchell v. Southern Gen. Ins. Co.*, 194 Ga. App. 218, 390 S.E.2d 79 (1990); *Southern Water Techs., Inc. v. Kile*, 224 Ga. App. 717, 481 S.E.2d 826 (1997); *John Crane, Inc. v. Wommack*, 227 Ga. App. 538, 489 S.E.2d 527 (1997); *Whelan v. Moone*, 242 Ga. App. 795, 531 S.E.2d 727 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 75B Am. Jur. 2d, Trial, §§ 1507, 1508, 1577 et seq., 1590 et seq.

C.J.S. — 35B C.J.S., Federal Civil Procedure, § 1030 et seq. 89 C.J.S., Trial, § 1095 et seq.

ALR. — Verdict as affected by agreement in advance among jurors to abide by less than unanimous vote, 73 ALR 93.

Effect of failure of special verdict or special finding to include findings of all ultimate facts or issues, 76 ALR 1137.

Failure of one or more jurors to join in answer to special interrogatory or special verdict as affecting verdict, 155 ALR 586.

Reversible effect of informing jury of the effect that their answers to special interrogatories or special issues may have upon ultimate liability or judgment, 90 ALR2d 1040.

Withdrawal of written special interrogatories or special questions submitted to jury, 91 ALR2d 776.

9-11-50. Motions for directed verdict and for judgment notwithstanding the verdict.

(a) **Motion for directed verdict; when made; effect.** A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of the case. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that a motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict, such verdict shall be directed.

(b) **Motion for judgment notwithstanding the verdict — When made; new trial motion.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not returned, such party, within 30 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the

court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same — Conditional rulings on grant of motion; motion for new trial by losing party.

(1) If the motion for judgment notwithstanding the verdict provided for in subsection (b) of this Code section is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and, if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial not later than 30 days after entry of the judgment notwithstanding the verdict.

(d) Same — Denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this Code section precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

(e) Erroneous denial of directed verdict. Where error is enumerated upon an order denying a motion for directed verdict and the appellate court determines that the motion was erroneously denied, it may direct that judgment be entered below in accordance with the motion or may order that a new trial be had, as the court may determine necessary to meet the ends of justice under the facts of the case. (Ga. L. 1966, p. 609, § 50; Ga. L. 1967, p. 226, §§ 22, 43, 48.)

Cross references. — Requirements pertaining to filing of motion for new trial and motion for judgment notwithstanding the verdict where appeal taken from judgment, ruling, or other procedure, § 5-6-36. Question of necessity for setting out portions of record or transcript of evidence in motions for new trial and for judgment notwithstanding the verdict, § 5-6-49.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 50, see 28 U.S.C.

Law reviews. — For article discussing motion for judgment notwithstanding the verdict in this state prior to adoption of this section, see 7 Mercer L. Rev. 352 (1956). For article, "The 1967 Amendments to the Georgia Civil Practice Act

and the Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967). For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007).

For case comment, "Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem," see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

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NEW TRIALS

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1910, §§ 5926 and 6545 and former Code 1933, § 110-104 and Ga. L. 1953, Nov.-Dec. Sess., p. 440, and Ga. L. 1959, p. 234 are included in the annotations for this Code section.

This section is patterned after the federal Civil Practice Act, and a court may turn to it for guidance. *Church's Fried Chicken, Inc. v. Lewis*, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

Purpose of this section. — Purpose of O.C.G.A. § 9-11-50 was to obviate the necessity of a new trial whenever the trial judge finds that the judge has erroneously refused to direct a verdict. *Hart v. Columbus*, 125 Ga. App. 625, 188 S.E.2d 422 (1972).

Construed with federal rules. — Except for giving presiding judge 30 days for a change of mind, as contrasted with the 10-day period under the Federal Rules of Civil Procedure, O.C.G.A. § 9-11-50 is the same as Rule 50, Fed. R. Civ. P. *Hart v. Columbus*, 125 Ga. App. 625, 188 S.E.2d 422 (1972).

Standard for granting a directed verdict or a judgment notwithstanding the verdict are the same. *Pendley v. Pendley*, 251 Ga. 30, 302 S.E.2d 554

(1983); *United Fed. Sav. & Loan Ass'n v. Connell*, 166 Ga. App. 329, 304 S.E.2d 131 (1983); *Custom Coating, Inc. v. Parsons*, 188 Ga. App. 506, 373 S.E.2d 291 (1988); *Morris v. Futch*, 193 Ga. App. 132, 386 S.E.2d 905, cert. denied, 193 Ga. App. 910, 386 S.E.2d 905 (1989).

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 the father's claims for tortious interference and misappropriation of trade secrets asserted against the father's son; moreover, given the jury's decision not to award damages on those claims, the appeals court declined to consider the son's claim that the trial court erred in failing to grant motions for a directed verdict and j.n.o.v. concerning them. *Lou Robustelli Mktg. Servs. v. Robustelli*, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

Grant of either a motion for directed verdict or judgment notwithstanding the verdict is authorized only when the evidence and all reasonable deductions therefrom demand a verdict in favor of the movant. *Mercer v. Woodard*, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Grant of directed verdict or j.n.o.v. as declaration of lack of conflict in evidence. — Act of directing a verdict or

granting a motion for judgment notwithstanding the verdict declares that there is no conflict in the evidence, and that all deductions and inferences from the evidence introduced demand a particular verdict. *Johnson v. Curenton*, 127 Ga. App. 687, 195 S.E.2d 279 (1972).

Verdict shall be directed when there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict. *Joiner v. Lane*, 235 Ga. App. 121, 508 S.E.2d 203 (1998).

Motion for directed verdict and j.n.o.v. erroneously denied on a breach of fiduciary duty claim as to a son's wife, who was not a corporate officer, director, or agent, and lacked the power to deal with third parties, including the creation of company obligations, without the son's approval, and the son was a corporate officer. *Lou Robustelli Mktg. Servs. v. Robustelli*, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

In a personal injury action, the trial court erred by denying a manufacturer's motions for a directed verdict and judgment notwithstanding the verdict because the undisputed evidence demanded a finding that the injured party assumed the risk of injuries from driving a doorless off-road vehicle; the injured party testified that the injured party read the operator's manual and warnings posted on the vehicle. *Yamaha Motor Corp., U.S.A. v. McTaggart*, 313 Ga. App. 103, 720 S.E.2d 217 (2011).

Record as record exists at close of trial controls whether the verdict should be directed. *DeLoach v. Myers*, 215 Ga. 255, 109 S.E.2d 777 (1959).

Substitution of court's judgment for jury's. — Directing of verdict or granting of motion for judgment notwithstanding the verdict is a very, very grave matter, as by such act, the case is taken away from the jury, and the court's own judgment is substituted therefor. *Johnson v. Curenton*, 127 Ga. App. 687, 195 S.E.2d 279 (1972).

Municipal court may be authorized to direct a verdict. *Lynch v. Southern Express Co.*, 146 Ga. 68, 90 S.E. 527 (1916).

To refuse to direct a verdict is within the discretion of the trial court, and absent abuse of such discretion, the appellate court will not reverse a case for such refusal. *Claude S. Bennett, Inc. v. Vanneman*, 95 Ga. App. 140, 97 S.E.2d 375 (1957).

Motion for directed verdict not waiver. — When the plaintiff and the defendant each separately request a directed verdict, the party unsuccessful in the party's request does not waive the party's right or have issues submitted to the jury or to except to direction of verdict for the other party. *Yablon v. Metropolitan Life Ins. Co.*, 200 Ga. 693, 38 S.E.2d 534 (1946).

Fact that each party moves for direction of a verdict in that party's favor does not, without more, amount to consent by both parties that case should be disposed of by direction of a verdict for one side or the other. *Roberts v. Wilson*, 198 Ga. 428, 31 S.E.2d 707 (1944).

Attorney's fees. — Trial court correctly found that a homebuilder's argument that the buyers were not entitled to recover attorney's fees on claims for which the jury did not award money damages was precluded since the issue was not raised in the homebuilder's motion for directed verdict; thus, the homebuilder was precluded from raising this argument in the motion for judgment non obstante veredicto. *Morrison Homes of Fla., Inc. v. Wade*, 266 Ga. App. 598, 598 S.E.2d 358 (2004).

In a breach of contract action between a city and the city's general contractor arising out of a renovation project on property above and within an inert landfill, because the jury could find that the city acted in bad faith in the city's dealings with the general contractor on the issue of overhead costs, was stubbornly litigious, and caused the contractor unnecessary trouble and expense after the contractor encountered landfill materials within the depth of the contractor's excavation which caused the contractor to have to halt work, the contractor properly awarded attorney fees under O.C.G.A. § 13-6-11; thus, the city was properly denied a directed verdict and judgment notwithstanding the verdict as to this issue. City

General Consideration (Cont'd)

of *Lilburn v. Astra Group, Inc.*, 286 Ga. App. 568, 649 S.E.2d 813 (2007).

Evidence sufficient to withstand motions for directed verdict and judgment notwithstanding the verdict. See *McFarland v. Hodge Homebuilders, Inc.*, 168 Ga. App. 733, 309 S.E.2d 853 (1983).

Trial court did not err in denying property owners' motions for a directed verdict and for judgment notwithstanding the verdict in the owners' suit to prevent a limited liability company from replacing an existing sewer pipe with a larger one because a sewer-line easement authorized the removal and replacement of a malfunctioning or worn-out sewer pipeline, and there was some evidence that the existing pipe was not functioning properly and was worn out; moreover, there was evidence that the removal of the existing sewer pipe and replacement with either a six-inch or eight-inch pipe would not expand the physical boundaries of the easement. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Trial court did not err in denying property owners' motions for a directed verdict and for judgment notwithstanding the verdict on a limited liability company's (LLC) counterclaim for conversion, which was predicated on the owners' disposal of pipe fixtures the LLC owned, because the evidence was sufficient to support the LLC's counterclaim for conversion; the owners exercised dominion and control over the pipe fixtures by having the fixtures removed from the owners' property and disposed of at a landfill, and even if the LLC acted wrongfully by depositing and storing the pipe fixtures on the owners' property, there was evidence that the owners failed to exercise due care in removing the expensive fixtures by having the fixtures dumped at a landfill with no consideration given as to the fixtures' ultimate fate. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Trial court did not err in denying a driver's motion for a directed verdict and motion for judgment notwithstanding the verdict on the amount of damages the jury awarded a decedent's estate for pain and suffering because the testimony of two

eyewitnesses that the decedent was unconscious when the eyewitnesses saw the decedent immediately after the automobile accident was not necessarily inconsistent with the testimony of the officer who arrived at the scene and observed the decedent while a doctor was ministering to the decedent and talking to the decedent; because the trial court approved the verdict in denying the driver's post-trial motion, a presumption of correctness arose that would not be disturbed absent compelling evidence. *Park v. Nichols*, 307 Ga. App. 841, 706 S.E.2d 698 (2011).

Question on appeal of direct verdict. — On appeal from order directing a verdict, the question before the court is whether the evidence is without conflict as the evidence pertains to the material issues in the case, and thus, when viewed in the light most favorable to the losing party, whether the evidence demands the verdict ordered. *Aldridge v. Dixie Fire & Cas. Co.*, 223 Ga. 130, 153 S.E.2d 723 (1967).

Direction of verdict for the defendant will be affirmed on review when it appears from all the evidence, both for the plaintiff and the defendant, with all reasonable deductions therefrom, that such verdict was demanded. *Riggins v. Equitable Life Assurance Soc'y*, 64 Ga. App. 834, 14 S.E.2d 182 (1941).

Notice of appeal 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 there is no evidence in the record to show whether a directed verdict or judgment notwithstanding the verdict was warranted, the appellate court must assume that the trial court was correct in the court's denial of the appellant's motions and affirm. *First Fed. Sav. & Loan*

Ass'n v. White, 168 Ga. App. 516, 309 S.E.2d 858 (1983).

No harm shown. — Although a trial court denied a property owner's motion for partial directed verdict on the issue of environmental contamination and damages in a condemnation proceeding by the Georgia Department of Transportation, as the jury was instructed not to consider that issue when determining the fair market value of the property there was no harm shown by the trial court's directed verdict ruling for purposes of the owner's appeal thereof. *H.D. McCondichie Props. v. Ga. DOT*, 280 Ga. App. 197, 633 S.E.2d 558 (2006).

Summary judgment compared. — Although in motions both under O.C.G.A. §§ 9-11-50 and 9-11-56 the moving party has the burden of showing that the opposite party has not presented sufficient evidence to authorize a jury to find in the party's favor, a ruling in favor of a movant for summary judgment is a more far-reaching determination. *Hawkins v. Greenberg*, 159 Ga. App. 302, 283 S.E.2d 301 (1981).

Cited in *Turk v. Jackson Elec. Membership Corp.*, 117 Ga. App. 631, 161 S.E.2d 430 (1968); *Warren v. Mann*, 117 Ga. App. 787, 161 S.E.2d 894 (1968); *Pritchard v. State*, 224 Ga. 776, 164 S.E.2d 808 (1968); *Chandler v. Gately*, 119 Ga. App. 513, 167 S.E.2d 697 (1969); *Todd v. Waddell*, 120 Ga. App. 20, 169 S.E.2d 351 (1969); *Gandy v. Griffin*, 120 Ga. App. 100, 169 S.E.2d 651 (1969); *Peara v. Atlanta Newspapers, Inc.*, 120 Ga. App. 163, 169 S.E.2d 670 (1969); *Wilson v. Matthews*, 120 Ga. App. 284, 170 S.E.2d 346 (1969); *Hemphill v. Simmons*, 120 Ga. App. 823, 172 S.E.2d 178 (1969); *Georgia S. & Fla. Ry. v. Blanchard*, 121 Ga. App. 82, 173 S.E.2d 103 (1970); *Worley v. Travelers Indem. Co.*, 121 Ga. App. 179, 173 S.E.2d 248 (1970); *Blackwell v. American S. Ins. Co.*, 121 Ga. App. 671, 175 S.E.2d 160 (1970); *Floyd v. Colonial Stores, Inc.*, 121 Ga. App. 852, 176 S.E.2d 111 (1970); *Mallin v. Mallin*, 226 Ga. 628, 176 S.E.2d 709 (1970); *Black v. New Holland Baptist Church*, 122 Ga. App. 606, 178 S.E.2d 571 (1970); *Stevens v. Stevens*, 227 Ga. 410, 181 S.E.2d 34 (1971); *Harrison v. Harrison*, 228 Ga. 126, 184 S.E.2d 147 (1971);

Tomlinson v. Patrick, 228 Ga. 373, 185 S.E.2d 407 (1971); *Hammock v. Allstate Ins. Co.*, 124 Ga. App. 854, 186 S.E.2d 353 (1971); *Smith v. Great Am. Life Ins. Co.*, 125 Ga. App. 587, 188 S.E.2d 439 (1972); *Thurmond v. Spoon*, 125 Ga. App. 811, 189 S.E.2d 92 (1972); *Wages v. Chemical Leaman Tank Lines*, 125 Ga. App. 798, 189 S.E.2d 110 (1972); *Young v. Bozeman*, 229 Ga. 195, 190 S.E.2d 523 (1972); *Gordon v. Carter*, 126 Ga. App. 343, 190 S.E.2d 570 (1972); *Owens v. Georgia Power Co.*, 229 Ga. 281, 190 S.E.2d 897 (1972); *Young v. Wiggins*, 229 Ga. 392, 191 S.E.2d 863 (1972); *Savannah Ice Delivery Co. v. Ayers*, 127 Ga. App. 560, 194 S.E.2d 330 (1972); *Sprewell v. Farmer*, 230 Ga. 297, 196 S.E.2d 866 (1973); *Humble Oil & Ref. Co. v. Mitchell*, 230 Ga. 323, 197 S.E.2d 126 (1973); *Barge & Co. v. Oakwood Steel Co.*, 128 Ga. App. 597, 197 S.E.2d 405 (1973); *Merino v. State*, 230 Ga. 604, 198 S.E.2d 311 (1973); *Roberts v. Allied Fin. Co.*, 129 Ga. App. 10, 198 S.E.2d 416 (1973); *Andrews v. Commercial Credit Corp.*, 129 Ga. App. 294, 199 S.E.2d 383 (1973); *New Era Publishing Co. v. Guess*, 231 Ga. 250, 201 S.E.2d 142 (1973); *Central of Ga. R.R. v. Sellers*, 129 Ga. App. 811, 201 S.E.2d 485 (1973); *Adams v. Smith*, 129 Ga. App. 850, 201 S.E.2d 639 (1973); *Guardian of Ga., Inc. v. Granite Equip. Leasing Corp.*, 130 Ga. App. 514, 203 S.E.2d 733 (1974); *Belk-Hudson Co v. Davis*, 132 Ga. App. 237, 207 S.E.2d 528 (1974); *Sears, Roebuck & Co. v. Reid*, 132 Ga. App. 136, 207 S.E.2d 532 (1974); *Glover v. Southern Bell Tel. & Tel. Co.*, 132 Ga. App. 74, 207 S.E.2d 584 (1974); *Johnson v. Mann*, 132 Ga. App. 169, 207 S.E.2d 663 (1974); *Baitcher v. Louis R. Clerico Assocs.*, 132 Ga. App. 219, 207 S.E.2d 698 (1974); *Scott v. Blackmon*, 132 Ga. App. 578, 208 S.E.2d 589 (1974); *Wright v. Lovett*, 132 Ga. App. 729, 209 S.E.2d 15 (1974); *Martin v. Moore*, 232 Ga. 842, 209 S.E.2d 182 (1974); *Mutual Life Ins. Co. v. Bishop*, 132 Ga. App. 816, 209 S.E.2d 223 (1974); *Kanellos & Co. v. Kavadas*, 132 Ga. App. 787, 209 S.E.2d 232 (1974); *McConnell v. Brenau College*, 134 Ga. App. 470, 215 S.E.2d 25 (1975); *Pharr Rd. Inv. Co. v. Sasser & Co.*, 133 Ga. App. 772, 212 S.E.2d 857 (1975); *Hagin v. Powers*, 134

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Ga. App. 609, 215 S.E.2d 346 (1975); Glo-Ann Plastic Indus., Inc. v. Peak Textiles, Inc., 134 Ga. App. 924, 216 S.E.2d 715 (1975); Lawyers Co-operative Publishing Co. v. Bekins Moving & Storage Co., 135 Ga. App. 12, 217 S.E.2d 372 (1975); Carreker v. National Diversified, Inc., 135 Ga. App. 511, 218 S.E.2d 117 (1975); Sunset Villa, Inc. v. Mothner-Simowitz Ins. Agency, Inc., 135 Ga. App. 706, 218 S.E.2d 463 (1975); McConnell v. Brenau College, 135 Ga. App. 711, 218 S.E.2d 464 (1975); Interstate Transp., Inc. v. Hogan, 135 Ga. App. 919, 219 S.E.2d 631 (1975); Kenney v. Piedmont Hosp., 136 Ga. App. 660, 222 S.E.2d 162 (1975); Lamb v. Central Ga. Elec. Membership Corp., 136 Ga. App. 863, 222 S.E.2d 679 (1975); Mills v. Smith, 236 Ga. 260, 223 S.E.2d 658 (1976); Rasmussen v. Martin, 236 Ga. 267, 223 S.E.2d 663 (1976); Hill v. Hospital Auth., 137 Ga. App. 633, 224 S.E.2d 739 (1976); Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976); Lyon v. Patterson, 138 Ga. App. 816, 227 S.E.2d 423 (1976); Hayes v. Flaum, 138 Ga. App. 787, 227 S.E.2d 512 (1976); Kitchens v. Lowe, 139 Ga. App. 526, 228 S.E.2d 923 (1976); Thomas v. Jackson, 238 Ga. 90, 231 S.E.2d 50 (1976); Stuckey v. Kahn, 140 Ga. App. 602, 231 S.E.2d 565 (1976); Smith v. Bank of S., 141 Ga. App. 114, 232 S.E.2d 629 (1977); Elkins v. Willett Lincoln-Mercury, Inc., 141 Ga. App. 458, 233 S.E.2d 851 (1977); Venable v. Block, 141 Ga. App. 523, 233 S.E.2d 878 (1977); Smith v. Telecab of Columbus, Inc., 238 Ga. 559, 234 S.E.2d 24 (1977); Creative Underwriters, Inc. v. Heilman, 141 Ga. App. 740, 234 S.E.2d 371 (1977); Helton v. Zellmer, 238 Ga. 735, 235 S.E.2d 35 (1977); Pascoe Steel Corp. v. Turner County Bd. of Educ., 142 Ga. App. 88, 235 S.E.2d 554 (1977); Hughes v. Winn-Dixie Stores, Inc., 142 Ga. App. 110, 235 S.E.2d 619 (1977); Reece v. Town of Lyerly, 239 Ga. 227, 236 S.E.2d 347 (1977); Stembridge v. Simmons, 143 Ga. App. 90, 237 S.E.2d 514 (1977); Grossman v. Glass, 143 Ga. App. 464, 238 S.E.2d 569 (1977); Fletcher v. Fletcher, 143 Ga. App. 404, 238 S.E.2d 753 (1977); Goforth v. Fogarty Van Lines, 143 Ga. App. 432, 238 S.E.2d 768 (1977); National Bank v. Refrigerated Transp. Co., 143 Ga. App. 661, 239 S.E.2d 551 (1977); Atlanta Army & Navy Store, Inc. v. Stuckman, 143 Ga. App. 850, 240 S.E.2d 220 (1977); Deroller v. Powell, 144 Ga. App. 585, 241 S.E.2d 469 (1978); Adderholt v. Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978); Johnson v. Castleberry, 144 Ga. App. 697, 242 S.E.2d 350 (1978); Cheney v. Barber, 144 Ga. App. 720, 242 S.E.2d 358 (1978); Rogers v. Joyner, 145 Ga. App. 179, 243 S.E.2d 249 (1978); Roger Budd Chevrolet Co. v. First State Bank & Trust Co., 145 Ga. App. 167, 243 S.E.2d 332 (1978); Maddox v. Maddox, 241 Ga. 118, 244 S.E.2d 3 (1978); Rockdale Awning & Iron Co. v. Sheppard, 145 Ga. App. 524, 244 S.E.2d 60 (1978); Gilbert v. Meason, 145 Ga. App. 662, 244 S.E.2d 601 (1978); Outlaw v. Transit Homes, Inc., 145 Ga. App. 695, 244 S.E.2d 633 (1978); Dalton Am. Truck Stop, Inc. v. ADBE Distrib. Co., 146 Ga. App. 8, 245 S.E.2d 346 (1978); Gordon v. Athens Convalescent Ctr., Inc., 146 Ga. App. 134, 245 S.E.2d 484 (1978); Decker v. Housing Auth., 146 Ga. App. 405, 246 S.E.2d 423 (1978); DOT v. Glenn, 146 Ga. App. 819, 247 S.E.2d 520 (1978); National Bank v. Refrigerated Transp. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978); Kennesaw Life & Accident Ins. Co. v. Hall, 147 Ga. App. 221, 248 S.E.2d 524 (1978); Kirk v. Barnes, 147 Ga. App. 423, 249 S.E.2d 140 (1978); DeKalb County v. Scruggs, 147 Ga. App. 711, 250 S.E.2d 159 (1978); Corrosion Control, Inc. v. William Armstrong Smith Co., 148 Ga. App. 75, 251 S.E.2d 49 (1978); Mayo v. State, 148 Ga. App. 213, 251 S.E.2d 80 (1978); Achour v. Belk & Co., 148 Ga. App. 306, 251 S.E.2d 157 (1978); Arrow Dyeing & Finishing Co. v. Clarklift of Dalton, Inc., 148 Ga. App. 693, 252 S.E.2d 197 (1979); Pippin v. Bryan, 149 Ga. App. 193, 253 S.E.2d 855 (1979); Horton v. Wayne County, 243 Ga. 789, 256 S.E.2d 775 (1979); Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979); Straynar v. Jack W. Harris Co., 150 Ga. App. 509, 258 S.E.2d 248 (1979); Rucker v. Frye, 151 Ga. App. 415, 260 S.E.2d 373 (1979); Johnson v. McAfee, 151 Ga. App. 774, 261 S.E.2d 708 (1979); Arrington v. Andrews, 152 Ga. App. 572, 263 S.E.2d

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Directed Verdict**1. In General**

Essence of motion for directed verdict is that there is no genuine issue of material fact to be resolved by the trier of facts, and that the movant is entitled to judgment on the law applicable to established facts. *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962).

Granting a directed verdict on a single issue is entirely consistent with the general purpose of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *Gene Thompson Lumber Co. v. Davis Parmer Lumber Co.*, 189 Ga. App. 573, 377 S.E.2d 15, cert. denied, 189 Ga. App. 912, 377 S.E.2d 15 (1988).

Signed verdict. — No signed verdict is required. *Sirmans v. Jones*, 142 Ga. App. 144, 235 S.E.2d 543 (1977).

Judgment entered upon directed verdict not signed by the jury is not void or illegal. *Morgan v. Mize*, 118 Ga. App. 534, 164 S.E.2d 565 (1968).

Motion for directed verdict is not essential when evidence demanded the verdict. *Kelly v. Chrysler Corp.*, 129 Ga. App. 447, 199 S.E.2d 856 (1973) (on motion for rehearing).

Failure to specify grounds for motion not reversible error. — When motion for directed verdict is granted and the moving party is entitled to judgment as a matter of law, such judgment should not be reversed merely because the moving party failed to properly specify grounds on which the motion was based. *Green v. Knight*, 153 Ga. App. 183, 264 S.E.2d 657 (1980); *Boykin v. North*, 218 Ga. App. 435, 461 S.E.2d 598 (1995).

Fact that both parties move for directed verdict does not constitute waiver by each party of the right to have fact issues decided by the jury, if fact issues remain. *Walker v. Bush*, 234 Ga. 366, 216 S.E.2d 285 (1975).

Directed verdict compared to summary judgment. — Trial court's function in ruling on a motion for summary judgment is analogous to the function the court performs when ruling on a motion for directed verdict. *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962).

Trial court's function in ruling on a motion for summary judgment is analogous to the function the court performs when ruling on a motion for directed verdict; the essence of both motions is that there is no genuine issue of material fact to be resolved by the trier of facts, and that the movant is entitled to judgment on the applicable law. *Standard Accident Ins. Co. v. Ingalls Iron Works Co.*, 109 Ga. App. 574, 136 S.E.2d 505 (1964).

Trial court's function in ruling on a motion for summary judgment is analogous to that in ruling on a motion for directed verdict; the essence of both motions is that there is no genuine issue of material fact to be resolved by the trier of fact, and that the movant is entitled to judgment on the law applicable to the established facts. *Chandler v. Gately*, 119 Ga. App. 513, 167 S.E.2d 697 (1969).

Motion for summary judgment is analogous to motion for directed verdict; however, although operation of the motions is essentially the same in reference to those issues upon which the movant for summary judgment would have the burden of proof at trial, the operation is somewhat different made by the opponent of the party with the trial burden. *Southern Bell Tel. & Tel. Co. v. Beaver*, 120 Ga. App. 420, 170 S.E.2d 737 (1969).

Summary judgment may be improper when directed verdict proper.

— Grant of summary judgment may be improper in a case in which, at trial, a grant of a directed verdict may be proper. *Southern Bell Tel. & Tel. Co. v. Beaver*, 120 Ga. App. 420, 170 S.E.2d 737 (1969).

Party who moves for summary judgment in a case premised on negligence has a considerable burden, and if the moving party is the defendant, the moving party may not be able to obtain summary judgment even though a directed verdict might be obtained at trial. *Turner v. Noe*, 127 Ga. App. 870, 195 S.E.2d 463 (1973).

Court's conclusion that summary judgment is inappropriate does not preclude subsequent directed verdict since the denial of a motion for summary judgment decides nothing except that under the evidence considered at that time there can be no judgment rendered as a matter of law. *Timber Equip., Inc. v. McKinney*, 166 Ga. App. 757, 305 S.E.2d 468 (1983).

Nonjury cases. — Motion for directed verdict is procedurally incorrect in a nonjury case, but the court may nonetheless treat the motion as one for involuntary dismissal. *Pichulik v. Air Conditioning & Heating Serv. Co.*, 123 Ga. App. 195, 180 S.E.2d 286 (1971).

In a nonjury case, it is procedurally incorrect to move for directed verdict; such a motion, as well as the grant

thereof, will be construed as one for involuntary dismissal under Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(b)). *Kennery v. Mosteller*, 133 Ga. App. 879, 212 S.E.2d 447 (1975).

Evidence. — Trial judge is never authorized to direct a verdict against a party litigant until the party has introduced or had an opportunity to introduce all evidence on the issues involved and rested the case. *Mallard v. Mallard*, 221 Ga. 480, 145 S.E.2d 533 (1965).

Court is required to grant the verdict based on the evidence, not the statement of counsel. *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

Directed verdict cannot be granted if there is "any evidence" to support a contrary verdict, but there cannot be "some evidence" that all the evidence demands a particular verdict. *Carden v. Burckhalter*, 214 Ga. App. 487, 448 S.E.2d 251 (1994).

Appellate courts review the denial of a motion for directed verdict under the "any evidence" standard, which requires the appellate court to construe the evidence in the light most favorable to the party who obtained a verdict, and if there is any evidence to support the verdict, the appellate court will not disturb the verdict. *Imperial Foods Supply, Inc. v. Purvis*, 260 Ga. App. 614, 580 S.E.2d 342 (2003).

Trial court's denial of the motel sellers' motion for a directed verdict as to a claim for damages under a tortious interference with business relationship claim, as well as for property damages, was proper as the evidence produced at trial satisfied the "any evidence" test; there was evidence that the sellers had turned off electricity to an advertising sign, failed to disclose that the sale terminated the motel franchise, and that there were frequent diesel spills on the property as well as evidence as to the cost of repairs to the property. *Chhina Family P'ship, L.P. v. S-K Group of Motels, Inc.*, 275 Ga. App. 811, 622 S.E.2d 40 (2005).

In a tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured by soot emitted from the apartment's heating system, the agent's motion for a directed verdict on the ground that the tenant did

Directed Verdict (Cont'd)**1. In General** (Cont'd)

not show that the agent caused the soot to appear in the apartment was properly denied although there was evidence that the tenant smoked, burned candles, and painted the apartment; construed to favor the tenant, the theory that the agent's negligent maintenance caused the problem was substantiated by the opinion of the tenant's expert and by the facts that the problem began before the tenant painted the apartment, and that no residue problems occurred in a subsequent apartment where the tenant also smoked and burned candles. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Trial court did not err in entering a directed verdict against a husband and wife, in the couples' suit seeking uninsured motorist benefits, as the couples failed to prove negligence, and inferences of such provided by the wife's testimony amounted to mere conjecture, which was insufficient for a liability claim to attach. *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).

Trial court properly denied the motions for a directed verdict and for a judgment notwithstanding the verdict filed by the executors of a will and trust because there was sufficient evidence to support the jury's finding that the documents were invalid as a product of undue influence based on the executors taking complete control of the elderly testator and isolating the testator from the testator's sons, as well as substituting the executors' desires and having the testator sign a new will and trust, which benefitted the executors and excluded the testator's wife and sons. *Davison v. Hines*, 291 Ga. 434, 729 S.E.2d 330 (2012).

Evidence did not demand verdict.

See *Thompson Enters., Inc. v. Coskrey*, 168 Ga. App. 181, 308 S.E.2d 399 (1983); *Cardin v. Telfair Acres of Lowndes County, Inc.*, 195 Ga. App. 449, 393 S.E.2d 731 (1990).

Insurer failed to show that the insurer was entitled to a verdict as a matter of law

under O.C.G.A. § 9-11-50(a) after: (1) the jury heard the evidence and decided against the insurer as to the driver's duty to mitigate damages; (2) the driver reported the accident to the insurer; (3) the insured was led to believe that the insurer would defend both the driver and the insured; (4) upon service of the negligence suit, the driver contacted the insured, telling the insured of the suit; and (5) the insurer failed to show that there was not a factual issue that the driver exercised ordinary care to mitigate the driver's damages. *Cincinnati Ins. Co. v. Macleod*, 259 Ga. App. 761, 577 S.E.2d 799 (2003).

In a suit over a nursing home manager's non-compliance with a nursing home operator's document requests, the manager was properly denied a directed verdict on a breach of contract claim because the manager failed to provide documents to the operator as required under a management agreement and termination was therefore permitted under the agreement. Additionally, the manager was properly denied a directed verdict on a conversion claim because the manager had held documentation belonging to the operator and had made unauthorized loans and employee payments. *Rome Healthcare LLC v. Peach Healthcare Sys.*, 264 Ga. App. 265, 590 S.E.2d 235 (2003).

Trial court did not err in denying a truck modifying company's motion for a directed verdict in a truck owner's products liability action arising from a fire in the truck cab due to an allegedly defective switch that had been installed by the company as the parties presented conflicting evidence to explain the origin and cause of the fire that burned the owner's body; accordingly, a particular verdict was not demanded and a directed verdict was not mandated. *Cottrell, Inc. v. Williams*, 266 Ga. App. 357, 596 S.E.2d 789 (2004).

Trial court properly denied an insurance management company and the company's president's motion for directed verdict, pursuant to O.C.G.A. § 9-11-50, in an action by a contractor who was forced to pay for a subcontractor's employee's injuries due to the failure of the subcontractor to have workers' compensation insurance as there was sufficient evidence of misrepresentations by the company and

the company's president, and justifiable reliance by the contractor, to support the contractor's fraud and negligent misrepresentation claims; the company and the company's president had assured the contractor repeatedly that the subcontractor had adequate workers' compensation insurance for building purposes, although the subcontractor did not, and based on the fraud by them, punitive damages pursuant to O.C.G.A. § 51-12-5.1(b) were properly presented to the jury for consideration. *FitzSimons v. W. M. Collins Enters., Inc.*, 271 Ga. App. 854, 610 S.E.2d 654 (2005).

Trial court properly denied the motel sellers' motion for directed verdict, pursuant to O.C.G.A. § 9-11-50, on the issue of fraud in the parties' agreement as the existence of a valid merger clause in the sale agreement for the motel did not bar the purchasers' claim that there was fraud based on misrepresentations in the agreement; further, there was evidence of such misrepresentations by the sellers as to the boundaries, which properties were covered by the agreement, and whether a restaurant was covered in the agreement. *Chhina Family P'ship, L.P. v. S-K Group of Motels, Inc.*, 275 Ga. App. 811, 622 S.E.2d 40 (2005).

Evidence that a fire rescue emergency vehicle's lights were working properly at the time of an accident and testimony that the lights "were in compliance with Georgia law," was sufficient for a jury to have found that the lights were visible from a distance of 500 feet, in compliance with O.C.G.A. § 40-6-6 for purposes of allowing the vehicle to proceed through a red light; accordingly, a trial court properly denied a driver's motion for a directed verdict and judgment notwithstanding the verdict pursuant to O.C.G.A. § 9-11-50(a) arising from a collision that occurred at the intersection involving the driver's vehicle and the emergency vehicle. *Wynn v. City of Warner Robins*, 279 Ga. App. 42, 630 S.E.2d 574 (2006).

In a medical malpractice action, the trial court did not err in denying an original doctor a directed verdict on grounds that the negligence of either the patient or the patient's subsequent doctor cut off the original doctor's liability as: (1) the pa-

tient was never put on notice of the need for any ongoing evaluation or treatment, and hence, any failure to seek routine medical care after the original doctor's misdiagnosis for over two years could not serve as the proximate cause of injury; (2) the acts or omissions of the subsequent doctor could not serve to cut off the liability of the original doctor; and (3) the jury was entitled to hear and resolve whether the subsequent doctor supplied an intervening cause of injury. *Amu v. Barnes*, 286 Ga. App. 725, 650 S.E.2d 288 (2007), *aff'd*, 283 Ga. 549, 662 S.E.2d 113 (2008).

Trial court did not err by denying a property owner's motion for a directed verdict on the issue of whether a power company had a duty to warn before opening dam flood gates in the property owner's negligence suit for flood damage as whether the power company had a duty to warn under Georgia tort law, as opposed to the power company's emergency action plan, was a matter for the jury. The property owner failed to cite a single appellate case in Georgia that required a dam owner or operator, as a matter of law, to notify downstream residents when opening flood gates and the evidence on the issue was in conflict, thus, the matter did not demand a verdict in the property owner's favor. *Lee v. Ga. Power Co.*, 296 Ga. App. 719, 675 S.E.2d 465 (2009).

Trial court did not err in denying lessees' motions for directed verdict after a jury found in favor of a lessor in the lessor's action to recover the unpaid rent due on a commercial lease because there was sufficient evidence supporting the jury's verdict that the lease was not terminated and that the lessees owed the lessor for past due rent; the language used in the warranty deed transferring title to the property from the original landlord to a purchaser and the quitclaim deed transferring title to the property from the purchaser to the lessor could be read as an assignment of the lease, and the jury was authorized to conclude that the lessor did not force the lessees to vacate the premises when the purchaser hired a locksmith to change the locks on the premises since the lessees sent the lessor a letter stating that the lessees would be leaving the facility. *Level One Contact, Inc. v. BJL*

Directed Verdict (Cont'd)**1. In General** (Cont'd)

Enters., LLC, 305 Ga. App. 78, 699 S.E.2d 89 (2010).

Will propounder was not entitled to a directed verdict in a will caveat as the evidence established a question for the jury on the issue of the testator's capacity due to testimony that the testator was regularly confused and did not appear to understand her medical conditions, including dementia. *Odom v. Hughes*, 293 Ga. 447, 748 S.E.2d 839 (2013).

Will propounder was not entitled to a directed verdict in a will caveat as the evidence established a question for the jury on the issue of whether the testator suffered from delusions based on monomania, and whether the propounder had misrepresented to the testator the nature of a real property transfer for purposes of fraud. *Odom v. Hughes*, 293 Ga. 447, 748 S.E.2d 839 (2013).

Will propounder was not entitled to a directed verdict in a will caveat as the evidence established a question for the jury on the issue of undue influence because there was more than merely an opportunity for the propounder to influence the testator; there was also evidence of the testator's diminished mental faculties and an established confidential relationship between the propounder and the testator. *Odom v. Hughes*, 293 Ga. 447, 748 S.E.2d 839 (2013).

Grounds not mentioned in a motion for directed verdict cannot thereafter be raised on appeal. *Fidelity & Cas. Ins. Co. v. Massey*, 162 Ga. App. 249, 291 S.E.2d 97 (1982).

Reopening of case after oral grant of directed verdict. — To allow reopening of a case after motion for directed verdict had been granted but before it had been reduced to writing was entirely within the court's discretion. *Wallace v. Yarbrough*, 155 Ga. App. 184, 270 S.E.2d 357 (1980).

Fact that the jury returns a verdict does not render the failure to direct verdict an error by hindsight. *Craft v. Hospital Auth.*, 173 Ga. App. 444, 326 S.E.2d 590 (1985).

Alleged violation of statute presented a jury question. — Upon a claim

that a pesticide company violated O.C.G.A. § 2-7-62(b)(3), given the multiple instructions included on the pesticide label, particularly that portion suggesting that the preparer reverse the order of the added components, the trial court properly concluded that the issue of whether the chemical was mixed in a manner inconsistent with its label was a jury question. Moreover, even if the company violated § 2-7-62(b)(3), it did not entitle the plaintiff to judgment as a matter of law, as it would improperly remove the issue of proximate cause from the jury. *Chancey v. Peachtree Pest Control Co.*, 288 Ga. App. 767, 655 S.E.2d 228 (2007), cert. denied, No. S08C0642, 2008 Ga. LEXIS 459 (Ga. 2008).

New trial. — If neither a directed verdict nor a judgment n.o.v. is warranted, surely a defendant is not entitled to a new trial. *Associated Software Consultants Org., Inc. v. Wysocki*, 177 Ga. App. 135, 338 S.E.2d 679 (1985).

When the erroneous grant of a directed verdict to one of multiple defendants will require a new trial, particularly when there is extensive evidence and debate, it is a wise exercise in judicial economy to grant a judgment n.o.v., rather than try the matter again as to that defendant, with the resulting prejudice to all parties. *Hickman v. Allen*, 217 Ga. App. 701, 458 S.E.2d 883 (1995).

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 arguing 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).

Directed verdict proper. — In a medical malpractice action, an executrix failed to support a claim for punitive damages related to a claim of abandonment as the executrix failed to present any expert testimony that there was a reasonable degree of medical certainty the decedent

would have survived, even if the doctor or another qualified surgeon had been at the hospital when the decedent began to bleed internally; thus, the trial court properly granted the doctor a directed verdict as to both claims. *King v. Zakaria*, 280 Ga. App. 570, 634 S.E.2d 444 (2006).

In a breach of contract action associated with a construction project, the trial court properly granted a limited liability company's motion for a directed verdict against a contractor as the contractor failed to present sufficient evidence linking the limited liability company to the contract sued upon, but all the evidence involved the contractor's negotiations and dealings with a businessperson and the businessperson's company. *L. Lowe & Co., Inc. v. Sunset Strip Props., LLC*, 283 Ga. App. 357, 641 S.E.2d 797 (2007).

Trial court did not err in directing a verdict as to a parent's ordinary negligence claim based on a hospital's decision to not follow the recommended protocol for testing the parent's newborn blood. The hospital had to exercise medical judgment to determine what to do to treat the child and assess the seriousness of the diseases tested for. *Walls v. Sumter Reg'l Hosp., Inc.*, 292 Ga. App. 865, 666 S.E.2d 66 (2008).

Since the first subsidiary company undertook no contractual obligation to perform work on the project for another, but merely hired the contractor to perform the project work, the first company was not a statutory employer liable for compensation to the injured employee under O.C.G.A. § 34-9-8, and had no immunity from suit under O.C.G.A. § 34-9-11. Therefore, the first company was entitled to a directed verdict in the company's favor on the basis that the company was a statutory employer under § 34-9-8, and was therefore entitled to Workers' Compensation immunity from suit under § 34-9-11. *Ramcke v. Ga. Power Co.*, 306 Ga. App. 736, 703 S.E.2d 13 (2010), cert. denied, No. S11C0482, 2011 Ga. LEXIS 583 (Ga. 2011).

Truck repairer's failures to repair an owner's truck to the owner's satisfaction or to agree on a trade-in price for the truck could not have justified the submission of attorney fees to the jury pursuant to

O.C.G.A. § 13-6-11, such that the trial court properly granted a directed verdict under O.C.G.A. § 9-11-50 to the repairer. *Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc.*, 311 Ga. App. 138, 714 S.E.2d 750 (2011).

Directed verdict proper when contract unenforceable as a matter of law. — In a potential home purchaser's action to recover earnest money, the seller was entitled to a directed verdict under O.C.G.A. § 9-11-50(a) on the basis that the contract was unenforceable because the contract did not list the loan amount or the interest rate on the loan; however, because the contract was unenforceable, the purchaser was not estopped from recovering the earnest money. *Parks v. Thompson Builders, Inc.*, 296 Ga. App. 704, 675 S.E.2d 583 (2009).

Appellate review of denial of motion for directed verdict. — Reversal on appeal of denial of motion for directed verdict means that a directed verdict should have been, and should be, entered. This is tantamount to a reversal with direction, and no retrial can be held. *Kirkland v. Southern Disct. Co.*, 187 Ga. App. 453, 370 S.E.2d 640, cert. denied, 187 Ga. App. 908, 370 S.E.2d 640 (1988).

Standard of appellate review of the trial court's denial of a motion for a directed verdict is the "any evidence" standard. *United Fed. Sav. & Loan Ass'n v. Connell*, 166 Ga. App. 329, 304 S.E.2d 131 (1983); *Southern Ry. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987); *Davis v. Glaze*, 182 Ga. App. 18, 354 S.E.2d 845 (1987); *Rizer v. Harris*, 182 Ga. App. 31, 354 S.E.2d 660 (1987), overruled on other grounds, *Eileen B. White & Assocs. v. Gunnells*, 263 Ga. 360, 434 S.E.2d 477 (1993); *Honesty v. Tinsley*, 183 Ga. App. 146, 358 S.E.2d 295 (1987); *Mitchell v. Southern Gen. Ins. Co.*, 194 Ga. App. 218, 390 S.E.2d 79, cert. denied, 194 Ga. App. 912, 390 S.E.2d 79 (1990); *Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992); *Mark Six Realty Assocs. v. Drake*, 219 Ga. App. 57, 463 S.E.2d 917 (1995).

Requirements that must be met in a directed verdict situation are very strict, and when there is some, though slight, evidence to support an issue raised in the complaint, it cannot be said, as required

Directed Verdict (Cont'd)**1. In General** (Cont'd)

by subsection (a) of O.C.G.A. § 9-11-50, that "the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict." *Hall v. Rome Auto. Co.*, 181 Ga. App. 621, 353 S.E.2d 542 (1987).

When determining whether a trial court erred by denying a motion for a directed verdict, this court reviews and resolves the evidence and any doubts or ambiguities in favor of the verdict. *Canal Ins. Co. v. Wilkes Supply Co.*, 203 Ga. App. 35, 416 S.E.2d 105, cert. denied, 203 Ga. App. 905, 416 S.E.2d 105 (1992); *Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992).

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 sufficient description of the property at issue; hence, the property owners' motion for a directed verdict was erroneously denied. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

As the Supreme Court of Georgia previously concluded that there was no factual conflict during summary judgment or at trial as to an employee being within the zone of danger, on remand the appellate court could not revisit that issue or review whether the trial court's denial of the railway company's motion for a directed verdict on the zone of danger issue was error. *Norfolk S. Ry. v. Everett*, 322 Ga. App. 867, 747 S.E.2d 92 (2013).

Appellate review of grant of motion for directed verdict. — In reviewing grant of a directed verdict or a judgment notwithstanding the verdict, the appellate court must decide whether all the evidence demanded the verdict, or whether there was some evidence supporting the verdict of the jury. *Pendley v. Pendley*, 251 Ga. 30, 302 S.E.2d 554 (1983).

Court of Appeals will consider the mer-

its of the appeal after the trial court reserved ruling on a motion for directed verdict and then directed a verdict after the jury rendered a verdict but before there had been an entry of judgment on that verdict, since no special harm resulted to either party from such consideration; overruling *Fabian v. Dykes*, 210 Ga. App. 703, 436 S.E.2d 819 (1993); *Wright v. Millines*, 204 Ga. App. 111, 418 S.E.2d 453 (1993); *Anaya v. Brooks Auto Parts*, 203 Ga. App. 485, 417 S.E.2d 423 (1992), to the extent they are inconsistent. *Continental Ins. Co. v. State Farm Mut. Ins.*, 212 Ga. App. 839, 443 S.E.2d 509 (1994).

Grant of directed verdict can be upheld when it is determined that all the evidence demands that verdict; this requires a de novo review. *Carden v. Burckhalter*, 214 Ga. App. 487, 448 S.E.2d 251 (1994); *Hulsey v. DOT*, 230 Ga. App. 763, 498 S.E.2d 122 (1998).

Issue rendered moot by later directed verdict. — Husband's complaint of the trial court's denial of the corporation's motion for summary judgment under O.C.G.A. § 9-11-56 was moot as the trial court later granted the corporation's motion for a directed verdict under O.C.G.A. § 9-11-50. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

Abandoned claims not addressed on appeal. — On appeal from a directed verdict entered against them, because the landowners did not specifically challenge the trial court's ruling as to the denial of their claim for attorney fees and punitive damages, absent evidence of any error resulting from that ruling, to the extent they intended to challenge the directed verdict as to these two claims, that challenge was abandoned. *Walls v. Moreland Altobelli Assocs.*, 290 Ga. App. 199, 659 S.E.2d 418 (2008).

Trial court did not err in denying motion for directed verdict. See *Hawkins v. Greenberg*, 166 Ga. App. 574, 304 S.E.2d 922 (1983); *Spoon v. Herndon*, 167 Ga. App. 794, 307 S.E.2d 693 (1983); *Brown v. Citizens & S. Nat'l Bank*, 168 Ga. App. 385, 308 S.E.2d 850 (1983), aff'd in part, rev'd in part on other grounds, 253 Ga. 119, 317 S.E.2d 180 (1984); *GEICO v. Presley*, 174 Ga. App. 562, 330 S.E.2d 779 (1985); *Price v. Hitchcock*, 174 Ga. App. 606, 330 S.E.2d 807 (1985).

Employer's motion for a directed verdict, pursuant to O.C.G.A. § 9-11-50, was properly denied in an employee's breach of employment agreement claim after it was found that the elements of breach of contract were proved pursuant to O.C.G.A. § 13-3-1; although the services to be provided were ambiguous in the contract, the use of parol evidence resolved the parties' intention on that issue. *ISS Int'l Serv. Sys. v. Widmer*, 264 Ga. App. 55, 589 S.E.2d 820 (2003).

Trial court did not err in a wrongful death action by denying the motion for a directed verdict of an engineering company that designed an allegedly defective reinforcing safety net that was installed in the soil above a combined sanitary and storm sewer, and which failed to prevent a hole from developing as: (1) the reinforcing safety net could have been considered a product under a theory of products liability; (2) there was evidence that the reinforcing safety net was not reasonably suited for its intended purposes; and (3) the engineering company could not have been considered a joint tortfeasor with the city for purposes of contribution. *Tensar Earth Techs., Inc. v. City of Atlanta*, 267 Ga. App. 45, 598 S.E.2d 815 (2004).

Trial court properly denied the defendants' motions for directed verdict and for judgment notwithstanding the verdict in an action by one title company against another, seeking recovery for a mistaken title examination performed by the defendants, as there was evidence that the plaintiff had to reimburse the plaintiff's principal for an amount paid out on a claim due to the defendants not having seen a transfer of title when the defendants performed the title examination; further, because issues raised on appeal as to why the trial court erred in denying the defendants' motions were not raised in the trial court pursuant to O.C.G.A. § 9-11-50(b), or were not raised in the motion for directed verdict, those issues were not preserved for appellate court review. *Southern Land Title, Inc. v. North Ga. Title, Inc.*, 270 Ga. App. 4, 606 S.E.2d 43 (2004).

County's motion for a directed verdict on the county's counterclaim and cross-claim for declaratory relief against

the homeowners was properly denied because the jury was not asked to decide issues of inverse condemnation, nuisance, or other claims of county liability for damages purportedly caused when the county dug a trench across a dam in response to the demand for immediate action by the Environmental Protection Division of the Georgia Natural Resources Department, pursuant to the Georgia Safe Dams Act, O.C.G.A. § 12-5-370 et seq., due to the danger posed by the dam. *Forsyth County v. Martin*, 279 Ga. 215, 610 S.E.2d 512 (2005).

Trial court properly denied both a motion for directed verdict and a motion for judgment notwithstanding the verdict based on the claim by a dentist and a dental center that a former employee had 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. Furthermore, the former employee's claim of negligent hiring and retention of the dentist were well grounded because the former employee presented evidence that officers of the dental center knew, based on allegations that the dentist had previously harassed other employees of the dental center, that the dentist posed a risk of also harassing the former employee and additional motions for directed verdict and judgment notwithstanding the verdict were properly denied. *Ferman v. Bailey*, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Defendant not entitled to directed verdict. See *Tiftarea Shopper, Inc. v. Maddox*, 187 Ga. App. 227, 369 S.E.2d 545 (1988); *Barentine v. Kroger Co.*, 264 Ga. 224, 443 S.E.2d 485 (1994).

Trial court erred in denying directed verdict. — Trial court erred in

Directed Verdict (Cont'd)**1. In General** (Cont'd)

denying a lessee's motion for directed verdict in an action by an assignee for damages relating to the expiration of a lease between the lessee and the lessors because the assignee had no entitlement to recover its lost profits, based on allegations that it could not operate its own convenience store due to the lessee's failure to timely vacate the premises, when it was limited through the assignment to recover only the remedies available to the lessors, i.e., failure to timely deliver possession and property damages. *Golden Pantry Food Stores, Inc. v. Lay Bros., Inc.*, 266 Ga. App. 645, 597 S.E.2d 659 (2004).

Because the provision in a business sales contract for \$ 10,000 in liquidated damages for the seller's one-time use of its former name was unreasonable, and the parties did not attempt to estimate the loss, the liquidated damage clause was an unenforceable penalty; the trial court thus erred by failing to grant the seller's motion for a directed verdict. *Caincare, Inc. v. Ellison*, 272 Ga. App. 190, 612 S.E.2d 47 (2005).

After a trial court erroneously failed to grant a plaintiff a directed verdict on the plaintiff's claim that a liquidated damage clause was an unenforceable penalty, and the defendant only sought liquidated damages, there were no grounds upon which to remand for a new trial on actual or nominal damages under O.C.G.A. § 9-11-50(e) as a directed verdict on liquidated damages would have resolved the defendant's entire counterclaim. *Caincare, Inc. v. Ellison*, 272 Ga. App. 190, 612 S.E.2d 47 (2005).

Trial court erred in denying motions for directed verdict, O.C.G.A. § 9-11-50, because a real estate broker and a real estate agent owed no duty to a potential buyer of property when the buyer did not engage the broker as defined in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq.; the buyer was, at most, a "customer" of the broker pursuant to O.C.G.A. § 10-6A-3(8), and the broker exercised reasonable care in locating a property owner and checking on the status of de-

sired property pursuant to § 10-6A-3. *Harrouk v. Fierman*, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

It was error not to direct a verdict pursuant to O.C.G.A. § 9-11-50(a) to a putative property owner in an action by various family members seeking to impose a constructive trust on real property under former O.C.G.A. § 53-12-93(a) as it was inequitable to grant the family members an interest in the property because the putative owner had worked the farm for over 18 years and had spent significant sums on the property compared to the very minimal amounts contributed by the family members over the years; the doctrine of part performance as an exception to the Statute of Frauds under O.C.G.A. § 13-5-31(3) was inapplicable because the oral agreement was not sufficiently certain or definite for purposes of enforcement. *Troutman v. Troutman*, 297 Ga. App. 62, 676 S.E.2d 787 (2009).

Trial court erred in directing a verdict as to damages after a landlord satisfied the requirement for submitting secondary evidence by establishing that the primary evidence, the purchase invoices, had been destroyed and that higher secondary evidence from the company was unavailable; the oral evidence as to the wholesale fair market value and as to the dealer's discount, based upon the actual damaged parts, was sufficient secondary evidence to go to a jury. *Hodges v. Vara*, 268 Ga. App. 815, 603 S.E.2d 327 (2004).

Because a police officer's evidence of damages was uncertain and there was some evidence that a police officer's shoulder injury was not caused by an individual's negligence, the trial court erred by entering a directed verdict in favor of the officer. *Teklewold v. Taylor*, 271 Ga. App. 664, 610 S.E.2d 617 (2005).

Trial court erred in granting a directed verdict, pursuant to O.C.G.A. § 9-11-50, to a pediatrician in a medical malpractice action by the parents of a minor whose undiagnosed bacterial meningitis caused brain damage and rendered the minor a quadriplegic as there was some evidence that the doctor violated the standard of care when the doctor allowed an unlicensed nurse to handle weekend calls from patients' families without the neces-

sity of contacting the pediatrician; although the nurse, who spoke with the parents and gave them erroneous information that the child probably had a virus or was hungry, was employed by the pediatrician's professional corporation, the pediatrician could not be shielded from individual liability from the pediatrician's own acts, pursuant to O.C.G.A. § 14-2-622(b). *Snider v. Basilio*, 276 Ga. App. 315, 623 S.E.2d 521 (2005).

Evidence presented by a testator's child, which proved the testator's disease, medication, and its effects, the testator's dependence on the care givers, their isolation of the testator from the child; their active encouragement and arrangements for the drafting and execution of a new will, the testator's short-term relationship with them, the testator's sporadic contact with and lack of trust towards one of the challenged beneficiaries, and the testator's long-standing expressions of testamentary intent to leave all of the testator's property to the child, which the testator repeated the day after execution of the disposition, supplied sufficient evidence to support the child's claim of undue influence to support the jury verdict in the child's favor and not a directed verdict entered by the trial court in the face of this evidence; although this evidence did not demand a finding that the will was the product of undue influence, it was sufficient to authorize the submission of that question to the jury. *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006).

Directed verdict on a breach of contract claim involving a promissory note was inappropriate because although the amount due was admittedly not paid, fraud and misrepresentation by plaintiffs, a corporation and the corporation's principal, were defenses to that claim; because the evidence presented to support a fraud defense by defendants, a corporation and two guarantors, also supported defendants' counterclaims, the error in granting the directed verdict was not harmless as the jury could have been influenced by that action in determining the viability of the counterclaims. *Jocelyn Canyon, Inc. v. Lentjes*, 292 Ga. App. 608, 664 S.E.2d 908 (2008).

In a homeowner's breach of contract

and negligent construction case, because there was no indication in the record that the trial court determined the cost of repair to be an inappropriate measure of damages and because the homeowner presented some evidence of the cost to repair fire damage, the trial court erred in directing a verdict against the homeowner. *John Thurmond & Assocs. v. Kennedy*, 284 Ga. 469, 668 S.E.2d 666 (2008).

Directed verdict in competency trial. — Trial court did not err in denying the defendant's motion for a directed verdict under O.C.G.A. § 9-11-50 in the defendant's competency trial because the evidence on competency was in conflict; even though the defendant's expert witness opined that the defendant was not competent to stand trial, the state's expert testified that the defendant was competent to do so. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Motion made after case submitted to the jury was untimely. — When a carrier did not file a motion for a directed verdict until after the case had been submitted to the jury, it was untimely under O.C.G.A. § 9-11-50. Furthermore, the untimely motion also barred the carrier from contending on appeal that it was entitled to judgment as a matter of law because of insufficient evidence. *Ga. Farm Bureau Mut. Ins. Co. v. Hyers*, 291 Ga. App. 316, 661 S.E.2d 682 (2008).

2. Grounds for Directed Verdict

Directed verdicts to be granted reluctantly and scrutinized with care.

— Motions for directed verdict should be granted reluctantly by the trial courts, and upon appeal should be scrutinized with great care by the reviewing court. *Lingo v. Kirby*, 142 Ga. App. 278, 236 S.E.2d 26 (1977).

Standard for directed verdict. — Verdict should not be directed unless there is no issue of fact, or unless proved facts, viewed from every possible legal point of view, can sustain no other finding than that directed. *Davis v. Wight*, 207 Ga. 590, 63 S.E.2d 405 (1951); *Columbus Wine Co. v. Sheffield*, 83 Ga. App. 593, 64 S.E.2d 356 (1951); *Whitlock v. Michael*, 208 Ga. 229, 65 S.E.2d 797 (1951); *Miles v. Blanton*, 211 Ga. 754, 88 S.E.2d 273

Directed Verdict (Cont'd)**2. Grounds for Directed Verdict (Cont'd)**

(1955); *Coffin v. Barbaree*, 214 Ga. 149, 103 S.E.2d 557 (1958); *Stone v. Jernigan*, 214 Ga. 249, 104 S.E.2d 101 (1958); *Bridges v. Elrod*, 216 Ga. 102, 114 S.E.2d 874 (1960); *Tift v. Gulf Oil Corp.*, 223 Ga. 83, 153 S.E.2d 702 (1967).

It is error for the court to direct a verdict in favor of a particular party or parties unless there is no issue of fact, or unless proved facts, viewed from every possible legal point, would sustain no other finding than the one so directed. *Horn v. Preston*, 217 Ga. 165, 121 S.E.2d 775 (1961); *Belch v. Gulf Life Ins. Co.*, 219 Ga. 823, 136 S.E.2d 351 (1964); *Gibson v. Filter Queen Co.*, 109 Ga. App. 650, 136 S.E.2d 922 (1964).

Test required by subsection (a) of this section is that evidence demands a verdict, not merely that the evidence supports a verdict in favor of the moving party. *Jenkins v. Gulf States Mtg. Co.*, 138 Ga. App. 835, 227 S.E.2d 522 (1976).

Rule in the final sentence of subsection (a) of this section purports to set forth the standard for directed verdict long recognized in this state. *Georgia Power Co. v. Nix*, 147 Ga. App. 681, 250 S.E.2d 17 (1978).

Verdict may be legally directed when evidence is not conflicting. *Tilley v. Cox*, 119 Ga. 867, 47 S.E. 219 (1904); *Price v. Central of Ga. Ry.*, 124 Ga. 899, 53 S.E. 455 (1906).

Directed verdict is appropriate only if there is no conflict in the evidence as to any material issue and the evidence introduced, construed most favorably to the party opposing the motion, demands a particular verdict. *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 508 S.E.2d 646 (1998).

Evidence to be construed most favorably to nonmovant. — General rule on a motion for directed verdict is that the evidence must be construed most favorably to the nonmovant. *Johnson v. Curenton*, 127 Ga. App. 687, 195 S.E.2d 279 (1972); *Folsom v. Vangilder*, 159 Ga. App. 844, 285 S.E.2d 583 (1981).

On directed verdict, the court is bound

to consider evidence in the light most favorable to the party against whom the verdict is asked to be directed. *Murray v. Gamble*, 127 Ga. App. 855, 195 S.E.2d 461 (1973); *North Ga. Prod. Credit Ass'n v. Vandergrift*, 239 Ga. 755, 238 S.E.2d 869 (1977); *Talmdage v. Talmdage*, 241 Ga. 609, 247 S.E.2d 61 (1978).

Evidence in cases of directed verdict must be construed most favorably toward the party opposing the motion. *Kalish v. King Cabinet Co.*, 140 Ga. App. 345, 232 S.E.2d 86 (1976).

Court's duty is to construe the evidence most favorably toward the party opposing the motion for a directed verdict, and it will labor to retain intact the verdict returned by the jury to whom the system has entrusted the dispensing of justice. *Eddie Parker Interests, Inc. v. Booth*, 160 Ga. App. 15, 285 S.E.2d 753 (1981).

Evidence should be construed in the light most favorable to the respondent to a motion for directed verdict. *Ranger Constr. Co. v. Robertshaw Controls Co.*, 166 Ga. App. 679, 305 S.E.2d 361 (1983).

In determining whether any conflict in the evidence exists, the court must construe the evidence most favorably to the party opposing the motion for directed verdict. *Skelton v. Skelton*, 251 Ga. 631, 308 S.E.2d 838 (1983).

When directed verdict proper. — It is error to direct a verdict, except when there is no conflict in the evidence as to the material facts, and the evidence introduced, together with all reasonable deductions or inferences therefrom, demands a particular verdict. *Yablon v. Metropolitan Life Ins. Co.*, 200 Ga. 693, 38 S.E.2d 534 (1946); *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949); *Harrison v. Southeastern Fair Ass'n*, 104 Ga. App. 596, 122 S.E.2d 330 (1961); *Kesler v. Kesler*, 219 Ga. 592, 134 S.E.2d 811 (1964).

Directed verdict is authorized when there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict. *Grace v. Rouse*, 202 Ga. 720, 44 S.E.2d 762 (1947); *Isom v. Schettino*, 129 Ga. App. 73, 199 S.E.2d 89 (1973); *Allred v. Dobbs*, 137 Ga. App. 227, 223 S.E.2d 265 (1976); *General Ins. Co. of Am. v. Bowers*,

139 Ga. App. 416, 228 S.E.2d 348 (1976); *Brown v. Truluck*, 239 Ga. 105, 236 S.E.2d 60 (1977); *Hall County Mem. Park v. Baker*, 145 Ga. App. 296, 243 S.E.2d 689 (1978); *Wilborn v. Elliott*, 149 Ga. App. 541, 254 S.E.2d 755 (1979); *Spivey v. Eavenson*, 150 Ga. App. 429, 258 S.E.2d 54 (1979); *Darwin v. Metropolitan Atlanta Rapid Transit Auth.*, 158 Ga. App. 635, 281 S.E.2d 361 (1981); *Jones v. Smith*, 160 Ga. App. 147, 286 S.E.2d 478 (1981); *Levine v. Peachtree-Twin Towers Co.*, 161 Ga. App. 103, 289 S.E.2d 306 (1982); *Gibson v. Talley*, 162 Ga. App. 303, 291 S.E.2d 72 (1982); *Canal Ins. Co. v. Wilkes Supply Co.*, 203 Ga. App. 35, 416 S.E.2d 105, cert. denied, 203 Ga. App. 905, 416 S.E.2d 105 (1992); *Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992).

When there are no material issues of fact, it is proper to direct a verdict in favor of a party entitled to the verdict under evidence submitted. *Seabolt v. Christian*, 82 Ga. App. 167, 60 S.E.2d 540 (1950).

It is only when evidence adduced demands that the jury find in favor of a certain party that it is proper to direct a verdict for such party. *Taylor v. Gill Equip. Co.*, 87 Ga. App. 309, 73 S.E.2d 755 (1952).

It is not erroneous to direct a verdict when there is no conflict in the evidence introduced and when all reasonable deductions or inferences which may be drawn therefrom demand a verdict so directed. *Smith v. Welch*, 212 Ga. 345, 92 S.E.2d 297 (1956); *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962).

It is error for the trial judge to direct a verdict, except when there is no conflict in the evidence introduced as to the material facts, and evidence introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict; and when there is a material conflict in the evidence upon a material issue, the trial judge cannot usurp the province of the jury and instruct the jury to render a given verdict. *Parker v. Parker*, 214 Ga. 509, 105 S.E.2d 742 (1958).

Motion for directed verdict is in order only when there is no conflict in the evidence and a verdict in the movant's favor is demanded. *Daniel v. Weeks*, 217 Ga. 388, 122 S.E.2d 564 (1961).

Before the trial court would be authorized to direct a verdict in favor of one party and against another, the evidence must demand the verdict directed. *Crosby Aeromarine, Inc. v. Hyde*, 115 Ga. App. 836, 156 S.E.2d 106 (1967).

It is only when there is no conflict in the evidence, or when all the evidence introduced, together with all reasonable deductions to be drawn therefrom, demands a particular verdict that the court is authorized to direct the verdict. *Maryfield Plantation, Inc. v. Harris Gin Co.*, 116 Ga. App. 744, 159 S.E.2d 125 (1967).

It is not error to direct a verdict if the evidence and all reasonable deductions therefrom, considered in the light most favorable to the respondent, demands the verdict and fails to disclose any material issue for jury resolution. *Burney v. Butler*, 243 Ga. 620, 255 S.E.2d 686 (1979).

Directed verdict is proper only if there is no conflict in the evidence as to any material issue and the evidence introduced together with all reasonable deductions or inferences therefrom demands a particular verdict. *Carver v. Jones*, 166 Ga. App. 197, 303 S.E.2d 529 (1983); *Brown v. Phillips*, 178 Ga. App. 316, 342 S.E.2d 786 (1986); *Beard v. Fender*, 179 Ga. App. 465, 346 S.E.2d 901 (1986); *Harrell v. Thompson*, 182 Ga. App. 470, 356 S.E.2d 69 (1987).

Directed verdict is not authorized unless there is no conflict in the evidence on any material issue and the evidence introduced, with all reasonable deductions demands a certain verdict. *Canal Ins. Co. v. Wilkes Supply Co.*, 203 Ga. App. 35, 416 S.E.2d 105, cert. denied, 203 Ga. App. 905, 416 S.E.2d 105 (1992).

Viewing the evidence in the light most favorable to the plaintiffs, the evidence introduced, with all reasonable deductions therefrom, demanded a verdict for the defendant. *B & C Tire & Battery, Inc. v. Cooper Tire & Rubber Co.*, 212 Ga. App. 228, 441 S.E.2d 468 (1994).

Directed verdict proper in quote accident case. — Because an injured party did not show that a truck driver was employed by the owner at the time of a motor vehicle accident or that the owner actually owned the truck, a directed verdict pursuant to O.C.G.A. § 9-11-50(a) in

Directed Verdict (Cont'd)**2. Grounds for Directed****Verdict (Cont'd)**

favor of the owner was proper. *King v. Evans*, 259 Ga. App. 626, 578 S.E.2d 480 (2003).

Directed verdict improper in personal injury action of tenant. — In a tenant's action against the leasing agent of an apartment complex alleging injury caused by soot emitted from the apartment's heating system, a motion for a directed verdict filed by the agent that claimed that the tenant failed to exercise ordinary care for the tenant's personal safety and assumed the risk of being exposed to a hazardous condition was properly denied; construed to favor the tenant, the evidence did not mandate a finding that the tenant knew, or in the exercise of ordinary care, should have known of an intentional and unreasonable exposure to a hazard, or that the tenant had actual knowledge of the danger and knew of a specific, particular risk of harm associated with conditions in the apartment. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured over a period of almost three years by soot emitted from the apartment's heating system was not time-barred by O.C.G.A. § 9-3-33 because the continuing tort theory tolled the running of the statute of limitations to within two years before the action was filed; because there was evidence that the tenant's exposure to the hazard was not eliminated more than two years before the action was filed, the agent's motion for a directed verdict on that ground was properly denied. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Directed verdict to high school coach in quantum meruit action. — In a contractor's quantum meruit action, a former high school baseball coach was erroneously denied a directed verdict as the evidence showed that although the contractor rendered a valuable service to a school by building an indoor baseball hitting facility, when the school board, and

not the coach, accepted those services to create an implied promise of payment, quantum meruit payment for construction of the facility could not lie against the coach; moreover, because there was no implied agreement requiring the coach to pay for the hitting facility, the contractor's argument that the coach was liable for having received a personal benefit from the construction of the hitting facility went to the question of unjust enrichment, and not quantum meruit. *Brown v. Penland Constr. Co.*, 281 Ga. 625, 641 S.E.2d 522 (2007).

Directed verdict in land sales transaction. — In an action premised on allegations of a breach of a land sales contract between a group of sellers and an investor, because testimony regarding the sale of an identical parcel at a different price and time failed to establish as a matter of law the precise market value as of the date of the breach, the trial court erred in denying the third seller's motion for directed verdict or JNOV. *Dunn v. Venture Bldg. Group, Inc.*, 283 Ga. App. 500, 642 S.E.2d 156 (2007).

Directed verdict proper in medical malpractice claim. — Decedent's parents and the administrator of the decedent's estate failed to present evidence showing the proximate cause element for a medical malpractice claim; the lack of continuous monitoring at a hospital was too remote as a matter of law to be the proximate cause of the decedent's suicide approximately 335 miles away in another state, and thus the trial court properly directed a verdict for the hospitals and physicians. *Miranda v. Fulton DeKalb Hosp. Auth.*, 284 Ga. App. 203, 644 S.E.2d 164 (2007), cert. denied, 2007 Ga. LEXIS 516 (Ga. 2007).

Directed verdict on malicious prosecution claim. — Absent evidence that a criminal prosecution for check fraud filed against a car buyer was terminated in the car buyer's favor, showing instead that the action against the car buyer remained pending, the trial court properly granted a directed verdict on the car buyer's malicious prosecution claim in favor of a car dealer and two of the dealer's employees. *Heflin v. Goodman*, 288 Ga. App. 454, 654 S.E.2d 417 (2007), cert. denied, 2008 Ga.

LEXIS 409 (Ga. 2008).

Directed verdict in tortious interference with business case. — Directed verdicts in favor of the defendants in a Georgia corporation's claims for tortious interference with business relations were proper as the assertion that the corporation was affiliated with an Alabama corporation and had a business relationship with the Alabama corporation's customers disregarded the legal significance of the undisputed fact that the Georgia corporation and the Alabama corporation were each a corporation. *All Star, Inc. v. Fellows*, 297 Ga. App. 142, 676 S.E.2d 808 (2009).

Directed verdict in boundary line dispute. — Trial court did not err in entering a judgment in favor of a church in the church's action against an adjoining landowner to establish a boundary line between their properties because the evidence the landowners presented to support the landowners' claimed boundary line was too vague and indefinite to allow any recovery, and the evidence demanded a judgment for the church with regard to the boundary line established in a survey. *Spivey v. Smith*, 303 Ga. App. 469, 693 S.E.2d 830 (2010).

Directed verdict when negligence of nightclub owner claimed. — Trial court did not err in granting a nightclub's motion for directed verdict under O.C.G.A. § 9-11-50(a) in a patron's action to recover for the pain and suffering the patron sustained when the patron was shot at the nightclub because the patron presented no evidence that the nightclub's security measures were insufficient or that the nightclub negligently performed the security measures the nightclub implemented. *Yearwood v. Club Miami, Inc.*, 316 Ga. App. 155, 728 S.E.2d 790 (2012).

Directed verdict improper in auto accident case. — Trial court properly denied the plaintiff's motion for a directed verdict in a negligence suit arising from an automobile accident because a stipulated admission of a codefendant did not admit a prima facie case of liability and the codefendants presented evidence supporting an alternate cause for the plaintiff's claimed damages, namely that the damages were pre-existing. *Stoddard v.*

Greenberg, No. A12A0182, 2012 Ga. App. LEXIS 1083 (Apr. 25, 2012).

Directed verdict in premise's liability claim. — Trial court properly directed a verdict in favor of a hotel in a guest's suit against the hotel on the guest's premises liability claim after a massage therapist allegedly sexually assaulted the guest because that claim required that the guest show a causal connection between the massage therapist's background and the injuries sustained, and the guest failed to show that the hotel knew or reasonably should have known that the massage therapist had a tendency to engage in behavior relevant to the guest's injuries. *Tomsic v. Marriott Int'l, Inc.*, 321 Ga. App. 374, 739 S.E.2d 521 (2013).

When it is error to fail to direct verdict. — Only when there is no conflict and a verdict is demanded as a matter of law is it error for the trial court to fail to direct a verdict. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Directed verdict in medical malpractice case appropriate. — In a medical malpractice action arising from an alleged mismanagement of an obstetrical complication during the birth of the patient's child, absent any record evidence of causation, the inapplicability of the doctrine of *res ipsa loquitur*, and given that the trial court did not err in the court's evidentiary rulings against the patient, the trial court properly granted a directed verdict to the doctor sued. *Hawkins v. OB-GYN Assocs., P.A.*, 290 Ga. App. 892, 660 S.E.2d 835 (2008), cert. denied, No. S08C1440, 2008 Ga. LEXIS 713 (Ga. 2008).

Directed verdict when no evidence of future medical expenses. — Trial court erred in failing to grant a defending driver's motion for a directed verdict under O.C.G.A. § 9-11-50(e) as to the plaintiff driver's damages for future medical expenses because the plaintiff presented no evidence from which it could be inferred that the plaintiff would have future medical expenses nor, if the plaintiff did, the amount thereof. *Bennett v. Moore*, 312 Ga. App. 445, 718 S.E.2d 311 (2011), cert. denied, 2012 Ga. LEXIS 317 (Ga. 2012).

Directed verdict is authorized when there is no conflict in the evi-

Directed Verdict (Cont'd)
2. Grounds for Directed Verdict (Cont'd)

dence and such a verdict is demanded. *Lakeview Memory Gardens, Inc. v. National Bank & Trust Co.*, 155 Ga. App. 478, 271 S.E.2d 219 (1980); *Steele v. Turner*, 158 Ga. App. 838, 282 S.E.2d 365 (1981); *Hawkins v. Greenberg*, 159 Ga. App. 302, 283 S.E.2d 301 (1981); *Ehlers v. Schwall & Heuett*, 177 Ga. App. 548, 340 S.E.2d 207 (1986).

Directed verdict is authorized only if there is no conflict in the evidence, and the evidence and all reasonable deductions therefrom demand a certain verdict. *Dick 'N Dale Sys., Inc. v. Danwil Int'l Trading Co.*, 199 Ga. App. 840, 406 S.E.2d 270 (1991).

Directed verdict is authorized only if there is no conflict in the evidence as to any material issue and the evidence adduced, with all reasonable deductions therefrom, shall demand a particular verdict. *Lawson v. Athens Auto Supply & Elec., Inc.*, 200 Ga. App. 609, 409 S.E.2d 60, cert. denied, 200 Ga. App. 895, 409 S.E.2d 60 (1991); *Palmer v. Taylor*, 215 Ga. App. 546, 451 S.E.2d 486 (1994).

Directed verdict improper when question on scope of employment. — In a pedestrian's personal injury action, because a jury question existed as to whether a cab service's employee was acting within the scope of the employee's employment at the time of the accident striking the pedestrian, a directed verdict in favor of the cab service was properly denied. *Decatur's Best Taxi Serv., Inc. v. Smith*, 282 Ga. App. 731, 639 S.E.2d 482 (2006).

Mere existence of conflicts in evidence does not render direction of verdict erroneous if it is demanded, either from proof or lack of proof on the controlling issue or issues. *Carr v. Jacuzzi Bros.*, 133 Ga. App. 70, 210 S.E.2d 16 (1974); *Lingo v. Kirby*, 142 Ga. App. 278, 236 S.E.2d 26 (1977); *Lakeview Memory Gardens, Inc. v. National Bank & Trust Co.*, 155 Ga. App. 478, 271 S.E.2d 219 (1980); *Wagner v. Timms*, 158 Ga. App. 538, 281 S.E.2d 295 (1981); *Hawkins v. Greenberg*, 159 Ga. App. 302, 283 S.E.2d

301 (1981); *Simmons v. Boros*, 176 Ga. App. 346, 335 S.E.2d 662 (1985), aff'd, 255 Ga. 524, 341 S.E.2d 2 (1986).

Mere conflicts in evidence do not render direction of a verdict erroneous, if the verdict was demanded on the controlling issue or issues. *Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968).

Trial court properly granted a motion for directed verdict as to all the plaintiffs. Although superficially the evidence was far from harmonious, there was sufficient competent evidence to authorize the trial court to conclude that there existed no genuine conflict as to any material issue. *Hutchinson v. Perkins*, 194 Ga. App. 389, 391 S.E.2d 122, cert. denied, 194 Ga. App. 911, 391 S.E.2d 122 (1990).

Immaterial conflicts. — Mere fact of conflicts in testimony does not render direction of verdict erroneous when it appears that the conflicts are immaterial, and that, giving to the opposite party the benefit of the most favorable view of the evidence as a whole, and of all legitimate inferences therefrom, a verdict against that party is demanded. *Gillen v. Coconut Grove Bank & Trust Co.*, 172 Ga. 908, 159 S.E. 282 (1931); *Veal v. Jenkins*, 58 Ga. App. 4, 197 S.E. 328 (1938); *Oliver v. Wayne*, 58 Ga. App. 787, 199 S.E. 841 (1938); *Stepp v. Stepp*, 195 Ga. 595, 25 S.E.2d 6 (1943); *Seabolt v. Christian*, 82 Ga. App. 167, 60 S.E.2d 540 (1950); *Anderson v. Anderson*, 210 Ga. 464, 80 S.E.2d 807 (1954); *Healan v. Powell*, 91 Ga. App. 787, 87 S.E.2d 332 (1955); *Carter v. Whatley*, 97 Ga. App. 10, 101 S.E.2d 899 (1958).

Mere fact that there are conflicts in testimony does not render direction of verdict erroneous if the conflicts are immaterial. *Berger v. Georgia Power Co.*, 77 Ga. App. 672, 49 S.E.2d 668 (1948).

Mere conflicts in testimony do not render the direction of a judgment erroneous when it appears that the conflicts are not material. *Blalock v. Central Bank*, 170 Ga. App. 140, 316 S.E.2d 474 (1984).

Directed verdict was properly granted as to a purchaser's fraud claim against a manufacturer because the purchaser did not show that the manufacturer's alleged fraud proximately

caused the purchaser's damages, which consisted of a loss of customers. *Pendley Quality Trailer Supply, Inc. v. B&F Plastics, Inc.*, 260 Ga. App. 125, 578 S.E.2d 915 (2003).

Directed verdict proper when no evidence supports plaintiffs' case. — Trial court did err in directing a verdict in favor of the defendant because the plaintiffs relied upon the doctrine of *res ipsa loquitor* but submitted no evidence showing that the plaintiffs' damages "were caused by an agency or instrumentality within the exclusive control of defendant" at the time of the collision, and because there was no evidence presented at trial to support a finding that the defendant was negligent. *Johnson v. Dallas Glass Co.*, 183 Ga. App. 584, 359 S.E.2d 448 (1987).

Trial court did not err in directing a verdict in favor of the defendant because the plaintiffs claimed that the defendant was responsible for the plaintiffs' injuries based on the doctrine of *respondeat superior*, but failed to present evidence showing that the alleged servant's negligence was the cause of the plaintiffs' damages. *Johnson v. Dallas Glass Co.*, 183 Ga. App. 584, 359 S.E.2d 448 (1987).

Because the plaintiff failed to advance any evidence of the requisite agency relationship or of any proximate causation for a realtor's activities, there was no conflict as to any material issue, and the trial court did not err in granting a directed verdict in favor of the defendant. *Marcoux v. Northside Realty Assocs.*, 207 Ga. App. 99, 427 S.E.2d 72 (1993).

In an action for a bank's conversion of loan commitment fees and breach of contract, a directed verdict for the bank was proper because the evidence demanded a finding that the plaintiffs surrendered the plaintiffs' title and right to the loan commitment fees when the plaintiffs paid the fees pursuant to the agreements that clearly provided that such fees were non-refundable and the evidence further demanded a finding that the plaintiffs did not satisfy several condition precedents to the loan commitments, the most important being the rehabilitation of the property in question. *Bryant v. Carver State Bank*, 207 Ga. App. 659, 428 S.E.2d 621 (1993).

Trial court erred in not granting a 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 9-11-50, in an action by a beauty pageant contestant who was banned from the contest after it was rumored that she was "stuffing" the ballot boxes, because the contestant failed to establish her claim for tortious interference with business relations because she did not offer direct evidence of the operators' actions to her 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 they were not strangers to those relationships; it was similarly error to deny the motions with respect to the contestant's slander claim as she 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).

In an action by an injured party against a taxicab company, alleging injuries by a taxicab owned by the company that was negligently operated by its driver, who was the company's employee, the evidence at trial showed that the driver leased the taxicab from the company for a certain daily amount and that the company had no control over the manner in which the driver performed the driver's work; therefore, the driver was an independent contractor, the company could not be held liable for the driver's negligence under the doctrine of *respondeat superior*, and it was error for the trial court to deny the company's motion for a directed verdict under O.C.G.A. § 9-11-50(a). *Metro Taxi, Inc. v. Brackett*, 273 Ga. App. 122, 614 S.E.2d 232 (2005).

If plaintiff simply fails to prove case, direction of verdict is proper. *Carr v. Jacuzzi Bros.*, 133 Ga. App. 70, 210 S.E.2d 16 (1974); *Neal v. Miller*, 194 Ga. App. 231, 390 S.E.2d 125 (1990).

In an action for negligence, plaintiffs'

Directed Verdict (Cont'd)
2. Grounds for Directed Verdict (Cont'd)

failure to prove any fault on the part of the defendant meant that the trial court did not err in directing a verdict in favor of the defendant. *Collins v. Ralston & Ogletree, Inc.*, 186 Ga. App. 583, 367 S.E.2d 861, cert. denied, 186 Ga. App. 917, 367 S.E.2d 861 (1988).

Evidence insufficient to support verdict for plaintiff. — If there is no conflict in the evidence and the evidence introduced, construed in the light most favorable to the plaintiff, is insufficient to support a verdict in the plaintiff's favor, it is not error for the trial court to direct a verdict in favor of the defendant. *Stewart v. Western Union Tel. Co.*, 83 Ga. App. 532, 64 S.E.2d 327 (1951).

If the defendant admits a prima facie case by the plaintiff and assumes the burden of proving an affirmative defense, failure to carry such burden may result in the court properly directing a verdict for the plaintiff. *Hall v. Beavers*, 78 Ga. App. 722, 51 S.E.2d 879 (1949).

Trial court erred in denying a bank's motion for a directed verdict in a borrower's breach of contract claim against the bank, arising from the bank's foreclosure sale of the borrower's property upon a default in payments, as an enforceable contract did not exist; although the borrower offered to pay a sum in order to postpone the sale, which was accepted by the bank, sufficient consideration was lacking because the borrower already had an obligation to pay that amount, which was due under the mortgage. *Citizens Trust Bank v. White*, 274 Ga. App. 508, 618 S.E.2d 9 (2005).

As evidence existed to support claims of fraud, conspiracy to commit fraud, and conversion, alleged by a group of investors against a company and the company's fundraisers regarding a patent the fundraisers convinced the investors to support, the trial court did not err in granting the investors a directed verdict; moreover, the fraud claims were not dependent on the characterization of the investments as either debt or equity. *Argentum Int'l, LLC v. Woods*, 280 Ga. App. 440, 634 S.E.2d 195 (2006).

In a divorce, the trial court did not err in granting a directed verdict under O.C.G.A. § 9-11-50 in the wife's claim of fraudulent conveyances; because the wife failed to present any evidence from which the jury could have reasonably inferred that a specific conveyance from the husband to the corporation was fraudulent, there was no conflict in the evidence as to any material issue, and the evidence, with all reasonable deductions therefrom, demanded a verdict in favor of the corporation. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

Direction of verdict on failure of plaintiff's proof or conclusive refutation. — Only if the plaintiff's evidence fails to prove the case as laid, without revealing as defense matter fatal to the cause pled, or when evidence adduced by the defendant, as a matter of law, conclusively refutes proof made of the plaintiff's case, may verdict for the defendant be directed. *Halligan v. Underwriters at Lloyd's London*, 102 Ga. App. 905, 118 S.E.2d 107 (1960).

When motion for directed verdict stands. — Although the court is bound to consider evidence in the light most favorable to the party against whom the verdict is asked to be directed, if, having done so, it appears that a verdict for that party is not authorized and cannot stand, motion for directed verdict on behalf of the moving party should be granted. *Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968); *City of Atlanta v. West*, 160 Ga. App. 609, 287 S.E.2d 558 (1981).

Directed verdict on easement issue. — Trial court erred in not granting the first property owner's motion for directed verdict regarding whether the second property owner could park vehicles on the easement that ran between their property, as neither the recorded easement, nor a personal agreement the parties signed later on following a dispute, was ambiguous regarding the fact that there was to be no interference with the easement; accordingly, the second property owner could not park vehicles on the easement and the trial court should have granted the first property owner's motion for a directed verdict on that issue. *Huckaby v.*

Cheatham, 272 Ga. App. 746, 612 S.E.2d 810 (2005).

It is proper to grant directed verdict on single issue. Taylor v. Buckhead Glass Co., 120 Ga. App. 663, 171 S.E.2d 779 (1969), rev'd on other grounds, 226 Ga. 247, 174 S.E.2d 566 (1970).

When directed verdict not proper. — Court cannot direct verdict if there is any reasonable inference, supported by evidence, that would authorize a verdict to the contrary. Taylor v. Chattooga County, 180 Ga. 90, 178 S.E. 298 (1935); Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946).

If there are issues of fact, it is error to direct verdict. North v. Tolbert, 80 Ga. App. 110, 55 S.E.2d 661 (1949).

Direction of verdict is error if the evidence, together with all reasonable inferences and deductions therefrom, would have authorized the verdict for the opposite party. Glover v. City Council, 83 Ga. App. 314, 63 S.E.2d 422 (1951); Williams v. Slusser, 104 Ga. App. 412, 121 S.E.2d 796 (1961).

It is error to direct verdict in any case if the evidence as to any material fact is in conflict or if circumstantial evidence does not demand the particular verdict. Canal Ins. Co. v. Tate, 111 Ga. App. 377, 141 S.E.2d 851 (1965).

If there is any evidence to support a verdict, denial of a motion for directed verdict is proper. Maloy v. Planter's Whse. & Lumber Co., 142 Ga. App. 69, 234 S.E.2d 807 (1977).

It is error to direct a verdict unless evidence demands the particular verdict and fails to disclose any material issue for jury resolution. Talmadge v. Talmadge, 241 Ga. 609, 247 S.E.2d 61 (1978); Georgia Power Co. v. Nix, 147 Ga. App. 681, 250 S.E.2d 17 (1978); Lorick v. Na-Churs Plant Food Co., 150 Ga. App. 209, 257 S.E.2d 332 (1979); Gibbs v. Jim Wilson Chevrolet Co., 161 Ga. App. 171, 288 S.E.2d 264 (1982); Camelot Club Condominium Ass'n v. Metro Lawns, Inc., 161 Ga. App. 574, 288 S.E.2d 325 (1982); Freyermuth v. Chon, 212 Ga. App. 845, 443 S.E.2d 636 (1994).

Directed verdict denied when no assumption of risk. — Based on the evidence recited, a verdict for the defen-

dant was authorized but not demanded as there was no evidence the plaintiff knowingly tempted fate by intentionally placing a hand into the discharge chute, as would demonstrate assumption of a known risk; therefore, the court did not err in denying the defendant's motion for directed verdict. Barger v. Garden Way, Inc., 231 Ga. App. 723, 499 S.E.2d 737 (1998).

Directed verdict in negligence cases. — In a case in which the plaintiff restaurant manager sued the defendant food vendor to recover damages for personal injuries that the manager sustained when the manager was knocked off the ground by the door of the vendor's delivery truck, which had a broken door latch, and the vendor claimed that the vendor was entitled to judgment because the failure of the leather strap that was used to secure the door was not foreseeable and that there was no evidence as to what caused the strap to break, the trial court did not err in denying the vendor's motions for directed verdict and for judgment notwithstanding the verdict, or in the alternative for a new trial because the evidence: (1) that the vendor's driver knew about the broken latch when the driver left the vendor's warehouse; (2) that the doors were very large; (3) that it was windy when the driver and the manager's employee were unloading the truck; (4) that because of the wind, the driver's attempts to secure the truck door by propping dollies against the door had failed; and (5) regarding the actual strap that was used, was adequate to support inferences by the jury that the vendor was negligent by allowing the use of a delivery truck with an inoperable door latch or was vicariously liable for the negligent attempt to secure the door with an inadequate strap. Imperial Foods Supply, Inc. v. Purvis, 260 Ga. App. 614, 580 S.E.2d 342 (2003).

Directed verdict on bad faith or refusal to settle claim. — No error occurred when the trial court denied the insurer's motion for directed verdict on the injured party's bad faith or refusal to settle claim that was assigned to the injured party by the insured as the insurer was liable to the insured and, thus, to the

Directed Verdict (Cont'd)**2. Grounds for Directed Verdict (Cont'd)**

assignee, the injured party, for failing to tender its policy limits even though the settlement offer made acceptance of the settlement contingent upon the injured party receiving the policy limits of a separate policy from a separate insurance company as the insurer was obligated to do what the insurer prudently could that was within the insurer's control, which included tendering the insurer's policy limits. *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 580 S.E.2d 519 (2003).

Directed verdict on issue of buyer's good faith. — Though a buyer's failure to get financing, which was a condition precedent to a contract, was not a breach of contract, the buyer was required to pursue the financing diligently, in good faith, and, as there was a question of a material issue of fact on the reasonableness of the buyer's actions, a directed verdict was error. *Patel v. Burt Dev. Co.*, 261 Ga. App. 436, 582 S.E.2d 495 (2003).

Directed verdict against company proper. — Because some evidence supported the jury's award and the individual ran the companies as one unit and did not inform the supplier that there were separate entities, the trial court properly allowed the corporate veil to be pierced and denied the individual's and the companies' motion for a directed verdict under O.C.G.A. § 9-11-50(a). *Scott Bros. v. Warren*, 261 Ga. App. 285, 582 S.E.2d 224 (2003).

Directed verdict on breach of confidential relationship claim. — Directed verdict for a seller on the buyers' breach of a confidential relationship claim was reversed because there was a fact issue as to whether the seller exercised a controlling influence over the buyers in the buyer's application for a mobile home permit, such that the buyers were kept from discovering zoning for the property or that the seller had an increased duty to disclose the zoning. *Howard v. Barron*, 272 Ga. App. 360, 612 S.E.2d 569 (2005).

Directed verdict in government entity's nuisance action. — Trial court

erred in granting a city's motion for judgment notwithstanding the verdict and in vacating an owner's attorney fees award because there was sufficient evidence that the city acted in bad faith by refusing to take any action to alleviate damage that the city knew or should have known was being caused by the city's sewer lines because: (1) the city was notified of raw sewage feces floating in a ravine across the street from the property; (2) the city received numerous complaints about an odor in the area; (3) the city's own samplings confirmed that the property was contaminated by unsafe levels of fecal coliform bacteria; and (4) the city's partial compliance with a Georgia Environmental Protection Department order confirmed that the sewer system contained numerous cracks, openings, and separations. *City of Atlanta v. Landmark Envtl. Indus.*, 272 Ga. App. 732, 613 S.E.2d 131 (2005).

Directed verdict against insurer. — Trial court's denial of appellee insurer's motion for a directed verdict, pursuant to O.C.G.A. § 9-11-50, in the appellant insurer's declaratory judgment action regarding contested motor vehicle coverage was proper as the appellant met the three-step requirement for institution of a declaratory judgment action since there was no suit pending that could have gone into default or been prejudiced, the declaratory judgment action was timely filed, and it provided a reservation-of-rights letter which listed the insured's lack of cooperation as the basis for questioning coverage; although the appellant later provided four additional reasons in the declaratory judgment action, including fraud and misrepresentation, which was found by the jury, such additional reasons did not have to be set forth in the reservation-of-rights letter as amendments under O.C.G.A. § 9-11-15(a) were permissible. *Gov't Emples. Ins. Co. v. Progressive Cas. Ins. Co.*, 275 Ga. App. 872, 622 S.E.2d 92 (2005).

Directed verdict in medical negligence cases. — In an action by a patient who was allergic to latex alleging that the hospital's negligent use of a latex catheter caused the patient to develop interstitial cystitis (IC), despite the medical expert's admission that the causes of IC were

unknown and that no research linked IC to latex allergies, the expert's testimony that allergic reactions could trigger IC, and did so in the patient's case, was sufficient evidence of medical causation to justify denying the hospital's motion for judgment notwithstanding the verdict. *EHCA Dunwoody, LLC v. Daniel*, 277 Ga. App. 783, 627 S.E.2d 830 (2006).

Directed verdicts in probate cases.

— Trial court did not err in denying the niece's motion for directed verdict under O.C.G.A. § 9-11-50(a), as some evidence supported the finding that the deed naming the niece as grantee was never delivered to the niece as required under O.C.G.A. § 44-5-30; there was evidence that the original deed was found in the decedent's safe deposit box and that the key to the box had been in the decedent's control when the decedent died. *Robinson v. Williams*, 280 Ga. 877, 635 S.E.2d 120 (2006).

Directed verdict in personal injury case. — In a personal injury action, because a fact issue was presented as to whether, at the time of the incident, a partnership's employee was within the scope of employment at the time a pedestrian was injured, and the jury was properly charged on this issue, the pedestrian was properly denied a directed verdict. *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

Directed verdict in property cases.

— Given evidence that the father performed part of the agreement at issue with a son for the latter to transfer title to a house, specifically by selling the father's house and paying the son the proceeds in exchange for the son's promise to convey, when the son failed to convey the house the trial court properly granted the father a constructive trust based on fraud, denied the son a directed verdict, and sustained the jury's verdict. *Perry v. Perry*, 285 Ga. App. 892, 648 S.E.2d 193 (2007).

Directed verdict in fraud in the inducement case. — Trial court did not err in denying a boyfriend a directed verdict on a fraud in the inducement claim asserted by the boyfriend's girlfriend, given evidence of the personal nature of their relationship which caused the girlfriend

to place trust and confidence in the boyfriend's repeated promises of marriage and believe that the boyfriend was acting in the girlfriend's best interest by taking the monies loaned to use for a business, which would ultimately allow the boyfriend to repay the girlfriend and support them after they were married. *Tankersley v. Barker*, 286 Ga. App. 788, 651 S.E.2d 435 (2007), cert. denied, 2007 Ga. LEXIS 742 (Ga. 2007).

Directed verdict in failure to warn case.

— Trial court did not err in failing to direct a verdict for a vehicle manufacturer in a failure to warn action due to lack of causation evidence as representatives of victims who died as a result of an accident involving the van provided evidence to support the causation element by showing that the van had a high center of gravity and lacked stability when fully loaded, and that the driver would not have operated the van if there had been a warning about the instability. *Bagnell v. Ford Motor Co.*, 297 Ga. App. 835, 678 S.E.2d 489 (2009).

Directed verdict in will contest. — Directed verdict for the caveators of a will was improper, although the witnesses to the will had died, given prior testimony from one witness by interrogatory and deposition that the decedent, who was blind, had signed the will voluntarily and knew it was the decedent's will; under O.C.G.A. § 53-5-23(a), this evidence presented a jury question. *Ammons v. Clouds*, 295 Ga. 225, 758 S.E.2d 282 (2014).

Directed verdict in rescission claim.

— Trial court did not err in denying the seller's motion for a directed verdict on the purchaser's rescission claim for fraud because the purchaser made a sufficient offer to restore to support a claim for rescission pursuant to O.C.G.A. § 13-4-60 and the purchaser did not have to return the car when the seller refused to give the purchaser the money back. *Krayev v. Johnson*, 327 Ga. App. 213, 757 S.E.2d 872 (2014).

In a medical malpractice action, the trial court erred by directing a verdict in favor of the defending urologist because a trier of fact could have concluded that the urologist did not simply offer informal assistance to colleagues, but by answering

Directed Verdict (Cont'd)**2. Grounds for Directed****Verdict** (Cont'd)

the emergency call, conferring with other doctors, then ordering or suggesting specialized tests, was acting as the patient's urologist and, therefore, consented to a physician-patient relationship. *Smith v. Rodillo*, 330 Ga. App. 365, 765 S.E.2d 432 (2014).

Jury verdict in favor of a former client was upheld on appeal because the trial court properly admitted evidence of the arbitration award involving the fee dispute and did not err by denying the firm a directed verdict on all claims since there was evidence to support the claims that the firm performed work on the former client's divorce case and billed in a manner that placed the firm's financial interests above the interests of the former client, in violation of both the terms of the parties' contract and the firm's fiduciary duties. *Cordell & Cordell, P.C. v. Gao*, 331 Ga. App. 522, 771 S.E.2d 196 (2015).

If evidence is in conflict on an issue and does not demand a verdict, it is error to direct a verdict thereon. *Macon Tel. Publishing Co. v. Elliott*, 165 Ga. App. 719, 302 S.E.2d 692 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

If there is any material conflict in the evidence, and when the evidence introduced, if all reasonable deductions and inferences therefrom, does not demand a particular verdict, it is error to direct a verdict. *Garrison v. Garmon*, 94 Ga. App. 868, 96 S.E.2d 550 (1957).

Because the evidence was conflicting concerning the mutual intention of the parties in a contract case, a material issue of fact remained for resolution by the jury, and the trial court erred in granting the motion for a directed verdict. *Doyle v. Estes Heating & Air Conditioning, Inc.*, 173 Ga. App. 491, 326 S.E.2d 846 (1985).

Conflicting evidence in contract dispute meant no directed verdict. — Because there was conflicting evidence as to material issues of fact with regard to the defendant's contractual liability to the plaintiff for the debt evidenced by one note and concerning the capacity in which the

defendant executed another note, the trial court erred in directing a verdict in favor of the plaintiff. *Smith v. Allen*, 180 Ga. App. 624, 349 S.E.2d 548 (1986).

Directed verdict not proper procedure for seeking particularity of fraud allegations. — Will propounder's claim in a motion for a directed verdict that caveators failed to plead fraud with particularity was procedurally improper as the proper remedy to seek more particularity was by a motion for a more definite statement or by the rules of discovery. *Odom v. Hughes*, 293 Ga. 447, 748 S.E.2d 839 (2013).

If there is a conflict in material evidence, it is reversible error to direct a verdict. *Duncan v. Mayfield*, 209 Ga. 882, 76 S.E.2d 805 (1953); *Livingston v. Livingston*, 210 Ga. 607, 82 S.E.2d 1 (1954).

Evidence does not demand a verdict for any party if it is in sharp conflict concerning material issues. *Peacock Constr. Co. v. Turner Concrete, Inc.*, 120 Ga. App. 357, 170 S.E.2d 440 (1969).

Directed verdict does not lie if there is conflict in the evidence as to any material issue and the verdict is not demanded. *Whiddon v. Forshee*, 228 Ga. 133, 184 S.E.2d 349 (1971).

It is error to direct a verdict if conflicts exist that would necessitate a jury's resolution. *Talmadge v. Talmadge*, 241 Ga. 609, 247 S.E.2d 61 (1978).

Contradictory testimony of litigant. — On motion for directed verdict, the general rule applies that testimony of a party litigant that is contradictory, vague, inconclusive, and ambiguous must be construed most strongly against such litigant when that party is the sole witness in that party's behalf. *Johnson v. Curenton*, 127 Ga. App. 687, 195 S.E.2d 279 (1972).

General principle concerning adverse construction of a litigant's equivocal and contradictory testimony clearly applies on consideration of a directed verdict, if the sole evidence on essential elements submitted by the party is that party's own testimony. *Johnson v. Curenton*, 127 Ga. App. 687, 195 S.E.2d 279 (1972).

If the evidence relied upon to support a

party's case is from that party, and this testimony is vague, contradictory, or evasive, it must be construed against that party; and if that version of the testimony most unfavorable shows that the verdict should be against that party, unless other evidence is presented tending to establish a right to recover, the party is not entitled to a favorable finding. *Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968).

Because there was no conflict in the evidence as to the issue of an insured's receipt of an umbrella policy, the trial court did not err in directing a verdict in favor of an insurer as to that policy; the insured's testimony that the insured could not say if the insured had read the policy because the insured did not know if the insured had received the policy contradicted the insured's earlier testimony that the insured had actually scanned the policy. *Gov't Emples. Ins. Co. v. Kralick*, 313 Ga. App. 492, 722 S.E.2d 107 (2012).

Evidence strongly supporting, but not demanding, a particular finding does not warrant a directed verdict. *Life Ins. Co. v. Dodgen*, 148 Ga. App. 725, 252 S.E.2d 629 (1979); *Barber v. Atlas Concrete Pools, Inc.*, 155 Ga. App. 118, 270 S.E.2d 471 (1980); *Sugrue v. Flint Elec. Membership Corp.*, 155 Ga. App. 481, 270 S.E.2d 921 (1980); *United Fed. Sav. & Loan Ass'n v. Connell*, 166 Ga. App. 329, 304 S.E.2d 131 (1983).

If the evidence strongly supports, but does not demand, a certain verdict, the factual determination remains for the jury. *Ranger Constr. Co. v. Robertshaw Controls Co.*, 166 Ga. App. 679, 305 S.E.2d 361 (1983); *Timber Equip., Inc. v. McKinney*, 166 Ga. App. 757, 305 S.E.2d 468 (1983).

Merely having strength or weight of evidence in one's favor is not sufficient cause for the court to take the case from the jury by direction of verdict. *Heaton v. Smith*, 121 Ga. App. 348, 174 S.E.2d 197 (1970).

Evidence preponderates in one party's favor insufficient. — If there is any material conflict in the evidence and the evidence introduced, with all reasonable deductions and inferences therefrom, does not demand a particular verdict, it is error

to direct a verdict, even though the evidence may preponderate strongly in favor of one party. *Shockey v. Baker*, 212 Ga. 106, 90 S.E.2d 654 (1955).

Court cannot properly direct a verdict merely because it may find the strength or weight of evidence is on one side, or because it might grant a new trial if a verdict should be returned against what it determines to be the preponderance of the evidence. *Northwestern Univ. v. Crisp*, 211 Ga. 636, 88 S.E.2d 26 (1955); *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962); *Kesler v. Kesler*, 219 Ga. 592, 134 S.E.2d 811 (1964).

Trial judge cannot properly direct a verdict merely because the evidence preponderates to one side rather than the other. *Cook v. Sheats*, 222 Ga. 70, 148 S.E.2d 382 (1966).

Judge cannot direct verdict because the judge thinks the strength or weight of evidence is on one side, or because the judge might grant a new trial if a verdict should be returned that is contrary to a preponderance of the evidence. *Findley v. McDaniel*, 158 Ga. App. 445, 280 S.E.2d 858 (1981).

Verdict should not be directed unless there is no issue of fact or proved facts can sustain no other finding than that directed. *Pennington v. Wynne*, 149 Ga. App. 151, 253 S.E.2d 830 (1979).

Verdict should not be directed unless there is no issue of fact, or unless proved facts, viewed from all possible legal points of view, sustain no other finding than that directed. *Bodge v. Salesworld, Inc.*, 154 Ga. App. 65, 267 S.E.2d 505 (1980).

Judgment not obtained when plaintiff neglects to show some material evidence. — Directed verdict is not a vehicle to obtain a judgment on the technical grounds that a plaintiff has merely neglected to show some evidence material to the plaintiff's case. Particularly, since the trial court may in the court's discretion permit the plaintiff to reopen the plaintiff's case and offer some neglected evidence, in such a case a directed verdict is generally improvident. *Able-Craft, Inc. v. Bradshaw*, 167 Ga. App. 725, 307 S.E.2d 671 (1983).

No error in court's refusal to grant

Directed Verdict (Cont'd)**2. Grounds for Directed Verdict (Cont'd)****motion in dispossessory proceeding.**

— See *May v. Poole*, 174 Ga. App. 224, 329 S.E.2d 561 (1985).

It is never error to refuse to grant motion for directed verdict when questions of fact remain, even though the evidence is strongly supportive of the appellant's contentions. *Eddie Parker Interests, Inc. v. Booth*, 160 Ga. App. 15, 285 S.E.2d 753 (1981).

In reviewing a trial court's denial of a motion for directed verdict, an appellate court reviews and resolves the evidence and any doubts or ambiguities in favor of the verdict; a directed verdict is not appropriate unless there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a certain verdict. The buyers' motion for a directed verdict on the issue of fraud in an action by the seller for rescission of a quitclaim deed was proper when jury questions existed regarding whether the buyers' real estate agent misrepresented, or failed to disclose after being questioned, whether adjoining landowners had made improvements on a disputed strip of land that was covered by the quitclaim deed. *Cistola v. Daniel*, 266 Ga. App. 891, 598 S.E.2d 535 (2004).

Denial of motion only error when no material issue exists. — Denial of motion for directed verdict made at the close of all the evidence is error only if the evidence fails to disclose any material issue for jury resolution. *Brumby v. Brooks*, 234 Ga. 376, 216 S.E.2d 288 (1975), later appeal, 140 Ga. App. 210, 230 S.E.2d 359 (1976).

Refusal to direct verdict not error when verdict not demanded. — If evidence at the time of the motion for directed verdict is subject to more than one construction and does not demand the verdict for either party, the trial court does not err in denying such motion. *Powell v. Ferguson Tile & Terrazzo Co.*, 125 Ga. App. 683, 188 S.E.2d 901 (1972), overruled on other grounds, *Fountain v. Dixie Fin. Corp.*, 252 Ga. 543, 314 S.E.2d 906 (1984).

Directed verdict in dispossession, conversion, and theft case.

— In an action for wrongful dispossession, trespass, conversion, and theft, the plaintiffs tendered into evidence a list of belongings taken from their mobile home and a price estimate on those items and testified that they were recently married, that the majority of their belongings were newly acquired as wedding or bridal shower gifts, some still in their original packages, and that the items had been priced by plaintiffs either by contacting the gift donors or by checking the Sears catalogue, and also testified about the condition and estimated value of their few older belongings; inasmuch as this evidence and the inferences drawn therefrom did not demand a verdict for the defendants, the denial of the guardians' motion for directed verdict was not error. *Sanders v. Hughes*, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Injured party was properly awarded damages for litigation expenses under O.C.G.A. § 13-6-11 as a driver's testimony tended to show that the injured party did not yield the right-of-way and that the driver was liable; the trial court was authorized to conclude that a bona fide controversy did not exist as to liability for the automobile accident and did not err by allowing evidence of the injured party's litigation expenses, denying the driver's motion for a directed verdict, or in charging the jury on the claim for litigation expenses. *Daniel v. Smith*, 266 Ga. App. 637, 597 S.E.2d 432 (2004).

Court cannot direct verdict if there is any reasonable inference supported by evidence that would authorize verdict to the contrary. *Findley v. McDaniel*, 158 Ga. App. 445, 280 S.E.2d 858 (1981).

Even if evidence strongly supports but does not demand a particular finding, directed verdict is not warranted. *Walnut Equip. Leasing Co. v. Williams*, 159 Ga. App. 679, 285 S.E.2d 54 (1981).

Direction of verdict proper only if verdict for opposite party would be set aside. — In order for direction of verdict to be error, it must appear that there was some evidence, together with all reasonable deductions and inferences

from the evidence, to support a verdict for the party against whom the verdict was directed; and in determining this question, evidence must be construed in the light most favorable to the party against whom the verdict was directed. *Whitaker v. Paden*, 78 Ga. App. 145, 50 S.E.2d 774 (1948); *Curry v. Durden*, 103 Ga. App. 371, 118 S.E.2d 871 (1961).

It is not reversible error to direct verdict if no other finding than that directed can legally be reached or sustained. *Charles S. Jacobowitz Co. v. Ferguson*, 78 Ga. App. 589, 51 S.E.2d 581 (1949).

There is no error in directing a verdict that is inevitable and the only legal result of the pleadings and evidence. *City of Abbeville v. Jay*, 205 Ga. 743, 55 S.E.2d 129 (1949); *Mize v. Paschal*, 206 Ga. 189, 56 S.E.2d 266 (1949); *Turner v. Maryland Cas. Co.*, 104 Ga. App. 693, 122 S.E.2d 479 (1961).

Because there were issues of fact that should have been submitted to the jury, the trial judge committed error in directing a verdict for the defendant. *Williams v. Williams*, 206 Ga. 395, 57 S.E.2d 337 (1950).

Direction of a particular verdict is not error if, under the pleadings and evidence, no other legal verdict could be reached. *Williams v. Harris*, 207 Ga. 576, 63 S.E.2d 386 (1951).

It is error to direct verdict unless, construing all the evidence in the light most favorable to the losing party, judgment in that party's favor would not be allowed to stand. *Powell v. Barker*, 96 Ga. App. 592, 101 S.E.2d 113 (1957).

If more than one inference can be drawn from evidence, the duty of solving the mystery should be placed upon the jury and not the trial judge; this is true with respect to circumstantial evidence as well as direct evidence. *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962).

Verdict may only be directed in situations in which, if there were a determination by the jury the other way, it would have to be set aside by the court. *State Farm Mut. Auto. Ins. Co. v. Snyder*, 125 Ga. App. 352, 187 S.E.2d 878 (1972); *Raybon v. Reimers*, 138 Ga. App. 511, 226 S.E.2d 620 (1976); *Kalish v. King Cabinet*

Co., 140 Ga. App. 345, 232 S.E.2d 86 (1976); *Kelly Ford, Inc. v. Paracsi*, 141 Ga. App. 626, 234 S.E.2d 170 (1977); *Georgia Power Co. v. Nix*, 147 Ga. App. 681, 250 S.E.2d 17 (1978); *Spivey v. Eavenson*, 150 Ga. App. 429, 258 S.E.2d 54 (1979).

Reasonable people could not differ.

— It is only when reasonable people may not differ as to the inferences to be drawn from evidence that it is proper to direct verdict. *Canal Ins. Co. v. Tate*, 111 Ga. App. 377, 141 S.E.2d 851 (1965).

Trial judge has no right whatever to weigh evidence or decide any issue of fact,

and before the court can legally direct a verdict for the defendants, the judge must find that there is no evidence of any kind supporting the plaintiff's position. *Barber v. Atlas Concrete Pools, Inc.*, 155 Ga. App. 118, 270 S.E.2d 471 (1980); *Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Johnson*, 161 Ga. App. 634, 288 S.E.2d 320 (1982).

It is only if reasonable persons may not differ as to the inferences to be drawn from the evidence that it is proper for the judge to remove the case from jury consideration. *Bennett v. Haley*, 132 Ga. App. 512, 208 S.E.2d 302 (1974); *Raybon v. Reimers*, 138 Ga. App. 511, 226 S.E.2d 620 (1976); *Brown v. Truluck*, 239 Ga. 105, 236 S.E.2d 60 (1977); *Plough Broadcasting Co. v. Dobbs*, 163 Ga. App. 264, 293 S.E.2d 526 (1982).

Question of prima facie case determinative.

— On motion for directed verdict, question is whether testimony on the plaintiff's behalf and the reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff, make out a prima facie case allowing the plaintiff to have the jury pass on the alleged cause of action. *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972), *aff'd*, 480 F.2d 158 (5th Cir.), *cert. denied*, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973); *Simmons v. Boros*, 176 Ga. App. 346, 335 S.E.2d 662 (1985), *aff'd*, 255 Ga. 524, 341 S.E.2d 2 (1986).

In a suit on open account, oral evidence concerning the amount of the defendant's indebtedness to the plaintiff was introduced without objection. This evidence made out a prima facie case and it was not necessary for the plaintiff to introduce

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other documents reflecting the balance due in order to prevail against the defendant's motion for a directed verdict. *Professional Ins. Servs., Inc. v. Sizemore Elec. Co.*, 188 Ga. App. 463, 373 S.E.2d 276 (1988).

Prima-facie negligence case. — Although it is true that questions of negligence are ordinarily for the trier of fact, if the plaintiff's evidence suggests only the elements of duty and injury, and nothing is offered to indicate breach of duty or causation, the plaintiff fails to establish the elements of negligence and thereby to make out a prima-facie case. *Smith v. Morico*, 166 Ga. App. 737, 305 S.E.2d 465 (1983).

Negligence, diligence, contributory negligence, and proximate cause are peculiarly matters for the jury, and the court should not take the place of the jury in solving them, except in plain and indisputable cases. *Eyster v. Borg-Warner Corp.*, 131 Ga. App. 702, 206 S.E.2d 668 (1974).

Because, in an auto accident case, on the evidence of record, reasonable men could have differed on whether the negligence of the defendant was the proximate cause of the plaintiff's claimed permanent injuries and the evidence was neither plain nor palpable, nor was a verdict for the plaintiff demanded, it was not error for the trial court to refuse to direct a verdict for the plaintiff on the issue of liability. *Campbell v. Forsyth*, 187 Ga. App. 352, 370 S.E.2d 207 (1988).

Directed verdict in fraud action. — In an action for fraud, because the evidence showed the sellers of a restaurant made at least two significant misrepresentations, it was a jury question whether additional diligence by the buyer was necessary; the trial court did not err by denying the seller's motion for a directed verdict. *Southern Store & Restaurant Equip. Co. v. Maddox*, 195 Ga. App. 2, 392 S.E.2d 268, cert. denied, 195 Ga. App. 2, 392 S.E.2d 268 (1990).

Direction of verdict on liability issue. — Trial judge may, under the correct

circumstances, direct verdict for the plaintiff as to liability in a personal injury action, while leaving damages issue to the jury. *Johnson v. Curenton*, 127 Ga. App. 687, 195 S.E.2d 279 (1972).

Directed verdict in will contest cases. — In a will contest, the trial court did not err in directing a verdict in favor of the propounder on the caveators' claim of improper execution because the evidence was insufficient to raise a conflict as to that issue. *Dyer v. Souther*, 272 Ga. 263, 528 S.E.2d 242 (2000).

Directed verdict in contractor cases. — When an independent subcontractor sued a retailer for injuries occurring while the subcontractor was doing work on the retailer's premises, the retailer was entitled to a directed verdict in its favor as the retailer exercised no control over the subcontractor's work, and any control over that work was contractually ceded to the subcontractor and to the contractor who hired the subcontractor. *Neiman-Marcus Group, Inc. v. Dufour*, 268 Ga. App. 104, 601 S.E.2d 375 (2004).

Directed verdict in dog bite cases. — Dog-bite victim sued the dog's owners, alleging the owners failed to warn the victim of the dog's vicious tendencies. As there was no evidence the dog had ever previously bitten or attacked anyone, and an owner's alleged statement that children would not "have to worry about getting bit" if the children stayed away from the owner's truck, when the dog was chained in the truck bed, was insufficient to establish the owners' knowledge of the dog's vicious propensity; thus, the owners were properly granted a directed verdict on this claim. *Huff v. Dyer*, 297 Ga. App. 761, 678 S.E.2d 206 (2009).

Direction of verdict on residency issue. — When a contractor stated under oath that home, office, business records, and reporting requirements were maintained in Tennessee, the trial court's factual determination as to nonresidency was correct and did not raise a jury issue. *Gorrell v. Fowler*, 248 Ga. 801, 286 S.E.2d 13, appeal dismissed, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982).

No direction of verdict when plaintiff raised issue of fraudulent conveyance. — Because the plaintiff raised the

issue of a fraudulent conveyance and established that the signature on the warranty deed was not made by the deceased, a directed verdict for the defendant was not required. *Smith v. Greenwood*, 247 Ga. 632, 278 S.E.2d 380 (1981).

In an insureds' suit against an insurer, because there was the slightest evidence of waiver of policy requirement of written proof of loss on the insurer's part, it was error to direct a verdict for the appellee-insurance company; rather, a jury question was presented. *Worth v. Georgia Farm Bureau Mut. Ins. Co.*, 174 Ga. App. 194, 330 S.E.2d 1 (1985).

Directed verdict proper when issue of ownership previously decided. — Directed verdict for a seller on the buyers' fraud claim was proper because, although the jury could find that the seller intentionally concealed from the buyers that the property's zoning required five-acres for a home to induce the buyers to buy the one-acre tract, misrepresentation as to zoning could not support a fraud claim. *Howard v. Barron*, 272 Ga. App. 360, 612 S.E.2d 569 (2005).

Trial court properly directed a verdict against the county and in favor of the homeowners on the issue of the county's ownership interest in a dam in the homeowners' suit seeking to limit the county's ability to breach the dam; that issue was resolved in a prior administrative action and appeals from that determination in which the county was found to be an owner required to repair or breach the dam pursuant to the Georgia Safe Dams Act, O.C.G.A. § 12-5-370 et seq., and the suit did not concern whether there were additional owners of the dam. *Forsyth County v. Martin*, 279 Ga. 215, 610 S.E.2d 512 (2005).

Trial court properly directed a verdict in favor of an engineering firm on the landowners' claims relating to the landowner's standing water and drainage issues because regardless of whether these claims sounded in nuisance, trespass, or negligence, causation was a central element which the landowners failed to support with any evidence. Further, the mere fact that one event chronologically followed another was alone insufficient to establish a causal relation between the events.

Walls v. Moreland Altobelli Assocs., 290 Ga. App. 199, 659 S.E.2d 418 (2008).

Directed verdict in damages determination. — Trial court erred in directing a verdict for the defendants in a fraud case because of insufficient evidence of damages as the evidence, construed in favor of the plaintiff, provided the jury with a basis to estimate the plaintiff's damages. *McCannon v. McCannon*, 231 Ga. App. 601, 499 S.E.2d 684 (1998).

Trial court erred in directing a verdict as to damages as a landlord presented a detailed, itemized statement describing each item destroyed by water putting out a fire negligently caused by a tenant's guest and showing its approximate wholesale cost as the jury could determine damages without speculation or guess work; further, the landlord had a specific memory of the price the landlord paid for three planetary assemblies and seven blowers and there was testimony as to their fair market value. *Hodges v. Vara*, 268 Ga. App. 815, 603 S.E.2d 327 (2004).

Trial court erred in failing to order a new trial on the issue of damages after the court granted a directed verdict in favor of a church in the church's action against an adjoining landowner to establish a boundary line between their properties because when the trial court entered the judgment for the church the court should have also refused to enter judgment on the damages portion of the jury's verdict and should have granted a new trial to the church on the issue of damages; if any evidence supported the jury's award in favor of the landowner, then the jury's award of no damages to the church would have been correct. *Spivey v. Smith*, 303 Ga. App. 469, 693 S.E.2d 830 (2010).

Defendant not entitled to fees when directed verdict should have been granted. — Because the trial court erred in not granting a plaintiff's motion for a directed verdict as to the defendant's counterclaim, the defendant was not entitled to fees under O.C.G.A. § 13-6-11 for prosecuting a successful counterclaim. *Caincare, Inc. v. Ellison*, 272 Ga. App. 190, 612 S.E.2d 47 (2005).

Appellate review. — Standard used to review grant or denial of directed verdict is the "any evidence" test. Georgia Dep't of

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Human Resources v. Montgomery, 248 Ga. 465, 284 S.E.2d 263 (1981).

Standard of appellate review of a trial court's denial of a motion for a direct verdict is the "any evidence test"; when evidence was sufficient to support the jury's verdict, the trial court did not err in denying the appellant's motion for directed verdict. *Little v. Little*, 173 Ga. App. 116, 325 S.E.2d 624 (1984).

Application of law in effect at time of ruling. — Although a motion for a directed verdict must state specific grounds therefor as a basis for appeal, it obviously is not possible to state grounds which do not exist at the time; and, to give effect to the rule that the law is applied as it exists at the time of appeal, the movant, who by new law is entitled to a certain judgment, should not be deprived of it for failure to state as grounds for directed verdict what did not exist at the time. *Hensel Phelps Constr. Co. v. Johnson*, 164 Ga. App. 404, 298 S.E.2d 261 (1982).

Directed verdict in negligence claim. — Because the evidence unequivocally showed that the plaintiff's knowledge of the danger of the wasps swarming was equal to the defendant-landowner's knowledge, the evidence demanded a verdict in the defendant's favor on the plaintiff's claim of negligence based on the defendant's superior knowledge of the danger. *Beard v. Fender*, 179 Ga. App. 465, 346 S.E.2d 901 (1986).

Directed verdict when inadequate demand. — Because the testimony of the defendant's agent established without any evidence to the contrary that the only demand for possession of the premises had been made on the previous tenant, not on the defendant, the presumption raised by the allegation in the affidavit that demand was made was rebutted by direct and positive evidence; a directed verdict in the defendant's favor was thereby demanded, and the trial court erred by denying the appellant's motion. *Jet Air, Inc. v. Management/USA, Inc.*, 180 Ga. App. 648, 350 S.E.2d 40 (1986).

Directed verdict on attorney's fees.

— Because the plaintiff failed to offer evidence as to what portion of attorney fees, if any, was attributable to the defendant's negligence, or whether the plaintiff's estimate of legal expenses was a reasonable value of the professional services rendered, the plaintiff did not carry the plaintiff's burden of proof, and the trial court properly directed a verdict on this issue. *Redwine v. Windham*, 237 Ga. App. 149, 513 S.E.2d 13 (1999).

Directed verdict on issue of liability in auto accident case. — Evidence having shown that the plaintiff was completely free of negligence and the defendant's testimony having revealed no legal reason or excuse for the defendant's failure to avoid colliding with the rear of the plaintiff's automobile, the trial judge did not err in directing a verdict for the plaintiff on the question of liability. *R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177, 539 S.E.2d 873 (2000).

Directed verdict in dog bite cases.

— Trial court correctly granted a directed verdict as to the dog owner's liability after the injured party failed to submit evidence that the dog owner knew that the dog had the propensity to commit the act that caused the injury and that the dog had ever bit anyone, or that the dog had a tendency to attack humans. However, the trial court did abuse the court's discretion in failing to allow the injured party to reopen the evidence in order to submit a certified copy of the leash law as it did not appear that reopening the evidence would have subjected the dog owner to unfairness or undue prejudice, or that the injured party was trifling with the court or intentionally delaying the trial. *Phiel v. Boston*, 262 Ga. App. 814, 586 S.E.2d 718 (2003).

Directed verdict on indemnity claim. — Trial court properly granted the insurer's motion for a directed verdict on the insurer's indemnity claim against the mortgage broker since the broker never requested that the insurer litigate or defend against the claim, and the insurer did confirm that the mortgage company either had paid or would have to pay damages in excess of the \$50,000 bond. *Nguyen v. Lumbermens Mut. Cas. Co.*,

261 Ga. App. 553, 583 S.E.2d 220 (2003).

Directed verdict on fraud claim. — Directed verdict was proper on the buyer's fraud claims because the defendants admitted the foundation wall was defective; the disagreement went to the repair method not the condition of the wall. *McEntyre v. Edwards*, 261 Ga. App. 843, 583 S.E.2d 889 (2003).

Directed verdict on guaranty. — In an action to recover from the guarantor, the trial court's entry of a directed verdict was upheld when the undisputed evidence showed that the guarantor did not withdraw the guaranty in the manner expressly required by its terms, and there was no evidence that the retailer consented to revocation on any terms other than those specified in the guaranty. *Hill Roofing Co. v. Lowe's Home Ctrs., Inc.*, 265 Ga. App. 822, 595 S.E.2d 638 (2004).

In an action filed by a bank to recover on a promissory note, as well as to recover on the guaranty tied to that note, the trial court properly granted a directed verdict to the bank, and against both the debtor and the guarantor, as the bank made out the bank's prima facie case by showing that the note was executed and the debtor remained liable thereunder; moreover, the guaranty's broad language obligated the guarantor to the bank, and no issue of fact existed as to whether the guarantor was discharged by any increased risk or any purported novation. *Fielbon Dev. Co. v. Colony Bank*, 290 Ga. App. 847, 660 S.E.2d 801 (2008).

Directed verdict on conversion issue. — Trial court properly entered a directed verdict in favor of the new owners on the former company president's claims for conversion when there was a dispute as to whether the president had a legal right to the funds from the check on which payment was stopped and the president was the guarantor rather than the owner of the trucks the president claimed the president was owed for. *Habel v. Tavormina*, 266 Ga. App. 613, 597 S.E.2d 645 (2004).

Directed verdict in defective construction case. — Customer failed to show that a construction company owed the customer a duty in the customer's action to recover for an alleged defective

construction of the customer's home, and also failed to show any demonstrable damages; thus, the trial court did not err in entering a directed verdict against the customer. *Wise v. Tidal Constr. Co.*, 270 Ga. App. 725, 608 S.E.2d 11 (2004).

Directed verdict proper following child's drowning. — Trial court did not err in granting the defendants' motion for a directed verdict as a child who drowned in an apartment complex swimming pool was capable of appreciating the risk associated with swimming in the pool, and the child's parent explicitly instructed the child to stay out of the deep end of a pool and never to swim without adult supervision. *Rice v. Oaks Investors II*, 292 Ga. App. 692, 666 S.E.2d 63 (2008), cert. denied, 2008 Ga. LEXIS 963 (Ga. 2008).

Directed verdict on fraudulent conveyance and negligent construction. — In a case involving a home buyer's fraudulent conveyance and negligent construction claims against a corporation, given the buyer's failure to present required evidence on the buyer's attorney fee claim under O.C.G.A. § 13-6-11, there was no error in the trial court's refusal to submit the issue to the jury and in directing a verdict on this claim. *Sims v. GT Architecture Contrs. Corp.*, 292 Ga. App. 94, 663 S.E.2d 797 (2008).

Directed verdict in dog bite cases. — Evidence that a dog might have previously harmed a small kitten and puppy did not indicate that the owner had any reason to suspect the dog had a propensity to bite, and was properly excluded. Absent evidence that the dog had any known vicious tendency, the trial court did not abuse the court's discretion in directing a verdict for the dog owner. *Kringle v. Elliott*, 301 Ga. App. 1, 686 S.E.2d 665 (2009).

Directed verdict in employment cases. — Because correspondence between the plaintiff and the plaintiff's former employer acknowledged that there was an agreement between the parties, and the plaintiff's testimony and letters between the parties were sufficient to show that the defendant agreed to pay the plaintiff for one-half of the plaintiff's loss on the sale of the plaintiff's house and that the plaintiff had suffered a loss on the

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plaintiff's house, there was evidence to establish a valid contract under Georgia law, and the trial court erred by directing the verdict for the defendant. *Foreman v. Eastern Foods, Inc.*, 195 Ga. App. 332, 393 S.E.2d 695 (1990).

Because an employer did not show that an employee solicited the employer's clients or improperly took its business or money while still an employee, the trial court properly granted the employee's O.C.G.A. § 9-11-50(a) motion for directed verdict on the employer's claims for breach of fiduciary duty, conversion, and interference with business relations. *Thomas County Bd. of Tax Assessors v. Thomasville Garden Ctr., Inc.*, 277 Ga. App. 591, 627 S.E.2d 192 (2006).

Directed verdict in auto injury cases. — Trial court invaded the province of the jury when the court directed a verdict in favor of the truck-operator who had injured the plaintiff's son in a vehicular collision because the plaintiff testified regarding the sound of slamming brakes immediately prior to the collision, thereby raising an inference of negligence. *Cagle v. Ameagle Contractors, Inc.*, 209 Ga. App. 712, 434 S.E.2d 546 (1993).

In a suit seeking recovery for injuries sustained in a vehicular collision, a directed verdict under O.C.G.A. § 9-11-50(a) was erroneous because cross-examination testimony of a treating doctor created a disputed factual issue as to whether all of the medical expenses were caused by the collision, and thus, this issue should have been presented to the jury. *Allen v. Spiker*, 301 Ga. App. 893, 689 S.E.2d 326 (2009), cert. denied, No. S10C0740, 2010 Ga. LEXIS 454 (Ga. 2010).

Directed verdict denied against state port authority. — Trial court correctly denied a directed verdict to the state's port authority as to its liability as the evidence did not demand that a contested signal by authority's employee was in fact given. *Georgia Ports Auth. v. Hutchinson*, 209 Ga. App. 726, 434 S.E.2d 791 (1993).

Military truck refurbishing company's foreign corporate representative was entitled to summary judgment when the representative performed the representative's obligations under the contract, the contract was no longer executory, and it suffered compensatory damages as a result; therefore, the company was not entitled to a directed verdict. *Commercial & Military Sys. Co. v. Sudimat, C.A.*, 267 Ga. App. 32, 599 S.E.2d 7 (2004).

Directed verdict in money owed case. — Motion for a directed verdict was properly denied in a case in which a supplier sought to recover money owed on an account because a purchaser failed to refute the supplier's evidence regarding indebtedness and delivery of goods; the purchaser did not show that the goods were not delivered by way of employee testimony, nor did the purchaser show that the amount allegedly owed was not accurate. *Kroger Co. v. U. S. Foodservice of Atlanta, Inc.*, 270 Ga. App. 525, 607 S.E.2d 177 (2004).

Directed verdict improper when corporate president acts inappropriately. — President's motion for a directed verdict was properly denied as fraud and justifiable reliance were not required to rescind the additional shares of stock that were obtained by telling a director that the director had had sexual relations with an employee and that the employee was threatening to sue the close corporation; the president's actions were illegal, oppressive, and unfairly prejudicial. *Gallagher v. McKinnon*, 273 Ga. App. 727, 615 S.E.2d 746 (2005).

Directed verdict in insurance claim case. — Because the testimony by the insured's daughter as to how the purchase price of the items contained on an inventory of the personal property lost in a fire was calculated, all of which were common household goods, coupled with the proof of loss form showing a depreciated value, was sufficient to uphold the monetary judgment entered, the insurer's motion for a directed verdict on this issue was properly denied. Moreover, the decedent-insured had already submitted a discounted actual cash value in the proof of loss form, the form was timely submitted to the insurer, and it also was admitted

ted at trial absent any objection. *Allstate Indem. Co. v. Payton*, 289 Ga. App. 202, 656 S.E.2d 554 (2008).

Directed verdict improper on issue of waiver. — Trial court properly denied a home remodeling company's motion for a directed verdict on a buyer's breach of home warranty claim as there was evidence that, contrary to the remodeler's assertions, the company had waived the formal notice of defects requirements in a purchase agreement, and the ultimate determination of waiver was a jury question. *RHL Props., LLC v. Neese*, 293 Ga. App. 838, 668 S.E.2d 828 (2008).

Directed verdict in employment cases. — Trial court did not err in denying a motion for a directed verdict filed by the Board of Regents of the University System of Georgia on the issue of whether an assistant professor's employment contract incorporated the Rules and Procedures for Responding to Allegations of Research Misconduct because the Rules were issued by the medical college where the professor worked and were thus "regulations of this institution" within the meaning of the professor's contract, and the contract incorporated the Rules by reference thereto. *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010).

Directed verdict on duty in premises liability action. — Trial court properly denied the Department of Correction's motion for directed verdict as to the issue of duty in a premises liability action by an inmate because there was conflicting evidence as to whether the inmate was in the warden's home on a work detail as a benefit to the department and whether the inmate was warned to stay out of the kitchen and dining area where an accident occurred. *Ga. Dep't of Corr. v. Couch*, 312 Ga. App. 544, 718 S.E.2d 875 (2011).

Directed verdict in slip and fall case. — Trial court properly denied a store's motion for a directed verdict in a slip and fall case because the suing couple presented evidence from which the jury could infer the store's constructive knowledge of the hazard based on water on the floor in the floral area being a recurrent

problem and mats on the floor to catch the water were not in place on the day the wife fell. *The Kroger Co. v. Schoenhoff*, 324 Ga. App. 619, 751 S.E.2d 438 (2013).

Contesting traffic citation meant no directed verdict. — In a suit against the driver of a truck who collided with the back of a pickup in which the plaintiff was a passenger, the plaintiff was not entitled to a directed verdict on the defendant's liability. Although the defendant received a traffic citation and pleaded guilty to the offense, the defendant explained that the defendant did this because the defendant did not understand its significance and had no time to contest the citation, which facts created a jury issue as to liability. *Pryor v. Phillips*, 222 Ga. App. 116, 473 S.E.2d 535 (1996).

Building purchaser was not entitled to judgment as a matter of law, pursuant to O.C.G.A. § 9-11-50(a), in a case in which the purchaser contended that the purchaser had done a portion of the salvage work on a contract to remove building materials from a warehouse that was being demolished prior to the seller barring the purchaser's workers from continuing due to the purchaser's failure to have obtained a certificate of worker's compensation; evidence in the record indicated that the lumber removed was valued in excess of the amount claimed due for the work done and, accordingly, there was evidence upon which the jury's verdict could be supported. *Lawrence v. Bland*, 259 Ga. App. 366, 577 S.E.2d 64 (2003).

Directed verdict was properly denied on negligent hiring and retention claims because there was a conflict in the evidence on the material issue of whether an employee's attack on and killing of a person in the person's apartment was foreseeable by the apartment complex that hired the employee. The issue of foreseeability remained based on evidence: (1) that the property manager who hired the employee knew the employee had been in trouble with the law but kept silent; (2) that the complex did not completely follow the complex's hiring policies; (3) that the complex's hiring process was not designed to determine whether a potential employee was convicted of a

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crime; (4) that the property manager, district manager, and regional manager did not do their respective jobs in hiring the employee; (5) that apartment key control policies were routinely violated; (6) that the complex knew that there were a recent series of unforced entries and robberies; (7) that an employee was suspected, but no criminal background checks were conducted; (8) that the employee was caught in an apartment; and (9) that despite all this, the complex's management still did not undertake criminal background checks of the small number of employees, control access to the keys, or alert residents to the situation. *TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 590 S.E.2d 807 (2003).

No directed verdict in land transaction case. — Motions for a directed verdict on the issue of due diligence in land transaction cases are properly denied if, in addition to inspecting the property, a home buyer asked the seller questions to which the seller gave false, deceptive, or otherwise reckless answers. *Cistola v. Daniel*, 266 Ga. App. 891, 598 S.E.2d 535 (2004).

No directed verdict in negligent misrepresentation claim. — Trial court did not err in denying the airplane company's motions for directed verdict and judgment notwithstanding the verdict on the corporation's claims for negligent misrepresentation because Georgia law did not require written proof of an oral promise as an element of a negligent misrepresentation claim; also, the evidence supported a finding that the company requested the corporation to purchase two Russian missile launchers and told the owner it would process all paperwork and pay \$80,000 for the launchers if the owner delivered the launchers. *Boeing Co. v. Blane Int'l Group, Inc.*, 276 Ga. App. 672, 624 S.E.2d 227 (2005).

No directed verdict in libel action. — Given that defendants, a newspaper, the editor, and a columnist, so doubted the truthfulness of their articles (alleging that a deputy sheriff beat an arrestee to death

with a flashlight) that they refused to print contradictory versions of the events, actual malice could be inferred; as a result, the trial court properly denied their motions for a directed verdict and awarded compensatory and punitive damages to a deputy sheriff in the deputy's libel action. *Lake Park Post, Inc. v. Farmer*, 264 Ga. App. 299, 590 S.E.2d 254 (2003), cert. denied, 543 U.S. 875, 125 S. Ct. 104, 160 L. Ed. 2d 125 (2004).

No directed verdict in conversion case. — In an action between a business and a bank for breach of contract, conversion, and damage to property, the bank's motion for directed verdict on the issue of conversion was properly denied because: (1) the business sufficiently proved ownership of the allegedly converted property and that the bank damaged the business's property; and (2) the seller's valuation of the items was not speculative as the seller was familiar with the items and the seller's figures were based on the value of the items in a used condition. *Cnty. Bank v. Handy Auto Parts, Inc.*, 270 Ga. App. 640, 607 S.E.2d 241 (2004).

No directed verdict in malicious prosecution case. — Trial court properly denied an employer's motion for directed verdict as to a malicious prosecution claim because the employee showed that the employer authorized the employee to write checks to herself and then reported the money stolen, the employer manufactured and post-dated documents to erroneously show that the employee wrote checks in violation of company policy and that the employee was not authorized to use a credit card, and the employer hired investigators to inquire about the alleged theft, who then contacted the police and provided the fabricated documents. *Vojnovic v. Brants*, 272 Ga. App. 475, 612 S.E.2d 621 (2005).

No directed verdict in will contest proceeding. — Trial court correctly denied an executor's motion for directed verdict in an action wherein the child of the testator filed a caveat and objection to the probate of the testator's last will and testament on the grounds that the will was the product of undue influence as sufficient evidence existed to support the conclusion that undue influence was used

to have the testator bequeath the only asset, namely a home, to the caregiver who was hired by the executor. The record established that the executor blocked calls from the testator's child, refused to let the child see the testator, and a confidential relationship was established between the caregiver and the testator as the caregiver took an active role in the planning, preparation, and execution of the will. *Bean v. Wilson*, 283 Ga. 511, 661 S.E.2d 518 (2008).

No directed verdict in personal injury action. — Since the bar allowed combative patrons to remain on the premises for an inordinate amount of time until a patron's foreseeable and permanent injury occurred during a fight, the denial of a motion for a directed verdict by the bar and the bar's owner in the patron's personal injury action was proper. *Mulligan's Bar & Grill v. Stanfield*, 294 Ga. App. 250, 668 S.E.2d 874 (2008), cert. denied, No. S09C0351, 2009 Ga. LEXIS 192 (Ga. 2009).

Directed verdict following improperly entered default judgment. — Trial court erred in denying the vehicle owner's motion for directed verdict as the evidence showed that the wrecker company's default judgment was improperly entered against the vehicle owner since the vehicle owner was improperly notified of the wrecker company's foreclosure action against it after it found the vehicle owner's vehicle abandoned; no dispute existed but that the wrecker company sent notice of the foreclosure proceeding to the wrong address in a different state than where the vehicle owner was located, through no fault of the vehicle owner. *Mitsubishi Motors Credit of Am., Inc. v. Robinson & Stephens, Inc.*, 263 Ga. App. 168, 587 S.E.2d 146 (2003).

Since the adjoining property owners did not show that the owners' had an interest in their neighbors' property, the trial court erred in denying the homebuilders' motion for directed verdict regarding the adjoining property owners' claims for negligent construction, negligent design, and negligent reconstruction as Georgia law did not permit a plaintiff with no interest in the relevant property to bring such claims. *D. G. Jenkins Homes, Inc. v. Wood*, 261 Ga.

App. 322, 582 S.E.2d 478 (2003).

Directed verdict in tortious interference with business and contractual relations. — Trial court erred in denying the airplane company's motions for directed verdict and judgment notwithstanding the verdict on the corporation's claims for tortious interference with business and contractual relations because the corporation did not produce any probative evidence to show that the airplane company's letters or telephone calls induced a breach of contract or caused a third party to discontinue a business relationship with the corporation; the corporation did not present any evidence that any party, including the addressees, had seen or even knew about the letters and telephone calls. *Boeing Co. v. Blane Int'l Group, Inc.*, 276 Ga. App. 672, 624 S.E.2d 227 (2005).

Directed verdict in actions involving a trust. — As the parties did not reach a meeting of the minds as to what type of trust was contemplated for purposes of a former business partner's deposit of insurance proceeds into a trust for the benefit of the deceased partner's minor daughter, there was no enforceable contract under O.C.G.A. § 13-3-1 and the trial court's denial of a directed verdict to the former business partner was error pursuant to O.C.G.A. § 9-11-50. *Oldham v. Self*, 279 Ga. App. 703, 632 S.E.2d 446 (2006).

Directed verdict in recovery on promissory note. — In an action to recover on a promissory note filed by a bank, while the bank might have been negligent in managing and monitoring the loan to the bank's debtor, absent any contrary evidence, the debtor remained obligated under the parties' contractual relationship. Hence, the trial court erred in failing to direct a verdict to the bank on the debtor's claim for negligence, attorney's fees, and punitive damages. *Fielbon Dev. Co. v. Colony Bank*, 290 Ga. App. 847, 660 S.E.2d 801 (2008).

Directed verdict in property cases. — It was error to deny an adjacent lot owner's motions for a directed verdict and judgment notwithstanding the verdict under O.C.G.A. § 9-11-50 in an action by property owners, alleging property dam-

Directed Verdict (Cont'd)**2. Grounds for Directed Verdict** (Cont'd)

age and requesting an award of attorney fees under O.C.G.A. § 13-6-11, as there was a bona fide controversy regarding the adjacent lot owner's liability in the circumstances; further, there was no showing that the adjacent lot owner acted with bad faith. *Lowery v. Roper*, 293 Ga. App. 243, 666 S.E.2d 710 (2008).

Directed verdict in emotional distress claim. — Because an owner did not take a neighbor's threat seriously, and because the neighbor's later trespasses were not committed in the owner's presence, the trial court erred when the court denied the neighbor's O.C.G.A. § 9-11-50(a) motion for directed verdict on the owner's emotional distress claim. *Norton v. Holcomb*, 299 Ga. App. 207, 682 S.E.2d 336 (2009), cert. denied, No. S09C1929, 2009 Ga. LEXIS 804 (Ga. 2009).

3. Time for Motion

There are only two points in time when a motion for directed verdict may be made: (1) at the close of the plaintiff's evidence; and (2) at the close of all the evidence. *Gleaton v. City of Atlanta*, 131 Ga. App. 399, 206 S.E.2d 46 (1974).

Defendant may be able to reserve right to move for directed verdict out of order or at a time not allowed by law, by stipulation. *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975).

Only the defendant may move for directed verdict at the close of the plaintiff's evidence. *Inabinet v. State Farm Mut. Auto. Ins. Co.*, 124 Ga. App. 514, 184 S.E.2d 514 (1971); *Allied Van Lines v. Hanson*, 131 Ga. App. 506, 206 S.E.2d 108 (1974).

Directed verdict for plaintiff not authorized when plaintiff rests. — Under subsection (a) of this section, the defendant, but not the plaintiff, may move for directed verdict at the close of the evidence for the plaintiff, and the trial judge has no authority to direct a verdict for the plaintiff on the plaintiff's motion at

this stage of the trial. *Kay Enters., Inc. v. Shawmac, Inc.*, 124 Ga. App. 225, 183 S.E.2d 503 (1971); *Carpenter v. Citizens & S. Bank*, 143 Ga. App. 765, 240 S.E.2d 106 (1977); *Colonial Film & Equip. Co. v. MacMillan Professional Magazines, Inc.*, 148 Ga. App. 632, 252 S.E.2d 61 (1979).

Direction of verdict prior to presentation of plaintiff's full case erroneous. — When the defendants' motion for directed verdict was made before the plaintiff had a full opportunity to present evidence and was based on the defendants' attorney's allegation that testimony that the plaintiff would elicit from the remaining witnesses would not support the plaintiff's case, the trial judge had no authority to direct a verdict for the defendants on motion at this stage of the trial. *Williams v. Buckley*, 148 Ga. App. 778, 252 S.E.2d 692 (1979).

There is no requirement that the defendant move for directed verdict prior to close of all evidence. *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975).

Motion for directed verdict before evidence closed. — There was no error in the trial court's grant of a truck repairer's motion for directed verdict before the evidence was closed pursuant to O.C.G.A. § 9-11-50(a) as the owner failed to proffer additional evidence on the issue such that the owner could not show that the owner was harmed by the trial court's ruling. *Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc.*, 311 Ga. App. 138, 714 S.E.2d 750 (2011).

Renewal of a motion for directed verdict at the end of the trial is not required. *GLW Int'l Corp. v. Yao*, 243 Ga. App. 38, 532 S.E.2d 151 (2000).

Trial court erred in finding that the carpet supplier was required to move for a directed verdict on the issue of attorney fees awarded to the carpet purchaser at the close of all of the evidence and not only at the close of the carpet purchaser's evidence as there was no statutory requirement that a motion for directed verdict be renewed at the end of the trial. *Lexmark Carpet Mills, Inc. v. Color Concepts, Inc.*, 261 Ga. App. 622, 583 S.E.2d 458 (2003).

O.C.G.A. § 9-11-50 is not to be construed to vitiate motion not made im-

mediately after close of evidence. — To construe this section so narrowly as to vitiate a motion for directed verdict unless it is made immediately after close of all the evidence would defeat the motion's general purpose and violate the express legislative intent that the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) be construed to secure the just, speedy, and inexpensive determination of every action. *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975).

Ruling on motion after verdict returned. — Trial court did not err in deferring the court's ruling on the motion for directed verdict until after the verdict was returned. *Steinberg v. City of Atlanta*, 213 Ga. App. 491, 444 S.E.2d 873 (1994).

Motion may not be made after jury has been charged. — Because the plaintiff made a motion for directed verdict on the issue of liability of the defendant after the jury was charged, having made no such motion during the trial, nothing was presented for the trial court's ruling nor appellate court's review. *Dukes v. Ruth*, 203 Ga. App. 246, 416 S.E.2d 565 (1992).

Reopening of motion prior to charge to jury. — Because the defendant moved for a directed verdict at the close of the plaintiff's evidence, renewal of the defendant's motion after close of all the evidence and oral argument, but prior to the court's charge to the jury, was timely made. *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975).

Motion prior to verdict not improper. — Since a case is viable up to the return of the verdict, and the plaintiff can still withdraw the case from the jury by voluntary dismissal at any time before the verdict via O.C.G.A. § 9-11-41, there is no logical reason why the case could not be withdrawn during such period of viability by a motion for directed verdict, giving the defendant somewhat correlative rights with the plaintiff. *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975).

Trial judge may grant a post-verdict motion for directed verdict of the winning party. Mayor of Savannah v. Palmerio, 242 Ga. 419, 249 S.E.2d 224 (1978).

Regardless of lack of filing of motion for j.n.o.v. — This section does not by the statute's express terms require that a motion for judgment notwithstanding the verdict be filed in order to preserve jurisdiction of the trial court to rule on a motion for directed verdict after the verdict itself has been returned. Mayor of Savannah v. Palmerio, 242 Ga. 419, 249 S.E.2d 224 (1978).

Judge may insulate jury charges from review thereby. — Trial judge may insulate jury charges from appellate review by granting a post-verdict motion for a directed verdict, so long as the appellate court determines that the trial court was correct in granting the motion for a directed verdict. Mayor of Savannah v. Palmerio, 242 Ga. 419, 249 S.E.2d 224 (1978).

Correctness of jury instructions moot when directed verdict granted. — When a motion for directed verdict is properly granted, any question as to the correctness of the trial court's instructions to the jury is moot. Mayor of Savannah v. Palmerio, 242 Ga. 419, 249 S.E.2d 224 (1978).

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Federal rule compared. — Former Code 1933, § 110-113 was in substance copied from Rule 50 of the Federal Rules of Civil Procedure, the only difference being as to time of filing and provision that a new trial may be prayed in the alternative. *Echols v. Thompson*, 211 Ga. 299, 85 S.E.2d 423 (1955).

Function of motion j.n.o.v. — Function of motion for judgment non obstante veredicto is not the same as that of a motion for new trial, but is a summary method of disposing of the entire litigation if it is obvious that the party against whom the motion is directed cannot under any circumstances win the case. *McClelland v. Carmichael Tile Co.*, 94 Ga. App. 645, 96 S.E.2d 202 (1956).

Purpose to provide for final disposition. — Sole purpose of a motion for judgment notwithstanding the verdict is to permit a court to review and reconsider a ruling on an antecedent motion for directed verdict, and the ultimate result intended is avoidance of another trial

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when the law demanded a result for the movant on the first trial. *Shetzen v. C.G. Aycock Realty Co.*, 93 Ga. App. 477, 92 S.E.2d 114 (1956).

Section providing for judgment notwithstanding the verdict (now O.C.G.A. § 9-11-50) provides for correction of error in refusing to direct verdict in the first instance, and obviates necessity for a second trial. *Shetzen v. C.G. Aycock Realty Co.*, 93 Ga. App. 477, 92 S.E.2d 114 (1956).

Purpose of adoption of the law providing for motion for judgment notwithstanding verdict was to provide for final disposition of the case by the appellate court if evidence is insufficient to justify the verdict rendered on any theory or if judgment for the losing party in the trial court is demanded by law. *Southern Bell Tel. & Tel. Co. v. Brackin*, 215 Ga. 225, 109 S.E.2d 782 (1959); *Kicklighter v. Kicklighter*, 217 Ga. 54, 121 S.E.2d 122 (1961).

Purpose of judgment notwithstanding verdict after submission to jury. — Purpose of allowing the trial judge to submit the case to the jury and then grant judgment notwithstanding the verdict is to avoid the necessity of retrial if the appellate court determines that the trial court erred in granting judgment notwithstanding the verdict since under these circumstances the appellate court can simply reinstate the verdict. *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 249 S.E.2d 224 (1978).

Purpose of a motion for judgment notwithstanding the verdict is to provide for final disposition by the appellate court if evidence is insufficient to justify the verdict rendered on any theory or if judgment for the losing party in the trial court is demanded by the law. *Ford Motor Credit Co. v. Parsons*, 155 Ga. App. 46, 270 S.E.2d 230 (1980).

Motion for judgment notwithstanding the verdict is simply a reasserted motion for directed verdict, with a second opportunity for the trial court to rule on the motion before time and expenses are incurred and appellate judicial resources are expended. It is an instrument designed to reduce court costs and delay.

Famiglietti v. Brevard Medical Investors, Ltd., 197 Ga. App. 164, 397 S.E.2d 720 (1990).

Applicable solely to civil actions. — Section dealing with judgments notwithstanding the verdict relates solely to pleading, procedure, and practice in trial of civil actions. *Wilson v. State*, 215 Ga. 775, 113 S.E.2d 607 (1960); *Fair v. State*, 220 Ga. 750, 141 S.E.2d 431 (1965).

Evidence to be construed most favorably to nonmovant. — In considering a motion for judgment notwithstanding the verdict, the court must view the evidence in the light most favorable to the party who secured the jury verdict; and this approach governs appellate courts as well as trial courts. *Church's Fried Chicken, Inc. v. Lewis*, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

In considering a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the party who secured the jury verdict. *Bryant v. Colvin*, 160 Ga. App. 442, 287 S.E.2d 238 (1981).

In considering a motion for judgment n.o.v., the trial court must view the evidence in the light most favorable to the party who secured the jury verdict. *United Fed. Sav. & Loan Ass'n v. Connell*, 166 Ga. App. 329, 304 S.E.2d 131 (1983).

On motion for judgment n.o.v., the evidence is to be construed most favorably to the nonmovant. *Davis v. Glaze*, 182 Ga. App. 18, 354 S.E.2d 845 (1987).

When judgment n.o.v. proper. — If evidence demands verdict for the defendant, it is error to deny the defendant's motion for judgment notwithstanding the verdict. *Wright Contracting Co. v. Davis*, 93 Ga. App. 810, 92 S.E.2d 812 (1956).

Judgment notwithstanding the verdict can be rendered only when evidence demands a verdict contrary to the one returned by the jury. *Osborn v. Youmans*, 219 Ga. 476, 134 S.E.2d 22 (1963).

It is only if a verdict for one party is demanded as a matter of law and the jury has returned an adverse verdict that a motion for judgment non obstante veredicto will lie. *Board of Educ. v. Fredericks*, 113 Ga. App. 199, 147 S.E.2d 789 (1966).

Grant of a motion for judgment notwithstanding the verdict is proper only if there

is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a particular verdict. *United States Fid. & Guar. Co. v. Blankenship Plumbing Co.*, 153 Ga. App. 335, 265 S.E.2d 66 (1980).

As with a directed verdict, a motion for judgment notwithstanding the verdict is proper only if there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict. *Hiers-Wright Assocs. v. Manufacturers Hanover Mtg. Corp.*, 182 Ga. App. 732, 356 S.E.2d 903 (1987).

JNOV in breach of lease action. — Trial court erred in denying a landlord's motion for judgment notwithstanding the verdict pursuant to O.C.G.A. § 9-11-50 in the tenants' breach of lease action; the landlord could not be charged with failing to consent to an assignment arrangement that was offered to the tenants and was refused. *Coordinated Props. v. Johnston*, 267 Ga. App. 298, 599 S.E.2d 213 (2004).

JNOV in contraction dispute case. — In a case in which judgment was entered in favor of an independent subcontractor who sued a retailer for injuries occurring while the subcontractor was doing work on the retailer's premises, the retailer was entitled to a judgment notwithstanding the verdict because the retailer exercised no control over the subcontractor's work, and any control over that work was contractually ceded to the subcontractor and to the contractor who hired the subcontractor. *Neiman-Marcus Group, Inc. v. Dufour*, 268 Ga. App. 104, 601 S.E.2d 375 (2004).

JNOV on conversion and trespass claims. — In a debtor's lawsuit against a bank for breach of contract, trespass, conversion, tortious interference with contractual relations, and tortious interference with business relations, the bank's motion for judgment notwithstanding the verdict was correctly granted on the conversion and trespass claims because the bank had title, under a management agreement, to the debtor's allegedly converted invoices as receivables, and could keep them. *Dalton Diversified, Inc. v. AmSouth Bank*, 270 Ga. App. 203, 605 S.E.2d 892 (2004).

JNOV in personal injury action against employer. —

Worker's claim under O.C.G.A. § 51-2-5(4) against a tire manufacturing plant, for which the worker did independent contractor work pursuant to an agreement between the plant and the worker's employer, failed because the plant had no statutory or contractual duty to maintain a forklift or to ensure that the employer properly maintained the forklift, and, accordingly, the trial court should have granted the plant's motion for judgment notwithstanding the verdict, pursuant to O.C.G.A. § 9-11-50; the forklift jumped backwards and due to a malfunctioning emergency brake, the transformer that it was carrying dropped and crushed the worker's arm, and it was noted that the forklift was purchased by the employer but was delivered directly to the plant and remained on those premises. *Cooper Tire & Rubber Co. v. Merritt*, 271 Ga. App. 16, 608 S.E.2d 714 (2004).

JNOV in will dispute case. — Will proponent's motion for judgment notwithstanding the verdict on the issue of undue influence was properly granted to the proponent because the evidence failed to show undue influence, in that the attorney who prepared the will testified that the will proponent was not present at the execution of the will, that the attorney discussed the contents of the will only with the testatrix, and that the testatrix had no doubt about what provisions the testatrix wanted in the will; the record also established that the proponent, who lived with the testatrix during the testatrix's last days, did not isolate the testatrix but that, instead, hospice personnel, friends, and family frequented the testatrix's house between the time when the proponent came to live with the testatrix and the time that the testatrix executed the will. *Smith v. Liney*, 280 Ga. 600, 631 S.E.2d 648 (2006).

JNOV in properly dispute cases. — 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

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land, the trial court erred in admitting parol evidence to provide a legally sufficient description of the property at issue; hence, the property owners' motion for a judgment notwithstanding the verdict in favor of the buyer was erroneously denied. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

JNOV in property dispute cases. — 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).

JNOV on personal property issue. — Truck seller and the truck's body shop were entitled to a judgment notwithstanding the verdict under O.C.G.A. § 9-11-50(b) on the truck purchasers' counterclaim regarding damages to the truck's engine during the truck's bailment for repairs to the truck's body because the purchasers failed to provide evidence as to the truck's post-bailment fair market value. *Newberry v. TriStar Auto Group, Inc.*, 297 Ga. App. 313, 677 S.E.2d 370 (2009).

When JNOV. not proper. — If the evidence supports the verdict for the plaintiff, it is not error for the court to refuse to direct a verdict for the defendant and to overrule the defendant's motion for judgment notwithstanding the verdict. *Echols v. Thompson*, 211 Ga. 299, 85 S.E.2d 423 (1955).

If there is any evidence to support the

verdict, denial of a motion for judgment n.o.v. is proper. *Maloy v. Planter's Whse. & Lumber Co.*, 142 Ga. App. 69, 234 S.E.2d 807 (1977).

JNOV in matters involving railroad. — Trial court properly denied a railroad's motion for a judgment notwithstanding the verdict (JNOV) because there was evidence that an employee's view was obstructed by vegetation on the railroad's property adjacent to the roadbed in violation of 49 C.F.R. § 213.37(c); further, the railroad's motion for a JNOV based on the fact that it was the employee's job to inspect for hazards was properly rejected because: (1) the employee was a railroad employee who clearly was performing the employee's normal trackside duties and was an intended beneficiary of the regulation; (2) the regulation was unambiguous; and (3) the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., was to be liberally construed. *Norfolk S. Ry. v. Blackmon*, 262 Ga. App. 266, 585 S.E.2d 194 (2003).

JNOV in RICO actions. — In victims' lawsuit against the perpetrator of a fraudulent scheme under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., after the victims had previously unsuccessfully sued the perpetrator for fraud and related claims, judgment n.o.v. was properly entered in favor of the perpetrator because the victims' claim was barred by res judicata and collateral estoppel as those claims should have been raised in their previous suits against the perpetrator, which involved the same parties and the same subject matter. *Austin v. Cohen*, 268 Ga. App. 650, 602 S.E.2d 146 (2004).

Based on evidence that a manufacturer interfered with a distributor's business relationship with its customers by marketing to those customers a product the manufacturer had no legal right to sell, that claim was erroneously set aside. *Fertility Tech. Res., Inc. v. Lifetek Med., Inc.*, 282 Ga. App. 148, 637 S.E.2d 844 (2006).

JNOV in interference with business relations claim. — Because sufficient evidence was presented to support a distributor's tortious interference with a contractual or business relationship claim alleged against a manufacturer, and be-

cause such was an intentional tort, demonstrating evidence of the manufacturer's bad faith, when coupled with other evidence of bad faith, an attorney-fee award under O.C.G.A. § 13-6-11 was authorized; thus, the trial court erred in setting the award aside in granting the manufacturer's motion for a judgment notwithstanding the verdict. *Fertility Tech. Res., Inc. v. Lifetek Med., Inc.*, 282 Ga. App. 148, 637 S.E.2d 844 (2006).

JNOV in class action suits. — 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).

JNOV not proper in auto accident case. — Trial court properly denied the plaintiffs' JNOV motion pursuant to O.C.G.A. § 9-11-50 in an action arising from an auto accident; the driver did not admit liability, the relevant facts were disputed, and the fact that the driver was unable to stop in time to avoid the collision did not demand a finding that the driver was following too closely in violation of O.C.G.A. § 40-6-49. *Cameron v. Peterson*, 264 Ga. App. 1, 589 S.E.2d 834 (2003).

JNOV not proper in promissory estoppel case. — Trial court did not err in denying a motion for a judgment notwithstanding the verdict as to the sellers' claim for promissory estoppel because: (1) the promise to purchase was to be performed within a reasonable time based upon clear and unambiguous terms, and the closing date was set for a day certain in the immediate future; (2) all actions

necessary for the sale, except the actual closing, occurred prior to the first closing date, including audits, examination of financial records, change in inventory code, and delivery of additional inventory; (3) all the basic terms of the promise were clear and certain so as to be enforceable; and (4) the sellers established reasonable reliance to their detriment based on their rejection of another potential purchaser's bona fide offer to purchase, change in value of the property, sale of inventory later needed, and other harm shown by the evidence. *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

JNOV not proper in negligence and product liability claim. — 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).

JNOV not proper in inverse condemnation case. — Trial court properly denied a city's motion for a judgment notwithstanding the verdict in an inverse condemnation case because a corporation showed that the corporation's lease was unique: (1) the location was within the traveling range of the corporation's customers who delivered the raw materials and of its customers who purchased the company's finished soil product; (2) some key customers were unwilling to travel very far and if the corporation relocated, the corporation would have lost their business; (3) the property permitted access for large trucks and contained a railroad spur; (4) the property had a dedicated scale house and a building for storing equipment; and (5) the corporation was using all of the nearly 20 acres. *City of Atlanta v. Landmark Envtl. Indus.*, 272 Ga. App. 732, 613 S.E.2d 131 (2005).

JNOV not proper in Hazardous Site Response Act claim. — JNOV was improperly granted to a chemical supplier in a property owner's suit to recover under

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the Georgia Hazardous Site Response Act (HSRA), O.C.G.A. § 12-8-90 et seq., and under theories of nuisance and trespass for the hazardous waste contamination of the owner's property because while there was testimony that actions of the dry cleaning business in the shopping center on the owner's property may also have contributed to the contamination, there was evidence from which the jury could conclude that the supplier spilled solvent on many occasions over its 30-year history of monthly deliveries to the cleaners and contributed to the contamination even if its spillage was not the sole cause of contamination. *Sprayberry Crossing P'ship v. Phenix Supply Co.*, 274 Ga. App. 364, 617 S.E.2d 622 (2005).

JNOV not proper in breach of fiduciary duty claim. — Trial court did not err in denying the 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 the defendant in a shareholder dispute arising from an agreement for purchase of the defendant's shares as the direct action by the defendant on a counterclaim for breach of fiduciary duty/usurpation of corporate opportunity was properly brought under *Thomas v. Dickens*, 250 Ga. 772 (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).

JNOV not proper in contest over partnership agreement. — General partners' (GPs') motion for a judgment notwithstanding the verdict was properly denied as: (1) a \$ 1.6 million award for the limited partners (LPs) for breach of a partnership agreement was supported by expert testimony that damages could be calculated by taking the value of the LPs' interest in a partnership and estimating the increase in that value if it were invested in a manner similar to the LPs' other investments; (2) even if a previous

judge's comments as to the determination of damages was an order, it was not the law of the case; (3) the GPs did not object to the verdict form, which allowed the jury free reign to set damages; and (4) the GPs' claim that the award did not directly correspond with specific evidence was properly rejected. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

JNOV not proper in negligence case. — 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).

JNOV not proper in subrogation claim. — Trial court did not err in denying a motion for judgment notwithstanding the verdict after a jury awarded damages on an insurer's subrogation claim as there could be no apportionment of damages with a city, even if the city was deemed liable, because the city was not a party to the action pursuant to O.C.G.A. § 51-12-33. *Universal Underwriters Group v. Southern Guar. Ins. Co.*, 297 Ga. App. 587, 677 S.E.2d 760 (2009).

Statute allows a trial court to defer the ruling on a motion for directed verdict and submit the case to the jury, subject to later determination of the legal questions raised by the motion. *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 249 S.E.2d 224 (1978).

Subsection (b) of O.C.G.A. § 9-11-50 allows the device of a motion for judgment notwithstanding the verdict to be used when a motion for directed verdict does not end a trial and the trial proceeds to

verdict. It is narrow, however, and does not permit reopening the case for new legal issues which are thought of retrospectively, with hindsight. *Famiglietti v. Brevard Medical Investors, Ltd.*, 197 Ga. App. 164, 397 S.E.2d 720 (1990).

Judgment notwithstanding the verdict does not actually change the verdict, but merely enters a judgment notwithstanding the verdict, thus, avoiding application of the old rule that it was error to direct a verdict and was never error to refuse to direct a verdict, and the constitutional problems involved therein as well as to eliminate a new trial. *Ammons v. Horton*, 128 Ga. App. 273, 196 S.E.2d 318 (1973).

Standard for granting judgment notwithstanding verdict is the same as that for directed verdict. *Russell v. State*, 155 Ga. App. 555, 271 S.E.2d 689 (1980).

Appellant's standard of review in a judgment notwithstanding the verdict case is whether the evidence, with all reasonable deductions therefrom, demanded a verdict contrary to that returned by the fact-finder. *Bagley v. Robertson*, 265 Ga. 144, 454 S.E.2d 478 (1995).

General grounds of motion for new trial and for JNOV are not always identical. *Shetzen v. C.G. Aycock Realty Co.*, 93 Ga. App. 477, 92 S.E.2d 114 (1956).

It was never intended that the movant be made to choose between moving for new trial and moving for judgment notwithstanding verdict. *Shetzen v. C.G. Aycock Realty Co.*, 93 Ga. App. 477, 92 S.E.2d 114 (1956).

Motion granted when only one reasonable conclusion possible. — Motion for judgment notwithstanding the verdict may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment; if there is conflicting evidence or if there is insufficient evidence to make a "one-way" verdict proper, judgment notwithstanding the verdict should not be awarded. *Church's Fried Chicken, Inc. v. Lewis*, 150 Ga. App. 154, 256 S.E.2d 916 (1979); *Bryant v. Colvin*, 160 Ga. App. 442, 287 S.E.2d 238 (1981).

When jury's verdict not supported by evidence. — If the verdict returned is not supported by any evidence, denial of a motion for judgment notwithstanding the verdict is error. *Ford Motor Credit Co. v. Parsons*, 155 Ga. App. 46, 270 S.E.2d 230 (1980); *City of Atlanta v. West*, 160 Ga. App. 609, 287 S.E.2d 558 (1981).

Judgment notwithstanding the verdict is improperly granted in the face of conflicting evidence, and an appellate court must view the evidence in the light most favorable to the party who secured the jury verdict. *Pendley v. Pendley*, 251 Ga. 30, 302 S.E.2d 554 (1983).

Error to strike evidence, then rule on motion. — Motion to strike is not a precursor to a motion for judgment notwithstanding the verdict. Moreover, the court may not excise some of the evidence admitted and then rule on the motion for judgment notwithstanding the verdict viewed with that evidence absent. *Famiglietti v. Brevard Medical Investors, Ltd.*, 197 Ga. App. 164, 397 S.E.2d 720 (1990).

Standard for judgment notwithstanding mistrial. — To warrant a grant of a motion for judgment notwithstanding mistrial, the same test obtains as that for directed verdict. *Long v. Walls*, 226 Ga. 737, 177 S.E.2d 373 (1970).

Motion for judgment notwithstanding mistrial is analogous to a motion for directed verdict or for judgment notwithstanding the verdict in that the motion can be sustained only when there is no conflict in the evidence as to any material issue and when the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict. *Georgia Power Co. v. Purser*, 152 Ga. App. 181, 262 S.E.2d 473 (1979); *Findley v. McDaniel*, 158 Ga. App. 445, 280 S.E.2d 858 (1981).

Motion for directed verdict is a condition precedent to a subsequent motion for judgment notwithstanding the verdict. *Whitman v. Burden*, 155 Ga. App. 67, 270 S.E.2d 235 (1980).

Requirement of directed verdict as prerequisite. — It is a condition precedent to a motion for judgment notwithstanding verdict that a motion for directed

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verdict must have been made and denied. *Southwind Trucking Co. v. Harvey*, 96 Ga. App. 715, 101 S.E.2d 223 (1957); *Fulton v. Chattanooga Publishing Co.*, 100 Ga. App. 573, 112 S.E.2d 15 (1959), rev'd on other grounds, 215 Ga. 880, 114 S.E.2d 138 (1960).

Motion for directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict, and if it appears from the record that no such motion was made, the motion for judgment notwithstanding the verdict cannot be considered on appeal. *Kiser v. Kiser*, 101 Ga. App. 511, 114 S.E.2d 397 (1960).

Motion for judgment notwithstanding the verdict may be granted only when a valid motion for directed verdict has been made by the movant and erroneously denied. *Daniel v. Weeks*, 217 Ga. 388, 122 S.E.2d 564 (1961); *Simmons v. Watson*, 221 Ga. 765, 147 S.E.2d 322 (1966); *Maloy v. Planter's Whse. & Lumber Co.*, 142 Ga. App. 69, 234 S.E.2d 807 (1977).

If the record does not disclose the making of a motion for directed verdict, there is no error in the refusal of the trial judge to grant a motion for judgment non obstante veredicto. *DeKalb County v. Brewer*, 111 Ga. App. 269, 141 S.E.2d 234 (1965); *Tadlock v. Duncan*, 215 Ga. App. 441, 451 S.E.2d 80 (1994).

When error is assigned on overruling of a motion for judgment notwithstanding the verdict made after trial, but no motion for directed verdict was made, no question is presented for determination by the appellate court. *Lumbermen's Mut. Ins. Co. v. Blackwell*, 112 Ga. App. 398, 145 S.E.2d 287 (1965).

Motion for judgment notwithstanding the verdict may be entertained only if the movant has previously moved for a directed verdict and is seeking to have judgment entered "in accordance with" that motion. *Nationwide Mut. Fire Ins. Co. v. Rhee*, 160 Ga. App. 468, 287 S.E.2d 257 (1981).

If review of the record and transcript reveals that no motion for directed verdict was made in the case, it follows that a motion for judgment n.o.v. was not appro-

priate, and the trial court erred in granting the judgment. *Gray v. Miller*, 166 Ga. App. 792, 305 S.E.2d 651 (1983).

If the ground asserted in defendant's motion for judgment n.o.v. in the trial court is argued on appeal, but it was not contained in the motion for directed verdict, as required by subsection (b), it will not be considered on appeal. *Wehunt v. ITT Bus. Communications Corp.*, 183 Ga. App. 560, 359 S.E.2d 383 (1987).

Grounds asserted in the motion for judgment n.o.v. and on appeal were not considered because those grounds were not asserted in support of the motions for directed verdict. *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987); *Tanner v. Gilleland*, 186 Ga. App. 377, 367 S.E.2d 257 (1988).

Questions concerning the evidence offered to support a claim for attorney fees raised in a motion for judgment notwithstanding the verdict would not be reviewed because the defendants did not raise the questions in the defendants' motion for a directed verdict. *Dee v. Sweet*, 218 Ga. App. 18, 460 S.E.2d 110 (1995).

In light of the guardians' failure to move for a directed verdict during the case, the trial court correctly found that their motion for judgment notwithstanding the verdict was procedurally barred under O.C.G.A. § 9-11-50(b). *Moore v. Stewart*, 315 Ga. App. 388, 727 S.E.2d 159 (2012).

Equivalent motion held sufficient.

— Motion made at the conclusion of the plaintiff's evidence, described by the movant as one for "involuntary nonsuit," was a sufficient prerequisite for a motion for judgment notwithstanding the verdict. *Jones v. Spindel*, 128 Ga. App. 88, 196 S.E.2d 22 (1973).

Time of making motion for directed verdict.

— Although subsection (b) of O.C.G.A. § 9-11-50 provides that a motion for judgment n.o.v. may be made "whenever a motion for a directed verdict made at the close of all the evidence is denied," the statutory phrase "at the close of all the evidence" does not deny to a defendant who has moved for a directed verdict at the close of the plaintiff's evidence the opportunity to move for judgment n.o.v. on the grounds presented in the plaintiff's motion for directed verdict. *Marett v. Pro-*

Professional Ins. Careers, Inc., 201 Ga. App. 178, 410 S.E.2d 373 (1991); Professional Consulting Servs. of Ga., Inc. v. Ibrahim, 206 Ga. App. 663, 426 S.E.2d 376 (1992).

Grounds for motion same as grounds for directed verdict. — Motion for judgment notwithstanding the verdict must be based on the same grounds raised initially in the motion for directed verdict, for it is in effect only a new ruling on a renewed motion. *Famiglietti v. Brevard Medical Investors, Ltd.*, 197 Ga. App. 164, 397 S.E.2d 720 (1990).

In an action among members of a limited liability company (LLC) that included a breach of contract by a physician against the LLC, in which the physician was awarded attorney fees, the trial court erred in granting judgment notwithstanding the verdict to the LLC on the issue of attorney fees because the LLC failed to raise, in the LLC's motion for directed verdict, the claim that the physician failed to apportion the proof of attorney fees among the claims. *James E. Warren, M.D., P.C. v. Weber & Warren Anesthesia Servs.*, 272 Ga. App. 232, 612 S.E.2d 17 (2005).

In a negligence action by an automobile driver, a trial court erred in granting a judgment notwithstanding the verdict (JNOV) under O.C.G.A. § 9-11-50(b) to the driver and amending the verdict to include a truck driver in the punitive damages portion thereof as the driver's motion for directed verdict made after the appellants, the truck driver, the driver's employer, and the employer's insurer, rested only addressed the issue of the truck driver's and the employer's liability for compensatory damages. *Am. Material Servs. v. Giddens*, 296 Ga. App. 643, 675 S.E.2d 540 (2009).

Motion for judgment notwithstanding the verdict may be considered only when based upon a motion for directed verdict timely made, that is, at the close of all the evidence. *Battle v. Yancey Bros. Co.*, 157 Ga. App. 277, 277 S.E.2d 280 (1981); *Buffington v. Haldi*, 210 Ga. App. 542, 436 S.E.2d 740 (1993).

Motion filed prior to judgment void. — Motion for judgment notwithstanding the verdict that is filed prior to entry of

judgment on the verdict is void. *Wall v. Citizens & S. Bank*, 153 Ga. App. 29, 264 S.E.2d 523 (1980), *aff'd*, 247 Ga. 216, 274 S.E.2d 486 (1981), overruled on other grounds, *McKeever v. State*, 189 Ga. App. 445, 375 S.E.2d 899 (1988).

Record as the record exists at the close of trial controls whether a motion for judgment notwithstanding the verdict should be granted. *DeLoach v. Myers*, 215 Ga. 255, 109 S.E.2d 777 (1959).

Hearing of motion before transcript of evidence available. — As a motion for new trial may be passed on before the transcript of evidence is filed, and as a motion for judgment notwithstanding the verdict may be joined with the motion for new trial with a prayer for relief in the alternative, if the court is familiar with the evidence, such latter motion may be heard and, if proper, granted, even though the transcript is not physically available at the time. *Castile v. Rich's, Inc.*, 131 Ga. App. 586, 206 S.E.2d 851 (1974).

Party cannot file, by amending new trial motion, late motion for judgment n.o.v. — If a 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 the 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).

Error based on failure to grant motion not considered when directed verdict not asked for at close of evidence. — Because a motion for directed verdict was made by the defendant at the close of the plaintiff's evidence and was denied, and then evidence was offered by the defendant, who failed to renew the motion at the close of all the evidence, the enumeration of error based on failure to grant a motion for judgment notwithstanding the verdict cannot be considered. *Battle v. Yancey Bros. Co.*, 157 Ga. App. 277, 277 S.E.2d 280 (1981).

Reservation of ruling on pending motion. — Because a motion for directed

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verdict, renewed at the close of the case, was preserved by the court's reserving ruling until after the jury's verdict, the court's ruling on the pending motion for directed verdict and grant of j.n.o.v. based on it without a formal motion for j.n.o.v. was not error. *Brandvain v. Ridgeview Inst., Inc.*, 188 Ga. App. 106, 372 S.E.2d 265 (1988), *aff'd*, 259 Ga. 376, 382 S.E.2d 597 (1989).

Conditional ruling on motion for new trial. — Because the defendant moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, and the trial court granted the j.n.o.v. motion, the case would be remanded for a conditional determination on the new trial motion. *Ogletree v. Navistar Int'l Transp. Corp.*, 221 Ga. App. 363, 471 S.E.2d 287 (1996).

Trial court erred in denying a city's motion for a new trial because a corporation failed to cite evidentiary support for the difference between the amount that its expert considered for abandoned processed soil product and the amount of the jury's award. *City of Atlanta v. Landmark Env'tl. Indus.*, 272 Ga. App. 732, 613 S.E.2d 131 (2005).

Right of voluntary dismissal after mistrial. — If a mistrial has been declared due to the inability of the jury to reach a verdict, and the defendant thereafter files a timely motion for judgment notwithstanding the mistrial, the plaintiff's right of voluntary dismissal is not restored unless and until that motion has been denied. *LeRoux v. Levine*, 194 Ga. App. 381, 390 S.E.2d 629 (1990).

Motion is not tool for opening new legal issues. — O.C.G.A. § 9-11-50(b) allows the device of a motion for judgment notwithstanding the verdict to be used when a motion for directed verdict does not end a trial and it proceeds to verdict; it is narrow, however, and does not permit reopening the case for new legal issues that are thought of retrospectively, with hindsight. Therefore, the developers' contention that an attorney fee award was based on a legal bill containing inadmissible hearsay did not preserve the denial

of their motion for judgment notwithstanding the verdict for appeal when the developers failed to raise the argument in the developers' motions for directed verdict. *Lincoln v. Tyler*, 258 Ga. App. 374, 574 S.E.2d 440 (2002), overruled on other grounds by *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

Standard of review on appeal. — Standard for granting a judgment notwithstanding the verdict is the same as that for a motion for directed verdict; it is warranted only when no conflict exists as to any material issue, and the evidence presented, together with all reasonable inferences, demands a certain verdict. On appeal, a court reviews the denial of either motion under the any evidence standard. *Bacon v. Volvo Serv. Ctr., Inc.*, 266 Ga. App. 543, 597 S.E.2d 440 (2004).

JNOV in asbestos related case. — Trial court did not err in denying the manufacturer's motion for judgment notwithstanding the verdict as evidence was introduced in the decedent's case against the manufacturer to show that the manufacturer produced products containing asbestos, to which the decedent was exposed at the plant where the decedent worked and that such exposure was a contributing factor to the decedent's asbestos-related illness. *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 586 S.E.2d 26 (2003).

Motion improperly denied. — Limited liability company's (LLC) motion for a judgment notwithstanding the verdict was properly denied as the member presented evidence of the LLC's collected funds and cash on hand as aids in the jury's determination of damages for breach of contract, which were based on accounts receivable; the jury's verdict was well within the range of the evidence. *James E. Warren, M.D., P.C. v. Weber & Warren Anesthesia Servs.*, 272 Ga. App. 232, 612 S.E.2d 17 (2005).

JNOV in attorney's fees issue. — Trial court erred in denying the doctor's motion for judgment notwithstanding the verdict on the issue of attorney fees awarded to the hospital under O.C.G.A. § 13-6-11 because the hospital failed to segregate the attorney fees allocable to the hospital's counterclaim, which were

recoverable, from those attorney fees incurred in defending against the doctor's suit alleging that the hospital inappropriately revoked the doctor's privileges in violation of the hospital's bylaws and Georgia public policy, which were not recoverable. *Whitaker v. Houston County Hosp. Auth.*, 272 Ga. App. 870, 613 S.E.2d 664 (2005).

JNOV when punitive damages sought. — Trial court erred in denying a doctor's motion for judgment notwithstanding the verdict on the issue of punitive damages awarded to a hospital on the hospital's breach of contract claim as punitive damages are not available for breach of contract claims. *Whitaker v. Houston County Hosp. Auth.*, 272 Ga. App. 870, 613 S.E.2d 664 (2005).

JNOV in rescission claim. — Because the alleged illegalities cited by a trustee were incidental to the purpose of the contracts with the investors, those contracts did not require a securities violation or usurious interest rate; thus, it followed that the trial court erred in denying a motion for judgment notwithstanding the verdict on the trustee's rescission claim *Douglas v. Bigley*, 278 Ga. App. 117, 628 S.E.2d 199 (2006).

Because: (1) the appellate court could not agree that the broad statements regarding merger in the business plan between two investment companies and in an investing trustee's testimony rendered the second of these two companies liable for the first company's conduct; (2) the trustee failed to present evidence documenting a merger transaction between the two companies or establishing that either or both companies no longer existed; (3) the evidence failed to show that one of the companies was absorbed into the other, creating a de facto merger; and (4) the trustee failed to show that the companies lacked separate personalities, the jury was not authorized to find the second company liable for the first company's activities; thus, the trial court erred in failing to enter judgment notwithstanding the verdict as to the trustee's claims against the second company. *Douglas v. Bigley*, 278 Ga. App. 117, 628 S.E.2d 199 (2006).

Trial court erred when the court denied

the motion for judgment notwithstanding the verdict filed by two relatives in an action by a third relative to quiet title in property that had been owned by a decedent; the deed filed by the third relative did not contain a complete description of the property to which the deed pertained, and therefore, the deed was invalid and could not supply the third relative with good title. *Lord v. Holland*, 282 Ga. 890, 655 S.E.2d 602 (2008).

New Trials

Paragraph (c)(1) of O.C.G.A. § 9-11-50 does not require the trial court to make findings of fact and conclusions of law. *Simon v. Womack*, 158 Ga. App. 47, 279 S.E.2d 254 (1981).

Paragraph (c)(1) of O.C.G.A. § 9-11-50 does not require the trial court to state the reasons for the court's holding on a motion for judgment n.o.v. and, as to a motion for new trial, it applies only when the movant for judgment n.o.v. and the movant for new trial are one and the same party. *Jamison v. First Ga. Bank*, 193 Ga. App. 219, 387 S.E.2d 375 (1989).

Discretion of judge to end litigation after trial. — Trial judge has discretion remaining after the trial is over, when the proper motions are made, whether to finally end the litigation or not; if the judge grants a new trial, the litigation is not finally disposed of. *Wilson v. Matthews*, 120 Ga. App. 284, 170 S.E.2d 346 (1969), overruled on other grounds, *Jones v. Burton*, 238 Ga. 394, 233 S.E.2d 367 (1977).

Motion for new trial may not be filed prior to entry of judgment on the verdict under subsection (b) of O.C.G.A. § 9-11-50, and if such motion is filed prior to entry of judgment, the motion is void. *Wall v. Citizens & S. Bank*, 153 Ga. App. 29, 264 S.E.2d 523 (1980), *aff'd*, 247 Ga. 216, 274 S.E.2d 486 (1981), overruled on other grounds, *McKeever v. State*, 189 Ga. App. 445, 375 S.E.2d 899 (1988).

Specification of grounds for grant or denial of new trial when j.n.o.v. granted. — Requirement that, in passing upon a motion for new trial, the trial judge shall specify grounds for granting or denying such motion is only applicable under paragraph (c)(1) of this section if the motion for judgment notwithstanding the

New Trials (Cont'd)

verdict is granted. *Guest v. Guest*, 150 Ga. App. 48, 256 S.E.2d 654 (1979).

Grant of first trial not error unless verdict for opposite party demanded. — Neither subsection (c) of Ga. L. 1967, p. 226, §§ 22, 43, and 48 (see now O.C.G.A. § 9-11-50) nor any other provision changes the law under former Code 1933, § 6-1608 (see now O.C.G.A. § 5-5-50), providing that the first grant of a new trial was not error unless the evidence demanded a verdict for the party opposing the motion therefor. *Martin v. Denson*, 117 Ga. App. 288, 160 S.E.2d 210 (1968).

When the trial court grants separate motions for judgment notwithstanding the verdict and for a new trial on general grounds, the grant of a motion for new trial is conditional on the appellate court's vacating or reversing the judgment n.o.v.; when the law and facts of the case do not demand a 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).

Motion improperly denied. — 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 sufficient description of the property at issue; hence, the property owners' motion for a new trial was erroneously denied. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

New trial motion proper means of attacking excessive nominal damages. — 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; 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, vacated in part on other grounds, 176 Ga. App.

770, 338 S.E.2d 546 (1985).

Granting directed verdict at new trial authorized. — At a second trial following the grant of the 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).

JNOV after general verdict. — In an action filed by a trustee alleging various claims, including breach of contract, rescission, breach of fiduciary duty, and fraud against two investors and their two companies, while evidence supported some, but not all of a trustee's claims, because the jury returned a general verdict, it was difficult to decipher on which claims the jury found the defendants liable, warranting a new trial on remand; but, judgment notwithstanding the verdict should have been entered against the second company as to all claims. *Douglas v. Bigley*, 278 Ga. App. 117, 628 S.E.2d 199 (2006).

When a directed verdict under O.C.G.A. § 9-11-50(a) on medical expenses was erroneously granted in a suit based on a vehicular collision, a new trial was required because after the directed verdict, the jury awarded general damages, and the appellate court was unable to conclude that the error was harmless since it could not determine if the jury factored the medical bills into account in awarding the general damages. *Allen v. Spiker*, 301 Ga. App. 893, 689 S.E.2d 326 (2009), cert. denied, No. S10C0740, 2010 Ga. LEXIS 454 (Ga. 2010).

Failure to hold new trial on remand. — On remand, because the only relief sought by a distributor in a contract action with a buyer was a new trial, and not the denial of a directed verdict or JNOV, 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 the buyer's claim for lost profits in the trial. *Strickland & Smith, Inc. v. Williamson*, 281 Ga. App. 784, 637 S.E.2d 170 (2006).

As a former husband failed to seek a

directed verdict in the trial court, the husband could not argue on appeal that the court should enter judgment in the husband's favor as a matter of law based on the insufficiency of the evidence in a matter, wherein the husband was sued for

alleged nonpayment under a promissory note; however, the husband was not barred on appeal from arguing that a new trial was warranted. *Cawley v. Bennett*, 293 Ga. App. 46, 666 S.E.2d 438 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d, Judgments, § 291 et seq. 75A Am. Jur. 2d, Trial, §§ 727 et seq., 767.

C.J.S. — 35B C.J.S., Federal Civil Procedure, §§ 1261, 1262. 49 C.J.S., Judgments, § 82, 83, 84, 85, 99. 88 C.J.S., Trial, § 511 et seq.

ALR. — Right of insurer to directed verdict on issue of suicide, 37 ALR 171.

Direction of verdict: effect of explanatory testimony of witness to deprive other testimony given by him of all probative effect, 66 ALR 1517.

Direction of verdict: effect of explanatory or qualifying testimony to nullify prima facie case made by plaintiff, 66 ALR 1532.

Right or duty of court to direct verdict where based upon testimony of party or interested witness, 72 ALR 27.

Absence of issue as to amount of recovery as distinguished from right to recover, as justifying direction of verdict as to amount, or return of verdict which does not assess amount, 105 ALR 1075.

Power of court to mold or amend verdict with respect to the parties for or against whom it was rendered, 106 ALR 418.

Objectionable evidence, admitted without objection, as entitled to consideration on demurrer to evidence or motion for nonsuit or directed verdict, 120 ALR 205.

Constitutional or statutory provision forbidding reexamination of facts tried by a jury as affecting power to reduce or set aside verdict because of excessiveness or inadequacy, 11 ALR2d 1217.

Entry of final judgment after disagreement of jury, 31 ALR2d 885.

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.

Motion by each party for a directed verdict as waiving the submission of fact questions to the jury, 68 ALR2d 300.

Practice and procedure with respect to motions for judgment notwithstanding or in default or verdict under Federal Civil Procedure Rule 50(b) or like state provisions, 69 ALR2d 449.

Res ipsa loquitur as ground for direction of verdict in favor of plaintiff, 97 ALR2d 522.

Dismissal nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action, 5 ALR3d 1405.

Power of court sitting as trier of fact to dismiss at close of plaintiff's evidence, notwithstanding plaintiff has made out prima facie case, 55 ALR3d 272.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case, 82 ALR3d 974.

Withdrawal or disregard of waiver of jury trial in civil action, 9 ALR4th 1041.

Propriety, under Rule 56 of the Federal Rules of Civil Procedure, of granting summary judgment when deponent contradicts in affidavit earlier admission of fact in deposition, 131 ALR Fed. 403.

9-11-51. Reserved.

9-11-52. Findings by the court.

(a) In ruling on interlocutory injunctions and in all nonjury trials in courts of record, the court shall upon request of any party made prior to such ruling, find the facts specially and shall state separately its conclusions of law. If an opinion or memorandum of decision is filed, it

will be sufficient if the findings and conclusions appear therein. Findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

(b) This Code section shall not apply to actions involving uncontested divorce, alimony, and custody of minors, nor to motions except as provided in subsection (b) of Code Section 9-11-41. The requirements of subsection (a) of this Code section may be waived in writing or on the record by the parties.

(c) Upon motion made not later than 20 days after entry of judgment, the court may make or amend its findings or make additional findings and may amend the judgment accordingly. If the motion is made with a motion for new trial, both motions shall be made within 20 days after entry of judgment. The question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to findings or a motion for judgment. When findings or conclusions are not made prior to judgment to the extent necessary for review, failure of the losing party to move therefor after judgment shall constitute a waiver of any ground of appeal which requires consideration thereof. (Code 1933, § 81A-152, enacted by Ga. L. 1969, p. 645, § 1; Ga. L. 1970, p. 170, § 1; Ga. L. 1987, p. 1057, § 1.)

Cross references. — Amendment of judgment to conform to verdict, § 9-12-14. Provision that judgment may not be set aside for any defect that is amendable as matter of form, § 9-12-15.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 52, see 28 U.S.C.

Law reviews. — For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
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General Consideration

Default judgments. — When the judgment entered against the defendant is by default, compliance with O.C.G.A. § 9-11-52 is not required. *Smith v. Mack*, 161 Ga. App. 95, 289 S.E.2d 299 (1982).

Motion to set aside a default judgment

pursuant to O.C.G.A. § 9-11-60 does not come within the ambit of O.C.G.A. § 9-11-52. *Jones v. Christian*, 165 Ga. App. 165, 300 S.E.2d 1 (1983).

Applicability. — Award of attorney fees under O.C.G.A. § 9-15-14 had to be vacated and remanded for reconsideration when the trial court had not made find-

ings of fact and conclusions of law supporting the award as such findings and conclusions were mandatory and did not have to be requested under O.C.G.A. § 9-11-52(a); furthermore, the lack of findings of fact and conclusions of law in the trial court's order overcame the presumption of regularity of all proceedings in a court of competent jurisdiction. *Gilchrist v. Gilchrist*, 287 Ga. App. 133, 650 S.E.2d 795 (2007).

Hearsay. — Only after making the finding of deprivation may the court consider hearsay. *In re D.S.*, 212 Ga. App. 203, 441 S.E.2d 412 (1994).

Request filed on same day as notice of appeal. — Court could not consider commercial tenant's argument that tenant's motion for findings of fact and conclusions of law was refused; even assuming that the tenant filed a motion that complied with O.C.G.A. § 9-11-52, the motion was untimely because the motion was filed on the same day as the notice of appeal, filing of which deprived the trial court of the power to affect the judgment appealed. *Keita v. K & S Trading*, 292 Ga. App. 116, 663 S.E.2d 362 (2008).

Failure of plaintiff to make a timely request for findings of fact and conclusions of law was a waiver of the plaintiff's claim that the trial court should have made such findings and conclusions, and nothing was presented for appellate review. *Cage v. Chase Home Mtg. Corp.*, 212 Ga. App. 861, 443 S.E.2d 504 (1994).

When the appellants failed to request that the trial court make findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52(a) prior to the entry of the court's order, it was unnecessary for the trial court to make any such findings. *Youngblood v. Youngblood*, 263 Ga. App. 820, 589 S.E.2d 602 (2003).

Waiver by failure to make postjudgment motion. — Appellant who intends to argue that a trial court's findings are inadequate or incomplete waives that argument by failing to make the postjudgment motion referenced in O.C.G.A. § 9-11-52(c). In such cases, an appellate court does not remand for additional findings but simply affirms. *Brannon v. Perryman Cemetery, Ltd.*, 308 Ga. App. 832, 709 S.E.2d 33 (2011).

Request made after court's ruling.

— Trial court, following the grant of an injunction requiring the manager of an adult day care center to hand over control of the center to the owner, was not required to make findings of fact and conclusions of law because the manager's request was not made until after the injunction had issued. *Kim v. First One Group, LLC*, 305 Ga. App. 861, 700 S.E.2d 729 (2010).

Trial court did not abuse the court's discretion by issuing an order that did not include findings of fact and conclusions of law and in failing to amend the court's order to include such findings and conclusions after a debtor filed a request pursuant to O.C.G.A. § 9-11-52 because the issues presented in the trial court were clearly reflected in the record, the only witness to testify at trial was the debtor, and the resolution of the issues depended on the law as applied to the undisputed facts; O.C.G.A. § 9-11-52(c) applied because the debtor did not file a motion asking the trial court to enter findings of fact and conclusions of law until after the trial court entered the court's judgment on the debtor's counterclaim. *Sevostiyanova v. Tempest Recovery Servs.*, 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Request made after entry of judgment.

