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Interpretations of Georgia's New Evidence Code – Hearsay and Character Evidence

by John Hadden

Georgia's new Evidence Code went into effect on Jan. 1, 2013, for all trials and proceedings held on or after that date. While the transition was immediate in the trial courts, the delay between trial court judgments and appellate review has meant that the appellate courts have continued to apply the prior Code in many cases decided before 2013 that are only now before them. Increasingly, however, the appellate courts have had the opportunity to address questions raised under the new Code. Two of the subjects receiving the most significant revisions under the new Code concern character evidence, particularly the new Code's treatment of certain "other acts" of parties (sometimes referred to as "prior bad acts" or "similar transactions"), and hearsay, including Sixth Amendment Confrontation Clause issues. This article will discuss a number of significant recent decisions of the Georgia Supreme Court and Court of Appeals analyzing these subjects.

Character Evidence – Other Acts of Defendants

A major revision to evidence law under the new Code concerns the introduction of evidence of other acts, predominantly in criminal cases. Previously, Georgia law permitted introduction of evidence of other acts if relevant to a party's "bent of mind" or "course of conduct," concepts subject to varying judicial interpretations that could leave substantial uncertainty for litigants, and which could, arguably, implicate the character of a party, despite general, though not absolute, prohibitions against that sort of evidence. The new Code, at O.C.G.A. § 24-4-404(b), does not list these two subjects as matters permitting the introduction of bad acts. Instead, the statute lists a non-exclusive list of proper bases for introducing such evidence: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Bradshaw v. State*,[1] the Supreme Court adopted the Eleventh Circuit's three-part test to determine admissibility of "other acts" evidence, citing *United States v. Ellisor*.[2] Under the *Bradshaw* test, in order for "other acts" evidence to be admitted under 404(b), the following conditions must be met: (1) the evidence must be relevant to an issue other than defendant's character; (2) the probative value must not be substantially outweighed by its undue prejudice; and (3) the government must offer sufficient proof so that the jury could find that defendant committed the act.

Although the test is a straightforward application of the statutory text of O.C.G.A. §§ 24-4-403[3] and 24-4-404, its formal articulation provides a specific framework for parties seeking to introduce or object to such evidence and for courts ruling on admission. As to the third prong, the Supreme Court noted that the State was required to show that a jury could have found that the defendant committed the other act by a preponderance of the evidence, again citing Eleventh Circuit authority.[4] A conviction or guilty plea is not required.

Shortly after its decision in *Bradshaw*, the Supreme Court further analyzed the admissibility of evidence under

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From the Chair

It is my pleasure to welcome everyone to the Appellate Practice Section this year.

Since this Section was established, it has flourished. The Appellate Practice Section comprises over 480 attorneys who handle appeals in state and federal courts. There are still attorneys whose practices involve appeals but who are not members of this Section. If you know one of these lawyers, please extend to them an invitation on my behalf.

If you are a member of this Section, I invite you to get involved. We have held a number of events this Fall, and have more events planned. We would love for you to join us.

We are planning a program during the Bar's Midyear Meeting at the Ritz-Carlton Buckhead, on Jan. 5, 2017, at noon. We will celebrate the careers of Chief Justice Hugh P. Thompson of the Supreme Court of Georgia and Presiding Judge Herbert E. Phipps of the Court of Appeals of Georgia. Check your email for registration information.

On Oct. 18, we were pleased to welcome former Supreme Court of Georgia Chief Justice Leah Ward Sears to speak at our scheduled lunch program. And at our Sept. 29 meeting, we heard from Dave Smith, the Clerk of Court for the U.S. Court of Appeals for the 11th Circuit and his Chief Deputy Clerk, Amy Nerenberg. We also had committee sign-up sheets.

The Programming & Events Committee is responsible for administering the Section's lunch programs and special events. The Communications Committee is responsible for publishing the newsletter, administering the listserv, and coordinating other outlets for information about section activities. The State Practice & Legislation Committee focuses on issues relating to practice before the Supreme Court of Georgia and the Court of Appeals of Georgia, including state appellate court proposals, comments on legislation and rules changes and considering whether to file amicus briefs. The Federal Practice Committee focuses on issues relating to appellate practice in the federal court system, including proposals and comments on legislation and rules changes, comments to the 11th Circuit on Rules Amendments and Proposals, overseeing ECAPI, and considering whether to file amicus briefs in federal court. And the Seminar Committee coordinates the Section's seminars, primarily the annual state appellate practice seminar.

If you would like to get involved this year, please reach out to me or any section officer. We are happy to help. And if you have any suggestions about how we can improve our activities, we would love to hear from you.

Margaret Heinen is the 2016-17 Section chair for the Appellate Practice Section. She is a senior staff attorney with The Appellate Division of the Georgia Public Defender Council and exclusively handles direct appeals from criminal cases in Georgia superior courts.

Inside This Issue

2016 AJEI Summit for Appellate Judges, Lawyers, and Staff Attorneys - Nov. 10-13, Philadelphia

by Christina Cooley Smith

This year's Appellate Judges Education Institute Summit features a conversation with the newest member of the United States Supreme Court, Justice Elena Kagan, who was sworn in just over six years ago. Conversations with Supreme Court Justices are a recurring feature at the Summit. Last year, Justice Stephen Breyer spoke about the "pragmatic passion" that motivates him and contrasted his approach to legal interpretation with Justice Antonin Scalia's. Justice Scalia spoke at the 2014 AJEI Summit with his co-author Bryan Garner about their book, "Reading Law."

Dean Erwin Chemerinsky, from the University of California Irvine School of Law, will again present his reviews of civil and criminal opinions issued by the U. S. Supreme Court last year, and will also serve as a panelist in a session titled "Evolution or Revolution? The Future of the Supreme Court." Several sessions will focus on appellate writing, from a plenary session by author and Professor Ross Guberman on "The Role of Personality in Appellate Writing," to breakout sessions on "Making 31 Flavors of Opinions: Who's Eating What You're Serving" and "Pixels to Punctuation: Writing in the Digital Age."

The AJEI is a non-profit institution whose mission is to produce this annual appellate law seminar, which is co-hosted this year by the ABA's Appellate Judges Conference and SMU Dedman School of Law. This is SMU's last Summit, as the 2017 Summit in Los Angeles will be co-hosted by the Duke University School of Law Center for Judicial Studies. In 2018, the Summit will come to Atlanta and will be chaired by the Appellate Practice Section's esteemed founder, Georgia Court of Appeals Judge Christopher McFadden.

I have written before about the Summit and how my attendance years ago led me to my current position as the 2015-2016 chair of the ABA's Council of Appellate Staff Attorneys (CASA), which is part of the Appellate Judges Conference, along with the Council of Appellate Lawyers. The Summit is developed and produced by the appellate judges, lawyers, and staff attorneys of the AJC, with the assistance of the co-hosting law school.

The Summit will be held at the historic Loews Philadelphia Hotel, which bills itself as "America's first skyscraper." It was commissioned in 1929 by the country's first savings bank and placed on the National Register of Historic Places in 1992. Registration is open and more information is available at http://ajei.law.smu.edu/Home.aspx.

Christina Cooley Smith is the senior staff attorney for Presiding Judge Anne Elizabeth Barnes of the Court of Appeals of Georgia.

Join the APS Listserv

You can join other members of the Appellate Practice Section on our listserv, an electronic mailing list for sharing information among those who specialize in appellate practice. Once you join, you can customize how many emails you receive and easily sort messages from the list. Answers about everything from the rules to formatting to general practice tips are available because the entire Section membership can see your question. When sending emails to the list, be sure to remember that recipients may include judges or opposing counsel, and review the tips posted on the group page. This list is designed for appellate practice questions, so questions for other subject areas should be sent to other lists.

To join the list, send an email to Lee Kynes (lee.kynes@kyneslaw.com) and request an invitation.

