2014 Court Watch Report

Decisions by Georgia's appellate courts can have a significant impact on consumers. Court Watch aims to educate consumers about recent Georgia appellate court decisions. If consumers know their rights and the legal challenges they may face in the justice system, they will be better prepared to protect their rights.

INTRODUCTION

The 2014 Court Watch Report is a publication of Georgia Watch, a statewide consumer advocacy organization. Founded in 2002, Georgia Watch is a nonprofit, nonpartisan organization whose mission is to empower and protect Georgia consumers on matters that impact their wallets and quality of life through education, advocacy and policy development. We work to influence public policies that positively impact consumers, safeguard consumer protections in the area of personal finance, promote access to safe and affordable healthcare, encourage fair utility rates and renewable energy options, and promote access to the courts.

The Court Watch Program educates consumers by analyzing and publicizing important consumer-related decisions of the Supreme Court of Georgia and Georgia Court of Appeals. The 2014 Report contains descriptions of select cases that were detailed in the 2013 Report, but have seen important subsequent litigation during 2014. Additionally, the 2014 Report contains cases that are still currently pending before the Supreme Court of Georgia for the 2015 judicial session.

Decisions by Georgia's appellate courts can have a significant impact on consumers. With the goal of consumer education in mind, the Court Watch Report is designed to be accessible for all Georgians. Consumers and their attorneys will be able to use the Court Watch Report to see how Georgia's appellate courts treat consumer issues and track cases pending in the Supreme Court of Georgia. If consumers know the legal challenges they may face in the justice system, they will be better prepared to protect their rights.

Before diving into the report, it is helpful to know that Georgia's court system is organized as a three-tiered hierarchy: the trial courts, the Georgia Court of Appeals, and the Georgia Supreme Court. The trial courts are the general courts of first impression; these are the courts that hear the issues first. If one of the parties is unhappy with the trial court's decision, she may "appeal" it to the next court in the hierarchy: the Court of Appeals. At the top of the court hierarchy is the Supreme Court of Georgia, which has full discretion to decide the cases it will hear. All courts are bound to the decisions made by other higher-level courts. In other words, all Georgia courts must adhere to the Supreme Court of Georgia's decisions, and the trial courts must adhere to the Court of Appeals' decisions. With this hierarchy in mind, this report focuses on decisions made by the Court of Appeals and the Supreme Court of Georgia.

The Court Watch Report organizes cases into four categories: 1) Access to Justice, 2) Government Transparency/Accountability, 3) Healthcare, Torts and Insurance, and 4) Consumer Finance.

By reading this report, consumers and attorneys representing the rights of consumers will gain valuable knowledge about consumer rights and current case law in an easily understandable way. For instance, a consumer may turn to the Access to Justice section and discover answers to practical questions such as, "How similar does my injury have to be to injuries of others in order to become part of a class action?" or "How far will the courts go to uphold an arbitration agreement?" Useful information can also be found under the Government Transparency/ Accountability category, where consumers can learn when government agencies may be able to shield themselves from consumer lawsuits by asserting sovereign immunity.

The 2014 Report includes two Georgia Supreme Court cases that detail the difficulties plaintiffs may face in trying to form a class action lawsuit. Additionally, this year's Report analyzes various cases involving sovereign immunity as it pertains to government agencies, depicting how challenging it can be for consumers to bring an action against a state agency. The 2014 Report also covers several medical malpractice cases; one that describes when a physician-patient relationship has been created for liability purposes with an on-call consulting physician, as well as two cases in which the Court of Appeals explains that registered nurses and certified nurse midwives may offer expert testimony at trial, when testifying in their area of expertise.

After reading the Court Watch Report, Georgia Watch encourages consumers to use their newfound knowledge to spread awareness and protect their legal rights. For more information about particular cases, the court opinions for the Supreme Court of Georgia are available at http://www.gasupreme.us and Court of Appeals opinions are available at http://www.gaappeals.us/.

The 2014 Court Watch Report was written largely by Jack W. Roberts, a 2016 J.D. candidate at Emory University School of Law and the Georgia Watch Fall 2014 Court Watch Fellow. Select information in the report was provided by Dalton Windham, J.D. and Katie Villalobos, J.D., both 2015 graduates of Emory University School of Law, and Lindsey Stephens, J.D., 2015 graduate of Duke University School of Law. Adriana Jaume, a 2016 J.D. candidate at Emory University School of Law, also made significant contributions. Georgia Watch would like to give special thanks to the following individuals for their generous support and advice:

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TABLE OF CONTENTS

ACCESS TO JUSTICE

1. *Georgia-Pacific Consumer Prods., LP v. Ratner,* 762 S.E.2d 419 (Ga. 2014).

While described as a potential big win for Georgia consumers in the 2013 version of this report, *Ratner* ultimately represents a significant obstacle to consumers who are suffering similar injuries from a common source. In *Ratner,* four Effingham County property owners sued Georgia-Pacific for nuisance, trespass, and negligence due to the release of hydrogen sulfide gas from Georgia-Pacific's Savannah River Mill. The Mill, located in Rincon, had been the subject of complaints from nearby residents for nearly two decades and is cited as the cause of both health concerns and property damage due to the corrosive effects of the gas.

Four property owners filed suit against Georgia Power in 2010, seeking class certification for an area including thirty-four residential properties and thirty-three parcels of land zoned for agricultural, industrial, or other purposes. The trial court certified the class, and the Court of Appeals upheld the class certification. The Supreme Court, however, reversed the class certification, citing a failure of the plaintiffs to satisfy the element of commonality found in O.C.G.A. § 9-11-23(a).

O.C.G.A. § 9-11-23(a) has four requirements: 1) numerosity, 2) commonality, 3) typicality, and 4) adequacy of representation. While the Court of Appeals ruled that the plaintiffs satisfied each of these elements, the Supreme Court found that commonality was not satisfied. To satisfy this element, according to the Court, plaintiffs must demonstrate that "'[t]here are questions of law or fact common to the class[.]'" The Georgia Supreme Court, however, cited the United States Supreme Court in the recent *Wal-Mart Stores, Inc. v. Dukes* case, explaining that the language from the statute is "'easy to misread, since any competently crafted class complaint literally raises common questions.'" To meet this requirement, the Georgia Supreme Court requires that "the class members have suffered the same injury." While it would seem that all the nearby residents would be suffering from the negative effects from the gas (Georgia-Pacific, in fact, has admitted the gas could cause corrosion of metal within a half-mile of the mill), the Court ruled that the plaintiffs in *Ratner* failed to show that they had a "common contention" that is "capable of classwide resolution[.]" The Court reasoned that the plaintiffs are unable to prove "on a classwide basis that the entire area by which the class was defined, in fact, was contaminated with hydrogen sulfide gas[.]"

The Court cited a lack of scientific evidence of the amounts of gas present in the air, and the direction of travel, as demonstrating the plaintiffs' inability to satisfy the Court's "rigorous analysis" pertaining to classwide contamination. Noting that the complaints received in the years preceding the lawsuit were not located uniformly within the area comprising the class, the court determined that the area was selected without "any logical determination of the actual effects of the Mill's numerous and intermittent releases of hydrogen sulfide[.]" While the Court conceded that "one fairly could conclude that a number of people in the vicinity of the Mill . . . have experienced problems that might be attributable to the alleged release of hydrogen sulfide gas[,]" it reversed the plaintiffs' class certification due to the lack of certainty involving the precise boundary containing properties experiencing damage from the hydrogen sulfide.

Ratner limits the ability of large groups of plaintiffs to bring unified suits against a corporations whose practices create environmental hazards. The impracticality of enjoining a large group of plaintiffs without the benefits of a class action lawsuit could lead to judicial inefficiency, inconsistent results, and ultimately a restriction on consumers' access to justice.

2. *Miller v. Deal*, No. S13G1197, 2013 Ga. LEXIS 581 (Ga. 2014).

In *Miller*, the Georgia Supreme Court took another step in the direction of whittling away individuals' rights to gain class-action certification. The plaintiffs in *Miller* were indigent parents, all of whom had been incarcerated for failure to pay child support. In the preceding civil contempt proceedings, each plaintiff was unable to afford to hire a lawyer, while their adversary, the Department of Human Services, was represented by lawyers. The plaintiffs contended that their lack of representation at these proceedings represents a violation of their constitutional right to due process, and subsequently attempted to gain class certification to seek a remedy.

The Supreme Court ruled that class certification was not warranted because the plaintiffs could not show commonality or typicality pursuant to O.C.G.A. § 9-11-23(a). The court reasoned that there is no "absolute, inflexible, and categorical right to appointed counsel" in a civil contempt proceeding about child support. This right only exists alongside "highly individualized considerations." Therefore, the Court reasoned that the plaintiffs could not show that their special circumstances are similar enough to fulfill the commonality element.

The Court's stringent interpretation of the statute's commonality and typicality requirements restrict judicial access for groups of plaintiffs seeking relief from due process violations. A more consumer-friendly ruling might hold that the commonality and typicality elements were satisfied by the plaintiffs' common status as indigent parents who had been incarcerated after proceedings in which they had been unable to afford legal representation. As stated by the dissenting judge in *Miller*, the state could better address the "fundamentally unfair system for collecting child support from indigent parents" by providing representation to those who are unable to afford it, and thus level the playing field between indigent parents and the Department of Human Resources.