— In divorce proceedings, because a former spouse moved for findings of fact after entry of the judgment, the trial court had the discretion to grant the motion for findings of fact but was not required to do so under O.C.G.A. § 9-11-52(c). *Hunter v. Hunter*, 289 Ga. 9, 709 S.E.2d 263 (2011).

No error in declining to amend judgment.

— Trial court did not err in declining to amend a judgment prohibiting a limited liability company (LLC) from making any permanent changes to the surface of the property owners' land in replacing a sewer pipe by including the additional finding that the owners could not make any permanent changes to the surface of the easement until installation of the new sewer pipe because the issue of the owners' planned construction and any potential claims related thereto were not included in the pre-trial order as matters for determination, and the LLC had not previously requested any declaratory or

General Consideration (Cont'd)

injunctive relief pertaining to that issue prior to the entry of judgment. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Cited in *Brown v. White*, 122 Ga. App. 771, 178 S.E.2d 757 (1970); *Butterworth v. Butterworth*, 227 Ga. 301, 180 S.E.2d 549 (1971); *Faucette v. Faucette*, 228 Ga. 201, 184 S.E.2d 586 (1971); *Henderson v. County Bd. of Registration & Elections*, 126 Ga. App. 280, 190 S.E.2d 633 (1972); *American Appraisal Co. v. Whitley Constr. Co.*, 126 Ga. App. 398, 190 S.E.2d 838 (1972); *Atlanta Country Club, Inc. v. Sanders*, 230 Ga. 146, 195 S.E.2d 893 (1973); *Bell v. Stocks*, 128 Ga. App. 799, 198 S.E.2d 209 (1973); *Insurance Co. of N. Am. v. City of Dalton*, 128 Ga. App. 853, 198 S.E.2d 401 (1973); *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973); *Stafford v. Mincy*, 129 Ga. App. 646, 200 S.E.2d 502 (1973); *Searcy v. Godwin*, 129 Ga. App. 827, 201 S.E.2d 670 (1973); *Collins v. Collins*, 231 Ga. 683, 203 S.E.2d 524 (1974); *Brook Forest Enters., Inc. v. Paulding County*, 231 Ga. 695, 203 S.E.2d 860 (1974); *Bennett Iron Works, Inc. v. Underground Atlanta, Inc.*, 130 Ga. App. 653, 204 S.E.2d 331 (1974); *Brown v. Hames*, 131 Ga. App. 148, 205 S.E.2d 716 (1974); *Orkin Exterminating Co. v. Evans Implement Co.*, 131 Ga. App. 502, 206 S.E.2d 107 (1974); *Southern Guar. Ins. Co. v. Duncan*, 131 Ga. App. 761, 206 S.E.2d 672 (1974); *Stinson v. Gray*, 232 Ga. 542, 207 S.E.2d 506 (1974); *Bituminous Cas. Corp. v. J.B. Forrest & Sons*, 132 Ga. 714, 209 S.E.2d 6 (1974); *Bank Bldg. & Equip. Corp. v. Georgia State Bank*, 132 Ga. App. 762, 209 S.E.2d 82 (1974); *Carter v. Kinman*, 132 Ga. App. 845, 209 S.E.2d 230 (1974); *Georgia Dep't of Human Resources v. Holland*, 133 Ga. App. 616, 211 S.E.2d 635 (1974); *Reynolds v. Reynolds*, 233 Ga. 799, 213 S.E.2d 841 (1975); *Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co.*, 233 Ga. 970, 213 S.E.2d 897 (1975); *Georgia Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 214 S.E.2d 495 (1975); *Board of Comm'rs v. Allgood*, 234 Ga. 9, 214 S.E.2d 522 (1975); *Hagin v. Powers*, 134

Ga. App. 609, 215 S.E.2d 346 (1975); *Lawyers Coop. Publishing Co. v. Bekins Moving & Storage Co.*, 135 Ga. App. 12, 217 S.E.2d 372 (1975); *Classic Enters., Inc. v. Continental Mtg. Investors*, 135 Ga. App. 105, 217 S.E.2d 411 (1975); *Wiggins v. Darrah*, 135 Ga. App. 509, 218 S.E.2d 106 (1975); *Atlanta Cas. Co. v. Williams*, 135 Ga. App. 562, 218 S.E.2d 282 (1975); *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975); *Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co.*, 235 Ga. 503, 220 S.E.2d 130 (1975); *Brown v. Fulton County Dep't of Family & Children Servs.*, 136 Ga. App. 308, 220 S.E.2d 790 (1975); *American San. Servs. v. EDM of Tex., Inc.*, 136 Ga. App. 200, 221 S.E.2d 66 (1975); *Nodvin v. Nodvin*, 235 Ga. 708, 221 S.E.2d 404 (1975); *Beneficial Std. Life Ins. Co. v. Usalavage*, 136 Ga. App. 328, 221 S.E.2d 457 (1975); *Leasing Int'l, Inc. v. Plemons*, 136 Ga. App. 455, 221 S.E.2d 663 (1975); *Wiles v. Brothers*, 136 Ga. App. 631, 222 S.E.2d 148 (1975); *Lawson v. Alvers*, 136 Ga. App. 801, 222 S.E.2d 203 (1975); *Tele-Spot v. Garden Cities Corp.*, 137 Ga. App. 238, 223 S.E.2d 273 (1976); *Jardine v. Jardine*, 236 Ga. 323, 223 S.E.2d 668 (1976); *Doyal Dev. Co. v. Blair*, 137 Ga. App. 434, 224 S.E.2d 55 (1976); *Graham v. Tallent*, 137 Ga. App. 444, 224 S.E.2d 98 (1976); *Shannondoah, Inc. v. Smith*, 137 Ga. App. 378, 224 S.E.2d 465 (1976); *Hopkins v. Donaldson*, 137 Ga. App. 786, 224 S.E.2d 788 (1976); *Reid v. Minter*, 137 Ga. App. 799, 224 S.E.2d 849 (1976); *Sanders v. Darnell*, 236 Ga. 604, 225 S.E.2d 23 (1976); *Rowland v. Kellos*, 236 Ga. 799, 225 S.E.2d 302 (1976); *Stouffer v. Stouffer*, 236 Ga. 908, 225 S.E.2d 892 (1976); *Reading Assocs., Ltd. v. Reading Assocs. of Ga., Inc.*, 236 Ga. 906, 225 S.E.2d 899 (1976); *Alston v. Georgia Credit Counsel, Inc.*, 138 Ga. App. 545, 227 S.E.2d 87 (1976); *Brown v. Brown*, 237 Ga. 201, 227 S.E.2d 360 (1976); *Williams v. Mathis*, 237 Ga. 305, 227 S.E.2d 378 (1976); *Shelor v. Shelor*, 139 Ga. App. 11, 228 S.E.2d 18 (1976); *White v. Atlanta Parking Serv. Co.*, 139 Ga. App. 243, 228 S.E.2d 156 (1976); *Nelson v. Mexicana de Jugo y Sabores*, 139 Ga. App. 612, 229 S.E.2d 102 (1976); *Hill v. Cockrell*, 139 Ga. App. 616, 229 S.E.2d 105 (1976); *Liberty Mut. Ins. Co. v. Alsco Constr. Co.*, 139 Ga.

App. 786, 229 S.E.2d 559 (1976); *Marler v. Citizens & S. Bank*, 139 Ga. App. 851, 229 S.E.2d 786 (1976); *Davis v. Embry*, 140 Ga. App. 181, 230 S.E.2d 314 (1976); *Thomas v. Jackson*, 238 Ga. 90, 231 S.E.2d 50 (1976); *Evans v. Marbut*, 140 Ga. App. 329, 231 S.E.2d 94 (1976); *Gooden v. Blanton*, 140 Ga. App. 612, 231 S.E.2d 541 (1976); *General Fin. Corp. v. Hester*, 141 Ga. App. 28, 232 S.E.2d 375 (1977); *Moore v. First Nat'l Bank*, 141 Ga. App. 164, 233 S.E.2d 26 (1977); *Henry v. Adair Realty Co.*, 141 Ga. App. 182, 233 S.E.2d 39 (1977); *Yalanzon v. Sharon Constr. Co.*, 141 Ga. App. 294, 233 S.E.2d 220 (1977); *Heller v. Board of Comm'rs*, 238 Ga. 501, 233 S.E.2d 761 (1977); *Johnson Ventures, Inc. v. Barkin*, 141 Ga. App. 810, 234 S.E.2d 340 (1977); *Saade v. Saade*, 238 Ga. 620, 234 S.E.2d 530 (1977); *Wilbanks v. Wilbanks*, 238 Ga. 660, 234 S.E.2d 915 (1977); *W.R.G. v. State*, 142 Ga. App. 81, 235 S.E.2d 43 (1977); *In re C.A.M.*, 142 Ga. App. 159, 235 S.E.2d 395 (1977); *Mallett v. Fulford*, 142 Ga. App. 200, 235 S.E.2d 650 (1977); *McKnight v. Mitchell*, 142 Ga. App. 344, 235 S.E.2d 763 (1977); *Brock v. Hall County*, 239 Ga. 160, 236 S.E.2d 90 (1977); *Griggers v. Bryant*, 239 Ga. 244, 236 S.E.2d 599 (1977); *Anthony v. Anthony*, 239 Ga. 273, 236 S.E.2d 621 (1977); *Minter v. Reid*, 143 Ga. App. 92, 237 S.E.2d 632 (1977); *Lee v. White Truck Lines*, 143 Ga. App. 94, 238 S.E.2d 120 (1977); *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977); *Black v. American Vending Co.*, 239 Ga. 632, 238 S.E.2d 420 (1977); *Hulsey v. Hendon*, 239 Ga. 474, 238 S.E.2d 691 (1977); *Milam v. Milam*, 240 Ga. 33, 239 S.E.2d 361 (1977); *Charamond v. Charamond*, 240 Ga. 34, 239 S.E.2d 362 (1977); *Michael v. McAdams*, 240 Ga. 65, 239 S.E.2d 518 (1977); *Wall v. Federal Land Bank*, 240 Ga. 236, 240 S.E.2d 76 (1977); *City of Atlanta v. McLennan*, 240 Ga. 407, 240 S.E.2d 881 (1977); *Saul v. Vaughn & Co.*, 240 Ga. 301, 241 S.E.2d 180 (1977); *Beatty v. Wilkerson*, 144 Ga. App. 280, 241 S.E.2d 654 (1977); *Cook v. Cook*, 240 Ga. 517, 241 S.E.2d 249 (1978); *Mercury Rising, Inc. v. Gwinnett Bank & Trust Co.*, 144 Ga. App. 502, 241 S.E.2d 620 (1978); *McCann v. Duggan*, 144 Ga. App. 547, 241 S.E.2d 647 (1978); *Bank of Clearwater v. Kimbrel*, 240 Ga. 570, 242 S.E.2d 16 (1978); *Hall v. Ault*, 240 Ga. 585, 242 S.E.2d 101 (1978); *Quilfo v. Creel*, 144 Ga. App. 653, 242 S.E.2d 319 (1978); *Galanti v. Emerald City Records, Inc.*, 144 Ga. App. 773, 242 S.E.2d 368 (1978); *Greene v. Colonial Stores, Inc.*, 144 Ga. App. 645, 242 S.E.2d 489 (1978); *Jackson v. Jackson*, 145 Ga. App. 564, 244 S.E.2d 91 (1978); *Aikens v. Turner*, 241 Ga. 401, 245 S.E.2d 660 (1978); *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978); *Stanley v. Department of Human Resources*, 146 Ga. App. 450, 246 S.E.2d 459 (1978); *Guest v. Guest*, 146 Ga. App. 512, 246 S.E.2d 503 (1978); *Farmer v. Farmer*, 147 Ga. App. 387, 249 S.E.2d 106 (1978); *Fountain v. Marta*, 147 Ga. App. 465, 249 S.E.2d 296 (1978); *Tingle v. Georgia Power Co.*, 147 Ga. App. 775, 250 S.E.2d 497 (1978); *Wolfe v. GMC*, 148 Ga. App. 716, 252 S.E.2d 215 (1979); *Mallett v. Fulford*, 149 Ga. App. 773, 256 S.E.2d 49 (1979); *Bradfield v. Gardner*, 150 Ga. App. 49, 256 S.E.2d 655 (1979); *Friedman v. Harbold*, 150 Ga. App. 482, 258 S.E.2d 154 (1979); *McCary v. Department of Human Resources*, 151 Ga. App. 181, 259 S.E.2d 181 (1979); *Redi-Cut Co. v. Bonanza Int'l, Inc.*, 244 Ga. 794, 262 S.E.2d 76 (1979); *Hasty v. Randall*, 152 Ga. App. 365, 262 S.E.2d 626 (1979); *Taylor v. Thompson*, 152 Ga. App. 547, 263 S.E.2d 487 (1979); *Davis v. Davis*, 245 Ga. 233, 264 S.E.2d 177 (1980); *Rich v. Piland*, 153 Ga. App. 253, 265 S.E.2d 290 (1980); *Allison v. Fulton-DeKalb Hosp. Auth.*, 245 Ga. 445, 265 S.E.2d 575 (1980); *Atlas Aviation, Inc. v. Hungate*, 153 Ga. App. 517, 265 S.E.2d 851 (1980); *James v. James*, 245 Ga. 624, 266 S.E.2d 224 (1980); *Sea Island Bank v. First Bulloch Bank & Trust Co.*, 245 Ga. 715, 267 S.E.2d 12 (1980); *Paxton v. Trust Co. Bank*, 245 Ga. 834, 268 S.E.2d 154 (1980); *Harper v. State*, 154 Ga. App. 550, 269 S.E.2d 56 (1980); *Mathis v. Citizens DeKalb Bank*, 157 Ga. App. 693, 278 S.E.2d 500 (1981); *Sigmon v. Womack*, 158 Ga. App. 47, 279 S.E.2d 254 (1981); *Krofft Dev. Corp. v. Quo Modo, Inc.*, 158 Ga. App. 403, 280 S.E.2d 368 (1981); *Housing Auth. v. Davis*, 158 Ga. App. 600, 281 S.E.2d 345 (1981); *Black v. Lowry*, 159 Ga. App. 57, 282 S.E.2d 700 (1981); *Goss v. Thornton*, 159

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App. 672, 314 S.E.2d 689 (1984); Wood v. Dan P. Holl & Co., 169 Ga. App. 839, 315 S.E.2d 51 (1984); Walker v. Hill, 253 Ga. 126, 317 S.E.2d 825 (1984); Stinson v. Georgia Dep't of Human Resources Credit Union, 171 Ga. App. 303, 319 S.E.2d 508 (1984); Fairburn Banking Co. v. Upton, 172 Ga. App. 81, 321 S.E.2d 814 (1984); Logan Paving Co. v. Massey-Ferguson Credit Corp., 172 Ga. App. 368, 323 S.E.2d 259 (1984); Exxon Corp. v. Butler, 173 Ga. App. 146, 325 S.E.2d 806 (1984); O'Quin v. Emergency Physicians, 173 Ga. App. 325, 326 S.E.2d 530 (1985); Gant v. Gant, 254 Ga. 239, 327 S.E.2d 723 (1985); Baker v. Wulf, 173 Ga. App. 674, 327 S.E.2d 796 (1985); Boatman v. Chapman, 174 Ga. App. 77, 329 S.E.2d 185 (1985); Pettus v. Smith, 174 Ga. App. 587, 330 S.E.2d 735 (1985); Simpkins v. Minks, 175 Ga. App. 729, 334 S.E.2d 340 (1985); Mims v. Wardlaw, 176 Ga. App. 891, 338 S.E.2d 866 (1985); In re C.R.M., 179 Ga. App. 38, 345 S.E.2d 141 (1986); Carter v. First Fed. Sav. & Loan Ass'n, 179 Ga. App. 532, 347 S.E.2d 264 (1986); DOT v. Arapaho Constr., Inc., 180 Ga. App. 341, 349 S.E.2d 196 (1986); Decker v. Decker, 256 Ga. 513, 350 S.E.2d 434 (1986); Holy Cross Lutheran Church, Inc. v. Clayton County, 257 Ga. 21, 354 S.E.2d 151 (1987); Gemini Constr. Co. v. Childs, 182 Ga. App. 207, 355 S.E.2d 81 (1987); State v. Mozley, 182 Ga. App. 871, 357 S.E.2d 313 (1987); Garmon v. Health Group of Atlanta, Inc., 183 Ga. App. 587, 359 S.E.2d 450 (1987); Marsh v. White, 185 Ga. App. 642, 365 S.E.2d 464 (1988); Panfel v. Boyd, 186 Ga. App. 214, 367 S.E.2d 54 (1988); Fadum v. Liakos, 186 Ga. App. 556, 367 S.E.2d 843 (1988); Glen Oak, Inc. v. Henderson, 258 Ga. 455, 369 S.E.2d 736 (1988); Banta v. Quik-Thrift Food Stores, Inc., 187 Ga. App. 250, 370 S.E.2d 3 (1988); Panfel v. Boyd, 187 Ga. App. 639, 371 S.E.2d 222 (1988); Doe v. Chambers, 188 Ga. App. 879, 374 S.E.2d 758 (1988); Gully v. Glover, 190 Ga. App. 238, 378 S.E.2d 411 (1989); Ruff v. Central State Hosp., 192 Ga. App. 631, 385 S.E.2d 734 (1989); Carole Lyden Smith Enters., Inc. v. Mathew, 193 Ga. App. 320, 387 S.E.2d 577 (1989); Manderson & Assocs. v. Gore, 193 Ga. App. 723, 389 S.E.2d 251 (1989); Lamb v. Tretiak, 194 Ga. App. 764, 391 S.E.2d 722

(1990); Sego v. City of Peachtree City, 260 Ga. 388, 392 S.E.2d 877 (1990); Westwind Corp. v. Washington Fed. Sav. & Loan Ass'n, 195 Ga. App. 411, 393 S.E.2d 479 (1990); Parking Co. of Am. v. Sucan, 195 Ga. App. 616, 394 S.E.2d 411 (1990); Central of Ga. Elec. Membership Corp. v. Mills, 196 Ga. App. 882, 397 S.E.2d 137 (1990); Wood v. Turner, 196 Ga. App. 815, 397 S.E.2d 161 (1990); Venture Design, Ltd. v. Original Appalachian Artworks, Inc., 197 Ga. App. 432, 398 S.E.2d 781 (1990); Greene v. Keener, 198 Ga. App. 565, 402 S.E.2d 284 (1991); Intertrust Corp. v. Fischer Imaging Corp., 198 Ga. App. 812, 403 S.E.2d 94 (1991); Smith Dev., Inc. v. Flood, 198 Ga. App. 817, 403 S.E.2d 249 (1991); Jewell v. State, 200 Ga. App. 203, 407 S.E.2d 763 (1991); Mantegna v. Professional Auto Care, Inc., 204 Ga. App. 254, 419 S.E.2d 43 (1992); Ardex, Ltd. v. Brighton Homes, Inc., 206 Ga. App. 606, 426 S.E.2d 200 (1992); Hanson v. Kent, 263 Ga. 124, 428 S.E.2d 785 (1993); Jefferson v. Zant, 263 Ga. 316, 431 S.E.2d 110 (1993); Burks v. First Union Mtg. Corp., 209 Ga. App. 41, 432 S.E.2d 822 (1993); National Chemco, Inc. v. Union Camp Corp., 209 Ga. App. 317, 433 S.E.2d 691 (1993); Hughes v. Cobb County, 264 Ga. 128, 441 S.E.2d 406 (1994); Bagley v. Robertson, 265 Ga. 144, 454 S.E.2d 478 (1995); McMillan v. Motor Warehouse, Inc., 221 Ga. App. 550, 472 S.E.2d 120 (1996); Safadi v. Thompson, 226 Ga. App. 685, 487 S.E.2d 457 (1997); Municipal Elec. Auth. v. City of Calhoun, 227 Ga. App. 571, 489 S.E.2d 599 (1997); J.C. Penney Co. v. Richmond County Bd. of Tax Assessors, 233 Ga. App. 399, 504 S.E.2d 201 (1998); Stephens v. Conyers Apostolic Church, 243 Ga. App. 170, 532 S.E.2d 728 (2000); Fontaine v. Sidelines IV, Inc., 245 Ga. App. 681, 538 S.E.2d 137 (2000); Lanier v. Burnette, 245 Ga. App. 566, 538 S.E.2d 476 (2000); BMH Real Estate Pshp. v. Montgomery, 246 Ga. App. 301, 540 S.E.2d 256 (2000); Lighting Galleries, Inc. v. Drummond, 247 Ga. App. 124, 543 S.E.2d 419 (2000); Magnus Homes, L.L.C. v. DeRosa, 248 Ga. App. 31, 545 S.E.2d 166 (2001); Walker v. Walker, 248 Ga. App. 177, 546 S.E.2d 315 (2001); In the Interest of A.D.L., 253 Ga. App. 64, 557 S.E.2d 489 (2001); In re Estate of

Garmon, 254 Ga. App. 84, 561 S.E.2d 216 (2002); Commercial Cas. Ins. Co. v. Mar. Trade Ctr. Builders, 257 Ga. App. 779, 572 S.E.2d 319 (2002); McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008); Hathaway Dev. Co. v. Advantage Fire Sprinkler Co., 290 Ga. App. 374, 659 S.E.2d 778 (2008); Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009); Asgharneya v. Hadavi, 298 Ga. App. 693, 680 S.E.2d 866 (2009); Washington v. Harrison, 299 Ga. App. 335, 682 S.E.2d 679 (2009); Johnson v. Randolph County, 301 Ga. App. 265, 687 S.E.2d 223 (2009); Katz v. Crowell, 302 Ga. App. 763, 691 S.E.2d 657 (2010); SN Int'l, Inc. v. Smart Props., 311 Ga. App. 434, 715 S.E.2d 826 (2011); In re Estate of Tapley, 312 Ga. App. 234, 718 S.E.2d 92 (2011); Shotwell v. Filip, 314 Ga. App. 93, 722 S.E.2d 906 (2012); God's Hope Builders, Inc. v. Mount Zion Baptist Church of Oxford, Georgia, Inc., 321 Ga. App. 435, 741 S.E.2d 185 (2013).

Findings, Generally

Subsection (a) mandatory. — Requirement in subsection (a) of Ga. L. 1969, p. 645, § 1 (see now O.C.G.A. § 9-11-52) that the trial court find the facts specially and state separately the court's conclusions of law thereon and enter judgment pursuant to Ga. L. 1966, p. 609, § 58 (see now O.C.G.A. § 9-11-58) is mandatory and not discretionary. Spivey v. Mayson, 124 Ga. App. 775, 186 S.E.2d 154 (1971); Booker v. J.T. Bickers Realty Co., 127 Ga. App. 614, 194 S.E.2d 490 (1972); Reese v. Ideal Realty Co., 128 Ga. App. 684, 197 S.E.2d 829 (1973); Southern Guar. Ins. Co. v. Duncan, 129 Ga. App. 632, 200 S.E.2d 483 (1973); Philips Broadcast Equip. Corp. v. Production 70's, Inc., 133 Ga. App. 765, 213 S.E.2d 35 (1975); Doyal Dev. Co. v. Blair, 234 Ga. 261, 215 S.E.2d 471 (1975); Githens v. Githens, 234 Ga. 715, 217 S.E.2d 291 (1975); Avery v. Avery, 234 Ga. 729, 218 S.E.2d 19 (1975); Reid v. Minter, 135 Ga. App. 763, 219 S.E.2d 15 (1975); Hagin v. Powers, 136 Ga. App. 395, 221 S.E.2d 245 (1975); Barkwell v. Helms, 137 Ga. App. 290, 223 S.E.2d 485 (1976); Crook v. Georgia Dep't of Human Resources, 137 Ga. App. 817, 224 S.E.2d 806 (1976); Miller v. Self, 137 Ga. App. 717, 224 S.E.2d 823 (1976); Finlay v. Oxford

Findings, Generally (Cont'd)

Constr. Co., 138 Ga. App. 49, 225 S.E.2d 495 (1976); Oster v. Rich's, Inc., 140 Ga. App. 373, 231 S.E.2d 140 (1976); Pruitt v. First Nat'l Bank, 142 Ga. App. 100, 235 S.E.2d 617 (1977); Gray v. Finance Am. Corp., 145 Ga. App. 253, 243 S.E.2d 671 (1978); Fred R. Surface & Assocs. v. Worozbyt, 148 Ga. App. 639, 252 S.E.2d 67 (1979); Beasley v. Jones, 149 Ga. App. 317, 254 S.E.2d 472 (1979); Hickok v. Starka Indus., Inc., 151 Ga. App. 668, 261 S.E.2d 418 (1979); Smith v. Randolph, 153 Ga. App. 78, 264 S.E.2d 557 (1980); Wojcik Constr. Co. v. Schell's Concrete Co., 153 Ga. App. 793, 266 S.E.2d 569 (1980); Woodruff v. B-X Corp., 154 Ga. App. 197, 267 S.E.2d 757 (1980); Cochran v. Cochran, 154 Ga. App. 326, 268 S.E.2d 728 (1980).

Findings of fact and conclusions of law required by O.C.G.A. § 9-11-52 are mandatory. *Frasier v. Department of Human Resources*, 159 Ga. App. 1, 282 S.E.2d 667 (1981).

Findings requirement not applicable to permanent injunctions. — City of Atlanta's argument that the trial court's order granting a permanent injunction was deficient because the order did not contain findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52(a) failed as § 9-11-52(a) only applied to interlocutory injunctions. *City of Atlanta v. S. States Police Benevolent Ass'n*, 276 Ga. App. 446, 623 S.E.2d 557 (2005).

Requirements applicable in both state and superior courts. — Subsection (a) of this section is applicable to the State Court of Cobb County. *General Fin. Corp. v. Hester*, 137 Ga. App. 367, 223 S.E.2d 763 (1976).

Requirement that judge make written findings of fact and conclusions of law, unless waived, applies to the various state courts as well as the superior courts of this state. *Risk v. Turner Coal & Brick Co.*, 139 Ga. App. 232, 228 S.E.2d 210 (1976); *Dyna-Comp Corp. v. Selig Enters., Inc.*, 143 Ga. App. 462, 238 S.E.2d 571 (1977).

In absence of waiver, subsection (a) of this section is mandatory and failure to comply with the subsection requires reversal. *Motes v. Stanton*, 237 Ga. 440, 228 S.E.2d 831 (1976).

Purpose of findings of fact is three-fold: as an aid in the trial judge's process of adjudication; for purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review. *Spivey v. Mayson*, 124 Ga. App. 775, 186 S.E.2d 154 (1971); *General Teamsters Local 528 v. Allied Foods, Inc.*, 228 Ga. 479, 186 S.E.2d 527 (1971), cert. denied, 405 U.S. 1041, 92 S. Ct. 1313, 31 L. Ed. 2d 582 (1972).

Reason for requiring findings of fact and conclusions of law is to assist appellate court in the court's review of the merits of an appeal. *Coleman v. Coleman*, 238 Ga. 183, 232 S.E.2d 57 (1977).

More than mere legal conclusion required. — When the court order concerning the adoption issue stated only: "The petition for final adoption coming on to be heard and the court having proceeded to a full hearing on the petition and the examination of the parties at interest in open court, under oath, and having given consideration to the investigative report of the Department of Human Resources and the recommendation therein contained, the court is satisfied that it is not in the best interest of (the child) that this adoption be approved," such order constituted a mere legal conclusion not supported by the mandatory findings of fact required by O.C.G.A. § 9-11-52. *Brant v. Bazemore*, 173 Ga. App. 294, 325 S.E.2d 905 (1985).

Judge's decision on facts as binding on parties as jury's verdict. — When a question of substantive fact (as distinguished from a decision of law) is submitted to the 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).

Evidence supporting findings and conclusions need not be recited in order. — Order complies with the requirements of O.C.G.A. § 9-11-52, notwithstanding the fact that the order does not specify the evidence actually relied upon in making the findings and reaching the conclusions. *Siegel v. General Parts*

Corp., 165 Ga. App. 339, 301 S.E.2d 292 (1983).

Order based on finding of fact. — Juvenile court's deprivation order was proper as the order was explicitly based on a mother's physical abuse of a child, although the fact was not included as a formal finding of fact; the trial court's reasoning leading to the conclusion of deprivation was clearly laid out. In the Interest of K.J., 268 Ga. App. 843, 602 S.E.2d 861 (2004).

Following a bench trial, the trial court properly awarded a lessee a monetary judgment and the lessor possession of the premises as the clear language of the underlying contract between the parties provided that the parties intended the contract to be a purchase and sale agreement, and the lessor's failure to perform barred the court from enforcing a liquidated damages provision. Thus, the appeals court refused to disturb the trial court's factual findings as such were not clearly erroneous. Lifestyle Home Rentals, LLC v. Rahman, 290 Ga. App. 585, 660 S.E.2d 409 (2008).

Findings of fact are not intended to amount to brief of evidence, and need be made only on issues necessary to disposition of case and upon which judgment was entered. Spivey v. Mayson, 124 Ga. App. 775, 186 S.E.2d 154 (1971); American Century Mtg. Investors v. Strickland, 138 Ga. App. 657, 227 S.E.2d 460 (1976); Siegel v. General Parts Corp., 165 Ga. App. 339, 301 S.E.2d 292 (1983).

Findings of fact should be brief, concise, pertinent, and adjusted to the evidence as reflected by the record; over elaboration and particularization is neither required nor desired. Spivey v. Mayson, 124 Ga. App. 775, 186 S.E.2d 154 (1971).

Findings of fact should not be redundant or argumentative, but should be inclusive enough to afford an intelligent review. Spivey v. Mayson, 124 Ga. App. 775, 186 S.E.2d 154 (1971).

Findings inclusive enough to afford intelligent review. — One purpose of findings is as an aid in the appellate courts' review; hence, findings should be inclusive enough to afford intelligent review. Donaldson v. Hopkins, 132 Ga. App.

713, 209 S.E.2d 131 (1974).

Both end result and process of inquiry to be stated. — Trial judge is to ascertain the facts and to state not only the end result of that inquiry but the process by which the result was reached. Beasley v. Jones, 149 Ga. App. 317, 254 S.E.2d 472 (1979); Wojcik Constr. Co. v. Schell's Concrete Co., 153 Ga. App. 793, 266 S.E.2d 569 (1980); Woodruff v. B-X Corp., 154 Ga. App. 197, 267 S.E.2d 757 (1980).

Mere recitation of events that took place at trial does not satisfy requirements of subsection (a) of this section as to findings and conclusions, nor does recitation in the order denying the motion for new trial. Fred R. Surface & Assocs. v. Worozbyt, 148 Ga. App. 639, 252 S.E.2d 67 (1979).

Mere recitation of events that took place at trial does not satisfy the requirements of subsection (a) of this section. Woodruff v. B-X Corp., 154 Ga. App. 197, 267 S.E.2d 757 (1980); In re D.L.G., 212 Ga. App. 353, 442 S.E.2d 11 (1994).

Dry recitation that certain legal requirements have been met is insufficient to satisfy the requirements of subsection (a) of this section. Beasley v. Jones, 149 Ga. App. 317, 254 S.E.2d 472 (1979).

Paraphrase of statutory requirements. — Paraphrase of statutory requirements for confirmation of a sale under power and an ultimate conclusion will not suffice as findings of fact and conclusions of law. Pruitt v. First Nat'l Bank, 142 Ga. App. 100, 235 S.E.2d 617 (1977).

Discrepancy in amount of judgment asserted by parties and shown in court's record. — When there is a discrepancy between the amount of judgment asserted by the parties and that shown in the trial court's record, and findings of fact and conclusions of law were not made according to O.C.G.A. § 9-11-52, the case must be remanded with any aggrieved party free to enter another appeal. Bourdon v. Plank, 170 Ga. App. 711, 318 S.E.2d 312 (1984).

"Findings of fact" which merely state court's answers to material issues are insufficient, especially when they contain no facts based on the evidence supporting those answers. C & H

Findings, Generally (Cont'd)

Couriers, Inc. v. American Mut. Ins. Co., 166 Ga. App. 853, 305 S.E.2d 500 (1983).

Court may request counsel to prepare findings and conclusions, which the judge is at liberty to amend or change in any respect deemed proper; the judge may also prepare the findings and conclusions without assistance of counsel. *Spivey v. Mayson*, 124 Ga. App. 775, 186 S.E.2d 154 (1971).

Findings to be made prior to judgment. — Legislative intent was that findings of fact and conclusions of law required by subsection (a) of this section be made prior to the rendition of the judgment, not after expiration of the time for appeal. *Jacobs Pharmacy Co. v. Richard & Assocs.*, 229 Ga. 156, 189 S.E.2d 853 (1972).

In a case of great magnitude and complexity, it was an abuse of discretion to deny the defendant's postjudgment motion for the issuance of findings of fact and conclusions of law, even though a formal request was not made prior to judgment. *Gold Kist, Inc. v. Wilson*, 220 Ga. App. 426, 469 S.E.2d 504 (1996).

Judgment not invalidated for subsequent making of findings. — When findings and conclusions required by subsection (a) of this section were not entered at time judgment was entered, but were subsequently made and transmitted to the reviewing court, the judgment complained of will not be invalidated. *Warren v. Walton*, 231 Ga. 495, 202 S.E.2d 405 (1973).

Final order signed on behalf of both parties "approved as to form" constitutes valid waiver of requirement that findings of fact and conclusions of law be stated. *Rude v. Rude*, 241 Ga. 454, 246 S.E.2d 311 (1978).

Waiver of findings. — While findings of fact should be included in the record in all contested civil cases tried by a judge without a jury, if the judgment rendered is approved in writing "as to form" by counsel for the parties, neither party can thereafter complain of a failure to comply with this section, because this section also provides that the requirement for making and including findings of fact in the record

may be waived in writing. *Stephens v. Stephens*, 232 Ga. 69, 205 S.E.2d 295 (1974).

Waiver of argument that findings were insufficient. — When a purchaser of land did not make a postjudgment motion under O.C.G.A. § 9-11-52(c) for amended or additional findings, the purchaser waived the argument that a special master's findings of fact did not set forth sufficient findings to justify the conclusions of law. *Waters v. Ellzey*, 290 Ga. App. 693, 660 S.E.2d 392 (2008).

Mere signature, without any recital to indicate intention, does not constitute a valid waiver of the requirement that the court enter findings of facts and conclusions of law. *Motes v. Stanton*, 237 Ga. 440, 228 S.E.2d 831 (1976); *Rude v. Rude*, 241 Ga. 454, 246 S.E.2d 311 (1978).

After approving form of order party cannot complain of lack of findings.

— If findings of facts and conclusions of law by the court are to be insisted upon, time to do it is when proposed order is presented to counsel for approval; after approving the form of the order, a party cannot complain of the court's failure to include findings of fact and conclusions of law. *Rude v. Rude*, 241 Ga. 454, 246 S.E.2d 311 (1978).

Absence of findings and conclusions not fatal. — Although findings of fact and conclusions of law are mandatory, their absence is not fatal. *Kennedy v. Brown*, 239 Ga. 286, 236 S.E.2d 632 (1977).

Failure to incorporate findings as amendable defect. — Failure of trial court to incorporate findings of fact and conclusions of law in order modifying the divorce decree was an amendable defect which appeared on the face of the record, not a defect which would warrant setting aside the judgment. *Kennedy v. Brown*, 239 Ga. 286, 236 S.E.2d 632 (1977).

Since the failure to include findings of fact and conclusions of law in the order in a proceeding under the "Uniform Reciprocal Enforcement of Support Act", O.C.G.A. Art. 2, Ch. 11, T. 19, was an amendable defect appearing on the face of the record, it was not subject to a motion to set aside and the trial court did not err in denying the defendant's motion to set aside judg-

ment. *Powell v. State*, 166 Ga. App. 780, 305 S.E.2d 646 (1983).

Bare statement of what the court considered in reaching the court's conclusions is not a recitation of how those facts give support to or what constitutes the separate conclusions. *Moore v. Farmers Bank*, 182 Ga. App. 94, 354 S.E.2d 692 (1987), overruled on other grounds, *Underwood v. Underwood*, 282 Ga. 643, 651 S.E.2d 736 (2007); *In re D.L.G.*, 212 Ga. App. 353, 442 S.E.2d 11 (1994).

Writing requirement. — Evidentiary hearing on issue of damages following the defendant's default is subject to requirement that findings of fact and conclusions of law be in writing. *Marsh v. Way*, 170 Ga. App. 300, 316 S.E.2d 599 (1984).

Oral findings stated into the record as supplemented by arguments of counsel will not satisfy the requirement for written findings and conclusions. *Aycock v. Morris Indus., Inc.*, 171 Ga. App. 50, 318 S.E.2d 780 (1984); *Beeks v. Consulatech, Inc.*, 222 Ga. App. 473, 474 S.E.2d 675 (1996).

Oral recitation is not compliance. — Oral recitations of the court's conclusions presented during the hearing are not a substantial compliance with subsection (a) of O.C.G.A. § 9-11-52. *Chamlee v. DOT*, 182 Ga. App. 120, 354 S.E.2d 701 (1987).

Adoption of proposed findings of prevailing party. — When the trial court adopts the verbatim proposed findings and conclusions of the prevailing party, the adequacy of the findings is more apt to be questioned, the losing party may forfeit the party's undeniable right to be assured that the party's position has been thoroughly considered, and the independence of the trial court's thought process may be cast in doubt, but the practice cannot be condemned when there is no evidence that the trial court did not give serious consideration to and review the proposed findings and conclusions eventually adopted. *Outdoor Adv. Ass'n v. DOT*, 186 Ga. App. 550, 367 S.E.2d 827, cert. denied, 186 Ga. App. 918, 367 S.E.2d 827 (1988).

Remand to trial court for preparation of findings and conclusions. — When the trial court fails to make findings or to find on a material issue, and an

appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made. *Spivey v. Mayson*, 124 Ga. App. 775, 186 S.E.2d 154 (1971); *Hickok v. Starka Indus., Inc.*, 151 Ga. App. 668, 261 S.E.2d 418 (1979).

Absence of findings required by subsection (a) of this section does not require reversal of the judgment, but only a remand of the case for the making of such findings. *Jacobs Pharmacy Co. v. Richard & Assocs.*, 229 Ga. 156, 189 S.E.2d 853 (1972).

When findings of fact and conclusions of law required by subsection (a) of this section were neither made nor waived, the case must be remanded with direction that the judge vacate the judgment, prepare or cause to be prepared appropriate findings of fact and conclusions of law, and enter a new judgment thereon, after which the losing party shall be free to enter a new appeal. *Medical Personnel Pool v. Middlebrooks*, 133 Ga. App. 148, 210 S.E.2d 372 (1974); *Gardner v. Goss*, 138 Ga. App. 637, 227 S.E.2d 92 (1976); *Jones v. Childs*, 139 Ga. App. 337, 228 S.E.2d 363 (1976); *Smith v. Randolph*, 153 Ga. App. 78, 264 S.E.2d 557 (1980).

Judgment rendered without findings of fact and conclusions of law may be vacated on appeal, and conclusions of law and facts supplied at the direction of the appellate court. *Kennedy v. Brown*, 239 Ga. 286, 236 S.E.2d 632 (1977).

When the trial court's order contains no recitation of the facts the court found to support the court's conclusions, the appeal is remanded with direction that the trial judge vacate the judgment, prepare, or cause to be prepared, appropriate findings of fact and conclusions of law, and enter a new judgment thereon, after which the losing party shall be free to enter another appeal if the losing party should wish to do so. *C & H Couriers, Inc. v. American Mut. Ins. Co.*, 166 Ga. App. 853, 305 S.E.2d 500 (1983).

Case must be remanded when the trial court fails to make findings of fact and conclusions of law in the court's dismissal order, and when neither party waives these findings and conclusions. *L & L Elec. Serv., Inc. v. L.K. Comstock & Co.*,

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168 Ga. App. 780, 310 S.E.2d 557 (1983); *Avery Mechanical Contractors v. Quality Mechanical Contractors*, 182 Ga. App. 168, 355 S.E.2d 102 (1987).

Judgment granting the state's petition to validate revenue bonds under the Revenue Bond Law, O.C.G.A. § 36-82-60 et seq., was remanded to the trial court because the trial court failed to mention in the judgment the citizen who intervened in the proceedings and to set forth findings of fact and conclusions of law with respect to various grounds pursued by the citizen as required by O.C.G.A. § 9-11-52(a); prior to the judgment, the citizen requested findings of fact and conclusions of law. *Sherman v. Dev. Auth.*, 314 Ga. App. 237, 723 S.E.2d 528 (2012).

Trial court erred by validating taxable revenue bonds for a county development authority as the order validating the bonds failed to set forth sufficient findings of fact and conclusions of law to support the court's holdings and, thus, failed to satisfy the requirements of O.C.G.A. § 9-11-52(a). *Sherman v. Dev. Auth.*, 320 Ga. App. 689, 740 S.E.2d 663 (2013).

When no enumeration of error is directed to court's failure to include findings of fact and conclusions of law, the judgment of trial court will not be reversed upon such ground. *Cunnane v. Cunnane*, 237 Ga. 650, 229 S.E.2d 431 (1976); *Lavender v. Myers*, 150 Ga. App. 547, 258 S.E.2d 257 (1979).

Findings proper in a stockholder's case against shareholder. — In a stockholder's suit against a corporation and the corporation's other owners, the trial court's finding that the stockholder paid in full for the stock issued to the stockholder was not clearly erroneous, based on the uncontradicted testimony from the vice-president of the corporation's bookkeeper, corporate record corroborated by financial and tax findings by the corporation, and no inference based on circumstantial evidence was rebutted by direct testimony. *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

Proper findings in divorce action. — In a divorce appeal, a trial court did not

abuse the court's discretion in not making the specific total-marital-estate-value finding that the husband belatedly requested, given the other findings the court made in the decree and the evidence in the record. *Driver v. Driver*, 292 Ga. 800, 741 S.E.2d 631 (2013).

When Findings Necessary

Findings and conclusions generally unnecessary to motions. — Provisions of this section which require findings of fact and conclusions of law are not applicable to motions. *Lupo v. Long*, 145 Ga. App. 876, 245 S.E.2d 73 (1978).

Dismissal rendered hearing moot. — Since the plaintiff did not perfect service, the trial court correctly dismissed that suit; dismissal of the action rendered a hearing on the merits and compliance with O.C.G.A. § 9-11-52 moot. *Nally v. Bartow County Grand Jurors*, 280 Ga. 790, 633 S.E.2d 337 (2006).

Required findings for involuntary dismissal. — Findings of fact and conclusions of law are unnecessary on decisions of motions under Ga. L. 1972, p. 689, §§ 4 and 5 or Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-12 or O.C.G.A. § 9-11-56) or any other motion, except as provided in Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(b)). *Walker v. Walker*, 238 Ga. 273, 232 S.E.2d 554 (1977).

Requirement of subsection (a) of Ga. L. 1970, p. 170, § 1 (see now O.C.G.A. § 9-11-52) that in all actions in superior court tried upon the facts without a jury, with certain exceptions, the court shall find the facts specially and state separately the court's conclusions of law thereon upon entry of judgment applies when the court enters an involuntary dismissal pursuant to Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(b)). *Salvador v. Wals*, 139 Ga. App. 362, 228 S.E.2d 384 (1976).

Findings not required for counterclaim dismissal. — Court was not required to give legal or factual reasons for dismissing the appellant's counterclaim. *Garrett v. Georgia Higher Educ. Assistance Corp.*, 217 Ga. App. 415, 457 S.E.2d 677 (1995).

Ruling on O.C.G.A. § 9-11-12(b)(6) motion. — Client's claim of a procedural

defect in the trial court's handling of the client's complaint seeking to vacate an arbitration award was rejected as the trial court did not have to make findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52(a) when ruling on an O.C.G.A. § 9-11-12(b)(6) claim; even if O.C.G.A. § 9-11-52(a) applied, the client did not request such findings of fact and conclusions of law. *Durden v. Suggs*, 271 Ga. App. 688, 610 S.E.2d 640 (2005).

Findings entered only upon request. — Under subsection (a) of O.C.G.A. § 9-11-52, as it was amended in 1987, entry of findings and conclusions is mandatory only upon request by a party, as opposed to the earlier law, when such entry was required unless waived by the parties. *Poor v. Leader Fed. Bank for Savs.*, 221 Ga. App. 889, 473 S.E.2d 563 (1996).

Alleged requests for findings that were framed as "issues for determination by the jury" were legally insufficient under subsection (a) of O.C.G.A. § 9-11-52 to mandate that the trial court issue such findings. *Progressive Preferred Ins. Co. v. Aguilera*, 243 Ga. App. 442, 533 S.E.2d 448 (2000).

Because conflicting evidence was presented concerning the values of the parties' assets as well as the premarital and marital contributions of each spouse, the trial court, sitting as the trier of fact, was required to determine whether and to what extent a particular asset was marital or non-marital, exercise the court's discretion, and then divide the marital property equitably; hence, inasmuch as the issues on appeal depended upon the factual determinations made by the trial court as fact finder, and neither party asked the trial court to make factual findings, the equitable distribution of marital property was not improper as a matter of law or fact. *Mathis v. Mathis*, 281 Ga. 865, 642 S.E.2d 832 (2007).

Trial court did not err by failing to set forth findings of fact and conclusions of law after a bench trial hearing in the trial court's denial of an estate administrator's petition for leave to recover and sell the estate's property as the administrator never requested such findings and conclusions of law within the time period re-

quired by O.C.G.A. § 9-11-52. *Huggins v. Powell*, 293 Ga. App. 436, 667 S.E.2d 219 (2008).

In a dispossessory proceeding, as the mortgagors did not request the state court to enter findings of fact and conclusions of law until after a ruling had been entered, the state court was not required to include that information pursuant to O.C.G.A. § 9-11-52(a) as to each of the mortgagors' defenses and counterclaims; O.C.G.A. § 44-7-56, which provided a mechanism for trial courts to enter findings of fact and conclusions of law in dispossessory cases being appealed, was permissive, not mandatory. *Mackey v. Fed. Nat'l Mortg.*, 294 Ga. App. 495, 669 S.E.2d 397 (2008).

Because the parties agreed that a verdict would be rendered without findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52, the trial court did not err in failing to make findings of fact and conclusions of law. *Swainsboro Cabinet Co. v. Ed Johns Constr. Co.*, 299 Ga. App. 462, 682 S.E.2d 599 (2009).

Appellant who did not request findings of fact and conclusions of law under O.C.G.A. § 9-11-52(a) failed to demonstrate error in the trial court's failure to specify the court's reasons for issuing an interlocutory injunction. *Am. Lien Fund, LLC v. Dixon*, 286 Ga. 562, 690 S.E.2d 415 (2010).

Because a chairperson of the board of education failed to allege any error in the sufficiency of the trial court's findings of fact or conclusions of law or request that the trial court amend the court's judgment to separately make such findings or conclusions, the chairperson waived the right to challenge the sufficiency of the findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52. *Cook v. Smith*, 288 Ga. 409, 705 S.E.2d 847 (2010).

When disposition of motion in nonjury case requires weighing of evidence and constitutes an adjudication on the merits, findings of fact and conclusions of law are required. *Bob Bennett Enters., Inc. v. Trust Co. Bank*, 153 Ga. App. 344, 265 S.E.2d 311 (1980).

Order making settlement agreement judgment of the court is something more than decision of a motion such as is contemplated by exemption in this

When Findings Necessary (Cont'd)

section, but rather is subject to the requirement of findings of fact and separate conclusions of law. *Greene v. Colonial Stores, Inc.*, 141 Ga. App. 35, 232 S.E.2d 381 (1977).

In an uncontested divorce action, the trial court was not required to make findings of fact and conclusions of law. *Russ v. Russ*, 272 Ga. 438, 530 S.E.2d 469 (2000).

Contested actions for divorce, alimony, and child custody. — Subsection (a) of this section requires findings of facts and conclusions of law in contested divorce, contested alimony, and contested custody of children actions. *Githens v. Githens*, 234 Ga. 715, 217 S.E.2d 291 (1975).

Contested child custody cases. — Requirement of written findings of fact and conclusions of law applies to contested child custody cases under subsection (a) of O.C.G.A. § 9-11-52. *Jordan v. Jordan*, 179 Ga. App. 155, 345 S.E.2d 675 (1986).

Subsection (a) of O.C.G.A. § 9-11-52 is mandatory in contested custody of children actions. *Couch v. Couch*, 177 Ga. App. 773, 341 S.E.2d 303 (1986).

Divorce, alimony, or child custody case in which separation agreement is modified by the trial judge pursuant to the judge's authority is "contested" within the meaning of subsection (a) of this section. *Mullis v. Mullis*, 238 Ga. 185, 232 S.E.2d 60 (1977).

Child custody cases. — Requirements of subsection (a) of this section are applicable to contested child custody cases. *Avery v. Avery*, 234 Ga. 729, 218 S.E.2d 19 (1975); *Motes v. Stanton*, 237 Ga. 440, 228 S.E.2d 831 (1976); *Coleman v. Coleman*, 238 Ga. 183, 232 S.E.2d 57 (1977).

Adoption of minor. — Adoption case necessarily involves custody of the adopted person, and "custody of minors" is among the matters excepted from the requirement that the trial court make findings of fact and conclusions of law. *Grady v. Hill*, 128 Ga. App. 153, 195 S.E.2d 794 (1973).

Subsection (a) of this section applies to an adoption proceeding as it is not among

any of the exceptions noted therein. *Perry v. Thomas*, 129 Ga. App. 325, 199 S.E.2d 634 (1973).

Deprivation petitions. — In ruling on deprivation petitions, findings of fact should be made in accordance with subsection (a) of this section. *In re A.A.G.*, 143 Ga. App. 648, 239 S.E.2d 697 (1977).

Since the trial court treated a deprivation determination as part of a custody determination, which does not require specific findings of fact, the case was remanded with direction that the court prepare findings of fact employing statutory standards for determination of deprivation. *In re J.B.*, 241 Ga. App. 679, 527 S.E.2d 275 (1999).

Confirmation of nonjudicial property sale. — Judge hearing confirmation of a nonjudicial sale of property is required to render a judgment with findings of fact. *Weems v. McCloud*, 619 F.2d 1081 (5th Cir. 1980).

Application for contempt is a motion before the court not coming within the ambit of O.C.G.A. § 9-11-52 and, as such, the trial judge does not err in failing to make special findings of fact and conclusions of law. *Baldwin v. National Bank*, 165 Ga. App. 381, 300 S.E.2d 209 (1983).

Denial of writ of certiorari. — Subsection (a) of O.C.G.A. § 9-11-52 does not apply when an application for writ of certiorari is denied. *Flacker v. Berr-Nash Corp.*, 157 Ga. App. 638, 278 S.E.2d 180 (1981), overruled as being incompatible with O.C.G.A. § 5-4-12(b), relating to the standard to be applied in appeals to superior court by application for certiorari. *Smith v. Elder*, 174 Ga. App. 316, 329 S.E.2d 511 (1985), overruled on other grounds, 228 Ga. App. 864, 493 S.E.2d 51 (1997), overruled on other grounds as stated in, *Norris v. Henry County*, 255 Ga. App. 718, 566 S.E.2d 428 (2002).

In an equity case, the court's duty to apply facts to law makes findings of fact and conclusions of law necessary, even when the court calls upon a jury for special verdicts. *Hanson v. First State Bank & Trust*, 254 Ga. 235, 327 S.E.2d 730 (1985).

Injunctions. — When the order granting injunctive relief fails to set forth findings of fact and conclusions of law pursu-

ant to subsection (a) of O.C.G.A. § 9-11-52, the requirements of which were not waived by the parties, that order is deficient as a matter of law. Accordingly, the order granting injunctive relief will be remanded for the preparation of written findings of fact and conclusion of law, after which the losing party may appeal to the court of appropriate jurisdiction. *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).

Consent order voluntarily entered into by both parties which was presented to the trial judge in order to dispose of all matters pending before the court was covered by the exceptions in O.C.G.A. § 9-11-52 and did not require written findings of fact and conclusions of law. *Elliott v. Flewellyn*, 174 Ga. App. 486, 330 S.E.2d 185 (1985).

Ruling on motion for summary judgment. — Trial court is not required to make findings of fact and conclusions of law with order granting summary judgment. *Healthdyne, Inc. v. Henry*, 144 Ga. App. 52, 240 S.E.2d 259 (1977).

Trial court need not make findings of fact in ruling on a motion for summary judgment. *Edwards v. McTyre*, 246 Ga. 302, 271 S.E.2d 205 (1980); *Brown v. Reeves*, 164 Ga. App. 89, 296 S.E.2d 393 (1982).

Grant of motion for summary judgment was excluded from the operation of O.C.G.A. § 9-11-52 by the clear language of the section. *Karsman v. Portman*, 173 Ga. App. 108, 325 S.E.2d 608 (1984).

It is not necessary to include findings of fact and conclusions of law on decisions on motions for summary judgment. *Fudge v. Colonial Baking Co.*, 186 Ga. App. 582, 367 S.E.2d 814 (1988).

Mere entry of findings of fact and conclusions of law in ruling on a motion for summary judgment does not constitute error per se. In certain cases when the trial court makes findings of fact and conclusions of law in ruling on motions for summary judgment, it can be helpful to the appellate courts and instructive to the parties. *Harrell v. Louis Smith Mem. Hosp.*, 197 Ga. App. 189, 397 S.E.2d 746 (1990).

It is not grounds for reversal that the

trial court elected not to issue findings of fact and conclusions of law in support of the court's grant of summary judgment. *Hopkins v. Hudgins & Co.*, 218 Ga. App. 508, 462 S.E.2d 393 (1995).

Motion to set aside default judgment pursuant to Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60(d)) does not come within the ambit of Ga. L. 1970, p. 170, § 1 (see now O.C.G.A. § 9-11-52). *Emery Enters., Inc. v. Automatic Fastners Div.*, 155 Ga. App. 24, 270 S.E.2d 261 (1980).

Application for contempt. — Since application for contempt does not come within definition of a pleading, it is necessarily a motion as defined in Ga. L. 1967, p. 226, § 7 (see now O.C.G.A. § 9-11-7(b)), and provisions of Ga. L. 1970, p. 170, § 1 (see now O.C.G.A. § 9-11-52) which require findings of fact and conclusions of law by the trial court are not applicable to motions. *Hines v. Hines*, 237 Ga. 755, 229 S.E.2d 744 (1976); *Fields v. Fields*, 240 Ga. 173, 240 S.E.2d 58 (1977).

Hearing on fitness of applicant to take bar examination is not such an action as is contemplated under subsection (a) of this section, requiring finding of facts and conclusions of law in actions tried upon the facts without a jury. *Gardner v. Gwinnett Circuit Bar Ass'n*, 241 Ga. 614, 247 S.E.2d 64 (1978).

Foreclosure sale price. — Judgment in an action to confirm a foreclosure sale is inadequate if the judgment contains no specific finding concerning the sufficiency of the price brought at sale. *Lanier v. Citizens State Bank*, 186 Ga. App. 395, 367 S.E.2d 585 (1988).

Revenue bond validation proceeding. — Because a revenue bond validation order contained merely a dry recitation that certain legal requirements had been met, adequate appellate review of the trial court's decision making process was effectively prevented; the validation order did not specifically address a resident's objection that the transaction did not comply with the Development Authorities Law, O.C.G.A. § 36-62-8(b), or the process by which the court came to the court's conclusion that the proposed transaction followed all proper and necessary steps. *Sherman v. Dev. Auth.*, No. A12A0587,

When Findings Necessary (Cont'd)

2012 Ga. App. LEXIS 624 (July 5, 2012).

Review of Findings on Appeal

Subsection (a) of this section contains so-called “any evidence rule,” which has long been binding upon appellate courts in this state on appeals taken from nonjury single-judge judgments. *Pinkerton & Laws Co. v. Atlantis Realty Co.*, 128 Ga. App. 662, 197 S.E.2d 749 (1973).

“Any evidence rule” defined. — “Any evidence rule” provides that when a nonjury single-judge judgment is reviewed, neither the Supreme Court nor the Court of Appeals will interfere with a finding by the trial tribunal when there is any evidence to support the finding. *Kingston Dev. Co. v. Kenerly*, 132 Ga. App. 346, 208 S.E.2d 118 (1974).

“Clearly erroneous” test is same as “any evidence rule.” — In a bench trial the court sits as the trier of fact and the court’s findings shall not be set aside unless clearly erroneous. The “clearly erroneous” test is the same as the “any evidence rule”; thus, an appellate court will not disturb fact findings of a trial court if there is any evidence to sustain those findings. *Allen v. Cobb Heating & Air Conditioning Co.*, 158 Ga. App. 209, 279 S.E.2d 505 (1981); *Smith v. Carlton Farms, Inc.*, 181 Ga. App. 743, 353 S.E.2d 624 (1987); *Kimbrell v. Effingham Bd. of Tax Assessors*, 191 Ga. App. 544, 382 S.E.2d 388 (1989); *CFUS Props., Inc. v. Thornton*, 246 Ga. App. 75, 539 S.E.2d 571 (2000); *Ins. Indus. Consultants, Inc. v. Essex Invs., Inc.*, 249 Ga. App. 837, 549 S.E.2d 788 (2001).

When a nonjury judgment by a trial court is reviewed by an appellate court in Georgia, it will not interfere with the findings of fact by the trial tribunal if there is “any evidence” to support the findings. This “any evidence” test is the same as the “clearly erroneous” test for findings of fact by the trial judge required by subsection (a) of O.C.G.A. § 9-11-52. *Wolfe v. Rhodes*, 166 Ga. App. 845, 305 S.E.2d 606 (1983).

Judge’s finding not disturbed if supported by any evidence. — When a

case is submitted to a judge for trial and decision, without a jury, the judge’s finding is given the same weight as a verdict, and if there is any evidence to support the finding, the finding will not be disturbed on appeal unless clearly erroneous. *Evans v. Marbut*, 140 Ga. App. 329, 231 S.E.2d 94 (1976), cert. dismissed, 238 Ga. 583, 234 S.E.2d 506 (1977); *Mullins v. Oden & Sims Used Cars, Inc.*, 148 Ga. App. 250, 251 S.E.2d 65 (1978).

Appellate courts of this state will not interfere with the findings of a judge sitting without a jury if there is any evidence to support the findings. *Associated Distribs., Inc. v. McBee*, 140 Ga. App. 433, 231 S.E.2d 449 (1976).

Trial court did not err in entering judgment against the venture capital firm on the firm’s fraudulent misrepresentation counterclaim asserting that the three stockholders misrepresented or fraudulently concealed the existence of a consulting agreement that when revealed resulted in the termination of their company’s most valuable contract; evidence in the record supported the trial court’s finding that the consulting agreement was not material in regard to the venture capital firm’s fraudulent misrepresentation claim. *Tampa Bay Fin., Inc. v. Nordeen*, 272 Ga. App. 529, 612 S.E.2d 856 (2005).

Even if other findings might also have been authorized. — Even though findings of fact contended for by appellants would have been authorized by evidence presented at trial, when the facts found by the trial court were also authorized by the evidence such findings would not be set aside. *Cooper v. Rosser*, 232 Ga. 597, 207 S.E.2d 513 (1974).

Clearly erroneous standard of review. — Like the findings of a jury or of the Workers’ Compensation Board, the judge’s findings of fact are binding on appeal, and unless wholly unsupported or clearly erroneous will not afford a basis for reversal. *Spivey v. Mayson*, 124 Ga. App. 775, 186 S.E.2d 154 (1971).

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility. *Bell v. Cronin*, 248 Ga. 457, 283 S.E.2d 476

(1981); *Mutual Ins. Co. v. Dublin Pub. Inc.*, 190 Ga. App. 94, 378 S.E.2d 497 (1989); *Claxton Enter. v. Evans County Bd. of Comm'rs*, 249 Ga. App. 870, 549 S.E.2d 830 (2001).

Findings of fact by a trial judge will not be set aside unless "clearly erroneous." *Smith v. Smith*, 248 Ga. 268, 282 S.E.2d 324 (1981), overruled on other grounds, *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Finding of facts by the trial court in nonjury cases will not be set aside on appeal unless the findings are wholly unsupported by the evidence or are clearly erroneous. *Davis v. Hospital Auth.*, 167 Ga. App. 304, 306 S.E.2d 306 (1983).

Findings of the trial judge were to be set aside as clearly erroneous when the award of back pay to a former president of a corporation was speculative and not supported by the evidence. The former president would not have drawn that salary for that period because the business would not have continued. *Davis v. Davis*, 262 Ga. 420, 419 S.E.2d 913 (1992).

On a motion to enforce a settlement agreement, the appellate court construes the evidence to uphold the trial court's judgment and will not disturb the trial court's findings thereon unless the findings are clearly erroneous; thus, when the trial court conducted a hearing and considered the evidence before concluding that appellants, the children of a decedent, did not carry the appellants' burden of proving that an enforceable settlement agreement was reached with appellee, the decedent's widow, the trial court acted as a finder of fact, and the clearly erroneous standard of O.C.G.A. § 9-11-52(a) thus applied in reviewing the trial court's decision. *Griffin v. Wallace*, 260 Ga. App. 857, 581 S.E.2d 375 (2003), aff'd, Ga. , 615 S.E.2d 542 (2005).

If a trial court in a civil case hears live testimony and is called upon to act as the ultimate finder of fact on a duress issue, a clearly erroneous, rather than a de novo standard of review applies. *Peacock v. Spivey*, 278 Ga. App. 338, 629 S.E.2d 48 (2006).

Finding of trial court upheld. — In light of the plaintiff's own admission that the plaintiff offered to the plaintiff's new

employer, a competitor of the plaintiff's former employer, sales catalogues of two of the plaintiff's former employer's customers, to whom the plaintiff attempted to sell products from the plaintiff's new employer, the trial court did not err in finding that the plaintiff solicited sales in violation of the noncompetition provisions of the contract. *Fisher v. Marvin Reese Cos.*, 231 Ga. App. 487, 499 S.E.2d 411 (1998).

There being no showing of a manifest abuse of discretion, the trial court's ruling denying the defendant's request to make findings of fact and conclusions of law in support of the court's judgment was proper. *Greene County v. North Shore Resort at Lake Oconee, L.L.C.*, 238 Ga. App. 236, 517 S.E.2d 553 (1999); *Vernon Library Supplies, Inc. v. Ard*, 249 Ga. App. 853, 550 S.E.2d 108 (2001).

Probate court properly revoked letters testamentary, ordered reimbursement to a decedent's estate of excessive expenses, and ordered a settling of the estate's accounts after the decedent's executor committed 17 breaches of fiduciary duty, including failing to wind up the estate and failing to provide the decedent's other child with an accounting. *Fowler v. Cox*, 264 Ga. App. 880, 592 S.E.2d 510 (2003).

In a case in which the trial court denied a petition by the appellants, the children of a decedent, to enforce an alleged settlement agreement between themselves and the appellee, the decedent's widow, which supposedly was reached in a probate case following mediation of a dispute between the parties regarding the validity of the decedent's will, the trial court's finding that the children failed to prove that the widow's settlement offer was still open when the children tried to accept the offer was not clearly erroneous given that the widow testified that the widow did not re-extend the widow's settlement offer after the children rejected the offer and after the widow rejected the children's counteroffer, and given that a letter from the widow's counsel to opposing counsel after the counteroffer was rejected expressed the possibility of considering further settlement offers, but did not refer to any outstanding settlement offer. *Griffin v. Wallace*, 260 Ga. App. 857, 581 S.E.2d 375 (2003), aff'd, Ga. , 615 S.E.2d 542 (2005).

Review of Findings on Appeal (Cont'd)

Because there was evidence to support a trial court's factual conclusions that a tenant's breach of contract terms by failing to remove storage tanks from the landlord's premises upon termination of the lease did not amount to a default, the determination that the landlord was not entitled to exercise cross-default provisions in order to terminate other leases between the parties was affirmed; in order to have committed a default, pursuant to the language of the lease, the tenant was entitled to notice and an attempt to timely cure the default. *Dude, Inc. v. Foamex, L.P.*, 269 Ga. App. 909, 605 S.E.2d 459 (2004).

Trial court properly entered an order compelling a health plan to cover a stem cell transplant to treat an insured's kidney cancer; the health plan failed to meet the plan's burden under O.C.G.A. § 9-11-52(a) in challenging the judgment as the plan never provided the plan's enrollees with notice of plan limitations, which included stem cell procedure limitations, and therefore, the limitation was not enforceable. *Hosp. Auth. v. Bohannon*, 272 Ga. App. 96, 611 S.E.2d 663 (2005).

In a case in which the trial court found that the appellant altered its lot, for the purpose of operating a used car business, creating an artificial increase in the water flowing onto the appellee's property, the trial court did not clearly err under O.C.G.A. § 9-11-52(a) in determining that an adequate cure for the runoff problem required both implementation of a second engineering plan and removal of motor vehicles from the rear portion of the lot as the record supported the finding that the placement of gravel on the lot, together with the metal roof created by the number of vehicles parked there, rendered a substantial portion of the lot virtually impermeable. *Menzies v. Hall*, 281 Ga. 223, 637 S.E.2d 415 (2006).

Trial court's factual finding that a car dealer had not breached a verbal agreement to its customer regarding the wiring to an uninstalled radio unit that the customer sought was not clearly erroneous, given the appellate court's deference, as

the wiring was not an essential accessory that should have come with the radio as part of the radio's purchase. *Rise v. GAPVT Motors, Inc.*, 288 Ga. App. 246, 653 S.E.2d 320 (2007).

Trial court's findings in favor of a customer on the customer's counterclaim for malicious prosecution in a contractor's breach of contract and trover claim were upheld as the evidence established that the contractor had signed a sworn affidavit stating that the customer committed criminal fraud by not paying for an installed fence on the customer's property and refused to pay when the amount due was merely in dispute and the customer had, in fact, tendered a check for a portion of the amount due indicating that the remaining balance was in dispute. The fact that the contractor's execution of those false statements had consequences not intended, namely that the customer spent two nights in jail, was insufficient to absolve the contractor's liability for making those statements. *Gooch v. Tudor*, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Trial court did not abuse the court's discretion by awarding property owners interlocutory injunctive relief against a county to keep the owners from further harm pending the resolution of the case because the county was found to have exceeded the bounds of an easement and it was for the trial court to determine how the county was required to cure the problem. *Gwinnett County v. McManus*, 294 Ga. 702, 755 S.E.2d 720 (2014).

Findings and judgment not disturbed absent error of law. — In considering arguments concerning fact finding, the appellate courts cannot disturb the judge's findings and judgment absent some error of law. *Kingston Dev. Co. v. Kenerly*, 132 Ga. App. 346, 208 S.E.2d 118 (1974); *Nabors v. Blanche Reeves Interiors, Inc.*, 139 Ga. App. 638, 229 S.E.2d 117 (1976); *Browning v. Federal Home Loan Mtg. Corp.*, 210 Ga. App. 115, 435 S.E.2d 450 (1993).

Finding based upon erroneous legal theory is cause for reversal or remittal. *DOT v. Livaditis*, 129 Ga. App. 358, 199 S.E.2d 573 (1973).

While ordinarily a judgment right for any reason must be affirmed, when it is

apparent that the court rests judgment on reasons which are erroneous or upon an erroneous legal theory, the court commits reversible error. *Ayers v. Yancey Bros. Co.*, 141 Ga. App. 358, 233 S.E.2d 471 (1977).

Subsection (a) of O.C.G.A. § 9-11-52 provides that findings of trial courts in nonjury trials “shall not be set aside unless clearly erroneous.” This principle does not apply, however, when it appears that the trial court’s findings and judgment are based on an error of law. *Scott v. Purser Truck Sales, Inc.*, 198 Ga. App. 611, 402 S.E.2d 354 (1991).

If court’s judgment is based upon stated fact for which there is no evidence, the judgment should be reversed. *Lamas v. Baldwin*, 140 Ga. App. 37, 230 S.E.2d 13 (1976); *Dotson v. Henry County Bd. of Tax Assessors*, 161 Ga. App. 257, 287 S.E.2d 696 (1982).

When there is evidence to support finding that settlement had been made, the Court of Appeals is without authority to disturb the settlement on appeal. *General Communications Serv., Inc. v. Georgia Pub. Serv. Comm’n*, 149 Ga. App. 466, 254 S.E.2d 710, *aff’d*, 244 Ga. 855, 262 S.E.2d 96 (1979).

Insufficient evidence to support finding of settlement. — In a personal injury action hearing under O.C.G.A. § 9-11-52(a), it was error for the trial court to grant a motorist’s motion to enforce an alleged settlement agreement between the injured party and the motorist’s insurer because the evidence did not show the insurer’s unqualified acceptance of the injured party’s settlement proposal, nor did the evidence show the injured party’s acceptance of the insurer’s counteroffer. *Jones v. Frickey*, 274 Ga. App. 398, 618 S.E.2d 29 (2005), *aff’d*, 280 Ga. 573, 630 S.E.2d 374 (2006).

Insufficient findings to support equitable distribution award. — Trial court erred in the court’s division of marital property in allowing the wife to delay the ultimate payment of funds to the husband for an indefinite period of time as the final judgment simply awarded the home to the wife without making any finding that the husband was entitled to any equitable division of that asset. While the degree of detail required was not signifi-

cant, as the issue was not complex, some findings were required. *Arthur v. Arthur*, 293 Ga. 63, 743 S.E.2d 420 (2013).

Every presumption and inference favors judgment, and the evidence must be construed to uphold rather than to destroy the judgment. *Kingston Dev. Co. v. Kenerly*, 132 Ga. App. 346, 208 S.E.2d 118 (1974).

Concomitant with principle that findings of fact by trial judge who sits without a jury may not be set aside unless clearly erroneous is directive that after judgment every presumption and inference favors such judgment and evidence must be construed to uphold rather than destroy the judgment. *Nabors v. Blanche Reeves Interiors, Inc.*, 139 Ga. App. 638, 229 S.E.2d 117 (1976).

Assumption that evidence sufficient in absence of transcript. — In the absence of a transcript of the evidence, the court must assume evidence presented was sufficient to support judgment. *Craig miles v. Craig miles*, 237 Ga. 498, 228 S.E.2d 882 (1976).

Judgment of the trial court will not be disturbed if the record does not show error, and in the absence of a transcript of the evidence, the appellate courts must assume evidence was sufficient to support the judgment. *National Enters., Inc. v. Davis*, 145 Ga. App. 198, 243 S.E.2d 563 (1978).

State’s highest court accepted a probate court’s findings that a daughter’s evidence that the mother’s will had been revoked lacked credibility, that the presumption of revocation had been rebutted, and that the proffered copy was a true copy as the daughter did not provide the state’s highest court with a transcript of the probate court hearing. *Tanksley v. Parker*, 278 Ga. 877, 608 S.E.2d 596 (2005).

When there is no transcript of evidence, judgment must be affirmed as it cannot be said that the trial court’s findings are “clearly erroneous.” *White v. Johnson*, 151 Ga. App. 345, 259 S.E.2d 731 (1979).

When there is no transcript of the evidence, the appellate court cannot say a trial court’s finding is clearly erroneous and the court must, therefore, be bound by the finding. *Hammond v. State*, 168 Ga.

Review of Findings on Appeal (Cont'd)

App. 508, 308 S.E.2d 701 (1983).

Findings as to residence and domicile. — Findings of the trier of fact as to residence and domicile will not be disturbed if there is “any evidence” to support the findings. *Smith v. Smith*, 248 Ga. 268, 282 S.E.2d 324 (1981), overruled on other grounds, *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Attorney’s fees. — Since the trial court found that the plaintiffs failed to offer any competent evidence to support the purported debt underlying an attorneys’ fee lien, the court’s factual finding was upheld on appeal. *Ellis, Funk, Goldberg, Labovitz & Dockson v. Kleinberger*, 235 Ga. App. 360, 509 S.E.2d 660 (1998).

Findings as to recovery for value of services held erroneous. — After the plaintiff admitted to agreeing to pay a certain sum for the services of one employed by the defendant, the trial court’s ruling that the defendant was entitled to recover a different amount for such services was clearly erroneous. *Fruin-Colnon Corp. v. Air Door, Inc.*, 157 Ga. App. 804, 278 S.E.2d 708 (1981).

Findings departing from policy of board. — Trial court had the authority to reverse or remand decision of the State Personnel Board on ground that the board abused the board’s discretion by departing from the board’s progressive discipline policy. *Georgia Dep’t of Labor v. Sims*, 164 Ga. App. 856, 298 S.E.2d 562 (1982).

Failure to request. — When the record did not show that the plaintiff, the subject of bank’s dispossessory action, requested that the trial court include specific findings of fact and conclusions of law in the court’s order to vacate premises prior to the order’s issuance, the trial court did not err in failing to include these findings in the court’s final judgment. *Burks v. First Union Mtg. Corp.*, 209 Ga. App. 41, 432 S.E.2d 822 (1993); *Middlebrooks v. Fleet Fin., Inc.*, 217 Ga. App. 263, 456 S.E.2d 627 (1995).

Mother failed to preserve for appeal the mother’s claims that the trial court erred in failing to set forth the basis for the

court’s written legitimation order and in the court’s written order granting a father’s motion to change a child’s name as the mother never requested the findings of fact. *Carden v. Warren*, 269 Ga. App. 275, 603 S.E.2d 769 (2004).

On appeal from an order equitably distributing the parties’ marital property, inasmuch as the issues on appeal depended upon the factual determinations made by the trial court as fact-finder, and neither party asked the trial court to make factual findings, the Supreme Court of Georgia was unable to conclude that the trial court’s equitable distribution of marital property was improper as a matter of law or as a matter of fact. *Crowder v. Crowder*, 281 Ga. 656, 642 S.E.2d 97 (2007).

In an action to collect on past-due amounts owed by a homebuilder to two contractors, because the homebuilder failed to move the trial court to make or amend the court’s findings, or make additional findings and amend the judgment to the extent necessary for review, the homebuilder waived any claim on appeal that the trial court’s findings were inadequate or incomplete. *Hampshire Homes, Inc. v. Espinosa Constr. Servs.*, 288 Ga. App. 718, 655 S.E.2d 316 (2007).

City waived the right to challenge the sufficiency of the findings of fact and conclusions of law contained in the trial court’s judgment pursuant to O.C.G.A. § 9-11-52 because the city filed motions to set aside the judgment and to open default within 20 days after the judgment was entered, but such post-judgment motions did not allege any error in the sufficiency of the trial court’s findings of fact or conclusions of law or request that the trial court amend the court’s judgment to separately make such findings or conclusions. *City of East Point v. Jordan*, 300 Ga. App. 891, 686 S.E.2d 471 (2009), cert. denied, No. S10C0494, 2010 Ga. LEXIS 337 (Ga. 2010).

Court finding clearly erroneous. See *Big Canoe Corp. v. Williamson*, 168 Ga. App. 179, 308 S.E.2d 440 (1983).

Finding of trial court not clearly erroneous. See *Ridgley v. Helms*, 168 Ga. App. 435, 309 S.E.2d 375 (1983).

Motion properly denied. — In a commercial landlord’s suit for damages to the

extent that the rent the landlord would have been paid exceeded fair market value, the trial court properly denied the landlord's motions to amend the judgment or for a new trial; the landlord, via O.C.G.A. § 9-11-52(c), had improperly attempted to inject into the case a new methodology for calculating damages to replace the one it had used at trial. *Truststreet Props. v. Burdick*, 287 Ga. App. 565, 652 S.E.2d 197 (2007).

When findings in child custody case were so deficient the findings precluded review, the case was remanded to the trial court with direction that the trial judge vacate the judgment and make appropriate findings of fact and conclusions of law, and enter a new judgment thereon. *Milner v. Milner*, 177 Ga. App. 164, 338 S.E.2d 757 (1985).

Motions for Amendment and New Trial

Subsection (b) not designed as second opportunity to prove case. — Subsection (b) of this section is not a procedural device by which a party may be granted a second opportunity to prove the party's case after the party fails to do so in the first instance. *Buckley v. Thornwell*, 143 Ga. App. 764, 240 S.E.2d 258 (1977).

Amendment of judgment permitted at any time to include findings and conclusions. — Final judgment which requires but does not contain findings of fact and conclusions of law may be amended by the lower court at any time to meet objections when the judgment is consequently entered of record. *Peachtree Mtg. Corp. v. Northside Realty Assocs.*, 140 Ga. App. 541, 231 S.E.2d 350 (1976), *aff'd*, 239 Ga. 62, 235 S.E.2d 491 (1977).

Amendment not authorized to bring evidence to appellate courts. — Although amendment to a judgment of the court sitting without a jury, adding thereto certain statements, findings of fact, and conclusions of law, is authorized by subsection (b) of Ga. L. 1970, p. 170, § 1 (see now O.C.G.A. § 9-11-52), amendment is not an authorized means of bring-

ing evidence to the appellate court on appeal under Ga. L. 1965, p. 18, § 10 (see now O.C.G.A. § 5-6-41). *Chapman v. Connor*, 138 Ga. App. 518, 226 S.E.2d 625 (1976).

Reason for rule that new trial motion must go to findings of fact is that a new trial is necessarily authorized only when errors occurred which might have affected the finding of the trier of fact; if it is only the judgment thereon which is alleged to be erroneous or illegal, this alludes to a matter of law only and there is no need for a new trial, but the party must merely take direct exception at the proper time. *Sunn v. Mercury Marine*, 166 Ga. App. 567, 305 S.E.2d 6 (1983).

Time for motion for reconsideration. — In cases tried before the court without a jury, whether or not written findings are required, motion for reconsideration by the trial judge is proper if filed within the ten-day period, irrespective of expiration of the term of court. *Hathcock v. Hathcock*, 232 Ga. 719, 208 S.E.2d 819 (1974).

Motion for new trial is available remedy to review contested custody case between parents. *Adair v. Adair*, 236 Ga. 443, 224 S.E.2d 21 (1976).

Supplemental order making findings not new judgment. — Entry of supplemental order making findings of fact and conclusions of law does not change effect of final order dismissing complaint, but merely sets out the basis for a judgment of dismissal; it is not a new judgment. *Northside Realty Assocs. v. Peachtree Mtg. Corp.*, 239 Ga. 62, 235 S.E.2d 491 (1977); *Grizzle v. Federal Land Bank*, 145 Ga. App. 385, 244 S.E.2d 362 (1978).

Inherent power of judge over judgment during term. — Trial judge has inherent power during same term of court in which judgment is rendered to revise, correct, revoke, modify, or vacate such judgment, even upon the judge's own motion, for the purpose of promoting justice and in the exercise of sound legal discretion. *LeCraw v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 75B Am. Jur. 2d, Trial, §§ 1183, 1662 et seq.

C.J.S. — 35B C.J.S., Federal Civil Procedure, § 1044 et seq. 49 C.J.S., Judgments, § 361 et seq. 89 C.J.S., Trial, §§ 1236, 1237.

ALR. — Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Power of trial court, on remand for further proceedings, to change prior fact findings as to matter not passed upon by appellate court, without receiving further evidence, 19 ALR3d 502.

Propriety and effect of trial court's adoption of findings prepared by prevailing party, 54 ALR3d 868.

9-11-53. Reserved.

ARTICLE 7

JUDGMENT

9-11-54. Judgments.

(a) **Definition.** The term “judgment,” as used in this chapter, includes a decree and any order from which an appeal lies.

(b) **Judgment upon multiple claims or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Relief granted.**

(1) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings; but the court shall not give the successful party relief, though he may be entitled to it, where the propriety of the relief was not litigated and the opposing party had no opportunity to assert defenses to such relief.

(2) As used in this subsection, the term “action for medical malpractice” means any claim for damages resulting from the death of or injury to any person arising out of:

(A) Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such services or by any person acting under the supervision and control of a lawfully authorized person; or

(B) Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment.

(3) Notwithstanding paragraph (1) of this subsection, where a claim in an action for medical malpractice does not exceed \$10,000.00, a judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Where the claim exceeds \$10,000.00, a judgment by default may be rendered for the amount determined upon a trial of the issue of damages, provided notice of the trial is served upon the defaulting party at least three days prior to that trial.

(d) **Costs.** Except where express provision therefor is made in a statute, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs; but costs against this state and its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by the law. (Ga. L. 1966, p. 609, § 54; Ga. L. 1976, p. 1047, § 2.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 54, see 28 U.S.C.

Law reviews. — For article discussing counterclaims and crossclaims under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 205 (1967). For article discussing Georgia court decision on questions of appellate practice and procedure, see 31 Mercer L. Rev. 1 (1979). For article surveying Georgia cases in the area of trial practice and procedure from June 1979 through May 1980, see 32 Mercer L. Rev. 225 (1980). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For article, “Appeals, In-

terlocutory 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 article, “Trial Practice and Procedure,” see 53 Mercer L. Rev. 475 (2001). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

For note, “Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act,” see 7 Ga. St. B.J. 385 (1971). For note, “Conflicts of Interest in the Liability Insurance Setting,” see 13 Ga. L. Rev. 973 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
MULTIPLE CLAIMS OR PARTIES

RELIEF GRANTED
COSTS

General Consideration

“Judgment” includes summary judgment. — Subsection (a) of O.C.G.A. § 9-11-54 includes an order for partial summary judgment as the judgment is appealable under O.C.G.A. § 9-11-56(h). *Crolley v. Haygood Contracting, Inc.*, 207 Ga. App. 434, 429 S.E.2d 93 (1993).

Use of term “final” not dispositive. — Under the express language of O.C.G.A. § 9-11-54(b), the mere designation of a judgment as “final” is not controlling. Whether an order is final and appealable is judged by the order’s function and substance, rather than any “magic language.” *Rhymes v. E. Atlanta Church of God, Inc.*, 284 Ga. 145, 663 S.E.2d 670 (2008).

Appeal not allowed. — After 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 the county’s 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).

Denial of certification as final is not appealable. — Trial court’s determination that a judgment obtained by a lender against two guarantors was not final under O.C.G.A. § 9-11-54(b), because the guarantors’ third-party complaint against two others was still pending, was not appealable, although the remaining parties had no incentive to expedite the litigation. *Synovus Bank v. Peachtree Factory Ctr., Inc.*, 331 Ga. App. 628, 770 S.E.2d 887 (2015).

Inherent power of judge over judgment during same term. — Trial judge has inherent power during same term of court in which judgment is rendered to revise, correct, revoke, modify, or vacate such judgment, even upon the judge’s own motion, for purpose of promoting justice and in the exercise of sound legal discre-

tion. *LeCrew v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972).

Trial judge has the power during the same term of court at which a judgment is rendered to reverse, correct, revoke, modify, or vacate the judgment in the exercise of the judge’s discretion. This inherent power of the trial court was not changed by passage of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *McCoy Lumber Co. v. Garland Lumber Sales, Inc.*, 182 Ga. App. 75, 354 S.E.2d 686 (1987).

Garnishment court erred in holding that, because the term of court had expired, the court lacked power to correct a judgment so that the judgment would reflect the proper amount of the funds subject to a garnishment as the judgment was actually an interlocutory order rather than a final judgment. *Lott v. Arrington & Hollowell, P.C.*, 258 Ga. App. 51, 572 S.E.2d 664 (2002).

Trial court may not award relief beyond that sought in the complaint when the defendant does not file defensive pleadings and does not appear at trial, and a complaint cannot be amended to conform to the evidence in such circumstances. *Hackbart v. Hackbart*, 272 Ga. 26, 526 S.E.2d 840 (2000).

Because the superior court modified the court’s judgment so as to vacate the court’s order of dismissal and provide only for the entry of a default judgment, the issue of dismissal was moot and provided no basis for setting aside the judgment. But, because the court, absent amendment to the demand for judgment or argument supporting the judgment, awarded damages in excess of the amount claimed, that award had to be reversed. *Stamps v. Nelson*, 290 Ga. App. 277, 659 S.E.2d 697 (2008).

What judge orally declares is no judgment until it is put in writing and entered. *Williams v. Horn*, 124 Ga. App. 485, 184 S.E.2d 198 (1971).

Writing required. — Superior court is a court of record, and what the judge orally declares is no judgment until the order has been reduced to writing and entered as such. *Tyree v. Jackson*, 226 Ga.

690, 177 S.E.2d 160 (1970).

Consent orders. — Consent order is final when there is no language in the consent order reflecting it to be anything other than a final judgment. *Levingston v. Crables*, 203 Ga. App. 16, 416 S.E.2d 131 (1992).

Pending counterclaim. — Actions appealed pursuant to O.C.G.A. § 5-6-34(a)(2)-(9) may be appealed directly to the Supreme Court without regard to a pending counterclaim and the lack of a final judgment as to counterclaim is no bar to a direct appeal. *Westberry v. Saunders*, 250 Ga. 240, 296 S.E.2d 596 (1982).

Fieri facias is not an order of final judgment tolling the time for appeal. *Newton v. K.B. Property Mgt. of Ga., Inc.*, 166 Ga. App. 901, 306 S.E.2d 5 (1983).

Denial of summary judgment does not foreclose subsequent grant thereof, as an order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims and rights and liabilities of all the parties. *Graham Bros. Constr. Co. v. Seaboard Coast Line R.R.*, 150 Ga. App. 193, 257 S.E.2d 321 (1979); *Malloy v. Cauley*, 169 Ga. App. 623, 314 S.E.2d 464 (1984).

Grant of summary judgment during plaintiff's case-in-chief appropriate. — In a suit asserting undue influence and seeking revocation of a testator's will, the trial court did not err in granting summary judgment to the defendant on the issue of revocation during the presentation of the plaintiff's case-in-chief because, pursuant to O.C.G.A. § 9-11-54, there is no procedural impediment to a trial court granting a party's motion for summary judgment without disposing of the entire case. *Morrison v. Morrison*, 282 Ga. 866, 655 S.E.2d 571 (2008).

When the judge specifically reserves an issue for later decision, the issue is still pending, and the judge's preliminary decision cannot form the basis of a final decision for the purpose of appeal. *Henderson v. Smith*, 177 Ga. App. 89, 338 S.E.2d 520 (1985).

Claims for damages and fees not relitigated when judgment was final. — When the trial court directed verdicts

as to the plaintiff's claims on the issues of punitive damages and attorney's fees, and the court then entered judgments on those verdicts and certified the judgments as final, the plaintiff's only recourse was to appeal the judgments as to punitive damages and attorney's fees; those issues could not be relitigated in the plaintiff's renewal action raising other issues which were voluntarily dismissed in the initial suit and not reached by the directed verdicts. *Broadfoot v. Aaron Rents, Inc.*, 260 Ga. 836, 401 S.E.2d 257 (1991).

Effect of incomplete adjudication on appeal. — Since the trial court's decision to deny the company's motion to set aside, vacate, and annul the county's declaration of taking in a condemnation proceeding was an adjudication of less than all the claims before the trial court, and because the trial court did not make an express determination that the company could pursue an interlocutory appeal, the appellate court lacked jurisdiction over the company's appeal, which meant the appeal had to be dismissed. *TJW Enters. v. Henry County*, 261 Ga. App. 547, 583 S.E.2d 144 (2003).

Appeal from order denying substitution was premature. — 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).

Duty to timely appeal an order designated as final. — 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 right to review of those rulings was lost. *Lewis v. Carscallen*, 274 Ga. App. 711, 618 S.E.2d 618 (2005).

Child support guidelines. — 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

General Consideration (Cont'd)

claim. However, since the appellate court granted a parent'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).

Custodial parent was not prevailing party. — O.C.G.A. § 9-11-54(d) was not applicable to a case because the custodial parent was not the prevailing party as all three counts of the other parent's petition alleging contumacious conduct of the custodial parent were upheld by the trial court. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Child custody order in divorce case not a final judgment. — Because neither the original court-ordered parenting plan nor the two subsequent orders amending the plan constituted a final judgment, and the determination of child custody became final only when the final judgment and decree in the divorce case was entered, the wife's motion for new trial, although the motion obviously referenced the bench trial on the child custody issues, was timely filed within 30 days of the date of the final judgment in the divorce case. *Hoover v. Hoover*, 295 Ga. 132, 757 S.E.2d 838 (2014).

No error in declining to amend judgment. — Trial court did not err in declining to amend a judgment prohibiting a limited liability company (LLC) from making any permanent changes to the surface of the property owners' land in replacing a sewer pipe by including the additional finding that the owners could not make any permanent changes to the surface of the easement until installation of the new sewer pipe because the issue of the owners' planned construction and any potential claims related thereto were not included in the pre-trial order as matters for determination, and the LLC had not previously requested any declaratory or injunctive relief pertaining to that issue prior to the entry of judgment. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Mandamus denied when claim remains pending. — Because there had been no ruling on the city's conversion

claim, the travel companies incorrectly determined that the companies were authorized to invoke mandamus in an effort to force the trial court to close the city's case as the city's case remained pending, and the trial court properly dismissed the travel companies' petition for a writ of mandamus. *Trip Network, Inc. v. Dempsey*, 293 Ga. 520, 748 S.E.2d 432 (2013).

Cited in *Ward v. National Dairy Prods. Corp.*, 224 Ga. 241, 161 S.E.2d 305 (1968); *D. Davis & Co. v. Plunkett*, 119 Ga. App. 453, 167 S.E.2d 663 (1969); *Massey v. Consolidated Equities Corp.*, 120 Ga. App. 165, 169 S.E.2d 672 (1969); *Gardner v. Tarpley*, 120 Ga. App. 192, 169 S.E.2d 690 (1969); *DeKalb County v. Georgia Paperstock Co.*, 226 Ga. 369, 174 S.E.2d 884 (1970); *Brown v. Leggett*, 226 Ga. 366, 174 S.E.2d 889 (1970); *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970); *Residential Devs., Inc. v. Dodd*, 122 Ga. App. 674, 178 S.E.2d 333 (1970); *Cook v. Peeples*, 227 Ga. 473, 181 S.E.2d 375 (1971); *Parrish v. Clements*, 123 Ga. App. 495, 181 S.E.2d 510 (1971); *White v. Wright*, 124 Ga. App. 151, 183 S.E.2d 90 (1971); *Georgia Farm Bureau Mut. Ins. Co. v. Williamson*, 124 Ga. App. 549, 184 S.E.2d 665 (1971); *Rowe v. Rowe*, 228 Ga. 302, 185 S.E.2d 69 (1971); *Burdell v. Georgia R.R. Bank & Trust Co.*, 124 Ga. App. 828, 186 S.E.2d 291 (1971); *Reeves Transp. Co. v. Gamble*, 126 Ga. App. 165, 190 S.E.2d 98 (1972); *Horn v. Terminal Transp. Co.*, 126 Ga. App. 169, 190 S.E.2d 158 (1972); *Shell v. Watts*, 125 Ga. App. 542, 188 S.E.2d 269 (1972); *McDonald v. Rogers*, 229 Ga. 369, 191 S.E.2d 844 (1972); *Hales v. Sandersville Bldrs. Supply Co.*, 127 Ga. App. 558, 194 S.E.2d 281 (1972); *Barnett v. Thomas*, 129 Ga. App. 583, 200 S.E.2d 327 (1973); *Stephens v. Zakas*, 129 Ga. App. 917, 201 S.E.2d 627 (1973); *Roderiquez v. Newby*, 130 Ga. App. 139, 202 S.E.2d 565 (1973); *Waddell v. Todd*, 131 Ga. App. 244, 205 S.E.2d 519 (1974); *Benefield v. Elder Bldg. Supply Co.*, 132 Ga. App. 195, 207 S.E.2d 678 (1974); *Myers v. Mobile Am. Corp.*, 132 Ga. App. 331, 208 S.E.2d 169 (1974); *Johnson v. Martin*, 132 Ga. App. 813, 209 S.E.2d 256 (1974); *Ivey v. Ivey*, 233 Ga. 45, 209 S.E.2d 590

(1974); Von Waldner v. Baldwin/Cheshire, Inc., 133 Ga. App. 23, 209 S.E.2d 715 (1974); McReynolds v. Savannah News-Press Div., Southeastern Newspaper Corp., 133 Ga. App. 815, 212 S.E.2d 470 (1975); Mulligan v. Scott, 134 Ga. App. 815, 217 S.E.2d 307 (1975); American Fin. Co. v. First Nat'l Bank, 134 Ga. App. 24, 217 S.E.2d 364 (1975); Jackson v. Piper Aircraft Corp., 135 Ga. App. 86, 217 S.E.2d 404 (1975); Thomas v. Davis, 235 Ga. 32, 218 S.E.2d 787 (1975); Kaye v. Saint Francis Budget Stores, Inc., 136 Ga. App. 68, 220 S.E.2d 75 (1975); Clements v. Warner Robins Supply Co., 235 Ga. 612, 221 S.E.2d 35 (1975); Spikes v. Carter Realty Co., 136 Ga. App. 648, 222 S.E.2d 154 (1975); Southland Inv. Corp. v. McIntosh, 137 Ga. App. 216, 223 S.E.2d 257 (1976); Ensley v. Ensley, 236 Ga. 368, 223 S.E.2d 724 (1976); Roach-Russell, Inc. v. A.B.R. Metals & Servs., Inc., 138 Ga. App. 653, 227 S.E.2d 75 (1976); Richert v. Hill Aircraft & Leasing Corp., 138 Ga. App. 638, 227 S.E.2d 83 (1976); Brannon v. Whisenant, 138 Ga. App. 627, 227 S.E.2d 91 (1976); Dempsey v. Bradley Ctr., Inc., 139 Ga. App. 615, 229 S.E.2d 104 (1976); Young v. Jones, 140 Ga. App. 66, 230 S.E.2d 32 (1976); Rollins Communications, Inc. v. Henderson, Few & Co., 140 Ga. App. 504, 231 S.E.2d 412 (1976); Mundy v. Cincinnati Ins. Co., 141 Ga. App. 106, 232 S.E.2d 621 (1977); Venable v. Lee, 141 Ga. App. 159, 233 S.E.2d 3 (1977); Williams v. Citizens & S. Nat'l Bank, 142 Ga. App. 346, 236 S.E.2d 16 (1977); Kirk v. First Ga. Inv. Corp., 239 Ga. 171, 236 S.E.2d 254 (1977); Smith v. Citizens & S. Nat'l Bank, 142 Ga. App. 797, 237 S.E.2d 207 (1977); Middleton v. State Farm Life Ins. Co., 143 Ga. App. 176, 237 S.E.2d 684 (1977); Klovville, Inc. v. Kinsler, 239 Ga. 569, 238 S.E.2d 344 (1977); Davis v. Correct Mfg. Corp., 143 Ga. App. 460, 238 S.E.2d 553 (1977); Mullis v. Bone, 143 Ga. App. 407, 238 S.E.2d 748 (1977); Williams v. Ray, 144 Ga. App. 634, 241 S.E.2d 502 (1978); Loftin v. Carrollton State Bank, 145 Ga. App. 166, 243 S.E.2d 333 (1978); Brown v. National Van Lines, 145 Ga. App. 824, 245 S.E.2d 27 (1978); Fagala v. Morrison, 146 Ga. App. 377, 246 S.E.2d 408 (1978); Diversified One Investors, Ltd. v. Archway

Properties, Inc., 146 Ga. App. 453, 246 S.E.2d 462 (1978); Alesi v. Conant, 146 Ga. App. 455, 246 S.E.2d 464 (1978); Sumner v. Adel Banking Co., 241 Ga. 563, 246 S.E.2d 680 (1978); Bozard v. J.A. Jones Constr. Co., 146 Ga. App. 877, 247 S.E.2d 605 (1978); Jackson v. Piper Aircraft Corp., 147 Ga. App. 178, 248 S.E.2d 239 (1978); Norair Eng'r Corp. v. Saint Joseph's Hosp., 147 Ga. App. 595, 249 S.E.2d 642 (1978); Shmunes v. Coffey Chevrolet & Oldsmobile, Inc., 148 Ga. App. 114, 251 S.E.2d 105 (1978); Trust Co. v. Atlanta Aluminum Co., 149 Ga. App. 605, 255 S.E.2d 82 (1979); Camp v. Martin, 150 Ga. App. 51, 256 S.E.2d 657 (1979); Blatt v. Bernath, 151 Ga. App. 69, 258 S.E.2d 735 (1979); Duvall v. Baker, 244 Ga. 228, 259 S.E.2d 478 (1979); Spurlock v. Commercial Banking Co., 151 Ga. App. 649, 260 S.E.2d 912 (1979); Thurman v. Unicure, Inc., 151 Ga. App. 880, 261 S.E.2d 785 (1979); Norair Eng'r Corp. v. Erickson's, Inc., 152 Ga. App. 489, 263 S.E.2d 165 (1979); Mullinax v. Standard Fire Ins. Co., 152 Ga. App. 425, 263 S.E.2d 231 (1979); SCM Corp. v. Thermo Structural Prods., Inc., 153 Ga. App. 372, 265 S.E.2d 598 (1980); Dehler v. Setliff, 153 Ga. App. 796, 266 S.E.2d 516 (1980); Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980); Bergen v. Martindale-Hubbell, Inc., 245 Ga. 742, 267 S.E.2d 10 (1980); Horne v. Drachman, 247 Ga. 802, 280 S.E.2d 338 (1981); Martin v. Herr, 158 Ga. App. 329, 280 S.E.2d 387 (1981); Walker v. Walker, 159 Ga. App. 583, 284 S.E.2d 89 (1981); Deans v. Kingston Dev. Corp., 248 Ga. 557, 285 S.E.2d 11 (1981); Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981); United States Life Credit Corp. v. Johnson, 248 Ga. 852, 287 S.E.2d 1 (1982); State Farm Mut. Auto. Ins. Co. v. Hubbell Metals, Inc., 161 Ga. App. 275, 287 S.E.2d 726 (1982); Widener v. Ravenscroft, 161 Ga. App. 12, 289 S.E.2d 257 (1982); Trax, Inc. v. Pentagon Aero-Marine Corp., 162 Ga. App. 276, 290 S.E.2d 196 (1982); United States Life Credit Corp. v. Johnson, 161 Ga. App. 864, 290 S.E.2d 280 (1982); Williamson v. Bank Bldg. & Equip. Corp. of Am., 162 Ga. App. 295, 291 S.E.2d 124 (1982); Shepherd v. Metropolitan Property & Liab. Ins. Co., 163 Ga. App. 650, 294 S.E.2d 638 (1982);

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Scroggins v. Edmondson, 250 Ga. 430, 297 S.E.2d 469 (1982); Bingham, Ltd. v. Tool Technology, Inc., 166 Ga. App. 220, 303 S.E.2d 761 (1983); Continental Ins. Co. v. Higdon, 167 Ga. App. 231, 306 S.E.2d 20 (1983); Parks v. Atlanta Pub. Sch. Sys. Bd. of Educ., 168 Ga. App. 572, 309 S.E.2d 645 (1983); Chadwick v. Miller, 169 Ga. App. 338, 312 S.E.2d 835 (1983); Georgia Farm Bldgs., Inc. v. Willard, 169 Ga. App. 394, 313 S.E.2d 112 (1984); King v. Gosdin, 169 Ga. App. 878, 315 S.E.2d 666 (1984); Whiddon v. O'Neal, 171 Ga. App. 636, 320 S.E.2d 601 (1984); Davidson v. American Fitness Ctrs., Inc., 171 Ga. App. 691, 320 S.E.2d 824 (1984); Oculus Corp. v. Fred Chenoweth Equip. Co., 172 Ga. App. 547, 323 S.E.2d 836 (1984); Thompson v. Bank of S., 172 Ga. App. 579, 323 S.E.2d 877 (1984); Newsome v. Graham, 254 Ga. 711, 334 S.E.2d 183 (1985); Calhoun Clinic v. Raju, 173 Ga. App. 320, 326 S.E.2d 529 (1985); Collier v. Rogers, 173 Ga. App. 621, 327 S.E.2d 588 (1985); Mr. Transmission, Inc. v. Thompson, 173 Ga. App. 773, 328 S.E.2d 397 (1985); Nowell v. Fain, 174 Ga. App. 592, 330 S.E.2d 741 (1985); Mims v. Citizens & S. Bank, 174 Ga. App. 686, 331 S.E.2d 67 (1985); Woodall v. Orkin Exterminating Co., 174 Ga. App. 435, 332 S.E.2d 173 (1985); C & W Land Dev. Corp. v. Kaminsky, 175 Ga. App. 774, 334 S.E.2d 362 (1985); Vintage Enters., Inc. v. Powers, 175 Ga. App. 785, 334 S.E.2d 383 (1985); DeKalb County Teachers Fed. Credit Union v. Citizens & S. Nat'l Bank, 176 Ga. App. 120, 335 S.E.2d 464 (1985); Craft's Ocean Court, Inc. v. Coast House Ltd., 255 Ga. 336, 338 S.E.2d 277 (1986); Lord Jeff Knitting Co. v. Boyle, 177 Ga. App. 467, 339 S.E.2d 745 (1986); Green v. Carver State Bank, 178 Ga. App. 798, 344 S.E.2d 507 (1986); Days Inn of Am., Inc. v. Sharkey, 178 Ga. App. 718, 344 S.E.2d 518 (1986); Advanced Contouring, Inc. v. McMillan Div. of States Eng'g Corp., 179 Ga. App. 128, 345 S.E.2d 666 (1986); Hodges Plumbing & Elec. Co. v. ITT Grinnell Co., 179 Ga. App. 521, 347 S.E.2d 257 (1986); Pierce v. Cessna Aircraft Co., 179 Ga. App. 549, 347 S.E.2d 261 (1986); Travelers Indem. Co. v. Schenden, 182 Ga. App. 735, 356 S.E.2d 761 (1987);

Crumbly v. Wyant, 183 Ga. App. 802, 360 S.E.2d 276 (1987); Chastain Place, Inc. v. Bank S., 185 Ga. App. 178, 363 S.E.2d 616 (1987); Steele v. Gold Kist, Inc., 186 Ga. App. 569, 368 S.E.2d 196 (1988); Harris v. Harris, 258 Ga. 496, 371 S.E.2d 399 (1988); Stancil v. Gwinnett County, 259 Ga. 507, 384 S.E.2d 666 (1989); Coxwell Tractor & Equip. Sales, Inc. v. Burgess, 192 Ga. App. 663, 385 S.E.2d 753 (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); Jim Walter Homes, Inc. v. Roberts, 196 Ga. App. 618, 396 S.E.2d 787 (1990); West v. Nodvin, 196 Ga. App. 825, 397 S.E.2d 567 (1990); White v. Lawyers Title Ins. Corp., 197 Ga. App. 780, 399 S.E.2d 526 (1990); Landor Condominium Consultants, Inc. v. Bankers First Fed. Sav. & Loan Ass'n, 198 Ga. App. 274, 401 S.E.2d 305 (1991); Hartley v. Taylor, 198 Ga. App. 641, 402 S.E.2d 372 (1991); Stonica v. State Farm Fire & Cas. Co., 198 Ga. App. 717, 402 S.E.2d 553 (1991); Floyd v. First Union Nat'l Bank, 203 Ga. App. 788, 417 S.E.2d 725 (1992); Adams v. Moffatt, 204 Ga. App. 314, 419 S.E.2d 318 (1992); B.J.'s Flooring, Inc. v. T.C. Interiors, Inc., 204 Ga. App. 441, 419 S.E.2d 528 (1992); Powell v. Harsco Corp., 209 Ga. App. 348, 433 S.E.2d 608 (1993); Jayson v. Gardocki, 221 Ga. App. 455, 471 S.E.2d 545 (1996); Eckland v. Hale & Eckland, 231 Ga. App. 278, 498 S.E.2d 358 (1998); Fulton County Tax Comm'r v. GMC, 234 Ga. App. 459, 507 S.E.2d 772 (1998); Barge v. St. Paul Fire & Marine Ins. Co., 245 Ga. App. 112, 535 S.E.2d 837 (2000); Johnston v. Conasauga Radiology, P.C., 249 Ga. App. 791, 549 S.E.2d 778 (2001); Benedict v. Snead, 253 Ga. App. 749, 560 S.E.2d 278 (2002); Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003); Yates Paving & Grading Co. v. Bryan County, 265 Ga. App. 578, 594 S.E.2d 756 (2004); Stubbs v. Pickle, 287 Ga. App. 246, 651 S.E.2d 171 (2007); Ferdinand v. City of East Point, 288 Ga. App. 152, 653 S.E.2d 529 (2007); Planning Techs., Inc. v. Korman, 290 Ga.

App. 715, 660 S.E.2d 39 (2008); Southern Mut. Church Ins. Co. v. ARS Mech., LLC, 306 Ga. App. 748, 703 S.E.2d 363 (2010); Cmty. State Bank v. Strong, 651 F.3d 1241 (11th Cir. 2011); Wilcher v. Redding Swainsboro Ford Lincoln Mercury, 321 Ga. App. 563, 743 S.E.2d 27 (2013); Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014); Rumsey v. Gillis, 329 Ga. App. 488, 765 S.E.2d 665 (2014).

Multiple Claims or Parties

Enforceability of judgment. — Judgment entered in a multiple party and/or multiple claims case prior to the disposition of the entire case is not enforceable unless the requirements of subsection (b) of O.C.G.A. § 9-11-54 are followed. Metropolitan Atlanta Rapid Transit Auth. v. Federick, 187 Ga. App. 696, 371 S.E.2d 204, cert. denied, 187 Ga. App. 908, 371 S.E.2d 204 (1988).

Subsection (b) prevents appellate court from dealing with merits of the trial court's rulings when one of the claims remains for decision and the court did not expressly direct entry of judgment in conformance with subsection (b). Peace Officers' Annuity & Benefit Fund v. Blocker, 135 Ga. App. 822, 219 S.E.2d 456 (1975).

Effect of certification of premature orders. — When the hearing on a declaratory judgment issue was conducted less than 20 days after service of the plaintiff's petitions in violation of O.C.G.A. § 9-4-5, the trial court was without authority to make a ruling on the issue and the court's certification of the court's orders pursuant to subsection (b) of O.C.G.A. § 9-11-54 did not make valid the premature orders. Robert W. Woodruff Arts Ctr., Inc. v. Insardi, 266 Ga. 248, 466 S.E.2d 214 (1996).

Court was without authority to vacate order outside of the term in which the order was entered. — Trial court improperly vacated the court's own order outside of the term in which the order was entered so the order vacating the initial order was a nullity, but, as the initial order, which denied an application to modify or vacate an arbitration award, did not address a counterclaim seeking to confirm the arbitration award, it was not a final order, and so the later order con-

firning the award was affirmed. Tanaka v. Pecqueur, 268 Ga. App. 380, 601 S.E.2d 830 (2004).

Two methods of appeal. — There are two principal methods by which an appeal might be brought in multi-claim party cases from orders as to less than all claims or parties involved: (1) the complaining party may obtain a certificate of immediate review from the trial judge under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)); and (2) the trial judge may enter an order upon express determination that there are no just reasons for delay and upon express direction for entry of judgment under subsection (b) of Ga. L. 1966, p. 609, § 54 (see now O.C.G.A. § 9-11-54). When the second method is used, the appellate court must still determine whether the judgment rendered meets the requirements of finality contained in former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)). 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).

As 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 § 9-11-54(b) nor § 5-6-34(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).

Appealability determined by § 5-6-34. — Whether or not judgment was appealable must be determined by former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34), and when a judgment was not dispositive of a case and therefore was not final, and there was no compliance with the interlocutory appeal provision of that section, the appeal was subject to dismissal. Foskey v. Bank of Alapaha, 147 Ga. App. 541, 249 S.E.2d 346 (1978).

Tax commissioner's defective attempt to seek interlocutory review pursuant to O.C.G.A. § 5-6-34(b) did not have the ef-

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fect of making the judgment appealed from res judicata of the issue appealed; thus, the tax commissioner was entitled to appeal the trial court's denial of the tax commissioner's summary judgment motion in a case where the property owner sought to set aside a deed executed pursuant to a judicial tax foreclosure and sued the tax commissioner and property purchaser in order to do so. *Canoeside Props. v. Livsey*, 277 Ga. 425, 589 S.E.2d 116 (2003).

Direct appeal was proper, despite the fact that a claim for punitive damages remained pending, because the trial court made a final ruling with regard to compensatory damages and specifically found that there was no just reason for delay. *Sam's Wholesale Club v. Riley*, 241 Ga. App. 693, 527 S.E.2d 293 (1999).

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 the defendant and past rent due and owing to the plaintiff). *Whiddon v. Stargell*, 192 Ga. App. 826, 386 S.E.2d 884 (1989).

Appeal from an order dismissing a complaint as a sanction for repeated failure to attend scheduled depositions was premature since there was a counterclaim pending in the court below, no determination by the trial judge that there was no just reason for delay, and the appellant failed to follow the applicable procedure for review under O.C.G.A. § 5-6-34(b). *Fasse v. Sexton*, 193 Ga. App. 9, 387 S.E.2d 17 (1989).

Appellate court had jurisdiction over appeal with multiple parties. — Georgia Court of Appeals had jurisdiction over a case wherein a purchaser appealed a trial court's grant of summary judgment to other defendants and dismissed them, which occurred prior to settling with the sellers as the purchaser did not voluntarily dismiss the remaining defendants to obtain a directly appealable final order and if the parties had not reached a settlement and proceeded to trial, the purchaser would have been able to directly appeal the judgment resulting from the trial. *O'Dell v. Mahoney*, 324 Ga. App. 360,

750 S.E.2d 689 (2013).

Determination of finality under subsection (b) satisfies finality requirement of § 5-6-34. — Former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(a)(1)) and subsection (b) of Ga. L. 1966, p. 609, § 54 (see now O.C.G.A. § 9-11-54) are to be construed together so that a determination of finality under the latter satisfies the finality requirement of the former. *Thompson v. Clarkson Power Flow, Inc.*, 149 Ga. App. 284, 254 S.E.2d 401, aff'd, 149 Ga. App. 284, 260 S.E.2d 9 (1979).

Order expressing clear intent of finality. — "Final Judgment" order which did not recite the exact language of subsection (b) of O.C.G.A. § 9-11-54 nonetheless expressed a clear intent by the trial judge that the order be final, and therefore appealable, as to two of four defendants. *Cherry v. Hersch*, 193 Ga. App. 471, 388 S.E.2d 64 (1989).

Section 9-11-42 does not circumvent this section. — O.C.G.A. § 9-11-42 (consolidation and severance) seeks to further judicial convenience or avoid prejudice, not to circumvent the requirements of O.C.G.A. § 9-11-54. *Cable Holdings of Battlefield, Inc. v. Lookout Cable Serv., Inc.*, 173 Ga. App. 355, 326 S.E.2d 552 (1985).

Summary judgment exception to subsection (b). — O.C.G.A. § 9-11-56, which permits direct appeal from any grant of summary judgment, is an exception to the finality rule expressed in subsection (b) of O.C.G.A. § 9-11-54. *Edwards v. Davis*, 160 Ga. App. 122, 286 S.E.2d 301 (1981).

If a grant of partial summary judgment is not made final under subsection (b) of O.C.G.A. § 9-11-52, the party against whom summary judgment was granted has the option to either appeal or not appeal at that time, and if the party chooses to appeal, then the appellate decision on the summary judgment ruling is binding under O.C.G.A. § 9-11-60(h). *Roth v. Gulf Atl. Media of Ga., Inc.*, 244 Ga. App. 677, 536 S.E.2d 577 (2000).

Effect of clarification of prior final partial grant of summary 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 as to fewer than all claims or parties not final unless express determination made. — Absent express determination that there exists no just cause for delay and express direction for entry of judgment, any order or other form of decision, however designated, which adjudicates less than all claims does not terminate an action as to any of the claims. *Davis v. Roper*, 119 Ga. App. 442, 167 S.E.2d 685 (1969).

Entry of judgment as to one or more but fewer than all claims or parties was not a final judgment under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(a)(1)) and lacked res judicata effect unless the trial court made an express direction for entry of a final judgment and determination that no just reason for delaying finality of the judgment existed. *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 248 S.E.2d 641 (1978).

Pendency of a counterclaim plus absence in order of trial judge's express determination that there was no just reason for delay and express direction for entry of judgment prevented order from being final and appealable. *Patterson v. Professional Resources, Inc.*, 242 Ga. 459, 249 S.E.2d 248 (1978); *Cleveland v. Watkins*, 159 Ga. App. 885, 285 S.E.2d 546 (1981).

When case against state was still pending in court below, entry of judgment as to one or more but fewer than all claims or parties was not a final judgment under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(a)(1)), lacks res judicata effect, and was not appealable unless the trial court made an express direction for entry of final judgment and determination that no just reason for delaying finality of the judgment existed. *Wise v. Georgia State Bd. for Examination, Qualification & Registration of Architects*, 244 Ga. 449, 260 S.E.2d 477 (1979).

Uncertified order is not final. — O.C.G.A. § 9-11-54 makes clear that an order in a pending case which has not

been certified is not a final order. *Gresham Park Community Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981).

Order entered on the appellants' motion for new trial as to each of three defendants granting a new trial as to one of the defendants was an adjudication of "fewer than all the claims or the rights and liabilities of fewer than all the parties. . ." within the meaning of O.C.G.A. § 9-11-54(b); and denial of a motion as to the other defendants did not, in absence of the trial court's "express determination" and "express direction" with regard to finality, "terminate the action as to any of the . . . parties," and was not appealable. *Chadwick v. Frix*, 165 Ga. App. 20, 299 S.E.2d 93 (1983).

Directed verdict in favor of some of the parties is not a final judgment when the case is still pending as to the other parties and when a determination of no just reason for delay and a certification of final judgment is not issued. *Lawson v. Athens Auto Supply & Elec., Inc.*, 200 Ga. App. 609, 409 S.E.2d 60, cert. denied, 200 Ga. App. 895, 409 S.E.2d 60 (1991).

In insureds' suit regarding mold remediation work on the insureds' home, the insureds' were not required to appeal a ruling enforcing a settlement agreement with their insured and an order denying reconsideration of this ruling within 30 days because the orders were not final since the insureds' case remained pending against a construction company, and the trial court did not expressly determine that there was no just cause for delay and designate the orders as final judgments pursuant to O.C.G.A. § 9-11-54(b). *Stephens v. Alan V. Mock Construction Co., Inc.*, 302 Ga. App. 280, 690 S.E.2d 225, cert. denied, No. S10C1012, 2010 Ga. LEXIS 533 (Ga. 2010).

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 their right to pursue appellate review under

Multiple Claims or Parties (Cont'd)

O.C.G.A. § 5-6-38(a). *Sotter v. Stephens*, 291 Ga. 79, 727 S.E.2d 484 (2012).

Decree may be partly final and partly interlocutory. — Decree may be partly final and partly interlocutory; final as to its determination of all issues of law and fact and interlocutory as to its mode of execution. *Levingston v. Crables*, 203 Ga. App. 16, 416 S.E.2d 131 (1992).

When the trial court entered judgment in favor of two defendants, but did not resolve a counterclaim of one defendant, the judgment was interlocutory, not final, and was not subject to direct appeal; the court's designation of the judgment as "final" was not controlling. *Hadid v. Beals*, 233 Ga. App. 5, 502 S.E.2d 798 (1998).

Default against one party. — When default judgment was entered against one party in a multiparty suit, the trial court erred in holding that the judgment was final and that the court was without discretion to vacate the judgment. *Daniell v. Heyn*, 169 Ga. App. 772, 315 S.E.2d 284 (1984).

When a joint defendant defaults for failure to answer and the court subsequently finds in favor of the other joint defendants on the merits, the default judgment against the first defendant will stand since the default on a procedural issue serves to deny the defendant an opportunity to litigate the merits. *Fred Chenoweth Equip. Co. v. Oculus Corp.*, 254 Ga. 321, 328 S.E.2d 539 (1985).

Procedural default. — Court of Appeals erred in reversing the trial court's grant of partial summary judgment in favor of a county because the trial court did not have authority to enter the court's order purporting to make the grant of partial summary judgment final under O.C.G.A. § 9-11-54(b) since by the arrestee's first notice of appeal, an arrestee put the machinery of appellate review into motion under O.C.G.A. § 9-11-54(h) and committed a procedural default; accordingly, the arrestee was foreclosed from resubmitting the matter for review on appeal of the final judgment, and because the first direct appeal was dismissed, that dismissal was binding upon the trial court under O.C.G.A.

§ 9-11-60(h). *Houston County v. Harrell*, 287 Ga. 162, 695 S.E.2d 29 (2010).

Voluntary dismissal of joint tortfeasor did not void judgment against remaining defendants. — Voluntary dismissal with prejudice of an alleged joint tortfeasor did not void the judgment entered against the remaining defendants, but only adjudicated the liabilities of that party; as the voluntary dismissal neither terminated the action nor rendered the default judgment void, the trial court did not err in refusing to set aside a default judgment. *Mateen v. Dicus*, 286 Ga. App. 760, 650 S.E.2d 272 (2007), 129 S. Ct. 89, 172 L.Ed.2d 30 (2008).

Court of Appeals must hear appeal when final judgment ordered.

— When the action is still pending below as to other defendants, and also as to one defendant with respect to damages, but the trial court has entered the court's order pursuant to subsection (b) of O.C.G.A. § 9-11-54, finding that there is no just reason for delay and that final judgment as to liability is previously entered against that defendant, the Court of Appeals is bound to entertain an appeal by that defendant. *Wills v. McAuley*, 166 Ga. App. 4, 303 S.E.2d 26, cert. denied, 251 Ga. 41, 305 S.E.2d 120 (1983).

When a new trial was granted on one of the claims against one of the parties, this appeal is controlled by O.C.G.A. § 9-11-54 and in such circumstances, there must be an express determination under the section or there must be compliance with the requirements of O.C.G.A. § 5-6-34(b) (the interlocutory appeals procedure) and when these Code sections are not followed, the appeal is premature and must be dismissed. *Holland v. Holland Heating & Air Conditioning, Inc.*, 203 Ga. App. 213, 416 S.E.2d 557 (1992).

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).

Appeal premature absent determination under subsection (b) or certificate under § 5-6-34(b). — When there has been no express determination or no just reason for delay, or direction that an order for entry of judgment was final, providing for immediate appeal, or issuance of a certificate as provided for by former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)), an appeal was premature. *American Mut. Liab. Ins. Co. v. Moore*, 120 Ga. App. 624, 171 S.E.2d 751 (1969); *Carlisle v. Travelers Ins. Co.*, 195 Ga. App. 21, 392 S.E.2d 344 (1990).

When order appealed from adjudicated less than all claims and did not provide for entry of final judgment as to appellee upon express determination that there was no just reason for delay and upon express direction for entry of judgment as provided in subsection (b) of Ga. L. 1966, p. 609, § 54 (see now O.C.G.A. § 9-11-54), and when there was no certificate as provided for by former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)), there was no appealable judgment. *Givens v. Gray*, 124 Ga. App. 152, 183 S.E.2d 29 (1971).

In cases involving multiple parties, dismissal of a counterclaim as to one party is not a final order and is not appealable in the absence of an express determination by the judge that there was no just reason for delay, express direction for entry of judgment, and an immediate review certificate. *W.L. Pettus Constr. Co. v. Commercial Union Ins. Co.*, 138 Ga. App. 281, 226 S.E.2d 77 (1976).

When record fails to show that a final judgment has been entered or certificate of immediate review granted, an appeal is premature and must be dismissed. *Ward v. Charles D. Hardwick Co.*, 149 Ga. App. 546, 254 S.E.2d 872 (1979).

When case involving multiple parties remains pending in the superior court, and there is no certificate for immediate review nor express determination and direction pursuant to subsection (b) of this section, the appeal is premature and must be dismissed. *Hardy v. Georgia Power Co.*, 151 Ga. App. 803, 261 S.E.2d 749 (1979).

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 subsection (b) of O.C.G.A. § 9-11-54, or there must be compliance with the requirements of O.C.G.A. § 5-6-34(b) (procedure for review of judgments not deemed directly appealable). When neither of these sections is 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 (1991).

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 the 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).

Appeal from dismissal of plaintiff's claim when counterclaim pending.

— When there was no express determination that there was no just reason for delay nor express direction for entry of judgment under subsection (b) of Ga. L. 1966, p. 609, § 54 (see now O.C.G.A. § 9-11-54), nor was there a certificate for immediate review, under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)), an appeal from an order 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); *Cleveland v. Watkins*, 159 Ga. App. 885, 285 S.E.2d 546 (1981).

Appeal premature when counterclaim pending.

— Declaratory judgment finding is not final and an appeal therefrom is premature when a counterclaim is still pending in the trial court and there is the absence of a determination by the trial judge that there is no just reason for delay and an express direction for entry of judgment. *Union Indem. Ins. Co. v. Cherokee Ins. Co.*, 168 Ga. App. 82, 308 S.E.2d 238 (1983).

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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).

Dismissal of one of two defendants.

— When there is no express determination that there is no just reason for delay, and no express direction for entry of judgment, an order dismissing one of two defendants is not a final, appealable judgment. *Taylor v. McBerry*, 138 Ga. App. 593, 226 S.E.2d 607 (1976).

Unless court, in order dismissing one of multiple defendants, makes express determination of finality as set out in subsection (b) of this section, the case is still pending in the trial court and the procedure for interlocutory appeals must be followed. *Home Mart Bldg. Ctrs., Inc. v. Wallace*, 139 Ga. App. 49, 228 S.E.2d 22 (1976).

In a case involving joint claims against several defendants, an order dismissing a complaint as to some but not all defendants for failure to state a claim upon which relief can be granted is not a final appealable judgment. *Walker v. Robinson*, 232 Ga. 361, 207 S.E.2d 6 (1974).

When the trial court grants a defendant's motion to dismiss and denies another defendant's 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).

When a trial court grants a directed verdict in favor of one or some defendants in a joint and several action and the plaintiff elects to proceed against the remaining defendants without protest and without moving for a continuance to appeal the directed verdicts, the plaintiff is not deemed to have abandoned any action against the defendants released by directed verdict and such a release is not a

final judgment except by express determination. *James v. Allen*, 173 Ga. App. 636, 327 S.E.2d 501 (1985).

Order granting one co-defendant'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 co-defendants. *Knowles v. Old Spartan Life Ins. Co.*, 213 Ga. App. 204, 444 S.E.2d 136 (1994).

Dismissal of third-party complaint.

— When main claim remains pending and the court does not execute a certificate pursuant to subsection (b) of this section, an order dismissing a third-party complaint lacks finality. *Davis v. Roper*, 119 Ga. App. 442, 167 S.E.2d 685 (1969).

Directed verdict for plaintiff when third-party complaint pending. — Directed verdict and judgment for plaintiff in action on a promissory note in which the defendant answered and filed a third-party complaint against an alleged comaker of the note, without disposition of the third-party complaint, was not a final appealable judgment, and an interlocutory appeal was not authorized therefrom. *Cramer v. Parrott*, 149 Ga. App. 386, 254 S.E.2d 504 (1979).

Filing of answer by uninsured motorist insurer in damage action. — In an action for damages alleged to be due as a result of an automobile collision, when the plaintiff's uninsured motorist insurer filed an answer in the insurer's own behalf and has thereby elected to assume the status of a named party, and there had been no certificate of finality pursuant to subsection (b) of Ga. L. 1966, p. 609, § 54 (see now O.C.G.A. § 9-11-54) nor any permission granted for an interlocutory appeal pursuant to former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)), the appeal was premature and must be dismissed. *Lysius v. Bertha*, 151 Ga. App. 702, 261 S.E.2d 459 (1979).

Order denying defendant's motion to implead third party is not appealable, inasmuch as the order does not finally dispose of any rights of defendant. *Davis v. Roper*, 119 Ga. App. 442, 167 S.E.2d 685 (1969).

Appealability of interpleader order.

— Order which holds that interpleader is

a viable remedy and which dismisses the instigating stakeholder is not directly appealable unless the trial court clearly directs the entry of final judgment under subsection (b) of O.C.G.A. § 9-11-54. *Custom One-Hour Photo of Ga., Inc. v. Citizens & S. Bank*, 179 Ga. App. 70, 345 S.E.2d 147 (1986).

Denial of motion to set aside default judgment. — Generally, denial of a motion to set aside a default judgment is an appealable judgment, without a certificate of immediate review; however, this is not automatically the case if multiple parties are involved. *Cox v. Farmers Bank*, 151 Ga. App. 64, 258 S.E.2d 731 (1979).

Treatment of certification under subsection (b) as under § 5-6-34(b). — When the trial court erroneously entered certification pursuant to subsection (b) of Ga. L. 1966, p. 609, § 54 (see now O.C.G.A. § 9-11-54), the appellate court may treat the certification as one entered pursuant to former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)); however, because in such cases cause will have been treated by the trial court and the parties as an appeal from a final judgment, time limitations imposed by that section were not applicable. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

Plaintiff's right to appeal summary judgment for defendants. — After the trial court certified that a summary judgment in favor of three of four defendants was final and ripe for review, the plaintiff lost the plaintiff's right to obtain appellate review by failing to file a timely notice of appeal, even though the plaintiff had filed a motion for reconsideration. *Jarallah v. Aetna Cas. & Sur. Co.*, 199 Ga. App. 592, 405 S.E.2d 510 (1991).

When a broker who sued a client for a business broker commission also asserted a claim for a real estate commission, and the trial court entered summary judgment denying the real estate commission claim, and found that the judgment was final, under O.C.G.A. § 9-11-54(b), the broker had to appeal that judgment within 30 days of the judgment's entry; so, when the broker waited until the conclusion of a trial on the other claims to appeal the summary judgment, the right to appeal

the summary judgment was lost, and the broker's appeal of that issue was dismissed. *Bienert v. Dickerson*, 276 Ga. App. 621, 624 S.E.2d 245 (2005).

Party against whom summary judgment is granted may appeal after grant thereof or after final judgment is rendered. *Surgent v. Surgent*, 153 Ga. App. 100, 264 S.E.2d 568 (1980).

In a case in which O.C.G.A. § 9-11-54 applies because of multiple parties or claims, a party against whom summary judgment has been entered may appeal that judgment immediately or may wait until the entire action is concluded and then appeal. Thus, the case is still pending and the grant of summary judgment is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. *Edwards v. Davis*, 160 Ga. App. 122, 286 S.E.2d 301 (1981).

When third-party claim was necessarily adjudicated against parties as a matter of law by judgment against the parties in plaintiff's action, it was not necessary to expressly include a third-party defendant in that judgment or to make express determination therein which is provided by subsection (b) of this section for situations wherein fewer than all claims presented are adjudicated. *Fraser v. Moose*, 226 Ga. 256, 174 S.E.2d 412 (1970).

When claim and counterclaim are submitted to jury, who find verdict for plaintiff in amount sued for, with no reference to the defendant's counterclaim the verdict will be construed as deciding against the defendant's counterclaim so that the judgment is thus final and appealable; such case will not be construed to involve subsection (b) of this section, which concerns undecided issues. *Bernath Barrel & Drum Co. v. Ostrum Boiler Serv., Inc.*, 131 Ga. App. 140, 205 S.E.2d 459 (1974).

Order of dismissal subject to revision at any time absent express determination. — When multiple parties defendant are involved, in order to be an absolute, final, appealable judgment, an order dismissing fewer than all parties should contain an express determination that there is no just reason for delay and

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an express direction for entry of judgment; without that, the court's decision is subject to revision at any time before entry of judgment adjudicating all claims, rights, and liabilities of all parties. *Grizzard v. Davis*, 131 Ga. App. 577, 206 S.E.2d 853 (1974).

Revision prior to entry of judgment. — In absence of an express determination that there is no just reason for delay, a decision to direct entry or final judgment is subject to revision at any time before entry of judgment adjudicating all claims, rights, and liabilities of all the parties. *Clary v. Brown*, 139 Ga. App. 799, 229 S.E.2d 680 (1976).

When orders are subject to revision, appeals are premature. *Davis v. Transairco, Inc.*, 141 Ga. App. 544, 234 S.E.2d 134 (1977).

Dismissal without prejudice may be final judgment. — Even though a dismissal without prejudice may allow the plaintiff to recommence the plaintiff's claim at a later date, it is nonetheless a dismissal of the subject action. Thus, it can be made a final judgment in a case in which other claims remain pending when the trial court expressly determines there is no just reason for delay. *Gillis v. Goodgame*, 199 Ga. App. 413, 404 S.E.2d 815 (1991), rev'd on other grounds, 262 Ga. 117, 414 S.E.2d 197 (1992).

No 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 O.C.G.A. § 5-6-34(b). *Wright v. Millines*, 212 Ga. App. 453, 442 S.E.2d 300 (1994).

Denial of judgment n.o.v. appealable even though 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 subsection (b) of O.C.G.A. § 9-11-54. *GMAC v. Bowen Motors, Inc.*, 167 Ga. App. 463, 306 S.E.2d 675 (1983).

Failure to include dismissal of a defendant in notice of appeal. — 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).

In a condemnation case, the trial court errs in refusing to review and reconsider a "judgment on tenantability, suitability and lease termination" when such a judgment is not final pursuant to subsection (b) of O.C.G.A. § 9-11-54. *Metropolitan Atlanta Rapid Transit Auth. v. Gould Investors Trust*, 169 Ga. App. 303, 312 S.E.2d 629 (1983).

Specific reservation of issue of damages. — Trial court's order directing the entry of judgment against the defendant pursuant to subsection (b) of O.C.G.A. § 9-11-54 does not constitute a "final" judgment which would preclude the application of the liberal criteria set forth in O.C.G.A. § 9-11-55(b) for opening default when the trial court's order specifically reserves the issue of damages for later determination. *Cryomedics, Inc. v. Smith*, 180 Ga. App. 336, 349 S.E.2d 223 (1986).

Piece-meal review is not favored by the courts. *Foley v. Shanahan*, 133 Ga. App. 262, 211 S.E.2d 367 (1974).

Cause of action several rather than joint when legal theories differ. — After trial court enters judgment pursuant to subsection (b) of this section, determination must be made as to whether the cause of action is joint or several; a cause of action is several, as opposed to joint, when underlying legal theories which comprise the cause of action against the defendants are different. *Dehler v. Setliff*, 239 Ga. 19, 235 S.E.2d 540 (1977).

Fact that identical relief is demanded of several defendants does not make an otherwise several cause of action "joint," if legal theories against the individual de-

endants are dissimilar. *Dehler v. Setliff*, 239 Ga. 19, 235 S.E.2d 540 (1977).

Attorney's fees. — When a trial court grants judgment for a defendant on one count of a multi-count complaint and expressly directs entry of a final judgment under subsection (b) of O.C.G.A. § 9-11-54, the defendant must move for attorney's fees relating to that claim within 45 days of the judgment. *Little v. GMC*, 229 Ga. App. 781, 495 S.E.2d 572 (1998).

Summary judgment on one claim. — O.C.G.A. § 9-11-54(b) does not in any way preclude the granting of summary judgment on a claim, but merely authorizes a court, even though other claims may remain pending, to enter final judgment on one or more claims if the court makes certain express determinations; assuming a counterclaim by a debtor existed and remained pending in a suit brought against the debtor by a creditor, such did not prevent the trial court from granting summary judgment on the creditor's claim if there was no disputed material fact on that claim. *Ahmad v. Excell Petroleum, Inc.*, 276 Ga. App. 167, 623 S.E.2d 6 (2005).

Seller was entitled to immediate judgment on a promissory note pursuant to O.C.G.A. § 9-11-54(b) because the buyers failed to make payments on the note, and the buyers did not show damages in any amount from the alleged failure of consideration; the note was supported by adequate consideration because the buyers took immediate possession of the seller's business and began operating the business as the buyers' own. *West v. Diduro*, 312 Ga. App. 591, 718 S.E.2d 815 (2011), cert. denied, No. S12C0522, 2012 Ga. LEXIS 279 (Ga. 2012).

Relief Granted

Trial judge may grant relief although the relief was not specifically prayed for. *Empire Banking Co. v. Martin*, 133 Ga. App. 115, 210 S.E.2d 237 (1974).

Grant of equitable relief not prayed for authorized when raised. — When the issue is raised, the trial court is authorized to grant equitable relief even though that relief is not specifically

prayed for. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

Injunctive relief was authorized even though there was no express prayer therefor; however, the propriety of the relief must have been litigated and the opposing party must have had the opportunity to assert defenses to such relief. *Church v. Darch*, 268 Ga. 237, 486 S.E.2d 344 (1997).

Portion of default judgment exceeding prayer is nullity. — To the extent that a judgment by default exceeds the amount prayed for, the judgment is a nullity. *Jones v. Cooke*, 169 Ga. App. 516, 313 S.E.2d 773 (1984).

Notice to defaulting party required in medical malpractice actions. — Provisions of paragraph (c)(3) of O.C.G.A. § 9-11-54 requiring that notice of trial be served upon a defaulting party in a medical malpractice case involving a claim for damages exceeding \$10,000.00 prevail over the provisions of O.C.G.A. § 9-11-5(a) providing that a defaulting party waives all notices of trial. *Southwest Community Hosp. & Medical Ctr. v. Thompson*, 165 Ga. App. 442, 301 S.E.2d 501 (1983).

Notice published in county organ inadequate. — Provision of paragraph (c)(3) of O.C.G.A. § 9-11-54 requiring that the notice of trial be served upon the defaulting party is not satisfied by publication of notice of trial in the official county organ. *Southwest Community Hosp. & Medical Ctr. v. Thompson*, 165 Ga. App. 442, 301 S.E.2d 501 (1983).

Grant of damages improper when only equitable relief sought. — When the plaintiff sought only equitable relief, the trial court's judgment awarding damages to the plaintiff was not proper. *Bennett v. Blackwell*, 157 Ga. App. 617, 278 S.E.2d 159 (1981).

Summary judgment proper when no genuine issue. — Court may properly grant summary judgment on a ground other than that assigned in the motion since it is clear there is no genuine issue of material fact. *Colbert v. Piggly Wiggly S.*, 175 Ga. App. 44, 332 S.E.2d 304 (1985).

In every confirmation of sale case, issue of resale is always raised regardless of whether the issue has been affir-

Relief Granted (Cont'd)

matively pled in the creditor's complaint, if the debtor is afforded an opportunity to defend against a confirmation as well as against resale. *Adams v. Gwinnett Com. Bank*, 140 Ga. App. 233, 230 S.E.2d 324 (1976), *aff'd*, 238 Ga. 722, 235 S.E.2d 476 (1977).

Failure to pray for in personam relief. — When the plaintiff's complaint set forth a claim for in personam relief against the defendant, failure to demand such relief among the prayers is of no consequences. *Allied Asphalt Co. v. Cumbie*, 134 Ga. App. 960, 216 S.E.2d 659 (1975).

Money judgment in excess of amount claimed but within range of evidence. — Language of subsection (c) of this section apparently recognizes the right of the claimant to a money judgment exceeding the amount claimed if within the range of the evidence. *Jones v. Spindel*, 122 Ga. App. 390, 177 S.E.2d 187 (1970), *cert. dismissed*, 227 Ga. 264, 180 S.E.2d 242 (1971).

Nominal damages need not be specifically prayed for. — Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), it is not necessary to pray specifically for general or nominal damages in order to present a jury question as to nominal damages. *Bradley v. Godwin*, 152 Ga. App. 782, 264 S.E.2d 262 (1979).

Prejudgment interest. — Plaintiff did not demand prejudgment interest in the plaintiff's complaint or amended complaint, but since the parties agreed to submit the issue of prejudgment interest to a special master, the plaintiff's failure to include a prayer for prejudgment interest did not preclude recovery of the prejudgment interest. *Holloway v. State Farm Fire & Cas. Co.*, 245 Ga. App. 319, 537 S.E.2d 121 (2000).

Motion to strike certain paragraphs of complaint is not motion to dismiss complaint, and the trial judge erred in so treating the motion and dismissing the complaint for alleged defects in portion of prayers for relief. *Goette v. Darvoe*, 119 Ga. App. 320, 166 S.E.2d 912 (1969).

Grant of relief in accord with evidence not authorized absent opportu-

nity to litigate same. — Provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) respecting amendment of pleadings by introduction of evidence and grant of relief in accordance with such evidence have no application when the propriety of such relief was not litigated and the opposing party had no opportunity to assert defenses to such relief. *Cross v. Cross*, 230 Ga. 91, 195 S.E.2d 439 (1973).

Wife's right to alimony is not "litigated" when husband has no notice by her pleading that she will claim alimony and does not defend the action. *Lambert v. Gilmer*, 228 Ga. 774, 187 S.E.2d 855 (1972).

Trial court could not raise defense of usury. — In an action to collect the amount due on a loan, the trial court was without authority to raise the defense of usury on behalf of the borrower and erred to the extent the contract excluded the award of interest in the default judgment on the basis that the loan contract was usurious. *Ideal Loan & Fin. Corp. v. Little*, 217 Ga. App. 385, 457 S.E.2d 274 (1995).

General prayer for relief insufficient to authorize default judgment for money damages. — General prayer "for such other and further relief, etc.", combined with an allegation of cash value, was not, under subsection (c) of this section, sufficient to authorize a default judgment for money damages. *Dempsey v. Ellington*, 125 Ga. App. 707, 188 S.E.2d 908 (1972).

Default judgment may not exceed or differ from relief prayed for. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) precludes default judgment from exceeding the amount of or differing in kind or form from that prayed for in demand for judgment. *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977).

Judgment in default case granting more relief than originally requested is to that extent a nullity. *Orkin Exterminating Co. v. Townsend*, 136 Ga. App. 50, 220 S.E.2d 14 (1975).

Right to assume that only judgment demanded by plaintiff granted. — Defendant should have the right to submit without contest to a judgment specifically

demand by the plaintiff in the plaintiff's complaint, and when the defendant so submits, should not be under an obligation to follow the proceedings to see to it that such a judgment is taken against the defendant, but should be protected in the assumption that only such a judgment can and will be granted. *Dempsey v. Ellington*, 125 Ga. App. 707, 188 S.E.2d 908 (1972).

Judgment by default may be corrected to conform to pleadings at subsequent term of court, even after execution has been issued and property sold. *Williams v. Stancil*, 119 Ga. App. 800, 168 S.E.2d 643 (1969).

Judgment void when defendant never afforded opportunity to be heard. — Trial court's order which granted full relief to a company seeking certain e-mail records from the Georgia Department of Agriculture was void; the notice for the case management hearing from which the order emanated did not satisfy the notice requirements in O.C.G.A. § 9-10-2(1) for a hearing on the full merits of the case as the notice stated only "small motions" and procedural matters would be considered, and the department was never afforded an opportunity to present the department's opposition to the request through an O.C.G.A. § 9-11-54(c)(1) hearing. *Ga. Dep't of Agric. v. Griffin Indus.*, 284 Ga. App. 259, 644 S.E.2d 286 (2007).

Assumption that temporary injunction contested and supported by evidence. — Absent transcript of evidence adduced upon interlocutory hearing, it must be assumed on appeal that each item covered by a temporary injunction was contested and that it was supported by the evidence. *DeRose v. Holcomb*, 226 Ga. 289, 174 S.E.2d 410 (1970).

When lien antedating final judgment not prayed for, default judgment unauthorized. — As judgments by default are not to be different in kind from or exceed in amount prayed for in demand for judgment, in bank's action seeking special lien on husband's property when bank's complaint contained no prayer for the extraordinary relief of a lien which would antedate the final judgment, the trial court was without authority to order a default judgment and the second trial

court was correct in setting aside the bank's equitable lien. *First Nat'l Bank v. Blackburn*, 254 Ga. 379, 329 S.E.2d 897 (1985).

Grant of bank's motion to set aside default judgment against borrower was proper when a typographical error as to the amount sought in the demand for judgment was in the pleading rather than the judgment, and this defect was apparently intentionally waived by the borrower so as to serve in the borrower's favor in an attempt to take advantage of the limitation imposed by paragraph (c)(1) of O.C.G.A. § 9-11-54 on damages that can be awarded by default judgment. *Betts v. First Ga. Bank*, 177 Ga. App. 359, 339 S.E.2d 616 (1985).

In a proceeding seeking an interlocutory injunction, the trial court was authorized to issue a permanent injunction if the evidence presented at the trial authorized the interlocutory injunction. *United Cos. Lending Corp. v. Peacock*, 267 Ga. 145, 475 S.E.2d 601 (1996).

Costs

Discretion of court. — Subsection (d) of O.C.G.A. § 9-11-54 gives the trial court discretion in assessing costs. *Gold Kist, Inc. v. Williams*, 174 Ga. App. 849, 332 S.E.2d 22 (1985); *Dacosta v. Allstate Ins. Co.*, 199 Ga. App. 292, 404 S.E.2d 627, cert. denied, 199 Ga. App. 905, 404 S.E.2d 627 (1991).

Because the husband was the losing party on the parties' contested custody dispute in their divorce proceeding, the trial court had authority to assess the husband with the costs of that issue, pursuant to O.C.G.A. § 9-11-54(d), including the cost of a guardian ad litem and a psychologist. *Nguyen v. Dinh*, 278 Ga. 887, 608 S.E.2d 211 (2005).

When one party won that party's appeal and the other party won its cross-appeal, the court's apportionment of costs (by splitting costs equally between the parties) is appropriate. *Gold Kist, Inc. v. Williams*, 174 Ga. App. 849, 332 S.E.2d 22 (1985).

Award was enforceable even though court did not employ subsection (b) language. — Trial court properly made an award of attorney fees and

Costs (Cont'd)

costs immediately enforceable, when although the court did not employ the language of subsection (b) of O.C.G.A. § 9-11-54 in directing entry of a final judgment on the award of attorney fees and costs, the court unequivocally expressed the court's intent for the award to be final by declaring the award to be a judgment enforceable by post judgment collection. *American Express Co. v. Baker*, 192 Ga. App. 21, 383 S.E.2d 576, cert. denied, 192 Ga. App. 901, 383 S.E.2d 576 (1989).

Judgment affirmed with direction that defendant pay plaintiff amount of premiums paid to insurer under contract is not sufficient relief to prevent liability for costs of court. *Camp v. Fidelity Bankers Life Ins. Co.*, 129 Ga. App. 590, 200 S.E.2d 332 (1973).

Order denying costs vacated. — Order declining to award a limited liability

company (LLC) costs was vacated, and the matter was remanded for reconsideration because the jury found in favor of property owners on the owners' claim for nuisance but not on the owners' additional claims for trespass and punitive damages; the jury found in favor of the LLC on the issue of whether replacement with a six-inch or eight-inch pipe would constitute a substantial change and on the LLC's counterclaim for conversion but not on the LLC's additional counterclaims for trespass and punitive damages. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Taxpayer entitled to fee award. — Fee awards afforded to the taxpayer the additional relief to which the taxpayer was statutorily entitled under O.C.G.A. §§ 9-11-54(c)(1) and 48-5-311(g)(4)(B)(ii). *Fulton County Bd. of Tax Assessors v. Toro Props. VI, LLC*, 329 Ga. App. 26, 763 S.E.2d 496 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Costs, § 10 et seq. 27A Am. Jur. 2d, Equity, § 197 et seq. 46 Am. Jur. 2d, Judgments, § 41 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 86, 87. 35B C.J.S., Federal Civil Procedure, § 1113 et seq. 49 C.J.S., Judgments, § 1 et seq.

ALR. — Expense of litigation, other than taxable costs, as basis of separate action against party to former suit, 39 ALR 1218.

Judgment in action for services of physician or surgeon as bar to action against him for malpractice, 49 ALR 551.

What amounts to waiver by plaintiff of right to enter default judgment against defendant, or of the default itself after entry, 124 ALR 155.

Power of court to award alimony or property settlement in divorce suit as affected by failure of pleading or notice to make a claim therefor, 152 ALR 445.

Allowance of fees for guardian ad litem appointed for infant defendant, as costs, 30 ALR2d 1148.

Liability of state, or its agency or board, for costs in civil action to which it is a party, 72 ALR2d 1379.

Recovery on quantum meruit where only express contract is pleaded, under Federal Rules of Civil Procedure 8 and 54 and similar state statutes or rules, 84 ALR2d 1077.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party," 66 ALR3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail or affirmative claims, 66 ALR3d 1115.

What amounts to "appearance" under statute or rule requiring notice, to party who has "appeared," of intention to take default judgment, 73 ALR3d 1250.

Medical malpractice: patient's failure to return, as directed, for examination or treatment as contributory negligence, 100 ALR3d 723.

Modern status of state court rules governing entry of judgment on multiple claims, 80 ALR4th 707.

Construction of state offer of judgment rule — Issues of time, 112 ALR5th 47.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment or multiple claims, 89 ALR Fed. 514.

9-11-55. Default judgment.

(a) **When case in default; opening as matter of right; judgment.** If in any case an answer has not been filed within the time required by this chapter, the case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter of right by the filing of such defenses within 15 days of the day of default, upon the payment of costs. If the case is still in default after the expiration of the period of 15 days, the plaintiff at any time thereafter shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the complaint or other original pleading were supported by proper evidence, without the intervention of a jury, unless the action is one ex delicto or involves unliquidated damages, in which event the plaintiff shall be required to introduce evidence and establish the amount of damages before the court without a jury, with the right of the defendant to introduce evidence as to damages and the right of either to move for a new trial in respect of such damages; provided, however, in the event a defendant, though in default, has placed damages in issue by filing a pleading raising such issue, either party shall be entitled, upon demand, to a jury trial of the issue as to damages. An action based upon open account shall not be considered one for unliquidated damages within the meaning of this Code section.

(b) **Opening default.** At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instantly, and shall announce ready to proceed with the trial. (Ga. L. 1966, p. 609, § 55; Ga. L. 1967, p. 226, § 24; Ga. L. 1981, p. 769, § 1; Ga. L. 1982, p. 3, § 9.)

Cross references. — Provision that judge is qualified to try civil case where no defense is filed, irrespective of relationship to party or interest in case, § 15-1-9. Default judgments, Uniform Superior Court Rules, Rule 15. Default judgments in state court cases, Uniform State Court Rules, Rule 15. Default judgments in probate court proceedings, Uniform Rules for the Probate Courts, Rule 13.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 55, see 28 U.S.C.

Law reviews. — For article surveying Georgia cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978). For article dealing with prevention of malpractice claims and litigation, see 16 Ga. St. B.J. 68 (1979). For survey article citing devel-

opments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008). For article, “Discovering Clarity: A Call to Renovate Georgia’s Discovery Landscape,” see 19 Ga. St. B.J. 11 (April 2014).

For note, “Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act,” see 7 Ga. St. B.J. 385 (1971). For note, “Preferential Treatment of the United States under Federal Civil Discovery Procedures,” see 13 Ga. L. Rev. 550 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WHEN CASE IN DEFAULT

PROOF OF DAMAGES

1. IN GENERAL
2. JURY TRIAL OF DAMAGE ISSUE

OPENING DEFAULT

1. IN GENERAL
2. AS MATTER OF RIGHT
3. AT ANY TIME BEFORE JUDGMENT

General Consideration

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Code 1910, §§ 5654 et seq., and 5662 and former Code 1933, §§ 110-401, 110-402, and 110-404 are included in the annotations for this Code section.

O.C.G.A. § 9-11-56 not controlling as to default. — O.C.G.A. § 9-11-55, not O.C.G.A. § 9-11-56, is the controlling statute on the issue of default. A motion for summary judgment is not an appropriate means by which a plaintiff can secure a judgment based upon the defendant’s alleged default. *Watson v. Georgia State Dep’t of Educ. Credit Union*, 201 Ga. App. 761, 412 S.E.2d 286 (1991).

As there was no such thing as a default summary judgment, summary judgment was not authorized merely because a defendant filed a one-page response that contained no substantive argument and failed to comply with Ga. Unif. Super. Ct. R. 6.5. *Milk v. Total Pay & HR Solutions, Inc.*, 280 Ga. App. 449, 634 S.E.2d 208 (2006).

“Default” and “default judgment” distinguished. — Law distinguishes between a default, which involves an interlocutory matter, and a default judgment,

which represents a final judicial action and the vesting of rights. *Clements v. United Equity Corp.*, 125 Ga. App. 711, 188 S.E.2d 923 (1972); *Lanier v. Foster*, 133 Ga. App. 149, 210 S.E.2d 326 (1974).

Similarity of current and prior law. — This section is substantially the same as former Code 1933, § 110-401, as amended, which was repealed by enactment of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Sing Recording Co. v. LeFevre Sound Studios, Inc.*, 122 Ga. App. 327, 176 S.E.2d 657 (1970).

Language of this section relating to automatic default upon failure to answer or plead within time required is substantially the same as under the former practice applying in superior courts. *Electro-Kinetics Corp. v. Wilson*, 122 Ga. App. 171, 176 S.E.2d 604 (1970).

No conflict with probate court rule. — There is no conflict between O.C.G.A. § 9-11-55 and Rule 13 of the Uniform Rules for the Probate Courts. *Greene v. Woodard*, 198 Ga. App. 427, 401 S.E.2d 617 (1991).

Default does not admit legal conclusions in complaint. — While a default operates as an admission of the well-pled factual allegations in a complaint, it does not admit the legal conclusions contained therein; as such, a default

does not preclude a defendant from showing that under the facts as deemed admitted, no claim existed which would allow the plaintiff to recover. *Fink v. Dodd*, 286 Ga. App. 363, 649 S.E.2d 359 (2007).

Subsection (a) of O.C.G.A. § 9-11-55 governs an application for year's support and caveat filed in probate court. *Greene v. Woodard*, 198 Ga. App. 427, 401 S.E.2d 617 (1991).

No distinction between actions seeking money judgments and equity. — Section providing for default when the defendant has not answered as required is inapplicable to an action for divorce. *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953); *Brackett v. Brackett*, 217 Ga. 84, 121 S.E.2d 146 (1961) (decided under former Code 1933, § 110-401).

This section makes no distinction between civil actions seeking money judgments and cases seeking relief in equity. *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970).

Divorce cases. — Default provisions of this section have no application to divorce cases. *Simpson v. Simpson*, 240 Ga. 543, 242 S.E.2d 45 (1978).

Equitable division of marital property exempted from section. — O.C.G.A. § 9-11-55 is authority for the grant of default judgments; however, O.C.G.A. § 19-5-8 specifically exempts from the general ambit of § 9-11-55 issues with regard to the equitable division of marital property. *Brown v. Brown*, 271 Ga. 887, 525 S.E.2d 359 (2000).

Disciplinary proceeding. — Subsection (b) of O.C.G.A. § 9-11-55 applies in a disciplinary proceeding; thus, in order to authorize the opening of an attorney's default, the attorney was required to show "providential cause," "excusable neglect," or a "proper case." *In re Turk*, 267 Ga. 30, 471 S.E.2d 842 (1996).

Modification of alimony. — Default provisions of O.C.G.A. § 9-11-55 have no application to proceedings for modification of alimony. *McElroy v. McElroy*, 252 Ga. 553, 314 S.E.2d 893 (1984).

Motions to set aside or modify judgments. — This section has no application to motions to set aside or modify judgments. *Southeast Ceramics, Inc. v. Ervin Co.*, 127 Ga. App. 346, 193 S.E.2d 262 (1972).

Collateral attack on valid default judgment unauthorized. — Trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds as: (1) its finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

Movant not entitled to default judgment. — Trial court did not err in denying an executor's motion for default judgment because, once the evidence showed that a paragraph of the complaint did not compel the conclusion that a warranty deed was void, the trial court was free to reject the conclusion contained in another paragraph of the complaint. Because the evidence revealed that the executor was not entitled to have the warranty deed set aside, the trial court did not err in denying the executor's motion for default judgment; furthermore, the executor failed to show a tender or refusal of tender, a condition precedent to an equitable action for cancellation of a deed, and the trial court did not err in permitting the introduction of evidence by the conveyees of the deed. *Standridge v. Spillers*, 263 Ga. App. 401, 587 S.E.2d 862 (2003).

Trial court erred in granting actual damages for orthodontic expenses, as well as punitive damages and attorney fees, to an ex-husband in a fraud claim against the ex-wife, arising from allegations that the ex-wife fraudulently misrepresented that the ex-wife's former husband had abandoned the daughters, which the ex-husband later adopted, as the divorce decree and the adoption order were presumptively valid and in full force and effect and, accordingly, the ex-husband could not recover for expenses that the ex-husband was legally obligated to pay; although the ex-wife failed to respond to the complaint, the trial court erred in granting the ex-husband a default judgment under O.C.G.A. § 9-11-55(a) because

General Consideration (Cont'd)

the relief was not available to him, and as there was no actual damages awarded, there could be no punitive damages under O.C.G.A. § 51-12-5.1(b) and no attorney fees. *Grand v. Hope*, 274 Ga. App. 626, 617 S.E.2d 593 (2005).

In an action between a contractor and a landowner alleging a breach of contract and other related claims in which disputes arising under the parties' contract were required to be submitted to arbitration, the superior court erred in entering a default judgment against the landowner, and in denying relief from the landowner, ignoring a stay pending arbitration, as the issues involved in the litigation were ones that fell under the parties' agreement. *GF/Legacy Dallas, Inc. v. Juneau Constr. Co., LLC*, 282 Ga. App. 14, 637 S.E.2d 511 (2006), cert. denied, 2007 Ga. LEXIS 157 (Ga. 2007).

In a suit arising from a contract for the sale of land, because the buyer waived the right to a default judgment by raising the issue of default for the first time on appeal, the trial court did not err in considering the seller's evidence and entering judgment in the seller's favor. *Shirley v. Ficarrota*, 285 Ga. App. 169, 645 S.E.2d 667 (2007).

Trial court did not err in denying a candidate's request for entry of a default judgment on a 42 U.S.C. § 1983 claim that a county board of elections (BOE) and board members violated the candidate's rights under the United States Constitution and on the claim that the board conspired to commit fraud against the candidate by attempting to have the candidate's name removed from the ballot in an election for county commissioner because the answer of the BOE and members to those claims was valid and timely when the BOE and members filed an answer within 30 days after service of the summons and petition; the judgment from which the BOE and members appealed addressed only the candidate's request for injunctive relief and did not address the merits of the candidate's claims for damages based on their alleged violations of the candidate's constitutional rights or their alleged acts of fraud against the

candidate, and because those claims were distinct from the injunction appealed, those claims remained within the trial court's jurisdiction. *Johnson v. Randolph County*, 301 Ga. App. 265, 687 S.E.2d 223 (2009).

Default judgment proper. — Default judgment was properly entered against an LLC as the trial court did not err in holding that the LLC was required to be represented by counsel; further, without a hearing transcript, the appeals court was unable to review the LLC's claims that the trial court erred in denying the LLC the opportunity to hire counsel, file an amended answer, and hold a hearing on the amount of damages owed. *Sterling, Winchester & Long, LLC v. Loyd*, 280 Ga. App. 416, 634 S.E.2d 188 (2006).

Because a medical care provider failed to assert an available defense in the underlying action which would have absolved the provider from any liability and prevented a default judgment from entering against the provider, the trial court did not err in entering summary judgment against the provider on the provider's claims for contribution and indemnity. *Emergency Professionals of Atlanta, P.C. v. Watson*, 288 Ga. App. 473, 654 S.E.2d 434 (2007), cert. denied, 2008 Ga. LEXIS 407 (Ga. 2008).

Appeals of property evaluations. — As the appeal procedure outlined in O.C.G.A. § 48-5-311(f) does not contemplate the filing of a "complaint" or "answer," a default judgment will not lie for failure to file defensive pleadings in a de novo hearing on appeal in the superior court from a property evaluation. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

Default concept inapplicable to workers compensation enforcement proceeding. — Filing in superior court of a petition to enforce an award or a settlement agreement pursuant to O.C.G.A. § 34-9-106 is not a separate suit, but rather a continuation of the board of workers' compensation proceeding and the concept of default is not applicable. *Wade v. Harris*, 210 Ga. App. 882, 437 S.E.2d 863 (1993).

Forfeiture under § 16-13-49. — O.C.G.A. § 16-13-49 (forfeiture) is a spe-

cial statutory proceeding which must be strictly construed and complied with, and as such, not all provisions of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, apply, including O.C.G.A. § 9-11-55. *Fulton v. State*, 183 Ga. App. 570, 359 S.E.2d 726 (1987).

O.C.G.A. § 9-11-55 has no application to the forfeiture provisions of O.C.G.A. § 16-13-49 of the controlled substances law, which provides a special statutory proceeding to which default is not applicable. *Hubbard v. State*, 201 Ga. App. 213, 411 S.E.2d 44, cert. denied, 201 Ga. App. 904, 411 S.E.2d 44 (1991); *Turner v. State*, 213 Ga. App. 309, 444 S.E.2d 372 (1994).

Error in default judgment when no proof established negligence. — In a negligence action involving a nursing home, the trial court erred by entering a default judgment against two shareholder entities of the corporate nursing home as the complaint failed to allege any abuses of the corporate form on their part and did not allege that the shareholder entities actually mistreated the deceased resident. *EnduraCare Therapy Mgmt. v. Drake*, 298 Ga. App. 809, 681 S.E.2d 168 (2009).

Trial court could not raise defense of usury. — In an action to collect the amount due on a loan, the trial court was without authority to raise the defense of usury on behalf of the borrower and erred to the extent the court excluded the award of interest in the default judgment on the basis that the loan contract was usurious. *Ideal Loan & Fin. Corp. v. Little*, 217 Ga. App. 385, 457 S.E.2d 274 (1995).

Defendant's default operates as admission of material facts which are well and properly pled in the plaintiff's complaint. *Summerour v. Medlin*, 48 Ga. App. 403, 172 S.E. 836 (1934) (decided under former Code 1910, §§ 5655 and 5662).

Default only operates as an admission of the well-pled allegations of a complaint and does not preclude a defaulting party from showing that no claim existed that would permit recovery; therefore, although a management company for the landlord of a storage facility was in default, the company properly presented evidence showing that the tenant was limited to recovery for breach of contract,

and that the tenant did not assert a valid tort claim based solely on the breach of contract. *Lancaster v. Storage USA P'ship, L.P.*, 300 Ga. App. 567, 685 S.E.2d 474 (2009).

Judgment by default may be corrected to conform to pleadings at a subsequent term of court, even after execution has been issued and property sold. *Williams v. Stancil*, 119 Ga. App. 800, 168 S.E.2d 643 (1969).

In order to set aside a default judgment, the defendant must have not only a meritorious defense but a legal excuse for the defendant's nonappearance. *West Court Square v. Assayag*, 131 Ga. App. 690, 206 S.E.2d 579 (1974).

Trial court did not abuse the court's discretion in denying a corporate president's motion to open a default judgment as the corporate president's sole defense regarding why the president thought the default was improperly entered was that the trial court did not have personal jurisdiction over the president; however, the corporate president waived that defense by not properly raising the defense and since, in any event, that defense lacked merit, the trial court did not err in denying the motion to open the default judgment. Furthermore, the trial court did not abuse the court's discretion in denying the motion as the corporate president did not even argue that the four conditions precedent were met for opening a default judgment and, thus, the trial court did not even have the discretion to consider whether one of the three grounds for opening a prejudgment default was present. *Mitchell v. Gilwil Group, Inc.*, 261 Ga. App. 882, 583 S.E.2d 911 (2003).

Appeal from denial of motion to set aside default judgment. — Generally, denial of a motion to set aside a default judgment is appealable, without a certificate of immediate review; however, this is not automatically the case when multiple parties are involved. *Cox v. Farmers Bank*, 151 Ga. App. 64, 258 S.E.2d 731 (1979).

When the owners of a corporation sued waived a forum selection clause, the owners also waived the defenses of personal jurisdiction and venue by failing to raise the defenses at the earliest opportunity;

General Consideration (Cont'd)

thus, as non-parties to the underlying case, the owners could not otherwise appeal the default judgment against the corporation. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. App. 2008).

Motion for "partial summary judgment" is not an appropriate means by which a plaintiff can secure a judgment based upon the defendant's alleged default. *Williams v. Heykow, Inc.*, 171 Ga. App. 936, 321 S.E.2d 431 (1984).

Motion to strike pending. — It was error to grant a motion for default judgment without explicitly ruling on a pending motion to strike even though no answer was filed. *Cato Oil & Grease Co. v. Lewis*, 250 Ga. 24, 295 S.E.2d 527 (1982).

Motion for new trial. — Motion for a new trial is not a viable method to attack the liability portion of a default judgment, but such a motion is a viable method to attack the damages portion of a default judgment only insofar as the damages being sought are unliquidated. *Nova Group, Inc. v. M.B. Davis Elec. Co.*, 187 Ga. App. 403, 370 S.E.2d 626, cert. denied, 187 Ga. App. 908, 370 S.E.2d 626 (1988).

Default judgment against one of several parties. — When the default judgment was entered against one party in a multiparty suit, the trial court erred in holding that the judgment was final and that the court was without discretion to vacate the judgment. *Daniell v. Heyn*, 169 Ga. App. 772, 315 S.E.2d 284 (1984).

Trial court's oral pronouncement of default on multiple parties not binding. — Trial court's oral announcement that the court was imposing a default judgment against a husband and his parents for abandonment of the husband's child was not binding on the trial court, and the court properly later determined that the court could not impose damages against the parents for the husband's abandonment. *Bridges v. Wooten*, 305 Ga. App. 682, 700 S.E.2d 678 (2010).

Plaintiff may waive right to default by proceeding to trial. — Statutory right to judgment following default is not an indefeasible right, but may or may not

be asserted, and may be waived by a plaintiff by proceeding with the action without taking advantage of the plaintiff's right to judgment in a timely and proper manner. *Ewing v. Johnston*, 175 Ga. App. 760, 334 S.E.2d 703 (1985).

Default judgment is a final and appealable judgment. *Smithson v. Harry Norman, Inc.*, 192 Ga. App. 796, 386 S.E.2d 546 (1989).

Cited in *Keith v. Byram*, 118 Ga. App. 364, 163 S.E.2d 753 (1968); *Jones v. Itson*, 121 Ga. App. 759, 175 S.E.2d 43 (1970); *United Bonding Ins. Co. v. Bray Lumber Co.*, 122 Ga. App. 548, 177 S.E.2d 829 (1970); *Walker v. Powell*, 123 Ga. App. 498, 181 S.E.2d 501 (1971); *Escambia Chem. Corp. v. Rocker*, 124 Ga. App. 434, 184 S.E.2d 31 (1971); *Georgia Farm Bureau Mut. Ins. Co. v. Williamson*, 124 Ga. App. 549, 184 S.E.2d 665 (1971); *Lymon v. Hollywood Fashions, Inc.*, 126 Ga. App. 627, 191 S.E.2d 473 (1972); *Foster Co. v. Livingston*, 127 Ga. App. 317, 193 S.E.2d 626 (1972); *Goldberg v. Painter*, 128 Ga. App. 214, 196 S.E.2d 157 (1973); *Loukes v. McCoy*, 129 Ga. App. 167, 199 S.E.2d 125 (1973); *Krasner v. Lester*, 130 Ga. App. 234, 202 S.E.2d 693 (1973); *Hopkins v. Harris*, 130 Ga. App. 489, 203 S.E.2d 762 (1973); *Johnson v. Cook*, 130 Ga. App. 575, 203 S.E.2d 882 (1974); *Williamson v. C & S Realty Co.*, 130 Ga. App. 592, 203 S.E.2d 906 (1974); *Nat'l Health Servs., Inc. v. Townsend*, 130 Ga. App. 700, 204 S.E.2d 299 (1974); *Security Mgt. Co. v. Keasler*, 131 Ga. App. 230, 205 S.E.2d 515 (1974); *Snyder v. Allen*, 131 Ga. App. 617, 206 S.E.2d 591 (1974); *Axelroad v. Preston*, 232 Ga. 836, 209 S.E.2d 178 (1974); *Barrett v. Barrett*, 232 Ga. 840, 209 S.E.2d 181 (1974); *Avis Rent A Car Sys. v. Rice*, 132 Ga. App. 857, 209 S.E.2d 270 (1974); *Thomas v. Home Credit Co.*, 133 Ga. App. 602, 211 S.E.2d 626 (1974); *Avant v. Patrick*, 133 Ga. App. 708, 213 S.E.2d 14 (1975); *Matuszczak v. Kelly*, 233 Ga. 914, 213 S.E.2d 875 (1975); *Evans v. Goodyear Tire & Rubber Co.*, 135 Ga. App. 75, 217 S.E.2d 318 (1975); *Pittman v. McKinney*, 135 Ga. App. 192, 217 S.E.2d 446 (1975); *Cel-Ko Bldrs. & Developers, Inc. v. BX Corp.*, 136 Ga. App. 777, 222 S.E.2d 94 (1975); *Termplan, Inc. v. Haynes*, 137 Ga. App. 122, 223 S.E.2d 19 (1975); *Tallman*

Pools of Ga., Inc. v. Napier, 137 Ga. App. 500, 224 S.E.2d 426 (1976); Wright v. Thompson, 236 Ga. 655, 225 S.E.2d 226 (1976); Reading Assocs., Ltd. v. Reading Assocs. of Ga., Inc., 236 Ga. 906, 225 S.E.2d 899 (1976); Wall v. Benningfield, 237 Ga. 173, 227 S.E.2d 13 (1976); Shannon Co. v. Heneveld, 138 Ga. App. 756, 227 S.E.2d 412 (1976); Shuford v. Jackson, 139 Ga. App. 469, 228 S.E.2d 605 (1976); Whitaker v. Whitaker, 237 Ga. 739, 229 S.E.2d 603 (1976); Shelton v. Bowman Transp., Inc., 140 Ga. App. 248, 230 S.E.2d 762 (1976); Gooden v. Blanton, 140 Ga. App. 612, 231 S.E.2d 541 (1976); Henry v. Adair Realty Co., 141 Ga. App. 182, 233 S.E.2d 39 (1977); Lester v. Master Charge, 141 Ga. App. 593, 234 S.E.2d 164 (1977); Atlanta Car For Hire Ass'n v. Snead, 142 Ga. App. 276, 235 S.E.2d 679 (1977); Jesup Carpet Factory Outlet, Inc. v. Ken Carpets of LaGrange, Inc., 142 Ga. App. 301, 235 S.E.2d 684 (1977); Williams v. Citizens & S. Nat'l Bank, 142 Ga. App. 346, 236 S.E.2d 16 (1977); Schwartz v. C & S Mtg. Co., 142 Ga. App. 682, 236 S.E.2d 856 (1977); Lord v. Smith, 143 Ga. App. 378, 238 S.E.2d 731 (1977); North Ga. Prod. Credit Ass'n v. Vandergrift, 239 Ga. 755, 238 S.E.2d 869 (1977); Gregson v. Webb, 143 Ga. App. 577, 239 S.E.2d 230 (1977); Sewell v. Leifer, 144 Ga. App. 36, 240 S.E.2d 584 (1977); Staten v. Staten, 240 Ga. 478, 241 S.E.2d 237 (1978); Diaz v. First Nat'l Bank, 144 Ga. App. 582, 241 S.E.2d 467 (1978); Retail Union Health & Welfare Fund v. Seabrum, 240 Ga. 695, 242 S.E.2d 18 (1978); Spencer v. Taylor, 144 Ga. App. 641, 242 S.E.2d 308 (1978); Galanti v. Emerald City Records, Inc., 144 Ga. App. 773, 242 S.E.2d 368 (1978); Cheeks v. Barnes, 241 Ga. 22, 243 S.E.2d 242 (1978); Marler Oil Co. v. United Car & Truck Leasing, Inc., 145 Ga. App. 160, 243 S.E.2d 336 (1978); Hill v. Hill, 241 Ga. 218, 244 S.E.2d 862 (1978); Whitby v. Maloy, 145 Ga. App. 785, 245 S.E.2d 5 (1978); Critz Buick, Inc. v. Aliotta, 145 Ga. App. 805, 245 S.E.2d 56 (1978); Hubert v. Lawson, 146 Ga. App. 698, 247 S.E.2d 223 (1978); In re Boswell, 242 Ga. 313, 249 S.E.2d 13 (1978); Equilease Corp. v. Moore, 147 Ga. App. 421, 249 S.E.2d 155 (1978); Marbut Co. v. Capital City Bank, 148 Ga. App. 664, 252 S.E.2d 85 (1979); Bank of Cumming v. Moseley, 243 Ga. 858, 257 S.E.2d 278 (1979); Kerns v. White, 150 Ga. App. 305, 257 S.E.2d 374 (1979); Powell v. Powell, 244 Ga. 25, 257 S.E.2d 531 (1979); Carlson v. Holt, 152 Ga. App. 95, 262 S.E.2d 508 (1979); Caldwell v. Atlanta Bd. of Educ., 152 Ga. App. 291, 262 S.E.2d 573 (1979); Cotton v. Federal Land Bank, 153 Ga. App. 153, 265 S.E.2d 59 (1980); Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980); McCarthy v. Holloway, 245 Ga. 710, 267 S.E.2d 4 (1980); Cotton v. Federal Land Bank, 246 Ga. 188, 269 S.E.2d 422 (1980); Perrin v. Kilgore, 158 Ga. App. 300, 279 S.E.2d 714 (1981); Willett Lincoln-Mercury, Inc. v. Larson, 158 Ga. App. 540, 281 S.E.2d 297 (1981); GMAC v. Yates Motor Co., 159 Ga. App. 215, 283 S.E.2d 74 (1981); Brannon Enters., Inc. v. Deaton, 159 Ga. App. 685, 285 S.E.2d 58 (1981); Smith v. Sears, Roebuck & Co., 160 Ga. App. 342, 287 S.E.2d 73 (1981); DeLoach v. Floyd, 160 Ga. App. 728, 288 S.E.2d 65 (1981); Mock v. Copeland, 160 Ga. App. 876, 288 S.E.2d 591 (1982); F & M Bank v. Smith, 162 Ga. App. 410, 291 S.E.2d 80 (1982); Cochran v. Levitz Furn. Co., 249 Ga. 504, 291 S.E.2d 535 (1982); Stevens v. Wakefield, 163 Ga. App. 40, 292 S.E.2d 516 (1982); Simon v. McGee Plumbing & Elec. Co., 164 Ga. App. 667, 299 S.E.2d 388 (1982); Wills v. McAuley, 166 Ga. App. 4, 299 S.E.2d 914 (1983); Southwest Community Hosp. & Medical Ctr. v. Thompson, 165 Ga. App. 442, 301 S.E.2d 501 (1983); Becker v. Fairman, 167 Ga. App. 708, 307 S.E.2d 520 (1983); Christian v. M & R Collection Adjustment, Inc., 167 Ga. App. 712, 307 S.E.2d 523 (1983); Muscogee Realty Dev. Corp. v. Jefferson Co., 168 Ga. App. 673, 310 S.E.2d 245 (1983); Klosterman v. Tudor, 170 Ga. App. 4, 315 S.E.2d 920 (1984); Sears, Roebuck & Co. v. Ramey, 170 Ga. App. 873, 318 S.E.2d 740 (1984); Stinson v. Georgia Dep't of Human Resources Credit Union, 171 Ga. App. 303, 319 S.E.2d 508 (1984); Summer-Minter & Assocs. v. Phillips, 171 Ga. App. 528, 320 S.E.2d 376 (1984); Seaboard Coast Line R.R. v. Mobil Chem. Co., 172 Ga. App. 543, 323 S.E.2d 849 (1984); Long v. A.L. Williams & Assocs., 172 Ga. App. 564, 323 S.E.2d 868 (1984); Buice v. White, 172 Ga. App. 634, 324 S.E.2d 203 (1984); Georgia

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Farm Bldgs., Inc. v. Willard, 597 F. Supp. 629 (N.D. Ga. 1984); Cronin v. State, 172 Ga. App. 675, 324 S.E.2d 533 (1984); Attridge v. Maines, 174 Ga. App. 472, 330 S.E.2d 409 (1985); Ross v. White, 175 Ga. App. 791, 334 S.E.2d 371 (1985); MTW Inv. Co. v. Vanguard Properties Fin. Corp., 179 Ga. App. 403, 346 S.E.2d 575 (1986); Cohutta Mills, Inc. v. Hawthorne Indus., Inc., 179 Ga. App. 815, 348 S.E.2d 91 (1986); Cole v. Smith, 182 Ga. App. 59, 354 S.E.2d 835 (1987); Atlantic Mechanical Contractors v. Hurston, 185 Ga. App. 511, 364 S.E.2d 638 (1988); 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); Gray v. Whisenaut, 258 Ga. 242, 368 S.E.2d 115 (1988); Daughtry v. Cohen, 187 Ga. App. 253, 370 S.E.2d 18 (1988); Dickens v. First Capital Income Properties, Ltd., 187 Ga. App. 607, 371 S.E.2d 130 (1988); Munford v. Maclellan, 258 Ga. 679, 373 S.E.2d 368 (1988); May v. Volkswagen of Am., Inc., 125 F.R.D. 521 (N.D. Ga. 1989); Camelback Mgt. Co. v. Phoenix Periodicals, Inc., 192 Ga. App. 101, 383 S.E.2d 651 (1989); Cassidy v. Wilson, 196 Ga. App. 6, 395 S.E.2d 291 (1990); Chrysler Credit Corp. v. Brown, 198 Ga. App. 653, 402 S.E.2d 753 (1991); Cole v. Lucas, 201 Ga. App. 423, 411 S.E.2d 284 (1991); Evans v. Willis, 203 Ga. App. 699, 418 S.E.2d 73 (1992); Day v. Norman, 207 Ga. App. 37, 427 S.E.2d 31 (1993); Sagnibene v. Budget Rent-A-Car Sys., 209 Ga. App. 44, 432 S.E.2d 639 (1993); Pleats, Inc. v. OMSA, Inc., 211 Ga. App. 643, 440 S.E.2d 214 (1993); Bryant v. Haynie, 216 Ga. App. 430, 454 S.E.2d 533 (1995); Frasure v. Calhoun, 221 Ga. App. 272, 471 S.E.2d 57 (1996); Cornelius v. Wood, 223 Ga. App. 339, 477 S.E.2d 595 (1996); Revels v. Wimberly, 223 Ga. App. 407, 477 S.E.2d 672 (1996); Walker v. Hambrick, 226 Ga. App. 207, 486 S.E.2d 77 (1997); Southwire Co. v. American Arbitration Ass'n, 248 Ga. App. 226, 545 S.E.2d 681 (2001); McCombs v. Synthes, 250 Ga. App. 543, 553 S.E.2d 17 (2001); Smith v. Local Union No. 1863, Int'l Longshoremen's Ass'n of Clerks, 260 Ga. App. 683, 580 S.E.2d 566 (2003); Majeed v. Randall, 279

Ga. App. 679, 632 S.E.2d 413 (2006); Hutcheson v. Elizabeth Brennan Antiques & Ints., Inc., 317 Ga. App. 123, 730 S.E.2d 514 (2012); Bogart v. Wis. Inst. for Torah Study, 321 Ga. App. 492, 739 S.E.2d 465 (2013); Oduok v. Wedean Props., 319 Ga. App. 785, 738 S.E.2d 626 (2013); Brougham Casket & Vault Co., LLC v. DeLoach, 323 Ga. App. 701, 747 S.E.2d 707 (2013).

When Case in Default

Under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), all claims, whether in law or equity, require filing of an answer to preclude entry of a default judgment against the defendant. Times-Journal, Inc. v. Jonquil Broadcasting Co., 226 Ga. 673, 177 S.E.2d 64 (1970).

Automatic default after expiration of statutory period. — When no answer was filed by the defendant within the statutory time, and the time for filing was not extended or default opened as a matter of right within 15 days thereafter, the case was automatically in default, and the court erred in overruling the petitioner's oral motion to enter judgment in the petitioner's case when the case was duly called for trial, thereby rendering nugatory all further proceedings in the case. Chapman v. Commercial Bank, 208 Ga. 593, 68 S.E.2d 603 (1952) (decided under former Code 1933, § 110-401).

Trial court did not err in granting a financial corporation's motion for default judgment in an action to establish a lost security deed because the buyer failed to respond within the time period allowed by O.C.G.A. § 9-11-55. Haamid v. First Franklin Fin. Corp., 299 Ga. App. 828, 683 S.E.2d 891 (2009).

Failure to perfect service. — Time for filing an answer never began to run because the plaintiff did not perfect service on any of the defendants in the case, and thus there was never a default. Nally v. Bartow County Grand Jurors, 280 Ga. 790, 633 S.E.2d 337 (2006).

Answer to amendment adding party not required. — Construing the pertinent provisions of O.C.G.A. §§ 9-11-7, 9-11-8, 9-11-12, 9-11-15, and 9-11-21 in pari materia, it is clear that the Civil Practice Act, O.C.G.A. Ch. 11, T. 9,

authorizes the addition of parties, by order of the court, and that an “amended complaint” effecting such an addition does not require a responsive pleading unless the trial court orders a reply thereto. As the added party was not required by statute nor affirmatively ordered by the trial court to answer the amended complaint, it follows that the added party was never in default and the default judgment entered against the added party was void. *Chan v. W-East Trading Corp.*, 199 Ga. App. 76, 403 S.E.2d 840, cert. denied, 199 Ga. App. 905, 403 S.E.2d 840 (1991).

Trial court erred in entering a default judgment against a law firm sued by a client in a legal malpractice action as the law firm was not required to answer an amended complaint, which added the firm as a party, absent a court order directing the firm to file a responsive pleading. *Stubbs v. Pickle*, 287 Ga. App. 246, 651 S.E.2d 171 (2007).

Answer to be filed within 30 days after service. — Subsection (a) of this section requires an answer to be filed within the time required by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), in other words, within 30 days after service of the summons and complaint. *Olvey v. Citizens & S. Bank*, 146 Ga. App. 484, 246 S.E.2d 485 (1978).

Because a corporate president did not sign an original answer or submit a valid answer within 30 days, and an answer submitted for the president by a non-attorney corporate principal was not sufficient pursuant to O.C.G.A. § 9-11-11(a), a default judgment was properly entered against the president under O.C.G.A. § 9-11-55. *Rainier Holdings, Inc. v. Tatum*, 275 Ga. App. 878, 622 S.E.2d 86 (2005).

After a realty group acknowledged a waiver of service under O.C.G.A. § 9-10-73, the group had 30 days to file an answer, and upon failing to do so in that time period, a default judgment under O.C.G.A. § 9-11-55 was validly entered in favor of a flooring company, despite the fact that the company failed to provide the group with notice pursuant to O.C.G.A. § 9-11-5(a); the group failed to assert a timely defense, and the default certificate filed by the company satisfied the require-

ments of Ga. Unif. Super. Ct. R. 15. *SRM Realty Servs. Group, LLC v. Capital Flooring Enters.*, 274 Ga. App. 595, 617 S.E.2d 581 (2005).

Because a plaintiff’s personal injury action against a driver lapsed into default due to the driver’s failure to timely file an answer or other responsive pleading, despite the fact that the driver could have moved to open the default, when no attempt was made to do so, the trial court erred in failing to grant the plaintiff a default judgment against the driver and in considering the driver’s motion to dismiss. *Lewis v. Waller*, 282 Ga. App. 8, 637 S.E.2d 505 (2006).

Extension of time to answer. — In determining whether a valid extension has been granted, O.C.G.A. §§ 9-11-6(b) and 9-11-55(a) must be construed together. *Roberson v. Gnann*, 235 Ga. App. 112, 508 S.E.2d 480 (1998).

Response is required to a pleading construed as a third-party complaint, and default judgment is proper if the party fails to answer. *Wolski v. Hayes*, 144 Ga. App. 180, 240 S.E.2d 720 (1977).

Since no answer is required to counterclaim, case cannot go into default for failure to respond thereto, and no default judgment can be authorized on this ground. *Wolski v. Hayes*, 144 Ga. App. 180, 240 S.E.2d 720 (1977).

Failure to file defensive pleadings in de novo hearing on appeal in superior court for property evaluation for tax assessment purposes is not grounds for a default judgment. *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977).

Failure to file certificate required by Ga. Unif. Super. Ct. R. 15. — Because the information required in a Ga. Unif. Super. Ct. R. 15 certificate of default (date and type of service, lack of responsive pleading) could also be found in the record, the failure to file a Rule 15 certificate was not a nonamendable defect in the record sufficient to authorize setting aside a default judgment under O.C.G.A. § 9-11-60(d). The plain language of O.C.G.A. § 9-11-55 entitled the plaintiff to default judgment when the defendant did not answer and 15 days had elapsed. *Williams v. Contemporary Servs. Corp.*,

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325 Ga. App. 299, 750 S.E.2d 460 (2013).

Summons or process on which default based must comply with chapter. — Default judgment under subsection (a) of this section may not lawfully be entered on the basis of a summons or process which was not in compliance with the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Lee v. G.A.C. Fin. Corp.*, 130 Ga. App. 44, 202 S.E.2d 221 (1973).

Mere filing of a default summary judgment motion did not result in the entry of a default judgment. — Nothing showed a final or conclusive judgment on the merits in plaintiff home buyer's state court case against defendant companies, and the buyer's mere filing of a default summary judgment motion did not result in the entry of a default judgment; thus, the Rooker-Feldman doctrine did not preclude federal jurisdiction upon removal. *Jones v. Commonwealth Land Title Ins. Co.*, No. 11-13469, 2012 U.S. App. LEXIS 1487 (11th Cir. Jan. 25, 2012), cert. dismissed, mot. denied, U.S. , 133 S. Ct. 35, 183 L. Ed. 2d 671 (2012) (Unpublished).

Defendant who defaults does not waive defects in service, even when the defendant receives actual notice of the lawsuit. *Dotson v. Luxtron, Inc.*, 155 Ga. App. 504, 271 S.E.2d 644 (1980).

Late return of service not fatal to default. — When return of service, while filed late, was filed prior to the entry of a default judgment, and there was no attack on the service itself, the court did not err in denying the motions to set aside the default judgment and to dismiss the action. *Olvey v. Citizens & S. Bank*, 146 Ga. App. 484, 246 S.E.2d 485 (1978).

Late answer filed by uninsured motorist carrier. — Trial court erred in denying an insured's motion for a default judgment and granting the uninsured motorist carrier's motion for summary judgment because the court relied upon a typographical error in case law in determining that the carrier's answer was not filed late and thereby finding that the carrier was not in default. *Kelly v. Harris*, 329 Ga. App. 752, 766 S.E.2d 146 (2014).

Default operates to admit only the well-pleaded allegations of the com-

plaint and the fair inferences and conclusions of fact to be drawn therefrom; thus, a defendant in default is not precluded by operation of the default from showing that no claim existed which could allow the plaintiff to recover. *Azarat Mktg. Group, Inc. v. Department of Admin. Affairs*, 245 Ga. App. 256, 537 S.E.2d 99 (2000).

Trial court did not err in awarding damages to an attorney on default judgment without conducting a trial or requiring evidence of the reasonableness of the attorney fees because, in a lawsuit seeking the balance due on an account when the case was in default under O.C.G.A. § 9-11-55(a), a doctor was deemed to have admitted each and every allegation of the attorney's petition. *Vaughters v. Outlaw*, 293 Ga. App. 620, 668 S.E.2d 13 (2008).

Default judgment held not abuse of discretion. — When party ignores interrogatories served on the party, does not appear at a court-ordered hearing on failure to answer, and further ignores a court order to answer within 30 days, it is not an abuse of discretion to enter a default judgment and assess costs against the party. *Williamson v. Lunsford*, 119 Ga. App. 240, 166 S.E.2d 622 (1969).

Answer required from all parties named in complaint. — When an answer was filed in the name of only one of four separate entities named as defendants in the action, the other three defendants could not benefit from the answer and, having filed no answer of their own, were in default. *McCombs v. Southern Regional Medical Ctr., Inc.*, 233 Ga. App. 676, 504 S.E.2d 747 (1998).

Default judgment against joint defendants. — If the alleged liability is joint, a default judgment should not be entered against a defaulting defendant until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the nondefaulting defendant(s). *Stasco Mechanical Contractors v. Williamson*, 157 Ga. App. 545, 278 S.E.2d 127 (1981).

Entitlement to verdict and judgment. — When the case lapsed into default after the expiration of the grace period, the plaintiff became entitled to a

verdict and judgment by default as if every item and paragraph of the plaintiff's complaint was supported by proper evidence. *Sidwell v. Sidwell*, 237 Ga. App. 716, 515 S.E.2d 634 (1999).

Forfeiture actions under § 16-13-49.

— Procedures for opening default as a matter of right under subsection (a) of O.C.G.A. § 9-11-55 are applicable, pursuant to O.C.G.A. § 9-11-81, in forfeiture actions under O.C.G.A. § 16-13-49. *Ford v. State*, 271 Ga. 162, 516 S.E.2d 778 (1999), reversing *Ford v. State*, 235 Ga. App. 755, 509 S.E.2d 734 (1998) and overruling *State v. Britt Caribe, Ltd.*, 154 Ga. App. 476, 268 S.E.2d 702 (1980).

After an accused failed to appear or otherwise file an answer in a condemnation proceeding filed against the accused in connection with the accused's arrest for possession of methamphetamine, and the accused failed to show that counsel was ineffective in failing to file an answer, the state was properly granted judgment. *Walters v. State of Ga.*, 269 Ga. App. 883, 605 S.E.2d 458 (2004).

Remand required to determine if default. — Remand was required for further proceedings as the record did not make it clear whether, after the moving company defaulted on the customer's complaint and the trial court awarded unliquidated damages to the customer, an evidentiary hearing was held at which the customer established the amount of damages as was required upon a default by O.C.G.A. § 9-11-55(a). *Wise Moving & Storage, Inc. v. Rieser-Roth*, 259 Ga. App. 832, 578 S.E.2d 535 (2003).

Defendant who defaults is estopped from offering defenses to defeat the right of recovery. — When a law firm sued a client to collect the balance owed to the law firm for legal services that the firm rendered to the client and a default judgment was entered against the client for the client's failure to file an answer, the trial court did not err in awarding the firm attorney fees incurred in bringing the suit to collect the fees owed as the fee agreement allowed the firm to receive reimbursement for the firm's fees in collecting on the debt, and the client, by virtue of the client's default, was estopped from raising the client's asserted defense

that the agreement was not binding on the parties. *Sprowell v. Thomas & Hutson*, 260 Ga. App. 312, 581 S.E.2d 322 (2003).

Defect in answer cured and default error.

— Because a lessee waited over a month to file a motion to open a default without an explanation for the delay, the lessee was estopped from contending that the damages awarded to the lessor were not authorized by the lease; therefore, pursuant to O.C.G.A. § 9-11-55(a), the trial court properly denied the lessee's motion to open the default judgment. *Broad. Concepts v. Optimus Fin. Servs.*, 274 Ga. App. 632, 618 S.E.2d 612 (2005).

Defect in a corporation's answer, through a nonattorney corporate principal, was cured by the filing of an answer by a licensed attorney, and the properly filed answer related back to the date of the original answer, pursuant to O.C.G.A. § 9-11-15(c); accordingly, it was error to enter a default judgment against the corporation, pursuant to O.C.G.A. § 9-11-55. *Rainier Holdings, Inc. v. Tatum*, 275 Ga. App. 878, 622 S.E.2d 86 (2005).

Denial of motion for default judgment error when party failed to answer.

— Denial of a listing broker's motion for default judgment against a buyer was error because the buyer did not file an answer, the time for filing an answer was not extended, and under O.C.G.A. § 9-11-55(a), the buyer's case was automatically in default 30 days after the buyer was served; further, the buyer did not move to open the default. The trial court's earlier findings on cross-motions for summary judgment regarding the co-defendant's lack of contractual liability were irrelevant to the issue of whether the listing broker was entitled to a default judgment. *H.N. Real Estate Group, LLC v. Dixon*, 298 Ga. App. 124, 679 S.E.2d 130 (2009).

Waiver of default. — Executor of the decedent's estate waived the right to seek a default judgment in a medical malpractice lawsuit because the executor allowed the health care provider to file an untimely answer and then waited over a year and a half before moving for, or otherwise raising, the issue of default, while in the meantime engaging in efforts to compel discovery responses and joining

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with the health care provider in filing motions to extend the completion of discovery. *Laurel Baye Healthcare of Macon, LLC v. Neubauer*, 315 Ga. App. 474, 726 S.E.2d 670 (2012).

Proof of Damages**1. In General**

Phrase “ex delicto” in subsection (a) of this section describes a tort. *Taylor v. Stapp*, 134 Ga. App. 468, 215 S.E.2d 23 (1975).

Driver in default entitled to discovery. — Even though the issue of liability was resolved by a driver’s default, the question of damages remained; the driver was entitled to introduce evidence as to damages and the driver had the right to engage in discovery. *Russaw v. Burden*, 272 Ga. App. 632, 612 S.E.2d 913 (2005).

Each material allegation of complaint admitted except as to damages. — When judgment by default is rendered in case in which damages are not liquidated, the defendant is thereby concluded as to the truth of all material allegations of the petition save as to the amount of damages. *Summerour v. Medlin*, 48 Ga. App. 403, 172 S.E. 836 (1934) (decided under former Code 1910, §§ 5655 and 5662).

Defendant in default in action for damages arising out of a collision is in the position of having admitted each and every material allegation of the plaintiff’s complaint, except as to the amount of damages suffered by the plaintiff. *Whitby v. Maloy*, 150 Ga. App. 575, 258 S.E.2d 181 (1979).

Trial court properly denied an injured party’s motion for a default judgment as the driver did not dispute that the driver was in default, thereby admitting every material allegation of the complaint, except the amount of damages; as the driver contested damages, the trial court properly set the case for trial as to proximate cause and damages; the injured party was not entitled to court costs as the driver did not seek to open the default. *Russaw v. Burden*, 272 Ga. App. 632, 612 S.E.2d 913 (2005).

When action based upon liquidated demand is in default, judgment may be entered in favor of the plaintiff without introduction of evidence. *Haney v. Brownlee*, 102 Ga. App. 424, 116 S.E.2d 347 (1960) (decided under former Code 1933, § 110-401).

When contract action based on liquidated demand is in default, judgment may be entered in favor of the plaintiff without introduction of evidence, as if every item and paragraph of the petition were supported by proper evidence. *Dickey v. Mingledorff*, 110 Ga. App. 454, 138 S.E.2d 735 (1964) (decided under former Code 1933, § 110-401).

Debt or demand is liquidated when agreed on by parties or fixed as to amount by operation of law. *Shaef Chem. Co. v. Cook*, 106 Ga. App. 223, 126 S.E.2d 806 (1962) (decided under former Code 1933, § 110-401).

If damages are unliquidated, evidence in support thereof must be introduced; otherwise, judgment may be taken without evidence. *Wallis v. McMurray*, 91 Ga. App. 549, 86 S.E.2d 529 (1955) (decided under former Code 1933, § 110-401).

Damages are unliquidated when petition alleges that sum is due as reasonable value of services. *Wallis v. McMurray*, 91 Ga. App. 549, 86 S.E.2d 529 (1955) (decided under former Code 1933, § 110-401).

Attorney’s fees. — While ordinarily attorney’s fees are thought to be in the nature of unliquidated damages, attorney’s fees in a stipulated percentage of a liquidated amount may also be a liquidated claim. *Young v. John Deere Plow Co.*, 102 Ga. App. 132, 115 S.E.2d 770 (1960) (decided under former Code 1933, § 110-401).

In a default situation, a request for unliquidated damages, such as attorney’s fees, requires an evidentiary hearing at which each attorney must provide admissible evidence of fees in the form of personal testimony, or through the testimony of the custodian of the applicable billing records as an exception to the hearsay rule. *Oden v. Legacy Ford-Mercury, Inc.*, 222 Ga. App. 666, 476 S.E.2d 43 (1996).

No necessity for open account for liquidated damages. — Subsection (a)

of O.C.G.A. § 9-11-55 imposes no requirement that the cause of action be based on an open account in order for the damages to be considered liquidated. *Pittard Mach. Co. v. Eisele Corp.*, 166 Ga. App. 324, 304 S.E.2d 129 (1983).

Damages for a complaint on an open account are liquidated. *Tidwell v. Cherokee Culvert Co.*, 168 Ga. App. 613, 310 S.E.2d 15 (1983).

Damages were not liquidated for purposes of a default judgment since the contract was not attached to the complaint and only a conclusory allegation was made that a certain sum was due. *Hazlett & Hancock Constr. Co. v. Virgil Womack Constr. Co.*, 181 Ga. App. 25, 351 S.E.2d 218 (1986); *Carter v. Ravenwood Dev. Co.*, 249 Ga. App. 603, 549 S.E.2d 402 (2001).