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O.C.G.A. § 24-4-404(b) in the context of general intent crimes, in which the state is required to prove only intent to commit an act, and not the intent to commit the resulting crime. Driving under the influence (DUI), for example, is a general intent crime. Analyzing the issue in 2014 in the DUI context, the Court of Appeals held that other acts were not generally admissible under 404(b) with respect to general intent crimes, at least to the extent of proving intent or knowledge, because it found that no culpable mental state was required to commit the crimes, and the past DUI did not elucidate, in the case being prosecuted, whether the defendant committed the crime again.[5] The Supreme Court disagreed. In *State v. Jones*,[6] it held that O.C.G.A. § 24-4-404(b) was applicable to both general and specific intent offenses, and remanded the case to the Court of Appeals for analysis under the *Bradshaw* test. The Supreme Court noted that the defendant's intent to commit the act was placed in issue by virtue of his not guilty plea, and it concluded, under the first prong of *Bradshaw*, that such evidence could be relevant for a number of permissible purposes.

Finally, in *State v. Frost*,[7] the Supreme Court addressed a distinct aspect of admissibility of other DUI offenses. O.C.G.A. § 24-4-417 specifically provides for the admission of prior DUIs in cases where (1) the accused refuses to submit to, or provide an adequate breath sample for, the state-administered alcohol test, or (2) the identity of the driver is in dispute. The Court held that, as to the first category of cases (a refusal or inadequate sample), evidence of prior DUIs was generally admissible, and not limited to cases where the prior acts were relevant to issues related to the state-administered test. Taken together, *Jones* and *Frost* stand for the broad admissibility of other acts in DUIs as well as other general intent crimes, subject to the *Bradshaw* analysis set forth last year.

Hearsay and the Confrontation Clause

Another significant aspect of the 2013 Evidence Code concerns the admissibility of hearsay. As summarized below, the appellate courts have begun to address a number of issues related to hearsay, including application of the business records exception and consideration of Confrontation Clause issues when hearsay is offered against a criminal defendant.

Business records exception: Among the more widely-applicable changes to the Evidence Code were those related to the business records exception. The 2013 Code revised this exception in two key respects: business records can now contain opinions and diagnoses, strictly prohibited under older law, and the foundation for business records can be laid through a written certification (subject to quite specific requirements), instead of requiring testimony as before.[8] This means, as a practical matter, that medical records and other records are far more likely to be admitted due to the reduced cost and increased usability of records containing opinions.

Under pre-2013 law, the Courts had taken a relatively liberal view toward admission of business records that contained records of *other* businesses. Thus far, the appellate courts appear to have retained this approach, at least with respect to successor entities. In *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*,[9] the Court of Appeals noted, citing federal authorities, that "bank records are particularly suitable for admission" under the business records exception, and permitted the records of a predecessor bank to be admitted as part of the successor's business records. This principle was reiterated in *Triple T-Bar, LLC v. DDR Southeast Springfield, LLC*,[10] also involving records from a predecessor. Notably, the Court also favorably quoted pre-2013 authority for the proposition that where "routine, factual documents made by one business are transmitted and delivered to a second business and there entered in the regular course of business of the receiving business," the records of the other business could properly be admitted as part of the business records of the second business. Although this issue was not squarely before the Court, it appears that prior law regarding non-predecessor, separate entities, may well continue to be admissible under the modified evidence rules.

Another recent case points to an important consideration regarding the admissibility of certain business records, particularly financial records. Financial institutions often store information in a format that permits production of a consolidated and simplified report based on the underlying data. In *Roberts v. Community & Southern Bank*,[11] the Court of Appeals rejected the argument that certain account information produced as a "loan history report" was a summary rather than an original business record. Although summaries of voluminous records are admissible under O.C.G.A. § 24-10-1006, the rule requires that the underlying records be made available or else the summary may be excluded.

With respect to banking records, the *Roberts* court held that the report was admissible, noting that it listed the entire history of a loan in detail prepared from records of a predecessor and therefore qualified as a business record in the form of a data compilation as permitted by O.C.G.A. § 24-8-803(6). The *Roberts* court distinguished this type of record from a mere summary, which had been excluded in the earlier case of *Capital City Developers LLC v. Bank of North Georgia*,[12] decided under prior (but similar) law, in which the Court excluded purported business records because "[t]hese printouts are not such records; they are summaries of such records." Because the distinction between summaries and record compilations may be unclear, where admission of business records are critical, litigants should ensure that the underlying records are available.

The Court of Appeals has also recently analyzed the application of the business records exception to a distinct type of record: a shoplifting report prepared by a store's loss-prevention manager. In *Thompson v. State*,[13] the Court of Appeals ruled, over a vigorous dissent, that the report could be admitted in a criminal prosecution. Although the majority agreed that a report prepared in anticipation of prosecution or litigation could not be admitted as a business record (citing the Supreme Court's earlier decisions in *Rackoff v. State*[14] and *Stewart v. State*[15]),

it held that the business was not a party to the prosecution and that, as to that business, the report was prepared in the regular course of business. The dissent disagreed, contending that the inquiry should instead be whether the activity recorded in the business record involved the systematic conduct of the business, citing the United States Supreme Court's decision in *Palmer v. Hoffman*.[16] Reports of extraordinary events that could lead to litigation, it argued, did not fall into this category and should be inadmissible. Despite the outcome of this decision, the Court's division suggests that interpretation of what constitutes the "regular course of business" may not be fully resolved.

Confrontation clause challenges: In criminal cases, admission of hearsay, even where an exception applies, raises the additional question of whether the evidence violates the defendant's Confrontation Clause rights when cross-examination is not available. In *Crawford v. Washington*,[17] the United States Supreme Court developed a new jurisprudential articulation of this issue, holding that such statements violate the Confrontation Clause to the extent that they are "testimonial" in nature. The Georgia Court of Appeals has addressed this issue in at least two contexts: under the doctrine of "forfeiture by wrongdoing" and under the present sense impression hearsay exception.

In *Brittain v. State*,[18] the Court of Appeals addressed the question of whether a statement admitted under the "forfeiture by wrongdoing" doctrine could be admitted. Under this doctrine, a witness's out-of-court statement may be used against a party where that party has procured the witness's absence. Although *Brittain* applied the pre-2013 Evidence Code, the Court expressly noted that the doctrine had been codified in the new Code at O.C.G.A. § 24-8-804(b)(5), and that testimony offered under this exception was admissible against an accused notwithstanding Sixth Amendment Confrontation Clause issues, consistent with prior United States Supreme Court precedent.[19]

In *Owens v. State*,[20] the Court held, citing pre-2013 authority, that statements made in the course of a 911 call could be deemed nontestimonial, and therefore proper evidence over a Confrontation Clause challenge, if "the telephone call is made to avert a crime in progress or to seek assistance in a situation involving immediate danger." Finding that the call also fell within the present sense impression hearsay exception codified at O.C.G.A. § 24-8-803(1) of the new Evidence Code, the Court affirmed admission of the hearsay statement.

Conclusion

Although we remain in the early days of the new Georgia Evidence Code, the decisions being issued from the appellate courts are likely to shape the state of evidence law for years to come. This is particularly true in areas such as those discussed in this article, where prior law underwent substantial changes. As more cases reach the appellate courts, litigants should be prepared to remain watchful for new decisions that may alter long-standing prior law in response to the new statutory rules.

John Hadden is a trial attorney with the office of Turkheimer & Hadden in Atlanta. He is author of Green's Georgia Law of Evidence and co-author of Georgia Law of Torts—Trial Preparation and Practice.

(Endnotes)

1 *Bradshaw v. State*, 296 Ga. 650, 769 S.E.2d 892 (2015). Cf. *Olds v. State*, 299 Ga. 65, 786 S.E.2d 633 (2016) (clarifying application of *Bradshaw* decision).