3. *Ga. Reg'l Transp. Auth. v. Foster*, 764 S.E.2d 862 (Ga. Ct. App. 2014).

In *Foster*, the Georgia Regional Transportation Authority ("GRTA") appealed from an order denying its motion for judgment on the pleadings claiming the case was time-barred because it was filed outside of the statute of limitations. This case arose when Dana Foster (plaintiff) was injured while she was a passenger on a GRTA bus on August 16, 2011. Foster claims the driver sped up unexpectedly, causing her to fall and sustain injuries. On February 10, 2012, Foster sent notice of her tort claim to GRTA, though there is nothing to prove the State responded. It was not until more than two years after the incident that Foster filed this particular personal injury suit against GRTA.

However, GRTA moved for judgment on the pleadings claiming that Foster's suit was outside of the two-year statute of limitations allotted for tort claims against the State. Foster based her argument on the fact that the two years did not begin running from the time of the

accident, but rather from the time of the State's response. She asserted that a tolling provision in O.C.G.A. § 36-33-5(d) applies to claims brought against the State under the Georgia Tort Claims Act ("GTCA"). However, the Court of Appeals disagreed.

According to the Court of Appeals, the tolling provision Foster relied on is not applicable to suits against the State, just suits against municipalities. Thus, the tolling provision Foster relied on does not apply to her suit against this state agency, and the statute of limitations for her suit has therefore passed. The Court of Appeals reversed the trial court's denial of GRTA's motion for judgment on the pleadings, as Foster's suit was ultimately determined to be time-barred. This decision has a negative impact on Georgia consumers, as the Court of Appeals is strictly enforcing the statute of limitations to bar suits, despite consumers' misinterpretations of the law.

4. *Holman v. State,* 765 S.E.2d 614 (Ga. Ct. App. 2014).

Ulysses Holman had been convicted in a trial by jury of driving under the influence (DUI) and serious injury by vehicle. Holman then appealed his conviction. The aspect of this case that is of utmost importance to Georgia consumers involves Holman's trial transcript and relaying it to the appellate record. In Holman's first appeal, his conviction was upheld based on the fact that he did not request that his trial transcript be included in the appellate record. Because there was no trial transcript, it was impossible for the appellate court to review the errors of the trial court that Holman was alleging.

According to O.C.G.A. § 5-6-37, a notice of appeal must include what is to be omitted from the record on appeal and whether or not any transcript of evidence and proceedings should be included in the record on appeal. Holman did not comply with these requirements, as his notice only stated that nothing should be omitted, but gave no notice that the trial transcript was to be included. Because there was no notice that the trial transcript was to be in the appellate record, the appellate court had nothing to review to decide whether the errors Holman brought forth on appeal actually occurred in the trial court. It was because of this absence of transcript notice that Holman's conviction was upheld during his first appeal.

In this second appeal, the Court of Appeals of Georgia used this judgment as a guideline for future appeals. The Court of Appeals stated that it will allow Holman's second appeal due to the procedural errors of his first appeal regarding the trial transcript, but asserted that this will not be allowed in the future. After this opinion, if notice of transcript inclusion is not given, then the appellate court will be obligated to automatically agree with the trial court's opinion. This is a setback for Georgia consumers (though a win for Holman), as the appellate court is using Holman's errors as a lesson for all future appellants in establishing that they must not make the same mistakes in an appeal because the outcome will not be as successful as it was for Holman.

5. *McKean v. GGNSC Atlanta, LLC,* 765 S.E.2d 681 (Ga. Ct. App. 2014).

McKean centers on whether mandatory arbitration agreements signed by third parties can bind unknowing seniors. The Court of Appeals held that these agreements cannot bind consumers who have not given full decision-making authority to another person. Shortly after his

mother passed away, Dwayne McKean filed suit alleging that defendants' negligence in providing her with nursing home care led to her death. The defendants moved to dismiss based on an arbitration agreement that McKean signed on his mother's behalf. The "Alternative Dispute Resolution Agreement" ("ADR agreement") stated that any disagreement was to be resolved solely by an ADR arbitration process. McKean argued that, at the time, he did not have the authority to sign for his mother and bind her to the agreement, but the trial court disagreed, dismissing McKean's suit and compelling arbitration. McKean appealed to the Court of Appeals.

O.C.G.A. § 13-3-1 states that a valid contract must have able parties, consideration, and assent. Because his mother did not sign the contract requiring arbitration, the appellees had to prove that McKean had the authority to sign for her and bind her to the agreements. In order to establish McKean's authority, the appellees had to either prove a principal-agent relationship or ratification by the principal. The Court found that there was no principal-agent relationship at the time of the contract. When looking at the issue of ratification, the Court pointed out that a crucial aspect of ratification is that the principal must have full and complete knowledge of all key facts. That standard was not met here, as there was no proof McKean's mother knew about the ADR agreement. The appellees also argued that when McKean's mother gave him power of attorney for future agreements this ratified agreements he had already entered. The Court was not persuaded by this argument. The Court of Appeals ultimately found there was neither authorization nor ratification giving McKean the authority to sign on behalf of his mother and bind her to the mandatory arbitration agreement. This decision is monumental for Georgia seniors who are often forced into mandatory nursing home arbitration agreements without their informed consent.

6. *Crane Composites, Inc. v. Wayne Farms, LLC,* 765 S.E.2d 921 (Ga. 2014).

Wayne Farms was a chicken processing plant that burned down in May 2003. Close to three years later, Wayne Farms filed suit against Crane Composites, Inc. ("Crane"), which made the interior panels used in the plant. Wayne Farms alleged that Crane's interior panels caused the fire to spread, thus claiming Crane's negligence added to the damage. During this time, the legislature passed O.C.G.A. § 9-11-68(b)(1), which allows a defendant to recover attorney fees and litigation expenses if the defendant previously offered a settlement that the plaintiff denied, and then the final judgment of the suit indicates no liability of the defendant or if the final judgment is less than 75 percent of the settlement offer.

During litigation, Crane made a settlement offer for $500,000, which Wayne Farms never accepted. Months later, the jury returned the verdict in Crane's favor. Based on O.C.G.A. § 9-11-68(b)(1), Crane attempted to recover its attorney fees and litigation costs from Wayne Farms, which the trial court denied based on *L.P. Gas Indus. Equip. Co. v. Burch.* The Court explained that *L.P. Gas* held that O.C.G.A. § 9-11-68 could not apply to a case where the injury happened before the statute was enacted. Crane appealed this decision, and the Court of Appeals was equally divided, which automatically transferred the case to the Georgia Supreme Court.

Because the injury took place before the statute was effective, but the suit was filed after the statute was enacted, the Court concluded O.C.G.A. § 9-11-68 does apply. The opinion of the Supreme Court overruled a 2010 Court of Appeals holding in *L.P. Gas Industrial Equipment Co.*

v. Burch, 701 S.E.2d 602, which stated that the law in effect at the time of injury shall determine the aspects of any resulting litigation. This means that Wayne Farms will be forced to comply with O.C.G.A. § 9-11-68 and pay Crane's attorney's fees and litigation costs. This holding impacts Georgia consumers negatively as it allows O.C.G.A. § 9-11-68 to apply to any suits that take place after the effective date, regardless of when the injury occurred. This forces plaintiffs to either settle a suit or possibly end up being forced to pay the defendant's attorney's fees and litigation costs.

7. *Dorn v. Ga. Dep't of Behavioral Health and Developmental Disabilities,* 765 S.E.2d 385 (Ga. Ct. App. 2014).

In *Dorn*, Paul Dorn is suing the Georgia Department of Behavioral Health and Development Disabilities (the "Department") for damages stemming from the death of his son, Brooks Cameron Dorn (the "decedent"), who was under the care of the Department. The decedent committed suicide while he was on conditional release from a psychiatric facility operated by the Department. Dorn alleges the Department's negligence led to his son's suicide. Dorn filed an "Ante Litem Notice of Wrongful Death Claim" against the Department, but he failed to list a specific amount of loss suffered (damages).

Because Dorn failed to list the specific amount before filing suit, which is a requirement in the Georgia Tort Claims Act, the Department successfully dismissed the complaint. The court noted that O.C.G.A. § 50-21-26 requires a party with a potential claim against the state to provide the state with notice prior to filing suit, in order to waive the state's sovereign immunity. Furthermore, O.C.G.A. § 50-21-26(a)(5)(E) requires that a written notice of the claim must list the amount of loss. Because Dorn failed to comply by not stating a specific amount, the trial court dismissed his claim. The statute requires notice of the amount of the loss claimed *at the time*, meaning Dorn could have listed an amount that he could have later altered, so long as the Department was put on notice of a specific amount before the suit was filed.

Dorn responded that his failure to list a specific amount caused no prejudice to the state, and also that his suit should be allowed because he was acting pro se (meaning he had no legal counsel). However, the Court of Appeals denied both of these contentions because Dorn did not comply with the plain language of the statute requiring a specific amount, and also because a claimant acting pro se does not mean he is exempted from statutory requirements. This decision negatively impacts Georgia consumers because it allows no room for claimants' errors, even those acting with no legal counsel.

GOVERNMENT TRANSPARENCY & ACCOUNTABILITY

1. *Burke County v. Askin*, 755 S.E.2d 747 (Ga. 2014).