Trial court's determination that damages alleged were liquidated was erroneous since invoices or agreements from which the amount of damages were derived were not attached to the complaint and incorporated therein. *T.A.I. Computer, Inc. v. CLN Enters., Inc.*, 237 Ga. App. 646, 516 S.E.2d 340 (1999).

When complaint alleges account in certain amount, damage evidence unnecessary. — When the trial court bases a default judgment as to liability and damages on the count of the complaint which alleges an account stated in an amount certain, the movant is entitled to a judgment without presenting evidence of damages. *Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.*, 166 Ga. App. 506, 305 S.E.2d 14 (1983).

Damages are "ex contractu" when plaintiff seeks recovery for rent due under a lease. *Maolud v. Keller*, 157 Ga. App. 430, 278 S.E.2d 80 (1981).

Strict proof of damages required. — Under this section, a case does not automatically become in default upon failure to timely file responses when the action involves unliquidated damages, in which event the plaintiff is required to introduce evidence and establish the amount of damages. *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977).

Failure to answer in action for damages arising from collision does not result in

admission of existence of any amount of damages, and strict proof of damages is required by law. *Whitby v. Maloy*, 150 Ga. App. 575, 258 S.E.2d 181 (1979).

When an action is ex delicto, the plaintiff is required to establish the plaintiff's damages by evidence before a jury. *Maolud v. Keller*, 157 Ga. App. 430, 278 S.E.2d 80 (1981).

Under the provisions of O.C.G.A. § 9-11-55, the plaintiff in an ex contractu action for unliquidated damages must prove the amount of the plaintiff's damages even if the defendant is in default. The debt is liquidated when it is rendered certain what is due and how much is due. *Copelan v. O'Dwyer*, 159 Ga. App. 750, 285 S.E.2d 216 (1981).

After the plaintiff presented cash receipts as evidence of deposits totaling a certain sum with the officer of a credit union, which the officer refused to return, it was error to deny the plaintiff's motion for a default judgment on unliquidated damages. *Ward v. Dollar*, 216 Ga. App. 143, 453 S.E.2d 142 (1995).

Defendant's failure to answer did not result in the admission of the existence of any amount of damages, and it could properly contest the issue of damages by rigid cross-examination and by the introduction of evidence so long as the cross-examination did not touch on the issue of liability. *Magnan v. Miami Aircraft Support, Inc.*, 217 Ga. App. 855, 459 S.E.2d 592 (1995).

Because the damages sought by an advertiser were not proven as required by O.C.G.A. § 9-11-55(a) and because no due process violation for want of notice occurred, the trial court properly denied the advertiser's request for damages. *BellSouth Adver. & Publ. Corp. v. Kingdom Adventures, LLC*, 277 Ga. App. 495, 627 S.E.2d 125 (2006).

Trial court erred in entering a default judgment in the amount of \$15,000 against a home inspector because a purchaser's damages were unliquidated, and other than the prayer in the purchaser's complaint for \$15,000, the purchaser made no showing of the amount of damages; the purchaser's failure to prove the purchaser's damages constituted a nonamendable defect within the meaning

Proof of Damages (Cont'd)**1. In General (Cont'd)**

of O.C.G.A. § 9-11-60(d)(3) of the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Default held not to liquidate amount sued for. — When a complaint did not establish, even with its allegations admitted by virtue of default, that a service provider and its client operated under an open account arrangement, nor did it appear from the complaint that the amount was liquidated as between the parties, the fact of default did not render it liquidated. *James C. Welch Constr. Co. v. Quantum Group, Inc.*, 188 Ga. App. 740, 374 S.E.2d 232 (1988).

Judge hearing evidence without jury. — In contract action for unliquidated damages, the trial judge may hear evidence from the plaintiff without a jury and render a judgment. *Rogers v. Griggs*, 235 Ga. 273, 219 S.E.2d 372 (1975).

Necessity of proof of damages on default for failure to comply with discovery. — Although Ga. L. 1970, p. 157, § 1 (see now O.C.G.A. § 9-11-37(d)), relating to sanctions for failure to comply with discovery, is silent as to the necessity of proof of damages when judgment by default has been imposed against a disobedient party, principles of Ga. L. 1967, p. 226, § 24 (see now O.C.G.A. § 9-11-55(a)) should apply to a judgment by default imposed thereunder. *House v. Hewett Studios, Inc.*, 125 Ga. App. 127, 186 S.E.2d 584 (1971); *Sterling Factors v. Whelan*, 245 B.R. 698 (N.D. Ga. 2000).

Proof of damages against guarantor of open account. — Creditor who obtains default judgment against debtor on open account must prove damages under subsection (a) of this section when the creditor similarly obtains default judgment against the debtor's guarantor, since as to the guarantor, the creditor's action was not one on open account but on the guaranty contract. *Graybar Elec. Co. v. Opp*, 138 Ga. App. 456, 226 S.E.2d 271 (1976).

Amount admitted by guarantor's principal not conclusive. — Guarantor

is not conclusively bound by a judgment or the amount admitted due by the guarantor's principal, and such amount is only prima facie evidence of liability to the creditor; while a default judgment against a guarantor as to liability based on the guarantor's failure to answer the complaint was proper, the trial court erred in granting a judgment against the guarantor without proof of damages, and the case was remanded for further proceedings regarding the damages owed by the guarantor. *McCorvey Grading & Pipeline, Inc. v. Blalock Oil Co.*, 268 Ga. App. 795, 602 S.E.2d 842 (2004).

Proof required in attachment proceeding. — Even if no appearance or answer is filed by the defendant in an attachment proceeding in rem, the plaintiff must still prove allegations of the plaintiff's declaration by a preponderance of the evidence before the plaintiff is entitled to recover any damages resulting therefrom. *Homasote Co. v. Stanley*, 104 Ga. App. 636, 122 S.E.2d 523 (1961) (decided under former Code 1933, § 110-401).

Matters relating to liability foreclosed. — By failure of the defendant in a tort action to answer or by dismissal of an answer, the case is in default and the defendant is foreclosed as to all matters relating to the grounds of liability inhering in the tort action; thereafter, the only issue is the amount of damages to be awarded. *Lee v. Morrison*, 138 Ga. App. 332, 226 S.E.2d 124 (1976).

Defense which goes to right of recovery. — Upon assessment of damages, defense which goes to the right of recovery cannot be made. *Flanders v. Hill Aircraft & Leasing Corp.*, 137 Ga. App. 286, 223 S.E.2d 482 (1976).

Defense to assessment of damages which goes to the right of recovery cannot be made. *Lee v. Morrison*, 138 Ga. App. 332, 226 S.E.2d 124 (1976).

Defenses which go to the right of recovery, such as the doctrine of comparative negligence, are not available to the defendant in default, even though the same defense may also go to the assessment of damages. *Whitby v. Maloy*, 150 Ga. App. 575, 258 S.E.2d 181 (1979).

Defenses that go to the right of recovery

are not available to the defendant in default even though the same defense also may go to the assessment of damages. *Gibbs v. Abiose*, 235 Ga. App. 214, 508 S.E.2d 690 (1998).

Defendant's waiver of right to introduce evidence. — Defendant who fails to answer a suit is given rights under subsection (a) of O.C.G.A. § 9-11-55 to introduce evidence on damages; however, because the defendant failed to answer the suit at all, the rights are deemed waived. *Erwin v. Gibson*, 205 Ga. App. 136, 421 S.E.2d 752, cert. denied, 205 Ga. App. 900, 421 S.E.2d 752 (1992).

Nonapplicability of § 9-11-15(b) to default. — Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15(b)), which provides that when issues not raised by the pleadings are tried by express or implied consent, the issues shall be treated in all respects as if the issues had been raised in the pleadings, has no application when the defendant is precluded by default from raising such an issue. *Lee v. Morrison*, 138 Ga. App. 332, 226 S.E.2d 124 (1976).

Necessity of determining plaintiff's entitlement to equitable relief. — When case not in equity is in default, the plaintiff is entitled to a default judgment as a matter of law without introduction of any evidence except as to unliquidated damages; however, in equity cases, a determination must first be made that admitting every allegation in the petition as true, the plaintiff is entitled to the relief sought. *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970).

Amount of damages not to be adjudicated on motion for summary judgment. — When the plaintiff's complaint presents a claim for unliquidated damages, the amount of such damages cannot be adjudicated by the court on a motion for summary judgment, but must be proved as provided by law. *Republic Ins. Co. v. Cook*, 129 Ga. App. 833, 201 S.E.2d 668 (1973).

Matters in statement of account supported by proper evidence. — In defaulted action on account, when statement of account attached as exhibit to complaint lists debtor corporation by tradename, under this section these mat-

ters, as well as those pertaining to materials furnished and amount due as shown on the statement of account, must be deemed "supported by proper evidence," so that the corporation has been duly adjudicated an account debtor in a specified amount. *Tri-State Culvert Mfg., Inc. v. Crum*, 139 Ga. App. 448, 228 S.E.2d 403 (1976).

Section as authority in cases not involving default. — Order that trial as to amount of unliquidated damages, after grant of summary judgment as to liability, be held without jury pursuant to subsection (a) of this section was not error as this section has been specifically cited by the appellate courts in cases not involving default judgments for proving unliquidated damages when there is no question which a jury must decide. *C.P.D. Chem. Co. v. National Car Rental Sys.*, 148 Ga. App. 756, 252 S.E.2d 665 (1979).

Punitive damages. — Even if the trial court erred in awarding punitive damages in a default judgment case by not making a specific finding on a verdict form that punitive damages were authorized, the error was harmless; prior to awarding the punitive damages, the trial court conducted a separate hearing and received evidence on damages thereby satisfying the statutory requirements. *Hill v. Johnson*, 210 Ga. App. 824, 437 S.E.2d 801 (1993).

Proof not required. — When, according to the contract, upon breach by the purchaser the broker was entitled to keep up to one-half of the earnest money as the broker's commission, with the balance of the earnest money to be retained by the seller as liquidated damages, inasmuch as there was no broker entitled to a commission, the seller was entitled to keep all of the earnest money as liquidated damages pursuant to the contract. Since the parties agreed to the damages for breach of the contract, the damages were liquidated, and the seller was entitled to a judgment without putting on evidence of damages. *McGuire v. Norris*, 180 Ga. App. 383, 349 S.E.2d 261 (1986).

When evidence to mitigate punitive damages not allowed. — In an action for trespass, after the defendant's motion to open the defendant's default had been

Proof of Damages (Cont'd)**1. In General (Cont'd)**

denied and the case proceeded to trial on the issue of compensatory and punitive damages, the trial court correctly refused defendant permission to question the plaintiff concerning whether the plaintiff knew that an easement had allegedly existed on the affected property and also correctly refused to permit the defendant to attempt to mitigate punitive damages by presenting evidence concerning the alleged existence of such an easement, since, although such evidence might have affected the amount of punitive damages assessed, it also bore upon the right of recovery, which had already been established by the factum of the default. *Krystal Co. v. Carter*, 180 Ga. App. 667, 350 S.E.2d 306 (1986).

No error in trial court granting judgment for damages and attorney fees. — See *Danger v. Strother*, 171 Ga. App. 607, 320 S.E.2d 613 (1984).

2. Jury Trial of Damage Issue

Editor's notes. — Prior to amendment by Ga. L. 1981, p. 769, § 1, this section required the amount of damages as to actions ex delicto to be tried before a jury. The 1981 amendment deleted this requirement, and inserted the proviso in subsection (a) of this section as to entitlement to a jury trial on demand on the issue of damages in the event defendant raised the issue. Hence, cases prior to the 1981 amendment should be consulted with care.

Requirement under local Act that nonappearing defendant must have demanded jury. — Since this section contemplates foregoing default judgment, it is incorrect to interpolate requirement under local Act that nonappearing defendant must have spoken up to demand a jury to determine the amount of damages to avoid waiver. *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

Amount of damages due has to be fixed by the jury, even when the defendant is in default, but otherwise allegations of petition are to be taken as true.

Flanders v. Hill Aircraft & Leasing Corp., 137 Ga. App. 286, 223 S.E.2d 482 (1976); *Lee v. Morrison*, 138 Ga. App. 332, 226 S.E.2d 124 (1976).

Evidence of amount of damages admissible. — Evidence was admissible that the damage sustained by the plaintiff's automobile was the same as that sustained in a previous collision, even though the defendant was in default on the issue of liability, since this evidence did not challenge the defendant's liability for damages or the plaintiff's right to recover damages, but went only to the amount of damages. *Gibbs v. Abiose*, 235 Ga. App. 214, 508 S.E.2d 690 (1998).

Absent jury trial damage award void. — In an action ex delicto, the plaintiff is required to establish damages by evidence before a jury, and when a jury is not impanelled, that part of the default judgment awarding damages to the plaintiff is void. *Singleton v. Varnedoe*, 141 Ga. App. 311, 234 S.E.2d 86 (1977).

Right to force jury trial is limited. — Right of the defendant in default to force a jury trial on the issue of damages is limited to those instances in which the action is ex delicto or the damages sought are unliquidated. *Fadum v. Liakos*, 186 Ga. App. 556, 367 S.E.2d 843, cert. denied, 186 Ga. App. 917, 367 S.E.2d 843 (1988).

Right of defendant to contest amount of damages. — If the plaintiff is required to produce evidence as to the amount of the damages, the defendant impliedly has the right to contest that amount. *Ben Hyman & Co. v. Solow*, 101 Ga. App. 249, 113 S.E.2d 489 (1960) (decided under former Code 1933, § 110-401).

Defendants were entitled to a trial on damages, to notice of a trial on damages, and to ask for a jury trial on damages, but were accorded none of these rights; therefore, it could not be concluded that the defendants had a full and fair opportunity to litigate the issues so as to apply the equitable doctrine of collateral estoppel. *Sterling Factors, Inc. v. Whelan*, 236 Bankr. 495 (Bankr. N.D. Ga. 1999).

Right of both parties to move for new trial on damage issues. — Legislature did not intend to give the right of appeal to the plaintiff only and withhold

the right from the defendant, but to give both parties the right to move for a new trial and to except on issue of amount of damages. *Ben Hyman & Co. v. Solow*, 101 Ga. App. 249, 113 S.E.2d 489 (1960) (decided under former Code 1933, § 110-401).

Failure to make specific demand. — When the defendant merely informed the trial court of the defendant's right to a jury trial on the issue of damages and did not at any time make a specific demand for a jury trial on the issue as to damages, and the defendant failed to make any objection when the judge made the rulings, a demand for jury trial of the issue as to damages was never made an issue before the trial court; thus, no question was presented for appellate review. *Stephenson v. Wildwood Farms, Inc.*, 194 Ga. App. 728, 391 S.E.2d 706 (1990).

Upon a review of the evidence before the trial court, because neither of an individual's filed documents amounted to a "pleading" which placed damages in issue, neither document was in the nature of a formal answer, and neither actually disputed the amount of damages claimed, the trial court did not err in denying the individual a jury trial on the issue of damages; hence, the appeals court noted that to avoid doubt and confusion in the future, a defendant desiring a jury trial should file an answer specifically contesting damages and a demand for jury trial on the issue of damages, both clearly labeled as such. *Diaz v. Wills*, 286 Ga. App. 357, 649 S.E.2d 353 (2007).

When there was no stipulation that the jury would consist of less than 12 jurors, as provided by Ga. L. 1967, p. 226, § 34 (see now O.C.G.A. § 9-11-47(a)), the default judgment entered after the trial before 11 jurors was void as not before a jury. *First Fid. Ins. Corp. v. Busbia*, 128 Ga. App. 485, 197 S.E.2d 396 (1973).

Defendant erroneously precluded from offering evidence. — By deeming claims of wrongful termination and slander as admitted due to a defendant's default in the action, the trial court erred since only well-pled facts in the complaint were deemed admitted by the default, not legal conclusions contained in the complaint; as a result, the trial court erred by

precluding the defendant from offering evidence to contradict those claims at a hearing on damages. *Fink v. Dodd*, 286 Ga. App. 363, 649 S.E.2d 359 (2007).

Defendant's right unaffected by discovery sanction. — Defendant, whose answer denying liability for personal injuries was dismissed as a discovery sanction, was still entitled to notice of the trial on damages and, upon demand, a jury trial on that issue. *Green v. Snellings*, 260 Ga. 751, 400 S.E.2d 2 (1991).

Opening Default

1. In General

Liberal construction. — Provisions relating to opening of defaults should be given a liberal construction in promotion of justice and establishment of the truth. *Bradley v. Henderson*, 56 Ga. App. 488, 193 S.E. 79 (1937); *Haynes v. Smith*, 99 Ga. App. 433, 108 S.E.2d 772 (1959); *Strickland v. Galloway*, 111 Ga. App. 683, 143 S.E.2d 3 (1965) (decided under former Code 1933, § 110-404).

Rule permitting opening of default is remedial in nature and should be liberally applied, for default judgment is a drastic sanction that should be invoked only in extreme situations. Whenever possible, cases should be decided on their merits for a default judgment is not favored in the law. *Boynton v. State Farm Mut. Auto. Ins. Co.*, 207 Ga. App. 756, 429 S.E.2d 304 (1993).

Criteria for opening default. — At any time before final judgment, a judge in the judge's discretion may allow a defendant to open a default, upon payment of costs: (a) for providential cause which prevented filing of a plea; (b) for excusable neglect; or (c) when a judge determines that a proper case has been made for default to be opened on terms fixed by the court. *Johnson v. Dockery*, 222 Ga. 569, 150 S.E.2d 921 (1966) (decided under former Code 1933, § 110-404).

As a condition precedent to opening a default, the defendant must set up a meritorious defense, offer to plead instant, and answer ready to proceed with the trial. *Johnson v. Dockery*, 222 Ga. 569, 150 S.E.2d 921 (1966) (decided under former Code 1933, § 110-404).

Opening Default (Cont'd)**1. In General (Cont'd)**

Under subsection (b) of O.C.G.A. § 9-11-55, a prejudgment default may be opened on one of three grounds if four conditions are met. The three grounds are: (1) providential cause, (2) excusable neglect, and (3) proper case; the four conditions are: (1) showing made under oath, (2) offer to plead instant, (3) announcement of ready to proceed with trial, and (4) setting up a meritorious defense. *C.W. Matthews Contracting Co. v. Walker*, 197 Ga. App. 345, 398 S.E.2d 297 (1990).

Compliance with the four conditions of subsection (b) of O.C.G.A. § 9-11-55 is a condition precedent to opening a prejudgment default, and once met, the question of whether to open the default rests within the sound discretion of the trial court. *Anderson v. Flake*, 270 Ga. 141, 508 S.E.2d 650 (1998).

Failure to meet statutory requirements. — When the driver's motion to dismiss the complaint and open the default judgment did not contain "a motion to open default judgment" or "an express announcement that he was ready to proceed to trial, as required by O.C.G.A. § 9-11-55(b)," the motion to open the default did not contain all the statutory requirements; thus, the trial court did not have discretion to open the default and erred in granting the driver's motion to dismiss. *Cotton v. Lamb*, 265 Ga. App. 73, 593 S.E.2d 19 (2003).

Trial court properly declined to vacate a default judgment, pursuant to O.C.G.A. § 9-11-55(b), entered in favor of a development company as to claims that a subdivision association improperly charged various fees as the association's board of directors failed to reply to the company's claims made after the association intervened in the action, and none of the statutory factors allowing vacation were met; however, the trial court erred in permanently enjoining the association from charging the company water service fees as the default did not admit the company's conclusions of law, and covenants on the property allowed the association to charge the water service fees. *Crawford v. Dammann*, 277 Ga. App. 442, 626 S.E.2d 632 (2006).

Because a party seeking to open a default did not satisfy any of the three O.C.G.A. § 9-11-55(b) grounds for opening a default, a trial court had no discretion to open the default; a city did not show excusable neglect by arguing that the city sent the complaint to the city's insurer, since the city did nothing to ensure that the insurer received the complaint or that an answer was filed; the trial court erred in setting the default aside. *Williams v. City of Atlanta*, 280 Ga. App. 785, 635 S.E.2d 165 (2006).

Because the plaintiff presented sufficient evidence that, after filing the plaintiff's complaint, the plaintiff provided the sheriff's office with the defendant's correct address, and a few weeks later, contacted the sheriff's office to inquire whether service had been completed upon the defendant and learned that repeated service attempts were unsuccessful, evidence of reasonable diligence supporting the denial of a motion to set aside a default judgment was found; moreover, unlike O.C.G.A. § 9-11-4(e)(1), service via overnight delivery was supported and did not violate the defendant's due process rights. *B&B Quick Lube, Inc. v. G&K Servs. Co.*, 283 Ga. App. 299, 641 S.E.2d 198 (2007).

In an action filed for payment of a debt, because a guarantor of that debt failed to provide either a meritorious defense or present sufficient facts to substantiate a claim of excusable neglect, the trial court did not abuse the court's discretion in denying the guarantor's motion to open the default judgment entered. *Butterworth v. Safelite Glass Corp.*, 287 Ga. App. 848, 652 S.E.2d 877 (2007).

Trial court did not err in declining to open the default judgment because the defendants filed a motion to open the default more than four months after the plaintiff moved for the entry of a default judgment and filed a default certificate which stated that the defendants failed to answer the complaint; the late-filed answer was little more than a general denial and did not present what could reasonably be characterized as a meritorious defense; and the defendants did not present to the court a legal excuse for late filing. *Mecca Constr., Inc. v. Maestro Invs., LLC*, 320 Ga. App. 34, 739 S.E.2d 51 (2013).

Since it was undisputed that the debtors motion to open default was not made under oath, the debtors failed to comply with O.C.G.A. § 9-11-55(b), and the trial court had no discretion to open the default. *Brazell v. J. K. Boatwright & Co., P.C.*, 324 Ga. App. 502, 751 S.E.2d 133 (2013).

Motion must show grounds. — Failure of motion to open default to show a meritorious defense is alone fatal to appellant's cause. *Global Assocs. v. Pan Am. Communications, Inc.*, 163 Ga. App. 274, 293 S.E.2d 481 (1982); *Thomason v. Exxon Corp.*, 227 Ga. App. 44, 487 S.E.2d 605 (1997).

Trial court did not err in refusing to open default after the defendants failed to show under oath the existence of a meritorious defense. *Stewart v. Turner*, 229 Ga. App. 119, 493 S.E.2d 251 (1997).

When the facts detailed in the defendant's affidavits contradicted allegations of the complaint and the defendant acted with reasonable promptness in setting up a meritorious defense, the trial court did not abuse the court's broad discretion in opening the default. *Exxon Corp. v. Thomason*, 269 Ga. 761, 504 S.E.2d 676 (1998), reversing *Thomason v. Exxon Corp.*, 227 Ga. App. 44, 487 S.E.2d 605 (1997).

In a personal injury case, an individual's motion to open the default was properly denied because the individual made no offer to plead instant as the motion to open the default and attachments thereto were not inclusive of an answer to the patron's complaint. *Red Train, Inc. v. Harris*, 262 Ga. App. 846, 586 S.E.2d 738 (2003).

To open a default judgment there must be a motion, meritorious defense, a legal excuse for late filing, and payment of costs. *Gowdey v. Rem Assocs.*, 176 Ga. App. 83, 335 S.E.2d 309 (1985).

To open default requires factual information showing meritorious defense. — Trial court did not err in refusing to set aside a default judgment that was entered against the defendant client in the plaintiff law firm's suit to collect the balance owed for legal services that were rendered to the client as the conclusory affidavit of the client's counsel in which

the counsel made a general denial of the client's indebtedness to the law firm was insufficient to qualify as a showing of a meritorious defense for purposes of opening the default under O.C.G.A. § 9-11-55(b); factual information showing a meritorious defense was required. *Spewell v. Thomas & Hutson*, 260 Ga. App. 312, 581 S.E.2d 322 (2003).

Trial court erred in granting a health service's motion to open a default taken against it when it failed to file an answer in a timely manner after a bankruptcy stay was modified, allowing the action against the service to proceed, as the service failed to set forth a meritorious defense; the service's reference to medical records was not sufficient to set forth the "essential elements" of a meritorious defense for purposes of opening the default under O.C.G.A. § 9-11-55(b). *Lucas v. Integrated Health Servs. of Lester, Inc.*, 268 Ga. App. 306, 601 S.E.2d 701 (2004).

In an architecture company's suit against a former client for failure to pay consulting fees, the trial court properly refused to open a prejudgment default because the client failed to show the existence of a meritorious defense as required by O.C.G.A. § 9-11-55(b); the client's sworn motion was completely devoid of facts and details that would have provided a defense to the action. *Water Visions Int'l, Inc. v. Tippet Clepper Assocs.*, 293 Ga. App. 285, 666 S.E.2d 628 (2008).

When the beneficiaries of a family trust sued an accounting firm retained by the trust's trustee, it was not error to open a default judgment entered against the firm because the firm met the firm's burden to state facts showing a meritorious defense. *Mayfield v. Heiman*, 317 Ga. App. 322, 730 S.E.2d 685 (2012).

Discretion to open default to be exercised in accordance with law. — Although a motion to open a default judgment is addressed to the sound discretion of the trial judge, such discretion must always be exercised in accordance with the law. *Godfrey v. Home Stores, Inc.*, 101 Ga. App. 269, 114 S.E.2d 202 (1960) (decided under former Code 1933, §§ 110-401 and 110-404).

Trial court erred in denying a motion to open a default judgment because the

Opening Default (Cont'd)**1. In General** (Cont'd)

movant made a proper showing of a proper case for reopening the default by making a showing under oath through the filing of the affidavit of one of its directors setting out both the reasons for the default and the company's meritorious defense, offering to plead immediately, attaching a copy of the company's proposed answer to the motion to open the default, tendering court costs, announcing itself ready for trial, and raising a meritorious defense by showing that if relief from default was granted, the outcome of the suit could be different from the result if the default stood; accordingly, it was then up to the trial court to exercise the court's discretion in opening the default. *Boggs Rural Life Ctr., Inc. v. IOS Capital, Inc.*, 255 Ga. App. 847, 567 S.E.2d 94 (2002).

Trial court properly exercised the court's judgment and discretion in granting the seller's motion to open the seller's default when the seller argued that at the hearing on the seller's motion to open default, the seller offered an adequate explanation for the delay. *MacDonald v. Harris*, 265 Ga. App. 131, 593 S.E.2d 32 (2003).

Default judgment was vacated and the denial of the defendant's motion to open default was reversed because the trial court erroneously found the court lacked discretion to consider the asserted grounds for opening default; thus, a remand was necessary for the trial court to exercise the court's discretion and consider the merits of all asserted grounds in the motion. *Ferrell v. Young*, 323 Ga. App. 338, 746 S.E.2d 167 (2013).

Judge may not act arbitrarily. — While the trial judge is given broad discretion, this does not mean that the judge may act arbitrarily, but that the judge must exercise sound and legal discretion; the judge may not open a default capriciously or for fanciful or insufficient reasons. *McMurria Motor Co. v. Bishop*, 86 Ga. App. 750, 72 S.E.2d 469 (1952); *Davison-Paxon Co. v. Burkart*, 92 Ga. App. 80, 88 S.E.2d 39 (1955); *Haynes v. Smith*, 99 Ga. App. 433, 108 S.E.2d 772 (1959); *Swain v. Harris*, 101 Ga. App. 263, 113

S.E.2d 467 (1960); *Snow v. Conley*, 113 Ga. App. 486, 148 S.E.2d 484 (1966) (decided under former Code 1933, § 110-404).

Court's discretion not disturbed absent manifest abuse. — Unless the discretion of the judge is manifestly abused, it will not be disturbed. *McCray v. Empire Inv. Co.*, 49 Ga. App. 117, 174 S.E. 219 (1934) (decided under former Code 1910, §§ 5654 to 5656).

Discretion of the trial judge in opening the default and permitting the defendant to plead will not be interfered with by the reviewing court, unless manifestly abused, to plaintiff's injury. *Bradley v. Henderson*, 56 Ga. App. 488, 193 S.E. 79 (1937) (decided under former Code 1933, § 110-404).

It is discretionary with the trial court to permit a default judgment to be opened after 15 days but before final judgment, but such discretion must be exercised in accordance with the law. *Wallis v. McMurray*, 91 Ga. App. 549, 86 S.E.2d 529 (1955) (decided under former Code 1933, § 110-404).

Discretion of trial judge in opening the default judgment and permitting the defendant to plead will not be interfered with unless manifestly abused, to plaintiff's injury. *Haynes v. Smith*, 99 Ga. App. 433, 108 S.E.2d 772 (1959); *Strickland v. Galloway*, 111 Ga. App. 683, 143 S.E.2d 3 (1965) (decided under former Code 1933, § 110-404).

Opening default judgment is a matter resting within the sound discretion of the trial court and the exercise of that discretion will not be disturbed absent a showing of abuse. *Howard v. Technosystems Consol. Corp.*, 244 Ga. App. 767, 536 S.E.2d 753 (2000).

Because the defendant effectively waived defenses of a lack of both personal jurisdiction and venue in failing to appear at trial, the trial court did not abuse the court's discretion in striking the defendant's answer and denying a motion to set aside the default judgment entered. *Jacques v. Murray*, 290 Ga. App. 334, 659 S.E.2d 643 (2008).

In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the out-of-state seller's motion to open the

default judgment entered against the seller as it was within the trial court's discretion to deny the motion on the ground of the seller's negligent and inexcusable failure to keep up with the seller's registered agent to obtain notice and the insurer's inexplicable failure to recognize that the insurer had a duty to defend the lawsuit on behalf of the seller. *Vibratex, Inc. v. Frost*, 291 Ga. App. 133, 661 S.E.2d 185 (2008).

Filing of appeal acted as supersedeas. — In a personal injury lawsuit, the pendency of the defendant's appeal from denial of the defendant's motion to set aside the default judgment acted as a supersedeas depriving the trial court of the jurisdiction to consider the defendant's subsequent extraordinary motion for new trial. *Fred Jones Enters., LLC v. Williams*, 331 Ga. App. 481, 771 S.E.2d 163 (2015).

Sole function of an appellate court reviewing a trial court's grant of a motion to open default is to determine whether all the conditions set forth in O.C.G.A. § 9-11-55 have been met and, if so, whether the trial court abused the court's discretion based on the facts peculiar to each case. *Majestic Homes, Inc. v. Sierra Dev. Corp.*, 211 Ga. App. 223, 438 S.E.2d 686 (1993).

Discretion of court to open default is greater before final judgment than after. *Strickland v. Galloway*, 111 Ga. App. 683, 143 S.E.2d 3 (1965) (decided under former Code 1933, § 110-404).

Extent of judicial discretion. — Discretion of trial court to open default is greater before final judgment than after, and after judgment this discretion applies only to judgments entered within the same term of court. *Haynes v. Smith*, 99 Ga. App. 433, 108 S.E.2d 772 (1959); *R.H. Macey & Co. v. Chancey*, 116 Ga. App. 511, 157 S.E.2d 758 (1967) (decided under former Code 1933, § 110-404).

Compliance with subsection (b) mandatory. — Generally, the opening of a default judgment rests within the sound discretion of the trial court. However, compliance with the four conditions stated in subsection (b) of O.C.G.A. § 9-11-55 is a condition precedent; in its absence, the trial judge has no discretion to open the

default. *C.W. Matthews Contracting Co. v. Walker*, 197 Ga. App. 345, 398 S.E.2d 297 (1990).

When the defendant failed to satisfy the requisite statutory grounds of "providential cause," "excusable neglect," or a "proper case" necessary to open a default, the trial court properly refused to open the default. *Tauber v. Community Ctrs. Two*, 235 Ga. App. 705, 509 S.E.2d 662 (1998); *Winn-Dixie Charlotte, Inc. v. Brunner Cos. Income Props., Ltd. Pshp. I*, 245 Ga. App. 672, 538 S.E.2d 152 (2000).

Opening default after final judgment. — Former section relating to opening of defaults was not applicable when a final judgment had been rendered adverse to the movant. *Cravey v. Citizens & S. Nat'l Bank*, 110 Ga. App. 284, 138 S.E.2d 321 (1964) (decided under former Code 1933, § 110-404).

Former section relating to opening of defaults was not applicable when final judgment had been rendered before motion to open default and vacate judgment was filed. *Rhonehouse v. Jetspra, Inc.*, 115 Ga. App. 129, 153 S.E.2d 570 (1967) (decided under former Code 1933, § 110-404).

Former section relating to opening of defaults had no application to motion to set aside final judgment rendered after default. *R.H. Macey & Co. v. Chancey*, 116 Ga. App. 511, 157 S.E.2d 758 (1967) (decided under former Code 1933, § 110-404).

Trial court has no discretion to allow a default to be opened for excusable neglect after final judgment. *Cryomedics, Inc. v. Smith*, 180 Ga. App. 336, 349 S.E.2d 223 (1986).

Plenary control of court over orders and judgments during term at which orders are rendered extends to judgment of "in default." *East Side Lumber & Coal Co. v. Barfield*, 193 Ga. 273, 18 S.E.2d 492 (1942) (decided under former Code 1933, §§ 110-401, 110-402 and 110-404).

Setting aside of default judgment held abuse of discretion. — When the defendant's sole reason for not filing pleadings on time was the fact that "February term" appeared on the back of the petition and process and the defendant

Opening Default (Cont'd)**1. In General (Cont'd)**

thought the defendant had until then to take necessary action, the trial judge abused the judge's discretion in setting aside the final default judgment. *R.H. Macey & Co. v. Chancey*, 116 Ga. App. 511, 157 S.E.2d 758 (1967) (decided under former Code 1933, § 110-404).

Because a lessee's conduct during the discovery stage of the proceedings below on the lessor's breach-of-lease complaint clearly demonstrated gross neglect, specifically, the lessee's failure to: (1) respond to a motion to compel and attend the hearing thereon; (2) communicate with counsel; and (3) attack the default judgment until eight months after it was entered, the trial court manifestly abused the court's discretion in granting the lessee's motion to set the default aside. *Kairos Peachtree Assocs., LLC v. Papadopoulos*, 288 Ga. App. 161, 653 S.E.2d 386 (2007).

Trial court erred in setting aside a default against an insured on the ground that the insured mistakenly believed that the insurer was providing a defense; the insured did not show that the insured successfully transmitted the complaint to the insurer, who denied that it received a faxed complaint, and the insured did nothing to ensure that the complaint was received by the insurance company. *Wright v. Mann*, 271 Ga. App. 832, 611 S.E.2d 118 (2005).

Setting aside of vacation of default judgment during subsequent term improper. — Judgment entered during appearance term, vacating previous judgment "in default" and permitting the defendant to plead, may not be set aside at subsequent trial term and the defendant again be adjudged in default, merely because it was entered of the court's motion and without application of the defendant, or because the court in so vacating the previous entry of default acted upon the mistaken opinion that the plaintiff did not oppose such action. *East Side Lumber & Coal Co. v. Barfield*, 193 Ga. 273, 18 S.E.2d 492 (1942) (decided under former Code 1933, §§ 110-401, 110-402 and 110-404).

Rule as to opening up default judgments does not apply to garnishment

proceeding. *General Fin. Corp. v. Kelsey*, 106 Ga. App. 108, 126 S.E.2d 261 (1962) (decided under former Code 1933, § 110-404).

Proper case must be made for default to be opened. — Right of judge to exercise discretionary power to open default does not arise until after the judge determines, from the facts shown under oath, that a proper case has been made for the default to be opened. *Metropolitan Life Ins. Co. v. Scarboro*, 42 Ga. App. 423, 156 S.E. 726 (1930) (decided under former Code 1910, § 5656).

In light of the evidence that a company was not a proper party in interest to a slip and fall lawsuit, and that the company acted diligently before and after the default, the trial court did not abuse the court's broad discretion in accepting the company's explanation and opening the default under the "proper case" ground of O.C.G.A. § 9-11-55(b). *Strader v. Palladian Enters., LLC*, 312 Ga. App. 646, 719 S.E.2d 541 (2011).

No discretion of court to open default. — Since the plaintiff filed a response to the defendant's motion for a default judgment, but did not move to open the default, let alone satisfy the four conditions required for opening default, the trial court correctly ruled that the court did not have discretion to open the default. *Jesson v. GCH & Assocs.*, 248 Ga. App. 97, 545 S.E.2d 645 (2001).

When motion to reopen default shows no sound and legal reason for doing so, it is not a matter for exercise of discretion, but a matter of law that the defendant's motion should not prevail. *Davison-Paxon Co. v. Burkart*, 92 Ga. App. 80, 88 S.E.2d 39 (1955); *Snow v. Conley*, 113 Ga. App. 486, 148 S.E.2d 484 (1966) (decided under former Code 1933, § 110-404).

"Excusable neglect" refers to reasonable excuse for failing to answer as distinguished from willful disregard of the process of the court. *Georgia Farm Bldgs., Inc. v. Willard*, 170 Ga. App. 327, 317 S.E.2d 229, *aff'd*, 253 Ga. 649, 325 S.E.2d 591 (1984); *Mars, Inc. v. Moore*, 207 Ga. App. 912, 429 S.E.2d 299 (1993).

Failure to make out "an extremely good case" for excusable neglect is not the cor-

rect standard under subsection (b) of O.C.G.A. § 9-11-55, but rather, excusable neglect refers to a reasonable excuse for failing to answer. *Patel v. Gupta*, 234 Ga. App. 441, 507 S.E.2d 763 (1998).

Excusable neglect. — When the irregular recording of the return of service and the disappearance of the complaint, both of which occurred through no fault of appellant or the appellant's attorney, were factors in the delay in responding to the complaint and in turning over the complaint to the employer, the appellant did as the appellant was expected to do; contemporaneously with this case, a second case was filed against the appellant by another victim involving the same accident and after the appellant similarly turned over the pleadings to the appellant's employer, the documents were sent on to the insurer and a defense was provided, the evidence demanded a finding of excusable neglect. *Spikes v. Holloway*, 212 Ga. App. 653, 442 S.E.2d 471 (1994).

Defendant did not establish excusable neglect based on the defendant's claim that the defendant gave the complaint to the defendant's partner for delivery to the partnership's insurance agent since the defendant did not speak with the agent afterwards or receive assurances that the agent was proceeding with the defense. *Follmer v. Perry*, 229 Ga. App. 257, 493 S.E.2d 631 (1997).

Because of the many methods which now exist for communicating and transmitting documents, exclusive reliance on the postal service for communicating the existence of a legal complaint between the client and the attorney is insufficient to show providential cause or excusable neglect. *Ellis v. Five Star Dodge, Inc.*, 242 Ga. App. 474, 529 S.E.2d 904 (2000).

In an action against the state, the trial court did not abuse the court's discretion in refusing to open the default on the basis of excusable neglect when it was shown that a process server hand-delivered the summons and complaint to an attorney in the Governor's Office of Executive Counsel on the same day the complaint was filed and, due to miscommunications between the Executive Counsel and the State Law Department, the officer responsible for responding to the complaint mis-

takenly believed that it had not been properly served and, based upon such belief, decided not to answer the complaint. *Azarat Mktg. Group, Inc. v. Department of Admin. Affairs*, 245 Ga. App. 256, 537 S.E.2d 99 (2000).

Trial court did not abuse the court's discretion in finding that one of the grounds for opening default, excusable neglect, was present since: (1) one defendant sent the plaintiff a check for "final payment" under the contract at issue; (2) the plaintiff accepted and deposited this check; (3) the same defendant, on behalf of the other defendants, forwarded proof of payment to the trial court with a request to remove the plaintiff's materialman's lien; and (4) afterward, the defendants reasonably believed the defendants had settled the case and that no further action on the defendants' parts was necessary. *Bridges v. Mann*, 247 Ga. App. 730, 544 S.E.2d 755 (2001).

When more than 16 months passed between service of discovery requests on defendants and the trial court's order striking the defendants' responsive pleadings and an additional 25 months passed before the defendants moved to open default, even though the defendants provided evidence that one defendant suffered from a disability and the other was preoccupied with the disabled defendant's care, these circumstances did not excuse such a lengthy period of inattention to the litigation. *Carter v. Ravenwood Dev. Co.*, 249 Ga. App. 603, 549 S.E.2d 402 (2001).

Trial court did not err in granting the alleged wrongdoer's motion for reconsideration of entry of default judgment and in ordering that the default judgment be reopened; the alleged wrongdoer was understandably confused when the alleged wrongdoer was served with the same lawsuit twice, especially since the first process server posed as a person with ties to an insurance company, and thus excusable neglect existed for the failure to timely file a response to the first process after the alleged wrongdoer was served with while the alleged wrongdoer did file a timely response to the second process with which the alleged wrongdoer was served. *Gilliam v. Love*, 275 Ga. App. 687, 621 S.E.2d 805 (2005).

Opening Default (Cont'd)**1. In General** (Cont'd)

It was error to open a default against lenders under O.C.G.A. § 9-11-55(b) because the lenders had not shown excusable neglect. After sending the complaint to their attorney by e-mail, the lenders had not taken any action to confirm receipt of the e-mail by the attorney, who had not received the complaint and had not represented otherwise. *Flournoy v. Wells Fargo Bank, N.A.*, 289 Ga. App. 560, 657 S.E.2d 625 (2008).

As a communications company was served with a civil complaint and the company did not take steps to ensure that the complaint was forwarded to the company's insurer, resulting in the failure to answer the complaint and the automatic entry of a default judgment against the company pursuant to O.C.G.A. § 9-11-55(a), it was an abuse of discretion for a trial court to grant the company's motion under § 9-11-55(b) to open the default as there was no diligence shown by the company that supported a finding of excusable neglect. *BellSouth Telcoms., Inc. v. Future Communs., Inc.*, 293 Ga. App. 247, 666 S.E.2d 699 (2008).

Trial court acted within the court's discretion in finding that failure to answer complaint in medical malpractice suit was not excusable neglect for purposes of O.C.G.A. § 9-11-55(b) because the failure of the doctor's employer to timely forward the complaint and amended complaint to an insurer was imputable to the doctor. *McBee v. Benjamin*, 272 Ga. App. 567, 612 S.E.2d 802 (2005).

Costs must be paid to open default. — In a wrongful death action, the trial court did not abuse the court's discretion by refusing to open the default judgment entered against the defendant because the defendant failed to pay costs upon moving to open the default and under the plain language of O.C.G.A. § 9-11-55(b), payment of costs is a condition precedent for opening default and merely offering to pay costs is insufficient; therefore, because that statutory requirement was not met, the trial court lacked discretion to open the default. *Freese II, Inc. v. Mitchell*, 318

Ga. App. 662, 734 S.E.2d 491 (2012).

Payment of costs is mandatory condition precedent to opening default. See *Minnesota Mut. Life Ins. Co. v. Love*, 120 Ga. App. 502, 171 S.E.2d 361 (1969); *White Plains Carpet v. United States Fid. & Guar. Co.*, 130 Ga. App. 158, 202 S.E.2d 558 (1973); *Hazzard v. Phillips*, 249 Ga. 24, 287 S.E.2d 191 (1982); *Davis v. Southern Exposition Mgt. Co.*, 232 Ga. App. 773, 503 S.E.2d 649 (1998).

Trial court is authorized to grant a motion to open a default judgment so long as the movant has paid the costs prior to the grant of that motion. *Copeland v. Carter*, 247 Ga. 542, 277 S.E.2d 500 (1981); *Dennis v. National Bank*, 182 Ga. App. 634, 356 S.E.2d 563 (1987).

Motion to open not timely filed. — Trial court did not err in denying a motion to open a default and by failing to find that a proper case had been made for the default to be opened when the defendant moved to open the default more than four months after the deadline for filing the answer had passed, and the defendant made no showing under oath in connection therewith and simply offered to pay court costs. *Evers v. Money Masters, Inc.*, 203 Ga. App. 546, 417 S.E.2d 160 (1992).

Right to review of opening of default 153 days after service. — When the defendant obtains an order of the trial court allowing opening of a default 153 days after service of the summons and complaint, there is no requirement that the plaintiff, in order to preserve the right to review, move to set aside such order or seek to take an immediate appeal with a certificate of review. *Cate v. Harrell*, 128 Ga. App. 219, 196 S.E.2d 155 (1973).

Default not to be opened ex parte. — Nothing in this section provides that a default may be opened by an ex parte order, nor should it be done. *Livesay v. King*, 129 Ga. App. 751, 201 S.E.2d 178 (1973).

Hearing on opening of default contemplated. — While it is not specifically provided that a hearing must be held on application for opening a default, language of this section indicates that a hearing is contemplated. *Livesay v. King*, 129 Ga. App. 751, 201 S.E.2d 178 (1973).

Notice and opportunity to object required. — One who moves the court to

change the status of a pending matter, such as the opening of a default in order that the defendant may plead, should serve the opposite party with a copy of the motion and of a rule nisi which the court should enter thereon, thus affording the opposite party a fair opportunity to object or to defend against the proposed action. *Livesay v. King*, 129 Ga. App. 751, 201 S.E.2d 178 (1973).

Relief against penalties for lack of punctuality. — While the law makes requirements of punctuality in pleadings, the law also usually makes provision for relieving against penalties imposed for lack of this virtue, when interests of truth and justice require it. *Clements v. United Equity Corp.*, 125 Ga. App. 711, 188 S.E.2d 923 (1972).

Specific reservation of issue of damages. — Trial court's order directing the entry of a judgment against the defendant pursuant to O.C.G.A. § 9-11-54(b) does not constitute a "final" judgment which would preclude the application of the liberal criteria set forth in subsection (b) of O.C.G.A. § 9-11-55 for opening default when the trial court's order specifically reserves the issue of damages for later determination. *Cryomedics, Inc. v. Smith*, 180 Ga. App. 336, 349 S.E.2d 223 (1986); *Rogers v. Coronet Ins. Co.*, 206 Ga. App. 46, 424 S.E.2d 338 (1992); *Rapid Taxi Co. v. Broughton*, 244 Ga. App. 427, 535 S.E.2d 780 (2000).

Denial of request to open default not error. — See *Barone v. McRae & Holloway*, 179 Ga. App. 812, 348 S.E.2d 320 (1986); *Jim Walter Homes, Inc. v. Roberts*, 196 Ga. App. 618, 396 S.E.2d 787 (1990); *Ryles v. First Oglethorpe Co.*, 213 Ga. App. 327, 444 S.E.2d 578 (1994); *Billy Cain Ford Lincoln Mercury, Inc. v. Kaminski*, 230 Ga. App. 598, 496 S.E.2d 521 (1998); *K-Mart Corp. v. Hackett*, 237 Ga. App. 127, 514 S.E.2d 884 (1999).

Because the defendant presented no excuse for late filing and payment of costs, and the defendant's counsel had actual notice of the pendency of the suit 21 days before the answer was due, the trial court did not abuse the court's discretion in refusing to open the default judgment. *Atlanta Medical Accounting Corp. v. Financial Software, Inc.*, 227 Ga. App. 311, 489 S.E.2d 93 (1997).

Trial court could determine whether a proper case was made for the default to be opened; the trial court rejected the argument that the guarantor's mistaken belief that a timely, proper answer on behalf of all defendants had been filed amounted to excusable neglect or presented a proper case for opening a default. *Associated Doctors of Warner Robins, Inc. v. U.S. Foodservice of Atlanta, Inc.*, 250 Ga. App. 878, 553 S.E.2d 310 (2001).

Trial court did not abuse the court's discretion in denying a doctor's motion to open a default as the doctor was not justified in relying on a medical corporation to forward a medical malpractice complaint to the insurer after the entry of a default against the doctor; the doctor did not contact the insurer, and the doctor failed to file a motion to open the default for nearly a month. *Mcbee v. Benjamin*, 272 Ga. App. 567, 612 S.E.2d 802 (Feb. 23, 2005).

Deputy sheriff's service of a wrongful foreclosure complaint on a mortgagee's local branch manager at a branch office, rather than on the designated registered agent for service, was proper service pursuant to O.C.G.A. §§ 9-11-4 and 14-2-1510(d), and the trial court properly denied the mortgagee's motion to open a default pursuant to O.C.G.A. § 9-11-55(b) based on the mortgagee's claim that there was no jurisdiction due to improper service; the deputy's testimony that the manager indicated that the manager was authorized to accept service and that the manager did in fact accept the papers was entitled to a presumption in favor of the return of service. *GMAC Mortg. Corp. v. Bongiorno*, 277 Ga. App. 328, 626 S.E.2d 536 (2006).

Because the only explanation offered for the defendant's failure to file a timely answer was the defendant's belief that the defendant's partner was retaining local counsel, and there was no evidence to show that the defendant was diligent in the defendant's efforts to obtain or confirm representation by local counsel, the trial court's denial of the defendant's motion to open a default under O.C.G.A. § 9-11-55(b) was proper. *Constructamax, Inc. v. Andy Bland Constr., Inc.*, 280 Ga. App. 403, 634 S.E.2d 168 (2006).

Opening Default (Cont'd)**1. In General** (Cont'd)

Trial court did not err in denying a corporation's motion to open a default judgment against companies that it subsequently acquired, as although regional counsel for the companies had received timely notice that the complaint had been served, regional counsel had not retained local counsel to answer the complaint; even when regional counsel obtained an extension of time in which to answer, no answer was filed within the agreed-to extension, no additional extension was requested until after the time granted in the first extension had expired, and the motion to open the default was not filed until almost three months after the answer was due. *COMCAST Corp. v. Warren*, 286 Ga. App. 835, 650 S.E.2d 307 (2007), cert. denied, 2008 Ga. LEXIS 82 (Ga. 2008).

In a breach of contract suit seeking payment of a commission for a real estate transaction, defaulting defendants were not entitled to reopen a default judgment under O.C.G.A. § 9-11-55(b) because the defendants' explanation that, although the defendants had been served, "it was unclear what happened" did not establish a "proper case" to open the default. *Northpoint Group Holdings, LLC v. Morris*, 300 Ga. App. 491, 685 S.E.2d 436 (2009), cert. denied, No. S10C0368, 2010 Ga. LEXIS 349 (Ga. 2010).

Superior court did not err by denying a company's motion to open default because the motion was filed after a judgment had been entered against the company, and since the company was in default as a matter of law when the company failed to timely respond to a habeas corpus petitioner's claims, the superior court was authorized to enter a default judgment; although the state's failure to timely respond to a petition for habeas corpus relief did not entitle the petitioner to a default judgment, the company was a private entity, and the relief granted to the petitioner pursuant to the default judgment was not in the nature of habeas relief. *Sentinel Offender Servs., LLC v. Harrelson*, 286 Ga. 665, 690 S.E.2d 831 (2010).

Trial court did not abuse the court's

discretion in denying a corporation's motion under O.C.G.A. § 9-11-55(b) to open and set aside the default judgment because the corporation made no showing that the trial court was substantively in error in rejecting the corporation's attempt to open the default under the "providential cause" or "excusable neglect" provisions of § 9-11-55(b); the trial court heard all of the evidence and determined that none of the grounds under § 9-11-55 were met, including that of a "proper case" being made for opening the default. *Cardinal Robotics, Inc. v. Moody*, 287 Ga. 18, 694 S.E.2d 346 (2010).

Opening default when multiple parties. — Trial court erred when the court denied a motion to open a default filed by one of two relatives claiming an undivided one-half interest in a property to which a third relative sought to quiet title. The liability of relatives one and two was joint so the third relative was required to recover against both relatives one and two on the strength of the third relative's own title, and as the third relative was unable to prove a case against relative one, a default against relative two was improper. *Lord v. Holland*, 282 Ga. 890, 655 S.E.2d 602 (2008).

Indivisibility of judgments rule required setting aside of default judgment. — Trial court did not err in denying a contractor's motion to set aside a default judgment after the default judgment was set aside as to a second contract only because the indivisibility of judgments rule required that the joint judgment, if set aside as to the second contractor, had to be set aside as to the first contractor as well; the setting aside of the judgment as to the second contractor was for reasons other than on the merits, and there remained a possibility that the second contractor's liability, if any, to a homeowner could be put in issue. *Merry v. Robinson*, 313 Ga. App. 321, 721 S.E.2d 567 (2011).

Effect of agreement to extend time for filing answer and late filing. — Trial court erred in opening a default after counsel made an agreement to extend the time to file the answer because the time for filing the answer was not extended as provided by law and the answer was not filed within 15 days of the default; further-

more, the defendant's answer was not made or verified under oath as required by O.C.G.A. § 9-11-55(b) for opening a default. *Wilcher v. Smith*, 256 Ga. App. 427, 568 S.E.2d 589 (2002).

Default held properly opened. See *Donalson v. Coca-Cola Co.*, 164 Ga. App. 712, 298 S.E.2d 25 (1982); *Perkins Masonry Contractors, Inc. v. Housing Auth.*, 184 Ga. App. 856, 363 S.E.2d 164 (1987); *Ford v. Saint Francis Hosp.*, 227 Ga. App. 823, 490 S.E.2d 415 (1997).

When a bank was sued by a homeowners' association for fees and assessments imposed on lots which the bank foreclosed on, and the bank's default was entered, the bank demonstrated a "proper case" for opening the default, under O.C.G.A. § 9-11-55(b), because the bank had acquired recorded title to the lots to secure a debt before the covenants imposing the challenged fees and assessments were recorded, so it set up a meritorious defense calling for a different result from that which would obtain if the default judgment was allowed to stand. *Legacy Hills Residential Ass'n v. Colonial Bank*, 255 Ga. App. 144, 564 S.E.2d 550 (2002).

Trial court did not err in permitting the corporate officer of two companies in receivership to answer the investors' complaint one day late as the officer was understandably confused by the several lawsuits filed against the officer and all of the materials necessary for compliance with the statute had been filed by the officer. *Albee v. Krasnoff*, 255 Ga. App. 738, 566 S.E.2d 455 (2002).

After a medical company established a meritorious defense based on excusable neglect, showed that the outcome of a suit might be different, and moved to open a default no more than two weeks late, the trial court did not abuse the court's discretion in opening the default pursuant to O.C.G.A. § 9-11-55(b). *Henderson v. Quadramed Corp.*, 260 Ga. App. 680, 580 S.E.2d 542 (2003).

Trial court did not err in setting aside the default judgment and granting summary judgment to the driver based upon expiration of the two-year statute of limitations for personal injury claims as the driver paid all court costs, announced ready for trial, offered a meritorious de-

fense (the statute of limitation) in the driver's motion and verified answer, and offered a showing of providential cause or excusable neglect under oath. *Griffin v. Rutland*, 259 Ga. App. 846, 578 S.E.2d 540 (2003).

In a personal injury action, and by reading O.C.G.A. § 9-11-15(a) in pari materia with O.C.G.A. § 9-11-21, because a plaintiff sued two parties, but substituted only one, the partnership originally sued was not required to file an answer absent an order from the court to do so, and hence could not be found in default; as a result, the trial court correctly found a proper case was made for the default to be opened. *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

Entertainer and a security service were properly permitted to reopen a default under O.C.G.A. § 9-11-55(a) because they filed a sworn affidavit asserting that the answer was filed as soon as counsel obtained pro hac vice admission in the case, and there was no evidence of any trial delay or prejudice. *Herring v. Harvey*, 300 Ga. App. 560, 685 S.E.2d 460 (2009), cert. denied, No. S10C0389, 2010 Ga. LEXIS 305 (Ga. 2010).

Trial court did not err in allowing a lessee to open a default pursuant to O.C.G.A. § 9-11-55(b) because each of the four conditions precedent to opening a prejudgment default had been met; the lessee filed an answer, announced ready to proceed to trial, and filed a sworn affidavit setting forth a meritorious defense, and the default was the result of a one day miscalculation of the due date, not of a failure to file an answer. *ABA 241 Peachtree, LLC v. Brooken & McGlothen, LLC*, 302 Ga. App. 208, 690 S.E.2d 514 (2010).

Trial court did not abuse the court's discretion by granting a wife's motion to open her default under O.C.G.A. § 9-11-55(b) and allowing a creditor's case against her to proceed on the merits because the record supported the trial court's conclusion that each of the four conditions precedent for opening a default had been met; the wife believed that her attorney had filed an answer on her behalf, the attorney did file an answer on

Opening Default (Cont'd)**1. In General (Cont'd)**

behalf of a debtor, the wife's husband, the parties proceeded with discovery, the wife immediately filed an answer and motion to open default once she realized that she was in default, and the creditor failed to establish any specific claim of prejudice resulting from the opening of the default. *Thomas v. Brown*, 308 Ga. App. 514, 707 S.E.2d 900 (2011).

Trial court did not abuse the court's discretion in opening the default judgment entered against a hotel because the hotel promptly sought to open the default upon learning of the mistake between in-house and outside counsel, there was no indication that the plaintiff sustained unique harm or specific prejudice from opening the default, and at the time of the hotel's motion to open the default, the hotel already had submitted to the trial court sworn witness testimony containing facts establishing the hotel's meritorious defense. *Tomsic v. Marriott Int'l, Inc.*, 321 Ga. App. 374, 739 S.E.2d 521 (2013).

Defendants had right to open default when trial court prematurely entered default judgment. — 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. However, the defendants were permitted to bring a motion to open the default under § 9-11-55(b). *Florez v. State*, 311 Ga. App. 378, 715 S.E.2d 782 (2011), cert. dismissed, 2012 Ga. LEXIS 64 (Ga. 2012).

Denial of motion to set aside default was reversible error. — Because a contractor presented sufficient evidence showing that an assignee that sued the contractor had actual knowledge through its assignor of the contractor's physical address, yet failed to attempt service at that address before serving the Secretary of State, the trial court erred in denying the contractor's motion to set aside the default judgment entered in favor of the assignee. *TC Drywall & Plaster, Inc. v. Express Rentals, Inc.*, 287 Ga. App. 624, 653 S.E.2d 70 (2007).

Trial court did not err in opening a default judgment as: (1) the movant satisfied the four conditions outlined under O.C.G.A. § 9-11-55(b); (2) the motion was verified and stated that the movant had responsive pleadings to file instant, was ready to proceed to trial, and had a meritorious defense; and (3) the movant contemporaneously filed a verified answer to the complaint setting out the movant's defenses. *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007).

Trial court erred in denying the county school district employees' motion to set aside a default judgment entered against the employees under O.C.G.A. § 9-11-55(b) in the parents' wrongful death action because while the employees were sued in both the employees' official and individual capacities, the parents' wrongful-death suit arose from actions the employees took in the employees' official capacities as employees of the school and, thus, the trial court erred as a matter of law in finding that the entry of the default judgment barred the employees from being able to assert that official immunity protected the employees from the parents' wrongful death action; official immunity is not a mere defense but rather an entitlement not to be sued that must be addressed as a threshold matter before a lawsuit may proceed. *Cosby v. Lewis*, 308 Ga. App. 668, 708 S.E.2d 585 (2011).

Harmful error required prior to opening default. — While it was clear that the doctor satisfied the conditions of O.C.G.A. § 9-11-55 for a motion to open a prejudgment default, and while the doctor's affidavit created an issue as to whether the doctor was personally served with the patient's complaint, the trial court did not abuse the court's discretion in denying the motion to set aside the default judgment as the doctor did not show harmful error. *Collier v. Cawthon*, 256 Ga. App. 825, 570 S.E.2d 53 (2002).

When defendant's claim much larger than plaintiff's, court authorized to open default. — Trial court was authorized to open the default, notwithstanding the defendant's failure to set forth a meritorious defense "under oath", when the complaint dealt on the complaint's face with only a relatively small

indebtedness, while the default affected the defendant's right to assert a much larger claim which the defendant reasonably viewed as being independent of the claim sued upon. *Ragan v. Smith*, 188 Ga. App. 770, 374 S.E.2d 559 (1988).

Acquiescence in failure to pay costs. — Defendant's acquiescence in vacation and opening of default judgment precluded appellate review of the claim that the required payment of costs had not been made. *Robinson v. Moonraker Assocs.*, 205 Ga. App. 597, 423 S.E.2d 44 (1992).

Belief that complaint already answered. — Since the defendants reasonably believed that the defendants already had answered the same complaint, the trial court was authorized to conclude that the defendants' failure to file a timely answer was not a wilful disregard of all court process. *Colonial Penn Life Ins. Co. v. Market Planners Ins. Agency, Inc.*, 209 Ga. App. 562, 434 S.E.2d 124 (1993).

Belief that insurer was handling. — Trial court did not abuse the court's discretion in opening the default in a negligence action against a physician and others after the physician forwarded the pleadings to an insurer and the insurer misplaced the documents; the defendants had reason to believe that the insurer was defending the suit, there was no prejudice to the plaintiffs in opening the default, and the defendants pled what appeared to be a meritorious defense. *Shortnacy v. N. Atlanta Internal Med., P.C.*, 252 Ga. App. 321, 556 S.E.2d 209 (2001).

Refusal by clerk of proffer of costs. — When the defendant's attorney attempted to pay costs before the hearing, but the clerk refused to accept the proffered check or cash pursuant to instructions from the trial court, the trial court did not err in finding that costs were paid as required by the statute. *SunTrust Bank v. Perry*, 233 Ga. App. 701, 505 S.E.2d 230 (1998).

Circumstances indicated meritorious defense. — See *Muscogee Realty Dev. Corp. v. Jefferson Co.*, 252 Ga. 400, 314 S.E.2d 199 (1984); *Berklite v. Bill Heard Chevrolet Co.*, 239 Ga. App. 791, 522 S.E.2d 246 (1999).

Meritorious defense must be shown under oath. — Trial court lacked discre-

tion to open a default judgment since the meritorious defense set forth in the answer was not made under oath as the purported verification of the answer did not contain the signature of a notary or any other indication that it was made under oath. *SunTrust Bank v. Perry*, 233 Ga. App. 701, 505 S.E.2d 230 (1998).

No requirement of showing complete defeat of plaintiff's claim. — Requirement of O.C.G.A. § 9-11-55(b) to set up a meritorious defense in order to open a default judgment did not require the defendant to show that it would completely defeat the plaintiff's claim. *Johnson v. Am. Nat'l Red Cross*, 253 Ga. App. 587, 569 S.E.2d 242 (2002), *aff'd*, 276 Ga. 270, 578 S.E.2d 106 (2003).

Effect of setting aside of default judgment. — Once default judgment is set aside, case returns to the posture the case occupied prior to the entry of the default judgment, which posture is usually that of being in default. *P.H.L. Dev. Corp. v. Smith*, 174 Ga. App. 328, 329 S.E.2d 545 (1985).

No excusable neglect where defendant had notice even before service. — When defense counsel had notice before a defendant was served with the complaint that the plaintiff had filed an action seeking declaratory relief, then the defendant did not show excusable neglect for failure to respond, although the defendant stated that the defendant suffered memory loss as a result of the accident which was the subject of the suit, counsel attempted to verify service with the clerk's office, and counsel suggested that there may have been some miscommunication between the defendant and counsel's office. *Coleman v. Superior Ins. Co.*, 204 Ga. App. 78, 418 S.E.2d 390 (1992).

Refusal to open default had nothing to do with ruling as to notice. — Analyzing a personal injury action filed against an insured, and a declaratory judgment action subsequently filed by an insurer, the Court of Appeals of Georgia erred in holding that an insured was estopped from asserting compliance with its insurer's policy provisions regarding notice, and additionally erred, on that basis, in reversing the denial of summary judgment to the insurer in the insurer's de-

Opening Default (Cont'd)**1. In General (Cont'd)**

claratory judgment action, as neither res judicata nor collateral estoppel barred inquiry into the question of whether the insureds' notice of a lawsuit to the insurer was timely; furthermore, even if the refusal to open the default was premised on the state court's finding that the insured failed to prove the merits of the insured's claim of insufficiency of service of process, this still would not equate to a ruling that the insured failed to provide the insurer with adequate notice. *Karan, Inc. v. Auto-Owners Ins. Co.*, 280 Ga. 545, 629 S.E.2d 260 (2006).

Voluntary dismissal of joint tortfeasor did not void judgment against remaining defendants. — Voluntary dismissal with prejudice of an alleged joint tortfeasor did not void the judgment entered against the remaining defendants, but only adjudicated the liabilities of that party; as it neither terminated the action nor rendered the default judgment void, the trial court did not err in refusing to set aside a default judgment. *Mateen v. Dicus*, 286 Ga. App. 760, 650 S.E.2d 272 (2007), 129 S. Ct. 89, 172 L.Ed.2d 30 (2008).

Failure to have registered agent for service not reason to open default. — Trial court did not abuse the court's discretion in deciding not to open a default judgment entered against a limited liability company under O.C.G.A. § 9-11-55(b) because the limited liability company offered no reasonable explanation for failing to maintain a proper registered agent for service of process. *Sierra-Corral Homes, LLC v. Pourreza*, 308 Ga. App. 543, 708 S.E.2d 17 (2011), cert. denied, No. S11C1121, 2011 Ga. LEXIS 584 (Ga. 2011).

2. As Matter of Right

Defendant is allowed 15 days as a matter of right to open default, upon payment of costs, and thereafter if case is still in default the plaintiff is entitled to judgment on the pleadings without trial, unless action is ex delicto or involves unliquidated damages. *Lowrance v. Bank of LaFayette*, 115 Ga. App. 788, 156

S.E.2d 158 (1967) (decided under former Code 1933, § 110-401).

Prerequisite that costs are paid. — Right to open automatic default within 15 day period is expressly conditioned upon payment of costs. *Hoard v. Wiley*, 113 Ga. App. 328, 147 S.E.2d 782 (1966) (decided under former Code 1933, § 110-401).

Right to open default judgment within 15 days upon payment of costs is absolute; any judgment entered prior thereto is premature, and must be set aside when proper motion is made and costs paid within 15-day period. *Parker v. Branan*, 108 Ga. App. 229, 132 S.E.2d 556 (1963) (decided under former Code 1933, § 110-401).

Plaintiff is not entitled to judgment by default until expiration of 15 day period during which defendant may, as a matter of right, open default by paying accrued costs and filing a defense to the action. *Potts v. Smith Grain Co.*, 99 Ga. App. 270, 108 S.E.2d 285 (1959) (decided under former Code 1933, § 110-401).

Court has no discretion or jurisdiction to decide whether defendant may file defensive pleadings within 15-day period, except that the court, in the exercise of inherent power, would be the arbiter in case of a dispute as to whether or not costs had been paid. *Whitsett v. Hester-Bowman Enters., Inc.*, 94 Ga. App. 78, 93 S.E.2d 788 (1956) (decided under former Code 1933, §§ 110-401 and 110-404).

Right of foreign corporation to opening of default within 45 days from service on Secretary of State. — When the defendant foreign corporation filed an answer and paid accrued court costs within 45 days from the time of receipt of a copy of the petition in the office of the Secretary of State, the default against it could be opened as a matter of right. *Avis, Inc. v. Graham*, 217 Ga. 330, 122 S.E.2d 245 (1961) (decided under former Code 1933, § 110-401).

Applicability of subsection (a) to cases when no judgment entered. — Provisions of subsection (a) of this section as to opening default on payment of costs and filing of defensive pleadings relate to those cases when no judgment has been entered. *Hill v. Hill*, 234 Ga. 836, 218 S.E.2d 619 (1975).

No right to open default when costs not paid. — When it appears from the record that the defendant has not paid costs, the defendant is not entitled to open the default as a matter of right. *Hines v. Wingo*, 120 Ga. App. 614, 171 S.E.2d 905 (1969).

When an appellant did not pay the costs during the 15-day grace period, the filing of the appellant's answer and counterclaim did not alone open the default as a matter of right. *Hazzard v. Phillips*, 249 Ga. 24, 287 S.E.2d 191 (1982).

Mere fact that plaintiff will not be prejudiced not justification. — Although the discretion of the trial court in opening a default and permitting the defendant to plead will not be interfered with by the appellate courts unless manifestly abused, to the injury of the plaintiff, the Court of Appeals will not convert this principle to a right to have the default opened unless prejudice to the plaintiff is shown. *Barone v. McRae & Holloway*, 179 Ga. App. 812, 348 S.E.2d 320 (1986).

Applicability to probate proceedings. — In a probate matter, a trial court erred by dismissing an executor's objection to the setting aside of certain real property as year's support in favor of an estate as the executor had filed an objection within 15 days of the default order amending the year's support order, pursuant to O.C.G.A. § 9-11-55(a), and by paying costs. The provisions of § 9-11-55(a) relating to the opening of default judgments as a matter of right within 15 days of default applied to a year's support proceedings in probate court. *In re Estate of Ehlers*, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

3. At Any Time Before Judgment

Subsection (b) of O.C.G.A. § 9-11-55 should be given liberal construction, in the promotion of justice and the establishment of the truth. *Alex v. Parkway-Boulevard Corp.*, 157 Ga. App. 269, 277 S.E.2d 276 (1981).

Rule permitting opening of default is remedial in nature and should be liberally applied for default judgment is a drastic sanction that should be invoked only in extreme situations. Whenever possible cases should be decided on their merits for

default judgment is not favored in law. Generally, a default should be set aside when the defendant acts with reasonable promptness and alleges a meritorious defense. *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).

Purpose of subsection (b) of this section is to furnish relief when there was an understandable misunderstanding. *Cobb County Fair Ass'n v. Boyle*, 143 Ga. App. 754, 240 S.E.2d 136 (1977); *American Erectors, Inc. v. Hanie*, 157 Ga. App. 687, 278 S.E.2d 196 (1981).

Subsection (b) of this section conveys very ample powers as to opening defaults; not for only providential cause, which is broad, and excusable neglect, which is still broader, but finally, as if reaching out to take in every conceivable case where injustice might result if the default were not opened, when the judge from all the facts determines that a proper case has been made. *Houston v. Lowes of Savannah, Inc.*, 136 Ga. App. 781, 222 S.E.2d 209 (1975).

Improper if any of conditions precedent not met. — Generally, whether the trial court opens a default is a matter resting within the sound discretion of the trial court, but for the relief to be granted, subsection (b) of O.C.G.A. § 9-11-55 requires that there must be a motion, a meritorious defense, a legal excuse for late filing, and payment of costs. When the defendant presents no excuse except failure to retain an attorney, and no meritorious defense other than a general denial and for all the record shows, the defendant has not paid costs at any time, it is obvious that at least one of the several conditions precedent to opening the default has not been met; thus, the trial court has no exercisable discretion and errs in opening the default and allowing the defendant to defend against the complaint. *Millholland v. Stewart*, 166 Ga. App. 431, 304 S.E.2d 533 (1983).

Under subsection (b) of O.C.G.A. § 9-11-55, a prejudgment default may be opened on one of three grounds if four conditions are met. The three grounds are: (1) providential cause, (2) excusable neglect, and (3) proper case; the four conditions are: (1) showing made under oath,

Opening Default (Cont'd)**3. At Any Time Before Judgment** (Cont'd)

(2) offer to plead instant, (3) announcement of ready to proceed with trial, and (4) setting up a meritorious defense. Compliance with the four conditions is a condition precedent; in its absence, the trial judge has no discretion to open the default. *Grayson & Hollingsworth, Inc. v. C. Henning Studios, Inc.*, 194 Ga. App. 531, 391 S.E.2d 8, cert. denied, 194 Ga. App. 911, 391 S.E.2d 8 (1990).

Three grounds for opening default.

— Subsection (b) of this section provides three grounds for opening default: providential cause, excusable neglect, and when the judge from all the facts determines that a proper case has been made. *Houston v. Lowes of Savannah, Inc.*, 235 Ga. 201, 219 S.E.2d 115, answer conforming to, 136 Ga. App. 781, 222 S.E.2d 209 (1975).

Subsection (b) of this section provides three ways in which a default may be opened. *Cobb County Fair Ass'n v. Boyle*, 143 Ga. App. 754, 240 S.E.2d 136 (1977).

O.C.G.A. § 9-11-55 states three grounds upon which a trial court may open a default: providential cause, excusable neglect, and a proper case. The Supreme Court will affirm the trial court's decision to open default if the record sustains the decision under any of the three noted grounds. *Copeland v. Carter*, 247 Ga. 542, 277 S.E.2d 500 (1981).

Subsection (b) of O.C.G.A. § 9-11-55 allows a prejudgment default to be opened if there is a showing of any one of the following: (1) providential cause; (2) excusable neglect; and (3) a proper case. *Womack Indus., Inc. v. Tifton-Tift County Airport Auth.*, 199 Ga. App. 237, 404 S.E.2d 618 (1991).

There is a difference between tests for opening default under the first two grounds under subsection (b) of this section, i.e., providential cause and excusable neglect, and that of the third; the first two grounds have been narrowly defined in case law and do not allow exercise of the broad discretion of the third. *Clements v. United Equity Corp.*, 125 Ga. App. 711, 188 S.E.2d 923 (1972); *Lanier v. Foster*,

133 Ga. App. 149, 210 S.E.2d 326 (1974).

"Excusable neglect" is defined as neglect which might have been an act of a reasonably prudent person under the same circumstances. *Ezzard v. Morgan*, 118 Ga. App. 50, 162 S.E.2d 793 (1968); *Howell Enters., Inc. v. Ray*, 163 Ga. App. 68, 293 S.E.2d 24 (1982).

Excusable neglect cannot be determined by any fixed rule but rather must be determined by the facts of the case. This determination is within the sound discretion of the trial court and will not be disturbed by the appellate court absent an abuse of discretion. *First Nat'l Ins. Co. of Am. v. Thain*, 107 Ga. App. 100, 129 S.E.2d 381 (1962) (decided under former Code 1933, § 110-404); *Dever v. Lee*, 188 Ga. App. 483, 373 S.E.2d 224, cert. denied, 188 Ga. App. 911, 373 S.E.2d 224 (1988).

"Excusable neglect" implies not simply any, but reasonable or excusable neglect as to, or occasioned by, some fact, or something that has or has not been done, of which the complaining party ought to have knowledge, and which, if the party had such knowledge, might have prevented default. *First Nat'l Ins. Co. of Am. v. Thain*, 107 Ga. App. 100, 129 S.E.2d 381 (1962) (decided under former Code 1933, § 110-404).

Circumstances determine finding of excusable neglect. — What constitutes "excusable neglect" depends upon the circumstances in each case. *Snow v. Conley*, 113 Ga. App. 486, 148 S.E.2d 484 (1966) (decided under former Code 1933, § 110-404).

Term "excusable neglect" does not mean gross negligence. *McMurria Motor Co. v. Bishop*, 86 Ga. App. 750, 72 S.E.2d 469 (1952); *Haynes v. Smith*, 99 Ga. App. 433, 108 S.E.2d 772 (1959); *First Nat'l Ins. Co. of Am. v. Thain*, 107 Ga. App. 100, 129 S.E.2d 381 (1962); *Snow v. Conley*, 113 Ga. App. 486, 148 S.E.2d 484 (1966) (decided under former Code 1933, § 110-404); *Ezzard v. Morgan*, 118 Ga. App. 50, 162 S.E.2d 793 (1968); *Sanders v. American Liberty Ins. Co.*, 225 Ga. 796, 171 S.E.2d 539 (1969), later appeal, 122 Ga. App. 407, 177 S.E.2d 176 (1970); *Cate v. Harrell*, 128 Ga. App. 219, 196 S.E.2d 155 (1973); *Early Co. v. Bristol Steel &*

Iron Works, Inc., 131 Ga. App. 775, 206 S.E.2d 612 (1974); Cobb County Fair Ass'n v. Boyle, 143 Ga. App. 754, 240 S.E.2d 136 (1977); Hendricks v. Hubert, 158 Ga. App. 371, 280 S.E.2d 396 (1981).

Excusable neglect does not mean willful disregard of the process of the court, but refers to cases when there is a reasonable excuse for failing to answer. *McMurria Motor Co. v. Bishop*, 86 Ga. App. 750, 72 S.E.2d 469 (1952); *Haynes v. Smith*, 99 Ga. App. 433, 108 S.E.2d 772 (1959); *First Nat'l Ins. Co. of Am. v. Thain*, 107 Ga. App. 100, 129 S.E.2d 381 (1962); *Snow v. Conley*, 113 Ga. App. 486, 148 S.E.2d 484 (1966) (decided under former Code 1933, § 110-404); *Ezzard v. Morgan*, 118 Ga. App. 50, 162 S.E.2d 793 (1968); *Sanders v. American Liberty Ins. Co.*, 225 Ga. 796, 171 S.E.2d 539 (1969), later appeal, 122 Ga. App. 407, 177 S.E.2d 176 (1970); *Cate v. Harrell*, 128 Ga. App. 219, 196 S.E.2d 155 (1973); *Early Co. v. Bristol Steel & Iron Works, Inc.*, 131 Ga. App. 775, 206 S.E.2d 612 (1974).

When excusable neglect justifies opening. — Default may be opened for excusable neglect, provided all other aspects of law are complied with as to opening a default. *Cobb County Fair Ass'n v. Boyle*, 143 Ga. App. 754, 240 S.E.2d 136 (1977).

Parties are bound to take notice of time and place of trial and of when their presence is required; even illiteracy does not excuse one from using diligence to ascertain correctly the contents of a notice duly served. *Snow v. Conley*, 113 Ga. App. 486, 148 S.E.2d 484 (1966) (decided under former Code 1933, § 110-404).

Failure to read and comply with process as gross negligence. — It is error to grant motion to open default except for providential cause or excusable neglect; failure or even inability to read and comply with process is not a reasonable excuse but constitutes gross negligence. *Hatcher v. Scarboro*, 113 Ga. App. 103, 147 S.E.2d 361 (1966) (decided under former Code 1933, § 110-404).

Press of business as insufficient excuse. — Press of business, even when accompanied by mistaken belief as to time when defensive pleadings may be filed, is

no ground to open default. *Snow v. Conley*, 113 Ga. App. 486, 148 S.E.2d 484 (1966) (decided under former Code 1933, § 110-404).

Excusable neglect was not shown when the defendant's failure to file the defendant's answer was a result of a mistake in the office of the defendant's attorney coupled with the attorney's busy trial schedule. *United States Xpress, Inc. v. W. Timothy Askey & Co.*, 194 Ga. App. 730, 391 S.E.2d 707 (1990).

Defendant's failure to timely forward the complaint and summons to the defendant's attorney due to a mix-up in the defendant's office does not constitute excusable neglect, providential cause, or a proper case for the opening of default under subsection (b) of O.C.G.A. § 9-11-55. *Pulliam v. Nichols*, 202 Ga. App. 95, 413 S.E.2d 215 (1991).

Failure of the defendant's insurance agent to deliver the summons and complaint to the insurer and the failure of the defendant to check on the suit were omissions which the trial court could find did not constitute excusable neglect. *Drug Emporium, Inc. v. Peaks*, 227 Ga. App. 121, 488 S.E.2d 500 (1997).

"Proper case" defined. — Statute plainly gives a trial judge the discretion to open a default when the judge considers a proper case has been made, which is materially different from providential cause and excusable neglect. *Houston v. Lowes of Savannah, Inc.*, 136 Ga. App. 781, 222 S.E.2d 209 (1975).

"Excusable neglect" and "providential cause" are not required for "proper case" decision. To impose "excusable neglect" and "providential cause" on a "proper case" decision by the trial judge would be to excise by judicial surgery one-third of the statute. *Houston v. Lowes of Savannah, Inc.*, 136 Ga. App. 781, 222 S.E.2d 209 (1975).

Broader discretion contemplated under "proper case" ground. — Exercise of broader discretion in opening default under the "proper case" ground than under the grounds of providential cause and excusable neglect constitutes the general policy of the law. *Broadaway v. Thompson*, 127 Ga. App. 600, 194 S.E.2d 342 (1972).

Opening Default (Cont'd)
3. At Any Time Before Judgment (Cont'd)

“Proper case” language is coextensive. — Language in this section “where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened” is coextensive with other requirements contained in the section. *Kitchens v. Lowe*, 139 Ga. App. 526, 228 S.E.2d 923 (1976).

Discretion of trial court to open default. — While this section gives a judge broad discretion in opening a default, it does not mean that a judge can act arbitrarily, but that a judge may exercise sound and legal discretion; the statute does not give a judge authority to open a default capriciously or for fanciful or insufficient reasons. *Sanders v. American Liberty Ins. Co.*, 225 Ga. 796, 171 S.E.2d 539 (1969), later appeal, 122 Ga. App. 407, 177 S.E.2d 176 (1970); *Alex v. Parkway-Boulevard Corp.*, 157 Ga. App. 269, 277 S.E.2d 276 (1981).

Under subsection (b) of this section, at any time before final judgment the judge in the judge’s discretion may open a default when, from all the facts, the judge determines that a proper case has been made. *Clements v. United Equity Corp.*, 125 Ga. App. 711, 188 S.E.2d 923 (1972).

Statute does not give a judge the authority to open a default capriciously or for fanciful or insufficient reasons. *Cate v. Harrell*, 128 Ga. App. 219, 196 S.E.2d 155 (1973).

While this section gives a judge broad discretion, the statute does not mean that the judge can act arbitrarily, but that the judge may exercise sound and legal discretion. *Cate v. Harrell*, 128 Ga. App. 219, 196 S.E.2d 155 (1973).

Trial court has no authority to open default for reasons which fall short of a reasonable excuse for negligent failure to answer. *Early Co. v. Bristol Steel & Iron Works, Inc.*, 131 Ga. App. 775, 206 S.E.2d 612 (1974).

Trial court has discretion to open default, even absent showing of providential cause or excusable neglect. *Thomas v. McKibben*, 135 Ga. App. 886, 219 S.E.2d 621 (1975).

While subsection (b) of this section gives a judge broad discretion, subsection (b) does not give a judge authority to open a default capriciously or for fanciful or insufficient reasons. *Thomas v. McKibben*, 135 Ga. App. 886, 219 S.E.2d 621 (1975).

Trial judge cannot just act willy-nilly and open default without exercise of any legal discretion whatever, giving as the judge’s reason that a proper case has been made, when no case at all has actually been made, proper or otherwise. *Johnson v. Durrence*, 136 Ga. App. 439, 221 S.E.2d 652 (1975).

Whether or not the trial court opens a default is a matter resting within the court’s sound discretion. *Taurus Prods., Inc. v. Maryland Sound Indus., Inc.*, 155 Ga. App. 147, 270 S.E.2d 337 (1980).

Even the broad “proper case” ground does not vest the trial court with discretion to open a default for reasons which fall short of a reasonable excuse for failure to answer. *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).

Discretion of trial court not to open default. — Decision of the trial court not to open a default -- like the court’s decision to open a default -- will not be interfered with unless the court’s discretion is manifestly abused. *Daniel v. Causey*, 220 Ga. App. 589, 469 S.E.2d 839 (1996).

Facts warranting exercise of discretion to be shown. — While this section provides for opening of a default by the trial judge as a matter of discretion, and the judge’s discretion is greater before default judgment is entered than afterward, this discretion is a legal one, and in absence of a showing of facts upon which a finding of providential cause or excusable neglect could be made, it is generally an abuse of discretion to open a default. *State Farm Mut. Auto. Ins. Co. v. Pritchett*, 124 Ga. App. 815, 186 S.E.2d 510 (1971).

Judge is required to exercise legal discretion in opening a default, and in order to do so, some facts must be proven which warrant exercise of legal discretion. *Johnson v. Durrence*, 136 Ga. App. 439, 221 S.E.2d 652 (1975).

Discretion limited to original trial judge. — Generally, whether the trial

court opens a default is a matter resting within the sound discretion of the court, but usually the case rests in the bosom of the trial judge who originally heard the case and entered the order. To allow a losing party to bring before a different judge a renewed motion and dispute a ruling on a motion already heard and denied, after the time for appeal has passed, makes a mockery of the principle of *res judicata* and wholly disregards the rules of appellate procedure. It allows full sway to a practice that courts abhor, the practice of "judge shopping," seeking to find a judge who is more responsive to arguments than the last. *Sears v. Citizens Exch. Bank*, 166 Ga. App. 840, 305 S.E.2d 609 (1983).

Absence of deliberate failure to obey as prerequisite. — To open default there must be an absence of deliberate and intentional failure to obey process of the court. *Cate v. Harrell*, 128 Ga. App. 219, 196 S.E.2d 155 (1973).

One who moves to open default must allege and prove some reason good in law for one's failure to make defense at time one was required by law to present a defense. *Minnesota Mut. Life Ins. Co. v. Love*, 120 Ga. App. 502, 171 S.E.2d 361 (1969).

Refusal to open default proper when affidavit states no grounds therefor. — When counsel stipulates and agrees that the answer be withdrawn and dismissed, the case automatically becomes in default, and the motion to open default based upon an affidavit which states no grounds therefor may be overruled. *Electro-Kinetics Corp. v. Wilson*, 122 Ga. App. 171, 176 S.E.2d 604 (1970).

Conditions precedent to opening default. — This section requires that any showing to open a default shall be made under oath, set up a meritorious defense, offer to plead *instante*, and announce ready to proceed with trial, and when these conditions precedent are not met, the trial judge has no discretion in the matter. *Georgia Hwy. Express Co. v. Do-All Chem. Co.*, 118 Ga. App. 736, 165 S.E.2d 429 (1968).

Having a defense to an action is not in itself a ground to opening default; for this relief to be granted, there must be a mo-

tion, a meritorious defense, a legal excuse for nonappearance, and payment of costs. *B-X Corp v. Fulton Plumbing Co.*, 140 Ga. App. 131, 230 S.E.2d 331 (1976).

For a request to open default to be granted, there must be a motion, a meritorious defense, a legal excuse for late filing, and payment of costs. *Taurus Prods., Inc. v. Maryland Sound Indus., Inc.*, 155 Ga. App. 147, 270 S.E.2d 337 (1980).

Failure to show meritorious defense is alone fatal to motion to open default under subsection (b) of this section; this requirement is a condition precedent, and in its absence, the trial judge had no discretion to open the default. *Coleman v. Dairyland Ins. Co.*, 130 Ga. App. 228, 202 S.E.2d 698 (1973); *Town of Thunderbolt v. River Crossing Apts., Ltd.*, 189 Ga. App. 607, 377 S.E.2d 12, cert. denied, 189 Ga. App. 913, 377 S.E.2d 12 (1988); *Forrister v. Manis Lumber Co.*, 232 Ga. App. 370, 501 S.E.2d 606 (1998).

Conclusory statement of meritorious defense inadequate. — Facts showing a meritorious defense must be set forth, and a mere statement that the party "has a good and meritorious defense" is inadequate. *Coleman v. Dairyland Ins. Co.*, 130 Ga. App. 228, 202 S.E.2d 698 (1973).

Refusal to open default not error when conditions not met. — When the defendants presented no excuse except inadvertence, no meritorious defense other than general denial, and failed to pay costs until long past the required deadline, the trial court did not err in refusing to open default nor in striking the answer. *Taurus Prods., Inc. v. Maryland Sound Indus., Inc.*, 155 Ga. App. 147, 270 S.E.2d 337 (1980).

Discretion of judge before and after entry of default judgment distinguished. — Prior to entry of default judgment, the court has wide discretion when the court finds that from all the facts a proper case has been made to open default; after judgment, the court generally has "sound discretion" and inherent power to change or modify nonjury judgments entered during the same term. *Tippins Bank & Trust Co. v. Atlantic Bank & Trust Co.*, 151 Ga. App. 179, 259 S.E.2d 179 (1979).

Opening Default (Cont'd)
3. At Any Time Before Judgment (Cont'd)

Discretion of the trial court to open a default is greater before the final judgment than after. *Alex v. Parkway-Boulevard Corp.*, 157 Ga. App. 269, 277 S.E.2d 276 (1981).

Available only prior to entry of final judgment. — When the trial court gave no basis for setting aside a default judgment other than the court's failure to provide notice of the judgment to the defendant, the court erred when the court did not re-enter the default judgment but instead opened the default under subsection (b) of O.C.G.A. § 9-11-55, which subsection is available only prior to the entry of a final judgment. *Vangoosen v. Bohannon*, 236 Ga. App. 361, 511 S.E.2d 925 (1999).

Court's discretion limited after final judgment. — Subsection (b) of this section authorizes the trial judge, in the judge's discretion, to open a default at any time before final judgment; it is only after final judgment that the trial court's discretion is limited in this regard. *Florida E. Coast Properties, Inc. v. Davis*, 133 Ga. App. 932, 213 S.E.2d 79 (1975).

Judge has no authority to open a default after the term has passed for reasons which fall short of a reasonable excuse for negligent failure to answer. *Sanders v. American Liberty Ins. Co.*, 225 Ga. 796, 171 S.E.2d 539 (1969), later appeal, 122 Ga. App. 407, 177 S.E.2d 176 (1970).

Failure to answer in conversion claim. — When a plaintiff brought a conversion action against a defendant, the defendant was served with a copy of the complaint and summons the same day, no answer was filed, and the case went into default and judgment was entered in favor of the plaintiff and against the defendant, and there was no evidence which would authorize setting aside the original judgment pursuant to O.C.G.A. § 9-11-60(d)(2), thus, it was error for the trial court to set aside the judgment under subsection (b) of O.C.G.A. § 9-11-55. *Allen v. Nash*, 195 Ga. App. 597, 394 S.E.2d 395 (1990).

"Excusable neglect" provision only applicable before judgment. — While this section provides that the court may allow default to be opened for excusable neglect, this provision only applies prior to final judgment. *Golden Star, Inc. v. Broyles Ins. Agency, Inc.*, 118 Ga. App. 95, 162 S.E.2d 756 (1968).

Generally, appellate court will not interfere when the judge has exercised discretion in opening the default. *Matuszczak v. Kelly*, 135 Ga. App. 577, 218 S.E.2d 292 (1975).

When the record shows the court has considered a motion to open default judgment and has exercised the court's discretion in the matter, the Court of Appeals will not interfere, absent a showing of abuse. *Sheet Metal Workers Int'l Ass'n v. Carter*, 144 Ga. App. 48, 240 S.E.2d 569 (1977), rev'd on other grounds, 241 Ga. 220, 244 S.E.2d 860 (1978).

When the defendant answers an original complaint but fails to comply with a court order requiring an answer to an amended complaint, the court has plenary power to vacate or modify the court's order, and under normal circumstances exercise of the court's discretion to open default will not be overruled. *Haire v. Cook*, 237 Ga. 639, 229 S.E.2d 436 (1976).

When complaints were filed on December 6, 1988, and the defendant was served on December 7, 1988, thereby giving the defendant until Friday, January 6, 1989, to file the defendant's answers, and the answers were mailed to the clerk of the court on January 4 but were not filed by the clerk until Monday, January 9, which was the next business day following their due date, whereupon the plaintiffs proceeded with discovery and took no action regarding the late filing until May 23, 1989, when the plaintiffs filed their motions for default judgment, the trial court abused the court's discretion in refusing to set aside the default judgments and in denying the defendant's motions to open the defaults. *West v. Smith*, 196 Ga. App. 69, 395 S.E.2d 302, cert. denied, 196 Ga. App. 69, 395 S.E.2d 302 (1990).

Overturning when abuse of discretion is manifest. — Because refusal to open default is discretionary, such refusal will not be overturned unless an abuse of

discretion is manifest. *Taurus Prods., Inc. v. Maryland Sound Indus., Inc.*, 155 Ga. App. 147, 270 S.E.2d 337 (1980).

When the judgment permitting opening of default is based on conflicting evidence, discretion vested in the trial court will not be controlled unless manifestly abused. *Minnesota Mut. Life Ins. Co. v. Love*, 120 Ga. App. 502, 171 S.E.2d 361 (1969).

When the defendant has complied with all conditions (i.e., payment of costs, offer to plead a meritorious defense instant, and to announce ready for trial) the judge has wide discretion with which the Court of Appeals will not interfere unless manifestly abused. *Clements v. United Equity Corp.*, 125 Ga. App. 711, 188 S.E.2d 923 (1972).

Discretion of the trial judge in opening a default and permitting the defendant to plead will not be interfered with by an appellate court unless manifestly abused, to the injury of the plaintiff. *Alex v. Parkway-Boulevard Corp.*, 157 Ga. App. 269, 277 S.E.2d 276 (1981); *Miller v. Tranakos*, 198 Ga. App. 668, 402 S.E.2d 772 (1991).

Default should be opened if “reasonable excuse” for failing to answer is shown. *Cobb County Fair Ass’n v. Boyle*, 143 Ga. App. 754, 240 S.E.2d 136 (1977).

When the evidence demands a finding of excusable neglect in following the progress of the case, the trial court abuses the court’s discretion in not opening the default. *American Erectors, Inc. v. Hanie*, 157 Ga. App. 687, 278 S.E.2d 196 (1981).

Hospital entitled to have default opened. — In a medical malpractice action against a hospital and four residents, a proper case was established for the hospital’s default to be opened under O.C.G.A. § 9-11-55(b) when, upon discovering the default, the hospital acted promptly, the patient and family were not prejudiced as a result of the default being opened, and the hospital alleged a meritorious defense to the lawsuit. *Nelson v. Bd. of Regents of the Univ. Sys. of Ga.*, 307 Ga. App. 220, 704 S.E.2d 868 (2010).

Reliance on postal service not sufficient to require opening of default. — With several methods of communicating information available in our modern

society, reliance on the postal service alone in a matter of such gravity as defense of an action seeking \$15,000.00 in damages is not sufficient to require, as a matter of law, that default judgment be opened. *Truck & Trailer Sales Corp. v. East Coast Transp. Co.*, 141 Ga. App. 85, 232 S.E.2d 578 (1977).

Ground of providential cause is clearly not applicable to the failures and shortcomings of the postal service. *Truck & Trailer Sales Corp. v. East Coast Transp. Co.*, 141 Ga. App. 85, 232 S.E.2d 578 (1977).

While failure to follow upon mailing may be understandable, it is not “excusable neglect.” *Truck & Trailer Sales Corp. v. East Coast Transp. Co.*, 141 Ga. App. 85, 232 S.E.2d 578 (1977).

Because of the many existing methods for communicating and transmitting documents, exclusive reliance on the postal service for communicating the existence of a legal complaint between the client and the attorney is insufficient to show “providential cause” or “excusable neglect.” *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).

Failure to pay attention to process. — If party, on reading a writ, reaches the wrong conclusion and therefore pays no attention to the process and fails to answer, the party’s neglect is inexcusable and gross, and the trial court has no authority to open a default for reasons which fall short of reasonable excuse for negligent failure to answer. *Jordan v. Clark*, 119 Ga. App. 18, 165 S.E.2d 922 (1969); *Hendricks v. Hubert*, 158 Ga. App. 371, 280 S.E.2d 396 (1981).

Failure to meet any of conditions precedent. — When the defendant presents no excuse except failure to retain an attorney, and no meritorious defense other than a general denial, and for all the record shows, the defendant has not paid costs at any time, it is obvious that at least one of the several conditions precedent to opening the default has not been met; thus, the trial court has no exercisable discretion and errs in opening the default and allowing the defendant to defend against the complaint. *Millholland v.*

Opening Default (Cont'd)
3. At Any Time Before Judgment (Cont'd)

Stewart, 166 Ga. App. 431, 304 S.E.2d 533 (1983).

No explanation for failure to open default. — Trial court did not err in denying the defendant's motion to open the default and in entering judgment against the defendant based on the default when the defendant offered no explanation whatever for the defendant's failure to open the default during the 15-day period in which the defendant could have done so as a matter of right. *Grayson & Hollingsworth, Inc. v. C. Henning Studios, Inc.*, 194 Ga. App. 531, 391 S.E.2d 8, cert. denied, 194 Ga. App. 531, 391 S.E.2d 8 (1990).

Reasonable excuse for failing to file timely answer not established as matter of law when an insurance agency received a complaint and summons on September 9, 1980, but did not forward the documents to the liability insurer until August 13, 1981, and the insured did not move to open the default until over nine months after learning of the default's existence. *Georgia Farm Bldgs., Inc. v. Willard*, 170 Ga. App. 327, 317 S.E.2d 229, aff'd, 253 Ga. 649, 325 S.E.2d 591 (1984).

Failure to timely secure counsel. — Trial judge properly exercised discretion in opening the default entered when the defendant failed to secure counsel in time to advise the defendant of the deadline for filing an answer. *Broadaway v. Thompson*, 127 Ga. App. 600, 194 S.E.2d 342 (1972).

Failure to answer because counsel is not ready constitutes willful disregard of the process of the court and cannot be sanctioned. *Brown v. National Van Lines*, 145 Ga. App. 824, 245 S.E.2d 27 (1978).

Failure of counsel to ascertain the facts or reach an opinion does not constitute "excusable neglect," "providential cause," or a "proper case" for default to be opened. *Brown v. National Van Lines*, 145 Ga. App. 824, 245 S.E.2d 27 (1978).

Failure to answer complaint. — Trial court had jurisdiction over a home inspector, and the inspector was required under O.C.G.A. § 9-11-12(a) of the Georgia Civil Practice Act (see now O.C.G.A.

Ch. 11, T. 9) to file an answer to the purchaser's complaint within 30 days, but because the inspector failed to do so, the inspector was in default. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Plaintiff's alleged delay in authorizing release to defendant insurer of medical information is not "providential cause" or "excusable neglect" under subsection (b) of this section. *Interstate Life & Accident Ins. Co. v. Densley*, 130 Ga. App. 70, 202 S.E.2d 463 (1973).

Potential subjection of defendant to frequent lawsuits which would cause the defendant serious economic loss should the defendant have to engage legal counsel to defend each complaint is not sufficient excuse to open a default judgment. *Cate v. Harrell*, 128 Ga. App. 219, 196 S.E.2d 155 (1973).

Opening of default judgment against third-party defendant purely on basis of pleadings, without consideration of fact, when the third-party defendant's motion to dismiss and to open the default stated that the third party misunderstood the nature of the third party practice and was not represented by counsel, was an abuse of discretion as these statements do not constitute a proper case for opening of a default judgment. *Dukes v. Burke*, 139 Ga. App. 583, 228 S.E.2d 729 (1976).

Default due to reliance on word of another. — Litigant should not unnecessarily be forced into default for having reasonably relied on word of the litigant's fellow, particularly when no innocent party will suffer if the default is opened. *Cobb County Fair Ass'n v. Boyle*, 143 Ga. App. 754, 240 S.E.2d 136 (1977).

Good cause for belief that insurer was defending suit. — Since there was good cause for the defendant to believe that the suit was being defended by an insurance company, any neglect by the defendant in following the progress of the case was excusable. *Powell v. Eskins*, 193 Ga. App. 144, 387 S.E.2d 389 (1989); *Pinehurst Baptist Church, Inc. v. Murray*, 215 Ga. App. 259, 450 S.E.2d 307 (1994).

Filing of a motion to open a default before the remittitur is not an impediment to a trial court's consideration

thereof. *Marsh v. Way*, 255 Ga. 284, 336 S.E.2d 795 (1985).

Once a final judgment is entered, the provisions of subsection (b) of O.C.G.A. § 9-11-55 regarding the opening of default are inapplicable, and the case proceeds under subsection (d) of O.C.G.A. § 9-11-60. *Archer v. Monroe*, 165 Ga. App. 724, 302 S.E.2d 583 (1983); *Ferros v. Georgia State Patrol*, 211 Ga. App. 50, 438 S.E.2d 163 (1993); *Pine Tree Publ'g, Inc. v. Community Holdings, Inc.*, 242 Ga. App. 689, 531 S.E.2d 137 (2000).

Provisions of subsection (b) of O.C.G.A. § 9-11-55, regarding the opening of a default, become inapplicable upon entry of a final judgment. *Anderson v. Bibb Supply Co.*, 188 Ga. App. 817, 374 S.E.2d 556 (1988); *North Ga. Home Constr. Co. v. Lackey*, 193 Ga. App. 346, 388 S.E.2d 766 (1989).

Motion to open default upon remand not proper until remittitur filed. — In an appeal from a default judgment, when the Court of Appeals ordered remand for preparation of findings of fact and conclusions of law and the defaulting party then moved to open the default in the trial court, the motion was not properly before the court since the trial court did not regain jurisdiction until remittitur was actually filed. *Marsh v. Way*, 173 Ga. App. 399, 326 S.E.2d 499, *aff'd*, 255 Ga. 284, 336 S.E.2d 795 (1985).

Motion filed following remand untimely. — When a judgment is vacated and the case remanded for findings of fact and conclusions of law with regard to damages, a motion to open default made upon remand is not timely. *Marsh v. Way*, 255 Ga. 284, 336 S.E.2d 795 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d, Judgments, § 232 et seq.

Am. Jur. Proof of Facts. — Fraud in Obtaining or Maintaining Default Judgment, 10 POF2d 427.

C.J.S. — 49 C.J.S., Judgments, §§ 253 et seq., 516, 519.

ALR. — Duty of court upon opening default to defer vacation of judgment or order until result of trial on merits, 98 ALR 1380.

Abandonment of or withdrawal from case by attorney as ground for opening or setting aside judgment by default, 114 ALR 279.

Filing cross petition or other step amounting of general appearance after judgment based upon valid constructive service as affecting right under statute to open judgment, 122 ALR 159.

Waiver of right to default judgment, 124 ALR 155; 64 ALR5th 163.

Doctrine of res judicata as applied to judgments by default, 128 ALR 472; 77 ALR2d 1410.

Mistaken belief or contention that defendant had not been served, or had not been legally served, with summons, as ground for setting aside default judgment, 153 ALR 449.

Validity, construction, and application

of statutes providing for entry of default judgment by clerk without intervention of court or judge, 158 ALR 1091.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 ALR 496.

Reliance by employee codefendant on promise or assumption that employer would defend in employee's behalf as ground for vacation of default judgment, 16 ALR2d 1139.

Withdrawal or vacation of appearance, 64 ALR2d 1424.

Doctrine of res judicata as applied to default judgments, 77 ALR2d 1410.

Failure of liability insurer, after notification, to defend suit against insured, as warranting opening default against insured on ground of inadvertence or excusable neglect, 87 ALR2d 870.

Propriety of default judgment against defendant, without introduction of evidence, in quo warranto proceeding, 92 ALR2d 1121.

Necessity of taking proof as to liability against defaulting defendant, 8 ALR3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 ALR3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 ALR3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 ALR3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 ALR3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 ALR3d 303.

What amounts to "appearance" under statute or rule requiring notice, to party who has "appeared," of intention to take default judgment, 73 ALR3d 1250.

Fraud in obtaining or maintaining default judgment as ground for vacating or setting aside in state courts, 78 ALR3d 150.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions, 30 ALR4th 9.

What constitutes "appearance" under Rule 55(b)(2) of Federal Rules of Civil Procedure, providing that if party against whom default judgment is sought has "appeared" in action, that party must be served with notice of application for judgment, 139 ALR Fed 603.

9-11-56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage.

(d) **Case not fully adjudicated on motion.** If on motion under this Code section judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are

actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. All affidavits shall be filed with the court and copies thereof shall be served on the opposing parties. When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Code section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt.

(h) **Appeal.** An order granting summary judgment on any issue or as to any party shall be subject to review by appeal. An order denying summary judgment shall be subject to review by direct appeal in accordance with subsection (b) of Code Section 5-6-34. (Ga. L. 1966, p. 609, § 56; Ga. L. 1967, p. 226, § 25; Ga. L. 1975, p. 757, § 3.)

Cross references. — Motions in civil actions, Uniform Superior Court Rules, Rule 6. Reply, Uniform State Court Rules, Rule 6.2. Motions for summary judgment

in probate court proceedings, Uniform Rules for the Probate Courts, Rules 6.5 and 6.6.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 56, see 28 U.S.C.

Law reviews. — For article discussing effective use of motions for summary judgment prior to adoption of this section, see 23 Ga. B.J. 439 (1961). For article summarizing summary judgment in this state, see 27 Mercer L. Rev. 285 (1975). For article discussing interplay of the Appellate Practice Act (Art. 2, Ch. 6, T. 5), § 9-11-54(b), and subsection (h) of this section, see 31 Mercer L. Rev. 1 (1979). For survey of Georgia trial practice and procedure from June 1979 through May 1980, see 32 Mercer L. Rev. 225 (1980). For survey of Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For article discussing expert testimony and summary judgment motions in medical malpractice actions, see 18 Ga. St. B.J. 44 (1981). For survey of Georgia trial practice

and procedure from mid-1981 through mid-1982, see 34 Mercer L. Rev. 299 (1982). For annual survey of law of torts, see 38 Mercer L. Rev. 351 (1986). 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 appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

For note, “Summary Judgment in Medical Malpractice Actions,” see 7 Ga. St. B.J. 470 (1971). For case note, “Lynch v. Waters: Tolling Georgia’s Statute of Limitations for Medical Malpractice,” see 38 Mercer L. Rev. 1493 (1987).

For case comment, “Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986). For comment, “Overruling Tradition: Summary Judgment in the Eleventh Circuit After 1986,” see 41 Mercer L. Rev. 737 (1990).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L 1959, p. 234, § 1 et seq., are included in the annotations for this Code section.

Constitutionality. — Summary judgment does not unconstitutionally deprive litigants of their right to a jury trial since summary judgment may be entered only when there is no issue of fact for consideration. *Harry v. Glynn County*, 269 Ga. 503, 501 S.E.2d 196 (1998).

Due process requirements. — Although a motion for summary judgment is a vehicle for disposing of a controversy without the necessity of a trial and a summary disposition of the issues in order to efficiently resolve litigation, nevertheless, due process requires that the respondent not be surprised; rather, that the respondent be given reasonable opportunity to refute the movant's showing that there are no genuine issues of material fact. *Porter Coatings v. Stein Steel & Supply Co.*, 247 Ga. 631, 278 S.E.2d 377 (1981).

Crux of summary judgment procedure. — Crux of summary judgment procedure is that if there is no substantial issue as to any material fact, then the court can apply the appropriate legal principles and define the legal rights of the parties without lengthy trials to establish already undisputed facts. *Caldwell v. Mayor of Savannah*, 101 Ga. App. 683, 115 S.E.2d 403 (1960) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Essence of a motion for summary judgment is that there is no genuine issue of material fact to be resolved by the trier of facts, and that the movant is entitled to

judgment on the law applicable to the established fact. *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Similarity to federal rule. — O.C.G.A. § 9-11-56 is similar to Fed. R. Civ. P. 56, and on review it is proper for the appellate court to consider federal rulings. *Federal Ins. Co. v. Oakwood Steel Co.*, 126 Ga. App. 479, 191 S.E.2d 298 (1972).

Summary Judgment Act of 1959, Ga. L. 1959, p. 234, § 1 et seq., was substantially identical to Rule 56 of the Federal Rules of Practice and Procedure, 28 U.S.C. *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 126 S.E.2d 442 (1962).

O.C.G.A. § 9-11-56 must be strictly followed in consideration of a motion for summary judgment. *Southeastern Metal Prods., Inc. v. Horger*, 166 Ga. App. 205, 303 S.E.2d 536 (1983).

Unawareness of rules not excusable. — Florida attorney's unawareness of Georgia rule permitting motion for summary judgment to be decided by the court without oral hearing was not excusable neglect that warranted reconsideration of the grant of summary judgment. *Dominiak v. Camden Tel. & Tel. Co.*, 205 Ga. App. 620, 422 S.E.2d 887, cert. denied, 205 Ga. App. 899, 422 S.E.2d 887 (1992).

Ga. L. 1966, p. 609, § 56 (see now O.C.G.A. § 9-11-56) must be construed with Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-1). *Taylor v. Donaldson*, 227 Ga. 496, 181 S.E.2d 340, cert. denied, 404 U.S. 805, 92 S. Ct. 163, 30 L. Ed. 2d 38 (1971).

O.C.G.A. § 9-11-56 controls over local court rules. — Local court rules that are not in substantial compliance with the

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requirements of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) with regard to summary judgment proceedings are of no effect. *Smith v. Conley*, 152 Ga. App. 589, 263 S.E.2d 453 (1979).

No conflict with superior court rules. — O.C.G.A. § 9-11-56 and Rule 6.3 of the Uniform Rules of Superior Courts work together consistently. Furthermore, Rule 6.3 does not thwart the obvious purpose of a hearing in summary judgment, which is to provide counsel with an opportunity to persuade the court and to provide the court with an opportunity to interrogate counsel. *Kelley v. First Franklin Fin. Corp.*, 256 Ga. 622, 351 S.E.2d 443 (1987).

There is no conflict between the requirements of Uniform Superior Court Rules 6.2 and 6.5 and O.C.G.A. § 9-11-56; rather, the requirements are in addition to those set out in the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *West v. Nodvin*, 183 Ga. App. 645, 359 S.E.2d 729 (1987).

Rule 6.3 of the Uniform Superior Court Rules is not inconsistent with subsection (c) of O.C.G.A. § 9-11-56, and it is not error for the trial court to grant summary judgment in accordance with Rule 6.3 without an oral-argument hearing, if neither party requested such a hearing. *Dallas Blue Haven Pools, Inc. v. Taslimi*, 256 Ga. 739, 354 S.E.2d 160 (1987).

Subsection (c) of O.C.G.A. § 9-11-56 refers only to filing of opposing affidavits prior to the day of hearing and provides no authority for other responsive materials to be filed outside the 30-day period prescribed in Superior Court Rule 6.2. *Winchester v. Sun Valley-Atlanta Assocs.*, 206 Ga. App. 140, 424 S.E.2d 85 (1992); *Coastal Plains Trucking Co. v. Thomas County Fed. Sav. & Loan Ass'n*, 224 Ga. App. 885, 482 S.E.2d 493 (1997).

Section 9-11-55 controlling as to default. — Motion for summary judgment is not an appropriate means by which a plaintiff can secure a judgment based upon the defendant's alleged default. O.C.G.A. § 9-11-55 is the controlling statute on the issue of default. *Watson v. Georgia State Dep't of Educ. Credit Union*, 201 Ga. App. 761, 412 S.E.2d 286 (1991).

Summary judgment is analogous to directed verdict; operation of the motions is essentially the same in reference to those issues upon which a movant for summary judgment would have, at trial, the burden of proof, but somewhat different if the motion is made by the opponent of the party with the trial burden. *Southern Bell Tel. & Tel. Co. v. Beaver*, 120 Ga. App. 420, 170 S.E.2d 737 (1969).

"Claim" defined. — General Assembly did not intend to give a restrictive meaning to the term "claim" in Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56), and this term is not confined to such actions as contracts, torts, or the like. *Taylor v. Donaldson*, 227 Ga. 496, 181 S.E.2d 340, cert. denied, 404 U.S. 805, 92 S. Ct. 163, 30 L. Ed. 2d 38 (1971).

Appeal to superior court by propounder of will as "claim". — Term "claim," as used in O.C.G.A. § 9-11-56, applies if the propounder of a purported will, upon appeal to the superior court, seeks to establish it as the last will and testament of the decedent. *Taylor v. Donaldson*, 227 Ga. 496, 181 S.E.2d 340, cert. denied, 404 U.S. 805, 92 S. Ct. 163, 30 L. Ed. 2d 38 (1971).

Statute of limitations may be raised in brief in opposition to a motion for summary judgment. *Brown v. Quarles*, 154 Ga. App. 350, 268 S.E.2d 403 (1980).

Law of the case doctrine. — Because the law of the case doctrine did not apply to issues not previously ruled upon below, enumerated as error on appeal, or discussed in a prior appellate decision, the trial court erred in denying summary judgment to a boat's charterer, and partial summary judgment to both the charterer and the boat's owner, in an action arising out of injuries sustained by a longshoreman while on board a cargo ship as the law of the case rule did not preclude consideration of the charterer's status and the issue of whether both were liable under the International Safety Management Code as such were not previously addressed by the trial court. *Eastern Car Liner, Ltd. v. Kyles*, 280 Ga. App. 362, 634 S.E.2d 129 (2006).

Respondent to a motion to dismiss is entitled to notice of conversion of the motion into one for summary judgment.

ment and to 30 days to respond to the motion for summary judgment unless such notice and opportunity are waived. *Bonner v. Fox*, 204 Ga. App. 666, 420 S.E.2d 312 (1992).

Adjudication on summary judgment is an adjudication on the merits. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977); *Fierer v. Ashe*, 147 Ga. App. 446, 249 S.E.2d 270 (1978); *National Heritage Corp. v. Mount Olive Mem. Gardens, Inc.*, 148 Ga. App. 398, 251 S.E.2d 311 (1978), rev'd on other grounds, 244 Ga. 240, 260 S.E.2d 1 (1979); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981).

Summary judgment is an abbreviated trial of no less importance than any other trial on the merits. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Davidson Mineral Properties, Inc. v. Gifford-Hill & Co.*, 235 Ga. 176, 219 S.E.2d 133 (1975).

Grant of summary judgment is a ruling on merits. *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

Granting summary judgment is a decision on the merits and ends the case; amendments and subsequent motions for summary judgment made after this decision on the merits are too late. *Ellington v. Tolar Constr. Co.*, 142 Ga. App. 218, 235 S.E.2d 729, cert. dismissed, 239 Ga. 849, 240 S.E.2d 551 (1977).

Party against whom summary judgment is granted is in the same position as if having lost a verdict. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977); *National Heritage Corp. v. Mount Olive Mem. Gardens, Inc.*, 148 Ga. App. 398, 251 S.E.2d 311 (1978), rev'd on other grounds, 244 Ga. 240, 260 S.E.2d 1 (1979); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981).

There is no such thing as a "default summary judgment." By failing to respond to a motion for summary judgment, a party merely waives the right to present evidence in opposition to the motion. It does not automatically follow that the

motion should be granted. *McGivern v. First Capital Income Properties, Ltd.*, 188 Ga. App. 716, 373 S.E.2d 817 (1988); *Hughes v. Montgomery Contracting Co.*, 189 Ga. App. 814, 377 S.E.2d 723 (1989).

Effect of summary judgment on abusive litigation counterclaim. — Because trial courts are not "infallible" when determining whether questions of fact exist on motions for summary judgment, a trial court's grant of summary judgment on a complaint does not control the merits of a subsequent motion for summary judgment on the defendant's abusive litigation counterclaim arising out of the filing of that complaint. *Seckinger v. Holtzendorf*, 200 Ga. App. 604, 409 S.E.2d 76, cert. denied, 200 Ga. App. 897, 409 S.E.2d 76 (1991).

Denial of motion for summary judgment decides nothing except that under the evidence before the court at that time there can be rendered no judgment as a matter of law. *Ellington v. Tolar Constr. Co.*, 142 Ga. App. 218, 235 S.E.2d 729, cert. dismissed, 239 Ga. 849, 240 S.E.2d 551 (1977); *Graham Bros. Constr. Co. v. Seaboard Coast Line R.R.*, 150 Ga. App. 193, 257 S.E.2d 321 (1979); *T.L. Rogers Oil Co. v. South Carolina Nat'l Bank*, 203 Ga. App. 605, 417 S.E.2d 336, cert. denied, 203 Ga. App. 908, 417 S.E.2d 336 (1992).

When the plaintiffs contended that because the trial court originally denied the defendant's motion for summary judgment based on the running of the statute of limitations, it was barred from later entering an order granting such a motion, based on the doctrine of *res judicata*, it was held that the denial of a motion for summary judgment decides nothing, and thus the plaintiffs' argument based on the doctrine of *res judicata* was inapposite. *Gaskins v. A.B.C. Drug Co.*, 183 Ga. App. 518, 359 S.E.2d 364 (1987).

Costs, fees, awards despite summary judgment denial. — Denial of summary judgment does not preclude as a matter of law the exercise of the trial court's discretion under O.C.G.A. § 9-15-14 to award litigation costs and attorney's fees for frivolous actions upon the trial of the case. *Porter v. Felker*, 261 Ga. 421, 405 S.E.2d 31 (1991).

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Denial of summary judgment in a prior case resulted in collateral estoppel of a later claim of abusive litigation. The previous denial of summary judgment to the plaintiff in the abusive litigation case, who was the defendant in the prior case, constituted a binding determination that the claim in the prior case did not lack substantial justification. *Walker v. McLarty*, 199 Ga. App. 460, 405 S.E.2d 294 (1991), cert. denied, 199 Ga. App. 907, 405 S.E.2d 294 (1991) But see. *Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing *Graves v. State*, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

Subsection (d) of O.C.G.A. § 9-11-56 provides specifically for partial summary judgment. There is no requirement that all claims pled be included in a motion for partial summary judgment. *Clark v. West*, 196 Ga. App. 456, 395 S.E.2d 884 (1990).

Judgment on the pleadings held not partial summary judgment. — If the record shows that no matter outside the pleadings is presented or considered by the court when making an order on a motion for judgment on the pleadings, entry of judgment is not a partial summary judgment, but a judgment on the pleadings only. *Goolsby v. Allstate Ins. Co.*, 130 Ga. App. 881, 204 S.E.2d 789 (1974).

Disposition of motion to dismiss under summary judgment procedure when matter outside pleadings considered. — Although a petition may amply meet liberalized requirements of notice pleading so as to preclude dismissal from consideration of the petition alone, the court has authority to consider the matter outside the pleadings, if presented, and if the court does so, the court must dispose of the matter under summary judgment procedures. *Kiker v. Hefner*, 119 Ga. App. 629, 168 S.E.2d 637 (1969).

Defendant's motion to dismiss for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process was not converted to a summary judgment motion upon consideration of

matters outside the pleadings and, thus, dismissal was not directly appealable under the summary judgment statute. *Church v. Bell*, 213 Ga. App. 44, 443 S.E.2d 677 (1994).

Motion to dismiss by the state transportation department was treated as a motion for summary judgment because the department, the surviving relatives of the decedents who died in an auto accident, and the trial court relied on numerous documents outside the pleadings. *DOT v. Carr*, 254 Ga. App. 781, 564 S.E.2d 14 (2002).

Motion for summary judgment on basis of complaint equivalent to motion to dismiss. — If a motion for summary judgment is made by the defendant solely on the basis of the complaint, such motion is functionally equivalent to a motion to dismiss for failure to state a claim; such complaint should be liberally construed in favor of the complainant, with the facts alleged in the complaint taken as true, and the motion for summary judgment must be denied if a claim has been pled. *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369 (1977).

Trial judge has inherent power, during the same term of court in which judgment is rendered, to revise, correct, revoke, modify, or vacate such judgment, even upon the court's own motion, for purpose of promoting justice and in the exercise of sound legal discretion. *LeCraw v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972).

Number of motions for summary judgment. — There is nothing limiting the number of times a party may make a motion for summary judgment. *Graham Bros. Constr. Co. v. Seaboard Coast Line R.R.*, 150 Ga. App. 193, 257 S.E.2d 321 (1979); *T.L. Rogers Oil Co. v. South Carolina Nat'l Bank*, 203 Ga. App. 605, 417 S.E.2d 336, cert. denied, 203 Ga. App. 908, 417 S.E.2d 336 (1992).

Renewed or second motion for summary judgment may be considered within the discretion of a trial court, even though there has been no expansion of the record since the denial of the first motion for summary judgment. *Southeastern Metal Prods., Inc. v. Horger*, 166 Ga. App. 205,

303 S.E.2d 536 (1983); *Travelers Indem. Co. v. Thomas*, 172 Ga. App. 816, 324 S.E.2d 735 (1984).

Nothing in O.C.G.A. § 9-11-56 limits the number of times a party may make a motion for summary judgment, even without proffering additional evidence, leaving it within the trial judge's discretion to consider such motions. *Eastern Car Liner, Ltd. v. Kyles*, 280 Ga. App. 362, 634 S.E.2d 129 (2006).

Although the court found that summary judgment was improperly granted, nothing in O.C.G.A. § 9-11-56 limited the number of times a party could make a motion for summary judgment; thus, upon remand, either party could file a motion for summary judgment and seek a determination based upon the evidence and standard for summary adjudication. *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

Grant after previous denial. — Previous denial of summary judgment does not preclude the subsequent grant thereof on the basis of an expanded record. *Ellington v. Tolar Constr. Co.*, 142 Ga. App. 218, 235 S.E.2d 729, cert. dismissed, 239 Ga. 849, 240 S.E.2d 551 (1977); *Graham Bros. Constr. Co. v. Seaboard Coast Line R.R.*, 150 Ga. App. 193, 257 S.E.2d 321 (1979); *Christian v. Allstate Ins. Co.*, 152 Ga. App. 358, 262 S.E.2d 621 (1979); *T.L. Rogers Oil Co. v. South Carolina Nat'l Bank*, 203 Ga. App. 605, 417 S.E.2d 336, cert. denied, 203 Ga. App. 908, 417 S.E.2d 336 (1992).

Prior denial of summary judgment does not foreclose the subsequent grant thereof, as an order or other form of decision is subject to revision at any time before entry of judgment adjudicating all claims, rights, and liabilities of all parties. *Fierer v. Ashe*, 147 Ga. App. 446, 249 S.E.2d 270 (1978).

Although the plaintiffs filed the plaintiffs' negligence lawsuit in the superior court of one county and that court denied the defendants' motion for summary judgment, the circuit court in the county to which the lawsuit was transferred did not err in reconsidering the defendants' motion for summary judgment and granting the motion because nothing limits the number of times a party may make a

motion for summary judgment and res judicata does not apply to a denial of a motion for summary judgment. *Hubbard v. DOT*, 256 Ga. App. 342, 568 S.E.2d 559 (2002).

Striking of a counterclaim after consideration of the proposed pretrial orders of the plaintiff and the defendant, pleadings, evidence, and arguments of counsel is tantamount to a 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).

Third-party defendant is entitled to move for summary judgment against the original plaintiff on any ground for which the original defendant would be entitled to summary judgment against the plaintiff. *Empire Shoe Co. v. Nico Indus., Inc.*, 197 Ga. App. 411, 398 S.E.2d 440 (1990).

When motion to dismiss is treated as motion for summary judgment. — If a motion to dismiss is supplemented by argument of counsel and matters outside of the pleadings, it is treated as a motion for summary judgment. *Blasingame v. Blasingame*, 249 Ga. 791, 294 S.E.2d 519 (1982).

An exhibit offered at a hearing on an interlocutory injunction that was the basis of the trial court's decision to grant the appellee's motion to dismiss converted the motion to dismiss to a motion for summary judgment, and the appellants were entitled to have the notice required in the summary judgment provisions. *Wallis v. Trustees, Sugar Hill United Methodist Church*, 252 Ga. 51, 310 S.E.2d 915 (1984).

In an action filed by children to recover damages for injuries sustained by their parent in a fall in a nursing home facility, a motion to dismiss the action for failure to state a claim filed by the center that operated the facility was converted to a motion for summary judgment and, on appeal, was to be reviewed as such; the children, as nonmovants, submitted documentary evidence in response to the motion, and, by doing so, in effect requested that the motion be converted into one for

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summary judgment and acquiesced in the trial court's decision not to give notice of the actual nature of the pending motion. *Gaddis v. Chatsworth Health Care Ctr., Inc.*, 282 Ga. App. 615, 639 S.E.2d 399 (2006).

Treatment of O.C.G.A. § 9-11-12(b)(6) motion as one for summary judgment. — So long as the parties are afforded sufficient time within which to file affidavits and other evidentiary materials, a trial court sua sponte can treat an O.C.G.A. § 9-11-12(b)(6) motion as one for summary judgment, even though neither party has introduced matter outside of the pleadings. *Zepp v. Mayor of Athens*, 180 Ga. App. 72, 348 S.E.2d 673 (1986).

Although the trial court converted the defendant limited liability company's (LLC's) motion to dismiss the plaintiff sanitation company's action into a motion for summary judgment when the court considered matters outside the pleadings, the appellate court refused to reverse the trial court's judgment finding that an agreement which allowed the sanitation company to purchase the LLC for \$500,000 less than any amount offered by a third party was an unreasonable restraint on alienation because the trial court allowed the sanitation company to introduce evidence in support of the company's claims. *RTS Landfill, Inc. v. Appalachian Waste Sys., LLC*, 267 Ga. App. 56, 598 S.E.2d 798 (2004).

Notice of conversion of motion to motion for summary judgment. — In a case alleging unfair employment termination, the trial court's failure to notify the employee of the trial court's conversion of the employer's motion to dismiss to a summary judgment motion, and the court's failure to give the employee at least 30 days to respond, although error, was not reversible because the employee failed to show that the employee was harmed by this deficiency in the notice; because the employee failed to provide the appellate court with a transcript of the summary judgment hearing, the trial court's summary judgment was presumed to have been correct on appeal and was affirmed. *Bynum v. Horizon Staffing*, 266

Ga. App. 337, 596 S.E.2d 648 (2004).

Motion in limine held not to be, in effect, a motion for summary judgment. — Motion in limine in a dispossessory action that the issuance of the writ of possession had rendered the issue of possession moot was not in effect a motion for summary judgment and, in granting the motion and dismissing the case, the court did not violate the defendant's right, pursuant to subsection (c) of O.C.G.A. § 9-11-56 and Rule 6.2 of the Uniform Rules for Superior and State Courts, to have at least 30 days to respond to the motion, when none of the parties wished to pursue their damage claims and, therefore, nothing remained to be tried. *Diplomat Restaurant, Inc. v. Anthony*, 180 Ga. App. 431, 349 S.E.2d 284 (1986).

Standing to oppose motion made by codefendant. — Codefendant in a tort action has no standing to oppose a motion for summary judgment made by the other codefendant, if the codefendant has no existing rights that will be adversely affected by the grant thereof. *Southeastern Erection Co. v. Flagler Co.*, 108 Ga. App. 831, 134 S.E.2d 822 (1964) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Effect of ruling at earlier hearing on admissibility. — Grant of judgment for the plaintiffs on the pleadings after a ruling that no issuable defense had been alleged was not error on the ground that the court had, some months earlier, denied a motion for summary judgment made on behalf of the plaintiffs, when the court was considering the effect of evidence, whereas at the preliminary hearing the court was considering the admissibility of the evidence. *Phillips v. Marcin*, 162 Ga. App. 202, 290 S.E.2d 546 (1982).

Seventh Amendment right to jury trial not infringed. — Because the Seventh Amendment to the U.S. Constitution did not apply in state courts, and an insured's right to a jury trial thereunder was not infringed when genuine issues of material fact were lacking and disposition of the matter was best handled by way of summary judgment, the insured's Seventh Amendment right to a jury trial was not infringed; as a result, the insured failed to demonstrate any constitutional

deprivation warranting a 42 U.S.C. § 1983 action. *Cuyler v. Allstate Ins. Co.*, 284 Ga. App. 409, 643 S.E.2d 783, cert. denied, 2007 Ga. LEXIS 510 (Ga. 2007).

Cited in *Algernon Blair, Inc. v. National Sur. Corp.*, 222 Ga. 672, 151 S.E.2d 724 (1966); *Atlanta Funtown, Inc. v. Crouch*, 114 Ga. App. 702, 152 S.E.2d 583 (1966); *Harrington v. Frye*, 116 Ga. App. 755, 159 S.E.2d 84 (1967); *Grizzard v. Grizzard*, 224 Ga. 42, 159 S.E.2d 400 (1968); *O'Kelley v. Evans*, 224 Ga. 49, 159 S.E.2d 418 (1968); *Jackson v. Kight*, 117 Ga. App. 385, 160 S.E.2d 668 (1968); *Norton Realty & Loan Co. v. City of Gainesville*, 224 Ga. 166, 160 S.E.2d 819 (1968); *Kerry v. Brown*, 224 Ga. 200, 160 S.E.2d 832 (1968); *Passmore v. Truman & Smith Inst., Inc.*, 117 Ga. App. 620, 161 S.E.2d 323 (1968); *McLeod v. Westmoreland*, 117 Ga. App. 659, 161 S.E.2d 335 (1968); *Levy v. G.E.C. Corp.*, 117 Ga. App. 673, 161 S.E.2d 339 (1968); *Boatright v. Padgett Motor Sales, Inc.*, 117 Ga. App. 578, 161 S.E.2d 402 (1968); *Brooks v. Holman*, 117 Ga. App. 615, 161 S.E.2d 512 (1968); *Futch v. Futch*, 224 Ga. 350, 161 S.E.2d 868 (1968); *McCurry v. Bailey*, 224 Ga. 318, 162 S.E.2d 9 (1968); *Dyer v. Lanier*, 224 Ga. 371, 162 S.E.2d 340 (1968); *Trammell v. West*, 224 Ga. 365, 162 S.E.2d 353 (1968); *Ryder v. Schreeder*, 224 Ga. 382, 162 S.E.2d 375 (1968); *Kiker v. Hefner*, 224 Ga. 511, 162 S.E.2d 731 (1968); *Moulder v. Steele*, 118 Ga. App. 87, 162 S.E.2d 785 (1968); *Atlanta Biltmore Hotel Corp. v. Martell*, 118 Ga. App. 172, 162 S.E.2d 815 (1968); *Flowers v. Flowers*, 118 Ga. App. 85, 162 S.E.2d 818 (1968); *Zappa v. Allstate Ins. Co.*, 118 Ga. App. 235, 162 S.E.2d 911 (1968); *Sanfrantello v. Sears, Roebuck & Co.*, 118 Ga. App. 205, 163 S.E.2d 256 (1968); *Rubel Baking Co. v. Levitt*, 118 Ga. App. 306, 163 S.E.2d 437 (1968); *Wade v. Howell*, 224 Ga. 626, 163 S.E.2d 717 (1968); *National Factor & Inv. Corp. v. State Bank*, 224 Ga. 535, 163 S.E.2d 817 (1968); *Fidelity-Phenix Ins. Co. v. Mauldin*, 118 Ga. App. 401, 163 S.E.2d 834 (1968); *Seaview Dev. Co. v. Galanti*, 118 Ga. App. 378, 163 S.E.2d 845 (1968); *Savannah Elec. & Power Co. v. Edenfield*, 118 Ga. App. 531, 164 S.E.2d 366 (1968); *Zeesman v. Cordele Credit Jewelry, Inc.*, 224 Ga. 732, 164 S.E.2d 729

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MacDonald, Inc. v. Ga. Cas. & Sur. Co., 293 Ga. 9, 743 S.E.2d 373 (2013); Bobick v. Cmty. & S. Bank, 321 Ga. App. 855, 743 S.E.2d 518 (2013); Bd. of Regents of the Univ. Sys. of Ga. v. Barnes, 322 Ga. App. 47, 743 S.E.2d 609 (2013); Ansley v. Raczka-Long, 293 Ga. 138, 744 S.E.2d 55 (2013); Sherman v. City of Atlanta, 293 Ga. 169, 744 S.E.2d 689 (2013); McGraw v. IDS Prop. & Cas. Ins. Co., 323 Ga. App. 408, 744 S.E.2d 891 (2013); Hanna v. First Citizens Bank & Trust Co., Inc., 323 Ga. App. 321, 744 S.E.2d 894 (2013); Price v. Thapa, 323 Ga. App. 638, 745 S.E.2d 311 (2013); Aubain-Gray v. Hobby Lobby Stores, Inc., 323 Ga. App. 672, 747 S.E.2d 684 (2013); Carter v. Riggins, 323 Ga. App. 747, 748 S.E.2d 117 (2013); Cmty. Music Ctrs. of Atlanta, LLC v. JW Broad., Inc., 323 Ga. App. 757, 748 S.E.2d 127 (2013); Norfolk S. Ry. v. Zeagler, 293 Ga. 582, 748 S.E.2d 846 (2013); Benfield v. Wells, 324 Ga. App. 85, 749 S.E.2d 384 (2013); Houston v. Wal-Mart Stores E., L.P., 324 Ga. App. 105, 749 S.E.2d 400 (2013); Patel v. Ameris Bank, 324 Ga. App. 227, 749 S.E.2d 809 (2013); Freeman v. Smith, 324 Ga. App. 426, 750 S.E.2d 739 (2013); Danes v. Rogers, 324 Ga. App. 504, 751 S.E.2d 135 (2013); Stillwater Enters. v. Hanson Pipe & Precast, LLC, 324 Ga. App. 582, 751 S.E.2d 193 (2013); O'Dell v. Mahoney, 324 Ga. App. 360, 750 S.E.2d 689 (2013); STC Two, LLC v. Shulman-Weiner, 325 Ga. App. 245, 750 S.E.2d 730 (2013); Herren v. Sucher, 325 Ga. App. 219, 750 S.E.2d 430 (2013); Aquanaut Diving & Eng'g, Inc. v. Guitar Ctr. Stores, Inc., 324 Ga. App. 570, 751 S.E.2d 175 (2013); Bedsole v. Action Outdoor Adver. JV, LLC, 325 Ga. App. 194, 750 S.E.2d 445 (2013); The Kroger Co. v. Schoenhoff, 324 Ga. App. 619, 751 S.E.2d 438 (2013); Johnson v. Burrell, 294 Ga. 301, 751 S.E.2d 301 (2013); Crabapple Lake Parc Cmty. Ass'n v. Circeo, 325 Ga. App. 101, 751 S.E.2d 866 (2013); Quinney v. Phoebe Putney Mem. Hosp., 325 Ga. App. 112, 751 S.E.2d 874 (2013); DJ Mortg., LLC v. Synovus Bank, 325 Ga. App. 382, 750 S.E.2d 797 (2013); Wells Fargo Bank, N.A. v. Twenty Six Properties, LLC, 325 Ga. App. 662, 754 S.E.2d 630 (2014); Richards v. Wells Fargo Bank, N.A., 325 Ga. App. 722, 754 S.E.2d 770

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(2014); *Burke v. Prime Rate Premium Fin. Corp.*, 325 Ga. App. 760, 754 S.E.2d 802 (2014); *First Chatham Bank v. Liberty Capital, LLC*, 325 Ga. App. 821, 755 S.E.2d 219 (2014); *Wooden v. Synovus Bank*, 325 Ga. App. 876, 756 S.E.2d 19 (2014); *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 755 S.E.2d 683 (2014); *Askew v. Rogers*, 326 Ga. App. 24, 755 S.E.2d 836 (2014); *Scrocca v. Ashwood Condominium Ass'n*, 326 Ga. App. 226, 756 S.E.2d 308 (2014); *Taylor v. McGraw*, 327 Ga. App. 654, 760 S.E.2d 657 (2014); *Reed v. Carolina Cas. Ins. Co.*, 327 Ga. App. 130, 755 S.E.2d 356 (2014); *Thompson-El v. Bank of Am., N.A.*, 327 Ga. App. 309, 759 S.E.2d 49 (2014); *Cartersville Ranch, LLC v. Dellinger*, 295 Ga. 195, 758 S.E.2d 781 (2014); *Fabian v. Pontikakis*, 327 Ga. App. 392, 759 S.E.2d 295 (2014); *Adams v. DeWitt*, 327 Ga. App. 576, 760 S.E.2d 191 (2014); *Roca Properties, LLC v. Dance Hotlanta, Inc.*, 327 Ga. App. 700, 761 S.E.2d 105 (2014); *Internet Brands, Inc. v. Jape*, 328 Ga. App. 272, 760 S.E.2d 1 (2014); *915 Indian Trail, LLC v. State Bank & Trust Co.*, 328 Ga. App. 524, 759 S.E.2d 654 (2014); *Barzey v. City of Cuthbert*, 295 Ga. 641, 763 S.E.2d 447 (2014); *Hayek v. Chastain Park Condo. Ass'n*, 329 Ga. App. 164, 764 S.E.2d 183 (2014); *Sanchez v. Atlanta Union Mission Corp.*, 329 Ga. App. 158, 764 S.E.2d 178 (2014); *Courtland Hotel, LLC v. Salzer*, 330 Ga. App. 264, 767 S.E.2d 750 (2014); *Boston v. Athearn*, 329 Ga. App. 890, 764 S.E.2d 582 (2014); *Cope v. Evans*, 329 Ga. App. 354, 765 S.E.2d 40 (2014); *DeKalb County v. Kirkland*, 329 Ga. App. 262, 764 S.E.2d 867 (2014); *Hill v. VNS Corp.*, 329 Ga. App. 274, 764 S.E.2d 876 (2014); *Maree v. ROMAR Joint Venture*, 329 Ga. App. 282, 763 S.E.2d 899 (2014); *Rumsey v. Gillis*, 329 Ga. App. 488, 765 S.E.2d 665 (2014); *Holcomb v. Long*, 329 Ga. App. 515, 765 S.E.2d 687 (2014); *Davidson v. Meticulously Clean Sweepers, LLC*, 329 Ga. App. 640, 765 S.E.2d 783 (2014); *Justice v. SCI Ga. Funeral Servs.*, 329 Ga. App. 635, 765 S.E.2d 778 (2014); *Rollins v. Rollins*, 329 Ga. App. 768, 766 S.E.2d 162 (2014); *First Citizens Bank & Trust, Inc. v. Ruddell*, 330 Ga. App. 82, 766 S.E.2d 538

(2014); *Godwin v. Mizpah Farms, LLLP*, 330 Ga. App. 31, 766 S.E.2d 497 (2014); *Sentinel Offender Services, LLC v. Glover*, 296 Ga. 315, 766 S.E.2d 456 (2014); *Wright v. Waterberg Big Game Hunting Lodge Otjahewita (Pty), Ltd.*, 330 Ga. App. 508, 767 S.E.2d 513 (2014); *Lowry v. Fenzel*, 331 Ga. App. 603, 769 S.E.2d 522 (2015); *Buttacavoli v. Owen, Gleaton, Egan, Jones & Sweeney LLP*, 331 Ga. App. 88, 769 S.E.2d 794 (2015); *Brazeal v. NewPoint Media Group, LLC*, 331 Ga. App. 49, 769 S.E.2d 763 (2015); *Gaslowitz v. Stabilis Fund I, LP*, 331 Ga. App. 152, 770 S.E.2d 245 (2015); *Sanders v. Riley*, 296 Ga. 693, 770 S.E.2d 570 (2015); *Amah v. Whitefield Acad., Inc.*, 331 Ga. App. 258, 770 S.E.2d 650 (2015); *Ashton Atlanta Residential, LLC v. Ajibola*, 331 Ga. App. 231, 770 S.E.2d 311 (2015); *Roberts v. Cmty. & S. Bank*, 331 Ga. App. 364, 771 S.E.2d 68 (2015); *9766, LLC v. Dwarf House, Inc.*, 331 Ga. App. 287, 771 S.E.2d 1 (2015); *Bd. of Regents of the Univ. Sys. of Ga. v. Winter*, 331 Ga. App. 528, 771 S.E.2d 201 (2015); *Southern States-Bartow County, Inc. v. Riverwood Farm Prop. Owners Ass'n, Inc.*, 769 S.E.2d 823, No. A14A1562, 2015 Ga. App. LEXIS 190 (2015); *In re Estate of Wade*, 331 Ga. App. 535, 771 S.E.2d 214 (2015); *SJN Props., LLC v. Fulton County Bd. of Assessors*, 296 Ga. 793, 770 S.E.2d 832 (2015).

Purpose of Summary Judgment

Prompt and inexpensive method of disposing of cases. — Motion for summary judgment is designed to provide a prompt and inexpensive method of disposing of any cause if the pleadings, depositions, and affidavits clearly show there is no issue of material fact, although allegations of the pleadings standing alone may raise such an issue. *Maxey-Bosshardt Lumber Co. v. Maxwell*, 127 Ga. App. 429, 193 S.E.2d 885 (1972).

Purpose of former Ga. L. 1959, p. 234, § 1 et seq. was to afford to either party litigant, upon motion, a judgment forthwith if the record shows there was not a genuine issue existing between the parties. *Southern v. Adams*, 111 Ga. App. 217, 141 S.E.2d 320 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Very purpose of former Ga. L. 1959, p. 234, § 1 et seq. was to afford either party litigant a judgment forthwith if the record showed there was not a genuine issue existing between the parties, but only after each party had an opportunity to make out a case or establish a defense, as the case may be. *Scales v. Peevy*, 103 Ga. App. 42, 118 S.E.2d 193 (1961); *Sparks v. Rinker*, 111 Ga. App. 191, 141 S.E.2d 185 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Summary resolution has its place; efficient and orderly dispensation of justice is enhanced when unnecessary and protracted litigation is avoided. *Shmunis v. GMC*, 146 Ga. App. 486, 246 S.E.2d 486 (1978).

Unnecessary jury trials eliminated.

— Summary judgment was clearly intended to dispose of litigation expeditiously and avoid the useless time and expense of going through a jury trial even though the petition fairly bristles with serious allegations, if, when given notice and an opportunity to produce affidavits by persons competent to testify on their own knowledge to the truth of such allegations, the pleader does nothing to contradict affidavits of the movant that show the opposite party has no right to prevail. *Crutcher v. Crawford Land Co.*, 220 Ga. 298, 138 S.E.2d 580 (1964); *Brown v. J.C. Penney Co.*, 123 Ga. App. 233, 180 S.E.2d 364 (1971); *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Motel Mgt. Sys. v. Billing*, 143 Ga. App. 702, 240 S.E.2d 173 (1977) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Function of motion for summary judgment is to avoid a useless trial if there is no genuine issue as to any material fact. *General Gas Corp. v. Carn*, 103 Ga. App. 542, 120 S.E.2d 156 (1961) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Former Ga. L. 1959, p. 234, § 1 et seq. obviously had as one of its purposes, if there was no genuine issue as to any material fact, to allow the trial court to apply appropriate legal principles and define the legal rights of the parties without lengthy trials to establish already undisputed facts. *Scales v. Peevy*, 103 Ga. App. 42, 118 S.E.2d 193 (1961) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Purpose of the Summary Judgment Act of 1959 (former Ga. L. 1959, p. 234, § 1 et seq.) was to eliminate the necessity for a jury trial if there was no genuine issue as to any material fact in the case. *General Ins. Co. of Am. v. Camden Constr. Co.*, 115 Ga. App. 189, 154 S.E.2d 26 (1967) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Purpose of former Ga. L. 1959, p. 234, § 1 et seq. was to eliminate the necessity for a jury trial if there is no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 126 S.E.2d 442 (1962); *King v. Fryer*, 107 Ga. App. 715, 131 S.E.2d 203 (1963); *Lampkin v. Edwards*, 222 Ga. 288, 149 S.E.2d 708 (1966); *Boston Ins. Co. v. Barnes*, 120 Ga. App. 585, 171 S.E.2d 626 (1969); *Elder v. Smith*, 121 Ga. App. 461, 174 S.E.2d 239, rev'd on other grounds, 226 Ga. 688, 177 S.E.2d 77 (1970); *Tony v. Pollard*, 248 Ga. 86, 281 S.E.2d 557 (1981) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Purpose of former Ga. L. 1959, p. 234, § 1 et seq. was to eliminate the necessity for a trial by jury if, giving the opposing party the benefit of all reasonable doubts and all favorable inferences that may be drawn from the evidence, there was no genuine issue as to any material fact, and the moving party was entitled to judgment as a matter of law. *Butterworth v. Pettitt*, 223 Ga. 355, 155 S.E.2d 20 (1967); *Southern Bell Tel. & Tel. Co. v. Beaver*, 120 Ga. App. 420, 170 S.E.2d 737 (1969); *Kroger Co. v. Cobb*, 125 Ga. App. 310, 187 S.E.2d 316 (1972); *Maxey-Bosshardt Lumber Co. v. Maxwell*, 127 Ga. App. 429, 193 S.E.2d 885 (1972); *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Beach v. First Fed. Sav. & Loan Ass'n*, 140 Ga. App. 882, 232 S.E.2d 158 (1977); *Jones v. First Nat'l Bank*, 142 Ga. App. 18, 234 S.E.2d 794 (1977); *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977); *Hewatt v. Bonner*, 142 Ga. App. 442, 236 S.E.2d 111 (1977); *Motel Mgt. Sys. v. Billing*, 143 Ga. App. 702, 240 S.E.2d 173 (1977); *Skinner v. Humble Oil & Ref. Co.*, 145 Ga. App. 372, 243 S.E.2d 732 (1978); *Culwell v. Lomas & Nettleton Co.*, 148 Ga. App. 478, 251

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S.E.2d 579 (1978); *Mock v. Canterbury Realty Co.*, 152 Ga. App. 872, 264 S.E.2d 489 (1980); *Riddle v. Driebe*, 153 Ga. App. 276, 265 S.E.2d 92 (1980); *Cincinnati Ins. Co. v. Davis*, 153 Ga. App. 291, 265 S.E.2d 102 (1980); *Lagerstrom v. Beers Constr. Co.*, 157 Ga. App. 396, 277 S.E.2d 765 (1981); *Troutt v. Nash AMC/Jeep, Inc.*, 157 Ga. App. 399, 278 S.E.2d 54 (1981); *Parlato v. Metropolitan Atlanta Rapid Transit Auth.*, 165 Ga. App. 758, 302 S.E.2d 613 (1983); *Bowman v. United States Life Ins. Co.*, 167 Ga. App. 673, 307 S.E.2d 134 (1983) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Purpose of permitting summary judgments is to dispose of unnecessary trials and not to upset a verdict authorized by the evidence merely because at a previous stage of the case a finding may not have been authorized in accordance with such verdict. *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968).

Ga. L. 1967, p. 234, § 1 et seq. (see now O.C.G.A. § 9-11-56) serves a useful purpose, namely, to eliminate the necessity of trial by jury if there is no genuine issue of fact to be tried. *Brown v. J.C. Penney Co.*, 123 Ga. App. 233, 180 S.E.2d 364 (1971).

Point of summary judgment is to remove from the jury what is so clear as not to need rumination. *Siefferman v. Peppers*, 159 Ga. App. 688, 285 S.E.2d 61 (1981).

No intent to change existing procedures afforded to parties. — Purpose of former Ga. L. 1959, p. 234, § 1 et seq. was not to change or amend or do away with any of the existing procedures afforded parties to a lawsuit. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 110 Ga. App. 515, 139 S.E.2d 124 (1964) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Not intended to eliminate all trial by jury. — It is not the purpose of summary judgment to change the general rules with reference to submitting questions to the jury, and summary judgment should be granted only if there is no genuine issue of fact as shown by the record before the court. *Wasserman v. Southland Inv. Corp.*, 105 Ga. App. 420,

124 S.E.2d 674 (1962); *Clayton v. Steve-Cathey, Inc.*, 105 Ga. App. 570, 125 S.E.2d 118 (1962) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Purpose of enacting Ga. L. 1959, p. 234, § 1 et seq. was not to change the general rule that questions of negligence, of contributory negligence, of cause and proximate cause, and of whose negligence or of what negligence constitutes the proximate cause of an injury are, except in plain, palpable, and indisputable cases, solely for the jury. *Malcom v. Malcolm*, 112 Ga. App. 151, 144 S.E.2d 188 (1965) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Trial of all the issues of fact by the jury was not intended to be abrogated by summary judgment. *Ginn v. Morgan*, 225 Ga. 192, 167 S.E.2d 393 (1969).

Material issues identified. — Purpose of summary judgment procedure is to determine whether there is a material issue of fact to be tried, rather than to set up technical pitfalls for the unwary. *Glenn v. Metropolitan Atlanta Rapid Transit Auth.*, 158 Ga. App. 98, 279 S.E.2d 481 (1981).

On summary judgment, a trial court determines only whether a material issue of fact exists, and such determination does not include "the discovery of the truth of such fact" or permit frustration of a plaintiff's constitutional right to a trial by jury "by inferring the existence of other facts" from predicate evidence. *Bruno's Food Stores, Inc. v. Taylor*, 228 Ga. App. 439, 491 S.E.2d 881 (1997).

Procedure pierces formal verbiage of pleadings. — Primary purpose of summary judgment procedure was to allow a party to pierce the allegations of the pleadings, show the truth to the court, and receive judgment if there was no genuine issue of material fact, although an issue might be raised by the pleadings. *Scales v. Peevy*, 103 Ga. App. 42, 118 S.E.2d 193 (1961); *Spratlin v. Manufacturers Acceptance Corp.*, 105 Ga. App. 463, 125 S.E.2d 110 (1962); *Calhoun v. Eaves*, 114 Ga. App. 756, 152 S.E.2d 805 (1966); *Laite v. Baxter*, 126 Ga. App. 743, 191 S.E.2d 531 (1972); *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 202 S.E.2d 515 (1973); *Flanders v. Columbia*

Nitrogen Corp., 135 Ga. App. 21, 217 S.E.2d 363 (1975); *Maxwell v. Columbia Realty Venture*, 155 Ga. App. 289, 270 S.E.2d 704 (1980) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Purpose of a motion for summary judgment is to pierce formal verbiage of the pleadings by showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Connors v. City Council*, 120 Ga. App. 499, 171 S.E.2d 578 (1969); *French v. Norman*, 124 Ga. App. 567, 184 S.E.2d 663 (1971).

Summary judgment is designed to enable the judge, by piercing formal verbiage of the pleadings, to filter out sham issues that might otherwise cause needless and time-consuming litigation. *Boston Ins. Co. v. Barnes*, 120 Ga. App. 585, 171 S.E.2d 626 (1969); *Porter v. Felker*, 261 Ga. 421, 405 S.E.2d 31 (1991).

Very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial so that only the latter may subject a suitor to the burden of a trial. *Maxey-Bosshardt Lumber Co. v. Maxwell*, 127 Ga. App. 429, 193 S.E.2d 885 (1972).

Applicability to Certain Actions, Proceedings, Issues, and Defenses

Attorney fees. — When a company sought attorney fees, under O.C.G.A. § 13-6-11, and punitive damages from its attorneys regarding their participation in a sale of the company's assets, summary judgment should have been granted in favor of the attorneys because no claims as to which such relief might have been awarded were found to be proper. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

In an action to recover on a promissory note with past due interest, and upon entering summary judgment in favor of the lender, the trial court erred in awarding the lender \$10,195.40 in attorney fees in a judgment in which the principal and interest amounted to only \$6,259.12; under the formula delineated under O.C.G.A. § 13-1-11, such amount was limited to \$650.91. *Long v. Hogan*, 289 Ga.

App. 347, 656 S.E.2d 868 (2008), cert. denied, 2008 Ga. LEXIS 516 (Ga. 2008).

Evidence supported an award of attorney fees because the evidence presented by the client in a legal malpractice suit could authorize a jury to conclude that, despite owing the client a fiduciary duty, the attorney's persistent failure to adequately represent the client went beyond mere negligence and rose to the level of bad faith. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

Breach of fiduciary duty. — In a case in which a company sued the company's attorneys for breach of fiduciary duty for closing a sale of the company's assets, summary judgment was properly granted in favor of the attorneys because the attorneys made all proper disclosures to the employee and officer who had apparent authority to conduct the sale, and they justifiably relied on that authority, as well as on certain consent minutes from the corporation which was represented as being the company's parent. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Summary judgment was inappropriate in a breach of fiduciary duty action which centered around a verbal settlement agreement as material fact issues remained as to whether: (1) a company's offer to buy the minority shareholders' stock required a written purchase agreement; (2) the parties agreed to all material terms; and (3) a note signed by one of the minority shareholders had been cancelled. *McKenna v. Capital Res. Partners, IV, L.P.*, 286 Ga. App. 828, 650 S.E.2d 580 (2007), cert. denied, 2007 Ga. LEXIS 752, 763 (Ga. 2007).

Because a claim filed by a minority shareholder against the officers and directors of a corporation alleging their depletion of corporate assets through excessive salaries related to the value or price the shareholder would receive in a stock appraisal action, the shareholder's exclusive remedy was within that action; thus, a separate breach of fiduciary duty claim filed in the shareholder's direct action against the officers and directors was properly disposed of via summary judgment. *Levy v. Reiner*, 290 Ga. App. 471,

**Applicability to Certain Actions,
Proceedings, Issues, and
Defenses (Cont'd)**

659 S.E.2d 848 (2008).

Recoupment. — In an action seeking a writ of possession for a mobile home, because the mobile home's tenants expressly waived any recourse against their bankrupt lender arising from a prior judgment, based on a voluntary settlement with the bankrupt lender accepting a general unsecured claim, the tenants could not later assert any right of recoupment; as a result, the trial court did not err in granting summary judgment as to that claim against the tenants and in favor of a successor lender. *Hill v. Green Tree Servicing, LLC*, 280 Ga. App. 151, 633 S.E.2d 451 (2006).

Employee fraud. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) in an employee's fraud claim, wherein the employee contended that the employee was fraudulently induced to give up additional severance benefits in order to accept an at-will position with the successor to the employer, and that such position did not in fact exist, as the record clearly indicated that the employee worked and was paid for a period of almost two years prior to the employee's termination. *Cramp v. Georgia-Pacific Corp.*, 266 Ga. App. 38, 596 S.E.2d 212 (2004).

Acts of employees. — Because an employer had not produced any evidence that established, as a matter of law, that a bartender's actions in breaking up a fight in their bowling center fell outside the class of activities its bartenders performed generally, a jury issue remained, and summary judgment should not have been granted. *Brown v. AMF Bowling Ctrs., Inc.*, 236 Ga. App. 277, 511 S.E.2d 619 (1999).

Plaintiff who could not show that an employee was acting within the scope of employment at the time of a collision could not show a genuine issue of material fact in a wrongful death action against the employer, and summary judgment was therefore appropriate. *Tyner v. Comfort Rest Sleep Prods., Inc.*, 236 Ga. App. 423, 512 S.E.2d 321 (1999).

Grant of summary judgment to an amusement park in an injured worker's personal injury suit was proper because the worker had violated OSHA regulations and National Fire Protection Association (NFPA) standards governing electrical safety in numerous respects, which were mandatory and had the force of law, and the worker's conduct fulfilled all of the requirements of negligence per se. *Kull v. Six Flags over Ga. II, L.P.*, 264 Ga. App. 715, 592 S.E.2d 143 (2003).

Summary judgment in favor of a crane company was reversed because a question of fact remained regarding whether a crane operator, who was an employee of the company, was acting as the company's employee or as a borrowed servant of a general contractor on a construction site when the operator allegedly committed a negligent act that injured a worker. A contract between the company and the contractor labeling the operator a borrowed servant was not dispositive and a question remained regarding how much control the contractor actually had over the crane operator's actions. *Gibson v. Tim's Crane & Rigging, Inc.*, 266 Ga. App. 42, 596 S.E.2d 215 (2004).

Employee on personal errand. — Trial court properly granted summary judgment to the company on the injured person's lawsuit alleging that the company was liable to the injured party for the actions of its employee, who struck the injured party's vehicle while turning the truck the employee was driving into an intersection as the employee returned from a personal visit with relatives as the injured person could not show that the employee was acting within the scope of employment, that the company had actual knowledge of the employee's driving record, or that the employee's driving record showed a pattern of reckless driving. *Upshaw v. Roberts Timber Co.*, 266 Ga. App. 135, 596 S.E.2d 679 (2004).

Trial court properly granted an employer's motion for summary judgment, in a personal injury action filed by a mother and daughter as the latter failed to show that the former was liable under the doctrine of respondeat superior for the accident caused by its employee, given that the employee was running personal er-

rands at the time of the collision, despite the fact the errands seemed work-related, and was not on a special mission undertaken at the employer's direction; further, any reliance by the mother and daughter on the traveling sales person exception applied in workers' compensation cases was misplaced. *Gassaway v. Precon Corp.*, 280 Ga. App. 351, 634 S.E.2d 153 (2006).

Trial court properly granted summary judgment to the health center on the patient's claim that the center was responsible for the negligent hiring/retention of the mental health assistant who allegedly raped the patient as the health center showed that the center exercised ordinary care not to hire a person who posed a reasonably foreseeable risk of inflicting harm on others by hiring a professional investigation service to do a background check on the mental health assistant; as a result of that background check, the service advised the health center that the mental health assistant had not been involved in criminal activity and the patient did not show that the health center otherwise knew that the mental health assistant posed a risk of harm to the center's patients. *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 596 S.E.2d 604 (2004).

When a company sued the company's attorneys and accountants for fraud and aiding and abetting fraud regarding their participation in a sale of the company's assets because they did not notify the company's principal of the sale, summary judgment was properly granted in favor of the attorneys and accountants because the employee who conducted the sale had apparent authority to do so and actual fraud was insufficiently pled, under O.C.G.A. § 9-11-9(b), as a response to the attorneys' and accountants' motion for summary judgment. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Because a corporation's president did not participate in the allegedly negligent work of employees of the corporation at a decedent's home or supervise or direct the employees in the work at the home, summary judgment in favor of the president in a wrongful death action brought by the decedent's children was affirmed; the

president's alleged failure to provide proper training to the employees was not a sufficiently direct participation in a tort to expose the president to personal liability. *Beasley v. A Better Gas Co.*, 269 Ga. App. 426, 604 S.E.2d 202 (2004).

In the employer's action to recover for theft of corporate funds, the employee was not entitled to summary judgment because the six-year statute of limitations applicable to constructive trust claims only barred the employer's action as to some, but not all, of the employee's thefts. *Total Supply, Inc. v. Pridgen*, 267 Ga. App. 125, 598 S.E.2d 805 (2004).

Employer was properly granted summary judgment in an employee's personal injury and loss of consortium suit filed against the employer because the employee's accidental injury, which occurred as the employee was walking to work from an employer-owned parking facility to the employee's work building and who was struck by an employer-operated vehicle, was compensable under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *Longuepee v. Ga. Inst. of Tech.*, 269 Ga. App. 884, 605 S.E.2d 455 (2004).

Because a contract between a crane owner and a general contractor stated that the owner's employee was a borrowed servant, a trial court correctly granted summary judgment in a negligence action arising from injuries resulting from the crane operation. *Tim's Crane & Rigging, Inc. v. Gibson*, 278 Ga. 796, 604 S.E.2d 763 (2004).

In a negligent hiring and supervision suit based on respondeat superior filed by a decedent's wife against an employer and its allegedly negligent employee, the trial court properly denied an employer's motion for summary judgment, given that the evidence was in dispute as to whether the employee was acting in the scope of employment at the time of the fatal injury to the decedent, and whether the employee might have foreseen that some injury would have resulted from an act or omission, or that consequences of a generally injurious nature might have been expected, based upon evidence that in the 22 years that the employee had driven for companies owned by the same people, the employee had received two speeding tick-

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ets and was involved in two minor car accidents. *Remediation Res., Inc. v. Balding*, 281 Ga. App. 31, 635 S.E.2d 332 (2006).

In a personal injury action, the trial court properly granted summary judgment to an employer on the issue of respondeat superior as the employer could not be found liable for its employee's personal actions undertaken at the time of the collision, which were not in furtherance of the employer's interests, and were not within the employee's scope of employment nor ratified by the employer. *Hankerson v. Hammett*, 285 Ga. App. 610, 647 S.E.2d 319 (2007).

In a personal injury action arising from an auto accident, summary judgment to an employer was reversed as an injured driver presented some evidence showing that at the time of the accident the employer's employee might have been on a work-related cell phone call or distracted by such a call that the employee chose not to answer, creating a jury question as to the employer's liability for the employee's actions. *Hunter v. Modern Cont'l Constr. Co.*, 287 Ga. App. 689, 652 S.E.2d 583 (2007).

In a tort action filed by an executrix against a hospital, the hospital was properly granted summary judgment on a claim of medical battery as the undisputed facts supported an inference that the executrix's mother consented to the nursing staff determining what types of food the mother could tolerate, and as a result the nursing staff's conduct in exercising that discretion in deciding what types of food the mother could eat did not support a medical battery claim. *Morton v. Wellstar Health Sys.*, 288 Ga. App. 301, 653 S.E.2d 756 (2007), cert. denied, 2008 Ga. LEXIS 292 (Ga. 2008).

County sheriff's authority over county-owned property. — County sheriff had the independent authority to repaint and remark county-owned sheriff's vehicles assigned to the sheriff's exclusive use, but lacked the authority to modify portions of a county-owned build-

ing in which the sheriff's office and jail were housed as that facility was shared with the superior, state, and magistrate courts of Clayton County, as well as the clerks of those courts, the solicitor general, and the district attorney, and hence, not under the sheriff's exclusive use. As a result, subject to compliance with O.C.G.A. § 40-8-91, summary judgment in favor of the county as to the extent of the sheriff's authority was reversed as to the former, but affirmed as to the latter. *Hill v. Clayton County Bd. of Comm'rs*, 283 Ga. App. 15, 640 S.E.2d 638 (2006), , overruled on other grounds, *Mayor & Aldermen of Savannah v. Batson-Cook Co.*, 291 Ga. 114, 728 S.E.2d 189 (Ga. 2012).

Applying this rule in a Federal Employers' Liability Act case and permitting the claimant to reach a jury trial, rather than applying a different theory embodied in the comparable federal rule, did no violence to the principle that federal cases interpreting the substantive law control. *Hepner v. Southern Ry.*, 182 Ga. App. 346, 356 S.E.2d 30 (1987).

Federal Employers' Liability Act. — Trial court erroneously granted summary judgment to an employer, upon an employee's claim for benefits under the Federal Employers' Liability Act, for injuries to the right leg, right knee, and right ankle, given the evidence substantiating those injuries and that the employer was placed on some kind of notice regarding the injuries; but, summary judgment was upheld as to claims for benefits regarding the employee's injuries to both arms, wrists, hands, feet, left ankle, and left knee as no evidence substantiating those injuries, or as to medical causation, was presented. *Phelps v. CSX Transp., Inc.*, 280 Ga. App. 330, 634 S.E.2d 112 (2006).

Quantum meruit for broker's fee. — In a case in which a former employee alleged that the employee was entitled to quantum meruit against the former employer for having found a buyer for the employer's property, for which the employer had orally indicated that the employer would reward the employee, but the employee failed to raise in the trial court that the employee was a referral agent who was exempt from the real estate licensing statutes pursuant to

O.C.G.A. § 43-40-29(a)(9), the issue was not reviewable on appeal; summary judgment under O.C.G.A. § 9-11-56(c) was granted to the employer as the employee was not licensed under O.C.G.A. §§ 43-40-1(2)(A) and 43-40-30(a). The true nature of the exchange was a sale of real estate, an agreement was prohibited by the licensing statutes; accordingly, it could not be the basis of a quantum meruit claim. *Everett v. Goodloe*, 268 Ga. App. 536, 602 S.E.2d 284 (2004).

Equitable subrogation. — In an action seeking a declaration that a bank held a first priority lien against certain real property that a trust purchased at a non-judicial foreclosure sale, because the trust failed in the trust's burden to show that, as a matter of law, the application of the principle of equitable subrogation would impair its superior or equal equity, or that it would be unduly prejudiced thereby; and similarly failed to show that the bank was culpably and inexcusably negligent, the trial court did not err in denying the trust's motion for summary judgment. *Greer v. Provident Bank, Inc.*, 282 Ga. App. 566, 639 S.E.2d 377 (2006).

Malicious prosecution claim by former employee. — Employer, an armored truck company, reasonably believed that its ex-employee, a messenger, had taken five bags from a bank holding room, signed for only four, and absconded with the missing bag; the trial court properly granted summary judgment to the employer on the messenger's malicious prosecution claim. *Gibbs v. Loomis, Fargo & Co.*, 259 Ga. App. 170, 576 S.E.2d 589 (2003).

Adverse possession by state. — Questions of fact as to whether the state acquired land by adverse possession arise if the state's claim of acquisition by adverse possession is disputed by parties producing evidence that the parties have record title to the land, that the state's possession of the land was permissible, and that the state did not purport to have a valid claim of right to the land or give notice that it did have a valid claim to the land. *Tanner v. Brasher*, 254 Ga. 41, 326 S.E.2d 218 (1985).

Adverse possession by private party. — Trial court properly granted

summary judgment to the grantor's grandchildren as the grandchildren held the disputed parcel of property under color of title, via a deed to the grantor's daughter, albeit the fact that such was not effective as a deed conveying a present interest, for the prescription period of seven years, and the grantor's heirs at law did not contest the deed until suit was filed. *Matthews v. Crowder*, 281 Ga. 842, 642 S.E.2d 852 (2007).

Easement. — Trial court properly granted a corporation's summary judgment motion and awarded a corporation injunctive relief, barring an owner from interfering with the corporation's right of access to a highway, as the corporation's predecessor improved property on which it held a parol license, which created an easement that ran with the land under O.C.G.A. § 44-9-4, and which passed to the corporation. *Blake v. RGL Assocs., Inc.*, 267 Ga. App. 709, 600 S.E.2d 765 (2004).

Trial court erred in granting a couple's motion for summary judgment, in an action against a landowner declaring that a warranty deed included an express easement across the landowner's land, as the language contained within the deed failed to contain any means of identifying the quantity, dimensions, or location of the easement intended to be conveyed, and a survey failed to show the easement; thus, the express easement sought to be conveyed was void for vagueness and unenforceable. *Smith v. Tolar*, 281 Ga. App. 406, 636 S.E.2d 112 (2006).

Because a buyer's proposed landfill would not be a public utility, but would be privately-owned, it was not entitled to a written verification of zoning compliance so it could pursue a state permit to build a landfill; hence, when combined with the fact that the county did not violate the provisions of the Open Meetings Act under O.C.G.A. § 50-14-1(d), the county was properly granted summary judgment as to these issues. *EarthResources, LLC v. Morgan County*, 281 Ga. 396, 638 S.E.2d 325 (2006).

In an action arising from the sale of property, the trial court erred in granting summary judgment to the sellers, contrary to both O.C.G.A. §§ 44-5-62 and

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44-5-63, as a floodwater detention easement burdened the property by permitting the impoundment of water on it to prevent flooding or increased water runoff on other property located downstream and, even though the lake was certainly open and obvious, the same could not necessarily be said of the easement; moreover, a factual issue remained as damages and although the buyers' constructive notice of the easement by reason of its recordation within the chains of title would provide a compelling reason for exempting the easement from operation of the warranty deed, O.C.G.A. § 44-5-63 provided otherwise. *McMurray v. Housworth*, 282 Ga. App. 280, 638 S.E.2d 421 (2006).

Because the record contained no evidence that a neighboring landowner's predecessor in interest, or its agents, used the road continuously for at least 20 years, the predecessor did not acquire a private way by prescription and hence, the neighbor lacked any private way by prescription over a landowner's property to clear timber and remove barbed wire from the roadway without committing a trespass; hence, the trial court did not err in granting the landowner summary judgment as to the issue of trespass. *Norton v. Holcomb*, 285 Ga. App. 78, 646 S.E.2d 94 (2007), cert. denied, 2007 Ga. LEXIS 654 (Ga. 2007).

Because genuine issues of material fact remained as to whether a lessee's failure to reserve an easement to the subject property at the time the lessee executed a corrective quitclaim deed was otherwise unreasonable, foreclosing the condemnation action, partial summary judgment to the lessee was unwarranted. *Wright v. Brookshire*, 286 Ga. App. 162, 648 S.E.2d 485 (2007).

Pursuant to an expressed dedication involving land owned by an adjacent landowner and a neighbor, the trial court properly granted summary judgment in favor of the neighbor as the declaration authorized the neighbor to rearrange their own building and parking spaces as long as the easement was maintained. *Wilcox Hold-*

ings, Ltd. v. Hull, 290 Ga. App. 179, 659 S.E.2d 406 (2008).

Because the language of an easement agreement between two adjacent commercial landowners was ambiguous, parol evidence was admissible to show the parties' intent. Thus, questions of fact remained regarding intent, making summary judgment inappropriate. *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

Action between adjoining landowners. — In a suit between two landowners to enforce the terms of an easement, while no error resulted from an order striking certain affidavits in support of a second landowner's claim for reimbursement for its grading work, genuine material fact issues precluded summary judgment on this claim. Further, summary judgment was unwarranted as to the issue of whether the second landowner was entitled to use a detention pond on the first landowner's property. *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

Appeal from probate court. — Appeal to the superior court from the probate court is subject to established procedures for civil actions, thus entitling a party to invoke the summary judgment procedure. *Woodall v. First Nat'l Bank*, 118 Ga. App. 440, 164 S.E.2d 361 (1968).

Arbitration. — Motion for summary judgment is not a proper procedural vehicle by which to seek to enforce an arbitration provision in a limited warranty because the remedy of a defendant who is aggrieved by the refusal of a plaintiff to arbitrate is to apply to the court for a stay of proceedings pending arbitration. *Tillman Group, Inc. v. Keith*, 201 Ga. App. 680, 411 S.E.2d 794 (1991).

Case referred to auditor. — Court of record has no jurisdiction to entertain and grant summary judgment in a case which has been referred to an auditor for the purpose of having the auditor determine the questions of law and fact involved, if the auditor has heard the case and filed a report of the auditor's findings of law and fact. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 110 Ga. App. 515, 139 S.E.2d 124 (1964) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Verbal contracts. — When a party who leased certain land from its supposed owner, who could not read, and then attempted to enforce an option to purchase the land, which was included in documents the lessee gave the owner to sign, the owner was entitled to summary judgment canceling their agreement because the agreement did not adequately describe the land that was the subject of the transaction, and the lessee was not entitled to summary judgment and specific performance. *Makowski v. Waldrop*, 262 Ga. App. 130, 584 S.E.2d 714 (2003).

Sellers were properly granted summary judgment in an action filed by a buyer arising out of an oral land sales contract given that: (1) no evidence of the buyer's partial performance existed sufficient to remove that contract from the statute of frauds; (2) a wetlands study and interest rate negotiation were not a part of the contract; and (3) a later negotiated contract was an arm's length transaction, the price of which was negotiated at the time, and hence, did not relate to the original contract. *Payne v. Warren*, 282 Ga. App. 524, 639 S.E.2d 528 (2006).

In light of the unresolved facts as to whether a monetary transfer between the parties, evidenced by an oral agreement, was either a loan or an investment, and the borrowers failed to affirmatively disprove the lender's claim that the transfer was a loan as alleged in the complaint, the trial court erred in granting summary judgment to the borrowers. *Marcum v. Gardner*, 283 Ga. App. 453, 641 S.E.2d 678 (2007).

Because a buyer's direct and uncontroverted evidence sufficiently showed the existence of an enforceable oral agreement for a dealer to sell to the buyer a rare Mercedes-Benz, with the price term being the manufacturer's suggested retail price ultimately arrived at by the manufacturer, and the dealer's circumstantial evidence failed to create a genuine issue of material fact regarding the price, the buyer satisfied the burden required to support an order granting summary judgment in the buyer's favor. *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008).

Contracts. — Because issues of fact existed as to whether the parties entered

a binding contract terminating a warehousing agreement, and whether that agreement constituted an accord and satisfaction, summary judgment should not have been granted. *Nebraska Plastics, Inc. v. Harris*, 236 Ga. App. 499, 512 S.E.2d 388 (1999).

Summary judgment was properly granted to a hospital pursuant to O.C.G.A. § 9-11-56 in the hospital's action against a doctor, seeking recovery of monies loaned to the doctor that were not repaid, because it was found that the doctor breached the agreement within six years of the time that the action was commenced and, accordingly, the action was not time-barred under O.C.G.A. § 9-3-24; the court noted that because the parties had indicated in the contract that the parties "expected" that the amount would be completely repaid within one year of when the repayments were commenced, such was merely a hope and not a binding condition that, when the year expired, started the running of the six-year limitations period, based on contract interpretation laws and the inapplicability of parol evidence under O.C.G.A. § 13-2-1(1). *Walker v. Gwinnett Hosp. Sys.*, 263 Ga. App. 554, 588 S.E.2d 441 (2003).

Summary judgment was properly granted in favor of the seller because the trial court properly exercised the court's judgment and discretion in granting the seller's motion to open the seller's default judgment; no ratification of the parties' contract occurred because it was clear that the seller did not authorize the seller's sibling to act in the seller's behalf when the sibling signed the seller's name to the contract. *MacDonald v. Harris*, 265 Ga. App. 131, 593 S.E.2d 32 (2003).

When items stolen from an electric company were sold to a supply company, the supply company was not entitled to summary judgment dismissing the electric company's breach of contract claim against it because there were issues of fact concerning the scope of the contract between the parties on which this claim was based, including whether the contract covered new and used goods and whether the parties mutually departed from the agreement's terms. *Fed. Ins. Co. v. Westside*

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Supply Co., 264 Ga. App. 240, 590 S.E.2d 224 (2003).

Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to those in possession of a colt in a tortious interference with a contract claim by a horse trainer, in which the trainer alleged having a contract to keep the recently born colt in exchange for continued services to the mare's owner; the court found that there was no showing that the possessors of the colt were aware of a contract regarding the ownership of the colt, the possessors had followed the necessary procedures for filing a financing statement under O.C.G.A. § 11-9-501 et seq., the possessors had allegedly foreclosed on the possessors' lien on the mare by the time that the possessors became aware of the trainer's claim, pursuant to O.C.G.A. § 44-14-490, and the trainer did not record a lien against the colt pursuant to O.C.G.A. § 44-14-511. *Medlin v. Morganstern*, 268 Ga. App. 116, 601 S.E.2d 359 (2004).

When a retired police officer to whom a city had paid more retirement benefits than the police officer was entitled sued the city for breach of contract when the city corrected the error, the city was entitled to summary judgment because the city's contract with the officer required the payment of the amount of retirement benefits that the city paid after correcting the error, and the city clerk who caused the error had no authority to change that contract, so the contract was not breached. *Dodd v. City of Gainesville*, 268 Ga. App. 43, 601 S.E.2d 352 (2004).

Summary judgment for the storage companies on an owner's breach of contract claim was proper because the owner failed to show that the storage companies breached any duty owed under the contract; the contract clearly provided that the contract created no duty on the part of the storage companies to protect the owner's personal property and that the owner assumed all risk of loss. *Liberty v. Storage Trust Props., L.P.*, 267 Ga. App. 905, 600 S.E.2d 841 (2004).

Because the trial court was faced with an ambiguity in a covenants declaration regarding the construction of improvements on commercial property, the court erred in granting summary judgment to the property's owner and the lessee, and finding that the ambiguity had to be construed against the developer, instead of first attempting to resolve the ambiguity by applying the rules of contract construction provided in O.C.G.A. § 13-2-2(4). *White v. Kaminsky*, 271 Ga. App. 719, 610 S.E.2d 542 (2004).

Trial court did not err in dismissing a nine-count complaint filed by two uninsured patients, for failing to state a claim and treated as a motion for summary judgment, alleging that a health care provider overcharged the patients for medical care received at rates grossly in excess of the rates charged to private medical insurers, or to Medicare/Medicaid benefit programs, as the parties entered into a valid contract, which the provider did not breach, and the patients failed to support the patients' claims that the provider committed an unfair trade practice or breached a fiduciary duty owed to the patients. *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006).

In a dealer's action for breach of contract and trespass to chattel against two buyers following the buyers' purchase of a vehicle, the trial court properly granted summary judgment to the dealer as the buyers' breach of contract, trespass to chattel, and default on the purchase agreement essentially waived any right they had to arbitrate the dispute; moreover, an appeal as to the propriety of the supersedeas bond imposed was dismissed as moot. *Almonte v. West Ashley Toyota*, 281 Ga. App. 808, 637 S.E.2d 755 (2006), cert. denied, 2007 Ga. LEXIS 71 (2007).

In a buyer's suit arising out of a failed deal to sell the seller's business seeking damages for breach of contract and specific performance, the trial court erred in granting summary judgment to the sellers as construction of the plain language of an addendum to the parties' letter of intent to sell the business showed that the parties had reached a binding agreement on all material terms concerning the purchase and sale of that business. *Goobich v. Wa-*

ters, 283 Ga. App. 53, 640 S.E.2d 606 (2006).

Based on the application of a merger clause in an expressed and lawful property sales contract, and the clear and unambiguous intent not to hold the lenders liable for transactions concerning the conveyance of a beach house made as consideration supporting the sale, summary judgment was properly granted to the lenders on the sellers' claims of fraud, concealment, breach of contract and unjust enrichment filed against the sellers. *Donchi, Inc. v. Robdol, LLC*, 283 Ga. App. 161, 640 S.E.2d 719 (2007).

Trial court did not err in awarding summary judgment to the State Medical Education Board, making a student liable for both the amount of the scholarship received and attorney's fees, as: (1) estopels were unfavored under Georgia law; (2) the student came forward with no more than hearsay to support a claim that oral misrepresentations of fact were made regarding the scholarship; (3) the contract was not rescinded by either party; (4) no mutual mistake of fact was found; and (5) any impossibility in performing the contract was personal to the student. *Calabro v. State Med. Educ. Bd.*, 283 Ga. App. 113, 640 S.E.2d 581 (2006).

Because a buyer failed to comply with provisions of its contract with a seller requiring written notice of a breach, this failure barred the buyer from relying on the seller's alleged breach of the agreement as a basis for the buyer's refusal to close and demand for refund of the earnest money; but, because the seller complied with the notice provision by notifying the buyer that the buyer's refusal to close placed the buyer in breach or default of the agreement and that the buyer had 15 days to cure the breach or default, upon the buyer's failure to do so, the buyer was entitled to summary judgment and to retain the earnest money as liquidated damages. *Pillar Dev., Inc. v. Fuqua Constr. Co.*, 284 Ga. App. 858, 645 S.E.2d 64 (2007), cert. denied, 2007 Ga. LEXIS 669 (Ga. 2007).

Under the same transaction test, because the claims raised by a buyer in a Georgia state court were judicially determined in litigation between the parties in

both the federal district court and the federal circuit court of appeals, and also sought redress for the same wrongs, the state court did not err in denying the buyer's partial summary judgment motion regarding those wrongs. *BKJB P'ship v. Moseman*, 284 Ga. App. 862, 644 S.E.2d 874, cert. denied, 2007 Ga. LEXIS 558 (Ga. 2007).

Upon construction of a contract between an independent contractor and a billboard owner under O.C.G.A. § 13-2-2 because: (1) it was clear that the contractor did not waive any right to recover against the owner under any possible scenario, but only waived a right to recover against the owner's predecessor for damages if the waiver did not invalidate the insurance coverage; and (2) the contract only waived the owner's liability if the waiver did not invalidate the contractor's insurance, summary judgment was erroneously entered to the owner on grounds that the contractor waived a right to recover from the owner and because the trial court failed to consider whether the waiver invalidated the contractor's insurance. *Holmes v. Clear Channel Outdoor, Inc.*, 284 Ga. App. 474, 644 S.E.2d 311 (2007).

While the trial court properly found that a separate and independent contract made the subject of the buyers' breach of contract counterclaim against the seller unenforceable, supporting summary judgment for the seller on the buyers' counterclaim, the court erred in finding that the buyers' denial of any liability to the seller on the seller's complaint was insufficient; thus, the seller was not entitled to summary judgment on the seller's complaint for payment under a consignment contract and for attorney fees. *Jones v. Equip. King Int'l*, 287 Ga. App. 867, 652 S.E.2d 811 (2007).

On appeal from an order granting a broker's customer summary judgment in the broker's breach of contract action, because the merger doctrine did not apply to the fee contract involving a broker and the customer and the loan contract between the lender and the customer, and material fact issues remained as to the compensation due to the broker, and as to what effect, if any, a modification of the amount of the broker's fee had on the

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broker's fee agreement with the broker's customer, summary judgment in the customer's favor was reversed. *Atlanta Integrity Mortg., Inc. v. Ben Hill United Methodist Church, Inc.*, 286 Ga. App. 795, 650 S.E.2d 359 (2007).

While the trial court did not err in entering an order granting partial summary judgment to a city on the city's breach of contract claim against a county and the county's tax commissioner, ruling that the latter breached the county's contract to bill, collect, and remit ad valorem taxes on the city's behalf because the county was not given adequate notice that the trial court would address the amount of damages incurred by the city as a result of the county's breach, the grant of summary judgment as to the damages issue was reversed on due process grounds. *Ferdinand v. City of East Point*, 288 Ga. App. 152, 653 S.E.2d 529 (2007), cert. denied, 2008 Ga. LEXIS 213 (Ga. 2008).

In a breach of contract action filed by a school against an enrolled student's parents seeking payment of a full year's tuition, the trial court properly granted summary judgment to the school as the parents failed in the parents' burden of showing that a liquidated damages clause in the contract amounted to an unenforceable penalty. *Turner v. Atlanta Girls' Sch., Inc.*, 288 Ga. App. 115, 653 S.E.2d 380 (2007).

Because the third party failed to present sufficient evidence supporting that party's position that the third party had a right, as successor in interest, to sue on a creditor's account with the creditor's debtor in order to support the third party's right, summary judgment in the third party's favor in a suit against the debtor was erroneously entered. *Ponder v. CACV of Colo., LLC*, 289 Ga. App. 858, 658 S.E.2d 469 (2008).

Summary judgment for a bank was proper on a corporation's breach of contract, promissory estoppel, and fraud claims as the bank did not promise not to foreclose the bank's superior mortgage on a property under any circumstances; the

bank simply promised to pay the corporation if lots were sold and the corporation removed the corporation's materialman's lien. *Kesco, Inc. v. Brand Banking Co.*, 268 Ga. App. 874, 603 S.E.2d 49 (2004).

Trial court properly denied summary judgment to an independent medical utilization review provider for an employee benefit health plan on a plan participant's breach of contract claim as the participant asserted a third party beneficiary claim against the review provider under a side contract between the review provider and the plan sponsor. *Monroe v. Bd. of Regents of the Univ. Sys.*, 268 Ga. App. 659, 602 S.E.2d 219 (2004).

Summary judgment was improperly granted in favor of a limited partner on that partner's claim that a corporation's breach of contract claim against the partner was barred by the four year statute of limitations applicable to contracts for the sale of goods under O.C.G.A. § 11-2-725 because the contract involved a conveyance of leasehold interests in real property for oil and gas exploration, not the sale of oil and gas. Summary judgment should have been awarded in favor of the corporation on the corporation's claim that the six year statute of limitations in O.C.G.A. § 9-3-24, which was applicable to contracts in writing, applied and did not bar the action. *ABF Capital Corp. v. Yancey*, 264 Ga. App. 850, 592 S.E.2d 492 (2003).

Trial court improperly granted summary judgment to a claims administrator for an employee benefit health plan on a plan participant's breach of contract claim as the participant raised a jury question on the issue of whether the claims administrator performed the administrator's contractual obligations. *Monroe v. Bd. of Regents of the Univ. Sys.*, 268 Ga. App. 659, 602 S.E.2d 219 (2004).

Contract for specific performance. — Grant of summary judgment to the plaintiff on the plaintiff's action for specific performance of a contract provision that allegedly required the defendant to sell the defendant's stock to the plaintiff was affirmed; the trial court properly found that the contract required one partner to sell that partner's corporate stock to another partner at book value as deter-

mined by the corporation's CPA, and that the contract was valid, enforceable, and supported by valuable consideration. *Auldridge v. Rivers*, 263 Ga. App. 396, 587 S.E.2d 870 (2003).

Attorney fee contracts. — Trial court properly granted summary judgment to an attorney in the attorney's action to collect fees due under a written fee agreement with a former client as the attorney provided the services outlined within the contract, and the former client failed to produce any competent evidence supporting an affirmative defense of failure of consideration after the attorney made a prima facie case for summary judgment. *Browning v. Alan Mullinax & Assocs., P.C.*, 288 Ga. App. 43, 653 S.E.2d 786 (2007).

Real estate sales contract. — In an action arising from the sale of a condominium unit, the trial court did not err in denying the owners' summary judgment motion on the owners' claim of a right of first refusal, as the owners had no such right, but the owners were properly granted summary judgment on the buyer's claims of tortious interference with contractual and business relations and for punitive damages as the owners had a legitimate right to protect when the owners voted on the sale of the subject unit. *Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

Contract for marital settlement. — Trial court erred in granting summary judgment to the executors on an action to enforce a marital settlement agreement entered into before one spouse died as the agreement, which was a contract, was not unenforceable for lack of consideration, but the surviving spouse was also not entitled to judgment as a matter of law because issues regarding the deceased spouse's capacity to enter into the agreement and the surviving spouse's possible rescission of the contract had to be considered by a jury. *Guthrie v. Guthrie*, 259 Ga. App. 751, 577 S.E.2d 832 (2003), aff'd, 277 Ga. 700, 594 S.E.2d 356 (2004).

Contract to make a will. — In an action to enforce a contract to make a will, the trial court erred in denying both parties' motions for summary judgment since

the contract recited adequate consideration and, thus, was not illusory but was binding, the contract was not in furtherance of an immoral relationship and thus unenforceable, and the contract had not been abandoned; thus, there were no issues for which a jury decision was required. *Abrams v. Massell*, 262 Ga. App. 761, 586 S.E.2d 435 (2003).

Contracts between contractors. — When a subcontractor sought compensation from a contractor for increased labor costs caused by the contractor, the contractor was not entitled to summary judgment dismissing the subcontractor's claim as: (1) the subcontractor did not waive the subcontractor's claim by failing to respond to the contractor's denial thereof within 48 hours as the contractor only decided whether the subcontractor could legally assert the subcontractor's claim; (2) the subcontractor's agreement to perform the subcontractor's work according to the contract's timetable did not bar the subcontractor's claim, as this only barred claims for delays contemplated by the parties when the contract was signed, and this provision did not address whether the subcontractor was entitled to compensation for increased labor costs; (3) change orders the subcontractor signed did not bar the subcontractor's claim as it sought damages for disruption, and not merely damages for delay; and (4) a "no damages for delay" provision in the contractor's contract with the owner did not bar the subcontractor's claim because it conflicted with a superseding provision of the contractor's contract with the subcontractor allowing the subcontractor to seek compensation for interferences and delays. *Atl. Coast Mech. v. R. W. Allen Beers Constr.*, 264 Ga. App. 680, 592 S.E.2d 115 (2003).

Summary judgment on contract issues. — Appellees failed to present any evidence establishing the appellees' status as the current holders of an interest in the contract at issue, despite the appellant's allegation that the contract between them has since been assigned by the appellees to a third party; therefore, since the appellant's objection that the appellees are not the real parties in interest had yet to be addressed, the trial court erred in

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granting the appellees' motion for summary judgment. *Sawgrass Bldrs., Inc. v. Key*, 212 Ga. App. 138, 441 S.E.2d 99 (1994).

Lease contracts. — Because fact issues remained as to whether a lessee's conduct in attempting to exercise a credit amounted to a waiver of the credit, and whether the lessee made a good-faith, prompt, and diligent effort to resolve the amount due under a commercial lease so as to prevent the lessor from terminating the lease and gaining possession, both of which a jury was to decide, summary judgment was improperly entered on the lessor's claim for rent, and properly denied on the lessor's petition for a writ of possession. *Eckerd Corp. v. Alterman Props.*, 264 Ga. App. 72, 589 S.E.2d 660 (2003).

Because a lessee failed to create an issue of fact regarding whether the lessor breached the parties' underlying commercial lease or whether the lessee waived the alleged breach, the trial court correctly granted the lessor's motion for summary judgment on the lessee's breach of contract claim. *Nguyen v. Talisman Roswell, L.L.C.*, 262 Ga. App. 480, 585 S.E.2d 911 (2003).

Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) to the defendants in an action for breach of a lease by the successor in interest to the lessor as the defendants admitted that the defendants had defaulted on the lease and that the successor was owed back rent. *Gilco Invs., Inc. v. Stafford Cordele, LLC*, 267 Ga. App. 167, 598 S.E.2d 889 (2004).

Because a sublease was ambiguous regarding a sublessee's obligation to pay operating expenses due under the master lease, fact questions remained as to the parties' intent, and a trial court erred in entering summary judgment for the sublessee. *Holcim (US), Inc. v. AMDG, Inc.*, 265 Ga. App. 818, 596 S.E.2d 197 (2004).

Indemnity contracts. — In an action to recover under an indemnity agreement, because the undisputed facts showed that

a party was estopped from denying the validity of a bond, and that the party indemnified a surety for payments made thereunder, the surety was properly granted summary judgment as to the party's liability for monies paid under the bond. *Samda Inv. Group, LLC v. Western Sur. Co.*, 287 Ga. App. 235, 651 S.E.2d 152 (2007).

Because the debtor read a plain, unambiguous guaranty contract and signed the contract as written, the court enforced the contract as written and granted summary judgment to the bank; summary judgment on damages was reversed because, although the remainder of the damages could be calculated on the record, no evidence in the record supported the post-closing interest rate. *Charania v. Regions Bank*, 264 Ga. App. 587, 591 S.E.2d 412 (2003).

Guaranty contract. — As no matter of fact was involved, the construction of a guaranty was a matter of law for the court, which found that the guaranty executed by a guarantor contained a very broad waiver clause that plainly and unambiguously waived any claims the guarantor might have had against the debtor and extended to claims arising in equity, or under contract, statute, or common law; the waiver obviously included a claim under O.C.G.A. § 10-7-41, so the trial court erred by denying summary judgment to the debtor and other defendants, and erred as well in granting summary judgment in favor of the guarantor. *Brookside Cmtys., LLC v. Lake Dow N. Corp.*, 268 Ga. App. 785, 603 S.E.2d 31 (2004).

Because an agent for a limited liability company and a builder's vice president testified that the parties negotiated and agreed on the terms of a construction contract including price, time, and the form of the contract, and the limited liability company authorized the builder to begin, the facts showed that the parties entered into an enforceable contract, and since a contract existed, the members' personal guaranties of the construction contract were valid; a trial court's summary judgment in favor of the builder on the members' personal guaranties was affirmed. *Marett v. Brice Bldg. Co.*, 268 Ga. App. 778, 603 S.E.2d 40 (2004).

In an action to collect unpaid rent and fees owed by a lessee to a lessor under a lease agreement, the trial court properly granted partial summary judgment to the lessor, and against the lessee and the lessee's guarantor, as: (1) the language in the lease could not be construed to limit or modify the guarantor's pre-existing obligations under the guaranty through the time of the guarantor's revocation of the lease; and (2) the language of the guaranty, standing alone, was unambiguous and created an unconditional, continuing guaranty. *The Cupboard, LLC v. Sunshine Travel Ctr.*, 283 Ga. App. 34, 640 S.E.2d 584 (2006).

In an action on a guaranty, because the plain and unambiguous terms of the guaranty and the guaranty's addendum only obligated the guarantor to the lease obligations of the original tenant, who was also the guarantor's subsidiary, and not the obligations of a new tenant, the guarantor was properly absolved of any liability to the landlord for the obligations of that new tenant, entitling the tenant to summary judgment on that issue. *Highwoods Realty L.P. v. Cmty. Loans of Am., Inc.*, 288 Ga. App. 226, 653 S.E.2d 807 (2007).

Successor in interest tax liability. — Order granting summary judgment on the issue of a successor in interest's liability for unpaid taxes in favor of that successor was reversed as the successor failed to protect itself from successor liability for the unpaid sales and use taxes owed by the successor's predecessor under O.C.G.A. § 48-8-46, and the successor failed to protect itself against unrecorded tax liens to the extent allowed by the statute. *Graham v. JD Design Group, Inc.*, 281 Ga. App. 347, 636 S.E.2d 66 (2006).

Warranty contracts. — Summary judgment should have been granted to a store, pursuant to O.C.G.A. § 9-11-56(c), in an action by a dissatisfied customer who asserted causes of action for breach of an express warranty and a violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as the customer failed to offer evidence of the terms of the warranty, which made both claims lack any foundation; the alleged warranty was based on a store employee's notation on

the customer's receipt that the kitchen cabinets that the customer purchased had a "10-year warranty," but there was no indication of any further terms, so there was no enforceable warranty proven. *Home Depot U.S.A., Inc. v. Miller*, 268 Ga. App. 742, 603 S.E.2d 80 (2004).

Consent decree. — Summary judgment was affirmed because no construction was required of a consent decree; therefore, the trial court was required to enforce the agreement as written. Since the terms of a settlement agreement were clear and unambiguous in requiring that a motorist pay \$24,600 to settle a wrongful death claim, the settlement agreement was for new money and did not consider credit for \$10,000 already paid by the motorist's insurer; if the parties had intended to give credit for the earlier payment, the settlement agreement would have stated this. *Hicks v. Walker*, 265 Ga. App. 495, 594 S.E.2d 710 (2004).

When a tenant who terminated the tenant's lease early and agreed to pay the landlord the difference between the tenant's rental obligation and rent the landlord was able to obtain from a third party said this agreement was a guaranty from which the tenant had been discharged, the landlord was entitled to partial summary judgment on the landlord's breach of contract claim in the landlord's suit to enforce the agreement because the agreement was not a guaranty subject to the discharge provisions of O.C.G.A. § 10-7-20 et seq., as the tenant did not agree to be answerable for the debt of another but, instead, agreed to continue the tenant's rental obligation to the landlord, subject to any credit the tenant might be entitled to for rent the landlord received from a third party. *Equifax, Inc. v. 1600 Peachtree, L.L.C.*, 268 Ga. App. 186, 601 S.E.2d 519 (2004).