2 *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008). *Ellisor* addressed application of Federal Rule of Evidence 404(b) as it existed at the time, which was essentially identical to O.C.G.A. § 24-4-404(b). The Federal Rules were "restyled" in 2011 and no longer match verbatim the Georgia rules, but the changes did not alter the substance of the rules.

3 O.C.G.A. § 24-4-403 is simply the codification of Georgia's common-law "balancing test," which allows a court to exclude otherwise relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

4 *United States v. Edouard*, 485 F.3d 1324, 1345 (11th Cir. 2007).

5 *Jones v. State*, 326 Ga. App. 658, 757 S.E.2d 261 (2014).

6 *State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (2015). Cf. Olds v. State, 299 Ga. 65, 786 S.E.2d 633 (2016) (clarifying application of *Bradshaw* decision).

7 *State v. Frost*, 297 Ga. 296, 773 S.E.2d 700 (2015).

8 O.C.G.A. § 24-8-803(6); *see also* O.C.G.A. § 24-9-902(11, 12) (establishing authentication requirements for business records).

9 *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*, 327 Ga. App. 245, 758 S.E.2d 145 (2014).

10 *Triple T-Bar, LLC v. DDR Southeast Springfield, LLC*, 330 Ga. App. 847, 769 S.E.2d 586 (2015).

11 *Roberts v. Community & Southern Bank*, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

12 *Capital City Developers LLC v. Bank of North Georgia*, 316 Ga. App. 624, 730 S.E.2d 99 (2012).

13 *Thompson v. State*, 332 Ga. App. 204, 770 S.E.2d 364 (2015).

14 *Rackoff v. State*, 281 Ga. 306, 637 S.E.2d 706 (2006).

15 *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

16 *Palmer v. Hoffman*, 318 U.S. 109 (1943).

17 *Crawford v. Washington*, 541 U.S. 36 (2004).

18 *Brittain v. State*, 329 Ga. App. 689, 766 S.E.2d 689 (2014).

19 *See Giles v. California*, 554 U.S. 353 (2008).

20 *Owens v. State*, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

The Life Cycle of Precedent in the Court of Appeals: Part I

by Eric J. Marlett

An analysis of a Georgia Court of Appeals case, regarding its status as binding precedent, consists of two fundamental components: (a) whether, in the first instance, at the time the Court's opinion issued, the case constituted a binding precedent; and (b) whether the case has since been overruled or disapproved, and thus can no longer be followed for at least one principle of law.

Article VI, Section V, Paragraph III of the Georgia Constitution provides that "the decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents." Difficulties arise, however, when, either explicitly or implicitly, decisions of the Court of Appeals are inconsistent with each other.

Chief Judge Carley, in a special concurrence in *Dollar v. Dep't of Human Res.*[1], identified the basic, and significant, issue for the Court of Appeals, namely that

> [w]hen this Court is faced with previous decisions of this Court in apparent conflict with each other, it cannot automatically rely upon the latest decision as can the Supreme Court, because an appeal filed in this Court is usually considered and resolved by a division of three judges, while the Supreme Court always sits en banc.[2]

With regard to the first leg of the analysis, i.e., the determination as to which decisions of the Court of Appeals are to be considered binding precedent when issued, Rule 33(a) of the Court of Appeals controls. If it is a decision of a three judge panel, it is binding precedent if, and only to the extent, that all three judges concur fully in the judgment and everything said in the opinion.[3] If there is any part of the opinion in which all three judges do not fully concur, that part of the opinion is considered physical precedent only, and has no precedential value beyond its possible use as persuasive authority.[4] Until recently, if there was a dissent among the panel, the next panel and a seventh judge would participate, or, in some cases, the full Court, and in those instances, a full concurrence of a majority was needed for the decision to be considered binding precedent.[5]

However, due to recent legislative changes, the Court of Appeals was expanded to fifteen judges this year, and the rules regarding the establishment and overruling of precedent are actually still in the process of being developed. The new statute eliminates the old seven judge panels in the event of a dissent, and instead grants to the Court of Appeals the power to "provide by rule for certain cases to be heard and determined by more than a single division".[6] In such cases, the statute requires nine judges for a quorum, but otherwise leaves the procedural details to the Court of Appeals.[7] The Court of Appeals recently announced that its new rules would be released in the near future, but in the meantime, the Court has clarified, by way of operating procedures adopted effective July 1, 2016, that in the event of any dissent on a panel, the next two full divisions of the Court, for a total of nine judges, will participate, and in any case involving the overruling of a prior decision, the full fifteen judge Court will participate.[8] Although the new publicly released operating procedures do not specify, presumably the existing rule remains in effect that a majority of a nine judge panel or the full Court will constitute binding precedent.[9]

The second leg of the analysis is the determination as to whether a case has been overruled or disapproved. Until recently, this was governed, insofar as the effect of the decisions of the Court of Appeals on each other, by statute, as set forth in former O.C.G.A. § 15-3-1(d) (2015), which was enacted in its most recent form in 1996 (when the Court expanded from nine judges to ten), and which provided that

> [i]t being among the purposes of this Code section to avoid and reconcile conflicts among the decisions made by less than all of the Judges on the court and to secure more authoritative decisions, it is provided that when two divisions plus a seventh Judge sit as one court the court may, by the concurrence of a majority, overrule any previous decision in the same manner as prescribed for the Supreme Court. As precedent, a decision by such court with a majority concurring shall take precedence over a decision by any division or two divisions plus a seventh Judge. A decision concurred in by all the Judges shall not be overruled or materially modified except with the concurrence of all the Judges.[10]

To break that down, essentially, the statute gave authority for a seven judge panel of the Court of Appeals to overrule any decision of a three judge panel, or any other seven judge panel. Although not stated explicitly, a full court, twelve judge decision, could overrule *any* prior decision of the Court of Appeals, and *only* a full court could overrule a prior full court decision. Moreover, if a prior full court decision was unanimous, it could only be "overruled or materially modified" by another unanimous, full court decision.

The 2016 legislative changes completely eliminated the statutory requirements of former O.C.G.A. § 15-3-

1(d) (2015), which now states simply that "The Court of Appeals shall provide by rule for the establishment of precedent and the manner in which prior decisions of the court may be overruled." While those rules have not yet been released, it is clear from the recently implemented operating procedures that the new nine judge panels would not be able to overrule prior precedent, as the full fifteen judge Court must now participate. Again, although not specified, presumably it remains the case that a majority of the full Court can overrule a prior decision, but it is not clear if the old statutory rule requiring a unanimous full court decision to overrule a prior unanimous full court has been, or will be, carried forward in the new rules.

In practice, although the old statute may have provided for it, the overruling of prior precedent by a seven judge panel, rather than the full court, was a rare, if not non-existent, occurrence. The reality was that when any judge of the Court of Appeals sought to overrule prior precedent, the full court would consider it. In fact, any draft opinion proposing to overrule a prior case would be circulated first to the author of the prior case, and then to any judges who concurred in that prior decision, if they were still on the bench, for them to review, analyze and vote on it, before even being sent to the remainder of the three judge panel to which the case was assigned, and then through the normal decision chain of each remaining judge on the Court. One of the main rationales for always submitting a decision to overrule to the whole court, rather than utilizing a seven judge panel, was to avoid a situation where the author of the prior decision, or a judge who concurred in that decision, was not on the seven judge panel reconsidering the holding in that decision, and would therefore ultimately be excluded from participating in the vote to overrule the case. This informal practice has now been formally implemented in the new operating procedures of the Court, which now *require* any overruling of a prior decision to be considered by the full Court, and the new rules, once released, will undoubtedly carry this forward.

It is pursuant to these two basic principles then, the authority to *issue* binding precedent, and the authority to *change* binding precedent, that the jurisprudence of the Court of Appeals grows and alters over time.