Burke County II (referred to as such due to a 2012 case involving the same matter) involves the 1962 resolution by the county to construct five roads in a proposed subdivision. At some point, two of the roads and all but a few hundred feet of a third were constructed. The remaining two roads were never constructed.

In 2004, the plaintiffs purchased a tract of undeveloped land, the only access to which comes from Francis Street, the proposed road that the county only partially constructed. The plaintiffs asked the county to repair and maintain all the roads in the subdivision, but the county refused.

The Supreme Court upheld the lower court's ruling that the county's failure to maintain the roads in accordance with their 1962 agreement and a subsequent 2009 re-approval of the subdivision constituted an "arbitrary, capricious, unreasonable and gross abuse of discretion." The Supreme Court ordered the county to complete construction of the road. The Supreme Court's ruling in *Burke County II* represents a victory for government accountability and for individuals depending on governments to fulfill their commitments.

2. *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014).

Hill involves confidentiality and the drugs that the state uses to administer lethal injections to death row inmates. In a case that made national headlines, Warren Hill, who by some accounts is mentally disabled, was sentenced to death for two separate murders.

A 2013 Georgia statute protects the identity of individuals involved in administering executions. This includes the drug companies that produce the lethal drugs. Hill's execution was delayed in 2013 by a Fulton County judge who ruled that the statute protecting these identities was unconstitutional because they violated the inmate's rights to due process.

The Supreme Court overturned, ruling that the statute was not unconstitutional and that the prisoner had no right to know the identity of the producers of the means of his execution. The Court cited a long standing history of concealing these identities. Furthermore, it reasoned that a lack of confidentiality might cause persons necessary to the process of execution to become unwilling to participate. The Supreme Court's decision overturned the lower court's injunction, and Hill was once again scheduled for execution, and was put to death by the state on January 27, 2015.

As pointed out in the *Hill* dissent, this case came on the heels of another widely-publicized execution case, that of Clayton D. Lockett in Oklahoma. Lockett's execution also involved drugs of an unrevealed origin, and Lockett's execution took forty-five minutes and involved him twitching and mumbling. The Lockett execution led to heightened calls for government transparency regarding execution drugs. The majority's reasoning surrounding the potential unwillingness of participants to remain involved with the process of the execution if confidentiality were not preserved is sound. Indeed, the Danish producer of pentobarbital, a popular barbiturate used for execution, made their drug unavailable to states administering executions following public outcry.

3. *Brown v. State*, 759 S.E.2d 489 (Ga. 2014).

Dwight T. Brown, the former CEO of Cobb County Electric Membership Corporation ("EMC"), was indicted for allegedly stealing millions of dollars in patronage capital from EMC members, including Cobb County and the Cobb County School District. Brown challenged his

indictment on the grounds that four members of the grand jury had been members of Cobb EMC, and were thus inherently biased.

The Supreme Court denied Brown's attempt to strike the indictment, reasoning that grand jurors are not required to be fully unbiased and impartial, since the grand jury does not decide whether or not the defendant is guilty, but whether or not the case should go to trial. Cobb EMC is owned by 175,000 members in Cobb and neighboring counties.

Brown now awaits trial on 31 criminal counts. The criminal case comes on the heels of a Cobb EMC settlement returning approximately $98 million to its members after EMC allegedly retained $286 million that should have previously been returned to its members.

4. *Bullock v. State*, 760 S.E.2d 672 (Ga. Ct. App. 2014); *State v. Alonso* 758 S.E.2d 334 (Ga. Ct. App. 2014).

Two noteworthy "civil forfeiture" (alternately "asset forfeiture") cases appeared before the Georgia Court of Appeals this year. The topic of civil forfeiture has become increasingly relevant, as reports of serious abuse by prosecutors and law enforcement agencies have been uncovered by reporters at sources such as Forbes and the Washington Post. The most extreme cases of these involve seizures such as that of a Philadelphia couple's home due to their adult son being found with $40 worth of heroin (*See* pending Pennsylvania case *Sourovelis v. City of Philadelphia*).

Civil forfeiture in Georgia originates from O.C.G.A. § 16-13-49, which allows the State to seize "all property which is, directly or indirectly, used or intended for use in any manner to facilitate" the use or sale of a controlled substance. The law states that "no person shall have a property right" in such items. The law, similar to others nationwide, was designed in good faith, and can be quite effective in fighting organized crime by seizing the tools that allow drug kingpins to prosper. While a judge generally must order the forfeiture, this proceeding is often separate from the criminal trial. Therefore, a judge might order seizure, only to find that later the defendant was found innocent by a jury.

The problem arises when law enforcement wrongly suspect the use or sale of controlled substances, or wrongly associate a form of property with such sale or use. The result is that when the State possesses a person's property, that person has little means by which to retrieve this other than by going to court. Even then, there is no guarantee that the local law enforcement will not auction the property before the accused can regain it. This creates a system that seems to treat the accused as guilty until proven innocent when it comes to their property, and that, predictably, weighs disproportionately against minorities.

The two present cases both involve forfeiture proceedings surrounding drug related arrests. In *Bullock*, the defendant was arrested for marijuana. The state attempted to obtain a forfeiture hearing to seize an automobile, a digital scale, a money counter, and a digital video recorder that it associated with Mr. Bullock's marijuana use. However, since the state failed to hold a hearing within 60 days after the complaint, the Court of Appeals agreed the case should have been dismissed. Mr. Bullock's property was essentially saved on a procedural technicality.

In *Alonso*, the state initiated forfeiture proceedings against the defendant to seize her automobile, currency and a currency counter, and various computer equipment in connection with a drug arrest. Here, the trial court dismissed the state's complaint due to lack of timely filing. This time, the Court of Appeals reversed because the complaint was filed in time.

In the present cases, it appears that the property seized from the accused was at least indirectly related to the use and sale of controlled substances. However, Georgia's continued use of the civil forfeiture statute makes it easy to imagine abuse by law enforcement, as has happened in other jurisdictions. The law allows the seizure of persons' property without a fair trial, and individuals must undergo costly and time-consuming legal procedures to retrieve their property, if it is even available to be retrieved. Furthermore, the attorney's fees from these proceedings are seldom reimbursed, even if an accused person wins the right to reclaim his property. This means that a subject of civil forfeiture often must choose between foregoing the cost of an attorney at the risk of losing his case due to a procedural misstep and spending potentially thousands of dollars out-of-pocket to retrieve property that was wrongfully taken. Georgia's legislature and courts can do more to ensure the rights of the accused are protected in civil forfeiture matters.

5. *Austin v. Clark*, 755 S.E.2d 796 (Ga. 2014).

Ms. Austin filed a complaint against numerous school officials after allegedly sustaining personal injuries after she fell from a sidewalk as she was leaving a graduation ceremony at Peach County High School. Ms. Austin alleges that she was on school property when she stepped from a sidewalk into a roadway and her leg became lodged in an opening in the curb where water drains from the roadway. She alleges that the defendants negligently performed the ministerial duties of inspecting, maintaining, and repairing the sidewalk and road where she fell.

The school officials filed a motion to dismiss, asserting that the claims against them were barred by the doctrine of official immunity. The trial court granted the motion, and the Court of Appeals affirmed. The Supreme Court, however, reversed, allowing the complaint to move forward.

The doctrine of official immunity is primarily developed in Georgia through case law. It holds that while a public official may be personally liable for negligent ministerial acts, he may not be held liable for his discretionary acts unless the acts are willful, wanton, or outside the scope of his authority. A ministerial act is defined as one that is "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." A discretionary act, however, "calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." Understandably, the distinction between the two is "highly fact-specific." Thus, the Supreme Court ruled that more fact-finding must occur before this issue in this case can be definitively decided.

The Supreme Court ruled in favor of consumers injured on government property by allowing Ms. Austin's claim to proceed to further discovery. As is noted in the concurring

opinion, however, it may be time for the General Assembly to define the pleading rules surrounding this doctrine more explicitly.

6. *Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 755 S.E.2d 184 (Ga. 2014).

By overruling 2005's *IBM. v. Evans*, the *Sustainable Coast* case prevents individuals from seeking injunctive relief against state agencies that may be acting outside their legal authority. While this has immediate environmental implications due to the alleged failure of the Department of Natural Resources ("DNR") to uphold the Shore Protection Act, it also signifies a broader limitation on individuals who feel the government is overstepping its legal boundaries. The Center for a Sustainable Coast is an organization that works to protect Coastal Georgia's natural resources and environment. The Center brought a suit against DNR attempting to prevent the DNR from issuing letters of permission to third parties authorizing land alterations to property within the jurisdiction of Georgia's Shore Protection Act, O.C.G.A. § 12-5-230. The Supreme Court ordered that the organization's claim be dismissed because sovereign immunity barred the organization's claim for injunctive relief.

The Center for Sustainable Coast reasoned that each time the DNR issues a letter of permission to a third party, it violates the Shoreline Protection Act by allowing unlawful alterations of Georgia's coastal lands. The Act allows "only activities and alterations of the sand dunes and beaches which are considered to be in the best interest of the state and which do not substantially impair the values and functions of the sand-sharing system." The Center was not seeking damages, only injunctive relief to prevent such letters of permission from being issued. Nevertheless, the Court examined the Act, and reasoned that the Act did not contain any waiver of sovereign immunity, meaning that the state cannot be sued by a private citizen on matters pursuant to the Act. This runs contrary to the aforementioned *IBM* decision, which held that an exception to sovereign immunity existed when a party sought injunctive relief against the state.