Breach of car dealership agreement. — Summary judgment was properly entered for an automobile manufacturer on a dealership's claim that the manufacturer improperly terminated the parties' dealership agreement as the agreement was terminated after the dealership closed the dealership's business and the dealership's property was foreclosed; the termination was not

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procedurally defective as the termination notice was sent to the dealership's location of record, to the owner of the dealership at the owner's home address, and to the dealership's attorney. *Greensboro Ford, Inc. v. Ford Motor Co.*, 267 Ga. App. 773, 600 S.E.2d 631 (2004).

Summary judgment was properly entered for an automobile manufacturer on a dealership's claim that the manufacturer failed to pay for the repurchase of the dealership's parts, signage, tools, and equipment as: (1) the dealership failed to return the required release; (2) no vehicles were left at the dealership because the inventory had been seized, impounded, and sold; (3) the property on which the dealership was located had been foreclosed; (4) when the business relocated, the dealership was no longer receiving cars or parts from the manufacturer; and (5) the dealership presented no evidence of the value of the items that the dealership contended the dealership should have been paid for. *Greensboro Ford, Inc. v. Ford Motor Co.*, 267 Ga. App. 773, 600 S.E.2d 631 (2004).

Vehicle purchase agreements. — Absent a confidential relationship between a lienholder and a prospective buyer of a vehicle subject to a lien, and absent any duty on the lienholder to disclose any problems with the vehicle's title to the buyer, the lienholder was properly granted summary judgment on the buyer's negligence, fraudulent concealment, and derivative claim for punitive damages. *Lilliston v. Regions Bank*, 288 Ga. App. 241, 653 S.E.2d 306 (2007), cert. denied, 2008 Ga. LEXIS 275 (Ga. 2008).

Foreclosure sales. — In a wrongful foreclosure proceeding, summary judgment was properly granted in favor of the foreclosing seller because the seller showed that the buyer failed to maintain property insurance or to pay the taxes and assessments due, as required under a security deed; in addition, the propriety of the foreclosure sale was established through an attorney's affidavit and a newspaper publisher's affidavit. *Ledford*

v. Darter, 260 Ga. App. 585, 580 S.E.2d 317 (2003).

Tax foreclosure sales. — Trial court properly granted summary judgment to the property owner on the property owner's action that sought to set aside a deed executed pursuant to a judicial tax foreclosure sale. No genuine issue existed but that the tax sale was void because the sale was from a grantor who did not have title to the property to the property purchaser and that the sale could not pass title, which remained in the property owner. *Canoeside Props. v. Livsey*, 277 Ga. 425, 589 S.E.2d 116 (2003).

Request for disclosure of tax records. — Trial court properly granted summary judgment to the corporation on the corporation's request for disclosure of the individual's tax records, which the corporation sought for the limited purpose of determining whether the individual's business properly qualified as a disadvantaged business regarding the awarding to it of a city contract for airport advertising, as Georgia's Open Records Act, O.C.G.A. § 50-18-70 et seq., favored the disclosure of public records, and neither the individual nor the city could find a specific exception that applied to bar disclosure under such circumstances. *City of Atlanta v. Corey Entm't, Inc.*, 278 Ga. 474, 604 S.E.2d 140 (2004).

Foreclosure actions. — Because the debtor failed to send written notice of the correct address of the subject property to the bank or the bank's agents, and could not assert an absent grantee's priority to escape the consequences of the debtor's own failure to provide a correct property address to all future holders of the note and deed, the foreclosure sale was not set aside; thus, the trial court properly granted summary judgment to the bank and the assignees of the security interest on the ground that the bank provided sufficient notice of the foreclosure sale. *Jackson v. Bank One*, 287 Ga. App. 791, 652 S.E.2d 849 (2007), cert. denied, 2008 Ga. LEXIS 169 (Ga. 2008).

In a foreclosure action between a bank and the bank's debtors, given that the debtors failed to substantiate the claims of error asserted on appeal with sufficient evidence to create a jury question, and the

bank committed no wrong in attempting to collect on a prior judgment against the debtors, summary judgment was properly entered to the bank, disposing of all the debtors' counterclaims filed against the bank. *All Fleet Refinishing, Inc. v. W. Ga. Nat'l Bank*, 280 Ga. App. 676, 634 S.E.2d 802 (2006).

Wrongful foreclosure. — Lender was properly granted summary judgment on a borrower's claims for wrongful foreclosure and breach of contract because the borrower defaulted and the borrower's claims were barred by releases of liability in loan modification documents. *Heritage Creek Dev. Corp. v. Colonial Bank*, 268 Ga. App. 369, 601 S.E.2d 842 (2004).

Georgia Land Sales Act. — Trial court properly granted summary judgment against a home buyer's claim that the sale of the property at issue failed to comply with the Georgia Land Sales Act (Act), O.C.G.A. § 44-3-1 et seq., as the property contained a house suitable for occupancy at the time of the sale; further, despite the buyer's argument that the statutory exemption under O.C.G.A. § 44-3-4(2) did not apply to residential property, giving the words of the exemption their plain and ordinary meaning, the exemption had to be read as excluding from the Act property upon which either a commercial building, an industrial building, a condominium, a shopping center, a house, or an apartment house was situated. *Mancuso v. Steyaard*, 280 Ga. App. 300, 640 S.E.2d 50 (2006).

Land sales contracts. — In an action between a buyer and a seller arising out of a land sales contract, because a question of material fact remained as to whether the failure to close was the buyer's fault, and because both an oral waiver and waiver by conduct could be inferred, the trial court erred in granting summary judgment to the seller. *Miller v. Coleman*, 284 Ga. App. 300, 643 S.E.2d 797 (2007).

In an action arising out of an alleged breach of a land sales contract, given that the trial court relied on findings of fact that had been resolved only in the context of the ruling on an interlocutory injunction filed by the buyer, and that issues of material fact plainly remained as to whether the seller fulfilled the contractual

obligations to designate land adjacent to the buyer's property for use as a city or county road, the trial court's grant of summary judgment to the seller had to be reversed. *Taylor v. Thomas*, 286 Ga. App. 27, 648 S.E.2d 426 (2007).

In an action filed by a trust and its trustee against a school board alleging breach of a real estate contract, or in the alternative, specific performance of the contract at a reduced purchase price, summary judgment in favor of the school board was reversed on the breach of contract claim; however, summary judgment on the specific performance claim was affirmed as the trust failed to tender the full purchase price, which was a prerequisite to a specific performance demand, the trust was not excused from doing so, and a tender would not have been futile. *Peaches Land Trust v. Lumpkin County Sch. Bd.*, 286 Ga. App. 103, 648 S.E.2d 464 (2007).

In a dispute over an installment contract to purchase land, because evidence sufficiently showed that a buyer partially performed a subsequent oral agreement that was not barred by a merger clause contained in the contract, and the seller accepted the benefit of such performance, summary judgment to the seller was erroneous; moreover, given that jury questions as to part performance of the oral agreement remained, the order denying the buyer's partial summary judgment motion was upheld. *Hernandez v. Carnes*, 290 Ga. App. 730, 659 S.E.2d 925 (2008).

Suit against real estate agents. — Trial court properly dismissed an action that a homebuyer filed against the buyer's real estate agent and a seller's real estate agent after the ignition of natural gas that had leaked from the fireplace in the buyer's house because there was no evidence that either agent knew about the leak, concealed the leak, or provided false information about the value of the house. *Resnick v. Meybohm Realty, Inc.*, 269 Ga. App. 486, 604 S.E.2d 536 (2004).

Trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, al-

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though a sale was not consummated, the realtor remained entitled to the realtor's six percent commission, and the seller remained obligated to pay that amount, which was the proper measure of damages. *Ben Farmer Realty, Inc. v. Owens*, 286 Ga. App. 678, 649 S.E.2d 771 (2007), cert. denied, 2008 Ga. LEXIS 81 (Ga. 2008).

Third party beneficiary. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) to the Stone Mountain Memorial Association and to the Georgia Department of Corrections in a breach of contract action by an inmate who was injured while on a work detail that was required by the Department on the Association's property as the inmate was not an intended beneficiary of the contract pursuant to O.C.G.A. § 9-2-20(b); although the contract provided for the safety of the workplace, those contract provisions were not intended to benefit the inmates on work details but, instead, the inmates were just incidental beneficiaries. *Gay v. Ga. Dep't of Corr.*, 270 Ga. App. 17, 606 S.E.2d 53 (2004).

In a breach of contract action filed by an employee, who was a third-party beneficiary to an employment contract with a contractor, the trial court erred in granting the employee summary judgment as: (1) under the plain language of the employment agreement at issue between the parties, as well as the county's personnel policy, the contractor was authorized to terminate the employee based on the employee's inability or unfitness to perform the assigned duties due to an injury; and (2) the employee could not perform all the job's requirements. *Am. Water Serv. USA v. McRae*, 286 Ga. App. 762, 650 S.E.2d 304 (2007), cert. denied, 2007 Ga. LEXIS 761 (Ga. 2007).

Because a valid general release entered into by a home buyer and home builder effectuated a binding accord and satisfaction barring any future claims between the parties, and absent evidence to void the release based on fraud, the buyer's

filed claims in a subsequent suit filed against the home builder were properly summarily dismissed; thus, assessment of attorney fees was not an abuse of discretion and a penalty for filing a frivolous appeal was ordered. *Pacheco v. Charles Crews Custom Homes, Inc.*, 289 Ga. App. 773, 658 S.E.2d 396 (2008).

Contract action involving road construction. — Summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted in the county's action to recover money had and received by the contractor because the contractor asserted that the contract, which was for road striping and which was not opened for public bidding, was for a specialized service under O.C.G.A. § 32-4-63(5), an exception to the public bidding requirements under O.C.G.A. § 32-4-64; however, O.C.G.A. § 32-1-3(6) expressly defined road striping as a form of road construction and not as a special service. *Howard v. Brantley County*, 260 Ga. App. 330, 579 S.E.2d 758 (2003).

Trial court erred in granting summary judgment on a homebuyer's breach of contract claim against the buyer's realtor as material fact issues remained as to whether the realtor violated the realtor's duties under the Brokerage Relationships in Real Estate Transaction Act, O.C.G.A. § 10-6A-1 et seq.; however, summary judgment was proper, based on the testimony presented on the motion, as to the homebuyer's fraudulent concealment claim. *Ikola v. Schoene*, 264 Ga. App. 338, 590 S.E.2d 750 (2003).

Employment contracts. — Trial court did not err by granting summary judgment to a company on an employee's action to enforce an employment agreement and a promise to convey 20 percent of the company's stock to the employee because: (1) the indefinite statement in the employment contract of the employee's duties, the term of the employment, and the employee's salary made the employment contract unenforceable; and (2) the promise of 20 percent of the company's stock was for past consideration, and that was not sufficient consideration to make the promise enforceable. *Key v. Naylor, Inc.*, 268 Ga. App. 419, 602 S.E.2d 192 (2004).

Because there was some evidence that

an employment contract was valid and enforceable, the employer was not entitled to summary judgment; but, the employer was entitled to judgment because the time period for payment of future commissions was too indefinite to be enforced as those commissions were not otherwise billable during the period of employment. *Hiers v. ChoicePoint Servs.*, 270 Ga. App. 128, 606 S.E.2d 29 (2004).

In an employee's suit arising out of the termination of an employment contract, the trial court properly granted the employer's motion for summary judgment as: (1) as an at-will employee, the employee could be terminated without cause at any time; (2) the employer was authorized to protect the employer's interest in the employer's curriculum and property; (3) no evidence supported a claim of slander; and (4) vague statements accusing the employee of a crime did not constitute slander per se. *Taylor v. Calvary Baptist Temple*, 279 Ga. App. 71, 630 S.E.2d 604 (2006).

Upon a de novo review of the plain terms outlined in an employment contract, a former employer was not entitled to receive commission payments from a former employee, a licensed sales agent, for deals closed with the employee's subsequent employer as any contrary reading would result in an unenforceable contract, under O.C.G.A. § 43-40-19(c); hence, summary judgment was properly granted to the employee on that issue, and the former employer's claim for money had and received also failed. *Richard Bowers & Co. v. Creel*, 280 Ga. App. 199, 633 S.E.2d 555 (2006).

In an action regarding an alleged breach of an employment contract seeking commissions on deals made by a real estate agent that a former real estate broker alleged it was entitled to, the trial court erred in entering summary judgment against the agent, finding that the agent owed the broker commissions as to one of two contested deals, because: (1) the agent closed the deal with that client after terminating employment with the broker; and (2) it was undisputed that the agent had not agreed to share commissions with the broker on deals struck after the agent left the broker's employ. Thus, since sum-

mary judgment was properly entered in the agent's favor regarding commissions paid to the agent as to the second of the two contested clients, the broker was not entitled to litigation costs under O.C.G.A. § 13-6-11. *Morgan v. Richard Bowers & Co.*, 280 Ga. App. 533, 634 S.E.2d 415 (2006).

Trial court did not err in denying an employer's summary judgment motion, determining that the employee had performed the services necessary to be entitled to the allegedly agreed-upon per diem compensation; hence, the employee's status as an at-will employee was not determinative, and did not bar the cause of action. *Walker Elec. Co. v. Byrd*, 281 Ga. App. 190, 635 S.E.2d 819 (2006).

Trial court did not err in granting an employer's motion for summary judgment: (1) denying the employee's request for mandamus relief, given that the employee had no clear legal right to a job reinstatement, and based on a federal conviction, that claim was moot; and (2) denying the employer's quantum meruit claim, as the existence of an employment contract, under which the employee sought the same compensation as a quantum meruit claim, precluded any quantum meruit recovery. *Williams v. City of Atlanta*, 281 Ga. 478, 640 S.E.2d 35 (2007).

In a renewal action resulting from the termination of a commission agreement in favor of a payee, because the payee's quantum meruit and reformation claims were barred by res judicata, and the fact that the state court potentially lacked jurisdiction over the reformation claim was immaterial, the trial court erred in denying the payor's motion for summary judgment. *ChoicePoint Servs. v. Hiers*, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, 2007 Ga. LEXIS 499 (Ga. 2007).

In an action arising from an alleged employment contract between the parties, the trial court erred in granting summary judgment to an employer as genuine issues of material fact remained regarding whether a contract indeed existed between the parties, which the employee actually signed and acknowledged. *Shilling v. Cornerstone Med. Assocs., LLC*, 290 Ga. App. 169, 659 S.E.2d 416 (2008).

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In a breach of contract action centering around a contract of employment with a county employer and the county's board of tax assessors, because the employment contract was never approved by the county commission, and the county's payment of a salary to the employee was not considered a ratification of the contract in the contract's entirety, the employee possessed only an at-will employment. Thus, summary judgment was properly entered against the employee. *Powell v. Wheeler County*, 290 Ga. App. 508, 659 S.E.2d 893 (2008).

Non-solicitation covenants in employment contracts. — In an action arising from an alleged breach of a non-solicitation covenant within a consultant agreement, because the employee subject to the covenant understood the covenant to apply only to those clients the employee's employer acquired when it bought the employee's former company, or with whom the employee had material contact during the course of that employment, the trial court misconstrued the agreement by limiting the agreement's scope, and the employer was erroneously granted summary judgment based on the employee's alleged breach. *Atl. Ins. Brokers, LLC v. Slade Hancock Agency, Inc.*, 287 Ga. App. 677, 652 S.E.2d 577 (2007).

Action under Fair Dismissal Act. — In an action in which an employee, who was terminated for failing to obtain an educator's certificate, waived a rehearing, and was paid a full salary through the date of a hearing, the employee's due process rights under the Fair Dismissal Act, O.C.G.A. § 20-2-940, were not violated; consequently, the school board was properly granted summary judgment. *Oliver v. Lee County Sch. Dist.*, 270 Ga. App. 61, 606 S.E.2d 88 (2004).

Solemn admission in *judicio*. — Trial court properly granted a seller's motion for partial summary judgment and denied the escrow agent's motion to dismiss, in the seller's suit to recover the earnest money deposited by the buyers because the buyers admitted in the buy-

ers' answer that the buyers knew the identity and location of the property, and although the buyers later amended the buyers' answer to raise a Georgia Statute of Frauds, O.C.G.A. § 13-5-30, defense, the buyers never withdrew the buyers' admission, and the buyers and the escrow agent were bound by the admission; the admission constituted a solemn admission in *judicio* under former O.C.G.A. § 24-4-24(b)(7) (see now O.C.G.A. § 24-14-26), and created a conclusive presumption of law under former subsection (a) of that section. *Nhan v. Wellington Square, LLC*, 263 Ga. App. 717, 589 S.E.2d 285 (2003).

Res judicata. — Appeals court agreed with the trial court that the doctrine of res judicata barred the negligence and breach of contract claims asserted by two property owners against a contractor as: (1) the claims were essentially identical to the allegations in a counterclaim filed in a prior Cherokee County action; (2) the parties in the two cases were identical for purposes of res judicata; and (3) the Cherokee County suit resulted in an adjudication on the merits. *Perrett v. Sumner*, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

Stock agreement not illegal or immoral. — Although the parties intended to circumvent Georgia Department of Revenue regulations by issuing corporate stock to an employee's spouse, the stock agreement was not illegal or immoral, a trial court erred in voiding the interest of the employee's spouse, and summary judgment in favor of the corporation in the spouse's action for an accounting, dissolution, and other relief was reversed; the corporation's failure to add a different shareholder's name to the corporate stock register did not demand a finding, for summary judgment purposes, that the person was not a shareholder, and the denial of the corporation's summary judgment motion as to that shareholder was affirmed. *Edwards v. Grapefields, Inc.*, 267 Ga. App. 399, 599 S.E.2d 489 (2004).

Oral contract for transfer of real property. — Summary judgment was properly entered against the deceased's child on a claim against the deceased's estate for specific performance in regard to an alleged oral contract for the convey-

ance of property since no evidence was presented regarding the value of the land or the home or the value of the services performed in exchange for the alleged promise. *Miller v. Miller*, 262 Ga. App. 546, 586 S.E.2d 36 (2003), overruled on other grounds, *Mateen v. Dicus*, 281 Ga. 455, 637 S.E. 2d 377.

Landowners' trespass and negligence suit. — Trial court properly denied a neighbor's motion for summary judgment and the appellate court reversed the denial of the cross-motion for summary judgment filed by the adjoining landowners in a trespass and negligence suit because the neighbor purchased property without first obtaining a survey and the adjoining landowners' home was already encroaching upon the neighbor's property by two feet at the time of the purchase; the adjoining landowners were not liable for their predecessor's conduct in building the house and a fence across the property line of the neighbor's predecessor in title, in the absence of evidence that their predecessor was acting as their agent, and were, therefore, entitled to summary judgment. *Navajo Constr., Inc. v. Brigham*, 271 Ga. App. 128, 608 S.E.2d 732 (2004).

Landowner's trespass and nuisance suit. — In two cases involving a dispute for nuisance and trespass arising out of excessive water runoff which flowed onto a landowner's land, the trial court's grant of summary judgment to a construction contractor as to the issue of the contractor's liability was reversed, while the denial of summary judgment to a developer as to the issue of the contractor's liability was affirmed, as: (1) the combination of the lay and expert testimony as to the presence of the excess runoff and its cause presented questions of fact for a jury to decide; (2) merely because the county approved the development activities did not mean that either the contractor or the developer or both could not be held liable for nuisance; and (3) the landowner's action against the alleged creators of the water-runoff nuisance was authorized, regardless of their having sold the property. *Green v. Eastland Homes, Inc.*, 284 Ga. App. 643, 644 S.E.2d 479 (2007), cert. denied, 2007 Ga. LEXIS 629 (Ga. 2007).

Premises liability to invitee. — In a premise liability action, because questions

of fact remained as to whether a student was a university's invitee at the time the student was shot on what was alleged to be the university's property at the time of the assault, and thus, whether the university owed the student a duty of ordinary care, and no evidence was presented that the student lost an "invitee" status, summary judgment in the university's favor was reversed. *Clark Atlanta Univ., Inc. v. Williams*, 288 Ga. App. 180, 654 S.E.2d 402 (2007), cert. denied, 2008 Ga. LEXIS 227 (Ga. 2008).

In a premises liability action filed by a guest of a property owner, because the guest failed to show that the owner had any actual or constructive knowledge of the alleged hazard that allegedly caused the guest's injuries, specifically, a hole in an otherwise flat, grassy area of the owner's yard, the court properly granted the owner summary judgment. *Thomas v. Deason*, 289 Ga. App. 753, 658 S.E.2d 165 (2008).

Restrictive covenants. — On appeal from an order in a declaratory judgment action, the trial court did not err in finding, upon cross-motions for summary judgment, that restrictive covenants which had been made applicable to the subdivision over 20 years earlier remained in effect and prohibited a buyer from re-subdividing certain tracts into residential lots with less than five acres, but did err in ruling that interpretation of the covenants was a legal matter for the court, rather than a factual matter for the jury. *Britt v. Albright*, 282 Ga. App. 206, 638 S.E.2d 372 (2006), cert. denied, 2007 Ga. LEXIS 199 (Ga. 2007).

Credibility. — If credibility is crucial, summary judgment becomes improper and a trial indispensable. *Winkles v. Brown*, 227 Ga. 33, 178 S.E.2d 865 (1970).

If a question of credibility arises as to a material issue, summary judgment should not be granted. *Georgia Cas. & Sur. Co. v. Almon*, 122 Ga. App. 42, 176 S.E.2d 205 (1970); *Ash v. Spear*, 137 Ga. App. 12, 223 S.E.2d 26 (1975).

Questions of credibility cannot be resolved on summary judgment. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

False light and invasion of privacy. — Trial court properly granted summary

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judgment to an auto dealer, mortgage broker, and lender on an accused person's claim for invasion of privacy by placing a person in a false light as the accused person did not show that the false information — that the accused person allegedly participated in a fraudulent financing scheme — was distributed to the public at large. Additionally, the trial court correctly granted summary judgment on the issue of the accused person's claim that there was an invasion of privacy through appropriation as the accused person did not show any evidence that they took the accused person's name and likeness for their own advantage. *Blakey v. Victory Equip. Sales, inc.*, 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Defamation actions. — Summary judgment procedures are particularly appropriate in defamation actions when U.S. Const., amend. i is applicable. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Because of the importance of free speech, summary judgment is the rule, not the exception, in defamation cases. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

Debtor's defamation claim, under O.C.G.A. § 51-5-1(a), against a creditor for reporting its repossession of collateral from the debtor to credit reporting agencies was properly summarily dismissed, under O.C.G.A. § 9-11-56(c), because such a claim was preempted by the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., absent the creditor's malice or willful intent to injure the debtor, which were not shown. *Corbin v. Regions Bank*, 258 Ga. App. 490, 574 S.E.2d 616 (2002).

Summary judgment for a city manager was appropriate in a community activist's defamation action because the activist was a limited-purpose public figure by reason of extensive participation in city affairs, and the activist failed to show actual malice by the manager. *Sparks v. Peaster*, 260 Ga. App. 232, 581 S.E.2d 579 (2003).

Summary judgment was improperly granted to an employer pursuant to O.C.G.A. § 9-11-56(c) in a terminated employee's suit alleging breach of contract, defamation, and tortious interference with contract because there were disputed questions of material fact and matters of credibility that a jury had to resolve regarding whether the corporation's president discharged the employee in good faith or did so for personal reasons unrelated to the employee's job performance. *Salhab v. Tift Heart Ctr., P.C.*, 260 Ga. App. 799, 581 S.E.2d 363 (2003).

Statement that a sheriff provided to the Georgia Department of Labor (DOL) after the sheriff decided not to rehire an employee and the employee filed a claim for workers' compensation benefits was privileged, and the trial court ruled correctly that the sheriff was entitled to summary judgment on the employee's claim alleging slander, even though the sheriff's statement was published by a newspaper one week later and the newspaper published a follow-on article that stated that the sheriff stood by the statement the sheriff made to the DOL. *Cooper-Bridges v. Ingle*, 268 Ga. App. 73, 601 S.E.2d 445 (2004).

Trial court erroneously granted summary judgment against an election candidate, and in favor of the incumbent, on the former's defamation claims stemming from a printed newspaper advertisement as issues of fact remained as to the actual malice exhibited by the incumbent in publishing the advertisement, and the flagrant accusations stated therein went beyond the criticism, hostility, and unfairness a candidate might expect to encounter while running for political office. *Howard v. Pope*, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

Libel actions. — In an action by a contractor against a newspaper and the newspaper's editor, because: (1) the average reader would have interpreted a printed headline's use of the term "rape" as an attempt to convey the severity of the damage to the land that the contractor inflicted rather than to characterize the contractor's conduct that resulted in the damage as criminal; and (2) the article referred to by the headline did not constitute libel per se as the editor unquestion-

ably did not intend, and readers did not interpret, the word “rape” as having any sexual connotation in the context used in the article, the editor and the newspaper were properly granted summary judgment as to the contractor’s libel and libel per se claims. *Lucas v. Cranshaw*, 289 Ga. App. 510, 659 S.E.2d 612 (2008).

Defamation actions by public figures. — If public figures bring defamation actions, summary judgment, rather than a trial on the merits, is a proper vehicle for affording constitutional protection if there is no substantive basis for a finding of knowing falsity or reckless disregard. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

In as much as the First Amendment mandates that a public figure plaintiff prove actual malice by clear and convincing evidence, a court ruling on a motion for summary judgment in a defamation case must be guided by the *New York Times* “clear and convincing” evidentiary standard in determining whether a genuine issue of actual malice exists — that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. *Barber v. Perdue*, 194 Ga. App. 287, 390 S.E.2d 234 (1989), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 414 (1990).

Application of public figure standard in libel case. — Summary judgment as to liability was reversed because the intermediate appellate court and the trial court applied the wrong standard of fault to a limited-purpose public figure involved in a controversy over the operation of a county landfill; the *New York Times v. Sullivan* standard applied, requiring the public figure to prove by clear and convincing evidence that the Internet user published false and defamatory statements knowing that the statements were false or acting in reckless disregard of their truth or falsity. *Mathis v. Cannon*, 276 Ga. 16, 573 S.E.2d 376 (2002).

Application of voluntary payment doctrine. — Voluntary payment doctrine did not bar a city’s unjust enrichment and conversion claims filed against a construction contractor as the contractor failed to show that a genuine issue of material fact

remained over whether the city was negligent in ascertaining the true facts and any prejudice if the duplicate payment were returned to the city. *D & H Constr. Co. v. City of Woodstock*, 284 Ga. App. 314, 643 S.E.2d 826 (2007).

Assertions that were merely opinions. — Trial court properly granted the youth leader’s motion for summary judgment on the troop leader’s libel action since the youth leader’s resignation letter, which, inter alia, alleged that the troop leader was “immoral” and did not live life according to the ideals of scouting did not support a libel action since its assertions were only opinions, incapable of being proved false. *Gast v. Brittain*, 277 Ga. 340, 589 S.E.2d 63 (2003).

Action against police officers. — In an action for false arrest, false imprisonment, and malicious prosecution, the police officers were entitled to summary judgment based on qualified immunity after a school’s principal failed to show the officers acted with actual malice or deliberate intent to injure the principal when the officers arrested the principal for hindering the arrest of two students for fighting and closing a door on an officer’s foot and arm. *Reed v. DeKalb County*, 264 Ga. App. 83, 589 S.E.2d 584 (2003).

Background check agent was entitled to summary judgment on the employee’s claims for negligence, defamation, libel, and slander since the employee’s agreement with the employer, which contained an exculpatory clause releasing the employer and the employer’s agents from any liabilities, claims, or lawsuits in regard to the information obtained in any background check was valid and the libel, slander, and defamation claims were barred by the one year statute of limitations as publication occurred when the agent sent the report to the employer not when the employer fired the employee. *McCleskey v. Vericon Res., Inc.*, 264 Ga. App. 31, 589 S.E.2d 854 (2003).

Defenses of lack of jurisdiction and insufficient service. — Defenses of lack of jurisdiction over the person and insufficiency of service of process are matters in abatement, not matters in bar, and are not within the scope of summary judgment procedure. *Larwin Mtg. Investors v. Delta*

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Equities, Inc., 129 Ga. App. 769, 201 S.E.2d 187 (1973).

Jurisdictional type motion is not within the scope of summary judgment procedure. *Hemphill v. Con-Chem, Inc.*, 128 Ga. App. 590, 197 S.E.2d 457 (1973).

Waiver of most defenses. — Trial court erred to the extent the court ruled that an insurer was prevented from introducing any evidence on liability following a default judgment entered against the insurer because the insurer could still assert policy defenses but, otherwise, by failing to answer timely the insurer was precluded from asserting any affirmative defense included within O.C.G.A. § 9-11-8(c). *Willis v. Allstate Ins. Co.*, 321 Ga. App. 496, 740 S.E.2d 413 (2013).

Motions to dismiss for lack of jurisdiction over the person, when tried on affidavits pursuant to O.C.G.A. § 9-11-43(b), do not become motions for summary judgment. *McPherson v. McPherson*, 238 Ga. 271, 232 S.E.2d 552 (1977); *Terrell v. Porter*, 189 Ga. App. 778, 377 S.E.2d 540 (1989).

Although a defendant's motion for summary judgment raised the issue of insufficiency of service of process, that defense is a plea in abatement and, as such, it is not properly a basis of a motion for summary judgment, but if the defense is raised for resolution in the trial court and it has not otherwise been waived by the defendant, the nomenclature of the pleading that raises that issue should not be a material consideration. Under these circumstances, the proper disposition of the case is to vacate the order of the trial court on the cross-motions for summary judgment and to remand the case with the direction that the plaintiff's complaint be dismissed for insufficiency of service of process. *Cheshire Bridge Enters., Inc. v. Lexington Ins. Co.*, 183 Ga. App. 672, 359 S.E.2d 702, cert. denied, 183 Ga. App. 905, 359 S.E.2d 702 (1987).

Dilatory pleas. — Because summary judgment was improperly granted on a dilatory plea, and hence was not an adjudication on the merits, a plea of res

judicata in a subsequent action would be denied. *National Heritage Corp. v. Mount Olive Mem. Gardens, Inc.*, 244 Ga. 240, 260 S.E.2d 1 (1979).

Discrimination. — Although there was evidence that a homeowner who listed a house with a real estate agency committed discrimination when the homeowner refused to show the house to African-American homebuyers, the evidence did not support the homebuyers' claims that the agency and a broker who worked for the agency participated in that discrimination, and the appellate court reversed the trial court's judgment denying summary judgment in favor of the agency, the broker, and a real estate company that sold a franchise to the agency on the homebuyers' claims alleging violation of Georgia's Fair Housing Act, O.C.G.A. § 8-3-200 et seq., and intentional infliction of emotional distress. *Coldwell Banker Real Estate Corp. v. DeGraft-Hanson*, 266 Ga. App. 23, 596 S.E.2d 408 (2004).

Dispute as to meaning of words. — When it is clear from a writing and other evidence that the parties' intent as to meaning of certain words contained in the writing is in dispute, summary judgment should not be granted. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

Language of agreement controlled between exterminator and insurer. — Exterminator was properly granted summary judgment in a home owner's action to recover additional damages after a settlement for termite damage because the literal language of the agreement made additional repairs the responsibility of an insurer, rather than the exterminator. *Anderson v. Astro Exterminating Servs.*, 259 Ga. App. 370, 577 S.E.2d 67 (2003).

Domestication of child support judgments of foreign countries. — In a case in which the plaintiff, a West German resident, sought to domesticate a West German judgment for child support, and because the facts established the defendant's minimum contacts with West Germany and that the defendant was afforded adequate notice and a reasonable opportunity to be heard in West Germany, the court abused the court's discretion in failing to rule that the West German judg-

ment be domesticated and was enforceable according to the judgment's terms. *Knothe v. Rose*, 195 Ga. App. 7, 392 S.E.2d 570 (1990).

Failure to file Family Violence Report. — Officers who investigated a claim of possible child abuse failed in the officers' obligation to file a Family Violence Report, as required by O.C.G.A. § 17-4-20.1(c), and the trial court properly denied a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 by the officers and others in a wrongful death claim on behalf of a deceased child as genuine issues of material fact existed as to whether their failure to investigate and file the necessary report proximately resulted in the child's injuries and death; the definition of "family violence" was broad under O.C.G.A. § 19-13-1, and although "reasonable discipline" was expected thereunder, the officers had an obligation to investigate allegations that a child was being whipped. *Meagher v. Quick*, 264 Ga. App. 639, 594 S.E.2d 182 (2003).

Forfeiture of bond. — Jury trial is not required when a bond is forfeited, unless the trial court agrees that there are genuine issues of material fact to be resolved. *State v. Slaughter*, 246 Ga. 174, 269 S.E.2d 446 (1980).

On forfeiture of bond, securities become quasiparties to the proceedings and subject themselves to the jurisdiction of the court so that summary judgment may be rendered on their bonds. *State v. Slaughter*, 246 Ga. 174, 269 S.E.2d 446 (1980).

Counterclaim for payments on bond by co-surety. — Summary judgment was properly entered for a lessee bank on a lessor developer's counterclaim that alleged that the bank was obligated to pay the entire debt to the bondholder incurred to fund the project, rather than the debt service over the 15-year term of the lease, as the parties knew that the lease term was 15 years and that the term of the note was 20 years, yet failed to specifically provide that the bank pay the debt after the lease expired; parol evidence was inadmissible under O.C.G.A. § 13-2-2(1) to prove the parties' intentions as the lease was unambiguous. *Porter Communs. Co. v. SouthTrust Bank*, 268

Ga. App. 29, 601 S.E.2d 422 (2004).

Fraud. — Although summary judgment may in a proper case be obtained in an action based on fraud and misrepresentation, summary judgment will be denied if the moving party is not entitled to judgment as a matter of law. *Mitchell v. Calhoun*, 229 Ga. 757, 194 S.E.2d 421 (1972).

If information as to a claimed fraudulent transaction rests exclusively within the knowledge of the participants, and the plaintiff has no means successfully to meet the facts alleged in the defendant's affidavit, summary judgment should not be granted on the defendant's affidavit. *Mitchell v. Calhoun*, 229 Ga. 757, 194 S.E.2d 421 (1972).

Because the plaintiff alleged fraud but failed to point to any evidence to prove an essential element of fraud, there remained no genuine issue of material fact, and therefore the trial court did not err in granting the defendant's motion for summary judgment on the issue of fraud. *Brown v. Buffington*, 203 Ga. App. 402, 416 S.E.2d 883 (1992).

Trial court erroneously granted summary judgment dismissing the home buyers' fraud claim against the sellers and the sellers' agent, given various misrepresentations made by the sellers' agent on the sellers' behalf, for the purpose of inducing the buyers to purchase the home. *Smiley v. S & J Inves., Inc.*, 260 Ga. App. 493, 580 S.E.2d 283 (2003).

When items stolen from an electric company were sold to a supply company, the supply company was not entitled to summary judgment dismissing the electric company's fraud claim against the supply company because a jury could find that the supply company's principal knew the items were stolen. *Fed. Ins. Co. v. Westside Supply Co.*, 264 Ga. App. 240, 590 S.E.2d 224 (2003).

Trial court erred in granting summary judgment pursuant to O.C.G.A. § 9-11-56(c) to a parent in an action against the parent's child, alleging fraud and coercion in the child's failure to transfer assets to the parent after the parent had transferred them to the parent's two children in order to protect them in the event that the parent was put into a

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nursing home; the evidence showed that the parent had control over all faculties and was under no duress, fraud, or coercion while engaging in the transfers to the children, and summary disposition of the issues as to liability and vesting of title back to the parent was inappropriate. *Friar v. Friar*, 265 Ga. App. 680, 595 S.E.2d 374 (2004).

Because it was shown that a decedent, before dying, substantially depleted his assets by making gifts to his wife and by purchasing land in the name of a corporate entity without consideration from the entity, a jury could infer that the decedent was intentionally depleting his assets to deprive his ex-wife of access to those assets in claims under the terms of a settlement agreement between the decedent and the ex-wife. Since such actions could be construed as an intent to defraud, it was error to grant the decedent's executor, the decedent's surviving wife, and the corporate entity summary judgment on claims of fraud. *Miller v. Lomax*, 266 Ga. App. 93, 596 S.E.2d 232 (2004).

Buyer presented enough evidence to raise issues of fact concerning the buyer's claim that the sellers knew about the condition of a septic system before the sellers sold the house and intentionally misled the buyer by telling the buyer that the system was in "perfect working order," and the trial court erred by granting the sellers' motion for summary judgment on the buyer's claim alleging fraud. *Hudson v. Pollock*, 267 Ga. App. 4, 598 S.E.2d 811 (2004).

Summary judgment for storage companies in an owner's fraud claim was proper because: (1) the parties' contract contained a merger clause; (2) the owner did not seek to rescind the contract until the owner filed a complaint; (3) by seeking damages for breach of contract in the owner's complaint, the owner took action inconsistent with a repudiation; (4) the owner delayed almost nine months in attempting to rescind the contract; and (5) since the owner failed to promptly rescind the contract, the merger clause barred the

owner's fraud claim. *Liberty v. Storage Trust Props., L.P.*, 267 Ga. App. 905, 600 S.E.2d 841 (2004).

In an action between a home builder and its buyers, the trial court did not err in granting summary judgment on the buyers' fraud claim as: (1) the terms of the construction contract explicitly acknowledged that the construction price was based on allowances set in the budget and would change if actual costs exceeded the original allowance amount; (2) the buyers both acknowledged that the buyers understood that the original contract price was not a fixed price, and that the buyers would be responsible for actual costs that exceeded the allowances contained in the contract; (3) the buyers admitted that a portion of the additional costs resulted from changes that the buyers had requested; and (4) as a result, the mere existence of the change orders did not indicate that the builder fraudulently induced the buyers to enter into the contract. *Davis v. Whitford Props.*, 282 Ga. App. 143, 637 S.E.2d 849 (2006).

Trial court did not err in granting a car dealer summary judgment against a customer's fraud claim as: (1) the customer's contention that the dealer knew of the alleged defects in a car sold to the customer at the time of the sale was specifically negated by affidavits submitted by the dealer's service and maintenance employees; and (2) even if the dealer knew of the car's defectiveness after the sale, this knowledge did not amount to either knowledge, or a reckless disregard of the car's defectiveness, at the time of the sale; hence, as a result, the trial court did not err in granting the dealer's motion for summary judgment on the customer's claims for attorney fees under O.C.G.A. § 13-6-11, costs, and punitive damages pursuant to O.C.G.A. § 51-12-5.1. *Morris v. Pugmire Lincoln Mercury, Inc.*, 283 Ga. App. 238, 641 S.E.2d 222 (2007).

Dissolution of nonprofit corporation. — Trial court erred in entering summary judgment for a college as to a Baptist convention's request to enjoin the college from dissolving as: (1) the convention was a member of the college under the Georgia Nonprofit Corporations Code, specifically under an earlier version of

O.C.G.A. § 14-3-140; (2) the college's attempt at dissolving was a sham as the college intended to continue its functions under a new corporate entity; (3) the corporate reorganization was either a merger under O.C.G.A. § 14-3-1103(a)(3) or a disposition of assets under O.C.G.A. § 14-3-1202(b)(3), but it was not a true dissolution, and absent the convention's approval, it could not stand; and (4) O.C.G.A. § 14-3-1430(2)(A) did not justify the dissolution as the convention was the only member and it did not seek dissolution. *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).

Stockholders' declaratory judgment action. — Because no evidence was presented that the shares in the administratively dissolved company which the stockholders originally purchased, and which pre-dated the corporation's formation, were ever transformed into the corporation's stock, and the stockholders' fraud claims were vague at best, the corporation was properly granted summary judgment in the stockholders' declaratory judgment action seeking a declaration that the stockholders owned stock in the corporation based on the stockholders' purchase of stock in the administratively dissolved company. *Wright v. AFLAC, Inc.*, 283 Ga. App. 890, 643 S.E.2d 233 (2007).

Georgia Public Service Commission. — Actions against the Georgia Public Service Commission are not exempt from the summary judgment procedures of O.C.G.A. § 9-11-56. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Application to Telephone Customer Protection Act. — Because a telephone customer was enrolled in a radio station's discount program, calls containing unsolicited advertisements fell within the established business relationship exemption and were not automatically prohibited by the Telephone Customer Protection Act (TCPA), 47 U.S.C. § 227; the telephone customer was barred from recovering under the TCPA, and summary judgment in favor of the radio station was affirmed. *Schneider v. Susquehanna Radio Corp.*, 260 Ga. App. 296, 581 S.E.2d 603 (2003).

Open Records Act. — In denying a request under the Open Records Act (ORA), O.C.G.A. § 50-18-70 *et seq.*, an agency was limited to the authority cited in denying an initial request; an insurance commissioner's refusal to disclose an investigation report and records was an abuse of discretion based on the reasons provided for denying the request, and an order granting summary judgment in favor of the commissioner and denying an individual's summary judgment motion in an ORA action was reversed. *Hoffman v. Oxendine*, 268 Ga. App. 316, 601 S.E.2d 813 (2004).

Insufficiency in the allegations of a complaint is not a matter that is proper for review on a motion for summary judgment if the allegations of the complaint are considered well-pled and the single issue before the court is whether on the merits the moving party in the position of a defendant has carried the party's burden of showing that as a matter of law the party in the position of a plaintiff is not entitled to relief because one essential element under any theory of recovery is lacking and incapable of proof. *Robinson v. Starr*, 197 Ga. App. 440, 398 S.E.2d 714 (1990).

Insurance fraud. — Issues of fact concerning whether a former employee actually signed an insurance card and whether an insurer detrimentally relied upon alleged misrepresentations precluded the award of summary judgment in the insurer's fraud action against a former employee. *Centennial Life Ins. Co. v. Smith*, 210 Ga. App. 194, 435 S.E.2d 498 (1993).

Summary judgment was properly granted for the insurer because the insured's complaint fell outside the four-year statute of limitation for fraud and negligent misrepresentation claims. *Nash v. Ohio Nat'l Life Ins. Co.*, 266 Ga. App. 416, 597 S.E.2d 512 (2004).

Auto insurance contracts. — Since there was no law or policy requiring insurance coverage for negligent service of alcohol, the home insurer's motor vehicle exclusion applied as the injured party's damages arose out of an automobile accident, and the alleged independent act of negligence did not negate the exclusion.

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Manning v. USF&G Ins. Co., 264 Ga. App. 102, 589 S.E.2d 687 (2003).

When an injured party sued the insurer of a motorist against whom the injured party obtained a judgment, both to collect on the judgment and to assert a claim, as assignee of the motorist, for bad faith failure to settle, the insurer was not entitled to summary judgment because, even though the motorist did not provide the insurer with notice of the claim, the injured party provided the insurer with sufficient notice, under O.C.G.A. § 33-7-15(c), when it provided the insurer a copy of the complaint, with a court clerk's notation of the case number and the date on which the complaint was filed, and the insurer did not show that the injured party's failure to provide the insurer with a copy of the summons deprived it of the ability to timely and adequately investigate the claim. Canal Indem. Co. v. Greene, 265 Ga. App. 67, 593 S.E.2d 41 (2003).

Trial court properly entered summary judgment against a corporation's insurer as the corporation was the named insured on a policy, notwithstanding the policy's identification of the named insured as an individual, doing business as a trade name, as the insurer filed a certificate of insurance with the Georgia Public Service Commission, pursuant to former O.C.G.A. § 46-7-12(a), stating that it had insured the corporation, doing business as the trade name; as the insurer failed to rebut testimony that a truck owned by the individual was involved in an accident while it was engaged in the corporation's business, the injured parties' collision with the truck was covered by the policy. Hartford Cas. Ins. Co. v. Smith, 268 Ga. App. 224, 603 S.E.2d 298 (2004).

Summary judgment was properly entered for an insurer in the injured parties' declaratory judgment suit as the insurer clearly stated that the insurer was issuing one contract, albeit in two sections, and that the insurer's insured was entitled to only one payout; the insurer issued two policy numbers and two declarations

pages to the insured as the insurer could only accommodate four vehicles under the insurer's policy declarations, and the insured had seven vehicles. Smith v. Allstate Ins. Co., 268 Ga. App. 229, 603 S.E.2d 302 (2004).

Since an injured person was neither named in the policy covering the vehicle in which the person was riding at the time of an accident, nor residing in the same household as the policy holder, and was not a beneficiary of the other four policies owned by the policyholder, the injured person was not entitled to stack the policies; thus, a trial court's summary judgment in favor of the insurance company was affirmed. Beard v. Nunes, 269 Ga. App. 214, 603 S.E.2d 735 (Aug. 23, 2004).

Trial court properly entered partial summary judgment for an insurer and refused to extend the full limits of the policy to the injured parties; the policy excluded "any loss arising out of" the use of an automobile by any person living with the insured, which covered the driver, and the injured parties were injured due to the driver's actions in driving an automobile. Carver v. Empire Fire & Marine Ins. Co., 270 Ga. App. 100, 605 S.E.2d 842 (2004).

In an action concerning the limits of uninsured motorist (UM) coverage available under a claimant's policy, which was held with the claimant's husband who was the named insured thereunder, their insurer was properly granted summary judgment on that issue as the 2001 amendment to O.C.G.A. § 33-7-11 had no effect on the limits of UM coverage under the policy covering the claimant's vehicle, and as such, the insurer was not required to notify the claimant of the change in the law or to secure a separate UM election at the time this vehicle was added to the original insurance policy. Soufi v. Haygood, 282 Ga. App. 593, 639 S.E.2d 395 (2006).

Insurance provision in murder-suicide case. — Because substantial fact issues existed as to whether an insurance policy provision transferring ownership to the insured was activated in an apparent murder-suicide case, and whether the insured had murdered his wife, the owner of the policy, it was error of the court to grant summary judgment. Bland v. Ussey, 172

Ga. App. 131, 322 S.E.2d 335 (1984).

Insurance contracts. — As the facts were not in dispute and a proper construction of the unambiguous language of the vacancy exclusion of an insurance policy showed that the vandalism that occurred in a certain insured building was not a covered loss because the building had been vacant for more than 60 days prior to the loss, the trial court should have granted the insurer summary judgment in an action by the buyer of the building, who was the assignee of the insured, to recover for the vandalism damage. *Sorema N. Am. Reinsurance Co. v. Johnson*, 258 Ga. App. 304, 574 S.E.2d 377 (2002).

Trial court erred in granting summary judgment to the casualty insurance company on the insured's claim for damages under the insured's insurance policy it had on the insured's property that was destroyed by fire as the purpose of summary judgment was to determine whether there was a triable issue of fact and whether the insured submitted to an examination as required under the policy could not be determined until that issue was tried. The error occurred because the insured submitted to an examination, but left the examination after three hours of questioning when the insured became angry at the way the insured was being questioned, although the insured did say as the insured left that the insured would continue the questioning with the assistance of the court. *Evans v. Ohio Cas. Ins. Co.*, 264 Ga. App. 485, 591 S.E.2d 378 (2003).

When an insurer sought a declaratory judgment defining the insurer's rights and responsibilities under an insurance policy issued to an insured cemetery that was sued for desecrating a grave, the construction of the policy was a matter for the court that could be resolved by summary judgment. *Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga. App. 421, 591 S.E.2d 430 (2003).

When an insured sued an insurance agent for fraud and breach of fiduciary duty because the agent allegedly misrepresented the coverage afforded by a policy the insured purchased through the agent, the insured's failure to read the policy entitled the agent to summary judgment,

as no confidential relationship between the insured and the agent existed. *Canales v. Wilson Southland Ins. Agency*, 261 Ga. App. 529, 583 S.E.2d 203 (2003).

Trial court properly declined to rule, as a matter of law, that when a child was with the noncustodial parent, the child was not a "resident" of the noncustodial parent's home for insurance coverage purposes; the questions of domicile and residence were typically fact questions left to the jury, and because the parents had joint custody of a child killed in a home accident while staying at the noncustodial father's home, a jury could find that the child was in fact a resident of the father's home at the time of the accident. *Baldwin v. State Farm Fire & Cas. Co.*, 264 Ga. App. 229, 590 S.E.2d 206 (2003).

Denial of an insurance company's summary judgment motion in a declaratory action brought against an injured person seeking a determination regarding coverage obligations in the injured person's underlying assault and battery claim was reversed because the injured person conceded that there was no coverage, but asserted estoppel based on delays in sending the reservation of rights notice and in filing the declaratory judgment action; since the injured person had no rights under the policy, the injured person was not allowed to sue the insurance company directly, and the injured person also lacked standing to assert the defense of waiver or estoppel against the insurance company for failing to provide a timely notice of reservation of rights. *Capitol Indem. Corp. v. Fraley*, 266 Ga. App. 561, 597 S.E.2d 601 (2004).

Trial court's grant of summary judgment pursuant to O.C.G.A. § 9-11-56 to an insurer in an insured's declaratory judgment action seeking a coverage determination was erroneous because the insured, who worked as a roofing supervisor for a livelihood, had been engaged in manual roofing labor for the insured's pastor as a favor at the time of the incident and, accordingly, the insured's actions were not excluded under either the business pursuits exclusion nor under the professional services exclusion as roofing was a trade or occupation; the insured's notice to the insurer within a month of being sued was

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reasonably timely. *Cunningham v. Middle Ga. Mut. Ins. Co.*, 268 Ga. App. 181, 601 S.E.2d 382 (2004).

Upon an insurer's interlocutory appeal, the appeals court found that the insurer was properly denied summary judgment on an insured's individual and class action claims for unearned insurance premiums owed under credit life and disability policies as the insured satisfied any contractual notice requirements to filing suit, the class was properly certified, and the insured adequately represented the interests of the class. *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 634 S.E.2d 123 (2006).

In an action between an insurer and its insured regarding the insured's claim for additional coverage, because the provisions regarding blanket liability and additional limits of liability were ambiguous, and application of O.C.G.A. § 13-2-2 was insufficient to eliminate the ambiguity in that it was impossible to ascertain how much coverage was provided for the items at issue, particularly soft cost, a jury was to consider the circumstances surrounding the transaction to determine the scope and effect of the policy; hence, the insured was erroneously granted partial summary judgment on the issue. *RLI Ins. Co. v. Highlands on Ponce, LLC*, 280 Ga. App. 798, 635 S.E.2d 168 (2006).

Trial court's grant of summary judgment was upheld on appeal, in an insurance applicant's negligent misrepresentation action filed against an agency and its agent, as the applicant failed to include the insurance application, that was the focus of the suit, in the appellate record. *Hattaway v. Conner*, 281 Ga. App. 20, 635 S.E.2d 330 (2006).

In an action filed against an insurer seeking coverage under a homeowners policy, the insureds were properly denied coverage for damages to a home the insureds did not live in, and the insurer was properly granted summary judgment on the issue of coverage as the policy at issue clearly stated that the "insured premises" meant the residence the insureds used as

their primary residence. *Varsalona v. Auto-Owners Ins. Co.*, 281 Ga. App. 644, 637 S.E.2d 64 (2006).

Trial court erred in denying an insurer's motion for summary judgment as to the issue of coverage as an assault and battery exclusion contained in the insurer's commercial general liability policy barred coverage to the insured for damages claims arising from a shooting on the insured's premises in a wrongful death action filed against the insured; moreover, inclusion of the phrase "whether or not" in the exclusion was significant and made clear that the exclusion was intended to apply to all instances of assault and battery occurring on the premises. *First Specialty Ins. Corp. v. Flowers*, 284 Ga. App. 543, 644 S.E.2d 453 (2007).

Trial court did not err in granting an insurer summary judgment in the insurer's declaratory judgment action finding that the insurer owed no duty to the insured to defend or indemnify the insured in an action filed by the insured's client who was injured in an accident involving the covered vehicle as the policy at issue showed no liability coverage and, hence, did not obligate the insurer to that duty. *Simulton v. AIU Ins. Co.*, 284 Ga. App. 152, 643 S.E.2d 553 (2007).

In a breach of contract action filed by an insured against an insurer, the trial court did not err in granting the insurer summary judgment as to the issue of coverage as questions answered untruthfully in the application for insurance by the insured amounted to misrepresentations warranting a cancellation of the policy at issue, pursuant to O.C.G.A. § 33-24-7. *T. J. Blake Trucking, Inc. v. Alea London, Ltd.*, 284 Ga. App. 384, 643 S.E.2d 762 (2007), cert. denied, No. S07C1101, 2007 Ga. LEXIS 505 (Ga. 2007).

Because Georgia contract law stated that the statute of limitation on a contract which contemplated an actual demand began to run 30 days after notice was sent of the amount due, as contemplated by the contract between an insured and the insured, the trial court erred in finding that the insurer's claim for reimbursement from the insured was time-barred; thus, summary judgment in favor of the insured was inappropriate. *Canal Ins. Co. v. Pro*

Search, 286 Ga. App. 164, 648 S.E.2d 497 (2007), cert. denied, 2007 Ga. LEXIS 870 (Ga. 2007).

Trial court properly granted summary judgment to an insured in the insurer's declaratory judgment action, requiring the insurer to defend and indemnify the insured in the underlying suit filed by a resident of the insured's personal care home arising from an attack by a fellow resident as the incident occurred without the insured's foresight, expectation, or design, and was thus properly characterized as accidental under the terms of the insured's policy. *Cincinnati Ins. Co. v. Magnolia Estates, Inc.*, 286 Ga. App. 183, 648 S.E.2d 498 (2007), cert. denied, 2008 Ga. LEXIS 88 (Ga. 2008).

Due to the inadequacies of an insured's bad faith demand, as its attempt to equate the submission of a claim with the demand for payment required by O.C.G.A. § 33-4-6 was directly contravened by case law, and the fact that the insurer met all the insurer's obligations under the policy the insurer issued to the insured, the trial court did not err in denying summary judgment to the insured and granting summary judgment on the insurer's cross-motion, authorizing the insurer to quitclaim the refinanced property to the insurer in full satisfaction of the insurer's duties and obligations under the policy. *BayRock Mortg. Corp. v. Chi. Title Ins. Co.*, 286 Ga. App. 18, 648 S.E.2d 433 (2007), cert. denied, 2008 Ga. LEXIS 108 (Ga. 2008).

Because the damages a tenant sought under a commercial general liability policy issued to the insured-landlord for carbon monoxide poisoning were clearly excluded by the unambiguous terms contained within an exclusion under the policy, the trial court erred in denying the insurer's motion for summary judgment as to the issue of coverage. *Auto-Owners Ins. Co. v. Reed*, 286 Ga. App. 603, 649 S.E.2d 843 (2007), aff'd, 284 Ga. 286, 667 S.E.2d 90 (2008).

Given that the language in an insurance contract providing for catastrophic coverage only extended to inpatient, and not outpatient, services, the trial court properly granted summary judgment as to the issue of the insurer's coverage as the

hospital bill for which the insured sought payment was for outpatient services. *Michna v. Blue Cross & Blue Shield of Ga., Inc.*, 288 Ga. App. 112, 653 S.E.2d 377 (2007), cert. denied, 2008 Ga. LEXIS 214 (Ga. 2008).

Under the ordinary rules of contract construction, because: (1) no ambiguity in an insurance contract existed; and (2) the insurer was authorized to reduce the uninsured motorist policy limits therein per the directions of the insured, no error resulted from the trial court's order granting summary judgment to an insurer as to the issue of coverage. Moreover, separate signatures rejecting bodily injury coverage and property damage coverage were not required, and the court did not rely upon affidavits containing inadmissible evidence. *Lambert v. Alfa Gen. Ins. Corp.*, 291 Ga. App. 57, 660 S.E.2d 889 (2008).

Summary judgment was properly granted to an insured pursuant to O.C.G.A. § 9-11-56(c) and denied to an insurer in the insured's action seeking to collect unpaid claims under the insured's policy wherein the insured was entitled to indemnification for losses arising from employee dishonesty; however, based on the construction rules of O.C.G.A. § 13-2-2, the ambiguous non-cumulative policy liability limit was construed in the insured's favor, but could not be interpreted to allow the limit for each of the years of coverage, but rather, the limit was applied to the entire three-year policy period. *Cincinnati Ins. Co. v. Sherman & Hemstreet, Inc.*, 260 Ga. App. 870, 581 S.E.2d 613 (2003), aff'd, 277 Ga. 734, 594 S.E.2d 648 (2004).

Insurance settlement. — Trial court properly granted summary judgment to the vehicle owner in the insurer's suit against the vehicle owner after the insurer settled a claim with an injured victim after the company employee who rented a vehicle from the vehicle owner was involved in an accident that injured the victim; since no evidence showed the insurer and the vehicle owner contracted otherwise, Georgia statutory law dictated that the renter's liability insurance coverage, provided by the insurer, was the primary insurance and the vehicle owner's insurance provided secondary cover-

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age. *Zurich Am. Ins. Co. v. General Car & Truck Leasing Sys.*, 258 Ga. App. 733, 574 S.E.2d 914 (2002).

In an action claiming beneficiary status to two annuities issued to a decedent, the trial court properly granted summary judgment to a foundation, and against an individual, on grounds that the decedent failed to do all that was necessary to change the beneficiary of the decedent's annuities to the individual, as such was specifically required for the change of beneficiary designation to go into effect, and substantial compliance with the requirements was insufficient; hence, no material fact issues remained. *Lake v. Young Harris Alumni Found., Inc.*, 283 Ga. App. 409, 641 S.E.2d 628 (2007).

Uninsured motorist coverage. — Conclusion that an insurer was only obligated to provide an insured with \$40,000 of uninsured motorist (UM) coverage was supported by both the unambiguous policy language and by the fact that the insured admitted that the insured had not made a written request pursuant to former O.C.G.A. § 33-7-11(a)(3) for an increase in UM coverage above the minimum coverage required at the time of the accident; thus, the trial court properly granted the insurer summary judgment on the insurer's request for a declaration that the insured only had \$40,000 of UM coverage. *Payne v. Middlesex Ins. Co.*, 259 Ga. App. 867, 578 S.E.2d 470 (2003).

Because Georgia public policy prohibited an exclusion within an insurer's uninsured coverage for the use of any motor vehicle by an insured to carry persons or property for a fee, as such denied the statutorily mandated coverage to an otherwise qualified insured, and the requirements under O.C.G.A. § 33-7-11 were plain and not illogical, summary judgment in favor of the insurer on this issue was reversed. *Wagner v. Nationwide Mut. Fire Ins. Co.*, 288 Ga. App. 132, 653 S.E.2d 526 (2007).

Trial court erred in denying motions for summary judgment pursuant to O.C.G.A. § 9-11-56 by an insurer in a declaratory

judgment action pursuant to O.C.G.A. § 9-4-2 seeking to determine whether the insurer had a duty to defend, and by the owners of an automobile on claims of negligent entrustment by the plaintiffs, a driver and passengers; the owners' son, who was driving the vehicle when the accident occurred, did not have permission to drive the vehicle, and therefore the son was not an insured under the owners' insurance policy. *Metro. Prop. & Cas. Ins. Co. v. McCall*, 261 Ga. App. 92, 581 S.E.2d 651 (2003).

Parent who filed a wrongful death action against an unidentified driver after a child's body was found by the side of a road presented no evidence that the unidentified driver was negligent or that the driver's actions caused the decedent's death, and the appellate court affirmed the trial court's judgment granting a motion for summary judgment, which was filed by an insurance company that provided uninsured motorist coverage. *Dawkins v. Doe*, 263 Ga. App. 737, 589 S.E.2d 303 (2003).

Trial court erroneously granted summary judgment to an UM insurer because the injured claimant, who was also a federal employee, fell under the purview of federal compensation law; thus, under these federal provisions, the medical benefits insurer and the workers' compensation insurer had subrogation liens and were able to enforce the liens upon the injured party's receipt of a settlement from the liable third party, regardless of Georgia's requirement that such action be preceded by a determination that the injured person had been fully compensated. *Thurman v. State Farm Mut. Auto. Ins. Co.*, 278 Ga. 162, 598 S.E.2d 448 (2004).

Insured who tried to recover damages for injuries the insured sustained in a motor vehicle accident in Florida, but who alleged that the insured's claim was denied because the insured's did not have the right to sue under Florida's no-fault statute, was entitled to collect uninsured motorist benefits from the insured's own insurance company, pursuant to O.C.G.A. § 33-7-11. However, the trial court, which heard the insured's action against, erred when the court denied the company's motion for summary judgment on the in-

sured's claim seeking penalties and attorney fees, pursuant to O.C.G.A. § 33-4-6, because the case presented a unique issue of law and there was no evidence that the company acted in bad faith when the company denied the insured's claim. *Ga. Farm Bureau Mut. Ins. Co. v. Williams*, 266 Ga. App. 540, 597 S.E.2d 430 (2004).

Insurance coverage on dealer "loaner" vehicle. — Nothing required an insurer to provide excess insurance on a "loaner" car above the statutory minimum limits but the law required excess coverage in an amount not less than the limits; summary judgment reducing coverage below the limits was error. *Hendrix v. Universal Underwriters Ins. Co.*, 263 Ga. App. 589, 588 S.E.2d 761 (2003).

Death while pursued by emergency vehicles. — Trial court erred in denying summary judgment to a city and the city's employees in a wrongful death action; a police officer's actions were not the proximate cause of the decedent's death during a crash with a vehicle that was fleeing from the police at high speed, and therefore O.C.G.A. § 40-6-6 did not apply. *City of Pooler v. Edenfield*, 263 Ga. App. 278, 587 S.E.2d 408 (2003).

Punitive damages may not be recovered if there is no entitlement to compensatory damages; because a homeowner had settled the property damage claim arising from an incident in which a truck struck the homeowner's house, and was not allowed to recover under the bodily injury provision of the policy since the homeowner was not injured in and did not witness the incident, summary judgment for an insurance company in the company's declaratory judgment action addressing the company's liability on the homeowner's punitive damage claim was affirmed. *Flynn v. Allstate Ins. Co.*, 268 Ga. App. 222, 601 S.E.2d 739 (2004).

Insurer coverage. — An insurer was entitled to summary judgment in the insurer's declaratory judgment action because the insurer's policy did not cover an injured bar patron's claims against an insured, an investigations and security firm that serviced the bar, because the subject policy's clear exclusions for assault, battery, and punitive damages did

not conflict with a security guard endorsement. *Capitol Indem., Inc. v. Brown*, 260 Ga. App. 863, 581 S.E.2d 339 (2003).

State benefit health plan claims administrator was properly granted summary judgment in an action challenging the administrator's review of a physician's corporation's health plan claims because, in part, the administrator had no duty to produce the administrator's policies absent a confidential relationship, which was not established merely by the corporation's trust and confidence in the administrator. *Brown v. Blue Cross Blue Shield of Ga., Inc.*, 260 Ga. App. 796, 581 S.E.2d 636 (2003).

In a declaratory judgment action, the insurer was entitled to summary judgment on the parents' claim since the homeowners policy issued to the insured specifically excluded coverage for injury to the parents' son, who was shot and killed by the insured's son during an aggravated assault at a pizza restaurant; the exclusion authorized the trial court to find, as a matter of law, that a reasonable person in the insured's son's circumstances could expect bodily harm to result from the son's criminal actions. *Tripp v. Allstate Ins. Co.*, 262 Ga. App. 93, 584 S.E.2d 692 (2003).

Absent an insurance clause showing mutual intent for a subcontractor's insurance to cover losses to the store and contractor, an indemnity clause was statutorily void and unenforceable; thus, summary judgment was properly denied. *Federated Dep't Stores v. Superior Drywall & Acoustical*, 264 Ga. App. 857, 592 S.E.2d 485 (2003).

Summary judgment in favor of cities and an insured in a declaratory judgment action brought by the insured's insurer was reversed; the underlying claim by the cities against the insured was for loss of grant monies arising from the alleged improper preparation of applications that did not fit into the policy definition of a property loss, and since the policy also excluded losses related to professional services, the insurer had no duty to defend. *Nationwide Mut. Fire Ins. Co. v. City of Rome*, 268 Ga. App. 320, 601 S.E.2d 810 (2004).

Trial court properly granted summary judgment pursuant to O.C.G.A.

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§ 9-11-56(c) to an insured in the insured's breach of insurance contract claim against an insurer for the insurer's failure to pay a claim, arising from water and sewage damage to the insured's offices; heavy rains had seeped into a large pit that was excavated by the city, which then flowed into a pipe that overflowed into the insured's office, and such water was not within the well-accepted definition of "surface water," such that the policy's surface water exclusion was inapplicable. *Selective Way Ins. Co. v. Litig. Tech., Inc.*, 270 Ga. App. 38, 606 S.E.2d 68 (2004).

In a mother's suit claiming that an insurer breached an insurance contract with the son by failing to defend the son in the mother's suit brought against the son arising out of a car accident occurring when the son was driving the mother's car, summary judgment was properly granted on the issue of insurance coverage under the policy, which obligated the insurer to pay damages for which the insured was legally liable because of damages arising out of an accident involving the insured car or a car which was not owned by a resident of the insured's household because, while the mother and the son lived in the same house, this was not determinative of the question of whether the mother was a resident of the son's household. The mother's proof showed that she and her son maintained distinct households under different management, in that they each were responsible for separate parts of the house, did not cook or clean for each other, and came and went independently; and the insurer offered no evidence to counter the mother's proof. *Southern Gen. Ins. Co. v. Foy*, 279 Ga. App. 385, 631 S.E.2d 419 (2006).

Because the trial court erred in construing an insurer's policy to its insured, and a fact question remained as to an issue of slander, summary judgment was inappropriately entered; but, the insurer was not required to provide specific, unambiguous reasons for denying coverage in its reservation of rights letter to the insured. *Southern Gen. Ins. Co. v. Foy*, 279 Ga. App. 385, 631 S.E.2d 419 (2006).

Because: (1) resolution of the issues raised in a petition filed by the Georgia Insurers Insolvency Pool were dependent upon a determination by the State Board of Workers' Compensation of the amount, if any, an injured employee was entitled to recover in the pending, unresolved claim for workers' compensation; and (2) after a notice to controvert was filed, the Board never held a hearing or issued any findings with regard to liability for the claim, the trial court lacked subject matter jurisdiction to determine the applicability of earlier provisions of O.C.G.A. § 33-36-14(a) to the Pool's claim against an insurer, after another carrier became insolvent, and hence, grant the Pool summary judgment in its declaratory judgment action. *Royal Indem. Co. v. Ga. Insurers Insolvency Pool*, 284 Ga. App. 787, 644 S.E.2d 279 (2007), cert. denied, 2007 Ga. LEXIS 639 (Ga. 2007).

Intent. — In a declaratory judgment action by an insurance company asking for an interpretation of an insurance policy that excludes coverage for injuries expected or intended by the insured, because the insured, while intoxicated, shot and killed his son and daughter-in-law, the question of intent or expectation uniquely fits the pattern of those issues of material fact that are not appropriate issues for summary judgment but are decided by the trier of fact. *State Farm Fire & Cas. Co. v. Morgan*, 258 Ga. 276, 368 S.E.2d 509 (1988).

Summary judgment in corporate actions. — Trial court properly granted summary judgment to a president of a corporation in the president's petition to remove a *lis pendens*, which alleged that the president purchased property with embezzled funds as the shareholder's allegation was used to support the shareholder's tort claims of, inter alia, conversion and breach of fiduciary duty; thus, a *lis pendens* was unauthorized and the president could not be charged with notice of it. *Hudson v. Dobson*, 260 Ga. App. 473, 580 S.E.2d 268 (2003).

Summary judgment in estate matters. — In an action for conversion of the estate's assets relating to a joint account created under O.C.G.A. § 7-1-813 between the executrix and a half-sister,

given that some evidence existed that the decedent's purpose in establishing a joint account between the executrix of decedent's estate and the half-sister was for the decedent's convenience, and not to effect a gift, summary judgment was erroneously granted to the half-sister. *Gray v. Benton*, 280 Ga. App. 339, 634 S.E.2d 86 (2006).

Summary judgment in matters involving a trust. — In a declaratory judgment action between a settlor's offspring regarding an agreement signed by the settlor to reform a trust, the trial court properly granted summary judgment to one sibling over the other, upholding the agreement as validly reforming the trust in order to fully effectuate the settlor's intent that the offspring divide the remainder of a trust's proceeds equally between them, per stirpes; moreover, the trial court correctly ruled that the prevailing sibling could not rely on the defenses of laches and unclean hands as such were equitable doctrines not applicable in a declaratory judgment action. *Briden v. Clement*, 283 Ga. App. 626, 642 S.E.2d 318 (2007).

Laches. — If it cannot be said as a matter of law that a plaintiff was dilatory in asserting a claim, the defense of laches is a question for the jury, and summary judgment cannot be granted for the defendant on such issue. *Davidson Mineral Properties, Inc. v. Gifford-Hill & Co.*, 235 Ga. 176, 219 S.E.2d 133 (1975).

Mandamus actions. — Fact that O.C.G.A. § 9-6-20 et seq. provides rules under which mandamus actions shall be tried would not make O.C.G.A. § 9-11-56 inapplicable in mandamus actions because there is no express conflict between the sections. *Harrison v. Weiner*, 226 Ga. 93, 172 S.E.2d 840 (1970).

Matters in abatement and in bar. — Motion for summary judgment applies to the merits of a claim or to matters in bar, but not to matters in abatement. *Boyd Motors, Inc. v. Radcliff*, 128 Ga. App. 15, 195 S.E.2d 291 (1973); *Larwin Mtg. Investors v. Delta Equities, Inc.*, 129 Ga. App. 769, 201 S.E.2d 187 (1973).

Defenses enumerated in O.C.G.A. § 9-11-12(b), except for failure to state a claim upon which relief can be granted,

are matters in abatement, which are not within the scope of summary judgment procedure. *Boyd Motors, Inc. v. Radcliff*, 128 Ga. App. 15, 195 S.E.2d 291 (1973); *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 232 Ga. 614, 208 S.E.2d 459 (1974); *International Indem. Co. v. Blakey*, 161 Ga. App. 99, 289 S.E.2d 303 (1982); *Kirkpatrick v. Mackey*, 162 Ga. App. 876, 293 S.E.2d 461 (1982).

Motion for summary judgment cannot be granted on matters in abatement. *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 232 Ga. 614, 208 S.E.2d 459 (1974); *Carlson v. Hall County Planning Comm'n*, 233 Ga. 286, 210 S.E.2d 815 (1974); *Walsey v. Lockhart*, 136 Ga. App. 624, 222 S.E.2d 141 (1975); *C.W. Matthews Contracting Co. v. Capital Ford Truck Sales, Inc.*, 149 Ga. App. 354, 254 S.E.2d 426 (1979); *Primas v. Saulsberry*, 152 Ga. App. 88, 262 S.E.2d 251 (1979); *Safwat v. United States Leasing Corp.*, 154 Ga. App. 341, 268 S.E.2d 395 (1980); *Bennett v. Fine Jewelers Atl. Guild, Inc.*, 194 Ga. App. 377, 390 S.E.2d 625 (1990).

Summary judgment involves an adjudication on the merits, and should not be used in ruling on a dilatory plea or plea in abatement. *National Heritage Corp. v. Mount Olive Mem. Gardens, Inc.*, 244 Ga. 240, 260 S.E.2d 1 (1979).

Matters in abatement are raised and resolved under O.C.G.A. § 9-11-12, and are not proper subjects for a motion for summary judgment. *Hight v. Blankenship*, 199 Ga. App. 744, 406 S.E.2d 241 (1991).

As a determination whether compliance with the ante litem notice requirement of O.C.G.A. § 36-33-5 was met by property owners who asserted claims against a municipality was properly considered a matter in abatement, which should have been raised in a motion to dismiss under O.C.G.A. § 9-11-12, flexibility by the court was required; accordingly, consideration of the matter within the summary judgment context, pursuant to O.C.G.A. § 9-11-56, was proper because matters outside of the pleadings, including the owners' depositions, were considered. *Davis v. City of Forsyth*, 275 Ga. App. 747, 621 S.E.2d 495 (2005).

Peer review. — Under the Health Care Quality Improvement Act of 1986, specif-

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ically 42 U.S.C. § 11112(a)(4), a professional review action is presumed to have met the requisite conditions for immunity unless the presumption is rebutted by a preponderance of the evidence; thus, in ruling on a motion for summary judgment under the Act, the trial court is required to determine, viewing the facts in the light most favorable to the plaintiff, whether a reasonable jury could conclude that the plaintiff has shown by a preponderance of the evidence that the peer review activities did not meet the standards set forth in the Act. *Patton v. St. Francis Hosp.*, 260 Ga. App. 202, 581 S.E.2d 551 (2003).

Trial court properly granted summary judgment for a hospital in an action arising out of the refusal to reinstate a doctor's staff privileges, finding that the hospital had immunity under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 et seq., because: (1) letters allowing the doctor to resume seeing patients only if the doctor complied with the doctor's psychiatrist's plan were not peer review action; (2) if the letters were peer review action, the doctor was afforded adequate notice and fair process; (3) the doctor failed to rebut the presumption that the peer review process was reasonable; (4) the doctor failed to rebut the presumption that the doctor was afforded adequate notice and a hearing; and (5) any violation of the hospital's bylaws did not necessarily mean that the doctor was denied adequate notice and a hearing under the HCQIA. *Taylor v. Kennestone Hosp., Inc.*, 266 Ga. App. 14, 596 S.E.2d 179 (2004).

Medical malpractice. — If a motion for summary judgment is supported by evidence that there is no genuine issue for trial, as the medical doctor performed the entire procedure in a medically accepted and recognized manner and in so doing exercised the degree of care and skill that is generally employed by physicians under similar circumstances, it would be necessary that the plaintiff offer evidence showing that there is a genuine issue for trial. *Swindell v. St. Joseph's Hosp.*, 161 Ga.

App. 290, 291 S.E.2d 1 (1982); *Bieling v. Battle*, 209 Ga. App. 874, 434 S.E.2d 719 (1993).

Trial court erred in denying the appellants' motion for summary judgment on the patient's second action for medical malpractice, breach of contract, and failure to secure informed consent as the first action was against the same defendant, it was an adjudication on the merits, and the patient had a full and fair opportunity to litigate the first action. *Simon v. Gunby*, 260 Ga. App. 3, 578 S.E.2d 482 (2003).

Summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to physicians in a medical malpractice action against the physicians in which the plaintiff patient claimed radiation damage to an arm that the doctors did not reveal until the expiration of the limitations period of O.C.G.A. § 9-3-71(a); however, the record revealed that the physicians had repeatedly informed the patient that such damage was one of the possible causes of the arm pain and there was no fraud found on the physicians' part which would have extended the time period pursuant to O.C.G.A. § 9-3-96. *Price v. Currie*, 260 Ga. App. 526, 580 S.E.2d 299 (2003).

Summary judgment was granted pursuant to O.C.G.A. § 9-11-56(c) to a hospital in an action brought by parents who alleged that the mother had received negligent pre-natal care at the hospital, which resulted in permanent injuries to her son; the obstetricians and residents who rendered care to the mother were found to be in private practice and were independent contractors who were not subject to any control over their judgments or decisions by the hospital, rather than employees of the hospital and, accordingly, there was no liability on the part of the hospital for the contractor's actions. *Anderson v. Medical Ctr., Inc.*, 260 Ga. App. 549, 580 S.E.2d 633 (2003).

In a medical malpractice suit decided in favor of a doctor on the doctor's motion for summary judgment, *res ipsa loquitur* did not apply in a malpractice suit as an unintended result did not raise an inference of negligence; it was presumed that medical or surgical services were performed in an ordinarily skillful manner.

Oakes v. Magat, 263 Ga. App. 165, 587 S.E.2d 150 (2003).

O.C.G.A. § 31-9-6.1(c) squarely places the responsibility for obtaining consent to surgical procedures on the shoulders of the “responsible physician,” who is defined in O.C.G.A. § 31-9-6.1(h) as the physician who performs the procedure or the physician under whose direct orders the procedure is performed by a nonphysician; an assisting physician was not responsible for obtaining a patient’s consent for a leg-nerve surgery, and summary judgment for the doctor in a malpractice case brought by the patient was affirmed. Duke v. Bachner, 266 Ga. App. 109, 596 S.E.2d 414 (2004).

Statute of repose in a medical malpractice claim ran from the date the negligent or wrongful act or omission occurred without regard to when the injury arising from the negligent act or omission occurred or was discovered; thus, a malpractice claim filed more than five years after the date on which the last negligent or wrongful act or omission attributable to the doctor and the medical center could have occurred was time barred, and summary judgment in favor of a doctor and a medical center in a patient’s malpractice claim was affirmed. Christian v. Atha, 267 Ga. App. 186, 598 S.E.2d 895 (2004).

Trial court properly granted a surgeon’s summary judgment motion and held that a patient’s medical malpractice suit was barred by the two-year statute of limitations set forth in O.C.G.A. § 9-3-71(a), which began to run at the time of the alleged misdiagnosis, when a surgeon advised the patient that the patient did not have breast cancer but recommended close follow-up care; the case did not fall within the limited exception for subsequent injury cases as the patient’s symptoms worsened over time. Harrison v. Daly, 268 Ga. App. 280, 601 S.E.2d 771 (2004).

In a negligence action filed by a decedent’s administrator, summary judgment was properly granted to a doctor and a clinic for the post-op treatment of the decedent as: (1) both the doctor and the clinic remained immune from suit under O.C.G.A. § 51-1-29.1; (2) the doctor’s treatment of the decedent’s complications

immediately following the decedent’s surgery did not change the voluntary nature of the treatment as a whole; (3) it was reasonable to expect that a physician would continue to treat a patient following surgery; and (4) the appeals court viewed the doctor’s voluntary treatment of the decedent as a whole, not divided into categories of preoperative, operative, and post-operative; moreover, because no evidence was presented that either the doctor or the clinic was a “charitable institution,” and O.C.G.A. § 51-1-29.1 provided no such exception, waiver of any common-law charitable immunity through the doctor’s procurement of liability insurance did not apply. Wells v. Rogers, 281 Ga. App. 473, 636 S.E.2d 171 (2006), cert. denied, 2007 Ga. LEXIS 101 (Ga. 2007).

Because a catheter intentionally placed in a patient’s body was not a “foreign object” as contemplated by O.C.G.A. § 9-3-72, and the fact that the catheter might have been negligently placed did not alter this finding, absent evidence of a doctor’s fraud or concealment of the fraud, summary judgment in a patient’s medical malpractice suit was properly granted to a doctor and a clinic as the applicable two-year statute of limitation had expired by the time the action was filed. Pogue v. Goodman, 282 Ga. App. 385, 638 S.E.2d 824 (2006).

Trial court erred in denying partial summary judgment on a patient’s medical malpractice and ordinary negligence claims, when, given evidence that the patient suffered an injury arising out of the misdiagnosis in January of 1999, when the patient was first seen by the doctor manifesting continuous symptoms of a moderate B-12 deficiency and the doctor failed to make the diagnosis and provide treatment, and the patient failed to file an action within the two years; but, because the patient’s ordinary negligence and breach of fiduciary duty claims were essentially malpractice claims, subject to the same limitations period, summary judgment as to these claims was upheld. Stafford-Fox v. Jenkins, 282 Ga. App. 667, 639 S.E.2d 610 (2006).

On appeal from the grant of summary judgment in favor of a dentist in a pa-

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tient's medical malpractice action, such as was upheld based on the expiration of the statute of limitation and rejection of the continuous treatment doctrine by the Supreme Court of Georgia and because the exception for a subsequent injury did not apply. *Bousset v. Walker*, 285 Ga. App. 102, 645 S.E.2d 593 (2007).

In a medical malpractice action, because the record on appeal contained evidence creating a genuine issue of material fact as to the proximate cause of a patient's injuries, the trial court erred in granting a hospital summary judgment; moreover, the appeals court declined to hear the hospital's claim that the patient failed to comply with O.C.G.A. § 9-11-9.1. *Renz v. Northside Hosp., Inc.*, 285 Ga. App. 882, 648 S.E.2d 186 (2007).

Trial court erred in granting a medical clinic's motion for summary judgment in a patient's medical malpractice action and in finding that an affidavit provided by a patient's expert did not sufficiently establish causation as the expert specifically explained the precautions that should have been taken by the employee administering a shot to the patient, and stated that the failure to take these precautions proximately caused the patient's injury; moreover, given the expert's past relevant experience as a nurse, the expert was competent to provide an opinion in the case. *Allen v. Family Med. Ctr., P.C.*, 287 Ga. App. 522, 652 S.E.2d 173 (2007).

Because a medical care provider failed to assert an available defense in the underlying action which would have absolved the provider from any liability and prevented a default judgment from entering against the provider, the trial court did not err in entering summary judgment against the provider on the provider's claims for contribution and indemnity. *Emergency Professionals of Atlanta, P.C. v. Watson*, 288 Ga. App. 473, 654 S.E.2d 434 (2007), cert. denied, 2008 Ga. LEXIS 407 (Ga. 2008).

In a medical malpractice action, because the undisputed evidence showed that both the personal injury claims and a

later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly denied summary judgment as to those claims. *Cleaveland v. Gannon*, 288 Ga. App. 875, 655 S.E.2d 662 (2007), aff'd, 284 Ga. 376, 667 S.E.2d 366 (2008).

In a couple's medical malpractice action, because: (1) the couple failed to follow the court's case management orders, which the couple selected and consented to; (2) the couple's only expert was properly excluded as a rebuttal witness; and (3) the couple failed to present any evidence of causation, the trial court properly entered summary judgment against the couple. *Thomas v. Peachtree Orthopaedic Clinic, P.C.*, 290 Ga. App. 869, 660 S.E.2d 758 (2008), cert. denied, No. S08C1373, 2008 Ga. LEXIS 915 (Ga. 2008).

In a medical malpractice action, because the suing couple's failure to faithfully engage in discovery could not be remedied by the exclusion of probative trial evidence, specifically, the testimony from the couple's expert witness, the trial court erred in entering summary judgment against the couple. *Hart v. Northside Hosp., Inc.*, 291 Ga. App. 208, 661 S.E.2d 576 (2008).

Trial court properly granted summary judgment to an eye doctor and a corporation as even though the type of eye surgery performed on the patient made the patient more vulnerable to an eye infection and even though an eye infection caused the patient's loss of sight, the patient was unable to show the medical malpractice element of causation since the patient did not show that anything the doctor did, or failed to do, caused the eye infection. *Berrell v. Hamilton*, 260 Ga. App. 892, 581 S.E.2d 398 (2003).

Doctor's liability for certifying patient "safe" for activity. — Trial court properly granted summary judgment to a doctor on the administrator's wrongful death suit alleging that the doctor negligently certified the truck driver to drive a truck even though the doctor knew or should have known that the truck driver had a pre-existing heart condition as the truck driver three months later died while driving the truck which then struck the

decedent's vehicle and killed the decedent; even giving the administrator the benefit of all reasonable doubt, and construing the evidence and inferences in the administrator's favor, the doctor was entitled to summary judgment because the doctor did not have the legal authority to restrain the truck driver for the benefit of the motoring public and, thus, the doctor did not owe a duty to the decedent. *Houston v. Bedgood*, 263 Ga. App. 139, 588 S.E.2d 437 (2003).

Apparent authority of doctor working in emergency room. — Trial court erred in granting the hospital's motion for summary judgment on the issue of whether an emergency room doctor was an apparent employee of the hospital since the evidence failed to show that the hospital had sufficiently notified the patient that the doctor was not the hospital's employee by allegedly posting a sign or including a paragraph in a two page document so indicating. *Cooper v. Binion*, 266 Ga. App. 709, 598 S.E.2d 6 (2004).

Hospital's liability for doctor's actions. — Trial court erred in granting summary judgment to the hospital on the issue of whether the doctor was an actual employee of the hospital because evidence showed, inter alia, that the doctor was hired to perform a service rather than accomplish a task, the hospital supplied the equipment used by the doctor, the hospital retained the right to control the doctor's hours of work, the doctor was paid by the hour, the doctor spent all working hours at the hospital, the hospital handled all the billing of patients, and the hospital paid the doctor's malpractice insurance. *Cooper v. Binion*, 266 Ga. App. 709, 598 S.E.2d 6 (2004).

Negligent credentialing. — Surviving spouse's negligent credentialing suit against a hospital was properly dismissed on summary judgment as the undisputed evidence showed that the surgeon did not perform the prostatic cryosurgery negligently. The surviving spouse's own expert witness affirmatively stated that the rectal injury, which caused the deceased spouse's death, was not the result of the surgeon's negligence during the cryosurgery but was a complication that could have occurred during any prostate

cancer surgery and in the absence of any negligence, and that the surgeon's negligence did not occur until five weeks later, during the surgeon's treatment of the deceased spouse following an emergency hospitalization. *Ladner v. Northside Hosp., Inc.*, 314 Ga. App. 136, 723 S.E.2d 450 (2012).

Intentional infliction of emotional distress by medical staff. — Trial court's grant of summary judgment, pursuant to O.C.G.A. § 9-11-56(c), to a hospital was proper in an action by a patient and her husband, alleging intentional infliction of emotional distress because there was no evidence to support a finding of intent or reckless disregard by an emergency room nurse, who had unsuccessfully attempted to search through the patient's clothing when she came in suffering a miscarriage; the fact that when the wife was home doing laundry, the intact fetus, still in the fetal sac, fell out of her pants could have been sufficient to support a finding that the nurse was negligent, but not more. *Roddy v. Tanner Med. Ctr., Inc.*, 262 Ga. App. 202, 585 S.E.2d 175 (2003).

Legal malpractice. — Trial court properly granted partial summary judgment to an attorney, the law firm partners, and the law firm on a client's breach of fiduciary duty and fraud claims as the claims were merely duplicative of the client's legal malpractice claim. Furthermore, even if the claims were not duplicative, the client's evidence that the attorney charged a grossly excessive fee, charged the client for estate planning software that the attorney retained for general use, failed to inform the client about the attorney's concerns, and misrepresented the attorney's ability would not have survived summary judgment. *Griffin v. Fowler*, 260 Ga. App. 443, 579 S.E.2d 848 (2003).

Trial court erred in granting summary judgment to the closing attorney on the alleged client's claims for legal malpractice and fraud as genuine issues about whether an attorney-client relationship existed and whether misrepresentations had been made precluded summary judgment, but the trial court properly granted summary judgment to the closing attorney on the alleged client's Georgia Racke-

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teer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., claim because the alleged client did not show the required “pattern of racketeering” activity. *Mays v. Askin*, 262 Ga. App. 417, 585 S.E.2d 735 (2003).

Because the evidence showed that an attorney continued to represent a brother and sister as co-executors of an estate after conflicts of interest arose, that the attorney used information obtained from the brother to bring a collection action against the sister, and that the attorney retained another attorney to investigate more of the sister’s debts, material issues of fact existed that precluded summary judgment on the sister’s claims against the attorney for legal malpractice, breach of fiduciary duty, fraud, and conspiracy. *Traub v. Washington*, 264 Ga. App. 541, 591 S.E.2d 382 (2003).

Trial court properly granted summary judgment to an attorney after a client filed a legal malpractice claim against the attorney more than four years and 11 months after the attorney withdrew from representing the client in a bankruptcy matter as no genuine issue of material fact existed but that the client’s claim was barred by the four-year limitations period and, thus, any act of malpractice on the attorney’s part giving rise to the claim had to have occurred more than four years before the client filed the client’s claim. *Shores v. Troglin*, 260 Ga. App. 696, 580 S.E.2d 659 (2003).

Attorneys’ summary judgment motion in a legal malpractice case was properly denied as there was evidence that a nurse in the injured party’s underlying negligence case deviated from the standard of care, and that but for the attorneys’ negligence in dismissing the negligence case, intending to refile the case later, despite the passing of the time period limited by the statute of repose, the injured party would have won the underlying negligence case. *Blackwell v. Potts*, 266 Ga. App. 702, 598 S.E.2d 1 (2004).

In a legal malpractice action, because the attorneys’ failure to exercise due dili-

gence in procuring service of process constituted professional negligence, resulting in a loss of their clients’ rights to pursue a claim against their own UM carrier, and conflicting evidence was presented as to the issue of whether the clients’ rights under O.C.G.A. § 9-2-61 to pursue a claim against their own uninsured motorist insurance carrier were impeded by their attorneys’ actions, summary judgment was reversed. *Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L.*, 280 Ga. App. 207, 633 S.E.2d 614 (2006).

While an attorney was shielded from liability as to the issue of whether a breach occurred as to the duty of care owed to the clients by failing to verify the complaint pursuant to O.C.G.A. § 9-11-11.1(b), opting instead to dismiss the complaint and refile the complaint as a renewal action, summary judgment as to the issues of harm to the clients and a breach of the duty of ordinary care as a result of the attorney’s failure to advise was reversed. *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 283 Ga. App. 10, 640 S.E.2d 633 (2006).

Despite an attorney’s claim that privity of contract with a decedent’s widow was lacking, because the evidence supported a finding that the widow was an intended beneficiary of the decedent’s will, the attorney owed the widow a similar duty to the one owed to the decedent, as the attorney’s client, resulting in the attorney’s liability upon a breach of that duty, making partial summary judgment in the widow’s favor proper. *Young v. Williams*, 285 Ga. App. 208, 645 S.E.2d 624 (2007).

In a legal malpractice action, despite the fact that the trial court held that the client’s failure to prove proximate causation supported an order granting summary judgment to the attorney and that attorney’s law firm, the appeals court nevertheless held that summary judgment was properly granted to the attorney, under the “right for any reason” rule, as the suit was untimely filed. Moreover, the client’s argument that the attorney could have amended the suit to add a damages claim up until the time of a pre-trial order, and that this later failure to act should be considered the triggering date for the mal-

practice action, was unavailing, as the attorney's failure to amend constituted a failure to avoid the effect of the earlier breach and a failure to mitigate damages, but was not a failure inflicting a new harm, thus triggering a new limitations period. *Duke Galish, LLC v. Arnall Golden Gregory, LLP*, 288 Ga. App. 75, 653 S.E.2d 791 (2007), cert. denied, 2008 Ga. LEXIS 212 (Ga. 2008).

Attorney contract claim reversed.

— Trial court's denial of a client's summary judgment motion was reversed as the oral contract between an attorney and the client was unenforceable in that: (1) there was no definition of what was to be considered the ultimate or logical conclusion of any given case assigned to the attorney, nor were there standards for determining if the attorney "didn't do the job"; (2) there was no stated duration of the agreement, and the public policy of Georgia was clear that, absent a definite term of employment, the contract was terminable at will under O.C.G.A. § 34-7-1; and (3) the attorney's claimed damages, the attorney's hourly rate times the number of hours it would have taken the attorney to bring each case to its ultimate or logical conclusion, were speculative and not objectively ascertainable from the oral contract. Furthermore, as to an attorney's breach of contract claim, the trial court failed to consider the public policy issues involved in the attorney-client relationship and should have granted summary judgment to the client; in Georgia, because of the fiduciary relationship between an attorney and a client, the client had the absolute right to discharge the attorney and terminate the relationship at any time, even without cause, and the client's freedom in ending the attorney-client relationship without financial penalty was favored over the attorney's right to enforce the damages provision in the attorney's retainer contract because requiring a client to pay damages for terminating the client's attorney's employment contract eviscerated the client's absolute right to terminate. *Ga. Farm Bureau Mut. Ins. Co. v. Croley*, 263 Ga. App. 659, 588 S.E.2d 840 (2003).

Ratification. — When a company sued the company's accountants regarding the

accountants' participation in a sale of the company's assets, summary judgment should have been granted in favor of the accountants because the company ratified the actions of the company's employee who had apparent authority to conduct the sale when the company retained the proceeds of the sale and accepted a return of the assets sold in settlement of another lawsuit. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Summary judgment was properly granted to an attorney in a former criminal client's legal malpractice action because the former client failed to establish any grounds to support the client's allegations of ineffective assistance and was merely relitigating the client's denied habeas petitions on which the attorney had represented the client. *Cornwell v. Kirwan*, 270 Ga. App. 147, 606 S.E.2d 1 (2004).

Denial of summary judgment affirmed.

— Trial court's denial of a client's summary judgment motion was affirmed as to an attorney's conversion claim because the issue of the attorney's consent to the removal of files from the attorney's office was not clear-cut. *Ga. Farm Bureau Mut. Ins. Co. v. Croley*, 263 Ga. App. 659, 588 S.E.2d 840 (2003).

Negligence. — Even though the facts in the case are uncontradicted and uncontroverted, if the facts are such that there is room for a difference of opinion between reasonable persons as to whether or not negligence should be inferred, the right to draw the inference is peculiarly within the exclusive province of the jury. *Yeager v. Jacobs*, 111 Ga. App. 358, 141 S.E.2d 837 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

It is for a jury to decide in a negligence case whether the alleged acts constituted negligence and whether or not the acts were the proximate cause of the plaintiff's injuries, and the mere fact that it is shown without dispute that the plaintiff was guilty of certain acts that could be characterized as negligent would not authorize a grant of summary judgment for the defendant if reasonable minds could differ as to whether the plaintiff's acts amounted to negligence. *Yeager v. Jacobs*, 111 Ga. App. 358, 141 S.E.2d 837 (1965) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

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Questions necessitating a decision as to whether the facts show that lack of ordinary care for one's own safety, which will bar recovery, or only that comparative negligence, which will reduce it, are generally for the jury. *Stukes v. Trowell*, 119 Ga. App. 651, 168 S.E.2d 616 (1969).

In a negligence case, it must be plainly and palpably shown that the defendants in no way contributed to the proximate cause of damages incurred in order for the trial court to sustain a motion for summary judgment in their favor. *Chastain v. Atlanta Gas Light Co.*, 122 Ga. App. 90, 176 S.E.2d 487 (1970).

Issues of negligence, including the related issues of assumption of risk, lack of ordinary care for one's own safety, lack of ordinary care in avoiding the consequences of another's negligence, and comparative negligence, are ordinarily not susceptible of summary adjudication, whether for or against the plaintiff or the defendant, but must be resolved by trial. *Reed v. Batson-Cook Co.*, 122 Ga. App. 803, 178 S.E.2d 728 (1970); *Shuman Supply of Savannah, Inc. v. Skinner*, 128 Ga. App. 431, 197 S.E.2d 152 (1973); *North v. Toco Hills, Inc.*, 160 Ga. App. 116, 286 S.E.2d 346 (1981); *Fort v. Boone*, 166 Ga. App. 290, 304 S.E.2d 465 (1983).

Negligence, diligence, and contributory negligence are not ordinarily susceptible of adjudication on summary judgment. *Lockhart v. Walker*, 124 Ga. App. 241, 183 S.E.2d 503 (1971).

Party who moves for summary judgment in a case premised on negligence has a considerable burden, and if the defendant is the movant, sometimes summary judgment may not be obtained even though a directed verdict could be secured at trial. *Turner v. Noe*, 127 Ga. App. 870, 195 S.E.2d 463 (1973).

Questions involving negligence, and especially those involving whether, under the circumstances, the defendant exercised ordinary care, are properly for the jury. *Lockhart v. Beaird*, 128 Ga. App. 7, 195 S.E.2d 292 (1973).

Questions of negligence as to cause and

proximate cause, and as to what negligence, and whose negligence, constitutes proximate cause of damages in tort cases are generally solely for the jury, except in plain and palpable cases. *Summers v. Milcon Corp.*, 134 Ga. App. 182, 213 S.E.2d 515 (1975).

Summary judgment will not usually be as feasible in negligence cases, when the standard of the reasonable person must be applied to conflicting testimony, as it is in other kinds of litigation, since even if there is no dispute as to the facts, it is usually for the jury to say whether the conduct in question met the standard of the reasonable person. *Epps Air Serv., Inc. v. DeKalb County*, 147 Ga. App. 195, 248 S.E.2d 300 (1978); *Jones v. Crown Constr. Co.*, 152 Ga. App. 578, 263 S.E.2d 460 (1979).

Unless no other conclusion is permissible, questions of negligence are matters for jury resolution and are not ordinarily susceptible to summary adjudication. *Epps Air Serv., Inc. v. DeKalb County*, 147 Ga. App. 195, 248 S.E.2d 300 (1978).

Questions of negligence and proximate cause are peculiarly questions for the jury except in clear, plain, palpable, and undisputed cases. Only in the rare case in which there is an admission of liability or an indisputable fact situation that clearly establishes liability should summary judgment be granted. *Lozynsky v. Hutchinson*, 159 Ga. App. 715, 285 S.E.2d 70 (1981).

Negligence in the workplace. — In an action against the issuer of a property loss policy covering a boiler involved in an explosion, the defenses that the death of the decedent was the result of the negligence of others and that the decedent and the decedent's employer knew of the defective condition in the subject boiler and did not rely on inspections, did not require affirmative pleading and involved questions of fact, precluding a grant of partial summary judgment. *Cleveland v. American Motorists Ins. Co.*, 163 Ga. App. 748, 295 S.E.2d 190 (1982).

If the facts conclusively show by plain, palpable, and undisputed evidence that the defendant was not at fault, including a case involving contentions of negligence, contributory negligence, or exercise of or-

dinary care for one's own safety, the case properly may be resolved as a matter of law through the vehicle of summary judgment. *Fort v. Boone*, 166 Ga. App. 290, 304 S.E.2d 465 (1983).

Issues of negligence, assumption of risk, contributory negligence, and comparative negligence are not susceptible of summary adjudication except in plain, palpable, and indisputable cases. *Malvarez v. Georgia Power Co.*, 166 Ga. App. 498, 304 S.E.2d 542 (1983).

When issues of negligence, diligence, and contributory negligence are involved, it is necessary that such issues be resolved by a jury rather than by summary adjudication. *Georgia Power Co. v. Knighton*, 169 Ga. App. 416, 312 S.E.2d 872 (1984).

In an automotive negligence action, because the materials relied upon by the defendant pierced the plaintiff's pleadings, the plaintiff's failure to set forth specific facts showing there was a genuine issue for trial warranted an award of summary judgment for the defendant. *Butler v. Huckabee*, 209 Ga. App. 761, 434 S.E.2d 576 (1993).

In a negligence action, questions of proximate cause are peculiarly reserved for jury determination except in clear, plain, and undisputed cases. *Coweta County v. Adams*, 221 Ga. App. 868, 473 S.E.2d 558 (1996).

Because the plaintiff failed to present any evidence that raised a question of fact as to whether the defendant was negligent, the plaintiff's contentions regarding what might have happened disappeared in light of the uncontradicted witness testimony as to what did happen, and the trial court correctly granted summary judgment to the defendant. *Etheredge v. Kersey*, 236 Ga. App. 243, 510 S.E.2d 544 (1998).

Because the plaintiff in a negligence case failed to make a showing that the defendant's negligence caused the plaintiff's injuries, but could only speculate that a greasy substance caused the plaintiff to slip and fall, summary judgment was properly awarded to the defendant. *Christopher v. Donna's Country Store*, 236 Ga. App. 219, 511 S.E.2d 579 (1999).

Resolution of an employer's obligation to indemnify a manufacturer with regard

to a claim brought by an employee did not turn on whether the employer was negligent but instead hinged on whether the manufacturer was solely negligent, and since the manufacturer submitted evidence creating a fact issue as to whether the employee failed to exercise ordinary care for the employee's own safety, the trial court erred when the court granted partial summary judgment to the employer on the manufacturer's contractual indemnification claim; the manufacturer failed to show that the employer did not adequately train the employee, so summary judgment as to that issue was affirmed, and the trial court did not err in denying partial summary judgment to the employer on the manufacturer's claim for a defense. *Nat'l Gypsum v. Ploof Carriers Corp.*, 266 Ga. App. 565, 597 S.E.2d 597 (2004).

Even though later damage to a gas line left exposed in a home was an intervening act that led to a fatal gas fueled fire in the home, the liability of a corporation for the negligence of the corporation's employees in leaving the gas line exposed was still allowed if the employees could have reasonably anticipated or foreseen the intervening act as a consequence of the original negligence; as the evidence would have allowed a jury to find that the natural and probable consequence of leaving a line exposed was that the line would have been damaged, the issue of proximate cause should have been decided by a jury, and summary judgment in favor of the corporation in a wrongful death action brought by the decedent's children was reversed. *Beasley v. A Better Gas Co.*, 269 Ga. App. 426, 604 S.E.2d 202 (2004).

Trial court properly granted summary judgment against an employee, in a third-party action against two contractors and a consultant, because: (1) the employee failed to present sufficient evidence that the alleged negligence by these third parties caused excessive clogging of the conveyor as the employee was injured and forced the employer to operate a conveyor without its cover; and (2) even if the employee established a factual issue as to whether these third parties were negligent in failing to install an emergency pull-cord on the conveyor or in failing to

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put a second light switch in the tunnel, the employee was still required to show that such was a proximate cause of the injury, which the employee failed to do; moreover, none of the third parties could have reasonably anticipated or foreseen that the employer would negligently seal off the access where the tunnel light switch was located and disregard the manufacturer's warnings and OSHA regulations by running the conveyor with a section of the cover removed. *Cieplinski v. Caldwell Elec. Contrs., Inc.*, 280 Ga. App. 267, 633 S.E.2d 646 (2006).

Because any duty a construction site owner and various contractors had to warn a construction worker of the buried electrical lines was satisfied by notice to that worker's supervisor, who admitted to notice and knowledge of the buried lines, the trial court properly entered summary judgment against the worker in a negligence action filed against them as no other duties existed; moreover, the worker's denial as to being informed by the supervisor of the existence and location of the buried lines in the area worked on was neither relevant nor material to the issue of any duty owed to the worker, and was not a genuine issue of material fact that would have precluded summary judgment. *McKinney v. Regents of the Univ. Sys. of Ga.*, 284 Ga. App. 250, 643 S.E.2d 736 (2007), cert. denied, 2007 Ga. LEXIS 497 (Ga. 2007).

Negligence from sporting event. — Trial court properly granted summary judgment to a professional baseball player and the player's team, and against a baseball fan, in the latter's negligence suit as the fan voluntarily assumed the risk of injury from an errantly thrown baseball, and thus failed to come forth with specific evidence giving rise to a triable issue of fact. *Dalton v. Jones*, 260 Ga. App. 791, 581 S.E.2d 360 (2003).

Contractor's negligence. — Trial court properly granted partial summary judgment to a contractor, the contractor's business, and a subcontractor under O.C.G.A. § 9-11-56(c) because: (1) a party

was injured while attempting to put out a fire allegedly caused by the contractor's negligence, injuring the party's leg and foot; (2) despite being prescribed a removable cast and crutches, the injured party walked to the bathroom without the cast and crutches and fell, injuring the party's shoulder; (3) the treating physician testified that if the injured party was not experiencing pain, the injured party could walk short distances without the cast and crutches, however, the injured party had been experiencing pain; and (4) the injured party's own intervening act broke the chain of causation for the shoulder injury. *Hynes v. Cagle*, 264 Ga. App. 367, 590 S.E.2d 770 (2003).

Summary judgment is appropriate in negligence cases when, viewing all the facts and reasonable inferences from those facts in a light most favorable to the plaintiff, the evidence does not create a triable issue on the question of proximate cause; although the question of proximate cause is ordinarily for the jury to decide, plain and indisputable cases may be decided by the court as a matter of law and the inquiry in such cases is whether the causal connection between the defendant's conduct and the injury is too remote for the law to countenance a recovery. *Brown v. All-Tech Inv. Group, Inc.*, 265 Ga. App. 889, 595 S.E.2d 517 (2004).

Negligence in auto accident. — Summary judgment was properly entered for a trucker in a third-party negligence action brought by a driver who turned into a truck to avoid a head-on collision while the driver was attempting a pass that was illegal under O.C.G.A. § 40-6-42; there was nothing to show that the trucker knew, or in the exercise of ordinary care should have known, that the driver was likely to attempt an illegal pass and the trucker was complying with the traffic regulations at the time of the accident. *Rios v. Norsworthy*, 266 Ga. App. 469, 597 S.E.2d 421 (2004).

Trial court correctly rejected a *res ipsa loquitur* claim brought against a car owner by a passenger injured in an accident that occurred when the car suffered a sudden steering malfunction since there was evidence that negligent driving may have caused the accident and since the

malfunction could have occurred for reasons other than negligent maintenance or repair; however, the trial court erred in denying the car owner's summary judgment motion on the injured passenger's negligence claims since the car owner showed that the owner diligently repaired and maintained the car for over two years until the accident here, since the injured person's evidence did not support a reasonable inference that the malfunction resulted from negligent repair or maintenance and since negligence by the owner could not have been reasonably inferred solely because the owner had repaired and maintained a car that suffered a malfunction. *Ken Thomas of Ga., Inc. v. Halim*, 266 Ga. App. 570, 597 S.E.2d 615 (2004).

Trial court properly granted summary judgment to a vehicle driver on the vehicle passenger's negligence action against the driver and a second driver after the second driver pulled into the intersection and caused a collision with the vehicle driven by the first driver; the passenger could not show that the first driver breached any duty owed to the passenger or that the first driver's actions were the proximate cause of the passenger's injuries. *McQuaig v. Tarrant*, 269 Ga. App. 236, 603 S.E.2d 751 (2004).

Trial court properly denied a driver's summary judgment motion in a police officer's personal injury action against the driver as the officer's suit was not barred by the Fireman's Rule given that the alleged negligence that occurred to cause the accident which injured the officer had nothing to do with the officer's presence at the scene. *Davis v. Pinson*, 279 Ga. App. 606, 631 S.E.2d 805 (2006).

Conclusion of the expert's testimony as to the cause of an auto accident was speculative and could not support summary judgment as the credibility of the expert and the weight to be given to the opinion were matters to be addressed by the jury; moreover, if the expert's opinion was based upon inadequate knowledge, this fact did not mandate the exclusion of the opinion but, rather, presented a jury question as to the weight which should be assigned to the opinion. *Layfield v. DOT*, 280 Ga. 848, 632 S.E.2d 135 (2006).

In a negligence action stemming from

an auto accident between a driver and a farmer's cow, the trial court properly granted summary judgment on the driver's claim for consequential damages, which was sought for a "ruined vacation," as the driver failed to show any evidence of a physical injury which was a necessary element on a claim premised on ordinary negligence. *Hoeflick v. Bradley*, 282 Ga. App. 123, 637 S.E.2d 832 (2006).

In a personal injury action arising from a child's injuries as a pedestrian, because conflicting testimony was presented to the trial court as to the issue of a driver's negligence as well as a parent's comparative negligence and apportionment of fault, if any, the trial court properly denied the driver's motion for summary judgment. *Sutton v. Justiss*, 290 Ga. App. 565, 659 S.E.2d 903 (2008).

In a negligence action arising from a vehicular accident, the trial court did not err in denying summary judgment to the driver of the other car and its owner, because the injured party's testimony supplied a reasonable basis to conclude that the injuries were more likely than not the result of the impact of the collision with the car's driver. *Wilson v. Allen*, 272 Ga. App. 172, 612 S.E.2d 39 (2005).

In a personal injury action against a vehicle's owner filed by an injured passenger based on the negligence of the vehicle's driver, the trial court properly granted summary judgment to the owner, finding no liability under the family purpose doctrine because: (1) the driver was not a member of the owner's immediate household; and (2) the passenger failed to present competent evidence in response to the owner's summary judgment motion as neither hearsay or evidence of conjecture and speculation was sufficient. *Patterson v. Lopez*, 279 Ga. App. 840, 632 S.E.2d 736 (2006).

In a personal injury action filed by a husband and wife against a driver and that driver's employer, a negligent entrustment claim asserted against the employer was properly disposed of on summary judgment, but because the motion did not include both their negligent hiring and respondeat superior claims, and the husband and wife were not given full and fair notice that those claims were to be

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included in the motion, those claims also survived. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

Gross negligence. — Summary judgment was properly entered for the storage companies on an owner's gross negligence claim because: (1) assuming the owner's allegations were true, the storage companies' actions would only be ordinary negligence; (2) the storage companies owed no duty to the owner; and (3) the storage companies were not liable under Georgia's Good Samaritan Doctrine, as the companies did not assume a duty to conduct a vehicle count in the companies' operations manual, the owner was not aware of the manual until after the owner filed suit, and were the storage companies required to conduct a vehicle count, their failure to do so would not have increased the risk of theft as daily counts could only detect that a theft might have occurred after the theft had already occurred. *Liberty v. Storage Trust Props., L.P.*, 267 Ga. App. 905, 600 S.E.2d 841 (2004).

Negligence by independent contractor. — Although exculpatory clauses signed by a pilot and a safety pilot who flew an aircraft company's plane and engaged in simulated aerial combat were not against public policy under O.C.G.A. § 1-3-7, they were not enforceable if the company was found to have been grossly negligent or to have engaged in willful misconduct, which was an issue to be resolved by the jury; additionally, a jury issue remained as to whether one of the pilots was an independent contractor for purposes of the company's liability under O.C.G.A. § 51-2-5(5), and, accordingly, a grant of summary judgment pursuant to O.C.G.A. § 9-11-56 to the company was error. *McFann v. Sky Warriors, Inc.*, 268 Ga. App. 750, 603 S.E.2d 7 (2004).

To establish a negligence claim, a plaintiff must come forward with specific facts establishing the elements of negligence as to each defendant, including proximate causation, and may not rest upon generalized allegations. Summary judgment was properly granted to a construction

company and an architectural firm in an action alleging construction work near the intensive care unit where a patient was being treated stirred up a fatal fungus that caused the patient's death because: (1) it was not established that the construction company performed the work; (2) no medical evidence supported a finding that any alleged construction work was the proximate cause of the transmission of the fungus; (3) the architectural firm was not responsible for deciding when or how the work would be performed; and (4) the architectural firm was not responsible for the hospital's decisions regarding patient treatment, treatment locations, or timing of treatment. *Piedmont Hosp., Inc. v. Reddick*, 267 Ga. App. 68, 599 S.E.2d 20 (2004).

Negligence by a restaurant. — In a case brought by an injured person against a restaurant seeking damages arising from the injured person's slip and fall in a restroom, summary judgment for the restaurant was reversed; the restaurant failed to show that the restaurant lacked superior knowledge of the water condition in the restroom because the restaurant knew that a toilet in an adjacent restroom had overflowed onto the floor, a restaurant employee had pushed water from the adjoining restroom into the restroom at issue, the restaurant was notified by the injured person's sister that there was water everywhere, the sister's warning to the injured person stopped short of expressly extending to the inside of the restroom, and there was no warning cone placed at either the door of or inside the restroom in question. *Belcher v. Ky. Fried Chicken Corp.*, 266 Ga. App. 556, 597 S.E.2d 604 (2004).

Summary judgment, pursuant to O.C.G.A. § 9-11-56(c), was properly granted to a restaurant by a trial court in an action by a restaurant patron, alleging emotional distress when the patron discovered two blood spots on the french fry container, fearing that the patron would contract HIV or hepatitis, because the patron failed to provide evidence of more than the patron's "fear" of exposure to the diseases; accordingly, the patron's claims for negligence, negligence per se, and breach of the implied warranty of mer-

chantability, under O.C.G.A. §§ 11-2-314 and 51-1-23, failed due to the patron's failure to meet the damages requirement. *Wilson v. J & L Melton, Inc.*, 270 Ga. App. 1, 606 S.E.2d 47 (2004).

Administrative errors as negligent act. — When a retired police officer, to whom a city paid more retirement benefits than the officer was entitled, sued the city for negligence when the city corrected the error, the city was entitled to summary judgment because the city had no authority to pay the officer more retirement benefits than were provided in the officer's retirement plan, and the officer's alleged "early retirement," based on a city clerk's representation that the officer would receive the higher benefit amount the officer was erroneously paid was not an injury for purposes of a negligence cause of action. *Dodd v. City of Gainesville*, 268 Ga. App. 43, 601 S.E.2d 352 (2004).

Assumption of risks. — Summary judgment in favor of a skate center was affirmed in a claim brought by a skater who was injured when another skater collided with the skater on an ice rink; it was found that the skater assumed the risks of ice skating, which, by the skater's own admissions, were known to the skater. *Fowler v. Alpharetta Family Skate Ctr., LLC*, 268 Ga. App. 329, 601 S.E.2d 818 (2004).

Negligence by railroad. — Appellate court erred in concluding that the trial court's denial of summary judgment to the town and railway on the estate representative's claim that they failed to keep a railroad right-of-way free of visual obstructions caused by overgrown vegetation should be reversed; genuine issues of material fact remained with respect to two separate, independent duties that they may have owed the decedent, whose tractor-trailer was struck by a train as the decedent drove the tractor-trailer across the town's railroad tracks, with one duty arising under the common law and one duty arising under O.C.G.A. § 32-6-51 if there was an absence of any governmental authorization that allegedly obstructed decedent's view. *Fortner v. Town of Register*, 278 Ga. 625, 604 S.E.2d 175 (2004).

Trial court erroneously denied summary judgment pursuant to O.C.G.A.

§ 9-11-56(c) to a railroad in a negligence action by an injured car driver, whose car was hit in the rear by a drunk driver, propelling the driver's vehicle forward into a train, as the injured car driver was unable to establish proximate cause between the accident and the negligence of the railroad in maintaining the crossing; whether the reflectorized crossbuck was at the wrong height or not was irrelevant as the drunk driver's intervening act broke the chain of causation. *CSX Transp., Inc. v. Deen*, 269 Ga. App. 641, 605 S.E.2d 50 (2004).

Simple negligence by medical professionals. — While the trial court erred in granting summary judgment against a patient in a medical malpractice action based on a failure to attach an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 because the complaint could be construed as alleging claims of ordinary negligence, to the extent the complaint could be read to allege professional malpractice claims, summary judgment was proper; moreover, there were instances in which actions performed by a professional were nevertheless not professional acts constituting professional malpractice, but, rather, were acts of simple negligence which would not require proof by expert evidence. *Brown v. Tift County Hosp. Auth.*, 280 Ga. App. 847, 635 S.E.2d 184 (2006).

Farmer's negligence. — In a negligence action, summary judgment entered against a driver on a property damages claim was reversed, based on the collateral source rule, defendant farmer's failure to prove the existence of a subrogation agreement, and the issue of the farmer's liability to the driver, if any, was a jury question. *Hoefflick v. Bradley*, 282 Ga. App. 123, 637 S.E.2d 832 (2006).

Negligence of D.O.T. — Because alternative grounds in a negligence action arising out of the construction and resurfacing of a road, specifically, whether competent evidence showed that there were any defects in the roadway and whether the Department of Transportation's acceptance of the paving project exonerated the contractor, presented questions of fact for a jury to decide, the Supreme Court of Georgia's reversal of an order granting summary judgment to the Department

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and the contractor was adopted. *Layfield v. DOT*, 283 Ga. App. 151, 640 S.E.2d 618 (2006).

Trial court's summary judgment order in a negligence suit was properly entered against a couple, and in favor of a parent, as: (1) the family purpose doctrine did not apply to the couple's lawsuit; (2) the parent's child was not a member of the parent's household; and (3) upon a review of the record, after the parent came forward with sufficient evidence to support the motion, the couple as the non-moving party failed to come forward with evidence in opposition to the motion. *Hicks v. Newman*, 283 Ga. App. 352, 641 S.E.2d 589 (2007).

Because the undisputed facts presented before the trial court showed that the insurer of the leased premises owed no duty to those who leased the premises, and did not undertake any duty itself or through the insurer's claims adjuster, the trial court erred in denying the insurer's summary judgment motion on the lessees' negligence claim filed against the lessee. *GuideOne Mut. Ins. Co. v. Hunter*, 286 Ga. App. 852, 650 S.E.2d 424 (2007).

Negligence based on breach of duty. — In a lessee's negligence action against a lessor, because questions of fact remained regarding the lessor's breach of a duty owed to the lessee in reporting the recovery of a previously stolen rental trailer, and as to whether a breach of that duty proximately caused the lessee to become arrested for being in possession of stolen property and remained detained for a lengthy period of time, those issues could not be resolved as a matter of law; thus, an order granting the lessor summary judgment had to be reversed. *Halilovic v. Penske Truck Leasing*, 287 Ga. App. 215, 651 S.E.2d 160 (2007).

Negligence by court clerk. — Because a litigant could not utilize a theory known as "outsider reverse veil-piercing" to support a claim of negligence against a superior court clerk to satisfy a judgment owed to that litigant by a third party, and because the litigant failed to present any

other viable proximate cause argument, the clerk was entitled to complete summary judgment as to the issue. *Lollis v. Turner*, 288 Ga. App. 419, 654 S.E.2d 229 (2007).

Negligence by bus accident. — In a negligence action between an injured bus passenger and a bus company, because the passenger failed to present evidence regarding the cause of the injuries the passenger sustained while walking in a field after disembarking from the bus after the bus had pulled over, and because the cause remained a matter of pure speculation or conjecture, the trial court had a duty to grant summary judgment to the bus company. *Greyhound Lines, Inc. v. Williams*, 290 Ga. App. 450, 659 S.E.2d 867 (2008).

Negligence in felling tree. — In a civil action for damages caused by felling of a tree under the doctrine of respondeat superior, the trial court erroneously denied the homeowner's motion for summary judgment as an independent contractor was hired to fell the tree and the homeowner had no control over the contractor's actions, and the act of felling the tree was not wrongful in itself; moreover, the homeowner's single suggestion or comment that the contractor could proceed with felling the tree as an entire unit did not necessarily have to be followed and did not create liability on the homeowner's part, but was simply confirming the freedom of the contractor to fell the tree as that contractor deemed appropriate. *Whatley v. Sharma*, 291 Ga. App. 228, 661 S.E.2d 590 (2008).

Good Samaritan law and negligence action. — In a negligence action filed by the parents on behalf of their injured son, because jury questions remained as to whether a doctor had to provide immediate "emergency care at the scene of an accident or emergency" to the son within the meaning of the Good Samaritan statute, O.C.G.A. § 51-1-29, as well as the employer-hospital's immunity from any vicarious liability, summary judgment was erroneously entered against the parents and in favor of both the doctor and the hospital. *Gilley v. Hudson*, 283 Ga. App. 878, 642 S.E.2d 898 (2007).

Premises liability to licensee. — Trial court properly entered summary judgment for a radio station in an injured party's negligence action as the injured party was a licensee and the station did not wilfully or wantonly injure the injured party by maintaining in a perfectly level condition the floor upon which the injured party fell. *Howard v. Gram Corp.*, 268 Ga. App. 466, 602 S.E.2d 241 (2004).

Liability for hunter's death who was licensee on property. — Premises owner and its operator were properly granted summary judgment in an action filed against them by a decedent's administrator, as the decedent, who was granted permission to hunt on the property without a permit, was not shown to be anything other than a licensee, no breach of any duty owed to the decedent as a licensee was presented, and an intervening illegal act by a third party was the proximate cause of the decedent's death; moreover, because the evidence showed that there had never been an accidental shooting of one hunter by another on the premises, no basis existed for holding that the owners or operator should have foreseen that a third party would come onto the property and illegally shoot at a target which the third party could not identify. *Hadden v. ARE Props., LLC*, 280 Ga. App. 314, 633 S.E.2d 667 (2006).

Premises liability to lessee. — In a wrongful death action filed by a decedent-lessee's administrator in which the decedent was killed when crossing a public highway that the lessor did not control, the lessor was properly granted summary judgment as the administrator failed to show that the lessor was negligent per se or that the lessor breached either a common law or private duty owed to the lessee. *Walton v. UCC X, Inc.*, 282 Ga. App. 847, 640 S.E.2d 325 (2006).

Trial court properly granted summary judgment to the homeowners, in a personal injury action filed by a caretaker who worked in the home, as the caretaker's equal knowledge of the improper construction of the stairs in the home barred recovery, despite the fact that the construction violated the applicable building code; moreover, the caretaker's claim was not saved by an admission of contributory

negligence. *Argo v. Chitwood*, 282 Ga. App. 156, 637 S.E.2d 865 (2006).

In a premises liability action arising from a slip and fall on ice by an injured lessee, because jury issues existed as to whether the party exercised the requisite care, and as to the premises owner's knowledge of the hazard, the trial court erred in granting summary judgment to the owner and an insurer and in reasoning that the lessee failed to exercise due care. *Little v. Alliance Fire Prot., Inc.*, 291 Ga. App. 116, 661 S.E.2d 173 (2008).

Appraisers were properly granted summary judgment on the buyers' professional negligence claim, alleging that the appraisers grossly over-inflated the value of the subject property, since the appraisers were not manifestly aware of the use to which the information was to be put and did not intend that the information be so used; despite the fact that the mortgagees were listed among the class of persons to whom the report could have been distributed, the appraisers were clearly unaware that one occupying such status would rely on the appraisal in purchasing the property. *Martha H. West Trust v. Mkt. Value of Atlanta, Inc.*, 262 Ga. App. 90, 584 S.E.2d 688 (2003).

Negligent infliction of emotional distress. — Trial court properly entered summary judgment under O.C.G.A. § 9-11-56 for the owner of a truck and the truck owner's employee in a train engineer's suit for the negligent infliction of emotional distress arising out of an accident between a train and a truck as the engineer was not physically injured in the accident, and the engineer did not have a property interest injury resulting in a pecuniary loss arising out of the engineer's inability to continue working as the engineer was an at-will employee; the employee's argument that the zone of danger rule should be adopted in negligent infliction of emotional distress actions was rejected. *Shores v. Modern Transp. Servs.*, 262 Ga. App. 293, 585 S.E.2d 664 (2003).

Because an injured party alleged a physical impact and physical injuries, but did not claim that these injuries caused the party mental suffering or emotional distress, the party's mental distress claim was barred by Georgia's impact rule;

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hence, the trial court erred in denying summary judgment to the driver of the other car involved in the accident and the owner of the car. *Wilson v. Allen*, 272 Ga. App. 172, 612 S.E.2d 39 (2005).

Trespass. — Summary judgment was properly entered for a realtor as to a landowner's trespass claim; the landowner never determined that the offending silt fence was actually on the landowner's property, and the realtor testified that the fence was located on a public right-of-way. *Sorrow v. Hadaway*, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Person who rented space in a cousin's apartment without the landlord's knowledge or consent was a trespasser, and the trial court properly dismissed an action that the person filed against the landlord and a company that managed the apartment complex seeking damages for injuries the person sustained when the person slipped and fell, because the evidence showed that neither the landlord nor the property manager breached their duty not to willfully or wantonly injure trespassers. *Gomez v. Julian LeCraw & Co.*, 269 Ga. App. 576, 604 S.E.2d 532 (2004).

Imputed liability for acts of independent contractor. — Summary judgment was properly entered for a realtor and a developer as to a landowner's claim that the realtor and the developer were liable under O.C.G.A. §§ 51-2-4 and 51-2-5 for failing to ascertain the location of the boundary between the realtor's lot and the landowner's lot and communicate the boundary line to an independent contractor hired by the developer to brush the realtor's; the developer testified that a creek and a transformer had been used as landmarks for the boundary line in instructing the contractor, and the landowner did not challenge the use of the landmarks. *Sorrow v. Hadaway*, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Contractors and subcontractors. — Summary judgment was properly granted in favor of the home center company on the homeowners' negligence claim because welding was not an intrinsically

dangerous activity for which the company remained responsible for its subcontractors; the company was not restricted by the contract in subcontracting the break down and removal of the trade-in mobile home, and was therefore not liable if this were done negligently. *Luther v. Wayne Frier Home Ctr. of Tifton, Inc.*, 264 Ga. App. 827, 592 S.E.2d 470 (2003).

Since a cause of action alleging that a subcontractor had negligently installed wiring in a house accrued on the date of substantial completion of the house for purposes of damage to the realty, a trial court erred in denying the subcontractor's motion for summary judgment, which asserted that the case, filed more than four years after substantial completion of the house, was time barred as to damage to the real property; however, since the cause of action for damage to personal property damaged in the fire accrued on the date of the fire and not the date of substantial completion, the claim for damage to personalty was not time barred, and summary judgment as to that claim was properly denied. *Stamschror v. Allstate Ins. Co.*, 267 Ga. App. 692, 600 S.E.2d 751 (2004).

Trial court properly granted summary judgment to the materialman on an action to recover on a lien release bond after an electrical subcontractor did not pay for materials supplied to the subcontractor by the materialman, and despite the claim of the general contractor and surety that the materialman did not comply with a lien statute notice requirement; the lien statute notice requirement was meant to protect prospective purchasers from unknowingly buying property encumbered by liens and did not apply to the materialman's situation because the materialman, acting as a lien claimant, was attempting to recover on a lien discharge bond that the general contractor and the surety had filed to discharge the lien against the electrical contractor. *Washington Intl Ins. Co. v. Hughes Supply, Inc.*, 271 Ga. App. 50, 609 S.E.2d 99 (2004).

There was no such thing as a default summary judgment, and even if a building owner failed to respond to a subcontractor's summary judgment motion, the sub-

contractor was required to show that summary judgment was appropriate; summary judgment for the subcontractor against the building owner was reversed because there was no claim that the building owner was liable under the contract, no claim that the building owner received money to which the subcontractor was entitled, and no evidence that allowing the building owner to retain heat pumps supplied by the subcontractor violated some principle of equity, and the circumstances were insufficient to authorize summary judgment based on an implied constructive trust. *Tabar, Inc. v. D & D Servs.*, 267 Ga. App. 659, 601 S.E.2d 143 (2004).

Enforcement of materialman's liens. — Because a notice under O.C.G.A. § 44-14-361.1(a)(3) was not filed within 14 days of a lien claimant's suit being initiated, the lien was unenforceable, and the trial court did not err in granting a developer's motion for partial summary judgment against the lien claimant; while the appeals court sympathized with the lien claimant's argument that the claimant received a file-stamped copy and as a result believed no fee was due, ultimately it was the responsibility of the plaintiff and plaintiff's counsel to see that the appropriate fees were paid in a timely manner. *Kendall Supply, Inc. v. Pearson Cmtys., Inc.*, 285 Ga. App. 863, 648 S.E.2d 158 (2007).

Fair Business Practices Act. — Pursuant to O.C.G.A. § 10-1-401(a)(1), an action under the Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., cannot be brought more than two years after the person bringing the action knew or should have known of the occurrence of the alleged violation; since the alleged contradictory language in a construction contract on which an FBPA claim was based was present when the contract was signed, the statute of limitations began running when the contract was signed; thus, an FBPA suit filed against a homebuilder more than two years after the date of the contract was untimely, and the trial court's summary judgment in favor of the homebuilder was affirmed. *Tiismann v. Linda Martin Homes Corp.*, 268 Ga. App. 787, 603 S.E.2d 45 (2004).

Misappropriation of trade secrets.

— Because: (1) the trial court erred in holding that mere suspicion of a possible misappropriation of an employer's trade secrets by one of its former employees amounted to objectively reasonable notice sufficient to trigger the running of the statute; and (2) a fact issue existed as to whether the suspicions reflected in the employer's letters to the former employee's counsel were sufficient to cause a reasonable person to investigate whether its trade secrets had been misappropriated, the trial court erred in granting the former employee partial summary judgment on the basis of the five-year statute of limitations under O.C.G.A. § 10-1-766. *Porex Corp. v. Haldopoulos*, 284 Ga. App. 510, 644 S.E.2d 349 (2007), cert. denied, 2007 Ga. LEXIS 498 (Ga. 2007).

Fair Credit Reporting Act. — Because the record evidence showed that a customer failed to file suit alleging claims under the Fair Credit Reporting Act within the two years after a wireless service provider reported the customer's outstanding debt to one credit agency, as required by 15 U.S.C. § 1681p, the suit was properly dismissed via summary judgment as time-barred. *Lamb v. Verizon Wireless Servs., LLC*, 284 Ga. App. 696, 644 S.E.2d 412 (2007).

General premises liability for commercial entities. — In a customer's premises liability action, because factual issues existed as to whether a retailer knew or should have known of a hazardous condition when it left a rolled-up carpet mat leaning on its end in the produce department, and whether the retailer could foresee that it would be knocked over and become a tripping hazard, summary judgment in favor of the retailer, and against the customer, was reversed. *Freeman v. Wal-Mart Stores, Inc.*, 281 Ga. App. 132, 635 S.E.2d 399 (2006).

In a wrongful death action against a church as a premises owner, because the decedent's husband, as administrator of the estate, failed to raise a material fact question of the church's liability for allowing its parishioners to park on the side of the roadway, and thus, obstruct the decedent's view of the adjacent intersection, causing the decedent to collide with an

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oncoming northbound vehicle, the church was properly granted summary judgment. *Gay v. Redland Baptist Church*, 288 Ga. App. 28, 653 S.E.2d 779 (2007).

Trial court properly granted summary judgment to a retailer, in a customer's negligence action filed against the retailer for injuries sustained when a tomato tower punctured an eye, as the customer's injury arose out of a third party's actions which the retailer did not and could not have foreseen, and hence no evidence was presented that the retailer breached a duty owed to the customer. *Thomas v. Home Depot, U.S.A., Inc.*, 284 Ga. App. 699, 644 S.E.2d 538 (2007).

In a customer's personal injury action, a property owner was properly granted summary judgment as the owner had no duty to foresee any danger from the owner's criminally damaged pay phone falling on the customer's head, the way the injury occurred was not reasonably expected, and due to the fact that such could not occur except from the customer's unexpected acts. *McAfee v. ETS Payphones, Inc.*, 283 Ga. App. 756, 642 S.E.2d 422 (2007).

Because: (1) the undisputed evidence presented to the trial court was that a retailer had no knowledge of a hazard posed by a previously loaded BB gun placed on an open display shelf and accessible to children; and (2) a parent failed to show that it was reasonably foreseeable that the parent's child would take the gun and shoot the child's sibling, the trial court did not err in granting the retailer summary judgment as to the issue of the retailer's liability. *Roberts v. Wal-Mart Stores, Inc.*, 287 Ga. App. 316, 651 S.E.2d 464 (2007).

In a premises liability action, the trial court properly granted summary judgment to a participant in a contest held by a licensee, without considering the question of whether the participant assumed the risk of falling by participating in a jump-rope in a suit and dress shoes, as that participant failed to show that the licensee had control over the condition of

the premises where the contest was held, and had superior knowledge of the hazard or defect which allegedly caused the participant's injuries. *Dixon v. Infinity Broad. East, Inc.*, 289 Ga. App. 71, 656 S.E.2d 211 (2007).

Because a party injured in a fall admitted to having actual knowledge not only of the alleged hazard which caused the fall, but of the specific danger the hazard presented, and as a result appreciated the danger involved, the trial court erred in denying summary judgment to the premises owner as to the issue of liability, given that based on the foregoing, the party should have avoided any injury in the exercise of ordinary care. *Callaway Gardens Resort, Inc. v. Bierman*, 290 Ga. App. 111, 658 S.E.2d 895 (2008).

Because a skating rink patron failed to present sufficient evidence showing that the rink owners breached a duty by failing to have identifiable floor guards on duty at the time of the patron's fall, and that the breach proximately caused the patron's injuries, but instead, the unequivocal evidence showed that a floor guard was on duty at that time of the fall, the trial court properly granted summary judgment to the owners as to the issue of the owner's liability. Moreover, testimony from other management personnel, who were not at the rink at the time of the fall, did not contradict the assistant manager's positive assertions or written report and did not create a material issue of fact. *Evans v. Sparkles Mgmt., LLC*, 290 Ga. App. 458, 659 S.E.2d 860 (2008).

General premises liability for homeowners, landlords, and others.

— Summary judgment in favor of homeowners was affirmed in a premises liability claim based on an injury to a four-year-old child on a trampoline in the homeowners' yard because there was no showing that the homeowners willfully or wantonly led the child into a hidden peril on the homeowners' premises and, therefore, did not breach the duty of care owed to the homeowners' social guest; however, when jury questions existed as to whether the homeowners undertook the supervision of the child and whether the homeowners used reasonable care to protect the child from injury, summary judgment on a

negligent supervision claim was reversed. *Nunn v. Page*, 265 Ga. App. 484, 594 S.E.2d 701 (2004).

In a personal injury action, because an injured party failed to show that the landlords could not have had constructive notice of the deteriorated condition of the steps upon which that party fell and was injured, the landlords were not liable for the landlords' failure to keep the premises in repair. Thus, the landlords were properly granted summary judgment as to the issue of liability for the party's injuries. *Stelter v. Simpson*, 288 Ga. App. 402, 655 S.E.2d 237 (2007).

In a premises liability action filed by a repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action. *Saunders v. Indus. Metals & Surplus, Inc.*, 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

Trial court properly granted summary judgment to an apartment complex owner, and against the decedent's personal representative, in the latter's premises liability action against the former as: (1) evidence was lacking that the vacant apartment where the decedent was murdered was negligently left unlocked; and (2) despite the criminal history of the area where the apartment was located, the owner had no reasonable belief to anticipate that a murder would have occurred on the owner's premises. Moreover, guesses or speculation which raised merely a conjecture or possibility were insufficient to create even an inference of fact for consideration on summary judgment. *Wojcik v. Windmill Lake Apts., Inc.*, 284 Ga. App. 766, 645 S.E.2d 1 (2007), cert. denied, 2007 Ga. LEXIS 637 (Ga. 2007).

Because a painter failed to show that a homeowner's knowledge of an electrical

wiring defect was superior to that of the painter, the homeowner was entitled to summary judgment as to the issue of the homeowner's liability. *Schuessler v. Bennett*, 287 Ga. App. 880, 652 S.E.2d 884 (2007), cert. denied, 2008 Ga. LEXIS 230 (Ga. 2008).

Landlord liability in guest's premises liability lawsuit. — Trial court properly granted summary judgment to a landlord on the guest's premises liability lawsuit as the pleadings, affidavits, depositions, and other material on file did not establish a genuine issue of material fact and the landlord was entitled to judgment as a matter of law; the guest did not show that the guest lacked knowledge of the hazard presented by descending a steep stairway to reach the tenant's basement apartment since the guest had descended the stairway on four occasions without incident before being injured in a fall, and the guest also did not show that the steep stairway was the only way to access the apartment. *Yon v. Shimeall*, 257 Ga. App. 845, 572 S.E.2d 694 (2002).

Slander of title. — Petition that a husband and wife filed against an attorney seeking \$50,000 "for humiliation and embarrassment" they experienced because an attorney initiated a foreclosure action after they refused to pay a promissory note did not state a claim for special damages, and the state supreme court held that the trial court properly granted the attorney's motion for summary judgment on the husband and wife's claim alleging slander of title, even though the trial court dismissed the claim on other grounds. *Latson v. Boaz*, 278 Ga. 113, 598 S.E.2d 485 (2004).

Negligent inspection claim. — Trial court properly granted summary judgment dismissing a home buyers' claim of professional negligence against an engineering firm that performed an allegedly negligent inspection of the home because the buyers had no privity with the firm and none of the exceptions to this requirement applied. *Smiley v. S & J Inves., Inc.*, 260 Ga. App. 493, 580 S.E.2d 283 (2003).

Summary judgment was properly entered for a railroad as to an injured party's premises liability claim based on a premises owner's non-delegable duty to keep

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the premises safe for the protection of invitees. The railroad neither owned nor occupied the sidetrack that was the site of the accident. Assuming that the railroad did own the sidetrack, there was no evidence that the railroad had any knowledge of the defective condition that was the result of its lessee's use of a defective iron grate. The injured party conceded that the defective grate was not readily apparent and the injured party failed to show that the railroad would have discovered the defect had the railroad conducted a reasonable inspection. *Mixon v. Ga. Cent. Ry., L.P.*, 266 Ga. App. 365, 596 S.E.2d 807 (2004).

Landlord and tenant actions. — Summary judgment under O.C.G.A. § 9-11-56 for an owner, a manager, and a lessor of an apartment was properly entered in a tenant's action for trespass arising out of the tenant's eviction; the entry of the writ of possession was proper, on the writ's face, under O.C.G.A. § 44-7-50. *Vickers v. Merry Land & Inv. Co.*, 263 Ga. App. 316, 587 S.E.2d 816 (2003).

Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) to a lessor in a lessee's breach of contract action; pursuant to a lease for roof space to be used for a billboard, the lessee defaulted by interfering with a cellular antenna already placed on the roof, and the lessor provided the proper notice of termination. *Tower Projects, LLC v. Marquis Tower, Inc.*, 267 Ga. App. 164, 598 S.E.2d 883 (2004).

Summary judgment was properly granted to a landlord in the landlord's dispossessory action against a tenant because: (1) the tenant failed to pay the rent timely on at least two prior occasions within the 12 months preceding the payment at issue; (2) the tenant mailed the rent payment on July 10th; (3) although the lease did not specifically state that the rent was to be paid and received by 5:00 p.m., "paid" did not mean "tendered," and the terms "normal hours of business" and "by 5:00 p.m." also implied that receipt of

the rent was necessary, rather than just the rent's tender; (4) the lease provided that written notice of the lease's cancellation would be given after three late payments; and (5) a claimed conflict between the executive director's affidavit and a newsletter did not create an issue of material fact as the tenant's payment was mailed after the deadline set forth in the newsletter. *Baker v. Hous. Auth. of Waynesboro*, 268 Ga. App. 122, 601 S.E.2d 350 (2004).

Trial court properly entered summary judgment for a landlord against a tenant and a guarantor because the tenant admitted that the tenant withheld rent for over one year and the outstanding balances due under the lease and the guaranty were undisputed; the trial court was not required to wait until discovery was completed under O.C.G.A. § 9-11-56(a) as the matter was ripe for a ruling. *Vick v. Tower Place, L.P.*, 268 Ga. App. 108, 601 S.E.2d 348 (2004).

After applying the rules of contract construction under O.C.G.A. §§ 13-2-2 and 13-2-3, the Court of Appeals of Georgia upheld an order granting summary judgment to a lessee as the lessee was not required to pay the lessee's portion of the security related costs under the terms of the lease, according to the Common Area Costs formula contained therein; hence, the lessee was authorized to refuse to pay those costs without being in breach of the lease agreement. *Covington Square Assocs., LLC v. Ingles Mkts., Inc.*, 283 Ga. App. 307, 641 S.E.2d 266 (2007).

In a case involving a commercial lease, because the tenant failed to prove all the elements of the tenant's constructive eviction defense, the landlord was properly granted summary judgment on the landlord's claim for rent and late fees; but because genuine fact issues remained as to the tenant's diminution of rent counterclaim when the landlord terminated the water service and for the time period the tenant was without water, as well as regarding the issue of whether the landlord waived a requirement that the tenant install a submeter, the landlord was not entitled to summary judgment regarding these issues. *Delta Cleaner Supply Co. v. Mendel Drive Assocs.*, 286 Ga. App. 227, 648 S.E.2d 651 (2007).

While the trial court properly granted summary judgment to a lessee regarding the enforcement of a lease provision barring removal of certain improvements to the leasehold originally made by the lessor's predecessor-in-interest, despite the lessor's demand that such be removed, given a non-waiver provision in the lease, and the fact that a demand for reimbursement for insurance premiums paid over the life of the lease could be made at any time, the landlord was entitled to the premiums. *Ranwal Props., LLC v. John H. Harland Co.*, 285 Ga. App. 532, 646 S.E.2d 730 (2007).

Specific performance of land sales contract. — In a buyer's suit seeking specific performance of a land sales contract that contained a clear and unambiguous clause stating that time was of the essence, the trial court properly granted summary judgment against the buyer, due to the buyer's failure to timely tender additional earnest money, and because that action amounted to a breach authorizing the sellers to terminate the agreement. *Chowhan v. Miller*, 283 Ga. App. 749, 642 S.E.2d 428 (2007).

Because the evidence presented at trial made it clear that a lessor conveyed no ownership interest to a tenant, leaving that tenant with only a right to possess and use the leased property, and more specifically, a usufruct, the tenant did not own an interest in the property, and thus could not pursue an easement by necessity under O.C.G.A. § 44-9-40; hence, summary judgment in the lessor's favor as to this issue was upheld on appeal. *Read v. Ga. Power Co.*, 283 Ga. App. 451, 641 S.E.2d 680 (2007).

In an action seeking specific performance of a land sales contract, because genuine issues of material fact existed as to whether the \$45,000 sales price was adequate in relation to the fair market value of the subject property, and whether enforcement of the contract was equitable, the trial court erred in granting the buyers of that land summary judgment. *Weeks v. Rowell*, 289 Ga. App. 507, 657 S.E.2d 881 (2008).

Class action suit for breach of lease. — Trial court properly dismissed a class action suit arising out of a breach of a

lease agreement and filed by a group of uninsured patients against a hospital for failure to state a claim upon which relief could be granted, which the court converted to a motion for summary judgment, as the class members: (1) failed to timely object to the merits of the oral motion; (2) acquiesced to the evidence in support of the motion; and (3) failed to show they were third-party beneficiaries of the agreement, with sufficient standing to sue upon a breach of the agreement's terms. *Davis v. Phoebe Putney Health Sys.*, 280 Ga. App. 505, 634 S.E.2d 452 (2006).

Commercial lease agreements. — In a lessor's action to enforce the provisions of a commercial lease pursuant to O.C.G.A. § 13-1-11, because a lessee's predecessor-in-interest failed to strictly comply with a cancellation option in the lease, and time was of the essence, the trial court erred in ruling otherwise, resulting in an expiration of the option due to the failure to timely exercise the option; thus, on remand the lessor was entitled to summary judgment on the lessor's possession claim and to the past rent due under the lease for the term sought. *Piedmont Ctr. 15, LLC v. Aquent, Inc.*, 286 Ga. App. 673, 649 S.E.2d 733 (2007), cert. denied, 2007 Ga. LEXIS 749 (Ga. 2007).

Equipment lease agreements. — In an action arising out of its lessee's breach of an equipment lease, the lessor was properly granted summary judgment, as a claim that an affidavit from the lessor's valuation expert was raised for the first time on appeal and thus was not addressed, and the lessee could not complain that the equipment or delivery was defective, as the lessee took the equipment under the lease "as is." *Locke's Graphic & Vinyl Signs, Inc. v. Citicorp Vendor Fin., Inc.*, 285 Ga. App. 826, 648 S.E.2d 156 (2007).

Injunctive relief against housing authority. — Since there was no evidence of a continuing trespass and since a housing authority had an adequate remedy at law, summary judgment granting an injunction barring entry on the housing authority's property by a husband and wife was reversed. *Strange v. Hous. Auth. of Summerville*, 268 Ga. App. 403, 602 S.E.2d 185 (2004).

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Owners and occupiers of land. — Homeowners' summary judgment motion should have been granted as the homeowners had no actual or constructive notice of a problem with a deck that collapsed, injuring the injured party; the home had been inspected one year earlier, and no problem with the deck was identified, although the inspection report indicated that the deck was not bolted to the house. Nailing a deck to a house was acceptable at the time of the inspection. *Wingo v. Harrison*, 268 Ga. App. 156, 601 S.E.2d 507 (2004).

Summary judgment on zoning issue. — Because no evidence was presented regarding the content of the relevant county zoning ordinance at the time a landowner purchased the land in question, and whether the use of the property as a landfill was prohibited by the ordinance, and because laches did not apply against the state in which a zoning issue was involved, summary judgment was improperly granted in favor of a landowner. Further, the trial court erred in finding that the landfill was grandfathered as a non-conforming use under that zoning ordinance. *Flippen Alliance for Cmty. Empowerment, Inc. v. Brannan*, 267 Ga. App. 134, 601 S.E.2d 106 (2004).

Breach of warranty of title. — In a breach of warranty of title action, the trial court did not err in granting summary judgment in favor of the title insurance company despite the company's failure to object to title within 30 days of the date the sales contract was executed since the sales contract provided that no provisions survived closing, including the title-objection; thus, after the closing, the provisions of the warranty deed superceded any time limitations regarding objections to the title in the contract. *Weiss v. Old Republic Nat'l Title Ins. Co.*, 262 Ga. App. 120, 584 S.E.2d 710 (2003).

Quiet title actions. — In quiet title actions initiated by each party regarding the same parcel of residential property, the trial court properly adopted a special master's order granting summary judgment

in favor of a bank, who was the assignee of the holder of the loan secured by the property, finding that fee simple title vested in the bank, as the transfer of the property to the assignee of the holder of the security deed was valid when the deed under power was recorded; in the absence of any court order invalidating or setting aside that deed, the deed legally vested title in the property in the assignee of the holder of the security deed, and thus in the bank. *Vereen v. Deutsche Bank Nat'l Trust Co.*, 282 Ga. 284, 646 S.E.2d 667 (2007), cert. denied, 552 U.S. 1143, 128 S. Ct. 1089, 169 L. Ed. 2d 811 (2008).

Action against partners for payment of judgment against another partner. — In a case in which the plaintiff sued a limited partnership and two of its general partners for payment of a judgment gained against another general partner (a corporation), the trial court properly granted the defendants' motion for summary judgment because they were not parties to the prior suit. *Hartley v. Shenandoah, Ltd.*, 170 Ga. App. 868, 318 S.E.2d 508 (1984).

Breach of fiduciary duty. — When a company sued a company's accountants for breach of fiduciary duty regarding a sale of the company's assets, summary judgment was properly granted in favor of the accountants because the evidence was insufficient to create a factual dispute as to whether the accountants exercised a controlling influence over the will, conduct, and interest of the company as required under O.C.G.A. § 23-2-58 for a fiduciary relationship to arise. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Breach of settlement agreement. — Trial court properly entered summary judgment for a company, the company's subsidiary, and an employee in an injured party's claim that the company breached its settlement agreement with the injured party by adding a term barring the injured party from the company's premises as the company's desire to keep the injured party off of the company's property was independent of the settlement agreement and did not change or vary the terms of the settlement agreement; a private property owner may at any time restrict

persons from coming onto its property. *Batayias v. Kerr-McGee Corp.*, 267 Ga. App. 848, 601 S.E.2d 174 (2004).

Issue of nonmaterial fact in beneficiary's suit for mishandling of funds.

— Although there was a genuine issue of fact as to whether a savings and loan association had knowledge of a court order requiring court permission before encroaching upon the corpus of a trust, it was not a material fact because, even if the association had such knowledge, the association was permitted by O.C.G.A. § 7-1-190 to pay out the funds on the order of the trustee under the presumption that the trustee was acting in compliance with the trustee's fiduciary duties, so summary judgment was properly granted in favor of the association in the beneficiaries' suit for mishandling of the trust. *Chelena v. Georgia Fed. Sav. & Loan Ass'n*, 256 Ga. 336, 349 S.E.2d 180 (1986).

Misappropriation of trade secrets.

— Because a doctor's patient list was not a trade secret within the meaning of the Georgia Trade Secrets Act, O.C.G.A. § 10-1-761(4)(A), and because an attorney the doctor sued for misappropriation was not in the same industry as the doctor, the attorney's possession of the list did not reduce the doctor's competitive advantage in the field, which was the main purpose of protecting a trade secret; thus, the attorney was entitled to summary judgment on the doctor's claim of misappropriation. *Vito v. Inman*, 286 Ga. App. 646, 649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

Promissory estoppel and reasonable reliance. — Because promissory estoppel involves reasonable reliance, and questions of reasonable reliance are usually for the jury to resolve, the grant of summary judgment to the defendant was improper because jury issues remained on the plaintiff's promissory estoppel claim. *Ambrose v. Sheppard*, 241 Ga. App. 835, 528 S.E.2d 282 (2000).

Tortious interference with business relations. — Trial court properly granted a hospital's summary judgment motion pursuant to O.C.G.A. § 9-11-56 as to a doctor's claims for tortious interference with business relations because the doctor's claim was precluded as a matter of

law by the stranger doctrine. *Mulligan v. Brunswick Mem'l Hosp. Auth.*, 264 Ga. App. 39, 589 S.E.2d 851 (2003).

In an action alleging both tortious interference with business relations and a tortious interference with contract filed by an uncle against a nephew and the nephew's wife, summary judgment was properly entered against the uncle, as the evidence in support of the claims failed to show that the nephew had an improper purpose; more specifically, as regarding the former claim, the evidence amounted to either hearsay or double hearsay, and as to the second claim, the nephew could act with privilege with regards to the contract at issue. *Kirkland v. Tamplin*, 285 Ga. App. 241, 645 S.E.2d 653 (2007), cert. denied, 2007 Ga. LEXIS 616 (Ga. 2007); 552 U.S. 1297, 128 S. Ct. 1750, 170 L.Ed.2d 541 (2008).

Tortious interference with employment relationship.

— Summary judgment was properly entered for a company, the company's subsidiary, and the company's employee in an injured party's tortious interference with employment relationship claim as the injured party was an at-will employee of a contractor working at the company's plant, and the action of requesting that the injured party leave the premises was not malicious and did not fit within the definition of wrongful conduct. *Batayias v. Kerr-McGee Corp.*, 267 Ga. App. 848, 601 S.E.2d 174 (2004).

Tortious interference with contracts. — Buyer's tortious interference with contracts claims were properly disposed of on summary judgment as: (1) all parties to an interwoven contractual arrangement were not liable for tortious interference with any of the contracts or business relationships; and (2) a claim for tortious interference with contractual relations could not be predicated upon an allegedly improper filing of a lawsuit. *BKJB P'ship v. Moseman*, 284 Ga. App. 862, 644 S.E.2d 874, cert. denied, 2007 Ga. LEXIS 558 (Ga. 2007).

Business relationship. — Proof that a defendant was no stranger to the business relations at issue is fatal to a claim of tortious interference with business relations. By offering the services of off-duty police officers to provide private security

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at baseball games, a security company brought a city and the city's police department into the business relationship. The stranger doctrine foreclosed the security company's tortious interference with a business relationship claim brought against the city and police supervisors based on the supervisors' decision to deny permission to the off-duty officers to provide private security through the security company, and summary judgment in favor of the city and the police supervisors was affirmed. *Cox v. City of Atlanta*, 266 Ga. App. 329, 596 S.E.2d 785 (2004).

Storage facility owner's duty of care. — Disputed facts regarding whether a storage facility owner fulfilled the owner's duty of exercising ordinary care in keeping its approaches safe by providing a walk board with no means of securing the board to a loading dock or moving van precluded summary judgment. *McGinnis v. Admiral Moving & Storage Co.*, 223 Ga. App. 410, 477 S.E.2d 841 (1996).

Usury. — Trial court properly granted summary judgment to a water company in the purchaser's complaint that a late fee for unpaid water bills was a cloak for a usurious loan as there was no evidence giving rise to a triable issue regarding the agreement to provide water. *Mallard v. Forest Heights Water Works, Inc.*, 260 Ga. App. 750, 580 S.E.2d 602 (2003).

Pending action. — Motion for summary judgment will lie on the ground of pendency of the former original action, in a second action brought by the same plaintiff against the same defendant and involving the same cause of action as in the former action. *Reeves Transp. Co. v. Gamble*, 126 Ga. App. 165, 190 S.E.2d 98 (1972).

Interspousal immunity doctrine barred a suit by a husband's estate against a wife's estate for injuries sustained by the husband in an auto accident in which the wife was driving the auto occupied by the husband; the danger was that the wife's estate could have conceded fault to get insurance proceeds for both

estates, and the trial court's summary judgment in favor of the wife's estate was affirmed. *Larkin v. Larkin*, 268 Ga. App. 127, 601 S.E.2d 487 (2004).

Intentional infliction of emotional distress. — Trial court properly entered summary judgment against an uncle, and in favor of the uncle's nephew and the nephew's wife, on the uncle's intentional infliction of emotional distress claim, as the complained of statements amounted to common expressions from family members and a common vicissitude of ordinary life, though given in a threatening tone of voice, and were not extreme and outrageous. *Kirkland v. Tamplin*, 285 Ga. App. 241, 645 S.E.2d 653 (2007), cert. denied, 2007 Ga. LEXIS 616 (Ga. 2007); 552 U.S. 1297, 128 S. Ct. 1750, 170 L.Ed.2d 541 (2008).

Because an employee failed in the burden of showing that the conduct and behavior of the employee's former manager did not, as a matter of law, qualify as extreme and outrageous conduct, the trial court properly granted summary judgment as to the issue of liability to the employee's former employer and former manager; moreover, while comments made within the context of one's employment might be horrifying or traumatizing, the comments were generally considered a common vicissitude of ordinary life. *Wilcher v. Confederate Packaging, Inc.*, 287 Ga. App. 451, 651 S.E.2d 790 (2007).

Official immunity. — Trial court properly granted summary judgment to a county school board and the board's superintendent in a parents negligence action arising out of an attack on school grounds that injured their daughter as the board and the superintendent presented sufficient evidence that a school safety plan was in place at the elementary school at the time the child was attacked, entitling the board and the superintendent to official immunity barring the parents' negligence claims. *Leake v. Murphy*, 284 Ga. App. 490, 644 S.E.2d 328 (2007), cert. denied, 2007 Ga. LEXIS 671 (Ga. 2007).

In a tort action for personal injuries and property damage arising from an auto collision filed against a city and the city's police officer, the trial court properly granted summary judgment to the officer,

given that the officer was engaged in a discretionary function of responding to an emergency situation at the time the accident at issue occurred. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

Personal injury. — Because the plaintiff was injured in a restaurant by an exploding bottle, the fact that the plaintiff's evidence did not prove definitively which of the two manufacturers supplied the particular bottle — or, indeed, that the bottle's disintegration and the plaintiff's subsequent injuries were due to fault on the part of either manufacturer — was of no significance in determining whether summary judgment should be granted against the plaintiff. *Scott v. Owens-Illinois, Inc.*, 173 Ga. App. 19, 325 S.E.2d 402 (1984).

Defendant insurer was properly granted summary judgment on a claim by the plaintiffs, a postal worker and spouse, for underinsured motorist benefits in a case in which the plaintiffs received \$95,554 from the tortfeasor who injured the postal worker, representing the tortfeasor's cumulative policy limits of \$100,000 less \$4,445 that was paid to the postal service for damage to a postal truck, because, even though \$34,666 of the \$95,554 went to a workers' compensation program and a health insurer on their subrogation claims, the subrogation sums represented money that the postal worker had already recovered in the form of workers' compensation and health benefits coverage for some of the worker's damages; thus, the subrogation claims did not constitute "payment of other claims or otherwise" that reduced the tortfeasor's available coverage. The plaintiffs recovered more than their available \$75,000 in uninsured/underinsured motorist coverage, and the trial court was correct that the tortfeasor was not underinsured for purposes of O.C.G.A. § 33-7-11(b)(1)(D)(ii). *Thurman v. State Farm Mut. Auto. Ins. Co.*, 260 Ga. App. 338, 579 S.E.2d 746 (2003).

Trial court properly granted summary judgment to the amusement park operator on the injured party's personal injury claim after the party was struck in the

face with a lap restraint bar as the party did not show that the ride was a perilous instrumentality, that the amusement park operator had a superior knowledge of the hazard, or that the amusement park operator was in exclusive control of the car the party was getting into at the time of the accident such that the party should have been allowed to apply the doctrine of *res ipsa loquitur* to the party's case. *Harrelson v. Wild Adventures, Inc.*, 263 Ga. App. 569, 588 S.E.2d 341 (2003).

Summary judgment was properly granted to a warehouse corporation because the record did not reflect a genuine issue of material fact as to causation in a worker's claim for an injury suffered in the warehouse since there was no evidence the worker actually tripped. *Pennington v. Wjl*, 263 Ga. App. 758, 589 S.E.2d 259 (2003).

Trial court properly granted summary judgment in favor of a sheriff's deputy who was sued by a motorist who was injured when the motorist's car was struck by a car being driven by a suspect fleeing from police. *Standard v. Hobbs*, 263 Ga. App. 873, 589 S.E.2d 634 (2003).

Summary judgment in favor of a trading firm and a security company on a personal injury action was affirmed because the action was based on damages to victims of a shooting rampage by a former customer of the trading company; the shooter's criminal act was an intervening cause to any possible foreseeable injury the firm might have created, and the security company did not owe any of the victims of the rampage a duty. *Brown v. All-Tech Inv. Group, Inc.*, 265 Ga. App. 889, 595 S.E.2d 517 (2004).

Trial court erred in granting summary judgment for a school board in an injured party's personal injuries claim based on the injured party's failure to present evidence that the injuries were actually caused by a defective condition in a slide as the argument was not presented in the school board's motion and the injured party had no opportunity to respond to it; the injured party did not have a full and final opportunity to meet and controvert the ground for summary judgment upon which the trial court relied, and the summary judgment could not be affirmed un-

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der the right for any reason rule. *Hart v. Appling County Sch. Bd.*, 266 Ga. App. 300, 597 S.E.2d 462 (2004).

Summary judgment in favor of a ranch owner was affirmed in a case brought against the owner by an injured person who believed that the injured person had been hit by bullet shrapnel at a shooting range on the ranch owner's property but did not see the object after the bullet struck the injured person, did not know what had happened to the bullet, did not know who had shot the rifle, and did not know what type of rifle the person had used or the caliber of bullet involved; the injured person was unaware of anyone else being hit with any debris, and the injured person's expert testified to not having an opinion of what struck the injured person and could not say whether any particular target at the range would have caused a bullet to ricochet to the spot on which the injury occurred. *Hobday v. Galardi*, 266 Ga. App. 780, 598 S.E.2d 350 (2004).

In a personal injury action against a utility and the utility's independent contractor, the trial court properly granted summary judgment against a cable installer finding that: (1) the utility was not vicariously liable to the installer for the allegedly negligent acts of the utility's contractor; (2) the utility's right to inspect the work did not render the utility liable for the contractor's negligence as that right was intended for the limited purpose of making sure the contractor competently carried out the terms of the contract; (3) the utility was not liable for the utility's failure to flag a power line trench in which the installer fell and was injured, as surface markings showing the path of the trench would not have informed the installer of the danger, and the installer was not injured as a result of excavating or blasting; and (4) the High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., did not apply to afford the installer a remedy. *Perry v. Georgia Power Co.*, 278 Ga. App. 759, 629 S.E.2d 588 (2006).

Retailer was properly granted summary

judgment in a personal injury action filed against the retailer by one of the retailer's customers under the doctrine of *res ipsa loquitur* as the customer failed to show that the retailer retained exclusive control over the box that fell from a stationary position on a shelf and allegedly caused the customer's injuries, and the customer conceded that there was no evidence that the retailer had superior knowledge of an allegedly dangerous condition; further, the retailer was not required to show that the retailer's employees carried out an inspection of the shelved items within a reasonable time period before the incident. *Aderhold v. Lowe's Home Ctrs., Inc.*, 284 Ga. App. 294, 643 S.E.2d 811 (2007).

In a personal injury action arising from the electrocution of two construction workers while operating a crane leased by a buyer and seller of heavy equipment, the trial court properly denied summary judgment to the buyer/seller of the crane as material fact issues remained as to the condition of the crane when the crane left the buyer/seller's possession, and as to the element of causation; moreover, the learned intermediary doctrine did not apply. *Dozier Crane & Mach., Inc. v. Gibson*, 284 Ga. App. 496, 644 S.E.2d 333 (2007).

In a personal injury action arising from a fall suffered by a lessee's visitor from a pull-down staircase, because no questions of fact remained as to an out-of-possession landlord's liability for failure to repair, defective construction, or failure to warn, the landlord was properly granted summary judgment as to those issues. *Gainey v. Smacky's Invs., Inc.*, 287 Ga. App. 529, 652 S.E.2d 167 (2007).

Because a driver failed to present sufficient record evidence that a city received timely ante litem notice that the driver sustained a personal injury, much less the nature, character, or particularities of any such injury, but the notice submitted merely established that the driver sustained property damage, the driver did not substantially comply with O.C.G.A. § 36-33-5(b); thus, the trial court properly granted the city summary judgment on that issue. *Harris-Jackson v. City of Cochran*, 287 Ga. App. 722, 652 S.E.2d 607 (2007).

Recreational Property Act. — Trial court did not err in granting summary

judgment to a city on allegations of negligence asserted against the city by an injured motorcycle driver as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. *Carroll v. City of Carrollton*, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Wrongful death action brought by parent. — Despite evidence of a parent's cruel treatment of the decedent, the trial court erred in finding that the parent forfeited parental rights, and thus lost the status as a parent and, in so doing, lost the right to recover as an heir of the decedent's estate as the loss of parental power did not necessarily result in a parent's loss of a right to inherit as an heir from the estate of that parent's child, short of having the parent's rights terminated prior to the child's death; hence, summary judgment against the parent on the issue was reversed. *Blackstone v. Blackstone*, 282 Ga. App. 515, 639 S.E.2d 369 (2006).

Wrongful death. — In a wrongful death action, because the employer of a driver was not responsible for the personal activities the employee was involved in at the time of the fatal accident that killed the decedent, and the special mission exception did not apply, the employer was properly granted summary judgment in a suit filed against the employer by the decedent's estate and survivors. *Banks v. AJC Intl., Inc.*, 284 Ga. App. 22, 643 S.E.2d 780 (2007).

In a wrongful death action filed against a county sheriff's deputy and the county, the administrator's claim that the deputy failed to report an accident and failed to render aid, in violation of both O.C.G.A. §§ 40-6-270(a)(3) and 40-6-273 were rejected, and the deputy and the county were erroneously denied summary judgment as the evidence showed that: (1) the

deputy radioed for officer assistance; (2) the two officers looked for a second vehicle that might have been involved in the accident, to no avail; and (3) based on the results of the investigation, no evidence existed that the deputy breached the duty imposed by § 40-6-273 *Purvis v. Steve*, 284 Ga. App. 116, 643 S.E.2d 380 (2007), cert. denied, 2007 Ga. LEXIS 517 (Ga. 2007).

In a wrongful death action filed on behalf of a deceased employee, because jury questions remained as to whether the defenses of assumption of the risk and equal knowledge of danger barred the claims of negligence, negligence per se, respondeat superior, and premises liability, and as to whether the claims were barred by the exclusive remedy provision of the Workers' Compensation Act, summary judgment to the decedent's employer was reversed. *Champion v. Pilgrim's Pride Corp. of Del., Inc.*, 286 Ga. App. 334, 649 S.E.2d 329 (2007), cert. denied, 2008 Ga. LEXIS 83 (Ga. 2008).

Because the trial court properly found that a decedent's son, as a sole heir, could recover at least a portion of a settlement under 45 U.S.C. § 51 for the wrongful death of the decedent, and because the decedent father's widow validly waived a claim under 45 U.S.C. § 59, pursuant to a prenuptial agreement, the court did not err in granting partial summary judgment to the heir. But, the matter was remanded for the trial court to determine how the proceeds at issue should be divided between the survival and wrongful death claims. *Tadlock v. Tadlock*, 290 Ga. App. 568, 660 S.E.2d 430 (2008).

Wrongful death in workplace. — Because a subsidiary had no ownership interest in the equipment that killed an employee, and to the extent that the subsidiary was acting in concert or in a joint enterprise with the employer/owner, O.C.G.A. § 34-9-11 of the Workers' Compensation Act barred the spouse's wrongful death suit; consequently, the trial court did not err in granting summary judgment to the subsidiary pursuant to O.C.G.A. § 9-11-56(c). *Jones v. Macon Soils, Inc.*, 270 Ga. App. 298, 606 S.E.2d 316 (2004).

Dog bite cases. — In a plaintiff's suit against the dog owners to recover for

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injuries sustained from a dog bite, summary judgment against the plaintiff was improper because the plaintiff's evidence that the owners' dog had bitten another person on the hand before the incident, that one of the owners had made a statement that the owner did not allow the dog in the house with guests because the dog could bite somebody, and that the same owner had admitted to the plaintiff's mother that the owner should have warned the plaintiff to stay away from the dog raised a jury question as to whether the owners knew that the dog had a propensity to bite; moreover, the evidence did not show that the plaintiff assumed the risk as a matter of law by ignoring the dog's growl; since a dog's growl does not put a dog owner on notice of the dog's propensity to bite, it is not plain evidence that a third party actually knew about and appreciated the danger that the dog might bite. *Raith v. Blanchard*, 271 Ga. App. 723, 611 S.E.2d 75 (2005).

Premises liability and injuries by animals. — True ground of premises liability is the landowner's or occupier's superior knowledge of the perilous condition and the danger therefrom to persons coming upon the property; a trial court's summary judgment dismissing claims against real estate agents and brokers for injuries arising from a dog bite while the injured person was viewing listed property for sale was affirmed because there was no showing that the real estate agents and brokers had any knowledge that the dogs were dangerous. *Gibson v. Rezvanpour*, 268 Ga. App. 377, 601 S.E.2d 848 (2004).

In an action to enjoin enforcement of a judgment, the trial court improperly entered, sua sponte, summary judgment in favor of the judgment creditors because the trial court's judgment was based on an issue not previously raised by the parties, and judgment was entered without giving the judgment debtor a full opportunity to respond to the issues raised. *Studenic v. Birk*, 260 Ga. App. 364, 579 S.E.2d 788 (2003).

Trial court erred in granting summary

judgment to the dog owners on the worker's negligence claim after the worker was knocked down allegedly by the dog owners' dog as a genuine issue of material fact existed about whether the one dog owner voluntarily undertook a duty to restrain the dogs on the owner's premises and, if so, whether that voluntary undertaking was negligently performed. *Osowski v. Smith*, 262 Ga. App. 538, 586 S.E.2d 71 (2003).

When premises owner was deemed to have superior knowledge of the hazard that was alleged to have caused the slip and fall, based on the testimony of the injured patron's daughter that the owner had actual knowledge of the hazard, summary judgment in the owner's favor was unauthorized, and the appeals court erred in finding otherwise. *Dickerson v. Guest Servs. Co.*, 282 Ga. 771, 653 S.E.2d 699 (2007).

Slip and fall by pedestrian in pothole. — Trial court erred in denying summary judgment to both a city and the Department of Transportation, in a slip and fall case filed against them by a pedestrian, as: (1) the pedestrian conceded that the pedestrian was a licensee with equal constructive knowledge of any hazard posed by potholes; (2) the pothole in which the pedestrian fell was not a concealed or camouflaged danger; and (3) no evidence was presented that the pothole was maintained wilfully or wantonly. *Ga. DOT v. Strickland*, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Normal household items causing fall by licensee in home. — In a licensee's personal injury action, the trial court properly found that a homeowner was entitled to summary judgment as a matter of law as the homeowner owed no duty to the licensee to warn of the obviousness of a broom handle, tools on the floor, or the couch corner, which the licensee alleged caused a fall, as such were plainly visible and not hidden perils. *Ellis v. Hadnott*, 282 Ga. App. 584, 639 S.E.2d 559 (2006).

Slip and fall in businesses. — In a slip and fall case based on an injured party's fall in a truck stop's shower, the truck stop owner was not entitled to summary judgment because the owner's admitted lack of a regular inspection proce-

dure created a genuine issue of material fact as to whether the owner had constructive knowledge of the condition that caused the injured party to fall, and it was not shown that the injured party failed to exercise care for the party's own safety as the injured party removed two used bars of soap from the shower floor. *Pylant v. Samuels Inc.*, 262 Ga. App. 358, 585 S.E.2d 696 (2003).

In a slip and fall case brought by an injured person who alleged that the fall was caused by a newly waxed tile floor in a golf course clubhouse, the trial court erred in finding, based on some deposition responses, that the injured person had abandoned the claim that the wax had caused the fall and was claiming only that the tile floor, not the wax on the floor, caused the fall, and that the injured person knew walking on a tile floor with spikes was risky; the injured person's complaint and the evidence offered that the injured person had not unequivocally conceded that the wax on the floor did not cause the fall, and the trial court's summary judgment in favor of the premises owner was reversed. *Berson v. Am. Golf Corp.*, 265 Ga. App. 772, 595 S.E.2d 622 (2004).

In a slip and fall case, an injured person's knowledge of uneven, unlit steps at the place where the injured person fell, obtained from ascending the steps once in the dark, did not equal a hotel's knowledge from sweeping the area daily and maintaining the steps regularly; thus, a trial court's denial of the hotel's summary judgment motion was affirmed. *Mac International-Savannah Hotel, Inc. v. Hallman*, 265 Ga. App. 727, 595 S.E.2d 577 (2004).

Summary judgment for a grocery store in a slip and fall case was proper because an injured person slipped in water caused by another customer and the grocery store had no actual or constructive knowledge of the water. *Mock v. Kroger Co.*, 267 Ga. App. 1, 598 S.E.2d 789 (2004).

Mere fact that an injured person slipped and fell while on a department store's premises did not give rise to liability absent some evidence that a foreign substance was present; a department store in a slip and fall case was entitled to sum-

mary judgment, and a trial court's denial of the department store's summary judgment motion was reversed because an injured person did not see or touch anything on the floor that caused the injured person to fall but was merely supposing or hypothesizing that there was some sort of substance on the ground that caused the injured person to fall, and a department store employee testified that the floor was clean and dry, and that no foreign substance was on the floor after the fall. *Belk Dep't Store of Charleston, S.C., Inc. v. Cato*, 267 Ga. App. 793, 600 S.E.2d 786 (2004).

Trial court erred in denying a corporation's motion for summary judgment on a customer's claim seeking damages for injuries the customer sustained by slipping and falling on a wet floor after entering a restaurant because the customer was aware of the hazard and the evidence did not show that people who worked at the restaurant possessed superior knowledge that the floor was wet and posed a hazard to customers. *Flagstar Enters., Inc. v. Burch*, 267 Ga. App. 856, 600 S.E.2d 834 (2004).

Summary judgment for a restaurant in a slip and fall case was proper and was affirmed because there was no showing that the restaurant had actual or constructive knowledge of the grease which allegedly caused the slip and fall that was superior to that of the injured person; an inspection by the restaurant manager only 5 to 10 minutes before the incident was sufficient, as a matter of law, to establish that the restaurant exercised ordinary care under O.C.G.A. § 51-3-1 to inspect the premises and keep the premises safe. *Markham v. Schuster's Enters., Inc.*, 268 Ga. App. 313, 601 S.E.2d 712 (2004).

In a customer's slip and fall action against a store, because genuine issues of material fact existed as to whether the store had superior knowledge of the alleged water on the floor where the customer allegedly fell, summary judgment was erroneously entered in the store's favor. *Durham v. Patel*, 282 Ga. App. 437, 638 S.E.2d 851 (2006).

In a slip and fall action filed by a mall patron against the mall's owner and the mall's cleaning contractor, summary judg-

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ment was properly granted to the latter as no evidence was presented that the contractor wrongfully failed to clean the spot on which the patron slipped; however, summary judgment in the owner's favor was reversed as the owner failed to present evidence of any reasonable inspection procedures, giving the patron the benefit of an inference of the owner's constructive knowledge of a hazard. *Prescott v. Colonial Props. Trust, Inc.*, 283 Ga. App. 753, 642 S.E.2d 425 (2007).

Because the trial court correctly determined that the parking lot in which a customer fell was owned and maintained by the grocery store's landlord, not by the grocery store, and was not an "approach" to the premises for purposes of O.C.G.A. § 51-3-1, the grocery store was properly granted summary judgment as to the issue of liability in a customer's personal injury suit filed against the store. *Robinson v. Kroger Co.*, 284 Ga. App. 488, 644 S.E.2d 316 (2007).

Because an injured employee testified that the rain, and not any sloping surface, caused the slip and fall at issue, the employee was charged with equal knowledge of the rainy day conditions, and as a result no evidence was presented that the hospital exposed the employee to any unreasonable risk of harm; thus, the trial court erred in denying the employer's motion for summary judgment. *Sunlink Health Sys. v. Pettigrew*, 286 Ga. App. 339, 649 S.E.2d 532 (2007).

In a slip and fall case filed by a retailer's patron alleging a breach of the retailer's duty to keep the retailer's premises reasonably safe, the trial court properly granted summary judgment to the retailer on the issue of whether the retailer's nearby employees were in a position to discover the hazard on which the patron slipped, specifically a grape on the floor; however, in the absence of clear evidence of how long the grape was present on the floor, and in the absence of evidence that the retailer actually carried out its inspection procedures, the retailer could not show as a matter of law that the retailer

lacked constructive knowledge of the hazard which caused the patron's fall. *Blocker v. Wal-Mart Stores, Inc.*, 287 Ga. App. 588, 651 S.E.2d 845 (2007).

Court of appeals upheld an order granting summary judgment to a janitorial services company on claims filed against the company by a premises owner's invitee for damages sustained by the invitee resulting from a slip and fall on the owner's premises as the janitorial services company was an independent contractor and not an owner occupier of the premises where the invitee fell, and hence owed no contractual duty to the invitee. *Taylor v. AmericasMart Real Estate, LLC*, 287 Ga. App. 555, 651 S.E.2d 754 (2007).

In a personal injury action arising out of a slip and fall, because jury questions existed as to whether a premises owner's inspection procedure was reasonable, the appeals court refused to say that the owner lacked constructive knowledge of a hazard that allegedly caused a slip and fall as a matter of law. Thus, summary judgment entered in favor of the owner was reversed. *Gibson v. Halpern Enters.*, 288 Ga. App. 790, 655 S.E.2d 624 (2007).

In a premises liability action against a retailer, because the patron failed to show proof that a single employee of the retailer was in the immediate area of the spill that allegedly caused the patron's fall, and could have easily seen and removed the spill prior to the slip and fall, or proof that the liquid had been there for a sufficient length of time that the retailer should have discovered and removed the spill during a reasonable inspection and: (1) inasmuch as the purported hazard was not readily visible to the patron; and (2) the patron failed to establish that the retailer's employees, who were at least 20 to 30 feet away, could have easily seen and removed the spill, or that the liquid had been on the retailer's floor long enough that the retailer should have discovered and removed the spill during a reasonable inspection, the trial court erred in denying the retailer's motion for summary judgment as to the retailer's liability to the patron. *Kmart Corp. v. McCollum*, 290 Ga. App. 551, 659 S.E.2d 913 (2008).

Because genuine material fact issues remained as to whether a supermarket's

inspection procedures in the area in which a customer fell were reasonable and whether a reasonable inspection procedure would have detected a mixture of blood and water on the floor, summary judgment in favor of the supermarket was reversed; moreover, the appeals court rejected the supermarket's claim that the customer had equal knowledge of the hazard since the customer had previously walked down the aisle before the customer fell there. *Food Lion, LLC v. Walker*, 290 Ga. App. 574, 660 S.E.2d 426 (2008).

Summary judgment was proper because no evidence showed an office park knew of, or caused, material to collect at the place a pedestrian slipped on steps, there was no breach of a duty to discover the leaves, and the pedestrian did not show that handrails were required on the steps. *Porter v. Omni Hotels, Inc.*, 260 Ga. App. 24, 579 S.E.2d 68 (2003).

Owner of a grocery store was erroneously granted summary judgment in a negligence suit by a store patron who slipped on a grape and fell as the testimony regarding the manager's unobstructed view of the area in which the fall occurred, the manager's admission that the manager could have seen the grape, and the evidence that the manager and two other employees were in the immediate vicinity and could easily have removed the hazard had they seen it, all revealed that there was a genuine issue of material fact as to whether the store owner had constructive knowledge of the dangerous condition. *Dix v. Kroger Co.*, 257 Ga. App. 19, 570 S.E.2d 89 (2002).

Summary judgment should have been granted to a property owner in a customer's suit to recover for injuries sustained when the customer slipped and fell on a bean on the floor of the owner's store because the owner did not have actual notice of the bean, and the evidence was insufficient to show that the owner had constructive notice of the bean, in that no bean was seen during an inspection of the area in which the customer fell five minutes before the fall, and no evidence showed that the owner's employees were in the immediate vicinity of the fall. *Kroger Co. v. Williams*, 274 Ga. App. 177, 617 S.E.2d 160 (2005).

Store owner was entitled to summary judgment in an action brought by a client who fell upon an allegedly slippery sidewalk because the plaintiff did not show that the sidewalk was negligently painted, and the record proved exactly the contrary. *Caven v. Warehouse Home Furnishings Distribs., Inc.*, 209 Ga. App. 706, 434 S.E.2d 532 (1993).

Slip and fall in other cases. — Executive Committee of the Baptist Convention was not entitled to summary judgment on the injured party's claim arising out of injuries sustained when the injured party fell in a pothole while attending a women's conference sponsored by the church because whether the injured party's failure to observe the defect amounted to a lack of reasonable care was a jury question. *Thomas v. Exec. Comm. of the Baptist Convention*, 262 Ga. App. 315, 585 S.E.2d 217 (2003).

Trial court erred in granting an owner's summary judgment motion in a slip and fall case brought by an injured party, as questions remained as to the owner's liability because: (1) the owner was on constructive notice as to the condition of a drainage culvert; (2) a reasonable inspection would have revealed that the cement surrounding the drainage culvert was slanted and had not been painted to alert pedestrians to any danger; (3) the injured party could not have seen the dramatic slope of the culvert from the injured person's vantage point on the median and could not appreciate the danger involved; (4) that the rough uneven pavement was a static condition did not automatically absolve the owner; and (5) the failure of the injured party to watch every step did not require summary judgment against the injured person. *Hagadorn v. Prudential Ins. Co.*, 267 Ga. App. 143, 598 S.E.2d 865 (2004).

Premises owner was properly granted summary judgment in an occupant's personal injury action filed against it as the uneven and unstable brick-paved walkway where the occupant fell was an open and obvious static condition which the occupant was presumed to have knowledge of, given that the occupant had successfully traversed the area before; moreover, while the occupant might have

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disagreed with the trial court's application of the law to the facts presented, that disagreement did not warrant reversal. *Nemeth v. RREEF Am., LLC*, 283 Ga. App. 795, 643 S.E.2d 283 (2007).

Trial court did not err in granting summary judgment to a seller in a buyer's personal injury action alleging negligence and nuisance as: (1) speculation as to what caused the buyer's fall was insufficient to sustain the former; and (2) evidence was lacking that the seller created, continued, or maintained the alleged nuisance, or controlled the release of a discharge on the property that allegedly caused the buyer's slip and fall. *Grinold v. Farist*, 284 Ga. App. 120, 643 S.E.2d 253 (2007).

In a slip and fall case, the trial court properly granted summary judgment to a premises owner on grounds that: (1) no material issue of fact remained as to whether a roof repair contractor's injuries were caused by the owner's failure to keep the subject premises safe; (2) the contractor failed to present any evidence that a foreign substance or any unusual hazard on the roof surface caused the fall; (3) it was not raining on the day of the fall; and (4) prior to the fall, the contractor inspected the roof by walking the length of the roof and looking at the roof from below, satisfied that the area was safe. *Hardnett v. Silvey*, 285 Ga. App. 424, 646 S.E.2d 514 (2007).

Slip and fall in homes. — Evidence that showed: (1) that a caretaker who was hired to care for a homeowner's invalid wife used stairs in the homeowner's house six to eight times before the caregiver was injured when the caregiver's knee buckled while carrying laundry down the stairs; (2) that the caregiver did not slip on a foreign substance that was on the stairs; and (3) that the stairs were properly manufactured and maintained, warranted summary judgment for the homeowner on the caretaker's claim alleging negligence, and the trial court's judgment denying the homeowner's motion for summary judgment was reversed. *Duvall v. Green*, 262 Ga. App. 669, 586 S.E.2d 369 (2003).

In a patron's slip and fall action filed against a home seller, the trial court properly found that the seller was entitled to summary judgment as a matter of law because the patron could not show that the seller's knowledge of the condition which allegedly caused the patron's fall, specifically, loose gravel on the ground immediately adjacent to unbuffered metal trailer tongues, was superior to the patrons. *Whitley v. H & S Homes, LLC*, 279 Ga. App. 877, 632 S.E.2d 728 (2006).

In a slip and fall action between a daughter and the daughter's mother, because the evidence showed that the daughter was a mere social guest or licensee in the mother's home at the time of the daughter's injury, present only in the home for the daughter's convenience, and the mother did not act with any intent to harm the daughter, the mother was properly granted summary judgment on the issue of liability for the daughter's personal injuries resulting from a slip and fall. *Behforouz v. Vakil*, 281 Ga. App. 603, 636 S.E.2d 674 (2006).

Summary judgment for the tortfeasor was affirmed because the injured party failed to show a genuine issue of material fact as to the existence of a slippery floor, the tortfeasor's knowledge of the condition, or that the tortfeasor's knowledge of the condition was superior to the knowledge of the injured party, given the injured party's use of the hallway, and the injured party's responsibility to see that the tortfeasor did not fall as the injured party was the care giver to the alleged tortfeasor. *Sudduth v. Young*, 260 Ga. App. 56, 579 S.E.2d 7 (2003).

Drunk driving. — Trial court properly granted the hosts' motion for summary judgment in an injured party's action under the Georgia Dram Shop Act, O.C.G.A. § 51-1-40(b), because: (1) the intoxicated driver's brother testified that the driver was not noticeably intoxicated at the party; (2) at the request of the brother, the driver agreed to stay with the hosts after the party because the driver had been drinking; (3) because there was direct evidence that the driver agreed not to drive soon, contrary knowledge could not be imputed to the hosts. *Hodges v. Erickson*, 264 Ga. App. 516, 591 S.E.2d 360 (2003).

When proof of spoliation present following drunk driving accident. — 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).

Summary judgment was properly granted dismissing the motorists' suit against a restaurant under the Dram Shop Act, O.C.G.A. § 51-1-40(b), for injuries sustained in a collision with one of the restaurant's patrons because the evidence did not present a question of fact as to whether the restaurant knew that the patron would be driving soon after the patron left the premises. *Sugarloaf Cafe, Inc. v. Willbanks*, 279 Ga. 255, 612 S.E.2d 279 (2005).

Under the voluntary departure rule, if an invitee voluntarily departed from the route designated and maintained by the owner/occupier for the invitee's safety and convenience, the invitee assumed the risk of those hazards existent in the selected route as the conditions did not constitute a hazard when the traversed property was used for its intended purpose unless the hazard was common to both areas or the owner had notice that the unauthorized route was being regularly used improperly; because an injured person voluntarily departed from a sidewalk and fell on a partially exposed drainage pipe, and there was no evidence that the unauthorized route was being used improperly on a regular basis, summary judgment for a landlord in the injured person's premises liability case was affirmed. *Chamblee v. Grayco, Inc.*, 266 Ga. App. 154, 596 S.E.2d 683 (2004).

Railroad not liable for railroad crossing fatality. — Railroad and the

town were entitled to summary judgment in a survivor's action claiming damages from the survivor's decedent's fatal collision with a train because the survivor failed to show that the allegedly vision-obstructing vegetation was planted or maintained in violation of any statute, code, or local ordinance, and although railroads could be liable under common law negligence principles, the failure to maintain a railroad right of way was addressed by the Georgia Code of Public Transportation, specifically by O.C.G.A. § 32-6-51. *Town of Register v. Fortner*, 262 Ga. App. 507, 586 S.E.2d 54 (2003).

Delivery drivers. — In a personal injury action filed by an injured driver, the trial court granted summary judgment to a bus delivery courier on grounds that the delivery person who the driver alleged caused the accident was an independent contractor, and not the courier's employee as: (1) the courier did not control how the delivery person carried out the delivery of the bus, or what route to take in making the delivery; (2) the delivery person was required to comply with all governmental requirements, was required to maintain log books, and was required to pay all incidental fees and taxes; and (3) a requirement that the bus be delivered the next day was placed on the delivery person by the buyer, and not the courier. *Larmon v. CCR Enters.*, 285 Ga. App. 594, 647 S.E.2d 306 (2007).

Uninsured motorist coverage. — Insurer was properly granted summary judgment in an insured's action for uninsured motorist coverage because there was no evidence of actual physical contact between the insured and an unknown driver, who allegedly struck either a manhole cover or the bottom of a construction barrel that then struck the insured's car, nor was there any corroborating eyewitness evidence. *Hambrick v. State Farm Fire & Cas. Co.*, 260 Ga. App. 266, 581 S.E.2d 299 (2003).

Teenager driving past curfew. — In a case in which the injured parties sought punitive damages from a motorist who collided with their vehicle because the motorist was a minor whose license did not allow the minor to drive after 1:00 a.m., and the collision occurred after 1:00

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a.m., the minor was entitled to partial summary judgment dismissing the punitive damages claim because the time the motorist was driving did not proximately cause the accident, nor was the motorist's action part of a pattern or policy of dangerous driving, such as driving while intoxicated or speeding excessively. *Brooks v. Gray*, 262 Ga. App. 232, 585 S.E.2d 188 (2003).

Pending cross action. — Motion for summary judgment will lie on the ground of pendency of substantially the same cross-claim filed against the party in a former action. *Reeves Transp. Co. v. Gamble*, 126 Ga. App. 165, 190 S.E.2d 98 (1972).

Summary judgment proper notwithstanding failure to show factual issues when counterclaim could not stand on own. — Because a housing authority failed to show that factual issues regarding the counterclaim brought by a husband and wife alleging violations of the Open Records Act, O.C.G.A. § 50-18-70 et seq., must have been decided in its favor, the trial court erred in granting summary judgment in favor of the authority on this claim; but since the husband and wife did not appeal the summary judgment for the authority on their slander claim, and since the civil conspiracy claim could not stand without this underlying tort, summary judgment for the authority on this issue was proper. *Strange v. Hous. Auth. of Summerville*, 268 Ga. App. 403, 602 S.E.2d 185 (2004).

Oral contract to make a will. — Trial court properly granted summary judgment for an executor in a suit by a child of the decedent alleging that the decedent orally contracted to leave a portion of the decedent's estate to the child as: (1) the validity of an agreement to make a will was a substantive matter for choice of law purposes, so Florida law applied; (2) oral contracts to make a will were invalid under Fla. Stat. ch. 732.701(1); and (3) the decedent's child failed to identify any terms in an earlier will made by the decedent that stemmed from a contract to

leave a portion of the estate to the child. *Harper v. Harper*, 267 Ga. App. 553, 600 S.E.2d 659 (2004).

Probate of will. — If the evidence authorizes it, a superior court is empowered to grant summary judgment probating a will in solemn form so as to administer a decedent's estate. *Taylor v. Donaldson*, 227 Ga. 496, 181 S.E.2d 340, cert. denied, 404 U.S. 805, 92 S. Ct. 163, 30 L. Ed. 2d 38 (1971).

On appeal to the superior court from the probate court of a proceeding to probate a will, under O.C.G.A. § 9-11-56, either party may move for summary judgment. *Tony v. Pollard*, 248 Ga. 86, 281 S.E.2d 557 (1981).

Trial court properly granted the widow's and the co-executor's motion for summary judgment and denied the family members' motion against the decedent's widow and the co-executor for partial summary judgment in the family members' lawsuit seeking their alleged share of the portion of the decedent's estate that the decedent inherited under the decedent's father's will, because of the transfer documents from a family settlement that occurred under the father's will and because the decedent left a lineal descendant surviving the descendant in decedent's adopted child. *Haley v. Regions Bank*, 277 Ga. 85, 586 S.E.2d 633 (2003).

Summary judgment, pursuant to O.C.G.A. § 9-11-56, was reversed because a genuine issue of material fact remained as to whether a transfer of money to the decedent's child before the decedent died was an advancement on the child's inheritance, and whether the child breached a fiduciary duty as a result. *Walters v. Stewart*, 263 Ga. App. 475, 588 S.E.2d 248 (2003).

Trial court erred in granting summary judgment pursuant to O.C.G.A. § 9-11-56 to will caveators in a will propounder's action seeking to probate a decedent's will because the decedent had sufficiently signed the will on the signature line of the self-proving clause, pursuant to O.C.G.A. § 53-2-40.1, and there existed two competent witness signatures, which were sufficient for attestation purposes; accordingly, the statutory requirements for proper execution of a will under O.C.G.A. § 53-2-40

appeared to have been met and a jury issue was raised as to whether, in fact, the requirements were met. *Miles v. Bryant*, 277 Ga. 362, 589 S.E.2d 86 (2003).

Will provision did not require the executors to fund a marital trust with non-publicly traded stock, and did not conflict with the executor's power to fund the trust with assets the executor deemed advisable; since the will empowered the executors to sell the estate's assets and did not require them to fund the trust with the specific stock, the parol evidence rule barred use of an affidavit of the attorney who prepared the will to shed light on the testator's intent, and summary judgment in favor of a wife and against the executors was reversed. *Reynolds v. Harrison*, 278 Ga. 495, 604 S.E.2d 184 (2004).

In a probate action, because the testatrix's older four children failed in their burden of showing undue influence at the time that the will was executed, and an affidavit submitted by one of the testatrix's older children did not change this result, as such consisted of inadmissible hearsay, the superior court properly granted summary judgment to the testatrix's youngest child. *Barber v. Holmes*, 282 Ga. 768, 653 S.E.2d 448 (2007).

Co-executors' conduct in an estate administration. — Trial court erred in granting summary judgment to the co-executors in claims of breach of fiduciary duty and constructive fraud or conspiracy filed by the beneficiaries of an estate because it was necessary for a jury to decide whether the co-executors breached their fiduciary duties to the beneficiaries or committed constructive fraud or engaged in a conspiracy through their actions due to the factual questions that arose regarding the co-executors' actions. *Bloodworth v. Bloodworth*, 260 Ga. App. 466, 579 S.E.2d 858 (2003).

Processioning proceeding. — When the protestant in a processioning proceeding pleaded a defense of *res judicata* and moved for summary judgment on this ground, the supporting motion with the record of a prior processioning proceeding between the same parties concerning the same issue of boundary, and in which the protestant obtained judgment, and the

applicant made no contrary showing, a motion for summary judgment was properly granted. *Souther v. Kichline*, 124 Ga. App. 111, 183 S.E.2d 87 (1971).

Promissory note. — Ordinarily, summary judgment offers a speedy and efficient disposition of a case if there is an executed promissory note and the sole question is how much, if any, is due. *Pollard v. First Nat'l Bank*, 169 Ga. App. 598, 313 S.E.2d 785 (1984).

Because a guarantor's daughter and son-in-law's bankruptcy plan did not identify the guarantor's obligation on promissory notes that the guarantor co-signed in favor of a bank, the inquiry mandated by 11 U.S.C. § 1322(b)(1) was not performed, the guarantor's liability to the bank was not discharged by the bankruptcy court's judgment, the bank was entitled to recover principal and interest due on the promissory notes in an action filed in state court, and the state trial court properly granted the bank's motion for summary judgment against the guarantor. *Hampton v. Bank of Lafayette*, 259 Ga. App. 677, 578 S.E.2d 486 (2003).

In an action filed by a trust on a promissory note and guaranty against a guarantor, the trial court properly granted the trust summary judgment as the guarantor's unsworn affidavit did not qualify as competent evidence creating a factual issue as to the issue of whether the guarantor was entitled to a setoff; moreover, the court disagreed that the guaranty showed that the guarantor signed the guaranty in a representative capacity. *Keane v. Annice Heygood Trevitt Support Trust*, 285 Ga. App. 155, 645 S.E.2d 641 (2007).

Former member of a golf club was not entitled to summary judgment in the club's suit on a promissory note for an installment plan of a non-refundable membership as the member breached the note by failing to pay the final two installments, the club was entitled to keep the sums paid as liquidated damages, consideration was adequate, the fees paid for initiation were not contingent on the continuation of a membership, and nothing in the record showed that the membership contract was ever rescinded. *Bonem v. Golf Club of Ga., Inc.*, 264 Ga. App. 573, 591 S.E.2d 462 (2003).

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After obtaining consent from the probate court to sell construction equipment an executrix's decedent secured with a promissory note, the executrix was entitled to summary judgment as to the tort claims alleged against the decedent's corporation, after the corporation wrongfully retained possession of the equipment, converted two certificates of deposit, and the decedent's liability on the notes was extinguished under a provision of a stock sales agreement; furthermore, evidence was presented that the corporation's failure to release the equipment prevented the equipment's sale to third parties and thereby constituted a breach of a duty to mitigate damages. *Midway R.R. Constr. Co. v. Beck*, 281 Ga. App. 412, 636 S.E.2d 110 (2006).

In an action to recover on two promissory notes, because material fact issues remained regarding the consideration given for the promissory notes, creating an ambiguity for which parol evidence was admissible, and as to whether the notes were signed as part of the same transaction, summary judgment to either the lender or the debtor was inappropriate. *Foreman v. Chattooga Int'l Techs., Inc.*, 289 Ga. App. 894, 658 S.E.2d 470 (2008).