An interesting, recent example of the operation in practice, and the implications, of these principles, is the 2014 case of *S-D RIRA, LLC v. Outback Prop. Owners' Ass'n*[11]. That case involved the question of whether an ongoing use of property in violation of restrictive covenants can give rise to *multiple* causes of action, or only *one* cause of action, on the part of the owners' association to enforce the covenants, and consequently whether the statute of limitation begins to run upon *each use* of the property, or only upon the owner's *first use* of the property in violation of the covenants.[12] Two prior cases, *Black Island Homeowners Assn. v. Marra*[13] in 2003, and *Marino v. Clary Lakes Homeowners Assn*.[14] in 2013, both of which were three judge panel decisions, had held that where a covenant violation was based on ongoing conduct, the statute of limitation began to run on a cause of action from each instance of such conduct.[15] In contrast, a violation based on a "permanent fixture" could only be enjoined within two years of when that fixture was placed on the property.[16]

In *S-D RIRA*, the full court unanimously concurred in the *judgment*, which, in relevant part, involved remand to the trial court for further factual determination as to the accrual of the statute of limitation[17], but the path to that unanimous result was fascinating. The majority opinion consisted of five Divisions, with the vote being 11-1 for the first four Divisions, and 6-6 on the fifth Division.[18] Thus, as issued, the opinion in *S-D RIRA* constituted binding precedent under Rule 33(a) as to Divisions 1 through 4, but *not* as to Division 5, which failed to obtain the vote of a majority of the Court.

In that fifth Division of the otherwise majority opinion, six judges held that the "continuing violation" theory, which was applied in prior case law, was incorrect, and accordingly voted to overrule *Black Island* and *Marino*.[19] The remaining six judges joined in a special concurrence in which they agreed that the instant case needed to be remanded for further factual determination, but stated that this was because the violation at issue was really a "permanent fixture", and so the "continuing violation" rule did not apply.[20] In their analysis, the six specially concurring judges concluded that *Black Island* and *Marino* should *not* be overruled, however, only five of those judges went so far as to say that those prior cases had been correctly decided.[21]

This split in the fifth Division, however, was not expressly acknowledged in the original opinion, and, in fact, the majority states, as to *Black Island* and *Marino*, without qualification, that "those cases are hereby overruled".[22] When those cases are now *Shepardized*, they are actually identified as having been overruled. On motion for reconsideration, however, the Court of Appeals clarified the effect of its ruling in Division 5 of *S-D RIRA*, noting that because only six judges, and not a majority of the Court, voted to overrule *Black Island* and *Marino*, Division 5 effectively only "advocated overruling" those prior cases, and "[t]he continuing violation theory announced in *Black Island* and applied in *Marino*, therefore, remains good law."[23]

S-D RIRA is thus not only an intriguing example of the legal principles discussed in this article, but is furthermore an excellent reminder of the importance of careful reading and analysis, particularly with regard to opinions that address the overruling of prior precedent.[24] It is also an indication of some of the complexities that arise when jurisprudence undergoes change, or even when a change is considered, but fails to receive sufficient votes. In the case of *S-D RIRA*, the binding principles of law did not, in fact, change, but a review of that case confined only to the language in the majority opinion, or even a reliance on *Shepard's*, would not reveal the full picture.

In a forthcoming issue of this newsletter, Part II of this article will explore in more depth the intricacies inherent in our system of creating and overruling judicial precedent.

Such intricacies may manifest themselves in those scenarios where there is an *apparent* conflict in binding authority, but no express overruling, giving rise to a debate as to whether the authorities can be distinguished, whether there has been an implicit overruling, or whether there should now be an explicit overruling, as well as in those circumstances where a case has overruled prior precedent, and then has, itself, been subsequently overruled, effectively reinstating former law. In addition, Part II will also address the distinction between overruling and disapproving, the role of the Supreme Court of Georgia, the effect of changes in statutory law, and the infrequently used, though valuable, "concurrence dubitante".

It can be vitally important to recognize and determine when precedent is, and remains, binding, and when it is not, so be sure to gain that understanding and use it to its full advantage.

Eric J. Marlett is a senior associate with McGahren, Gaskill & York, LLC, a general practice litigation and transactional firm with offices in Gwinnett County. Mr. Marlett is a graduate of Georgia Tech, New York Law School, and Goizueta Business School at Emory University, and focuses his practice primarily on civil litigation and appeals.

1 *Dollar v. Dep't of Human Res.*, 196 Ga. App. 698, 396 S.E.2d 913 (1990) (Carley, C.J., concurring specially)
2 *Id.*, at 702.
3 Rule 33(a), Georgia Court of Appeals.
4 *See Id.*; *see also, Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 349-50, 606 S.E.2d 567 (2004) (Barnes, J., concurring specially).
5 *Id.; see also,* former O.C.G.A. § 15-3-1(c)(1) and (2) (2015).
6 O.C.G.A. § 15-3-1(c)(2) (2016).
7 *Id.*
8 http://www.gaappeals.us/news2.php?title=Court of Appeals New Operating Procedures
9 The Court has indicated that it intends to implement new operating procedures no later than December Term 2017, which would allow for 2-1 panel decisions without having to go to nine judges, but any such 2-1 decision would constitute physical precedent only. The Court is also considering procedures that would permit a party to request rehearing en banc. *Id.*
10 Former O.C.G.A. § 15-3-1(d) (2015). The language of this statutory section originated in 1945, at a time when the Court of Appeals consisted of six judges. In that original version, a majority of the whole court could only overrule a panel decision where there was not a full concurrence by the panel judges. A supermajority of five judges was needed to overrule a unanimous panel decision, and a unanimous full court decision could only be overruled by a unanimous full court. The statute did not materially change when the Court expanded to seven judges in 1960, other than to clarify that a prior six judge, unanimous decision could now only be overruled by the full court of seven judges. When the Court expanded to nine judges in 1961, the requirement of five judges to overrule remained, but this now constituted a simple majority, and was sufficient to supersede any prior decision, other than a unanimous full court decision, which continued to require the concurrence of all the judges.
11 *S-D RIRA, LLC v. Outback Prop. Owners' Ass'n*, 330 Ga. App. 442, 765 S.E.2d 498 (2014). For a similar example, *see also*, *Travis Pruitt & Assocs., P.C. v. Hooper*, 277 Ga. App. 1, 625 S.E.2d 445 (2005).
12 *See S-D RIRA, LLC v. Outback Prop. Owners' Ass'n*, 330 Ga. App. at 457-69.
13 *Black Island Homeowners Assn. v. Marra*, 263 Ga. App. 559, 588 S.E.2d 250 (2003).
14 *Marino v. Clary Lakes Homeowners Assn.*, 322 Ga. App. 839, 747 S.E.2d 31 (2013).
15 *S-D RIRA, LLC v. Outback Prop. Owners' Ass'n*, 330 Ga. App. at 457-58.
16 *Id.*
17 *Id.*, at 461-63.
18 *Id.*, at 463.
19 *Id.*, at 457-63 & 468.
20 *Id.*, at 463-68.
21 *Id.*, at 467-68.
22 *Id.*, at 460.
23 *Id.*, at 468. On May 11, 2015, the Supreme Court of Georgia denied certiorari in a 4-3 decision (Case No. S15C0643), and thus *S-D RIRA*, *Black Island* and *Marino* will stand, as they are, unless and until the issue is revisited in a future case.
24 Although an even split on the previous twelve judge Court was admittedly far more likely to happen, the currently constituted fifteen judge Court will not necessarily be immune from this issue, as the new operating procedures do permit the consideration of overruling precedent even if one or more judges are disqualified, as long as at least nine judges participate. http://www.gaappeals.us/news2.php?title=Court of Appeals New Operating Procedures

Open Chambers: Concurrences and Dissents

by Hon. Stephen Louis A. Dillard

(This is a three-part series of excerpts from Open Chambers: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals *by Judge Stephen Louis A. Dillard. The article was a special contribution to the Summer 2014 Mercer Law Review Journal. Please note that the endnotes do not correspond with those in the original article, which may be read in its entirety at: 65 Mercer L. Rev. 831. The Appellate Practice Section thanks Judge Dillard for granting permission to share these excerpts with its members. NOTE: Since the original publication of this article in 2014, the Court of Appeals has expanded to 15 judges and the rules regarding decisions by more than a three judge panel have changed. See Eric Marlett's articles in this issue,* The Life Cycle of Precedent in the Court of Appeals: Part I, *and* Rule Changes in the Court of Appeals: An Update, *for further discussion of these changes.)*

In addition to the approximately 150 opinions I am assigned to author or dispose of every year, I am also required to carefully examine and consider the merits of approximately 300 opinions or orders drafted by my colleagues on the panel, as well as those that "roll over" to my division as a result of a dissent or are considered en banc. To be sure, most of the opinions issued by our court are not particularly controversial and result in unanimous decisions with full concurrences from the other judges.[1] But occasionally, we do disagree with one another. And when that happens, a judge who takes issue with the proposed opinion has numerous options.