While the Court did not address the issue of whether or not the letters of permission in question actually are in violation of the Shore Protection Act, this decision bars individuals from keeping their government in check if the letters are in fact unlawful. The court did seem to leave open the possibility for actions against public officers in their individual capacities. However, this presents a very high bar for plaintiffs, as under Art. I, Sec II(IX)(d) of the State Constitution, it would require that the public officer acted with malice or intent to cause harm. By limiting citizens' rights to use the state court system to seek injunctions against state agencies, *Sustainable Coast* limits citizens' ability to keep their government in check.

7. *Dept. of Transp. v. Jarvie,* 766 S.E.2d 94 (Ga. Ct. App. 2014); *Ga. DOT v. Owens,* 766 S.E.2d 569 (Ga. Ct. App. 2014).

Jarvie involves an appeal by the Department of Transportation ("DOT") from the denial of its motion to dismiss a lawsuit filed by the children of the late William Jarvie. Jarvie was a passenger involved in a deadly collision with a construction vehicle. DOT claims the trial court incorrectly ruled that it was not entitled to sovereign immunity. The Court of Appeals of Georgia reversed this decision for the following reasons.

DOT hired a contractor to widen an interstate road, which required a stockpile in the median. Jarvie's vehicle collided with a dump truck entering the highway from the median. The court explained the charges against DOT are for the negligent design, construction, and maintenance of work vehicle access and egress to the interstate median. DOT moved to dismiss the complaint arguing it has sovereign immunity, meaning it cannot be sued without its consent because of a special protection. The trial court denied DOT's motion, and this appeal followed. Under the Georgia Tort Claims Act ("GTCA"), there is a waiver of the state's immunity, but there are also exceptions to the waiver.

The plaintiffs argued DOT is liable because it negligently allowed the stockpile in the median and failed to monitor it. However, because of DOT's limited role, the Court of Appeals held that DOT is immune from liability, pursuant to O.C.G.A. § 50-21-24(9). This decision appears to be a setback for Georgia consumers, as DOT's conduct to allow median stockpiling was held to fall within one of the exceptions to the immunity waiver in the GTCA, thus denying DOT's liability.

A similar outcome can be seen in *Owens*, where there was also a collision at a road construction site that resulted in the death of Rondale Owens and the serious injuries of two others. The plaintiffs claim the death and injuries were due to negligence on the part of the Georgia Department of Transportation ("DOT") due to its contractor's faulty traffic control plan and failure to make site-specific modifications. The Court of Appeals ultimately concluded that DOT was entitled to sovereign immunity because their conduct in overseeing a contractor fell into one of the exceptions listed in O.C.G.A. § 50-21-24. Instead, DOT's contractor, CW Matthews, was held responsible.

8. *Dep't of Transp. v. Kovalcik*, No. A14A0694, 2014 Ga. App. LEXIS 500 (Ga. Ct. App. 2014).

In *Kovalcik*, DOT's sovereign immunity is waived, allowing the plaintiffs to continue with their lawsuit, as it is held that the negligence causing Ms. Kovalcik's death was due to the DOT's failure to maintain their construction site properly. This is different from the previous two cases dealing with the DOT and sovereign immunity because in those two cases, the DOT's limited role in construction site maintenance allowed them to preserve their sovereign immunity and forego the lawsuits against them.

On a rainy night in March 2008, Ms. Kovalcik was killed in a crash in Buckhead as a passenger in a car driven by Mr. Bridges. Mr. Bridges had entered what he believed to be the left-hand turn lane to make a left turn in an area where road construction had been taking place. Instead, his vehicle entered a short left-hand turn lane immediately preceding the intersection, which allowed drivers to turn left into a parking lot, rather than turning on the subsequent street, as Mr. Bridges had intended. This shorter lane was bounded by a concrete wall, into which Mr. Bridges collided, causing his vehicle to roll and kill Ms. Kovalcik.

Ms. Kovalcik's family sued the Department of Transportation ("DOT") for negligent design, claiming that the DOT failed to ensure the roadway was safe for use by the public and

failed to provide adequate signage or warning of approaching traffic barriers. The DOT answered, asserting sovereign immunity.

Sovereign immunity is generally only inapplicable if the state waives its right and consents to lawsuits. The Georgia Tort Claims Act ("GTCA") did just this – it waived sovereign immunity for "the torts of state officers and employees acting within the scope of their official duties or employment." An exception to GTCA exists, however, for inspection functions, and the DOT argued that this incident falls within this exception. DOT argued that it did not draft the construction plans for the ongoing project, and should be immune from any liability stemming from its inspection of the plans prepared by the constructing contractor.

The trial court held that this did not fall within the exception to GTCA, and thus sovereign immunity remained waived. The Supreme Court affirmed. Peachtree Road, where the accident occurred, is a state route. Therefore, DOT's inspection was not just of the construction plans, but of the newly configured roadway itself. This caused their inspection to fall within GTCA, and not within its exceptions. Therefore, the Kovalcik family is free to pursue their suit.

While *Kovalcik* represents a victory for Georgia drivers in that it allows tort suits regarding improper inspection of construction projects on state roads, it should not be read too broadly. As the Court notes, the DOT may have a duty to inspect county roadways as well, but DOT would be immune from this duty. Individuals still cannot sue the DOT over questions of its inspection power or function of property not owned by the state (*see:* Maguer v. DOT, 547 S.E.2d 304 (Ga. Ct. App. 2001)).

9. *Pennington v. Gwinnett Cnty.*, 764 S.E.2d 860 (Ga. Ct. App. 2014).

The Penningtons entered into a contract with T-Mobile South LLC ("T-Mobile"), in which T-Mobile was given the option to lease a portion of the Penningtons' property to install a cell phone tower. The Penningtons allege Gwinnett County interfered with this contract, which resulted in a taking and amounted to inverse condemnation. The contract allowed T-Mobile to pay the Penningtons $1,000 for the option to lease part of their land for twelve months. It also gave T-Mobile the option to extend the contract for an additional twelve months and an additional $1,000. The contract specifically stated it was not a commitment for future lease agreements. T-Mobile extended the option for a total of three years.

T-Mobile applied for a permit with Gwinnett County to place the tower on the Penningtons' land, though it was repeatedly denied. During this time, T-Mobile and Gwinnett County entered into a lease allowing T-Mobile to place its tower at a county park near the Penningtons' property. Shortly thereafter, the Penningtons filed the initial suit alleging the County took their lease with T-Mobile, which amounted to an improper taking by inverse condemnation. The trial court granted summary judgment in favor of the County, meaning the court saw there was no way the Penningtons could prevail in a trial.

On appeal, the Penningtons argued the trial court erred in stating there was no inverse condemnation. The Court of Appeals disagreed with the Penningtons by pointing out that inverse condemnation only applies if the Penningtons had a valid property interest that was taken. The

Penningtons had no property interest because their contract with T-Mobile was only an option contract. In other words, the option to lease the land was solely up to T-Mobile, so when T-Mobile decided not to exercise the option to lease, the Penningtons no longer had a property interest. This opinion illustrates how difficult it is for Georgia consumers to assert wrongdoing on the part of counties who may interfere with their private property and contractual interests.

HEALTHCARE. TORTS, INSURANCE

1. *Roberson v. 21st Century Nat'l Ins. Co.*, 759 S.E.2d 614 (Ga. Ct. App. 2014).

Mr. Roberson was injured in a motor vehicle accident in a car driven by Mr. Snipes and owned by Mr. Booker. Mr. Roberson sued both Mr. Snipes and Mr. Booker, and he also sued 21st Century, who was his wife's uninsured motorist insurance carrier. However, 21st Century moved for summary judgment because its policy contained a "Named Driver Exclusion Endorsement" that excluded Mr. Roberson from all coverage under the policy. The trial court granted this motion. Mr. Roberson appealed, claiming the exclusion did not apply and enforcement of the exclusion would violate both O.C.G.A. § 33-7-11 and Georgia public policy.

Mrs. Roberson's policy provides that that 21st Century "will pay compensatory damages that an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of . . . [b]odily injury sustained by an insured." The policy defines the "insured" as either Mrs. Roberson or "any family member." As a result, Mr. Roberson felt that he was entitled to the benefit of the policy's uninsured motorist coverage. However, Mrs. Roberson's policy also includes a "Named Driver Exclusion Endorsement" which provides that "ALL coverages under this policy are excluded" for claims arising from an accident when certain vehicles are operated by a "named excluded driver," and Mr. Roberson is identified as such.

O.C.G.A. § 33-7-11provides that coverage "shall not be applicable where any insured named in the policy shall reject the coverage in writing." The law requires a written rejection of uninsured motorist coverage, and Mrs. Roberson's coverage agreement does not include such a rejection. Therefore, the Court of Appeals held that Georgia law precludes 21st Century from excluding Mr. Roberson from her coverage.