Negotiable instruments. — Trial court did not err in granting summary judgment to a bank and a credit union on claims of conversion, civil conspiracy, and for attorney fees and punitive damages as: (1) no probative evidence existed that the buyer received delivery of the check, and thus, it never became a holder of the instrument at issue or entitled to enforce it; (2) no evidence was presented that the bank and credit union acted in concert against the buyer; (3) no evidence of misconduct or bad faith on the part of the bank or the credit union was presented; but, the trial court properly found that a genuine issue of material fact existed as to whether the bank and the credit union were holders in due course. *Hartsock v. Rich's Empls. Credit Union*, 279 Ga. App. 724, 632 S.E.2d 476 (2006).

Debtor and creditors. — Trial court erred in entering summary judgment for a creditor in a debtor's suit seeking to quiet title as: (1) a co-debtor paid the creditor's note in full, which extinguished the debt; (2) once the note was paid, the collateral should have been released; (3) the creditor could not assign the note to the co-debtor; (4) the co-debtor had only a right to contribution as there was no indication that the co-debtor was a surety under the co-debtor's agreement with the debtor; and (5) O.C.G.A. § 9-13-78 was inapplicable as the statute pertained to co-defendants against whom a judgment had been obtained. *Johnson v. AgSouth Farm Credit*, 267 Ga. App. 567, 600 S.E.2d 664 (2004).

In an action to recover the balance of the money owed under a loan, because the guarantor of the loan failed to show the lack of an adequate foundation for the admitted evidence, a claim that the trial court erred in admitting the loan history report as a business record failed; hence, the proponent bank was properly granted summary judgment on the issue. *Ishak v. First Flag Bank*, 283 Ga. App. 517, 642 S.E.2d 143 (2007).

Trial court's order granting summary judgment to a collection company, and against a debtor, in the former's deficiency action, was upheld on appeal as it was not based on inadmissible hearsay, but upon records admissible under the business records exception to the hearsay rule, and was dispositive of the debtor's counterclaims, which arose out of the company's request for a deficiency judgment. *Boyd v. Calvary Portfolio Servs.*, 285 Ga. App. 390, 646 S.E.2d 496 (2007).

Because genuine material fact issues remained as to a portion of the indebtedness owed to a creditor by a debtor, the creditor was not entitled to summary judgment as to that portion; moreover, the debtor was not entitled to a credit for the debtor's payment to the creditor as one of the signatories on the account admitted that such was made on behalf of another corporation the debtor's president and vice-president owned. *Sweet Water Tree Farm, Inc. v. J. Frank Schmidt & Son, Inc.*, 287 Ga. App. 455, 651 S.E.2d 787 (2007).

Action to collect unpaid credit card debt. — Because an action filed by a creditor to collect unpaid credit card charges was based on a written contract, and not an open account, the trial court properly held that the six-year limitations period under O.C.G.A. § 9-3-24 applied, supporting summary judgment in the creditor's favor; moreover, because the transaction at issue was a written contract, the form of the debtor's acceptance was immaterial. *Hill v. Am. Express*, 289 Ga. App. 576, 657 S.E.2d 547 (2008), cert. denied, 2008 Ga. LEXIS 490 (Ga. 2008).

Actions against financial institutions. — In an action filed by a bank customer's son after the bank paid the customer the proceeds of a certificate of deposit (CD) the customer purchased in both the customer's name and the son's name, alleging violations of the son's rights in the CD, the appellate court held that the bank was protected from liability by O.C.G.A. §§ 7-1-816 and 7-1-820 because the customer's telephone request for redemption was made in accordance with conditions of the customer's account and the bank's regulations, and the appellate court affirmed the trial court's judgment granting summary judgment for the bank. *South v. Bank of Am.*, 260 Ga. App. 91, 579 S.E.2d 80 (2003).

When a debtor who purchased credit disability insurance sued a creditor for wrongful repossession, the trial court erroneously granted summary judgment to the creditor, under O.C.G.A. § 9-11-56(c), because the creditor had an obligation to look to the credit disability insurance first before repossessing the debtor's vehicle. *Corbin v. Regions Bank*, 258 Ga. App. 490, 574 S.E.2d 616 (2002).

Bankruptcy. — In a Chapter 7 bankruptcy proceeding, a debtor's failure to remit lottery proceeds from the debtor's retail store to the Georgia Lottery Corporation satisfied the defalcation while acting in a fiduciary capacity exception to the discharge provision under § 523(a)(4) of the Bankruptcy Code, 11 U.S.C. § 523(a)(4); thus, summary judgment in favor of the Corporation on the issue of liability was proper. *Georgia Lottery Corp. v. Thompson* (In re Thompson), 296 B.R.

563 (Bankr. M.D. Ga. 2003).

Re-acceptance of vehicle after alleged revocation. — Buyer's acts of ownership over a truck after informing the buyer's creditor that the buyer would be returning the truck constituted, as a matter of law, re-acceptance of the vehicle; therefore, there was no genuine issue of fact with respect to the buyer's revocation of acceptance and the trial court did not err in granting summary judgment. *Olson v. Ford Motor Co.*, 258 Ga. App. 848, 575 S.E.2d 743 (2002).

Repossession of vehicle. — Trial court properly granted summary judgment to an auto dealer, a mortgage broker, and a lender on the accused person's claim for tortious interference with business relations; even if it was assumed that the accused person had established all the other elements of tortious interference regarding the repossession of a vehicle another person bought using the accused person's name, the accused person did not offer any proof that they acted maliciously by reporting the repossession. *Blakey v. Victory Equip. Sales, inc.*, 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Summary judgment was properly entered for a credit union on an owner's claim for wrongful possession as the owner defaulted on the agreement with the credit union by failing to pay the storage fees for the car which resulted in a garageman's lien; under O.C.G.A. § 11-9-601(a), as the owner was in default, the credit union could, pursuant to O.C.G.A. § 11-9-609(a), take possession of the collateral, and under O.C.G.A. § 11-9-610, the credit union could sell the collateral. *Endsley v. Robins Fed. Credit Union*, 267 Ga. App. 512, 600 S.E.2d 441 (2004).

In a civil action arising from a creditor's repossession of a debtor's vehicle, summary judgment on a debtor's conversion and punitive damages claims against a creditor was reversed as the trial court erroneously found that the debtor's failure to demand that the creditor return the subject vehicle was fatal to the claim, given that the creditor wrongfully repossessed and then sold the car subject to the parties' finance agreement, and hence no demand was necessary; but, as the debtor

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did not challenge summary judgment on the debtor's emotional distress claim, the judgment was upheld. *Williams v. Nat'l Auto Sales, Inc.*, 287 Ga. App. 283, 651 S.E.2d 194 (2007).

Duty to warn in products liability action. — Because the trial court granted summary judgment to a spine plate manufacturer pursuant to O.C.G.A. § 9-11-56, based on the doctrine of learned intermediary, in the patient's failure to warn claim, it was clear that the trial court determined that the warning given by the manufacturer to the physician was adequate or reasonable as a matter of law and, accordingly, the Court of Appeals should have reviewed the patient's arguments on that doctrine in the patient's appeal. *McCombs v. Synthes*, 277 Ga. 252, 587 S.E.2d 594 (2003).

Real-party-in-interest objection. — Summary judgment cannot properly be granted to a defendant on the basis of a real-party-in-interest objection. *Warshaw Properties v. Lackey*, 170 Ga. App. 101, 316 S.E.2d 482 (1984).

Since a real-party-in-interest objection is a matter in abatement and does not go to the merits of an action, such an objection cannot be disposed of by means of summary judgment but is properly disposed of pursuant to a motion to dismiss. *Fleming v. Caras*, 170 Ga. App. 579, 317 S.E.2d 600 (1984).

Trial court erred in granting summary judgment pursuant to O.C.G.A. § 9-11-56 to a boat owner in an action arising from a boat/jet ski accident; although the plaintiffs were not proper parties to the action, as the plaintiffs did not own the jet ski and did not hold any valid subrogation claim, a real party in interest defense pursuant to O.C.G.A. § 9-11-17 was not a proper subject for summary judgment, and the trial court should have dismissed the action. *Franco v. Cox*, 265 Ga. App. 514, 594 S.E.2d 717 (2004).

Third-party beneficiaries. — When an attorney sued a former client's ex-spouse to enforce a lien on the former client's former marital residence, which

was titled in the ex-spouse's name, the attorney was entitled to summary judgment because the ex-spouse's separation agreement with the former client provided for the satisfaction of liens against the former client, and the attorney was an unnamed third-party beneficiary of that separation agreement. *Northern v. Tobin*, 262 Ga. App. 339, 585 S.E.2d 681 (2003).

RICO. — Because the plaintiffs, in neither the complaint nor the evidence in opposition to a motion for summary judgment, produced any evidence raising the issue that the defendants committed two predicate criminal acts indictable under state or federal law and within one of the categories allowing an action under the federal Racketeer Influenced and Corrupt Organization statute, 18 U.S.C. § 1961 et seq., summary judgment for the defendant was proper. *Roth v. Connor*, 235 Ga. App. 866, 510 S.E.2d 550 (1998).

Court properly denied the defendants' motion for summary judgment in a bank's state RICO action because a genuine issue of fact remained as to the defendants' participation in a pattern of racketeering activity sufficient to ground liability under O.C.G.A. § 16-14-4(a); the jury could also reasonably find that the defendants were knowing and voluntary participants in a racketeering enterprise sufficient to establish liability under O.C.G.A. § 16-14-4(b). *Faillace v. Columbus Bank & Trust Co.*, 269 Ga. App. 866, 605 S.E.2d 450 (2004).

Termination of employment. — Because a decision to terminate the plaintiff was made after the plaintiff had tendered a resignation, which resignation triggered a provision in the plaintiff's Buy-Sell Agreement that required the repurchase of the plaintiff's stock, the price for which would decrease if the plaintiff was fired for cause, and because the evidence, construed in the plaintiff's favor, supported an inference that the president's stated reasons for terminating the plaintiff were contrived, there was some evidence from which a jury could infer a lack of good faith on the part of the president, and the trial court erred in granting partial summary judgment on the issue of whether the plaintiff was fired for good cause. *Phillips v. Key Servs., Inc.*, 235 Ga. App. 564, 510 S.E.2d 304 (1998).

Summary judgment pursuant to O.C.G.A. § 9-11-56(c) was properly granted to the defendants, a city, a city mayor, and a city council, in a police chief's action alleging wrongful termination and tortious interference with business relations as the defendants acted within the defendants' authority in discharging the police chief for falsifying another police officer's application for training; further, the chief was an at-will employee and, accordingly, the chief's employment was terminable at will and such action did not give rise to a claim for alleged wrongful termination. *Wilson v. City of Sardis*, 264 Ga. App. 178, 590 S.E.2d 383 (2003).

Sexual harassment and retaliation. — Although the supervisor's isolated attempt to kiss the employee was clearly inappropriate and reprehensible, alone it was insufficient to create a jury question regarding the employee's claim of sexual harassment from a hostile work environment; thus, summary judgment was appropriately granted. Furthermore, the employer was entitled to summary judgment on the employee's retaliation claim after the employee resigned; the employee could not show that the employer took any adverse employment action against the employee by requiring the employee to leave on the original date the employee chose. *Liebno v. Drexel Chem. Co.*, 262 Ga. App. 517, 586 S.E.2d 67 (2003).

Battery. — Grant of partial summary judgment pursuant to O.C.G.A. § 9-11-56 to a physician in a patient's action alleging breach of fiduciary duty and battery arising from an alleged failure to obtain valid consent prior to performing a medical procedure was erroneous because the physician had represented to the patient that the patient's orthopedic surgeon had been made aware of the treatment plans and had approved the plans, but there was no direct evidence that the surgeon had actually received the plans and had been aware of the plans and approved of the plans; accordingly, the jury could have found that the physician misrepresented that situation with an intent to deceive pursuant to O.C.G.A. § 51-6-2(b), which would have constituted sufficient fraud to have vitiated the consent. *Petzelt v.*

Tewes, 260 Ga. App. 802, 581 S.E.2d 345 (2003).

Employee's claim of battery. — Grant of summary judgment in favor of the employee on the employee's claim of battery was reversed because there were factual issues regarding whether a co-worker's conduct constituted an offensive touching and whether the touching was intentional. *Vasquez v. Smith*, 259 Ga. App. 79, 576 S.E.2d 59 (2003).

Public employee's freedom of speech. — Summary judgment was properly granted to the defendants on the employee's claim that the employee was dismissed for exercising the constitutional right to free speech, in violation of 42 U.S.C. § 1983, because the employee's speech, made during an internal investigation of university officers, was made primarily in the employee's role as an employee and not as a citizen; thus, the speech was not constitutionally protected. *Jones v. Bd. of Regents of the Univ. Sys. of Ga.*, 262 Ga. App. 75, 585 S.E.2d 138 (2003).

Local government personnel issues. — Because a county tax commissioner's employees were within the county's civil service system, the county was properly granted summary judgment and, hence, the county's personnel director was authorized to refuse to implement raises to the employees as the commissioner sought; moreover, the commissioner's reliance on O.C.G.A. § 36-1-21 did not change the result as that statute expressly applied only to civil service systems created by county governing authorities, and the civil service system at issue was created by the Georgia General Assembly. *Ferdinand v. Bd. of Comm'rs*, 281 Ga. 643, 641 S.E.2d 787 (2007).

Exclusivity doctrine of the Georgia Workers' Compensation Act. — Trial court properly granted summary judgment in favor of a co-worker and an employer as the exclusivity doctrine of the Georgia Workers' Compensation Act, specifically O.C.G.A. § 34-9-11(a), barred an employee's assault and battery and intentional infliction of emotional distress claims against a co-worker, and the employee's negligent retention and respondeat superior claims against the

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employer as the claims were ancillary to a physical occurrence arising in the course of employment; the injuries were incurred when the co-worker inflicted a minor punch or poke on the employee, not an incidental contact, which showed some level of physical harm. *Lewis v. Northside Hosp., Inc.*, 267 Ga. App. 288, 599 S.E.2d 267 (2004).

In a wrongful death action, the trial court erred in denying an employer's motion for summary judgment against the claims filed by the decedent's parents, as those claims were limited by the exclusivity provisions of the Georgia Workers' Compensation Act, given evidence that the decedent's death arose out of and in the course of employment, pursuant to O.C.G.A. § 34-9-1(4). *Burns Int'l Sec. Servs. Corp. v. Johnson*, 284 Ga. App. 289, 643 S.E.2d 800 (2007).

State preemption of county ordinance. — Because the plain language of O.C.G.A. § 16-11-173 expressly precluded a county from regulating the carrying of firearms in any manner, a county ordinance attempting to regulate the carrying of firearms was preempted by the statute; thus, the trial court erred in concluding otherwise and by denying summary judgment to a citizen and advocacy group on those grounds. *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga. App. 748, 655 S.E.2d 346 (2007).

Whistleblowers. — Summary judgment was erroneously granted to the board of regents on the employee's claim under O.C.G.A. § 45-1-4, the "whistleblower" statute, because a jury issue existed regarding whether "action" was taken against the employee for purposes of § 45-1-4; the record contained at least some circumstantial evidence that the employee was dismissed in reprisal for the employee's investigation into the university's officers and for disclosing information of fraud in connection with the investigation. *Jones v. Bd. of Regents of the Univ. Sys. of Ga.*, 262 Ga. App. 75, 585 S.E.2d 138 (2003).

Breach of implied warranties of merchantability and fitness for par-

ticular purpose. — Seller was denied summary judgment on the customer's action alleging breach of implied warranties of merchantability and fitness for a particular purpose; the customer's failure to serve the seller with notice of the defect in the product until two years and three days after the customer suffered an injury was, by itself, not enough of a delay to prejudice the seller and bar relief. *Wal-Mart Stores, Inc. v. Wheeler*, 262 Ga. App. 607, 586 S.E.2d 83 (2003).

Conversion. — Denial of summary judgment as to a claim that funds were allegedly converted to the defendants' personal use was reversed because there was no evidence in the record to support such a claim. *Harris v. Gilmore*, 265 Ga. App. 841, 595 S.E.2d 651 (2004).

Consignment. — While a buyer of a motor home on consignment was entitled to summary judgment after the dealer never paid the consignors, when the consignors refused to execute an assignment and warranty of title when the buyer sought the same, the buyer was entitled to damages, including reasonable attorney's fees under O.C.G.A. § 40-3-32(a) caused thereby. *Smith v. Hardeman*, 281 Ga. App. 402, 636 S.E.2d 106 (2006).

Debtor/creditor issues. — Summary judgment under O.C.G.A. § 9-11-56(c) was properly granted to a creditor in the creditor's action seeking to collect on a debt since the debtor's defense consisted of a claim in recoupment, pursuant to O.C.G.A. §§ 13-7-2 and 13-7-13, based on personal injuries the debtor suffered from the negligent conduct of the creditor; the court ruled that such a defense was not applicable to the creditor's claim because the claims were legally distinct. *Long v. Reeves Southeastern Corp.*, 259 Ga. App. 257, 576 S.E.2d 641 (2003).

Desecration of cemetery. — Summary judgment for the secretary of a land company was affirmed in a case brought by family members claiming that acts committed by the land company allegedly desecrated the family members' family cemetery because affidavits submitted by the secretary attested to the fact that the secretary never acted outside of the scope of the secretary's authority as an officer of the land company, did not personally di-

rect, supervise, or control the operator who cleared the land in question, and did not personally direct, supervise, or directly take part in the land clearing that allegedly resulted in the desecration; the burden shifted to the family members, who put forth no affidavits or other evidence that demonstrated the secretary's individual liability for the alleged tortious acts. *Cesar v. Shelton*, No. A04A0717, 2004 Ga. App. LEXIS 355 (Mar. 15, 2004).

Georgia Recreational Purposes Act defense. — Trial court erred in granting summary judgment for a school board as to an injured party's personal injury claim based on the Georgia Recreational Purposes Act, specifically O.C.G.A. §§ 51-3-22 and 51-3-23, as the school board presented no evidence that the playground was open to the public and the injured party presented evidence that the playground: (1) was fenced-in; (2) was only for the use of children enrolled in the school; and (3) was not open to any segment of the general public. *Hart v. Appling County Sch. Bd.*, 266 Ga. App. 300, 597 S.E.2d 462 (2004).

Tort action. — One spouse's claim for damages for a motorcycle accident against the other spouse involved only a tort claim, and was not a divorce case within the meaning of Ga. Const. 1983, Art. VI, Sec. VI, Para. III(6), even though the spouse sought a divorce in another count of the complaint, and the Supreme Court of Georgia did not have jurisdiction over the interlocutory appeal of the denial of the other spouse's motion to dismiss, which had been treated as a motion for summary judgment; the spouse claimant's argument that the appeal fell within the Supreme Court of Georgia's appellate jurisdiction over constitutional issues was rejected as no allegedly unconstitutional statutes were specified, and argued only that the interspousal tort immunity doctrine, as codified in O.C.G.A. § 19-3-8, was unconstitutional as applied. *Gates v. Gates*, 277 Ga. 175, 587 S.E.2d 32 (2003).

Trial court did not err in granting summary judgment to the defendants in a tort action, based on a bankruptcy court's order confirming their Chapter 11 plan, which discharged the tort claim and barred the plaintiffs from continuing their

suit as the plaintiffs did not dispute that their tort claim was within the scope of the defendants' discharge in bankruptcy; further, the trial court correctly concluded that such constituted a defense which barred the plaintiffs' tort action to collect the discharged claim. *Roy v. Garden Ridge, L.P.*, 283 Ga. App. 74, 640 S.E.2d 665 (2006).

In a parent's suit as a next friend to the parent's daughter, the trial court erred in denying summary judgment to a retailer and the retailer's employees on the parent's claim of tortious misconduct as no evidence was presented that the child victim was the retailer's business invitee, but was merely a licensee under both O.C.G.A. §§ 51-3-1 and 51-3-2 as the child merely entered the business with the sole intent to use the restroom; however, summary judgment was properly denied as to the invasion of privacy, intentional infliction of emotional distress, false imprisonment, false arrest, and damages claims filed by the parent against the defendants. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Tort claim arising from flooding. — Trial court properly granted summary judgment to the city on the claimant's tort claims arising from the back up of a sewer that flooded the claimant's home as no genuine dispute existed that the claimant did not file a written ante litem notice with the city within six months of the happening of the event that gave rise to the claim, the first flooding. The claimant was required to file written notice within that time even though the claimant alleged the flooding was a continuing nuisance as the city was entitled to notice arising from the first flooding so the city could attempt to fix the problem, and the claimant's failure to timely give the city written notice meant the city could not be held liable. *Cundy v. City of Smyrna*, 264 Ga. App. 535, 591 S.E.2d 447 (2003).

Slander claims. — In a suit between feuding neighbors, the trial court properly held that the words spoken by one against the other, which the latter alleged were disparaging against America's loss on September 11, 2001, were not slanderous

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as the words were an expression of pure opinion, which was neither provable as true nor as false; as a result, the neighbor who uttered the allegedly slanderous comments was entitled to summary judgment on the other's claim of slander per se. *Bullard v. Boulter*, 286 Ga. App. 218, 649 S.E.2d 311 (2007).

Stalking arising to invasion of privacy. — Because: (1) evidence was presented that the appellee denied the intent required under the stalking statute, O.C.G.A. § 16-5-90; and (2) a motion quashing a subpoena for the appellee's cell phone records was proper as those cell phone records were not reasonably calculated to lead to the discovery of admissible evidence or information relevant to the intrusiveness of the appellee's behavior, the trial court properly denied partial summary judgment on the appellant's stalking claim and entered an order quashing a subpoena for appellee's cell phone records; but, because the appellee's alleged repeated actions of following the appellant and taking pictures arose to an invasion of privacy, summary judgment was inappropriate. *Anderson v. Mergenhagen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007).

Action brought by auctioneer for tort of auction company. — When an auctioneer sought damages from the auction company for whom the auctioneer worked and the principal because the auctioneer was arrested in another state for contracting and advertising for an auction without a license, the auction company and principal were entitled to summary judgment because the auctioneer did not show the auction company or principal violated any duty owed the auctioneer that caused the auctioneer's injury, as the auctioneer knew, when the auctioneer advertised and contracted for the auction in the other state; further, the auction company did not have a license to conduct an auction in that state so the auctioneer did not establish the elements necessary to recover for the auction company's or principal's alleged tortious conduct under

O.C.G.A. § 51-1-1. *Morris v. Gavin, Inc.*, 268 Ga. App. 771, 603 S.E.2d 1 (2004).

Products liability. — Under the learned intermediary doctrine, a warning included with a plate surgically implanted into a consumer by the consumer's physician stating that the plate could break when subjected to the increased loading associated with delayed union or non-union, and such occurred to the consumer, was adequate and reasonable under the circumstances of the case; thus, summary judgment against the consumer was properly entered. *McCombs v. Synthes (U.S.A.)*, 266 Ga. App. 304, 596 S.E.2d 780 (2004).

Because: (1) a couple failed to present sufficient evidence to show an original manufacturing defect in their used car at the time the car left the car's manufacturer; (2) two product recalls did not apply to the vehicle; and (3) the doctrine of res ipsa loquitur did not apply, summary judgment was properly granted to the car's manufacturer on the couple's negligent manufacturing, failure to warn, and one of the spouse's loss of consortium claim; moreover, even if the trial court erred in considering the affidavits submitted by the manufacturer's expert, such did not amount to reversible error. *Miller v. Ford Motor Co.*, 287 Ga. App. 642, 653 S.E.2d 82 (2007).

Privileged communications. — Attorney's statements regarding a doctor made in the form of two phone messages to the doctor's patients were privileged as the statements were made in anticipation of a lawsuit the attorney was preparing to file, were not slanderous, and did not interfere with the doctor's business relations; thus, the attorney was entitled to summary judgment on the doctor's claims of slander and tortious interference with business relations. *Vito v. Inman*, 286 Ga. App. 646, 649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

Creation of easement by implication. — Trial court erred in granting summary judgment, pursuant to O.C.G.A. § 9-11-56, to a property owner who sought an easement by implication of law pursuant to O.C.G.A. § 44-9-1 over an adjoining property owners' land as the record was insufficient to support such a determina-

tion; the parties' accounts of how the land was divided upon foreclosure from the original grantor differed greatly and there were no deeds, deed assignments, dates, or foreclosure information provided in the record in order to properly determine if such an easement was created. *Boyer v. Whiddon*, 264 Ga. App. 137, 589 S.E.2d 709 (2003).

Condemnation actions. — In a condemnation action, partial summary judgment was properly granted in favor of the Georgia Department of Transportation because an owner was unable to recover losses for business damages as the evidence showed that the owner was not actually conducting a business on the condemned land, despite the fact that a lease agreement between the owner and a lessee gave the owner some control over the business operations of a service station and store located on the property. *Davis Co. v. DOT*, 262 Ga. App. 138, 584 S.E.2d 705 (2003).

Statutes of limitations. — Motion for summary judgment is the proper procedure by which to secure a ruling on the statute of limitations. *Houston v. Doe*, 136 Ga. App. 583, 222 S.E.2d 131 (1975).

Although the act that originally caused the nuisance might not have been committed within the period of limitations of the action, the defendant presented some evidence that the groundwater contamination was a continuing tort that continued to inflict damages in the four years prior to the suit; therefore, summary judgment was inappropriate when based upon the suit being time barred. *Tri-County Inv. Group v. Southern States, Inc.*, 231 Ga. App. 632, 500 S.E.2d 22 (1998).

Trial court properly granted summary judgment to a driver in the victim's action stemming from a vehicular collision on the basis that service did not relate back to the time of filing the complaint as the victim did not ensure that the suit was being filed in the proper county. *Williams v. Bragg*, 260 Ga. App. 377, 579 S.E.2d 800 (2003).

In a medical malpractice action, because the trial court erroneously applied the five-year statute of repose contained in O.C.G.A. § 9-3-71(b), and not O.C.G.A. § 9-3-73, in finding that the parents'

amended negligence complaint against certain doctors and nurses was time-barred, the trial court erred in entering summary judgment against the parents; further, the trial court also erred in finding that the doctors and nurses were rendering care to only the mother, and not the mother and the newborn child. *Johnson v. Thompson*, 286 Ga. App. 810, 650 S.E.2d 322 (2007), cert. denied, 2008 Ga. LEXIS 90 (Ga. 2008).

Because a sublessee failed to file its claims under a divisible sublease within the six-year period after the claims arose, pursuant to the requirements of O.C.G.A. § 9-3-24, and a different limitations period applicable to construction contracts and express warranties did not apply, partial summary judgment to the sublessor as to the time-barred claims was properly entered. *New Morn Foods, Inc. v. B & B Egg Co.*, 286 Ga. App. 29, 648 S.E.2d 428 (2007).

Because a belated claim in a breach of contract action filed against an alleged homebuilder's partner did not relate back to the date of the original complaint, as required by O.C.G.A. § 9-11-15(c), summary judgment in favor of the homebuilder was correctly granted based on the expiration of the six-year limitation period under O.C.G.A. § 9-3-24. *Wallick v. Lamb*, 289 Ga. App. 25, 656 S.E.2d 164 (2007).

Tree limb hitting visitor to property. — In a case brought against a property owner by an injured person who was hurt when a limb fell from a tree in the property owner's yard and struck the injured person, summary judgment for the property owner was affirmed because the property owner's expert signed an affidavit in which the expert stated that because there were green leaves growing on the limb, the average person would not have known that the limb was diseased and in which the expert also stated that the tree was healthy, with no visible signs of stress and no visible signs of existing hazards; there was no evidence that the tree was diseased or decayed, and thus there was no prior notice to the property owner that the tree may have constituted a dangerous condition. *Klein v. Weaver*, 265 Ga. App. 390, 593 S.E.2d 913 (2004).

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Forfeiture. — Massage parlor operator was entitled to summary judgment in a civil forfeiture action instituted by the State of Georgia in connection with a Georgia Racketeer Influenced and Corrupt Organizations Act action because the state merely rested on the state's allegations used to procure a search warrant and did not have admissible evidence, documentary or testimonial, to support the state's allegations that the operator had engaged in the predicate acts of prostitution, federal money laundering, mail fraud, and Travel Act violations, both individually and in conspiracy with others. *Pabey v. State*, 262 Ga. App. 272, 585 S.E.2d 200 (2003).

Inverse condemnation action. — City was properly granted summary judgment in an inverse condemnation suit because the city's change in making a road a one-way street did not disturb the direct vehicular access existing from the owners' land to the abutting street; thus, there was no compensable taking, despite the fact that access was less convenient. *Hanson v. City of Roswell*, 262 Ga. App. 671, 586 S.E.2d 341 (2003).

Trial court properly granted partial summary judgment to a county in an action filed against the county by a competitor in the water supply business because a claim of inverse condemnation arising from the county's operation of a competing water supply system and resulting loss of business was not based on physical damage to the competitor's property, but rather left the claim extant, whether advanced under a theory of trespass or inverse condemnation. *Jones v. Putnam County*, 289 Ga. App. 290, 656 S.E.2d 912 (2008).

Immunity of city for death of fleeing suspect. — Appellate court erred in denying a city's motion for summary judgment in a police pursuit case as the statute stating that a city could be held liable for injuries sustained during a police pursuit, under certain circumstances, applied only to innocent persons who were injured and not to fleeing suspects unless it was

shown the officer intended to injure the suspect; since no such showing was made, the parents of the fleeing suspect who was killed trying to drive away from the officer could not recover from the city. *City of Winder v. McDougald*, 276 Ga. 866, 583 S.E.2d 879 (2003).

42 U.S.C. § 1983 action. — Janitorial service owner's 42 U.S.C. § 1983 claim against a police detective, a police chief, and a police department could not withstand summary judgment because the police detective properly relied upon a trustworthy source to establish probable cause to arrest the owner for a theft from a customer's spa without investigating. *Means v. City of Atlanta Police Dept.*, 262 Ga. App. 700, 586 S.E.2d 373 (2003).

Abusive litigation. — Because a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that the claims were not counterclaims and, accordingly, dismissed the claims for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in the defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Because the Court of Appeals of Georgia merely found in a prior action between the parties that an employer failed to prove the employer's claims against a former employee at trial, and that holding did not amount to a binding determination that those claims were without substantial justification or that the employer engaged in abusive litigation, the trial court properly granted summary judgment to the employer as to the former employee's abusive litigation claims; moreover, although questions of reasonableness were generally for the jury, given that the employer was successful at every stage of the litigation,

tion prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing the company's claims. *Bacon v. Volvo Serv. Ctr., Inc.*, 288 Ga. App. 399, 654 S.E.2d 225 (2007).

Punitive damages. — When a company sued the company's accountants for punitive damages regarding their participation in a sale of the company's assets because they did not notify the company's principal of the sale, summary judgment was properly granted in favor of the accountants because the accountants' failure to inform the principal of the sale and their participation in the sale breached no duty the accountants owed the company and was attributable to the company's and principal's own failure to apprise the accountants that the corporation represented as the company's parent was no longer the parent and was not authorized to approve the sale. *R.W. Holdco, Inc. v. Johnson*, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Summary judgment was properly entered for a realtor and a developer as to a landowner's punitive damages claims as the realtor and the developer were entitled to summary judgment on the landowner's underlying claims. *Sorrow v. Hadaway*, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Because the appeals court found that other intentional tort claims survived summary judgment which would authorize the imposition of punitive damages if the jury were to find that a retailer and the retailer's employees acted with a wanton disregard of a nine-year-old child's rights, the trial court did not err by denying summary judgment on these grounds. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

In a legal malpractice action, because the evidence sufficiently showed that the client was precluded from seeking punitive damages in the underlying suit against the opposing party, the attorney being sued was properly granted summary judgment on the issue. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

Tax issues. — Summary judgment for a county board of tax assessors (BTA) in a taxpayer's suit seeking injunctive relief and a writ of mandamus compelling a board of equalization (BOE) to adjudicate its appeal of a reassessment for one tax year was reversed as: (1) there were no objective criteria in place for choosing businesses for audits when the taxpayer was chosen for a four-year audit; (2) there was evidence that the BTA attempted to thwart the taxpayer's statutory right to prompt adjudication of its appeal before the BOE under O.C.G.A. § 48-5-311; and (3) there was a jury question as to whether the audit was begun by an accounting firm or the BTA for an improper purpose in violation of O.C.G.A. § 48-5-299(a). *Parisian, Inc. v. Cobb County Bd. of Tax Assessors*, 263 Ga. App. 332, 587 S.E.2d 771 (2003).

County and the county tax commission were entitled to summary judgment as a matter of law in an action filed by a trucking company seeking a refund for ad valorem taxes the company paid as it was undisputed at trial that the company failed to timely file for either an apportionment in two subject years, as required by Ga. Comp. R. & Regs. r. 560-11-7-.02, and that the company did not appeal the company's ad valorem assessment within 45 days of the assessment in either year, pursuant to O.C.G.A. § 48-5-311; furthermore, O.C.G.A. § 48-5-380, which allowed a taxpayer to seek a refund up to three years after paying an erroneous or illegal tax, did not apply. *Trans Link Motor Express, Inc. v. Dougherty County*, 265 Ga. App. 10, 592 S.E.2d 859 (2003).

In a bench trial, in which an order was issued establishing the 1997 fair market value of the taxpayer's property at a value of \$4,709,000, which was an amount greater than the value set by the board of equalization, but when the taxpayer paid taxes in 1997, 1998, and 1999, based on the board of equalization's 1997 valuation and when because the 1997 value of the taxpayer's property was finally determined to be \$4,709,000, the taxpayer automatically returned the property in 1998 and 1999 at that value, the taxpayer underpaid taxes for the 1997, 1998, and 1999 tax years and the tax assessors were en-

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titled to a summary judgment finding that the taxpayer had underpaid taxes and that the taxpayer owed additional sums; furthermore, the statutory notice requirements of O.C.G.A. § 48-5-306 did not preclude summary judgment. *Pine Pointe Hous., L. P. v. Bd. of Tax Assessors*, 269 Ga. App. 855, 605 S.E.2d 443 (2004).

Because taxpayer's assignee lacked standing to claim a refund of ad valorem taxes allegedly overpaid by the assignor, the trial court erred in finding that the assignee was entitled to the refund; as a result, the court also erred in denying the respective counties summary judgment on the issue. *Clayton County v. HealthSouth Holdings, Inc.*, 288 Ga. App. 406, 654 S.E.2d 143 (2007).

Sovereign immunity. — Trial court erred in granting a school board's motion for summary judgment as to an injured party's personal injury claim based on sovereign immunity as: (1) the trial court applied the wrong version of Ga. Const. 1983, Art. I, Sec. II, Para. IX(e), which was amended, prospectively, after the accident; (2) the applicable version of Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) was that in effect at the time of the accident in 1990; and (3) the parties agreed that an insurance policy would have constituted a waiver of the board's sovereign immunity, which implied that a policy existed; the case was remanded so that the trial court could reconsider the court's decision in light of the correct law and any insurance policy. *Hart v. Appling County Sch. Bd.*, 266 Ga. App. 300, 597 S.E.2d 462 (2004).

In an action arising out of an arrest, despite the way the arrestee was treated, the trial court properly dismissed a complaint against a county, and granted summary judgment on the same complaint against a city on sovereign immunity grounds because the arrestee failed to show that the immunity had been waived. *Scott v. City of Valdosta*, 280 Ga. App. 481, 634 S.E.2d 472 (2006).

In a tort action for personal injuries and property damage arising from an auto collision filed against a city, because the

facts did not involve an officer's pursuit of a fleeing suspect, or damages caused by a fleeing suspect, O.C.G.A. § 40-6-6 did not apply to the action, and thus, the trial court erred in relying on the statute as a ground for granting summary judgment to the city on sovereign immunity grounds. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

Official immunity for discretionary acts. — As a student's personal injury damages claims against three school employees were based on the employees negligent failure to supervise the student when the student was with a non-party, and that such failure allegedly led to the student being molested by the third-party, the supervisory decisions made were discretionary acts requiring personal deliberation and judgment; hence, any reliance on O.C.G.A. § 19-7-5 did not provide a basis for civil liability against the employees for a negligent breach of a ministerial duty, and the student's claims were barred by the doctrine of official immunity as a matter of law. *Reece v. Turner*, 284 Ga. App. 282, 643 S.E.2d 814 (2007).

Display of skeletal remains by state. — Adult child's tort claims against a state university board of regents for the autopsy, study, and display of the parent's skeletal remains in a glass case in a medical school for decades were dismissed because the claims accrued no later than 1950, at which time sovereign immunity applied to Georgia and its agencies; thus, a trial court erred in denying the board's motions for summary judgment and dismissal. *Bd. of Regents v. Oglesby*, 264 Ga. App. 602, 591 S.E.2d 417 (2003).

Proceedings to renew judgment. — While O.C.G.A. § 9-12-21 did not prevent the assignee of a judgment from seeking to enforce the judgment in the amount the assignee paid for the judgment, O.C.G.A. § 9-12-21 intended the transfer of an entire judgment so the assignment of a part interest in a judgment required the judgment debtor's consent in order to prevent the judgment debtor from being subjected to a multiplicity of suits arising from the same judgment; absent that consent, the assignee of a part interest in a judgment against the judgment debtor could not

seek to renew the judgment so the assignee, in a suit to renew the judgment, was not entitled to summary judgment. *Rathbone v. Ward*, 268 Ga. App. 822, 603 S.E.2d 20 (2004).

Uninsured motorists. — Trial court properly granted an insurer's summary judgment motion in an insured's suit for uninsured motorist benefits as the insured's suit against a deputy sheriff in the deputy's official capacity was barred by the statute of limitations; the insured could not establish that the insured was legally entitled to recover from the deputy, as required by O.C.G.A. § 33-7-11(a)(1). *Soley v. State Farm Mut. Auto. Ins. Co.*, 267 Ga. App. 606, 600 S.E.2d 707 (2004).

Action to open intestate estate. — Putative heir's action seeking an order opening the intestate estate was subject to the three-year statute of limitations contained in O.C.G.A. § 9-11-60(f), and the trial court erred when the court denied a motion for summary judgment that was filed on behalf of a widow who administered the estate because the heir's action was filed more than three years after the probate court issued an order discharging the widow as administrator. *Moore v. Mack*, 266 Ga. App. 847, 598 S.E.2d 525 (2004).

Frivolous litigation. — In the absence of fact issues as to malice and lack of substantial justification, the trial court properly granted summary judgment to the attorney and the former client on a lawyer's frivolous litigation claim against them. Furthermore, the filing of the abusive litigation suit outside the statute of limitations was justified and proper given the absence of any clear authority under Georgia law as to precisely when the statute of limitations commenced under O.C.G.A. § 51-7-84(b). *Land v. Boone*, 265 Ga. App. 551, 594 S.E.2d 741 (2004).

Premises liability. — Summary judgment was properly entered for a railroad as to an injured party's premises liability claim based on a premises owner's non-delegable duty to keep the premises safe for the protection of invitees. The railroad neither owned nor occupied the sidetrack that was the site of the accident. Assuming that the railroad did own the sidetrack, there was no evidence that the

railroad had any knowledge of the defective condition that was the result of its lessee's use of a defective iron grate. The injured party conceded that the defective grate was not readily apparent and the injured party failed to show that the railroad would have discovered the defect had the railroad conducted a reasonable inspection. *Mixon v. Ga. Cent. Ry., L.P.*, 266 Ga. App. 365, 596 S.E.2d 807 (2004).

In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws; thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that the contractor's independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. *Benson-Jones v. Sysco Food Servs. of Atlanta, LLC*, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

Reimbursement under indemnity agreement. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to a surety company in the company's reimbursement action against indemnitors because the company met the company's burden of showing good-faith payments on the bonds and the indemnitors failed to meet their burden of showing bad faith by the company; issues as to the validity, reliability, and admissibility of supporting documents and affidavits lacked merit as the issue was not whether a factual dispute existed, but whether there was any evidence of bad faith on the part of the company for which nothing was offered by the indemnitors. *Anderson v. United States Fid. & Guar. Co.*, 267 Ga. App. 624, 600 S.E.2d 712 (2004).

Order granting summary judgment to an LLC was upheld, when, under the plain terms of an indemnity provision

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between the LLC and one of its shareholders, the shareholder was liable for costs associated with defending claims made by its agent against the LLC; but, the shareholder was not liable for costs associated with a suit over the payment of commissions, as such did not relate to the marketing and sales efforts covered by the indemnity clause and undertaken by the shareholder. *SRG Consulting, Inc. v. Eagle Hosp. Physicians, LLC*, 282 Ga. App. 842, 640 S.E.2d 306 (2006).

Custody case could not determine other civil issues. — Because the trial court relied upon documents other than the pleadings, a motion to dismiss should in fact have been treated as a motion for summary judgment; a juvenile court had no jurisdiction over claims of fraud, breach of contract, perjury, and defamation made by one former spouse against the other, and thus a custody case between the parties, which was litigated in juvenile court, was not an adjudication of the spouse's claim for purposes of res judicata. *Litsky v. Schaub*, 269 Ga. App. 254, 603 S.E.2d 754 (2004).

Divorce. — Because questions pertaining to alimony, property, and all other issues of the marriage were intended to be covered by the parties' prior separation agreement in the event the parties divorced, and the wife freely entered into the agreement, her subsequent claim for alimony and an interest in the marital home were properly dismissed via summary judgment. *D'Errico v. D'Errico*, 281 Ga. 508, 640 S.E.2d 30 (2007).

Personal injury. — Because the plaintiff, in a personal injury action, having failed to present some evidence that the defendant's security was inadequate or that any such inadequacy was the proximate cause of the plaintiff's injuries, summary judgment was properly granted to the defendant. *Collins v. Shepherd*, 212 Ga. App. 54, 441 S.E.2d 458 (1994).

Trial court did not abuse the court's discretion in granting the defendant motorist summary judgment based on a lack of timely service of process in an action by

the plaintiffs, a driver and the driver's passenger, to recover damages for personal injuries and property damage because: (1) the renewal complaint was timely filed within the applicable limitation period, but there was no evidence that the motorist was served within five days after the applicable limitation periods of O.C.G.A. §§ 9-3-31 and 9-3-33 for property damage and personal injury claims, respectively, expired, or that the motorist was served at all; and (2) the plaintiffs offered only the conclusory allegation of the plaintiffs' counsel in an affidavit that diligent efforts were made to serve the motorist after a failed attempt at service in one county led to the discovery that the motorist had apparently relocated to a different area in Georgia; the unsuccessful attempt alerted the plaintiffs to a problem with service, requiring the plaintiffs to exercise the greatest possible diligence in serving the motorist, but the plaintiffs failed in the plaintiffs' burden of proving such efforts by failing to offer specific details regarding what efforts the plaintiffs made to locate and serve the motorist. *Carter v. McKnight*, 260 Ga. App. 105, 578 S.E.2d 901 (2003).

Summary judgment was properly granted to dismiss a dump truck driver's insurer from a counterclaim arising in a motor vehicle accident case because the insurer was statutorily exempt from any direct action against the insurer. *Morgan Driveaway, Inc. v. Canal Ins. Co.*, 266 Ga. App. 765, 598 S.E.2d 38 (2004).

Analyzing a personal injury action filed against an insured, and a declaratory judgment action subsequently filed by its insurer, the Court of Appeals of Georgia erred in holding that an insured was estopped from asserting compliance with its insurer's policy provisions regarding notice, and additionally erred, on that basis, in reversing the denial of summary judgment to the insurer in the insurer's declaratory judgment action as neither res judicata nor collateral estoppel barred inquiry into the question of whether the insureds' notice of a lawsuit to the insurer was timely. *Karan, Inc. v. Auto-Owners Ins. Co.*, 280 Ga. 545, 629 S.E.2d 260 (2006).

Trespass. — Trial court did not err in granting summary judgment to the plain-

tiff on the defendants' counterclaims for trespass to property, wrongful filing of a dispossessory action, and illegally acquiring title to the defendants' property because all of the counterclaims were based on the erroneous theory that the defendants were the owners of the property that the defendants had lost by foreclosure. *Green v. Sommers*, 254 Ga. App. 446, 562 S.E.2d 808 (2002).

Promissory notes. — Trial court properly granted summary judgment to a bank and against the obligors on the promissory notes that the obligors executed and allegedly defaulted on, and on the obligors' counterclaim for intentional infliction of emotional distress as the evidence showed the obligors executed the notes, defaulted on the notes, had no defense, and did not show how modification agreements to which the obligors were not parties relieved the obligors of their obligations; furthermore, the obligors did not show that the attorney was acting for the bank when the attorney allegedly made a statement to a third party that the attorney was going to make life miserable for the obligors, and, thus, the obligors did not show an intentional infliction of emotional distress claim. *Reece v. Chestatee State Bank*, 260 Ga. App. 136, 579 S.E.2d 11 (2003).

Rights in life insurance policy. — Insured was properly granted summary judgment in a lawsuit filed by a beneficiary to whom the insured assigned the right to collect the proceeds of a supplemental group life insurance policy because the insured did not die, and cancelled the assigned policy, as the terms of the viatical settlement allowed the beneficiary to have a vested right in a renewal of that policy, but not in a replacement policy. *Livoti v. Aycock*, 263 Ga. App. 897, 590 S.E.2d 159 (2003).

Inappropriate based on defect in expert's affidavit. — Defect in an expert's affidavit attached to the complaint in a legal malpractice action should be attacked via motion to dismiss, and summary judgment on the basis of such defect was inappropriate. *Freeman v. Pittman*, 220 Ga. App. 672, 469 S.E.2d 543 (1996).

Action for return of earnest money. — Trial court erred in granting summary

judgment, pursuant to O.C.G.A. § 9-11-56(c), to a seller in an action to recover earnest money for the sale of a shopping center; the purchaser was entitled to the return of the money because the purchaser could not obtain financing, which was a condition for the return of the money under the terms of the contract, interpreted pursuant to O.C.G.A. §§ 13-2-1 and 13-2-2. *Ali v. Aarabi*, 264 Ga. App. 64, 589 S.E.2d 827 (2003).

Prison nurse not entitled to summary judgment on prisoner's overdose claim. — Trial court properly denied a prison nurse's motion for summary judgment on the estate administrators' 42 U.S.C. § 1983 claim against the nurse, following the death of an inmate by Tylenol overdose, because the administrators presented sufficient evidence that the nurse, who examined the decedent, refused to act despite knowledge of the substantial risk of harm to the decedent. *Minor v. Barwick*, 264 Ga. App. 327, 590 S.E.2d 754 (2003).

Prison officials not entitled to summary judgment. — Trial court incorrectly denied a prison official's motion for summary judgment on the estate administrators' 42 U.S.C. § 1983 claim against the official, following an inmate's death from a Tylenol overdose because, although the official was aware that the decedent faced a substantial risk of serious harm, the administrators did not show that the official displayed deliberate indifference to the decedent's serious medical needs. Furthermore, the administrators failed to prove that the official was acting outside the scope of the person's official duties or employment; consequently, even if the official acted with malice or intent to injure the decedent, the official was immune from liability on the administrators' state law claims against the official. *Minor v. Barwick*, 264 Ga. App. 327, 590 S.E.2d 754 (2003).

Action for breach of lease. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) to a lessor in a lessee's breach of contract action; pursuant to a lease for roof space to be used for a billboard, the lessee defaulted by interfering with a cellular antenna already placed on the roof and the

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lessor provided the proper notice of termination. *Tower Projects, LLC v. Marquis Tower, Inc.*, 267 Ga. App. 164, 598 S.E.2d 883 (2004).

Public nuisance. — Trial court correctly entered summary judgment against the plaintiffs on the plaintiffs' public nuisance count because the evidence did not show that all members of the public who came into contact with the river were injured, and thus, the plaintiffs' public nuisance cause of action was effectively erased. During the decades prior to the deaths, no other person had ever drowned when entering the river via the boat ramp, whether during power generation or otherwise, and the other six boys who accompanied the decedents into the water on the ramp that day were uninjured. *White v. Ga. Power Co.*, 265 Ga. App. 664, 595 S.E.2d 353 (2004).

No evidence for jury in inadvertent distribution of pornographic material. — Summary judgment was properly granted to the video store on the parent's suit against the store after the parent discovered that a children's video contained explicit pornographic material, as the intervening criminal act of an unknown third party who recorded explicit pornographic material on the store's children's videotape was not reasonably foreseeable; thus, the store met the store's burden under O.C.G.A. § 9-11-56(c) by establishing that there was no evidence to create jury issues on the essential elements of the parent's case. *Davis v. Blockbuster, Inc.*, 258 Ga. App. 677, 575 S.E.2d 1 (2002).

Defendants' negligence in allowing gun to be accessible prevented summary judgment. — Although at trial the burden of proof as to each element of negligence would be upon the plaintiff, on summary judgment the burden is upon the defendants as movants to negate at least one of the elements, and if the defendants' evidence fails to conclusively refute the plaintiff's allegations of their negligence in allowing a gun to remain in a place accessible to a trustee who robbed

and raped the plaintiff, the defendants' motion for summary judgment should be denied, as a jury could reasonably conclude that the trustee's criminal action was foreseeable and that the defendants were negligent by knowingly allowing a gun to be kept in an unlocked drawer in an area where a convicted criminal was authorized to be in the performance of the criminal's duties. *Tolbert v. Tanner*, 180 Ga. App. 441, 349 S.E.2d 463 (1986).

Summary judgment awarded to bank. — Since two affidavits presented by a bank's risk operations officer averred that a business card application filed by both debtors represented the agreement that they would both be jointly and severally liable for the full account in the event of default, the bank was entitled to summary judgment. *Nugent v. SunTrust Bank*, 263 Ga. App. 730, 589 S.E.2d 298 (2003).

Recoupment from attorney. — Partial summary judgment was properly granted to a client in the client's contribution action to recoup the attorney's portion of the judgment the client satisfied since the evidence in the record proved the client paid the judgment in full by entering into a release agreement with the prevailing party, and the attorney failed to point to any evidence in the record to prove otherwise. *Gerschick v. Pounds*, 262 Ga. App. 554, 586 S.E.2d 22 (2003), overruled on other grounds by *VATACS Group, Inc. v. HomeSide Lending, Inc.*, 281 Ga. 50, 635 S.E.2d 758 (2006).

Propriety of Summary Judgment

Seventh amendment right to jury.

— Summary judgment is authorized if there are no issues of material fact in dispute; in such circumstances the jury, as trier of fact, has no role, and the opposing party's Seventh Amendment rights are not infringed. *Barrett v. Independent Order of Foresters*, 625 F.2d 73 (5th Cir. 1980).

Intended scope of summary judgment. — If a motion for summary judgment were to be denied in every instance in which an issue appears in the pleadings by allegation and denial, there would be little or no use or need for summary judgment as there would be no functional

difference between a motion therefor and the traditional system of taking advantage of defects in the pleadings by demurrers; it is obvious that the General Assembly intended summary judgment to have a greater and more beneficial scope. *Scales v. Peevy*, 103 Ga. App. 42, 118 S.E.2d 193 (1961) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Summary judgment is an extreme remedy and should be awarded only when the truth is quite clear. *Watkins v. Nationwide Mut. Fire Ins. Co.*, 113 Ga. App. 801, 149 S.E.2d 749 (1966) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Courts cautious in granting summary judgment. — Since summary judgment is a peremptory method of disposing of a case once and for all on its merits, courts will be cautious about foreclosing parties from a valid defense. *Simmons v. State Farm Mut. Auto. Ins. Co.*, 111 Ga. App. 738, 143 S.E.2d 55 (1965) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Trial essential if genuine issue exists. — If there is a genuine issue as to any material fact, a trial under the normal process is absolutely essential. *Davis v. Holt*, 105 Ga. App. 125, 123 S.E.2d 686 (1961) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Absence of genuine issue and entitlement to judgment are prerequisites. — Because the strategies by a county and the municipalities within the county under the Service Delivery Strategic Act, O.C.G.A. § 36-70-20 et seq., had nothing to do with a developer's actions, given that it was not the decision of the developer, or any individual property owner, to control the property owner's supplier of water, the developer was properly granted summary judgment in a city's action for declaratory and injunctive relief. Also, the city's quest to overturn the May 2005 service delivery strategy was rendered moot by the enactment of later strategy. *City of Demorest v. Town of Mt. Airy*, 282 Ga. 653, 653 S.E.2d 43 (2007).

In a suit filed by the car owner against a lienholder for wrongful repossession and conversion of the subject vehicle, summary judgment to the lienholder and partial summary judgment to the owner was inappropriate given that questions of fact

remained as to whether the vehicle was on a lienholder's debtor's lot for repairs, or if the vehicle had been sold or consigned to the debtor, and was thus subject to the lienholder's security interest. *Gavahi-Kashani v. Auto. Fin. Corp.*, 286 Ga. App. 69, 648 S.E.2d 672 (2007).

Because material fact questions remained regarding the quality of a utility company's inspection and whether the company had constructive knowledge of an electrical wiring defect outside of a homeowner's home, summary judgment was properly denied. *Schuessler v. Bennett*, 287 Ga. App. 880, 652 S.E.2d 884 (2007), cert. denied, 2008 Ga. LEXIS 230 (Ga. 2008).

Lack of jury issue. — Because the evidence was not such as to raise a jury issue, the trial court therefore properly granted summary judgment in favor of the plaintiff. *Davison's Auto Serv. Co. v. Security Ins. Co.*, 187 Ga. App. 220, 369 S.E.2d 538 (1988).

Trial court properly granted summary judgment to a relative after the home healthcare agency sued the relative for a balance due on a contract the relative signed to have nursing services provided to the relative's father. The relative clearly signed in a representative capacity the contract that the home healthcare agency drafted and provided for the relative to sign, the principal, the relative's father, was clearly named in the document as such, and it was evident that the contract was substantially in the name of the principal; accordingly, there was no issue for the jury to decide because the contract obligated the father, not the relative, to pay. *Associated Servs. of Accountable Prof'ls, Ltd. v. Workman*, 265 Ga. App. 348, 593 S.E.2d 882 (2004).

Because there was no dispute that: (1) the owner sold the property to a tenant obtained by the realty firm and that the sale occurred during the lease term; and (2) the realty firm satisfied the precedent terms under its commission agreement with the owner entitling the firm to a full commission and prejudgment interest thereon, the trial court erred in denying the realty firm summary judgment on this claim. *Tommy McBride Realty v. Nicholson*, 286 Ga. App. 135, 648 S.E.2d 468 (2007).

Propriety of Summary Judgment (Cont'd)

In an action arising from the sale of a condominium unit, because there was no issue of material fact as to whether the declaration of condominium's "lender" exception applied to the sale of the unit to the buyer, the trial court erred in concluding that the issue was for the jury. *Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

Regulatory investigation. — Trial court properly dismissed a declaratory judgment action brought by a bank and a cash advance lender, which was operating as an agent for the bank, to stop the Georgia Industrial Loan Commissioner from conducting an investigation of their lending activities because the Commissioner was authorized to conduct an investigation of the two entities' loan activities, in spite of the lender's claim that the bank and the lender were operating under the authority of federal banking law. *BankWest, Inc. v. Oxendine*, 266 Ga. App. 771, 598 S.E.2d 343 (2004).

Directed verdict compared. — Grant of summary judgment may be improper even though, at trial, a grant of directed verdict may be proper. *Southern Bell Tel. & Tel. Co. v. Beaver*, 120 Ga. App. 420, 170 S.E.2d 737 (1969); *Kroger Co. v. Cobb*, 125 Ga. App. 310, 187 S.E.2d 316 (1972).

Summary judgment for the defendant is not necessarily authorized merely because under the evidence adduced the defendant might be entitled to a directed verdict on trial. *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), aff'd in part and rev'd in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971); *Chastain v. Atlanta Gas Light Co.*, 122 Ga. App. 90, 176 S.E.2d 487 (1970).

Grant of summary judgment may be improper even though, at trial, a grant of a directed verdict may be proper, if the party making the motion for summary judgment is not required to carry the burden on the trial of the case. *Central of Ga. Ry. v. Woolfolk Chem. Works, Ltd.*, 122

Ga. App. 789, 178 S.E.2d 710 (1970); *Ray v. Webster*, 128 Ga. App. 217, 196 S.E.2d 175 (1973).

Summary judgment may be granted on evidence that would compel direction of a verdict and should be denied when a directed verdict would be improper. *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981).

Trial court properly granted summary judgment to the tax sale purchaser and other parties, and properly denied the summary judgment motion filed by the tax sale challengers as the purported sale of the property by the bankrupt party to one of the tax sale challengers was void ab initio since the sale was conducted in violation of the bankruptcy court's automatic stay and the bankrupt party did not first obtain permission from the bankruptcy court to sell the property to one of the tax sale challengers. As a result, the tax sale challengers did not have standing to challenge the tax sale of the property at issue. *Edwards v. Heartwood 11, Inc.*, 264 Ga. App. 354, 590 S.E.2d 734 (2003).

Failure to state a claim compared. — Because the Georgia superior court should not have exercised the court's equitable jurisdiction when the property owners failed to exhaust the owners' administrative remedies under O.C.G.A. § 48-5-311 through the county board of equalization, the superior court's judgment for declaratory relief in favor of the property owners at summary judgment was reversed; instead, the superior court should have dismissed the property owners' suit for failing to state a claim. *Chatham County Bd. of Assessors v. Jepson*, 261 Ga. App. 771, 584 S.E.2d 22 (2003).

Absence of reasonable explanation in medical malpractice case. — Summary judgment in favor of a doctor in a medical malpractice case was affirmed because a patient failed to point to any damage flowing from the doctor's single alleged failure to communicate a correct diagnosis that was not time barred; additionally, the patient admitted in a deposition that the doctor did tell the patient of the diagnosis, although this contradicted the patient's own affidavit testimony, and because the favorable portion of a party's

self-contradictory testimony was the only evidence of such party's right of recovery, the opposing party was entitled to summary judgment in the absence of a reasonable explanation. *Oliver v. Sutton*, 265 Ga. App. 787, 595 S.E.2d 598 (2004).

Summary judgment should be granted only in cases in which undisputable, plain, and palpable facts exist on which reasonable minds could not differ as to the conclusion to be reached. *Stuckes v. Trowell*, 119 Ga. App. 651, 168 S.E.2d 616 (1969); *Indian Trail Village, Inc. v. Smith*, 139 Ga. App. 691, 229 S.E.2d 508 (1976).

Absence of genuine issue and entitlement to judgment are prerequisites. — Genuine issue as to a material fact is required in order to preclude summary judgment. *Dillard v. Brannan*, 217 Ga. 179, 121 S.E.2d 768 (1961) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Summary judgment cannot deprive a party of the opportunity to have a trial of a genuine issue as to any material fact; however, a shadowy semblance of an issue is not enough to defeat the motion. *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 126 S.E.2d 442 (1962) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

It is permissible to grant a motion for summary judgment only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Malcom v. Malcolm*, 112 Ga. App. 151, 144 S.E.2d 188 (1965) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

On summary judgment, the inquiry must be whether there remains any genuine issue of fact after consideration of the pleading and supporting evidence. *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 195 S.E.2d 277 (1972).

If evidence produced in a motion for summary judgment pierces the allegations of the pleadings and shows that there is no genuine issue of material fact, a summary judgment motion should be sustained. *Crawford v. McDonald*, 125 Ga. App. 289, 187 S.E.2d 542 (1972).

Essence of a motion for summary judgment is that there is no genuine issue of material fact to be resolved by the trier of facts. *Turner v. Noe*, 127 Ga. App. 870, 195 S.E.2d 463 (1973).

Grant of a motion for summary judgment

is not "appropriate" within the meaning of subsection (e) of O.C.G.A. § 9-11-56 unless the moving party is entitled to judgment as a matter of law. *Southern Protective Prods. Co. v. Leasing Int'l, Inc.*, 134 Ga. App. 945, 216 S.E.2d 725 (1975).

If the record has been fully developed by depositions and affidavits, and construing all the facts and inferences to be drawn therefrom in favor of the nonmovant, such party would not be entitled to have a jury verdict stand, a grant of summary judgment is proper. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Summary judgment should be granted only in cases in which undisputable, plain, and palpable facts exist on which reasonable minds could not differ as to the conclusion to be reached. *Stuckes v. Trowell*, 119 Ga. App. 651, 168 S.E.2d 616 (1969); *Indian Trail Village, Inc. v. Smith*, 139 Ga. App. 691, 229 S.E.2d 508 (1976).

If there is no genuine dispute of material fact and the admitted facts point to the right of one party to a judgment as a matter of law, then summary judgment is the proper remedy. *Sands v. Lamar Properties, Inc.*, 159 Ga. App. 718, 285 S.E.2d 24 (1981).

In a motion for summary judgment, the decision is made based upon the pleadings and evidence of record as to whether there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Southeastern Fid. Ins. Co. v. Tesler*, 159 Ga. App. 60, 282 S.E.2d 703 (1981).

While the party opposing a motion for summary judgment is entitled to the benefit of all favorable inferences, if, after this is done, the record still shows no genuine issue of a material fact, summary judgment for the moving party is authorized. *Shockley v. Henslee*, 122 Ga. App. 163, 176 S.E.2d 470 (1970); *Cole v. Jordan*, 161 Ga. App. 409, 288 S.E.2d 260 (1982); *Gurley v. Ford Motor Credit Co.*, 163 Ga. App. 875, 296 S.E.2d 171 (1982).

Subsection (c) of O.C.G.A. § 9-11-56 allows summary judgment only if there is no genuine issue as to any material fact, and the evidence shows that the movant is entitled to judgment as a matter of law. *Pugh v. Frank Jackson Lincoln-Mercury*,

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Inc., 165 Ga. App. 292, 300 S.E.2d 227 (1983).

If there is no evidence presented that would create a genuine issue on any material fact, the trial court does not err in granting summary judgment. *Houser v. Tilden Fin. Corp.*, 166 Ga. App. 710, 305 S.E.2d 440 (1983).

If the nonexistence of any genuine issue of material fact is established by such credible evidence that on the facts and law the movant is entitled to judgment as a matter of law, the motion should be granted, unless the respondent shows good reason why the respondent is at the time of the hearing unable to present facts in opposition to the motion. *Fort v. Boone*, 166 Ga. App. 290, 304 S.E.2d 465 (1983).

If allegations of pleadings are pierced and there is no issue of material fact, so that a party is entitled to judgment, it is incumbent on the court to grant a motion for summary judgment. *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 202 S.E.2d 515 (1973), overruled on other grounds, *Clements v. Toombs County Hosp. Auth.*, 175 Ga. App. 651, 334 S.E.2d 188 (1985); *McGee v. Gillis*, 171 Ga. App. 47, 318 S.E.2d 521 (1984).

Motion for summary judgment should not be granted unless it affirmatively appears from the pleadings and evidence that the party so moving is entitled to prevail. *McGivern v. First Capital Income Properties, Ltd.*, 188 Ga. App. 716, 373 S.E.2d 817 (1988).

It is permissible to grant a motion for summary judgment only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *International Bhd. of Boilermakers v. Newman*, 116 Ga. App. 590, 158 S.E.2d 298 (1967); *Weekes v. Parker*, 120 Ga. App. 549, 171 S.E.2d 660 (1969); *Chastain v. Atlanta Gas Light Co.*, 122 Ga. App. 90, 176 S.E.2d 487 (1970); *Metco Plumbing & Heating, Inc. v. Southeastern Plumbing Supply Co.*, 124 Ga. App. 584, 184 S.E.2d 670 (1971); *Smith v. Sandersville Prod. Credit Ass'n*, 229 Ga. 65, 189 S.E.2d 432 (1972); *Galloway v. Banks County*, 139 Ga. App. 649, 229

S.E.2d 127 (1976); *McCraw v. Watkins*, 242 Ga. 452, 249 S.E.2d 202 (1978); *Jackson v. First Bank*, 150 Ga. App. 182, 256 S.E.2d 923 (1979); *Myers v. McLarty*, 150 Ga. App. 432, 258 S.E.2d 56 (1979); *Jimerson v. Republic Land & Inv. Co.*, 234 Ga. App. 417, 506 S.E.2d 920 (1998).

Because a customer did not present an issue of fact as to whether a store had equal or superior knowledge of a dangerous condition, the trial court did not err in granting the store's summary judgment motion. *Ergas v. Home Depot, Inc.*, 260 Ga. App. 734, 580 S.E.2d 684 (2003).

Evidence should demand verdict.

— If no evidence is offered that would form a basis for the conclusions contained in the affidavit, it is error to grant a motion for summary judgment as the proof did not demand as a matter of law, a finding in the plaintiff's favor. *Bob's Dairy Barn & Restaurant, Inc. v. I.D.S. Leasing Corp.*, 135 Ga. App. 227, 217 S.E.2d 462 (1975).

Test under subsection (a) of O.C.G.A. § 9-11-56 is not merely that the evidence supports a verdict for the moving party, but that the evidence demands the verdict. *Custom Coating, Inc. v. Parsons*, 188 Ga. App. 506, 373 S.E.2d 291 (1988).

Single outcome must appear without dispute.

— Summary judgments should only be granted if, construing all inferences against the movant, it yet appears without dispute that the case can have but a single outcome. *Lawrence v. Gardner*, 154 Ga. App. 722, 270 S.E.2d 9 (1980); *Bragg v. Missroon*, 186 Ga. App. 803, 368 S.E.2d 564 (1988).

Improper if genuine issue exists.

— On consideration of a motion for summary judgment, the evidence adduced thereon in the form of depositions, affidavits, etc., should be construed most strongly against the movant, and if under any view of the case there appears to be a dispute as to any material issue of fact, summary judgment should not be granted. *King v. Schaeffer*, 115 Ga. App. 344, 154 S.E.2d 819, aff'd, 223 Ga. 468, 155 S.E.2d 815 (1967).

It is error to grant a motion for summary judgment if the pleadings, depositions, and affidavits do not show that there is no genuine issue as to any mate-

rial fact and that the moving party is entitled to judgment as a matter of law. *McChargue v. Black Grading Contractors*, 119 Ga. App. 35, 166 S.E.2d 43 (1969).

Summary judgment cannot deprive a party of the opportunity to have a trial of a genuine issue as to any material fact. *Weekes v. Parker*, 120 Ga. App. 549, 171 S.E.2d 660 (1969).

Summary judgment should not be granted if there is the slightest doubt as to the facts. *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973).

It was error for the trial judge to grant the plaintiff summary judgment as to the issue of settlement because there remained a genuine issue as to a material fact. *Ravan v. Stephens*, 243 Ga. 289, 253 S.E.2d 753 (1979).

Summary judgment is improper if there is a genuine issue as to any material fact. *Piano & Organ Ctr., Inc. v. Southland Bonded Whse., Inc.*, 139 Ga. App. 480, 228 S.E.2d 615 (1976); *Griffin v. Bremen Steel Co.*, 161 Ga. App. 768, 288 S.E.2d 874 (1982).

Trial court properly denied an employer's motion for summary judgment in a personal injury action brought against the employer by an auto accident victim because a jury issue existed as to whether the employer's employee was calling the employer on the employee's cell phone while driving on the way to work at the time of the auto accident. *Clo White Co. v. Lattimore*, 263 Ga. App. 839, 590 S.E.2d 381 (2003).

Summary judgment was properly denied on a broker's claim for attorney fees under O.C.G.A. § 13-6-11 because there was no evidence that the client made the contract, agreeing to pay commission on the sale of the home to the broker, in bad faith or that the client's breach was the result of a sinister motive as a matter of law; issues of fact existed as to whether the client was stubbornly litigious because there was a factual dispute as to the client's understanding of the client's obligations. *Steel Magnolias Realty, LLC v. Bleakley*, 276 Ga. App. 155, 622 S.E.2d 481 (2005).

Because the record revealed that a family's action for trespass, continuing trespass, intentional infliction of emotional

distress, and declaratory judgment was timely filed, and jury questions remained as to the issues of abandonment and the family's standing to bring the family's suit against a developer who allegedly destroyed the family's cemetery, summary judgment was erroneously awarded to the developer. *Ceasar v. Shelton Land Co.*, 285 Ga. App. 421, 646 S.E.2d 689 (2007).

In an action to invalidate an allegedly forged quitclaim deed filed by a husband, which transferred an interest in certain property to the husband's wife, summary judgment was erroneously granted to the husband, as a bankruptcy trustee presented sufficient evidence of disputed issues of material fact concerning the husband's equitable claim; hence, the matter was remanded for further proceedings under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq. *Hurst v. Evans*, 284 Ga. App. 274, 643 S.E.2d 824 (2007).

Because a genuine dispute precluded the recovery of attorney fees from the attorney by the client based upon the client's claim of stubborn litigiousness, summary judgment was reversed. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

Because an actual and ongoing controversy existed regarding the rights of competing parties to a condominium unit, specifically the unit's owners and the unit's buyer and disputes concerning ownership of or right of access to land were classic candidates for resolution via declaratory judgment, the trial court correctly denied the owners' motion for summary judgment on the buyer's counterclaim for declaratory judgment. *Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

If the facts are heatedly contested, with both sides supporting their contentions with affidavits and depositions, it cannot be said that there is no genuine issue as to any material fact. *Pritchard v. Neal*, 139 Ga. App. 512, 229 S.E.2d 18 (1976).

Evidence does not pierce defenses. — When the plaintiff's evidence does not in any way address or pierce the defenses to the action, it is error to grant the plaintiff's motion for summary judgment.

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Jones v. Howard, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

Failure to eliminate every issue. — If there are substantial issues of fact, it is error for the court to grant summary judgment. Caldwell v. Mayor of Savannah, 101 Ga. App. 683, 115 S.E.2d 403 (1960) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

If a defendant fails to eliminate every genuine issue of material fact, the judge errs in granting a motion for summary judgment. Smithwick v. No. 2 D Curtis Mock Assocs., 127 Ga. App. 749, 195 S.E.2d 271 (1972).

If the defendant fails to carry the burden of showing that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law as to all matters for which relief is sought, the denial of a motion for summary judgment is correct. P.F. Collier, Inc. v. Dreesen, 128 Ga. App. 64, 195 S.E.2d 766 (1973).

If more than one inference can be drawn from the evidence, the duty of solving the mystery should be placed upon the jury and not the trial judge; this is true with respect to circumstantial evidence as well as direct evidence. McCarty v. National Life & Accident Ins. Co., 107 Ga. App. 178, 129 S.E.2d 408 (1962) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

It was error to grant summary judgment in favor of an anesthesiologist association group and a doctor in an action by an independent anesthesiologist and a professional corporation that claimed conspiracy to restrain trade and tortious interference stemming from an arrangement in which the independent anesthesiologist was permitted to provide services at a hospital served by the group because it was for the jury to determine whether the group improperly manipulated the surgery schedule, the assignment of cases, and first call duty so that the independent anesthesiologist and two colleagues were not used or preferred by the doctors and hospital staff. Mulligan v. Alta Anesthesia Assocs. of Ga., P.C., 260

Ga. App. 727, 580 S.E.2d 678 (2003).

Denial may be proper even absent responsive affidavit. — Because a summary judgment motion was not adequately supported by the evidence, it was appropriate for the trial court to deny the motion even in the absence of a responsive affidavit. Beard v. McDowell, 174 Ga. App. 793, 331 S.E.2d 104 (1985).

Conflicting affidavits. — If the affidavits in the record are in conflict as to material facts, the court does not err in denying summary judgment since there remain substantial issues to be determined. W.J. Bremer, Inc. v. United Bonding Ins. Co., 122 Ga. App. 183, 176 S.E.2d 633 (1970).

Grant of motion on basis of admissions. — If a party fails to answer a request for admissions within the requisite time, and the admissions remove all issues of fact, the other party is entitled to a grant of that party's motion for summary judgment. Moore Ventures Ltd. Partnership v. Stack, 153 Ga. App. 215, 264 S.E.2d 725 (1980).

Denial in face of offsetting counterclaim. — Trial court may, in the court's discretion, deny summary judgment in the face of a valid, pending counterclaim, if there is a reasonable probability that the plaintiff's recovery will be greatly mitigated or even offset by the defendant's recovery on trial of the counterclaim. Mock v. Canterbury Realty Co., 152 Ga. App. 872, 264 S.E.2d 489 (1980).

There is no sound reason to conclude that, if there is a pending valid counterclaim, the trial court must deny a persuasive and valid motion for summary judgment, or alternatively, that it is error per se to grant a motion for summary judgment if there is a pending, valid counterclaim. Williams v. Church's Fried Chicken, Inc., 158 Ga. App. 26, 279 S.E.2d 465 (1981).

Trial court does not commit error per se by granting summary judgment in a case with a valid pending counterclaim. Ackerman v. First Nat'l Bank, 239 Ga. App. 304, 521 S.E.2d 221 (1999).

Error to deny judgment if ultimate result is clear. — It is error to deny a trial when there is a genuine dispute of facts, but it is just as much error, or

perhaps more in cases of hardship or if the impetus is given to strike suits, to deny or postpone judgment if the ultimate legal result is clearly indicated. *Maxey-Bosshardt Lumber Co. v. Maxwell*, 127 Ga. App. 429, 193 S.E.2d 885 (1972).

Dispute over irrelevant or de minimis matters. — Because not every detail of sundry disputed factual matters was conclusively resolved in the pleadings or through discovery procedures, but examination of the record indicated that such disputed matters were either irrelevant or, at best, de minimis, the evidence clearly indicated that there remained in the case no genuine issues of material fact that would preclude an award of summary judgment, and the court below did not err in granting the plaintiff's motion for summary judgment. *James v. Ford Motor Credit Corp.*, 166 Ga. App. 879, 305 S.E.2d 604 (1983).

Failure to exhaust administrative remedies. — Trial court properly granted summary judgment to the industrial loan commissioner after the loan companies sought a declaratory judgment that the industrial loan commissioner did not have jurisdiction over its business practice of using an out-of-state bank to make loans through the loan companies; since the industrial loan commissioner had not ruled on whether the practice violated the Georgia Industrial Loan Act, O.C.G.A. § 7-3-1 et seq., the loan companies had not exhausted their administrative remedies under the Act and, thus, were not entitled to seek declaratory relief from the courts. *USA Payday Cash Advance Ctrs. v. Oxendine*, 262 Ga. App. 632, 585 S.E.2d 924 (2003).

Summary judgment improper if possible to infer acting within scope of employment. — In a personal injury case in which an employee was involved in a collision during the employee's day off, but because the employee regularly made deliveries on that day between the employer and affiliated companies, summary judgment for the employer was improper because a jury could have inferred that the employee was acting within the scope of employment at the time; summary judgment for the affiliates was proper because the employee was acting, at most,

as an independent contractor with respect to them. *Thompson v. Club Group, Ltd.*, 251 Ga. App. 356, 553 S.E.2d 842 (2001).

Summary judgment for plaintiff. — Mere want of knowledge does not prevent summary judgment in favor of the plaintiff; it should be a sufficient ground of defense only when it appears that a thorough investigation has been made and that ignorance persists after genuine efforts to ascertain facts about the validity of the plaintiff's claim. *Berrien v. Avco Fin. Servs., Inc.*, 123 Ga. App. 862, 182 S.E.2d 708 (1971).

Upon a motion for summary judgment, if the defenses set up in an answer are pierced by the plaintiff's affidavits and the defendant fails to respond with specific facts showing a genuine issue for trial, summary judgment is properly granted. *Soni v. Coppedge*, 159 Ga. App. 889, 285 S.E.2d 604 (1981).

Trial court properly granted summary judgment to sellers on the sellers' suit for non-payment of purchase-money promissory notes as the buyers waived the buyers' defense of fraud by not electing to pursue a remedy regarding it and, instead, continuing to pay on the notes, and the buyers did not show that the sellers' suit was filed beyond the applicable six-year statute of limitations. *Little Sky, Inc. v. Rybka*, 264 Ga. App. 744, 592 S.E.2d 154 (2003).

Summary judgment when statute inapplicable. — Trial court did not have to consider the testing company's summary judgment motion regarding whether the company and others had a right to a refund of the unlawful collection of excessive fees as the court properly granted the state environmental agency's motion to dismiss because the statute under which the testing company sought the refund, O.C.G.A. § 48-2-35, did not apply because the state revenue commissioner did not collect or administer the fee for which the testing company and others sought the refund, and that statute only applied to the illegal collection of tax or license made by the state revenue commissioner. *Ga. Emission Testing Co. v. Reheis*, 268 Ga. App. 560, 602 S.E.2d 153 (2004).

Trial court properly granted summary judgment to the county on the telecommu-

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nications company's challenge to the county's ordinance imposing a one-time permit fee on telecommunications companies applying to use the county's public rights-of-way. Due to state statutory law, no question existed that the county had the right to enforce the county's ordinance imposing the permit fee as the fee was reasonably related to the county's attempt to recoup the county's administrative cost for processing the permit; furthermore, the telecommunications company did not show that application of the ordinance violated the company's equal protection rights. *BellSouth Telecomms., Inc. v. Cobb County*, 277 Ga. 314, 588 S.E.2d 704 (2003).

Because the defendant offered nothing to refute the plaintiff's proof, a grant of summary judgment was demanded under subsection (e) of O.C.G.A. § 9-11-56. *General Am. Ins. Co. v. Boyens*, 125 Ga. App. 414, 188 S.E.2d 172 (1972).

If the plaintiff on a motion for summary judgment makes a prima facie case, and there is no evidence in rebuttal, the plaintiff is entitled to summary judgment. *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), *aff'd in part and rev'd in part* on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971).

If a party is the sole witness in the party's own behalf and so has naturally presented the case in its most favorable light, and the presentation discloses that the defense has no legal validity, it is incumbent upon the court to rule adversely to the party without further ado. *Maxey-Bosshardt Lumber Co. v. Maxwell*, 127 Ga. App. 429, 193 S.E.2d 885 (1972) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

If the plaintiff moving for summary judgment introduces evidence showing that there is no genuine issue of material fact and that the plaintiff is entitled to prevail on the undisputed facts, and the defendant rests on the pleadings without offering any evidence to suggest any remaining factual issue, the trial court's

grant of a motion for summary judgment is correct. *Cox v. Frost*, 147 Ga. App. 429, 249 S.E.2d 695 (1978).

Because the plaintiff established a prima facie right to recover on notes and the defendant did not establish a legally sufficient defense, the plaintiff was entitled to summary judgment. *Area v. Cagle*, 148 Ga. App. 769, 252 S.E.2d 655 (1979).

Summary judgment for defendant. — To prevail on a motion for summary judgment a defendant-movant is required to pierce the allegations of the complaint and to establish as a matter of law that the plaintiff could not recover under any theory fairly drawn from the pleadings and the evidence; once the defendant pierces the pleading of the plaintiff and shows the court that one essential element, under any theory, is lacking and incapable of proof, the defendant-movant is entitled to summary judgment as a matter of law, irrespective of any issues of fact with regard to other essential elements. *Holiday Inns, Inc. v. Newton*, 157 Ga. App. 436, 278 S.E.2d 85 (1981).

Consideration of defendant's affidavits. — Trial court properly considered a motion for judgment on the pleadings as one for summary judgment because matters outside of the pleadings were presented and considered; such other documents included affidavits filed by the defendant, which the plaintiff moved to strike, but never obtained a ruling on the motion. *Premier/Georgia Mgmt. Co. v. Realty Mgmt. Corp.*, 272 Ga. App. 780, 613 S.E.2d 112 (2005).

Strict liability for injury caused by animal. — In a wrongful death action based on the death of an infant caused by a dog, the dog owner was entitled to summary judgment on the strict liability claim because the parents were required to proffer more than a subject belief regarding the animal; the parents failed to present evidence that the animal was *ferae naturae* or an animal of wild nature or disposition. *Harper v. Robinson*, 263 Ga. App. 727, 589 S.E.2d 295 (2003).

If the evidence introduced by the movant pierces the pleadings and discloses an absence of a right to recover, the grant of summary judgment is proper and should follow. *Brown v. J.C.*

Penney Co., 123 Ga. App. 233, 180 S.E.2d 364 (1971).

Defendant who has cast upon the plaintiff the burden of responding with evidence to create or preserve a genuine issue of fact is entitled to prevail by summary judgment in the absence of any rebuttal evidence. *Walker v. Hall*, 123 Ga. App. 457, 181 S.E.2d 508 (1971).

If the defendant, as the movant for summary judgment, produces evidence conclusively establishing a fact or facts that negate one or more essential elements of the plaintiff's action, it is useless to present the case to a jury, and the defendant is entitled to summary judgment as a matter of law. *Laite v. Baxter*, 126 Ga. App. 743, 191 S.E.2d 531 (1972).

Once a defendant who is moving for summary judgment pierces the pleadings of the plaintiff and shows the court that one essential element under any theory of recovery is lacking and incapable of proof, the defendant is entitled to summary judgment as a matter of law, irrespective of any issues of fact with regard to the other essential elements. *Waldrep v. Goodwin*, 230 Ga. 1, 195 S.E.2d 432 (1973); *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Defendant is entitled to summary judgment if the defendant produces evidence conclusively establishing facts that negate one or more essential elements of the plaintiff's action. *Reed v. Ed Taylor Constr. Co.*, 198 Ga. App. 595, 402 S.E.2d 346 (1991).

Plaintiff, having received nothing for a claimed homestead exemption, commenced an action against the clerk of the superior court for the amount of the homestead exemption, alleging that the loss thereof was because the defendant had failed to record the deeds, but the plaintiff had no aggregate interest in the property against which to assert the claimed homestead exemption, and the plaintiff therefore had no claim upon which relief could be granted, and the defendant was entitled to summary judgment as a matter of law. *Wallis v. Clerk, Superior Court*, 166 Ga. App. 775, 305 S.E.2d 639 (1983).

If the defendant, as movant for sum-

mary judgment, produces evidence conclusively establishing a fact or facts that negate one or more essential elements of the plaintiff's action, it is useless to present the case to a jury, and the defendant movant is entitled to summary judgment as a matter of law. *Calhoun v. Eaves*, 114 Ga. App. 756, 152 S.E.2d 805 (1966) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Summary judgment upon motion therefor by the defendant should never be entered except if the defendant is entitled to its allowance beyond all doubt. To warrant its entry, the facts conceded by the plaintiff or demonstrated beyond reasonable question to exist should show the defendant's right to judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances. *Watkins v. Nationwide Mut. Fire Ins. Co.*, 113 Ga. App. 801, 149 S.E.2d 749 (1966).

Because the plaintiff's petition, as a matter of law, set forth a cause of action, unless depositions set forth as exhibits to the defendant's motion for summary judgment showed without dispute that the plaintiff was not entitled to recover, the motion for summary judgment should have been denied. *McGeeney v. Robertson*, 102 Ga. App. 318, 116 S.E.2d 252 (1960) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Summary judgment for plaintiff and defendant. — Trial court can grant judgment for both the plaintiff and the defendant on their respective claims, even when only the plaintiff moves for summary judgment. *Massey v. Consolidated Equities Corp.*, 120 Ga. App. 165, 169 S.E.2d 672 (1969).

Summary judgment can be granted to a nonmoving party provided that the grant is proper in all other respects. *Golston v. Garigan*, 245 Ga. 450, 265 S.E.2d 590 (1980); *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981).

Trial court may grant summary judgment to a nonmoving party if filing would be a pure formality. *Cruce v. Randall*, 152 Ga. App. 183, 262 S.E.2d 488 (1979), aff'd, 245 Ga. 669, 266 S.E.2d 486 (1980).

Order granting partial summary

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judgment motion properly enforced.

— Trial court properly granted the limited partners' motion seeking to enforce an order granting the limited partners' motion for partial summary judgment against the general partner, which required that the limited partners be paid their preferred returns before the general partner could charge management fees to the books, as the general partner's affidavit stated that management fees had been paid, the general partner's counsel stated at the hearing that management fees had been paid, and the limited partners' expert testified that the partnership had generated sufficient revenue to pay the limited partners' preferred returns. *Kellett v. Klein*, 267 Ga. App. 749, 600 S.E.2d 686 (2004).

Summary judgment for less than amount sued for. — Motion for summary judgment may be granted for less than the total amount sued for if there is no material issue of fact as to such amount. *Friend v. Bank of Eastman*, 112 Ga. App. 756, 146 S.E.2d 110 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Mere possibility of causation in a negligence case is not enough, and when the matter remained one of pure speculation or conjecture, or the probabilities were at best evenly balanced, it became the duty of a court to grant summary judgment for the defendant; because the homeowners' own expert deposed that the expert could not determine the cause of an explosion and fire at the homeowners' house, summary judgment should have been granted to a furnace installer in a case brought by the homeowners claiming that the installer had acted negligently in installing or repairing the furnace, causing the furnace to explode. *Denson Heating & Air Conditioning Co. v. Oglesby*, 266 Ga. App. 147, 596 S.E.2d 685 (2004).

Genuine issue of material fact found. — Plaintiff moved for summary judgment, contending that the parties had agreed to a settlement of the case in which the defendant by and through the defendant's attorney had agreed to pay in full

the claim of the plaintiff, but the letters from the defendant's attorney, although expressing a general inclination towards adaptation of a written agreement for settlement of the case, contained conditional language that the record did not show to have been satisfied, and an affidavit of the plaintiff's attorney was ambiguous, if not self-contradictory, as to whether there was an agreement that the defendant pay the plaintiff's entire claim, genuine issues of material fact remained for jury resolution, and summary judgment against the defendant was reversed. *Tedoff v. Moncrief Unique Indoor Comfort, Inc.*, 166 Ga. App. 426, 304 S.E.2d 529 (1983).

Because material fact issues regarding a guarantor's waiver and estoppel defenses existed, a creditor was erroneously granted summary judgment in the creditor's suit against the guarantor regarding a debtor's underlying open account. *Everts v. Century Supply Corp.*, 264 Ga. App. 218, 590 S.E.2d 199 (2003).

No genuine issue of material fact was found. See *Dozier v. Wallace*, 169 Ga. App. 126, 311 S.E.2d 839 (1983); *Koets, Inc. v. Benveniste*, 169 Ga. App. 352, 312 S.E.2d 846 (1983), *aff'd*, 252 Ga. 520, 314 S.E.2d 912 (1984).

Because the plaintiff insured had two policies covering all-risk personal property coverage, one of which was expressly "for direct physical loss of, or damage to" covered property and the second of which specified that the policy was for "direct physical loss or damage to" such property if caused by or the result of a peril not otherwise excluded, the trial court properly denied the insured's motion for summary judgment on the insured's claim for a declaration that the insured was insured for remediation costs incurred in converting the insured's computer systems from two-digit to four-digit date recognition capability to avoid Y2K (year 2000) computer problems; the policies clearly contemplated an actual change due to an accident or other fortuitous event acting directly upon the property causing the property to become unsatisfactory for future use or requiring repairs to make it fit. Since the insured admitted that the deficiency in the computer systems existed from the time the systems

were created and the insured avoided problems by undertaking the remediation program, no change in the systems by direct physical loss of, or damage thereto, as a result of a fortuitous event was alleged, and the insured, thus, failed to provide any evidence to give rise to a genuine issue of material fact supportive of the insured's claim for coverage and failed to make a prima facie claim for recovery. *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 581 S.E.2d 317 (2003).

Since the parties stipulated that the county tax assessors board denied the taxpayer an exemption from ad valorem taxation of certain tangible personal property based on an undervaluation of its inventory, since the taxpayer properly filed for the exemption, and because statutory law stated that the exemption was waived for failing to report inventory, and not an undervaluation of inventory, the trial court properly granted summary judgment to the taxpayer on the issue of whether the county equalization board properly determined that the taxpayer was entitled to the exemption. *Gwinnett County Bd. of Tax Assessors v. Std. Distrib. & Supply*, 263 Ga. App. 128, 587 S.E.2d 262 (2003).

Trial court properly granted summary judgment to a city on a parent's negligence claim against the city stemming from a child's serious automobile accident at a known dangerous intersection that was inappropriately signaled because the city was immune from suit as to whether to install a traffic signal at the intersection, which was a discretionary act, entitling the city to sovereign immunity; further, a successful tax referendum to fund a new traffic light did not create a duty to install a traffic light at the intersection before completing other projects. *Riggins v. City of St. Marys*, 264 Ga. App. 95, 589 S.E.2d 691 (2003).

Malicious prosecution. — Summary judgment, under O.C.G.A. § 9-11-56(c), was properly granted dismissing a parent and child's suit against a neighbor for malicious prosecution because: (1) the parent showed no evidence that the underlying criminal prosecution had been terminated in the parent's favor; and (2)

the child's evidence that the prosecution against the child had been terminated as a result of mediation was not evidence that the prosecution had been terminated in the child's favor, so neither the parent nor the child were able to prove an element of a cause of action for malicious prosecution. *Smith v. Lewis*, 259 Ga. App. 548, 578 S.E.2d 220 (2003).

No facts establishing breach of duty. — Summary judgment was properly entered against an injured party because the party's evidence merely established that an unfortunate event occurred and the party was injured, without specific facts establishing a breach of duty, as well as the other elements of negligence; the presentation of hearsay and affidavits that contained information that lacked the affiant's personal knowledge, and was based on the best of the affiant's knowledge and belief, was nothing more than opinion without any demonstrated basis. *Hodges v. Putzel Elec. Contrs.*, 260 Ga. App. 590, 580 S.E.2d 243 (2003).

Medical malpractice. — Trial court properly granted the defendants, an orthodontist and an orthodontic corporation, summary judgment in a medical malpractice action by the plaintiffs, a patient and the patient's parents, for misdiagnosis and mistreatment of the patient, as the complaint was filed more than two years after the patient last saw the orthodontist for treatment, no new injury occurred subsequent to the last day of treatment, and the plaintiffs failed to provide evidence to support the plaintiffs' claim that fraud tolled the running of the limitation period; thus, the action was time-barred under the two-year limitation period of O.C.G.A. § 9-3-71 for medical malpractice actions. *Kane v. Shoup*, 260 Ga. App. 723, 580 S.E.2d 555 (2003).

Summary judgment was properly granted to sublessors, pursuant to O.C.G.A. § 9-11-56, in a sublessee's multi-claim action arising from agreements entered into between the parties with respect to concert promotion at a particular venue, which was done in order to satisfy a minority business enterprise participation minimum that was imposed by the city; based on the terms of the various documents signed between the

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parties, there was no legal partnership pursuant to O.C.G.A. § 14-8-1 and no joint venture since the sublessors did not share control of the concert promotions, did not share profits or liabilities, the terms used in the agreements were not dispositive on the issue, and the sublessee's assistance was titular only. *Jerry Dickerson Presents, Inc. v. Concert/Southern Chastain Promotions*, 260 Ga. App. 316, 579 S.E.2d 761 (2003).

Negligence in failing to maintain smoke detectors. — Summary judgment was properly entered for a landlord and a property manager (appellees) in a negligence suit filed by an injured party as the appellees complied with state law as to the installation of smoke detectors contained in O.C.G.A. § 25-2-40(a)(2), and as evidence of any failure to maintain the detectors was inadmissible under § 25-2-40(g); as § 25-2-40(a)(2) was more specific, it governed over any conflicting statutory or common law duty of care, such as those contained in O.C.G.A. §§ 44-7-13 and 51-3-1 and as § 25-2-40(g) was enacted more recently than the older statutes, it controlled. *Hill v. Tschannen*, 264 Ga. App. 288, 590 S.E.2d 133 (2003).

Taxpayers' challenge to county's detectors. — Summary judgment was properly awarded to a county on an action by county residents who were challenging, through injunction, mandamus, and declaratory judgment, whether a county commission's decision to enter a lease purchase agreement was either constitutional under Ga. Const. 1983, Art. IX, Sec. V, Para. I(a) or in compliance with O.C.G.A. § 36-60-13; the agreement did not create a debt under the constitution that was subject to a county vote, and the lease, as written, did not create any county obligations that were not in compliance with the statute. *Bauerband v. Jackson County*, 278 Ga. 222, 598 S.E.2d 444 (2004).

Lease violation. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) to the defendants in an action for breach of a lease by the successor in interest to the lessor as

the defendants admitted that the defendants had defaulted on the lease and that the successor was owed back rent. *Gilco Invs., Inc. v. Stafford Cordele, LLC*, 267 Ga. App. 167, 598 S.E.2d 889 (2004).

Violations of implied trust in property. — Summary judgment was properly granted to a husband in an action regarding the existence of an implied trust pertaining to certain property, as he quitclaimed any interest he had in that property to the wife as part of a divorce settlement. *Whiten v. Murray*, 267 Ga. App. 417, 599 S.E.2d 346 (2004).

In an equitable action regarding the existence of an implied trust, because a resulting trust arose in favor of the wife through monthly payments to the financing company and taxes, because the husband quitclaimed his entire interest in the property at issue to her, and because the alleged bona fide purchasers had notice of the wife's interest by filing suit to have a mobile home on the property removed and also had a duty to make inquiry as to the wife's rights in the premises, summary judgment entered against the wife was reversed. *Whiten v. Murray*, 267 Ga. App. 417, 599 S.E.2d 346 (2004).

Breach of fiduciary claims. — Trial court properly granted summary judgment to the claims administrator and medical utilization review provider for an employee benefit health plan on an estate administrator's breach of fiduciary duty claims, as they owed no fiduciary duties to the estate administrator, and the appellate court refused to recognize a cause of action for aiding and abetting a breach of fiduciary duty. *Monroe v. Bd. of Regents of the Univ. Sys.*, 268 Ga. App. 659, 602 S.E.2d 219 (2004).

Construction contracts. — Summary judgment was properly awarded to a city as a HUD lender to homeowners who needed an emergency home improvement loan in a case in which the homeowners' action was based on alleged construction problems by the contractor chosen to perform the work. The city, as lender, was not a party to the construction contract, was not liable on the contract, and was explicitly excluded in the contract as a liable party for any construction problems; since the city did not assume any duty to the

homeowners to inspect the property, summary judgment was properly awarded to the city. *Waller v. Econ. & Cmty. Dev. Dep't*, 269 Ga. App. 129, 603 S.E.2d 442 (2004).

When a county contracted with a landfill construction company to relocate parts of a landfill, and the contract provided for a certain method of compensating the company, and when the county orally agreed to make interim payments to the company using a different method, with the final payment to be adjusted according to the payment method specified in the contract, the company was not entitled to summary judgment in the company's breach of contract suit against the county for not using a method other than that stated in the contract to determine the company's compensation, because there was no evidence that the parties mutually agreed to depart from this contract provision so as to require notice, pursuant to O.C.G.A. § 13-4-4, that one party insisted on strict compliance with the original contract terms; thus, the county was entitled to summary judgment. *Handex of Fla., Inc. v. Chatham County*, 268 Ga. App. 285, 602 S.E.2d 660 (2004).

Mechanic's lien. — Trial court did not err by granting partial summary judgment to a buyer on the buyer's claim that the seller's mechanic's lien was invalid for failure to record an affidavit for the commencement of an action so as to establish the lien as required by O.C.G.A. § 44-14-361.1(a)(3). *Krut v. Whitecap Hous. Group, LLC*, 268 Ga. App. 436, 602 S.E.2d 201 (2004).

Real estate sales contract. — When a buyer claiming the buyer was fraudulently sold real estate argued, on appeal, that the trial court's summary dismissal of the buyer's complaint under O.C.G.A. §§ 9-11-12(b)(6) and 9-11-56 deprived the buyer of the right to a jury trial, this claim had no merit because, when the opposing parties filed an affidavit with their motion for summary judgment claiming that the misrepresentation alleged in the buyer's complaint did not occur, and the buyer did not respond to that motion, the evidence in the record was undisputed that the misrepresentation, which was the crux of the buyer's claims, did not happen, so

there was no fact-finding role for a jury to perform. *Crane v. Samples*, 267 Ga. App. 895, 600 S.E.2d 624 (2004), cert. denied, 544 U.S. 927, 125 S. Ct. 1650, 161 L. Ed. 2d 488 (2005).

Duty arising to supervise adult son out on bond. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56(c) to a grandmother of an adult grandson who shot and killed his girlfriend as there was no showing that the grandmother had any duty to supervise the grandson, nor did she own the premises on which the shooting occurred, such that a claim of premises liability could stand under O.C.G.A. § 44-7-1(a); summary judgment to the mother of the adult son was also proper on the negligent supervision claim as she only had a duty to supervise the son, who was out on bond, during her non-working hours, and the son committed the killing during her work hours. *Spivey v. Hembree*, 268 Ga. App. 485, 602 S.E.2d 246 (2004).

Summary judgment was properly granted, dismissing an unjust enrichment claim brought by the purchasers of a home against the seller because the doctrine of unjust enrichment did not apply in that the undisputed evidence showed that the purchasers acted with the intention of personally benefiting from the repairs and additions the purchasers made to the house and without any expectation that the seller would be responsible for the cost; further, since the purchasers failed to exercise the purchase option in accordance with the contract, title was not transferred, and the trial court did not err in failing to treat the transaction as a sale with a mortgage. *Morris v. Britt*, 275 Ga. App. 293, 620 S.E.2d 422 (2005).

Driver operating vehicle on personal mission. — Summary judgment dismissing an administrator's suit against a corporation to recover for the death of the administrator's decedent, who was struck by a car operated by a driver and given to the driver by a corporation, was proper because the evidence showed that the driver operated the restaurant as an independent contractor, there was no evidence to show that the corporation had the authority to control the operation of either the restaurant or the truck, and the

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undisputed evidence showed that the driver was driving the truck at the time of the accident on a purely personal mission. *Williams v. Chick-fil-A, Inc.*, 274 Ga. App. 169, 617 S.E.2d 153 (2005).

Summary judgment improperly granted as burden of proof different in civil and criminal cases. — Summary judgment was improperly granted to a beneficiary in an insurer's interpleader action to determine whether the beneficiary was entitled to the life insurance policy proceeds of the insured, the beneficiary's wife, because evidence that the insured died of a gunshot wound while in Mexico, that the beneficiary was carrying a gun while in Mexico, and that the beneficiary lied about the insured's cause of death created a genuine issue of fact as to whether the beneficiary's recovery was barred under O.C.G.A. § 33-25-13; the fact that the beneficiary had been acquitted of the insured's murder had no impact on the outcome of the civil case because the civil case had a different burden of proof. *Cantera v. Am. Heritage Life Ins. Co.*, 274 Ga. App. 307, 617 S.E.2d 259 (2005).

Improper when genuine issue exists. — Summary judgment for a ship owner and a charterer in a longshoreman's negligence claim brought pursuant to the Longshore Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), was reversed because there were fact issues as to ballast and roll issues, the safety of the ship at turnover, the officers' and crew's active involvement in the cargo operations, whether the ship owner's actions were negligent, the ship owners' duty to intervene, whether the International Safety Management Code was violated, and whether that proximately caused the longshoreman's injuries. *Kyles v. E. Car Liners, Inc.*, 266 Ga. App. 784, 598 S.E.2d 353 (2004).

When questions remain summary judgment properly denied. — City's motion for summary judgment was properly denied because the employee was terminated because, due to the employee's physical limitations, there were no assign-

ments for which the employee was qualified, which created an issue of fact as to the basis for termination. Additionally, *Barnesville, Ga., City Ordinance art. II, § 16(a)(1)* could not be read to mean that, at the time of termination, the employee had already met Social Security Administration (SSA) disability entitlement, there was an issue of fact as to whether the employee's application to the city for disability retirement was timely and, if untimely, whether any delay was caused by a pendency of a disability determination by the SSA, and there was evidence that the employee's physical disability began on a specific date while the employee was employed by the city and that the employee was awarded SSA benefits based upon that physical disability. *City of Barnesville v. Littlejohn*, 264 Ga. App. 185, 590 S.E.2d 376 (2003).

Summary judgment improperly awarded when party unable to read.

— Trial court erred in granting summary judgment to the defendant in the face of the plaintiff's uncontroverted assertion that the plaintiff could not read with any degree of proficiency or understand and was tricked into signing a release while under a disability and in considerable pain and under medication. *Mallard v. Jenkins*, 179 Ga. App. 582, 347 S.E.2d 339 (1986).

Trial court improperly granted summary judgment in an action under O.C.G.A. § 16-12-31 [repealed] to forfeit monies, because the defendants set forth specific facts advancing a genuine issue for trial through documentation evidencing saving withdrawals, a loan repayment, a back pay award, a legal settlement and, their long-time accumulation of coins. *Wilson v. State*, 206 Ga. App. 599, 426 S.E.2d 192 (1992).

Failure to negate element of prima facie case. — Trial court erred in granting a motion for summary judgment because evidence was insufficient to negate any element of the plaintiff's prima facie case. *Huntington v. Fishman*, 212 Ga. App. 27, 441 S.E.2d 444 (1994).

Failure to timely designate appraiser. — Because an insurer denied coverage since the insureds did not designate an appraiser within the policy's time

limits, summary judgment was improper; there was evidence from which a trier of fact could determine that the insurer waived strict compliance with the time limit in which to designate an appraiser. *Gilbert v. Southern Trust Ins. Co.*, 252 Ga. App. 109, 555 S.E.2d 69 (2001).

Racial discrimination. — Lower courts erred in granting summary judgment to a poultry integrator whom a black poultry grower accused of racial discrimination, breach of contract, and intentional infliction of emotional distress as the grower provided sufficient allegations to overcome summary judgment. *Blockum v. Fieldale Farms Corp.*, 275 Ga. 798, 573 S.E.2d 36 (2002).

Excessive fee collection by local government. — Fact that the county increased the county's fees for building permits and other real estate development fees when the county had accumulated a two million dollar surplus from those fees was evidence that the fees may have exceeded the reasonable cost of the county's regulatory activity, and summary judgment for the county was reversed in a case alleging a violation of O.C.G.A. § 48-13-9. *Home Builders Ass'n of Savannah v. Chatham County*, 276 Ga. 243, 577 S.E.2d 564 (2003).

Since a jury issue existed as to the extent of the accord and satisfaction of a hospital's claims for treatment provided to a company's employees, and the company's liability for any remaining claims for the employees, summary judgment was improperly granted to the company. *Hosp. Auth. v. Pyrotechnic Specialties, Inc.*, 263 Ga. App. 886, 589 S.E.2d 644 (2003).

Employment termination dispute. — Because an employment agreement did not specifically define what was meant by the word "due," as such term was used in determining what compensation the employee was entitled to through the effective date of the employee's termination, summary judgment on the employee's breach of contract claim regarding what amount of compensation the employee was to receive was erroneously entered. *Reichman v. Southern Ear, Nose & Throat Surgeons, P.C.*, 266 Ga. App. 696, 598 S.E.2d 12 (2004).

Impact of failure to submit sworn statements. — Vacation and remand of

the denial of a motion for summary judgment by the principals of a corporation was appropriate because the trial court denied the motion for the reason that the principals did not present sworn statements to negate alleged facts, but the court did not consider the issues pertaining to the ground that was asserted by the principals in the motion. *Meredith v. Thompson*, 312 Ga. App. 697, 719 S.E.2d 592 (2011).

Lack of personal jurisdiction. — Trial court erred in denying summary judgment pursuant to O.C.G.A. § 9-11-56 to a guarantor in a company's action to collect on a promissory note; the guarantor was not subject to personal jurisdiction in Georgia pursuant to O.C.G.A. § 9-10-91 as the guarantor was a resident of Illinois and was never in Georgia during the course of the negotiations, the guarantor did not initiate or solicit the sale of a restaurant to the guarantor's son, and the guarantor agreed to guaranty the note only after a company requested the guaranty as a condition of the sale, and therefore the guarantor did not purposefully take advantage of the privilege of doing business in Georgia. *Stuart v. Peykan, Inc.*, 261 Ga. App. 46, 581 S.E.2d 609 (2003).

Subject matter jurisdiction is a matter in abatement to be resolved pursuant to § 9-11-12(b). — Because subject matter jurisdiction is a matter in abatement, jurisdiction had to be resolved on a motion pursuant to O.C.G.A. § 9-11-12(b), and not by a motion for summary judgment. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Proper if no independent claim to support attorney fee claim. — Because there were no viable independent counterclaims remaining in a construction company's claims against a labor supplier, the construction company could no longer assert a claim for attorney fees and litigation costs under O.C.G.A. § 13-6-11 and, accordingly, summary judgment under O.C.G.A. § 9-11-56 to the supplier was proper. *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Conversion from motion to dismiss. — Because the trial court, without objec-

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tion, considered a contract between the parties and both parties relied heavily on the contract language before the trial court, the movant's motion to dismiss was converted to a motion for summary judgment. *Cox v. Athens Reg'l Med. Ctr., Inc.*, 279 Ga. App. 586, 631 S.E.2d 792 (2006).

Partial summary judgment. — In an action between a car dealer and the dealer's customer, the trial court did not err in granting partial summary judgment to the former, on the latter's claims for fraud, willful misrepresentation, theft, conversion, compensatory and punitive damages, and travel expenses as the claims would have ultimately failed at the bench trial; thus, the propriety of the trial court's partial summary judgment order on these claims was a moot question and was not addressed by the court. *Rise v. GAPVT Motors, Inc.*, 288 Ga. App. 246, 653 S.E.2d 320 (2007).

Because: (1) evidence demonstrating an agency relationship between the grantees and the grantor of a security deed was lacking, and (2) the mere lapse of time was insufficient to establish the affirmative defense of laches, partial summary judgment was properly entered in the trustee's favor on that claim based on mutual mistake as well as an order invalidating the foreclosure sale upon the deed. *Harvey v. Bank One, N.A.*, 290 Ga. App. 55, 658 S.E.2d 824 (2008).

Burdens on Motion for Summary Judgment

1. In General

Duty of each party to present case in full. — It is the duty of each party at a hearing on a motion for summary judgment to present that party's case in full. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Thomas v. Allstate Ins. Co.*, 133 Ga. App. 193, 210 S.E.2d 361 (1974); *HFC v. Rogers*, 137 Ga. App. 315, 223 S.E.2d 462 (1976); *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976); *Colodny v. Dominion Mtg. & Realty Trust*, 141 Ga. App. 139, 232 S.E.2d 601 (1977); *Hip Pocket,*

Inc. v. Levi Strauss & Co., 144 Ga. App. 792, 242 S.E.2d 305 (1978); *Walsey v. American Fletcher Nat'l Bank & Trust Co.*, 151 Ga. App. 104, 258 S.E.2d 760 (1979); *DOT v. Garrett*, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

Grounds of motion need not be specified. — Motion for summary judgment is not subject to dismissal for failure to specify grounds upon which the motion relies. *Shockley v. Zayre of Atlanta, Inc.*, 118 Ga. App. 672, 165 S.E.2d 179 (1968).

Insufficient evidence of assumption of risk. — Summary judgment was properly denied to an electric installation company in an action by a restaurant employee who suffered a severe shock when the employee touched a heated table, which was allegedly caused by a plug that was not grounded and by a loose electrical wire as the company did not prove that the employee assumed the risk of the injury as a matter of law when the employee put the employee's hands on the table after a customer informed the employee that the customer received a mild shock; whether the employee appreciated the risk of the injury was an issue for jury determination as it was not established that the employee fully appreciated the risk faced by touching the table, given the information. *D & S Elec., Inc. v. Batson*, 270 Ga. App. 210, 606 S.E.2d 37 (2004).

Speculation insufficient evidence. — Trial court properly granted summary judgment to the company on the widow's wrongful-death claim as the widow did not present any evidence that the actions of the driver of the company's truck in running over her husband caused his death. The husband had been lying in the middle of the roadway after he was thrown from his motorcycle while traveling at a high rate of speed when it was struck by a truck that suddenly pulled out into the middle of the road, and witnesses could not tell if the husband was alive or dead at the time the company's truck drove over him less than a minute after the first accident, which meant that only speculation, not proof, was involved in whether he was dead by the time the company's truck accidentally drove over him while trying to avoid his motorcycle in the road. *Mobley v. Nabisco, Inc.*, 264

Ga. App. 352, 590 S.E.2d 741 (2003).

2. Burden on Movant Generally

Movant must pierce opponent's affirmative defense. — Party moving for summary judgment has the burden of piercing the opponent's affirmative defense. *Peppers v. Siefferman*, 153 Ga. App. 206, 265 S.E.2d 26 (1980); *Olympic Dev. Group, Inc. v. American Druggists' Ins. Co.*, 175 Ga. App. 425, 333 S.E.2d 622 (1985); *First Union Nat'l Bank v. J. Reisbaum Co.*, 190 Ga. App. 234, 378 S.E.2d 317 (1989).

Movant must establish absence of defenses. — On a motion for summary judgment, the burden is on the movant to conclusively establish the absence or non-existence of any defense. *Fletcher v. Ford*, 189 Ga. App. 665, 377 S.E.2d 206 (1988), cert. denied, 189 Ga. App. 912, 377 S.E.2d 206 (1988).

Burden of showing lack of genuine issue and entitlement to judgment. — Burden of showing the absence of a genuine issue of any material fact rests on the party moving for summary judgment. *Shadix v. Dowdney*, 117 Ga. App. 720, 162 S.E.2d 245 (1968); *Sullivan Enters., Inc. v. Stockton*, 118 Ga. App. 542, 164 S.E.2d 336 (1968); *Matthews v. North Cobb Tire Co.*, 120 Ga. App. 269, 170 S.E.2d 57 (1969); *Anderson v. Redwal Music Co.*, 122 Ga. App. 247, 176 S.E.2d 645 (1970); *Lockhart v. Walker*, 124 Ga. App. 241, 183 S.E.2d 503 (1971); *Mitchell v. Calhoun*, 229 Ga. 757, 194 S.E.2d 421 (1972); *Benson Paint Co. v. Williams Constr. Co.*, 128 Ga. App. 47, 195 S.E.2d 671 (1973); *Whitehead v. Capital Auto. Co.*, 239 Ga. 460, 238 S.E.2d 104 (1977); *Southern Trust Ins. Co. v. Clark*, 148 Ga. App. 579, 251 S.E.2d 823 (1978); *Taylor v. Taylor*, 243 Ga. 506, 255 S.E.2d 32 (1979); *Scroggins v. Whitfield Fin. Co.*, 152 Ga. App. 8, 262 S.E.2d 168 (1979); *Romanik v. Buitrago*, 153 Ga. App. 886, 267 S.E.2d 301 (1980); *Edwards v. McTyre*, 246 Ga. 302, 271 S.E.2d 205 (1980); *Jonesboro Tool & Die Corp. v. Georgia Power Co.*, 158 Ga. App. 755, 282 S.E.2d 211 (1981); *Hanover Ins. Co. v. Nelson Conveyor & Mach. Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981); *Mallard v. Jenkins*, 179 Ga. App. 582, 347 S.E.2d 339 (1986).

Burden is on the movant for summary judgment to establish contentions relied on to authorize such judgment by proper affidavits or other permitted evidence when such contentions are controverted by the pleadings of the adverse party. *Massey v. National Homeowners Sales Serv. Corp.*, 225 Ga. 93, 165 S.E.2d 854 (1969).

In summary judgment proceedings, the burden is on the movant to demonstrate the lack of a substantial factual issue. *Brown v. Sheffield*, 121 Ga. App. 383, 173 S.E.2d 891 (1970); *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 202 S.E.2d 515 (1973), overruled on other grounds, *Clements v. Toombs County Hosp. Auth.*, 175 Ga. App. 651, 334 S.E.2d 188 (1985).

Burden of proof is on the movant to establish an entitlement to summary judgment by proper affidavits and other permitted evidence. *Mica-Top Fixture Co. v. Frank G. Shattuck Co.*, 124 Ga. App. 100, 183 S.E.2d 15 (1971).

Burden is upon the movant to affirmatively show that there is no genuine issue of material fact and that the movant is entitled to summary judgment. *Smith v. Sandersville Prod. Credit Ass'n*, 229 Ga. 65, 189 S.E.2d 432 (1972); *Lawson Prods., Inc. v. Rousey*, 132 Ga. App. 726, 209 S.E.2d 125 (1974); *Peachtree Bottle Shop, Inc. v. Bessemer Sec. Corp.*, 134 Ga. App. 729, 215 S.E.2d 692 (1975); *Stratton & McLendon, Inc. v. Cameron-Brown Co.*, 140 Ga. App. 430, 231 S.E.2d 447 (1976); *Cumberland Assocs. v. Market Assistants, Inc.*, 142 Ga. App. 483, 236 S.E.2d 109 (1977).

Burden of establishing the nonexistence of any genuine issue of fact is upon the moving party on a motion for summary judgment, and all doubts are to be resolved against the movant. *Lansky v. Goldstein*, 136 Ga. App. 607, 222 S.E.2d 62 (1975); *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Movant has the burden to prove the nonexistence of any genuine issue of material fact, and in so determining, the court will treat the respondent's paper with considerable indulgence. *Fletcher v. Ford*, 189 Ga. App. 665, 377 S.E.2d 206, cert. denied, 189 Ga. App. 912, 377 S.E.2d 206 (1988).

Burdens on Motion for Summary**Judgment (Cont'd)****2. Burden on Movant****Generally (Cont'd)**

Because an insurer carried the insurer's burden of showing that the representation of an insured's business was false, and that the representation was material in that the representation changed the nature, extent, or character of the insurance coverage risk, the trial court did not err in granting the insurer summary judgment. *Marchant v. Travelers Indem. Co.*, 286 Ga. App. 370, 650 S.E.2d 316 (2007).

When burden shifts. — Burden of showing the absence of a genuine issue of material fact rests on the party moving for summary judgment; the burden does not shift until the pleadings are pierced. *Allen & Bean, Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980).

On a motion for summary judgment, the burden of proof is squarely on the moving party, and does not shift to the respondent unless the movant, by affidavits or other evidence, shows a prima facie right to such judgment. *Ramseur v. American Mgt. Ass'n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

Burden of proof is shifted when the moving party makes a prima facie showing that the movant is entitled to judgment as a matter of law. At that time the opposing party must come forward with rebuttal evidence or suffer judgment against that party. *Trust Co. Bank v. Stubbs*, 203 Ga. App. 557, 417 S.E.2d 373, cert. denied, 203 Ga. App. 908, 417 S.E.2d 373 (1992).

Prima facie case not established. — In an action based on a personal guaranty because the guaranty agreement left blank the name of the principal debtor, it was unnecessary for the appellants to present rebuttal evidence or respond to the motion because the evidence the appellee presented did not establish a prima facie case entitling the appellee to summary judgment. *Ellis v. Curtis-Toledo, Inc.*, 204 Ga. App. 704, 420 S.E.2d 756 (1992).

In an action to collect on a debt filed by a creditor's assignee, the trial court erroneously granted summary judgment in

the amount of the debt owed, plus interest because the assignee failed to attach to either the motion for summary judgment or affidavit prepared by the legal account manager the necessary documents that purported to establish the debt owed by the debtor. *Powers v. Hudson & Keyse, LLC*, 289 Ga. App. 251, 656 S.E.2d 578 (2008).

Burden is upon the movant to establish a lack of a genuine issue of fact and the right to judgment as a matter of law, and any doubt as to the existence of such an issue is resolved against the movant. *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 126 S.E.2d 442 (1962) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Movant must negate at least one essential element. — Moving party has the burden of negating at least one of the essential elements of the opponent's case, and of establishing that no genuine issues of material fact remain. *Vizzini v. Blonder*, 165 Ga. App. 840, 303 S.E.2d 38 (1983); *Progressive Ins. Co. v. Kelly*, 181 Ga. App. 181, 351 S.E.2d 544 (1986).

Best way to preserve a party's fundamental right to a jury trial is to require the moving party to negate by proof an essential element of the nonmoving party's claim. *Hepner v. Southern Ry.*, 182 Ga. App. 346, 356 S.E.2d 30 (1987).

Uncontradicted evidence required. — Burden is on the moving party to establish every element necessary to sustain a grant of the motion by uncontradicted evidence. *Berrien v. Avco Fin. Servs., Inc.*, 123 Ga. App. 862, 182 S.E.2d 708 (1971).

Plaintiff is entitled to summary judgment only if it appears without contradiction that there is no genuine issue of fact, and the burden is on the plaintiff to establish every element necessary to sustain a grant of the motion by uncontradicted evidence. *Berrien v. Avco Fin. Servs., Inc.*, 123 Ga. App. 862, 182 S.E.2d 708 (1971).

Evidence must be of necessary certitude. — On a motion for summary judgment by the plaintiff, the burden is upon the plaintiff to produce evidence of the necessary certitude, that is, that demands a finding as a matter of law that the defenses pled are untrue. *Hurston v. Dealer Serv. Plan, Inc.*, 141 Ga. App. 148,

232 S.E.2d 641 (1977); *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Evidence must conclusively eliminate all material issues. — To prevail on a motion for summary judgment, the movant has the burden to produce the evidence that conclusively eliminates all material issues in the case. *Kohlmeyer & Co. v. Bowan*, 130 Ga. App. 386, 203 S.E.2d 630 (1973); *Fountain v. World Fin. Corp.*, 144 Ga. App. 10, 240 S.E.2d 558 (1977).

Movant must show truth of essential matters. — It is the obligation of the movant for summary judgment to show positively the truth of the matters that are essential to a judgment in the movant's behalf. *Watkins Prods., Inc. v. England*, 123 Ga. App. 179, 180 S.E.2d 265 (1971).

Defendant movant's evidence must refute plaintiff's allegations and show truth. — In order to pierce allegations of material fact contained in the plaintiff's petition, evidence offered by the defendant on a motion for summary judgment must unequivocally refute those allegations and must clearly show what is the truth of the matter alleged. *Watkins v. Nationwide Mut. Fire Ins. Co.*, 113 Ga. App. 801, 149 S.E.2d 749 (1966) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

It is not sufficient if evidence merely preponderates toward the defendant's theory rather than the plaintiff's, or if it does no more than disclose circumstances under which satisfactory proof of the plaintiff's case on trial will be highly unlikely. *Watkins v. Nationwide Mut. Fire Ins. Co.*, 113 Ga. App. 801, 149 S.E.2d 749 (1966) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Shifting of burden to plaintiff respondent to produce rebuttal evidence. — When the defendant has made a motion for summary judgment, which motion is supported by affidavits, depositions, or other evidentiary matter showing a prima facie right on the part of the defendant to have summary judgment rendered in the defendant's favor, duty is cast upon the plaintiff to produce rebuttal evidence at the hearing thereof, by introduction of depositions or affidavits suffi-

cient to show to the court that there is a genuine issue of fact to be decided by the jury. *Cochran v. Southern Bus. Univ., Inc.*, 110 Ga. App. 666, 139 S.E.2d 400 (1964) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Burden is upon the movant to establish a lack of a genuine issue of fact and a right to summary judgment as a matter of law, and any doubt as to the existence of such an issue is resolved against the movant. *Georgia Mut. Ins. Co. v. Morgan*, 115 Ga. App. 520, 154 S.E.2d 720 (1967); *Chapman v. Turnbull Elevator, Inc.*, 116 Ga. App. 661, 158 S.E.2d 438 (1967); *Boston Ins. Co. v. Barnes*, 120 Ga. App. 585, 171 S.E.2d 626 (1969); *Lawson v. Duke Oil Co.*, 155 Ga. App. 363, 270 S.E.2d 898 (1980).

Burden is upon the party moving for summary judgment, and the party opposing the motion is given benefit of all favorable inferences that may be drawn from the evidence. *International Bhd. of Boilermakers v. Newman*, 116 Ga. App. 590, 158 S.E.2d 298 (1967); *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969); *Carr v. Young*, 120 Ga. App. 464, 170 S.E.2d 834 (1969), overruled on other grounds, *Stanger v. Cato*, 182 Ga. App. 498, 356 S.E.2d 97 (1987).

Burden is upon the movant to pierce the pleadings and to establish a lack of a genuine issue of fact and the movant's right to judgment as a matter of law; any doubt as to the existence of such issue or issues is resolved against the movant, and the opposing party is given the benefit of all reasonable doubts and all favorable inferences that may be drawn from the evidence. *Caldwell v. Gregory*, 120 Ga. App. 536, 171 S.E.2d 571 (1969); *Connors v. City Council*, 120 Ga. App. 499, 171 S.E.2d 578 (1969); *Chastain v. Atlanta Gas Light Co.*, 122 Ga. App. 90, 176 S.E.2d 487 (1970).

Party moving for summary judgment has the burden of showing the absence of a genuine issue of any material fact; and if the trial court is presented with a choice of inferences to be drawn from the facts, all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the opposing party. *Fountain v. World Fin. Corp.*, 144 Ga. App.

Burdens on Motion for Summary**Judgment (Cont'd)****2. Burden on Movant****Generally (Cont'd)**

10, 240 S.E.2d 558 (1977).

Burden when movant does not have burden of proof at trial. — Movant for summary judgment has the burden of proof even as to issues upon which the opposing party would have the trial burden. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969); *Lansky v. Goldstein*, 136 Ga. App. 607, 222 S.E.2d 62 (1975); *Danny's Cabinet Shop, Inc. v. G & M Fire Extinguisher Sales & Serv., Inc.*, 149 Ga. App. 215, 253 S.E.2d 802 (1979).

On motion for summary judgment, the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, and all doubts are to be resolved against the movant; the movant has that burden even as to issues upon which the opposing party would have the trial burden. *Ham v. Ham*, 230 Ga. 43, 195 S.E.2d 429 (1973); *Black v. Hamilton*, 133 Ga. App. 881, 212 S.E.2d 449 (1975); *Piano & Organ Ctr., Inc. v. Southland Bonded Whse., Inc.*, 139 Ga. App. 480, 228 S.E.2d 615 (1976).

Burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether the moving party or the opposing party would at trial have the burden of proof on the issue concerned, and rests on the moving party whether the moving party is required to show existence or nonexistence of facts. *Southern Bell Tel. & Tel. Co. v. Beaver*, 120 Ga. App. 420, 170 S.E.2d 737 (1969); *Central of Ga. Ry. v. Woolfolk Chem. Works, Ltd.*, 122 Ga. App. 789, 178 S.E.2d 710 (1970); *Kroger Co. v. Cobb*, 125 Ga. App. 310, 187 S.E.2d 316 (1972).

If the party upon whom the burden of proof upon trial does not lie, makes motion for summary judgment, all the evidence adduced on that motion, including testimony of the party opposing the motion, is construed most strongly against the movant. *Burnette Ford, Inc. v. Hayes*, 227 Ga. 551, 181 S.E.2d 866 (1971), overruled on other grounds, *Tri-Cities Hosp. Auth. v. Sheats*, 247 Ga. 713, 279 S.E.2d

210 (1981); *Hospital Auth. v. AGN Mfg., Inc.*, 124 Ga. App. 159, 183 S.E.2d 58 (1971); *Burnette Ford, Inc. v. Hayes*, 124 Ga. App. 65, 183 S.E.2d 78 (1971); *Epps Air Serv., Inc. v. DeKalb County*, 147 Ga. App. 195, 248 S.E.2d 300 (1978); *Roberson v. Home Ins. Co.*, 149 Ga. App. 590, 254 S.E.2d 908 (1979); *Brooks v. Douglas*, 154 Ga. App. 54, 267 S.E.2d 495 (1980); *Combs v. Adair Mtg. Co.*, 155 Ga. App. 432, 270 S.E.2d 828 (1980); *Aiken v. Drexler Shower Door Co.*, 155 Ga. App. 436, 270 S.E.2d 831 (1980); *Pugh v. Frank Jackson Lincoln-Mercury, Inc.*, 165 Ga. App. 292, 300 S.E.2d 227 (1983).

On motion for summary judgment by a party on whom the burden of proof does not lie on the trial of the case, all the evidence must be construed against the movant and in favor of the party opposing the motion. *Pugh v. Frank Jackson Lincoln-Mercury, Inc.*, 165 Ga. App. 292, 300 S.E.2d 227 (1983).

To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. A defendant may do this by showing the court that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the plaintiff's case. If there is no evidence sufficient to create a genuine issue as to any essential element of the plaintiff's claim, that claim tumbles like a house of cards. *Lee v. Dep't of Natural Res. of Ga.*, 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Allegation of incapacity in the plaintiff's complaint must be met by some evidentiary matter in order for the defendant movant to pierce the pleadings on a motion for summary judgment. *Keith v. McLanahan*, 147 Ga. App. 342, 249 S.E.2d 128 (1978).

Hospital entitled to summary judgment in personal injury action. — Hospital was entitled to summary judgment in an action brought by one of the hospital's physicians, who was injured after tripping in the staff parking lot, when

the physician was unable to link the cause of the injury and the hospital's responsibility for that cause. *Baldwin County Hosp. Auth. v. Martinez*, 204 Ga. App. 840, 420 S.E.2d 760, cert. denied, 204 Ga. App. 921, 420 S.E.2d 760 (1992).

If evidence insufficient, timely responsive brief irrelevant. — Because the evidence relied upon by the movant was insufficient to support the movant's motion for summary judgment, regardless of the timeliness of the brief in response to the motion, the movant was not entitled to summary judgment. *Hill v. Loren*, 187 Ga. App. 71, 369 S.E.2d 260, cert. denied, 187 Ga. App. 907, 369 S.E.2d 260 (1988).

Movant asserting forgery as defense. — Movant who asserts forgery as a defense has the burden of proof that the signature is not authentic and, if so, not authorized, even though the respondent holder in due course would have such burden at trial. *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997).

Burden not met. — In response to the defendant's motion for partial summary judgment, the plaintiff did not come forward with any specific evidence in support of the plaintiff's claim that the defendant wrongfully, illegally, or fraudulently calculated the plaintiff's premiums; therefore, the defendant was entitled to summary judgment on that portion of the counterclaim. *T & R Custom, Inc. v. Liberty Mut. Ins. Co.*, 227 Ga. App. 144, 488 S.E.2d 705 (1997).

3. Burden on Nonmovant

No conflict exists between this rule and the mandate of Superior Court Rule 6.5; rather, that rule's requirement of filing a statement of material facts in issue is in addition to and not contrary to the Code provision. *Mills v. J.E. Sharber Oil Co.*, 181 Ga. App. 81, 351 S.E.2d 275 (1986).

Options of respondent to motion. — Respondent may resist a motion for summary judgment by doing nothing, relying on the failure of the movant to remove all issues of fact from the case, or by presenting evidence showing an issuable fact. *Benefield v. Malone*, 110 Ga. App. 607, 139 S.E.2d 500 (1964), later appeal, 112 Ga.

App. 408, 145 S.E.2d 732 (1965); *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 195 S.E.2d 277 (1972) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

One page response inadequate. — Summary judgment was not authorized merely because a defendant filed a one-page response that contained no substantive argument and failed to comply with Ga. Unif. Super. Ct. R. 6.5. *Milk v. Total Pay & HR Solutions, Inc.*, 280 Ga. App. 449, 634 S.E.2d 208 (2006).

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 issue, 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).

Opposing party not required to refute evidence until burden carried. — No duty devolves upon the opposing party to produce rebuttal evidence until a prima facie showing is made by the movant. *Matthews v. North Cobb Tire Co.*, 120 Ga. App. 269, 170 S.E.2d 57 (1969); *Lockhart v. Walker*, 124 Ga. App. 241, 183 S.E.2d 503 (1971); *Houston v. Doe*, 136 Ga. App. 583, 222 S.E.2d 131 (1975); *Lawrence v. Gardner*, 154 Ga. App. 722, 270 S.E.2d 9 (1980).

Burden of proof always lies with the movant for summary judgment, and this burden must be carried by the movant before the opposing party is required to refute evidence submitted by the movant. *Guthrie v. Monumental Properties, Inc.*, 141 Ga. App. 21, 232 S.E.2d 369 (1977).

If a prima facie showing is made that the moving party is entitled to judgment as a matter of law, the opposite party must come forward with rebuttal evidence at that time or suffer judgment against the opposing party. *Meade v. Heimanson*, 239 Ga. 177, 236 S.E.2d 357 (1977).

Opposing party in a summary judgment proceeding is under no duty to present counter evidence in opposition to the motion for summary judgment until the moving party has produced evidence demanding that judgment. *Peoples Bank v.*

Burdens on Motion for Summary**Judgment (Cont'd)****3. Burden on Nonmovant (Cont'd)**

Austin, 159 Ga. App. 223, 283 S.E.2d 81 (1981); Horton v. Wombles, 182 Ga. App. 214, 355 S.E.2d 124 (1987).

Although it is true that on motion for summary judgment, the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, the burden of proof is shifted when the moving party makes a prima facie showing that the movant is entitled to judgment as a matter of law. At that time the opposing party must come forward with rebuttal evidence or suffer judgment against the party. Leonaitis v. State Farm Mut. Auto. Ins. Co., 186 Ga. App. 854, 368 S.E.2d 775, cert. denied, 186 Ga. App. 918, 368 S.E.2d 775 (1988).

Once the moving party for summary judgment has carried the movant's burden of making out a prima facie case, the burden shifts and the opposite party must come forward with rebuttal evidence or suffer judgment against the opposing party. Hinkley v. Building Material Merchants Ass'n, 187 Ga. App. 345, 370 S.E.2d 201 (1988).

Once the party moving for summary judgment has made a prima facie showing that the movant is entitled to judgment as a matter of law, the burden shifts to the nonmovant, who must then come forward with rebuttal evidence sufficient to show the existence of a genuine issue of material fact. Weldon v. Del Taco Corp., 194 Ga. App. 174, 390 S.E.2d 87 (1990); Southern Gen. Ins. Co. v. Davis, 205 Ga. App. 274, 421 S.E.2d 780 (1992).

Until the moving party produces evidence or materials that prima facie pierce the pleadings of the opposing party, no duty rests upon the opposing party to produce any counter evidence or materials in affirmative support of its side of the issue as made by the pleadings. Southern Bell Tel. & Tel. Co. v. Beaver, 120 Ga. App. 420, 170 S.E.2d 737 (1969); Guthrie v. Monumental Properties, Inc., 141 Ga. App. 21, 232 S.E.2d 369 (1977); Sun First Nat'l Bank v. Gainesville 75, Ltd., 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Until the movant produces proof that pierces the pleadings, there is no requirement that the opposing party offer counterproof. Anderson v. Redwal Music Co., 122 Ga. App. 247, 176 S.E.2d 645 (1970); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82 (1979).

Respondent has no burden whatever; the burden of proving a right to summary judgment lies with the movant. Watkins Prods., Inc. v. England, 123 Ga. App. 179, 180 S.E.2d 265 (1971).

Until movant shows absence of material issue. — Respondent in summary judgment proceeding is not ever required to rebut a motion until the movant has carried the burden of showing no material issue. Ginn v. Morgan, 225 Ga. 192, 167 S.E.2d 393 (1969); Mica-Top Fixture Co. v. Frank G. Shattuck Co., 124 Ga. App. 100, 183 S.E.2d 15 (1971).

Entitlement to judgment. — On motion for summary judgment, the respondent has no burden at all until the movant has first shown that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law on the basis of the pleadings and the affidavits. Doughty v. Associates Com. Corp., 152 Ga. App. 575, 263 S.E.2d 493 (1979).

Until such time as judgment is demanded, the defendant respondent to the plaintiff's motion for summary judgment is not required to produce any evidence. Maxwell v. Columbia Realty Venture, 155 Ga. App. 289, 270 S.E.2d 704 (1980).

By proper affidavits and permitted evidence. — It is only when a motion for summary judgment is supported by proper affidavits or other permitted evidence that the adverse party had a duty to produce evidence of fact. Massey v. National Homeowners Sales Serv. Corp., 225 Ga. 93, 165 S.E.2d 854 (1969).

Burden shifts to nonmovant when prima facie showing made. — If a motion for summary judgment is supported by affidavits, depositions, or other evidentiary matter showing a prima facie right in the movant to have judgment rendered in the movant's favor, the duty is cast upon the opposing party to produce rebuttal evidence at the hearing sufficient to show existence of a genuine issue of

fact. *Germaine v. Webster's Shopping Ctr., Inc.*, 116 Ga. App. 547, 158 S.E.2d 682 (1967); *Stephens County v. Gaines*, 128 Ga. App. 662, 197 S.E.2d 424 (1973); *Lawyers Title Ins. Corp. v. Noland Co.*, 140 Ga. App. 114, 230 S.E.2d 102 (1976).

One opposing a motion for summary judgment must present the essence of the party's case or else suffer judgment. *Meade v. Heimanson*, 239 Ga. 177, 236 S.E.2d 357 (1977).

Burden is on moving party to show that no material issues of fact exist; burden of proof can be shifted, however, when a prima facie showing is made that the moving party is entitled to judgment as a matter of law, and the opposite party must come forward with rebuttal evidence at that time, or suffer judgment against the opposing party. *Skinner v. Humble Oil & Ref. Co.*, 145 Ga. App. 372, 243 S.E.2d 732 (1978); *Herman v. Walsh*, 154 Ga. App. 712, 269 S.E.2d 535 (1980).

Summary judgment in workers' compensation case. — Pretermitted whether the trial court correctly determined that no benefits had been paid under Georgia's Workers' Compensation Act, and thus the employer had no right of subrogation to the tort claim settlement proceeds, the trial court's order granting partial summary judgment to the employee extinguishing the employer's subrogation lien had to be affirmed as the employer failed to carry the employer's burden of showing that the injured employee was fully and completely compensated within the meaning of O.C.G.A. § 34-9-11.1(b). *Paschall Truck Lines, Inc. v. Kirkland*, 287 Ga. App. 497, 651 S.E.2d 804 (2007).

Nonmovant must present alternative theories. — If the movant for summary judgment presents evidence that shows that there is no genuine issue of material fact, the movant has met the movant's burden, and the burden then shifts to the opposite party to present any alternative theories, if such exist, which would support the opposing party's action and within which genuine issues of fact remain. *Culwell v. Lomas & Nettleton Co.*, 148 Ga. App. 478, 251 S.E.2d 579 (1978).

Nonmovant must meet and controvert specific facts set forth by the mov-

ing party. *Stone Mt. Mem. Ass'n v. Herrington*, 225 Ga. 746, 171 S.E.2d 521 (1969); *Hartline-Thomas, Inc. v. H.W. Ivey Constr. Co.*, 161 Ga. App. 91, 289 S.E.2d 296 (1982); *City of Cordele v. Turton's, Inc.*, 163 Ga. App. 327, 293 S.E.2d 560 (1982).

Summary judgment in favor of a consulting group was proper since an entertainment club, which presented evidence on the club's behalf, failed to present evidence that refuted the consulting group's evidence establishing the entertainment club's breach of a contract and the amount of damages due to the consulting group as a consequence of that breach of contract. *Oasis Goodtime Emporium I, Inc. v. Crossroads Consulting Group, LLC*, 255 Ga. App. 375, 565 S.E.2d 573 (2002).

Nonmoving party must set forth specific facts showing genuine issue.

— If the party moving for summary judgment has presented evidence of the necessary servitude, the opposing party must, in opposing affidavits, set forth specific facts showing a genuine issue to be decided by the jury. *Hyman v. Horwitz*, 148 Ga. App. 647, 252 S.E.2d 74 (1979).

When a motion for summary judgment is made, the adverse party may not rest upon the allegations of the pleadings, but must set forth specific facts showing there is a genuine issue for trial. *Oliver v. Thomas*, 158 Ga. App. 388, 280 S.E.2d 416 (1981); *Curtis v. J.L. Todd Auction Co.*, 159 Ga. App. 863, 285 S.E.2d 596 (1981).

When a motion for summary judgment is submitted and supported by evidence, the adverse party may not rest upon the case as made, but must set forth specific facts and present the case in full in order to show there is a genuine issue for trial. *Alghita v. Universal Inv. & Mfg. Co.*, 167 Ga. App. 562, 307 S.E.2d 99 (1983).

Opposing affidavits must set forth specific facts. — Mere conclusions are

not sufficient to overcome allegations or admissions in an opposing motion for summary judgment, if the moving party has presented evidence of the necessary certitude; the opposing party must, in the opposing affidavits, set forth specific facts showing a genuine issue to be decided by a jury. *Scroggins v. Whitfield Fin. Co.*, 152 Ga. App. 8, 262 S.E.2d 168 (1979).

Burdens on Motion for Summary**Judgment (Cont'd)****3. Burden on Nonmovant (Cont'd)**

Mere statement of conclusion insufficient. — Adverse party must set forth “specific facts”; the opposing party cannot merely state a conclusion. *Norris v. Kunes*, 166 Ga. App. 686, 305 S.E.2d 426 (1983).

When motion to dismiss is converted. — When matters outside the pleadings are considered by the trial court on a motion to dismiss for failure to state a claim, the motion is converted to a motion for summary judgment pursuant to O.C.G.A. § 9-11-56, and the trial court has the burden of informing the party opposing the motion that the court will consider matters outside the pleadings and that, if the opposing party so desires, the party has no less than 30 days to submit evidence in response to the motion for summary judgment; moreover, when patients in a class action suit against a hospital acquiesced in the hospital’s submission of evidence in support of their motion to dismiss, and in effect, requested that the motion be converted into one for summary judgment by submitting evidence and by urging the trial court and the appeals court to consider it, the patients waived the right to any formal 30-day notice from the trial court. *Davis v. Phoebe Putney Health Sys.*, 280 Ga. App. 505, 634 S.E.2d 452 (2006).

“Plaintiff breached the contract” insufficient response. — In a suit on account, the trial court does not err in granting the plaintiff’s motion for summary judgment while reserving ruling on the defendant’s counterclaim, if the defendant does nothing other than allege generally in the defendant’s answer that “plaintiff breached the contract.” *Concert Promotions, Inc. v. Haas & Dodd, Inc.*, 167 Ga. App. 883, 307 S.E.2d 763 (1983).

Because the plaintiff failed to carry the burden of piercing the defendant’s defense of release, it was not necessary that the defendant come forward with evidence sufficient to show the release, and since the plaintiff was not entitled to judgment as a matter of law, the trial court did not err by denying the

court’s motion for summary judgment. *Howell Mill/Collier Assocs. v. Gonzales*, 186 Ga. App. 909, 368 S.E.2d 831 (1988).

Imputing liability to owner of car.

— In a passenger’s personal injury action against an owner of another vehicle that had been negligently driven by another, causing it to collide with the car in which the passenger was riding, summary judgment was properly granted to the owner under O.C.G.A. § 9-11-56 since the passenger did not offer evidence to support the passenger’s claim for imputing liability on the owner, pursuant to O.C.G.A. § 51-2-2, beyond the passenger showing that the owner owned and insured the vehicle; it was noted that the true test of liability for imputing liability was not the title or ownership, but rather the agency. *Collins v. Hamilton*, 259 Ga. App. 52, 576 S.E.2d 42 (2002).

Punitive damages. — In a case in which the defendant filed interrogatories requesting that the plaintiffs give “each and every fact” upon which the plaintiffs relied in support of their general allegations that the defendant’s “wilful and wanton” conduct authorized a recovery of punitive damages and the plaintiffs responded that the plaintiffs were relying upon the fact that the defendant was physically unable to drive an automobile and had continued to drive notwithstanding the defendant’s limitations, but the defendant, in support of the motion for summary judgment, submitted the defendant’s own affidavit, as well as that of a physician, both of which were to the fact that, at the time of the collision, the defendant was physically capable of driving safely and without restriction, and in opposition, the plaintiffs submitted only the affidavit of a witness who stated that, on one prior occasion, the witness had seen the defendant drive dangerously and recklessly as to speed and following too closely, but without injurious result, the plaintiffs failed to produce specific facts that would rebut the defendant’s evidence of the lack of aggravating circumstances so the trial court correctly granted the defendant partial summary judgment on the issue of punitive damages. *Currie v. Haney*, 183 Ga. App. 506, 359 S.E.2d 350, cert. denied, 183 Ga. App. 905, 359 S.E.2d 350 (1987).

Affidavit showing refusal to cohabit. — If the party moving for summary judgment files an affidavit setting forth evidentiary facts showing refusal to cohabit and the lack of any prospects for reconciliation, summary judgment will be granted unless there is an opposing affidavit showing that the movant has not refused to cohabit or has shown prospects for reconciliation. *Bryan v. Bryan*, 248 Ga. 312, 282 S.E.2d 892 (1981).

Reference to depositions filed after summary judgment motion not permitted. — Because depositions relied upon by a husband and wife in their personal injury and loss of consortium action were not filed prior to the time a motion for summary judgment was ruled upon, their reference to the testimony contained therein could not be considered, and their brief in opposition to the summary judgment motion citing the testimony was not proper evidence for opposing the motion. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

Failure to present evidence of actual knowledge supporting negligent entrustment claim. — In a personal injury action asserting negligent entrustment, because the injured party failed in the burden of presenting evidence that a passenger in the opposing vehicle had actual knowledge of the incompetent driving of that vehicle's driver, or of facts from which such knowledge could be inferred, due to that driver's intoxication, summary judgment in the passenger's favor was properly entered; the injured party failed to prove an essential element of the entrustment claim. *Williams v. Ngo*, 289 Ga. App. 44, 656 S.E.2d 193 (2007).

4. Burdens When Defendant Is Movant

Burden on the defendant's motion for summary judgment is on the defendant to pierce the pleadings and to show conclusively that the plaintiff has no right to recover. *Reed v. Batson-Cook Co.*, 122 Ga. App. 803, 178 S.E.2d 728 (1970).

Movant defendant must effectively pierce any state of facts contained in the plaintiff's complaint or those that may be proved in connection therewith so as to preclude as a matter of law the plaintiff's

right to prevail under any theory alleged. *Morton v. Stewart*, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

When the movant is the defendant, the movant has the additional burden of piercing the plaintiff's pleadings and affirmatively negating one or more essential elements of the complaint. *Corbitt v. Harris*, 182 Ga. App. 81, 354 S.E.2d 637 (1987).

If a motion for summary judgment is made by a defendant, that defendant shoulders the burden of disproving the plaintiff's case, that is, the defendant must affirmatively disprove the case by uncontroverted evidence that demands a finding that no genuine issue as to any material fact remains, and the defendant is entitled to a judgment as a matter of law. *Equitable Life Assurance Soc'y v. Reynolds*, 186 Ga. App. 608, 367 S.E.2d 879 (1988).

When the defendant moves for summary judgment, the defendant has the burden of piercing the pleadings and affirmatively negating one or more essential elements of the plaintiff's case. *Church v. SMS Enters.*, 186 Ga. App. 791, 368 S.E.2d 554 (1988).

Defendant may demonstrate that there is no genuine issue of material fact to be decided by showing the court that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the plaintiff's case. *Brown v. Brewer*, 237 Ga. App. 145, 513 S.E.2d 10 (1999).

Defendant must unequivocally refute allegations. — In order to pierce allegations of material fact contained in the plaintiff's petition, evidence offered by the defendant on a motion for summary judgment must unequivocally refute those allegations and must clearly show what is the truth of the matter alleged. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969); *Matthews v. North Cobb Tire Co.*, 120 Ga. App. 269, 170 S.E.2d 57 (1969); *Supreme Oil Co. v. Brock*, 129 Ga. App. 863, 201 S.E.2d 659 (1973).

Movant's evidence must be of necessary certitude. — On a motion for

Burdens on Motion for Summary**Judgment (Cont'd)****4. Burdens When Defendant Is Movant (Cont'd)**

summary judgment in favor of the defendant on the ground that the plaintiff has no valid claim, the defendant has the burden of producing evidence of the necessary certitude that negates the plaintiff's claim. *Central of Ga. Ry. v. Woolfolk Chem. Works, Ltd.*, 122 Ga. App. 789, 178 S.E.2d 710 (1970); *Kroger Co. v. Cobb*, 125 Ga. App. 310, 187 S.E.2d 316 (1972).

Movant's evidence must negate one essential element under every theory of recovery. — In order for the defendant to prevail on a motion for summary judgment, pleadings, uncontradicted evidence, or admission must negate an essential element of recovery. *Seligman & Latz of Atlanta, Inc. v. Grant*, 116 Ga. App. 539, 158 S.E.2d 483 (1967).

Burden is on the defendant who moves for summary judgment to produce evidence that conclusively negates at least one essential element entitling the plaintiff to recover under every theory fairly to be drawn from pleadings and evidence. *Goodwin v. Mullins*, 122 Ga. App. 84, 176 S.E.2d 551 (1970); *Central of Ga. Ry. v. Woolfolk Chem. Works, Ltd.*, 122 Ga. App. 789, 178 S.E.2d 710 (1970); *Reed v. Batson-Cook Co.*, 122 Ga. App. 803, 178 S.E.2d 728 (1970); *Lockhart v. Beaird*, 128 Ga. App. 7, 195 S.E.2d 292 (1973); *Turner v. Noe*, 127 Ga. App. 870, 195 S.E.2d 463 (1973); *Moss v. Central of Ga. R.R.*, 135 Ga. App. 904, 219 S.E.2d 593 (1975); *Horner v. Savannah Valley Enters., Inc.*, 138 Ga. App. 117, 225 S.E.2d 458 (1976).

To entitle the defendant to summary judgment, undisputed facts, as disclosed by the pleadings and evidence, must negate at least one essential element entitling the plaintiff to recovery and under every theory fairly drawn from the pleadings and evidence and, if necessary, prove the negative or nonexistence of an essential element affirmatively asserted by the plaintiff. *Epps Air Serv., Inc. v. DeKalb County*, 147 Ga. App. 195, 248 S.E.2d 300 (1978); *Lawrence v. Gardner*, 154 Ga. App. 722, 270 S.E.2d 9 (1980); *Waller v. Transworld Imports, Inc.*, 155 Ga. App. 438, 271 S.E.2d 1 (1980).

Burden is on the defendant who moves for summary judgment to produce evidence that conclusively negates the essential elements entitling the respondent to recover under any theory that may be drawn fairly from the pleadings and the evidence. *Fort v. Boone*, 166 Ga. App. 290, 304 S.E.2d 465 (1983).

To prevail on a motion for summary judgment, a defendant-movant is required to pierce the allegations of the complaint and to establish as a matter of law that the plaintiff could not recover under any theory fairly drawn from the pleadings and the evidence. *Reed v. Adventist Health Systems/Sunbelt*, 181 Ga. App. 750, 353 S.E.2d 523 (1987); *Trust Co. Bank v. Stubbs*, 203 Ga. App. 557, 417 S.E.2d 373, cert. denied, 203 Ga. App. 908, 417 S.E.2d 373 (1992).

When the defendant is the movant, the defendant has the burden of negating conclusively at least one of the essential elements of the plaintiff's case. *Ryder Truck Rental, Inc. v. Carter*, 189 Ga. App. 43, 374 S.E.2d 830 (1988).

Defendant may meet the burden for summary judgment under O.C.G.A. § 9-11-56 by showing the court that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the plaintiff's case; if there is no evidence sufficient to create a genuine issue as to any essential element of the plaintiff's claim, that claim tumbles like a house of cards, and all of the other disputes of fact are rendered immaterial. *Sudduth v. Young*, 260 Ga. App. 56, 579 S.E.2d 7 (2003).

Defendant's burden not carried by failure of evidence to prove plaintiff's case. — Defendant, on whom burden of proof at trial does not lie, and who on motion for summary judgment in the defendant's favor does not pierce the issues made by the pleadings or disprove one or more of the essential elements of the plaintiff's case, does not carry the defendant's burden merely because evidence submitted fails to prove the plaintiff's case. *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), aff'd in part and rev'd in part on

other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971).

Burden discharged by pointing out absence of evidence. — Defendant who will not bear the burden of proof at trial need not affirmatively disprove the non-moving party's case; instead, the burden on the moving party may be discharged by pointing out, by reference to the affidavits, depositions, and other documents in the record, that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991); *Brown v. Buffington*, 203 Ga. App. 402, 416 S.E.2d 883 (1992).

Contrary to the plaintiff's argument, a driver and the driver's passenger, in opposing the defendant motorist's summary judgment motion in the plaintiffs' action to recover for personal injuries and property damage, the motorist was not required to produce evidence to support the motorist's assertion that the motorist was never served with process; rather, the motorist met the summary judgment burden by pointing out in the record that there was an absence of evidence to support the plaintiffs' case in that regard and, specifically, that there was evidence that the sheriff's office had been unable to serve the motorist. *Carter v. McKnight*, 260 Ga. App. 105, 578 S.E.2d 901 (2003).

Affirmative showing that plaintiff not entitled to recovery required. — To warrant entry of summary judgment in favor of the defendant, undisputed facts should show the right of the defendant to judgment with such clarity as to leave no room for controversy, and should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances. *Lockhart v. Walker*, 124 Ga. App. 241, 183 S.E.2d 503 (1971); *Buford-Clairmont, Inc. v. Jacobs Pharmacy Co.*, 131 Ga. App. 643, 206 S.E.2d 674 (1974); *Allen & Bean, Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980).

Evidence that merely preponder-

ates toward the defendant's theory rather than the plaintiff's, or if it does no more than disclose circumstances under which satisfactory proof of the plaintiff's case on trial will be highly unlikely. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969); *Matthews v. North Cobb Tire Co.*, 120 Ga. App. 269, 170 S.E.2d 57 (1969); *Supreme Oil Co. v. Brock*, 129 Ga. App. 863, 201 S.E.2d 659 (1973).

Burden on nonmovant plaintiff. — If the defendant moves for summary judgment, there is no burden on the plaintiff to come forward with proof of the plaintiff's case until evidence adduced *prima facie* disproves an essential element of the plaintiff's theory of recovery. *Continental Assurance Co. v. Rothell*, 121 Ga. App. 868, 176 S.E.2d 259 (1970), *aff'd in part and rev'd in part on other grounds*, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971).

If the movant defendant's showing on a summary judgment motion pierces material issues made by the pleadings, an evidentiary response by the plaintiff respondent is required for the plaintiff to avoid an adverse summary judgment. *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 195 S.E.2d 277 (1972).

When the defendant makes a motion for summary judgment under O.C.G.A. § 9-11-56, which motion is supported by affidavits, depositions, or other evidentiary matters showing a *prima facie* right on the part of the defendant to have summary judgment rendered in the defendant's favor, the duty is then cast upon the plaintiff to produce rebuttal evidence at the hearing on the motion, by the introduction of depositions, affidavits, or other evidence sufficient to show to the court that there is a genuine issue of fact to be decided by the jury. *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977).

Plaintiff need not produce evidence until the defendant's evidence pierces the plaintiff's pleadings and demands a finding in the defendant's favor on the particular issue of fact made by the pleadings. *Fort v. Boone*, 166 Ga. App. 290, 304 S.E.2d 465 (1983).

Plaintiff is not required to respond to issues that are not raised in the defen-

Burdens on Motion for Summary**Judgment (Cont'd)****4. Burdens When Defendant Is Movant (Cont'd)**

defendant's motion for summary judgment or to present the plaintiff's entire case on all allegations in the complaint; thus, until the defendant pierced the allegations of the complaint on a particular issue, the plaintiff was not required to respond to the motion on that issue. *Hodge v. Sada Enters., Inc.*, 217 Ga. App. 688, 458 S.E.2d 876 (1995).

If the defendant hospital makes a motion for summary judgment and the attending physician gives a medical affidavit that states a medical opinion that the alleged deviation from the standard of care has no causal connection with the injury or aggravated a pre-existing condition, such motion has pierced the plaintiff's pleadings, refuted causation, and shifted the burden to the plaintiff of coming forward with some evidence to create a material issue of fact. *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 233 Ga. App. 706, 505 S.E.2d 232 (1998).

Once the defendant has carried burden of showing an absence of a genuine issue of fact, the plaintiff is required to offer refuting evidence, and if the plaintiff has failed to produce refuting evidence, the trial court's grant of summary judgment is proper. *Gilbert v. Jones*, 187 Ga. App. 303, 370 S.E.2d 155 (1988).

Standard for defendant's burden. — When the defendant moving for summary judgment presents evidence apparently destroying the plaintiff's cause of action, the defendant meets the burden; the burden then shifts to the plaintiff to present any alternative theories, if such exist, which would support the action and within which genuine issues of fact remain. *Gerald v. Ameron Automotive Ctrs.*, 145 Ga. App. 200, 243 S.E.2d 565 (1978), rev'd on other grounds, 245 Ga. 5, 262 S.E.2d 895 (1980).

Nonmovant plaintiff need not prove entitlement to relief. — In opposing a motion for summary judgment, it is not necessary for the plaintiff to produce sufficient evidence to show that the plaintiff is entitled to the relief sought.

Wall v. Georgia Farm Bureau Mut. Ins. Co., 238 Ga. 275, 232 S.E.2d 555 (1977); *Thomas v. McGee*, 242 Ga. 441, 249 S.E.2d 242 (1978).

If the movant defendant has pierced the allegations of the pleadings and shown the truth to the court, the defendant may receive a grant of summary judgment if there is no genuine issue of material fact considering the pleadings and available evidence. *Fort v. Boone*, 166 Ga. App. 290, 304 S.E.2d 465 (1983).

Plaintiff's options of producing counterproof or doing nothing. — If the defendant moves for summary judgment, the plaintiff has the choice of producing counterproof and thus making an issue of fact, or doing nothing, that is, creating no issue of fact and suffering judgment. *Brown v. J.C. Penney Co.*, 123 Ga. App. 233, 180 S.E.2d 364 (1971).

If the defendant alleges that cashing of check and retaining proceeds constitutes accord and satisfaction, regardless of any protest, oral or written, and regardless of whether the other party is given notice of protest or any purported reservation of rights, the defendant thus undertakes to discharge a treble burden: not only that ordinarily imposed upon the proponent of an affirmative defense, but a second burden that requires the movant for summary judgment to establish that there exist no material issues of fact in the case, and yet a third that requires the movant who is also the defendant affirmatively to negate one or more essential elements of the case made out by the plaintiff. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

In a "slip and fall" case, on a motion for summary judgment the burden was on the defendant store owner, as movant, to come forward with evidence tending to show that the defendant did not have constructive knowledge of the presence of the alleged hazard. *Shiver v. Singletary*, 186 Ga. App. 746, 368 S.E.2d 523, cert. denied, 186 Ga. App. 918, 368 S.E.2d 523 (1988).

In a slip and fall case, if the plaintiff has alleged that the defendant had actual knowledge of a defect, the defendant-movant must proffer some evi-

dence that the defendant did not know of the defect, in order to proceed toward summary judgment. *Baldwin County Hosp. Auth. v. Coney*, 188 Ga. App. 339, 373 S.E.2d 252 (1988).

Defendant's motion granted absent testimony negating allegation. — In a product liability action, given the plaintiff's continued inability or unwillingness to cite any specific instances of the manufacturer's alleged negligence in the design and manufacture of a van, the trial court was authorized under such circumstances to conclude that no such conduct had in fact occurred and that no material issue of fact remained to be tried with respect to this claim, even in the absence of sworn testimony affirmatively negating the allegation that such conduct had occurred. *Collins v. Byrd*, 204 Ga. App. 893, 420 S.E.2d 785, cert. denied, 204 Ga. App. 921, 420 S.E.2d 785 (1992).

Evidence on Motion

1. In General

Purpose of summary judgment procedures would not be advanced by artificial blockades against production of facts helpful in a determination of whether or not a jury issue exists, and this includes both oral and documentary evidence. *Kiker v. Pinson*, 120 Ga. App. 784, 172 S.E.2d 333 (1969).

Conversion from motion to dismiss. — When matters outside the pleadings are considered by the trial court on a motion to dismiss for failure to state a claim, the motion is converted to a motion for summary judgment pursuant to O.C.G.A. § 9-11-56, and the trial court has the burden of informing the party opposing the motion that the court will consider matters outside the pleadings and that, if the opposing party so desires, the party has no less than 30 days to submit evidence in response to the motion for summary judgment. *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006).

List of forms of evidence not exclusive. — Forms of evidence listed in O.C.G.A. § 9-11-56 are not exclusive means of presenting evidence on a motion for summary judgment; the trial court

may consider any material which would be admissible or usable at trial. *Benton Bros. Ford Co. v. Cotton States Mut. Ins. Co.*, 157 Ga. App. 448, 278 S.E.2d 40 (1981).

Court will consider all materials which meet standards of this section.

— Court is obliged to take account of the entire setting of the case on a summary judgment motion, and the court will consider all papers of record, as well as any material prepared for the motion that meets the standard prescribed in subsection (e) of O.C.G.A. § 9-11-56. *Glisson v. Morton*, 203 Ga. App. 77, 416 S.E.2d 134 (1992).

Introduction of items in subsection (c). — There is no requirement under subsection (c) of this section that the items listed be introduced into evidence. *Thompson v. Abbott*, 226 Ga. 353, 174 S.E.2d 904 (1970), overruled on other grounds, *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 232 Ga. 614, 208 S.E.2d 459 (1974).

Introduction of evidence not prerequisite to consideration. — Trial court properly considered defendant's answers to interrogatories in passing on a motion for summary judgment, even though such answers were not introduced into evidence, as introduction of evidence is not a necessary condition for consideration of such evidence on summary judgment. *Ford v. Georgia Power Co.*, 151 Ga. App. 748, 261 S.E.2d 474 (1979).

Subsection (c) limits certain evidence considered on motion. — Subsection (c) of O.C.G.A. § 9-11-56 requires that only supporting material which is "on file" at least 30 days before the hearing shall be considered for the movant. *Porter Coatings v. Stein Steel & Supply Co.*, 247 Ga. 631, 278 S.E.2d 377 (1981).

Complaint is not evidence, and thus may not be considered in deciding a motion for summary judgment. *Clements v. Hendi*, 182 Ga. App. 118, 354 S.E.2d 700 (1987).

Patient's complaint was not evidence and thus could not be considered in deciding a motion for summary judgment. *Wellstar Health Sys. v. Painter*, 288 Ga. App. 659, 655 S.E.2d 251 (2007).

Improper legal standard in withdrawal of admissions. — Because the

Evidence on Motion (Cont'd)**1. In General** (Cont'd)

trial court applied the wrong legal standard in refusing to allow the defendants to withdraw the defendants' admissions, and should have applied the standard set forth in O.C.G.A. § 9-11-36(b) and considered whether withdrawal would serve the presentation of the merits and whether it would prejudice the plaintiffs, summary judgment was improper; moreover, the trial court erroneously held that summary judgment was proper because the defendants had shown no excuse for their former counsel's failure to respond to the plaintiffs request for admissions as the defendants were not required to make such a showing. *Sayers v. Artistic Kitchen Design, LLC*, 280 Ga. App. 223, 633 S.E.2d 619 (2006).

Documentary evidence. — Subsection (c) of this section does not preclude use of documentary evidence in a summary judgment proceeding. *Kiker v. Pinson*, 120 Ga. App. 784, 172 S.E.2d 333 (1969).

Statement of facts. — Statement of facts submitted pursuant to Uniform Superior Court Rule 6.5 is not evidence for purposes of a motion for summary judgment. *Rapps v. Cooke*, 234 Ga. App. 131, 505 S.E.2d 566 (1998).

Additional evidence. — O.C.G.A. § 9-11-56 does not prohibit successive motions for summary judgment based on additional evidence. Conversely, the statute does not prohibit the filing of additional evidence once a motion for summary judgment is denied. If a deficiency in evidence can be cured short of trial, then the obvious expedient of a motion more fully supported will achieve final resolution more quickly and inexpensively for all concerned. *Hogans v. Food Giant, Inc.*, 185 Ga. App. 645, 365 S.E.2d 496 (1988); *NeSmith v. Ellerbee*, 203 Ga. App. 65, 416 S.E.2d 364 (1992).

Competent and admissible evidence required. — "Genuine issue" test is not met unless evidence offered is competent and admissible. *General Ins. Co. of Am. v. Camden Constr. Co.*, 115 Ga. App. 189, 154 S.E.2d 26 (1967) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Case must be provable by competent evidence. — Depositions or affidavits offered in support of the plaintiff's case and in opposition to the defendant's motion for summary judgment must affirmatively show that the plaintiff's case is provable by competent evidence. *Cochran v. Southern Bus. Univ., Inc.*, 110 Ga. App. 666, 139 S.E.2d 400 (1964) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Deposition improperly excluded because it was an unsigned copy. — In a parents' action against a care home arising out of the death of their adult son, the trial court erred in refusing to consider a copy of the deposition of the parents' expert because it was not an original and had not been signed by the deponent; the copy contained the court reporter's signed certification that the transcript was a true and complete record of the evidence given by the expert. *Blake v. KES, Inc.*, 329 Ga. App. 742, 766 S.E.2d 138 (2014).

Speculation insufficient. — Speculation which raises merely a conjecture or possibility is not sufficient to create even an inference of fact for consideration on summary judgment. *Emory Univ. v. Smith*, 260 Ga. App. 900, 581 S.E.2d 405 (2003).

Showing of competency to testify required. — Affidavit which fails to show affirmatively that the affiant is competent to testify to matters stated therein fails to comply with subsection (c) of this section as to evidence under motions for summary judgment. *Watkins Prods., Inc. v. England*, 123 Ga. App. 179, 180 S.E.2d 265 (1971).

Evidence in support of or in opposition to a motion for summary judgment, whether by deposition, affidavit, interrogatory, or otherwise, must show affirmatively that the affiant is competent to testify to matters stated therein. *Crawford v. McDonald*, 125 Ga. App. 289, 187 S.E.2d 542 (1972).

Incompetent complainant. — When the complainant's affidavit affirmatively revealed that the complainant was not competent to testify as to the matters stated therein, the affidavit would not support a motion for summary judgment. *Ireland v. Matthews*, 120 Ga. App. 510,

171 S.E.2d 387 (1969).

Competence to testify as to law of foreign state. — When there is no showing that the defendant is competent to testify as to the law of the foreign state, the affidavit of the defendant as to such matters is without probative value on a motion for summary judgment. *Ryle v. Ryle*, 130 Ga. App. 680, 204 S.E.2d 339 (1974).

Subsection (e) does not change proof required to defeat motion for summary judgment, when evidence submitted therewith has pierced the pleadings; it is merely a statutory amendment to reflect what has already been decided judicially as to the opposing evidence required. *Prudential Ins. Co. of Am. v. Seagraves*, 117 Ga. App. 480, 160 S.E.2d 912 (1968).

Enactment of subsection (e) of this section did not eliminate requirement that pleadings be pierced. *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 195 S.E.2d 277 (1972).

Consideration of entire setting of case. — Court is obliged to take account of the entire setting of a case on a motion for summary judgment; in addition to the pleadings, it will consider all papers of record as well as any material prepared for the motion that meets the standard prescribed in subsection (e) of this section. *Union Circulation Co. v. Trust Co. Bank*, 146 Ga. App. 612, 247 S.E.2d 197 (1978).

Court is obligated to take account of entire setting of case on a motion for summary judgment. *Smith v. Jones*, 154 Ga. App. 629, 269 S.E.2d 471 (1980).

Trial judge should always search entire record before granting motion for summary judgment, and should not be limited to evidence introduced at hearing. *Thompson v. Abbott*, 226 Ga. 353, 174 S.E.2d 904 (1970), overruled on other grounds, *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 232 Ga. 614, 208 S.E.2d 459 (1974); *Jackson v. Couch Funeral Home*, 131 Ga. App. 695, 206 S.E.2d 718 (1974); *Realty Contractors, Inc. v. Citizens & S. Nat'l Bank*, 146 Ga. App. 69, 245 S.E.2d 342 (1978); *Union Circulation Co. v. Trust Co. Bank*, 146 Ga. App. 612, 247 S.E.2d 197 (1978); *Sacks v. Bell Tel. Labs., Inc.*, 149 Ga. App. 799, 256 S.E.2d 87 (1979).

In ruling on motion for summary judgment, particularly one based upon a contract which is controlling, it is axiomatic that the court must search the entire record and consider all papers of record properly before the court. *American Mut. Fire Ins. Co. v. Llewellyn*, 142 Ga. App. 824, 237 S.E.2d 227 (1977).

On consideration of summary judgments, trial court must look at the entire record. *Lawson v. Duke Oil Co.*, 155 Ga. App. 363, 270 S.E.2d 898 (1980).

Completion of discovery not required before ruling on motion. — In an action by the children of a decedent against the operators of a nursing home, the trial court was not required to allow the children to complete discovery before ruling on the operators' motion for summary judgment. If the children needed additional discovery for their response to the motion, the children should have invoked O.C.G.A. § 9-11-56(f). *Carr v. Kindred Healthcare Operating, Inc.*, 293 Ga. App. 80, 666 S.E.2d 401 (2008).

Additional evidence may be ordered by judge. — If there is doubt in the trial judge's mind as to whether the movant has carried the burden of showing there is no substantial issue of material fact, the judge may require such additional evidence as the judge deems advisable and prescribe the method by which additional evidence must be presented. *Benefield v. Malone*, 110 Ga. App. 607, 139 S.E.2d 500 (1964), later appeal, 112 Ga. App. 408, 145 S.E.2d 732 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Parties need not formally offer outside matter as evidence or have the evidence marked as an exhibit at a hearing on the motion. *Union Circulation Co. v. Trust Co. Bank*, 146 Ga. App. 612, 247 S.E.2d 197 (1978); *Smith v. Jones*, 154 Ga. App. 629, 269 S.E.2d 471 (1980); *Bimbo Bldrs., Inc. v. Stubbs Properties, Inc.*, 158 Ga. App. 280, 279 S.E.2d 730 (1981).

Personal affidavit sufficient to raise jury issue. — When a party resisting a motion for summary judgment offers nothing more than the party's own personal affidavit, even if assumed to be self-serving, the conflicting allegation in the parties' competing affidavits may be

Evidence on Motion (Cont'd)**1. In General** (Cont'd)

enough to defeat the motion and require jury resolution. *Shalom Farms, Inc. v. Columbus Bank & Trust Co.*, 169 Ga. App. 145, 312 S.E.2d 138 (1983).

Affidavit based on information not in record. — When an affidavit offered by the plaintiff was based solely on information not part of the record in the case, the affidavit had no probative value in response to the motion for summary judgment. *Nettles v. Laws*, 172 Ga. App. 241, 322 S.E.2d 546 (1984).

Affidavit from an out-of-state expert, whose conclusions were based on medical records not attached to the affidavit and not otherwise in the record, filed in opposition to a motion for summary judgment, was inadmissible under O.C.G.A. § 9-11-56. *Oakes v. Magat*, 263 Ga. App. 165, 587 S.E.2d 150 (2003).

Court should not exclude affidavit when documents on file. — Although the documents referred to in an affidavit are not attached to the affidavit, as required by subsection (e) of O.C.G.A. § 9-11-56, the trial court should not exclude the affidavit when all of the documents are filed in the case. *Hughey v. Emory Univ.*, 168 Ga. App. 239, 308 S.E.2d 558 (1983).

Deposition need only be on file to be considered. — Deposition need not be introduced in evidence in order to be considered in ruling upon a motion for summary judgment as the law only requires that the deposition be on file. *GMC v. Walker*, 244 Ga. 191, 259 S.E.2d 449 (1979); *Porter Coatings v. Stein Steel & Supply Co.*, 157 Ga. App. 260, 277 S.E.2d 272, *aff'd*, 247 Ga. 631, 278 S.E.2d 377 (1981).

Depositions must be filed 30 days before the hearing to be considered on behalf of the movant for summary judgment. *Lynch v. Georgia Power Co.*, 180 Ga. App. 178, 348 S.E.2d 719 (1986).

Trial judge is bound to consider pleadings, including amended complaint, in ruling on a motion for summary judgment. *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 195 S.E.2d 277 (1972).

Amended pleadings filed after summary judgment hearing but before rendition of judge's order are to be considered in passing on motion for summary judgment. *Haskins v. Jones*, 142 Ga. App. 153, 235 S.E.2d 630 (1977).

In addition to the pleadings, court will consider all papers of record, as well as any material prepared for the motion that meets the standard prescribed in subsection (e) of this section as submitted by both parties. *Smith v. Jones*, 154 Ga. App. 629, 269 S.E.2d 471 (1980).

Examination of materials extraneous to pleadings. — On motion for summary judgment, the court is authorized to examine proffered materials extraneous on the pleadings, not for the purpose of trying an issue, but to determine whether there is a genuine issue of material fact to be tried; such extraneous matter most often consists of depositions, answers to interrogatories, admissions on file, and affidavits, if any, but also among matters which may be considered are oral testimony, judicial notice, presumptions, stipulations, concessions of counsel, certified transcript of a court, exhibits, and other papers that have been identified by affidavit or otherwise made admissible in evidence or useable at trial. *Bodrey v. Cape*, 120 Ga. App. 859, 172 S.E.2d 643 (1969).

Interrogatories and answers may be considered. — Even when the movant based the movant's motion on the pleadings and the depositions of the plaintiffs, nevertheless the court was authorized to also consider the interrogatories and answers thereto. *Stone Mt. Mem. Ass'n v. Herrington*, 225 Ga. 746, 171 S.E.2d 521 (1969).

Indication of review by judge sufficient. — If a trial judge in the judge's order recites that the judge has considered each affidavit, deposition, and document submitted, there will not be a reversal on appeal on the ground that the judge did not do so. *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977).

If the trial court indicates in an order granting a motion for summary judgment that such motion is being granted after review of the record, the appellate court will not hold that the trial court failed to

review the relevant portions of a deposition simply because the original on file remained sealed and was not opened until after the order granting the motion was entered. *GMC v. Walker*, 244 Ga. 191, 259 S.E.2d 449 (1979).

Order of trial court indicating that record was reviewed was sufficient showing of review of documents, even though the depositions were still sealed. *Smith v. Jones*, 154 Ga. App. 629, 269 S.E.2d 471 (1980).

Evidence adduced at former trial and judgment of appellate court may be relied upon by the movant as well as pleadings and other forms of evidence specifically mentioned in this section. *Goldsmith v. American Food Servs., Inc.*, 123 Ga. App. 353, 181 S.E.2d 95 (1971).

Introduction of record of former case on different cause. — In an entirely new case not constituting continuation of a previous case based on same cause of action, record adduced on former case could be introduced in support of the motion for summary judgment; this record would be of no greater weight than other affidavits, depositions, and other documentary evidence in support or in opposition to the motion. *Miller v. Douglas*, 235 Ga. 222, 219 S.E.2d 144 (1975).

Copy of transcript of prior hearing of same case. — When evidence adduced upon prior hearing of the same case is relied upon to support a motion for summary judgment, a transcript of such evidence must be attached to or introduced in support of such motion. *Reid v. Wilkerson*, 223 Ga. 751, 158 S.E.2d 241 (1967).

Transcript of probate proceeding. — When a transcript of a probate proceeding is certified by a court reporter and transmitted from a probate court to a superior court, the transcript can be relied upon to support or oppose a motion for summary judgment. *Tony v. Pollard*, 248 Ga. 86, 281 S.E.2d 557 (1981).

Vacation of summary judgment and new hearing set. — When a summary judgment is vacated and a new hearing set, in the absence of an express order, the matter is reopened for all purposes including the subsequent filing of affidavits, depositions, etc., until the date of the new hearing. *Bishop v. Stephens*, 164 Ga. App.

45, 296 S.E.2d 250 (1982).

Premising of judgment on document not in record and not in evidence before court. — Trial court's order granting summary judgment, premised entirely upon a document not in the record, not in evidence before the trial court, and not appearing in the record before the appellate court must be reversed. *Nelson v. Smothers*, 164 Ga. App. 112, 296 S.E.2d 414 (1982).

Deposition testimony quoted in brief. — Since a brief in support of a motion for summary judgment is not proper evidence upon which summary judgment can be granted, deposition testimony as quoted in the movant's brief could not serve as the basis for summary judgment. *Lynch v. Georgia Power Co.*, 180 Ga. App. 178, 348 S.E.2d 719 (1986).

Requests for admissions. — When both defendants asserted that the lease was altered, the failure of one defendant to file a separate denial of requests to admit did not remove all issues of fact and entitle the plaintiff to judgment. *Freeway Junction Bakery, Inc. v. Krupp Cash Plus III*, 202 Ga. App. 703, 415 S.E.2d 312 (1992), overruled on other grounds, 287 Ga. 358, 695 S.E.2d 586 (2010).

Judicial notice of separate action. — In a suit on two promissory notes, the trial court erred in taking judicial notice of the evidence presented in a separate declaratory judgment action on the notes in granting summary judgment. *Kaplan v. Krosco, Inc.*, 167 Ga. App. 197, 306 S.E.2d 88 (1983).

Inconsistent statements constituted "direct" contradiction. — When a customer fell from a raised platform in a store, the customer's statement in a deposition that the customer was distracted by the need to summon assistance from a clerk was directly contradicted by the customer's subsequent statement in an affidavit that the customer was distracted by a need to negotiate the customer's way around boxes, thereby justifying the trial court in disregarding the affidavit. *Simone v. Hancock Textile Co.*, 175 Ga. App. 191, 332 S.E.2d 669 (1985).

Suggestion of vague defense by opposing party inadequate. — Purpose of this section would be defeated if the party

Evidence on Motion (Cont'd)**1. In General** (Cont'd)

opposing the motion for summary judgment was permitted to defeat the motion by suggesting so vague a defense as to prevent the movant or court from ascertaining the theory behind the motion. *Meade v. Heimanson*, 239 Ga. 177, 236 S.E.2d 357 (1977); *Goodman v. St. Joseph's Infirmary, Inc.*, 144 Ga. App. 614, 241 S.E.2d 487 (1978); *Reuben v. First Nat'l Bank*, 151 Ga. App. 476, 260 S.E.2d 498 (1979).

When the plaintiff in an action to enforce an indemnity agreement made a prima-facie showing of the indebtedness and moved for summary judgment, the defendant's general assertion of partial failure of consideration, unsupported by specific facts or arguments, was insufficient to avoid judgment. *Thomasson v. Pineco, Inc.*, 173 Ga. App. 794, 328 S.E.2d 410 (1985).

Inference from circumstantial evidence without probative value. — In passing on a motion for summary judgment, a finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists. *Ussery v. Koch*, 115 Ga. App. 463, 154 S.E.2d 879 (1967), overruled on other grounds, *Raven v. Dodd's Auto Sales & Serv., Inc.*, 117 Ga. App. 416, 160 S.E.2d 633 (1968); *Mullis v. Merit Fin. Co.*, 116 Ga. App. 582, 158 S.E.2d 415 (1967); *Brewer v. Southeastern Fid. Ins. Co.*, 147 Ga. App. 562, 249 S.E.2d 668 (1978); *Withrow Timber Co. v. Blackburn*, 244 Ga. 549, 261 S.E.2d 361 (1979).

In an action based on respondeat superior, after an alleged employee and employer gave direct and positive testimony that at the time of the accident the employee was not acting within the scope of the employee's employment, the plaintiff must show, in addition to the presumption that the employee driving the employer's automobile is acting within the scope of employment, some other fact indicating that the employee was so acting; if this other fact is direct evidence, that is sufficient to allow the case to go to the jury, but

if the other fact is circumstantial evidence, it must be inconsistent with the defendant's evidence, or if consistent, it must demand a finding of fact on the issue in favor of the plaintiff. *Withrow Timber Co. v. Blackburn*, 244 Ga. 549, 261 S.E.2d 361 (1979).

Nature of admission made by motion. — While it is frequently said that a motion admits certain allegations of the opponent, this admission is purely for the sake of argument and to enable the court to arrive at the law uncluttered with questions of fact; it is a temporary negative admission, that is to say, mere failure to deny for an immediate purpose, and does not constitute a positive admission or estoppel for later phases of the case. *Worlds v. Worlds*, 154 Ga. App. 850, 270 S.E.2d 68 (1980).

Time for objection to evidence. — There is no specific time limit for objection to evidence offered on a motion for summary judgment. *Area v. Cagle*, 148 Ga. App. 769, 252 S.E.2d 655 (1979).

Untimely submission of nonmovant's evidence. — When a debtor, faced with a creditor's motion for summary judgment supported by an affidavit, did not timely respond with an affidavit or other evidence placing the facts supported by the creditor's affidavit in dispute, the debtor waived the right to present evidence in opposition to the motion, and the trial court did not abuse the court's discretion in declining to consider the untimely affidavits submitted by the debtor. *Gerben v. Beneficial Ga., Inc.*, 283 Ga. App. 740, 642 S.E.2d 405 (2007).

2. Admissibility of Evidence

Admissibility governed by rules of evidence. — In considering evidence submitted in connection with and in opposition to a motion for summary judgment, the court should apply applicable rules of evidence and, after having done so, construe the evidence as the evidence then stands in favor of the party opposing the motion. *Chandler v. Gately*, 119 Ga. App. 513, 167 S.E.2d 697 (1969).

Admissibility of evidence on motion for summary judgment is governed by rules relating to form and admissibility of evidence generally so that evidence inadmis-

sible on a hearing of the case is inadmissible on a motion for summary judgment. *Matthews v. Wilson*, 119 Ga. App. 708, 168 S.E.2d 864 (1969); *Crawford v. McDonald*, 125 Ga. App. 289, 187 S.E.2d 542 (1972); *Ryle v. Ryle*, 130 Ga. App. 680, 204 S.E.2d 339 (1974); *Thomasson v. Trust Co. Bank*, 149 Ga. App. 556, 254 S.E.2d 881 (1979); *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981).

Rules as to admissibility of evidence are applicable in summary judgment proceedings. *Wheat v. Montgomery*, 130 Ga. App. 202, 202 S.E.2d 664 (1973).

Evidence which would be admissible on a hearing of the case would generally be admissible on a motion for summary judgment. *Thomasson v. Trust Co. Bank*, 149 Ga. App. 556, 254 S.E.2d 881 (1979).

Court cannot consider hearsay, opinions, and conclusions in affidavits submitted. *Davis v. Haupt Bros. Gas Co.*, 131 Ga. App. 628, 206 S.E.2d 598 (1974).

Affidavit must set forth admissible facts. — Affidavit filed in support of a motion for summary judgment must contain evidentiary matter which would be admissible under the rules of evidence if the affiant were in court and testifying. *Bell v. Bell*, 114 Ga. App. 507, 151 S.E.2d 880 (1966) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Affidavits in support of or in opposition to motions for summary judgment must set forth such facts as would be admissible in evidence at trial. *Mullis v. Merit Fin. Co.*, 116 Ga. App. 582, 158 S.E.2d 415 (1967) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

This section requires that an affidavit set forth such facts as would be admissible in evidence to show that charges are in good faith controverted. *Resolute Ins. Co. v. Norbo Trading Corp.*, 118 Ga. App. 737, 165 S.E.2d 441 (1968).

Affidavit may contain all evidentiary matter which, if the affiant were in court and testifying on the witness stand, would be admissible under the rules of evidence as part of the affiant's testimony. *Resolute Ins. Co. v. Norbo Trading Corp.*, 118 Ga. App. 737, 165 S.E.2d 441 (1968) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

When an affidavit contains conclusions

which would not be admissible in evidence, the conclusions are to be disregarded in considering the affidavit in connection with the motion for summary judgment. *Dews v. Ratterree*, 246 Ga. App. 324, 540 S.E.2d 250 (2000).

Evidence rule applicable to depositions, interrogatories, and other evidence. — Subsection (e) of O.C.G.A. § 9-11-56 requires application of evidence rules to affidavits in support of or in opposition to a motion for summary judgment, and if such rules are applied to affidavits those rules must also be applied to depositions and interrogatories which may be submitted. *Chandler v. Gately*, 119 Ga. App. 513, 167 S.E.2d 697 (1969).

Rule that affidavits shall set forth such facts as would be admissible in evidence also applies to depositions, interrogatories, and other evidence submitted on a motion for summary judgment. *Matthews v. Wilson*, 119 Ga. App. 708, 168 S.E.2d 864 (1969).

Inadmissible evidence may not be considered. — All hearsay, unsupported conclusions, contemporaneous oral agreements contrary to an unambiguous written contract, and the like, as well as favorable portions of a party's self-conflicting evidence, must be stricken or eliminated from consideration. *Chandler v. Gately*, 119 Ga. App. 513, 167 S.E.2d 697 (1969).

Since the document upon which the plaintiffs relied to prove the plaintiffs' tort claim was inadmissible as evidence, there was no genuine issue of material fact, and the entry of judgment in favor of the defendant was proper. *Davidson v. American Fitness Ctrs., Inc.*, 171 Ga. App. 691, 320 S.E.2d 824 (1984).

When an injured party sued the owner and the manager of a shopping mall for injuries suffered when the party was shot in the mall's parking lot, a printout of crimes at the mall for the previous 30 months and police incident reports, neither of which were certified or authenticated, could not be considered in ruling on the owner's and manager's summary judgment motion as the rules of evidence applicable to a trial of the case also applied to a hearing on the summary judgment motion. *Baker v. Simon Prop. Group*,

Evidence on Motion (Cont'd)**2. Admissibility of Evidence (Cont'd)**

Inc., 273 Ga. App. 406, 614 S.E.2d 793 (2005).

Inadmissible hearsay. — Ride safety checklist had not been authenticated as a business record and thus was merely inadmissible hearsay that could not be considered as evidence in support of a motion for summary judgment. *Valentin v. Six Flags Over Ga., L.P.*, 286 Ga. App. 508, 649 S.E.2d 809 (2007).

Burden not satisfied by inadmissible evidence. — Party resisting summary judgment, in addition to coming forward with evidence which is sufficient to create a genuine issue of material fact, must present some credible warrant for admissibility, and the trial court did not err in awarding summary judgment when the court perceived the resisting party's evidence to be inadmissible. *Wilson v. Nichols*, 253 Ga. 84, 316 S.E.2d 752 (1984).

Judge bound by uncontradicted evidence in affidavits irrespective of improper material therein. — Affidavits on motion for summary judgment are no place for opinions, ultimate facts, and conclusions of law, and should be restricted to admissible evidentiary facts, but the trial judge may consider such affidavits, and is bound by the uncontradicted evidentiary matter in such affidavits, irrespective of the opinions, ultimate facts, and conclusion of law stated therein. *Harvey v. C.W. Matthews Contracting Co.*, 114 Ga. App. 866, 152 S.E.2d 809 (1966); *Caldwell v. Gregory*, 120 Ga. App. 536, 171 S.E.2d 571 (1969) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Discovery material. — Filing those portions of discovery material necessary to motions for summary judgment is not error. *Jacobsen v. Muller*, 181 Ga. App. 382, 352 S.E.2d 604 (1986).

Interrogatories and answers thereto may properly be considered when ruling on a motion for summary judgment. *Benefield v. Malone*, 110 Ga. App. 607, 139 S.E.2d 500 (1964); *Atlantic Coast Line R.R. v. Daugherty*, 116 Ga. App. 438, 157 S.E.2d 880 (1967) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Movant cannot rely on evidence while invoking inadmissibility of evidence.

— Movant cannot rely on evidence to support motion for summary judgment and at the same time invoke rule of inadmissibility of the evidence. *Jordan v. Ailstock*, 230 Ga. 67, 195 S.E.2d 425 (1973).

Respondent is not limited to mere rebuttal of movant's affirmations; respondent's range of resistance to motion for summary judgment is limited only by the pleadings, and the respondent may show anything properly within their ambit which portrays an issuable fact. *Benefield v. Malone*, 110 Ga. App. 607, 139 S.E.2d 500 (1964), later appeal, 112 Ga. App. 408, 145 S.E.2d 732 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Highest and best evidence required. — Affidavit of an attorney that the attorney checked the property records in the clerk's office and that the chain of title including the described deeds failed to meet the requirement of subsection (e) of this section that affidavits submitted in support of motions for summary judgment shall set forth such facts as would be admissible in evidence as the deeds themselves would be the highest and best evidence. *Green v. Wright*, 225 Ga. 25, 165 S.E.2d 843 (1969).

Certified copy of a court transcript is one of the items a trial court is authorized to examine on a motion for summary judgment to determine whether there is a genuine issue of material fact to be tried. *Abalene Pest Control Serv., Inc. v. Orkin Exterminating Co.*, 196 Ga. App. 463, 395 S.E.2d 867 (1990).

Testimony by a witness given under oath in the form of a transcript to an earlier criminal proceeding was admissible on a motion for summary judgment in a subsequent civil action. *Abalene Pest Control Serv., Inc. v. Orkin Exterminating Co.*, 196 Ga. App. 463, 395 S.E.2d 867 (1990).

Uncertified office records produced and authenticated by the defendant's physician and placed in the record were sufficient support to the plaintiffs' opposing affidavit as to satisfy the requirements of subsection (e) of O.C.G.A. § 9-11-56.

Paulin v. Okehi, 264 Ga. 625, 449 S.E.2d 291 (1994).

Ordinance. — When the plaintiffs, in opposition to a motion for summary judgment, filed a number of affidavits, but a tendered ordinance was neither a certified copy nor accompanied by an appropriate affidavit authenticating the ordinance as a duly enacted ordinance, the requirements of O.C.G.A. § 9-11-56 were not satisfied. Roth v. Connor, 235 Ga. App. 866, 510 S.E.2d 550 (1998).

Copies of police arrest reports and federal drug enforcement agency investigation reports were properly admitted in support of a motion for summary judgment, and certification was not required since the copies were not referred to in an affidavit. Freeman v. City of Atlanta, 195 Ga. App. 641, 394 S.E.2d 784, cert. denied, 195 Ga. App. 641, 394 S.E.2d 784 (1990).

Criminal conviction. — Since a criminal conviction cannot be taken as evidence in a civil action to establish the truth of the facts on which the conviction was rendered and since only admissible evidence should be considered in ruling on a motion for summary judgment, the fact that the plaintiff was found guilty of driving without a taillight was not before the court, although the defendant averred such conviction in the defendant's affidavit supporting the defendant's motion for summary judgment. Myers v. Barnard, 180 Ga. App. 192, 348 S.E.2d 733 (1986).

Medical narrative reports. — In a wrongful death suit brought by a minor son's parents, alleging negligence and police misconduct arising out of an incident in which emergency surgery on their son was delayed due to police detention of the doctor who was to perform the surgery, summary judgment was improperly granted to the hospital, the hospital's security officer, and the police officer on a finding that there was no issue of fact as to causation; the medical narrative report prepared by the doctor was admissible evidence under former O.C.G.A. § 24-3-18(a) (see now O.C.G.A. § 24-8-826) and could be considered in opposition to a motion for summary judgment under O.C.G.A. § 9-11-56(c), in that the doctor's opinion in the report that the son, "in all likelihood," would have survived had the

doctor not been prevented from caring for the son constituted a properly expressed medical opinion. Dalton v. City of Marietta, 280 Ga. App. 202, 633 S.E.2d 552 (2006).

Requirement that pleadings be considered does not make pleadings evidence. — Requirement that pleadings must be considered on a hearing does not make the pleadings evidence, but merely shows the causes alleged, in order that by comparison with the evidence it can be determined if the movant should prevail. Butterworth v. Pettitt, 223 Ga. 355, 155 S.E.2d 20 (1967) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

When excerpts from plaintiff's personnel file met the standards prescribed in subsection (e) of O.C.G.A. § 9-11-56, the trial court did not err in considering the documents filed in support of the defendant's motion for summary judgment. Glisson v. Morton, 203 Ga. App. 77, 416 S.E.2d 134 (1992).

Proof of agency. — When there was no evidence that a principal authorized someone to act as the principal's agent, agency could not have been proven by declarations of the alleged agent, and a summary judgment affidavit describing statements made by a payee's attorney which had allegedly accelerated a note was properly excluded when the only evidence that the attorney was the payee's agent was the affidavit itself. McManus v. Turner, 266 Ga. App. 5, 596 S.E.2d 201 (2004).

3. Conclusory Statements

Determining whether genuine issues exist. — In considering depositions and affidavits in support of or in opposition to a motion for summary judgment, facts contained therein, and not conclusions stated, determine whether genuine issue of fact exists. Matthews v. Wilson, 119 Ga. App. 708, 168 S.E.2d 864 (1969); Fannin v. Fannin, 133 Ga. App. 681, 212 S.E.2d 16 (1975).

Ultimate or conclusory facts and conclusions of law cannot be utilized on summary judgment motion. Belcher v. Logan, 150 Ga. App. 249, 257 S.E.2d 299 (1979); Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Evidence on Motion (Cont'd)**3. Conclusory Statements (Cont'd)**

General conclusory statement in pleadings to the effect that the contract was breached, in the face of an instrument attached to those pleadings showing that no contract existed which could be breached, failed to state a cause of action sufficient to withstand a motion for summary judgment. *Levine v. First Bank*, 154 Ga. App. 730, 270 S.E.2d 20 (1980).

Conclusions may not generally be used in affidavits to support or oppose summary judgment motions. *Holloway v. Dougherty County Sch. Sys.*, 157 Ga. App. 251, 277 S.E.2d 251 (1981).

Conclusory allegations by the plaintiff are insufficient, in the absence of substantiating facts or circumstances, to raise a material issue for trial. *Sherwood v. Boshears*, 157 Ga. App. 542, 278 S.E.2d 124 (1981).

Allegations, conclusory facts, and conclusions of law cannot be utilized to support or defeat motions for summary judgment. *Peterson v. Midas Realty Corp.*, 160 Ga. App. 333, 287 S.E.2d 61 (1981).

When although an affidavit recites that the affidavit was made on personal knowledge, the affidavit sets forth only contentions and conclusions without reference to any factual basis for them, the affidavit is insufficient to demonstrate the absence of a genuine issue as to any material fact. *Parlato v. Metropolitan Atlanta Rapid Transit Auth.*, 165 Ga. App. 758, 302 S.E.2d 613 (1983).

Conclusory allegations are insufficient, in absence of substantiating fact or circumstances, to raise a material issue for trial. *Cornell Indus., Inc. v. Colonial Bank*, 162 Ga. App. 822, 293 S.E.2d 370 (1982).

Statement in an affidavit that "neither I nor my wife owe the plaintiff anything" was not one of fact, but a conclusion or allegation of the ultimate fact which was not sufficient to support a motion for summary judgment. *Sullivan v. Fabe*, 198 Ga. App. 824, 403 S.E.2d 208 (1991), cert. denied, 198 Ga. App. 899, 403 S.E.2d 208 (1991).

Statements in affidavit that "none of the debts alleged in the complaint would be the responsibility of these defendants"

were conclusions, and not statements of specific fact sufficient to support a motion for summary judgment. *Sullivan v. Fabe*, 198 Ga. App. 824, 403 S.E.2d 208 (1991), cert. denied, 198 Ga. App. 899, 403 S.E.2d 208 (1991).

Property owner's defamation of title action under O.C.G.A. § 51-9-11 failed because the owner's conclusory allegations that the owner had fully paid a surveyor's bill for work done, although sworn to, did not, without more, create a material issue of fact regarding the falsity of statements in a surveyor's lien; thus, the owner failed to establish an essential element of defamation of title and summary judgment in favor of the surveyor was appropriate. *Simmons v. Futral*, 262 Ga. App. 838, 586 S.E.2d 732 (2003).

Buyer, who adduced only one conclusory affidavit, failed to create any genuine issue of material fact regarding the nexus between an alleged arson, a defamation claim, and a community club; accordingly, summary judgment in favor of the club was proper. *Smith v. Jones*, 278 Ga. 661, 604 S.E.2d 187 (2004).

In a medical malpractice action, a physician's affidavit submitted by the nonmovants was properly struck as being merely conclusory as the affidavit referred to the standard of care but did not state what the standard of care was; an affidavit that stated no particulars was not sufficient to rebut a motion for summary judgment. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Bare legal conclusions in affidavits in support of a motion for summary judgment are insufficient to show either absence of any material issue of fact or to create an issue of fact. *Mica-Top Fixture Co. v. Frank G. Shattuck Co.*, 124 Ga. App. 100, 183 S.E.2d 15 (1971).

In an insurer's interpleader action to determine whether the beneficiary of an insured's three life insurance policies was entitled to the proceeds of the policies, the beneficiary's statements in an affidavit that the beneficiary did not kill the wife and did not know who caused the death were not competent evidence in support of the motion for summary judgment be-

cause the statements were conclusions or allegation of the ultimate fact, there were no substantiating facts, and the affidavit was self-serving. *Cantera v. Am. Heritage Life Ins. Co.*, 274 Ga. App. 307, 617 S.E.2d 259 (2005).

Statements made on information and belief. — Ultimate or conclusory facts and conclusions of law, as well as statements made on belief or on information and belief, cannot be utilized on summary judgment motion. *Cel-Ko Bldrs. & Developers, Inc. v. BX Corp.*, 136 Ga. App. 777, 222 S.E.2d 94 (1975); *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

Statement only amounting to denial of allegation by other party. — Because the defendant's statement by affidavit that the defendant mailed the application "as soon as practicable" did no more than meet the plaintiff's allegation that the plaintiff "had a duty to forward the application as soon as practical," the defendant's statement in the defendant's affidavit has no more effect than the denial of the allegation in the defendant's answer, and as the issue is still very much in dispute, summary judgment was improper. *Stewart v. Boykin*, 165 Ga. App. 868, 303 S.E.2d 50 (1983).