If a judge agrees with the judgment line in a proposed opinion, but not all of the reasoning contained therein, he or she can (1) draft a memorandum to the authoring judge outlining the problems or concerns with the opinion, and identifying any language that needs to be added or omitted in order to obtain the full concurrence of that judge;[2] (2) draft a special concurrence that includes a full concurrence, but which provides additional reasoning for or commentary concerning the court's decision; (3) draft a special concurrence that does not include a full concurrence (thus making the opinion or any disputed division of the opinion of no precedential value), but outlines entirely separate reasoning for concurring in the judgment line; (4) draft a concurrence dubitante, which is a full concurrence, but one that is done so doubtfully; or (5) simply concur in judgment only with or without a separate opinion, which also renders the opinion of no precedential value.[3] If a judge on the original panel joins the special concurrence of another judge, the case is then reassigned to the author of the special concurrence and that concurrence becomes the majority opinion.

If a judge disagrees with the judgment line, he or she may author a dissenting opinion, which will then cause the case to transition to a seven-judge "whole court," consisting of the original panel members, a backup panel of judges, and the presiding judge of the next division.[4] For example, if a judge on the First Division dissents from an opinion authored by one of the other panel members, the case will then be voted on by all three judges of the First Division, all three judges of the Second Division, and the presiding judge of the Third Division.[5] A majority opinion or dissent will only trigger the consideration of the entire (twelve-judge) court when it seeks to overrule a prior precedent, or when the majority of the original panel of judges or those of a seven-judge "whole court" conclude that the case is of such importance that it warrants en banc consideration (something that rarely happens).[6] If the court sitting en banc considers a case and is "evenly divided" at six-six, the case is then transferred to the Georgia Supreme Court (without the opinion being published).[7]

Unlike the majority opinions I author, I typically draft concurrences and dissents with very little assistance from my staff attorneys. To be sure, I have asked my staff attorneys for their assistance in drafting concurrences and dissents on occasion, and I always confer with one or more of them before any opinion leaves my chambers, but I generally do not confer with my staff attorneys about other judges' opinions. My intent is to handle as much of the "other judge" work as possible, which allows my staff attorneys to primarily focus on assisting me with the opinions I author.

With all of that said, practitioners should understand that even when the court issues a unanimous decision, the other judges on the panel are always fully engaged in the opinion-writing process. Indeed, there is often a great deal of informal conferencing, exchanging of back-and-forth memoranda, and substantial revisions to the proposed opinion, all of which the parties never see. There are even cases in which the proposed opinion triggers a dissent, is circulated as a seven or twelve-judge decision, and then, after numerous concurrences and dissents are drafted, returns to the original three-judge panel and is issued as a unanimous decision. Those who regularly practice before our court should not assume that the only time the other panel members are fully engaged in another judge's case (that is, one they are not assigned to author) is when they publish either a concurrence or dissent. I spend a considerable amount of time each term working on opinions authored by my colleagues, and they do likewise.

(Endnotes)

1 Alston & Bird, LLP, supra note 8, at 142-43 ("The Court of Appeals is divided into 'rotating' three-judge 'panels' or

'divisions.' These three-judge panels ordinarily render the decisions of the Court of Appeals ... The Court of Appeals decides cases with panels of more than three judges only in limited circumstances.").

2 Occasionally, a judge will simply pen a brief handwritten note to the authoring judge, outlining any areas of concern. These notes are treated no differently than a more formal memorandum and they are circulated along with the file for the other judge or judges' consideration.

3 There is even one extraordinary occasion in which I published an opinion "concurring dubitante in judgment only," which means that I had serious doubts in that case about not only the reasoning of the majority opinion but also the judgment line. See Nalley v. Langdale, 319 Ga. App. 354, 372-73, 734 S.E.2d 908, 922 (2012) (Dillard, J., concurring dubitante in judgment only). This type of concurrence has only been used once in the history of the court of appeals and is affectionately referred to by one of my colleagues as "concurring Dillardtante." See Alyson M. Palmer, Judges, Lawyers Mull Possible Changes to State Appeals Court, Fulton County Daily Rep., Feb. 13, 2014 ("Dillard said in his concurrence that the two-term rule precluded him 'from engaging in the type of extended study necessary to achieve a high degree of confidence that my experienced, able colleagues are right.' McFadden quipped that it was a 'concurrence Dillardtante,' adding, 'if he didn't pull an all-nighter before he did that, it was pretty darn close.'").

4 See O.C.G.A. § 15-3-1(c)(1) ("Each division shall hear and determine, independently of the others, the cases assigned to it, except that the division next in line in rotation and a seventh Judge shall participate in the determination of each case in which there is a dissent in the division to which the case was originally assigned.").

5 The chief judge of the court of appeals, currently the Honorable Herbert E. Phipps, appoints the presiding judges and assigns the remaining judges to serve on one of the court's four divisions. See O.C.G.A. § 15-3-1(b) ("The court shall sit in divisions composed of three Judges in each division. Two Judges shall constitute a quorum of a division. The assignment of Judges to each division shall be made by the Chief Judge, and the personnel of the divisions shall from time to time be changed in accordance with rules prescribed by the court. The Chief Judge shall designate the Presiding Judges of the divisions and shall, under rules prescribed by the court, distribute the cases among the divisions in such manner as to equalize their work as far as practicable.").

6 See O.C.G.A. § 15-3-1(c)(2) ("In all cases which involve one or more questions which, in the opinion of the majority of the Judges of the division or of the two divisions plus a seventh Judge to which a case is assigned, should be passed upon by all the members of the court, the questions may be presented to all the members of the court; and if a majority of all the members of the court decide that the question or questions involved should, in their judgment and discretion, be decided by all the members of the court, the case shall be passed upon by all the members of the court, provided that a majority of the Judges passing upon the case concur in the judgment.").

7 See Ga. Const. art. VI, § 5, para. 5; see also Ga. Const. art. VI, § 5, para. 4 (authorizing the court of appeals to certify questions to the Georgia Supreme Court to aid its decisional process).

Book Briefs: The Chicago Guide to Grammar, Usage, and Punctuation

by Brandon A. Bullard

In high school, I had a friend who ravaged computer manuals. During lunch, on break, between classes, often in class, we would find my friend deep in the folds of Fortran, Python, C, C++, Java, or a world of others. Wrapped and enrapt in those technical manuals, my friend bathed in the algorithms and drank down the syntax of every computer language then in use. My friend now owns an embarrassingly successful software company, while my calls to the IT department are downright embarrassing.

The moral is that if you want to use any tool well—especially a complex one—you will immerse yourself in its fundamentals. You will read its instruction manuals. And if your tool is the English language—as it is for all lawyers in English-speaking jurisdictions—your instruction manual is the subject of this review: *The Chicago Guide to Grammar, Usage, and Punctuation* by Bryan A. Garner.