Here, the Court of Appeals offered additional protection against unfair insurance policy language, especially for consumers who may not be fully aware of their policy coverages. The Court held that an insurer may fix the terms of its policy "as it wishes[.]" However, "when an uninsured motorist policy provision is in conflict with the clear intent of O.C.G.A. § 33-7-11, the policy provision is unenforceable, and the statute controls."

2. *Carter v. Progressive Mt. Ins.*, No. S13G1048, 2014 Ga. LEXIS 579 (Ga. 2014).

Velicia Carter was injured in an automobile accident with Jeova Oliveira, who was allegedly under the influence of alcohol at the time of the accident. Oliveira had an auto liability insurance policy with GEICO with a $30,000 per person liability limit. Carter was insured by Progressive, including coverage of $25,000 per person for uninsured or underinsured motorist coverage.

Carter entered into a settlement with GEICO in which the latter paid the $30,000 limit of Oliveira's policy, allocating $29,000 for punitive damages and $1,000 for compensatory damages. Carter also sued Progressive as her uninsured motorist carrier to recover the remainder of compensatory damages to which she felt she was entitled. However, the trial court awarded Progressive summary judgment due to the amount of punitive damages paid in the GEICO settlement. The court reasoned that since Carter had allocated the GEICO settlement in a manner so skewed towards punitive damages, she had failed to exhaust the limits of Oliveira's liability policy, and therefore forfeited the ability to make a claim against GEICO under O.C.G.A. § 32-24-41.1. The court concluded that Georgia law allows an injured party to settle a claim and subsequently recover uninsured motorist benefits "only to the claimant's actual injuries or losses and not to punitive damages."

The Supreme Court reversed. The Court ruled that the Georgia law is in place to prevent the liability carrier to shift the payment of punitive damages to the uninsured motorist coverage. Therefore, since Carter was seeking not punitive damages from Progressive, but actual losses, her suit should not have been barred. *Carter* increases the amount of damages that victims of uninsured motorist accidents may recover from their policies and from the limited policies of the liable motorists.

3. *Cook v. Glover,* No. A12A2506, 2014 Ga. LEXIS 579 (Ga. 2014).

The Georgia Department of Human Services, Family and Children Services ("DFCS") granted Mr. Glover's application for Medicaid benefits, but they imposed a multi-month asset transfer penalty on him due to his failure to name the state as the remainder beneficiary on an annuity. Mr. Glover was an 82 year old man residing in a Gainesville nursing home. He had purchased an irrevocable, non-assignable annuity for himself shortly before applying for Medicaid. DFCS's penalty for not naming the state as the remainder beneficiary on the annuity meant that Glover's benefits could not be paid to the nursing home during the seven month penalty period.

Glover appealed the penalty to an Administrative Law Judge, who initially reversed the penalty. DFCS requested for agency review by the Department of Community Health ("DCH"), which is responsible for the Medicaid program. DCH upheld the penalty. Glover then sought review by the Superior Court of Hall County, which confirmed the penalty. The Court of Appeals, however, re-reversed the penalty. The court held that Glover's annuity was not an asset to which the asset transfer penalty should apply.

Mr. Cook, serving as the Commissioner of DCH, argued that the Court of Appeals misinterpreted the annuity section of the Medicaid Act, and said that since the federal statute was ambiguous, the Court should defer to the agency's interpretation of the statute. The Supreme Court overturned, stating that the agency's interpretation of the statute was ambiguous enough to warrant deference by the Courts. Therefore, Mr. Glover's penalty was reinstated, triggering this appeal by DCH.

While the federal rules of administrative deference under the landmark *Chevron* case warrant more discussion than this report can allow, it seems clear that, at least in the present case, awarding more deference to the agency produced an unfavorable outcome for Mr. Glover. As a result of the Court's decision, Medicaid will not be forced to pay for Mr. Glover's nursing home expenses for seven months.

4. *Ford Motor Co. v. Conley*, 757 S.E.2d 20 (Ga. 2014).

Following a 2006 single-vehicle rollover accident that occurred in Catoosa County in 2006, Jordan and Renee Conley filed a product liability suit against Ford, alleging design flaws in the Ford Explorer Sport Trac that caused the death of Ms. Conley's mother and severely injured their son.

The trial court jury returned a verdict in favor of Ford. However, following another Georgia case in which the insurance status of Ford was not properly disclosed, the Conleys filed an appeal. It appeared that Ford used a uniform policy of nondisclosure when it came to its insurance policies, but Georgia law requires insurance information to be discovered for purposes of qualifying the jury under O.C.G.A. § 9-11-26(b)(2). This law is in place to ensure that jury members are not biased due to being insured by the same company as the defendant.

The Court of Appeals could not come to an agreement, so the Georgia Supreme Court took the case. The Court ultimately ordered a new trial on the grounds of improper jury qualification. While acknowledging that "high hurdles" must be cleared for a new trial, and that this should only happen in extraordinary circumstances in which an error in the verdict cannot be corrected after the fact, the Court ruled that the Conleys had met this burden.

Conley is important in ensuring that consumers in products liability cases face an impartial jury. Before the new trial commenced, Ford settled by paying the Conleys an undisclosed amount.

5. *Davidson v. Meticulously Clean Sweepers, LLC*, 765 S.E.2d 783 (Ga. Ct. App. 2014).

Davidson deals with a slip and fall case. Shortly after a winter storm, Nancy Davidson slipped and fell on a patch of black ice outside of a Dollar Tree store owned by three corporate entities ("Rivergate"). The Davidsons sued Rivergate, its property management company, Dollar Tree, the Dollar Tree manager, and Meticulously Clean Sweepers, LLC ("MCS") for negligence. The defendant at issue in this appeal is MCS, as all other defendants settled. MCS moved for summary judgment, claiming the Davidsons were not third–party beneficiaries of the contract between Rivergate and MCS and also based on the lack of evidence proving MCS had been negligent. This appeal by the Davidsons followed.

MCS was an independent contractor hired by Rivergate to provide sweeping and blowing services around the shopping center, which included de-icing services. The court emphasizes that the contract between Rivergate and MCS specifically stated that no third parties could benefit from any part of their contract. The court also explains that a business owner owes a duty of ordinary care to its customers, but that duty does not extend to independent contractors, such as

MCS. Furthermore, because the contract between Rivergate and MCS specifically points out that no third parties can benefit from the contract, the Davidsons, as a third-party, are not entitled to recover from an alleged failure to perform a duty.

Because the Davidsons failed to show MCS owed them a duty of ordinary care, and they were not third-party beneficiaries of the contract, the Court of Appeals held that the trial court did not err in granting MCS's motion for summary judgment. This is a setback for Georgia consumers as it stands for the premise that consumers cannot recover as third-party beneficiaries to a contract between a business and an independent contractor, especially if a provision exists stating that no third-party shall benefit.

6. *Atlanta Nat'l League Baseball Club v. F.F.*, No. A14A0398, 2014 Ga. App. LEXIS 507 (Ga. Ct. App. 2014).

At a 2010 Atlanta Braves game, a six-year-old female spectator was sitting behind the visitors' dugout when she was struck by a foul ball. She suffered a skull fracture and brain injuries. Her parents sued the Braves, their owners, and Major League Baseball for negligence in failing to adequately provide protection to fans.

At some point before the 2010 season, the Braves had added netting to portions of both dugouts to protect players from balls leaving the field of play. Safety netting behind home plate only protected 2,791 of the stadium's 49,856 seats and did not extend to seats directly behind the dugouts. Although attendance at the game was sparse and protected seats were available, a surcharge would have applied had the family chosen to move to one of the protected seats.

The Braves argue that the "limited duty" or "baseball rule" applies. This rule states that providing a sufficient number of protected seats behind home plate to meet the ordinary demand for such seats discharges the Braves from the duty to provide a reasonably safe environment for all spectators that may choose not to sit in those seats. The trial court denied the Braves' motion for summary judgment, and the Court of Appeals affirmed.

The Braves' decision to add netting to the dugouts to protect the players is highly relevant here. The seats in which the plaintiffs were sitting are presumably no less dangerous than where the players sit, yet the Braves elected not to extend netting to the nearby spectator seats. While true negligence must be decided when the case returns to trial level, this case may ensure that spectator industries will take greater steps to guarantee the safety of consumers attending their events.

7. *Dion v. Y.S.G. Enters.*, 766 S.E.2d 48 (Ga. 2014).

Dion involves a wrongful death action filed by Peggy Dion ("Dion") against Y.S.G. Enterprises, Inc., d/b/a Depot Sports Bar and Grill ("Depot") for the death of her husband, Dale. Dale died in a single-car accident, while his blood alcohol content was 0.282. Prior to the accident, Dale had been at Depot consuming alcohol for roughly eight hours. When Dale went to close his tab, a Depot employee unsuccessfully tried to retrieve his car keys to prevent him from driving. Dion alleges the conduct of Depot's employees was the proximate cause of Dale's death.

The Court of Appeals upheld the trial court's motion to dismiss, and Dion appealed to the Georgia Supreme Court. The Supreme Court's opinion refers to the common law rule, which asserts that the person who drank the alcohol is liable for any damages, not the seller or provider. Under this rule, Dion's suit could not stand, as Dale's intoxication and decision to drive was his own choice, not relatable to the provider of the alcohol. The Court then discussed the Dram Shop Act, which added new causes of action where providers could be held liable. However, the Court was quick to note that even the additions do not apply to Dale's death. The Court found it clear that the common law rule that prohibits Dion's suit is still applicable to Dale's death. This common law rule is explicitly written into the Dram Shop Act. The circumstances of Dale's death do not fit into any of the new causes of action listed in O.C.G.A. § 51-1-40 (b).