Denial of existence of agency relationship as statement of fact. — Bare denial of existence of an agency relationship, made by a purported party thereto, is a statement of fact sufficient to support a motion for summary judgment in an action based on the doctrine of respondeat superior. *Withrow Timber Co. v. Blackburn*, 244 Ga. 549, 261 S.E.2d 361 (1979).

4. Affidavits

A. In General

Three requirements for affidavit. — To constitute a complete affidavit, three essential features are requisite: first, the written oath embodying the facts sworn to by the affiant; second, the signature of the affiant thereto; and, third, the jurat or attestation, by an officer authorized to administer the oath, that the affidavit was actually sworn to and subscribed before the officer by the affiant. *Glenn v. Metro-*

politan Atlanta Rapid Transit Auth., 158 Ga. App. 98, 279 S.E.2d 481 (1981).

Affidavits permitted but not required. — O.C.G.A. § 9-11-56 permits motions for summary judgment to be supported by affidavits, but does not require the affidavits. *English Restaurant, Inc. v. A.R. II., Inc.*, 194 Ga. App. 639, 391 S.E.2d 462 (1990).

Affidavits not required when question is one of law only. — If there is no genuine issue as to any material fact and the pleadings show the question to be one of law only, affidavits are not essential prerequisites to the granting of summary judgment. *Dillard v. Brannan*, 217 Ga. 179, 121 S.E.2d 768 (1961) (decided under Ga. L. 1959, p. 234, § 1 et seq.).

Showing that no jury issue existed is sufficient. — There was no merit to a customer's argument that because a corporation and employee did not file any affidavits or other sworn testimony, summary judgment could not be granted in their favor; they simply had to show that no jury issue existed as to an essential element of the customer's claim. *Kirkland v. Earth Fare, Inc.*, 289 Ga. App. 819, 658 S.E.2d 433 (2008).

Affidavits under O.C.G.A. § 9-11-12(b). — Affidavits made in support of Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12(b)) motions must conform to the requirements of subsection (e) Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56). *McPherson v. McPherson*, 238 Ga. 271, 232 S.E.2d 552 (1977).

Applicability of subsection (e) to affidavits. — Although requirements of subsection (e) of this section are not expressly applicable to affidavits in general, those requirements stand as a codification of the common-law requirements as to affidavits and hence are applicable as such. *McPherson v. McPherson*, 238 Ga. 271, 232 S.E.2d 552 (1977) (see now O.C.G.A. § 9-11-56)).

Contents must be admissible in evidence. — Affidavit considered on motion for summary judgment must show that affiant has personal knowledge of facts stated therein, and must contain evidentiary matter which, if the affiant were in court and testified, would be admissible as part of the affiant's testimony.

Evidence on Motion (Cont'd)**4. Affidavits** (Cont'd)**A. In General** (Cont'd)

Chandler v. Gately, 119 Ga. App. 513, 167 S.E.2d 697 (1969).

Only facts within the personal knowledge of the witness and admissible in evidence may be considered on a motion for summary judgment or in opposition thereto. Summer v. Allison, 127 Ga. App. 217, 193 S.E.2d 177 (1972).

Partial summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to a labor supplier in a construction company's counterclaim alleging tortious interference with its contractual relations, based on an allegedly illegal lien filed by the supplier against a property, when no factual basis was found for the counterclaim and, accordingly, the counterclaim was dismissed; it was noted that the affidavit of the administrative manager of the company contained irrelevant matter which was properly excluded under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-402 and 24-4-403) as the affidavit related to the supplier's failure to sign a lien waiver and the affidavit had no logical bearing to the material fact in issue and, further, it was found to be inadmissible hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. § 24-8-802). Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Bare legal conclusions in affidavits create no issue of fact on motion for summary judgment. Resolute Ins. Co. v. Norbo Trading Corp., 118 Ga. App. 737, 165 S.E.2d 441 (1968) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Noncomplying affidavits. — Affidavits not complying with this section must be disregarded. Oglesby v. Farmers Mut. Exch., 128 Ga. App. 387, 196 S.E.2d 674 (1973).

Because plaintiff's expert opinion was based on medical records that were not attached to the affidavit nor otherwise made a part of the record, the affidavit was deficient and lacked probative value. Herndon v. Ajayi, 242 Ga. App. 193, 532 S.E.2d 108 (2000).

Only portions of affidavits in compliance to be considered. — When affi-

davits are offered in support of a motion for summary judgment, only those portions which were made upon the personal knowledge of the affiant, which were not mere conclusions unsupported by facts, and which would be admissible under general rules of evidence upon trial should be considered. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782 (1969).

Unexplained contradictory portions of affidavits. — Under contradictory testimony rule, unexplained contradictory portions of an affidavit must be eliminated. McCoy v. State Farm Ins. Co., 199 Ga. App. 675, 405 S.E.2d 743 (1991).

Rule in Georgia is that if, on a motion for summary judgment, a party offers self-contradictory testimony, the trial court must eliminate the favorable portions of the contradictory testimony unless a reasonable explanation is offered for the contradiction; if a contradiction is explained, then the issue is merely one of credibility of the witness. Any conflicting responses given by a principal of a seller later in the principal's deposition could have been reasonably explained by the principal's uncertainty whether the seller was seeking to recover the seller's lost profits and to confusion by both the principal and the supplier's attorney as to the content of a specific letter, and any conflict was a matter of credibility for the jury to resolve so the trial court erred in holding on entering summary judgment that the seller was not entitled to seek lost profits. Mitchell Family Dev. Co. v. Universal Textile Techs., LLC, 268 Ga. App. 869, 602 S.E.2d 878 (2004).

Trial court properly refused to consider contradictory testimony in the participant's affidavit submitted in opposition to a motion for summary judgment since statements in the affidavit contradicted the deposition testimony, and the record contained no explanation for those contradictions; while the trial court erred in excluding even the uncontradicted portions of the participant's affidavit, any error was harmless as the remaining portions of the affidavit were duplicative of the participant's deposition testimony, which was before the trial court. Liles v. Innerwork, Inc., 279 Ga. App. 352, 631 S.E.2d 408 (2006).

Propriety of motion to strike affidavit. — Motion to strike an affidavit submitted on summary judgment is properly considered if such motion is properly and timely made. *Ford v. Georgia Power Co.*, 151 Ga. App. 748, 261 S.E.2d 474 (1979).

Trial court did not abuse the court's discretion in denying a buyer's motion to strike the affidavit of an expert filed by the seller two days before oral argument on the seller's summary judgment motion because the buyer was offered a continuance but declined, thereby waiving the 30-day requirement in O.C.G.A. § 9-11-56(c). *Ficklin v. Hyundai Motor Am., Inc.*, 272 Ga. App. 61, 611 S.E.2d 732 (2005).

Motion to strike affidavit. — To the extent that an affidavit contains materials which would not be admissible in evidence, it is subject to a motion to strike. But a motion to strike must be timely or the objection is waived. *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981).

Striking affidavits as sanction. — Sanctions provided for in O.C.G.A. § 9-11-56(g) do not authorize the trial court to strike or disregard the affidavits presented by a party as a sanction. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Untimely affidavits. — In ruling on a motion for summary judgment, the trial court has discretion to consider untimely affidavits. *United States Enters., Inc. v. Mikado Custom Tailors*, 163 Ga. App. 306, 293 S.E.2d 533, rev'd on other grounds, 250 Ga. 415, 297 S.E.2d 290 (1982).

Court is vested with discretion whether to consider affidavits untimely served. *Strickland v. DeKalb Hosp. Auth.*, 197 Ga. App. 63, 397 S.E.2d 576 (1990).

In a summary judgment action, while O.C.G.A. § 9-11-6(b) permitted late service of affidavits in support of a motion, in giving such permission, the trial court was not required to make a written finding of excusable neglect; accordingly, the court was not required to state the court's basis for finding excusable neglect. *Green v. Bd. of Dirs. of Park Cliff Unit Owners Ass'n*, 279 Ga. App. 567, 631 S.E.2d 769 (2006).

Trial court erred in granting summary judgment to a dog owner in a neighbor's malicious prosecution suit without considering the neighbor's affidavit on the basis that the affidavit was not timely filed pursuant to Ga. Unif. Super. Ct. R. 6.2. O.C.G.A. § 9-11-56(c) required a trial court to consider opposing affidavits filed any time prior to the hearing. *Woods v. Hall*, 315 Ga. App. 93, 726 S.E.2d 596 (2012).

Copy not considered. — Since an affidavit of one of the defendants' witnesses was not the original, but only a copy, the trial court could not consider the affidavit, and could not use the affidavit as evidence. *Clauss v. Plantation Equity Group, Inc.*, 236 Ga. App. 522, 512 S.E.2d 10 (1999).

Unsworn document cannot be regarded as affidavit. — Testimony of the plaintiff's counsel, in response to a motion for summary judgment, was presented in the form of an unsworn document, which could not be regarded as an affidavit, and thus failed under subsection (e) of O.C.G.A. § 9-11-56 to create a question of fact. *Barrett v. Commercial Union Ins. Co.*, 188 Ga. App. 353, 373 S.E.2d 59 (1988).

Verified pleading should have no greater effect than affidavit. — Subsection (e) of O.C.G.A. § 9-11-56 demands that both supporting and opposing affidavits be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. To the extent that a verified pleading meets that requirement then the verified pleading may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. *Foskey v. Smith*, 159 Ga. App. 163, 283 S.E.2d 33 (1981), cert. vacated, 249 Ga. 32, 289 S.E.2d 248 (1982).

Verified pleadings have been held equivalent to a supporting or opposing affidavit for purposes of raising an issue of fact on summary judgment. *Harrison v. Harrison*, 159 Ga. App. 578, 284 S.E.2d 83 (1981).

Verified pleading used in support of a motion for summary judgment had no greater effect than an affidavit tendered

Evidence on Motion (Cont'd)**4. Affidavits** (Cont'd)**A. In General** (Cont'd)

under O.C.G.A. § 9-11-56(e), and the pleading had to have been made on "personal knowledge;" when the contents of a deposition showed that the material parts of the deposition were statements of personal knowledge, the requirement as to personal knowledge was met although the jurat did not so state. *Adcock v. Adcock*, 259 Ga. App. 514, 577 S.E.2d 842 (2003).

Disavowal of authorship renders statements inadmissible. — Verification of response to interrogatories stating that "the word usage and sentence structure may be that of the attorney" was language of disavowal of authorship and rendered the statements in the response inadmissible under subsection (e) of O.C.G.A. § 9-11-56. *Johnson v. Hames Contracting, Inc.*, 208 Ga. App. 664, 431 S.E.2d 455 (1993).

Affidavit in contravention of motion for summary judgment must state more than mere conclusions; the affidavit must state specific adverse facts. *Hyman v. Horwitz*, 148 Ga. App. 647, 252 S.E.2d 74 (1979).

Conclusory opinion of defendant's negligence insufficient. — Malpractice plaintiff as respondent on summary judgment cannot prevail on the motion merely by presenting a conclusory opinion that the defendant was negligent or failed to adhere to professional standards of conduct without stating the parameters of such conduct and the particulars of the defendant's deviation therefrom. *Turner v. Kitchings*, 199 Ga. App. 860, 406 S.E.2d 280 (1991).

Court may consider admissible parts of affidavit and ignore conclusions. — Fact that affidavits contain certain averments which could be characterized as conclusions and hearsay does not prohibit the trial judge from considering the admissible parts thereof and from granting summary judgment if appropriate. *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981).

Affirmative defenses may not be raised by affidavit in support of motion for summary judgment. *First Nat'l Bank*

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

When appellees did not raise failure of consideration as an affirmative defense in the appellee's pleadings, such a defense was waived and could not be raised by affidavit in support of a motion for summary judgment. *Hanover Ins. Co. v. Nelson Conveyor & Mach. Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981).

Cross-examination. — Affidavits in support of summary judgment are not subject initially to cross-examination. *Norton v. Georgia R.R. Bank & Trust*, 248 Ga. 847, 285 S.E.2d 910 (1982), *aff'd*, 253 Ga. 596, 322 S.E.2d 870 (1984).

Affiant need not be subjected to cross-examination before the affiant's affidavit may be considered in support of a motion for summary judgment. *Mustin v. Citizens & S. Nat'l Bank*, 168 Ga. App. 549, 309 S.E.2d 822 (1983).

When, under discovery, the plaintiff had an opportunity to cross-examine the defendant on deposition, but failed to exercise such right, the affidavit was not subject to attack. *Pass v. Bouwsma*, 239 Ga. App. 902, 522 S.E.2d 484 (1999).

Inability to question defense witnesses precludes judgment. — In a negligence action, the court erred in granting summary judgment before the plaintiff was able to question two key defense witnesses who avoided the plaintiff's discovery attempts, but who filed affidavits in support of the defendant's motion. This judgment deprived the plaintiff of an opportunity to develop proof which may have well given rise to triable issues of fact, and also overlooked the rule that, when a party fails to produce evidence, the charge or claim against the party is presumed to be well founded. *ShIPLEY v. Handicaps Mobility Sys.*, 222 Ga. App. 101, 473 S.E.2d 533 (1996).

Failure to object would constitute a waiver of any formal defects in an affidavit; however, when the deficiency is one of substance rather than form, the trial court errs in the court's grant of summary judgment even though the affidavit is not objected to. *Parlato v. Metropolitan Atlanta Rapid Transit Auth.*, 165 Ga. App. 758, 302 S.E.2d 613 (1983).

Objections to affidavits presented by parties in support of or against a motion

for summary judgment will not be entertained for the first time on appeal when such affidavits were considered by the trial judge, without objection, in ruling on motions for summary judgment. *Chapman v. McClelland*, 248 Ga. 725, 286 S.E.2d 290 (1982).

Because a family who filed suit against a driver after a collision did not object to any of the driver's affidavits supporting the driver's motion for summary judgment, the court would not entertain objections to the affidavits on appeal. *Abimbola v. Pate*, 291 Ga. App. 769, 662 S.E.2d 840 (2008).

B. Personal Knowledge

Personal knowledge required. — Affidavit which shows that the affidavit is not made on personal knowledge of the affiant is insufficient to show to the court that there is a genuine dispute for the jury to decide. *Cochran v. Southern Bus. Univ., Inc.*, 110 Ga. App. 666, 139 S.E.2d 400 (1964) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Affidavits must be made on personal knowledge. *Wakefield v. A.R. Winter Co.*, 121 Ga. App. 259, 174 S.E.2d 178 (1970); *Worley v. Pierce*, 211 Ga. App. 863, 440 S.E.2d 749 (1994).

Affidavits not showing the affidavits were made on personal knowledge must be disregarded. When affidavits in support of a motion for summary judgment do not recite or show affirmatively that statements therein were made on personal knowledge of affiants, those the affidavits may not be considered. *Mica-Top Fixture Co. v. Frank G. Shattuck Co.*, 124 Ga. App. 100, 183 S.E.2d 15 (1971).

When nowhere in an affidavit is it recited or shown affirmatively that the statement was made on personal knowledge and that the affiant is competent to testify as to matters stated in the affidavit, the affidavit fails to meet the personal knowledge requirement of subsection (e) of this section. *Eaton Yale & Towne, Inc. v. Strickland*, 228 Ga. 430, 185 S.E.2d 923 (1971); *Lubbers v. Tharpe & Brooks, Inc.*, 160 Ga. App. 709, 288 S.E.2d 54 (1981).

If it appears that any portion of the affidavit was not made upon the affiant's personal knowledge, or if it does not affir-

matively appear that it was so made, that portion is to be disregarded in considering the affidavit in connection with the motion for summary judgment. *Morris-Bancroft Paper Co. v. Coleman*, 188 Ga. App. 809, 374 S.E.2d 544, cert. denied, 188 Ga. App. 912, 374 S.E.2d 544 (1988).

When, in a malpractice action, defendant's own affidavit established by personal knowledge that the defendant met the appropriate standard of care, the defendant pierced the plaintiff's pleadings, and the plaintiff's expert's affidavit in opposition to summary judgment, based solely on medical records rather than the affiant's personal knowledge of the facts, was without probative value. *Williams v. Hajosy*, 210 Ga. App. 637, 436 S.E.2d 716 (1993).

Summary judgment, pursuant to O.C.G.A. § 9-11-56, was improperly granted to a store in a customer's slip and fall premises liability action, arising from the customer having slipped on a puddle of clear liquid on the floor of the store's center aisle, as the store manager's affidavit in support of the motion for summary judgment was found to be legally insufficient pursuant to § 9-11-56(e) in that the affidavit did not indicate that the affidavit was based on the manager's personal knowledge as to the specific inspection just prior to the incident and various other allegations made therein; further, the court found that jury issues were presented as to the reasonableness of the store's inspection program under the circumstances, and whether the customer had exercised reasonable care while in the store. *Davis v. Bruno's Supermarkets, Inc.*, 263 Ga. App. 147, 587 S.E.2d 279 (2003).

Statement as to personal knowledge generally sufficient. — Statement in affidavit that the affidavit is based upon personal knowledge generally is sufficient, especially when the affidavit's averments are supported by attachments to the affidavit. *Whitaker v. Trust Co.*, 167 Ga. App. 360, 306 S.E.2d 329 (1983).

Showing of personal knowledge may be met by other evidence. — Statement in the jurat that the affidavit is made upon personal knowledge is generally sufficient, but requirement of per-

Evidence on Motion (Cont'd)**4. Affidavits** (Cont'd)**B. Personal Knowledge** (Cont'd)

sonal knowledge may be met by other material in evidence, at least when no objection to the form of the affidavit was made in the trial court. *Wakefield v. A.R. Winter Co.*, 121 Ga. App. 259, 174 S.E.2d 178 (1970).

Requirement of personal knowledge may be met by other material in evidence, at least when no objection to the form of the affidavit was made in the trial court. *Georgia Hwy. Express, Inc. v. W.D. Alexander Co.*, 124 Ga. App. 143, 183 S.E.2d 215 (1971).

Even though an affidavit did not expressly state that the affidavit was based on personal knowledge, the affidavit was sufficient when the affidavit clearly reflected that the affidavit's contents were rooted in the affiant's personal knowledge and observation. *Edwards v. Campbell Taggart Baking Cos.*, 219 Ga. App. 806, 466 S.E.2d 911 (1996).

Statement in jurat or showing in deposition sufficient. — Statement in the jurat to the effect that the affidavit is made upon personal knowledge is generally sufficient, and when the contents of the deposition show that the material parts of the deposition are statements of personal knowledge, the requirement as to personal knowledge is met even though the jurat does not so state. *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 126 S.E.2d 442 (1962) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Summary judgment not void for failure to make statement of personal knowledge. — If there is no motion to strike or objection to the sufficiency of a motion for summary judgment based upon the invalidity of affidavits, a judgment entered thereon is not void because of a failure to state explicitly that this fact is within the personal knowledge of the deponent. *Smith v. Ragan*, 140 Ga. App. 33, 230 S.E.2d 89 (1976).

Noncompliance with "personal knowledge" requirement. — Affiant's statement that "the following facts are true and correct to the best of the affiant's knowledge and belief" did not evince com-

pliance with the "personal knowledge" requirement of subsection (e) of O.C.G.A. § 9-11-56. *Morris-Bancroft Paper Co. v. Coleman*, 188 Ga. App. 809, 374 S.E.2d 544, cert. denied, 188 Ga. App. 912, 374 S.E.2d 544 (1988).

Statement of affiant "upon information and belief" cannot be considered, as this evidence is not upon the personal knowledge of the affiant. *Gann v. Mills*, 124 Ga. App. 238, 183 S.E.2d 523 (1971).

Basis for professional expert's opinion must be shown. — Expert's affidavit in opposition to a motion for summary judgment in a malpractice suit must state the particulars; the affidavit must establish the minimum requirements of professional conduct applicable to the various professional categories of the defendants involved, and set forth how or in what way the various defendants deviated therefrom. *Strickland v. DeKalb Hosp. Auth.*, 197 Ga. App. 63, 397 S.E.2d 576 (1990).

Unsworn allegations made on best of lawyer's knowledge not evidence. — Unsworn allegations are not evidence, nor do they rise to that level when accompanied by an affidavit made, not upon personal knowledge, but upon "the best of [lawyer's] knowledge," which is just a variation of "information and belief." *Heavey v. Security Mgt. Co.*, 129 Ga. App. 83, 198 S.E.2d 694 (1973).

Personal knowledge held shown. — Although the attached verification did not state that the allegations of the complaint were made upon the plaintiff's personal knowledge, as required in order to be considered on a motion for summary judgment, the allegation that the defendant did not give the plaintiff proper notice of foreclosure was sufficient to affirmatively indicate that such allegation was within the plaintiff's personal knowledge. *Rapps v. Cooke*, 234 Ga. App. 131, 505 S.E.2d 566 (1998).

Appellee's affidavit regarding the profits of a business satisfied the personal knowledge requirement of O.C.G.A. § 9-11-56(e). The affidavit showed that the appellee was the manager of the business, that the appellee was familiar with its records and accounts, and that the appellee's statements concerning the business's financial statements were based on

the appellee's personal knowledge. *Ellison v. Hill*, 288 Ga. App. 415, 654 S.E.2d 158 (2007), cert. denied, 2008 Ga. LEXIS 282 (Ga. 2008).

Bank officer's affidavit attesting to the authenticity of a line of credit agreement, note, and guaranties, confirming the occurrence of default, and setting out the outstanding indebtedness, was sufficiently made on personal knowledge despite the creditors' objections that the officer had no personal involvement in the transactions. *Windham & Windham, Inc. v. Suntrust Bank*, 313 Ga. App. 841, 723 S.E.2d 70 (2012).

On a lessor's motion for summary judgment on a lease and guaranty, although the lessor successor's assistant general counsel's initial affidavit was not made on personal knowledge and demonstrated no familiarity with the lessor's business records, the deficiencies were cured in a second affidavit filed eight months before the trial court's decision. *Triple T-Bar, LLC v. DDR Southeast Springfield, LLC*, 330 Ga. App. 847, 769 S.E.2d 586 (2015).

Personal knowledge held not shown. — Affidavit did not meet requirements of subsection (e) of O.C.G.A. § 9-11-56 when, although the affiant indicated that the affiant had personal knowledge of the codefendant's prior conduct, the affidavit did not reflect that the affiant was even present at the time of the alleged battery, or that the affiant had any personal knowledge of the codefendant's conduct at that time or the circumstances of the battering by the defendant upon the plaintiff. *Johnson v. Crews*, 165 Ga. App. 43, 299 S.E.2d 99 (1983).

Doctor's statements in medical records constituted hearsay and, although the records were attached to an affidavit, the relevant information was not within the affiant's personal knowledge. *Georgia Farm Bureau Mut. Ins. Co. v. Allen*, 228 Ga. App. 607, 492 S.E.2d 339 (1997).

C. Records and Supporting Documentation

Records should be attached to affidavit. — When records relied upon and referred to in an affidavit are neither attached to the affidavit nor included in the record and clearly identified in the

affidavit, the affidavit is insufficient. *Pratt v. Tri City Hosp. Auth.*, 193 Ga. App. 473, 388 S.E.2d 69 (1989).

In a medical malpractice action, because it was undisputed that the record on appeal failed to include the medical records on which the parents' expert's conclusions were based, the parents failed to comply with O.C.G.A. § 9-11-56(e), hence, the trial court did not err when the court granted summary judgment against the parents on this basis. *Conley v. Children's Healthcare of Atlanta, Inc.*, 279 Ga. App. 792, 632 S.E.2d 409 (2006).

Attorney-in-fact for the entity serving as manager of a lender's assignee could authenticate the business records of the lender and the assignee in support of an action to collect on three promissory notes, pursuant to O.C.G.A. § 24-8-803(6); however, as to the third note, the affidavit failed to attach the payment history and that claim failed. *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*, 327 Ga. App. 245, 758 S.E.2d 145 (2014).

Attachment of all records not required. — When depositions of doctors and documents identified and referred to by the doctors provided a sufficient factual basis for an expert's opinions as to the care provided by the defendants, the fact that other records listed by the expert were not in the record was not fatal to the expert's affidavit. *Washington v. Georgia Baptist Medical Ctr.*, 223 Ga. App. 762, 478 S.E.2d 892 (1996), aff'd in part and rev'd in part, *Porquez v. Washington*, 268 Ga. 649, 492 S.E.2d 665 (1997).

Sufficiency of affidavit relating to records made in regular course of business. — Affidavit submitted in support of a motion for summary judgment which satisfies the requirements of Ga. L. 1952, p. 177, §§ 1-3 (see now O.C.G.A. § 24-8-803), relating to records made in the regular course of business, likewise meets the requirement of subsection (e) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56). *Thomasson v. Trust Co. Bank*, 149 Ga. App. 556, 254 S.E.2d 881 (1979).

Absent preliminary proof required to qualify under Ga. L. 1952, p. 177, §§ 1-3 (see now O.C.G.A. § 24-8-803), relating to records made in the regular course of

Evidence on Motion (Cont'd)**4. Affidavits** (Cont'd)**C. Records and Supporting Documentation** (Cont'd)

business, the affiant's statements as to facts, knowledge of which the affiant obtained from records not personally kept by the affiant, were hearsay and had no probative value. *Thomasson v. Trust Co. Bank*, 149 Ga. App. 556, 254 S.E.2d 881 (1979).

When the plaintiff's affidavit referred to certain business records purportedly supporting the plaintiff's motion, but the records were not attached to the affidavit, the references to the business records cannot be used to support the motion. *Val Preda Motors v. National Uniform Serv.*, 195 Ga. App. 443, 393 S.E.2d 728 (1990).

Expert's affidavit may not rely on unintroduced documents. — Court may not consider an expert's affidavit which is based solely upon documentation which is neither a part of the record nor attached to the affidavit. *Landers v. Georgia Baptist Medical Ctr.*, 175 Ga. App. 500, 333 S.E.2d 884 (1985); *Augustine v. Frame*, 206 Ga. App. 348, 425 S.E.2d 296 (1992).

Expert's affidavit was not sufficient, to support the movant's motion for summary judgment when the affidavit did not show the statements made therein were from the witness' personal knowledge, the affidavit did not pierce the pleadings on each basis for imposing liability, and even assuming the expert was qualified, the affidavit did not establish when the expert examined the property in question or that the expert was personally familiar with the property. *King v. Sheraton Savannah Corp.*, 194 Ga. App. 618, 391 S.E.2d 457 (1990).

Expert affidavit is insufficient to oppose the defendant's motion for summary judgment if the documents on which the affiant relies in forming the expert's opinions are not certified or sworn, even if unsworn copies are attached to the affidavit, and if the expert's affidavit relies on the plaintiff's affidavit, when the plaintiff's affidavit does not contain sufficient facts on which the expert, relying on the affidavit alone, could base the expert's opinions.

Johnson v. Srivastava, 199 Ga. App. 696, 405 S.E.2d 725 (1991).

Unsupported affidavit of expert witness. — When the affidavit of the plaintiff's expert would have created a genuine issue of fact as to whether a qualified inspector should have found visible evidence of termite infestation but for the absence from the record of the supporting material relied upon by the expert, it was not probative to contradict the defendant's affidavit, and the defendant was entitled to judgment as a matter of law. *Gunnin v. Swat, Inc.*, 195 Ga. App. 344, 393 S.E.2d 700 (1990).

Erroneous exhibit attached to affidavit. — Trial court erred in entering summary judgment in favor of the plaintiff when there was no evidence authorizing such judgment since Exhibit "B" attached to the affidavit of the custodian of plaintiff's accounts attached to the motion for summary judgment was clearly erroneous in the calculations reaching the balance due the plaintiff. *Fowler v. Ford Motor Credit Co.*, 180 Ga. App. 738, 350 S.E.2d 319 (1986).

X-ray films require certification. — X-ray films relied on by physician-affiant in medical malpractice case were material requiring certification under subsection (e) of O.C.G.A. § 9-11-56. *Bush v. Legum*, 176 Ga. App. 395, 336 S.E.2d 284 (1985).

Medical records not attached. — When the medical records upon which a medical expert reached the expert's conclusions were not attached to the expert's affidavit or included in the record, the affidavit was insufficient to meet the evidentiary standards under subsection (e) of O.C.G.A. § 9-11-56 on a motion for summary judgment and, as a matter of law, lacked any probative value. *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 233 Ga. App. 706, 505 S.E.2d 232 (1998).

Medical records attached. — Summary judgment was properly granted in favor of a doctor, the doctor's anesthesiology clinic, and others since the doctor properly attached to the affidavit a certified copy of the medical record which was referred to in the affidavit, and the affidavit was made upon the doctor's personal knowledge, and rather than relying on the complained-of medical record in reaching

the doctor's conclusions, merely concurred in the possible causes of the injuries at issue. *Oakes v. Magat*, 263 Ga. App. 165, 587 S.E.2d 150 (2003).

D. Application

Trial court did not err in converting motion to dismiss into a motion for summary judgment in a medical malpractice case; the patient did not object to the trial court's decision, and even if the patient was not clear as to the trial court's intent, the patient did not show that the patient would have filed additional affidavits, briefs, or other supporting documentation had the patient been given additional time to do so in the context of a motion for summary judgment. *Tucker v. Thomas C. Talley, M.D., P.C.*, 267 Ga. App. 820, 600 S.E.2d 778 (2004).

Affidavit of neurologist found sufficient to create issue of fact as to testamentary capacity. *Baldwin v. First Tenn. Bank*, 251 Ga. 561, 307 S.E.2d 919 (1983).

Affidavit asserting diligent service efforts insufficient. — Statements in a plaintiff's affidavit asserting that diligent efforts were made to serve an owner prior to the order for service by publication and that the owner hid to avoid service were bare conclusions that were neither supported by facts nor based on personal knowledge, and thus the affidavit was properly stricken; a statement in a process server's affidavit that, in the process server's professional opinion, the owner was intentionally evading service of process, was also a bare conclusion, not supported by facts, about the owner's true motives and intent, and was also properly stricken. *Baxley v. Baldwin*, 279 Ga. App. 480, 631 S.E.2d 506 (2006).

Affidavit asserting plainly that, to affiant's knowledge, mother did not sign deed, raises issue for a jury to determine as to genuineness of the deed. *Mathews v. Brown*, 235 Ga. 454, 219 S.E.2d 701 (1975).

Letter to plaintiff not considered affidavit. — Letter from a person who had inspected a vehicle destroyed by fire, addressed to the plaintiff, did not qualify as an affidavit and the contents of the letter therefore amounted to no more than factual allegations additional to those in

the pleadings. *Barber v. Threlkeld Ford*, 199 Ga. App. 787, 406 S.E.2d 249 (1991).

Reliance on technical manuals. — Trial court abused the court's discretion under O.C.G.A. § 9-11-56(c) in refusing to permit an injured party to supplement the party's response to a manufacturer's reliance, for the first time at the summary judgment hearing, on a technical manual not produced during discovery; the injured party was prejudiced by the ruling, which was not in accordance with the intent of the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, to promote justice and not to obstruct the administration of justice. *Hunter v. Werner Co.*, 258 Ga. App. 379, 574 S.E.2d 426 (2002).

Affidavit opinion as to cause of accident properly struck. — Police officer's affidavit stated that a van owner and the owner's friend chased a thief who stole the van and did not lose sight of the van, and opined that a crash between the van and two accident victims would not have occurred but for the chase. The trial court properly struck portions of the affidavit that consisted of the officer's opinions based on the officer's conversations with the van owner and were not based on physical evidence that the jurors without training in accident investigation might be unable to properly evaluate, such as skid marks, distances, and the positions and damage to the vehicles. *Whitlock v. Moore*, 312 Ga. App. 777, 720 S.E.2d 194 (2011), cert. denied, 2012 Ga. LEXIS 304, 321 (Ga. 2012).

5. Opinion Evidence

No absolute rule against opinion evidence. — Rule that opinion evidence cannot be used to support grant of summary judgment is not absolute. *Tony v. Pollard*, 248 Ga. 86, 281 S.E.2d 557 (1981).

Opinion testimony insufficient for summary judgment. — Summary judgment can never issue based solely upon opinion evidence; in all such cases, the jury must decide the case. *Ginn v. Morgan*, 225 Ga. 192, 167 S.E.2d 393 (1969).

Opinion testimony of ultimate fact to be decided is never sufficient to authorize a grant of summary judgment. *State Hwy. Dep't v. Charles R. Shepherd, Inc.*, 119 Ga.

Evidence on Motion (Cont'd)
5. Opinion Evidence (Cont'd)

App. 872, 168 S.E.2d 922 (1969); *Jordan v. Scherffius*, 121 Ga. App. 685, 175 S.E.2d 97 (1970); *Galloway v. Banks County*, 139 Ga. App. 649, 229 S.E.2d 127 (1976); *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

Opinion evidence is not permissible as basis for summary judgment although it may be used in opposition. *Summer v. Allison*, 127 Ga. App. 217, 193 S.E.2d 177 (1972).

Testimony that amounts to no more than opinion does not require grant of motion for summary judgment. *Lockhart v. Beaird*, 128 Ga. App. 7, 195 S.E.2d 292 (1973).

Summary judgment can never issue based solely upon opinion evidence. *Hawkins v. Greenberg*, 159 Ga. App. 302, 283 S.E.2d 301 (1981), overruled on other grounds, *Haynes v. Hoffman*, 164 Ga. App. 236, 296 S.E.2d 216 (1982), overruled on other grounds, *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009).

Opinions which are nothing more than ultimate conclusions of fact and law are of no probative value and must be disregarded on a motion for summary judgment. *Adkins v. Adkins*, 168 Ga. App. 151, 308 S.E.2d 432 (1983).

Opinion used to preclude summary judgment. — While opinion evidence adduced by respondent is sufficient to preclude the grant of summary judgment, it does not follow that introduction of opinion evidence by the movant will authorize the grant of summary judgment. *Harrison v. Tuggle*, 225 Ga. 211, 167 S.E.2d 395 (1969).

While opinion evidence adduced by the nonmovant is sufficient to preclude grant of summary judgment, it does not follow that introduction of opinion evidence by the movant will authorize the grant thereof, since no burden is on the respondent to rebut the movant's case until the movant has first removed, by affidavits, admissions, interrogatories, etc., all jury questions from the case. *Davidson Mineral Properties, Inc. v. Gifford-Hill & Co.*, 235 Ga. 176, 219 S.E.2d 133 (1975).

Opinion evidence cannot be utilized for

the granting of a summary judgment motion; however, opinion evidence in affidavits can be sufficient to preclude the granting of a summary judgment motion. *Stevens v. Wakefield*, 160 Ga. App. 353, 287 S.E.2d 49 (1981), rev'd on other grounds, 249 Ga. 254, 290 S.E.2d 58 (1982).

Grant of summary judgment cannot be supported by opinion evidence, but opinion evidence in affidavits can be sufficient to preclude the grant of a summary judgment. *Lee v. Lee*, 194 Ga. App. 606, 391 S.E.2d 654, cert. denied, 194 Ga. App. 912, 391 S.E.2d 654 (1990).

Opinion evidence precluding summary judgment. — While opinion evidence is not sufficient to authorize a grant of summary judgment, it may preclude grant of a motion therefor. *Aetna Cas. & Sur. Co. v. Cowan Supply Co.*, 125 Ga. App. 155, 186 S.E.2d 556 (1971).

Opinion evidence can be sufficient to preclude grant of summary judgment. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

If plaintiff must produce expert's opinion in order to prevail at trial, and the defendant produces an expert's opinion in the defendant's favor on a motion for summary judgment but the plaintiff fails to produce a contrary expert opinion in opposition to that motion, there is no genuine issue to be tried by the jury and it is not error to grant summary judgment to the defendant. *Howard v. Walker*, 242 Ga. 406, 249 S.E.2d 45 (1978); *Golden v. Payne*, 152 Ga. App. 800, 264 S.E.2d 292 (1979); *Parker v. Knight*, 245 Ga. 782, 267 S.E.2d 222 (1980); *Lawrence v. Gardner*, 154 Ga. App. 722, 270 S.E.2d 9 (1980); *Davidson v. Shirley*, 616 F.2d 224 (5th Cir. 1980); *Hawkins v. Greenberg*, 159 Ga. App. 302, 283 S.E.2d 301 (1981); *Hardinger v. Park*, 159 Ga. App. 729, 285 S.E.2d 212 (1981); *Jones v. Wike*, 654 F.2d 1129 (5th Cir. 1981); *Savannah Valley Prod. Credit Ass'n v. Cheek*, 248 Ga. 745, 285 S.E.2d 689 (1982).

If the plaintiff must produce an expert's opinion that the defendant was negligent in order to avoid the grant of a directed verdict in favor of the defendant, the plaintiff must also produce an expert's opinion in order to avoid the grant of

summary judgment in favor of the defendant when the defendant moves for summary judgment solely on the basis of the defendant's own affidavit, submitted in the defendant's capacity as an expert, that the defendant was not negligent. *Payne v. Golden*, 245 Ga. 784, 267 S.E.2d 211 (1980).

Expert opinion supporting allegations of both parties. — Simply because the defendant is initially responsible for production of certain expert witnesses, the defendant is not entitled to summary judgment when experts the defendant relies upon also offer expert testimony which a jury could find supports the plaintiff's allegations of medical negligence. *Lawrence v. Gardner*, 154 Ga. App. 722, 270 S.E.2d 9 (1980).

Conflicting expert testimony precludes summary judgment. — Given the conflict between the experts' testimony concerning an obviously hazardous condition, and the inferences to be drawn from the absence of prior accidents, a question of fact exists whether a defective condition existed which the defendant, in the exercise of ordinary care in keeping the defendant's premises safe in the more than 30 years the defendant has owned the premises, knew or should have known would cause injury to an invitee. *Haire v. City of Macon*, 200 Ga. App. 744, 409 S.E.2d 670, cert. denied, 200 Ga. App. 896, 409 S.E.2d 670 (1991).

Opinion evidence on competency of party to contract insufficient. — In a case in which the issue is whether one of the parties had the requisite mental capacity to make a contract, opinion evidence will not authorize the grant of summary judgment that such party was competent. *McCraw v. Watkins*, 242 Ga. 452, 249 S.E.2d 202 (1978).

Seller's affidavit as to value insufficient. — Genuine issue of fact is not raised by the seller's own affidavit as to the value of property in a suit for specific performance. *Baker v. Jellibeans, Inc.*, 252 Ga. 458, 314 S.E.2d 874 (1984).

Opinion evidence that marriage not irretrievably broken. — When the respondent files an affidavit expressing the respondent's opinion that the marriage is not irretrievably broken and that

there are genuine prospects for reconciliation, then summary judgment should be denied. *Bryan v. Bryan*, 248 Ga. 312, 282 S.E.2d 892 (1981).

In legal malpractice action, attorney-defendant may make affidavit as expert in the attorney's own behalf. In view of the presumption that legal services are performed in an ordinary skillful manner, the movant is then required to produce an expert's affidavit, unless there is "clear and palpable" negligence. *Rose v. Rollins*, 167 Ga. App. 469, 306 S.E.2d 724 (1983).

Statements held to be conclusions bearing on ultimate fact. — In an action against a tavern owner arising out of an alleged battery by one patron upon another, statements in the owner's affidavit that the owner had no reason to anticipate the actions of the patron and that the owner could not by exercise of reasonable care have discovered or prevented injury were conclusions bearing on the ultimate fact to be decided and could not be utilized on a summary judgment motion. *Johnson v. Crews*, 165 Ga. App. 43, 299 S.E.2d 99 (1983).

6. Medical Opinion Evidence

Medical malpractice plaintiff cannot prevail on conclusory opinion. — Plaintiff in a medical malpractice case cannot prevail on a motion for summary judgment by merely presenting a conclusory opinion that the defendant was negligent or failed to adhere to the professional standard. Plaintiff must state the particulars and establish the parameters of the acceptable professional conduct and set forth how or in what way the defendant deviated therefrom. *Loving v. Nash*, 182 Ga. App. 253, 355 S.E.2d 448 (1987); *Connell v. Lane*, 183 Ga. App. 871, 360 S.E.2d 433 (1987).

Records must be sworn or certified. — To be sufficient to controvert the defendant's expert opinion and create an issue of fact in a medical malpractice case, the plaintiff's expert must base the expert's opinion on medical records which are sworn or certified copies, or upon the expert's own personal knowledge, and the expert must state the particulars in which the defendant's treatment of the plaintiff

Evidence on Motion (Cont'd)**6. Medical Opinion Evidence (Cont'd)**

was negligent. *Loving v. Nash*, 182 Ga. App. 253, 355 S.E.2d 448 (1987).

Failure of opposing party to present expert evidence in malpractice case. — When the opposing party does not present an expert medical opinion to counter the defendant physician's expert opinion in a medical malpractice case, the physician is entitled to summary judgment. *Aaron v. Harrison*, 160 Ga. App. 172, 286 S.E.2d 762 (1981).

Absent evidence of causation in an action under the Federal Employers' Liability Act provided by the employee's treating physician as the doctor based a diagnosis on an incomplete medical history of the employee without considering earlier lung-related illnesses, and while unaware of the employee's prior chemical exposure and treatment by other physicians, the trial court properly granted an employer's motion for partial summary judgment on the employee's claim for benefits. *Shiver v. Ga. & Fla. Railnet, Inc.*, 287 Ga. App. 828, 652 S.E.2d 819 (2007), cert. denied, No. S08C0394, 2008 Ga. LEXIS 330 (Ga. 2008).

Sufficiency of doctor's expert opinion in malpractice case. — Doctor's own affidavit as an expert that the doctor had not negligently performed the doctor's medical duties is a sufficient expert opinion to establish grounds for summary judgment in a malpractice action unless the plaintiff-patient refutes such testimony by an expert opinion that the defendant's treatment was not reasonable under the circumstances. *Gragg v. Spenser*, 159 Ga. App. 525, 284 S.E.2d 40 (1981).

Physician moving for summary judgment in a medical malpractice case may rely on the physician's own affidavit, submitted in the physician's capacity as an expert, that the physician was not negligent; to avoid summary judgment, the plaintiff must then produce expert testimony to the contrary. *Hardinger v. Park*, 159 Ga. App. 729, 285 S.E.2d 212 (1981).

Sufficiency of affidavit of non-treating physician. — When in the plaintiff's expert's affidavit, the affiant, a non-treating physician, states that the

affiant's opinions are based, at least in part, on the affiant's personal knowledge of the facts of the case, and the affiant goes on to state the particulars in which the affiant believes the defendants were negligent, the affidavit is sufficient to raise a genuine issue of material fact and preclude the trial court's grant of summary judgment. *Crawford v. Phillips*, 173 Ga. App. 517, 326 S.E.2d 593 (1985).

Plaintiff's expert in a medical malpractice action was entitled to base the expert's opinions upon medical records which the expert reviewed and would be the same facts introduced hypothetically at trial since all documents referenced in the expert's affidavit were part of the record prior to the hearing on the summary judgment motion. *Hall v. Okehi*, 194 Ga. App. 721, 391 S.E.2d 787 (1990).

When the plaintiff's expert's affidavit does not state that the expert has any "personal knowledge of the facts of the case," and in fact states that the expert's knowledge concerning the case is confined to uncertified medical records, the affidavit is insufficient to create a question of material fact (notwithstanding that, in reality, it is always questionable whether an affidavit statement of a non-treating physician has substantially more "knowledge" than derived from a personal review of the medical records). *Crawford v. Phillips*, 173 Ga. App. 517, 326 S.E.2d 593 (1985).

Testimony of plaintiff's medical witnesses as to the probability of a connection between an automobile accident and the plaintiff's later physical problems was sufficient to avoid summary judgment for the defendant, the driver of the other car. *Holley v. Smallwood*, 174 Ga. App. 365, 330 S.E.2d 136 (1985).

Application of the contradictory testimony rule was improper. — In a medical malpractice case brought by a married couple, it was error to grant summary judgment to the defendants based on the finding that the testimony of the couple's expert was conflicting and lacking in credibility; application of the contradictory testimony rule was improper when the testimony was that of a non-party expert witness, and accordingly, notwithstanding the inconsistencies in the ex-

pert's testimony, the trial court should have given the couple the benefit of the most favorable version of such testimony as a whole which the jury would be authorized to accept. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

While an expert witness can base opinions on medical records reviewed by the witness, subsection (e) of O.C.G.A. § 9-11-56 requires that sworn or certified copies of such material be attached to the affidavit. If such medical records are not part of the record in the case, the records would have no probative value. *Lance v. Elliott*, 202 Ga. App. 164, 413 S.E.2d 486 (1991).

7. Oral Testimony

Subsection (c) construed. — It is not the general purpose of subsection (c) of this section to permit use of oral testimony. *Price v. Star Serv. & Petro. Corp.*, 119 Ga. App. 171, 166 S.E.2d 593 (1969).

Section makes no reference to oral testimony. — This section refers strictly to affidavits, depositions, answers to interrogatories, and admissions on file, but does not refer to oral testimony. *Johnson v. Aetna Fin., Inc.*, 139 Ga. App. 452, 228 S.E.2d 299 (1976).

Motions not generally heard on oral testimony. — Generally, motions for summary judgment are not heard on oral testimony. *Orr v. Woodruff-Robinson, Inc.*, 142 Ga. App. 861, 237 S.E.2d 463 (1977).

Oral evidence may be used with proper notice. — Evidence on motion for summary judgment may be heard orally in some instances, provided proper notice is given. *Orr v. Woodruff-Robinson, Inc.*, 142 Ga. App. 861, 237 S.E.2d 467 (1977).

When motion for summary judgment is to be heard on oral testimony, proper notice must be given to the opposite party, unless notice is waived. *Myers v. McLarty*, 150 Ga. App. 432, 258 S.E.2d 56 (1979).

No obligation to permit use. — Law creates no obligation on court to permit use of oral evidence at a hearing on a motion for summary judgment. *Gunter v. National City Bank*, 239 Ga. 496, 238 S.E.2d 48 (1977).

Discretion of court. — While there may be circumstances in which the court may, in the court's sound discretion, permit use of oral evidence at the hearing on a motion for summary judgment as, for example, when both parties agree, there is no requirement that the court do so. *Johnson v. Aetna Fin., Inc.*, 139 Ga. App. 452, 228 S.E.2d 299 (1976).

In the exercise of sound discretion the trial court may permit the introduction of oral evidence, but there is no obligation that the court do so, and if the court does, it must be done in strict conformity with the law. *Pierce v. Gaskins*, 168 Ga. App. 446, 309 S.E.2d 658 (1983).

Introduction over objection not permitted. — Trial court is without authority to permit introduction of oral testimony over the opposing party's objection. *Pierce v. Gaskins*, 168 Ga. App. 446, 309 S.E.2d 658 (1983).

Denial of use of oral testimony not reversible error. — Denial of request to permit use of oral testimony on hearing on motion for summary judgment is not ground for reversal. *Price v. Star Serv. & Petro. Corp.*, 119 Ga. App. 171, 166 S.E.2d 593 (1969).

Writing requirement. — Evidentiary hearing on issue of damages following the defendant's default is subject to requirement that findings of fact and conclusions of law be in writing. *Marsh v. Way*, 170 Ga. App. 300, 316 S.E.2d 599 (1984).

Undisputed testimony of witnesses admitted in probate court will sustain grant of summary judgment admitting the will to probate. *Norton v. Georgia R.R. Bank & Trust*, 248 Ga. 847, 285 S.E.2d 910 (1982), aff'd, 253 Ga. 596, 322 S.E.2d 870 (1984).

Construction of Evidence and Inferences

Respondent's papers given considerable indulgence. — Movant's papers should be carefully scrutinized, while opposing party's papers are treated with considerable indulgence. *Herrington v. Stone Mt. Mem. Ass'n*, 119 Ga. App. 658, 168 S.E.2d 633, rev'd on other grounds, 225 Ga. 746, 171 S.E.2d 521 (1969); *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969); *Ham v.*

Construction of Evidence and Inferences (Cont'd)

Ham, 230 Ga. 43, 195 S.E.2d 429 (1973); Gregory v. Vance Publishing Corp., 130 Ga. App. 118, 202 S.E.2d 515 (1973); Lansky v. Goldstein, 136 Ga. App. 607, 222 S.E.2d 62 (1975); Piano & Organ Ctr., Inc. v. Southland Bonded Whse., Inc., 228 S.E.2d 615 (1976); Danny's Cabinet Shop, Inc. v. G & M Fire Extinguisher Sales & Serv., Inc., 149 Ga. App. 215, 253 S.E.2d 802 (1979); Sun First Nat'l Bank v. Gainesville 75, Ltd., 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Movant's proof is carefully scrutinized while respondent's proof is treated with indulgence. Whitehead v. Capital Auto. Co., 239 Ga. 460, 238 S.E.2d 104 (1977).

In determining whether any genuine issue of material fact exists, the court will treat the respondent's paper with considerable indulgence. Mallard v. Jenkins, 179 Ga. App. 582, 347 S.E.2d 339 (1986).

Court must carefully scrutinize movant's papers to determine whether the movant is entitled to judgment as a matter of law, regardless of the opponent's response or lack thereof. Southern Protective Prods. Co. v. Leasing Int'l, Inc., 134 Ga. App. 945, 216 S.E.2d 725 (1975).

Allegations of both the complaint and answer must be taken as true in a summary judgment case, unless the movant successfully pierces the allegations so as to show that no material issue of fact remains. Alexander v. Boston Old Colony Ins. Co., 127 Ga. App. 783, 195 S.E.2d 277 (1972); Gregory v. Vance Publishing Corp., 130 Ga. App. 118, 202 S.E.2d 515 (1973), overruled on other grounds, Clements v. Toombs County Hosp. Auth., 175 Ga. App. 651, 334 S.E.2d 188 (1985).

Allegations of both the petition and the answer must be taken as true in a summary judgment case, unless the movant successfully pierces the allegations so as to show that no material issue of fact remains. Cotton States Mut. Ins. Co. v. Martin, 110 Ga. App. 309, 138 S.E.2d 433 (1964); Butterworth v. Pettitt, 223 Ga. 355, 155 S.E.2d 20 (1967) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Piercing pleadings required before summary judgment. — Absent piercing of the pleadings, court errs in granting summary judgment. State Farm Mut. Auto. Ins. Co. v. Wendler, 115 Ga. App. 452, 154 S.E.2d 772 (1967).

On motion for summary judgment, pleadings of opposing party must be taken as true until it appears beyond controversy that no fact issue exists. Joiner v. Mitchell County Hosp. Auth., 125 Ga. App. 1, 186 S.E.2d 307 (1971), aff'd, 229 Ga. 140, 189 S.E.2d 412 (1972); Duke Enters., Inc. v. Espy, 140 Ga. App. 527, 231 S.E.2d 522 (1976); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82 (1979).

Evidence construed favorably to nonmovant and unfavorably to movant. — Party opposing motion for summary judgment is entitled to liberal construction in that party's favor of the pleadings and evidence. Saunders v. Vickers, 116 Ga. App. 733, 158 S.E.2d 324 (1967); Dollar v. First Bank, 153 Ga. App. 789, 266 S.E.2d 566 (1980); Mixon v. Georgia Bank & Trust Co., 154 Ga. App. 32, 267 S.E.2d 483 (1980).

On motions for summary judgment, evidence must be construed most favorably toward the party opposing the granting of summary judgment; and most unfavorably toward the party applying for the motion. State Hwy. Dep't v. Charles R. Shepherd, Inc., 119 Ga. App. 872, 168 S.E.2d 922 (1969); Pritchard v. Neal, 139 Ga. App. 512, 229 S.E.2d 18 (1976); Drake v. Leader Nat'l Ins. Co., 153 Ga. App. 314, 265 S.E.2d 114 (1980).

All evidence adduced on a motion for summary judgment, including the testimony of the party opposing the motion, was to be construed more strongly against the movant. Tri-Cities Hosp. Auth. v. Sheats, 247 Ga. 713, 279 S.E.2d 210 (1981).

All ambiguities and conclusions on consideration of summary judgment must be construed most favorably toward the respondent and against the movant. North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981).

Evidence must be construed most favorably to party opposing motion for summary judgment. McCarty v. Na-

tional Life & Accident Ins. Co., 107 Ga. App. 178, 129 S.E.2d 408 (1962) (decided under former Ga. L. 1959, p. 234, § 1 et seq.); Harris v. Stucki, 116 Ga. App. 371, 157 S.E.2d 507 (1967); Chandler v. Gately, 119 Ga. App. 513, 167 S.E.2d 697 (1969); Summer v. McCrory Corp., 146 Ga. App. 515, 249 S.E.2d 768 (1978); Keappler v. Allen, 152 Ga. App. 746, 264 S.E.2d 37 (1979); Mixon v. Georgia Bank & Trust Co., 154 Ga. App. 32, 267 S.E.2d 483 (1980).

Nonmovant given benefit of reasonable doubts and inferences. — Party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists, and the trial court must give that party the benefit of all favorable inferences that may be drawn from the evidence. Holland v. Sanfax Corp., 106 Ga. App. 1, 126 S.E.2d 442 (1962) (decided under former Ga. L. 1959, p. 234, § 1 et seq.); Malcom v. Malcolm, 112 Ga. App. 151, 144 S.E.2d 188 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.); Watkins v. Nationwide Mut. Fire Ins. Co., 113 Ga. App. 801, 149 S.E.2d 749 (1966) (decided under former Ga. L. 1959, p. 234, § 1 et seq.); Blount v. Seckinger Realty Co., 167 Ga. App. 778, 307 S.E.2d 683 (1983).

Party opposing motion for summary judgment must be given the benefit of all favorable inferences. McCarty v. National Life & Accident Ins. Co., 107 Ga. App. 178, 129 S.E.2d 408 (1962) (decided under Ga. L. 1959, p. 234, § 1 et seq.); Ussery v. Koch, 115 Ga. App. 463, 154 S.E.2d 879 (1967), overruled on other grounds, Raven v. Dodd's Auto Sales & Serv., Inc., 117 Ga. App. 416, 160 S.E.2d 633 (1968).

Party opposing motion for summary judgment must be given benefit of all reasonable doubts. McCarty v. National Life & Accident Ins. Co., 107 Ga. App. 178, 129 S.E.2d 408 (1962) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Party opposing motion for summary judgment is to be given benefit of all reasonable doubts in determining whether a genuine issue exists, and the trial court must give that party the benefit of all favorable inferences that may be drawn from the evidence. Chapman v. Turnbull Elevator, Inc., 116 Ga. App. 661,

158 S.E.2d 438 (1967); State Hwy. Dep't v. Charles R. Shepherd, Inc., 119 Ga. App. 872, 168 S.E.2d 922 (1969); Anderson v. Redwal Music Co., 122 Ga. App. 247, 176 S.E.2d 645 (1970); Cotton States Mut. Ins. Co. v. Proudfoot, 123 Ga. App. 397, 181 S.E.2d 305 (1971), later appeal, 126 Ga. App. 799, 191 S.E.2d 870 (1972), and 230 Ga. 169, 196 S.E.2d 131 (1973); Burton v. National Indem. Co., 123 Ga. App. 402, 181 S.E.2d 107 (1971); Lawson Prods., Inc. v. Rousey, 132 Ga. App. 726, 209 S.E.2d 125 (1974); Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

On motion for summary judgment, evidence must be construed most favorably to party opposing the motion, and the opposing party must be given the benefit of all reasonable doubts and all favorable inferences. Weekes v. Parker, 120 Ga. App. 549, 171 S.E.2d 660 (1969).

Law is very strict respecting motions for summary judgment and any doubt must be resolved in favor of respondent in such motions. Boston Ins. Co. v. Barnes, 120 Ga. App. 585, 171 S.E.2d 626 (1969).

All inferences must be resolved in favor of party opposing motion for summary judgment. W.J. Bremer, Inc. v. United Bonding Ins. Co., 122 Ga. App. 183, 176 S.E.2d 633 (1970); Scroggins v. Whitfield Fin. Co., 152 Ga. App. 8, 262 S.E.2d 168 (1979).

Every inference will be indulged in favor of defendants and all doubts will be resolved against plaintiff moving for summary judgment. Winkles v. Brown, 227 Ga. 33, 178 S.E.2d 865 (1970).

Evidence must be construed most favorably to the opposing party, and the trial court must give the opposing party the benefit of all favorable inferences that may be drawn from the evidence. Textile Prods., Inc. v. Fitts Cotton Goods, Inc., 124 Ga. App. 421, 184 S.E.2d 14 (1971); Smith v. Sandersville Prod. Credit Ass'n, 229 Ga. 65, 189 S.E.2d 432 (1972); Peachtree Bottle Shop, Inc. v. Bessemer Sec. Corp., 134 Ga. App. 729, 215 S.E.2d 692 (1975); City of Rome v. Turk, 235 Ga. 223, 219 S.E.2d 97 (1975); Indian Trail Village, Inc. v. Smith, 139 Ga. App. 691, 229 S.E.2d 508 (1976); Cumberland Assocs. v. Market Assistants, Inc., 142 Ga. App. 483, 236 S.E.2d 109 (1977); Jarriel v. Preferred

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Risk Mut. Ins. Co., 155 Ga. App. 136, 270 S.E.2d 238 (1980).

Party opposing motion for summary judgment is to be given benefit of all reasonable doubts in determining whether genuine issue exists. *Smith v. Sandersville Prod. Credit Ass'n*, 229 Ga. 65, 189 S.E.2d 432 (1972); *Peachtree Bottle Shop, Inc. v. Bessemer Sec. Corp.*, 134 Ga. App. 729, 215 S.E.2d 692 (1975); *National Life Assurance Co. v. Massey-Ferguson Credit Corp.*, 136 Ga. App. 311, 220 S.E.2d 793 (1975); *Cumberland Assocs. v. Market Assistants, Inc.*, 142 Ga. App. 483, 236 S.E.2d 109 (1977).

Party resisting motion for summary judgment is given benefit of all favorable inferences that may be drawn from the evidence. *Benson Paint Co. v. Williams Constr. Co.*, 128 Ga. App. 47, 195 S.E.2d 671 (1973); *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 202 S.E.2d 515 (1973), overruled on other grounds, *Clements v. Toombs County Hosp. Auth.*, 175 Ga. App. 651, 334 S.E.2d 188 (1985); *Mattison v. Travelers Indemn. Co.*, 157 Ga. App. 372, 277 S.E.2d 746 (1981).

All inferences, all ambiguities, and all doubts are resolved against the movant for summary judgment and in favor of the party opposing the grant of summary judgment. *Summers v. Milcon Corp.*, 134 Ga. App. 182, 213 S.E.2d 515 (1975).

Opposing party is given the benefit of all reasonable doubts and favorable inferences that may be drawn from the evidence, and the moving party is entitled to judgment as a matter of law only if there is no genuine issue as to any material fact. *Hip Pocket, Inc. v. Levi Strauss & Co.*, 144 Ga. App. 792, 242 S.E.2d 305 (1978).

Party opposing the motion for summary judgment is to be given the benefit of all reasonable doubts and all favorable inferences that may be drawn from the evidence. *Eiberger v. West*, 247 Ga. 767, 281 S.E.2d 148 (1981).

All inferences of fact from the proof proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. *Jonesboro Tool*

& Die Corp. v. Georgia Power Co., 158 Ga. App. 755, 282 S.E.2d 211 (1981).

Parties opposing the motion are entitled to all favorable inferences and the evidence is to be construed most strongly in their favor. *Hanover Ins. Co. v. Nelson Conveyor & Mach. Co.*, 159 Ga. App. 13, 282 S.E.2d 670 (1981).

On a motion for summary judgment, the evidence must be construed most strongly against the movant, and the party opposing the motion is entitled to all inferences that may fairly and reasonably be drawn in support of the nonmovant's case. *Vizzini v. Blonder*, 165 Ga. App. 840, 303 S.E.2d 38 (1983).

On a motion for summary judgment, the party opposing the motion is to be given the benefit of all reasonable doubts and all favorable inferences that may be drawn from the evidence; this is so even when the movant is the party on whom the burden of proof at trial does not lie. *Georgia Int'l Life Ins. Co. v. Huckabee*, 175 Ga. App. 343, 333 S.E.2d 618 (1985).

In ruling on a motion for summary judgment, the opposing party should be given the benefit of all reasonable doubt and the court should construe the evidence and all inferences and conclusions arising therefrom most favorably toward the party opposing the motion; moreover, opinion evidence can be sufficient to preclude the grant of summary judgment. *Mitchell v. Rainey*, 187 Ga. App. 510, 370 S.E.2d 673 (1988).

Evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor. *Barber v. Perdue*, 194 Ga. App. 287, 390 S.E.2d 234 (1989), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 414 (1990).

When the evidence is ambiguous or doubtful, the party opposing the motion must be given the benefit of all reasonable doubts and all favorable inferences and such evidence must be construed most favorably to the party opposing the motion. *Jordan v. Ailstock*, 230 Ga. 67, 195 S.E.2d 425 (1973); *Match Point, Ltd. v. Adams*, 148 Ga. App. 673, 252 S.E.2d 90 (1979), overruled on other grounds, *Mock v. Canterbury Realty Co.*, 152 Ga. App. 872, 264 S.E.2d 489 (1980); *Reese v. Sand-*

ers, 153 Ga. App. 654, 266 S.E.2d 313 (1980).

Construction of testimony of parties. — Although general rule is that upon trial of case testimony of party litigant, when self-contradictory or ambivalent, must be construed against the litigant, yet on motion for summary judgment made by party upon whom burden of proof does not lie at trial, all evidence must be construed against the movant and in favor of the party opposing the motion. *Columbia Drug Co. v. Cook*, 127 Ga. App. 490, 194 S.E.2d 286 (1972); *Benton Bros. Ford Co. v. Cotton States Mut. Ins. Co.*, 157 Ga. App. 448, 278 S.E.2d 40 (1981).

In dealing with summary judgments, the rule concerning construction of party's testimony is to adopt that construction favorable to the opposing party when conflicting testimony comes from a litigant. *Johnson v. Curenton*, 127 Ga. App. 687, 195 S.E.2d 279 (1972).

All evidence and materials submitted on a motion for summary judgment, including testimony of the parties, must be construed most strongly against the movant. *Keheley v. Benham*, 155 Ga. App. 59, 270 S.E.2d 285 (1980).

Once the trial court has eliminated the favorable portions of contradictory testimony, the court must take all testimony on motion for summary judgment as the testimony then stands, and construe the testimony in favor of the party opposing the motion in determining whether summary judgment should be granted. *Prophesy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 343 S.E.2d 680 (1986).

Vague or contradictory testimony.

— Rule as to construing evidence most favorably to the party opposing the motion for summary judgment applies to testimony of that party, even though the testimony may be vague and contradictory. *Jordan v. Ailstock*, 230 Ga. 67, 195 S.E.2d 425 (1973); *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 202 S.E.2d 515 (1973); *Match Point, Ltd. v. Adams*, 148 Ga. App. 673, 252 S.E.2d 90 (1979); *Aiken v. Drexler Shower Door Co.*, 155 Ga. App. 436, 270 S.E.2d 831 (1980).

"Contradictory testimony rule" applies to testimony presented in support or response to a motion for summary judgment.

This rule provides that a party's self-conflicting testimony is to be construed against the party. If a reasonable explanation is offered for the contradiction, however, the inconsistency will not be construed against the party witness. The burden rests on the party giving the contradictory testimony to tender the reasonable explanation, and whether this has been done is an issue of law. *Stone v. Dayton Hudson Corp.*, 193 Ga. App. 752, 388 S.E.2d 909 (1989).

If no explanation is given for the conflict in testimony or a party's explanation is determined to be unreasonable, the trial court must eliminate the favorable portions of the contradictory testimony and then take all testimony on motion for summary judgment, as it then stands, and construe the evidence in favor of the party opposing the motion in determining whether summary judgment should be granted. *Stone v. Dayton Hudson Corp.*, 193 Ga. App. 752, 388 S.E.2d 909 (1989).

Self-contradictory statements. —

When the respondent to a motion for summary judgment makes deliberate and intentional self-contradictory statements about a material issue of fact, that party's unfavorable testimony may be used against that party. *Ward v. Griffith*, 162 Ga. App. 194, 290 S.E.2d 290 (1982).

Contradictions by movant to be resolved against movant. —

When a party directly contradicts themselves, the conflict will be resolved against the party on a motion for summary judgment unless a reasonable explanation is offered. *Georgia Farm Bureau Mut. Ins. Co. v. Nolan*, 180 Ga. App. 28, 348 S.E.2d 554 (1986).

Conflict or contradiction in testimony of opposing party,

must be construed in the opposing party's favor; such contradictions, at the most, may themselves create a conflict in the evidence, as well as a question of credibility, which is solely for the jury. *Keheley v. Benham*, 155 Ga. App. 59, 270 S.E.2d 285 (1980).

When the deponent's testimony is somewhat vague and inconsistent, but does not disclose an attempt to confuse or mislead the court, although such inconsistency might weaken the deponent's case at trial it does not, as a matter of law, entitle the movant to summary judgment. *Aiken v.*

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Drexler Shower Door Co., 155 Ga. App. 436, 270 S.E.2d 831 (1980).

Inconsistencies between plaintiff nonmovant's affidavit and deposition immaterial. — On motion for summary judgment made by the defendant, it is immaterial that there are inconsistencies between the plaintiff's affidavit and the deposition, as that part of the plaintiff's testimony most favorable to the plaintiff's position will be taken as true. *Columbia Drug Co. v. Cook*, 127 Ga. App. 490, 194 S.E.2d 286 (1972); *Roberson v. Home Ins. Co.*, 149 Ga. App. 590, 254 S.E.2d 908 (1979). But see *Davis v. Ferrell*, 118 Ga. App. 690, 165 S.E.2d 313 (1968), construing plaintiff's deposition testimony which conflicted with his affidavit most strongly against him.

Intentional or deliberate self-contradictions. — When a party is intentionally or deliberately self-contradictory, the court may be justified in taking against the party that version of the party's testimony which is most unfavorable to the party. *Brooks v. Douglas*, 154 Ga. App. 54, 267 S.E.2d 495 (1980); *Combs v. Adair Mtg. Co.*, 155 Ga. App. 432, 270 S.E.2d 828 (1980); *Aiken v. Drexler Shower Door Co.*, 155 Ga. App. 436, 270 S.E.2d 831 (1980).

Only if party testifying in that party's own behalf intentionally or deliberately contradicts oneself in order to confuse or mislead the court so as to elude summary judgment shall the more favorable portion of the contradictory testimony be treated as though it did not exist. *Aiken v. Drexler Shower Door Co.*, 155 Ga. App. 436, 270 S.E.2d 831 (1980).

Explanation by party of contradictions. — Rule in *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 343 S.E.2d 680 (1986), that when a party offers a reasonable explanation for contradictory testimony the inconsistency will not be used against the party, applies to the movants for summary judgment as well as the respondents, so that if a movant for summary judgment provides a reasonable explanation for a contradiction, the inconsistency will not be con-

strued against the movant. However, the reasonable explanation merely permits the favorable portion of the contradictory testimony to remain as evidence to be considered; it does not operate to eliminate the unfavorable testimony so as to establish any fact authorizing the grant of summary judgment. *Gentile v. Miller, Stevenson & Steinichen, Inc.*, 257 Ga. 583, 361 S.E.2d 383 (1987).

Contradictory statements by nonparty witnesses. — Requirement that testimony of a party who personally offers to be a witness in one's own behalf is to be construed most strongly against that party, when passing upon a motion for summary judgment, does not apply to contradictory statements by witnesses who are not parties to the litigation. *Miller v. Douglas*, 235 Ga. 222, 219 S.E.2d 144 (1975).

Effect of burden of proof at trial. — Doubts are to be resolved against the movant, even if at trial opposing party would have burden of proof. *Whitehead v. Capital Auto. Co.*, 239 Ga. 460, 238 S.E.2d 104 (1977).

All evidence adduced on motion for summary judgment, including testimony of party upholding the motion, is construed more strongly against the movant, even though the movant may not be the party upon whom the burden of proof lies at trial. *Combs v. Adair Mtg. Co.*, 245 Ga. 296, 264 S.E.2d 226 (1980).

Application of Prophecy rule. — Appellate court properly found that the company was not entitled to summary judgment as even though the Prophecy rule applied such that a party could adopt the party's unsworn statement that the party affirmed under oath even when the unsworn statement contradicted the party's later, sworn testimony, the record did not show that the employee affirmed under oath that portion of the employee's unsworn statement that the company relied on to obtain summary judgment in the employee's personal injury case, and, thus, the employee was entitled to rely on the employee's later, more favorable deposition testimony, which created a genuine issue of material fact and precluded summary judgment. *CSX Transp., Inc. v. Belcher*, 276 Ga. 522, 579 S.E.2d 737 (2003).

Insufficient evidence. — Defendants may prevail under subsection (e) of O.C.G.A. § 9-11-56 by showing the court that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of a plaintiff's case. *Bandy v. Mills*, 216 Ga. App. 407, 454 S.E.2d 610 (1995).

Circumstantial evidence as basis for summary judgment. — Trial court's denial of the first possible motorist and second possible motorist's summary judgment motion was error as the motorist and the passenger conceded that the second possible driver was neither the owner nor the driver of the car that struck the motorist and the passenger's vehicle, and circumstantial evidence failed to point more strongly to a conclusion opposite the direct testimony of the first possible driver and the second possible driver that their car which struck the motorist and the passenger's vehicle had been stolen on the night in question and, therefore, the first possible driver was not driving the car when the car struck the motorist and passenger's vehicle. *Rosales v. Davis*, 260 Ga. App. 709, 580 S.E.2d 662 (2003).

More specificity required to support motion. — When the administrative law judge used the improper legal standard when the judge granted summary judgment to the Georgia Environmental Protection Division on grounds that the draft permit included the name of the receiving body of water in the fact sheet attached with the draft permit, more specificity was required and, thus, reversal of the summary judgment order was warranted. *Hughey v. Gwinnett County*, 278 Ga. 740, 609 S.E.2d 324 (2004).

Clear and convincing evidence to support appointment of conservator. — Similar to a ruling on a motion for summary judgment in a civil action, because a parent's gravely-impaired judgment, which combined with a physical frailty and impaired vision, made the parent vulnerable to exploitation by a new person living with the parent, the probate court properly concluded that the parent lacked sufficient understanding to make significant responsible decisions concern-

ing the management of the parent's property; moreover, because the parent chose not to include the transcript of the evidence in the appellate record, and, as any pre-trial ruling on the parent's capabilities was, after a trial determining the matter, harmless if not moot, the probate court's ruling was upheld. *Yetman v. Walsh*, 282 Ga. App. 499, 639 S.E.2d 491 (2006).

Time and Notice for Hearing of Motion for Summary Judgment

Spirit of the summary judgment procedure. — Granting motion for summary judgment without affording opposite side time provided or without giving notice or opportunity to be heard does not comport with spirit of this section. *Peoples Fin. Corp. v. Jones*, 134 Ga. App. 649, 215 S.E.2d 711 (1975).

Denial of motion for extension of time proper. — Because a motion for an extension of time to respond to a summary judgment motion and conduct additional discovery failed to set forth specific reasons why additional time was necessary and failed to include the affidavit required under O.C.G.A. § 9-11-56(f), a trial court acted within the court's discretion in declining to grant the requested extension of time. *Smyrna Dev. Co. v. Whitener Ltd. P'ship*, 280 Ga. App. 788, 635 S.E.2d 173 (2006).

Notice of affirmative defense. — Affirmative defense of limitations cannot be raised for the first time orally at a hearing on a summary judgment motion without any notice to the opposing party. *Hansford v. Robinson*, 255 Ga. 530, 340 S.E.2d 614 (1986).

Phrase "at any time" is simply used to distinguish between times plaintiffs and defendants have in which to file a motion for summary judgment; it means at any time before a trial begins in which a final judgment is to be rendered, and does not mean that a motion for summary judgment may be filed without any time limit whatsoever. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 110 Ga. App. 515, 139 S.E.2d 124 (1964) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Party may move for summary judgment at any time. — Party against

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whom claim is asserted may move at any time for summary judgment. *Fierer v. Ashe*, 147 Ga. App. 446, 249 S.E.2d 270 (1978); *Christian v. Allstate Ins. Co.*, 152 Ga. App. 358, 262 S.E.2d 621 (1979).

Defendant may move at any time for summary judgment, with or without supporting affidavits. *Nimmer v. Strickland*, 242 Ga. 430, 249 S.E.2d 233 (1978).

Notice and hearing required. — Subsection (c) of O.C.G.A. § 9-11-56 requires notice to an adverse party and a hearing. *Ferguson v. Miller*, 160 Ga. App. 436, 287 S.E.2d 363 (1981).

Trial court erred in granting summary judgment on an election candidate's claim for defamation by a radio broadcast as the candidate did not have a full and fair opportunity to meet and attempt to controvert the assertions with respect to that claim. *Howard v. Pope*, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

Party must have 30 days' notice of hearing and an opportunity to respond to a motion for summary judgment. *Leverich v. Roddenberry Farms, Inc.*, 253 Ga. 414, 321 S.E.2d 328 (1984).

When a motion to dismiss was converted to a motion for summary judgment, and nothing in the record reflected that the plaintiff received any notice that the motion would be heard, the dismissal of the complaint was error. *Barrett v. Wharton*, 196 Ga. App. 688, 396 S.E.2d 603 (1990).

Granting the plaintiffs motion for summary judgment without holding a hearing or fixing a time for a hearing thereon and without giving the defendant notice of the time when judgment would be rendered is a procedural shortcoming requiring reversal. *Smith v. Conley*, 152 Ga. App. 589, 263 S.E.2d 453 (1979).

Actual notice. — Spirit of the summary judgment procedure contemplates that the respondent shall have actual notice of a day upon which the matter will be heard and judgment rendered upon the record then existing. A mere reference to the local court rules sent by the attorney does not give such actual notice and an

opportunity to be heard. *Ferguson v. Miller*, 160 Ga. App. 436, 287 S.E.2d 363 (1981).

Failure to give notice. — It is error to grant final relief without giving party opposing motion statutory requirement of notice prior to a hearing on the merits of the claim for final relief. *Royston v. Royston*, 236 Ga. 648, 225 S.E.2d 41 (1976).

Court's error in conducting a hearing on the defendant's motion in absence of proper service of notice of the hearing on the plaintiff was not harmless since the plaintiff was deprived of the plaintiff's statutory right to file opposing affidavits up to one day before the hearing. *Goodwin v. Richmond*, 182 Ga. App. 745, 356 S.E.2d 888 (1987).

When a trial court orally noted that a limitations period did not bar a lessor's action to recover for a lessee's alleged default in the lessee's financing obligations for office equipment, such was not controlling since the trial court's written order sua sponte granted summary judgment to the lessor on a finding that all defenses were barred by a prior order of the Bankruptcy Court; however, when there was no indication that proper notice had been provided to the lessee, it was determined that the lessee had not been given a full opportunity to address the basis on which the summary judgment order had been entered. *Carroll v. Finova Capital Corp.*, 265 Ga. App. 517, 594 S.E.2d 720 (2004).

In a wrongful foreclosure action, the trial court erred in conducting a hearing on the defendants' motion to dismiss and in converting the motion to dismiss into a motion for summary judgment by considering evidence outside the pleadings, without giving the plaintiff prior notice as the trial court's notice of hearing stated that the court was conducting a status conference, and the notice made no mention of the defendants' motion to dismiss. *Garner v. US Bank Nat'l Ass'n*, 329 Ga. App. 86, 763 S.E.2d 748 (2014).

Statutorily mandated service requirement waived. — Even though the defendant was never served with a motion for summary judgment, since the trial court gave the defendant fair notice of,

and an opportunity to respond to, the motion, the statutorily-mandated service requirement was waived. *Ferguson v. Duron, Inc.*, 244 Ga. App. 19, 534 S.E.2d 142 (2000).

Receipt of notice of claim. — Summary judgment for an insurer was reversed as factual issues remained as to whether an insurance agency was able to accept notices of claims on behalf of an insurer as a fiduciary and as a dual agent. *Bowen Tree Surgs., Inc. v. Canal Indem. Co.*, 264 Ga. App. 520, 591 S.E.2d 415 (2003).

Grant of summary judgment without notice at hearing on motion to compel. — It was error to grant summary judgment in the defendant's favor in the plaintiff's absence at a hearing on a motion to compel, without notice to the plaintiff that summary judgment would be heard or that a judgment for money damages would be sought on grounds entirely distinct from those pled in a prior summary judgment motion, and by support of an affidavit of which the plaintiff had no notice. *Jackson v. Bekele*, 152 Ga. App. 417, 263 S.E.2d 225 (1979).

Hearing motion before discovery complete. — Trial court did not abuse the court's discretion by hearing the plaintiff's motion for summary judgment before discovery was complete. *Garner v. Roberts*, 238 Ga. App. 738, 520 S.E.2d 255 (1999).

Ruling on summary judgment motion instead of discovery motion. — Trial court did not abuse the court's discretion in not ruling on a motion to compel discovery prior to ruling on a motion for summary judgment because the questions from the discovery procedure sought to clearly invade the attorney-client privilege. *NationsBank v. SouthTrust Bank*, 226 Ga. App. 888, 487 S.E.2d 701 (1997).

Trial court's consideration of a summary judgment motion by the defendant was premature as the plaintiffs raised discovery issues that required judicial scrutiny; accordingly, the case had to be remanded to permit consideration of the plaintiffs' motion to compel discovery that was denied by the trial court. *Parks v. Hyundai Motor Am., Inc.*, 258 Ga. App. 876, 575 S.E.2d 673 (2002).

Hearing of Motion for Summary Judgment

Purpose of hearing. — Obvious purpose of hearing on motion for summary judgment is to provide counsel with an opportunity to persuade the court and to provide the court with an opportunity to interrogate counsel. *Premium Distrib. Co. v. National Distrib. Co.*, 157 Ga. App. 666, 278 S.E.2d 468 (1981).

Hearing procedure is designed to give the opposing party fair opportunity to contradict the supporting material relied upon by the movant. *Porter Coatings v. Stein Steel & Supply Co.*, 247 Ga. 631, 278 S.E.2d 377 (1981).

Subsection (c) of O.C.G.A. § 9-11-56 requires that hearing date be set and hearing conducted before a motion for summary judgment is granted; the failure of the trial court to do so is error. *Premium Distrib. Co. v. National Distrib. Co.*, 157 Ga. App. 666, 278 S.E.2d 468 (1981).

"Hearing" does not necessarily mean an oral hearing, but O.C.G.A. § 9-11-56 at the very least contemplates notice to the respondent that the matter will be heard and taken under advisement as of a certain day. *Ferguson v. Miller*, 160 Ga. App. 436, 287 S.E.2d 363 (1981).

"Hearing" means opportunity to respond. — Hearing referred to in subsection (c) of O.C.G.A. § 9-11-56 simply means an opportunity to respond. If the adverse party is given this opportunity, then the party has been heard within the meaning of that statute. *Brown v. Shiver*, 183 Ga. App. 207, 358 S.E.2d 862 (1987).

Both respondent and movant have a right to be heard as provided in O.C.G.A. § 9-11-56. *Sentry Ins. v. Echols*, 174 Ga. App. 541, 330 S.E.2d 725 (1985).

Duty of each party at a hearing on the motion for summary judgment is to present each party's case in full. *Bible Farm Serv., Inc. v. House Hasson Hdwe. Co.*, 157 Ga. App. 358, 277 S.E.2d 341 (1981); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981).

Opposing party to present evidence at time of hearing. — When there has been an order to show cause under a motion for summary judgment, the time for the opposite party to present that

Hearing of Motion for Summary Judgment (Cont'd)

party's relevant evidence, if any, is at the time of the hearing on the order to show cause, and if this is not done, it is too late to complain later. *Scales v. Peevy*, 103 Ga. App. 42, 118 S.E.2d 193 (1961) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Time for party opposing motion for summary judgment to present relevant evidence or show satisfactory reasons for nonproduction is at hearing on an order to show cause, and if this is not done, it is too late to complain later. *King v. Fryer*, 107 Ga. App. 715, 131 S.E.2d 203 (1963); *Planters Rural Tel. Coop. v. Chance*, 108 Ga. App. 146, 132 S.E.2d 90 (1963) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Defendant's failure to demand hearing does not constitute waiver of that right. *Premium Distrib. Co. v. National Distrib. Co.*, 157 Ga. App. 666, 278 S.E.2d 468 (1981).

Hearing sanctioned even if motion never filed. — In a procedural context, the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, sanctions the hearing of a motion for summary judgment even though no such motion is ever filed. *Richmond Leasing Co. v. First Union Bank*, 188 Ga. App. 843, 374 S.E.2d 746, cert. denied, 188 Ga. App. 912, 374 S.E.2d 746 (1988).

Denial of motion does not negate need for hearing. — Necessity of a hearing in accordance with O.C.G.A. § 9-11-56 is not abrogated merely because the motion is ultimately denied. *Sentry Ins. v. Echols*, 174 Ga. App. 541, 330 S.E.2d 725 (1985).

Failure to hold hearing. — When the record and the briefs of the parties reflect that, while a hearing on the motion was scheduled and the parties notified, no hearing was actually held, the appropriate course of action is to remand the case to the trial court for a determination as to whether the respondent waived the respondent's right to a hearing. *Hillis v. First Nat'l Bank*, 168 Ga. App. 408, 309 S.E.2d 404 (1983).

While it was error for the trial court to fail to hold a hearing on a motion for

summary judgment, which was granted, as the losing parties did not show harm by the denial of their right to a hearing — not stating what defense they expected to raise and not arguing that the grant of summary judgment was improper — a reversal was not demanded. *Harper v. Birmingham Trust Nat'l Bank*, 171 Ga. App. 618, 320 S.E.2d 622 (1984).

Failure of a trial court to hold a hearing on a motion for summary judgment prior to a ruling thereon is error; nonetheless, that error is not reversible absent a showing of harm. *Sentry Ins. v. Echols*, 174 Ga. App. 541, 330 S.E.2d 725 (1985); *Christensen v. State*, 219 Ga. App. 10, 464 S.E.2d 14 (1995).

Purpose of the 30 day waiting period required by O.C.G.A. § 9-11-56 is to place the opposing party on notice as to the material relied upon by the movant in support of the motion so that the opposing party might have sufficient opportunity to prepare a response. *Benton Bros. Ford Co. v. Cotton States Mut. Ins. Co.*, 157 Ga. App. 448, 278 S.E.2d 40 (1981).

Statutory requisite that, unless waived or extended, supporting material must be on file at least 30 days before a summary judgment hearing is an implementation of the fundamental principle of due process. *Bonds v. John Wieland Homes, Inc.*, 177 Ga. App. 254, 339 S.E.2d 318 (1985).

Service of motion less than 30 days before hearing. — When motion for summary judgment is served less than 30 days before the time fixed for hearing, but no prejudice occurs to the party opposing the motion, the trial court may properly proceed with the hearing. *Cel-Ko Bldrs. & Developers, Inc. v. BX Corp.*, 136 Ga. App. 777, 222 S.E.2d 94 (1975).

Waiver of 30-day requirement. — The 30-day requirement under subsection (c) of O.C.G.A. § 9-11-56 can be waived. *Mobley v. Coast House, Ltd.*, 182 Ga. App. 305, 355 S.E.2d 686 (1987).

When the trial court inquired of counsel the best time available to hear the several pending motions and respondent's attorney expressly asked the court to rule upon all motions for summary judgment at one time and no mention or objection was made by the attorney that only six days had expired between the time of filing and

the time of ruling on several of the motions, any defect as to the timeliness of the granting of the disputed motions for summary judgment was waived. *Mobley v. Coast House, Ltd.*, 182 Ga. App. 305, 355 S.E.2d 686 (1987).

Court did not err in holding a hearing on a summary judgment motion only 15 days after the motion was supplemented with citations to authority, and did not deprive the nonmovants of the right to 30 days to respond, when the nonmovants waived expansion of the time and resetting of the trial by not only rejecting the court's offer but by affirmatively asking the court to move forward with the summary judgment determination. *Southern Trust Ins. Co. v. Georgia Farm Bureau Mut. Ins. Co.*, 194 Ga. App. 751, 391 S.E.2d 793 (1990).

Nonmoving party waived the matter of the trial court's failure to comply with the procedural mandate that the nonmoving party be afforded 30 days within which to respond to a motion as the nonmoving party for summary judgment failed to raise this procedural defect at the hearing. *Dennisson v. Lakeway Publishers, Inc.*, 196 Ga. App. 85, 395 S.E.2d 366 (1990).

Timeliness of hearing waived by appearance and argument. — When both parties appeared and argued plaintiff's motion to strike and dismiss (in effect a motion for summary judgment or judgment on the pleadings) on the day assigned, without objection as to time, no complaint may later be made as to the timeliness of the hearing. *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969).

Permissible not to require oral argument hearing unless requested. — When O.C.G.A. §§ 9-11-56, 9-11-78, and 9-11-83 are considered in conjunction, it is permissible for the court rules to provide that an oral argument hearing is not required unless the party requests a hearing. *Dallas Blue Haven Pools, Inc. v. Taslimi*, 180 Ga. App. 734, 350 S.E.2d 265 (1986), *aff'd*, 256 Ga. 739, 354 S.E.2d 160 (1987).

When timely response to motion filed, oral argument erroneously denied. — Because the responding party

timely responded to a summary judgment motion, pursuant to Ga. Unif. Super. Ct. R. 6.3, the trial court erred in denying that party oral argument on that motion and in granting summary judgment to the movant. *Green v. Raw Deal, Inc.*, 290 Ga. App. 464, 659 S.E.2d 856 (2008).

Entry of order prior to expiration of 30 day period. — Unless the record unequivocally demonstrates that the nonmovant's defenses to the motion are wholly meritless and frivolous or the nonmovant fails to raise the procedural defect at the hearing, the trial court's entry of an order on the motion prior to the expiration of 30 days from its service is reversible error, even though the trial court may ultimately determine on a renewed motion that the movant is entitled to summary judgment. *Dixon v. Midland Ins. Co.*, 168 Ga. App. 319, 309 S.E.2d 147 (1983); *U. S. Traffic Corp. v. Turcotte*, 246 Ga. App. 187, 539 S.E.2d 884 (2000).

Trial court's error in initially ruling upon a motion for summary judgment before expiration of the 30-day response period was not prejudicial since the court reaffirmed the court's grant of summary judgment after the expiration of the 30-day period during which time no response was made. *Segrest v. Intown Value Hdwe., Inc.*, 190 Ga. App. 588, 379 S.E.2d 615 (1989).

Trial court's error in granting the defendants' summary judgment motion prior to the end of the 30-day response period did not require reversal and remand when the plaintiff's action was barred by the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. Ch. 9, T. 34. *Larraga v. Aetna Cas. & Sur. Co.*, 222 Ga. App. 654, 475 S.E.2d 649 (1996).

Entry of judgment for both movant and nonmovant plaintiffs permitted when defendant has notice of issues.

— It is proper to enter summary judgment in favor of nonmovant party plaintiff as well as for movant party plaintiff, absent written notice or waiver thereof if issues are the same as those involved in the movant's motion of which the opposite parties have notice. *Cruce v. Randall*, 245 Ga. 669, 266 S.E.2d 486 (1980).

Continuance or refusal to allow filing when opposing affidavits not

Hearing of Motion for Summary Judgment (Cont'd)

served prior to hearing. — There may be situations when failure to serve opposing affidavits prior to the day of hearing will result in the trial court refusing with propriety to allow the affidavits to be filed, or situations when the court may allow the affidavits to be filed but grant a motion for continuance. *Simmons v. State Farm Mut. Auto. Ins. Co.*, 111 Ga. App. 738, 143 S.E.2d 55 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Conversion of Other Motions to Motions for Summary Judgment

Conversion of motion to dismiss. — Party is entitled to notice of conversion of motion to dismiss into a motion for summary judgment as well as 30 days to respond to such motion. *Riverhill Community Ass'n v. Cobb County Bd. of Comm'rs*, 236 Ga. 856, 226 S.E.2d 54 (1976).

When on a hearing on a motion to dismiss a complaint because of failure to state a claim, evidence is introduced and admitted by the court, the motion to dismiss is converted to one for summary judgment, and the opposing party must be given 30 days notice of the motion. *Jaynes v. Douglas*, 147 Ga. App. 678, 250 S.E.2d 14 (1978).

Upon the trial court's conversion of a motion to dismiss to one for summary judgment, being the first notice to the plaintiffs in the record that the motion was one for summary judgment, the plaintiffs were then entitled to 30 days to respond to the motion as converted before a ruling was made on the motion, and the entry of the trial court's order on the summary judgment motion without allowing the plaintiffs 30 days to respond was error. *Hart v. Sullivan*, 197 Ga. App. 759, 399 S.E.2d 523 (1990).

Attachment of an affidavit to a motion to dismiss does not constitute notice that the motion will be converted to a motion for summary judgment. Until the trial court decides whether to consider or exclude matters outside the pleadings, the mere attachment of an affidavit to a motion to dismiss should not be construed to constitute notice of the conversion of that

motion to dismiss into a summary judgment motion. *Hart v. Sullivan*, 197 Ga. App. 759, 399 S.E.2d 523 (1990).

Trial court's order denying dismissal of a fraud claim in a medical malpractice action against a doctor, upon a motion which the trial court treated as one for summary judgment when the court considered material beyond the pleadings, was reversed as there was no evidence that the doctor knew or even suspected that the patient had a pancreatic tumor, or that the doctor withheld information regarding the tumor; thus, the doctrine of equitable estoppel did not apply and the fraud claim was barred by the statute of repose, O.C.G.A. § 9-3-71(b). *Balotin v. Simpson*, 286 Ga. App. 772, 650 S.E.2d 253 (2007), cert. denied, 2007 Ga. LEXIS 803 (Ga. 2007).

When a party did not object in the trial court to the conversion of a motion to dismiss for failure to state a claim into one for summary judgment, and the party did not challenge or address the conversion on appeal, any objection to the conversion was waived. *Action Concrete v. Portrait Homes - Little Suwanee Point, LLC*, 285 Ga. App. 650, 647 S.E.2d 353 (2007).

When motions to dismiss asserted, among other things, that the complaint failed to state a claim and the trial court considered material beyond the pleadings in ruling on the motions to dismiss, those motions were required to be treated as motions for summary judgment, and the losing party maintained the right to a direct appeal from an order granting partial summary judgment. *City of Demorest v. Town of Mt. Airy*, 282 Ga. 653, 653 S.E.2d 43 (2007).

Trial court erred in failing to grant a client's request for a hearing on a former attorney's motion to dismiss claims for legal malpractice and intentional infliction of emotional distress because the trial court considered matters outside the pleadings. Under O.C.G.A. § 9-11-12(b), the motion was required to be treated as one for summary judgment and disposed of as provided in O.C.G.A. § 9-11-56, and all parties were to be given a reasonable opportunity to present all material made pertinent to such a motion. *Fitzpatrick v. Harrison*, 300 Ga. App. 672, 686 S.E.2d 322 (2009).

Conversion of motion for judgment on pleadings. — When there is only a motion for judgment on the pleadings under consideration, which motion is converted into a motion for summary judgment by the presentation of matters outside the pleadings not excluded by the court, the trial judge must give reasonable opportunity to the opposing party to present all material pertinent to such motion; however, when a motion filed and heard is for summary judgment as well as judgment on the pleadings, and a motion for summary judgment is the only motion ruled upon, there is no requirement that the trial court offer the opposing party a reasonable opportunity to secure evidence or materials as the opposing party has already had notice that such would be required. *Hanson v. Byers*, 120 Ga. App. 298, 170 S.E.2d 315 (1969).

Personal guarantor did not show that the guarantor was harmed by a trial court's converting a bank's motion for judgment on the pleadings to a motion for summary judgment because the guarantor did not show that given additional time the guarantor would have filed additional affidavits or other supporting documentation in response to the motion for summary judgment. *Brooks v. Multibank 2009-1 RES-ADC Venture, LLC*, 317 Ga. App. 264, 730 S.E.2d 509 (2012).

Conversion of interlocutory injunction application. — Trial court has the authority to convert an application for interlocutory injunction into a motion for summary judgment. However, the court cannot do so without compliance with the provisions of subsection (c) of O.C.G.A. § 9-11-56. *Charming Shoppes, Inc. v. Black*, 252 Ga. 207, 312 S.E.2d 604 (1984); *Electronic Data Sys. Corp. v. Heinemann*, 217 Ga. App. 816, 459 S.E.2d 457 (1995).

Motion at hearing for temporary relief. — Motion for summary judgment can be made orally at hearing for temporary relief. *Royston v. Royston*, 236 Ga. 648, 225 S.E.2d 41 (1976).

Hearing on interlocutory injunction held not one for summary judgment. — When no motion to dismiss the complaint or other motions or responsive pleadings are made until after the plaintiffs have presented evidence at a hearing

on an application for interlocutory injunction, the hearing cannot properly be considered as a hearing on a motion for summary judgment. *McGregor v. Town of Fort Oglethorpe*, 236 Ga. 711, 225 S.E.2d 238 (1976).

Summary judgment for nonjoinder of indispensable party improper at hearing adjudicating indispensability. — It is not proper for the trial court to grant summary judgment against the plaintiff for failure to have an indispensable party joined in the same order in which the trial court adjudicates that individual to be indispensable. *Fradley v. Irvin*, 245 Ga. 307, 264 S.E.2d 866 (1980).

Time for trial on permanent child custody. — After time for filing defensive pleadings expires, it is not error for permanent child custody hearing to be set by rule nisi less than 30 days hence, as time for trial is set by Ga. L. 1976, p. 1677, § 1 (see now O.C.G.A. § 9-11-40(a)), not subsection (c) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56). *Brand v. Brand*, 244 Ga. App. 124, 259 S.E.2d 133 (1979).

Construction with Notice and Hearing Provisions of Superior Court Rules

Sufficiency of service under Superior Court Rule 6. — When the plaintiff alleged receiving no prior notice of the date of a ruling on motions for summary judgment, it was held that under Superior Court Rule 6, service of a motion on an opposing party serves as notice to that party that the court will take the matter under advisement after 30 days (the time during which the opposing party may file a response to the motion) after service of the motion has passed. *Jacobsen v. Muller*, 181 Ga. App. 382, 352 S.E.2d 604 (1986).

Superior Court Rule 6.2. — Superior Court Rule 6.2, which requires a party who opposes a motion to file a response, reply memorandum, affidavits, or other responsive material not later than 30 days after service of the motion unless otherwise ordered by the trial judge, does not conflict with O.C.G.A. § 9-11-56(c), which requires that the motion be served at least 30 days before the time fixed for hearing. *Spikes v. Citizens State Bank*, 179 Ga. App. 479, 347 S.E.2d 310 (1986).

Construction with Notice and Hearing Provisions of Superior Court Rules (Cont'd)

In the event of a conflict between Uniform State Court Rule 6.2, requiring opposing affidavits to be filed not later than 30 days, and O.C.G.A. § 9-11-56(c), subsection (c) prevails. *Walton v. Datry*, 185 Ga. App. 88, 363 S.E.2d 295 (1987), cert. denied, 185 Ga. App. 911, 363 S.E.2d 295 (1988).

O.C.G.A. § 9-11-56 permits the respondent to serve opposing affidavits at any time "prior to the date of the hearing" in the event that a hearing is set. To the extent the requirements of Uniform State Court Rule 6.2 conflict with the statutory provision, the rule must yield. *Wyse v. Potamkin Chrysler-Plymouth, Inc.*, 189 Ga. App. 64, 374 S.E.2d 785 (1988).

Superior Court Rule 6.3. — Superior Court Rule 6.3 does not conflict with O.C.G.A. § 9-11-56, since the rule does not require that litigants seek a hearing or waive the hearing, nor does the rule invest the trial court with discretion to deny to parties a right granted by statute. *Spikes v. Citizens State Bank*, 179 Ga. App. 479, 347 S.E.2d 310 (1986).

Superior Court Rule 6.3 regarding hearings was promulgated by a governmental body (the Supreme Court) pursuant to a constitutional delegation of authority, and the rule has the force and effect emanating from the delegating authority, the Constitution. Hence, even if the rule were contrary to a statute, such as O.C.G.A. § 9-11-56(c), the constitutional rule would control, and permit granting a motion for summary judgment without setting a hearing. *Dallas Blue Haven Pools, Inc. v. Taslimi*, 180 Ga. App. 734, 350 S.E.2d 265 (1986), *aff'd*, 256 Ga. 739, 354 S.E.2d 160 (1987).

Rule 6.3 of the Uniform Superior Court Rules is not inconsistent with subsection (c) of O.C.G.A. § 9-11-56, and it was not error for the trial court to arrive at the court's decision in accordance with Rule 6.3, Uniform Superior Court Rules, without an oral argument hearing, when neither party requested such a hearing. *Dallas Blue Haven Pools, Inc. v. Taslimi*, 180 Ga. App. 734, 350 S.E.2d 265 (1986), *aff'd*,

256 Ga. 739, 354 S.E.2d 160 (1987).

Hearing not required in absence of request by either rule or statute. — Neither O.C.G.A. § 9-11-56(c) nor Ga. Unif. Super. Ct. R. 6.3 required that the trial court hold an oral hearing on a trustee's motion for summary judgment in the trustee's action against an executor for breach of fiduciary duty because no party requested a hearing as set forth in Rule 6.3. *Royal v. Blackwell*, 289 Ga. 473, 712 S.E.2d 815 (2011).

Service and Filing of Affidavits

Purpose of subsection (c) to prevent surprise. — Purpose of subsection (c) of this section is to prevent a party from being surprised on the day of the hearing by an affidavit that the party would not be in a position to answer. *Vann v. Bice*, 127 Ga. App. 579, 194 S.E.2d 259 (1972).

Subsection (c) and § 9-11-6(d) to be read together to permit variance in time for service of opposing motions. — Subsection (c) of Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56) and Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6(d)) should be read together so as to vest in the court discretion to permit opposing affidavits to a motion for summary judgment to be served at some other time than provided in Ga. L. 1967, p. 226, § 25. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 210 S.E.2d 34 (1974).

Subsection (e) and § 9-11-6(d) to be read together in determining time requirements. — In determining whether affidavits in support of a motion for summary judgment are properly before the court, Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6(d)), relating to time for motions and affidavits, and subsection (e) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56) must be read together. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980); *Bailey v. Dunn*, 158 Ga. App. 347, 280 S.E.2d 388 (1981); *Citizens & S. Nat'l Bank v. Dorsey*, 159 Ga. App. 784, 285 S.E.2d 242 (1981); *McIntosh v. McLendon*, 162 Ga. App. 220, 290 S.E.2d 157 (1982).

Under prevailing authority, subsection (e) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56) and Ga. L. 1967, p.

226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6(d)) require affidavits in support of a motion for summary judgment to be served with the motion, unless the movant seeks and obtains an extension from the court pursuant to Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6(d)), and any such extension of time within which to file supporting affidavits should also ensure that the party opposing the motion will have 30 days within which to respond. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

When the supporting affidavit of a party moving for summary judgment was filed less than 30 days before the originally scheduled hearing date of June 19, but the affidavit had been on file for more than 30 days when the actual hearing was held because the trial court had continued the hearing until July 13, the trial court did not abuse the court's discretion when the court granted the summary judgment motion. *Smith v. Shaw*, 196 Ga. App. 2, 395 S.E.2d 286 (1990).

Supplemental affidavit was not filed 30 days before the time fixed for the hearing and therefore was not properly considered by the trial court. *Brandon v. Mayfield*, 215 Ga. App. 735, 452 S.E.2d 181 (1994).

Affidavits are required to be filed prior to the hearing. *Rose v. Rollins*, 167 Ga. App. 469, 306 S.E.2d 724 (1983).

Filing of response. — When a hearing on the plaintiff's motion for summary judgment and the time for response was continued by agreement to the date of the hearing, and the defendant's response was filed on that date, the filing was timely. *Liberty Forest Prods., Inc. v. Interstate Paper Corp.*, 138 Ga. App. 153, 225 S.E.2d 731 (1976).

Response to a motion for summary judgment is timely filed if filed on the date of the hearing, notwithstanding the language in Ga. L. 1967, p. 226, § 4 (see now O.C.G.A. § 9-11-5(d)) requiring all papers after the complaint to be filed within the time allowed for service. *Gross v. Pyrofax Gas Corp.*, 151 Ga. App. 130, 259 S.E.2d 137 (1979).

Response to a motion for summary judgment is timely filed if filed on the date of hearing, notwithstanding the language in O.C.G.A. § 9-11-6(d) requiring all papers

after the complaint to be filed within the time allowed for service. *Martin v. Newman*, 162 Ga. App. 725, 293 S.E.2d 18 (1982).

Failure to file responsive pleading.

— Plaintiff's failure to file a responsive pleading to the defendant's motion to dismiss, which was properly treated as a motion for summary judgment, constituted non-compliance with the provision governing affidavits supporting and opposing summary judgment and, thus, the defendant was entitled to an award of summary judgment. *Gaddy v. Thomasson*, 172 Ga. App. 876, 324 S.E.2d 817 (1984).

Opposing affidavits. — Party opposing motion for summary judgment has until the day prior to hearing to serve opposing affidavits, unless the trial court in the court's discretion permits the affidavits to be served at a later date, and service by mail is complete upon mailing. *Gross v. Pyrofax Gas Corp.*, 151 Ga. App. 130, 259 S.E.2d 137 (1979).

Adverse party may serve opposing affidavit prior to the day of the hearing on a motion for summary judgment. *Bailey v. Dunn*, 158 Ga. App. 347, 280 S.E.2d 388 (1981).

Affidavit made in opposition to a motion for summary judgment should be served on the opposite party at least one day prior to hearing the motion; however, the court has discretion to consider affidavits not so filed and the court's ruling on this issue will not be reversed unless there is an abuse of discretion. *Liberty Nat'l Life Ins. Co. v. Houk*, 157 Ga. App. 540, 278 S.E.2d 120, *aff'd*, 248 Ga. 111, 281 S.E.2d 583 (1981).

Affidavit made in opposition to a motion for summary judgment not served at least one day before the hearing is barred from consideration as evidence unless the record discloses the trial court, in the exercise of the court's discretion, has allowed the affidavit to be served and considered. *Talley v. City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264 (1981); *Dutton v. Dykes*, 159 Ga. App. 48, 283 S.E.2d 28 (1981).

When a party opposing summary judgment filed an affidavit and served the affidavit by mail the same day, one day before the summary judgment hearing as

Service and Filing of**Affidavits (Cont'd)**

required by O.C.G.A. § 9-11-56(c), the affidavit was not untimely; under O.C.G.A. § 9-11-5(b), service by mail was complete upon mailing. *Kirkland v. Kirkland*, 285 Ga. App. 238, 645 S.E.2d 626 (2007), cert. denied, 2007 Ga. LEXIS 646 (Ga. 2007); 552 U.S. 1312, 128 S. Ct. 1898, 170 L.Ed.2d 749 (2008).

Affidavits supplied before court's decision considered. — Since the trial court made no decision at the summary judgment hearing but took the matter under advisement, and it is undisputed that the defendant supplied the supporting affidavits before the trial court's decision on the matter, the trial court was authorized to consider the evidence submitted by the defendant. *Howell Mill/Collier Assocs. v. Gonzales*, 186 Ga. App. 909, 368 S.E.2d 831 (1988).

Failure to exercise reasonable diligence or greatest possible diligence in attempting service of process. — Because the evidence presented before the trial court failed to show that an injured passenger exercised either reasonable diligence or the greatest possible diligence in attempting service of process on an opposing driver, but instead showed that: (1) numerous attempts at service were unsuccessful; (2) the passenger filed the complaint eight days before the expiration of the limitation period, and service was not perfected until 16 months after the statute ran; (3) long lapses in time existed between failed attempts when apparently no actions were taken to effectuate service; and (4) the driver continued to reside in the same small community during the 16 months that it took to ultimately perfect service, the trial court did not err in granting summary judgment to the driver. *Moore v. Wilkerson*, 283 Ga. App. 340, 641 S.E.2d 578 (2007).

Late filed affidavit. — Trial court did not abuse the court's discretion in considering an affidavit that was submitted after the trial court conducted a hearing on the plaintiff's motion for summary judgment and was not on file for at least 30 days before the trial court issued the court's order on the motion since defen-

dants were put on notice by the trial court's letter requesting the information that the evidence contained in the affidavit would be filed with the court. Moreover, before the trial court issued the court's decision, defendants filed a response to the plaintiff's "renewed" motion containing nothing to counter the affidavit. *NeSmith v. Ellerbee*, 203 Ga. App. 65, 416 S.E.2d 364 (1992).

Trial court's "failure to rule" on a motion to consider additional evidence in opposition to a grant of summary judgment is not error when the affidavits to be filed would be untimely. *Splish Splash Waterslides, Inc. v. Cherokee Ins. Co.*, 167 Ga. App. 589, 307 S.E.2d 107 (1983).

Even though O.C.G.A. § 9-11-6(d) and subsection (c) of O.C.G.A. § 9-11-56 require an opposing affidavit to be served at least one day prior to the summary judgment hearing, the trial court is vested with discretion to consider affidavits not so served. *Liberty Nat'l Life Ins. Co. v. Houk*, 248 Ga. 111, 281 S.E.2d 583 (1981).

Trial court does not err in considering the plaintiff's supplemental affidavits even though the affidavits are served upon the defendant only a few days before the hearing when the affidavits either contain nothing that was not already admitted by the defendant by the defendant's failure to respond to the plaintiff's request for admissions, or the affidavits merely document the time spent on the case by the plaintiff's attorney in support of a prayer for attorney fees in addition to damages. *Concert Promotions, Inc. v. Haas & Dodd, Inc.*, 167 Ga. App. 883, 307 S.E.2d 763 (1983).

When the plaintiff filed an affidavit in opposition to the defendant's motion for summary judgment, but the affidavit was filed after the entry of the order granting summary judgment to the defendant, since the plaintiff's affidavit was not timely under subsection (c) of O.C.G.A. § 9-11-56, the plaintiff's affidavit was not effective to contradict the averments in the defendant's affidavit. *Myers v. Barnard*, 180 Ga. App. 192, 348 S.E.2d 733 (1986).

Consideration of untimely filed material will not warrant reversal of the court's ruling on a motion for summary judgment

if the record demonstrates either that the material was harmless or that the respondent acquiesced in the court's consideration of the motion. *Connell v. Houser*, 189 Ga. App. 158, 375 S.E.2d 136 (1988).

Opposing affidavit which was not filed until the day of the hearing was untimely, and the trial court did not err by refusing to consider the affidavit. *Valhalla, Inc. v. O'Donnell*, 199 Ga. App. 679, 405 S.E.2d 895 (1991).

On a lessor's motion for summary judgment on a lease and guaranty, because neither party requested a hearing on the lessor's motion and no hearing was held, the 30-day period for filing the lessor's counsel's affidavit in O.C.G.A. § 9-11-56(c) did not apply. The requirement in O.C.G.A. § 9-11-6(d) that the affidavit be served with the motion was to ensure adequate notice; in this case, the affidavit was filed eight months prior to the trial court's decision. *Triple T-Bar, LLC v. DDR Southeast Springfield, LLC*, 330 Ga. App. 847, 769 S.E.2d 586 (2015).

Objection at hearing rather than by motion. — When an affidavit made in support of a summary judgment motion is not served with the motion, the burden is on the movant, not the opposing party, to invoke the trial court's discretion with regard to the late filing, and objection by the opposing party at hearing instead of by motion is not a waiver of that objection. *Jones v. Howard*, 153 Ga. App. 137, 264 S.E.2d 587 (1980).

Trial court may deny verbal motion made on date of hearing to use certain depositions taken in another court. *Knight v. Bryant-Durham Elec. Co.*, 169 Ga. App. 502, 313 S.E.2d 758 (1984).

Waiver of requirement of timely filing. — Affidavit relied on in support of a motion for summary judgment must be on file for at least 30 days prior to the hearing. This strict requirement may be waived by the opposing party's acquiescence in the use of the untimely materials, or if the movant seeks and obtains an order from the trial court under O.C.G.A. § 9-11-6(b) extending the time for filing. *Gunter v. Hamilton Bank*, 201 Ga. App. 379, 411 S.E.2d 115 (1991).

Error in untimely affidavit waived by failure to object. — Any error arising

from a failure to timely file an affidavit in support of a motion for summary judgment is waived by the adverse party's failure to object to the filing of the affidavit in question in the trial court. *Southeastern Hose, Inc. v. Prudential Ins. Co. of Am.*, 167 Ga. App. 356, 306 S.E.2d 308 (1983).

Objection to the timeliness of an affidavit submitted in response to a motion for summary judgment will be deemed waived unless the objective is itself timely raised in the trial court. *Pruitt v. Tyler*, 181 Ga. App. 174, 351 S.E.2d 539 (1986).

Interest of justice. — Affidavit made in opposition to a motion for summary judgment may be admitted without objection, the time of service may be waived, or the court may for some other reason find it in the interest of justice to consider the evidence. *Liberty Nat'l Life Ins. Co. v. Houk*, 157 Ga. App. 540, 278 S.E.2d 120, aff'd, 248 Ga. 111, 281 S.E.2d 583 (1981).

Procedure When Affidavits Unavailable

Purpose of subsection (f). — Subsection (f) of this section should be used to protect the opposite party when a necessary motion for continuance is made on the ground of surprise. *Kiker v. Pinson*, 120 Ga. App. 784, 172 S.E.2d 333 (1969).

Discretion as to continuances. — Grant or denial of a continuance is within the discretion of the trial judge, and unless clearly abused will not be interfered with. *Calcutta Apts. Assocs. v. Linden & Deutsch*, 131 Ga. App. 743, 206 S.E.2d 559 (1974); *Patterson v. Lanham*, 182 Ga. App. 343, 355 S.E.2d 738, cert. denied, 484 U.S. 913, 108 S. Ct. 260, 98 L. Ed. 2d 218 (1987).

Continuances on motion for summary judgment are within the sound discretion of the trial court. *Cole v. Jordan*, 158 Ga. App. 200, 279 S.E.2d 497 (1981).

Express ruling on motion for continuance is preferred. — Better practice is for the trial court to address a motion for continuance under O.C.G.A. § 9-11-56(f) by issuing an express ruling thereon; such a ruling, of course, can be issued as part of the court's ruling on the summary judgment motion. A ruling on a

Procedure When Affidavits**Unavailable (Cont'd)**

pending § 9-11-56(f) motion would be especially well advised when a motion to compel discovery is also pending. *Jaraysi v. City of Marietta*, 294 Ga. App. 6, 668 S.E.2d 446 (2008).

Mere possibility that some new facts may turn up is not enough to require postponement. *Herring v. R.L. Mathis Certified Dairy Co.*, 121 Ga. App. 373, 173 S.E.2d 716, appeal dismissed, 400 U.S. 922, 91 S. Ct. 192, 27 L. Ed. 2d 183 (1970).

Affidavit as to professional malpractice. — When the plaintiff in a medical malpractice action is unable to present an affidavit of an expert witness on a motion for summary judgment, subsection (f) of this section authorizes the plaintiff to execute an affidavit to this effect and the court may, among other things, order a continuance to permit affidavits to be obtained. *Larson v. Friedman & Snyder*, 154 Ga. App. 702, 269 S.E.2d 532 (1980).

Affidavit as to professional malpractice. — Mandatory direction of O.C.G.A. § 9-11-9.1 that a plaintiff alleging professional malpractice “shall be required to file with the complaint” a specific expert affidavit necessarily preempts and supersedes the judicially-created rule that no plaintiff’s expert affidavit might be required in cases of malfeasance so “clear and palpable” as to be reasonably ascertained by the jury without expert evidence. *Barr v. Johnson*, 189 Ga. App. 136, 375 S.E.2d 51, cert. denied, 189 Ga. App. 911, 375 S.E.2d 51 (1988).

Denial of continuance for lack of diligence. — When the record is devoid of any discovery, requests for admissions, or notices to take depositions addressed to the party moving for summary judgment, during the period between the time the opposing party made a request for continuance pursuant to subsection (f) of this section and the time motions for summary judgment were argued at a hearing over two months later, the trial court properly entertained arguments for summary judgment in spite of a motion for continuance. *Shmunis v. GMC*, 146 Ga. App. 486, 246 S.E.2d 486 (1978).

It was not error to deny a continuance solely on the hope that an amnesia victim’s memory might improve to the point that the victim could remember the events at the time of the collision since the victim offered no medical or other expert evidence that this was likely to occur. *Gray v. Gober*, 185 Ga. App. 624, 365 S.E.2d 279 (1988).

Trial court properly denied the defendants’ motion for a continuance pursuant to O.C.G.A. § 9-11-56(f) in a breach of a lease agreement, as the dispute involved written leases and assignments which were not alleged to be ambiguous, and it was unclear what possible evidence employees of the successor in interest to the original lessor could provide to affect the intent of the documents. *Gilco Invs., Inc. v. Stafford Cordele, LLC*, 267 Ga. App. 167, 598 S.E.2d 889 (2004).

Trial court’s grant of summary judgment to a supplier on the supplier’s complaint for money due under an agreement and on account was affirmed; a defendant’s affidavit pursuant to the O.C.G.A. § 9-11-56(f) continuance motion failed to specify any information that the defendant could possibly obtain to dispute the debt owed to the supplier and, thus, the trial court did not abuse the court’s discretion when the court denied the motion for a continuance. *Wilson v. Edward Don & Co.*, 275 Ga. App. 787, 622 S.E.2d 18 (2005).

Affidavits Made in Bad Faith

Subsection (g) of O.C.G.A. § 9-11-56 only applies when a party to a lawsuit files a motion for summary judgment and it becomes apparent that the motion was filed in bad faith or solely for the purpose of delay. *Ravenwood Church v. Starbright, Inc.*, 168 Ga. App. 870, 310 S.E.2d 582 (1983).

Subsection (g) of O.C.G.A. § 9-11-56 was violated when the affidavit contained statements known to be false and statements based on other than personal knowledge. *Malloy v. Cauley*, 169 Ga. App. 623, 314 S.E.2d 464 (1984).

Function of Trial Court

Court not to sit as judge and jury. — In no sense does this section authorize the

court to sit as both judge and jury. *Watkins v. Nationwide Mut. Fire Ins. Co.*, 113 Ga. App. 801, 149 S.E.2d 749 (1966) (decided under former Ga. L. 1959, p. 234, § 1 et seq.); *Kohlmeyer & Co. v. Bowan*, 130 Ga. App. 386, 203 S.E.2d 630 (1973); *Black v. Hamilton*, 133 Ga. App. 881, 212 S.E.2d 449 (1975); *Peachtree Bottle Shop, Inc. v. Bessemer Sec. Corp.*, 134 Ga. App. 729, 215 S.E.2d 692 (1975); *Fountain v. World Fin. Corp.*, 144 Ga. App. 10, 240 S.E.2d 558 (1977).

Court will not resolve questions for jury. — Law relating to summary judgment does not purport to confer upon judges any greater authority to decide issues of fact normally reserved for decision by a jury than the judges possessed before the law's enactment. *Yeager v. Jacobs*, 111 Ga. App. 358, 141 S.E.2d 837 (1965) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Questions as to diligence and negligence, including contributory negligence, are questions peculiarly for the jury, and the court will decline to resolve the questions except in plain and indisputable cases. *Haire v. City of Macon*, 200 Ga. App. 744, 409 S.E.2d 670, cert. denied, 200 Ga. App. 896, 409 S.E.2d 670 (1991).

Function in ruling on motions for summary judgment and directed verdict analogous. — Trial court's function in ruling on a motion for summary judgment is analogous to the function the court performs when ruling on a motion for directed verdict. *McCarty v. National Life & Accident Ins. Co.*, 107 Ga. App. 178, 129 S.E.2d 408 (1962); *Standard Accident Ins. Co. v. Ingalls Iron Works Co.*, 109 Ga. App. 574, 136 S.E.2d 505 (1964); *Chandler v. Gately*, 119 Ga. App. 513, 167 S.E.2d 697 (1969); *W.J. Bremer, Inc. v. United Bonding Ins. Co.*, 122 Ga. App. 183, 176 S.E.2d 633 (1970) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Court only to determine if issues of fact exist. — Cardinal rule of summary judgment procedure is that the court may not resolve facts nor reconcile issues, but may only look to ascertain if there is an issue. *Suggs v. Brotherhood of Locomotive Firemen*, 104 Ga. App. 219, 121 S.E.2d 661 (1961) (decided under former Ga. L. 1959, p. 234, § 1 et seq.), overruled on

other grounds, *Benefield v. Malone*, 110 Ga. App. 607, 139 S.E.2d 500 (1964); *Fountain v. World Fin. Corp.*, 144 Ga. App. 10, 240 S.E.2d 558 (1977); *Woodstock Rd. Inv. Properties v. Lacy*, 149 Ga. App. 593, 254 S.E.2d 910 (1979); *Scroggins v. Whitfield Fin. Co.*, 152 Ga. App. 8, 262 S.E.2d 168 (1979); *Aiken v. Drexler Shower Door Co.*, 155 Ga. App. 436, 270 S.E.2d 831 (1980); *Jonesboro Tool & Die Corp. v. Georgia Power Co.*, 158 Ga. App. 755, 282 S.E.2d 211 (1981); *Foskey v. Smith*, 159 Ga. App. 163, 283 S.E.2d 33 (1981).

On summary judgment, the court is concerned only with whether there is a genuine issue of fact for determination, and not with the difficulty a party opposing the motion may have in proving the party's case. *Rigby v. Powell*, 233 Ga. 158, 210 S.E.2d 696 (1974).

Only authorized function of court is to determine existence of genuine issue of fact. — On motion for summary judgment, court is not authorized to try and resolve issues of fact; function of the court, and the court's only authorized function under this procedure, is to determine existence of a genuine issue of material fact. *Watkins v. Nationwide Mut. Fire Ins. Co.*, 113 Ga. App. 801, 149 S.E.2d 749 (1966) (decided under former Ga. L. 1959, p. 234, § 1 et seq.); *Kohlmeyer & Co. v. Bowan*, 130 Ga. App. 386, 203 S.E.2d 630 (1973); *Black v. Hamilton*, 133 Ga. App. 881, 212 S.E.2d 449 (1975); *Peachtree Bottle Shop, Inc. v. Bessemer Sec. Corp.*, 134 Ga. App. 729, 215 S.E.2d 692 (1975); *Fountain v. World Fin. Corp.*, 144 Ga. App. 10, 240 S.E.2d 558 (1977); *Porter v. Moschella*, 152 Ga. App. 678, 263 S.E.2d 538 (1979).

In ruling on a motion for summary judgment, the court does not try the case but merely determines from the record whether there are any genuine issues of fact. *Flanders v. Columbia Nitrogen Corp.*, 135 Ga. App. 21, 217 S.E.2d 363 (1975).

In ruling on a motion for summary judgment, a trial court is not empowered to resolve disputed issues of material fact but merely to determine if such issues exist for resolution. *Colquitt County Hosp. Auth. v. Health Star, Inc.*, 262 Ga. 285, 417 S.E.2d 147 (1992).

Function of Trial Court (Cont'd)

Credibility of affidavits. — On motion for summary judgment, court is not concerned with the credibility of affidavits, only with whether the affidavits show the existence of a genuine issue of fact. *Ussery v. Koch*, 115 Ga. App. 463, 154 S.E.2d 879 (1967); *Mullis v. Merit Fin. Co.*, 116 Ga. App. 582, 158 S.E.2d 415 (1967).

Court cannot weigh evidence or determine credibility. — On summary judgment proceedings, the court is not in a position to weigh the evidence or determine the evidence's credibility. When the facts alleged in the affidavits clearly create a conflict in the evidence as to a material issue, summary judgment is precluded. *HOH Co. v. Ethridge*, 168 Ga. App. 20, 308 S.E.2d 43 (1983).

It is within the discretion of the trial judge to consider a renewed motion for summary judgment even without an expansion of the record. *Premium Distrib. Co. v. National Distrib. Co.*, 157 Ga. App. 666, 278 S.E.2d 468 (1981).

Findings and conclusions not required. — Trial court is not required to enter findings of fact and conclusions of law in ruling on a motion for summary judgment. *Nelson v. Mexicana de Jugo y Sabores*, 139 Ga. App. 612, 229 S.E.2d 102 (1976); *Healthdyne, Inc. v. Henry*, 144 Ga. App. 52, 240 S.E.2d 259 (1977); *Victor v. First Trust & Deposit Co.*, 154 Ga. App. 97, 267 S.E.2d 639 (1980); *Thomas v. DeKalb County*, 227 Ga. App. 186, 489 S.E.2d 58 (1997).

Fact that the trial court's order granting the defendant's motion for summary judgment does not affirmatively indicate that the court considered the record is not cause for reversal, nor is it necessary to include findings of fact and conclusions of law on decisions on motions for summary judgment. *Fudge v. Colonial Baking Co.*, 186 Ga. App. 582, 367 S.E.2d 814 (1988).

An entry of findings of fact and conclusions of law was not necessary in a case where the trial court granted summary judgment to the defendants on all five of the plaintiff's tortious claims against the defendants, even though one of the defendants filed a counterclaim upon which the trial court did not rule; furthermore, the

plaintiff made no showing that it was practical for the trial court to do so. *Kuruvila v. Mulcahy*, 264 Ga. App. 626, 591 S.E.2d 491 (2003).

No error in entering findings of fact. — Mere entry of findings of fact and conclusions of law in ruling on a motion for summary judgment does not constitute error per se. In certain cases when the trial court makes findings of fact and conclusions of law in ruling on motions for summary judgment, it can be helpful to the appellate courts and instructive to the parties. *Harrell v. Louis Smith Mem. Hosp.*, 197 Ga. App. 189, 397 S.E.2d 746 (1990).

Presumption that court performs duty. — It is presumed that the trial judge, as a public official, faithfully and lawfully performed the duties devolving upon the judge by law. *Smith v. Jones*, 154 Ga. App. 629, 269 S.E.2d 471 (1980).

Court may decide issue of fraud in undisputed cases. — Although the question of fraud is ordinarily within the province of the jury, in plain and undisputed cases it is proper that the determination be made by the court. The trial court does not err in such a case in granting a motion for summary judgment upon the issue of fraud. *Horton v. Middle Ga. Bank*, 191 Ga. App. 51, 380 S.E.2d 749 (1989).

Appealability and Finality**1. In General**

Subsection (h) is peculiar to this state and does not appear in the Federal Rules of Civil Procedure. *Bush v. City of Albany*, 125 Ga. App. 558, 188 S.E.2d 245 (1972).

O.C.G.A. § 9-11-56(h) must be read in conjunction with O.C.G.A. §§ 5-6-34 and 5-6-35 regarding the procedure for appeal to this court. *Jarrett v. Ford Motor Credit Co.*, 178 Ga. App. 600, 344 S.E.2d 440 (1986).

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 and O.C.G.A. § 9-11-56(h) did not provide for direct appeals from all grants of

summary judgment, but had to be read in conjunction with O.C.G.A. §§ 5-6-34 and 5-6-35. *Bullock v. Sand*, 260 Ga. App. 874, 581 S.E.2d 333 (2003).

Exception to finality rule. — O.C.G.A. § 9-11-56(h) is an exception to the finality rule which is for the benefit of the losing party, and when the losing party appeals after the rendition of the final judgment, the grant of summary judgment is still subject to appellate review. Although a trial court properly dismissed a mechanic's negligence claim, the mechanic's fraud claim, the mechanic's reduction in force claim, and certain of the mechanic's wage claims as time barred, since each paycheck which failed to pay all wages due was a new violation, the trial court erred in dismissing the balance of the mechanic's wage claims. *Willis v. City of Atlanta*, 265 Ga. App. 640, 595 S.E.2d 339 (2004).

Section controlling in determining appealability. — Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56), being the last expression of legislative intent, controls over former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34) as to the appealability or reviewability of a motion for summary judgment. *Young v. Reese*, 118 Ga. App. 114, 162 S.E.2d 831 (1968).

Right to direct appeal under O.C.G.A. § 9-11-56(h) is for the losing party's benefit and is in addition to the party's right to appeal after the resolution of the entire case. *Gresham Park Community Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981).

De novo review. — Appellate court's review of an appeal from summary judgment is de novo. *Mohamud v. Wachovia Corp.*, 260 Ga. App. 612, 580 S.E.2d 259 (2003).

Partial summary judgment. — Subsection (h) of O.C.G.A. § 9-11-56 includes an order for partial summary judgment. *Crolley v. Haygood Contracting, Inc.*, 207 Ga. App. 434, 429 S.E.2d 93 (1993).

Subsection (h) inapplicable to motions to set aside and vacate judgments. — Subsection (h) of Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56) is not applicable to motions to set aside and vacate judgments authorized by Ga. L. 1967, p. 226, §§ 26, 27 and 30 (see now O.C.G.A. § 9-11-60(d)). *Farr v. Farr*, 120

Ga. App. 762, 172 S.E.2d 158 (1969).

Voluntary dismissal not appealable judgment. — 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).

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 issue, 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).

Question before appellate court. — In reviewing the grant of a motion for summary judgment, the question before the appellate court is whether allegations of the pleadings have been pierced so that no genuine issue of material fact remains. *Duke Enters., Inc. v. Espy*, 140 Ga. App. 527, 231 S.E.2d 522 (1976).

On review of summary judgment, the first essential question for determination by the appellate court is whether a genuine issue of material fact exists which should be decided by a jury; if no jury issue is found to exist, the next query is whether the moving party is entitled to judgment as a matter of law after each party has an opportunity to make out their case. *Hayes v. Brown*, 108 Ga. App. 360, 133 S.E.2d 102 (1963) (decided under former Ga. L. 1959, p. 234, § 1 et seq.).

Entire record reviewed on appeal. — Appellate court does not err in examining all the material of record to determine if there remain any issues for trial. *City of Rome v. Turk*, 235 Ga. 223, 219 S.E.2d 97 (1975).

On consideration of summary judgments, the appellate court must look at

Appealability and Finality (Cont'd)
1. In General (Cont'd)

the entire record. *Lawson v. Duke Oil Co.*, 155 Ga. App. 363, 270 S.E.2d 898 (1980).

Trial court did not err in concluding that the record upon which the summary judgment was based would be necessary for appellate review as the obligation of both the trial court and the appellate court is to consider the entire record when such a motion is ruled on. *Sumner v. First Union Nat'l Bank*, 200 Ga. App. 729, 409 S.E.2d 212, cert. denied, 200 Ga. App. 897, 409 S.E.2d 212 (1991).

Pleadings considered on appeal. — On review of grant of summary judgment, reviewing court's consideration of the pleadings, as amended, is required, whether specifically argued or not. *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 195 S.E.2d 277 (1972).

Additional evidence may not be admitted on appeal. — Appellate courts will only review evidence presented to the trial court before the court's ruling on the motion, and additional evidence will not be admitted on appeal. *Meade v. Heimanson*, 239 Ga. 177, 236 S.E.2d 357 (1977); *Stephens v. Tate*, 147 Ga. App. 366, 249 S.E.2d 92 (1978).

Prior objection by nonmoving party not required. — Issue in an appeal from the grant of summary judgment is whether the movant met the burden established by subsection (c) of O.C.G.A. § 9-11-56 and, in addressing that issue on appeal, the nonmoving party is entitled to advance all arguments without regard to whether the arguments were raised by way of objections below. *Dental One Assocs. v. JKR Realty Assocs.*, 269 Ga. 616, 501 S.E.2d 497 (1998).

Objection to errors not prerequisite to review. — It is not a prerequisite for the review of enumerated errors that the plaintiff object to or make an issue of these errors at trial below, when the alleged errors are asserted as reasons why the trial court should not have granted the motion for summary judgment. *Southern Protective Prods. Co. v. Leasing Int'l, Inc.*, 134 Ga. App. 945, 216 S.E.2d 725 (1975); *Binswanger Glass Co. v. Beers Constr. Co.*, 141 Ga. App. 715, 234 S.E.2d 363

(1977); *Griffin v. Wittfeld*, 143 Ga. App. 485, 238 S.E.2d 589 (1977).

Absent particularized enumerations of error only denial of motion as to whole case determined. — When the appellant fails to enumerate any error on the trial court's omission to make an order specifying whether certain facts appear without substantial controversy, the appellate court can determine only whether the court below erred in denying the summary judgment motion as to the whole case. *Ireland v. Matthews*, 120 Ga. App. 510, 171 S.E.2d 387 (1969).

When the motion for summary judgment sets out that there is no genuine issue as to any material fact and thus seeks judgment as to the whole case, and enumeration of error likewise is with regard to summary judgment in toto and makes no mention of any partial recovery, the appellate court can determine only whether the trial court erred in denying the motion as to the whole case. *Borden, Inc. v. Barker*, 124 Ga. App. 291, 183 S.E.2d 597 (1971).

Credibility not considered on appeal. — On motions for summary judgment, the appellate court cannot consider the credibility of witnesses or their affidavits, and a jury must resolve the question and the conflicts in the evidence which it produces. *Miller v. Douglas*, 235 Ga. 222, 219 S.E.2d 144 (1975).

Appellate court on review of summary judgment is not concerned with the credibility of affidavits, but only with whether the affidavits show the existence of a genuine issue of fact. *Ussery v. Koch*, 115 Ga. App. 463, 154 S.E.2d 879 (1967).

Reversal of order overruling summary judgment motion. — When the trial court overrules a motion for summary judgment, the appellate court will not reverse, unless from the entire record construed against the movant it appears that there is an absence of any genuine issue as to all material facts and that the movant is entitled to judgment as a matter of law. *Black v. Hamilton*, 133 Ga. App. 881, 212 S.E.2d 449 (1975).

When no ruling invoked, no question for review. — There was no error in the trial court's failure to allow the plaintiff's expert's affidavit to be supplemented

when the plaintiff never made a motion to supplement the affidavit, because when no ruling is invoked in the trial court ordinarily there is no question for review in appellate courts. *Crawford v. Phillips*, 173 Ga. App. 517, 326 S.E.2d 593 (1985).

Motion for new trial is not proper vehicle to obtain 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).

When trial court has considered dispositions, appellate court will not say that the trial court did not do so. *Porter Coatings v. Stein Steel & Supply Co.*, 157 Ga. App. 260, 277 S.E.2d 272, *aff'd*, 247 Ga. 631, 278 S.E.2d 377 (1981).

Order granting plaintiff's motion for partial summary judgment on the issue of the defendant's liability on an insurance policy was interlocutory, not res judicata as to the issues resolved therein, and subject to revision by the trial court at any time prior to final judgment, as by admitting evidence in support of a defense to liability which in substance vacated or set aside the court's previous order. *Glover v. J.C. Penney Cas. Ins. Co.*, 181 Ga. App. 753, 353 S.E.2d 587 (1987).

Res judicata defense based on prior summary judgment in malpractice case. — When a prior summary judgment for an attorney in a legal malpractice action was based on a recognition that, regardless of the applicability of any pleading requirements imposed by the subsequently enacted provisions of O.C.G.A. § 9-11-9.1, the client's failure to have complied with the evidentiary requirements of O.C.G.A. § 9-11-56 nevertheless mandated the grant of summary judgment on the merits, the attorney's res judicata defense in a subsequent action was viable and the trial court erred in failing to grant the attorney's motion for summary judgment based upon that viable defense. *Robinson v. Starr*, 197 Ga. App. 440, 398 S.E.2d 714 (1990).

Evidence sufficient to demand judgment for defendant. See *Peppers v. Veres*, 168 Ga. App. 367, 309 S.E.2d 388 (1983).

In an action by a physician for termination of the physician's hospital

privileges, grant of the physician's motion seeking a determination that the defendants breached the hospital bylaws, which did not include a ruling that the physician was entitled to recover on the physician's claim, was not a grant of summary judgment subject to direct appeal. *Saint Francis Hosp. v. Patton*, 228 Ga. App. 544, 492 S.E.2d 303 (1997).

Appeal dismissed absent evidence that exception to finality rule applied. — Because the trial court's order was best viewed as an order dismissing the plaintiffs' complaint for failure to comply with the requirements of O.C.G.A. § 9-11-17, and summary judgment could not properly be granted to a defendant on the basis of a real-party-in-interest objection, absent any evidence that an exception to the final judgment rule applied, the appeal from the trial court's order had to be dismissed. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Appeal dismissed as untimely filed. — 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).

Malicious prosecution claim by priest. — Trial court did not err in granting summary judgment to a property owner on the priest's malicious prosecution claim as probable cause existed to prosecute the priest since a police officer saw the priest violate a restraining order by committing a criminal trespass and by threatening another person; probable cause also existed because the two restraining order violations arose out of the same incident and were reasonably related even though the criminal charge for aggravated stalking arising out of the threat's made to the property owner's employee was later merged into another offense. *Holmes v. Achor Ctr., Inc.*, 260 Ga. App. 882, 581 S.E.2d 390 (2003).

Subcontractor's action. — Trial court properly granted summary judgment to a

Appealability and Finality (Cont'd)**1. In General (Cont'd)**

property owner after the subcontractor sued the property owner so that the subcontractor could perfect its materialman's lien against the property owner's property as the subcontractor's method of providing notice of the lien to the property owner did not comply with applicable statutory law, O.C.G.A. § 44-14-361.1(a)(2), since that statute expressly allowed the lien notice to be provided to the property owner by registered mail, certified mail, or statutory overnight delivery, and not through the facsimile transmission that the subcontractor used, especially since the facsimile transmission was not the equivalent method of providing notice as those methods set forth in the statute. *Phillips, Inc. v. Historic Props. of Am.*, 260 Ga. App. 886, 581 S.E.2d 389 (2003).

Employment contract. — Trial court properly granted partial summary judgment pursuant to O.C.G.A. § 9-11-56 to an employer on an employee's action alleging breach of an employment contract, holding that the employee could only recover wages payable up to the time of trial; O.C.G.A. § 10-6-37 provided that in all employment contracts for a definite duration, an employee could sue for the value of the services rendered, or could wait until the expiration of the year and sue for and recover the employee's entire wages, and in this action the employee elected to affirm the contract and bring an immediate suit for damages based upon the company's alleged breach thereof, and under this option, the employee only had the right to prove, and to recover for, all damages which may have accrued up to the date of the trial. *Harvey v. J. H. Harvey Co.*, 276 Ga. 762, 582 S.E.2d 88 (2003).

Tortious interference with inheritance. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to the defendants in the plaintiffs' action alleging tortious interference with an inheritance and other claims arising out of transfers of land to defendants as the parties' mother was still alive, and therefore the plaintiffs had no standing to bring such an action, and because the

plaintiffs' claims were barred by collateral estoppel; the trial court erred in denying the defendants' summary judgment motion as to claims raised by a guardian because no claims were actually raised by the guardian. *Copelan v. Copelan*, 261 Ga. App. 726, 583 S.E.2d 562 (2003).

Summary judgment appropriate as county did not waive immunity. — Trial court properly entered summary judgment for a county as to two injured parties' tort claims as the county's self-insurance plan for certain claims did not constitute a waiver of the county's sovereign immunity because the county did not purchase a motor vehicle liability insurance policy — a requirement under O.C.G.A. § 33-24-51(b); there is no statute which provides that by establishing a self-insurance plan, a county waives sovereign immunity. *Smith v. Chatham County*, 264 Ga. App. 566, 591 S.E.2d 388 (2003).

2. Grant of Summary Judgment

Legislative intent. — Clear and last expression of legislative intent with respect to appeals from grants of summary judgments, as expressed in Ga. L. 1966, p. 609, § 56 (see now O.C.G.A. § 9-11-56(h)), was to except summary judgments from general appealability provisions of former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34) and to allow appeal when summary judgment was granted on any issue or as to any party, even though the case is still pending within the purview of former Code 1933, § 6-701. *McLeod v. Westmoreland*, 117 Ga. App. 659, 161 S.E.2d 335 (1968).

Subsection (h) as exception to rule requiring final judgment for appeal. — 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).

Although generally an appeal is premature when a case remains pending, subsection (h) of this section makes the grant of summary judgment an exception to the rule requiring a final judgment in order to appeal. *Overstreet v. Doctors Hosp.*, 142 Ga. App. 895, 237 S.E.2d 213 (1977).

Subsection (h) of this section states an

exception to the finality rule which is for the benefit of the losing party. *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 248 S.E.2d 641 (1978); *Bozard v. J.A. Jones Constr. Co.*, 148 Ga. App. 425, 251 S.E.2d 362 (1978).

Subsection (h) of this section gives the losing party the right to direct appeal from an order granting summary judgment on any issue, even if judgment is not final, as when the order disposes of fewer than all claims; this is also true when an appeal is from the grant of partial summary judgment. *Sapp v. ABC Credit & Inv. Co.*, 243 Ga. 151, 253 S.E.2d 82 (1979).

Under subsection (h) of this section, grant of summary judgment is excepted from rule requiring final judgment as to all parties and claims before an appeal may be taken. *Capital Bank v. Levy*, 151 Ga. App. 819, 261 S.E.2d 722 (1979).

Subsection (h) of O.C.G.A. § 9-11-56, which permits direct appeal from any grant of summary judgment, is an exception to the finality rule expressed in O.C.G.A. § 9-11-54. *Edwards v. Davis*, 160 Ga. App. 122, 286 S.E.2d 301 (1981).

Grant of partial summary judgment is an appealable order. *Cohen v. Garland*, 119 Ga. App. 333, 167 S.E.2d 599 (1969); *Thomas v. McGee*, 242 Ga. 441, 249 S.E.2d 242 (1978); *Tri-County Feed & Seed, Inc. v. Savannah Valley Prod. Credit Ass'n*, 158 Ga. App. 815, 282 S.E.2d 344 (1981).

Dismissal of an owner's appeal of a summary judgment on a breach of contract and fraud complaint was improper since the complaint was amended to include a negligence count hours before a summary judgment on the fraud and breach of contract claims was filed, and therefore entered pursuant to O.C.G.A. § 9-11-58(b) (although the summary judgment order had been signed the previous day); the negligence claim was pending at the time that the summary judgment was entered, and although the summary judgment was subject to a direct appeal by the owner, the owner was not required to file an appeal at that time under O.C.G.A. § 9-11-56(h). *Liberty v. Storage Trust Props., L.P.*, 267 Ga. App. 905, 600 S.E.2d 841 (2004).

Grant of the plaintiff's motion for partial summary judgment to the effect that a

contract with the defendant was valid was not a final judgment and left the action pending below, but was directly appealable nevertheless under O.C.G.A. § 9-11-56(h) without a certificate of immediate review under O.C.G.A. § 5-6-34(b). *Jack V. Heard Contractors, Inc. v. Adams Constr. Co.*, 155 Ga. App. 409, 271 S.E.2d 222, overruled on other grounds, *South-east Ceramics, Inc. v. Klem*, 156 Ga. App. 636, 275 S.E.2d 723 (1980).

Time for appeal. — Appeal of partial summary judgment for the plaintiff must be filed within 30 days and is not extended by a motion for reconsideration. *Becker v. Fairman*, 167 Ga. App. 708, 307 S.E.2d 520 (1983); *Jones v. Walker*, 209 Ga. App. 532, 433 S.E.2d 726 (1993).

While a plaintiff can appeal directly an order granting summary judgment as to the main action, when the plaintiff fails to do so within 30 days, thereafter it can only appeal that order after final judgment. *Gulf Oil Co. v. Mantegna*, 167 Ga. App. 844, 307 S.E.2d 732 (1983).

Grant of summary judgment on one count of three-count petition is directly appealable, though remaining counts are still pending in trial court. *Ferguson v. United Ins. Co. of Am.*, 163 Ga. App. 282, 293 S.E.2d 736 (1982).

Summary judgment on any issue or as to any party may be appealed. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969).

Submission of specific issue on appeal permitted. — Subsection (h) of this section permits submission of a specific issue to the appellate court. *Bush v. City of Albany*, 125 Ga. App. 558, 188 S.E.2d 245 (1972).

Summary judgment for one of parties defendant appealable. — Order granting summary judgment in behalf of one of the parties defendant was appealable under subsection (h) of Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56) and under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34), even though the case was still pending. *George v. Lee*, 118 Ga. App. 302, 163 S.E.2d 262 (1968).

Summary judgment only final when entire case disposed of. — Grant of motion for summary judgment is appealable, but such grant constitutes final judg-

Appealability and Finality (Cont'd)**2. Grant of Summary****Judgment (Cont'd)**

ment only if it disposes of the entire case and the case is no longer pending in the court below. *Insurance Co. of N. Am. v. Fowler*, 148 Ga. App. 509, 251 S.E.2d 594 (1978).

Direct appeal even though judgment is not final. — Subsection (h) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56) gives the losing party the right to a direct appeal from an order granting summary judgment on any issue or as to any party, even if the judgment was not final under former Code 1933, § 6-701 or Ga. L. 1976, p. 1047, § 2 (see now O.C.G.A. §§ 5-6-34(a)(1) or 9-11-54(b)). *Bozard v. J.A. Jones Constr. Co.*, 148 Ga. App. 425, 251 S.E.2d 362 (1978); *Southern Guar. Ins. Co. v. Jeffares*, 190 Ga. App. 449, 379 S.E.2d 167, overruled on other grounds, *Strozier v. Simmons U.S.A. Corp.*, 192 Ga. App. 601, 385 S.E.2d 677 (1989).

Right to review lost by failure to appeal. — After the trial court certified that summary judgment in favor of three of four defendants was final and ripe for review, the plaintiff lost the plaintiff's right to obtain appellate review by failing to file a timely notice of appeal, even though the plaintiff had filed a motion for reconsideration. *Jarallah v. Aetna Cas. & Sur. Co.*, 199 Ga. App. 592, 405 S.E.2d 510 (1991).

Subsection (d) covers adjudication of less than all issues. — Rule embodied in subsection (d) of this section is designed to cover situations where the court makes partial adjudication of some but not all issues presented as, for example, when there is more than one claim for relief and the movant is entitled to favorable judgment on some of the claims, but on others there are disputed issues of fact necessitating trial. *Finney v. Pan-Am. Fire & Cas. Co.*, 123 Ga. App. 250, 180 S.E.2d 253 (1971).

Interlocutory order establishing facts not in controversy permitted. — This section provides that when a party applies for summary judgment on the entire case or on one claim when several

claims for recovery are pleaded or on a counterclaim or cross-claim, and the trial judge finds that summary judgment as to the entire case, claim, counterclaim, or cross-claim is not appropriate, the judge is authorized to enter an interlocutory order establishing for trial those facts which are without substantial controversy. *Robinson v. Franwylie, Inc.*, 145 Ga. App. 507, 244 S.E.2d 73 (1978).

Power of judge to reassess interlocutory order. — As with a pretrial order entered under Ga. L. 1968, p. 1104, § 5 (see now O.C.G.A. § 9-11-16), a trial judge retains full power to reassess an interlocutory order entered under subsection (d) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56) and to make one complete adjudication on all aspects of the case when the proper time arrives. *Robinson v. Franwylie, Inc.*, 145 Ga. App. 507, 244 S.E.2d 73 (1978).

Temporary adjudication of lack of issues. — Under subsection (d) of this section, trial judge may adjudicate temporarily the lack of issues until a final judgment in the case. *Mays v. Citizens & S. Nat'l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974), overruled on other grounds, *Mock v. Canterbury Realty Co.*, 152 Ga. App. 872, 264 S.E.2d 489 (1980).

Adjudication on less than all claims or parties remains interlocutory absent court's determination. — In a case involving multiple claims or parties, when the trial court fully adjudicates one or more but fewer than all claims or rights and liabilities of fewer than all parties, the court can make an adjudication under subsection (d) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56) final by making express determination and direction called for by Ga. L. 1976, p. 1047, § 2 (see now O.C.G.A. § 9-11-54(b)); however, failing to do that, the adjudication remains interlocutory. *Robinson v. Franwylie, Inc.*, 145 Ga. App. 507, 244 S.E.2d 73 (1978).

Adjudication of nondispositive issues not authorized. — Subsection (d) of this section does not authorize initiation of motions of which the sole object is to adjudicate issues of fact which are not dispositive of any claim or part thereof. *Robinson v. Franwylie, Inc.*, 145 Ga. App.

507, 244 S.E.2d 73 (1978); Planet Ins. Co. v. Ferrell, 228 Ga. App. 264, 491 S.E.2d 471 (1997).

Losing party who commits procedural default is foreclosed from re-submitting matter for review. — If a losing party suffers dismissal of the party's O.C.G.A. § 9-11-56(h) appeal for failure to fulfill procedural requirements, the losing party should, in return for that party's privilege of direct appeal, suffer the same sanction of res judicata which attaches to a final judgment from which a procedurally defective appeal is taken; therefore, a losing party on summary judgment who puts the machinery of immediate appellate review under O.C.G.A. § 9-11-56(h) into motion, yet commits a procedural default fatal to the losing party's appeal, is foreclosed from thereafter resubmitting the matter for review on appeal of the final judgment. *Eckerd Corp. v. Alterman Real Estate, Ltd.*, 266 Ga. App. 860, 598 S.E.2d 510 (2004).

Opposing party may appeal after grant of summary judgment or final judgment. — Party against whom summary judgment is granted may appeal either after grant of summary judgment or after rendition of final judgment, and when the party appeals after rendition of final judgment, the grant of summary judgment is still subject to appellate review. *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 248 S.E.2d 641 (1978); *Bozard v. J.A. Jones Constr. Co.*, 148 Ga. App. 425, 251 S.E.2d 362 (1978).

Defendant's motion to dismiss a party is normally appealable only as an interlocutory appeal, but as a grant of a motion for summary judgment it is directly appealable under subsection (h) of O.C.G.A. § 9-11-56. *McMullan v. Georgia Girl Fashions, Inc.*, 180 Ga. App. 228, 348 S.E.2d 748 (1986).

Only if co-defendants are sued as joint tort-feasors 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 co-defendant would be deemed a losing party and have standing to appeal the grant of summary judgment to another co-defendant. *C.W. Matthews Contracting Co. v. Studard*, 201 Ga. App. 741, 412 S.E.2d 539 (1991).

Pending claims. — Party may appeal grant of summary judgment after rendition of final judgment in the case, and the summary judgment is not res judicata as to any other claims which had remained pending. *Ramseur v. American Mgt. Ass'n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

Order as to ex delicto claims not final if ex contractu claim pending. — Order granting the defendant's motion to strike certain ex delicto allegations and the prayers of the plaintiff's complaint was not final when the appellant's ex contractu claim was still pending and, accordingly, the order was not directly appealable. *Whatley v. Blue Cross of Ga./Columbus, Inc.*, 165 Ga. App. 340, 301 S.E.2d 60 (1983).

Grant of motion for summary judgment in 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).

Grant of summary judgment held erroneous. — Trial court erred in granting the appellee's motion for summary judgment and in failing to grant the appellant's motion for summary judgment. *Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County*, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

On de novo review of a decision granting summary judgment to a consulting firm in an action against the firm by a hotel franchisee alleging negligence and negligent misrepresentation, it was error to grant summary judgment to the firm when the franchisee submitted an affidavit from an expert that demonstrated familiarity with the standard of care required of the consulting firm in performing an impact study and that concluded the firm breached that duty. The questions surrounding the expert's factual accuracies and conclusions were issues for trial, not summary judgment. *Marquis Towers, Inc. v. Highland Group*, 265 Ga. App. 343, 593 S.E.2d 903 (2004).

Summary judgment on partial issues held proper. — Summary judgment was properly entered on fraud claim as such claim was time-barred; but, when fact issues remained as to a foreclosure allegedly resulting from a non-existent

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debt, slandering the title to the underlying property, summary judgment was reversed as to these claims. *Boaz v. Latson*, 260 Ga. App. 752, 580 S.E.2d 572 (2003).

Judgment final only when entire case disposed of. — Because a partial taking condemnation order did not consist of a viable grant of partial summary judgment, and was not otherwise a final appealable judgment within the meaning of O.C.G.A. § 5-6-34(a), but 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).

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 its 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).

3. Denial of Summary Judgment

Editor's notes. — As originally enacted by Ga. L. 1966, p. 609, § 56, subsection (h) of this section provided that an order denying summary judgment was not appealable. The subsequent amendment by Ga. L. 1967, p. 226, § 25, stated that denial of summary judgment was not subject to review by direct appeal or other-

wise unless the trial judge certified within ten days that such order should be subject to review, in which case it would be subject to review by direct appeal. The 1975 amendment by Ga. L. 1975, p. 757, § 3 made an order denying summary judgment subject to review by direct appeal in accordance with § 5-6-34(b). The latter section provides for review of an order, decision, or judgment not otherwise subject to direct appeal if the trial judge certifies that such order, etc., is of such importance that immediate review should be had, and if the appellate court, on application, permits an appeal to be taken. Hence, decisions dealing with appealability of denial of summary judgment should be consulted with care, with particular attention to the dates on which such decisions were rendered.

Denial of motion not final judgment. — Denial of motion for summary judgment is not a final judgment. *Giordano v. Stubbs*, 129 Ga. App. 283, 199 S.E.2d 322 (1973), rev'd on other grounds, *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974).

Denial not appealable unless certain conditions are met. — Grant of motion for summary judgment is subject to direct appeal, but denial of such motion is not appealable unless certain conditions are met. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Procedure in § 5-6-34(b) held requisite to appeal. — Order denying summary judgment must be appealed in accordance with former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)). *First Nat'l Bank v. Ferrell*, 239 Ga. 8, 235 S.E.2d 507 (1977).

Denial of a motion for summary judgment is not subject to review by direct appeal, except on the grant of permission to appeal as set out in former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)). *Johnston-Willis Hosp. v. Cain*, 142 Ga. App. 305, 236 S.E.2d 374 (1977).

Appealability of denial of motion governed by subsection (h) and § 5-6-34(b). — Denial of motion for summary judgment was not reviewable other than by procedures set forth in former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)) and subsection (h) of Ga. L.

1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56). *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977).

Observance of interlocutory review procedures required. — No appeal lies from denial of a motion for summary judgment, standing alone, unless an interlocutory review procedure is observed. *U.S.I.F. Atlanta Corp. v. Paul*, 138 Ga. App. 625, 227 S.E.2d 90 (1976).

Appeal of other issues when appeal of summary judgment. — When direct appeal of the grant of summary judgment is taken, any other judgments, rulings, or orders rendered in the case and which may affect the proceedings below may be raised on appeal including the denial of a motion for summary judgment. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Cross appeal of denial of motion. — Denial of motion for summary judgment may be carried up as a cross appeal to appeal by the opposite party of a grant of a motion for summary judgment. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980). But see, *Campbell v. Carroll*, 121 Ga. App. 497, 174 S.E.2d 375 (1970).

Availability of direct appeal irrelevant to interlocutory appeal decision. — As the losing party on cross-motions for summary judgment, the defendant was entitled to proceed under O.C.G.A. § 5-6-34(b) to seek an interlocutory appeal from the denial of its motion or, in the alternative, to file a direct appeal from the grant of the plaintiff's motion pursuant to subsection (h) of O.C.G.A. § 9-11-56. Because 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).

Denial of summary judgment moot after trial of case. — Verdict and judgment appealed from after trial renders moot the order on a prior motion for summary judgment not certified and appealed as required by subsection (h) of this section. *Old Equity Life Ins. Co. v. Barnard*, 120 Ga. App. 596, 171 S.E.2d 636 (1969).

Order denying motion for summary judgment becomes moot when court reviews evidence upon trial of the case. *Patterson v. Castellaw*, 119 Ga. App. 712, 168 S.E.2d 838 (1969).

After verdict and judgment, it is too late to review judgment denying summary judgment. *Pascoe Steel Corp. v. Turner County Bd. of Educ.*, 142 Ga. App. 88, 235 S.E.2d 554, rev'd on other grounds in part, vacated on other grounds in part, 240 Ga. 88, 239 S.E.2d 517 (1977); *Gosnell v. Waldrup*, 158 Ga. App. 685, 282 S.E.2d 168 (1981).

After verdict and judgment have been entered, the Court of Appeals cannot review a judgment denying a motion for summary judgment because that issue became moot when the court heard evidence at trial. *Preferred Risk Mut. Ins. Co. v. Thomas*, 153 Ga. App. 154, 264 S.E.2d 662 (1980).

After verdict and judgment, it is too late to review a decision denying a summary judgment motion for that judgment becomes moot when the court reviews the evidence upon the trial of the case. *Hardaway Constructors, Inc. v. Browning*, 176 Ga. App. 530, 336 S.E.2d 579 (1985), cert. denied, 475 U.S. 1095, 106 S. Ct. 1491, 89 L. Ed. 2d 893 (1986).

After verdict and judgment, it was too late to review a judgment denying summary judgment for that judgment became moot when the court reviewed the evidence upon the trial of the case. *Argentum Int'l, LLC v. Woods*, 280 Ga. App. 440, 634 S.E.2d 195 (2006).

Husband's complaint of the trial court's denial of the corporation's motion for summary judgment under O.C.G.A. § 9-11-56 was moot as the trial court later granted the corporation's motion for a directed verdict under O.C.G.A. § 9-11-50. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

Effect on trial on merits. — Appellate court declined to review the trial court's denial of a defendant's motion for summary judgment because a trial on the merits was conducted. *Tensar Earth Techs., Inc. v. City of Atlanta*, 267 Ga. App. 45, 598 S.E.2d 815 (2004).

Extent of review following trial. — When a motion for judgment is overruled

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and the case is tried, appellate courts will review the sufficiency of the evidence to support the verdict, as well as enumerations of alleged trial errors, but will not also review the denial of the motion for summary judgment. *Drillers Serv., Inc. v. Moody*, 242 Ga. 123, 249 S.E.2d 607 (1978); *Simmons v. Edge*, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

When a motion for summary judgment is overruled and the case is tried, the appellate court will review evidence in support of the judgment as well as other enumerations of error, but because ordinarily the same issues are involved, the court will not review denial of the motion for summary judgment. *Rothstein v. Mirvis & Fox, Inc.*, 155 Ga. App. 79, 270 S.E.2d 301 (1980).

Because the issue of the purported illegality of the parties' contract was not presented to the jury, the court would review the trial court's denial of the motion for summary judgment on this ground; the court would not, however, consider the defendants' argument on summary judgment that damages were not proven since the jury considered damages in the subsequent trial. *Smith v. Saulsbury*, 286 Ga. App. 322, 649 S.E.2d 344 (2007).

Error in denial harmless after trial.

— When a motion for summary judgment is overruled and the case proceeds to trial and evidence introduced at trial authorizes a verdict on this same issue, any possible error in overruling the motion for summary judgment is harmless. *Clark v. Piedmont Hosp.*, 117 Ga. App. 875, 162 S.E.2d 468 (1968).

Losing party who initiates appellate review, yet commits procedural default fatal to appeal, is foreclosed from thereafter resubmitting the matter for review on appeal of the final judgment. *Mitchell v. Oliver*, 254 Ga. 112, 327 S.E.2d 216 (1985).

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 O.C.G.A. § 5-6-34(b) committed a procedural default fatal to its appeal and was foreclosed from resubmitting the matter for appellate review. It was improper for the trial court to vacate the court's original order denying summary judgment to provide the party with the opportunity to resubmit the party's application for interlocutory appeal. *International Indem. Co. v. Robinson*, 231 Ga. App. 236, 498 S.E.2d 795 (1998).

4. Certificate and Application for Review

Editor's notes. — As originally enacted by Ga. L. 1966, p. 609, § 56, subsection (h) of this section provided that an order denying summary judgment was not appealable. The subsequent amendment by Ga. L. 1967, p. 226, § 25, stated that denial of summary judgment was not subject to review by direct appeal or otherwise unless the trial judge certified within ten days that such order should be subject to review, in which case it would be subject to review by direct appeal. The 1975 amendment by Ga. L. 1975, p. 757, § 3 made an order denying summary judgment subject to review by direct appeal in accordance with § 5-6-34(b). The latter section provides for review of an order, decision, or judgment not otherwise subject to direct appeal if the trial judge certifies that such order, etc., is of such importance that immediate review should be had, and if the appellate court, on application, permits an appeal to be taken. Hence, decisions dealing with appealability of denial of summary judgment should be consulted with care, with particular attention to the dates on which such decisions were rendered.

Certificate from trial judge required. — When there is no certificate of a trial judge allowing an appeal of the refusal to grant a motion for summary judgment, the appellate court is without authority to review such ruling. *Peachtree on Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 170 S.E.2d 709 (1969); *Central Bd. on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 171 S.E.2d 747 (1969).

Absent proper certificate, denial of sum-

mary judgment is not subject to review. *Campbell v. Carroll*, 121 Ga. App. 497, 174 S.E.2d 375 (1970); *Carroll v. Campbell*, 226 Ga. 700, 177 S.E.2d 83 (1970).

Order deriving summary judgment shall be subject to review by obtaining certificate of immediate review. *Hiller v. Culbreth*, 139 Ga. App. 351, 228 S.E.2d 374 (1976).

Appeal by certificate is the only method whereby denial of a motion for summary judgment may be reviewed. *First Nat'l Bank v. Ferrell*, 239 Ga. 8, 235 S.E.2d 507 (1977).

When grant of summary judgment is appealed, it is impermissible for denial to be appealed simultaneously without certificate of immediate review. *Jones v. Neighbor Newspapers, Inc.*, 142 Ga. App. 365, 236 S.E.2d 23 (1977). (But see *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980)).

Certificate and application required. — There was no provision for review of denial of summary judgment in subsection (h) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56) or former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34(b)), except by direct appeal with a certificate of the trial judge and an application for review to the appropriate appellate court. *Marietta Yamaha, Inc. v. Thomas*, 237 Ga. 840, 229 S.E.2d 753 (1976), overruled on other grounds, *Marathon U.S. Realities, Inc. v. Kalb*, 244 Ga. 390, 260 S.E.2d 88 (1979); *American Mut. Fire Ins. Co. v. Llewellyn*, 142 Ga. App. 824, 237 S.E.2d 227 (1977).

Judgment denying summary judgment is reviewable only by certificate of immediate review and application for review by the appellate court. *Thomas v. McGee*, 242 Ga. 441, 249 S.E.2d 242 (1978).

When grant of the plaintiff's motion for partial summary judgment was not raised via cross appeal, but was appealable only under subsection (h) of Ga. L. 1975, p. 757, § 3 (see now O.C.G.A. § 9-11-56), and not under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34), denial of the defendant's motion for summary judgment could not be considered without a certificate for immediate review and application to the appellate court for permission to appeal. *Jack V. Heard Contractors, Inc. v.*

Adams Constr. Co., 155 Ga. App. 409, 271 S.E.2d 222 (1980). But see *Thomas v. McGee*, 242 Ga. 441, 249 S.E.2d 242 (1978); *Southeast Ceramics, Inc. v. Klem*, 156 Ga. App. 636, 275 S.E.2d 723 (1980).

When grant of partial summary judgment was appealed with denial of summary judgment, judgment granting partial summary judgment was appealable, but judgment denying summary judgment was reviewable only by certificate of immediate review. *Jack V. Heard Contractors, Inc. v. Adams Constr. Co.*, 155 Ga. App. 409, 271 S.E.2d 222 (1980). But see *Thomas v. McGee*, 242 Ga. 441, 249 S.E.2d 242 (1978); *Southeast Ceramics, Inc. v. Klem*, 156 Ga. App. 636, 275 S.E.2d 723 (1980).

Denial of summary judgment is not reviewable by the appellate courts in the absence of a timely certificate of immediate review and the granting of an interlocutory appeal by the appellate court unless there be a final judgment in the case and the cause is no longer pending in the lower court. *Weldon v. Southeastern Fid. Ins. Co.*, 157 Ga. App. 698, 278 S.E.2d 500 (1981).

Denial of a motion for summary judgment cannot be considered without a certificate for immediate review and an application to the court for permission to appeal. *National Equip. Sales, Serv. & Supplies, Inc. v. Hamrick Mfg. & Servs., Inc.*, 186 Ga. App. 400, 367 S.E.2d 287 (1988).

Certification and grant of application not exclusive means of appeal. — When summary judgment is denied, it may be appealed after certification by the trial judge and the granting of an application by the appropriate appellate court, but this is not the exclusive means of appealing the denial of a motion for summary judgment. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Certification not matter of right. — Certification for review is not automatic or a matter of right, but is a matter of discretion with the trial judge. *Barber v. Baker*, 118 Ga. App. 513, 164 S.E.2d 349 (1968).

Authority of judge as to issuance of certificate. — Trial judge is invested

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4. Certificate and Application for Review (Cont'd)

with absolute authority in issuance of certificate of appealability of denial of motion for summary judgment under subsection (h) of this section. *Lewis v. Williford*, 235 Ga. 558, 221 S.E.2d 14 (1975).

Certification should be made use of only sparingly, in close cases, when real doubt exists as to the merits of the motion. *C & A Land Co. v. Wilson Constr. Corp.*, 117 Ga. App. 744, 161 S.E.2d 922 (1968); *Barber v. Baker*, 118 Ga. App. 513, 164 S.E.2d 349 (1968).

Routine certification not contemplated. — Routine certification by trial courts of appealability of orders denying motions for summary judgment might well annul legislative intent as to subsection (h) of this section, the purpose of which was to do away with unnecessary delay and to assist the flow of cases toward trial on the merits. *C & A Land Co. v. Wilson Constr. Corp.*, 117 Ga. App. 744, 161 S.E.2d 922 (1968); *Flanagan v. Malsby*, 119 Ga. App. 474, 167 S.E.2d 739 (1969).

No review of facts without certificate. — Absent certificate for direct appeal on denial of a motion for summary judgment, the appellate court cannot review factual contentions. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

No direct appeal without certificate. — Order denying summary judgment is not subject to review by direct appeal or otherwise in absence of certificate for review by the trial judge within ten days of the order. *John L. Hutcheson Mem. Tri-County Hosp. v. Oliver*, 120 Ga. App. 547, 171 S.E.2d 649 (1969); *City of Jesup v. Spivey*, 133 Ga. App. 403, 210 S.E.2d 859 (1974); *Egerton v. Jolly*, 133 Ga. App. 805, 212 S.E.2d 462 (1975).

Denial of summary judgment is not subject to review by direct appeal or otherwise, unless the lower court certifies it for direct appeal. *Home Indem. Co. v. Godley*, 122 Ga. App. 356, 177 S.E.2d 105 (1970); *Bush v. City of Albany*, 125 Ga. App. 558, 188 S.E.2d 245 (1972); *Starkey v. Metro-*

politan Hotels, Inc., 129 Ga. App. 643, 200 S.E.2d 482 (1973).

Attempting review without certificate following final judgment. — When there is no certificate of immediate review as to denial of summary judgment, and the case is appealed after final judgment, enumeration of error on denial of summary judgment will not be considered. *Rustin Oldsmobile, Inc. v. Kendrick*, 123 Ga. App. 679, 182 S.E.2d 178 (1971).

Appellate court cannot consider merits of denial of a motion for summary judgment without a certificate of immediate review, even though there is a final judgment which forms the basis for an appeal. *Royal Atlanta Dev. Corp. v. M.D. Hodges Enters., Inc.*, 141 Ga. App. 838, 234 S.E.2d 676 (1977). (But see *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980)).

Certificate from trial judge unnecessary. — Summary judgment granted in favor of one of several defendants is a final and appealable judgment under subsection (h), and it is unnecessary to obtain a certificate from the trial judge that it should be reviewed. *LuAllen v. Home Mission Bd. of S. Baptist Convention*, 125 Ga. App. 456, 188 S.E.2d 138 (1972).

Denial tied to appealable order or judgment may be appealed without application. — Denial of a motion for summary judgment can be appealed without application when it is tied to an appeal of an appealable order or judgment. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Review of denial of summary judgment is permitted without necessity of making application for interlocutory appeal when there is a final judgment which is the basis of the appeal as for instance when both the plaintiff and the defendant moved respectively for summary judgments with the court granting the motion of the defendant and denying that of the plaintiff. *U.S.I.F. Atlanta Corp. v. Paul*, 138 Ga. App. 625, 227 S.E.2d 90 (1976).

Refusal to grant certificate not reviewable. — There is no right to a certificate of review to the overruling of a motion for summary judgment; whether or not such certificate is granted rests

solely with the trial judge, and the judge's refusal is not reviewable by the appellate court. *Newsrack Supply, Inc. v. Heinle*, 127 Ga. App. 843, 195 S.E.2d 193 (1973).

Failure to apply for and obtain order granting appellate review. — 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. § 9-11-56, but failed to apply to and obtain an order from this court granting an appeal, the defendant's appeal is premature. *Hargraves v. Turner*, 160 Ga. App. 807, 287 S.E.2d 664 (1982).

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 appellate court had jurisdiction to address the trial court's order denying the company's motion for reconsideration under O.C.G.A. § 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).

5. Standing

Appeal by plaintiff to grant of summary judgment to third-party defendant.

dant. — Since the plaintiff asserted no claim against a third-party defendant, the plaintiff was not aggrieved by the grant of summary judgment to the third-party defendant on the third-party action, which established only the third party's nonliability to the defendant and, thus, the plaintiff lacked standing to appeal an order granting such judgment. *Wallace v. Scott*, 164 Ga. App. 129, 296 S.E.2d 423 (1982).

Multi-party cases. — Grant of a motion for summary judgment in a multi-party case will not, standing alone, necessarily authorize the initiation of a direct appeal therefrom by any party to the underlying case. An appeal must be filed by one who has standing to pursue the appeal. *Shackelford v. Green*, 180 Ga. App. 617, 349 S.E.2d 781 (1986), *aff'd*, 257 Ga. 9, 356 S.E.2d 27 (1987).

Standing to appeal not present for order against another party. — Guarantor and the guarantor's principal had no standing, under O.C.G.A. § 9-11-56(h), to file a direct appeal of a trial court's grant of summary judgment to a contractor against a property owner because the guarantor and the guarantor's principal were not losing parties to the trial court's order against the owner on the contractor's breach of contract claim and because the guarantor and the guarantor's principal were not sued as joint tortfeasors of the owner. *Adams v. D-Money Enters.*, 312 Ga. App. 537, 718 S.E.2d 870 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Summary Judgment, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Pretrial Conference and Procedure, § 1. 23 Am. Jur. Pleading and Practice Forms, Summary Judgment, § 1 et seq.

C.J.S. — 35B C.J.S., Federal Civil Procedure, § 1147 et seq. 49 C.J.S., Judgments, § 294 et seq.

ALR. — Constitutionality of statute or rule of court providing for summary judgment

unless affidavit of merits is filed, 69 ALR 1031; 120 ALR 1400.

Motion for summary judgment as searching record, 91 ALR 884.

Summary judgment statute as applicable to action on war risk policy, 103 ALR 217.

What amounts to "debt," "liquidated demand," "contract," etc., within contemplation of summary or expedited judgment statutes, 107 ALR 1221.

Relief from stipulations, 161 ALR 1161. Proper procedure and course of action

by trial court, where both parties move for summary judgment, 36 ALR2d 881.

Propriety of granting summary judgment in case involving issue of gross or wanton negligence, 50 ALR2d 1309.

Proper procedure and course of action by trial court, where both parties move for judgment on the pleadings, 59 ALR2d 494.

Raising statute of limitations by motion for summary judgment, 61 ALR2d 341.

Power of court to grant summary judgment against less than all parties against whom relief is sought, 67 ALR2d 1456.

Propriety of considering answers to interrogatories in determining motion for summary judgment, 74 ALR2d 984.

Propriety of summary judgment on part of single or multiple claims, 75 ALR2d 1201.

Raising constitutionality of legislation by motion for summary judgment, 83 ALR2d 838.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition, 85 ALR2d 825.

Raising res judicata by motion for summary judgment under Federal Rule 56

and similar state statutes or rules, 95 ALR2d 648.

Summary judgment in mandamus or prohibition cases, 3 ALR3d 675.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 ALR3d 1361.

Reviewability of order denying motion for summary judgment, 15 ALR3d 899.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 ALR3d 1113.

Use of evidence excludable under dead man's statute to defeat or support summary judgment, 67 ALR3d 970.

Admissibility of oral testimony at state summary judgment hearing, 53 ALR4th 527.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 ALR4th 561.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 ALR Fed. 755.

9-11-57. Reserved.

9-11-58. Entry of judgment; judge's name to be typed, printed, or stamped after signature; filing of civil case disposition form.

(a) **Signing.** Except when otherwise specifically provided by statute, all judgments shall be signed by the judge and filed with the clerk. The signature of the judge shall be followed by the spelling of the judge's name and title legibly typed, printed, or stamped. The failure of the judgment to have the typed, printed, or stamped name of the judge shall not invalidate the judgment.

(b) **When judgment entered.** The filing with the clerk of a judgment, signed by the judge, with the fully completed civil case disposition form constitutes the entry of the judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of the same, as provided in this subsection. As part of the filing of the final judgment, a civil case disposition form shall be filed by the prevailing party or by the plaintiff if the case is settled, dismissed, or otherwise disposed of without a prevailing party; provided, however, that the amount of a sealed or otherwise confidential settlement agreement shall not be disclosed on the civil case disposition form. The

form shall be substantially in the form prescribed in Code Section 9-11-133. If any of the information required by the form is sealed by the court, the form shall state that fact and the information under seal shall not be provided. The entry of the judgment shall not be made by the clerk of the court until the civil case disposition form is filed. The entry of the judgment shall not be delayed for the taxing of costs. This subsection shall not apply to actions brought pursuant to Code Sections 44-7-50 through 44-7-59. (Ga. L. 1966, p. 609, § 58; Ga. L. 1993, p. 91, § 9; Ga. L. 2000, p. 850, § 2; Ga. L. 2006, p. 648, § 2/HB 1195.)

Cross references. — Authority of Superior Court clerks, § 15-6-60.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, “Code Sections 44-7-50 through 44-7-59” was substituted for “OCGA Sections 44-7-50 — 44-7-59” at the end of the last sentence of subsection (b).

Editor’s notes. — Ga. L. 2000, p. 850, § 10, not codified by the General Assembly, provides that the amendment to subsections (a) and (b) are applicable to civil actions commenced in superior or state court on or after July 1, 2000.

Ga. L. 2006, p. 648, § 3/HB 1195, not codified by the General Assembly, provides that the amendment to this Code section shall apply to actions and judgments filed on or after July 1, 2006.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 58, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009).

JUDICIAL DECISIONS

Construction with O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). — Trial court erroneously dismissed a litigant’s petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely “housekeeping or administrative orders” that did not suspend the running of the five-year period under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if the orders were in writing, signed by the trial judge, and properly entered in the records of the trial court. *Zepp v. Brannen*, 283 Ga. 395, 658 S.E.2d 567 (2008).

Construction with Title 5. — What additional requirements are imposed by O.C.G.A. § 9-11-58(b) of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, 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).

Prerequisites for effective judgment. — Two requirements must be met before an adjudication becomes an effective judgment: (1) judgment must be set forth in writing and signed by the judge; and (2) judgment so set forth must be entered in the civil docket by the clerk of court; before then, such judgment is inchoate and is of no effect for any purpose. *Bloodworth v. Thompson*, 230 Ga. 628, 198 S.E.2d 293 (1973).

In courts of record, all judgments must be in writing, signed by the judge, and entered by filing with the clerk. *Maroska v. Williams*, 146 Ga. App. 130, 245 S.E.2d 470 (1978).

Judgment inchoate until entered. — What judge orally declares is no judgment until it has been put in writing and entered as such. *Dunagan v. Sims*, 119 Ga. App. 765, 168 S.E.2d 914 (1969).

Order granting or refusing motion must be in writing. *Addis v. First Kingston Corp.*, 225 Ga. 231, 167 S.E.2d 656 (1969).

Until an order is signed by the judge, the order is ineffective for any purpose.

Majors v. Lewis, 135 Ga. App. 420, 218 S.E.2d 130 (1975).

Until entered in accordance with the provisions of subsection (b) of O.C.G.A. § 9-11-58, a judgment is inchoate and of no effect for any purpose. *Zeitman v. McBrayer*, 201 Ga. App. 767, 412 S.E.2d 287 (1991).

Because a superior court's contempt finding was based upon a violation of a verbal order that had not been reduced to writing, signed by the issuing judge, and filed with the clerk, the finding was ineffective pursuant to O.C.G.A. § 9-11-58(b) and, thus, had to be reversed. *Shirley v. Abshire*, 288 Ga. App. 819, 655 S.E.2d 694 (2007).

Denial of motion not precluded by oral announcement that motion would be granted. — Order denying motion for new trial and order denying motion to set that order aside are not illegal when the judge had orally announced that the judge would grant the motion for a new trial. *Waller v. Waller*, 226 Ga. 279, 174 S.E.2d 433 (1970).

Filing of signed judgment constitutes entry. — Under both Ga. L. 1965, p. 18, § 23 and Ga. L. 1966, p. 609, § 1 (see now O.C.G.A. Art. 2, Ch. 6, T. 5 and Ch. 11, T. 9), a judgment is effective only upon entry and filing of a judgment signed by the judge with the clerk constitutes entry. *Minnich v. First Nat'l Bank*, 154 Ga. App. 439, 268 S.E.2d 688 (1980).

Dismissal of an owner's appeal of a summary judgment on a fraud and breach of contract complaint was improper when the complaint was amended to include a negligence count hours before the summary judgment on the fraud and breach of contract claims was filed, and therefore entered pursuant to O.C.G.A. § 9-11-58(b) (although the summary judgment order had been signed the previous day); the negligence claim was pending at the time that the summary judgment was entered, and although the order granting summary judgment was subject to a direct appeal by the owner, the owner was not required to file an appeal at that time under O.C.G.A. § 9-11-56(h). *Liberty v. Storage Trust Props., L.P.*, 267 Ga. App. 905, 600 S.E.2d 841 (2004).

As a child advocate did not establish

that the juvenile court directed that the court's oral order was effective on the day the order was made, the advocate's motion to reconsider was premature under O.C.G.A. § 9-11-58(b) because the order was filed before the juvenile court filed a written order. *In the Interest of N. W.*, 309 Ga. App. 617, 710 S.E.2d 832 (2011).

Entry on docket not required. — Nothing in subsection (b) of this section requires entry of a judgment or order on the court docket; filing of a judgment, after the judgment has been signed by the judge, with the clerk is all that is required to complete the judgment's entry. *Thomas v. Allstate Ins. Co.*, 133 Ga. App. 193, 210 S.E.2d 361 (1974), overruled on other grounds, *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 248 S.E.2d 641 (1978); *Fastenberg v. Associated Distribs., Inc.*, 134 Ga. App. 213, 213 S.E.2d 898 (1975).

It is not essential to the validity of a judgment that the judgment be entered on the docket sheet. *Krasner v. Verner Auto Supply, Inc.*, 130 Ga. App. 892, 204 S.E.2d 770 (1974).

Entry dates from filing rather than signing. — Date of filing of judgment with the clerk of the court, not the date the judgment was signed by the trial judge, constitutes "entry" of the judgment. *Blanton v. Moseley*, 133 Ga. App. 144, 210 S.E.2d 368 (1974).

Because a custody transfer order had not been filed with the court clerk, in accordance with O.C.G.A. § 9-11-58(b), when an administrative employee allegedly failed to comply with the order, the trial court erred by finding the employee in contempt under former O.C.G.A. § 15-11-5(a) (see now O.C.G.A. § 15-11-31). *In the Interest of K.D.*, 272 Ga. App. 803, 613 S.E.2d 239 (2005).

No time limit given for signing and filing. — All judgments are signed by the judge and filed with the clerk; no time limit is given for such signing and filing. *Hiscock v. Hiscock*, 227 Ga. 329, 180 S.E.2d 730 (1971); *Moore v. Moore*, 229 Ga. 600, 193 S.E.2d 608 (1972); *Maloy v. Planter's Whse. & Lumber Co.*, 142 Ga. App. 69, 234 S.E.2d 807 (1977).

No time limit is given for the signing and filing of judgments. *Jefferson v. Ross*, 250 Ga. 817, 301 S.E.2d 268 (1983).

Entry of dismissal on court calendar or docket not entry of judgment.

— Entry of “DWOP” (dismissed for want of prosecution) on the court’s calendar or docket, without the judge’s signature and without filing with the clerk, does not amount to entry of a judgment. *Rothstein v. Brooks*, 133 Ga. App. 52, 209 S.E.2d 674 (1974).

Order to comply with settlement agreement. — State court order declaring that the 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).

Entry of judgment required for disposition of case or appeal. — There must be an entry of judgment to finally dispose of a case or for the purpose of using the judgment to support an appeal. *Dunagan v. Sims*, 119 Ga. App. 765, 168 S.E.2d 914 (1969).

In the absence of a judgment in writing, no question for decision is presented to the appellate court. *Dunagan v. Sims*, 119 Ga. App. 765, 168 S.E.2d 914 (1969).

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).

Judgment should be certain and definite, or should be capable of being made so by proper construction, which sometimes requires reference to the complaint. *Pico, Inc. v. Mickel*, 138 Ga. App. 856, 230 S.E.2d 488 (1976), *aff’d*, 238 Ga. 218, 232 S.E.2d 841 (1977).

Judgment must be specific enough for outsider to understand. — Judgment must be specific enough for an individual without inside knowledge to understand the judgment, especially when a judgment is to be a muniment of title. *Sease v. Singleton*, 246 Ga. 278, 271 S.E.2d 187 (1980).

Power of judge over judgment during term of entry.

— Unless a judgment is based upon the verdict of a jury, it remains in the breast of the court until the end of the term during which the judgment was entered, and the judge has the power on the judge’s own motion to vacate the judgment, with or without notice to the parties. *Rothstein v. Brooks*, 133 Ga. App. 52, 209 S.E.2d 674 (1974).

Continuing jurisdiction to enter judgment on jury verdict. — Court of record has continuing jurisdiction to enter judgment on a jury verdict at any time. *Jefferson v. Ross*, 250 Ga. 817, 301 S.E.2d 268 (1983).

Intent to record previously unrecorded action actually taken or judgment actually rendered. — Juvenile court had jurisdiction to award custody of a child to the Department of Human Resources and properly entered the court’s order of disposition awarding permanent custody to the Department because the mother and father had no rights to surrender to the great-grandparents when the termination order reflected the juvenile court’s intent to record a previously unrecorded action actually taken or judgment actually rendered; the juvenile court rendered judgment terminating the child’s parental rights at the conclusion of the hearing on September 3, 2008, and although the court’s oral ruling was not memorialized in a written order until September 9, 2008 and not filed until September 17, 2008, such order clearly stated that it was nunc pro tunc to September 3, 2008, the date of the termination hearing. *In re D.C.H.*, 300 Ga. App. 827, 686 S.E.2d 434 (2009).

Renewal of dormant judgment. — Except for determining whether or not a judgment has been dormant, provisions of O.C.G.A. § 9-11-58 are immaterial in an action for renewal of a dormant judgment. *Watkins v. Citizens & S. Nat’l Bank*, 163 Ga. App. 468, 294 S.E.2d 703 (1982), *aff’d*, 250 Ga. 29, 301 S.E.2d 892 (1983).

Proof of entry of order. — Finding that order was entered was supported by independent evidence of record in the form of testimony of the clerk of the probate court that the clerk entered the order by entering the notation “granted” in the

docket book and an extract of a “granted” entry appearing in the probate court docket. *Jabaley v. Jabaley*, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Mandamus to compel written order.

— When a juvenile court failed to enter a written order, the court failed to carry out an administrative act; therefore, mandamus was appropriate not to review the propriety of the court’s denial of the filing, but to compel the judge to enter a written order from which an appeal could be taken under O.C.G.A. § 9-11-58(a) and Ga. Unif. Juv. Ct. R. 17.1. *Titelman v. Stedman*, 277 Ga. 460, 591 S.E.2d 774 (2003).

Contempt based on oral judgment improper. — To the extent that a later contempt finding was based on the trial court’s oral pronouncement, the finding was a nullity. *In re Tidwell*, 279 Ga. App. 734, 632 S.E.2d 690 (2006).

Debtor failed to show rights were violated by order confirming sale. — Debtor sought to nullify the confirmation of the foreclosure sale by invoking the rule that a judgment must be in writing, signed by the judge, and filed with the clerk in accordance with O.C.G.A. § 9-11-58 to be effective, irrespective of any oral announcement by the trial court. The superior court at the second confirmation hearing correctly determined that, while a final order should be entered “to close [the first] case out,” the confirmation proceedings in connection with the foreclosure sale nevertheless comprised “a new action”, and with respect to such proceedings, the superior court signed a final order and duly filed the order with the clerk; thus, the debtor’s rights were not violated. *Friedman v. Regions Bank*, 288 Ga. App. 57, 653 S.E.2d 507 (2007).

When an appellant filed a bankruptcy petition after a temporary restraining order was issued verbally but before the order was reduced to writing, signed, and filed, it was error to hold the appellant in civil contempt as under O.C.G.A. § 9-11-58 the order was not effective until the order was written, signed, and filed. *Huffman v. Armenia*, 284 Ga. App. 822, 645 S.E.2d 23 (2007), cert. denied, 2007 Ga. LEXIS 554 (Ga. 2007).

Time for filing motion for attorney fees not impacted by civil disposition

form filing. — 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).

Cited in *Bragg v. Bragg*, 225 Ga. 494, 170 S.E.2d 29 (1969); *Spivey v. Mayson*, 124 Ga. App. 775, 186 S.E.2d 154 (1971); *Reese v. Ideal Realty Co.*, 128 Ga. App. 684, 197 S.E.2d 829 (1973); *Bell v. Stocks*, 128 Ga. App. 799, 198 S.E.2d 209 (1973); *Perry v. Thomas*, 129 Ga. App. 325, 199 S.E.2d 634 (1973); *G.M.J. v. State*, 130 Ga. App. 420, 203 S.E.2d 608 (1973); *Townsend v. Orkin Exterminating Co.*, 131 Ga. App. 824, 207 S.E.2d 230 (1974); *Philips Broadcast Equip. Corp. v. Production 70’s, Inc.*, 13 Ga. App. 765, 213 S.E.2d 35 (1975); *Milam v. Mojonner Bros. Co.*, 135 Ga. App. 208, 217 S.E.2d 355 (1975); *Pilgrim v. Brookfield West, Inc.*, 136 Ga. App. 619, 222 S.E.2d 137 (1975); *Lawson v. Alvers*, 136 Ga. App. 801, 222 S.E.2d 203 (1975); *Barnett v. Mobley*, 236 Ga. 565, 224 S.E.2d 406 (1976); *Bowen v. State*, 239 Ga. 517, 238 S.E.2d 62 (1977); *Stegar v. Northeast Foreign Car Serv., Inc.*, 143 Ga. App. 760, 240 S.E.2d 95 (1977); *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979); *Sheehan v. Sheehan*, 244 Ga. 367, 260 S.E.2d 77 (1979); *McCauley v. Board of Tax Assessors*, 245 Ga. 510, 265 S.E.2d 787 (1980); *Gates Rental, Inc. v. Perry*, 164 Ga. App. 297, 297 S.E.2d 79 (1982); *Boatright v. Sunshine Toyota, Inc.*, 177 Ga. App. 332, 339 S.E.2d 275 (1985); *Storch v. Hayes Microcomputer Prods., Inc.*, 181 Ga. App. 627, 353 S.E.2d 350 (1987); *West v. Mache of Cochran, Inc.*, 187 Ga. App. 365, 370 S.E.2d 169 (1988); *MacKenzie v. Sav-A-Lot Food Store*, 226 Ga. App. 32, 485 S.E.2d 559 (1997); *Fulton County Tax Comm’r v. GMC*, 234 Ga. App. 459, 507

S.E.2d 772 (1998); Taylor v. Young, 253 Ga. App. 585, 560 S.E.2d 40 (2002); Boggs Rural Life Ctr., Inc. v. IOS Capital, Inc., 255 Ga. App. 847, 567 S.E.2d 94 (2002); W.

Ray Camp, Inc. v. Cavalry Portfolio Servs., LLC, 308 Ga. App. 597, 708 S.E.2d 560 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d, Judgments, §§ 55 et seq., 67, 68.

C.J.S. — 49 C.J.S., Judgments, § 143 et seq.

ALR. — Impersonation or false state-

ment by juror as to his identity as ground for new trial, 127 ALR 717.

Modern status of state court rules governing entry of judgment on multiple claims, 80 ALR4th 707.

9-11-59. Reserved.

9-11-60. Relief from judgments.

(a) **Collateral attack.** A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods prescribed in this Code section.

(b) **Methods of direct attack.** A judgment may be attacked by motion for a new trial or motion to set aside. Judgments may be attacked by motion only in the court of rendition.

(c) **Motion for new trial.** A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings.

(d) **Motion to set aside.** A motion to set aside may be brought to set aside a judgment based upon:

(1) Lack of jurisdiction over the person or the subject matter;

(2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or

(3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

(e) **Complaint in equity.** The use of a complaint in equity to set aside a judgment is prohibited.

(f) **Procedure; time of relief.** Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may

be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments shall be brought within three years from entry of the judgment complained of.

(g) **Clerical mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(h) **Law of the case rule.** The law of the case rule is abolished; but generally judgments and orders shall not be set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby; provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be. (Ga. L. 1966, p. 609, § 60; Ga. L. 1967, p. 226, §§ 26, 27, 30; Ga. L. 1974, p. 1138, § 1; Ga. L. 1984, p. 22, § 9; Ga. L. 1986, p. 294, § 1; Ga. L. 1987, p. 564, § 1.)

Cross references. — Ground for new trial generally, § 5-5-20 et seq. Annulment of conveyances for fraud and relief against awards, judgments, and decrees obtained by imposition, § 23-2-60.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 60, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For article discussing collateral attack on contempt sanctions based upon constitutionally invalid injunctions, see 7 Ga. L. Rev. 246 (1973). For article examining waiver of objections to venue and lack of personal jurisdiction by default, see 12 Ga. L. Rev. 181 (1978). For article as to prevention of malpractice claims and litigation, see 16 Ga. St. B.J. 68 (1979). For article, “Insuring a Party’s Second Chance,” see 16 Ga. St. B.J. 177 (1980). For survey article citing developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For survey article on wills, trusts, and administration

of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey of appellate practice and procedure, see 36 Mercer L. Rev. 79 (1984). For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For article, “Trial Practice and Procedure,” see 53 Mercer L. Rev. 475 (2001). For annual survey article on legal ethics, see 56 Mercer L. Rev. 315 (2004). For annual survey of Administrative Law, see 57 Mercer L. Rev. 1 (2005). For survey article on workers’ compensation law, see 59 Mercer L. Rev. 463 (2007). For annual survey of law on insurance, see 62 Mercer L. Rev. 139 (2010). For article, “Appellate Practice and Procedure,” see 63 Mercer L. Rev. 67 (2011).

For note discussing reluctance of the courts of this state to grant appeals when an overruled motion for new trial is not enumerated as error, in light of *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968), appearing below, see 5 Ga. St. B.J. 269 (1968). For note, “Default Judgments Under the Federal Rules of Civil Procedure and the Georgia Civil Practice Act,” see 7 Ga. St. B.J. 385 (1971). For note, “Dis-

missal with Prejudice for Failure to Prosecute: Visiting the Sins of the Attorney upon the Client," see 22 Ga. L. Rev. 195 (1987).

For comment on *Marsh v. Northland Ins. Co.*, 242 Ga. 490, 249 S.E.2d 205 (1978), appearing below, see 31 Mercer L. Rev. 359 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

POWER OF COURT OVER JUDGMENTS, GENERALLY

COLLATERAL ATTACK

MOTION FOR NEW TRIAL

MOTION TO SET ASIDE

COMPLAINT IN EQUITY

1. IN GENERAL

2. FRAUD

3. NEGLIGENCE OF PETITIONER

4. ACCIDENT OR MISTAKE

TIME OF RELIEF

CORRECTION OF CLERICAL MISTAKES

LAW OF THE CASE RULE

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, §§ 5957 and 5965 and under former Code 1933, § 37-219 and Ch. 7, T. 110, are included in the annotations for this Code section.

Rule includes both equitable and legal grounds. — Since the 1986 amendment, both equitable and legal grounds for setting aside a judgment are now included in O.C.G.A. § 9-11-60. *Fulton v. State*, 183 Ga. App. 570, 359 S.E.2d 726 (1987).

Rooker-Feldman doctrine. — O.C.G.A. § 9-11-60 establishes a method for attacking Georgia state court judgments, but only in Georgia state courts; this is in accord with the Rooker-Feldman doctrine. *Rice v. Grubbs*, 158 Fed. Appx. 163 (11th Cir. Nov. 9, 2005).

Legislative intent of O.C.G.A. § 9-11-60 was to make a comprehensive determination of procedures for attacks on judgments. *Payne v. Shelnutt*, 126 Ga. App. 598, 191 S.E.2d 487 (1972); *Jordan v. G.A.C. Fin. Corp.*, 136 Ga. App. 641, 222 S.E.2d 149 (1975).

Federal Arbitration Act. — It was error to refuse to enforce a foreign judgment against a company that was based

on an arbitration award. The company had not sought to vacate the arbitration award within the three-month period allowed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and the company could not circumvent this limitation period by raising a claim under O.C.G.A. § 9-11-60. *McDonald v. H & S Homes, LLC*, 290 Ga. App. 103, 658 S.E.2d 901 (2008).

Means of attack prescribed in this section are exclusive. — This section specifies the manner in which a judgment may be attacked, and the means prescribed herein are exclusive. *Henry v. Adair Realty Co.*, 141 Ga. App. 182, 233 S.E.2d 39 (1977); *Henry v. Polar Rock Dev. Corp.*, 143 Ga. App. 189, 237 S.E.2d 667 (1977).

Civil judgments cannot be attacked by motion for reconsideration. — This section provides the exclusive methods by which civil judgments may be attacked, and a motion for reconsideration is not one of the methods enumerated therein. *Propes v. Stonington Homeowners Ass'n*, 149 Ga. App. 135, 253 S.E.2d 813 (1979).

Direct appeal is not covered by section. — This section deals with methods of attack on judgments other than by direct appeal; it is not necessary that a judgment be attacked by one of the methods provided by this section as any final

General Consideration (Cont'd)

judgment may be timely appealed. *Hiscock v. Hiscock*, 227 Ga. 329, 180 S.E.2d 730 (1971).

Post-judgment motions are not permitted to raise arguments or introduce evidence previously known to the parties but not addressed at trial. *Kim v. McCullom*, 222 Ga. App. 439, 474 S.E.2d 654 (1996).

Term "face of the record" has never been held to include papers involved in the litigation that are not a part of the record kept under the authority and direction of the clerk of the court in which the suit is pending; the phrase itself refers to the court record, not the file built up by litigants for the litigants personal use. *Jennings v. Davis*, 92 Ga. App. 265, 88 S.E.2d 544 (1955) (decided under former Code 1933, Ch. 7, T. 110).

Application to both foreign and domestic judgments. — This section applies to both domestic judgments and judgments from other states. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

Verdicts and judgments in divorce cases. — Ga. L. 1967, p. 226, §§ 26, 27, and 30 and Ga. L. 1968, p. 1104, § 9 (see now O.C.G.A. §§ 9-11-40 and 9-11-60) now embrace all situations that Ga. L. 1935, p. 481, relating to setting aside verdicts and judgments in divorce cases, was designed to meet. *Bradberry v. Bradberry*, 232 Ga. 651, 208 S.E.2d 469 (1974).

O.C.G.A. § 9-11-60 not applicable to action for child support arrearages under foreign state judgment. — Paragraph (a)(1) of O.C.G.A. § 9-11-60 and O.C.G.A. § 9-3-20 did not apply to a Uniform Reciprocal Enforcement of Support Act action to enforce arrearages on a foreign child support order. *Georgia Dep't of Human Resources v. Deason*, 238 Ga. App. 853, 520 S.E.2d 712 (1999).