Legal readers and writers, certainly the readers of this newsletter, have more than a passing familiarity with Bryan Garner. Indeed, as the Editor in Chief of *Black's Law Dictionary*; a regular contributor to the ABA Journal; an adviser to the *Green Bag*; the President of LawProse Inc.; the author of such books as *The Winning Brief*, *The Elements of Legal Style*, and *Garner's Dictionary of Legal Usage*; and the coauthor with the late Justice Antonin Scalia of *Making Your Case: The Art of Persuading Judges* and *Reading Law: The Interpretation of Legal Texts*, Garner figures in far more conversations about legal writing than not. His battle with the judicial establishment over the ideal placement of legal citations (in-text versus footnotes) is the stuff of Twitter legend. What is to be said, though, of his latest book?

Garner's *Chicago Guide* is what it purports to be: a manual for the English language. Dry and boring, right? Astoundingly no. *The Chicago Guide* is a masterwork—stunningly clear, complete, and engaging. Its nearly 600 pages (counting glossary, bibliography, notes, index, and pronunciation guide) cover every concept in grammar, usage, and punctuation. The tome begins with a short introduction to grammar, its history, and its importance. From there, it charges forward from the traditional parts of speech; through syntax, sentence diagrams, transformational grammar, and usage; right up to punctuation. Reading it front to back was transformative. I revisited old concepts, terms I had not thought about since grade school, and appreciated them again for the first time. Even concepts that I thought I knew well revealed themselves in tokens plainer than they ever had before. And I gleaned just a fraction of what the *Guide* had to offer me.

The Chicago Guide belongs on the desk of every lawyer, every writer, every serious user of the language. I hear your objection. You are a skilled writer. You know how to use the language. You don't need a 600-page exegesis of grammar fundamentals. Overruled. Even if *The Chicago Guide* were only about the fundamentals (it isn't), you are never better than the basics. Michael Jordan practiced free throws every day for a reason.

None of this is to suggest that *The Chicago Guide* is perfect. It has weaknesses. The section on usage, for instance, is under-inclusive. While it resolves many common usage concerns—*e.g.* whether "alongside" takes a preposition (it doesn't), the best usage of "decimate" (destroying a large part but not all of something), the difference between "include" and "comprise" ("include" is nonexclusive), and the correct meaning of "refute" (to disprove, not merely to deny or rebut)—the usage section is not a one-stop shop for all such issues. For that Garner would refer you to his *Modern English Usage*.

Another weakness is the section on transformational grammar, an approach for divining the rules of language by analyzing how it is actually used. This part of *The Chicago Guide* is too short. Garner concedes this point, of course.

> Entire books are devoted to deriving rules from sentences of increasing complexity and attempting to explain sentences that deviate from previously derived rules. This section [on transformational grammar] will focus on the established transformational-grammar rules for simple sentences.

Though it has been maligned by some, transformational grammar is useful in many circumstances and interesting. I would have liked to have had some more of it.

Those weaknesses aside, however, *The Chicago Guide* is excellent. If there is a better book of its type on the market, I cannot imagine what it could be. Buy it. Buy it now. Keep it close at hand whenever you put pen to paper or fingertips to keyboard. You will thank me.

Brandon Bullard is the executive staff attorney for the Georgia Public Defender Council.

Reversed. Now what?

by Robert B. Gilbreath

There is no good reason why the parties to an appeal should ever have to guess whether the appellate court's judgment of reversal requires a new trial or rendition of judgment for the prevailing party. Yet that scenario occurs from time to time in Georgia. The appellate court, whether it be the Court of Appeals or the Supreme Court, will render a judgment of reversal without any instructions as to whether the case should be retried or the lower court should render judgment for the winner.[1] As a result, cases sometimes ping pong up and down in the court system as the parties wrangle over the proper outcome in light of the appellate court's ruling.[2] This article proposes a new rule of appellate procedure to solve this problem.

Existing Georgia jurisprudence on the effect of an appellate court's reversal

When faced with the Supreme Court's reversal of one of its opinions, the Court of Appeals must: (i) read the Supreme Court's opinion within the context of the opinion being reversed; (ii) determine whether any portions of the opinion being reversed were neither addressed nor considered by the Supreme Court; and (iii) enter an appropriate disposition with regard to those portions that is consistent with the issue addressed and considered by the Supreme Court.[3]

The Court of Appeals has said, in *Strickland & Smith, Inc. v. Williamson*[4], that as a *general rule*, where there is a judgment of reversal but no express direction of the appellate court to the lower court, a new trial must be had.[5] In *Strickland*, however, the only relief the appellant sought was a new trial.[6] The Court explained that the result would have been different had the appellant moved for directed verdict and/or judgment n.o.v.:

> We do not agree with Williamson that this holding gives S & S "a second bite at the apple," as Williamson chose not to move for a directed verdict. If Williamson had moved for a directed verdict on the basis that S & S had not adequately proven damages, S & S could have sought to reopen its case and present additional proof, if it had any. Because Williamson did not appeal the denial of a directed verdict or j.n.o.v., but rather the denial of a motion for new trial, the only remedy available to him is a new trial, at which S & S will have an opportunity to present additional or different evidence.[7]

In 2010, the Court of Appeals confirmed, in *Sugarloaf Mills, Ltd. P'shp of Ga. v. Record Town, Inc.*[8], that the general rule discussed in *Strickland*—remand for a new trial—does not apply when the appellant moved for directed verdict or judgment n.o.v. in the trial court:

> Here, the landlord chose not to move to dismiss the tenant's counterclaim at the first bench trial (which would have essentially been the equivalent to moving for a directed verdict in a jury trial) on the specific ground that the tenant failed to prove the amount of damages for its attorney fees counterclaim. Thus, the tenant was not alerted to the need to reopen its case to cure this problem. As in *Williamson*, we hold that this decision by the landlord meant that following reversal and remand (absent contrary direction from this Court), the trial court was required to allow the tenant to prove those fees at a second trial.[9]

Four years later, the Court of Appeals reconfirmed this in *Blumenshine v. Hall*[10]. There, the Court sustained a challenge to the sufficiency of the evidence to support an attorneys' fees award and remanded for a new trial.[11] In doing so, the Court—citing *Sugarloaf Mills*—explained that the appellant had not moved at the bench trial to dismiss the attorney fee counterclaim on the basis of insufficient evidence, which would have been the equivalent of moving for directed verdict.[12]

In sum, the general rule concerning remands for a new trial does not apply when the appellant moved for directed verdict or judgment n.o.v. in the trial court. This is consistent with the Court of Appeals' earlier pronouncement that when a trial court errs in denying a defendant's motion for directed verdict or motion for j.n.o.v., "the correct procedure for the appellate court is to reverse and direct that judgment be entered for the moving party, if such action should undoubtedly follow."[13]

Despite the cases clarifying that a new trial is not appropriate when a party moved for directed verdict or judgment n.o.v., there remain situations where an appellate court's judgment of reversal without further instructions leaves room for disagreement about the proper disposition. For example, in *Kirkland v. So. Discount Co.*[14], in the first appeal, the Court of Appeals simply "reversed", and in the second appeal, the Court of Appeals had to resolve a dispute between parties as to the proper disposition of the case in light of the reversal. Similarly, in *MOM Corp. v. Chattahoochee Bank*[15], the Court of Appeals had to resolve a disagreement between the parties as to the effect of the Supreme Court's reversal. As explained next, there is a simple cure for this problem.