Therefore, the Supreme Court affirmed the Court of Appeals' decision to grant Depot's motion to dismiss because both the common law rule and O.C.G.A. § 51-1-40 prohibit Dion's suit, as Dale's consumption of alcohol was the proximate cause of his own death, and the conduct of Depot's employees was too far removed to be the proximate cause.

8. *Scott v. Butler*, 759 S.E.2d 545 (Ga. Ct. App. 2014).

Ms. Scott was the victim of ongoing physical and mental abuse at the hands of her boyfriend of four years. At least once, she was injured to the extent of having to go to the emergency room for treatment. Before and after ending the relationship in July 2011, Ms. Scott called the police on her boyfriend several times, resulting in his repeated arrests and convictions for assault, battery, and other charges. Despite two restraining orders, Ms. Scott's former boyfriend continued to stalk, harass, and threaten her.

At some point in 2012, the ex-boyfriend discovered Ms. Scott's place of employment. In July or August of that year, he appeared at her workplace, followed her home, and confronted her on her doorstep. Ms. Scott subsequently moved into a domestic violence women's shelter. Due to her fears that her ex-boyfriend would injure someone at her place of employment, Ms. Scott took a two-week leave of absence. Around the same time, Ms. Scott's stepfather murdered her mother in a murder-suicide. After discussing the situation with the store manager, who told her to resign, Ms. Scott did resign. However, when Ms. Scott applied for unemployment benefits, the employer opposed it, asserting that she had voluntarily quit her job because of "personal circumstances" that were unrelated to her employment and was thus disqualified from receiving benefits.

The Court ruled in Ms. Scott's favor. It reasoned that although Ms. Scott's employer "did not create or contribute to the dangers at issue, to deny Scott benefits under the circumstances presented would, in effect, require her to work in a dangerous environment wherein she and numerous others would be unnecessarily exposed to the actual threat of violence due to circumstances that are entirely beyond their control." Therefore, the Court reasoned that her resignation was in fact due to an issue at her workforce, and thus she was entitled to receive unemployment benefits. This holding provides victims of domestic abuse in Georgia with unemployment benefits if they are forced to leave their job to protect themselves from a stalking abuser.

9. *Abdel-Samed v. Dailey*, 755 S.E.2d 805 (Ga. 2014).

Mr. Dailey suffered a high pressure puncture wound to his hand after an accident with a high-pressure paint sprayer and went to the emergency room in Spaulding County just after midnight on the morning of December 11, 2005. He was examined by a physician's assistant (PA) and by Dr. Abdel-Samed, both of whom concurred that he was in need of emergency hand surgery. Mr. Dailey, however, was not transferred to another hospital for surgery until 7:33 a.m., with the surgery coming at 9:45 a.m. As a result, Mr. Dailey claims that he lost some range of motion and lost the tip of his middle finger to amputation. Mr. Dailey claims that these hardships are the result of the gross negligence of both Dr. Abdel-Samed and the PA.

Evidence shows that protocol for the Spalding Hospital would have been to call nearby affiliated hospitals to find a hand surgeon that was available and on call. Although Dr. Abdel-Samed testifies that she believed that Medical Center of Central Georgia (MCCG) was called in search of a hand surgeon, there is evidence that shows that MCCG was not called, and that they had a hand surgeon available. Additionally, in between the PA's examination of Mr. Dailey and Dr. Abdel-Samed's examination, Dr. Abdel-Samed had been on the phone with a doctor at Piedmont Hospital, who was available at the time (indeed, the same doctor who eventually operated on Mr. Dailey hours later). She was speaking to this doctor about another hand surgery candidate at her hospital and mentioned to him that she had another patient who might be in need of emergency surgery as well (i.e. Mr. Dailey). Yet this doctor was not contacted again regarding Mr. Dailey until after 7:30 a.m.

The standard for emergency medical malpractice cases is gross negligence. This is defined as acting in "the absence of even slight diligence, and slight diligence is defined in [O.C.G.A. § 51-1-4] as 'that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances.'" The Court found that this was a genuine emergency situation and stated that there was enough evidence to support a jury finding of gross negligence. The case was thus allowed to proceed to trial. *Dailey* will be important in upcoming cases where the determination of an emergency medical situation is of critical importance, and indeed it has already been cited as such (*See Nisbet v. Davis*, 760 S.E.2d 179 (Ga. Ct. App. 2014)).

10. *Gallant v. MacDowell*, 759 S.E.2d 818 (Ga. 2014).

In a case of alleged dental malpractice, Ms. MacDowell was referred by Dr. Winston to Dr. Gallant to provide a full mouth prosthodontic reconstruction. The two dentists maintain separate practices but worked as a team to perform dental services for MacDowell. Under the treatment plan, Dr. Winston would extract teeth from MacDowell and place implants into her jaw, and Dr. Gallant would subsequently use these implants when installing prosthetic teeth.

In August 2006, after MacDowell's first implant procedure, Dr. Gallant determined that the implants had been improperly placed, making prostheses installation difficult. He consulted with a third dentist, Dr. Arnold, who confirmed his opinion. Dr. Gallant was faced with a choice of working around the improperly placed implants or removing the implants in order to install new ones. Dr. Gallant admits that he did not inform MacDowell of her options and decided to

follow through with working around the difficulties presented by the improperly laid implants, feeling as if MacDowell had been through enough already.

As Dr. Gallant completed the prosthesis installation, MacDowell began making numerous complaints about their fit and comfort. After making many adjustments in response to these complaints, Dr. Gallant referred MacDowell back to Dr. Winston to examine her mouth. Dr. Winston informed MacDowell that her problems were being caused by the lengthy nature of Dr. Gallant's reconstruction and the narrow width of his prosthetics. As MacDowell's complaints continued, Dr. Gallant referred MacDowell to Dr. Arnold for a second opinion. Dr. Arnold continued her treatment by completely remaking the prostheses that had been installed.

MacDowell filed a complaint for professional malpractice against Dr. Gallant on January 26, 2010. Gallant responded with a motion for summary judgment, asserting that the suit was barred by the two-year statute of limitations. MacDowell responded by arguing that the statute of limitations should not have begun until Dr. Gallant allegedly concealed his opinion that the implants had been improperly placed. She asserted that since she did not discover the problems with the implants until she consulted with Dr. Arnold on February 13, 2008. The trial court ruled in favor of Dr. Gallant, ruling that the statute of limitations was instead tolled on January 8, 2008, which is the date at which MacDowell sought the care of Dr. Winston to complain about the fit and comfort of the prostheses. The court reasoned that a consultation with another doctor begins to toll the statute of limitations. The Court of Appeals reversed on the ground that the visits to Dr. Winston did not toll the statute of limitations since Dr. Winston was not an "independent medical opinion" through which MacDowell "reasonably could have discovered her cause of action."

The Supreme Court upheld the Court of Appeals' ruling. Because Dr. Winston and Dr. Gallant had jointly treated MacDowell, Dr. Winston did not qualify as an independent medical opinion. *Gallant* is important for plaintiffs in malpractice cases who do not discover their injuries or the acts or omissions that caused them until some time after their procedures. By delaying the tolling of the statute of limitations until a patient seeks a truly independent medical opinion, the Court helps prevent malpractice victims from having no means of legal redress against partnering healthcare providers.

11. *Smith v. Rodillo,* 765 S.E.2d 432 (Ga. Ct. App. 2014); *Tomeh v. Bohannon,* 765 S.E.2d 743 (Ga. Ct. App. 2014).

In *Smith v. Rodillo*, Glenn Smith sued Dr. Rodillo for professional negligence, claiming Rodillo's failure to examine him caused him to suffer severe injuries and undergo extensive treatment. The trial court directed a verdict in Dr. Rodillo's favor, ruling there was no physician-patient relationship between Rodillo and Smith, which Smith appealed to the Court of Appeals.

Smith went to the hospital with swelling around his penis, trouble urinating, and chest congestion. The ER physician unsuccessfully attempted to insert a catheter and consulted Dr. Rodillo, the on-call urologist, to assist him. Rodillo advised on the catheter insertion and also suggested a PSA test for Smith. Rodillo advised several tests be conducted on Smith, though Rodillo did not perform them. A delay in testing and subsequent late diagnosis caused Smith to

suffer severe injuries. During trial, Smith alleged the delay was due to Dr. Rodillo's negligence, which Rodillo denied.

The Court of Appeals stated there can be no malpractice without a physician-patient relationship. Evidence must show that Dr. Rodillo consented to undertake Smith's care before he can be held liable. The Court explained that one physician listening to another's description of a patient's symptoms and offering his professional opinion does not create a physician-patient relationship. However, the Court further explained that, when a doctor is on-call and receives a description of a patient's condition and directs the course of that patient's treatment, then a physician-patient relationship has been established. The Court reasoned that Dr. Rodillo offering advice on Smith's catheter, receiving information on his condition and history, and then ordering the PSA test sufficiently established a physician-patient relationship, despite Rodillo never physically examining Smith. It is for the Court to determine whether a physician-patient relationship was created, and this Court ultimately found that it was. Thus, the trial court's verdict in favor of Dr. Rodillo was determined to be in error, and he was found liable for the professional negligence in caring for Smith.