Enforcement of support order. — When the defendant failed to investigate paternity despite his suspicion that he was not the father of all his wife's children, and when his failure to investigate was not caused by any alleged misrepresentation by his former spouse, he failed

to show either actionable fraud or that his lack of investigation was unmixed with his own "negligence or fault," and the trial court erred in staying the enforcement of the out-of-state support order. *Department of Human Resources v. Fenner*, 235 Ga. App. 233, 510 S.E.2d 534 (1998).

Prior provisions carried forward. — Provisions of former Code 1933, §§ 110-702 and 110-705 are substantially carried forward in subsection (d) of this section. *Cook v. Bright*, 150 Ga. App. 696, 258 S.E.2d 326 (1979).

Attack on a void judgment may be made directly in equity or collaterally. *Wasden v. Rusco Indus., Inc.*, 233 Ga. 439, 211 S.E.2d 733 (1975), overruled on other grounds, *Murphy v. Murphy*, 263 Ga. 280, 430 S.E.2d 749 (1993).

Three methods prescribed for direct attack. — Omitting judgments void on the judgments' face and clerical errors, direct attack must be made on a judgment in one of three ways: a motion for new trial must comprise an error that does not appear on the face of the record; a motion to set aside must attack an error that does appear on the face of the record; and fraud, accident, or mistake may be raised only by an equitable petition in the appropriate superior court, and are subject to a three-year statute of limitation. *Payne v. Shelnutt*, 126 Ga. App. 598, 191 S.E.2d 487 (1972).

Procedures for reaching defects in a judgment, as opposed to a levy of execution, are controlled by O.C.G.A. § 9-11-60 and must be made by either motion for new trial, motion to set aside for a nonamendable defect appearing on the face of the record, or petition in equity. *Mason v. Fisher*, 143 Ga. App. 573, 239 S.E.2d 226 (1977).

Direct action required to vacate void judgment. — Because an attack on a punitive damage award was an impermissible collateral attack, a petition to vacate a void judgment was properly dismissed as the petition could only be brought as a direct action. *Walker v. Blackwell*, 259 Ga. App. 324, 577 S.E.2d 24 (2003).

Jurisdiction of probate court to vacate judgment probating will. — Both prior to and since enactment of the Civil

Practice Act (see now O.C.G.A. Ch. 11, T. 9), the probate court has had jurisdiction to vacate the court's judgment probating a will in solemn form that was obtained by fraud or other irregularity that renders the judgment voidable. *Dennis v. McCrary*, 237 Ga. 605, 229 S.E.2d 367 (1976).

Trial court had to determine whether attorney was authorized to accept service. — Trial court abused the court's discretion by dismissing a landlord's suit against a tenant under O.C.G.A. § 9-11-60 for lack of personal jurisdiction because a determination was necessary as to whether a law firm who accepted service was authorized to represent the tenant before the trial court determined that the court lacked personal jurisdiction over the tenant. *Endover Palisades, LLC v. Stuart*, 324 Ga. App. 90, 749 S.E.2d 381 (2013).

Presumption of validity of judgment. — There is a presumption that every fact necessary to make a general judgment by a court of competent jurisdiction valid and binding was before the court. *Liberty Mut. Ins. Co. v. Coburn*, 129 Ga. App. 520, 200 S.E.2d 146 (1973).

Judgment not void on judgment's face valid until set aside. — Until it is set aside as prescribed by this section, a judgment not void on the judgment's face is a valid and subsisting judgment, which allows the plaintiff to refile the plaintiff's petition. *Camera Shop, Inc. v. GAF Corp.*, 130 Ga. App. 88, 202 S.E.2d 241 (1973).

Court disregards label of motion and looks to substance. — Because the defendant chose to denominate the 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).

Arrest of judgment motion cannot be used to extend time for civil 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 that 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); *Willard v. Wilburn*, 203 Ga. App. 393, 416 S.E.2d 798, cert. denied, 203 Ga. App. 908, 416 S.E.2d 798 (1992).

Judgment infected by perjury. — If a judgment has allegedly been infected by perjury, the remedy is the institution of a direct attack upon that judgment and not a civil action against the alleged perjurer. *Shepherd v. Epps*, 179 Ga. App. 685, 347 S.E.2d 289 (1986).

Trial court had no authority in law to cancel allegedly dormant judgments upon the record, and the court's denial of a child's motion to do so on behalf of the child's deceased parent was not erroneous because collateral attacks on judgments are permissible only if the judgment is void on the judgment's face or if the judgment or other parts of the record contain a clerical mistake or error; in addition, because this motion to set aside judgment was not brought within the three-year period beginning at the entry of the judgment prescribed in O.C.G.A. § 9-11-60, the movant cannot get relief. *Cronic v. State*, 172 Ga. App. 675, 324 S.E.2d 533 (1984).

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).

Postjudgment attack on forfeiture. — Defendant's motion in a criminal proceeding for return of money that was forfeited in a civil proceeding was properly denied because the proper method of making a postjudgment attack on a forfeiture is through O.C.G.A. § 9-11-60. *Youree v.*

General Consideration (Cont'd)

State, 220 Ga. App. 453, 469 S.E.2d 208 (1996).

Surety sued a city after the cash bond the surety posted was forfeited. The suit was properly dismissed based on sovereign immunity; if the bond forfeiture was improper, under O.C.G.A. § 9-11-60(d), the surety's remedy lay not in a suit against the city, but in a motion in the traffic court to set aside the forfeiture. *Watts v. City of Dillard*, 294 Ga. App. 861, 670 S.E.2d 442 (2008).

Res judicata and estoppel by judgment will not bar either a motion to set aside a judgment or an extraordinary motion for new trial based upon newly discovered evidence. *Herringdine v. Nalley Equip. Leasing, Ltd.*, 238 Ga. App. 210, 517 S.E.2d 571 (1999).

Consideration with nolle prosequi. — Trial court properly vacated the court's first nolle prosequi order entered pursuant to O.C.G.A. § 17-8-3 and substituted one entered in open court almost two years later; although a trial court could vacate an order of nolle prosequi at will only during the term of court, and the trial court here indisputably vacated the court's order outside the term, this situation was governed by O.C.G.A. § 9-11-60, and treating the second ground of the defendant's motion as a motion to set aside under O.C.G.A. § 9-11-60(d)(2), the trial court was within the court's rights in essentially modifying the court's order under § 9-11-60(h). *Montgomery v. State*, 259 Ga. App. 153, 575 S.E.2d 917 (2003).

Prior decision binding precedent. — If a corporation was able to prove a breach of a consent judgment by the corporation's previous owner, the corporation could not show actual damages and was limited to recovering nominal damages because the corporation's claim was foreclosed by a previous decision of the court of appeals; that case was binding precedent and established that regardless of the owner's proof of claim, a sale of a motel would not have occurred, precluding the corporation's recovery of actual damages on the corporation's breach of contract claim. *Duke Galish, LLC v. Manton*, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

As property owners' application for a discretionary appeal as to the trial court's order that awarded a business entity attorney fees was previously denied, that decision was res judicata with respect to the issue of the fees; accordingly, the owners could not seek a second review by appealing the award of fees. *Elrod v. Sunflower Meadows Dev., LLC*, 322 Ga. App. 666, 745 S.E.2d 846 (2013).

Dismissal of appeal based on lack of appellate jurisdiction. — Because an appeal by the parents from the juvenile court's order denying their motion to rescind and re-enter the dismissal order under O.C.G.A. § 9-11-60(g) on the grounds that the trial court failed to give proper notice of the court's decision, in accordance with O.C.G.A. § 15-6-21(c), failed to challenge the juvenile court's error in denying the motion, but rather, challenged specific rulings entered by the juvenile court in the deprivation proceedings, denial of the motion to rescind and re-enter was affirmed on appeal as the appellate court lacked jurisdiction to consider the errors asserted by the parents in the underlying deprivation case. In the *Interest of S.C.*, 283 Ga. App. 387, 641 S.E.2d 618 (2007).

Failure to prove damages nonamendable defect. — Trial court erred in entering a default judgment in the amount of \$15,000 against a home inspector because a purchaser's damages were unliquidated, and other than the prayer in the purchaser's complaint for \$15,000, the purchaser made no showing of the amount of damages; the purchaser's failure to prove the purchaser's damages constituted a nonamendable defect within the meaning of the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, under O.C.G.A. § 9-11-60(d)(3). *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Motion to compel arbitration properly denied. — In a class action suit seeking to hold a lender liable for payday loans, the trial court properly ruled that the lender could not compel arbitration and denying the lender's motion to compel as moot because the trial court's earlier ruling striking the lender's arbitration defense as a discovery violation sanction was an adjudication on the merits and

carried a res judicata effect. Ga. Cash Am. v. Greene, 318 Ga. App. 355, 734 S.E.2d 67 (2012).

Cited in Lovett v. Zeigler, 224 Ga. 144, 160 S.E.2d 360 (1968); Burson v. Bishop, 117 Ga. App. 602, 161 S.E.2d 518 (1968); Kitchens v. Clay, 224 Ga. 325, 161 S.E.2d 828 (1968); Golden Star, Inc. v. Broyles Ins. Agency, Inc., 118 Ga. App. 95, 162 S.E.2d 756 (1968); Keith v. Byram, 118 Ga. App. 364, 163 S.E.2d 753 (1968); Boockholdt v. Brown, 224 Ga. 737, 164 S.E.2d 836 (1968); City Dodge, Inc. v. Atkins, 118 Ga. App. 676, 164 S.E.2d 864 (1968); O'Leary v. Smith, 225 Ga. 8, 165 S.E.2d 730 (1969); Cohen v. Garland, 119 Ga. App. 333, 167 S.E.2d 599 (1969); Singleton v. Rary, 119 Ga. App. 559, 167 S.E.2d 740 (1969); Gibson Prods. Co. v. Addison, 120 Ga. App. 37, 169 S.E.2d 374 (1969); Barrett v. Asbell, 225 Ga. 521, 169 S.E.2d 779 (1969); Hawes v. Bigbie, 120 Ga. App. 294, 170 S.E.2d 302 (1969); Keith v. Byram, 225 Ga. 678, 171 S.E.2d 120 (1969); Franklin v. Sea Island Bank, 120 Ga. App. 654, 171 S.E.2d 866 (1969); Martell v. Atlanta Biltmore Hotel Corp., 120 Ga. App. 880, 172 S.E.2d 842 (1969); Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459 (1970); Srochi v. Kamensky, 121 Ga. App. 518, 174 S.E.2d 263 (1970); Northern Freight Lines v. Fireman's Fund Ins. Cos., 121 Ga. App. 786, 175 S.E.2d 104 (1970); Jordan v. Plott, 121 Ga. App. 727, 175 S.E.2d 148 (1970); Newton v. Newton, 226 Ga. 440, 175 S.E.2d 543 (1970); D.H. Overmyer Co. v. Joe Summers Roofing Co., 121 Ga. App. 804, 175 S.E.2d 880 (1970); Carver v. Cranford, 122 Ga. App. 100, 176 S.E.2d 272 (1970); Mitchell v. Mitchell, 226 Ga. 678, 177 S.E.2d 89 (1970); American Liberty Ins. Co. v. Sanders, 122 Ga. App. 407, 177 S.E.2d 176 (1970); Martin v. Prior Tire Co., 122 Ga. App. 637, 178 S.E.2d 306 (1970); Grey v. Roboscope Int'l, Ltd. of Ga., Inc., 122 Ga. App. 725, 178 S.E.2d 334 (1970); Johnson v. McCauley, 123 Ga. App. 393, 181 S.E.2d 111 (1971); Walker v. Powell, 123 Ga. App. 498, 181 S.E.2d 501 (1971); King v. Schaeffer, 123 Ga. App. 531, 181 S.E.2d 700 (1971); Worley v. Travelers Indem. Co., 124 Ga. App. 64, 183 S.E.2d 91 (1971); Paine v. Lowndes County Bd. of Tax Assessors, 124 Ga. App.

233, 183 S.E.2d 474 (1971); Smith v. Smith, 228 Ga. 311, 185 S.E.2d 78 (1971); Kerr v. Noble, 124 Ga. App. 722, 185 S.E.2d 807 (1971); Sixth St. Corp. v. City Stores Co., 229 Ga. 99, 189 S.E.2d 407 (1972); Wheeler v. Wheeler, 229 Ga. 84, 189 S.E.2d 427 (1972); Scardina v. Scardina, 229 Ga. 341, 191 S.E.2d 52 (1972); Lowndes County v. Dasher, 229 Ga. 289, 191 S.E.2d 82 (1972); Motors Ins. Corp. v. Turpin, 126 Ga. App. 650, 191 S.E.2d 543 (1972); Minor v. Ray, 127 Ga. App. 1, 193 S.E.2d 41 (1972); Brooks v. Williams, 127 Ga. App. 311, 193 S.E.2d 231 (1972); Black v. Donehoo, 229 Ga. 712, 194 S.E.2d 90 (1972); Shepherd v. Foskey, 229 Ga. 709, 194 S.E.2d 110 (1972); Huckaby v. State, 128 Ga. App. 79, 195 S.E.2d 688 (1973); West v. Forehand, 128 Ga. App. 124, 195 S.E.2d 777 (1973); Jones v. Spindel, 128 Ga. App. 88, 196 S.E.2d 22 (1973); Goldberg v. Painter, 128 Ga. App. 214, 196 S.E.2d 157 (1973); Aiken v. Bynum, 128 Ga. App. 212, 196 S.E.2d 180 (1973); Peppers v. McCannon, 230 Ga. 387, 197 S.E.2d 361 (1973); First Fid. Ins. Corp. v. Busbia, 128 Ga. App. 485, 197 S.E.2d 396 (1973); Veal v. General Accident Fire & Life Assurance Corp., 128 Ga. App. 610, 197 S.E.2d 410 (1973); Stone v. Peoples Bank, 128 Ga. App. 796, 197 S.E.2d 925 (1973); Brown v. Brown, 230 Ga. 566, 198 S.E.2d 182 (1973); Coweta Bonding Co. v. Carter, 230 Ga. 585, 198 S.E.2d 281 (1973); Patman v. General Fin. Corp., 128 Ga. App. 836, 198 S.E.2d 371 (1973); Mason v. Service Loan & Fin. Co., 128 Ga. App. 828, 198 S.E.2d 391 (1973); Hite v. Waldrop, 230 Ga. 684, 198 S.E.2d 665 (1973); Williams v. Nuckolls, 230 Ga. 697, 198 S.E.2d 870 (1973); Kyzer v. Director, Dep't of Pub. Safety, 129 Ga. App. 186, 198 S.E.2d 888 (1973); Loukes v. McCoy, 129 Ga. App. 167, 199 S.E.2d 125 (1973); Miller v. Miller, 230 Ga. 777, 199 S.E.2d 241 (1973); Sikes v. Sikes, 231 Ga. 105, 200 S.E.2d 259 (1973); Jordan v. Caldwell, 231 Ga. 226, 200 S.E.2d 868 (1973); Stamm & Co. v. Boaz Spinning Co., 129 Ga. App. 779, 201 S.E.2d 480 (1973); Pinkerton & Laws Co. v. Robert & Co. Assocs., 129 Ga. App. 881, 201 S.E.2d 654 (1973); Vericon Corp. v. Hardin, 130 Ga. App. 239, 202 S.E.2d 691 (1973); Southern Distct. Co. v. Cooper, 130 Ga. App. 223, 203

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S.E.2d 237 (1973); *Cullers v. Home Credit Co.*, 130 Ga. App. 441, 203 S.E.2d 544 (1973); *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Purcell v. Cowart*, 231 Ga. 675, 203 S.E.2d 482 (1974); *Ansley v. Atlanta Suburbia Estates, Ltd.*, 231 Ga. 640, 203 S.E.2d 861 (1974); *Johnson v. Cook*, 130 Ga. App. 575, 203 S.E.2d 882 (1974); *Krasner v. Verner Auto Supply, Inc.*, 130 Ga. App. 892, 204 S.E.2d 770 (1974); *Snyder v. Allen*, 131 Ga. App. 617, 206 S.E.2d 591 (1974); *Wilson v. Grimes*, 232 Ga. 388, 207 S.E.2d 5 (1974); *Centennial Equities Corp. v. Hollis*, 132 Ga. App. 44, 207 S.E.2d 573 (1974); *Master Mtg. Corp. v. Craven*, 132 Ga. App. 404, 208 S.E.2d 158 (1974); *Prattes v. Southeast Ceramics, Inc.*, 132 Ga. App. 584, 208 S.E.2d 600 (1974); *Thrift v. Vi-Vin Prods., Inc.*, 232 Ga. 828, 209 S.E.2d 174 (1974); *Gray v. Hall*, 233 Ga. 244, 210 S.E.2d 766 (1974); *Mullinax v. Mullinax*, 233 Ga. 271, 211 S.E.2d 1 (1974); *Hinsley v. Liberty Loan Corp.*, 133 Ga. App. 344, 211 S.E.2d 3 (1974); *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975); *Keener v. MacDougall*, 233 Ga. 881, 213 S.E.2d 835 (1975); *Adams v. Adams*, 234 Ga. 139, 214 S.E.2d 561 (1975); *Parzini v. Center Chem. Co.*, 134 Ga. App. 414, 214 S.E.2d 700 (1975); *Jere Power Car Land, Inc. v. Moss*, 134 Ga. App. 523, 215 S.E.2d 288 (1975); *Murphy v. State*, 134 Ga. App. 571, 215 S.E.2d 330 (1975); *Thrift v. Vi-Vin Prods., Inc.*, 134 Ga. App. 717, 215 S.E.2d 709 (1975); *Robinson-Shamburger, Inc. v. Tenney*, 135 Ga. App. 131, 217 S.E.2d 184 (1975); *Anderson v. G.A.C. Fin. Corp.*, 135 Ga. App. 116, 217 S.E.2d 605 (1975); *Davenport v. Idlett*, 234 Ga. 864, 218 S.E.2d 577 (1975); *Hill v. Hill*, 234 Ga. 836, 218 S.E.2d 619 (1975); *Watson v. Watson*, 235 Ga. 136, 218 S.E.2d 863 (1975); *Davidson Mineral Properties, Inc. v. Gifford-Hill & Co.*, 235 Ga. 176, 219 S.E.2d 133 (1975); *Miller v. Douglas*, 235 Ga. 222, 219 S.E.2d 144 (1975); *Orkin Exterminating Co. v. Townsend*, 136 Ga. App. 50, 220 S.E.2d 14 (1975); *Moss v. Bishop*, 235 Ga. 616, 221 S.E.2d 38 (1975); *Earwood v. Liberty Loan Corp.*, 136 Ga. App. 799, 222 S.E.2d 204 (1975); *Jones v. Royal Globe Ins. Co.*, 137

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Power of Court over Judgments, Generally

Trial court has the inherent power to amend or set aside a judgment for any “meritorious reason,” provided the motion to set aside is filed during the term in which the judgment was rendered. *Goode v. O’Neal, Banks & Assocs.*, 165 Ga. App. 162, 300 S.E.2d 191 (1983).

Power to amend granted to the trial judge is plenary. *Camera Shop, Inc. v. GAF Corp.*, 130 Ga. App. 88, 202 S.E.2d 241 (1973).

Power of court over judgment during term in which entered. — Court of record has plenary control of the court’s orders and judgments during the term rendered, and may amend, correct, modify, supplement, or vacate them; exercise of this power during the term will not be disturbed unless there is an abuse thereof. *Drain Tile Mach., Inc. v. McCannon*, 80 Ga. App. 373, 56 S.E.2d 165 (1949) (decided under former Code 1933, Ch. 7, T. 110).

Trial judge has power during the term of court at which a judgment is rendered

to revise, revoke, or vacate that judgment, even on the judge’s own motion, for the purpose of promoting justice and in the exercise of sound discretion. *Bandy v. Smith*, 211 Ga. 192, 84 S.E.2d 449 (1954) (decided under former Code 1933, Ch. 7, T. 110).

Superior court has power, during the same term at which an order or judgment is rendered, to revoke or vacate the judgment for meritorious cause, and such power is not lost during the term merely because the time for excepting to the judgment directly has expired. *Williams v. Lawler Hosiery Mills, Inc.*, 212 Ga. 617, 94 S.E.2d 699 (1956) (decided under former Code 1933, Ch. 7, T. 110).

Superior court retains plenary control over judgments entered, during the term in which the judgments are entered, and in the exercise of sound discretion may revoke or vacate the judgments, and such discretion will not be interfered with by the appellate courts unless manifestly abused; such discretion may be applied in reinstating cases dismissed for lack of prosecution, reinstating cases dismissed on general demurrer, reinstating cases in default in which final judgment had been rendered, and, for good cause shown, reinstating a case after a verdict was rendered but before it is spread on the minutes. *Carolina Tree Serv., Inc. v. Cartledge*, 96 Ga. App. 240, 99 S.E.2d 705 (1957) (decided under former Code 1933, § 110-702).

Superior court retains plenary control over the court’s judgments during the term in which the judgments are entered and, in the exercise of sound discretion, may revoke the judgments; this inherent power applies to all judgments, save those that are founded on verdicts. *Allen v. Allen*, 218 Ga. 364, 127 S.E.2d 902 (1962) (decided under former Code 1933, Ch. 7, T. 110).

Court of record has continuing jurisdiction to enter judgment on a jury verdict at any time. *Jefferson v. Ross*, 250 Ga. 817, 301 S.E.2d 268 (1983), overruling *Maroska v. Williams*, 146 Ga. App. 130, 245 S.E.2d 470 (1978).

Whatever limitations may exist in subsection (d) of O.C.G.A. § 9-11-60 for post-term motions to set aside, a trial

judge has the power during the same term of court at which a judgment is rendered to reverse, correct, revoke, modify, or vacate the judgment in the exercise of the judge's discretion. *Piggly Wiggly S., Inc. v. McCook*, 216 Ga. App. 335, 454 S.E.2d 203 (1995).

Although a judgment cannot be set aside under O.C.G.A. § 9-11-60(d) unless the grounds relied upon are unmixed with negligence or fault of the movant, a trial court in the exercise of the court's discretion still has the inherent power during the same term of court at which a judgment is rendered to reverse, correct, revoke, modify, or vacate the judgment. *Kirkley v. Jones*, 250 Ga. App. 113, 550 S.E.2d 686 (2001).

Opening default. — Trial court has no discretion to allow a default to be opened for excusable neglect after final judgment. *Cryomedics, Inc. v. Smith*, 180 Ga. App. 336, 349 S.E.2d 223 (1986).

Trial court abused the court's discretion in not granting the vehicle owner's motion for a directed verdict and setting aside the default judgment entered against the vehicle owner as the evidence showed that the wrecker service that found the vehicle owner's vehicle abandoned did not send notice of the foreclosure action against the vehicle owner to the vehicle owner's correct address; rather, the wrecker company sent notice of that action to an incorrect address located in a state other than that in which the vehicle owner was located, through no fault of the vehicle owner. *Mitsubishi Motors Credit of Am., Inc. v. Robinson & Stephens, Inc.*, 263 Ga. App. 168, 587 S.E.2d 146 (2003).

In a personal injury lawsuit, the pendency of the defendant's appeal from the denial of the defendant's motion to set aside the default judgment acted as a supersedeas depriving the trial court of the jurisdiction to consider its subsequent extraordinary motion for new trial. *Fred Jones Enters., LLC v. Williams*, 331 Ga. App. 481, 771 S.E.2d 163 (2015).

Time for filing. — Motion to set aside made pursuant to O.C.G.A. § 9-11-60 does not have to be filed within the same term of court in which the challenged judgment was rendered. *Shepherd v. Metropolitan Property & Liab. Ins. Co.*, 163

Ga. App. 650, 294 S.E.2d 638 (1982).

Judgments and decrees in breast of court during term of entry. — Decree, during the term at which the decree was rendered, is said to be in the breast of the judge; after the term is over, the decree is upon the roll. This rule as to the finality of judgments has not been changed. *Holloman v. Holloman*, 228 Ga. 246, 184 S.E.2d 653 (1971); *Adams Drive, Ltd. v. All-Rite Trades, Inc.*, 136 Ga. App. 703, 222 S.E.2d 174 (1975).

Because a motion to re-open a case based on the failure to adjudicate a material issue was filed and acted upon after expiration of the term of court at which the final judgment was rendered, the trial court no longer had inherent authority over a case within the breast of the court. *Gabel v. Revels*, 203 Ga. App. 131, 416 S.E.2d 103 (1992).

Contractor's motion for reconsideration was an improper attempt to attack the trial court's judgment outside the term of court without setting forth a basis under O.C.G.A. § 9-11-60(d); because the trial court's term expired before the filing of the motion for reconsideration, the judgment was no longer within the breast of the trial court and could not be set aside or altered. *J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

Judgment may be set aside in exercise of discretion. — Judgment is in the breast of the court during the term in which the judgment is rendered, and the judge may set the judgment aside in the exercise of the judge's discretion. *Crowe v. Crowe*, 245 Ga. 719, 267 S.E.2d 14 (1980).

Excusable neglect. — Because a dental patient's expert affidavit pursuant to O.C.G.A. § 9-11-9.1 was not based on certified or sworn records, nor was the affidavit based on the personal knowledge of the expert, the trial court erred in denying the dentist's motion for summary judgment in the patient's dental malpractice action; although the records custodian failed to properly provide certified copies of the records upon the patient's discovery request, the patient waived the right to present such evidence pursuant to Ga. Unif. Super. Ct. R. 6.2 after the patient did not file a timely response to the den-

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tist's summary judgment with an O.C.G.A. § 9-11-56(f) affidavit, and the patient did not show excusable neglect for purposes of O.C.G.A. § 9-11-60(b). *Rudd v. Paden*, 279 Ga. App. 141, 630 S.E.2d 648 (2006).

Judgment not based on jury verdict. — If a judgment is not based on the verdict of a jury but is the act of the judge, it is in the breast of the court during the term in which the judgment is rendered, and in the exercise of sound discretion the judge may set the judgment aside. *Martin v. GMC, Fisher Body Div.*, 226 Ga. 860, 178 S.E.2d 183 (1970).

Judgment based on jury verdict. — If a prior judgment was based on a jury verdict trial a court does not, under the court's inherent power, have authority to vacate the judgment or set the judgment aside, even during the same term of court in which the judgment was rendered. *Edwards v. Yelverton*, 147 Ga. App. 525, 249 S.E.2d 334 (1978).

Judgment based on settlement. — If the trial court orders entry of a settlement amount and dismisses a case with prejudice and the plaintiff files a motion for new trial and a motion to set aside, contending that the plaintiff did not agree to the settlement and that the plaintiff's attorney was without authority to compromise, the trial court does not err in hearing this attack on the judgment; the matter is still in the breast of the trial court and the proceedings toll the time for appeal. *Sunn v. Mercury Marine*, 166 Ga. App. 567, 305 S.E.2d 6 (1983).

Even though relief is denied under O.C.G.A. § 9-11-60. — Trial judge may exercise inherent power to set aside a judgment, even though the judge denied the moving parties' prayers for relief under O.C.G.A. § 9-11-60, as long as the term of court has not ended. *Crowe v. Crowe*, 245 Ga. 719, 267 S.E.2d 14 (1980).

Although a party's claim as to lack of notice of trial may be without merit, this does not mean that the trial court is without authority to set aside the judgment or grant a new trial, if the circumstances warrant such relief. *Maolud v.*

Keller, 153 Ga. App. 268, 265 S.E.2d 86 (1980).

When a defect is not on the face of record. — If a meritorious motion is made to set aside a judgment during the term in which the judgment is rendered, the proceeding may be entertained, even though the motion is not based on a defect appearing on the face of the record. *Martin v. GMC, Fisher Body Div.*, 226 Ga. 860, 178 S.E.2d 183 (1970).

Hearing required because error not clear on face of judgment. — Because the facts presented did not create a circumstance showing the parties knew what order the trial court intended, and it was not obvious what the correct judgment should have been, the order entered could not have been corrected without an opportunity for the parties to be heard on this issue. *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

Provided some meritorious reason is given. — Rule that the judge retains plenary control over judgments and orders during the term at which the judgments and orders are rendered was never intended to authorize a judge to set aside a judgment duly and regularly entered, unless some meritorious reason is given therefor. *Hicks v. Hicks*, 226 Ga. 798, 177 S.E.2d 690 (1970).

Failure to give notice of trial. — Because a judgment was entered in contravention of a party's due process rights to notice, the trial court was authorized to set the judgment aside. *Crenshaw v. Crenshaw*, 267 Ga. 20, 471 S.E.2d 845 (1996).

Power to vacate consent order. — Under the court's power to revise, correct, revoke, modify, or vacate a judgment or order if a meritorious reason exists for doing so, a trial court properly reconsidered and vacated a consent order transferring the case. *Southern Drayage, Inc. v. Williams*, 216 Ga. App. 721, 455 S.E.2d 418 (1995).

Court has inherent power to modify the court's own judgment during the term at which the judgment was rendered, and this power may be exercised on the court's own motion, with or without notice to the parties. *Cagle v. Dixon*, 234 Ga. 698, 217 S.E.2d 598 (1975); *Clark v.*

Ingram, 150 Ga. App. 127, 257 S.E.2d 33 (1979).

Because the superior court modified the court's judgment so as to vacate the court's order of dismissal and provide only for the entry of a default judgment, the issue of dismissal was moot and provided no basis for setting aside the judgment. But, because the court, absent amendment to the demand for judgment or argument supporting the judgment, awarded damages in excess of the amount claimed, that award had to be reversed. *Stamps v. Nelson*, 290 Ga. App. 277, 659 S.E.2d 697 (2008).

In exercise of sound discretion. — Trial judge has inherent power, during the same term of court in which a judgment is rendered, to revise, correct, revoke, modify, or vacate such judgment, even upon the judge's own motion, for the purpose of promoting justice and in the exercise of sound legal discretion. *LeCraw v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972).

Trial judge has power during the same term of court at which a judgment is rendered to reverse, correct, revoke, modify, or vacate the judgment in the exercise of the judge's discretion. *Bank of Cumming v. Moseley*, 243 Ga. 858, 257 S.E.2d 278 (1979); *McCoy Lumber Co. v. Garland Lumber Sales, Inc.*, 182 Ga. App. 75, 354 S.E.2d 686 (1987).

Power over judgments not unlimited but discretionary. — Courts of record retain control over their orders and judgments during the term at which the judgments are made and, in the exercise of sound discretion, may revise or vacate the judgment; but the power to so deal with a judgment is not an unlimited or arbitrary power, but a discretionary one. *Burger v. Dobbs*, 87 Ga. App. 88, 73 S.E.2d 75 (1952) (decided under former Code 1933, Ch. 7, T. 110).

Law seeks an end of litigation; and when parties have had full opportunity to plead and be heard, and a judgment is entered which in the judgment's nature ends the controversy, that judgment should not be disturbed, even while in the breast of the court, except in the exercise of sound legal discretion when it is necessary to do it in order to promote justice.

Burger v. Dobbs, 87 Ga. App. 88, 73 S.E.2d 75 (1952) (decided under former Code 1933, Ch. 7, T. 110).

Power of court over judgment ceases with expiration of term. — Subsection (h) of this section has not changed the rule that after the expiration of the term at which a decree was entered, the decree is out of the power of the court to modify and revise the decree in any matter of substance or in any matter affecting the merits. *City of Cornelia v. Gunter*, 227 Ga. 464, 181 S.E.2d 489 (1971).

After expiration of the term at which a decree is entered, it is out of the power of the court to modify and revise the decree in any matter of substance or in any matter affecting the merits. *Adams Drive, Ltd. v. All-Rite Trades, Inc.*, 136 Ga. App. 703, 222 S.E.2d 174 (1975).

After a judgment has become final and the court's discretion to change or modify the judgment ceases because a new term of court has supervened, the court can in no event set aside such judgment, unless the judgment is absolutely void, by an ex parte order and in the absence of notice and hearing afforded to the opposite party. *Adams Drive, Ltd. v. All-Rite Trades, Inc.*, 136 Ga. App. 703, 222 S.E.2d 174 (1975).

With few exceptions, judgment may not be set aside beyond term in which judgment is rendered. *Hughes v. Powell*, 152 Ga. App. 851, 264 S.E.2d 303 (1980).

Statutory power to set aside judgment from others term. — Trial court is not authorized at a subsequent term of court to set aside a final judgment rendered at a prior term, except as provided in this section. *Holloman v. Holloman*, 228 Ga. 246, 184 S.E.2d 653 (1971).

Jurisdiction to set aside dismissal after term expires. — Judgment of dismissal for want of prosecution is a final judgment, and the trial court has no jurisdiction to set aside such dismissal after expiration of the term of court during which the judgment was entered, absent compliance with this section. *Stocks v. Colonial Stores, Inc.*, 143 Ga. App. 722, 240 S.E.2d 151 (1977).

Trial court has no jurisdiction to set aside a dismissal and reinstate a case after expiration of the term at which the case was dismissed, nor can a judgment of

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the court be changed, amended, or modified after the expiration of the term during which that judgment was entered. *Stocks v. Colonial Stores, Inc.*, 143 Ga. App. 722, 240 S.E.2d 151 (1977).

Just cause required to set aside or modify judgment. — Subsection (h) of this section, dealing with the law of the case rule, provides that with just cause a judgment may be set aside or modified, the court of course considering whether rights are vested and whether or not innocent parties would be hurt. *Camera Shop, Inc. v. GAF Corp.*, 130 Ga. App. 88, 202 S.E.2d 241 (1973).

Although the law of the case rule, at the trial level, has been abolished, an order should not be set aside or modified without just cause, and the burden is on the movant to demonstrate that the movant is entitled to judgment as a matter of law. *Tanner v. Tinsley*, 152 Ga. App. 330, 262 S.E.2d 602 (1979).

Continuing jurisdiction of foreign court. — Because a Florida court issued an original custody decree, subsequently issuing a modification, and because one of the “individual contestants” continued to live in Florida and did not consent to the Georgia court’s jurisdiction, Florida exercised “continuing, exclusive” jurisdiction, a Georgia county court erred in entering an order domesticating the final divorce decree and increasing the amount of child support, and the superior court should have granted the plaintiff’s motion to set aside the order. *Connell v. Woodward*, 235 Ga. App. 751, 509 S.E.2d 647 (1998).

No power over judgment once appeal taken. — Although, as a general proposition, the trial court has power to correct mistakes in judgments, a notice of appeal operates as a supersedeas and deprives the trial court of the power to affect the judgment appealed 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).

Habeas court lacked jurisdiction to

amend the court’s original order during the pendency of an appeal from that order as the filing of the notice of appeal operated as a supersedeas and deprived the trial court of the power to affect the judgment appealed. *Upton v. Jones*, 280 Ga. 895, 635 S.E.2d 112 (2006).

Court of appeals erred in reversing the trial court’s grant of partial summary judgment in favor of a county because the trial court did not have authority to enter the court’s order purporting to make the grant of partial summary judgment final under O.C.G.A. § 9-11-54(b) since by the arrestee’s first notice of appeal, an arrestee put the machinery of appellate review into motion under O.C.G.A. § 9-11-54(h) and committed a procedural default; accordingly, the arrestee was foreclosed from resubmitting the matter for review on appeal of the final judgment, and because the first direct appeal was dismissed, that dismissal was binding upon the trial court under O.C.G.A. § 9-11-60(h). *Houston County v. Harrell*, 287 Ga. 162, 695 S.E.2d 29 (2010).

Cause in which the trial court has been reversed on appeal is still pending in the trial court for further proceedings, or until what is de facto ordered to be done by the appellate court’s reversal is done. *West v. Dorsey*, 167 Ga. App. 233, 305 S.E.2d 840 (1983), rev’d on other grounds, 252 Ga. 92, 311 S.E.2d 816 (1984).

Collateral Attack

O.C.G.A. § 9-11-60 provides, generally, for collateral attack in any court by any person if a judgment is void on the judgment’s face; otherwise, judgments are subject to direct attack only in the court of rendition by motions to set aside or for new trial or by complaint in equity. *C & S Nat’l Bank v. Burden*, 145 Ga. App. 402, 244 S.E.2d 244 (1978).

Timeliness. — In a case in which a defendant filed a “petition seeking relief from judgment” under O.C.G.A. § 9-11-60(d)(2), after a trial court denied the defendant’s habeas corpus petition, the “petition” could not be considered untimely as such a petition did not have to be filed in the same term of court in which the judgment the petition attacked was

entered, but the “petition” was the wrong vehicle for seeking relief because the defendant did not allege the habeas court’s judgment was obtained or procured by extrinsic fraud, accident, or mistake, which were the grounds upon which a motion under § 9-11-60(d)(2) could be granted. If the “petition” was considered to be a motion for reconsideration of the merits of the habeas court’s judgment, it would have been untimely filed as such a motion had to be filed in the same term of court in which the judgment the petition attacked was entered. *Harris v. State*, 278 Ga. 280, 600 S.E.2d 592 (2004).

For a judgment to be attacked by third person it must be void on the judgment’s face. *Peek v. Southern Guar. Ins. Co.*, 142 Ga. App. 671, 236 S.E.2d 767 (1977), rev’d on other grounds, 240 Ga. 498, 241 S.E.2d 210 (1978).

Judgment is “void on its face” when a nonamendable defect appears on the face of the record or pleadings that is not cured by verdict or judgment, and the pleadings affirmatively show that no legal claim in fact existed. *Unigard Ins. Co. v. Kemp*, 141 Ga. App. 698, 234 S.E.2d 539 (1977); *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981); *Lawing v. Erwin*, 251 Ga. 134, 303 S.E.2d 444 (1983).

Collateral attacks provided for under O.C.G.A. § 9-11-60 are limited strictly to circumstances in which the trial court lacks either subject matter or personal jurisdiction, rendering such a judgment “void on its face” within the meaning of subsection (a), such that a nonamendable defect appearing on the face of the pleadings in a divorce suit was not such a judgment and was presentable only within the three-year limitations period of subsection (f). *Murphy v. Murphy*, 263 Ga. 280, 430 S.E.2d 749 (1993).

In a suit for damages arising from a motor vehicle accident, a trial court erred by failing to set aside a default judgment entered against a transport corporation for the corporation’s failure to file an answer to an amended complaint as no order from the trial court required the corporation to answer. As a result, the default judgment was improper since the default created a nonamendable defect. *Hiner*

Transp., Inc. v. Jeter, 293 Ga. App. 704, 667 S.E.2d 919 (2008).

If a nonamendable defect appears on the face of the record or pleadings, judgment is void and may be collaterally attacked by any person when the judgment becomes material to the interests of the parties to consider it. *Cooper v. Public Fin. Corp.*, 144 Ga. App. 572, 241 S.E.2d 839 (1978).

Void judgment is a mere nullity, and may be so held in any court when the judgment becomes material to the interest of the parties to consider the judgment; laches is no bar. *DeJarnette Supply Co. v. F.P. Plaza, Inc.*, 229 Ga. 625, 193 S.E.2d 852 (1972).

Judgment regular on its face not subject to collateral attack. — Judgment of superior court cannot be collaterally attacked, unless the invalidity of such a judgment appears on the judgment’s face; any attack upon such a judgment not void on the judgment’s face must be made in a direct proceeding for that purpose. *Payne v. McCrary*, 187 Ga. 573, 1 S.E.2d 742 (1939) (decided under former Code 1933, Ch. 7, T. 110).

If an order is not void upon the order’s face, but appears upon the order’s face to be perfectly legal and binding, such order may not be attacked collaterally in a proceeding praying for mandamus only. *Poole v. Doyal*, 203 Ga. 667, 47 S.E.2d 744 (1948) (decided under former Code 1933, Ch. 7, T. 110).

Although a judgment rendered by a court lacking jurisdiction of the parties or of the subject matter is void and may be attacked by any party in any court where such want of jurisdiction appears upon the face of the record, the judgment of a court of competent jurisdiction may not be collaterally attacked in any other court for irregularity, but shall be held as a valid judgment until the judgment is reversed or set aside. *Thompson v. Central of Ga. Ry.*, 98 Ga. App. 228, 105 S.E.2d 508 (1958) (decided under former Code 1933, Ch. 7, T. 110).

If a judgment does not show on the judgment’s face that the judgment is void for lack of jurisdiction of the subject matter or of the parties, it will only be subject to direct attack. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

Collateral Attack (Cont'd)

Action against an insurer arising from settlement of a minor's claim for personal injuries reached over 20 years prior was an improper collateral attack on the judgment of the court that approved the settlement and should have been dismissed. *Zepp v. Toporek*, 211 Ga. App. 169, 438 S.E.2d 636 (1994).

Alleged conspiracy to issue a writ of possession in a case would not render the judgment therein void on the judgment's face, and the judgment could be subject only to direct rather than collateral attack. *Dean v. Schreeder, Wheeler & Flint*, 222 Ga. App. 426, 474 S.E.2d 648 (1996).

Superior court lacked jurisdiction to vacate or set aside an order of the state court that was not void on the order's face and that had been affirmed on appeal. *Moseley v. Interfinancial Mgt. Co.*, 224 Ga. App. 80, 479 S.E.2d 427 (1996), cert. denied, 522 U.S. 925, 118 S. Ct. 322, 139 L. Ed. 2d 249 (1997).

Since the allegations in a joint suit would not render the judgments in the prior suits void on their face, the effect of the joint suit was to collaterally attack the judgments in the prior suits in violation of O.C.G.A. § 9-11-60. *Richardson v. Simmons*, 245 Ga. App. 749, 538 S.E.2d 830 (2000).

Attorney's defense to the trial court's order holding the attorney in contempt for the attorney's refusal to turn over a client's file challenging the underlying validity of the prior order requiring the attorney to turn over the file was a collateral attack that could be sustained under O.C.G.A. § 9-11-60(a) only if the prior order was void on the order's face. However, the trial court's prior order was not void on the order's face since: (1) the attorney was served with a motion to compel prior to the entry of the prior order; (2) the trial court had jurisdiction to issue an order to compel a nonparty to release necessary non-privileged documents specifically prepared in anticipation of a divorce action pending before the trial court under O.C.G.A. §§ 9-11-26(b), 9-11-34(c)(1), and 9-11-37(a); (3) the attorney willfully disregarded the prior order; and (4) the prior order was entered in a

matter over which the trial court had subject matter jurisdiction, making its disobedience contempt of court. *Mary A. Stearns, P.C. v. Williams-Murphy*, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

When a citizen failed to show that the judgment in the citizen's first case lacked either personal or subject matter jurisdiction, the citizen failed to show that the judgment was void; because the original order was not appealed, the citizen was not permitted to relitigate that same issue in a later action. *Nally v. Bartow County Grand Jurors*, 280 Ga. 790, 633 S.E.2d 337 (2006).

Trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds as: (1) the court's finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

Trial court properly granted summary judgment to a law firm and one of the firm's attorneys because the claims that formed the litigation constituted an unauthorized collateral attack on the settlement the mother accepted in an underlying medical malpractice action. *Buttacavoli v. Owen, Gleaton, Egan, Jones & Sweeney LLP*, 331 Ga. App. 88, 769 S.E.2d 794 (2015).

Absent fraud. — If a judgment is regular on the judgment's face, the presumption is that there was sufficient evidence to authorize the judgment, and the judgment is conclusive as to the subject matter that the judgment purports to decide until the judgment is reversed or impeached for fraud; the judgment cannot be attacked collaterally on account of any error or want of regularity in its exercise. *Rowell v. Rowell*, 214 Ga. 377, 105 S.E.2d 19 (1958) (decided under former Code 1933, Ch. 7, T. 110).

Judgment procured by fraud must be deemed absolutely void before the judgment can be collaterally attacked. *Wood v.*

Wood, 200 Ga. 796, 38 S.E.2d 545 (1946) (decided under former Code 1933, Ch. 7, T. 110).

Trial court did not err in setting aside the alimony and equitable division portions of a divorce decree in a case in which one spouse proved that the other spouse fraudulently hid assets to prevent their equitable division during the divorce, as under O.C.G.A. § 9-11-60(d)(2), fraud is a ground for setting aside a judgment. *White v. White*, 274 Ga. 884, 561 S.E.2d 801 (2002).

Judgment or decree of court having no jurisdiction is a mere nullity and may be attacked in any court and by any person. *Drake v. Drake*, 187 Ga. 423, 1 S.E.2d 573 (1939) (decided under former Code 1933, Ch. 7, T. 110).

Void judgment may be attacked in any court by any person. *Dupree v. Blankenship*, 83 Ga. App. 664, 64 S.E.2d 457 (1951) (decided under former Code 1933, § 110-701).

Third person not a party cannot go into court and move to set aside a judgment that is not against that party. *Merchants' & Mfrs'. Nat'l Bank v. Haiman*, 80 Ga. 624, 5 S.E. 795 (1888) (decided under former law); *Suwannee Turpentine Co. v. Baxter & Co.*, 109 Ga. 597, 35 S.E. 142 (1900) (decided under former law); *Chapman v. Taliaferro*, 1 Ga. App. 235, 58 S.E. 128 (1907) (decided under former law).

In motions to set aside, only parties to the record can make a motion. *Bruce v. Neal Bank*, 147 Ga. 392, 94 S.E. 241 (1917) (decided under former Civil Code 1910, § 5957).

One not a party to a judgment cannot on mere motion procure the judgement to be set aside. *Bivins v. Fleischer*, 214 Ga. 380, 105 S.E.2d 12 (1958) (decided under former Code 1933, §§ 37-219 and 110-710).

When the owners of a corporation sued waived a forum selection clause, the owners also waived the defenses of personal jurisdiction and venue by failing to raise those defenses at the earliest opportunity; thus, as non-parties to the underlying case, the owners could not otherwise appeal the default judgment against the corporation. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007),

cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

O.C.G.A. § 9-11-60 inapplicable to individual not a party to judgment. — Action against the attorney who represented a minor arising from the settlement of the minor's claim for personal injuries reached over 20 years prior was not barred by O.C.G.A. § 9-11-60 since the claim alleging that the attorney violated the attorney's professional obligations to the minor arose from the attorney's services as such. *Zepp v. Toporek*, 211 Ga. App. 169, 438 S.E.2d 636 (1994).

Consent judgment not subject to collateral attack for want of assent. — Consent judgment showing on the judgment's face that the judgment is a consent judgment cannot be attacked collaterally for want of assent; the attack must be by direct proceedings for that purpose, brought within the three-year period provided by law. *Evans v. Evans*, 62 Ga. App. 618, 9 S.E.2d 99 (1940) (decided under former Code 1933, Ch. 7, T. 110).

Collateral attack for fraud on judgment of foreign court. — Judgment of a court of a foreign state having jurisdiction of the subject matter and the parties cannot be collaterally attacked in the courts of this state on the ground of fraud. *Wood v. Wood*, 200 Ga. 796, 38 S.E.2d 545 (1946) (decided under former Code 1933, Ch. 7, T. 110).

Jurisdiction to set aside judgment affecting property. — Action to enjoin the sale or encumbrance of property in accordance with certain judgments was actually a collateral attack to set aside adverse judgments, and could only be entertained in the jurisdiction of the rendering court since the judgments were not void on the judgments' face. *Williams v. Nuckolls*, 229 Ga. 48, 189 S.E.2d 82 (1972) (decided under former Code 1933, Ch. 7, T. 110).

Conviction based on a guilty plea to an unenforceable ordinance is void on the conviction's face and a mere nullity, and may be attacked. *Cofer v. Cook*, 141 Ga. App. 646, 234 S.E.2d 185 (1977).

Collateral attack is proper in a license suspension case, if conviction on which the suspension was based is void on the conviction's face. *Hardison v. Shepard*,

Collateral Attack (Cont'd)

246 Ga. 196, 269 S.E.2d 458 (1980).

Judgment based on insufficient service. — If service is insufficient to give the court jurisdiction to render a judgment, and there is no waiver of service, the judgment may be attacked by any person whose rights are affected by the judgment. *Barnes v. Continental Ins. Co.*, 231 Ga. 246, 201 S.E.2d 150 (1973).

Levy under a void judgment against garnishee may be successfully resisted by an affidavit of illegality, alleging invalidity in the judgment. *Jenkins v. Community Loan & Inv. Corp.*, 120 Ga. App. 543, 171 S.E.2d 654 (1969).

Motion to dismiss contempt citation for failure to pay alimony. — Motion to dismiss a contempt citation for failure to pay alimony makes a collateral attack on the alimony judgment, which can only be sustained if the judgment is absolutely void. *Lambert v. Gilmer*, 228 Ga. 774, 187 S.E.2d 855 (1972).

Insufficient evidence. — Judgment may not be collaterally attacked on the ground that the judgment was based on insufficient evidence. *Lawing v. Erwin*, 251 Ga. 134, 303 S.E.2d 444 (1983).

Uninsured Motorist Act is not an exception. There is absolutely nothing within the terms of the Uninsured Motorist Act to evince a legislative intent that a judgment, otherwise valid on the judgment's face, is not to be afforded the statutory protection against collateral attack simply because that judgment was obtained in an action against an uninsured motorist. *Chitwood v. Southern Gen. Ins. Co.*, 189 Ga. App. 697, 377 S.E.2d 210, cert. denied, 189 Ga. App. 911, 377 S.E.2d 210 (1988).

Insurer could not collaterally attack a judgment against an uninsured motorist, in the insured's action to recover a judgment, by relying on extraneous evidence to show that the uninsured motorist had not been properly served in the underlying action. *Chitwood v. Southern Gen. Ins. Co.*, 189 Ga. App. 697, 377 S.E.2d 210, cert. denied, 189 Ga. App. 911, 377 S.E.2d 210 (1988).

No relief against judgment creditor

for fraudulently securing judgment.

— Law provides various forms of relief that can be pursued by one who believes that a judgment has been wrongly entered. However, a cause of action for damages based upon the judgment creditor's alleged fraudulent securing of the judgment is not among them. *Matthews Group & Assocs. v. Wages*, 180 Ga. App. 151, 348 S.E.2d 695 (1986).

Collateral attack on foreign judgment. — Collateral attack on a judgment entered in another state, based on lack of personal jurisdiction of the foreign court, is precluded only if the defendant has appeared in the foreign court and has thus had an opportunity to litigate the issue. *Ramsey Winch Co. v. Trust Co. Bank*, 153 Ga. App. 500, 265 S.E.2d 848 (1980).

Plaintiff's judgment obtained in Texas by default against a Georgia resident was properly set aside when the plaintiff failed to negate the defense of lack of personal jurisdiction. *Chambers v. Navare*, 231 Ga. App. 318, 498 S.E.2d 173 (1998).

In a Tennessee case in which there was no proof that the Georgia court lacked jurisdiction over either the mother or the subject matter when the court ordered the termination of the mother's parental rights, the mother could not mount a collateral attack on the Georgia termination order. *Downey v. Downey* (In re Adoption of Downey), 2003 Tenn. App. LEXIS 322 (Tenn. Ct. App. Apr. 30, 2003).

Collateral attack of summary judgment. — Debtor could not collaterally attack the trial court's prior summary judgment order through the filing of a subsequent lawsuit because the trial court's prior summary judgment order was not void on the judgment's face; thus, the only manner in which the debtor could have attacked the judgment was through a direct proceeding brought in the trial court that entered the judgment pursuant to O.C.G.A. § 9-11-60. *Rose v. Household Fin. Corp.*, 316 Ga. App. 282, 728 S.E.2d 879 (2012).

Motion for New Trial

Extraordinary motions for new trial were still an available procedure under former Code 1933, § 70-303 and Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. §§ 5-6-41 and 9-11-60).

Windsor Forest, Inc. v. Rocker, 121 Ga. App. 773, 175 S.E.2d 65 (1970).

Motion for new trial goes only to the verdict, and reaches only such errors of law and fact as contributed to rendition thereof. *Alexander v. Blackmon*, 129 Ga. App. 214, 199 S.E.2d 376 (1973).

Proper venue required. — 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).

Negligence of party or counsel. — Plaintiff's negligence in failing to prepare for trial, and the plaintiff and plaintiff's counsel's lack of diligence in following the progress of the proceedings, did not equate with an intrinsic defect necessitating a new trial, and the lack of showing of a legal excuse for the plaintiff's non-appearance at trial supported the trial court's order denying the plaintiff's motion for a new trial. *Scriver v. Lister*, 235 Ga. App. 487, 510 S.E.2d 59 (1998).

In a medical malpractice action, a motion for new trial asserting new evidence was properly denied due to a lack of the movant's diligence to procure the evidence as the new evidence was the identity of a witness who was revealed to the movant on the eve of trial, the movant declined the trial court's offer of a continuance to locate the witness, and did not attempt to locate the witness until after a verdict was returned. *Gill v. Spivey*, 264 Ga. App. 723, 592 S.E.2d 132 (2003).

It is not proper to contest sufficiency of an opponent's pleadings by motion for new trial. *Johnson v. Cleveland*, 131 Ga. App. 560, 206 S.E.2d 704

(1974); *Pillow v. Seymour*, 255 Ga. 683, 341 S.E.2d 447 (1986).

Motion for new trial required for evidentiary matters. — Ordinarily, a motion for new trial is required if a motion is made to set aside a judgment based solely upon matters of evidence or want of evidence, and if the motion is denominated a motion in arrest or to set aside, it will be considered a motion for new trial if it meets the requirements for attacking the verdict. *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556, cert. dismissed, 222 Ga. 820, 152 S.E.2d 693 (1966) (decided under former Code 1933, Ch. 7, T. 110).

Exclusion of evidence. — General partners' motion for a new trial was properly denied as evidence of the limited partners' attempts to liquidate their interests in the partnership was properly excluded as evidence of settlement negotiations. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Evidence properly admitted. — General partners' (GPs') motion for a new trial was properly denied as evidence of a GP's involvement in a prior suit was properly admitted to show a course of conduct because the prior suit also involved a breach of a partnership agreement, a breach of fiduciary duty, a nursing home, and accusations that the GP violated the plain language of the partnership agreement by failing to pay the limited partners their preferred returns. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Ground of motion for new trial must be complete in itself. *Blakeney v. Bank of Hahira*, 176 Ga. 190, 167 S.E. 114 (1932); *Anderson v. State*, 46 Ga. App. 728, 169 S.E. 60 (1933) (decided under former Civil Code 1910).

Availability of motions for new trial after involuntary dismissal. — After an order of involuntary dismissal under Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(b)), extraordinary motions for new trial are still available under former Code 1933, § 70-303 and Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. §§ 5-5-41 and 9-11-60). *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Verdict based on perjured testimony. — Extraordinary motions for new

Motion for New Trial (Cont'd)

trial are available if a verdict and judgment are based on the testimony of a witness who is subsequently found guilty of perjury. *Windsor Forest, Inc. v. Rocker*, 121 Ga. App. 773, 175 S.E.2d 65 (1970).

Extraordinary motions for new trial rest largely within the trial court's discretion and the court's judgment will not be interfered with unless the court's discretion has been manifestly abused. *Windsor Forest, Inc. v. Rocker*, 121 Ga. App. 773, 175 S.E.2d 65 (1970).

Objections that go to judgment only cannot properly be made grounds of a motion for new trial. A motion for new trial seeks to set aside the verdict. No new trial is necessary to correct a judgment or decree. If a judgment or decree is erroneous or illegal, direct exception should be taken to it at the proper time. *Sands v. Lamar Properties, Inc.*, 159 Ga. App. 718, 285 S.E.2d 24 (1981).

Juror misconduct. — General partners' (GPs') motion for a new trial was properly denied as the juror affidavits filed by the GPs outlining alleged juror misconduct constituted an attempt to impeach the jury's verdict in the exact manner prohibited by O.C.G.A. § 9-10-9. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Reason for the rule that a new trial motion must go to findings of fact is that a new trial is necessarily authorized only if errors occurred that might have affected the findings of the trier of fact; if it is only the judgment thereon that is alleged to be erroneous or illegal, this alludes to a matter of law only and there is no need for a new trial, but the party must merely take direct exception at the proper time. *Sunn v. Mercury Marine*, 166 Ga. App. 567, 305 S.E.2d 6 (1983).

Motion to re-open considered motion for new trial. — Motion to re-open a case, based upon the failure to adjudicate a material issue, is in essence a motion for new trial under which must be based upon an intrinsic defect not appearing upon the face of the record or pleadings. *Gabel v. Revels*, 203 Ga. App. 131, 416 S.E.2d 103 (1992).

Denial of 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).

Court erred in failing to hold hearing on motion. — Trial court erred in denying a hotel owner's motion for new trial without holding the hearing mandated by Ga. Unif. Super. Ct. R. 6.3; while the motion reiterated arguments made in the owner's unsuccessful motion to set aside a default judgment, the motion also argued that evidentiary errors occurred during the trial on damages and that the award was excessive, and thus sought a reexamination of the issues of fact. *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).

Motion to Set Aside

Editor's note. — As originally enacted, the first sentence of subsection (d) of O.C.G.A. § 9-11-60 stated that a motion to set aside must be predicated on some nonamendable defect which does appear on the face of the record or pleadings. Georgia Laws 1974, p. 1138, § 1, added the exception relating to jurisdictional errors. Hence, decisions relating to motions to set aside predicated on jurisdictional errors, based on O.C.G.A. § 9-11-60 prior to its 1974 amendment, should be consulted with care.

Constitutionality of subsection (d). — Subsection (d) of this section is not unconstitutionally vague. *Moore v. American Fin. Sys.*, 236 Ga. 610, 225 S.E.2d 17 (1976).

Subsection (d) as revision of prior law. — Subsection (d) of this section does not purport to resemble Fed. R. Civ. P. 60; it is a revision of the earlier law that was found prior to 1966 in former Code 1933, Ch. 7, T. 110, and as far back as the Code of 1873. *Moore v. American Fin. Sys.*, 236 Ga. 610, 225 S.E.2d 17 (1976).

Subsection (e) inapplicable to motions under subsection (d). — When an individual files a motion under subsection

(d) of this section, subsection (e) and the equitable principles set forth therein are inapplicable. *Eder v. American Express Co.*, 138 Ga. App. 168, 225 S.E.2d 737 (1976).

Based on notice under O.C.G.A. § 15-6-21(c). — Judgment was entered by the trial court based on a jury verdict in favor of the defendant, and the trial court instructed the defendant to mail a notice of the judgment to the plaintiff, which the plaintiff admittedly timely received; thus, the mandate of O.C.G.A. § 15-6-21(c) was met and the trial court properly denied the plaintiff's motion to set aside the judgment pursuant to O.C.G.A. § 9-11-60(g); although the trial court did not make a specific finding as to whether the notice requirements of § 15-6-21(c) were met, the facts that supported denial of the motion to set aside were set out and those indicated compliance with the notice statute. *Woods v. Savannah Rest. Corp.*, 267 Ga. App. 387, 599 S.E.2d 338 (2004).

Trial court properly set aside the dismissal of a declaratory judgment action brought by putative heirs against two trustees of an estate as the trial court failed to provide notice of a peremptory calendar call the case was placed on, which led to the dismissal, therefore, the trial court had the authority to correct the error. *Andrus v. Andrus*, 290 Ga. App. 394, 659 S.E.2d 793 (2008).

Construction with O.C.G.A. § 5-6-34. — 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).

Court of appeals was unable to determine whether the trial court's denial of a driver's motion under O.C.G.A. § 9-11-60(g) to set aside an order dismissing a lawsuit was proper because the trial

court made no findings of fact about whether the court sent the notice of the order of dismissal to the driver as required by O.C.G.A. § 15-6-21(c); the driver submitted affidavits in which members and employees of the driver's law firm attested that the firm did not receive notice of the order of dismissal, which also was some evidence that notice was not sent. *Tyliczka v. Chance*, 313 Ga. App. 787, 723 S.E.2d 27 (2012).

Construction with O.C.G.A. § 5-6-35. — While the denial of a motion to set aside may be considered appealable in its own right when the motion is filed pursuant to subsection (d) of O.C.G.A. § 9-11-60, 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 subsection (d) of O.C.G.A. § 9-11-60 are subject to the discretionary appeals procedure (O.C.G.A. § 5-6-35(a)(8)), even when coupled with motions for a new trial or judgment n.o.v. (§ 5-6-35(d)). *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

Appeal from an order denying a motion to set aside filed pursuant to subsection (d) of O.C.G.A. § 9-11-60 is subject to the application procedures set forth in O.C.G.A. § 5-6-35(b). *Agency Mgt. Servs. v. Escape Travel/Tour Servs.*, 199 Ga. App. 882, 406 S.E.2d 285 (1991); *TMS Ins. Agency, Inc. v. Galloway*, 205 Ga. App. 896, 424 S.E.2d 71 (1992).

Order that 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 a 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).

Appeal from a denial of a motion for relief from a foreign judgment based on the foreign state's lack of personal jurisdiction was subject to the discretionary

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appeal statute, O.C.G.A. § 5-6-35. *Okepkpe v. Commerce Funding Corp.*, 218 Ga. App. 705, 463 S.E.2d 23 (1995).

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).

Construction with O.C.G.A. § 34-9-106. — In a worker's compensation action, because an employer's motion to set aside an award in favor of an injured employee focused exclusively on issues that the employer could have had corrected in a direct appeal to the Workers' Compensation Board, or in the hearing before the administrative law judge, the superior court did not abuse the court's discretion in denying that motion. *Winnersville Roofing Co. v. Coddington*, 283 Ga. App. 95, 640 S.E.2d 680 (2006).

Construction with O.C.G.A. § 15-6-21. — Because the trial court failed to make an explicit finding of willfulness in the court's order dismissing the plaintiff's case for failure to comply with an order compelling discovery, dismissal was reversed, and the case was remanded for a hearing on the issue; as a result, the appeals court declined to consider an argument that the plaintiff's counsel did not receive notice of the order compelling discovery, pursuant to O.C.G.A. § 15-6-21(c), as any remedy for an alleged lack of notice was to pursue a motion to set aside pursuant to O.C.G.A. § 9-11-60(d)(2). *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

Construction with O.C.G.A. § 14-11-304. — Trial court did not abuse the court's discretion in denying a motion to set aside a consent judgment entered against a debtor, a limited liability company, as the fact that the company's sole member did not receive notice of the com-

plaint or approve the consent judgment was insufficient to warrant that relief as the member was considered a separate legal entity from the company. *Old Nat'l Villages, LLC v. Lenox Pines, LLC*, 290 Ga. App. 517, 659 S.E.2d 891 (2008).

Subsection (d) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60) does not conflict with Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15(b)), relating to amendments to conform to the evidence. *Moore v. American Fin. Sys.*, 236 Ga. 610, 225 S.E.2d 17 (1976).

O.C.G.A. § 9-11-15(b) does not overlap with subsection (d). — Ga. L. 1972, p. 689, § 6 (see now O.C.G.A. § 9-11-15(b)) only concerns amendments to conform to the evidence, and in no respect overlaps with subsection (d) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60). *Moore v. American Fin. Sys.*, 236 Ga. 610, 225 S.E.2d 17 (1976).

Power of court. — Judgment cannot be set aside unless the grounds relied upon are unmixed with the negligence or the fault of the movant; however, a trial court in the exercise of the court's discretion has inherent power during the same term of court at which a judgment is rendered to reverse, correct, revoke, modify, or vacate the judgment and the exercise of such discretionary power will not be reversed in the absence of a manifest abuse of discretion. *Young Constr., Inc. v. Old Hickory House #3, Inc.*, 210 Ga. App. 559, 436 S.E.2d 581 (1993).

Motion considered outside term in which judgment rendered. — O.C.G.A. § 9-11-60 makes no distinction between fraud, accident, mistake, lack of jurisdiction, or a nonamendable defect as grounds for setting aside a judgment. Therefore, a motion to set aside a judgment based upon fraud, accident, or mistake may also be properly considered and granted outside of the term in which the judgment was granted. *Wright v. Archer*, 210 Ga. App. 607, 436 S.E.2d 775 (1993).

When a trial court erroneously granted an insured statutory damages against an insurer, for bad faith, under O.C.G.A. § 33-4-6, for each of 26 medical bills arising from one automobile accident, this was a nonamendable defect that appeared

on the face of the record so the trial court could correct the court's judgment in the term of court after the term in which the judgment was entered by granting one statutory damages award for all claims arising from the accident. *Byrd v. Regal Ins. Co.*, 275 Ga. App. 779, 621 S.E.2d 758 (2005).

Claim was unauthorized as basis and was outside time limit. — In an action by a client against the client's former attorney, the client's claims that an order was invalid because the order was unreasonable, unlawful, ambiguous, or against public policy, or because the order resulted from the attorney's fraud or other wrongful acts, were either unauthorized as a basis for setting aside the judgment under O.C.G.A. § 9-11-60(d) or were raised outside of the three-year time limit of § 9-11-60(f). *Hook v. Bergen*, 286 Ga. App. 258, 649 S.E.2d 313 (2007), cert. denied, 2007 Ga. LEXIS 697 (Ga. 2007).

Stay pending arbitration. — In an action between a contractor and a landowner alleging a breach of contract and other related claims in which disputes arising under the parties' contract were required to be submitted to arbitration the superior court erred in entering a default judgment against the landowner, and in denying relief from that judgment, ignoring a stay pending arbitration, as the issues involved in the litigation were ones that fell under the parties' agreement. *GF/Legacy Dallas, Inc. v. Juneau Constr. Co., LLC*, 282 Ga. App. 14, 637 S.E.2d 511 (2006), cert. denied, 2007 Ga. LEXIS 157 (Ga. 2007).

Party must avail oneself of statutory procedure. — Assuming, arguendo, that a dismissal was improperly vacated and set aside by means of a consent order, a subsequent action against others is not a proper forum for addressing that issue. Rather, a plaintiff must resort to the procedure set forth in subsection (b) of O.C.G.A. § 9-11-60 for setting aside a judgment. *Howell Mill/Collier Assocs. v. Gonzales*, 186 Ga. App. 909, 368 S.E.2d 831 (1988).

Court not required to hold evidentiary hearing. — After a plaintiff attached only a list of documents to a motion to set aside a judgment, but not

the documents themselves, and nothing indicated that the documents were newly discovered or that the documents showed the judgment was in error, the trial court was not required to hold an evidentiary hearing to develop the evidence. *Hooper v. Harris*, 236 Ga. App. 651, 512 S.E.2d 312 (1999).

Superior court cannot set aside state court judgment. — Superior court of a county does not have authority to set aside a judgment of the state court of that county on the ground that publication of the state court calendar is legally insufficient notice of the trial date if the superior court is not the court of rendition. *Loveless v. Conner*, 254 Ga. 663, 333 S.E.2d 586 (1985).

Superior court could not set aside probate court order. — Superior court did not have jurisdiction to set aside an order of the probate court dismissing a guardian when the probate court judgment was not void on the judgment's face. *Utica Mut. Ins. Co. v. Mitchell*, 227 Ga. App. 830, 490 S.E.2d 489 (1997).

Judgment not set aside before case transferred to superior court. — Because a tenant's motion to set aside a default judgment in a dispossessory action was not granted, the default judgment stood as a final order, and the magistrate court's attempt to transfer the case to superior court by agreement of the parties was improper. *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Domestication of foreign judgment. — If the party seeking to domesticate a foreign judgment fails to fulfill the party's burden in establishing the jurisdiction of the foreign court, the Georgia trial court may set aside the judgment. *E. Howard St. Clair & Assocs. v. Northwest Carpets, Inc.*, 237 Ga. App. 537, 515 S.E.2d 660 (1999).

Uniform Enforcement of Foreign Judgments Law. — 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., is a motion to set aside under O.C.G.A. § 9-11-60(d), and the only appealable judgment in a case when a creditor sought to domesticate a New Jersey judgment in Georgia was the order deny-

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ing the motion to set aside; because the corporation and the individual failed to appeal the denial of the motion to set aside by application, the order directing the corporation and the individual to pay in accordance with the New Jersey judgment was a nullity and provided no basis for review so the appellate court had no jurisdictional basis for the appeal and the appeal was dismissed. *Arrowhead Alternator, Inc. v. CIT Communs. Fin. Corp.*, 268 Ga. App. 464, 602 S.E.2d 231 (2004).

Appeal of an order denying the appellants' motion to vacate a foreign judgment was dismissed because the appellants failed to follow the correct procedure for appealing the trial court's decision; 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).

Because a trial court was required by O.C.G.A. §§ 9-11-60 and 9-12-132 to accord a foreign judgment full faith and credit if the judgment was proper under the law in which the judgment was rendered, the court erred in holding that Georgia law governed the filing of the debtors' answer in a New York case; the trial court erred in granting a motion to set aside the judgment since the debtors were in default for failing to timely serve an answer upon counsel in accordance with N.Y. C.P.L.R. 320(a), 2103(b). *LeRoy Vill. Green Residential Health Care Facility, Inc. v. Downs*, 310 Ga. App. 754, 713 S.E.2d 728 (2011).

In an action to enforce a foreign judgment from Arkansas, the trial court erred by setting aside the judgment against an

individual defendant because that individual defendant appeared in the Arkansas court by filing in that court a motion to dismiss the action; thus, the individual defendant waived the defense of lack of personal jurisdiction by failing to raise the issue in the motion to dismiss in the Arkansas court. *Carter v. Heritage Corner, Ltd.*, 320 Ga. App. 828, 741 S.E.2d 182 (2013).

Complaint seeking to set judgment aside for fraud treated as motion to set aside. — Because the complaint was framed as an unauthorized complaint in equity, but was actually an effort to set aside the judgment of the probate court because of fraud, the plaintiff's complaint must be treated as a motion to set aside the judgment in which relief was denied. *Manley v. Jones*, 203 Ga. App. 173, 416 S.E.2d 744, cert. denied, 203 Ga. App. 907, 416 S.E.2d 744 (1992).

Defendant's motion to set aside based on fraud was properly dismissed because the fraud did not come within paragraph (d)(2) of O.C.G.A. § 9-11-60 and the defendant failed to exercise proper diligence to discover the forgery prior to judgment. *Herringdine v. Nalley Equip. Leasing, Ltd.*, 238 Ga. App. 210, 517 S.E.2d 571 (1999).

Jurisdiction over workers' compensation award. — Superior court, rather than the board of workers' compensation, is the proper forum for bringing a motion to set aside a workers' compensation award. *Griggs v. All-Steel Bldgs., Inc.*, 201 Ga. App. 111, 410 S.E.2d 309 (1991), cert. denied, 201 Ga. App. 903, 410 S.E.2d 309 (1992).

Setting aside judgment on ground of mistake in workers' compensation action. — Superior court abused the court's discretion in denying a city's motion to set aside a judgment granting a police officer's demand for judgment on the Workers' Compensation Board's award because the city was authorized to move to set aside the judgment on the ground of mistake under O.C.G.A. § 9-11-60(d)(2), and in the city's first opportunity to submit factual support for the city's argument regarding mistake, the city provided un rebutted evidence that a second stipulation and agreement the of-

ficer signed was entirely the product of a mistake; the failure of the city's effort to appeal the award to the superior court on the second stipulation and agreement was entirely the fault of the superior court because the superior court failed to issue a timely order on the city's initial appeal to that court, which resulted in an affirmance by operation of law of the Board's award. *City of Atlanta v. Holder*, 309 Ga. App. 811, 711 S.E.2d 332 (2011).

Superior court abused the court's discretion in denying a city's motion to set aside a judgment granting a police officer's demand for judgment on the Workers' Compensation Board's award because any earlier trial court orders were subject to a proper motion to set aside pursuant to O.C.G.A. § 9-12-40. *City of Atlanta v. Holder*, 309 Ga. App. 811, 711 S.E.2d 332 (2011).

Divorce granted by a court lacking personal jurisdiction is a nullity, and may be remedied by a motion to set aside the judgment in the court of rendition. *Peters v. Hyatt Legal Servs.*, 211 Ga. App. 587, 440 S.E.2d 222 (1993).

Challenge to residency assertion in divorce case was challenge to court's jurisdiction. — In a divorce case, a husband's enumerations of error raising the issue of the wife's residency under O.C.G.A. § 19-5-5(b)(2) were challenges to the trial court's jurisdiction over the subject matter; these related to a motion to set aside under O.C.G.A. § 9-11-60(d)(1). *Kuriatnyk v. Kuriatnyk*, 286 Ga. 589, 690 S.E.2d 397 (2010).

Modification of juvenile court orders. — Motion for modification of a juvenile court order terminating parental rights is similar to a motion to set aside under subsection (d) of O.C.G.A. § 9-11-60, 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).

Adoption. — Superior court erred in granting a mother's motion to dismiss a former partner's petition to adopt the mother's child because a judgment denying the mother's motion to set aside the adoption decree was *res judicata* as to the validity of the adoption decree, and the superior court that dismissed the part-

ner's petition for custody was not entitled to revisit the validity of the decree; whether or not the superior court properly had jurisdiction of the question of adoption when the court entered the court's adoption decree, the court was competent to entertain the motion to set aside that decree and to decide, in connection with that motion, whether the court had jurisdiction when the court entered the decree. *Bates v. Bates*, 317 Ga. App. 339, 730 S.E.2d 482 (2012).

Petition for blood test. — Putative father's petition for a blood test was, in substance, an extraordinary motion for a new trial based on newly discovered evidence, not characteristic of a motion to set aside, and was not subject to consideration pursuant to paragraph (d)(2) of O.C.G.A. § 9-11-60 in an attack upon an earlier consent judgment entered in a support proceeding. *Department of Human Resources v. Browning*, 210 Ga. App. 546, 436 S.E.2d 742 (1993).

No limit on time for relief based on nonamendable section. — Notwithstanding subsections (d) and (f) of O.C.G.A. § 9-11-60, a judgment in which there is a nonamendable defect apparent on the face of the record is always subject to attack by motion to set aside, regardless of the length of time the judgment has been in existence. *Smyrna Marine, Inc. v. Stocks*, 172 Ga. App. 426, 323 S.E.2d 286 (1984).

While in breast of court, a trial court may, in the court's discretion, set aside a judgment, even on a motion to set aside, in which there are no nonamendable defects on the face of the record. *Sunn v. Mercury Marine*, 166 Ga. App. 567, 305 S.E.2d 6 (1983).

Judge's decision on facts, while binding as jury's verdict, may be set aside. — If a question of substantive fact (as distinguished from a decision of law) is submitted to the 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).

Judge tries defense of lack of personal jurisdiction. — Because a default

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judgment had already been entered, the defendant could raise a defense of lack of jurisdiction over the defendant's person by motion to set aside the judgment, and submit the judgment to the trial court for disposition, but because this defense was raised by a motion after judgment, the trial court sat as the trier of fact. *Wolfe v. Rhodes*, 166 Ga. App. 845, 305 S.E.2d 606 (1983).

Motion to set aside not covered by O.C.G.A. § 9-11-52. — Motion to set aside a default judgment pursuant to subsection (d) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60) does not come within the ambit of Ga. L. 1970, p. 170, § 1 (see now O.C.G.A. § 9-11-52), relating to findings of the court. *Emery Enters., Inc. v. Automatic Fasteners Div.*, 155 Ga. App. 24, 270 S.E.2d 261 (1980); *Jones v. Christian*, 165 Ga. App. 165, 300 S.E.2d 1 (1983).

Inapplicability of O.C.G.A. § 9-11-56(h). — Ga. L. 1967, p. 226, § 25 (see now O.C.G.A. § 9-11-56(h)), relating to appeals, is not applicable to motions to set aside and vacate judgments authorized by subsection (d) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60). *Farr v. Farr*, 120 Ga. App. 762, 172 S.E.2d 158 (1969).

Matter developed by evidence not within orbit of subsection (d). — Subsection (d) of this section requires that a nonamendable defect appear upon the face of the pleadings or record, and if a matter asserted to be error, such as a defect in notice, does not appear upon the face of the record but is developed by the evidence, judgment may not be set aside under that section. *Newman v. Greer*, 131 Ga. App. 128, 205 S.E.2d 486 (1974).

Motion under subsection (d) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60) will not be granted if matters upon which the motion is predicated must be developed by evidence. *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975); *Gough v. Gough*, 238 Ga. 695, 235 S.E.2d 9 (1977); *Glenn v. Maddux*, 149 Ga. App. 158, 253 S.E.2d 835 (1979); *Emery Enters., Inc. v. Automatic Fasteners Div.*, 155 Ga. App. 24, 270 S.E.2d 261 (1980).

Matter which is developed by the evidence rather than appearing upon the face of the record or pleadings does not fall within the orbit of subsection (d) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60). *Prudential Timber & Farm Co. v. Collins*, 155 Ga. App. 492, 271 S.E.2d 43 (1980); *Gulf Oil Co. v. Mantegna*, 167 Ga. App. 844, 307 S.E.2d 732 (1983).

Defendant's efforts, following a default judgment, to attack the underlying claim (i.e., the original entry of judgment) would have required the development of the issue by evidence and was not a proper subject for a motion to set aside. *Clements v. Trust Co. Bank*, 171 Ga. App. 600, 320 S.E.2d 576 (1984).

Proper vehicle to take exception to judgment. — Because, regardless of how the 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, the 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).

Use of motion to introduce new evidence improper. — Motion to reconsider and set aside judgment, used to bring additional affidavits before the court so as to gain a reversal based on "new evidence," is not proper. *Glenn v. Maddux*, 149 Ga. App. 158, 253 S.E.2d 835 (1979).

Failure to provide court with all the evidence. — Trial court erred by setting aside the denial of a biological father's petition for legitimation because the voluntary acknowledgment of paternity preempted the denial as the father failed to make the trial court aware of the acknowledgment and could not subsequently use the document to set aside the trial court's final judgment. *Allifi v. Raider*, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Motion to set aside must be based upon a nonamendable defect appearing on the face of the record or pleadings. *Southeast Ceramics, Inc. v. Ervin Co.*, 127

Ga. App. 346, 193 S.E.2d 262 (1972); Prudential Timber & Farm Co. v. Collins, 155 Ga. App. 492, 271 S.E.2d 43 (1980); Hawkins v. Walker, 158 Ga. App. 562, 281 S.E.2d 311 (1981).

Substance of subsections (a), (b), and (d) of O.C.G.A. § 9-11-60 is that a void judgment may be attacked by motion to set aside for a nonamendable defect that appears, not just on the face of the judgment, but also on the face of the record or pleadings. Lamas v. Baldwin, 128 Ga. App. 715, 197 S.E.2d 779 (1973).

If no nonamendable defect appears on the face of the record, a default judgment cannot be set aside by motion. Security Mgt. Co. v. Keasler, 131 Ga. App. 230, 205 S.E.2d 515 (1974).

Motion made pursuant to subsection (d) of O.C.G.A. § 9-11-60 must be predicated on some nonamendable defect that appears on the face of the record or pleadings. Archer v. Monroe, 165 Ga. App. 724, 302 S.E.2d 583 (1983).

Absence of a judge's or clerk's signature on an affidavit for garnishment did not constitute a nonamendable defect justifying the grant of a motion to set aside a judgment. Horizon Credit Corp. v. Lanier Bank & Trust Co., 220 Ga. App. 362, 469 S.E.2d 452 (1996).

Since the defendant established the presence of a nonamendable defect on the face of the record, the trial court erred in denying the motion to set aside a default judgment which was based on the defendant's failure to answer an amended complaint. Shields v. Gish, 280 Ga. 556, 629 S.E.2d 244 (2006).

Although a spouse alleged on appeal that a motion to set aside that portion of the divorce decree which dealt with the issue of child support, which incorporated the parties' settlement agreement, was properly granted because the decree failed to set forth a specific baseline dollar amount for child support, as required by O.C.G.A. § 19-5-12, the decree contained stated dollar amounts which could be considered baseline payments; hence, pursuant to O.C.G.A. § 19-6-15 as applicable at the time, the trial court properly found that the spouse was liable for paying child support for two children in the range of 23 to 28 percent of the spouse's gross income.

Scott v. Scott, 282 Ga. 36, 644 S.E.2d 842 (2007).

Denial of motion which nonamendable defect. — Motion to set aside and vacate a judgment that is not based on a nonamendable defect appearing in the record is properly denied. Farr v. Farr, 120 Ga. App. 762, 172 S.E.2d 158 (1969).

Meaning of "nonamendable defect". — Absence of consideration as a defense is a matter to be developed by the evidence, and it is not a nonamendable defect within the meaning of subsection (d) of O.C.G.A. § 9-11-60. First Baptist Church v. King, 208 Ga. App. 250, 430 S.E.2d 635 (1993).

Because the information required in a Ga. Unif. Super. Ct. R. 15 certificate of default (date and type of service, lack of responsive pleading) could also be found in the record, the failure to file a Rule 15 certificate was not a nonamendable defect in the record sufficient to authorize setting aside a default judgment under O.C.G.A. § 9-11-60(d). Williams v. Contemporary Servs. Corp., 325 Ga. App. 299, 750 S.E.2d 460 (2013).

Claims based on decisional or judgmental error not cognizable. — Inasmuch as the party seeking to set aside a judgment of dismissal directed the party's claims of mistake to decisional or judgmental error underlying the trial court's judgment of dismissal, such claims were not cognizable under O.C.G.A. § 9-11-60(d)(2). Brown v. Gadson, 288 Ga. App. 323, 654 S.E.2d 179 (2007), cert. denied, 2008 Ga. LEXIS 236 (Ga. 2008).

In a divorce action, the husband's motion to set aside a juvenile court's custody order for lack of personal or subject matter jurisdiction and for a nonamendable defect on the face of the record was not authorized since jurisdiction of the juvenile court was unquestioned and, because the record showed the mother had a claim to custody, there was no showing of a nonamendable defect. Barnes v. Williams, 265 Ga. 834, 462 S.E.2d 612 (1995).

When an attorney sued a former client's ex-spouse to enforce a lien on the former client's former marital residence, which was titled in the ex-spouse's name, the

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ex-spouse had no standing to seek to set aside the judgment on which the lien was based as O.C.G.A. § 9-11-60(d) did not authorize a non-party to bring a motion to set aside a judgment, and the ex-spouse did not allege that the judgment was void on the judgment's face, which could have provided standing under § 9-11-60(a). *Northern v. Tobin*, 262 Ga. App. 339, 585 S.E.2d 681 (2003).

Trial court did not abuse the court's discretion in granting a husband's motion to set aside a judgment, pursuant to O.C.G.A. § 9-11-60, after the court granted a divorce to the wife pursuant to O.C.G.A. § 19-5-5 and awarded her the parties' marital residence and all of the personal effects therein as the husband was not represented by counsel and thought that he would have to receive notice prior to the wife obtaining the divorce. The court noted that although he was served, the husband did not file responsive pleadings and accordingly, was not noticed for the final hearing which distributed the property, representing the husband's entire life savings, completely to the wife, and further, the motion to set aside the judgment was made during the same court term as the initial judgment was granted. *Pope v. Pope*, 277 Ga. 333, 588 S.E.2d 736 (2003).

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).

Upon reading the rules within the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, in *para materia* with Ga. Unif. Super. Ct. R. 24.6(B), the trial court was authorized to grant a divorce well after 30 days from the time an answer would have been due; hence, the trial court did not err in denying a wife's motion to set the judgment aside. *Hammack v. Hammack*, 281 Ga. 202, 635 S.E.2d 752 (2006).

Trial court erred in granting a husband's motion to set aside an order awarding a 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 because the husband did not provide the trial court with an appropriate basis to set aside the court's final order pursuant to O.C.G.A. § 9-11-60(d)(2); to establish mistake, the husband could not rely on the mistake of trial counsel as if counsel were acting adversely to the husband, rather than as his representative before the trial court because trial counsel's failure to include a correct address for the husband on a motion to withdraw was an insufficient ground to set aside the case under O.C.G.A. § 9-11-60(d)(2). *Edge v. Edge*, 290 Ga. 551, 722 S.E.2d 749 (2012).

Trial court erred by denying an ex-husband's motion to set aside a divorce decree with the ex-wife because the marriage was void from the marriage's inception due to the ex-wife having a living spouse from an undissolved marriage at the time and there was no issue of the protection of a child to prevent the decree from being set aside. *Wright v. Hall*, 292 Ga. 457, 738 S.E.2d 594 (2013).

Irregularities not on face of record.

— In a proper proceeding, courts of this state may exercise jurisdiction that obtained at common law to set aside judgments for irregularities not appearing on the face of the record; such a petition may be brought at law as well as in equity. *Simpson v. Bradley*, 189 Ga. 316, 5 S.E.2d 893 (1939), cert. denied, 310 U.S. 643, 60 S. Ct. 1105, 84 L. Ed. 1410 (1940) (decided

under former Code 1933, §§ 37-219 and 110-710).

Despite the fact that a spouse might have been negligent for not attacking the divorce decree by direct appeal, when that spouse failed to show a non-amenable defect on the face of the record, the trial court erred in granting a O.C.G.A. § 9-11-60(d)(3) motion to set the decree aside as to the issue of child support. *Scott v. Scott*, 282 Ga. 36, 644 S.E.2d 842 (2007).

Defect on face of record required to set aside judgment after term of entry. — Motion in arrest of judgment or motion to set aside can be sustained only upon such cause as is apparent upon the face of the record. *Wofford v. Vandiver*, 72 Ga. App. 623, 34 S.E.2d 579 (1945) (decided under former Code 1933, § 110-702).

Motion to set aside a judgment, if there is no claim that the judgment was fraudulently procured, can be sustained only if the defects rendering the judgment invalid appear on the face of the record. *Fields v. Arnall*, 199 Ga. 491, 34 S.E.2d 692 (1945) (decided under former Code 1933, § 110-702).

Motion to set aside a judgment made after the term at which the judgment was rendered must be based on some defect appearing on the face of the record. *Reid v. Anderson*, 88 Ga. App. 298, 76 S.E.2d 541 (1953); *Charles S. Martin Distrib. Co. v. Southern Furnace Co.*, 88 Ga. App. 339, 76 S.E.2d 662 (1953) (decided under former Code 1933, Ch. 7, T. 110).

Motion to set aside a judgment, not predicated upon some defect apparent upon the face of the record or pleadings, was without merit. *Tobin v. Tobin*, 212 Ga. 205, 91 S.E.2d 508 (1956) (decided under former Code 1933, § 110-702).

If the term of court has expired, judgment is res judicata and is no longer in the breast of the court, and the court has no authority to vacate or set aside such judgment except for defects appearing on the face of the record. *Carolina Tree Serv., Inc. v. Cartledge*, 96 Ga. App. 240, 99 S.E.2d 705 (1957) (decided under former Code 1933, § 110-702).

Judgment will not be set aside after the expiration of the term in which the judgment was rendered for defects not appear-

ing on the face of the record that are amendable. *Allen v. Allen*, 218 Ga. 364, 127 S.E.2d 902 (1962) (decided under former Code 1933, § 110-702).

As a debtor did not file bankruptcy documents in a promissory note holder's action against the debtor, there was no error in the denial of the debtor's motion to set aside a default judgment taken against the debtor as the record was devoid of a nonamendable defect which appeared upon the face of the record or pleadings. *Chugh Shopping Ctr., Inc. v. Ameris Bank*, 323 Ga. App. 243, 746 S.E.2d 855 (2013).

Except when motion to set aside was continued to next term. — Trial court cannot, after the term at which a judgment or order is entered, set aside, alter, amend, or revoke the court's final judgment or order except for defects appearing on the face of the record; the only exception is if the motion or petition to set aside or arrest the judgment was filed at the term at which the judgment or order was rendered and was regularly continued to a succeeding term. *American Mut. Liab. Ins. Co. v. Satterfield*, 88 Ga. App. 395, 76 S.E.2d 730 (1953) (decided under former Code 1933, Ch. 7, T. 110).

End of term of court necessitates motion. — Since summary judgment was entered before the term of court ended and a motion was not filed until after that, a motion to set aside the judgment under subsection (d) of O.C.G.A. § 9-11-60 was required. *First Baptist Church v. King*, 208 Ga. App. 250, 430 S.E.2d 635 (1993).

Setting aside of judgment if no cause of actions exists. — Motion in arrest of or to set aside a judgment may be interposed as provided by law if it appears from the face of the record or the pleadings that no cause of action exists against a defendant. *Smith v. Franklin Printing Co.*, 54 Ga. App. 385, 187 S.E. 904 (1936) (decided under former Code 1933, Ch. 7, T. 110).

Because the adopted son identified no basis for voiding the award of a year's support to the decedent, his adopted mother, and the son's action to set aside the award was untimely under O.C.G.A. § 9-11-60(f), the award in favor of the biological mother (the decedent's daugh-

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ter) was upheld. *Harris v. Johnson*, 257 Ga. App. 182, 570 S.E.2d 582 (2002).

Trial court erred in setting aside consent decree. — Trial court erred in finding that a consent judgment was void due to impossibility of performance or lack of mutuality and in denying the sellers' motion for judgment instant on the consent judgment because the purchasers accepted the risk that the purchasers would be unable to complete the road on time per the agreement and set up an alternative method of compliance, namely, the payment of money to the sellers. *Kothari v. Tessfaye*, 318 Ga. App. 289, 733 S.E.2d 815 (2012).

Defendant's failure to answer based on an allegation of mistake did not justify setting aside the default judgment because the alleged mistake was not "unmixed with negligence or fault" of the defendant. *Lee v. Restaurant Mgt. Servs.*, 232 Ga. App. 902, 503 S.E.2d 59 (1998).

Gross neglect during discovery supported denial of motion to set aside default judgment. — Because a lessee's conduct during the discovery stage of the proceedings below on the lessor's breach-of-lease complaint clearly demonstrated gross neglect, specifically, the lessee's failure to: (1) respond to a motion to compel and attend the hearing thereon; (2) communicate with counsel; and (3) attack the default judgment until eight months after the judgment was entered, the trial court manifestly abused the court's discretion in granting the lessee's motion to set the default aside. *Kairos Peachtree Assocs., LLC v. Papadopoulos*, 288 Ga. App. 161, 653 S.E.2d 386 (2007).

If the pleadings are so defective that no legal judgment can be rendered, the judgment will be arrested or set aside; but a judgment will not be arrested or set aside for any defect in the pleading or record that is aided by the verdict or is amendable as a matter of form. *Auld v. Schmelz*, 199 Ga. 633, 34 S.E.2d 860 (1945) (decided under former Code 1933, Ch. 7, T. 110).

Meritorious reason necessary for setting aside of judgment. — Although

a motion to set aside a judgment is addressed to the sound discretion of the judge, the motion should not be granted unless some meritorious reason be given therefor, even though the motion is made during the term at which the judgment was rendered. *Hurt Bldg., Inc. v. Atlanta Trust Co.*, 181 Ga. 274, 182 S.E. 187 (1935); *Drain Tile Mach., Inc. v. McCannon*, 80 Ga. App. 373, 56 S.E.2d 165 (1949) (decided under former Code 1933, Ch. 7, T. 110). See also *Hicks v. Hicks*, 226 Ga. 798, 177 S.E.2d 690 (1970).

Failure to appear not a meritorious reason. — Failure of the defendant to appear and plead, in consequence of a misunderstanding between the defendant and defense counsel, does not afford a meritorious reason for granting a motion to set aside a judgment, even though made during the term, while the judgment was yet in the breast of the court. *Drain Tile Mach., Inc. v. McCannon*, 80 Ga. App. 373, 56 S.E.2d 165 (1949) (decided under former Code 1933, Ch. 7, T. 110).

Superior court did not abuse the court's discretion in denying a stepson's motion under O.C.G.A. § 9-11-60(d) to set aside a judgment entered in favor of an administrator based on the claim that the stepson's attorney had no notice of the trial date because the superior court placed the case on the trial calendar upon the stepson's request; therefore, pursuant to O.C.G.A. § 9-11-40(c)(2), the superior court was not required to provide the stepson with notice of the trial date, and the stepson's attorney had a duty to attend court and look after the attorney's and the stepson's interests. *Bocker v. Crisp*, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Pleadings must show that no claim existed. — To set aside a judgment under subsection (d) of O.C.G.A. § 9-11-60, a movant must show that the motion is predicated upon some nonamendable defect that does appear upon the face of the record or pleadings, and that the pleadings affirmatively show that no claim in fact existed. *Midland Guardian Co. v. Varnadore*, 148 Ga. App. 742, 252 S.E.2d 685 (1979); *Hyman v. Plant Imp. Co.*, 151 Ga. App. 553, 260 S.E.2d 531 (1979).

Unless motion is based on lack of jurisdiction. — Unless a motion to set aside a judgment is based upon lack of jurisdiction over the person or subject matter, the motion must be predicated upon some nonamendable defect that appears upon the face of the record or pleadings. *Gough v. Gough*, 238 Ga. 695, 235 S.E.2d 9 (1977).

Regardless of whether lack of jurisdiction appears on face of record or pleadings. — Under subsection (d) of O.C.G.A. § 9-11-60, as amended in 1974 by Ga. L. 1974, p. 1138, § 1, a motion to set aside a judgment may be based upon lack of jurisdiction over the person or subject matter, regardless of whether such lack of jurisdiction appears upon the face of the record or pleadings. *Cook v. Bright*, 150 Ga. App. 696, 258 S.E.2d 326 (1979); *Hawkins v. Walker*, 158 Ga. App. 562, 281 S.E.2d 311 (1981).

Lack of jurisdiction of the person usually arises from one of two defects: invalidity of service or faulty venue; either may or may not appear on the face of the record, but for purposes of a motion to set aside it does not matter. *Cook v. Bright*, 150 Ga. App. 696, 258 S.E.2d 326 (1979).

Service essential to personal jurisdiction. — O.C.G.A. § 9-11-60 provides that a judgment is subject to being set aside at any time by a motion premised upon lack of jurisdiction over the person, and unless a party has waived lawful service of process, such service is essential to give a court jurisdiction over that party's person. *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979).

Misleading identification of intended defendant. — Because a complaint actively misled as to the identity of the intended defendant, the action of an agent for service of process in returning the complaint was appropriate, and since there was no proper service upon any defendant, a motion to set aside should have been granted. *Carrier Transicold Div. v. Southeast Appraisal Resource Assocs.*, 233 Ga. App. 176, 504 S.E.2d 25 (1998).

Effect of subsection (d) of O.C.G.A. § 9-11-60 is to prevent waiver of the defense of lack of jurisdiction under

O.C.G.A. § 9-11-12(h)(1) by allowing the defense to be raised in a motion to set aside. *Phillips v. Williams*, 137 Ga. App. 578, 224 S.E.2d 515 (1976).

Under subsection (d) of O.C.G.A. § 9-11-60, a person may bring a motion to set aside a judgment void for lack of jurisdiction at any time, and O.C.G.A. § 9-11-12 could not be constitutionally applied to preclude a nonresident from bringing such a motion after a default judgment was entered against the nonresident. *Hoesch Am., Inc. v. Dai Yang Metal Co.*, 217 Ga. App. 845, 459 S.E.2d 187 (1995); *B & D Fabricators v. D.H. Blair Investment Banking Corp.*, 220 Ga. App. 373, 469 S.E.2d 683 (1996).

Rule of waiver by nonaction not abolished. — The 1974 amendment by Ga. L. 1974, p. 1138, § 1, relating to jurisdictional defects, did not abolish the general rule of waiver by nonaction, which exists if the defendant is properly served and elects not to respond to process, despite notice therein of its requirements. *Vanguard Diversified, Inc. v. Institutional Assocs.*, 141 Ga. App. 265, 233 S.E.2d 247 (1977).

One who, being properly served, wishes to rely on the defense of lack of venue, must bring the defense to the attention of the court at the proper time or the defense is waived; the 1974 amendment to subsection (d) by Ga. L. 1974, p. 1138, § 1, relating to jurisdictional defects, does not give a litigant who has been served and has knowledge of all the facts the right to sit idly by while a trial verdict and default judgment are entered against the litigant, and then set the whole procedure aside on a venue defense which should have been raised prior thereto. *Allen v. Alston*, 141 Ga. App. 572, 234 S.E.2d 152 (1977).

Diligence rule applies when an individual uses a motion to set aside, and precludes the movant from using a ground which the movant had known or could have discovered through reasonable diligence. *Camp v. Fidelity Bankers Life Ins. Co.*, 129 Ga. App. 590, 200 S.E.2d 332 (1973); *Rhodes v. Top Dog, Inc.*, 209 Ga. App. 777, 434 S.E.2d 578 (1993).

If an individual chooses a motion to set aside to obtain relief from a judgment, the principles applicable to a motion for new

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trial and to a complaint in equity would be applicable if the ground for the attack was one that was known or could have been discovered by reasonable diligence. *Camp v. Fidelity Bankers Life Ins. Co.*, 129 Ga. App. 590, 200 S.E.2d 332 (1973).

Motion to set aside a judgment cannot be based on a ground that could have been discovered by the appellant through the exercise of reasonable diligence prior to entry of a judgment. *Shepherd v. Metropolitan Property & Liab. Ins. Co.*, 163 Ga. App. 650, 294 S.E.2d 638 (1982).

Defect on calendar appears on face of record. — Trial calendar is a part of the record of a case, and a defect appearing on the calendar is a defect appearing on the “face of the record” within the meaning of subsection (d) of O.C.G.A. § 9-11-60. *Brown v. Citizens & S. Nat'l Bank*, 245 Ga. 515, 265 S.E.2d 791 (1980).

Plaintiff was estopped by laches from seeking to set aside a dismissal on the equitable grounds set forth in paragraph (d)(2) of O.C.G.A. § 9-11-60 because the plaintiff's counsel was aware of the existence of the dismissal order within a few days after the order was entered but waited more than two years to move to set the order aside and offered no explanation for the delay. *Lee v. Henson*, 198 Ga. App. 701, 402 S.E.2d 548 (1991).

Motion to set aside may be barred by laches as if an action in equity. *Herringdine v. Nalley Equip. Leasing, Ltd.*, 238 Ga. App. 210, 517 S.E.2d 571 (1999).

Lack of notice as nonamendable defect. — Judgment or order based on a trial or hearing, entered against a party without notice of the trial or hearing, is subject to a motion to set aside when lack of notice appears on the face of the record. *Brown v. Citizens & S. Nat'l Bank*, 245 Ga. 515, 265 S.E.2d 791 (1980).

Absence of an attorney's name on the trial calendar is a defect on the face of the record, and publication of this defective calendar did not constitute notice of trial; this lack of notice constituted a nonamendable defect on the face of the record, as contemplated by subsection (d) of O.C.G.A. § 9-11-60. *Brown v. Citizens*

& S. Nat'l Bank, 245 Ga. 515, 265 S.E.2d 791 (1980).

If the defendant's counsel withdraws from the case and notifies the court, but the only notice of the trial date is sent to this former counsel, who makes no effort to inform the former client, a motion to set aside a subsequently entered default judgment should be granted. *Georgia Hwy. Express, Inc. v. Whaley*, 166 Ga. App. 662, 305 S.E.2d 411 (1983).

Lack of notice of a divorce hearing, unless notice is waived, constitutes a “nonamendable defect that does appear upon the face of the record or pleadings,” thus authorizing a setting aside of the judgment. *Coker v. Coker*, 251 Ga. 542, 307 S.E.2d 921 (1983).

Failure of counsel or a party acting pro se to receive notice of trial is such a defect as will authorize the setting aside of the judgment. *Beach's Constr. Co. v. Moss*, 168 Ga. App. 462, 309 S.E.2d 382 (1983); *TMS Ins. Agency, Inc. v. Galloway*, 205 Ga. App. 896, 424 S.E.2d 71 (1992).

Failure of counsel or a party acting pro se to receive notice of a hearing constitutes such a defect as will authorize the setting aside of the judgment under paragraph (d)(3) of O.C.G.A. § 9-11-60. *Housing Auth. v. Parks*, 189 Ga. App. 97, 374 S.E.2d 842 (1988).

Trial court abused the court's discretion in denying an O.C.G.A. § 9-11-60(d) motion to set aside a default judgment entered when a builder failed to appear for trial in a breach of contract action; a nonamendable defect was shown on the face of the record, which established that the builder had never received actual notice of the trial as the notice was sent to the wrong address and was returned. *Moore v. Davidson*, 292 Ga. App. 57, 663 S.E.2d 766 (2008).

Trial court erred by denying the borrowers' motion under O.C.G.A. § 9-11-60(g) to set aside the order granting a bank summary judgment because while the trial court established that notice was sent the court failed to make any findings as to whether the attorneys for the borrowers had received notice of the order. *C & R Fin. Lenders, LLC v. State Bank & Trust Co.*, 320 Ga. App. 660, 740 S.E.2d 371 (2013).

Authority to grant motion to set aside at subsequent term of court. —

Trial judge had authority at a subsequent term of court to grant a motion to set aside an order denying a new trial and reenter it based upon lack of timely notice because this was not a modification or revision affecting the substance or merits of a decree, which must be accomplished during the term in which the decree was entered. *City of Monroe v. Jordan*, 201 Ga. App. 332, 411 S.E.2d 511 (1991).

Lack-of-notice claim failed when defendant could not be reached. —

In a suit brought on a note, in which there was nothing in the complaint to indicate that the damages were unliquidated, in which the defendant was represented by counsel, who received notice of trial but was unsuccessful in informing the defendant of the trial date even though the defendant had the same mailing address at all times, and in which default judgment was entered after the defendant failed to appear, the trial court did not abuse the court's discretion in denying a motion to set aside on the grounds of lack of notice and unliquidated damages. *Clements v. Trust Co. Bank*, 171 Ga. App. 600, 320 S.E.2d 576 (1984).

Defendant's failure to attend not justification for setting aside judgment. —

Because the trial court found that, according to the defendant's own personal recollection, the defendant had been telephoned at 9:45 A.M. on April 6, 1982, and told to appear at 10:45, the defendant's answer was stricken and default judgment was entered at 10:55 A.M., the defendant's counsel appeared in the judge's chambers at 11:09 A.M., the trial court considered all circumstances of the case, and it cannot be said that rendition of the default judgment was unmixed with negligence on the part of the defendant in failing to appear given notice, there was no abuse of discretion by the trial court in denying the defendant's motion to set aside the default judgment. *Archer v. Monroe*, 165 Ga. App. 724, 302 S.E.2d 583 (1983).

Refusal to set aside the judgment on the ground of mistake or accident was not error because the trial court specifically found that the failure of the defendant or

defendant's counsel to appear at the call of the case for trial was due "solely to the negligence of the defendant and defendant's legal counsel, unmixed with any acts of the court, the court administrator, the plaintiff's legal counsel, or any other person or entity." *Aycock v. Hughes*, 189 Ga. App. 838, 377 S.E.2d 689, cert. denied, 189 Ga. App. 911, 377 S.E.2d 689 (1989).

Denial of motion to set aside a default judgment against a corporation was not an abuse of discretion as the corporation's counsel admitted that the counsel failed to appear for trial because the counsel did not read the legal newspaper in which the trial calendar was published; the corporation offered no legal excuse for the corporation's failure to appear at the trial calendar. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Judgment's violation of statute not grounds for motion. —

Motion to set aside is not the proper remedy if a party attacks a judgment as a violation of a statute, e.g., O.C.G.A. § 19-6-27, not because of some nonamendable defect on the face of the record or pleadings or lack of personal or subject matter jurisdiction. *Page v. Page*, 255 Ga. 145, 335 S.E.2d 865 (1985).

Absent confidential or fiduciary relationship between parties. —

As a general rule, equity will grant no relief to one against whom an unfavorable judgment has been rendered, even in consequence of fraud, when one could have prevented the return of such judgment by the exercise of proper diligence; but this rule is not applicable if there is a confidential or fiduciary relationship between the parties, in which case the law requires the utmost good faith and does not require the parties to anticipate or watch for fraud. *Lewis v. Lewis*, 228 Ga. 703, 187 S.E.2d 872 (1972).

If the relationship between the parties is that of business people, and although in the majority of business dealings the parties have trust and confidence in each other's integrity, there is no confidential relationship between the individuals. *Parson-Nicholson, Inc. v. Dalton Carpet Finishing Co.*, 161 Ga. App. 595, 289 S.E.2d 25 (1982).

Affidavit of illegality insufficient. — Defendant cannot use an affidavit of ille-

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gality to attempt to reach any alleged defects in a default judgment; this can be done only by the means set out in subsection (b) of O.C.G.A. § 9-11-60. *Ryle v. Gold Kist, Inc.*, 172 Ga. App. 398, 323 S.E.2d 269 (1984).

Except if notice requirement waivable. — Because the notice requirement is waivable, inadequate notice is not a nonamendable defect appearing on the face of the record, and cannot be the basis for setting aside a judgment. *City of Calhoun v. Hamrick*, 243 Ga. 716, 256 S.E.2d 599 (1979).

Failure to verify a pleading is an amendable defect and is no basis for setting aside a judgment. *Dunn v. Lockheed-Georgia Co.*, 146 Ga. App. 750, 247 S.E.2d 601 (1978).

Relief under paragraph (d)(2) of O.C.G.A. § 9-11-60 may only be granted if the grounds are unmixed with the negligence or fault of the movant. *Northeast Atlanta Sur. Co. v. State*, 197 Ga. App. 399, 398 S.E.2d 435 (1990).

Mistake means misapprehension of fact. — Claim of mistake refers to the misapprehension of a past or present fact. *Northeast Atlanta Sur. Co. v. State*, 197 Ga. App. 399, 398 S.E.2d 435 (1990).

Condemnation judgment could not be set aside on the basis of mistake of fact, because the mistake was due to the negligence or fault arising from a surveying error by the county's surveyor. *Gatefield Corp. v. Gwinnett County*, 234 Ga. App. 621, 507 S.E.2d 164 (1998).

Motion to set aside a voluntary dismissal with prejudice on the ground of mistake was properly denied because the mistake was the result of the plaintiffs' own negligence or fault. *Kent v. State Farm Mut. Auto. Ins. Co.*, 233 Ga. App. 564, 504 S.E.2d 710 (1998).

Misnomer is amendable if it does not result in substitution or addition of another party. *Carroll v. Equico Lessors*, 141 Ga. App. 279, 233 S.E.2d 255 (1977).

Misnomer in complaint. — Description of the defendant corporation in the complaint as "U.S. Shelter Corporation of Delaware" instead of "U.S. Shelter Corpo-

ration" was a mere misnomer and not a nonamendable defect that would warrant setting aside a default judgment against the corporation. *Miller v. United States Shelter Corp.*, 179 Ga. App. 469, 347 S.E.2d 251 (1986).

Discrepancy in the defendant's name between the exhibits (inaccurate) and the pleadings (accurate) does not afford a basis for setting aside the judgment if the pleadings and record do not affirmatively show that no claim in fact existed against the defendant or that the plaintiff sued the wrong party. *Pittard Mach. Co. v. Eisele Corp.*, 166 Ga. App. 324, 304 S.E.2d 129 (1983).

Motion to set aside the judgment mistakenly docketed as a new and separate action that fulfilled all the requirements of a motion to set aside under paragraph (d)(2) of O.C.G.A. § 9-11-60 would be so construed. *Herringdine v. Nalley Equip. Leasing, Ltd.*, 238 Ga. App. 210, 517 S.E.2d 571 (1999).

Remand necessitated when trial court only considered one asserted ground of relief. — As a debtor's motion to set aside a default judgment taken against the debtor by the promissory note holder was only considered by the trial court on the ground of a nonamendable defect, a remand was necessitated in order for the trial court to consider the motion under the other ground asserted by the debtor. *Chugh Shopping Ctr., Inc. v. Ameris Bank*, 323 Ga. App. 243, 746 S.E.2d 855 (2013).

Alleged fraud of the plaintiff's attorney was not such a fraud as would authorize setting aside a dismissal under paragraph (d)(2) of O.C.G.A. § 9-11-60 because the fraud that will justify setting aside a judgment is that of the other side of the suit. *Moore v. Barfield*, 189 Ga. App. 348, 375 S.E.2d 623, cert. denied, 189 Ga. App. 913, 374 S.E.2d 771 (1988).

Motion for reconsideration distinguished from motion to set aside. — Nonstatutory motion to reinstate an action dismissed as a sanction for failure to comply with the trial court's order to timely answer interrogatories is the equivalent of a motion for reconsideration and cannot be considered as a motion to set aside as it is not based upon a

nonamendable defect that appears upon the face of the record. *Daniels v. McRae*, 180 Ga. App. 732, 350 S.E.2d 317 (1986).

Court must decide issue of sufficiency of process. — Court could not use the doctrine of laches to deny a motion to set aside a judgment based on a claim that the court lacked personal jurisdiction due to a failure of process without first deciding the issue of the sufficiency of the process. *Power v. Mobley*, 170 Ga. App. 167, 316 S.E.2d 580 (1984).

Issue of usury not a nonamendable defect. — Contention that late fee charges awarded by a court were a device to cover up usury raises a question of fact for jury resolution, and such an issue cannot be said to be a nonamendable defect that is not cured by judgment. *Hyman v. Plant Imp. Co.*, 151 Ga. App. 553, 260 S.E.2d 531 (1979).

Bank's motion to set aside default judgment against borrower. — Grant of a bank's motion to set aside a default judgment against a borrower was proper since a typographical error as to the amount sought in the demand for judgment was in the pleading rather than the judgment, and this defect was apparently intentionally waived by the borrower so as to serve in the borrower's favor in an attempt to take advantage of the limitation imposed by O.C.G.A. § 9-11-54(c)(1) on damages that can be awarded by default judgment. *Betts v. First Ga. Bank*, 177 Ga. App. 359, 339 S.E.2d 616 (1985).

Affidavit containing unnecessary hearsay is not a nonamendable defect within the contemplation of subsection (d) of O.C.G.A. § 9-11-60. *Henry v. Polar Rock Dev. Corp.*, 143 Ga. App. 189, 237 S.E.2d 667 (1977).

Failure to incorporate findings and conclusions amendable. — Failure of the trial court to incorporate findings of fact and conclusions of law in an order modifying a divorce decree was an amendable defect appearing on the face of the record, and thus not a defect that would warrant setting aside the judgment. *Kennedy v. Brown*, 239 Ga. 286, 236 S.E.2d 632 (1977).

Since the failure to include findings of fact and conclusions of law in the order in a proceeding under the "Uniform Recipro-

cal Enforcement of Support Act", O.C.G.A. Art. 2, Ch. 11, T. 19, was an amendable defect appearing on the face of the record, it was not subject to a motion to set aside, and the trial court did not err in denying the defendant's motion to set aside judgment. *Powell v. State*, 166 Ga. App. 780, 305 S.E.2d 646 (1983).

Motion must be predicated on nonamendable defect or lack of jurisdiction. — Because the defendant's "Motion to Vacate and Set Aside Judgment" was not predicated upon a nonamendable defect or a lack of jurisdiction, but 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 from the order granting the plaintiff's motion for summary judgment. *Miller v. Bank of S.*, 177 Ga. App. 42, 338 S.E.2d 436 (1985), overruled on other grounds, *MMT Enters., Inc. v. Cullars*, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Judgments will not be set aside merely because the judgments may be contrary to principles of law applicable to the case. *Shepherd v. Metropolitan Property & Liab. Ins. Co.*, 163 Ga. App. 650, 294 S.E.2d 638 (1982).

Absence of the attorney's name on a trial calendar is a defect on the face of the record, which constitutes a nonamendable defect on the face of the record as contemplated by subsection (d) of O.C.G.A. § 9-11-60. *Scott v. W.S. Badcock Corp.*, 161 Ga. App. 826, 289 S.E.2d 769 (1982).

Considerations of fraud applicable. — Considerations of fraud applicable to equitable complaints to set aside under subsection (e) of O.C.G.A. § 9-11-60 also are applicable to timely motions for new trial and motions to set aside. *Jackson v. Jackson*, 254 Ga. 280, 328 S.E.2d 733 (1985).

Fraud perpetrated by a stranger could not be used as the basis for setting aside a judgment in favor of the defendant who was not linked to the fraud. *Shilliday v. Dunaway*, 220 Ga. App. 406, 469 S.E.2d 485 (1996).

No fraud in the inducement. — Dismissal of the plaintiff's complaint extinguished an attorney's lien and there was

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no authority to set aside the dismissal based on fraud in the inducement. *Villani v. Edwards*, 251 Ga. App. 293, 554 S.E.2d 184 (2001).

Setting aside of judgment granting punitive damages when fraud not alleged. — Motion to set aside should have been granted insofar as the motion related to a punitive damage award because the complaint alleging breach of agreement to procure automobile insurance contained no allegation of fraud upon which an award of punitive damages could have been based. *Covington v. Saxon*, 163 Ga. App. 646, 295 S.E.2d 105 (1982).

Including life insurance provisions in divorce decree. — Even if the trial judge makes, in effect, a mistake of law by including life insurance provisions in a divorce decree, this does not constitute a ground for setting aside the decree. *Coker v. Coker*, 251 Ga. 542, 307 S.E.2d 921 (1983).

Contention that denial of a motion was "contrary to principles of justice and equity" sets forth no ground for reversal. *Norman Serv. Indus., Inc. v. Lusty*, 168 Ga. App. 164, 308 S.E.2d 411 (1983).

Motion for interest, filed after expiration of the term during which a judgment had been entered, provided no vehicle for the court to add interest to the judgment already entered because there had been no motion to set aside the judgment. *Moore v. Thompson*, 187 Ga. App. 672, 371 S.E.2d 111 (1988).

Paternity action should be separated. — Although a petition for determination of paternity must be brought where the child resides when the father lives outside of the state, the superior court should not have dismissed an entire motion/petition that included a motion to set aside the judgment for want of jurisdiction simply because one aspect of the case should have been heard elsewhere; the superior court should have transferred the paternity portion of the case, not dismissed it. *Suggs v. Suggs*, 204 Ga. App. 72, 418 S.E.2d 427 (1992).

Failure to disprove agent's authority. — Defendant's failure to present any

evidence regarding the lack of authority of the defendant's agent to receive service on behalf of a partnership warranted the trial court's denial of the defendant's motion to set aside the default judgment on that basis. *Northgate Village Apts. v. Smith*, 207 Ga. App. 479, 428 S.E.2d 381 (1993).

Validation judgment not subject to set aside. — Constitutional mandate that validation proceedings are conclusive does not allow these judgments to be set aside for fraud, accident, or mistake. *AMBAC Indem. Corp. v. Akridge*, 262 Ga. 773, 425 S.E.2d 637, cert. denied, 510 U.S. 817, 114 S. Ct. 69, 126 L. Ed. 2d 38 (1993).

Attack on a prior judgment based on the competency of the defendant is not a nonamendable defect that appears upon the face of the record or pleadings. *Sellers v. Bell*, 151 Ga. App. 440, 260 S.E.2d 538 (1979).

Because attorney's fees were improperly included in the judgment, that part could be set aside or arrested. *Love v. National Liberty Ins. Co.*, 157 Ga. 259, 121 S.E. 648 (1924) (decided under former Civil Code 1910, § 5957).

Failure to name the holder of a note in a notice of intention to include attorney's fees, as required by law, was not an amendable defect, and that portion of the judgment was absolutely void and rendered the judgment open to attack. *Carey v. Wyatt*, 17 Ga. App. 517, 87 S.E. 770 (1916) (decided under former Civil Code 1910, § 5957).

Failure to pay costs of previous action. — Contention that judgment for total divorce should be set aside because the plaintiff failed to pay court costs of a previous action came too late when made for the first time in a petition to set aside. *Crenshaw v. Crenshaw*, 198 Ga. 536, 32 S.E.2d 177 (1944) (decided under former Code 1933, Ch. 7, T. 110).

Objection to a petition on the ground of misjoinder of parties affords no ground to arrest the judgment. *Love v. National Liberty Ins. Co.*, 157 Ga. 259, 121 S.E. 648 (1924) (decided under former Civil Code 1910, § 5957).

Failure to notify court of renewal status of case not nonamendable defect. — Failure of the plaintiffs to notify

the trial court of the renewal status of plaintiffs' action pursuant to Superior Court Rule 4.8 was not a nonamendable defect appearing on the face of the record as required by paragraph (d)(3) of O.C.G.A. § 9-11-60 and did not warrant setting aside the judgment for the plaintiffs. *Hardeman v. Roberts*, 214 Ga. App. 484, 448 S.E.2d 254 (1994).

Rescission of judicial sale. — After a judicial sale has been confirmed, the court has no discretion to rescind the sale, except upon some special ground such as fraud, accident, or mistake that has worked an injustice, and which was unknown to the complainant at the time of confirmation. *Hurt Bldg., Inc. v. Atlanta Trust Co.*, 181 Ga. 274, 182 S.E. 187 (1935) (decided under former Code 1933, § 110-710).

Motion to set aside a consent judgment was subject to dismissal because the plaintiffs failed to set forth any reason why the plaintiffs could not have ascertained grounds of the plaintiffs' complaint by proper diligence prior to entry of judgment and failed to show any fraud by the defendant in procuring the plaintiff's consent to the decree as rendered. *Raines v. Lane*, 198 Ga. 217, 31 S.E.2d 403 (1944) (decided under former Code 1933, § 110-710).

Binding effect of consent judgment. — In the absence of fraud, accident, or mistake, a client is bound by a consent judgment entered into by counsel acting within the general scope of counsel's employment, and because neither the allegations nor proof were sufficient to bring the case from operation of this rule, the movant failed to show cause to set aside the consent judgment complained of. *Midtown Chains Hotel Co. v. Merriman*, 204 Ga. 71, 48 S.E.2d 831 (1948) (decided under former Code 1933, § 110-710).

Alleged agreement to dismiss not ground for setting aside judgment after defendant appeared and defended. — Alleged agreement by the defendant with the plaintiff's attorney, made before judgment, that the suit would be dismissed, is no ground for setting aside the judgment or arresting execution if the defendant appeared at trial and defended against the action. *Felker v.*

Johnson, 189 Ga. 797, 7 S.E.2d 668 (1940) (decided under former Code 1933, Ch. 7, T. 110).

Severe illness as proper ground for setting aside judgment. — Severe illness of a party, preventing the party from attending trial, will generally be treated as casualty or misfortune constituting proper ground for vacating or setting aside judgment rendered against the party. *Thomas v. Travelers Ins. Co.*, 53 Ga. App. 404, 185 S.E. 922 (1936) (decided under former Code 1933, § 110-701).

Erroneous rulings on pleadings are not proper grounds for motions to set aside judgments, nor proper grounds of a motion for new trial. *Hambrick v. Nova*, 112 Ga. App. 258, 144 S.E.2d 922 (1965) (decided under former Code 1933, Ch. 7, T. 110).

Motion to set aside portions of a decree that were alleged to be void, filed during the term at which the verdict and decree were rendered, because the nonamendable defects appeared on the face of the record, was the proper and authorized method to attach such parts of the decree. *Summers v. Summers*, 212 Ga. 614, 94 S.E.2d 725 (1956) (decided under former Code 1933, Ch. 7, T. 110).

Motion to set aside is not a proper vehicle to belatedly attack the sufficiency of a complaint, unless the complaint affirmatively shows the utter lack of a claim. *Johnson v. Cleveland*, 131 Ga. App. 560, 206 S.E.2d 704 (1974); *Smith v. Security Mtg. Investors*, 139 Ga. App. 635, 229 S.E.2d 115 (1976); *Fudge v. Weissinger*, 201 Ga. App. 409, 411 S.E.2d 62, cert. denied, 201 Ga. App. 903, 411 S.E.2d 62 (1991).

Default judgment rendered in an action on account was subject to a motion to set aside under subsection (d) of O.C.G.A. § 9-11-60 at the instance of an individual defendant sued jointly with a corporate defendant because the sworn itemized statement of account attached to the complaint affirmatively showed that the items and services were sold and delivered to the corporate defendant only, and that no claim in fact existed against the individual defendant from whom recovery was sought for the indebtedness of the corporation. *Gilham v. Stamm & Co.*,

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117 Ga. App. 846, 162 S.E.2d 248 (1968).

Garnishee entitled to hearing. — In a case in which a garnishee, who paid a default judgment rendered against the garnishee but had witnesses who would testify that such payment was under duress, brought a motion to set aside such judgment for lack of jurisdiction due to failure of service, denial of the motion to set aside on the basis that payment had rendered the issue moot, without affording the garnishee an evidentiary hearing on the issue of duress, was improper. *Homemakers, Inc. v. GAC Fin. Corp.*, 135 Ga. App. 242, 217 S.E.2d 475 (1975).

Lack of jurisdiction of the person when garnishment summons defective. — Trial court erred in denying an employer's motion to set aside a default judgment under O.C.G.A. § 9-11-60(d)(1) because the court was without jurisdiction of the employer's person since the garnishment summons a bank caused to be served against the employer was defective; the summons did not substantially comply with the requirement of O.C.G.A. § 18-4-113(a) that the summons be directed to the garnishee because the summons was directed to a corporation that was legally separate and distinct from the employer's paint and body shop. *Lewis v. Capital Bank*, 311 Ga. App. 795, 717 S.E.2d 481 (2011).

Garnishment proceedings. — Because a default judgment can be entered pursuant to O.C.G.A. § 18-4-115(a) only when the garnishee fails to timely file an answer, and by the plain terms of O.C.G.A. § 18-4-113(a)(1), the time in which an answer must be filed is triggered by the service of a summons of continuing garnishment, a default judgment is entered as provided in § 18-4-115(a) only after the garnishee has been served with proper process or has waived service of process, and § 18-4-115(b) provides relief, therefore, only when process has been served or waived; when a court enters a default judgment in a continuing garnishment proceeding in which the garnishee has not been served with a summons of continuing garnishment and the court has not obtained jurisdiction of the person of

the garnishee, the default judgment is not one entered as provided in § 18-4-115(a), and subsection (b) of § 18-4-115 affords no relief, and in such a case, the garnishee is entitled to bring a motion to set aside the default judgment under O.C.G.A. § 9-11-60(d)(1). *Lewis v. Capital Bank*, 311 Ga. App. 795, 717 S.E.2d 481 (2011).

Motion to set aside a judgment allegedly void on the judgment's face does not require a brief of the evidence, since the questions presented by such motion do not require consideration of such evidence. *Siefferman v. Kirkpatrick*, 121 Ga. App. 161, 173 S.E.2d 262 (1970).

When a default judgment is set aside, the case returns to its prior posture, and the defendant must file responsive pleadings to avoid defaulting a second time; and this is in no way changed when a default judgment is set aside, not under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), but through exercise of the trial court's discretion, as derived from the court's inherent powers. *Bank of Cumming v. Moseley*, 243 Ga. 858, 257 S.E.2d 278 (1979).

Judgment of dismissal for failure to prosecute. — In a case in which a personal injury suit was dismissed without prejudice when neither party appeared for a peremptory calendar call, the trial court failed to notify the parties of the dismissal, and the parties did not learn the case had been dismissed until nine months later, it was proper to grant the plaintiff's motion to set aside the judgment and reenter a new order dismissing the case, thereby enabling the plaintiff to refile the action within six months. *Morgan v. Starks*, 214 Ga. App. 265, 447 S.E.2d 651 (1994).

Standing to bring motion to set aside. — Only the person against whom a judgment is rendered has standing to bring a motion to set aside the default judgment for nonamendable defects in the record and pleadings under subsection (d) of this section. *Peek v. Southern Guar. Ins. Co.*, 142 Ga. App. 671, 236 S.E.2d 767 (1977), rev'd on other grounds, 240 Ga. 498, 241 S.E.2d 210 (1978).

Restrictions on motions to set aside not applicable to void judgments. — If

a judgment is void, restrictions on the use of motions to set aside set out in subsection (d) of this section cannot apply. *Holloway v. Frey*, 130 Ga. App. 224, 202 S.E.2d 845 (1973).

Grant of motion to set aside not a final judgment. — Grant of a motion to set aside a judgment, like the grant of a motion for new trial, leaves the case still pending, and thus is not a final judgment. *Mayson v. Malone*, 122 Ga. App. 814, 178 S.E.2d 806 (1970); *Hooper v. Taylor*, 230 Ga. App. 128, 495 S.E.2d 594 (1998).

Denial of motion is final and appealable. — Denial of a motion authorized by Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60) to set aside and vacate a judgment is final and appealable under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34). *Farr v. Farr*, 120 Ga. App. 762, 172 S.E.2d 158 (1969).

Appeal as a matter of right. — Denial of a motion to set aside is appealable as a matter of right. *Dudley v. Monsour*, 155 Ga. App. 269, 270 S.E.2d 686 (1980).

Appealability of refusal to set aside judgment. — Refusal to arrest a judgment or to vacate a judgment and set a judgment aside is such a final judgment as may be excepted to in a direct bill of exceptions (see now O.C.G.A. §§ 5-6-49 and 5-6-50). *Jewell v. Jewell*, 209 Ga. 678, 75 S.E.2d 3 (1953) (decided under former Code 1933, § 110-703).

Appeal from denial of motion. — Denial of the plaintiff's motion to set aside a judgment pursuant to O.C.G.A. § 9-11-60 is expressly a matter of discretionary appeal under O.C.G.A. § 5-6-35(a)(8), and a different result does not occur merely because the plaintiff's motion also sought a new trial. *Parker v. Bellamy-Lunda-Dawson*, 190 Ga. App. 257, 378 S.E.2d 502 (1989).

Although the Court of Appeals had jurisdiction to consider the grant of the 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 the appellants' 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, cert. denied, 193 Ga. App. 909, 388 S.E.2d 704 (1989).

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 because 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 a case in which the 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 a motion to set aside a default judgment against a corporation was affirmed as: (1) there was no pending motion in the record when the default judgment was entered since the corporation's summary judgment motion had been denied as premature; (2) a colloquy between the trial court and the corporation's counsel did not create a pending motion; and (3) the fact that the corporation was entitled to resubmit the corporation's summary judgment motion did not mean that a motion was pending. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Denial of a motion to set aside a default judgment against a corporation was not an abuse of discretion as the trial was properly noticed by publication of the trial calendar in the county's legal gazette; publication of a court calendar in the county's legal organ of record was sufficient notice to the parties to appear. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Because the defendant effectively waived defenses of a lack of both personal jurisdiction and venue in failing to appear at the trial, the trial court did not abuse

Motion to Set Aside (Cont'd)

the court's discretion in striking the defendant's answer and denying a motion to set aside the default judgment entered. *Jacques v. Murray*, 290 Ga. App. 334, 659 S.E.2d 643 (2008).

Trial court erred in refusing to set aside a default judgment pursuant to O.C.G.A. § 9-11-60(d) because the affidavit filed by the registered agent for the party against whom a default judgment was taken, stating that the agent was never served, did not constitute an answer or appearance and the party against whom default was taken raised the issue via a motion to set aside the judgment. *Stokes & Clinton, P.C. v. Noble Sys. Corp.*, 318 Ga. App. 497, 734 S.E.2d 253 (2012).

Denial of a "discretionary" motion to set aside is never appealable in its 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).

Discretionary appeal. — 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 because 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).

Action to open intestate estate. — Putative heir's action seeking an order opening the putative heir's father's intestate estate was subject to the three-year statute of limitations contained in O.C.G.A. § 9-11-60(f), and the appellate court held that the action was untimely because the action was filed more than three years after the probate court issued an order discharging the decedent's widow as administrator, and the heir did not provide evidence sufficient to show that the statute of limitations should be tolled, pursuant to O.C.G.A. § 9-3-96, because the widow fraudulently kept the heir from learning that she filed a petition seeking letters allowing her to administer her husband's estate. *Moore v. Mack*, 266 Ga. App. 847, 598 S.E.2d 525 (2004).

Partition action. — Trial court did not err when the court denied a mother's

motion to set aside a judgment of partition because the motion to set aside was filed more than three years after the entry of the judgment of partition, and that judgment was made by a court with jurisdiction; the trial court had subject-matter jurisdiction to enter the partitioning judgment since the land sought to be partitioned was partially located in the county of the trial court, and that court had personal jurisdiction of the mother since, under the partitioning statutes, the notice of intent to seek partitioning was the only process necessary to bring a defendant into court to meet the application for partitioning. *Cabrel v. Lum*, 289 Ga. 233, 710 S.E.2d 810 (2011).

Voluntary dismissal adjudication on the merits. — Drug store's voluntary dismissal of the store's inverse condemnation suit with prejudice barred the store's damages claim against a state agency in a direct condemnation action based on res judicata and the purported mistake of dismissing with prejudice was not subject to correction under O.C.G.A. § 9-11-60. *DOT v. Revco Disc. Drug Ctrs., Inc.*, 322 Ga. App. 873, 746 S.E.2d 631 (2013).

Complaint in Equity**1. In General**

Editor's note. — The procedure for using a complaint in equity to set aside a judgment was deleted and prohibited by the 1986 amendment to this Code section.

Jurisdiction to relieve against verdicts inequitably obtained exists as certainly as it does against awards, judgments, and decrees obtained by imposition. *Gentle v. Georgia Power Co.*, 179 Ga. 853, 177 S.E. 690 (1934) (decided under former Civil Code 1910, § 5965).

Principles of former law embodied by subsection (e). — Subsection (e) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60) provides for a complaint in equity to set aside a judgment for fraud, and inculcates the same principles of law found in former Code 1933, §§ 37-219 and 110-710. *Lewis v. Lewis*, 124 Ga. App. 579, 184 S.E.2d 672 (1971).

Subsection (e) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A.

§ 9-11-60) is identical with the provisions of former Code 1933, §§ 37-219 and 110-710, and cases decided under the former Code sections are applicable in principle to cases arising under this subsection. *Erwin v. Marx*, 228 Ga. 495, 186 S.E.2d 735 (1972).

Subsection (e) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60) embodies the principles of former Code 1933, §§ 37-219 and 110-710, and cases under those sections apply under subsection (e). *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

Purpose of subsection (e) of this section is to give equitable relief to those parties who are victims of fraud, accident, or mistake in the rendering of a judgment. *Jordan v. Caldwell*, 231 Ga. 226, 200 S.E.2d 868 (1973), overruled on other grounds, *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980).

Grounds for relief in subsection (e) not all-inclusive. — Although subsection (e) of this section only mentions that a complaint in equity may be brought to set aside a judgment for fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the complainant, equity has the power to afford relief on more grounds than those mentioned. *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

Former Code 1933, § 110-709 (see now O.C.G.A. § 9-12-16) gave a remedy under subsection (e) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60) to third parties who attack a judgment as void for any cause because lack of jurisdiction or power in a court entering judgment always avoids the judgment, especially as the judgment relates to and affects the rights of other parties; such action is a mere usurpation of power and may be declared void collaterally without any direct proceedings to revise the judgment. *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

Former Code 1933, § 110-709 (see now

O.C.G.A. § 9-12-16) allowed a party, through complaint in equity under subsection (e) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60), to attack a judgment void for any cause. *Bonneau v. Ohme*, 244 Ga. 184, 259 S.E.2d 631 (1979).

Principles of former Code 1933, § 110-709 (see now O.C.G.A. § 9-12-16), provided that the judgment of a court having no jurisdiction over the person or subject matter or that was void for any other cause was a nullity and may be so held in any court when material, applied to subsection (e) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60). *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

State court without authority to set aside judgment under subsection (e).

— State Court of DeKalb County had no authority to set aside a judgment at a subsequent term of court on the basis of fraud under subsection (e) of this section, since such court has no equity jurisdiction. *Bouldin v. Haverty Furn. Cos.*, 136 Ga. App. 30, 220 S.E.2d 48 (1975).

Subsection (e) of this section cannot be used to excuse an untimely notice of appeal. *Jordan v. Caldwell*, 231 Ga. 226, 200 S.E.2d 868 (1973).

There is no constitutional right to a jury trial in equity cases, even when questions of fraud are involved, and under subsection (e) of this section there is no error in the judge proceeding to hear a matter involving a question of negligence sitting as both a judge and jury. *Burns & Ledbetter, Inc. v. Primark Marking Co.*, 244 Ga. 341, 260 S.E.2d 58 (1979).

No right to jury trial when seeking to set aside divorce. — Filing of a petition to have a divorce decree and agreement set aside for fraud and misrepresentation invokes the equitable powers of the court, and there is no constitutional right to a jury trial thereon. *Keith v. Keith*, 231 Ga. 230, 200 S.E.2d 891 (1973).

Complaint in equity to set aside judgment authorized. — Absent an adequate remedy in law, a complaint in equity may be brought to set aside a judgment for fraud, accident, or mistake or the acts of the adverse party unmixed

Complaint in Equity (Cont'd)**1. In General** (Cont'd)

with the negligence or fault of the complainant. *Hartford Accident & Indem. Co. v. Hale*, 119 Ga. App. 565, 168 S.E.2d 204 (1969).

Requirements for setting aside judgment based on verdict. — If a judgment is based on a verdict, the same requisites for setting aside for fraud apply as to setting aside the judgment alone. *Dollar v. Fred W. Amend Co.*, 184 Ga. 432, 191 S.E. 696 (1937) (decided under former Code 1933, § 110-710).

Decree entered upon a verdict void for uncertainty is necessarily itself too uncertain to be enforced, and must be set aside or arrested upon a proper motion. *Jones v. Jones*, 220 Ga. 753, 141 S.E.2d 457 (1965) (decided under former Code 1933, Ch. 7, T. 110).

Judgment rendered by fraud, accident, or mistake. — Judgment of a court of competent jurisdiction may be set aside by the court that renders the judgment for fraud and irregularity. *Mobley v. Mobley*, 9 Ga. 247 (1851) (decided under former Civil Code 1910, § 5957).

Judgment founded on a verdict obtained by fraud practiced on a defendant and the court may be set aside, and the original case reinstated, in a court of law, with proper pleadings, and with all the parties at interest as parties to the motion, if such motion is made at the term of the court at which the verdict and judgment were entered, and if the movant shows that the movant was not in laches, has a meritorious defense, and announces ready for an instant trial. *May v. May*, 214 Ga. 352, 105 S.E.2d 11 (1958) (decided under former Code 1933, §§ 37-219 and 110-710).

If a judgment sought to be set aside or arrested was procured by accident, mistake, or fraud or through any defect not amendable appearing on the face of the record or pleadings or by perjury or any other irregularity, the judgment may be set aside or arrested. *Chambless v. Oates Plumbing & Heating Co.*, 97 Ga. App. 80, 102 S.E.2d 83 (1958) (decided under former Code 1933, Ch. 7, T. 110).

If a defendant has been served and

judgment is rendered against the defendant by fraud, accident, or mistake, without fault or negligence on the defendant's part, a petition in equity to set aside the judgment will lie. *Dollar v. Fred W. Amend Co.*, 184 Ga. 432, 191 S.E. 696 (1967) (decided under former Code 1933, § 110-710).

Trial court did not abuse the court's discretion under O.C.G.A. § 9-11-60(d)(2) in setting aside a default judgment as the defendants' failure to answer could be found to be the direct result of the attorney's statement and inaction in leading the defendants to believe the suit was resolved. *Cheuvront v. Carter*, 263 Ga. App. 837, 589 S.E.2d 609 (2003).

Authority of court to grant necessary relief. — Ordinarily, a judgment may be set aside for fraud, accident, or mistake or acts of the adverse party unmixed with negligence or fault of complainant by petition in equity after the term has passed; in such cases, the court may grant such relief, legal or equitable, as may be necessary to afford complete relief. *Clark v. Ingram*, 150 Ga. App. 127, 257 S.E.2d 33 (1979).

If a plaintiff in petition and a defendant in counterclaim ask for such other and further relief as the court deems just and proper, the court has authority to grant such relief, legal or equitable, as may be necessary to afford complete relief, and the relief granted by the court is not sua sponte. *Johnson v. Johnson*, 244 Ga. 155, 259 S.E.2d 88 (1979).

Good defense must be shown. — In order to successfully attack a judgment in equity on the grounds of fraud, accident, or mistake, a petitioner must show that there is a good defense to the action at law and that failure to make the defense was owing not to any negligence or fault of the petitioner, but to the fault of the defendants in equity or their attorney. *Baxter v. Weiner*, 246 Ga. 28, 268 S.E.2d 619 (1980).

Divorce decree not subject to be set aside in equity for restraining remarriage. — Divorced wife cannot use the equitable proceedings under subsection (e) of O.C.G.A. § 9-11-60 to complain that a portion of the divorce settlement agreement restrains her from remarrying and is void as a matter of law; such a decree

may not be set aside in equity unless the wife's assent was procured by fraud, duress, or mistake. *Cronic v. Cronic*, 238 Ga. 600, 234 S.E.2d 515 (1977).

Estoppel against parties to divorce by acknowledgment of service and admission of residency. — Parties to divorce proceedings who have acknowledged service and admitted residency are estopped thereafter to claim that the court rendering the divorce decree was without jurisdiction to grant the divorce. *Thompson v. Thompson*, 237 Ga. 509, 228 S.E.2d 886 (1976).

Judgment against incompetent. — Judgment rendered against an insane person who has no legal guardian and for whom no guardian ad litem has been appointed is voidable, even if the insane person was represented by counsel in the case. *Keith v. Byram*, 225 Ga. 678, 171 S.E.2d 120 (1969).

To set aside a judgment rendered against an incompetent defendant on the basis of the voidability, it is incumbent to file a petition in equity for such relief and proceed by complaint and summons. *Sellers v. Bell*, 151 Ga. App. 440, 260 S.E.2d 538 (1979).

Attack on judgment by incompetent defendant. — Insane person may institute, by next friend, in the court in which the judgment was rendered, proceedings in the nature of a motion to set aside the judgment as void. *Perry v. Fletcher*, 46 Ga. App. 450, 167 S.E. 796 (1933) (decided under former Code 1933, Ch. 7, T. 110).

In a case in which a person who was non compos mentis was sued upon a purported contractual obligation, being served only by the leaving of a copy of the petition and process at the incapacitated person's residence, and was not represented in the suit by any guardian or other person, judgment rendered against the incapacitated person was capable in a proper proceeding brought in the incapacitated person's behalf of being set aside as invalid. *Perry v. Fletcher*, 46 Ga. App. 450, 167 S.E. 796 (1933) (decided under former Code 1933, Ch. 7, T. 110).

Complaint seeking to set aside a deed conveying an incompetent's interest to the defendant was a proper petition in

equity under subsection (e) of O.C.G.A. § 9-11-60, warranting a set-aside of the ordinary court's judgment. *McLendon v. Georgia Kaolin Co.*, 813 F. Supp. 834 (M.D. Ga. 1992).

Judgment improperly obtained against minor. — General rule that an infant is bound by a judgment rendered in a suit in which the infant is represented by a next friend is subject to an exception in case of fraud, collusion, or like conduct on the part of the next friend, in which case the judgment may be set aside at the instance of the minor, even though it may be a consent judgment. *Nelson v. Estill*, 190 Ga. 235, 9 S.E.2d 73 (1940) (decided under former Code 1933, §§ 37-219 and 110-710).

Stipulation of state court held no bar to setting aside void judgment. — Stipulation recited in an order that there was no fraud, accident, or mistake or any acts of the adverse party unmixed with negligence or fault of complainant in obtaining a judgment in the State Court of DeKalb County would not prevent the court of equity from setting aside such judgment as void for lack of jurisdiction of the person. *Fain v. Hutto*, 236 Ga. 915, 225 S.E.2d 893 (1976).

Prior denial of motion not res judicata when additional grounds asserted. — If an equitable complaint also asserts additional grounds that were not included in a prior motion, the prior ruling of the trial judge against the motion to set aside the judgment is not res judicata. *Holloway v. McCarthy*, 151 Ga. App. 828, 261 S.E.2d 732 (1979), *aff'd*, 245 Ga. 710, 267 S.E.2d 4 (1980).

Evidence that the plaintiff in equity did not receive actual notice of a lawsuit did not constitute "fraud, accident, mistake, or the acts of the adverse party," and hence it was not a cognizable ground to vacate that judgment in a suit brought pursuant to subsection (e) of O.C.G.A. § 9-11-60. *Loveless v. Conner*, 254 Ga. 663, 333 S.E.2d 586 (1985).

Sufficient redress under subsection (e) in federal civil rights action. — Existence of a state judicial procedure to set aside judgments obtained by fraud (O.C.G.A. § 9-11-60) was sufficient to redress the plaintiff in a federal civil rights

Complaint in Equity (Cont'd)**1. In General** (Cont'd)

action for the deprivation the plaintiff alleged occurred in the plaintiff's prior divorce proceeding through the alleged conspiracy of the divorce participants to take advantage of the judge's debilitated condition to procure rulings favoring the plaintiff's spouse. There was no violation of procedural due process and, because of this, the plaintiff could not state a claim for the denial of substantive due process. *Collins v. Walden*, 613 F. Supp. 1306 (N.D. Ga. 1985), *aff'd*, 784 F.2d 402 (11th Cir. 1986).

Due process. — Judgment is void if the court which rendered the judgment acted in a manner materially inconsistent with due process. *Johnson v. Mayor of Carrollton*, 249 Ga. 173, 288 S.E.2d 565 (1982).

Party prevented by duress from defending a suit may be relieved from judgment. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962) (decided under former Code 1933, §§ 37-219 and 110-710).

Before a judgment will be set aside for duress, it must appear that the complainant had a good defense that the complainant was prevented from asserting at the original hearing or trial. *Frost v. Frost*, 235 Ga. 672, 221 S.E.2d 567 (1975).

Both an extraordinary motion for new trial and a complaint in equity require the petitioner's showing that there is a good defense to the action at law, but no adequate remedy at law. *Saxon v. Covington*, 178 Ga. App. 271, 342 S.E.2d 754 (1986).

Failure to show fraud or inequitable conduct. — Trial court did not err in denying the first tenant in common's protest to the court-ordered public sale of a sign owned by the first tenant in common and the second tenant in common as the sale was conducted at a proper time and place under the circumstances, and the second tenant in common did not commit any fraud or inequitable conduct in purchasing the sign at the public sale. *Caudell v. Toccoa Inn, Inc.*, 261 Ga. App. 209, 582 S.E.2d 180 (2003).

2. Fraud

Judgment obtained by fraud is void and may for that reason be set aside by a court of equity. *Lewis v. Lewis*, 228 Ga. 703, 187 S.E.2d 872 (1972).

When each of the victims of a fraudulent scheme unsuccessfully sued the perpetrator for fraud and related claims, because the perpetrator filed an affidavit stating that the perpetrator had never had any business dealings with the victims, when, in fact, the perpetrator had such dealings and admitted this in a related criminal case, it appeared that the perpetrator may have obtained the judgments dismissing the victims' claims by fraud on the court, and the victims could seek to set those judgments aside under O.C.G.A. § 9-11-60(d)(2). *Austin v. Cohen*, 268 Ga. App. 650, 602 S.E.2d 146 (2004).

Fraud must be by adverse party or that party's counsel or agent. — If equity has jurisdiction to set aside a judgment obtained through perpetration of fraud, it must be made to appear in an application for this purpose that the fraud was perpetrated by the adverse party or the adverse party's counsel or agents. *Dorsey v. Griffin*, 173 Ga. 802, 161 S.E. 601 (1931) (decided under former Civil Code 1910); *Elliott v. Elliott*, 184 Ga. 417, 191 S.E. 465 (1937) (decided under former Code 1933, § 110-710).

Type of fraud that would authorize the setting aside of a verdict at the instance of the movant is fraud of the other party or the other party's counsel. *Ketchum v. Ketchum*, 191 Ga. 140, 11 S.E.2d 788 (1940) (decided under former Code 1933, Ch. 7, T. 110).

Although a court of equity has authority to annul and set aside a judgment obtained by fraud, accident, or mistake, it must be made to appear in an action therefor, if fraud is claimed, that the fraud was perpetrated by the adverse party or the adverse party's counsel or agent. *Pike v. Andrews*, 210 Ga. 553, 81 S.E.2d 817 (1954) (decided under former Code 1933, §§ 37-219 and 110-710).

Rather than third party. — One who obtained a judgment at law and was not chargeable with any conduct amounting to fraud or imposition upon the adverse party in relation to the judgment would

not be interfered with by a court of equity for mere reason that a stranger perpetrated a fraud that prevented the other party from interposing a defense. *Pike v. Andrews*, 210 Ga. 553, 81 S.E.2d 817 (1954) (decided under former Code 1933, §§ 37-219 and 110-710).

Fraud must be extrinsic to issues in case. — Judgment cannot be vacated from fraud when the particular fraud was in issue in the original proceedings, even if additional evidence is discovered since trial to prove the fraud. *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932) (decided under former Civil Code 1910, § 5965).

Before equity will set aside a judgment on the ground of fraud by the opposite party, the fraud must be extrinsic to the issues in the case. *Pike v. Andrews*, 210 Ga. 553, 81 S.E.2d 817 (1954) (decided under former Code 1933, §§ 37-219 and 110-710).

Fraud must be actual rather than constructive. — General rule is that a court of equity, upon proper application, will set aside a judgment obtained by fraud, if such fraud is extraneous to the issues in the proceeding attacked, and especially if the court has been imposed upon by such fraud; such fraud must be actual and positive, not merely constructive, and must involve perpetration of intentional wrong or breach of a duty growing out of a fiduciary relation. *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932) (decided under former Civil Code 1910, § 5965).

Fraud in procurement of a judgment to be set aside must have been actual and positive, done with knowledge, and not merely constructive fraud, committed in ignorance of the true facts. *Rivers v. Alsup*, 188 Ga. 75, 2 S.E.2d 632 (1939) (decided under former Code 1933, §§ 37-219 and 110-710).

Fraudulent acts to be specifically alleged. — In order to authorize a court of equity to entertain a petition to set aside a judgment for fraud, the acts claimed to constitute the fraud must be clearly and specifically alleged. *Wessel-Duval & Co. v. Ramsey*, 170 Ga. 675, 153 S.E. 744 (1930) (decided under former Civil Code 1910).

Equity will not set aside a judgment for any matter that was actually pre-

sented and considered in the judgment assailed. *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932) (decided under former Civil Code 1910, § 5965).

Court will not retry same issues absent fraud, accident, or undue advantage. — Court of equity will not retry the same issues determined in a former hearing by a court of competent jurisdiction in the absence of fraud, accident, or undue advantage of the prevailing party. *Hubbard v. Whatley*, 200 Ga. 751, 38 S.E.2d 738 (1946) (decided under former Code 1933, § 110-710).

Fraudulent inducement of withdrawal of defense. — Equity will provide relief against a judgment obtained by the plaintiff's inducing the defendants to withdraw an equitable plea the defendants had filed by the plaintiff's promise to do the equity set up in the plea and to enter into writing to that effect if the plea were withdrawn, which the plaintiff failed to do. *Jordan v. Harber*, 172 Ga. 139, 157 S.E. 652 (1931) (decided under former Code 1933, Ch. 7, T. 110).

If one party fraudulently induces an adversary to withdraw a defense, the judgment will be set aside. *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932) (decided under former Civil Code 1910, § 5965).

Keeping opposing party from court. — When a litigant keeps the opposite party from court, equity will relieve against the judgment obtained in the other party's absence. *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932) (decided under former Civil Code 1910, § 5965).

One of the most frequently recurring forms of fraud on the part of one litigant against the other, entitling the latter to relief in equity against the judgment finally entered, is the making of some agreement or representation for the purpose of preventing an appearance or defense in the original action, reliance on which has the effect intended. *Jordan v. Harber*, 172 Ga. 139, 157 S.E. 652 (1931) (decided under former Code 1933, Ch. 7, T. 110).

When one party gives the other party assurances, upon which the other party can reasonably rely, that the suit will be dismissed or judgment will not be taken, and then procures a judgment, taking

Complaint in Equity (Cont'd)**2. Fraud** (Cont'd)

advantage of the trust and confidence of the other party, the party misled, who is not negligent, has a ground to set aside the judgment. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962) (decided under former Code 1933, §§ 37-219 and 110-710).

Verdict rendered on basis of fraudulent acknowledgment of service. —

In a case in which an action requiring personal service on the defendant proceeds on an acknowledgment of service by defendant under O.C.G.A. § 9-10-73, the verdict rendered therein in favor of the plaintiff is invalid if such acknowledgment was, in fact, a forgery or was obtained by fraud, and a motion to set aside such verdict, made at the same term at which the verdict was rendered, would be available. *Ketchum v. Ketchum*, 191 Ga. 140, 11 S.E.2d 788 (1940) (decided under former Code 1933, Ch. 7, T. 110).

Failure to disclose matters defeating own claim not fraud. — Mere failure of a party to disclose to the court or an adversary matters that would defeat the party's own claim or defense is not such fraud as will justify or require vacation of the judgment. *Buice v. T. & B. Bldrs., Inc.*, 219 Ga. 259, 132 S.E.2d 784 (1963) (decided under former Code 1933, §§ 37-219 and 110-710).

Averments of fraud cannot be predicated upon misrepresentations of law or as to matters of law. *Robbins v. National Bank*, 241 Ga. 538, 246 S.E.2d 660 (1978).

Fraud must be collateral to issues tried. — Matters once litigated generally are final, and hence the fraud shown by the complainant seeking to set aside the judgment and in equity must be extrinsic or collateral to the issues tried in rendering that judgment. *Frost v. Frost*, 235 Ga. 672, 221 S.E.2d 567 (1975).

Duress included in term "fraud". — Word "fraud" in subsection (e) of this section may be construed to include duress, as duress is but a species of fraud whereby one is induced contrary to one's will from presenting a defense to an action. *Frost v.*

Frost, 235 Ga. 672, 221 S.E.2d 567 (1975).

Fraud not predicated on oral promise not to enforce consent judgment.

— Consent judgment partakes of characteristics of both a contract and a judgment, and just as fraud cannot be predicated upon an oral promise not to enforce the unambiguous terms of a written contract, it cannot be predicated upon similar promises not to enforce unambiguous terms of a consent judgment. *Chambers v. Citizens & S. Nat'l Bank*, 242 Ga. 498, 249 S.E.2d 214 (1978), overruled on other grounds, *Tri-Cities Hosp. Auth. v. Sheats*, 247 Ga. 713, 279 S.E.2d 210 (1981).

Proof of fraud. — Rule that fraud may be shown by slight circumstances, contained in O.C.G.A. § 23-2-57, is not applicable to suits to set aside judgments. *Leventhal v. Citizens & S. Nat'l Bank*, 249 Ga. 390, 291 S.E.2d 222 (1982).

It is not fraudulent to assert a claim against a person voluntarily dismissed as a defendant in an earlier suit. *Murray v. Chulak*, 250 Ga. 765, 300 S.E.2d 493 (1983).

Attorney's knowing pursuance of claim against wrong person. —

"Fraud" within the meaning of subsection (e) of O.C.G.A. § 9-11-60 was practiced upon the defendant by the plaintiff through actions of the plaintiff's attorney, who was aware of the plaintiff's employee-spouse's representation to the defendant that the spouse would "handle" the matter of the action's having been filed against the wrong person, but who nonetheless pursued the claim of the plaintiff to judgment and sought to enforce the judgment by legal process. *Cox v. Kirkland*, 249 Ga. 796, 294 S.E.2d 514 (1982).

Superior court may set aside a judgment of a probate court as void for fraud, if an allegation of fact in the petition to the probate court that was necessary to give the court jurisdiction was known by the petitioner to be false and was therefore a fraud upon the court. *Henderson v. Hale*, 209 Ga. 307, 71 S.E.2d 622 (1952) (decided under former Code 1933, Ch. 7, T. 110).

Real-estate broker's liability to purchase for misrepresentation or non-disclosure of physical defects in prop-

erty sold. — Judgment of a probate court discharging the administrator may be set aside in a court of equity, if the judgment was procured by fraud practiced upon the heirs or the court. *White v. Roper*, 176 Ga. 180, 167 S.E. 177 (1932) (decided under former Code 1933, § 37-219 and Ch. 7, T. 110).

Although superior courts are not ordinarily empowered on equitable petition to set aside the probate of a will by a probate court, a superior court may set aside as void a judgment of the probate court for fraud, accident, or mistake. *Abercrombie v. Hair*, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, §§ 37-219 and 110-710).

Fraudulently procured divorce decree not set aside at instance of participant. — One who participates in fraudulently procuring a divorce decree may not then go into equity to have the decree set aside as allegedly void due to continuous cohabitation of the parties after the action was filed. *Crowe v. Crowe*, 245 Ga. 719, 267 S.E.2d 14 (1980).

Court of “appropriate jurisdiction” for attack on divorce decree obtained by fraud. — For an attack upon part of an original divorce decree, if the court’s jurisdiction was based upon the original decree having allegedly been obtained by fraud, a superior court that granted the decree attacked was the superior court of “appropriate jurisdiction.” *Hill v. Harper*, 230 Ga. 246, 196 S.E.2d 397 (1973).

Superior court retains jurisdiction. — If a party attacks a judgment via complaint in equity on the basis that the judgment was obtained by fraud, the superior court granting the judgment attacked is the superior court of appropriate jurisdiction. *Peagler v. Glynn County Fed. Employees Credit Union*, 171 Ga. App. 9, 318 S.E.2d 687 (1984).

Fraud not found. — Trial court abused the court’s discretion by vacating the domesticated foreign judgment because the seller failed to establish a jurisdictional defense before the trial court in Georgia or in Texas; the court did not find that the seller was harmed by the conduct of the purchaser, including extrinsic fraud, unmixed with its own negligence as required by O.C.G.A. § 9-11-60(d)(2), or

that the conduct of the purchaser created a non-amendable defect in the judgment as required by O.C.G.A. § 9-11-60(d)(3). *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 2003 Tex. App. LEXIS 3312 (Tex. Ct. App. Apr. 17, 2003).

3. Negligence of Petitioner

Relief against judgment obtained when defendant not negligent.. — If the defendant has been deprived of a hearing by the plaintiff’s fraud, unmixed with negligence on the defendant’s own part, a petition in equity to set aside the judgment will lie. *Nix v. Baxter*, 46 Ga. App. 153, 167 S.E. 115 (1932) (decided under former Civil Code 1910).

Negligence by complainant. — Equity will not intervene to set aside a judgment of a court of competent jurisdiction that might have been prevented except for negligence of the complainant. *W.T. Rawleigh Co. v. Seagraves*, 178 Ga. 459, 173 S.E. 167 (1934) (decided under former Civil Code 1910, § 5965).

Judgment will not be set aside in a court of equity on the ground that the defendant had a good defense of which the defendant was ignorant, unless the defendant’s ignorance and failure to assert such defense were unmixed with any fault of negligence on the defendant’s part. *W.T. Rawleigh Co. v. Seagraves*, 178 Ga. 459, 173 S.E. 167 (1934) (decided under former Civil Code 1910, § 5965).

Judgment may be set aside in equity for fraud, accident, or mistake, but only if there is no negligence or fault of the petitioner. *Bach v. Phillips*, 200 Ga. 308, 37 S.E.2d 407 (1946) (decided under former Code 1933, §§ 37-219 and 110-710).

Motion to vacate or set aside a verdict and judgment after the term of court at which the verdict and judgment are rendered will be denied if it appears that the movant has not been diligent or is negligent. *Fricks v. J.R. Watkins Co.*, 211 Ga. 110, 84 S.E.2d 51 (1954) (decided under former Code 1933, Ch. 7, T. 110).

Because the defendant in a pending lawsuit negligently failed to make a defense, equity would not intervene to grant any relief from a judgment obtained against the defendant in consequence of the defendant’s negligence. *Erwin v.*

Complaint in Equity (Cont'd)**3. Negligence of Petitioner** (Cont'd)

Marx, 228 Ga. 495, 186 S.E.2d 735 (1972); Stratton v. Bingham, 238 Ga. 287, 232 S.E.2d 560 (1977).

If the defendant negligently allows a default judgment to be entered against the defendant, equity will not intervene to grant relief from the judgment obtained in consequence of the defendant's negligence. Richardson v. Industrial Welding & Tool Supplies, Inc., 238 Ga. 144, 231 S.E.2d 760 (1977).

Phrase "unmixed with the negligence or fault of complainant," in subsection (e) of O.C.G.A. § 9-11-60, modifies the words "fraud, accident or mistake" as well as the words "acts of the adverse party." Leventhal v. Citizens & S. Nat'l Bank, 249 Ga. 390, 291 S.E.2d 222 (1982).

If there is any negligence or fault on the part of the movant, O.C.G.A. § 9-11-60 is inapplicable. Mitchell v. Speering, 239 Ga. App. 472, 521 S.E.2d 419 (1999).

No relief in equity from consequences of one's own negligence. — If a party has a good defense at law and from negligence fails to set it up at the proper time, that party must take the consequences of its own laches; the party cannot go into equity to be relieved from the consequences of such negligence. Peacock v. Walker, 213 Ga. 628, 100 S.E.2d 575 (1957) (decided under former Code 1933, §§ 37-219 and 110-710).

To authorize setting aside a judgment after the term at which the judgment was rendered, the actions of the adverse party causing the party's failure to appear and defend must be of such character that reliance on those actions did not amount to laches or negligence. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962) (decided under former Code 1933, §§ 37-219 and 110-710).

Negligence of a client or the client's attorney in failing to examine the original pleadings in a case is not ground for setting aside the judgment. Rahal v. Titus, 110 Ga. App. 122, 138 S.E.2d 68 (1964) (decided under former Code 1933, Ch. 7, T. 110).

Party must exercise reasonable diligence. —

Party is charged with the legal duty of keeping advised as to the progress of litigation in which the party is interested, and of being prepared, so far as reasonably possible, to meet every emergency arising therein. Hurt Bldg., Inc. v. Atlanta Trust Co., 181 Ga. 274, 182 S.E. 187 (1935) (decided under former Code 1933, § 110-710).

Individual who, through ignorance, allows judgment to go adversely cannot afterwards have the judgment set aside, even on the ground of fraud, if that individual has not exercised ordinary diligence in the premises. Hoke v. Walraven, 57 Ga. App. 106, 194 S.E. 610 (1937) (decided under former Code 1933, § 110-710).

For a setting aside of judgment, it must appear that it was not due to the defendant's negligence that fraud was perpetrated, and that due diligence by the defendant would not have prevented the fraud. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962) (decided under former Code 1933, §§ 37-219 and 110-710).

Judgment will not be set aside if the party complaining thereof does not show proper diligence in discovering or attempting to discover facts upon which the party relies to annul the judgment. Marshall v. Russell, 222 Ga. 490, 150 S.E.2d 667 (1966), cert. denied, 386 U.S. 911, 87 S. Ct. 857, 17 L. Ed. 2d 783 (1967) (decided under former Code 1933, § 110-710).

Court of equity will not act unless it is shown that the party seeking relief has exercised reasonable diligence. Vinson v. Citizens & S. Nat'l Bank, 223 Ga. 54, 153 S.E.2d 436 (1967) (decided under former Code 1933, § 110-710).

One who would have equity must do equity. — Although the judgment of a court having no jurisdiction of the person or subject matter or void for any other cause is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it, this rule must be construed in the light of principles that one who would have equity must do equity, that one who comes into a

court of equity with unclean hands must be denied relief, and that one will not be permitted to take advantage of one's own wrong or to trifle with the courts. *Corder v. Fulton Nat'l Bank*, 223 Ga. 524, 156 S.E.2d 452 (1967) (decided under former Code 1933, Ch. 7, T. 110).

Question of diligence for jury. — Ordinarily, the question of whether or not the complainant could have ascertained the falsity of representations by proper diligence is for determination by the jury. *City of Dalton v. United States Fid. & Guar. Co.*, 216 Ga. 602, 118 S.E.2d 475 (1961) (decided under former Code 1933, § 110-710).

Negligence in determining contents to divorce action after waiver of process. — Because a wife voluntarily signed an acknowledgment of service and waiver of process with respect to a suit for divorce, left the state, and made no investigation as to the contents of the suit, despite allegations that the husband breached an agreement not to submit the question of custody, judgment could not be set aside in equity because of the petitioner's negligence. *Bach v. Phillips*, 200 Ga. 308, 37 S.E.2d 407 (1946) (decided under former Code 1933, §§ 37-219 and 110-710).

Failure to appear due to erroneous assumption as to date of trial. — Failure of a defendant to attend and defend a suit cannot be relieved in equity upon the ground that the defendant was advised by the defendant's attorney that the case would not be tried until a later term, which advice was based on an erroneous assumption. *W.T. Rawleigh Co. v. Seagraves*, 178 Ga. 459, 173 S.E. 167 (1934) (decided under former Civil Code 1910, § 5965).

Absence of counsel. — After a trial on the merits, if evidence is presented to the judge sitting as the trier of facts, it is an abuse of discretion for the trial court to set aside the judgment, which in effect amounts to the grant of a new trial, merely because counsel failed to appear and defend the case when the case was called to trial, even though the reason for such nonappearance is that counsel mistakenly thought the case would be checked or had been checked over or that

because of other duties counsel overlooked the fact that the case had been called for trial. *Carolina Tree Serv., Inc. v. Cartledge*, 96 Ga. App. 240, 99 S.E.2d 705 (1957) (decided under former Code 1933, § 110-702).

Judgment rendered while counsel on leave with permission of court. — Because the defendant's attorney was granted a leave of absence by the judge and the pleadings showed that the defendant might have a good defense, equity could issue an injunction and set aside judgment rendered in the attorney's absence. *Eatonton Oil & Auto Co. v. Ledbetter*, 174 Ga. 715, 163 S.E. 891 (1932) (decided under former Civil Code 1910, § 5965).

Taking of judgment after settlement as fraud. — Because an insured party accepted a draft from the insurance company in full and final settlement of insurance claims and in consideration of an express or implied promise to pay the costs of court and dismiss the pending lawsuit against the company, the insured's taking of judgment thereafter amounted to "fraud" within the meaning of subsection (e) of O.C.G.A. § 9-11-60, and the insurance company was not under these circumstances negligent or at fault in the meaning of subsection (e) in relying upon the insured's promise and in failing to answer, pay the costs, and file the insured's attorney's written dismissal. *Marsh v. Northland Ins. Co.*, 242 Ga. 490, 249 S.E.2d 205 (1978). For comment, see 31 Mercer L. Rev. 359 (1979).

4. Accident or Mistake

Nature of mistake relievable in equity. — Mistake relievable in equity is an erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both parties to a transaction, without the mistake's erroneous character being intended or known at the time. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958) (decided under former Code 1933, § 110-710).

To be remediable at equity, a mistake

Complaint in Equity (Cont'd)**4. Accident or Mistake (Cont'd)**

must be one of past or present fact and not one of law. *Robbins v. National Bank*, 241 Ga. 538, 246 S.E.2d 660 (1978).

Docketing error made in the clerk's office amounts to an accident or mistake relievable in equity so far as the defendant is concerned, provided that the failure to answer is attributable thereto, without fault or negligence on the defendant's part. *Dollar v. Fred W. Amend Co.*, 184 Ga. 432, 191 S.E. 696 (1937) (decided under former Code 1933, § 110-710).

Mistake as to legal effect no ground for relief. — Simple mistake by a party as to the legal effect of an agreement that the party executes or as to the legal result of an act that the party performs is no ground for either defensive or affirmative relief. *Robbins v. National Bank*, 241 Ga. 538, 246 S.E.2d 660 (1978).

Judgments erroneously entered should be set aside if the mistake was that of the court and not that of the parties. *Toomer v. Hopkins*, 204 Ga. 34, 48 S.E.2d 733 (1948) (decided under former Code 1933, § 110-710).

Vacation of default judgment because clerk failed to enter filing of answer. — Because the clerk of the superior court, through inadvertence, omitted to make an entry of filing on the garnishee's answer, which had in fact been filed, it was not an error upon such showing being duly made to direct the clerk to make such an entry nunc pro tunc, and when the record was so amended, corrected pleadings and record alone authorized the court to arrest and vacate the default judgment against the garnishee. *Simmons v. J.A. Jones Constr. Co.*, 72 Ga. App. 517, 34 S.E.2d 300 (1945) (decided under former Code 1933, Ch. 7, T. 110).

When court unaware of filing answer by garnishee. — Showing that a letter asserting that the letter was an answer to a summons of garnishment was filed within the time required and that the court, unaware of this filing, signed a default judgment against the garnishee was a sufficient showing upon which to grant a motion to set aside the default judgment. *Aetna Fin. Co. v. Lee County*

Mfg., Inc., 116 Ga. App. 200, 156 S.E.2d 374 (1967) (decided under former Code 1933, § 110-702).

Relief from condemnation judgment based on mistake of fact. — Because, due to a mistake of fact unmixed with negligence, a condemnation proceeding for a public road was conducted throughout upon the theory that abutting property would be improved rather than damaged, the petition in equity, alleging the facts and alleging that the mistake prevented the owners from proving consequential damage, alleged a cause of action to set aside an award and judgment of condemnation and to recover full damages. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958) (decided under former Code 1933, §§ 37-219 and 110-710).

Contested decisional error by trial or appellate court not "mistake". — Although a court of equity may set aside a judgment for mistake, fraud, or accident, a contested decisional error by a trial or appellate court, as to fact, law, or both, resulting in a judgment, is not such a mistake as can be rectified by a subsequent action, in equity or otherwise, challenging that judgment. *Todd v. Dekle*, 240 Ga. 842, 242 S.E.2d 613 (1978).

Complaint seeking to set aside a judgment on the ground that the judgment resulted from a contested decisional error of a court fails to state a claim upon which relief can be granted. *Todd v. Dekle*, 240 Ga. 842, 242 S.E.2d 613 (1978).

Entry of default judgment against garnishee who filed answer as accident or mistake. — Entry of default judgment against a garnishee who filed an answer, for the amount claimed to be due on the garnishor's judgment, was erroneous, and under the court's equitable authority the superior court was authorized to set aside the default judgment on the ground that the judgment had been entered by accident or mistake. *Gibbs v. Spencer Indus., Inc.*, 244 Ga. 450, 260 S.E.2d 342 (1979).

Factual dispute regarding error or omission must be rectified by complaint in equity. — If there is a factual dispute between the parties about an error or omission, the only way for the

complaining party to rectify the alleged error or omission is by complaint in equity to set the judgment aside because of the alleged mistake. *Park v. Park*, 233 Ga. 36, 209 S.E.2d 584 (1974).

Divorce rendered against wife without process and notice. — Allegation that the defendant obtained a divorce on November 2, 1942, although the parties lived together as husband and wife until November 1, 1942, that the petitioner had no knowledge of the pendency of a divorce action, not having been served with process nor having acknowledged service thereof, and that the defendant kept the petitioner ignorant of the pending suit, sufficiently stated grounds of fraud for setting aside the divorce decree in equity. *Robertson v. Robertson*, 196 Ga. 517, 26 S.E.2d 922 (1943) (decided under former Code 1933, §§ 37-219 and 110-710).

Complaint seeking to modify a divorce decree for fraud may be treated as a petition in equity under subsection (e) of this section when the complaint was not filed within the term in which the decree was entered, but was filed within three years from entry of the decree. *Towns v. Towns*, 242 Ga. 580, 250 S.E.2d 453 (1978).

Failure of party accepting substitute process to forward process. — If substituted process is served on a person of suitable age and discretion residing with the defendant, the failure of the person served actually to hand over the summons and complaint to the party defendant does not constitute “fraud, accident, or mistake” within the meaning of subsection (e) of O.C.G.A. § 9-11-60 and, thus, does not constitute grounds in equity for the setting aside of a default judgment. *Villaruz v. Van Diviere Oil Co.*, 251 Ga. 145, 304 S.E.2d 58 (1983).

Erroneous failure to appear not a “mistake”. — Because a notice of hearing on a motion for summary judgment was given to the appellant’s counsel of record, and failure to appear was due solely to a mistake on the part of the appellant or the appellant’s counsel, subsection (e) of O.C.G.A. § 9-11-60 did not afford a basis for relief from summary judgment granted to the appellee. *McCullough v.*

Molyneaux, 163 Ga. App. 352, 294 S.E.2d 560 (1982).

Relief from a workers’ compensation award in which the employer was erroneously found to be uninsured should properly have been sought in a court of equity pursuant to O.C.G.A. § 9-11-60. *Russell v. Fast Framers, Inc.*, 164 Ga. App. 771, 298 S.E.2d 303 (1982).

Time of Relief

Applicability of O.C.G.A. § 9-11-6(a). — Subsection (f) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60) falls squarely within the rule of Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6(a)), which provides that the day of the act, event, or default from which the designated period of time begins to run shall not be included, whether the period is measured in days, months, years, or some other unit of time. *Earwood v. Liberty Loan Corp.*, 136 Ga. App. 799, 222 S.E.2d 204 (1975).

Judgment that is void for lack of jurisdiction of the person may be attacked at any time; and a default judgment entered against a party in an action in which there was no valid service of process is void, notwithstanding evidence that the defendant had actual knowledge of the suit. *Gieger Fin. Co. v. Travis*, 146 Ga. App. 224, 246 S.E.2d 132 (1978).

Subsections (d) and (f) of O.C.G.A. § 9-11-60 provide that a judgment is subject to being set aside at any time by motion premised upon a lack of jurisdiction over the person; unless a party has waived lawful service of process, such service is essential to give a court jurisdiction over that party’s person. *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979).

Even if execution has been issued. — Void judgment is a mere nullity and has no vital force under any consideration or at any time; such a judgment may be attacked in any court and by anybody whenever it becomes necessary, even if an execution has been issued upon it. *Ricks v. Liberty Loan Corp.*, 146 Ga. App. 594, 247 S.E.2d 133 (1978).

No bar, estoppel, or limitation on attack on void judgment. — Statutes of limitation have no application to void

Time of Relief (Cont'd)

judgments, and there can be no bar, estoppel, or limitation as to the time when a void judgment may be attacked. *Wasden v. Rusco Indus., Inc.*, 233 Ga. 439, 211 S.E.2d 733 (1975), overruled on other grounds, *Murphy v. Murphy*, 263 Ga. 280, 430 S.E.2d 749 (1993); *Ricks v. Liberty Loan Corp.*, 146 Ga. App. 594, 247 S.E.2d 133 (1978).

Three-year limit not applicable to judgment void on its face. —

Three-year limitation of subsection (f) of this section does not apply to an action to set aside a judgment that is void on the judgment's face. *Ricks v. Liberty Loan Corp.*, 146 Ga. App. 594, 247 S.E.2d 133 (1978).

Judgment void for lack of personal jurisdiction. —

Three-year statute of limitation that applies to all motions or proceedings to attack or set aside a judgment does not apply to a judgment void because of lack of jurisdiction of the person, which may be attacked at any time. *Webb v. National Dist. Co.*, 148 Ga. App. 313, 251 S.E.2d 163 (1978).

Relation back of service. — Because a suit in equity to attack judgments was filed prior to the running of the statute of limitations, but process was not served until the statute had run because the defendant was residing outside the state and maintained no fixed address and the defendant's attorney would not accept process nor divulge the defendant's location, process would relate back to the time of filing. *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

Untimely motion did not afford relief. — Trial court properly denied a motion to correct a judgment entered against two debtors and their guarantors, five years and eight months after the expiration of the term of court in which the judgment was entered as they failed to show any entitlement to relief or exception as to why they could not have timely sought the relief requested; moreover, while a judgment which was void for lack of jurisdiction could be attacked at any time, all other motions to set aside a judgment had to be brought within three

years after the judgment was entered, pursuant to O.C.G.A. § 9-11-60(f). *De La Reza v. Osprey Capital, LLC*, 287 Ga. App. 196, 651 S.E.2d 97 (2007), cert. denied, No. S07C1928, 2007 Ga. LEXIS 819 (Ga. 2007).

Motion filed out of term in which judgment issued. —

In a dispute involving new and former owners of a daycare center, the trial court was without authority to grant the new owners' motion for reconsideration of the dismissal of their motion to set aside a default judgment. The motion for reconsideration was filed and granted four terms after the judgment at issue; thus, the order granting the motion for reconsideration was void. *Levin Co. v. Walker*, 289 Ga. App. 299, 656 S.E.2d 588 (2008), cert. denied, 2008 Ga. LEXIS 399 (Ga. 2008).

Judgments that are not void on their face must be attacked by direct proceeding. —

Such an attack upon the judgment by a third party may be made at any time, whether at law or equity, in an affirmative defense. *Ray v. Tattnall Bank*, 167 Ga. App. 871, 307 S.E.2d 754 (1983).

Denial of request to reconsider decision not appealable in own right. —

Denial of a motion that 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 its own right pursuant to subsection (d) of O.C.G.A. § 9-11-60, 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).

Complaint filed three years after judgment properly dismissed. —

Because the plaintiff brought a complaint in equity seeking to set aside a final judgment that granted to the plaintiff the adoption of the defendant's child, alleging that the adoption had been fraudulently procured by the defendant's misrepresentation concerning the child's legitimacy, but the complaint in equity was filed more than three years after the entry of the challenged adoption decree, the trial court did not err in dismissing the complaint under subsection (b) of O.C.G.A. § 9-11-60. *Kirby v. Kirby*, 165 Ga. App. 163, 300 S.E.2d 192 (1983).

Action to set aside, on the ground of duress, that portion of a divorce decree that obligated the former wife to pay child support was required to have been brought within three years of the decree's entry. *Mehdikarimi v. Emaddazfull*, 268 Ga. 428, 490 S.E.2d 368 (1997).

Statute of limitations. — Suit in equity to enjoin enforcement of a judgment that allegedly has been satisfied by settlement after institution of the litigation, and payment of the agreed amount, is not barred by the three-year statute of limitations set forth in subsection (f) of O.C.G.A. § 9-11-60, nor is it barred by the four-year statutes applicable to a breach of contract. *Wells v. Mullis*, 255 Ga. 426, 339 S.E.2d 574 (1986).

Putative father's petition for a blood test was, in substance, an extraordinary motion for a new trial based on newly discovered evidence and was not subject to the limitation period in subsection (f) of O.C.G.A. § 9-11-60. *Department of Human Resources v. Browning*, 210 Ga. App. 546, 436 S.E.2d 742 (1993).

Incompetent's fraud claim not expired. — Although the judgment under attack in the case was entered in 1971, and the case was not filed until 1985, given O.C.G.A. § 9-3-90's grace period for mental incompetents, the statute of limitations on the incompetent's fraud claim never began to run. *McLendon v. Georgia Kaolin Co.*, 813 F. Supp. 834 (M.D. Ga. 1992).

Seller could not circumvent time period. — Because a collateral attack of an Alabama arbitration award was untimely for purposes of 9 U.S.C. § 12, which outlined a three-month statute of limitations to challenge such an award based on fraud, corruption, or partiality of the arbitrator, and a home seller's motion under O.C.G.A. § 9-11-60(d) did not afford the seller an avenue to circumvent this time period, the trial court erred in denying a home buyer's petition to domesticate the award. *McDonald v. H & S Homes, LLC*, 290 Ga. App. 103, 658 S.E.2d 901 (2008).

Dismissal pursuant to five-year rule. — Trial court properly dismissed law clients' malpractice action pursuant to the "five-year rule" as there was no writ-

ten order entered in the trial court for at least five years; that period was not tolled during the pendency of an appeal because the trial court had jurisdiction to proceed with at least part of the case. *Paul v. Smith, Gambrell & Russell*, 323 Ga. App. 447, 746 S.E.2d 739 (2013).

Correction of Clerical Mistakes

Application for appeal not required. — 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 subsection (g) of O.C.G.A. § 9-11-60 while mandating a discretionary approach for those under subsection (d) of § 9-11-60, the clear language of the statute prevents an interpretation that would render both motions subject to O.C.G.A. § 5-6-35(b) and, therefore, motions under subsection (g) of § 9-11-60 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).

Denial of a motion to set aside brought under subsection (g) of O.C.G.A. § 9-11-60 is directly appealable. *Kendall v. Peach State Mach., Inc.*, 215 Ga. App. 633, 451 S.E.2d 810 (1994).

Orders entered upon motions to correct a clerical error pursuant to subsection (g) of O.C.G.A. § 9-11-60 do not require applications to appeal. *Leventhal v. Moseley*, 264 Ga. 891, 453 S.E.2d 455 (1995); *Downs v. C.D.C. Fed. Credit Union*, 224 Ga. App. 869, 481 S.E.2d 903 (1997).

Court authorized to correct clerical mistakes at any time. — Under subsection (g) of O.C.G.A. § 9-11-60, clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of the court's own initiative or on motion and such notice as the court orders. *Clark v. Ingram*, 150 Ga. App. 127, 257 S.E.2d 33 (1979).

Clerical errors from any accident, slip, or omission may at any time be corrected by the court. *Clark v. Ingram*, 150 Ga. App. 127, 257 S.E.2d 33 (1979).

Trial court improperly stated that the

Correction of Clerical Mistakes (Cont'd)

court had no jurisdiction over any matter involving the defendant's case as certain issues, such as the correction of a clerical mistake in a judgment or court order at any time under O.C.G.A. § 9-11-60(g) remained within a trial court's jurisdiction; however, the trial court properly ruled on the defendant's motion to correct the defendant's sentence on the merits. *Wilson v. State*, 259 Ga. App. 627, 578 S.E.2d 260 (2003).

Trial court properly corrected an omission in a prior summary judgment order, which failed to reserve the matter of the amount of attorney fees awarded to a seller for final determination, even though the term of court in which the summary judgment had been entered had expired; the buyer cited no evidence creating a factual dispute as to the trial court's own admission that the court's failure to reserve the matter of the amount of attorney fees for final determination was due to oversight or omission. *Sofran Peachtree City, LLC v. Peachtree City Holdings, LLC*, 272 Ga. App. 851, 614 S.E.2d 111 (2005).

Probate court violated O.C.G.A. § 15-6-21(c)'s notice requirements by setting aside a partial final consent order sua sponte without notice to the parties' counsel. If the intent of the final order the court later entered was to supplement and not supplant the partial final order, O.C.G.A. § 9-11-60(g) allowed the fact-finder to correct "at any time" the mistaken omission of the partial final order's provision concerning appointment of an executor from the final order. *Harwell v. Harwell*, 292 Ga. App. 339, 665 S.E.2d 33 (2008).

Provided matters of substance not affected. — Clerical mistakes can be corrected by the court at any time, provided the mistakes are confined to the plain meaning and not inflated to include matters of substance. *Clark v. Ingram*, 150 Ga. App. 127, 257 S.E.2d 33 (1979).

Clerical error or omission should be obvious on face of record. — Ordinarily, a judgment should be modified under subsection (g) of Ga. L. 1974, p. 1138,

§ 1 (see now O.C.G.A. § 9-11-60) only if the clerical error or omission is obvious on the face of the record. *Cagle v. Dixon*, 234 Ga. 698, 217 S.E.2d 598 (1975).

Subsection (g) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60) was ordinarily to be used when a clerical error or omission was obvious on the face of the record. *Smith v. Smith*, 230 Ga. 238, 196 S.E.2d 437 (1973).

Except after hearing establishing clerical nature of omission. — There is an exception to the general principle of modifying only obvious clerical errors if there has been a hearing on a motion to correct a judgment and the evidence compels the conclusion that an omission was in fact a clerical error. *Cagle v. Dixon*, 234 Ga. 698, 217 S.E.2d 598 (1975).

Voluntary dismissal is "order" within meaning of subsection (g) of O.C.G.A. § 9-11-60, and is subject to correction as provided therein. *Page v. Holiday Inns, Inc.*, 245 Ga. 12, 262 S.E.2d 783 (1980).

Reentry of order of dismissal. — Since a dismissal order was never served upon the plaintiff because the trial court's staff misaddressed the envelope, the court properly set aside and then reentered the dismissal order and the order was effective as of the date the order was actually reentered. *Carnes Bros., Inc. v. Cox*, 243 Ga. App. 863, 534 S.E.2d 547 (2000).

Dismissal with prejudice could be corrected to dismissal without prejudice. — Trial court erred in denying the plaintiffs' motion under O.C.G.A. § 9-11-60(g) to withdraw the plaintiffs' dismissal with prejudice and submit a dismissal without prejudice. The plaintiffs' counsel and the defendant driver's counsel submitted affidavits that they had intended the dismissal to be without prejudice and had filed the dismissal with prejudice in error; § 9-11-60(g) allowed the correction of errors arising from oversight or omission, and the plaintiffs' UM insurer was not prejudiced by this mistake. *Mullinax v. State Farm Mut. Auto. Ins. Co.*, 303 Ga. App. 76, 692 S.E.2d 734 (2010).

Judgment by default may be corrected to conform to the pleadings at a subsequent term of the court, even after

execution has been issued and the property sold. *Williams v. Stancil*, 119 Ga. App. 800, 168 S.E.2d 643 (1969).

Court, when no adverse rights have intervened, has jurisdiction nunc pro tunc to enter an order of dismissal accurately reflecting what occurred upon trial of the case. *Israel v. Joe Redwine Ins. Agency*, 120 Ga. App. 14, 169 S.E.2d 347 (1969).

Correction of irregularities in judgment. — Not only mere clerical errors, but also irregularities in the judgment, if the irregularities appear on the face of the record, may be corrected after expiration of the term, and irregular judgments may be made perfect. *Williams v. Stancil*, 119 Ga. App. 800, 168 S.E.2d 643 (1979).

Mathematical error on face of judgment. — If a mathematical error in the principal amount of the judgment is complained of, but the error is shown on the face of the judgment, the judgment can be amended at any time so as to speak the truth. *Brannon v. Trailer Craft Mfg. Co.*, 130 Ga. App. 766, 204 S.E.2d 477 (1974).

Correction of mutual mistake. — If an omission is made in a judgment by mutual mistake of the parties, the trial judge is authorized to correct the judgment on the motion made for that purpose. *Smith v. Smith*, 230 Ga. 238, 196 S.E.2d 437 (1973).

Trial judge had authority to correct the judgment in a divorce case incorporating an agreement of the parties, which by mutual mistake omitted the words "per child," because the adverse party was given notice of the motion to correct such judgment, and at the hearing admitted that the agreement that was made the judgment of the court omitted the words "per child" as intended by the parties. *Smith v. Smith*, 230 Ga. 238, 196 S.E.2d 437 (1973).

Correction of judgment to conform to parties' agreement. — If both parties to a judgment agree that the judgment entered did not speak their agreement, a motion to modify and correct such judgment is permissible. *Brown v. Brown*, 233 Ga. 581, 212 S.E.2d 378 (1975).

Because the mother's attorney unknowingly signed a general release that was inadvertently prepared by the injured

party's insurer instead of a limited release to which the mother had agreed, the trial court should have granted the motion to rescind the dismissal under O.C.G.A. § 9-11-60(g); the mother's attorney immediately took steps to correct the mistake, and the mother's insurer, the only party that refused to consent to rescission of the dismissal, was not prejudiced, as allowing the correction would have merely placed it in the position it expected to be in before it realized that the mother's attorney had signed the wrong papers. *Sanson v. State Farm Fire & Cas. Co.*, 276 Ga. App. 555, 623 S.E.2d 743 (2005).

Omission of language from judgment. — If words, sentences, or paragraphs are omitted from a judgment and there is no factual dispute between the parties about such error or omission, the judgment may be corrected. *Park v. Park*, 233 Ga. 36, 209 S.E.2d 584 (1974).

Vacation of order entered by misconception or misrepresentation. — Original order of the court that was entered either by misconception or as a result of a misrepresentation was properly vacated. *Hunt v. Household Fin. Corp.*, 138 Ga. App. 693, 227 S.E.2d 467 (1976).

Amendment of record by reducing oral order to writing. — Language "amend its own records" in former Code 1933, §§ 24-104 and 81-1202 (see now O.C.G.A. § 15-1-3(6)) included amending the record by reducing to writing an order, which had previously existed only as an oral statement and was therefore not properly a part of the record at all, although it had been recognized as such during the trial of the case. *Maloy v. Planter's Whse. & Lumber Co.*, 142 Ga. App. 69, 234 S.E.2d 807 (1977).

Conformance of child support judgment to verdict. — Because a jury verdict in a divorce action provided for child support at the rate of \$100.00 per month until the children reached the age of 21, but the judgment entered on the verdict provided for payment of child support at the rate of \$50.00 per month for each minor child, until such child became self-supporting, married, or attained the age of 21, the court was able to order that the judgment be corrected for clerical error to conform to the verdict. *Lowe v.*

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Lowe, 243 Ga. 398, 254 S.E.2d 323 (1979).

Vacation and reentry of judgment for appeal purposes when losing party not timely notified of decision.

— Under former Code 1933, §§ 24-2620 and 24-2621 (see now O.C.G.A. § 15-6-21), it was the duty of the judge to file the judge's decision with the clerk of the court and notify the attorney of the losing party of the judge's decision; and if no notice was sent by the court or the clerk to the losing party, an action may be brought under subsection (g) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60) to set aside the earlier judgment, and upon a finding that notice was not provided as required by former Code 1933, §§ 24-2620 and 24-2621, the motion to set aside may be granted, the judgment reentered, and the 30-day period within which the losing party must appeal would begin to run from the date of the 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).

In considering whether the trial court's denial of a motion to set aside was erroneous because a party did not receive notice of the entry of judgment, the issue is not whether the losing party had knowledge that the judgment was entered, but rather whether the duty imposed on the court by O.C.G.A. § 15-6-21(c) was carried out; it is necessary that the trial court first make a finding regarding whether such duty was met and, if not, the earlier judgment must be set aside before judgment is reentered to commence a new 30-day period for appeal. *Kendall v. Peach State Mach., Inc.*, 215 Ga. App. 633, 451 S.E.2d 810 (1994).

In a workers' compensation case, when the trial court did not send the parties the court's judgment as required by O.C.G.A. § 15-6-21(c), the court erred in denying the employer's motion under O.C.G.A. § 9-11-60(g) to vacate and re-enter the judgment so that the employer could file a timely appeal; O.C.G.A. § 34-9-105(b) did not prevent granting of the motion because the trial court had complied with the court's time limitations, and it was

improper for the trial court to decide the motion based upon the court's determination that the employer knew or should have known that a judgment had been entered. *Wal-Mart Stores, Inc. v. Parker*, 283 Ga. App. 708, 642 S.E.2d 387 (2007).

Trial court did not abuse the court's discretion in setting aside a default judgment entered in favor of former police officers under O.C.G.A. § 9-11-60(d) because the default judgment was entered despite the fact that the record disclosed that a pension fund board of trustees timely answered the complaint and, thus, there was no basis upon which to claim a default judgment; the board's answer was filed 31 days after service, but because that day was a Monday and the 30th day after service fell on a Sunday, under O.C.G.A. § 1-3-1(d)(3), the answer was timely. *Stamey v. Policemen's Pension Fund Bd. of Trs.*, 289 Ga. 503, 712 S.E.2d 825 (2011).

Although a bicyclist failed to comply with the trial court's order to notify a driver of a default judgment against the driver for \$2.9 million, such failure did not permit the trial court to vacate the judgment under O.C.G.A. § 9-11-60(g) because the trial court had no duty to notify the driver of the judgment, pursuant to O.C.G.A. §§ 9-11-5(a) and 15-6-21(c). *Winslett v. Guthrie*, 326 Ga. App. 747, 755 S.E.2d 287 (2014).

Effect of correction on final order.

— 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 changing previously entered order on evidentiary grounds not authorized.

— Court was without authority to enter a nunc pro tunc judgment changing a previously entered order not involving correction of a clerical mistake arising from oversight or omission, but based on a motion to reconsider and set aside final judgment and decree on the ground that certain provisions were not supported by the evidence. *Brown v. Brown*, 233 Ga. 581, 212 S.E.2d 378 (1975).

Waiver by acceptance of benefits under judgment. — Wife waived the right to file a motion under subsection (g) of O.C.G.A. § 9-11-60 to correct a divorce judgment by accepting alimony payments and other benefits under the judgment for over two years prior to filing the motion. *Fender v. Fender*, 249 Ga. 773, 294 S.E.2d 474 (1982).

Court omitting signing of order orally granted. — If the plaintiff files an amendment to the complaint and a motion to add parties, a proposed (unsigned) order granting the motion is placed in the file at the same time as the motion, a hearing on the motion is held, and the trial court, in the exercise of the court's discretion, orally grants the motion, all within the limitations period, but, through oversight, the court omits the actual signing of the order, the trial court does not err in later entering a nunc pro tunc order so as to correct the court's own oversight and to make the record speak the truth. *Savannah Iron & Fence Corp. v. Mitchell*, 168 Ga. App. 252, 308 S.E.2d 569 (1983).

Foreign divorce decree. — Because an action to domesticate a Pennsylvania divorce decree was barred by the five-year statute of limitations in Georgia and, further, there was no authority for a Georgia court to "correct" a domesticated judgment of another state, denial of a summary judgment in favor of a former wife as to the wife's claim for domestication and correction of the decree was proper. *Eickhoff v. Eickhoff*, 263 Ga. 498, 435 S.E.2d 914 (1993).

New award of damages not clerical mistake. — Trial court erred in modifying a judgment to add prejudgment interest after the term of court in which the original judgment was entered as the award of prejudgment interest was the addition of a new award of damages and not a mere correction of a clerical mistake. *Capital Cargo, Inc. v. Port of Port Royal*, 261 Ga. App. 803, 584 S.E.2d 54 (2003).

No clerical errors found. — In an objector's appeal from an order enforcing a settlement agreement with a trust administrator, there was no error in denying the objector relief under O.C.G.A. § 9-11-60(g) because the errors alleged by

the objector could not in any way be said to be clerical or typographical errors. *Head v. Wachovia Bank, N.A.*, 264 Ga. App. 608, 591 S.E.2d 424 (2003).

Trial court erred by entering a second final decree of divorce pursuant to O.C.G.A. § 9-11-60(g) after the term of court in which the first final decree had been entered had already expired because there were no clerical mistakes made with respect to the first final decree; the alleged mistake by the clerk, if any, related to the clerk's failure to file the husband's premature motion for new trial and had nothing to do with any alleged clerical errors in the first order and, accordingly, the trial court could not "correct" any mistake relating to the handling of the husband's motion for new trial by issuing a "corrected" second order based on a first order that contained no clerical mistakes. *Tremble v. Tremble*, 288 Ga. 666, 706 S.E.2d 453 (2011).

Orders improperly vacated when requirements were not met. — Trial court erred in vacating the court's orders denying a trust's temporary restraining order and an executor's motions for a declaratory judgment and for injunctive relief because, when the orders were not void on the orders' face, the O.C.G.A. § 9-11-60 requirements were not met, a party did not file a motion to set aside the orders, the executor did not receive notice of the challenge, and the action was not the correction of a clerical error. *Cherry v. Moreton Rolleston, Jr. Living Trust*, 273 Ga. App. 876, 616 S.E.2d 157 (2005).

Amount of income intentionally included in divorce decree was not "mistake". — When a particular amount of income was intentionally inserted into a divorce decree that incorporated a negotiated child support amount, a trial court could not later "correct" the amount, as if it were a clerical mistake, without setting aside the whole judgment. *Porter-Martin v. Martin*, 280 Ga. 150, 625 S.E.2d 743 (2006).

Law of the Case Rule

Law of the case rule abolished. — Although an unsuccessful motion for summary judgment by the appellants, a doctor and the doctor's professional corporation,

Law of the Case Rule (Cont'd)

had been based on the statute of repose, O.C.G.A. § 9-3-71(b), and so was their later motion in limine, the fact that the statute of repose issue was decided against them in the ruling on the summary judgment motion did not make the prior ruling the law of the case so as to bar the appellants from raising the same statute of repose issue in their appeal from the denial of their motion in limine as the law of the case rule was statutorily abolished in O.C.G.A. § 9-11-60(h). *Eyzaguirre v. Baker*, 260 Ga. App. 53, 579 S.E.2d 47 (2003).

Trial court was not bound by an order in which the court previously found that the court lacked jurisdiction over a dispute between neighbors as the law of the case doctrine had been abolished pursuant to O.C.G.A. § 9-11-60(h). *Knapp v. Cross*, 279 Ga. App. 632, 632 S.E.2d 157 (2006).

Under O.C.G.A. § 9-11-60(h), the law of the case had been abolished and did not bind the trial court to the court's interim ruling ordering the wife of a mortgagor to pay rent into the registry of the court pursuant to O.C.G.A. § 44-7-54(a)(1) during a continuance of the lender's dispossessionary action. *Harper v. JP Morgan Chase Bank Nat'l Ass'n*, 305 Ga. App. 536, 699 S.E.2d 854 (2010).

Judgment is the law of the case until set aside or reversed. *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968).

Ruling on motion for new trial as law of case until set aside or reversed. — If a motion for new trial is filed and ruled upon by the trial court, it establishes the law of the case until set aside or reversed. *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968).

Unless prevented by appeal or enumeration of error. — Losing party may prevent a judgment overruling a motion for new trial from becoming the "law of the case" by appealing directly from such judgment, or by appealing from other appealable judgments and enumerating the error on the overruling of the motion for new trial. *Byers v. Lieberman*, 126 Ga. App. 582, 191 S.E.2d 470 (1972).