Georgia should adopt a new rule of appellate procedure in the interest of judicial economy

When cases ping pong back and forth between higher and lower courts in a battle over the proper disposition of the case in light of an appellate ruling, it causes a needless

waste of judicial and private resources. To avoid that problem, Georgia should adopt a rule like Texas Rule of Appellate Procedure 43.3, which provides: "When reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when (a) a remand is necessary for further proceedings. . . ."[16] Under current Georgia law, as set forth in O.C.G.A. § 5-6-8, an appellate court may, but is not required to, render the judgment the trial court should have rendered.[17]

In Texas, when an appellate court renders its judgment, it either explicitly remands the case for a new trial or renders the appropriate judgment for the appellant or, when necessary, does both. For example, here is how the Texas Court of Appeals disposed of the case of *AMX Enters., L.L.P. v. Master Realty Corp.*[18]:

> Having sustained AMX's first and third issues and overruled its second, fourth, fifth, and sixth issues, we reverse those portions of the trial court's judgment awarding AMX tolled interest under the Prompt Payment to Contractors Act and denying AMX its attorney's fees; render judgment that AMX recover from MRC $46,354.62 in interest under the Prompt Payment to Contractors Act; and remand the issue of AMX's reasonable and necessary attorney's fees to the trial court for a new trial. In response to AMX's motion for rehearing, we also remand for further proceedings the disposition of the funds in the trial court's registry; we deny all other relief AMX requested in its motion for rehearing.[19]

When an appellate court renders a judgment like this, there is no guesswork to be done about appropriate disposition of the case.

Conclusion

Georgians deserve the same clarity from judgments rendered by their appellate courts. As noted by Marc O. Knisely and Emily Frost in *Render Unto Judge Calvert: Correct Appellate Court Judgments*[20], "[c]larity and precision are necessary for each case's parties, who should not have to litigate further over the disposition of the case intended by the appellate court, and for the trial court, which must observe and enforce the appellate court judgment."[21] Too often, a simple "reversed," without delineating the effect of that ruling, invites a protracted battle in the lower court—a battle that could be easily avoided by requiring appellate courts to explicitly render the judgment the trial court should have rendered.

Robert B. Gilbreath is a member of the State Bar of Texas and a senior partner in the litigation department of the Dallas office of Hawkins Parnell Thackston & Young, LLP. He serves as his firm's Appellate and Legal Issues Practice Group Leader, and has handled more than 200 appeals in a wide variety of cases.

(Endnotes)

1 *See, e.g., Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286 (2016).
2 *See, e.g., Security Life Ins. Co. of Am. v. St. Paul Fire & Marine Ins. Co.*, 278 Ga. 800 (2004).
3 *Meadow Springs, LLC v. IH Riverdale, LLC*, 307 Ga. App. 72, 72 (2010).
4 *Strickland & Smith, Inc. v. Williamson*, 281 Ga. App. 784 (2006).
5 *Id*., at 785.
6 *Id*.
7 *Id*.; *see also Aldworth Co., Inc. v. England*, 281 Ga. 197, 201 (2006) ("[F]airness dictates 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 that the evidence is insufficient to support the verdict."); *Skylark Enters., Inc. v. Marsh & McLennan, Inc.*, 121 Ga. App. 235, 236 (1970) ("Of course, if the evidence demands a verdict for either party, it is the duty of the appellate courts having jurisdiction, to so declare as a matter of law and end of [sic] the litigation."). The general rule discussed in *Strickland* requires a new trial only when the "posture of the case" necessitates a new trial. *See State v. Jackson*, 295 Ga. 825, 828 n. 6 (2014).
8 *Sugarloaf Mills, Ltd. P'shp of Ga. v. Record Town, Inc.*, 306 Ga. App. 263 (2010).
9 *Id*., at 265-66.
10 *Blumenshine v. Hall,* 329 Ga. App. 449 (2014).
11 *Id*., at 454.
12 *Id*., at 454, n.2.
13 *Stafford Enters., Inc. v. Am. Cyanamid Co.*, 164 Ga. App. 646, 650 (1982); *see also Shockey v. Baker*, 212 Ga. 106, 108 (1955); *Ford Motor Credit Co. v. Parsons*, 155 Ga. App. 46, 47 (1980) ("The purpose of a motion for judgment notwithstanding the verdict is to provide for a final disposition of the case by the appellate court where the evidence is insufficient to justify the verdict rendered on any theory, or where a judgment for the losing party in the trial court is demanded by the law.") (internal quotation marks omitted).
14 *Kirkland v. So. Discount Co.*, 187 Ga. App. 453 (1988).
15 *MOM Corp. v. Chattahoochee Bank*, 203 Ga. App. 847 (1992).
16 Tex. R. App. P. 43.3; *see also* Hon. Charles A. Spain & Kevin H. Dubose, *"In Light of This Court's Opinion . . . ." Drafting Unambiguous Appellate Judgments*, 26. App. Advoc. 9 (Fall 2013).
17 *See* O.C.G.A. § 5-6-8 ("It shall be within the power of the appellate court rendering the decision in a case to make such order and to give such direction as to the final disposition of the case by the lower court as may be consistent with the law and justice of the case.").
18 *AMX Enters., L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506 (Tex. Ct. App. 2009).
19 *Id*., at 525.
20 Marc O. Knisely & Emily Frost, *Render Unto Judge Calvert: Correct Appellate Court Judgments*, 20 App. Advoc. 174 (Spring 2008).
21 *Id*., at 179.

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Rule Changes in the Court of Appeals: An Update

by Eric J. Marlett

In the Winter 2015 issue of *The Appellate Review*, we covered a number of significant rule changes in the Georgia Court of Appeals that became effective in the summer and fall of 2014. Since then, significant legislative changes have gone into effect expanding the Court of Appeals to fifteen judges and shifting rule making authority to the Court regarding procedures for determining cases by more than a single division and for establishing and overruling precedent. These new rules are still in the process of being developed, and they are expected to be released in the near future, but in the meantime the Court has implemented and published on its website certain operating procedures that became effective July 1, 2016.

Specifically, these new operating procedures provide that in the event of a dissent on a three judge panel, the next two full divisions of the Court, for a total of nine judges, rather than the previous seven, shall participate in the case. In the event that the overruling of a prior decision is involved, all fifteen judges of the Court shall participate, but disqualification of any judge or judges shall not preclude the overruling of precedent as long as at least nine judges participate.

The Court of Appeals has, as of Sept. 1, 2016, also approved additional changes to its operating procedures which are expected to go into effect by December Term 2017. These changes include allowing 2-1 decisions without requiring referral to a nine judge panel, though any such split decision would not be considered binding precedent. The Court will also implement procedures for polling the entire Court when overruling a prior decision is proposed or a judge otherwise desires the whole Court to consider a case. Finally, the Court is considering establishing procedures to allow a party to request rehearing en banc, taking into the consideration the constraints of the two-term rule of Article VI, Section IX, Paragraph II of the Georgia Constitution.

The following are some additional rule changes that became effective in 2015. The most extensive amendments span Rules 17, 18, 19 and 21, covering the transmission and handling of records, transcripts and evidence, and are interrelated.

Rule 21 ("Physical Evidence – Original Evidence") has been deleted in its entirety, and has been replaced with new language that streamlines the scope of the rule, now retitled simply "Original Evidence". The new rule carries forward the requirement that no original evidence is to be transmitted to the Court of Appeals unless requested by the Court, or pursuant to a motion granted by the Court. Such a motion, in addition to still requiring a specific explanation of the particular evidence, and the reason it is necessary to determine the appeal, now also requires the movant to "describe its general size and weight". The language in former Rule 21, that "[i]n no event, unless directed by this Court, shall physical evidence be transmitted to the Court which is bulky, cumbersome, or expensive to transport, or which, by reason of its nature, is dangerous to handle, or which is contraband", has been omitted from the new rule. Additionally, under former Rule 21, a party relying on any physical evidence had the option of including a photograph, video or audio recording of the evidence instead of sending the original evidence to the Court of Appeals. That language has been removed.