The physician-patient relationship of on-call physicians is also at issue in *Tomeh*. Here, Alikina Bohannon sued pediatrician, Dr. Tomeh, claiming that malpractice during Bohannon's labor and delivery led to the death of her son, Xavier, shortly after his birth. Dr. Tomeh filed a motion for summary judgment claiming no doctor-patient relationship existed, which the trial court denied, leading to this appeal.

Bohannon went into early labor, which led to a cesarean section, and roughly 25 minutes after birth, Xavier died. Hospital reports listed all medical personnel in the operating room, none of whom were Tomeh. Tomeh was listed as Xavier's doctor, as well as the provider of Xavier's intubation and resuscitation efforts, even though Tomeh's sworn statement avowed that he never participated in any treatment, consultation, advice, or care for either Bohannon or Xavier. Tomeh claimed the trial court erred in denying his motion for summary judgment, as there was no doctor-patient relationship, he was just the on-call pediatrician the day of delivery.

The Court stated the same requirement mentioned in *Smith v. Rodillo*, that a physician-patient relationship must be entered into consensually and knowingly by both parties. The Court reasoned that Dr. Tomeh's testimony, along with testimony that the hospital's system automatically assigns patients to on-call physicians, even if the physician never saw or treated the patient, indicated that no doctor-patient relationship was created. The Court explained that Tomeh is not liable for malpractice simply because he was the on-call pediatrician at the time. Because the evidence shows no doctor-patient relationship, the Court of Appeals ruled that the trial court erred in denying Tomeh's motion for summary judgment.

These two cases are very informative opinions for Georgia consumers as both cases establish when and what will constitute a physician-patient relationship pertaining to on-call physicians, which is especially important for future malpractice suits.

12. *Freeman v. LTC Healthcare of Statesboro, Inc.*, 766 S.E.2d 123 (Ga. Ct. App. 2014); *Dempsey v. Gwinnett Hosp. Sys.*, 765 S.E.2d 525 (Ga. Ct. App. 2014).

Freeman involves a malpractice suit by Charles W. Freeman against a long-term care facility, Westwood Nursing Center ("Westwood"), for the death of his wife. Following surgery to remove a brain tumor, Mrs. Freeman suffered serious complications and was transferred to Westwood, where she subsequently died. During trial, Mr. Freeman had Donna Jones, a registered nurse ("RN") give her expert opinion on what caused his wife's death and who was at fault. Jones stated that Westwood breached its standard of care, and had it not, Mrs. Freeman would still be alive. However, the trial court granted Westwood's motion for summary judgment based on a lack of evidence. The trial court ruled that Jones was not in a position to give an opinion on causation, which led to this appeal.

The Court of Appeals stated that in order to recover for medical malpractice, a plaintiff must show that there was a breach in the standard of care and that this breach caused the injury. The Court of Appeals went on to explain that the requisite causation element must be established through expert testimony. Westwood was trying to convey that RNs should be precluded from giving expert opinions on causation in medical malpractice cases. The Court of Appeals rejected this argument, noting that Georgia law determines expert opinions on a case-by-case basis, though the expert must be testifying within his or her area of expertise. However, in this instance, the Court determined that Jones' testimony simply re-established that Mrs. Freeman died of respiratory failure, rather than detailing the specific diagnosis and cause of that respiratory failure. The Court of Appeals ultimately affirmed the trial court's ruling in granting Westwood's motion for summary judgment. The Court reasoned that Freeman did not provide sufficient evidence to show that Westwood's breach caused Mrs. Freeman's death because, in this particular case, Jones' expert testimony on causation was outside her realm of specialized knowledge as an RN.

Dempsy involves an issue similar to that in *Freeman*. The Court of Appeals here also agreed that there is no bright line rule that RNs cannot give expert testimony on causation in medical malpractice suits, and the matter must be decided on a case by case basis. The Court in *Dempsy* allowed a certified nurse midwife ("CNM") to offer expert testimony and also broadened the definition of RN in Georgia to include CNMs.

Melissa Dempsey sued Gwinnett Hospital System, Inc. ("hospital") for medical malpractice. Dempsy alleged her daughter's permanent physical and mental disabilities were caused by a brain injury that occurred during birth, due to complications the RNs failed to detect. During trial, the jury returned a verdict for Dempsy. The hospital then filed a judgment notwithstanding the verdict on the grounds that the trial court erred in allowing the testimony of Dempsey's expert witness, Colleen Mannering, a CNM. The hospital alleged Mannering is not qualified to offer expert testimony on RNs, as she was not in the same profession. The trial court granted this motion, for which Dempsey appealed.

To resolve this issue, the Court relied on O.C.G.A. § 24-7-702(c), which states that a witness must have knowledge and experience in the area and must be in the same profession as the defendant. In applying this statute, the court concluded that Mannering is both a RN and a

CNM, as the court explained that Georgia law requires all CNMs to also be licensed as RNs. A CNM is an RN with advanced training in a specialized area. The Court of Appeals ruled that the trial court erred in granting the hospital's motion, as Mannering is a member of the same profession as the hospital's RNs and is thus permitted to offer expert testimony on the facts at hand.

CONSUMER FINANCE

1. *Mitchell v. Wells Fargo Bank*, No. S14A0391, 2014 Ga. LEXIS 585 (Ga. 2014).

In November 2005, Richard Mitchell obtained property in Alpharetta. He executed a security deed in favor of Mortgage Electronic Registration Systems ("MERS"), who assigned the deed to Wells Fargo as trustee. Security deeds are common in Georgia and differ from traditional mortgages because they allow for an outright transfer of title to the property to the lender to secure the debt of the deed. Lenders generally prefer security deeds to mortgages because they allow the lender to reclaim the title outright if a borrower is unable to pay off the loan, whereas in traditional mortgages, lenders only receive a lien on the property. Foreclosure on a mortgage is also more difficult for a lender.

Mr. Mitchell's property was indeed foreclosed upon after he became delinquent on his payments, and Wells Fargo purchased the property at a foreclosure sale on February 3, 2009. In May 2010, Mitchell filed a complaint against Wells Fargo, which Wells Fargo moved to dismiss due to a lack of merits. The trial court granted this motion to dismiss due to lack of jurisdiction, ruling that Mitchell had failed to properly serve notice to Wells Fargo. The court also granted Wells Fargo's motion for a bill of peace, which essentially prevented Mitchell from filing any more claims against Wells Fargo relating to the foreclosure for five years, unless Mitchell received written approval from the trial court. Finally, the court ordered that Mitchell pay Wells Fargo $4,000 for its attorney fees.

Mitchell appealed the dismissal, arguing that if the court did not have jurisdiction over Wells Fargo at the time of the original suit, then it should not have been able to issue the bill of peace pertaining to Mitchell. The Supreme Court sided with Wells Fargo, ruling that only the issue of jurisdiction over Mitchell is relevant toward the issuance of the bill of peace. The Court ruled that the bill remains binding over both Mr. Mitchell and his wife, although Mrs. Mitchell was not mentioned as a party in the original bill.

The rules of service, which serve as the foundation of Wells Fargo's original defense that the trial court lacked jurisdiction, are complex. The Court did not delve into the details surrounding Mr. Mitchell's faulty service since he apparently did not dispute the fact that it was indeed insufficient. Nonetheless, this case highlights how important it is for consumers to follow the proper laws regarding service of a large institution like Wells Fargo, as well as the importance of mortgage/deed awareness following the 2008 housing market crisis. Finally, it displays the courts' aversion to litigation following the housing crisis, as made evident by the trial court's insistence that Mr. Mitchell pay Wells Fargo's attorney fees and the issuance of the bill of peace.

2. *Owen v. Bank of the Ozarks,* 764 S.E.2d 893 (Ga. Ct. App. 2014).

The appellant, Benjamin Carl Owen, executed two promissory notes in favor of First Choice Community Bank ("First Choice"). In April 2011, First Choice failed, and the FDIC assigned Owen's notes to Bank of the Ozarks ("the bank"). Owen defaulted on the notes, and the bank filed this complaint to demand payment. The trial court granted summary judgment in favor of the bank. Owen argues he and First Choice orally agreed to modify the terms of the notes, though it was never put in writing. He claims that because of this oral agreement, the bank was not in a position to enforce the terms of the notes. Instead, it was obligated to receive its pay by foreclosing on the properties that were given as security for the notes.

The trial court denied Owen's arguments based on a doctrine from *D'Oench, Duhme, & Co. v. Fed. Deposit Ins. Corp*., with which the Court of Appeals agreed. The court went on to describe that the D'Oench, Duhme doctrine basically states that agreements made orally between the debtor and a failed bank will not be enforced against bank authorities and the banks that take over the debts. Owen argued that the doctrine does not apply in this case because the bank voluntarily accepted the term modifications in its arrangement with the FDIC.

The Court of Appeals ruled that the provision Owen based his argument on to exempt him from the doctrine was not actually part of his loan agreement, and thus, the doctrine still applies. The Court of Appeals also noted that Owen was never an intended beneficiary of the contracts between the FDIC and the bank. The outcome of this case is a setback for Georgia consumers as it details how difficult it may be for people to overcome contractual language used in banking and loan agreements.