Failure to appeal from a judgment overruling a motion for new trial or failure to

enumerate error thereon will not effect a dismissal of the appeal, but merely concludes the party as to the grounds urged in the motion for new trial. *Byers v. Lieberman*, 126 Ga. App. 582, 191 S.E.2d 470 (1972).

Defendants successfully sought an interlocutory appeal from the state court's order striking the defendants' arbitration defense, the state-court judgment was affirmed by the Court of Appeals of Georgia, and the Supreme Court of Georgia denied certiorari, so the judgment was now final for all preclusive purposes. *Cnty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011), cert. denied, U.S. , 133 S. Ct. 101, 184 L. Ed. 2d 22 (2012).

Law of the case rule still pertains insofar as appellate courts are concerned, if rulings of the trial judge are unexcepted to. *State Farm Mut. Auto. Ins. Co. v. Wendler*, 120 Ga. App. 839, 172 S.E.2d 360 (1969).

Law of the case rule has formally been abolished except as the rule applies to rulings by one of the appellate courts and those rulings are binding in all subsequent proceedings, including a second trial. *Continental Corp. v. DOT*, 185 Ga. App. 792, 366 S.E.2d 160, cert. denied, 185 Ga. App. 909, 366 S.E.2d 160 (1988); *McLean v. Continental Wingate Co.*, 222 Ga. App. 805, 476 S.E.2d 83 (1996); *In re Spruell*, 237 Ga. App. 259, 517 S.E.2d 190 (1999).

"Law of the case rule," as applied in *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968), has been abolished, provided, however, that any ruling by the appellate court in a case shall be binding in all subsequent proceedings in that case in the lower court and in the appellate court. *Jebco Ventures, Inc. v. City of Smyrna*, 529 Ga. 599, 385 S.E.2d 397 (1989); *Security Life Ins. Co. of Am. v. Clark*, 273 Ga. 44, 535 S.E.2d 234 (2000).

If the decision of an appellate court becomes "incorrect" because the law changes—either because of subsequent case law or because of later-enacted statutes—it may not be binding precedent for other situations; however, between the parties to the original decision it remains the law of the case. *Fulton-DeKalb Hosp. Auth. v. Walker*, 216 Ga. App. 786, 456 S.E.2d 97 (1995).

Court of Appeals holding was the law of the case as between the parties to an action even though the rationale of the holding was thereafter overruled by the Supreme Court in an unrelated case. *Dicks v. Zurich Am. Ins. Co.*, 231 Ga. App. 448, 499 S.E.2d 169 (1998).

Questions decided by appellate court binding as law of case. — If judgment is reversed by the appellate court, all questions as to pleadings and effect of evidence adjudicated by the appellate court are binding as the law of the case on a second trial, unless additional pleadings and evidence prevail to change such adjudications. *Monroe Motor Express v. Jackson*, 76 Ga. App. 280, 45 S.E.2d 445 (1947) (decided under former Code 1933).

Because a contempt order was previously affirmed on appeal by the Georgia Court of Appeals, a claim made thereafter that the order was void was rejected as the affirmed order became the law of the case. *Rice v. Lost Mt. Homeowners Ass'n*, 288 Ga. App. 714, 655 S.E.2d 214 (2007), cert. denied, 2008 Ga. LEXIS 376 (Ga. 2008).

Although the law of the case rule was abolished, the appellate court's finding in an earlier proceeding involving the termination of the mother's parental rights in the mother's three minor children that the children were deprived, the deprivation was caused by lack of parental care and control, and the deprivation was likely to continue was binding on the juvenile court in subsequent proceedings since an exception applied to the abolishment of the law of the case rule that allowed a ruling by the appellate court to be binding on all subsequent proceedings in the lower court. *In the Interest of D.F.*, 261 Ga. App. 148, 582 S.E.2d 16 (2003).

Because an appellate court previously ruled that an insurer was entitled to partial summary judgment on the issue of recoverable damages relating to the assignees' claims against it for failure to settle an underlying case, the amount of recoverable damages on a remanded trial was limited to the policy limits pursuant to the prior decision, and the matter could not be relitigated pursuant to O.C.G.A. § 9-11-60(h). *Empire Fire & Marine Ins.*

Co. v. Driskell, 264 Ga. App. 646, 592 S.E.2d 80 (2003).

Widower could not relitigate claims for compensatory and punitive damages based on the claim that the father-in-law had broken a verbal promise to give the widower a portion of life insurance proceeds to help defray the deceased wife's burial costs as the matter had been previously resolved by summary judgment in favor of the father-in-law, which decision was affirmed on appeal; such a decision was binding, pursuant to O.C.G.A. § 9-11-60(h), in the subsequent trial with respect to whether a promise had been made and broken as to the disposition of the life insurance proceeds, and the widower was barred from raising the issues relating to those damages by the doctrines of collateral estoppel and res judicata, under O.C.G.A. § 9-12-40. *Hardwick v. Williams*, 272 Ga. App. 680, 613 S.E.2d 215 (2005).

Under principles of both law of the case and judicial estoppel, a defendant could not complain when, after a modified sentence was overturned, the trial court reimposed the sentence originally imposed on the defendant. *Williams v. State*, 277 Ga. App. 841, 627 S.E.2d 808 (2006).

Affidavit of the plaintiff limited liability company's sole member did not demand summary judgment for the plaintiffs because the evidentiary posture of the case had not changed by the addition of the affidavit given the similarity of the arguments and evidence presented in the current and previous appeals before the appellate court; the affidavit was parol evidence, which a court could not consider unless an ambiguity existed in the contract, and there was no ambiguity in the parties' agreement. *IH Riverdale, LLC v. McChesney Capital Partners, LLC*, 292 Ga. App. 841, 666 S.E.2d 8 (2008).

In an action regarding an alleged defect in a home's septic system, the home buyers' agent was properly granted summary judgment as to a fraud claim based on the law of the case doctrine under O.C.G.A. § 9-11-60(h) because on a prior interlocutory appeal, the court reversed the trial court's denial of summary judgment to the listing agent, finding justifiable reliance had not been shown as to the fraud claim

Law of the Case Rule (Cont'd)

as no question existed that the buyers were informed through their agent that the septic tank had been pumped twice within a four-month period. *Davis v. Silvers*, 295 Ga. App. 103, 670 S.E.2d 805 (2008).

Because the Supreme Court of Georgia had already held on certiorari that a defendant's claims challenging the constitutionality of consecutive sentences were properly the subject of a motion to vacate a void sentence, that order constituted the law of the case, and the trial court was not authorized to make any ruling to the contrary, including the court's ruling that the defendant's constitutional challenges were waived. *Rooney v. State*, 287 Ga. 1, 690 S.E.2d 804, cert. denied, U.S. , 131 S. Ct. 117, 178 L. Ed. 2d 72 (2010).

Trial court erred in granting summary judgment in favor of a former clerk and a deputy clerk in an inmate's action alleging that they breached their duty to notify the department of corrections of the inmate's amended sentence as required by O.C.G.A. § 42-5-50(a) because the court of appeals previously ruled in the case that the clerks were not entitled to official immunity in their individual capacities for failing to perform the ministerial act of communicating the inmate's sentence to the DOC, and nothing in the record following remand changed that ruling; § 42-5-50(a) is imperative, and its performance is neither discretionary nor dependent upon a direction from the parties at interest. *McGee v. Hicks*, 303 Ga. App. 130, 693 S.E.2d 130 (2010), aff'd, 289 Ga. 573, 713 S.E.2d 841 (2011).

Trial court erred in denying the defendant's challenge to the jury traverse on the ground that the court lacked jurisdiction since the defendant was essentially seeking a writ of mandamus because in the court's order transferring the defendant's appeal to the court of appeals, the supreme court held that the matter did not involve a mandamus action brought against a public officer, and instead involved only the denial of a motion in a criminal case, and that transfer order established the rule of the case. *MacBeth v. State*, 304 Ga. App. 466, 696 S.E.2d 435 (2010).

Trial court did not err in ruling that under the law of the case rule, O.C.G.A. § 9-11-60(h), the defendant's custodial statement could not be used for retrial because the court of appeals had explicitly determined that the custodial statement at issue had been procured in violation of defendant's Sixth Amendment right to counsel, and such determination stood as the law of the case between the parties; because the suppression ruling concerning the defendant's custodial statement had already received interim appellate review, the trial court correctly determined that the issue was governed by the law of the case rule. *State v. Stone*, 304 Ga. App. 695, 697 S.E.2d 852 (2010).

Appellate court dismissed the defendant's appeal of a trial court's denial of an extraordinary motion for correction of sentence in which the defendant argued that the sentence imposed was void because the appeal was barred by the law of the case doctrine since the appeal involved the exact same subject matter of the defendant's previous appeals. *Paradise v. State*, 321 Ga. App. 371, 740 S.E.2d 238 (2013).

Parent could not raise various enumerations of error in the parent's appeal of a custody modification decision because the same issues had been raised in the prior appeals. *Gilchrist v. Gilchrist*, 323 Ga. App. 555, 747 S.E.2d 75 (2013).

State's challenge to the adequacy of nonhearsay evidence to support a trial court's finding that the defendant asserted the right to a speedy trial in due course lacked merit as the appellate court's prior holding that there was significant evidence of the defendant's attempt to obtain a speedy trial remained the law of the case. *State v. Takyi*, 322 Ga. App. 832, 747 S.E.2d 24 (2013).

In a class action litigation by a facsimile recipient against the sender, the affirmation of the certification of the class, which excluded certain recipients with whom the sender had shown an established business relationship, became the law of the case to which the courts were thereafter bound in further litigation in the matter. *Am. Home Servs. v. A Fast Sign Co.*, 322 Ga. App. 791, 747 S.E.2d 205 (2013).

Appellate decisions on attorney fees binding. — As a prior action arising from a real estate contract dispute resolved the issue of attorney fees against an attorney and the attorney's clients pursuant to O.C.G.A. § 9-15-14, that became the law of the case pursuant to O.C.G.A. § 9-11-60(h), such that a second action seeking attorney fees against the attorney was precluded. *Fortson v. Hardwick*, 297 Ga. App. 603, 677 S.E.2d 784 (2009), cert. denied, No. S09C1447, 2009 Ga. LEXIS 407 (Ga. 2009).

In the appellees' suit to recover attorney fees from appellants, the appellate court's opinion had specified the hours appellees spent on an appeal which the appellants had claimed were fraudulent. As the appellees deleted those challenged hours from the billing they presented to the trial court on remand, there were no issues to be tried; pursuant to O.C.G.A. § 9-11-60(h), the appellate court's prior decision was binding on the trial court as the law of the case. Furthermore, the trial court did not err in striking the appellants' amended answer raising, for the first time, a statute of limitations defense as the prior appellate court ruling was determinative of all claims. *Falanga v. Kirschner & Venker, P.C.*, 298 Ga. App. 672, 680 S.E.2d 419 (2009).

Clerk's duty to notify under O.C.G.A. § 42-5-50. — Court of Appeals erred in determining that the law of the case required a finding that a clerk's duty to notify the department of corrections of sentencing orders under O.C.G.A. § 42-5-50 was discretionary rather than ministerial because the Court of Appeals' prior decision did not resolve whether the clerk's acts were discretionary or ministerial but merely recognized that the plaintiff was asserting that the duties were ministerial. *Hicks v. McGee*, 289 Ga. 573, 713 S.E.2d 841 (2011).

Applicability. — "Law of the case" rule applies when the same parties and issues are involved and the evidentiary posture of the case remains the same. *Bruce v. Garges*, 259 Ga. 268, 379 S.E.2d 783 (1989); *Dacosta v. Allstate Ins. Co.*, 199 Ga. App. 292, 404 S.E.2d 627, cert. denied, 199 Ga. App. 905, 404 S.E.2d 627 (1991).

Law of the case is the controlling legal

rule established by a previous decision between the same parties in the same case. However, the principle only establishes the law of the case in its then existing evidentiary posture. *Lee v. DOT*, 198 Ga. App. 716, 402 S.E.2d 551 (1991).

Ruling that in a first trial the court did not err in refusing to direct a verdict or in refusing to grant judgment notwithstanding a mistrial became the law of the case was binding in all subsequent proceedings. *Grindle v. Chastain*, 229 Ga. App. 386, 493 S.E.2d 714 (1997).

Because the trial court denied the defendant's claim for return of property and the supreme court subsequently affirmed that denial, the latter ruling was binding and, because the defendant could show no change in the evidentiary posture of the case, the defendant was prohibited from relitigating the claim for return of the property. *Day v. State*, 242 Ga. App. 899, 531 S.E.2d 781 (2000).

Because the trial court had initially granted partial summary judgment to a landlord upholding the landlord's position that the tenant was not entitled to a credit for reconditioning expenses, but it reserved ruling on whether a writ of possession should be granted, and when the tenant appealed that judgment pursuant to O.C.G.A. § 9-11-56(h) but the court dismissed that appeal for failure to comply with O.C.G.A. § 44-7-56, the landlord's subsequent appeal from the final order granting a writ of possession to the landlord was dismissed to the extent that the landlord sought to relitigate the identical issues that the tenant attempted to litigate in the first appeal under O.C.G.A. § 9-11-56(h), and the prior appellate ruling was binding on the court under the law of the case rule, O.C.G.A. § 9-11-60(h). *Eckerd Corp. v. Alterman Real Estate, Ltd.*, 266 Ga. App. 860, 598 S.E.2d 510 (2004).

Testimony, in the defendant's second murder trial, given by two witnesses who had been jurors in the defendant's first murder trial, that the jurors heard the defendant make an admission of guilt while exiting the courtroom during the first trial, did not violate the law of the case rule, despite the fact that a footnote in a prior appellate opinion mentioned

Law of the Case Rule (Cont'd)

that the record indicated that the jury had exited the courtroom before the defendant made the statement; the footnote was not a “ruling” so as to have been binding in subsequent proceedings. *Slakman v. State*, 280 Ga. 837, 632 S.E.2d 378 (2006), cert. denied, 549 U.S. 1218, 127 S. Ct. 1273, 167 L. Ed. 2d 95 (2007).

Because the law of the case doctrine did not apply to issues not previously ruled upon below, enumerated as error on appeal, or discussed in a prior appellate decision, the trial court erred in denying summary judgment to a boat's charterer, and partial summary judgment to both the charterer and the boat's owner, in an action arising out of injuries sustained by a longshoreman while on board a cargo ship as the law of the case rule did not preclude consideration of the charterer's status and the issue of whether both were liable under the International Safety Management Code as such were not previously addressed by the trial court. *Eastern Car Liner, Ltd. v. Kyles*, 280 Ga. App. 362, 634 S.E.2d 129 (2006).

In a dispute between adjoining landowners over title to approximately six acres of land, the Supreme Court of Georgia's prior finding that the deeds relied upon by the appellant neighbors to convey the property to a third party were insufficient as a matter of law, was binding as the law of the case under O.C.G.A. § 9-11-60(h), and no amount of new evidence could change the court's holding that the deeds bore an insufficient description of the property to be conveyed as such was a question of law unaffected by circumstances extrinsic to the deeds themselves. *Pirkle v. Turner*, 281 Ga. 846, 642 S.E.2d 849 (2007).

Because the trial court, in a prior injunction proceeding, rejected a landowner's claim to a prescriptive right to maintain a garage encroachment by virtue of having received permission to build the garage and having erected the garage three years prior to the lawsuit, the claim was barred in a later proceeding as the law of the case; moreover, the landowner was prohibited from changing the evidentiary posture of the case merely by

changing testimony as to when the garage was built after summary judgment was already granted on the issue. *Daiss v. Bennett*, 286 Ga. App. 108, 648 S.E.2d 462 (2007).

Law of the case rule of O.C.G.A. § 9-11-60(h) did not prevent a court from deciding the issue of a county's entitlement to sovereign immunity because in an earlier appellate decision the court had not considered the issue of sovereign immunity. *DeKalb State Court Prob. Dep't v. Currid*, 287 Ga. App. 649, 653 S.E.2d 90 (2007), aff'd, *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

Former employer did not expand the evidentiary record in the trial court by submitting an affidavit in support of a second motion to set aside a default judgment after the appellate court entered an order denying the employer's application for discretionary appeal from the denial of a first motion but instead submitted the affidavit one month prior to the appellate court's denial; thus, the law of the case rule under O.C.G.A. § 9-11-60(h) applied and the trial court improperly granted the second motion. *Guthrie v. Wickes*, 295 Ga. App. 892, 673 S.E.2d 523 (2009).

Because the appellate court, in a wrongful death action against a county, did not directly address whether the Community Service Act, O.C.G.A. § 42-8-70 et seq., waived sovereign immunity but instead focused on the issue of gross negligence on a prior appeal, the law of the case rule of O.C.G.A. § 9-11-60(h) could not be expanded to encompass an implied ruling on an implied finding of a waiver of sovereign immunity. *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

Denial of practice groups' motion to dismiss the parents' medical malpractice action based on the parents' failure to comply with the expert affidavit requirement of former O.C.G.A. § 9-11-9.1 was error because a prior appellate decision concluded that, at the time the litigation was brought, the question of whether a plaintiff was subject to the expert affidavit requirement depended not on the identity of the defendant, but on the cause of action, and explicitly held that, without

an expert affidavit, the parents could have sustained only an ordinary negligence claim; the trial court's ruling, which held that because the practice groups were not licensed professionals or licensed health care facilities, no expert affidavit was needed, violated the law of the case. The parents could not have successfully argued on the appeal that the parents' malpractice claims were exempt from the expert affidavit requirement. *Atlanta Women's Health Group, P.C. v. Clemons*, 299 Ga. App. 102, 681 S.E.2d 754 (2009).

Standing orders with regard to subsequent proceedings. — Subsection (h) of O.C.G.A. § 9-11-60 has abolished the law of the case, but does not accommodate the view that a standing order can be ignored with regard to subsequent proceedings. If the order has been ratified by an appellate court, it must be treated with due deference. However, if the order is merely interlocutory in character, it remains within the breast of the trial court even after the expiration of the term. *Barber v. Collins*, 201 Ga. App. 104, 410 S.E.2d 444 (1991).

Statement constituting obiter dictum not binding. — Statement of an appellate court on a motion for rehearing that was not a binding holding of the court and was obiter dictum as it was not necessary to the decision, was not binding on the lower courts as the law of the case. *Browning v. Europa Hair, Inc.*, 145 Ga. App. 361, 243 S.E.2d 742 (1978).

Affirmance without opinion. — Although the Supreme Court of Georgia's affirmance without opinion of a trial court decision had no precedential value, it still established the law of the case. *Moreton Rolleston, Jr., Living Trust v. Kennedy*, 277 Ga. 541, 591 S.E.2d 834, cert. denied, 541 U.S. 1042, 124 S. Ct. 2168, 158 L. Ed. 2d 732 (2004).

Finality of reversal by appellate court. — If a trial court, after hearing a motion to set aside a prior order in a pending case, vacates the judgment complained of and on appeal the trial court's decision is reversed without direction, the judgment of the appellate court is final; upon the filing of the remittitur in the trial court, the issue is res judicata, and the lower court has no authority to allow

the movant to amend the movant's motion, nor hear further evidence or consider any other matter that would otherwise affect the finality of the judgment of the appellate court. *Shepherd v. Shepherd*, 243 Ga. 253, 253 S.E.2d 696 (1979).

Finality of affirmance of summary judgment. — Because the trial court had previously granted summary judgment on a conversion claim, and that summary judgment was affirmed on appeal, the decision on appeal was binding and the plaintiff could not replead the claim. *Faircloth v. A.L. Williams & Assocs.*, 219 Ga. App. 560, 465 S.E.2d 722 (1995).

Not sole remedy in conversion action. — In a conversion action brought by a vehicle owner against the owner of a towing company, there was no merit to the towing company owner's argument that O.C.G.A. § 9-11-60(d) was the exclusive vehicle by which the vehicle owner, who was not a party to the foreclosure proceedings involving the vehicle, was entitled to seek relief. Thus, the trial court did not lack jurisdiction to consider the conversion action. *Horner v. Robinson*, 299 Ga. App. 327, 682 S.E.2d 578 (2009).

Law of the case established by Court of Appeals. — Superior court should follow the law of the case as established by the Court of Appeals in conducting the jury trial. *Westinghouse Elec. Corp. v. Rider*, 168 Ga. App. 136, 308 S.E.2d 378 (1983).

Absent a change in the evidentiary posture, the rulings of the Court of Appeals are binding on the trial court in all subsequent proceedings in the case and may not be disregarded. *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).

If the Court of Appeals holds that the appellant's allegations are either without merit or not applicable to the circumstances in the case, this becomes the law of the case. *Blake v. Continental S.E. Lines*, 168 Ga. App. 718, 309 S.E.2d 829 (1983).

Direction of the Court of Appeals upon remand of a forfeiture proceeding requiring the trial court to determine whether the forfeiture violated the constitutional prohibition against excessive fines was

Law of the Case Rule (Cont'd)

mandatory and the trial court had no discretion to refuse to comply with the direction. *Rabern v. State*, 231 Ga. App. 84, 497 S.E.2d 631 (1998).

Relitigation of sanctions following remand. — Because the issue of a nonnoticing defendant's entitlement to sanctions for the plaintiffs' failure to appear for depositions was at least incidentally involved in the case and served as the basis for ordering a remand, rather than outright reversal, statements by the Court of Appeals on that issue were not dicta, but the law of the case. *South Ga. Medical Ctr. v. Washington*, 269 Ga. 366, 497 S.E.2d 793 (1998).

Trial court properly ruled that an attempt to relitigate sanctionability of the conduct was beyond the scope of the remand directive and thus barred by the law of the case rule. *Harkleroad v. Stringer*, 231 Ga. App. 464, 499 S.E.2d 379 (1998).

Transfer to Court of Appeals conclusive as to existence of constitutional questions. — Transfer by the Supreme Court to the Court of Appeals of a case that questions the constitutionality of a statute is a final determination that no constitutional question was in fact properly raised or, if so raised, that it was not meritorious. *Egerton v. Jolly*, 133 Ga. App. 805, 212 S.E.2d 462 (1975).

Holding on validity of ordinance. — If the validity of a city ordinance is challenged and on review by the Supreme Court of a judgment on demurrer the court holds that the ordinance is valid, the law of the case is thus fixed, and amended pleadings thereafter cannot again raise that question. *Medlock v. Allison*, 224 Ga. 648, 164 S.E.2d 112 (1968).

Holding that no verdict demanded by evidence. — Because the Court of Appeals, in considering a motion for new trial after the first trial of a case, held that the evidence did not demand a verdict for either party, such ruling was the law of the case. *Goodyear Tire & Rubber Co. v. Johnson*, 120 Ga. App. 395, 170 S.E.2d 869 (1969).

Prior erroneous reason for dismissal cannot be treated as binding under O.C.G.A. § 9-11-60 pursuant to the

law of the case rule. *Davis v. South Carolina Ins. Co.*, 143 Ga. App. 782, 240 S.E.2d 191 (1977).

Effect of expansion of evidentiary record. — Defendant's submission of affidavits after a denial of summary judgment was affirmed served to expand the evidentiary record; thus, consideration as to whether the new evidence demanded summary judgment for the defendant was required. *Brown v. Piggly Wiggly S., Inc.*, 228 Ga. App. 629, 493 S.E.2d 196 (1997).

Change in evidentiary posture of case. — Father could collaterally attack the validity of an order that modified custody as a defense to the wife's contempt motion since the evidentiary posture of the case has changed in view of subsequent rulings by the Alabama courts demonstrating that Alabama had retained jurisdiction over the custody of the child at issue. *Henderson v. Justice*, 237 Ga. App. 284, 514 S.E.2d 713 (1999).

Inapplicability to issues not earlier decided. — Law of the case rule is in no way dispositive of or even applicable to an issue that was not addressed in the earlier decision. *Modern Roofing & Metal Works, Inc. v. Owen*, 174 Ga. App. 875, 332 S.E.2d 14 (1985); *Parks v. State Farm Gen. Ins. Co.*, 238 Ga. App. 814, 520 S.E.2d 494 (1999).

Res judicata. — Because the state relied upon a former judgment which fully adjudicated the issue made by the appellants and that judgment had neither been reversed nor modified by any exception that the appellants had taken to it, such unreversed and unmodified judgment was res judicata as between the same two parties and thus was the law of the case. *Camp v. State*, 181 Ga. App. 714, 353 S.E.2d 832 (1987).

Trial court erred in granting a limited liability company summary judgment in the company's ejectment action against a property owner on the ground of res judicata under O.C.G.A. § 9-12-40 because there remained a question of fact regarding whether the owner was a party to the prior action; the owner asserted and presented affidavit evidence supporting the claim that the trial court in the quiet title action lacked personal jurisdiction over the owner, thus creating a genuine

issue of material fact regarding whether the owner was a party to the earlier litigation. *James v. Intown Ventures, LLC*, 290 Ga. 813, 725 S.E.2d 213 (2012).

If a grant of partial summary judgment is not made final under O.C.G.A. § 9-11-54(b), the party against whom summary judgment was granted has the option to either appeal or not appeal at that time, and if the party chooses to appeal, then the appellate decision on the summary judgment ruling is binding un-

der subsection (h) of O.C.G.A. § 9-11-60. *Roth v. Gulf Atl. Media of Ga., Inc.*, 244 Ga. App. 677, 536 S.E.2d 577 (2000).

Appellant's allegations without merit or inapplicable. — If the Court of Appeals holds that the appellant's allegations are either without merit or not applicable to the circumstances in the case, this becomes the law of the case. *Blake v. Continental S.E. Lines*, 168 Ga. App. 718, 309 S.E.2d 829 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Judgments, § 655 et seq. 58 Am. Jur. 2d, New Trial, §§ 13, 14, 37 et seq.

Am. Jur. Pleading and Practice Forms. — 15 Am. Jur. Pleading and Practice Forms, Judgments, § 291. 18B Am. Jur. Pleading and Practice Forms, New Trial, § 8.

C.J.S. — 35B C.J.S., Federal Civil Procedure, § 1248 et seq. 49 C.J.S., Judgments, §§ 352 et seq., 710 et seq.

ALR. — Collateral attack on judgment by party at whose instance it is entered, 3 ALR 535.

Failure of affidavit for publication of summons to state the facts required by statute as subjecting the judgment to collateral attack, 25 ALR 1258.

Nonresidence of one or both parties as affecting jurisdiction of court of suit proceeding to annul divorce decree rendered in same state, 33 ALR 469.

Mental incompetency at the time of rendition of judgment in civil action as ground of attack upon it, 34 ALR 221; 140 ALR 1336.

Meritorious defense as a condition of injunction against judgment for want of jurisdiction, 39 ALR 414; 118 ALR 1498.

Attacking decree of divorce after death of one of the parties on grounds other than original lack of jurisdiction, 40 ALR 1118.

Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 ALR 1219.

Right to writ of coram nobis as affected by intentional or negligent failure to bring facts to attention of court, 58 ALR 1286.

Incompetency, negligence, illness, or the

like, of counsel, as a ground for new trial or reversal in criminal case, 64 ALR 436.

Decree or order directing or confirming sale of homestead for payment of debts as subject to collateral attack, 66 ALR 926.

Correcting clerical errors in judgments, 67 ALR 828; 126 ALR 956; 126 ALR 956.

Reliance of attorney on agreement or supposed agreement of opposing attorney to give notice when case was set for trial as ground for relief from judgment, 69 ALR 1336.

Attack on domestic judgment on ground of unauthorized appearance for defendant by attorney, 88 ALR 12.

Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 ALR 1201.

Collateral attack on divorce decree because of defects in showing or allegations as to constructive service of process, 91 ALR 225.

Attack on judgment because of invalidity of contract on which it was rendered, 95 ALR 1267.

Judgment debtor's right to restitution upon reversal or vacation of judgment as subject to setoff in favor of judgment creditor, 101 ALR 1148.

Nonparty who acquires interest in property pending action or after judgment as within benefit of statute or rule providing for opening, vacating, or setting aside of judgments, 104 ALR 697.

Judgment (or final order) affecting title or interest in real property as subject to collateral attack because of insufficiency of description in the pleadings, 111 ALR 1200.

Retention of jurisdiction in suit in equity to determine whole controversy, including amount of loss or damage, after setting aside an award or finding by arbitrators or appraisers, 112 ALR 9.

Right of nonparties to move for the vacation of a judgment and to intervene in action or proceeding in respect of a matter in which they have an interest common with or similar to that of the parties, 112 ALR 434.

Time within which application to reopen or set aside a judgment by confession under warrant of attorney may be made, 112 ALR 797.

Verdict which finds for party upon his cause of action or counterclaim for money judgment, but which does not state amount of recovery, or is indefinite in this regard, or which affirmatively states that he is entitled to no amount, 116 ALR 828; 49 ALR2d 1328.

Judgment or order in connection with appointment of executor or administrator as *res judicata*, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 ALR 594.

Secreting witness or other conduct preventing summoning or appearance of witness as ground for relief from judgment, 131 ALR 1519.

Power to open or modify 'consent' judgment, 139 ALR 421.

Character, as direct or collateral attack, of action to set aside judgment, as affected by prayer for relief in respect of execution or other proceeding to enforce it, 140 ALR 823.

Power of lower court to set aside, on ground of fraud, judgment entered pursuant to mandate of, affirmed by, reviewing court, 146 ALR 1230.

Res judicata as affected by limitation of jurisdiction of court which rendered judgment, 147 ALR 196; 83 ALR2d 977.

Attorney's representation of parties adversely interested as affecting judgment or estoppel in respect thereof, 154 ALR 501.

Lapse of time as bar to action or proceeding for relief in respect of void judgment, 154 ALR 818.

Relief from stipulations, 161 ALR 1161.

Constructive service of process in action against nonresident to set aside judgment, 163 ALR 504.

Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment, 164 ALR 537.

Validity and effect of judgment based upon erroneous view as to constitutionality or validity of a statute or ordinance going to the merits, 167 ALR 517.

Power of court to vacate or modify its judgment or order after expiration of prescribed period upon application made within that period, 168 ALR 204.

Notice contemplated by statute for relief from judgment upon application within specified time after notice, 171 ALR 253.

Remedy and procedure to avoid release or satisfaction of judgment, 9 ALR2d 553.

Necessity of notice of application or intention to correct error in judgment entry, 14 ALR2d 224.

Conditioning the setting aside of judgment or grant of new trial on payment of opposing attorney's fees, 21 ALR2d 863.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 ALR2d 852.

Motion to vacate judgment or order as constituting general appearance, 31 ALR2d 262.

Vacation or setting aside of judgment as to one or more of multiple parties against whom rendered as requiring its vacation as to all, 42 ALR2d 1030.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Verdict for money judgment which finds for party for ambiguous or no amount, 49 ALR2d 1328.

Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty, 55 ALR2d 723.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Collateral attack on domestic nunc pro tunc judgment, 70 ALR2d 1131.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 ALR2d 801.

Appealability of void judgment or of one granting or denying motion for vacation thereof, 81 ALR2d 537.

Res judicata as affected by limitation of jurisdiction of court which rendered judgment, 83 ALR2d 977.

Who, other than natural or adopting parents, or heirs of latter, may collaterally attack adoption decree, 92 ALR2d 813.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 ALR2d 788.

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.

Necessity of taking proof as to liability against defaulting defendant, 8 ALR3d 1070.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 ALR3d 1255.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 ALR3d 350.

Amendment, after expiration of time for filing motion for new trial in civil case, of motion made in due time, 69 ALR3d 845.

Right to a jury trial on motion to vacate judgment, 75 ALR3d 894.

Fraud in obtaining or maintaining default judgment as ground for vacating or setting aside in state courts, 78 ALR3d 150.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate, 84 ALR3d 1119.

Vacating or setting aside divorce decree after remarriage of party, 17 ALR4th 1153.

Incompetence of counsel as ground for relief from state court civil judgment, 64 ALR4th 323.

Computation of net "loss" for which fidelity insurer is liable, 5 ALR5th 132.

Amendment of record of judgment in state civil case to correct judicial errors and omissions, 50 ALR5th 653.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 ALR5th 747.

Vacating or opening judgment by confession on ground of fraud, illegality, or mistake, 91 ALR5th 485.

9-11-61. Harmless error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (Ga. L. 1966, p. 609, § 61.)

Cross references. — Grounds for new trial generally, § 5-5-20 et seq.

U.S. Code. — For provisions of Federal

Rules of Civil Procedure, Rule 61, and annotations pertaining thereto, see 28 U.S.C.

JUDICIAL DECISIONS

Error is presumed hurtful unless the error appears to have had no effect upon the result of the trial. *Foster v. Harmon*, 145 Ga. App. 413, 243 S.E.2d 659 (1978).

Reversible error consists of error plus injury or harm. *Durham v. State*, 129 Ga. App. 5, 198 S.E.2d 387 (1973).

One who seeks reversal of verdict

and judgment must show harm as well as error. *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972).

Injury as well as error must be shown before new trial is granted. *City Dodge, Inc. v. Gardner*, 130 Ga. App. 502, 203 S.E.2d 729 (1973), *aff'd*, 232 Ga. 766, 208 S.E.2d 794 (1974).

To obtain a new trial, party must show injury as well as error. *Bennett v. Haley*, 132 Ga. App. 512, 208 S.E.2d 302 (1974).

An appellant must show harm as well as error to require reversal of the trial court's judgment. *Ideal Pool Corp. v. Champion*, 157 Ga. App. 380, 277 S.E.2d 753 (1981).

Harm, as well as error, required for showing. — 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. Under O.C.G.A. § 9-11-61, the parent was required not only to show error, but harm as well, and no such showing was made. *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).

Grant of new trial is appropriate when refusal would be inconsistent with substantial justice. *Warren v. Mann*, 117 Ga. App. 787, 161 S.E.2d 894 (1968).

Admission of irrelevant evidence not reversible error unless prejudicial. — Admission of irrelevant evidence is not a ground for reversal unless the appellant can show the evidence was prejudicial to the appellant. *Southwest Ga. Prod. Credit Ass'n v. Wainwright*, 241 Ga. 355, 245 S.E.2d 306 (1978); *Drew v. Collins*, 153 Ga. App. 794, 266 S.E.2d 570 (1980).

Evidence harmless when legitimately before the jury. — Appellate courts will not grant a new trial or reverse a case for error unless it is shown that the error is harmful; evidence is harmless when evidence of the same fact has been admitted and is legitimately before the jury. *Platt v. National Gen. Ins. Co.*, 205 Ga. App. 705, 423 S.E.2d 387, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992).

Exclusion of evidence is harmful when the exclusion affects a substantial right of a party to establish the party's

case with apparent, competent, and relevant evidence. *Newman v. Travelers Ins. Co.*, 143 Ga. App. 757, 240 S.E.2d 139 (1977).

Exclusion of substantially similar evidence harmless. — In a product liability case, as pertinent testimony of plaintiff's expert conveyed substantially the same information to the jury (concerning a warning symbol placed on the defendant's product) as contained in the relevant portions of the defendant's requested exhibit, any error in failing to admit the exhibit was harmless. *Continental Research Corp. v. Reeves*, 204 Ga. App. 120, 419 S.E.2d 48 (1992).

Exclusion of damage evidence harmless when jury verdict is against recovery. — Error in exclusion of evidence that pertains only to damages is harmless when the jury determines that the complainant is not entitled to recover. *Reliford v. Central of Ga. R.R.*, 140 Ga. App. 782, 232 S.E.2d 129 (1976).

Errors when verdict rendered as demanded. — Errors in court's instructions or in admission or exclusion of evidence will not be considered when the verdict was rendered as demanded. *Gaddis v. Georgia S. & Fla. Ry.*, 145 Ga. App. 826, 245 S.E.2d 8 (1978).

Ex parte communication not harmless error. — In a medical malpractice case, the plaintiffs were entitled to a new trial because the communication between the court and the jury was not disclosed to the plaintiffs or the plaintiffs' counsel until after the verdict, the note and response were not made a part of the record, recollections differed as to the nature and timing of the communication, and it was impossible for the appellate court to determine if a defense verdict would have been demanded regardless of the effect of the communication on the jury. *Phillips v. Harmon*, 328 Ga. App. 686, 760 S.E.2d 235 (2014).

Jury charge creating conclusive presumption. — Even if the jury charge creates a conclusive presumption, the error is harmless when intent is not at issue at the trial or when evidence of intent is overwhelming. *Hill v. Zant*, 638 F. Supp. 969 (M.D. Ga. 1986), *aff'd*, 833 F.2d 927 (11th Cir. 1987).

Judge's characterization admitted in error but error harmless. — Even though it was error to allow a federal judge's characterization of a principal's transactions as a sham into evidence in a breach of an employment contract suit, such error was harmless. *Ins. Indus. Consultants, LLC v. Alford*, 294 Ga. App. 747, 669 S.E.2d 724 (2008), cert. denied, No. S09C0465, 2009 Ga. LEXIS 200 (Ga. 2009).

Burden is on the appellant to establish the trial court's error; moreover, error which is harmless will not be cause for reversal. *Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n*, 247 Ga. 730, 279 S.E.2d 442 (1981).

Objecting party failed to carry burden of proving that admission of evidence unduly prejudiced rights. See *DOT v. 2.734 Acres of Land*, 168 Ga. App. 541, 309 S.E.2d 816 (1983).

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).

When the appellant has failed to comply with Uniform Superior Court Rule 6.5, but the error of procedure was harmless, in that the error did not affect the substantial rights of the plaintiff, the severe sanction of striking the affidavits was not mandated. *O'Quinn v. Southeast Radio Corp.*, 190 Ga. App. 608, 380 S.E.2d 487 (1989), overruled on other grounds, *Okekpe v. Commerce Funding Corp.*, 218 Ga. App. 705, 463 S.E.2d 23 (1995).

Error not harmless. — In a medical malpractice case, the trial court committed reversible error by finding that the patient waived a hearsay objection as to a defense pathologist's deposition testimony because the patient had the right to object to the testimony at trial and the testimony was inadmissible hearsay entitling the patient to a new trial since it was not harmless error in that the evidence was critical in the case because the evidence directly addressed the core disputed issue of whether the clinic's neurosurgeon left an excessive amount of cotton in the patient's brain. *Thomas v. Emory Clinic,*

Inc., 321 Ga. App. 457, 739 S.E.2d 138 (2013).

Cited in *Knickerbocker Tax Sys. v. Mr. Tax of Am., Inc.*, 227 Ga. 148, 179 S.E.2d 228 (1971); *Union Camp Corp. v. Youmans*, 277 Ga. 687, 182 S.E.2d 468 (1971); *Leach v. Midland-Guardian Co.*, 127 Ga. App. 562, 194 S.E.2d 260 (1972); *Flexible Prods. Co. v. Lavin*, 128 Ga. App. 80, 195 S.E.2d 677 (1973); *White v. Hammond*, 129 Ga. App. 408, 199 S.E.2d 809 (1973); *Newman v. Greer*, 131 Ga. App. 128, 205 S.E.2d 486 (1974); *Mouse-trap of Atlanta, Inc. v. Dekle*, 131 Ga. App. 758, 206 S.E.2d 562 (1974); *Tripcony v. Pickett*, 132 Ga. App. 563, 208 S.E.2d 574 (1974); *Shannon v. Kaylor*, 133 Ga. App. 514, 211 S.E.2d 368 (1974); *Southeast Transp. Corp. v. Hogan Livestock Co.*, 133 Ga. App. 825, 212 S.E.2d 638 (1975); *Epps v. State*, 134 Ga. App. 429, 214 S.E.2d 703 (1975); *Anderson v. Universal C.I.T. Credit Corp.*, 134 Ga. App. 931, 216 S.E.2d 719 (1975); *Lewyn v. Morris*, 135 Ga. App. 289, 217 S.E.2d 642 (1975); *Hunnicutt v. Hunnicutt*, 237 Ga. 497, 228 S.E.2d 881 (1976); *Green v. Kaplan*, 237 Ga. 602, 229 S.E.2d 369 (1976); *McDaniel v. White*, 140 Ga. App. 118, 230 S.E.2d 500 (1976); *Johnson v. State*, 238 Ga. 59, 230 S.E.2d 869 (1976); *Pickle v. Pickle*, 238 Ga. 66, 231 S.E.2d 61 (1976); *City Council v. Carpenter*, 240 Ga. 448, 241 S.E.2d 199 (1978); *Green v. Knight*, 153 Ga. App. 183, 264 S.E.2d 657 (1980); *Sylvester Motor & Tractor Co. v. Farmers Bank*, 153 Ga. App. 614, 266 S.E.2d 293 (1980); *Unicover, Inc. v. East India Trading Co.*, 154 Ga. App. 161, 267 S.E.2d 786 (1980); *Bailey v. Johnson*, 245 Ga. 823, 268 S.E.2d 147 (1980); *Mundt v. Olson*, 155 Ga. App. 145, 270 S.E.2d 344 (1980); *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980); *Smith v. Dixon Ford Tractor Co.*, 160 Ga. App. 885, 288 S.E.2d 599 (1982); *Jones v. Sudduth*, 162 Ga. App. 602, 292 S.E.2d 448 (1982); *In re Estate of Harris*, 251 Ga. 535, 307 S.E.2d 482 (1983); *Walker v. Hill*, 253 Ga. 126, 317 S.E.2d 825 (1984); *Curtis v. Curtis*, 255 Ga. 288, 336 S.E.2d 770 (1985); *Woodruff v. Naik*, 181 Ga. App. 70, 351 S.E.2d 233 (1986); *Southern Ry. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987); *Gully v. Glover*, 190 Ga. App. 238,

378 S.E.2d 411 (1989); Ailion v. Wade, 190 Ga. App. 151, 378 S.E.2d 507 (1989); Star Mfg., Inc. v. Edenfield, 191 Ga. App. 665, 382 S.E.2d 706 (1989); Clemons v. Atlanta Neurological Inst., 192 Ga. App. 399, 384 S.E.2d 881 (1989); DOT v. Hillside Motors, Inc., 192 Ga. App. 637, 385 S.E.2d 746 (1989); Weaver v. Ross, 192 Ga. App. 568, 386 S.E.2d 43 (1989); Rowe v. Rowe, 195 Ga. App. 493, 393 S.E.2d 750 (1990); Moore v. Sinclair, 196 Ga. App. 667, 396 S.E.2d 557 (1990); West v. Nodvin, 196 Ga.

App. 825, 397 S.E.2d 567 (1990); Horan v. Pirkle, 197 Ga. App. 151, 397 S.E.2d 734 (1990); Merrill v. Eiberger, 198 Ga. App. 806, 403 S.E.2d 91 (1991); Nalley Motor Trucks, Inc. v. Cochran, 200 Ga. App. 487, 408 S.E.2d 501 (1991); Turpin v. Worley, 206 Ga. App. 341, 425 S.E.2d 895 (1992); Owens v. Dep't of Human Res., 255 Ga. App. 678, 566 S.E.2d 403 (2002); Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 654 et seq., 899. 75 Am. Jur. 2d, Trials, §§ 388, 397.

C.J.S. — 5 C.J.S., Appeal and Error, § 965 et seq. 35B C.J.S., Federal Civil Procedure, §§ 1081, 1093, 1097, 1269, 1271. 36 C.J.S., Federal Courts, § 658 et seq. 49 C.J.S., Judgments, § 647 et seq. 66 C.J.S., New Trial, §§ 27-30.

ALR. — Communications between jurors and others as ground for new trial or reversal in criminal case, 62 ALR 1466.

Brief voluntary absence of defendant from courtroom during trial of criminal case as ground of error, 100 ALR 478.

Prejudicial effect of argument or remark that adversary was attempting to suppress facts, 29 ALR2d 996.

Error as to instructions on burden of proof under doctrine of *res ipsa loquitur* as prejudicial, 29 ALR2d 1390.

Power of court to vacate or modify order granting new trial in civil case, 61 ALR2d 642.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 ALR3d 501.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 ALR3d 1101.

Propriety and prejudicial effect of reference by counsel in civil case to amount of verdict in similar cases, 15 ALR3d 1144.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury, 24 ALR3d 1236.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 ALR3d 769.

9-11-62. Stay of proceedings to enforce a judgment.

(a) **Stay upon entry of judgment.** No execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after its entry, except that, in the case of a default judgment, execution may issue and enforcement proceedings may be taken at any time after entry of judgment and except that, in any case in which both the plaintiff or plaintiffs and the defendant or defendants agree, in writing, and file a copy of such agreement with the clerk of the court, execution may issue and enforcement proceedings may be taken at any time after entry of judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. Subsection (c) of this Code section governs the suspending, modifying,

restoring, or granting of an injunction during the pendency of an appeal.

(b) **Stay on motion for new trial or for judgment.** The filing of a motion for a new trial or motion for judgment notwithstanding the verdict shall act as supersedeas unless otherwise ordered by the court; but the court may condition supersedeas upon the giving of bond with good security in such amounts as the court may order.

(c) **Injunction pending appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) **Stay in favor of the state or agency thereof.** When an appeal is taken by the state or by any county, city, or town within the state, or an officer or agency thereof, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(e) **Power of appellate court not limited.** The provisions in this Code section do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve that status quo or the effectiveness of the judgment subsequently to be entered.

(f) **Stay of judgment as to multiple claims or multiple parties.** When a court has ordered a final judgment under the conditions stated in subsection (b) of Code Section 9-11-54, the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. (Ga. L. 1966, p. 609, § 62; Ga. L. 1967, p. 226, § 28; Ga. L. 1970, p. 550, § 1; Ga. L. 1972, p. 689, § 9; Ga. L. 1973, p. 693, § 1.)

Cross references. — Suspension of judgment by entry of appeal, § 9-12-19.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 62, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For note discussing procedure for issuance and amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Judgments effective upon entry. — Absent supersedeas, judgments are effective and therefore payable upon entry, even though execution thereon may be

delayed ten days. *Leventhal v. Citizens & S. Nat'l Bank*, 249 Ga. 390, 291 S.E.2d 222 (1982).

Clear mandate of subsection (a) of O.C.G.A. § 9-11-62 is to provide the party against whom a judgment has been entered the right to be free from execution and from proceedings for enforcement of the judgment for a period of ten days in order to determine the party's future course of action. *Bank S. v. Roswell Jeep Eagle, Inc.*, 200 Ga. App. 489, 408 S.E.2d 503 (1991).

Trial court's issuance of a writ of fieri facias at the time of the entry of the court's judgment against a law client violated O.C.G.A. § 9-11-62(a) as the judgment deprived the client of the client's right to be free from execution of the judgment for ten days in order to determine the client's future course of conduct; however, the trial court thereafter ordered that the client could post a cash bond, which rendered the issuance of the writ harmless. *Landau v. Davis Law Group, P.C.*, 269 Ga. App. 904, 605 S.E.2d 461 (2004).

Exemption of injunction cases from automatic supersedeas. — It was the intention of the legislature in enacting Ga. L. 1966, p. 609, § 62 (see now O.C.G.A. § 9-11-62) to exempt injunction cases from the automatic supersedeas provisions of former Code 1933, § 6-1002 (see now 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).

Because a property owner complied with an injunction without first obtaining a grant of supersedeas, the owner's appeal from the judgment granting the injunction was dismissed as moot,

pursuant to a rule of equitable jurisprudence and appellate procedure as well as O.C.G.A. § 9-11-62(a). *Babb v. Putnam County*, 269 Ga. App. 431, 605 S.E.2d 33 (2004).

Exemption of receivership case from automatic supersedeas. — In an action to dissolve a corporation, the filing of a notice of appeal from an order providing for either a forced sale or redesignation of a custodian as a receiver did not divest the trial court of jurisdiction to enter a final order converting the custodianship into a receivership since the final order merely implemented the earlier determination. *Black v. Graham*, 266 Ga. 154, 464 S.E.2d 814 (1996).

Exemption of administrative decisions from automatic supersedeas. — In an action in which the school district appealed an administrative law judge's (ALJ) decision in favor of the parents that awarded \$14,875 to the parents for reimbursement of the cost of private education services provided to the child and paid for by the child's parents, enforcement of that provision of the ALJ's final decision was stayed pursuant to Fed. R. Civ. P. 62(f) because in Georgia, the school district was a county agency, under O.C.G.A. § 9-11-62(d), the district would be entitled to a stay without having to post a bond. *Dekalb County Sch. Dist. v. J.W.M.*, 445 F. Supp. 2d 1371 (N.D. Ga. 2006).

Good cause for a supersedeas bond was financial difficulties. *Leventhal v. Seiter*, 208 Ga. App. 158, 430 S.E.2d 378 (1993).

Trial court is empowered to suspend or modify an injunction after appeal is taken therefrom by requiring a bond of plaintiff or otherwise so as to insure the security of the rights of the adverse party. *Stephens v. Geise*, 226 Ga. 639, 176 S.E.2d 923 (1970).

Under subsection (c) of O.C.G.A. § 9-11-62, the trial court was authorized to modify an earlier order to protect the rights of the parties notwithstanding a pending appeal. *Etheredge v. All Am. Hummer Limousines, Inc.*, 269 Ga. 436, 498 S.E.2d 60 (1998).

Burden rests upon appellant to obtain such order as will protect the appellant's rights and preserve the sta-

tus quo during the pendency of the appeal. *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).

To stop an action that has been ordered by trial court, supersedeas must be obtained from the trial court or from an appellate court in the event the trial court refuses to grant a supersedeas. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974).

Failure to file supersedeas or notice of appeal. — Subsection (a) of O.C.G.A. § 9-11-62, by negative implication, clearly allows an execution to issue upon a judgment after the ten-day period has run, if a notice of appeal or post-trial motion acting as a supersedeas has not been filed. *Bank S. v. Roswell Jeep Eagle, Inc.*, 200 Ga. App. 489, 408 S.E.2d 503 (1991).

Once ordered action is done appeal becomes moot. — Without supersedeas, an action ordered by the trial court must be done as ordered, and once the ordered action is taken, the complaint about its being erroneously ordered becomes moot. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974); *Jackson v. Bibb County Sch. Dist.*, 271 Ga. 18, 515 S.E.2d 151 (1999); *Peters v. State*, 237 Ga. App. 625, 516 S.E.2d 331 (1999).

To prevent appeal of an order requiring action which may affect the rights of litigants from becoming moot, it is necessary for the appealing party to obtain a supersedeas; if supersedeas is not obtained, and the ordered action takes place as ordered, the appeal becomes moot. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974); *Jackson v. Bibb County Sch. Dist.*, 271 Ga. 18, 515 S.E.2d 151 (1999).

Vendor's appeal from a one-year disqualification period from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) was moot because the one-year period had expired by the time the appeal was heard; the vendor had not sought a stay or an injunction preventing the disqualification from taking place pending the appeal, pursuant to O.C.G.A. § 9-11-62. *Babies Right Start v. Ga. Dep't of Pub. Health*, 293 Ga. 553, 748 S.E.2d 404 (2013).

Appeals not to amount to indepen-

dent establishment of injunction. — No appeal from denial of an injunction should have the effect of establishing an injunction independently of an order of the court entered pursuant to subsection (c) of this section. *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).

Mere appeal from an order denying an injunction, without further application for an interim order of supersedeas, does not impose any judicial restraint upon appellees' activities nor prohibit execution of the matter sought to be enjoined. *Clarke v. City of Atlanta*, 231 Ga. 84, 200 S.E.2d 264 (1973).

When judgment is entered declining to enjoin consummation of a future transaction, there is no legal impediment to prohibit the transaction from thereafter being effected; to erect such an impediment it is necessary for the losing party in the trial court to apply to such court for an injunction during the pendency of the appeal, and if the trial court denies such injunction, the losing party may then apply to the Supreme Court therefor. *Citizens to Save Paulding County v. City of Atlanta*, 236 Ga. 125, 223 S.E.2d 101 (1976).

Appeal from denial of injunction moot once act is done. — When injunctive relief is denied at the trial level, and pending appeal such relief is not allowed by either the trial court or the Supreme Court, there is no legal prohibition against consummation of the act or transaction in question, and once such act or transaction has been consummated, appeal from the judgment that denied injunctive relief becomes moot. *Citizens to Save Paulding County v. City of Atlanta*, 236 Ga. 125, 223 S.E.2d 101 (1976).

Appeals from restraining orders. — In action to enjoin holding of corporate stockholders meeting for the purpose of electing directors, when the trial court, after hearing, dissolves a restraining order and dismisses the complaint for failure to state a claim, and the stockholder's meeting is then held, an appeal of the order dissolving the restraining order and dismissing the complaint must be dismissed pursuant to Ga. L. 1972, p. 624, § 1 (see now O.C.G.A. § 5-6-48).

Strickland v. Adams, 231 Ga. 729, 204 S.E.2d 294 (1974).

Trial court has no authority to require county to post a supersedeas bond. Guhl v. Tuggle, 242 Ga. 412, 249 S.E.2d 219 (1978).

Indigency does not avoid bond requirement. — O.C.G.A. § 9-11-62 contains no provision for avoiding bond by filing an indigency affidavit. Byelick v. Michel Herbelin U.S.A., Inc., 260 Ga. App. 111, 578 S.E.2d 907 (2003).

Dismissal of prematurely instituted garnishment action. — Ordering that funds be paid into court and merely suspending the funds' disbursal until such time as the judgment becomes final or until a supersedeas bond is posted is clearly not harmless when the proper action was dismissal of a prematurely instituted garnishment action. Tate v. Burns, 172 Ga. App. 688, 324 S.E.2d 485 (1984).

Exempting custody provisions for the supersedeas action. — Appellate court found no error in the trial court's inclusion in the court's grant of a husband's motion for supersedeas bond a provision excepting the custody provisions of the final decree from the supersedeas arising from the wife's filing of a motion for new trial. Frazier v. Frazier, 280 Ga. 687, 631 S.E.2d 666 (2006).

Motion for new trial did not act as supersedeas given court's order to abide by child support award. — Trial court did not err in holding a spouse in contempt for failing to pay the child support that accrued while the spouse's motion for new trial was pending; O.C.G.A. § 9-11-62(b) provided that filing a motion for new trial acted as a supersedeas unless otherwise ordered, and in this case, the trial court ordered the spouse to abide by the child support award. Franklin v. Franklin, 294 Ga. 204, 751 S.E.2d 411 (2013).

Cited in Berrie v. Baucknecht, 224 Ga. 432, 162 S.E.2d 317 (1968); Martin v. GMC, Fisher Body Div., 224 Ga. 677, 164 S.E.2d 107 (1968); Dennis v. City of Palmetto, 226 Ga. 853, 178 S.E.2d 161 (1970); Kilgore v. Buice, 229 Ga. 445, 192 S.E.2d 256 (1972); Lott v. Foskey, 230 Ga. 134, 196 S.E.2d 141 (1973); McGee v. Craig, 230 Ga. 553, 198 S.E.2d 165 (1973); Brown v. Auchmuty, 232 Ga. 879, 209 S.E.2d 209 (1974); McClure v. Hopper, 234 Ga. 45, 214 S.E.2d 503 (1975); Detry v. Metropolitan Atlanta Rapid Transit Auth., 235 Ga. 521, 221 S.E.2d 8 (1975); Georgia Ass'n of Educators v. Harris, 403 F. Supp. 961 (N.D. Ga. 1975); Adair v. Adair, 236 Ga. 443, 224 S.E.2d 21 (1976); Herring v. Herring, 138 Ga. App. 145, 225 S.E.2d 697 (1976); Killingsworth v. First Nat'l Bank, 237 Ga. 544, 228 S.E.2d 901 (1976); Anthony v. Anthony, 239 Ga. 273, 236 S.E.2d 621 (1977); Faulkner v. Georgia Power Co., 241 Ga. 618, 247 S.E.2d 80 (1978); Exum v. Long, 157 Ga. App. 592, 278 S.E.2d 13 (1981); Imperial Body Works, Inc. v. National Claims Serv., Inc., 158 Ga. App. 241, 279 S.E.2d 534 (1981); Hunnicutt v. Hunnicutt, 248 Ga. 516, 283 S.E.2d 891 (1981); Williamson v. Bank Bldg. & Equip. Corp. of Am., 162 Ga. App. 295, 291 S.E.2d 124 (1982); Radio Webs, Inc. v. Tele-Media Corp., 249 Ga. 598, 292 S.E.2d 712 (1982); Ronskowsky v. Peters, 254 Ga. 270, 327 S.E.2d 735 (1985); Jones v. Gordon, 182 Ga. App. 29, 354 S.E.2d 658 (1987); State v. Vurgess, 182 Ga. App. 544, 356 S.E.2d 273 (1987); Bell v. Bell, 247 Ga. App. 462, 543 S.E.2d 455 (2000); Goswick v. Murray County Bd. of Educ., 281 Ga. App. 442, 636 S.E.2d 133 (2006); Coleman v. Retina Consultants, P.C., 286 Ga. 317, 687 S.E.2d 457 (2009); Blackmore v. Blackmore, 311 Ga. App. 885, 717 S.E.2d 504 (2011); Higdon v. Higdon, 321 Ga. App. 260, 739 S.E.2d 498 (2013); Sherman v. Atlanta Indep. Sch. Sys., 293 Ga. 268, 744 S.E.2d 26 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 16 et seq.

C.J.S. — 4 C.J.S., Appeal and Error,

§ 408 et seq. 33 C.J.S., Executions, § 152 et seq. 35B C.J.S., Federal Civil Procedure, § 1284 et seq. 49 C.J.S., Judgments, § 131 et seq.

ALR. — Right of state or federal court to protect litigants by enjoining proceedings in bankruptcy, 32 ALR 979.

Judicial, execution, or tax sale on election day, holiday, or Sunday, 58 ALR 1273.

Appeal from award of injunction as stay or supersedeas, 93 ALR 709.

Character, as direct or collateral attack, of action to set aside judgment, as affected by prayer for relief in respect of execution or other proceeding to enforce it, 140 ALR 823.

Injunction pendente lite in suit for divorce or separation, 164 ALR 321.

ARTICLE 8

PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

9-11-63. Reserved.

9-11-64. Reserved.

9-11-65. Injunctions and restraining orders.

(a) Interlocutory injunction.

(1) **Notice.** No interlocutory injunction shall be issued without notice to the adverse party.

(2) **Consolidation of hearing with trial on merits.** Before or after the commencement of the hearing of an application for an interlocutory injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for an interlocutory injunction which would be admissible upon the trial on the merits shall become a part of the record on the trial and need not be repeated upon the trial. This paragraph shall be construed and applied so as to save any rights of the parties which they may have to trial by jury.

(b) Temporary restraining order; when granted without notice; duration; hearing; application to dissolve or modify. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) The applicant's attorney certifies to the court, in writing, the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required.

Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, and shall expire by its terms within such time after entry, not to exceed 30 days, as the court fixes, unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the motion for an interlocutory injunction shall be set down for hearing at the earliest possible time and shall take precedence over all matters except older matters of the same character; when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for an interlocutory injunction; and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification; and in that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) **Security.** As a prerequisite to the issuance of a restraining order or an interlocutory injunction, the court may require the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been enjoined or restrained wrongfully. A surety upon a bond or undertaking under this Code section submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) **Form and scope of injunction or restraining order.** Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order by personal service or otherwise.

(e) **When inapplicable.** This Code section is not applicable to actions for divorce, alimony, separate maintenance, or custody of children. In such actions, the court may make prohibitive or mandatory orders, with or without notice or bond, and upon such terms and conditions as the court may deem just. (Ga. L. 1966, p. 609, § 65; Ga. L. 1967, p. 226, § 31; Ga. L. 1972, p. 689, §§ 10, 11.)

Cross references. — Injunctions generally, T. 9, C. 5. Equity generally, T. 23. Issuance of injunction to prevent nuisance, § 41-2-4.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 65, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For article discussing validity of ex parte injunction affecting

constitutionally protected rights, see 7 Ga. L. Rev. 246 (1973). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

For comment, “Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause,” see 60 Emory L.J. 1011 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

INTERLOCUTORY INJUNCTIONS

1. IN GENERAL

2. CONSOLIDATION

TEMPORARY RESTRAINING ORDERS

FORM AND SCOPE OF INJUNCTIONS AND RESTRAINING ORDERS

General Consideration

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, Ch. 2, T. 55 are included in the annotations for this Code section.

This section deals with extraordinary relief which may be sought and granted during the interim between filing of a complaint and final adjudication of a case on the case’s merits. *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970).

Power of trial court to protect rights of parties. — Trial judge whose ruling is sought to be reviewed is empowered to impose such terms and conditions as in the judge’s judgment are necessary to preserve and protect the rights of the parties until the Supreme Court can finally rule upon the question. *Bankers Life & Cas. Co. v. Cravey*, 209 Ga. 274, 71 S.E.2d 659 (1952) (decided under former Code 1933, Ch. 2, T. 55).

When judgment refusing an interlocutory injunction is brought to the Supreme Court for review, the trial judge is authorized to grant a supersedeas upon such terms as the trial judge deems necessary to preserve the rights of the parties until the judgment of the Supreme Court can be had; it is left, however, in the sound legal discretion of the judge to grant or refuse

it. *J.C. Lewis Motor Co. v. Mayor of Savannah*, 210 Ga. 591, 82 S.E.2d 132 (1954) (decided under former Code 1933, Ch. 2, T. 55).

Failure of court to ensure preservation of status quo as error. — Trial judge, by issuing rule nisi and granting supersedeas without requiring bond or making other provision to preserve the status quo, effectively deprives the plaintiff who prevailed in the suit for an injunction of the fruits of the plaintiff’s victory and thereby commits error. *Abney v. Harris*, 208 Ga. 184, 65 S.E.2d 905 (1951) (decided under former Code 1933, Ch. 2, T. 55).

Issuance of injunctive relief without notice and hearing. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) absolutely prohibits issuance of an interlocutory injunction or temporary restraining order without service of notice and hearing thereon, except that a temporary restraining order may issue ex parte as provided in subsection (b) of this section. *Paine v. Lowndes County Bd. of Tax Assessors*, 124 Ga. App. 233, 183 S.E.2d 474 (1971), overruled on other grounds, *Chancey v. Hancock*, 233 Ga. 734, 213 S.E.2d 633 (1975).

Because a homeowner asked for a hearing on the permanent injunctive relief the homeowner was seeking, the homeowner would not be heard to argue a lack of

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notice that the hearing would be a final hearing on the merits of the injunction. *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. 2010).

Although other parties had filed summary judgment motions regarding the disputed ownership of equipment, no one had raised the issue of injunctive relief before the hearing, and another party, who did not participate in the hearing, could not be bound by an interlocutory injunction issued against that party without notice under O.C.G.A. § 9-11-65(a)(1). *Abel & Sons Concrete, LLC v. Juhnke*, 295 Ga. 150, 757 S.E.2d 869 (2014).

Responsibility to file responsive pleadings. — This section cannot be construed so that in actions seeking a permanent injunction the defendant is relieved of the responsibility of filing responsive pleadings. *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970).

Entitlement of plaintiff to injunction when no defensive pleadings filed. — When no defensive pleadings are filed, the plaintiff seeking a permanent injunction is entitled to such injunction as a matter of law if the facts alleged authorize such relief. *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970).

Right to recover actual damage resulting from a wrongful restraint is recognized by O.C.G.A. § 9-11-65 by requiring the applicant to give security against such damages. *Moody v. Harris*, 170 Ga. App. 254, 316 S.E.2d 781 (1984).

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).

Insufficient evidence of damages resulting from wrongful order. — When the only evidence of actual damages resulting from a wrongful restraining order was testimony by the parties affected as to how much the parties lost without any basis upon which the jury could determine the extent of the losses suffered, such evidence was insufficient to support a damages award. *Moody v. Harris*, 170 Ga. App. 254, 316 S.E.2d 781 (1984).

Issuance of permanent injunction upheld despite failure to request such relief. — Issuance of permanent injunction preventing city officials from making any further charitable donations was upheld despite the fact that the resident did not request such relief as there was nothing improper in the prohibition of improper practice. *Harris v. Gilmore*, 265 Ga. App. 841, 595 S.E.2d 651 (2004).

Permanent injunction to preserve property owners association's covenants. — Trial court properly entered an injunction against a husband and wife requiring them, as homeowners and members of a neighborhood property owners association, to remove a chain link fence that was not allowed pursuant to the association's covenants and the association did not waive enforcement, nor did estoppel apply to grant the husband and wife an exception from the association's rules. *Wright v. Piedmont Prop. Owners Ass'n*, 288 Ga. App. 261, 653 S.E.2d 846 (2007).

Contempt adjudication for violation of restraining order not error. — After the trial court issued a restraining order which was personally served on the defendant and thereafter violated by the defendant, the court did not abuse the court's discretion in adjudging the defendant in contempt of court after the hearing, the defendant's only defense being that the court was without jurisdiction to grant the restraining order. *Martin v. Harris*, 216 Ga. 350, 116 S.E.2d 558 (1960).

Insureds could not be held in contempt for violating an invalid injunc-

tion. — Georgia insured, who had been specifically excluded from an Alabama class action, lacked standing to challenge the Alabama settlement, either in an individual capacity or a representative capacity; an injunction that was granted at the insured's request was invalid as the insured lacked a legal right to relief and the insurers could not be held in contempt for violating the injunction. *Am. Med. Sec., Inc. v. Parker*, 279 Ga. 201, 612 S.E.2d 261 (2005).

Dissolving temporary restraining order to allow bank foreclosure proceeding. — Trial court did not abuse the court's discretion by dissolving a temporary restraining order and allowing a bank to proceed with the bank's foreclosure action as it was within the trial court's discretion to condition the extension of injunctive relief upon the mortgagor's placement of an amount of money in escrow reflecting past-due payments on the mortgage, which the mortgagor declined to do. *Morgan v. U. S. Bank Nat'l Ass'n*, 322 Ga. App. 357, 745 S.E.2d 290 (2013).

Injunction sufficiently specific. — Injunction which stated that the defendants were not permitted to continue with the salary and position reductions at issue and were not allowed to interfere with the chief magistrate's ability to interview and hire personnel sufficiently described what was and was not permitted so as to allow for enforcement of the injunction. *Pike County v. Callaway-Ingram*, 292 Ga. 828, 742 S.E.2d 471 (2013).

Security bond requirement. — Trial court's decision under subsection (c) of O.C.G.A. § 9-11-65 to require the giving of a security bond is not a prerequisite to a wrongfully restrained party's right to recover damages. *Hogan Mgmt. Servs., P.C. v. Martino*, 242 Ga. App. 791, 530 S.E.2d 508 (2000), cert. denied, 531 U.S. 1075, 121 S. Ct. 770, 148 L. Ed. 2d 670 (2001).

Appellate review. — Trial court properly entered a temporary restraining order directing that the north entrance to a shopping center be opened instantaneously because a 2004 easement was clear and unambiguous and provided for full enjoyment of the easement of ingress and egress to the shopping center. *Nat'l Hills*

Exch. v. Thompson, 319 Ga. App. 777, 736 S.E.2d 480 (2013).

Cited in *National Life Ins. Co. v. Cady*, 227 Ga. 475, 181 S.E.2d 382 (1971); *Ford v. Herbermann*, 227 Ga. 751, 183 S.E.2d 204 (1971); *Lewis v. Citizens Exch. Bank*, 229 Ga. 333, 191 S.E.2d 49 (1972); *Akins v. Tucker*, 231 Ga. 646, 203 S.E.2d 532 (1974); *Fields v. Davies*, 235 Ga. 87, 218 S.E.2d 828 (1975); *Georgia Ass'n of Educators v. Harris*, 403 F. Supp. 961 (N.D. Ga. 1975); *Styers v. Pico, Inc.*, 236 Ga. 258, 223 S.E.2d 656 (1976); *Wilson v. Sermons*, 236 Ga. 400, 223 S.E.2d 816 (1976); *McGregor v. Town of Fort Oglethorpe*, 236 Ga. 711, 225 S.E.2d 238 (1976); *Shelton v. Peppers*, 237 Ga. 101, 227 S.E.2d 29 (1976); *Geld-Halden Indus., Inc. v. Parr*, 237 Ga. 773, 229 S.E.2d 620 (1976); *Nelson v. Bloodworth*, 238 Ga. 264, 232 S.E.2d 547 (1977); *Saul v. Vaughn & Co.*, 240 Ga. 301, 241 S.E.2d 180 (1977); *Thomas v. Fairburn Banking Co.*, 244 Ga. 741, 262 S.E.2d 58 (1979); *Cheek v. Savannah Valley Prod. Credit Ass'n*, 244 Ga. 768, 262 S.E.2d 90 (1979); *Fayette County v. Seagraves*, 245 Ga. 196, 264 S.E.2d 13 (1980); *Gervin v. Reddick*, 246 Ga. 56, 268 S.E.2d 657 (1980); *Coffey Enters. Realty & Dev. Co. v. DOT*, 248 Ga. 224, 281 S.E.2d 611 (1981); *Gresham Park Community Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981); *King v. Ingram*, 250 Ga. 887, 302 S.E.2d 105 (1983); *Shiver v. Benton*, 251 Ga. 284, 304 S.E.2d 903 (1983); *Regency Club v. Stuckey*, 253 Ga. 583, 324 S.E.2d 166 (1984); *Bell v. King, Phipps & Assocs.*, 176 Ga. App. 702, 337 S.E.2d 364 (1985); *Clayton v. Deverell*, 257 Ga. 653, 362 S.E.2d 364 (1987); *Columbus v. Diaz-Verson*, 258 Ga. 698, 373 S.E.2d 208 (1988); *Revels v. Hair*, 260 Ga. 889, 401 S.E.2d 520 (1991); *Georgia Canoeing Ass'n v. Henry*, 263 Ga. 77, 428 S.E.2d 336 (1993); *Mosley v. H.P.S.C., Inc.*, 267 Ga. 351, 477 S.E.2d 837 (1996); *Ebon Found., Inc. v. Oatman*, 269 Ga. 340, 498 S.E.2d 728 (1998); *Bootery, Inc. v. Cumberland Creek Properties, Inc.*, 271 Ga. 271, 517 S.E.2d 68 (1999); *Byelick v. Michel Herbelin USA, Inc.*, 275 Ga. 505, 570 S.E.2d 307 (2002); *Kace Invs., L.P. v. Hull*, 263 Ga. App. 296, 587 S.E.2d 800 (2003); *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011); *Davis v. Wallace*, 310 Ga. App.

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340, 713 S.E.2d 446 (2011).

Interlocutory Injunctions**1. In General**

Possibility of failure on merits not determinative. — It is not the function of a preliminary injunction to decide a case on the merits, and the possibility that the party obtaining a preliminary injunction may not win on the merits at trial is not determinative of the propriety or validity of granting the preliminary injunction. *Eastman Kodak Co. v. Fotomat Corp.*, 317 F. Supp. 304 (N.D. Ga. 1969), appeal dismissed, 441 F.2d 1079 (5th Cir. 1971).

Trial courts have the authority to convert an application for an interlocutory injunction into a motion for summary judgment. — Under O.C.G.A. § 9-11-65(a)(2), when a trial court has given notice of a hearing on an interlocutory injunction, the court may determine the merits of the issues after the interlocutory hearing, but it may do so only if the parties have not objected or have acquiesced. *RTS Landfill, Inc. v. Appalachian Waste Sys., LLC*, 267 Ga. App. 56, 598 S.E.2d 798 (2004).

Notice to the adverse party is all that is required by paragraph (a)(1) of this section. *Consortium Mgt. Co. v. Mutual Am. Corp.*, 246 Ga. 346, 271 S.E.2d 488 (1980).

There is no requirement of personal service prior to issuance of an interlocutory injunction. *Consortium Mgt. Co. v. Mutual Am. Corp.*, 246 Ga. 346, 271 S.E.2d 488 (1980).

Order held valid. — When initial restraining order is void for want of notice, second order termed a continuance of the prior order, granted after notice and opportunity to be heard, is valid and has the effect of an interlocutory injunction under subsection (a) of this section. *Finney v. Pan-Am. Fire & Cas. Co.*, 123 Ga. App. 250, 180 S.E.2d 253 (1971).

Trial court did not abuse the court's discretion in granting an interlocutory injunction upon finding that a home builder was causing a private nuisance by allow-

ing water to run-off from the builder's property, damaging the property of an adjoining property owner, since the builder was in default in the action and the property owner's pleadings established that the owner was entitled to the relief sought; the trial court could issue the court's order without giving the builder notice and an opportunity to be heard. *Wallace v. Lewis*, 253 Ga. App. 268, 558 S.E.2d 810 (2002).

Permanent injunction generally improper after interlocutory hearing. — General rule is that unless there is an order consolidating the trial on the merits with the hearing on the application for interlocutory injunction as provided in paragraph (a)(2) of O.C.G.A. § 9-11-65, then the entry of permanent relief after an interlocutory hearing is improper. *Gwinnett County v. Vaccaro*, 259 Ga. 61, 376 S.E.2d 680 (1989).

Trial court's injunction ordering that former employee be enjoined perpetually from disclosing the trade secrets of a former employer was improper because a permanent injunction cannot issue following an interlocutory hearing, and the record established that the trial court did not enter an order consolidating the trial of the action on the merits with the hearing on the former employer's application for the interlocutory injunction. *Ward v. Process Control Corp.*, 247 Ga. 583, 277 S.E.2d 671 (1981).

Limitations on preservation of jury trial. — Last sentence of paragraph (a)(2) of O.C.G.A. § 9-11-65 preserves the right to a jury trial as to claims for damages when tried with an equity case. It does not create a right to trial by jury in permanent injunction hearings. This is consistent with the second sentence of paragraph (a)(2) of that section, because if there were a right to a jury trial in permanent injunction hearings, then the evidence received at the earlier hearing would have to be reintroduced and repeated. *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982). See also *20/20 Vision Ctr., Inc. v. Hudgens*, 256 Ga. 129, 345 S.E.2d 330 (1986).

Determination on merits. — When there is notice of an interlocutory injunction hearing, the court may determine the

issues on their merits after the interlocutory hearing when there is no objection or when the parties have acquiesced. *Georgia Kraft Co. v. Rhodes*, 257 Ga. 469, 360 S.E.2d 595 (1987); *Gwinnett County v. Vaccaro*, 259 Ga. 61, 376 S.E.2d 680 (1989); *Dortch v. Atlanta Journal*, 261 Ga. 350, 405 S.E.2d 43 (1991); *A & D Asphalt Co. v. Carroll & Carroll of Macon, Inc.*, 238 Ga. App. 829, 520 S.E.2d 499 (1999).

In the absence of a transcript of a hearing on a request for an interlocutory injunction, it would be assumed that, consistent with the court's order, the trial court timely exercised the court authority under paragraph (a)(2) of O.C.G.A. § 9-11-65 and that the court did so with the landowners' consent. *Sapp v. Owens*, 270 Ga. 36, 504 S.E.2d 665 (1998).

After a trial court held a hearing on the companies' requests for a temporary restraining order (TRO) and to compel arbitration regarding a former executive's decision to accept employment with a competitor, and the TRO hearings were not consolidated with a trial on the merits, nor did the companies acquiesce in any decision to issue a final ruling on the merits pursuant to O.C.G.A. § 9-11-65(a)(2), there was no error in the trial court's determination that the covenant not to compete in the executive's employment agreement was not enforceable as the court was authorized to make such a determination in considering the likelihood of the companies' success on the merits. Once the covenant was found to be unenforceable on the covenant's face, the trial court was authorized to enter a definitive ruling as to the covenant's unenforceability. *BellSouth Corp. v. Forsee*, 265 Ga. App. 589, 595 S.E.2d 99 (2004).

Evidence at hearings on interlocutory injunctions. — In hearings on interlocutory injunctions, rules of evidence are not in all respects as rigidly enforced as on final trials, and admission of some secondary evidence, or admission of some hearsay or opinion evidence, will not necessarily require reversal. *State Hwy. Bd. v. City of Baxley*, 190 Ga. 292, 9 S.E.2d 266 (1940); *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941) (decided under former Code 1933, Ch. 2, T. 55).

Treatment of fact issues on hearing of application for interlocutory injunction. — On the hearing of an application for an interlocutory injunction, the presiding judge should not undertake to finally adjudicate issues of fact, but should pass on such questions only so far as to determine whether the evidence authorizes the grant or refusal of the interlocutory relief. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941) (decided under former Code 1933, Ch. 2, T. 55).

In an action arising out of an alleged breach of a land sales contract, given that the trial court relied on findings of fact that had been resolved only in the context of the ruling on an interlocutory injunction filed by the buyer, and that issues of material fact plainly remained as to whether the seller fulfilled the contractual obligations to designate land adjacent to the buyer's property for use as a city or county road, the trial court's grant of summary judgment to the seller had to be reversed. *Taylor v. Thomas*, 286 Ga. App. 27, 648 S.E.2d 426 (2007).

Discretion of judge as to grant of interlocutory injunction. — When, in a suit for injunction, evidence introduced at an interlocutory hearing consisted only of an original petition and the defendant's answer, which considered together presented an issue of fact as to the truth of the allegations made by the plaintiff as a basis for the relief sought, the presiding judge was not bound to grant an interlocutory injunction, and the judge's judgment refusing the injunction would not be disturbed. *Spivey v. Pope*, 180 Ga. 609, 180 S.E. 118 (1935) (decided under former Code 1933, Ch. 2, T. 55).

Absent any findings that the status quo was endangered or in need of preservation, and because an interlocutory injunction did not in fact preserve the status quo but forced a dog kennel owner to cease operations, the trial court abused the court's discretion in granting relief to an adjacent neighbor of the business, especially since that business had been in operation for several years without complaint. *Green v. Waddleton*, 288 Ga. App. 369, 654 S.E.2d 204 (2007).

In hearings on an application for interlocutory injunctions when the evidence on

Interlocutory Injunctions (Cont'd)**1. In General** (Cont'd)

material issues of fact is in conflict, grant or refusal of the application is within the discretion of the judge, and the exercise of the judge's discretion in granting or refusing the relief prayed for will not be controlled unless manifestly abused. *Turner v. Trust Co.*, 214 Ga. 339, 105 S.E.2d 22 (1958) (decided under former Code 1933, Ch. 2, T. 55).

Trial court did not abuse the court's discretion in issuing an interlocutory injunction enjoining officers from disposing of any of the documents or assets of a corporation and continuing a receivership because the officers controlled the assets that were a subject of the litigation, raising the possibility that the assets could be dissipated before the litigation is resolved; although the officers made several vague arguments about the powers granted to the receiver, the officers failed to show that the trial court abused the court's discretion in granting those powers. *Pittman v. State*, 288 Ga. 589, 706 S.E.2d 398 (2011).

Appeal will lie to grant or refuse an interlocutory injunction. *Walker v. Ful-Kalb, Inc.*, 181 Ga. 574, 183 S.E. 776 (1935); *Moore v. Selman*, 219 Ga. 865, 136 S.E.2d 329 (1964) (decided under former Code 1933, Ch. 2, T. 55).

Appeal will lie to grant or refuse an interlocutory injunction, and to any judgment which would have constituted a final determination of the cause. *Hagans v. Excelsior Elec. Membership Corp.*, 207 Ga. 53, 60 S.E.2d 162 (1950) (decided under former Code 1933, Ch. 2, T. 55).

When, after interlocutory hearing, a trial judge passes an order continuing in effect a previous restraining order until further order of the court, such order is in effect the granting of an interlocutory injunction and may be appealed directly. *Moore v. Selman*, 219 Ga. 865, 136 S.E.2d 329 (1964) (decided under former Code 1933, Ch. 2, T. 55).

Appeal from dissolution of temporary injunction after notice and hearing. — Appeal will lie from the order of the trial court, rendered after notice and hearing, dissolving a temporary injunc-

tion previously granted by the court, after notice and hearing. *Moore v. Selman*, 219 Ga. 865, 136 S.E.2d 329 (1964) (decided under former Code 1933, Ch. 2, T. 55).

Order held erroneous for lack of notice and hearing. — Order in a pending suit making additional parties defendant and granting an interlocutory injunction as to the parties, without any notice, rule nisi, or hearing, is erroneous. *Fitzpatrick v. Bloodworth*, 205 Ga. 366, 53 S.E.2d 917 (1949) (decided under former Code 1933, Ch. 2, T. 55).

Trial court erred in broadly and permanently enjoining two partners, who had been accused of wrongfully dissolving the partnership, from taking certain business actions on behalf of the partnership because the trial court failed to provide notice that the court was considering an award of preliminary and permanent injunctive relief prior to the hearing. *Petrakopoulos v. Vranas*, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

Manifest abuse of trial court's discretion found. — In a cause of action involving a dispute between joint venturers, the trial court manifestly abused the court's discretion in granting a temporary injunction which prohibited the plaintiff from engaging in any act which would have the effect of contesting the voting rights of investors in plaintiff's member entities, when those investors wanted to use the votes to gain control of the plaintiff and dismiss the lawsuit. The injunction did not maintain the status quo and failed to balance the equities of the parties properly. *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 658 S.E.2d 619 (2008).

Order denying interlocutory injunction held erroneous. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had

made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. *Meinhardt v. Christianson*, 289 Ga. App. 238, 656 S.E.2d 568 (2008).

2. Consolidation

Paragraph (a)(2) of this section authorizes court to make prohibitive or mandatory orders in the court's discretion, and gives the court discretion, for example, to postpone a contempt action pending a separate determination on the merits of the matter involved in the defendant's plea in abatement. *Crosby v. Greene*, 237 Ga. 56, 226 S.E.2d 739 (1976).

Consolidated hearing necessary for final determination of issues. — Trial court can grant an interlocutory injunction to preserve the status quo, but cannot make a final determination of the issues at an interlocutory hearing unless there is a consolidated hearing as authorized by paragraph (a)(2) of this section. *Miller v. Wells*, 235 Ga. 411, 219 S.E.2d 751 (1975), overruled on other grounds, *Wheatley Grading Contractors v. DFT Invs., Inc.*, 244 Ga. 663, 261 S.E.2d 614 (1979).

Grant or denial of an interlocutory injunction, as well as the affirmance thereof by the appellate court without opinion, does not establish the law of the case for a trial on the merits. *Sneakers of Cobb County v. Cobb County*, 265 Ga. 410, 455 S.E.2d 834 (1995).

Consolidation not required. — Paragraph (a)(2) of this section permits, but does not require, consolidation of a trial on the merits with hearing on the application for interlocutory injunction. *Kirk v. Hasty*, 239 Ga. 362, 236 S.E.2d 667 (1977).

Consolidation not permitted when party objects. — Trial court is not permitted to consolidate a hearing on an injunction with a hearing on the merits over the objection of one of the parties. *Brevard Fed. Sav. & Loan Ass'n v. Ford Mt., Inc.*, 261 Ga. 619, 409 S.E.2d 36 (1991); *Fontaine Condominium Ass'n v. Schnacke*, 230 Ga. App. 469, 496 S.E.2d 553 (1998).

In an action by a city to, inter alia,

compel a county tax commissioner to pay school tax receipts, a trial court erred in converting a hearing on an interlocutory injunction into a final hearing on a permanent injunction and a writ of mandamus without the proper notice under O.C.G.A. § 9-6-27(a); the commissioner was only given two days' notice and also did not consent to having any mandamus issue heard by the trial court without a jury under § 9-6-27(c) or to having the request for permanent injunctive relief under O.C.G.A. § 9-11-65(a)(2) heard at the same time. *Ferdinand v. City of Atlanta*, 285 Ga. 121, 674 S.E.2d 309 (2009).

Judgment was vacated and the case was remanded because the trial court consolidated an initial hearing on a landowner's application for an interlocutory injunction against a neighbor with a hearing on the merits of the landowner's complaint, and issued a permanent injunction in favor of the landowner over the neighbor's objection to the hearings being consolidated. *Smith v. Guest Pond Club, Inc.*, 277 Ga. 143, 586 S.E.2d 623 (2003).

Trial on merits held proper absent objection by adverse parties. — When lessors in a landlord/tenant case were on notice of the hearing on their motion for interlocutory injunction and did not object at trial to the trial judge's hearing the merits of the case at the interlocutory injunction hearing, the trial court did not err in advancing the trial on the merits without prior notice to the parties. *Wilkerson v. Chattahoochee Parks*, 244 Ga. 472, 260 S.E.2d 867 (1979).

Consolidation of hearing for an interlocutory injunction with the final hearing on the merits. — In an action to abate a nuisance and for injunctive relief against the owner and operator of a spa, the trial court did not abuse the court's discretion in advancing the trial on the merits and consolidating the trial with the hearing on the interlocutory injunction. *Kim v. State*, 272 Ga. 343, 528 S.E.2d 798 (2000).

Temporary Restraining Orders

Section to be strictly construed. — Because ex parte temporary restraining orders are harsh remedies, statutes authorizing such remedies must be strictly

Temporary Restraining Orders (Cont'd)

construed; therefore, statutory notice requirements were determined to be mandating and jurisdictional. *United Food & Com. Workers Union v. Amberjack Ltd.*, 253 Ga. 438, 321 S.E.2d 736 (1984).

Compliance with subsection (b) of this section is jurisdictional and mandatory. *Board of Comm'rs v. Allgood*, 234 Ga. 9, 214 S.E.2d 522 (1975).

Requirements of subsection (b) of this section are jurisdictional and unless the movant or applicant complies with such conditions precedent for granting a restraining order without notice to the opposite party as are set forth therein, the judge to whom the application is made acquires no jurisdiction to issue such order. *Mar-Pak Mich., Inc. v. Pointer*, 226 Ga. 189, 173 S.E.2d 206 (1970).

While subsection (b) of this section does not specifically use the word "jurisdiction," the statute's language is not subject to any interpretation other than that the statute denies authority to the judges of the superior courts to issue ex parte restraining orders unless it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to an applicant before notice can be served and a hearing had thereon. *Mar-Pak Mich., Inc. v. Pointer*, 226 Ga. 189, 173 S.E.2d 206 (1970).

Mootness. — Because a suspect was indicted, and the case was before an assigned trial court, an order granting the suspect's motion to restrain extra-judicial statements to the media was vacated, and a new order addressing non-disclosure was entered, the media's appeal of the restraining order was moot. *AJC Gwinnett News v. Corbin*, 279 Ga. 842, 621 S.E.2d 753 (2005).

Officers' argument that a temporary restraining order (TRO) was invalid was moot because the TRO had been superseded by an interlocutory injunction, and the officers did not argue that any alleged error in entering the TRO somehow infected the interlocutory injunction, which was entered after notice to the officers and a full hearing. *Pittman v. State*, 288 Ga.

589, 706 S.E.2d 398 (2011).

Force of temporary restraining order. — Temporary restraining order granted to remain of force until hearing of application for interlocutory injunction has all the force of an injunction, until rescinded or modified by the court. *Corley v. Crompton-Highland Mills*, 201 Ga. 333, 39 S.E.2d 861 (1946) (decided under former Code 1933, Ch. 2, T. 55).

Affidavit or verified complaint required. — Restraining order is not issued in compliance with subsection (b) of this section if there is no affidavit or verified complaint making the required factual showing. *Finney v. Pan-Am. Fire & Cas. Co.*, 123 Ga. App. 250, 180 S.E.2d 253 (1971).

Grant of restraining order void when conditions precedent not complied with. — Failure of applicant to comply with conditions precedent in subsection (b) of this section for the granting of a temporary restraining order without notice renders issuance of a temporary restraining order utterly void. *Finney v. Pan-Am. Fire & Cas. Co.*, 123 Ga. App. 250, 180 S.E.2d 253 (1971).

Amendment of restraining order without notice to plaintiffs. — Any error in amending a temporary restraining order without notice to the plaintiffs is harmless when the amended order does not permit anything which the plaintiffs had sought to have enjoined. *Grafton v. Turner*, 227 Ga. 809, 183 S.E.2d 458 (1971).

County and county's employees had immunity from damages. — Employee was not entitled to damages arising out of a violation of O.C.G.A. § 9-11-65(b) in obtaining a temporary restraining order (TRO) against the employee as the county had sovereign immunity and the county manager and the county attorney had sovereign immunity in their official capacities; the county manager and the county attorney had official immunity in their individual capacities as obtaining the TRO was a discretionary action that they undertook to protect the public and workplace safety after they were advised of the employee's actions. *Wallace v. Greene County*, 274 Ga. App. 776, 618 S.E.2d 642 (2005).

Temporary restraining order valid against corporation. — Temporary restraining order entered against a corporation and the corporation's officers was not invalid because the verified complaint and the state's attorney's certification were sufficient under O.C.G.A. § 9-11-65 to show that immediate and irreparable injury would result unless relief was granted before the officers could be heard in opposition and why notice would not be required. *Pittman v. State*, 288 Ga. 589, 706 S.E.2d 398 (2011).

Automatic dissolution of temporary restraining order is not an appealable judgment. *Clements v. Kushinka*, 233 Ga. 273, 210 S.E.2d 804 (1974).

Dissolution only appealable when heard on merits. — Issue of dissolution of a temporary restraining order must have been heard and determined on its merits before a judgment dissolving or refusing to dissolve the restraining order is subject to interlocutory appeal. *Clements v. Kushinka*, 233 Ga. 273, 210 S.E.2d 804 (1974).

Temporary protective order obtained under the Family Violence Act was not subject to the 30-day expiration period applicable to temporary restraining orders. *Carroll v. State*, 224 Ga. App. 543, 481 S.E.2d 562 (1997).

Late perfection of service. — Fact that service is not perfected on a party until four days after a temporary restraining order has been issued does not divest the trial court of jurisdiction when the statutory requirements of O.C.G.A. § 9-11-65 have been met. *Stewart v. McLean*, 252 Ga. 455, 314 S.E.2d 439 (1984).

Form and Scope of Injunctions and Restraining Orders

Applicability of specificity requirement of subsection (d). — Specificity requirement of subsection (d) of O.C.G.A. § 9-11-65 applies equally to mandated acts and acts of restraint. *Caring Hands, Inc. v. Department of Human Resources*, 214 Ga. App. 853, 449 S.E.2d 354 (1994), appeal dismissed, appeal after remand, 222 Ga. App. 608, 475 S.E.2d 660 (1996).

Personal care home could not be held in contempt for failure to comply with an

order to relocate residents from its premises which failed to set forth a reasonably detailed plan for the relocation and a reasonable time limit for the relocation. *Caring Hands, Inc. v. Department of Human Resources*, 214 Ga. App. 853, 449 S.E.2d 354 (1994), appeal dismissed, appeal after remand, 222 Ga. App. 608, 475 S.E.2d 660 (1996).

Party is bound by restraining order of which a party has notice, despite the fact that personal service of the order upon the party may have been defective in some respect. *Cameron v. Richards*, 246 Ga. 231, 271 S.E.2d 146 (1980).

Duty of defendant to determine meaning of order. — If the defendant is in doubt as to what acts the defendant may or may not do under an order granted pursuant to subsection (d) of this section, the defendant should request modification or construction of the statute's terms; if the defendant proceeds under the defendant's own construction, the defendant does so at the defendant's own peril. *General Teamsters Local 528 v. Allied Foods, Inc.*, 228 Ga. 479, 186 S.E.2d 527 (1971), cert. denied, 405 U.S. 1041, 92 S. Ct. 1313, 31 L. Ed. 2d 582 (1972).

City of Atlanta's argument that the permanent injunction issued against the city lacked specificity pursuant to O.C.G.A. § 9-11-65(d), despite the fact that the city later withdrew a motion seeking the trial court's clarification of the injunction, failed as the motion for clarification in the trial court was the proper procedure. *City of Atlanta v. S. States Police Benevolent Ass'n*, 276 Ga. App. 446, 623 S.E.2d 557 (2005).

Subsection (d) of O.C.G.A. § 9-11-65 requires a specific description of the property or assets which are the subject of the injunction to appear on the face of the order. *Hendrix v. Hendrix*, 254 Ga. 662, 333 S.E.2d 596 (1985).

Injunctive order which refers to the complaint for its sole description of the property which the defendant is restrained from encumbering or conveying attempts an impermissible incorporation by reference. *Hendrix v. Hendrix*, 254 Ga. 662, 333 S.E.2d 596 (1985).

Injunction improper when order not specific in terms. — Trial court's

Form and Scope of Injunctions and Restraining Orders (Cont'd)

injunction ordering that a former employee be enjoined perpetually from disclosing the trade secrets of a former employer was improper because of the undefined term “trade secrets” which violated the requirement of O.C.G.A. § 9-11-65 that every injunction order be specific in the order’s terms. *Ward v. Process Control Corp.*, 247 Ga. 583, 277 S.E.2d 671 (1981); *Sanford v. RDA Consultants Ltd.*, 244 Ga. App. 308, 535 S.E.2d 321 (2000).

With regard to the disclosure of proprietary information, the trial court’s order which granted an employer an interlocutory injunction enforcing non-solicitation and non-disclosure clauses against an employee lacked the specificity mandated by O.C.G.A. § 9-11-65(d) as the trial court’s order lacked sufficient detail to fully apprise the employee of which materials could not be used or disclosed. *Pregler v. C&Z, Inc.*, 259 Ga. App. 149, 575 S.E.2d 915 (2003).

Order enjoining the construction of a cell phone tower on leased property was vacated because the order did not comply with O.C.G.A. § 9-11-65(d) by describing the property subject to the injunction in reasonable detail; O.C.G.A. § 9-11-65(d) was to be strictly applied in the context of interests in land, and the order’s attempt to describe the property subject to the injunction by making reference to a lease attempted an impermissible incorporation by reference. *Verticality, Inc. v. Warnell*, 282 Ga. App. 873, 640 S.E.2d 369 (2006).

Details of injunctive order need not reveal trade secrets. — O.C.G.A. § 9-11-65 does not require that a trial court’s injunction against the disclosure of a trade secret itself disclose the trade secret; rather, the trial court’s injunction need only include a general description of the trade secret sought to be protected. *Ward v. Process Control Corp.*, 247 Ga.

583, 277 S.E.2d 671 (1981).

Nature of reasonable detail. — Trial court’s injunction against property owners who refused to allow a power company access to conduct surveys for a planned electrical transmission line was proper because the injunction was in “reasonable” detail when the injunction specified the land affected and the acts that the property owners were not to interfere with. *Bearden v. Ga. Power Co.*, 262 Ga. App. 550, 586 S.E.2d 10 (2003).

Preservation of marital asset. — In divorce proceedings, a trial court was within the court’s discretion under O.C.G.A. § 9-11-65(e) to order that a former wife pay the amount remaining from a line of credit the wife took out on the parties’ marital residence into the court registry as evidence was presented that the wife had been dissipating a significant marital asset without notice to the former husband. *Hunter v. Hunter*, 289 Ga. 9, 709 S.E.2d 263 (2011).

Trial court could enjoin non-parties over whom court lacked personal jurisdiction. — Trial court did not err in enjoining property managers who were the defendants in a suit involving a property management agreement from pursuing a suit regarding the same agreement in Virginia. Under O.C.G.A. § 9-11-65(d), the injunction also properly reached the defendants’ associated entities over whom the trial court lacked personal jurisdiction. *Am. Mgmt. Servs. East, LLC v. Fort Benning Family Cmtys., LLC*, 313 Ga. App. 124, 720 S.E.2d 377 (2011), cert. denied, No. S12C0630, 2012 Ga. LEXIS 386 (Ga. 2012).

Since the owner of the lot on which the road existed was in concert with the property owner and had notice of the action and the judgment entered against it, the trial court’s injunction against the lot owner, who was not a party to the action, was valid. *S-D Rira, LLC v. Outback Prop. Owners’ Ass’n*, No. A14A1307, 2014 Ga. App. LEXIS 813 (Nov. 21, 2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Injunctions, §§ 7, 243, 244, 249, 256, 257, 261 et seq., 276, 277, 280, 282 et seq., 299 et seq., 308, 331, 332.

Am. Jur. Pleading and Practice Forms. — 14A Am. Jur. Pleading and Practice Forms, Injunctions, §§ 4, 105, 116, 152.

C.J.S. — 35B C.J.S., Federal Civil Procedure, §§ 1048, 1342, 1343, 1345. 43A C.J.S., Injunctions, §§ 8, 20 et seq., 121, 122, 226, 227, 232, 239, 240, 244 et seq., 259, 260, 263, 265 et seq., 280 et seq., 289, 309, 310, 368 et seq., 402 et seq.

ALR. — Right of state or federal court to protect litigants by enjoining proceedings in bankruptcy, 32 ALR 979.

May suit for injunction against a non-resident rest upon constructive service or service out of state, 69 ALR 1038.

When preliminary order or temporary injunction deemed to have been dissolved within contemplation of statute providing for recovery of damages where injunction is dissolved, 123 ALR 1235.

Constitutionality of statute or practice requiring or authorizing temporary restraining order or injunction without notice, 152 ALR 168.

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.

Furnishing of bond as prerequisite to issuance of temporary restraining order, 73 ALR2d 854.

Dismissal of injunction action or bill without prejudice as breach of injunction bond, 91 ALR2d 1312.

Period for which damages are recoverable or are computed under injunction bond, 95 ALR2d 1190.

Who, under Federal Rule 65(d) and state counterparts, are persons "in active concert or participation" with parties to action so as to be bound by order granting an injunction, 97 ALR2d 490.

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.

9-11-66. Receivers.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. (Ga. L. 1966, p. 609, § 66.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 66, and annotations pertaining thereto, see 28 U.S.C.

JUDICIAL DECISIONS

Voluntary dismissal of complaint does not automatically discharge receiver who has qualified and taken possession of funds as once a receiver has been appointed, the receiver cannot be

dismissed except by order of court. *Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co.*, 233 Ga. 970, 213 S.E.2d 897, later appeal, 235 Ga. 503, 220 S.E.2d 130 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, §§ 15 et seq., 32, 36 et seq. 65 Am. Jur. 2d, Receivers, §§ 78 et seq., 116 et seq.

C.J.S. — 27 C.J.S., Dismissal and Nonsuit, § 11. 35A C.J.S., Federal Civil Pro-

cedure, § 64. 35B C.J.S., Federal Civil Procedure, § 757.

ALR. — Right to bring action against corporation, or prosecute pending action, as affected by the appointment of a receiver for the corporation, 8 ALR 441.

9-11-67. Deposit in court.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing to be held by the clerk of the court, subject to withdrawal, in whole or in part, at any time thereafter upon order of the court, upon posting of sufficient security. Where the thing deposited is money, interest thereupon shall abate. (Ga. L. 1966, p. 609, § 67.)

Cross references. — Recovery of interest upon damages for breach of contract, § 13-6-13.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 67, and

annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004).

JUDICIAL DECISIONS

Prejudgment and postjudgment interest. — In a contract action, a party was not entitled to prejudgment and postjudgment interest when deposits were made pursuant to the requirements of O.C.G.A. § 9-11-67. *Sacha v. Coffee Butler Serv., Inc.*, 215 Ga. App. 280, 450 S.E.2d 704 (1994).

Unconditional deposit required to relieve defendant from liability. — Check deposited in the clerk's office without leave of court, which was made out to the plaintiffs with an endorsement that "the undersign [sic] payees accept the amount of this payment in full satisfaction of all claims against drawer to property located at [the premises in issue]," failed to comply with the requirements of O.C.G.A. § 9-11-67 because it attempted to impose conditions on its acceptance, thereby rendering the money unavailable to the plaintiffs for withdrawal. Thus, the deposit did not relieve the defendant from all liability for postjudgment interest on the sums deposited in the court, and the trial court did not err by entering judgment therefor. *Gunnin v. Parker*, 198 Ga. App. 864, 403 S.E.2d 822, cert. denied, 198 Ga. App. 897, 403 S.E.2d 822 (1991).

Failure to deposit funds into registry. — Since the county in a condemnation proceeding did not deposit funds into the

registry as required by a consent decree, the requirements of the statute were not complied with; therefore, the trial court did not have authority to abate prejudgment interest by making the court's order retroactive to the date of the consent decree. *Threatt v. Forsyth County*, 250 Ga. App. 838, 552 S.E.2d 123 (2001).

Violation by attorney deemed contempt. — When, in a divorce proceeding, the husband's attorney violated O.C.G.A. § 9-11-67 and pertinent court rules, the court properly awarded attorney's fees paid to the wife personally by the husband's attorney either on the basis that the actions of the latter constituted contempt, or as a sua sponte award of attorney's fees. *Cohen v. Feldman*, 219 Ga. App. 90, 464 S.E.2d 237 (1995), overruled on other grounds by *Williams v. Cooper*, 280 Ga. 145, 625 S.E.2d 754 (2006).

Cited in *Hudson v. Omaha Indem. Co.*, 183 Ga. App. 847, 360 S.E.2d 406 (1987); *Cheeks v. Novatel Carcom, Inc.*, 200 Ga. App. 664, 409 S.E.2d 229 (1991); *Great S. Midway, Inc. v. Hughes*, 223 Ga. App. 643, 478 S.E.2d 400 (1996); *Threatt v. Forsyth County*, 262 Ga. App. 186, 585 S.E.2d 159 (2003); *Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC*, 262 Ga. App. 457, 585 S.E.2d 643 (2003); *Sanders v. Riley*, 296 Ga. 693, 770 S.E.2d 570 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Deposits in Court, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Deposits In Court, § 1 et seq.

C.J.S. — 26B C.J.S., Deposits in Court, § 1 et seq. 35B C.J.S., Federal Civil Procedure, § 1153.

ALR. — Who bears loss of funds held by third person, or deposited in court, awaiting outcome of litigation, 2 ALR 463.

Liability of clerk of court or his bond for money paid into his hands by virtue of his office, 59 ALR 60.

9-11-67.1. Settlement offers and agreements for personal injury, bodily injury, and death from motor vehicle; payment methods.

(a) Prior to the filing of a civil action, any offer to settle a tort claim for personal injury, bodily injury, or death arising from the use of a motor vehicle and prepared by or with the assistance of an attorney on behalf of a claimant or claimants shall be in writing and contain the following material terms:

(1) The time period within which such offer must be accepted, which shall be not less than 30 days from receipt of the offer;

(2) Amount of monetary payment;

(3) The party or parties the claimant or claimants will release if such offer is accepted;

(4) The type of release, if any, the claimant or claimants will provide to each releasee; and

(5) The claims to be released.

(b) The recipients of an offer to settle made under this Code section may accept the same by providing written acceptance of the material terms outlined in subsection (a) of this Code section in their entirety.

(c) Nothing in this Code section is intended to prohibit parties from reaching a settlement agreement in a manner and under terms otherwise agreeable to the parties.

(d) Upon receipt of an offer to settle set forth in subsection (a) of this Code section, the recipients shall have the right to seek clarification regarding terms, liens, subrogation claims, standing to release claims, medical bills, medical records, and other relevant facts. An attempt to seek reasonable clarification shall not be deemed a counteroffer.

(e) An offer to settle made pursuant to this Code section shall be sent by certified mail or statutory overnight delivery, return receipt requested, and shall specifically reference this Code section.

(f) The person or entity providing payment to satisfy the material term set forth in paragraph (2) of subsection (a) of this Code section may elect to provide payment by any one or more of the following means:

- (1) Cash;
- (2) Money order;
- (3) Wire transfer;
- (4) A cashier's check issued by a bank or other financial institution;
- (5) A draft or bank check issued by an insurance company; or
- (6) Electronic funds transfer or other method of electronic payment.

(g) Nothing in this Code section shall prohibit a party making an offer to settle from requiring payment within a specified period; provided, however, that such period shall be not less than ten days after the written acceptance of the offer to settle.

(h) This Code section shall apply to causes of action for personal injury, bodily injury, and death arising from the use of a motor vehicle on or after July 1, 2013. (Code 1981, § 9-11-67.1, enacted by Ga. L. 2013, p. 860, § 1/HB 336.)

Effective date. — This Code section became effective July 1, 2013.

Cross references. — Cause of action for physical injury, § 51-1-13. Separate causes of action for personal injury and property damage caused by motor vehicle,

§ 51-1-32. Duty of care of operator of motor vehicle to passengers, § 51-1-36.

Law reviews. — For article on the 2013 enactment of this Code section, see 30 Ga. St. U.L. Rev. 39 (2013).

9-11-68. Offers of settlement; damages for frivolous claims or defenses.

(a) At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:

- (1) Be in writing and state that it is being made pursuant to this Code section;
- (2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

(3) Identify generally the claim or claims the proposal is attempting to resolve;

(4) State with particularity any relevant conditions;

(5) State the total amount of the proposal;

(6) State with particularity the amount proposed to settle a claim for punitive damages, if any;

(7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and

(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

(b)(1) If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.

(2) If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf from the date of the rejection of the offer of settlement through the entry of judgment.

(c) Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree, but an offeror shall not be entitled to attorney's fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least 30 days (unless it is rejected during that 30 day period). A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under this Code section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and costs under this Code section.

(d)(1) The court shall order the payment of attorney's fees and expenses of litigation upon receipt of proof that the judgment is one

to which the provisions of either paragraph (1) or paragraph (2) of subsection (b) of this Code section apply; provided, however, that if an appeal is taken from such judgment, the court shall order payment of such attorney's fees and expenses of litigation only upon remittitur affirming such judgment.

(2) If a party is entitled to costs and fees pursuant to the provisions of this Code section, the court may determine that an offer was not made in good faith in an order setting forth the basis for such a determination. In such case, the court may disallow an award of attorney's fees and costs.

(e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the finder of fact determine whether the opposing party presented a frivolous claim or defense. In such event, the court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses. Under this subsection:

(1) Frivolous claims shall include, but are not limited to, the following:

(A) A claim, defense, or other position that lacks substantial justification or that is not made in good faith or that is made with malice or a wrongful purpose, as those terms are defined in Code Section 51-7-80;

(B) A claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position; and

(C) A claim, defense, or other position that was interposed for delay or harassment;

(2) Damages awarded may include reasonable and necessary attorney's fees and expenses of litigation; and

(3) A party may elect to pursue either the procedure specified in this subsection or the procedure specified in Code Section 9-15-14, but not both. (Code 1981, § 9-11-68, enacted by Ga. L. 2005, p. 1, § 5/SB 3; Ga. L. 2006, p. 589, § 1/HB 239.)

Editor's notes. — Ga. L. 2005, p. 1, § 1/SB 3, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hos-

pitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is

the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Law reviews. — For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see

57 Mercer L. Rev. 381 (2005). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For annual survey on administrative law, see 66 Mercer L. Rev. 1 (2014). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

For note, "The Swift, Silent Sword Hiding in the (Defense) Attorney's Arsenal: The Inefficacy of Georgia's New Offer of Judgment Statute as Procedural Tort Reform," see 40 Ga. L. Rev. 995 (2006).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 9-11-68(b)(1) does not merely prescribe the methods of enforcing rights and obligations, but rather affects the rights of parties by imposing an additional duty and obligation to pay an opposing party's attorney fees when a final judgment does not meet a certain amount or is one of no liability; by creating this new obligation, the statute operates as a substantive law, which is unconstitutional under Ga. Const. 1983, Art. I, Sec. I, Para. X, given the statute's retroactive effect to pending cases. *Fowler Props. v. Dowland*, 282 Ga. 76, 646 S.E.2d 197 (2007).

Trial court clearly erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, impeded access to the courts and violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, because Ga. Const. 1983, Art. I, Sec. I, Para. XII was never intended to provide a right of access to the courts, but was intended to provide only a right of choice between self-representation and representation by counsel; § 9-11-68(b)(1) does not deny litigants access to the courts but simply sets forth certain circumstances under which attorney's fees can be recoverable and, therefore, even if a con-

stitutional right of access to the courts provision did exist, the provision would not be applicable. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Trial court erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, since the court permitted the recovery of attorney's fees absent the prerequisite showings of either O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11, because there was no constitutional requirement that attorney's fees be awarded only pursuant to § 9-15-14 or § 13-6-11; in Georgia, attorney's fees are recoverable when authorized by some statutory provision or by contract, and § 9-11-68 is such a statutory provision authorizing the recovery of attorney's fees under specific circumstances. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Tort Reform Act of 2005, O.C.G.A. § 9-11-68, does not violate the uniformity clause of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because § 9-11-68 is a general law since the statute applies uniformly throughout the state to all tort cases; the purpose of the general law to encourage litigants in

tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation is a legitimate legislative purpose, consistent with the state's strong public policy of encouraging negotiations and settlements, and the fact that the statute applies to tort cases, but not other civil actions, does not render the statute an impermissible special law. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Purpose. — Clear purpose of O.C.G.A. § 9-11-68 is to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation. *Canton Plaza, Inc. v. Regions Bank, Inc.*, 325 Ga. App. 361, 749 S.E.2d 825 (2013).

Construction with other law. — Upon a proper appeal from a final order, while neither former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702) nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, a right to dismiss voluntarily without prejudice would be meaningless if doing so would trigger the payment of the defendant's attorney fees. *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007), cert. denied, No. S07C1602, 2007 Ga. LEXIS 656 (Ga. 2007).

Retroactive application of statute proper. — Trial court did not err when the court applied the 2006 version of O.C.G.A. § 9-11-68 in the property owners' action against the builders because, inasmuch as the owners did not obtain any judgment amount in the owners' favor, it did not matter whether the original or amended version of the statute was applied, or whether the amendment was substantive or procedural in nature; under either version of the statute the owners were liable for the builders' reasonable fees and expenses from the date the offer of settlement was rejected. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

Applicable to case filed after enactment despite injury predating effective date. — Georgia's offer of settlement statute, O.C.G.A. § 9-11-68, applied to a negligence action in which the injury occurred prior to the effective date of the statute because the action was filed after that date; although § 9-11-68 involved substantial rights and could only apply prospectively, the statute only related to rights arising within the litigation; as a result, *L. P. Gas Industrial Equipment Co. v. Burch*, 306 Ga. App. 156, 701 S.E.2d 602 (2010) is overruled. *Crane Composites, Inc. v. Wayne Farms, LLC*, 296 Ga. 271, 765 S.E.2d 921 (2014).

Preemption. — Fed. R. Civ. P. 68 did not preempt O.C.G.A. § 9-11-68 because the two were not in direct collision, and there was no reason to believe § 9-11-68 could not be applied in harmony with Rule 68 and, also, because § 9-11-68 was substantive in nature and did not conflict with Rule 68, the Georgia statute was not preempted by the federal rule. *Wheatley v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008).

Challenge to statute did not require service on Attorney General. — Because a personal injury plaintiff challenging the constitutionality of O.C.G.A. § 9-11-68(d) was not required by Georgia law to serve the Attorney General with notice of the action, an order granting the defendants' motion for attorney fees under § 9-11-68(d) was reversed. *Buchan v. Hobby*, 288 Ga. App. 478, 654 S.E.2d 444 (2007).

Provision not retroactive. — Plaintiffs in a medical malpractice and contract case were not entitled to attorney's fees because the plaintiffs did not specifically plead O.C.G.A. § 13-6-11 and did not allege any bad faith by a doctor and clinic. Further, claims for fees under O.C.G.A. § 9-11-68 were properly dismissed on directed verdict because the statute was not in effect at the time the complaint was filed; because the statute added duties and obligations, the statute could not be retroactive. *Morrison v. Mann*, No. 07-11294, 2008 U.S. App. LEXIS 6772 (11th Cir. Mar. 26, 2008) (Unpublished).

Statute had no application as statute became effective during pen-

dency of litigation. — Because O.C.G.A. § 9-11-68 did not apply as the statute became effective during the pendency of the litigation, because the trial court failed to include specific findings of fact to support an award of attorney's fees and costs of litigation under O.C.G.A. § 9-15-14, and because neither the first driver nor the first driver's attorney were afforded an opportunity to be heard before sanctions were imposed, the trial court erred in awarding the second driver attorney's fees and costs of litigation. *Olarsch v. Newell*, 295 Ga. App. 210, 671 S.E.2d 253 (2008).

Because O.C.G.A. § 9-11-68 was not in effect when an action a husband and wife filed against a company accrued, the couple was not entitled to a benefit conferred on the plaintiffs by the statute, which was the right to recover the couple's own attorney's fees and expenses of litigation if the company had rejected the couple's settlement demand and if the couple had obtained a final judgment in an amount greater than 125 percent of such offer of settlement. *L. P. Gas Indus. Equip. Co. v. Burch*, 306 Ga. App. 156, 701 S.E.2d 602 (2010).

Trial court did not err in denying a company's motion pursuant to O.C.G.A. § 9-11-68 to recover the attorney fees and expenses of litigation the company incurred after a husband and wife rejected the company's settlement offer because § 9-11-68 was inapplicable. O.C.G.A. § 9-11-68(b) operated as a substantive law, and it was not yet in effect when the substantive rights of the husband and wife became fixed; thus, the couple was entitled to seek compensation in tort from the company, free from any duty and obligation to pay attorney fees if the couple failed to obtain a final judgment that was at least 75 percent of any offer of settlement. *L. P. Gas Indus. Equip. Co. v. Burch*, 306 Ga. App. 156, 701 S.E.2d 602 (2010).

Rejection of second offer does not negate rejection of first offer. — After an insurer made an offer of settlement to a widower and an estate administrator, the fact that the insurer made another offer of settlement, which was also rejected, did not negate the effect of the rejection of the first offer for purposes of seeking attorney

fees and costs under O.C.G.A. § 9-11-68, after a jury rendered a verdict of no liability for the insurer. *Great West Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 693 S.E.2d 99 (2010).

Settlement offer not made in good faith. — Truck driver's and owner's offer of settlement for \$ 25,000 under O.C.G.A. § 9-11-68 was not made in good faith, although ultimately a second truck driver was found 100 percent liable to the decedent, because it was a wrongful death case in which the accident would not have occurred but for the first truck driver's admitted negligence. *Great West Cas. Co. v. Bloomfield*, 313 Ga. App. 180, 721 S.E.2d 173 (2011).

Settlement offer not made in bad faith. — School's offer of judgment under O.C.G.A. § 9-11-68 to a parent to settle the parent's slander claims for \$750 was not made in bad faith; the school reasonably and correctly anticipated that the school's exposure was minimal. Similarly, the fact that the school ultimately incurred \$84,000 in fees and expenses did not preclude a finding of good faith. *Cohen v. Alfred & Adele Davis Acad., Inc.*, 310 Ga. App. 761, 714 S.E.2d 350 (2011), cert. denied, No. S11C1795, 2011 Ga. LEXIS 976 (Ga. 2011); cert. denied, 132 S. Ct. 2106, 182 L. Ed. 2d 869 (2012).

Post-judgment motions for fees does not toll the time to appeal from final judgment. — 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).

Motion for attorney's fees meritless. — That portion of the defendants' renewed motion for attorney's fees that sought attorney's fees and expenses of litigation incurred on appeal was meritless since O.C.G.A. § 9-11-68 expressly limited the award of fees and expenses to those incurred "from the date of the rejection of the offer of settlement through the entry of judgment". Wheatley v. Moe's Southwest Grill, LLC, 580 F. Supp. 2d 1324 (N.D. Ga. 2008).

Basis for denying fees and costs should be set forth in trial court's order. — In a case in which: (1) a widower and an estate administrator rejected an insurer's offer of settlement; (2) the jury later entered a verdict in favor of the insurer; and (3) the trial court denied the insurer's motion for fees and costs, remand was required because the trial court did not set forth the basis for the court's determination as required by O.C.G.A. § 9-11-68(d)(2). Great West Cas. Co. v. Bloomfield, 303 Ga. App. 26, 693 S.E.2d 99 (2010).

Court erred by failing to indicate whether court segregated fees and expenses. — Award of attorney fees and expenses under Georgia's offer of settlement statute, O.C.G.A. § 9-11-68, to a defending bank was vacated because the trial court did not indicate whether the court was able to ascertain the fees and expenses attributable to the bank's defense of plaintiffs' claims as opposed to the bank's prosecution of its unsuccessful counterclaims; thus, there was no way to determine if the trial court segregated the recoverable fees and expenses from those which were nonrecoverable. Canton Plaza, Inc. v. Regions Bank, Inc., 325 Ga. App. 361, 749 S.E.2d 825 (2013).

Award of attorney's fees and expenses proper. — In calculating a reasonable fee amount, a district court did not abuse the court's discretion in finding that the rates requested by defendant companies were reasonable since the plaintiff oil company's bare assertion that a discount should have applied to the rates simply because the defendants actually negotiated a discount on the rates of

the out-of-town lawyers the company hired was incorrect. Moreover, the district court did not abuse the court's discretion in awarding fees for hours for multiple-attorney meetings or for including time spent on unsuccessful claims. Gowen Oil Co. v. Abraham, No. 12-12354, 2013 U.S. App. LEXIS 4563 (11th Cir. Mar. 6, 2013) (Unpublished).

O.C.G.A. § 9-11-68(b)(1) allowed a defendant to recover fees and expenses incurred not only by the defendant but also "on the defendant's behalf" and, thus, the defendants' insurance did not insulate the plaintiff from the payment of legal fees and expenses under § 9-11-68. Moreover, the defendants were entitled to fees that were incurred between the entry of summary judgment and the entry of judgment. Gowen Oil Co. v. Abraham, No. 12-12354, 2013 U.S. App. LEXIS 4563 (11th Cir. Mar. 6, 2013) (Unpublished).

Franchisor showed that attorney's fees the franchisor sought under O.C.G.A. § 9-11-68(b)(1) from the date of the rejection of the offer of settlement through the entry of judgment did not duplicate any part of the settlement, which reimbursed the franchisor for other attorney's fees incurred in defending against the claims. Eaddy v. Precision Franchising, LLC, 320 Ga. App. 667, 739 S.E.2d 410 (2013).

Award of attorney's fees and expenses proper but calculation not proper. — While an inmate was entitled to attorney's fees and litigation expenses under O.C.G.A. § 9-11-68(b), the trial court erred in calculating the award based solely, as far as the record reflected, on the contingency agreement rather than on evidence of hours, rates, or other indications regarding the value of the attorneys' professional services actually rendered. Ga. Dep't of Corr. v. Couch, 295 Ga. 469, 759 S.E.2d 804 (2014).

Because a retroactive application of O.C.G.A. § 9-11-68 would have impaired the offeror's rights to recover attorney's fees and costs, the trial court did not err in applying the statute in effect at the time the offer was made. Kromer v. Bechtel, 289 Ga. App. 306, 656 S.E.2d 910 (2008).

Particularity requirement met. — Offer of settlement met the particularity

requirements of O.C.G.A. § 9-11-68(a)(4), even though acceptance of the offer required execution of a release, which was not attached to the settlement offer. *Great West Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 693 S.E.2d 99 (2010).

Particularity requirement not met.

— Because the plaintiff asserted a claim for punitive damages, and such claim was pending at the time the offer of settlement was made, the defendant was required to state with particularity the amount proposed to settle that claim, which the defendant failed to do, thus, the defendant's offer did not meet the requirements of O.C.G.A. § 9-11-68(a), and the trial court did not err in ruling that the defendant could not recover attorney fees for an offer of settlement pursuant to that Code section. *Chadwick v. Brazell*, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

Application to State of Georgia in tort claims suit.

— In a suit brought by an inmate wherein a successful jury verdict was obtained against the Georgia Department of Corrections after the inmate was injured while working on a painting detail at the warden's house, the trial court properly denied the Department's motion to dismiss based on sovereign immunity because the state waived sovereign immunity for the torts of state employees while acting within the scope of the employees' official duties in the same manner as a private individual or entity would be liable under like circumstances; thus, since the Department rejected the inmate's offer of judgment, the Department was subject to the ramifications of O.C.G.A. § 9-11-68, including attorney fees. *Ga. Dep't of Corr. v. Couch*, 322 Ga. App. 234, 744 S.E.2d 432 (2013).

Offer failed to identify claims and did not meet particularity requirement in tort case. — In a slip and fall

case, an offer of settlement under O.C.G.A. § 9-11-68 for \$1,000 was ambiguous as to whether accepting the offer required the plaintiff to relinquish the plaintiff's claims against a co-defendant, against whom the plaintiff already held a default judgment, and therefore the offer failed to comply with § 9-11-68(a)(3) and (4). The trial court therefore erred in ordering the plaintiff to pay the offeror's attorney's fees of \$24,696. *Tiller v. RJJB Assocs., LLP*, 331 Ga. App. 622, 770 S.E.2d 883 (2015).

Necessity for hearing on motion for attorney's fees.

— Trial court did not err in awarding attorney's fees and expenses of \$27,276 after a restaurant prevailed in a patron's action, pursuant to O.C.G.A. § 9-11-68; although the court suggested that a hearing was necessary under O.C.G.A. §§ 9-15-14 and 14-2-1604, in this case, the patron waived a hearing by failing to request the hearing or otherwise challenge the reasonableness of the fees sought. *Bell v. Waffle House, Inc.*, 331 Ga. App. 443, 771 S.E.2d 132 (2015).

Preservation for review. — Court of Appeals declined to address the constitutional issues raised for the first time on appeal by an offeree, and even if the issues had been raised below, jurisdiction would have been in the supreme court. *Kromer v. Bechtel*, 289 Ga. App. 306, 656 S.E.2d 910 (2008).

Because the appellees did not raise the issue that retroactive application of the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, was unconstitutional in the trial court and obtain a distinct ruling on it from that court, the issue could not be considered for the first time in the supreme court. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Cited in *Wildcat Cliffs Builders, LLC v. Hagwood*, 292 Ga. App. 244, 663 S.E.2d 818 (2008).

RESEARCH REFERENCES

ALR. — Recoverable costs under state offer of judgment rule, 34 ALR6th 431.

9-11-69. Execution; discovery in aid thereof.

Process to enforce a judgment for the payment of money shall be a writ of execution unless the court directs otherwise. In aid of the judgment or execution, the judgment creditor, or his successor in interest when that interest appears of record, may do any or all of the following:

- (1) Examine any person, including the judgment debtor by taking depositions or propounding interrogatories;
- (2) Compel the production of documents or things; and
- (3) Upon a showing of reasonable necessity, obtain permission from a court of competent jurisdiction to enter upon that part of real property belonging to or lawfully occupied by the debtor which is not used as a residence and which property is not bona fide in the lawful possession of another;

in the manner provided in this chapter for such discovery measures prior to judgment. (Ga. L. 1966, p. 609, § 69; Ga. L. 1967, p. 226, § 32; Ga. L. 1987, p. 816, § 1.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 69, and annotations pertaining thereto, see 28 U.S.C.

Law reviews. — For survey article on trial practice and procedure for the period

from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003).

For note discussing discovery proceedings available to creditors, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Purpose of this section is to aid enforcement of a judgment or execution after it has become a final determination of the issue between the parties. *McLarty v. Emhart Corp.*, 122 Ga. App. 677, 178 S.E.2d 344 (1970).

Purpose of post judgment discovery under O.C.G.A. § 9-11-69 is to aid a litigant to recover on a liability which has been established by a judgment. *Miller v. United States Shelter Corp.*, 179 Ga. App. 469, 347 S.E.2d 251 (1986).

Post-judgment discovery procedures have for their purpose identifying assets to satisfy the judgment. *Fleming v. Busey*, 153 Ga. App. 489, 265 S.E.2d 839 (1980).

Allowable questions. — Any question which would lead to any property or sources of income of judgment debtor is pertinent and allowable. *Fleming v.*

Busey, 153 Ga. App. 489, 265 S.E.2d 839 (1980); *Miller v. United States Shelter Corp.*, 179 Ga. App. 469, 347 S.E.2d 251 (1986).

There is no territorial limitation in discovery statutes as to location of witnesses, documents, assets, etc. *Thrift v. Vi-Vin Prods., Inc.*, 134 Ga. App. 717, 215 S.E.2d 709 (1975).

Service by mail. — “In the manner provided in this chapter” includes service by mail upon counsel pursuant to O.C.G.A. § 9-11-5(b), such that the trial court erred in dismissing the plaintiff’s pleadings. *Clinton Leasing Corp. v. Patterson*, 209 Ga. App. 336, 433 S.E.2d 422 (1993).

Inapplicability of privilege as to matters working forfeiture. — Defendant is not privileged to refuse to answer on grounds that an answer would cause a

forfeiture of the defendant's estate and interfere with the defendant's right to earn a living. *Aldridge v. Mercantile Nat'l Bank*, 132 Ga. App. 788, 209 S.E.2d 234 (1974).

Privilege as to matters tending to work a forfeiture of an estate was inapplicable to post-judgment discovery proceedings geared toward uncovering or identifying assets to satisfy the judgment as the forfeiture did not result from answering questions or producing documents, but rather, results from a judgment already entered. *Kushner v. Mascho*, 143 Ga. App. 801, 240 S.E.2d 290 (1977).

Post-judgment discovery held only proper procedure. — In action brought by bank against corporation seeking recovery on several notes and trade acceptances, as well as to recover an overdraft on a checking account, the trial court was without authority to direct the appellants, sole stockholders in the corporation, to either return all collateral to the premises of the corporation or to provide a list of the equipment; the proper procedure for obtaining such information is by post-judgment discovery in aid of execution, pursuant to O.C.G.A. § 9-11-69, and the appellee's contention that the order to provide a list was authorized pursuant to the trial court's inherent power to issue orders necessary to the exercise of the court's jurisdiction was without merit. *Ponderosa Granite Co. v. First Nat'l Bank*, 173 Ga. App. 105, 325 S.E.2d 591 (1984).

Court may impose sanctions for failure to comply with post-judgment discovery orders, including contempt for not appearing at a deposition, notwithstanding the fact that the person to be deposed is a nonresident, although there is apparently no provision for the aggrieved party to move for a dismissal of an appeal. *Ostroff v. Coyner*, 187 Ga. App. 109, 369 S.E.2d 298 (1988).

Use of privilege against self-incrimination. — When interrogatories in *fiat* facias do not constitute or evidence extensive questioning as to the judgment debtor's financial affairs which would tend, as a matter of law, to incriminate the debtor, work a forfeiture of the debtor's estate, or bring disgrace or infamy upon the debtor or the debtor's fam-

ily, but are clearly within the ambit of O.C.G.A. § 9-11-69, the burden is on the debtor to state the general reason for the debtor's refusal to answer and to specifically establish that a real danger of incrimination exists with respect to each question. *Petty v. Chrysler Credit Corp.*, 169 Ga. App. 418, 312 S.E.2d 874 (1984).

Scope includes nonparties. — Plain language of paragraph (1) of O.C.G.A. § 9-11-69 works an express expansion of the permissible use of post-judgment written interrogatories to any person, regardless of whether the person is a party to the underlying action in which the money judgment was rendered. *Esasky v. Forrest*, 231 Ga. App. 488, 499 S.E.2d 413 (1998).

Impleader of persons not parties to the underlying judgment not permitted. — O.C.G.A. § 9-11-69 does not authorize a judgment creditor to implead and hold liable persons who were not parties to the underlying judgment. *C-Staff, Inc. v. Liberty Mut. Ins. Co.*, 275 Ga. 624, 571 S.E.2d 383 (2002).

O.C.G.A. § 9-11-69 did not authorize a judgment creditor to implead and hold liable persons who were not parties to the underlying judgment; a judgment creditor must initiate a separate civil action against persons the creditor claims are liable for a judgment to which they were not parties by filing a complaint and serving the defendants under the procedures set forth in the Civil Practice Act, see O.C.G.A. Ch. 11, T. 9. *Pazur v. Belcher*, 272 Ga. App. 456, 612 S.E.2d 481 (2004).

O.C.G.A. § 9-11-69 did not authorize a judgment creditor to implead and hold liable persons who were not parties to the underlying judgment; instead, the judgment-creditor had to initiate a separate civil action against persons the judgment-creditor claims were liable for a judgment to which they were not parties. However, in the instant case, the plaintiff judgment creditors were not seeking to hold the defendant transferee liable for the consent judgment, only to avoid an allegedly fraudulent transfer. *Reyes-Fuentes v. Shannon Produce Farm, Inc.*, No. 6:08-cv-59, 2012 U.S. Dist. LEXIS 61739 (S.D. Ga. May 2, 2012).

Action against shareholder for piercing corporate veil. — Employer's

complaint alleged against one of the employer's shareholders for piercing the corporate veil was not subject to a seven-year statute of limitations under O.C.G.A. § 9-12-60 as the employee failed to first obtain a judgment against the employer and then file a separate action to pierce the corporate veil, but instead filed an amended complaint against that shareholder over six years after the original complaint was filed. *Pazur v. Belcher*, 272 Ga. App. 456, 612 S.E.2d 481 (2004).

Scope includes spouse of debtor. — Spouse of a judgment debtor is within the scope of the post-judgment discovery process, subject to the limitations created by the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, provisions governing discovery generally. *In re Callaway*, 212 Ga. App. 500, 442 S.E.2d 309 (1994).

Non-party spouse. — Non-party spouse of a judgment debtor is within the scope of post-judgment discovery, including post-judgment interrogatories. *Esasky v. Forrest*, 231 Ga. App. 488, 499 S.E.2d 413 (1998).

No supplementary proceedings against non-parties. — District court erred when the court granted judgment-creditor's motion to commence supplementary proceedings against various third parties because in Georgia a judgment-creditor had to initiate a separate civil action against persons it claimed were liable for a judgment if they were not parties to the underlying action which granted the judgment. *Liberty Mut. Ins. Co. v. C-Staff, Inc.*, 318 F.3d 1052 (11th Cir. 2003).

Cited in *Tennessee, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977); *Johnson v. Heifler*, 149 Ga. App. 860, 256 S.E.2d 143 (1979); *Custom Form Mfg. Co. v. Miller*, 157 Ga. App. 410, 278 S.E.2d 69 (1981); *Chambers v. McDonald*, 161 Ga. App. 380, 288 S.E.2d 641 (1982); *Georgia Farm Bldgs., Inc. v. Willard*, 170 Ga. App. 327, 317 S.E.2d 229 (1984); *Grant v. Newsome*, 201 Ga. App. 710, 411 S.E.2d 796 (1991); *Threatt v. Forsyth County*, 262 Ga. App. 186, 585 S.E.2d 159 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Creditor's Bills, §§ 3, 31. 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 530 et seq.

C.J.S. — 26B C.J.S., Depositions, § 28 et seq. 27 C.J.S., Discovery, § 74 et seq. 33 C.J.S., Executions, §§ 4 et seq., 529, 530. 35B C.J.S., Federal Civil Procedure, §§ 1303, 1319 et seq.

ALR. — Judgment in replevin as implying a direction for return of property, 144 ALR 1149.

Sufficiency and timeliness of notice by indemnitee to indemnitor of action by third person, 73 ALR2d 504.

9-11-70. Judgment for specific acts; vesting title.

A decree for specific performance shall operate as a deed to convey land or other property without any conveyance being executed by the vendor. The decree, certified by the clerk, shall be recorded in the registry of deeds in the county where the land lies and shall stand in the place of a deed. In all other cases where a judgment directs a party to perform other specific acts and the party fails to comply within the time specified, the court may direct the acts to be done at the cost of the disobedient party by some other person appointed by the court; and acts when so done have like effect as if done by the party. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and

vesting it in others; and the judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon oral or written application to the clerk. (Ga. L. 1966, p. 609, § 70.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 70, and annotations pertaining thereto, see 28 U.S.C.

JUDICIAL DECISIONS

Divorce decree placing title to property in wife is just as valid as deed from husband would have been. *Elrod v. Elrod*, 231 Ga. 222, 200 S.E.2d 885 (1973).

Decree granting a life estate in property took precedence over quitclaim deed. — Husband's quitclaim deed of property to his second wife did not take priority over a recorded divorce decree stating that the husband had only a life estate in the property with his two children from his first marriage as remaindermen. *Price v. Price*, 286 Ga. 753, 692 S.E.2d 601 (2010).

Definite description of property required. — Decree for specific performance operates as a deed and should therefore contain a description as definite as that required to support a deed. *Plantation Land Co. v. Bradshaw*, 232 Ga. 435, 207 S.E.2d 49 (1974); *Scheinfeld v. Murray*, 267 Ga. 622, 481 S.E.2d 194 (1997).

Because there was no clear identification of the land to be conveyed in a parents' divorce settlement, their son was not

entitled to a decree of specific performance under O.C.G.A. § 9-11-70. *Haffner v. Davis*, 290 Ga. 753, 725 S.E.2d 286 (2012).

Suit for specific performance is prematurely brought when time for performance has not yet arrived. *Kirkland v. Morris*, 233 Ga. 597, 212 S.E.2d 781 (1975).

Superior court order reconveying land to a vendor under an option to repurchase is not one of specific performance and does not act as a deed to convey when the order makes the reconveyance of the land contingent on a sum of money being paid into the court registry. The court's order does not become a decree of specific performance until the contingency is met. *Nelson v. Smothers*, 168 Ga. App. 120, 308 S.E.2d 239 (1983).

Cited in *McMichael Realty & Ins. Agency, Inc. v. Tysinger*, 155 Ga. App. 131, 270 S.E.2d 88 (1980); *Bootery, Inc. v. Cumberland Creek Properties, Inc.*, 271 Ga. 271, 517 S.E.2d 68 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, Specific Performance, § 134 et seq.

C.J.S. — 35B C.J.S., Federal Civil Procedure, §§ 1307, 1309. 81A C.J.S., Specific Performance, §§ 1 et seq., 128 et seq.

ALR. — Rights and remedies respecting improvements made in reliance on a decree or order as to title or possession of real property which is subsequently reversed, 30 ALR 936.

Reversal as affecting purchase of property involved in suit, pending appeal without supersedeas, 36 ALR 421.

Inability to comply with judgment or order as defense to charge of contempt, 120 ALR 703.

Judgment in replevin as implying a direction for return of property, 144 ALR 1149.

ARTICLE 9
GENERAL PROVISIONS

9-11-71 through 9-11-77. Reserved.

9-11-78. Motion days.

Unless local conditions make it impracticable, each court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as is reasonable may make orders for the advancement, conduct, and hearing of actions. (Ga. L. 1966, p. 609, § 78.)

Cross references. — Motions in civil actions, hearing, Uniform Superior Court Rules, Rule 6.3.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 78, see 28 U.S.C.

JUDICIAL DECISIONS

Permissible not to require oral argument hearing unless requested. — When O.C.G.A. §§ 9-11-56(c), 9-11-78, and 9-11-83 are considered in conjunction, it is permissible for court rules to provide that an oral argument hearing is not required unless the party requests a hear-

ing. *Dallas Blue Haven Pools, Inc. v. Taslimi*, 180 Ga. App. 734, 350 S.E.2d 265 (1986), *aff'd*, 256 Ga. 739, 354 S.E.2d 160 (1987).

Cited in *McKinnon v. Trivett*, 136 Ga. App. 59, 220 S.E.2d 63 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, *Motions, Rules, and Orders*, §§ 8, 25.

C.J.S. — 35A C.J.S., *Federal Civil Pro-*

cedure, § 428 et seq. 60 C.J.S., *Motions and Orders*, §§ 11 et seq., 35 et seq.

9-11-79. Reserved.

9-11-80. Reserved.

9-11-81. Applicability.

This chapter shall apply to all special statutory proceedings except to the extent that specific rules of practice and procedure in conflict herewith are expressly prescribed by law; but, in any event, the provisions of this chapter governing the sufficiency of pleadings, defenses, amendments, counterclaims, cross-claims, third-party practice, joinder of parties and causes, making parties, discovery and depositions, interpleader, intervention, evidence, motions, summary judgment, relief from judgments, and the effect of judgments shall apply to

all such proceedings. (Ga. L. 1966, p. 609, § 81; Ga. L. 1967, p. 226, § 33; Ga. L. 1968, p. 1104, § 12.)

Cross references. — Special statutory proceeding for review of final action of Department of Banking and Finance, § 7-1-90.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 81, see 28 U.S.C.

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 inapplicability of provisions of this chapter concerning service of process

to personal property foreclosures under § 44-14-230 et seq., see 11 Ga. St. B.J. 230 (1975). For survey article citing developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982). For article, “Procedure and Problems in Georgia Ad Valorem Tax Appeals,” see 26 Ga. St. B.J. 98 (1990). For article, “Georgia Law of Alimony,” see 4 Ga. St. B.J. 54 (1999).

JUDICIAL DECISIONS

Special statutory proceedings are preserved under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to the extent that the statutes prescribe specific rules of practice and procedure in conflict herewith. *Gifford v. Courson*, 224 Ga. 840, 165 S.E.2d 133 (1968).

Exceptions. — This section makes provision for special statutory proceedings, which are the only exceptions to the practice and procedure prescribed by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) permitted in courts of record. *Lee v. G.A.C. Fin. Corp.*, 130 Ga. App. 44, 202 S.E.2d 221 (1973 (see now O.C.G.A. § 9-11-81)).

Creation of court by special Act not determinative. — Fact that a trial court is created by a special Act of the General Assembly does not mean that all proceedings in that court are special statutory proceedings. *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976).

Substance of chapter not to be contravened by local Acts and rules. — Local practice rules, and even local statutes referring to specific courts, may control the flow of business, the hearing of cases, and other issues, but may not contravene the substantive framework of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Auerback v. Maslia*, 142 Ga. App. 184, 235 S.E.2d 594 (1977).

Appeal to superior court from a county tax assessment is a “com-

plaint,” as contemplated by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), which is required to be answered by responsive pleading. *Hall County Bd. of Tax Assessors v. Reed*, 142 Ga. App. 556, 236 S.E.2d 532 (1977).

In a gas company’s suit against the state revenue commissioner for mandamus compelling the commissioner to accept its property tax returns under O.C.G.A. §§ 48-1-2(21) and 48-5-511(a), remand was proper to determine if the company had an acceptable alternative remedy in the company’s pending county tax appeals under O.C.G.A. § 48-5-311, as required by O.C.G.A. § 9-6-20, if the commissioner could be made a party to those appeals by joinder or some other procedure. *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 755 S.E.2d 683 (2014).

Application of chapter as to remedies not prescribed by special statutory proceedings. — Fact that special statutory proceedings provide only one remedy, but do not expressly prescribe against others, does not bar application of the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) as to the other remedies. *General Acceptance Corp. v. Bishop*, 126 Ga. App. 421, 190 S.E.2d 825 (1972).

Arbitration proceedings. — Even though an arbitration award confirmation proceeding is not a civil action, the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, governing discovery applies; thus, limited discov-

ery relating to affirmative defenses to confirmation may be permitted. *Hardin Constr. Group, Inc. v. Fuller Enters., Inc.*, 265 Ga. 770, 462 S.E.2d 130 (1995).

Condemnation is a “special statutory procedure”. *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972).

Including condemnation before special master. — Statutes (see now O.C.G.A. §§ 22-2-100 through 22-2-114), relating to condemnation proceedings before a special master, are not controlled by the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9), but are a special statutory proceeding. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Time for filing of defensive pleadings in a special master condemnation proceeding, as opposed to their sufficiency, is governed by special statutory procedure and when there has been a final adjudication in such proceeding which is designed to be expeditious, a party may not later tender an answer to the petition under the general rules of civil practice. *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972).

Condemnation proceedings. — Provisions of the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) may be applied if not in conflict with the condemnation act (see O.C.G.A. T. 22 and Ch. 3, T. 32). *Dorsey v. DOT*, 248 Ga. 34, 279 S.E.2d 707 (1981).

Requirements of the condemnation act override all provisions of the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) in conflict with the condemnation act’s specific purposes. *DOT v. Defoor*, 173 Ga. App. 218, 325 S.E.2d 863 (1984).

Trial court properly refused to dismiss a landowner’s appeal on grounds that the court failed to express dissatisfaction with the compensation awarded by the special master as the court provided the utility with sufficient notice, under the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9), that the landowner was objecting to the valuation given on the landowner’s property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which the utility intended to use that property, consequential damages potentially represented a signif-

icant portion of the compensation the landowner could recover. *Ga. Power Co. v. Stowers*, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) applies to habeas corpus proceedings insofar as questions arise therein regarding the sufficiency of the pleadings, admissibility of evidence under the petition as drawn, amendments, and other elements of pleading and practice enumerated in this section. *Johnson v. Caldwell*, 229 Ga. 548, 192 S.E.2d 900 (1972).

Legislature intended, in enacting the 1968 amendment to Ga. L. 1967, p. 226, § 33 (see now O.C.G.A. § 9-11-81), to repeal pro tanto the provisions of Ga. L. 1967, p. 835, § 1 et seq. (see now O.C.G.A. § 9-14-40 et seq.), insofar as they prescribed any different rules governing sufficiency of pleadings, amendments, and what evidence would be admissible in support of a claim of illegal imprisonment, and intended that thereafter the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) should apply. *Johnson v. Caldwell*, 229 Ga. 548, 192 S.E.2d 900 (1972).

Civil renewal provisions apply in habeas corpus proceedings. — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refile of a habeas corpus petition and, therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court’s dismissal of a petition as untimely was reversed. *Phagan v. State*, 287 Ga. 856, 700 S.E.2d 589 (2010).

Divorce proceedings are governed by the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Ivey v. Ivey*, 233 Ga. 45, 209 S.E.2d 590 (1974).

This section provides that the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) is applicable to all divorce and alimony proceedings with respect to relief from judgments and the effect of judgments in such proceedings. *Johnson v. Johnson*, 230 Ga. 204, 196 S.E.2d 394 (1973), overruled on other grounds, *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) does not apply to juvenile

courts. *Coleman v. Coleman*, 238 Ga. 183, 232 S.E.2d 57 (1977).

Juvenile court properly concluded that the court had no authority to impose attorney fees under O.C.G.A. § 9-15-14 of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) because the juvenile court had not adopted § 9-15-14, and there was no implicit attorney fee award for frivolous litigation in the former Juvenile Court Code; the Civil Practice Act does not apply to juvenile courts. *In re T.M.M.L.*, 313 Ga. App. 638, 722 S.E.2d 386 (2012).

Application of chapter to mandamus proceedings. — Provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) governing summary judgment and other named procedures apply to all mandamus proceedings. *Harrison v. Weiner*, 226 Ga. 93, 172 S.E.2d 840 (1970).

Although proceeding was a special proceeding by way of a writ of mandamus, the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) provides that it is controlling and shall apply to all motions. *Hatcher v. Hancock County Comm'rs of Rds. & Revenues*, 239 Ga. 229, 236 S.E.2d 577 (1977).

O.C.G.A. § 9-6-27(a) complemented rather than conflicted with O.C.G.A. § 9-11-4(k), which expressly established that the methods of service could have been used as alternative methods of service in special statutory proceedings; a taxpayer's failure to comply with O.C.G.A. § 9-6-27(a) in a case seeking mandamus and injunctive relief against a county was immaterial because the taxpayer served the county in the ordinary manner, and the county's reliance on O.C.G.A. § 9-11-81 was misplaced. *Haugen v. Henry County*, 277 Ga. 743, 594 S.E.2d 324, cert. denied, 543 U.S. 816, 125 S. Ct. 63, 160 L. Ed. 2d 22 (2004).

Quo warranto. — Action seeking a writ of quo warranto is one of the special statutory proceedings referenced in O.C.G.A. § 9-11-81. *Anderson v. Flake*, 270 Ga. 141, 508 S.E.2d 650 (1998).

Trover actions. — Trover and the defenses against a conditional vendor in a trover action are special statutory proceedings not controlled by the Civil Practice Act (see O.C.G.A. Ch. 11, T. 9). *J.G.T., Inc. v. Brunswick Corp.*, 119 Ga. App. 719, 168 S.E.2d 847 (1969).

Service in dispossessory proceedings. — Since former Code 1933, § 61-302 (see O.C.G.A. § 44-7-51), relating to dispossessory proceedings, did not expressly prescribe that the cumulative service provisions of Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. § 9-11-4(i)) were unavailable, Ga. L. 1968, p. 1104, § 12 (see now O.C.G.A. § 9-11-81), providing for exceptions to applicability of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9), was inoperable. *Navaho Corp. v. Stuckey*, 141 Ga. App. 271, 233 S.E.2d 217 (1977).

Sufficiency of affidavit seeking dispossessory warrant. — Sufficiency of an affidavit seeking a dispossessory warrant must be measured by the same strict rules applicable prior to enactment of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) since the Act does not apply when in conflict with special statutory proceedings. *Brinson v. Ingram*, 120 Ga. App. 271, 170 S.E.2d 39 (1969).

Dispossessory proceedings under O.C.G.A. Art. 3, Ch. 7, T. 44 do not dispense with the applicability of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) except in certain designated limited circumstances. *Trust Co. Bank v. Shaw*, 182 Ga. App. 165, 355 S.E.2d 99 (1987).

Foreclosure proceedings. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) controls in an application to confirm a foreclosure sale and permits the adding of parties to the proceedings. An application should not be dismissed because additional parties are necessary for adjudication but additional parties may be added. *Small Bus. Admin. v. Desai*, 193 Ga. App. 852, 389 S.E.2d 372, cert. denied, 193 Ga. App. 911, 389 S.E.2d 372 (1989).

In rem quiet title actions. — Default judgment against owners in a quiet title action based on the owners' failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure

with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, was inapplicable. *Woodruff v. Morgan County*, 284 Ga. 651, 670 S.E.2d 415 (2008).

Confirmation proceedings. — Discovery is permitted in a confirmation proceeding on a nonjudicial foreclosure sale because it is a special statutory proceeding and no statute establishes a contrary rule of discovery. *Alliance Partners v. Harris Trust & Sav. Bank*, 266 Ga. 514, 467 S.E.2d 531 (1996).

Procedure for appeal from probate court to superior court. — While the right of appeal to the superior court from a decision of the probate court is a constitutional right, the method and procedure by which that right is exercised is a “special statutory proceeding” within the meaning of that term as used in this section. *Bragg v. Bragg*, 225 Ga. 494, 170 S.E.2d 29 (1969).

Forfeiture proceedings. — Under O.C.G.A. § 9-11-81, the incorporation by reference provision of O.C.G.A. § 9-11-10(c) (form of pleadings), including incorporation of exhibits attached to pleadings, applies to forfeiture proceedings, unless specific, expressly prescribed rules of the forfeiture statute conflict with the incorporation of exhibits provisions. *Bell v. State*, 234 Ga. App. 693, 507 S.E.2d 535 (1998); *Woods v. State*, 243 Ga. App. 195, 532 S.E.2d 747 (2000).

O.C.G.A. § 16-13-49 (forfeiture) is a special statutory proceeding which must be strictly construed and complied with, and as such, not all provisions of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) apply, including O.C.G.A. § 9-11-55, the default judgment statute. *Fulton v. State*, 183 Ga. App. 570, 359 S.E.2d 726 (1987).

Since the claimant contesting the forfeiture of property was authorized to amend the claimant’s answer to a forfeiture complaint, the court erred in granting the state’s motion to strike the amendment. *Jackson v. State*, 231 Ga. App. 320, 498 S.E.2d 159 (1998).

Procedures for opening default as a matter of right under O.C.G.A. § 9-11-55(a) are applicable, pursuant to O.C.G.A. § 9-11-81, in forfeiture actions

under O.C.G.A. § 16-13-49. *Ford v. State*, 271 Ga. 162, 516 S.E.2d 778 (1999), reversing *Ford v. State*, 235 Ga. App. 755, 509 S.E.2d 734 (1998) and overruling *State v. Britt Caribe, Ltd.*, 154 Ga. App. 476, 268 S.E.2d 702 (1980).

Application to attorney fees. — Trial court did not err in granting declaratory relief to an attorney via a default judgment because a petition for declaratory judgment was an action at law pursuant to O.C.G.A. § 9-4-2 and a petition for declaratory judgment was governed by the practice rules contained in the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, specifically O.C.G.A. § 9-11-81, including the rules pertaining to default judgment; the attorney was entitled to a judgment that a doctor was not entitled to attorney fees from the doctor’s former spouse under O.C.G.A. § 9-15-14(b) based on the admissions that the former spouse had successfully obtained a family violence protective order against the doctor and that this order was only vacated after the former spouse agreed to voluntarily dismiss the case. *Vaughters v. Outlaw*, 293 Ga. App. 620, 668 S.E.2d 13 (2008).

Cited in *Woodall v. First Nat’l Bank*, 118 Ga. App. 440, 164 S.E.2d 361 (1968); *Dye v. Turner Concrete, Inc.*, 119 Ga. App. 78, 166 S.E.2d 773 (1969); *Shaw v. Davis*, 119 Ga. App. 801, 168 S.E.2d 853 (1969); *State Farm Mut. Auto. Ins. Co. v. Black*, 120 Ga. App. 151, 169 S.E.2d 742 (1969); *Brown v. Brown*, 121 Ga. App. 88, 172 S.E.2d 875 (1970); *Bodrey v. Bodrey*, 122 Ga. App. 23, 176 S.E.2d 234 (1970); *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970); *Martin v. Prior Tire Co.*, 122 Ga. App. 637, 178 S.E.2d 306 (1970); *Stevens v. Stevens*, 227 Ga. 410, 181 S.E.2d 34 (1971); *Taylor v. Donaldson*, 227 Ga. 496, 181 S.E.2d 340 (1971); *Lowe v. Lowe*, 123 Ga. App. 525, 181 S.E.2d 715 (1971); *Gresham v. Symmers*, 227 Ga. 616, 182 S.E.2d 764 (1971); *Control Data Corp. v. Carley*, 124 Ga. App. 62, 183 S.E.2d 71 (1971); *Savannah Bank & Trust Co. v. Keane*, 126 Ga. App. 53, 189 S.E.2d 702 (1972); *Kinlock v. State Hwy. Dep’t*, 127 Ga. App. 847, 195 S.E.2d 459 (1973); *Snooks v. Factory Square, Inc.*, 129 Ga. App. 772, 201 S.E.2d 168 (1973); *Continental Ins. Co. v. Mercer*,

130 Ga. App. 339, 203 S.E.2d 297 (1973); Ben O'Callaghan Co. v. Rose, Silverman & Hunt, 131 Ga. App. 29, 205 S.E.2d 45 (1974); Whitehurst v. Universal C.I.T. Credit Corp., 131 Ga. App. 202, 205 S.E.2d 489 (1974); Carter v. Harrell, 132 Ga. App. 148, 207 S.E.2d 648 (1974); McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373 (1974); Bradberry v. Bradberry, 232 Ga. 651, 208 S.E.2d 469 (1974); Adams v. Citizens & S. Nat'l Bank, 132 Ga. App. 622, 208 S.E.2d 628 (1974); Yeargin v. Burleson, 132 Ga. App. 652, 209 S.E.2d 99 (1974); Ivey v. Ivey, 233 Ga. 45, 209 S.E.2d 590 (1974); English v. Milby, 233 Ga. 7, 209 S.E.2d 603 (1974); Sikes v. Sikes, 233 Ga. 97, 209 S.E.2d 641 (1974); Georgia State Bd. of Dental Exmrs. v. Daniels, 137 Ga. App. 706, 224 S.E.2d 820 (1976); Coursin v. Harper, 236 Ga. 729, 225 S.E.2d 428 (1976); Burrell v. Wood, 237 Ga. 162, 227 S.E.2d 60 (1976); Heath v. Stinson, 238 Ga. 364, 233 S.E.2d 178 (1977); Tanis v. Tanis, 240 Ga. 718, 242 S.E.2d 71 (1978); Tingle v. Georgia Power Co., 147 Ga. App. 775, 250 S.E.2d 497 (1978); DOT v. Ridley, 244 Ga. 49, 257 S.E.2d 511 (1979); Favors v. Travelers Ins. Co., 244 Ga. App. 203, 258 S.E.2d 554

(1979); Yield, Inc. v. City of Atlanta, 152 Ga. App. 171, 262 S.E.2d 481 (1979); Roe v. Doe, 246 Ga. 138, 268 S.E.2d 901 (1980); Weems v. McCloud, 619 F.2d 1081 (5th Cir. 1980); Rogers v. DeKalb County Bd. of Tax Assessors, 247 Ga. 726, 279 S.E.2d 223 (1981); Carmichael v. Carmichael, 248 Ga. 216, 282 S.E.2d 71 (1981); Hanover Ins. Co. v. Nelson Conveyor & Mach. Co., 159 Ga. App. 13, 282 S.E.2d 670 (1981); Alpha Transp. Serv., Inc. v. Cartwright, 248 Ga. 701, 285 S.E.2d 713 (1982); DOT v. Defoor, 173 Ga. App. 218, 325 S.E.2d 863 (1984); Brooks v. DOT, 254 Ga. 60, 327 S.E.2d 175 (1985); Christopher v. State, 185 Ga. App. 532, 364 S.E.2d 905 (1988); Guthrie v. Bank S., 195 Ga. App. 123, 393 S.E.2d 60 (1990); Greene v. Woodard, 198 Ga. App. 427, 401 S.E.2d 617 (1991); Rice v. Higginbotham, 235 Ga. App. 378, 508 S.E.2d 736 (1998); Nash v. State, 243 Ga. App. 800, 534 S.E.2d 492 (2000); Ga. Pines Cmty. Serv. Bd. v. Summerlin, 282 Ga. 339, 647 S.E.2d 566 (2007); In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007); Weaver v. State, 299 Ga. App. 718, 683 S.E.2d 361 (2009); Sherman v. City of Atlanta, 293 Ga. 169, 744 S.E.2d 689 (2013); Kelly v. Harris, 329 Ga. App. 752, 766 S.E.2d 146 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Service requirements for city court governed by Act creating it. — Requirements for service of summons under the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) would not apply to the city court when Act creating the court provides

that in cases of \$200.00 or less the procedure and practice to be followed shall be governed by the law relating to and governing justice of the peace courts in force at the date of the passage of the Act. 1967 Op. Att'y Gen. No. 67-419.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Accord and Satisfaction, § 8. 2 Am. Jur. Pleading and Practice Forms, Appearance, § 2.

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 10, 192.

9-11-82. Jurisdiction and venue unaffected.

This chapter shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein. (Ga. L. 1966, p. 609, § 82.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 82, see 28 U.S.C.

Law reviews. — For article discussing aspects of third party practice (impleader) under this chapter, see 4 Ga. St. B.J. 355 (1968). For article, “Current Problems with Venue in Georgia,” see 12 Ga. St. B.J. 71 (1975). For article examining waiver of objections to venue and lack of personal jurisdiction by default, see 12 Ga. L. Rev. 181 (1978).

For note discussing problems with venue in this state and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

For comment on *Register v. Stone’s Independent Oil Distrib., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971), appearing below, see 8 Ga. St. B.J. 428 (1972).

JUDICIAL DECISIONS

Enactment of new procedural method of bringing in parties cannot change the jurisdictional rules of the Constitution of this state. *Register v. Stone’s Indep. Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971). For comment, see 8 Ga. St. B.J. 428 (1972).

Jurisdictional distinctions between law and equity remain. *Burnham v. Lynn*, 235 Ga. 207, 219 S.E.2d 111 (1975).

Constitutional venue provisions may not be altered or changed by the legislature or the courts, and the adoption of procedural devices for adjudicating claims of various parties in the same ac-

tion does not effect a change in the venue requirements of the Constitution of this state. *Pemberton v. Purifoy*, 128 Ga. App. 892, 198 S.E.2d 356 (1973); *Haley v. Citizens & S. Nat’l Bank*, 141 Ga. App. 13, 232 S.E.2d 362 (1977).

Cited in *Register v. Stone’s Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1970); *Buford v. Buford*, 231 Ga. 9, 200 S.E.2d 97 (1973); *Henderson v. Kent*, 158 Ga. App. 206, 279 S.E.2d 503 (1981); *Lester Witte & Co. v. Cobb Bank & Trust Co.*, 248 Ga. 235, 282 S.E.2d 296 (1981); *Georgia Power Co. v. Busbin*, 159 Ga. App. 416, 283 S.E.2d 647 (1981).

RESEARCH REFERENCES

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 56 et seq., 65 et seq., 129 et seq., 151, 168, 239, 357, 358, 368, 369. 35B

C.J.S., Federal Civil Procedure, §§ 1342, 1343, 1345.

9-11-83. Local court rules.

Each court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with this chapter or any other statute. (Ga. L. 1966, p. 609, § 83.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 83, see 28 U.S.C.

JUDICIAL DECISIONS

Substantive framework of chapter not to be contravened. — Local practice rules, and even local statutes referring to

specific courts, may control the flow of business, the hearing of cases, and other issues, but may not contravene the sub-

stantive framework of the Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9). *Auerback v. Maslia*, 142 Ga. App. 184, 235 S.E.2d 594 (1977).

Permissible not to require oral argument hearing unless requested. — When O.C.G.A. §§ 9-11-56(c), 9-11-78, and 9-11-83 are considered in conjunction, it is permissible for court rules to provide that an oral argument hearing is not required unless the party requests a hearing. *Dallas Blue Haven Pools, Inc. v. Taslimi*, 180 Ga. App. 734, 350 S.E.2d 265

(1986), *aff'd*, 256 Ga. 739, 354 S.E.2d 160 (1987).

Cited in *Siefferman v. Kirkpatrick*, 121 Ga. App. 161, 173 S.E.2d 262 (1970); *Newell Rd. Bldrs., Inc. v. Ramirez*, 126 Ga. App. 850, 192 S.E.2d 184 (1972); *Ambler v. Archer*, 230 Ga. 281, 196 S.E.2d 858 (1973); *McKinnon v. Trivett*, 136 Ga. App. 59, 220 S.E.2d 63 (1975); *Allstate Ins. Co. v. Reynolds*, 138 Ga. App. 582, 227 S.E.2d 77 (1976); *Miles v. Edgewood Chenille, Inc.*, 162 Ga. App. 168, 290 S.E.2d 494 (1982).

RESEARCH REFERENCES

C.J.S. — 21 C.J.S., Courts, § 240 et seq. 35A C.J.S., Federal Civil Procedure, § 24 et seq. 35B C.J.S., Federal Civil

Procedure, §§ 781 et seq., 789, 955, 1342 et seq.

9-11-84. Forms.

The forms contained in Code Sections 9-11-101 through 9-11-132 are sufficient under this chapter and are intended to indicate the simplicity and brevity of statement which this chapter contemplates. (Ga. L. 1966, p. 609, § 84; Ga. L. 1967, p. 226, § 49.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 84, see 28 U.S.C.

specialized pleadings and procedures to meet needs of juvenile court practice, see 23 Mercer L. Rev. 341 (1972).

Law reviews. — For article advocating

JUDICIAL DECISIONS

Prayer for process not prerequisite to valid service. — Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) contains no requirement that a prayer for process be

included in the complaint as a prerequisite to valid service of process. *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974).

RESEARCH REFERENCES

C.J.S. — 35A C.J.S., Federal Civil Procedure, §§ 13, 279, 301 et seq.

9-11-85. Short title.

This chapter may be known and cited as the “Georgia Civil Practice Act.” (Ga. L. 1966, p. 609, § 85.)

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 85, see 28 U.S.C.

ARTICLE 10

FORMS

Cross references. — Form for motion for new trial, § 5-5-42.

9-11-100. Reserved.**9-11-101. Form of summons.**

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

SUMMONS

To the above-named defendant:

You are hereby summoned and required to file with the clerk of said court and serve upon _____, plaintiff's attorney, whose address is _____, an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of court

(Ga. L. 1966, p. 609, § 101.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, "(Clerk will insert number.)" was substituted for "Clerk will insert number." near the beginning of the form.

JUDICIAL DECISIONS

Cited in Tyree v. Jackson, 226 Ga. 690, 177 S.E.2d 160 (1970); Gresham v. Symmers, 227 Ga. 616, 182 S.E.2d 764 (1971); Lee v. G.A.C. Fin. Corp., 130 Ga. App. 44, 202 S.E.2d 221 (1973); Zachery v. Geiger Fin. Co., 130 Ga. App. 243, 202 S.E.2d 689 (1973); Chancey v. Hancock, 233 Ga. 734, 213 S.E.2d 633 (1975); DOT

v. Massengale, 141 Ga. App. 70, 232 S.E.2d 608 (1977); Portis v. Evans, 249 Ga. 396, 291 S.E.2d 511 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Process, § 8.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

ALR. — Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 ALR2d 928.

Pleading of election remedies, 99 ALR2d 1315.

9-11-102. Reserved.

9-11-103. Form of complaint on a promissory note.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

1.

Defendant on or about June 1, 1965, executed and delivered to plaintiff a promissory note in the following words and figures: (here set out the note verbatim); (a copy of which is hereto annexed as Exhibit A); whereby defendant promised to pay to plaintiff or order on June 1, 1966, the sum of \$10,000.00 with interest thereon at the rate of 6 percent per annum.

2.

Defendant owes to plaintiff the amount of said note and interest.

Wherefore, plaintiff demands judgment against defendant for the sum of \$10,000.00, interest, costs, and attorney fees (where applicable).

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 103; Ga. L. 1980, p. 649, § 1.)

JUDICIAL DECISIONS

Cited in Ghitter v. Edge, 118 Ga. App. 209 S.E.2d 272 (1974); Southeastern 750, 165 S.E.2d 598 (1968); A & D Barrel Plumbing Supply Co. v. Lee, 133 Ga. App. & Drum Co. v. Fuqua, 132 Ga. App. 827, 470, 211 S.E.2d 418 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-104. Form of complaint on an account.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

Defendant owes plaintiff \$10,000.00 according to the account hereto annexed as Exhibit A.

Wherefore, plaintiff demands judgment against defendant for the sum of \$10,000.00, interest, costs, and attorney fees (where applicable).

Attorney for plaintiff

 Address

(Ga. L. 1966, p. 609, § 104; Ga. L. 1980, p. 649, § 2.)

JUDICIAL DECISIONS

Cited in Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-105. Form of complaint for goods sold and delivered.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

Defendant owes plaintiff \$10,000.00 for goods sold and delivered by plaintiff to defendant between June 1, 1966, and December 1, 1966.

Wherefore, plaintiff demands judgment against defendant for the sum of \$10,000.00, interest, costs, and attorney fees (where applicable).

 Attorney for plaintiff

 Address

(Ga. L. 1966, p. 609, § 105; Ga. L. 1980, p. 649, § 3.)

9-11-106. Form of complaint for money lent.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,

)

Plaintiff

)

)

v.

)

Civil action

)

File no. _____

C.D.,

)

(Clerk will insert

Defendant

)

number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

Defendant owes plaintiff \$10,000.00 for money lent by plaintiff to defendant on June 1, 1966.

Wherefore, plaintiff demands judgment against defendant for the sum of \$10,000.00, interest, costs, and attorney fees (where applicable).

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 106; Ga. L. 1980, p. 649, § 4.)

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-107. Form of complaint for money paid by mistake.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,

Plaintiff

v.

C.D.,

Defendant

)

)

)

)

)

)

)

Civil action

File no. _____

(Clerk will insert
number.)**COMPLAINT**

The defendant C.D., herein named, is a resident of _____ (street),
_____ (city), _____ County, Georgia, and is subject to the
jurisdiction of this court.

Defendant owes plaintiff \$10,000.00 for money paid by plaintiff to
defendant by mistake on June 1, 1966, under the following circum-
stances: (Here state the circumstances with particularity).

Wherefore, plaintiff demands judgment against defendant for the
sum of \$10,000.00, interest, costs, and attorney fees (where applicable).

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 107; Ga. L. 1980, p. 649, § 5.)

Law reviews. — For article, “2013 Georgia Corporation and Business Orga- nization Case Law Developments,” see 19 Ga. St. B.J. 28 (April 2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Plead- ing, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

ALR. — Recovery of tax paid under unconstitutional statute or ordinance, 48 ALR 1381; 74 ALR 1301.

Right to recover money voluntarily paid with knowledge of facts but under misap-

prehension as to legal rights or obliga- tions, 53 ALR 949.

Good faith in receiving payment made under mistake of fact as affecting its re- covery, 87 ALR 649.

Exception as regards payments to offi- cers of court to rule preventing recovery back of payments made under mistake of law, 111 ALR 637.

9-11-108. Form of complaint for money had and received.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,

Plaintiff

v.

C.D.,

Defendant

)

)

)

)

)

)

)

Civil action

File no. _____

(Clerk will insert

number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

Defendant owes plaintiff \$10,000.00 for money had and received from one G.H. on June 1, 1966, to be paid by defendant to plaintiff.

Wherefore, plaintiff demands judgment against defendant for the sum of \$10,000.00, interest, costs, and attorney fees (where applicable).

 Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 108; Ga. L. 1980, p. 649, § 6.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, a comma was inserted following “C.D.” near the beginning of the form.

JUDICIAL DECISIONS

Cited in Dickey v. South Side Atlanta Bank, 118 Ga. App. 1, 162 S.E.2d 305 (1968); Department of Pub. Health v. Perry, 123 Ga. App. 816, 182 S.E.2d 493 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

ALR. — Right to recover money voluntarily paid with knowledge of facts but under misapprehension as to legal rights or obligations, 53 ALR 949.

9-11-109. Form of complaint for negligence.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,

Plaintiff

v.

C.D.,

Defendant

)

)

)

)

)

)

)

Civil action

File no. _____

(Clerk will insert
number.)**COMPLAINT**

The defendant C.D., herein named, is a resident of _____ (street),
_____ (city), _____ County, Georgia, and is subject to the
jurisdiction of this court.

1.

On June 1, 1966, on a public highway called Broad Street in Athens,
Georgia, defendant negligently drove a motor vehicle against plaintiff
who was then crossing said highway.

2.

As a result plaintiff was thrown down and had his leg broken and was
otherwise injured, was prevented from transacting his business, suf-
fered great pain of body and mind, and incurred expenses for medical
attention and hospitalization in the sum of \$1,000.00.

Wherefore, plaintiff demands judgment against defendant in the sum
of \$10,000.00 and costs.

Attorney for plaintiff_____
Address

(Ga. L. 1966, p. 609, § 109; Ga. L. 1980, p. 649, § 7.)

JUDICIAL DECISIONS

Cited in White v. Augusta Motel Hotel Fowler, 124 Ga. App. 242, 183 S.E.2d 586
Inv. Co., 119 Ga. App. 351, 167 S.E.2d 161 (1971); Dillingham v. Doctors Clinic, 135
(1969); Bulloch County Hosp. Auth. v. Ga. App. 736, 219 S.E.2d 2 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, Negligence, § 227.

9-11-110. Form of complaint for negligence when plaintiff is unable to determine responsible person.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,

Plaintiff

v.

C.D. and E.F.,

Defendants

)

)

)

)

)

)

)

Civil action

File no. _____

(Clerk will insert
number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court. (Add appropriate statement about domicile of defendant E.F.)

1.

On June 1, 1966, on a public highway called Broad Street in Athens, Georgia, defendant C.D. or defendant E.F., or both defendants C.D. and E.F., willfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

2.

As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of \$1,000.00.

Wherefore, plaintiff demands judgment against C.D. or against E.F. or against both in the sum of \$10,000.00 and costs.

Attorney for plaintiff

 Address

(Ga. L. 1966, p. 609, § 110; Ga. L. 1980, p. 649, § 8.)

JUDICIAL DECISIONS

Cited in White v. Augusta Motel Hotel Inv. Co., 119 Ga. App. 351, 167 S.E.2d 161 (1969); Bulloch County Hosp. Auth. v. Fowler, 124 Ga. App. 242, 183 S.E.2d 586 (1971); Dillingham v. Doctors Clinic, 135 Ga. App. 736, 219 S.E.2d 2 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-111. Form of complaint for conversion.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

On or about December 1, 1966, defendant converted to his own use ten bonds of the _____ Company (here insert brief identification as by number and issue) of the value of \$10,000.00, the property of plaintiff.

Wherefore, plaintiff demands judgment against defendant in the sum of \$10,000.00, interest, and costs.

 Attorney for plaintiff

 Address

(Ga. L. 1966, p. 609, § 111; Ga. L. 1980, p. 649, § 9; Ga. L. 1984, p. 22, § 9.)

JUDICIAL DECISIONS

Cited in Charles S. Martin Distrib. Co. v. Indon Indus. Inc., 134 Ga. App. 179, 213 S.E.2d 900 (1975); Prudential Ins. Co. of Am. v. Baum, 629 F. Supp. 466 (N.D. Ga. 1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

Am. Jur. Pleading and Practice Forms. — 7A Am. Jur. Pleading and Practice Forms, Conversion, § 2.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-112. Form of complaint for specific performance of contract to convey land.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

1.

On or about December 1, 1966, plaintiff and defendant entered into an agreement in writing, a copy of which is hereto annexed as Exhibit A.

2.

In accordance with said agreement, plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3.

Plaintiff now offers to pay the purchase price.

Wherefore, plaintiff demands:

- (1) That defendant be required specifically to perform said agreement,
- (2) Damages in the sum of \$1,000.00, and
- (3) That, if specific performance is not granted, plaintiff have judgment against defendant in the sum of \$10,000.00.

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 112; Ga. L. 1980, p. 649, § 10.)

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-113. Form of complaint on claim for debt and to set aside fraudulent conveyance under Code Section 9-11-18.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D. and E.F.,	)	(Clerk will insert
Defendants	)	number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court. (Add appropriate statement about domicile of defendant E.F.)

1.

Defendant C.D. on or about _____ executed and delivered to plaintiff a promissory note in the following words and figures: (here set out the note verbatim); (a copy of which is hereto annexed as Exhibit

A); whereby defendant C.D. promised to pay to plaintiff or order on _____ the sum of \$5,000.00 with interest thereon at the rate of _____ percent per annum.

2.

Defendant C.D. owes to plaintiff the amount of said note and interest.

3.

Defendant C.D. on or about _____ conveyed all his property, real and personal (or specify and describe), to defendant E.F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above-referred to.

Wherefore, plaintiff demands:

(1) That plaintiff have judgment against defendant C.D. for \$10,000.00 and interest;

(2) That the aforesaid conveyance to defendant E.F. be declared void and the judgment herein be declared a lien on said property;

(3) That plaintiff have judgment against the defendants for costs.

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 113; Ga. L. 1980, p. 649, § 11.)

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-114. Form of complaint for negligence under Federal Employers' Liability Act.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

1.

During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at _____ and known as Tunnel No. _____.

2.

On or about June 1, 1966, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

3.

In the course of thus repairing and enlarging the tunnel on said day, defendant employed plaintiff as one of its workmen and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

4.

By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to the defendant's orders, struck and crushed by a rock which fell from the unsupported portion of the tunnel and was (here describe plaintiff's injuries).

5.

Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning \$ _____ per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of \$ _____ for medicine, medical attendance, and hospitalization.

Wherefore, plaintiff demands judgment against defendant in the sum of \$ _____ and costs.

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 114; Ga. L. 1980, p. 649, § 12.)

JUDICIAL DECISIONS

Cited in White v. Augusta Motel Hotel (1969); Dillingham v. Doctors Clinic, 135 Inv. Co., 119 Ga. App. 351, 167 S.E.2d 161 (1969); Ga. App. 736, 219 S.E.2d 2 (1975).

RESEARCH REFERENCES

ALR. — What employees are engaged in interstate commerce within the Federal Employers' Liability Act, 10 ALR 1184; 14 ALR 732; 24 ALR 634; 29 ALR 1207; 49 ALR 1339; 65 ALR 613; 77 ALR 1374; 90 ALR 846.

Applicability of state statutes and rules of law to actions under Federal Employers' Liability Act, 36 ALR 917; 89 ALR 693.

Railroad employee injured while engaged in removing weeds, brush, etc.,

from roadbed or right of way, as within Federal Employers' Liability Act, 143 ALR 481.

Right of foreign domiciliary, or of ancillary, personal representative to maintain action for death under Federal Employers' Liability Act, 163 ALR 1284.

Applicability of state practice and procedure in Federal Employers' Liability Act actions brought in state courts, 79 ALR2d 553.

9-11-115 through 9-11-117. Reserved.

9-11-118. Form of complaint for interpleader and declaratory relief.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____

C.D., E.F., and X.Y.,) (Clerk will insert
Defendants) number.)

COMPLAINT

The defendant C.D., herein named, is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court. (Add appropriate statement about domicile of remaining defendants.)

1.

On or about June 1, 1965, plaintiff issued to G.H. a policy of life insurance whereby plaintiff promised to pay to K.L. as beneficiary the sum of \$10,000.00 upon the death of G.H. The policy required the payment by G.H. of a stipulated premium on June 1, 1966, and annually thereafter as a condition precedent to its continuance in force.

2.

No part of the premium due June 1, 1966, was ever paid and the policy ceased to have any force or effect after July 1, 1966.

3.

Thereafter, on September 1, 1966, G.H. and K.L. died as the result of a collision between a locomotive and the automobile in which G.H. and K.L. were riding.

4.

Defendant C.D. is the duly appointed and acting executor of the will of G.H., defendant E.F. is the duly appointed and acting executor of the will of K.L., and defendant X.Y. claims to have been duly designated as beneficiary of said policy in place of K.L.

5.

Each of the defendants, C.D., E.F., and X.Y., is claiming that the above-mentioned policy was in full force and effect at the time of the

death of G.H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6.

By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy if it was in force at the time of death of G.H.

Wherefore, plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G.H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 120; Ga. L. 1980, p. 649, § 13; Ga. L. 1984, p. 22, § 9; Ga. L. 2006, p. 72, § 9/SB 465.)

RESEARCH REFERENCES

ALR. — Insurance: facility of payment clause, 166 ALR 10.

9-11-119. Form of motion to dismiss, presenting defense of failure to state a claim.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	
Defendant	)	

MOTION TO DISMISS

The defendant moves the court as follows:

1.

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2.

(Additional defenses under subsection (b) of Code Section 9-11-12.)

Attorney for defendant

Address

NOTICE OF MOTION

To: _____

Attorney for plaintiff

Please take notice that the undersigned will bring the above motion on for hearing before this court at _____, on the _____ day of _____, _____, at ____: __ __.M. or as soon thereafter as counsel can be heard.

Attorney for defendant

Address

(Ga. L. 1966, p. 609, § 121; Ga. L. 1980, p. 649, § 14; Ga. L. 1999, p. 81, § 9.)

JUDICIAL DECISIONS

Cited in Zappa v. Allstate Ins. Co., 118 S.E.2d 37 (1976); Prudential Timber & Ga. App. 235, 162 S.E.2d 911 (1968); Farm Co. v. Collins, 144 Ga. App. 849, 243 Miller v. Alderhold, 228 Ga. 65, 184 S.E.2d S.E.2d 80 (1978); Dallas Blue Haven 172 (1971); Brock v. Pennsylvania Nat'l Pools, Inc. v. Taslimi, 180 Ga. App. 734, Mut. Cas. Ins. Co., 140 Ga. App. 110, 230 350 S.E.2d 265 (1986).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19B Am. Jur. Pleading and Practice Forms, Pleading, § 311.

9-11-120. Form of answer presenting defenses under subsection (b) of Code Section 9-11-12.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	
Defendant	)	

ANSWER

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiff for the goods mentioned in the complaint, he is indebted to him jointly with G.H. G.H. is alive, is subject to the jurisdiction of the court, and has not been made a party.

Third Defense

Defendant admits the allegations contained in paragraphs 1 and 4 of the complaint, alleges that he is without knowledge or information

sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint, and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

COUNTERCLAIM

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

CROSS-CLAIM AGAINST DEFENDANT M.N.

(Here set forth the claim constituting a cross-claim against defendant M.N. in the manner in which a claim is pleaded in a complaint.)

Attorney for defendant

Address

(Ga. L. 1966, p. 609, § 122; Ga. L. 1980, p. 649, § 15.)

9-11-121. Form of answer to complaint set forth in Code Section 9-11-108, with counterclaim for interpleader.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	
Defendant	)	

ANSWER

Defense

Defendant denies the allegations stated to the extent set forth in the counterclaim herein.

COUNTERCLAIM FOR INTERPLEADER

1.

Defendant received the sum of \$10,000.00 as a deposit from E.F.

2.

Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E.F.

3.

E.F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore, defendant demands:

(1) That the court order E.F. to be made a party defendant to respond to the complaint and to this counterclaim.

(2) That the court order the plaintiff and E.F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E.F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

Attorney for defendant

Address

(Ga. L. 1966, p. 609, § 123; Ga. L. 1980, p. 649, § 16.)

JUDICIAL DECISIONS

Cited in Insurance Co. of N. Am. v. 578 (1969); Evans v. Cushing Properties, Citizens Bank, 225 Ga. 347, 168 S.E.2d 197 Ga. App. 380, 398 S.E.2d 306 (1990).

9-11-122. Form of summons and complaint against third-party defendant.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	
Defendant and Third-	)	
Party Plaintiff	)	
v.	)	
	)	
E.F.,	)	
Third-Party Defendant	)	

SUMMONS

To the above-named third-party defendant:

You are hereby summoned and required to file with the clerk of said court and serve upon _____, plaintiff's attorney whose address is _____, and upon _____, who is attorney for C.D., defendant and third-party plaintiff, and whose address is _____, an answer to the third-party complaint which is herewith served upon you, within 30 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

Clerk of court

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	
Defendant and Third-	)	
Party Plaintiff	)	
	)	
v.	)	
	)	
E.F.,	)	
Third-Party Defendant	)	

THIRD-PARTY COMPLAINT

1.

Plaintiff, A.B., has filed against defendant, C.D., a complaint, a copy of which is hereto attached as "Exhibit A." A copy of all other pleadings filed prior to the filing of this third-party complaint is hereto attached as "Exhibit B."

2.

(Here state the grounds upon which C.D. is entitled to recover from E.F. all or part of what A.B. may recover from C.D. The statements should be framed as in an original complaint.)

Wherefore, C.D. demands judgment against third-party defendant E.F. for all sums that may be adjudged against defendant C.D. in favor of plaintiff A.B.

Attorney for C.D.,
third-party plaintiff

Address

(Ga. L. 1966, p. 609, § 124; Ga. L. 1969, p. 979, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Process, § 8.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

ALR. — Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 ALR2d 928.

9-11-123. Form of motion to intervene as a defendant under Code Section 9-11-24.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
v.	)	Civil action
C.D.,	)	File no. _____
Defendant	)	
E.F.,	)	
Applicant for Intervention	)	

MOTION TO INTERVENE AS A DEFENDANT

E.F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that _____.

Attorney for E.F., applicant
for intervention

Address

NOTICE OF MOTION

(Contents the same as in Code Section 9-11-119)

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)
Plaintiff	)

9-11-123

CIVIL PRACTICE

9-11-124

v.	)	Civil action
C.D.,	)	File no. _____
Defendant	)	
E.F.,	)	
Intervenor	)	

INTERVENOR'S ANSWER

First Defense

Intervenor admits the allegations stated in paragraphs 1 and 4 of the complaint, denies the allegations in paragraph 3, and denies the allegations in paragraph 2 insofar as they assert the _____

_____.

Second Defense

(Set forth defenses)

Attorney
for E.F., intervenor

Address

(Like form if intervention is as plaintiff).

(Ga. L. 1966, p. 609, § 125; Ga. L. 1984, p. 22, § 9.)

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-124. Form of motion for production of documents under Code Section 9-11-34.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)
Plaintiff	)
	)

v.	)	Civil action
	)	File no. _____
C.D.,	)	
Defendant	)	

MOTION FOR PRODUCTION OF DOCUMENTS

Plaintiff A.B. moves the court for an order requiring defendant C.D.:

1.

To produce and to permit plaintiff to inspect and to copy each of the following documents: (Here list the documents and describe each of them).

2.

To produce and to permit plaintiff to inspect and to photograph each of the following objects: (Here list the objects and describe each of them).

3.

To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).

Defendant C.D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Attorney for plaintiff

Address

NOTICE OF MOTION

(Contents the same as in Code Section 9-11-119)

EXHIBIT A

AFFIDAVIT

State of _____,
County of _____

A.B., being first duly sworn says:

1.

(Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

2.

(Here set forth all that plaintiff knows which shows that each of the above-mentioned items is relevant to some issue in the action.)

Sworn to and subscribed _____

before me this _____

A.B.

day of _____, _____.

Address

(Ga. L. 1966, p. 609, § 126; Ga. L. 1980, p. 649, § 17; Ga. L. 1999, p. 81, § 9; Ga. L. 2015, p. 5, § 9/HB 90.)

The 2015 amendment, effective modernize, and correct the Code, revised March 13, 2015, part of an Act to revise, punctuation in this Code section.

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-125. Form of request for admission under Code Section 9-11-36.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,

Plaintiff

v.

C.D.,

Defendant

)
)
)
)
)
)
)
)

Civil action

File no. _____

REQUEST FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

Plaintiff A.B. requests defendant C.D. within _____ days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1.

That each of the following documents exhibited with this request is genuine: (Here list the documents and describe each document).

2.

That each of the following statements is true: (Here list the statements).

Attorney for plaintiff

Address

(Ga. L. 1966, p. 609, § 127; Ga. L. 1980, p. 649, § 18.)

JUDICIAL DECISIONS

Cited in A & D Barrel & Drum Co. v. Fuqua, 132 Ga. App. 827, 132 S.E.2d 272 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d, Pleading, § 31 et seq.

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-126 through 9-11-130. Reserved.

9-11-131. Form of judgment on jury verdict.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,)
Plaintiff)

v.)

Civil action

File no. _____

C.D.,)
Defendant)

JUDGMENT

This action came on for trial before the court and a jury, Honorable John Marshall, presiding, and the issue having been duly tried and the jury having duly rendered its verdict,

It Is Ordered and Adjudged

(That the plaintiff A.B. recover of the defendant C.D. the sum of \$ _____, with interest thereon at the rate of ____ percent as provided by law, and his costs of action.)

or

(That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C.D. recover of the plaintiff A.B. his costs of action.)

Dated at _____, Georgia, this _____ day of _____, _____.

Judge

(Ga. L. 1966, p. 609, § 133; Ga. L. 1980, p. 649, § 19; Ga. L. 1999, p. 81, § 9.)

RESEARCH REFERENCES

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.

9-11-132. Form of judgment on decision by the court.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	
Defendant	)	

JUDGMENT

This action came on for (trial) (hearing) before the court, Honorable John Marshall, presiding, and the issues having been duly (tried) (heard) and a decision having been duly rendered,

It Is Ordered and Adjudged

(That the plaintiff A.B. recover of the defendant C.D. the sum of \$_____, with interest thereon at the rate of _____ percent as provided by law, and his costs of action.)

or

(That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C.D. recover of the plaintiff A.B. his costs of action.)

Dated at _____, Georgia, this _____ day of _____, _____.

Judge

(Ga. L. 1966, p. 609, § 134; Ga. L. 1980, p. 649, § 20; Ga. L. 1982, p. 3, § 9; Ga. L. 1999, p. 81, § 9.)

RESEARCH REFERENCES

C.J.S. — 71 C.J.S., Pleading, § 43 et seq.
Am. Jur. Pleading and Practice — 15 Am. Jur. Pleading and Practice Forms, Judges, § 80.

9-11-133. Forms meeting requirements for civil case filing and disposition.

(a) The forms set out in subsections (b), (c), (d), and (e) of this Code section or forms substantially similar to such forms shall be sufficient to meet the requirements for civil case filing and disposition forms; provided, however, that the general civil case filing information form and domestic relations case filing information form shall be required to contain an acknowledgment by the filer that the complaint and any exhibits or other attachments satisfy the redaction requirements of Code Section 9-11-7.1. The civil case forms set out in Exhibit F of the “Report and Recommendations of the 1997-1998 Court Filings Committee” published by the State Bar of Georgia and dated May 15, 1998, are substantially similar to the forms set out in this Code section.

(b) General Civil Case Filing Information Form.

GENERAL CIVIL CASE FILING INFORMATION FORM (NONDOMESTIC)

Court

____ Superior County _____ Date filed _____

____ State mm-dd-yyyy

Docket no. _____

Plaintiff(s) (last, suffix,
first, middle initial,
maiden)

1. _____

2. _____

Defendant(s) (last, suffix,
first, middle initial,
maiden)

1. _____

2. _____

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CIVIL PRACTICE

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3. _____

3. _____

4. _____

4. _____

Plaintiff/petitioner's attorney

_____ Pro Se

Bar #

No. of plaintiffs _____

No. of defendants _____

CHECK PRIMARY CASE TYPE:

IF TORT, IS CASE TYPE:

(Check only ONE)

(Check no more than TWO)

_____ Contract/Account

_____ Auto Accident

_____ Wills/Estate

_____ Premises Liability

_____ Real Property

_____ Medical Malpractice

_____ Dispossessory/Distress

_____ Other Professional

_____ Personal Property

Negligence

_____ Equity

_____ Product Liability

_____ Habeas Corpus

_____ Other (specify) _____

_____ Appeals, Reviews

_____ Postjudgment Garnish-
ment, Attachment, or

Are punitive damages pleaded?

_____ Yes _____ No

Other Relief

_____ Nondomestic Contempt

_____ Tort (If tort, fill in
right column)

_____ Other General Civil
(specify) _____

(c) **Domestic Relations Case Filing Information Form.**

DOMESTIC RELATIONS CASE FILING
INFORMATION FORM

Court

_____ Superior

County _____

Date filed _____

mm-dd-yyyy

Docket no. _____

Plaintiff(s)

(last, suffix, first, middle
initial, maiden)

1. _____

2. _____

Plaintiff/Petitioner's attorney

Bar #

Defendant(s)

(last, suffix, first, middle
initial, maiden)

1. _____

2. _____

____ Pro Se

CONTEMPT

____ Contempt — Custody,

Visitation, or

Parenting Time

____ Contempt — Child

Support and Alimony

____ Contempt — Child Support

____ Contempt — Alimony

____ Other Domestic Contempt

CHECK CASE TYPE:

(one or more)

____ Divorce (includes
annulment)

Contested? ____ Yes ____ No

Child Custody
issue? ____ Yes ____ No

Child Support

issue? ____ Yes ____ No FAMILY VIOLENCE

____ Separate Maintenance

____ Adoption

____ Paternity (includes
legitimation)

____ Interstate Support

Enforcement Action

____ Domestication of

Foreign Custody Decree

____ Family Violence Act

Additional information —

Ex Parte Relief

Did the initial pleading

include a request for

relief:

1. From alleged family

violence? ____ Yes ____ No

2. Was ex parte relief

Petition

requested? ____ Yes ____ No

3. Was ex parte relief

granted? ____ Yes ____ No

MODIFICATION

OTHER

____ Modification — Custody,

Visitation, or

Parenting Time

Does the modification

include a parent

selection by a child

who is at least 14

years of age? ____ Yes ____ No

____ Modification — Child

Support and Alimony

____ Modification — Child

Support

____ Modification — Alimony

Have the parties agreed to

binding arbitration? ____ Yes ____ No

Have the parties reached

a custodial agreement? ____ Yes ____ No

If yes, is custody:

____ Joint custody

____ Joint legal custody

____ Joint physical custody

____ Sole custody to: _____

Financial affidavit

submitted? ____ Yes ____ No

Child support forms

submitted? ____ Yes ____ No

(d) **General Civil Case Final Disposition Form.**GENERAL CIVIL CASE FINAL
DISPOSITION FORM
(NONDOMESTIC)

Court

____ Superior

County _____

Date _____

____ State

disposed
mm-dd-yyyy

Docket no. _____

Reporting party _____

(Name)

(Title)

Name of plaintiff/petitioner(s)

Plaintiff/petitioner's attorney ____ Pro Se

Bar #

Name of defendant/respondent(s)

Defendant/respondent's attorney _____ Pro Se

Bar #

TYPE OF DISPOSITION

1. ____ Pretrial Dismissal
(specify which type)
 - A. ____ Involuntary
 - B. ____ Voluntary (without prejudice)
 - C. ____ Voluntary (with prejudice)
2. ____ Pretrial Settlement
3. ____ Default Judgment
4. ____ Summary Judgment
5. ____ Transferred/
Consolidated
6. ____ Bench Trial
7. ____ Jury Trial (specify outcome further)
 - A. ____ Dismissal after jury selected
 - B. ____ Settlement during trial
 - C. ____ Judgment on Verdict
 - D. ____ Directed Verdict or JNOV

AWARD

1. If verdict for plaintiff, how much was awarded?
\$ _____ compensatory
\$ _____ punitive
2. If verdict on cross or counter claims, how much was awarded?
\$ _____ compensatory
\$ _____ punitive
3. Did the court modify the award?
_____ Yes _____ No
4. Were attorneys fees awarded?
_____ Yes _____ No

ADR

1. Was ADR utilized?
_____ Yes _____ No
2. If yes, was it (check if applicable):
_____ court annexed?
_____ court mandated?

1. Judgment on verdict.
- Was the verdict:
- A. ____ For plaintiff(s) (all)
- B. ____ For defendant(s) (all)
- C. ____ Other: (explain) _____
- _____
- _____
3. Did the matter settle after trial for other than judgment? (If known at the time of this submission)
- _____ Yes _____ No

(e) Domestic Relations Case Final Disposition Information form.

DOMESTIC RELATIONS CASE FINAL
DISPOSITION INFORMATION FORM

Court
____ Superior County _____ Date _____
disposed mm-dd-yyyy

Docket no. _____

Reporting party _____
(Name) (Title)

Name of plaintiff/petitioner(s)

Plaintiff/petitioner's attorney

____ Pro Se

Bar #

Name of defendant/respondent(s)

Defendant/respondent's attorney

____ Pro Se

Bar #

RELIEF GRANTED (Check all that apply)

- ## 1. ____ Ex Parte Relief

TYPE OF DISPOSITION

1. Dismissed Without Final Order
 - A. ____ Voluntary (by parties)
 - B. ____ Involuntary (by court)
2. ____ Pretrial Settlement
3. ____ Judgment on the Pleadings
4. ____ Summary Judgment
5. ____ Trial
 - A. Bench Trial
 - B. Jury Trial
 1. ____ Dismissal after jury selected
 2. ____ Settlement during trial
 3. ____ Judgment on Verdict
 4. ____ Directed Verdict or JNOV

ADR

1. Was mediation utilized?

2. ____ Temporary Relief
3. ____ Final Relief
 - A. ____ Divorce/Annulment/
Separate Maintenance
 - B. ____ Child Custody
 - (i) Parenting plan included? ____ Yes ____ No
 - (ii) Custodial arrangement:

____ Joint custody

____ Joint legal custody

____ Joint physical custody

____ Sole custody

to: _____
 - (iii) Fourteen year old made parental selection? ____ Yes ____ No
 - C. Visitation or parenting time

Approximate percentage of parenting time per year (or number of days) for: ____ Mother ____ Father

Parenting time was contested? ____ Yes ____ No
 - D. ____ Child Support
 - (i) Forms attached? ____ Yes ____ No
 - E. ____ Legitimation/
Paternity
 - F. ____ Alimony
 - G. ____ Contempt
 - H. ____ Equitable Division

___ Yes ___ No

I. ___ Protective Order

2. If yes, was it (check if

applicable):

___ court annexed?

___ court mandated?

Finding of family

violence? ___ Yes ___ No

J. ___ Adoption

3. Was there an agreement to

binding arbitration?

___ Yes ___ No

If yes, what matters were

subject to binding

arbitration?

___ Child custody

___ Visitation or Parenting Time

___ Parenting Plan

K. Attorney's fees?

___ Yes ___ No

If yes, in what amount: \$_____

and to whom: _____

L. Other (specify) _____

4. ___ Dismissed prior to
granting of relief.

(Code 1981, § 9-11-133, enacted by Ga. L. 2000, p. 850, § 3; Ga. L. 2007, p. 554, § 4/HB 369; Ga. L. 2010, p. 878, § 9/HB 1387; Ga. L. 2013, p. 141, § 9/HB 79; Ga. L. 2014, p. 482, § 3/SB 386.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsections (b) and (c).

The 2014 amendment, effective July 1, 2014, in the first sentence of subsection (a), substituted "shall be sufficient" for "are sufficient" and added a proviso at the end. See Editor's note for applicability.

Editor's notes. — Ga. L. 2000, p. 850, § 10, not codified by the General Assembly, provides that the enactment of this Code section is applicable to civil actions commenced in superior or state court on or after July 1, 2000.

Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "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 shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2014, p. 482, § 10/SB 386, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to any filings made on or after July 1, 2014.

9-11-133

CIVIL PRACTICE ACT

9-11-133

JUDICIAL DECISIONS

Cited in GMC Group, Inc. v. Harsco Mortuary, Inc., 293 Ga. App. 854, 668 Corp., 293 Ga. App. 707, 667 S.E.2d 916 S.E.2d 476 (2008).
(2008); Batesville Casket Co. v. Watkins