Rule 18 ("Preparation and Arrangement of Records and Transcripts"), however, has been expanded, and now contains a new subsection (b) which governs the transmission and handling of video and audio recordings. Current Rule 18(b) provides that when transcripts are to be included in the record, "copies of all video or audio recordings that were introduced into evidence shall be transmitted to this Court along with the trial or hearing transcript." The party who tendered any such recordings must ensure that they are part of the *trial court* record, but the *appellant* bears the responsibility of making sure that all such video and audio recordings are sent to the Court of Appeals. The remainder of the new section (b) addresses the Court's authority to "take whatever action is necessary in order to ensure completion of the record", but notes that the consequences of a failure to complete the record may be the nonconsideration of enumerations of error associated with the missing recordings. Any recordings transmitted must be on DVD or video or audio CD, together with any software needed to play them. The formerly accepted formats of VHS and audio cassette tape, previously allowed under former Rule 21, are no longer supported.

The old Rule 18(b), regarding sealing of records, is now subsection (c), and a new subsection (d) has been added, which provides that instead of transmitting a paper transcript, as long as all other criteria for transcripts have been met, the trial court may now submit a certified transcript on CD in a searchable PDF format. Rule 17 ("Duty of Trial Court Clerks") and Rule 19 ("Transmission of Transcript") have been appropriately updated to reflect this newly available method for transmitting the transcript, and Rule 17 has

also now been aligned with the recent changes in Rules 30(b) and 31(e), to clarify that trial court documents containing a judge's electronically signed or stamped signature are acceptable where it is the official practice to sign in this manner.

The remaining 2015 amendments affect Rules 1, 4 and 24.

Rule 1(a) ("Requirement for Written and Signed Documents") has been updated, similarly to Rule 17, to provide that documents containing a judge's electronically signed or stamped signature are permissible where it is the official practice to sign in this manner, and that Rule has also been revised to clarify that conformed or stamped signatures by judges, attorneys and staff, instead of not being permitted, are now not permitted "except as otherwise provided in the Court's electronic filing instructions."

Following the recent amendment of Rule 46, making electronic filing mandatory as of January 1, 2015, Rule 4(b) ("Electronic Filing") has also been changed accordingly to provide that counsel are now "required to file all documents electronically with the Court". A list of examples of documents required to be e-filed has been included in the Rule, and the Court's eFaST site, which provides a copy of the general electronic filing instructions noted in the Rule, also now provides separate, detailed instructions for e-filing emergency motions, and interlocutory and discretionary applications.

Finally, Rules 24(f) ("Limitation as to Length") and 24(g) ("Attachments and Exhibits") have been amended to remove the option of attaching exhibits to an appellate brief. Rule 24(f) no longer makes any reference to "exhibits and appendices" in defining the page limits, and Rule 24(g), which formerly provided that documents attached to a brief, but not certified as part of the record, would not be considered, now simply states "[d]o not attach any document or exhibit to an appellate brief."

As always, when filing with the Court of Appeals, be sure to double check the current rules on the Court's website for any recent amendments.

Eric J. Marlett is a senior associate with McGahren, Gaskill & York, LLC, a general practice litigation and transactional firm with offices in Gwinnett County. Mr. Marlett is a graduate of Georgia Tech, New York Law School, and Goizueta Business School at Emory University, and focuses his practice primarily on civil litigation and appeals.

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Joint Appellate Practice Meeting: A Review of SCOTUS Health Law Decisions

by Margaret Heinen

On Aug. 25, 2016, the Appellate Practice Section and Health Law Section co-sponsored a Supreme Court Roundup led by appellate experts Erin Fuse Brown and Merritt E. McAlister. The turnout was good; members of both sections filled a conference room at King & Spalding in Atlanta. The program was also available by webcast at HunterMaclean in Savannah, as well as online for those who wanted to watch from the comfort of their own offices.

Brown and McAlister shared their analysis of several SCOTUS decisions from last term that involved healthcare issues. The bulk of the program was dedicated to three major decisions: *Universal Health Services v. Escobar*, *Zubik v. Burwell*, and *Gobeille v. Liberty Mutual Insurance Company.*

In *Universal Health Services v. Escobar* (Docket No. 15-7), the parents of a teenage girl who died in the care of her mental health providers filed a False Claims Act lawsuit to hold the facility liable based on a failure to comply with state licensing and supervision regulations. In a unanimous decision written by Justice Thomas, the Court held that when a defendant makes specific representations about the goods or services provided, but fails to disclose non-compliance with material statutory, regulatory, or contractual requirements that make those misrepresentations misleading with respect to those goods or services, the implied false certification theory can be a basis for liability under the False Claims Act, *even if* those material requirements were not expressly designated as conditions of payment.

Zubik v. Burwell (14-1418) involved the question of whether religious nonprofits such as universities and charities should be exempt from the contraceptive mandate—a regulation adopted by the U.S. Department of Health and Human Services under the Affordable Care Act that requires non-church employers to cover certain contraceptives for their female employees. Interestingly, in a per curiam opinion, the Court made it clear that it "expresses no view on the merits of the case." But it did remand the case to give the parties an opportunity to reach an agreement that would allow women under those plans to receive contraceptive coverage while still accommodating the nonprofits' religious exercise.

In *Gobeille v. Liberty Mutual Insurance Company* (14-181), the Court held that ERISA pre-empts a State of Vermont law requiring comprehensive claims payment information from certain entities for an all-inclusive health care database.

Brown and McAlister also discussed *Whole Woman's Health v. Hellerstedt* (15-274). The issue was whether a Texas law that required physicians who perform abortions to have admitting privileges at a nearby hospital, and required abortion clinics to have facilities similar to a surgical center, impose an undue burden on a woman's right to have an abortion. In a 5-3 decision written by Justice Breyer, the Court held that these requirements were unconstitutional: neither requirement conferred medical benefits sufficient to justify the burden upon access to abortion, and each requirement imposed substantial obstacles.

As for cases to watch, Brown and McAlister talked about a handful of matters that share a common thread: statistical sampling.

In *United States ex rel. Martin v. Life Care Centers of America, Inc.* (E.D. Tenn.), a nursing home operator allegedly charged Medicare for unreceived services. The government claimed that there are too many cases to litigate individually, so it sought to rely on the findings of a statistical expert who used a random sample of 400 patient admissions (out of 54,396) to determine how many of the claims were fraudulent. The Eastern District of Tennessee recognized that extrapolation was novel in the liability context, but not prohibited by precedent or legislative history.

In *United States ex rel. Michaels v. Agape Senior Community, Inc.* (D.S.C.; 4th Cir.), relators said that it would cost $16 million – $26 million for experts to review more than 50,000 claims involving a nursing home operator who allegedly charged Medicare for unnecessary services. Rather than litigate each case individually, the relators sought to use statistical sampling to prove damages. The U.S. District Judge would not allow the use of statistical sampling, but did recommend a bellwether trial of 100 claims. The case is now on appeal in the 4th Circuit, which granted review via interlocutory appeal.

The meeting ended with a discussion of the most interesting case on the watchlist: *United States House of Representatives v. Burwell* (D.D.C.; D.C. Cir.). The House of Representatives, in a 225 to 201 vote (with all 225 votes in favor belonging to Republicans), agreed to file a lawsuit against President Barack Obama in the U.S. District Court for the District of Columbia. The issue was whether the government's cost-sharing payments under the Affordable Care Act violate the Appropriations Clause. (There is also a sub-issue here: Does the House have standing to sue the executive branch?) On May 12, 2016, Judge Rosemary Collyer ruled in favor of the House, finding that public money cannot be used to fund cost-sharing subsidies because Congress did not specifically appropriate money for that purpose. That ruling has been stayed pending appeal.

Margaret Heinen is the 2016-17 Section chair for the Appellate Practice Section. She is a senior staff attorney with The Appellate Division of the Georgia Public Defender Council and exclusively handles direct appeals from criminal cases in Georgia superior courts.