3. *Krayev v. Johnson,* 757 S.E.2d 872 (Ga. Ct. App. 2014).

Mr. Johnson purchased a used BMW car from Mr. Krayev and Elite Motor Sports ("Elite") for the total price of slightly over $25,000. Before signing the purchase agreement, Mr. Krayev told Mr. Johnson that he owned Elite, which he said dealt in high end cars. Krayev gave Johnson an emissions inspection report for the car that showed it had passed its most recent test, and Krayev assured him that the car was in great condition. Krayev discouraged Johnson from consulting with an independent mechanic because of the inspections he claimed to have already completed on the car. Although Krayev did not have the certificate of title for the car with him, he assured that he would deliver it to Johnson the next day. Johnson then signed the purchase agreement, paid the necessary $10,000 down payment and took possession of the car.

Immediately following the sale, Johnson bought new tires and rims for the car. Hours later, it broke down, and he had to have it towed to his house. The next day, Johnson had the car inspected, only to find that it did was unable to pass an emissions test and the catalytic converter and transmission were both defective. Johnson obtained an estimate for repairs, which listed a cost between $4,500 and $6,000. Additionally, Krayev failed to deliver the title of the car to Johnson as he had promised.

Johnson called Krayev to discuss the problems, but Krayev did not answer the phone or return his voicemails. Johnson wrote a letter on August 28, 2011 describing his difficulties and requesting reimbursement for the repairs. Johnson further stated, "If I can't have all [of] these problems corrected, I want a full refund of my down payment and would like to terminate our contract[.]" Johnson attempted to cancel the check for the down payment, but it had already cleared the bank. Krayev finally returned Johnson's call, but refused to repair the car or refund the down payment. He informed Johnson, "This is not Wal-Mart, so you can't just return things . . . if they don't work properly."

Meanwhile, Johnson continued to drive the car and continued to experience difficulties for which he had to have the car towed three times during the month of September alone. He was never able to get a permanent license or insurance for the car due to his lack of possession of the title to the car. Johnson made the first monthly payment of $753.61 in October, but then stopped driving the car altogether and refused to make any additional payments.

Krayev demanded that Johnson return the car due to his lack of payments, but Johnson refused until Krayev returned his purchase money. In December 2011, Johnson filed suit, without an attorney, in Fulton County Magistrate Court against Krayev, claiming that the purchase agreement had been illegal. Krayev countersued, among other things, for breach of purchase agreement. The court ordered that the car be returned to Krayev.

In October 2012, Johnson, now represented by an attorney, filed an amended complaint, adding Elite as a defendant and adding claims such as breach of warranty and violation of the Fair Business Practices Act ("FBPA"). Ultimately, the trial court entered judgment for Johnson, including attorney's fees and punitive damages, for $63,702.53, based on the court's belief that Krayev had acted in bad faith and created unnecessary problems and costs for Johnson. Krayev and Elite appealed this judgment, claiming that Johnson had waived his right to rescind the purchase agreement due to his October 2011 monthly payment. The Court of Appeals disagreed with Krayev and affirmed the verdict in Johnson's favor because of Johnson's willingness to return the BMW in exchange for the return of his purchase money. When Johnson, as a defrauded buyer, initially demanded that Krayev give the money back, the Court ruled that this can serve as a proper recession of the contract.

Krayev demonstrates courts' willingness to protect consumers who are on the wrong end of dubious used automobile sales. It also serves as a reminder of how important it is for consumers to seek third-party inspections and ensure that titles to automobiles are produced at the time of purchase.

4. *Polo Golf & Country Club Homeowners' Ass'n v. Rymer*, 754 S.E.2d 42 (Ga. 2014).

In this long-running dispute, the Rymers sued their subdivision homeowners' association and Forsyth County, seeking repairs to stormwater facilities. The subdivision's pipes had failed, causing flooding and sinkholes on the Rymers' property, as well as the property of other subdivision residents. The homeowners' association subsequently filed an action against the county under the belief that a county ordinance requiring homeowners' associations to repair stormwater problems on their properties was unconstitutional. The Supreme Court held that the

Forsyth ordinance did not apply to the subdivision because its language applied only to new developments, not pre-existing ones.

With the county ordinance no longer applicable and the homeowners' association no longer strictly liable for the repairs, the Court evaluated the Rymers' argument that they had relied upon the homeowners' promises to repair the problem. The original trial jury had ruled in the homeowners' association's favor, and the Supreme Court ruled that this was a reasonable conclusion and upheld the verdict. Barring any subsequent litigation, the Rymers (or their insurance company) will be responsible for repairing the damage to their property. The same will likely be true for other subdivision residents who experienced the same damage.

This case has a broader significance, however. Forsyth County, unhappy with the Court's determination that the earlier county addendum requiring homeowners' associations to repair such damage did not apply to existing developments, passed another addendum clarifying this. Although it could not be applied retroactively in this case, moving forward, Forsyth homeowners' associations will be liable for stormwater problems experienced by their residents. It is important to note, however, that most Georgia counties do not contain such an ordinance, and the default rule is that homeowners are responsible for their own damages.

5. *Raw Properties, Inc. v. Lawson et al,* No. 14A0175, 2014 Ga. App. (Ga. Ct. App. 2014).

Raw Properties sued the DeKalb County tax commissioner, contending that DeKalb conducted a tax sale of Raw's properties without providing it with the statutorily required prior written notice of the sale. Raw sought reimbursement of the $26,000 redemption fee that it had to pay the county when it purchased the property back from the person who had bought it at the tax sale. The trial court ruled in the commissioner's favor, holding that although written notice had not been provided, the commissioner had provided constructive notice to Raw's owners through telephone calls.

On appeal, Raw asserted that the trial court had erred in this decision. The commissioner responded and also included the assertion that the suit should have been barred by sovereign immunity. The Court of Appeals remanded the case to the trial court to rule on whether or not sovereign immunity truly does bar Raw's claims against the commissioner, the county, or both.

If the trial court does indeed conclude that sovereign immunity bars the action against the commissioner and/or the county, Raw will have the opportunity to appeal once again on the determination of whether or not the commissioner's phone calls fulfill the notice requirements for a tax sale. *Raw* is worth monitoring as it continues its path through the courts and has the possibility to shape the procedures that local governments must use to fulfill Georgia courts' requirements on conducting a tax sale.

6. *Raysoni v. Payless Auto Deals,* No. S13G1826, 2014 Ga. LEXIS 906 (Ga. 2014).

In *Raysoni*, a case for which Georgia Watch filed an amicus brief in support of the plaintiff, the Supreme Court delivered a big win for Georgia consumers affected by

misrepresentations made by used car dealers. Mr. Raysoni claims that he relied upon oral and written misrepresentations from a car dealer that a used minivan he was purchasing had never been in a wreck. Two months after purchasing the van, Raysoni learned that the van had, in fact, been in a wreck and had substantial frame damage, which significantly decreased the car's value.

Raysoni contends that Payless knew at the time of his purchase that the minivan had been wrecked and had sustained substantial damage, but a salesperson intentionally misled him about the condition of the vehicle and purposefully used an inaccurate Carfax report to further mislead him. Upon realizing that the minivan had been in an accident and was actually worth about $8,000 less than the amount he paid for it, Raysoni attempted to return the van, but Payless refused. Payless claims that it is protected by a fine print statement on the buyers' agreement that states that salesmen's verbal representations are not binding on Payless. The Court of Appeals ruled in Payless' favor. The Supreme Court, however, held that this contractual provision does not excuse Payless because Raysoni also relied upon a written document in the form of the Carfax report.

Payless also relies on two provisions in the fine print of the contract. One provision recommends that buyers get inspections by third-party mechanics, and the other states "CUSTOMER SHOULD NOTE THAT THIS VEHICLE WAS ANNOUNCED HAVING UNIBODY DAMAGE AT THE AUCTION." The Court of Appeals held that these provisions protected Payless from liability, due in part to the fact that they were printed in capital letters. The Supreme Court disagreed. It stated that "the entirety of the fine print appears in capital letters, all in a relatively small font, rendering it difficult for the author of this opinion, among others, to read it." The capitalized disclaimers were also mixed with "a hodgepodge of other seemingly unrelated, boilerplate contractual provisions - provisions about, for instance, a daily storage fee and a restocking charge for returned vehicles - all of which are capitalized and in the same small font." The Supreme Court held that the lower courts should not have decided as a matter of law that these two provisions excused Payless, due to their potentially inconspicuous placement in the signed agreement.

The Supreme Court ultimately sent the case back to the jury to determine if it was reasonable for Raysoni to rely on representations that the minivan was undamaged and never had been in a wreck - particularly those representations made in the inaccurate Carfax report. This is a significant improvement over the Court of Appeals' decision that Payless' contractual provisions completely protected it from judgment. While underscoring the importance of making informed purchases and seeking neutral opinions, *Raysoni* will nevertheless make it more difficult for dealers to hide behind fine print when selling damaged cars. It is our hope that the jury will find that Mr. Raysoni's reliance upon the verbal and written representations given to him by Payless was reasonable, and that Payless is liable for the financial damage it caused Mr. Raysoni.