The Appellate Review

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Dodging Minefields in the Application Process: A Primer for the Road

Filing an application for discretionary or interlocutory appeal to our state appellate courts is fraught with traps for the unwary and uninformed. A thirteen-year veteran of the Georgia Court of Appeals Central Staff offers some guidance. Part I of II.

by M. Katherine Durant

So your client is unhappy with an order of the trial court and wants you to pursue an appeal on his or her behalf. The road to filing an appeal, however, is winding and full of minefields, pitfalls, potholes – and even manholes – which you will want to avoid. Here are some matters to consider along the path.

Which Appellate Procedure to Use: To "begin at the beginning"[1] of your journey, you must first determine which avenue of appeal to pursue, and to that end, you must review the order you seek to appeal and ask, "Is this order subject to direct appeal?" Most frequently, that question is answered by determining whether the order is a "final judgment" under OCGA § 5-6-34 (a) (1), meaning, "it leaves no issues remaining to be resolved, constitutes the trial court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court."[2] But the order may otherwise be subject to direct appeal by statute[3] or case law.[4]

The Discretionary Application. Even if the order you seek to appeal is a final judgment or is seemingly directly appealable for other reasons, that is not the end of your inquiry. In order to reduce the caseload of our courts, the Georgia legislature determined that, in the types of cases listed in OCGA § 5-6-35 (a), you must petition the appropriate state appellate court for permission to appeal. These include appeals to review:

(1) Orders of the superior courts reviewing decisions of lower courts, auditors, and state or local administrative agencies,[5] including the State Board of Workers' Compensation,[6] the Board of Education, and local zoning authorities.[7] The statute, however, specifically

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excludes from the discretionary application requirement appeals from superior court orders reviewing Public Service Commission rulings and probate court decisions, as well as orders in ad valorem tax and condemnation cases.

(2) Domestic relations orders,[8] except (possibly) for those in child custody cases.[9]

(3) Distress or dispossessory warrants where the only issue is the amount of rent due and such amount is $2,500 or less.[10]

(4) Garnishment or attachment orders.[11]

(5) Probation revocation cases.[12]

(6) Orders in actions for damages in which the judgment is $10,000.00 or less,[13] unless the judgment is "zero."[14]

(7) Denials of extraordinary motions for new trial.[15]

(8) Orders denying motions to set aside a judgment under OCGA § 9-11-60 (d) or denying relief upon a complaint in equity to set aside a judgment under OCGA § 9-11-60 (e).[16]

(9) Orders granting or denying temporary restraining orders.[17]

(10) Orders awarding or denying attorney fees under OCGA § 9-15-14,[18] unless the underlying case is currently pending on direct appeal.[19]

(11) State court orders reviewing decisions of magistrate courts by de novo proceedings.[20]

(12) Orders terminating parental rights.[21]

In addition, the Prisoner Litigation Reform Act of 1996 requires that an appeal of any civil action filed by an indigent prisoner must comply with the discretionary appeal provisions of OCGA § 5-6-35.[22]

When deciding whether you must file an application for discretionary appeal, it is important to remember that the "underlying subject matter" is dispositive of whether OCGA § 5-6-35 is applicable, even when a particular judgment or order is procedurally subject to a direct appeal under OCGA § 5-6-34 (a).[23] Thus, for example, OCGA § 5-6-34 (a) (2) provides that contempt orders are directly appealable; nonetheless, you must file a discretionary application from a contempt order in a *domestic relations* case,[24] because OCGA § 5-6-35 (a) (2) requires it.[25]

The Interlocutory Application. If the order is not a final judgment or does not otherwise fall into one of the exceptions to the final judgment rule,[26] what procedure must you follow to appeal? The answer is found in OCGA § 5-6-34 (b), which describes the procedure for filing an application for interlocutory appeal. Be aware that where both the discretionary appeal statute, OCGA § 5-6-35, and the interlocutory appeal statute, OCGA § 5-6-34 (b), are both applicable, the more stringent requirements of OCGA § 5-6-34 (b) prevail, and you must file an application for interlocutory appeal.[27]

Also note that if you choose not to challenge an interlocutory ruling by application under OCGA § 5-6-34 (b) on a particular issue, you lose nothing: your decision not to file an application for interlocutory appeal – or even a defective attempt to seek interlocutory review – will not make that interlocutory judgment *res judicata* of that issue if and when you later appeal the final ruling.[28]

Bungling the Procedure. What happens if you follow the wrong appellate procedure? It depends. If you file a direct appeal when you should have filed an application for interlocutory or discretionary appeal, your appeal will be dismissed.[29] Likewise, if you file an application for discretionary appeal when you were required to follow the interlocutory appeal procedure, your application will be dismissed.[30] But what is the result if you file a discretionary application when you were required to file a notice of appeal? These cases were previously dismissed by the appellate courts. The Legislature, however, stepped in to provide some relief to those in this situation. With the enactment of OCGA § 5-6-35 (j), the appellate courts of this state are now required to grant timely applications for discretionary appeal where the party is entitled to a direct appeal.[31] And apparently in response to the enactment of OCGA § 5-6-35 (j), the appellate courts

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"The Greatest ECAPI Ever"

FROM THE CHAIR

James F. Bogan III
Kilpatrick Stockton LLP

The second-ever Eleventh Circuit Appellate Practice Institute (ECAPI II) was held at the Georgia Bar Headquarters on October 23 and 24, during the Eleventh Circuit's en banc week. Those who came experienced one of the best legal seminars they ever attended. At least, that is what about twenty different people told me during the conference. So when I declared ECAPI II "the Greatest ECAPI Ever" after the last panel presentation on Friday, I was being (somewhat) serious.

As he did for ECAPI I, United States Supreme Court Justice Clarence Thomas attended and served as our keynote speaker. Justice Thomas is from Georgia (from the Savannah area) and is the Eleventh Circuit's Supreme Court Justice. His participation was important to the success of ECAPI II and made it easy for us to recruit top-flight speakers.

Just as important was the participation of the judges on the Eleventh Circuit Court of Appeals. All told, there are seventeen active and senior judges on the Eleventh Circuit bench; ten of them participated. We are extremely grateful to Judges Stanley Birch, Emmet Cox, Joel Dubina, Peter Fay, James Hill, Frank Hull, Phyllis Kravitch, Stanley Marcus, Bill Pryor, and Gerald Tjoflat for their participation.

Moreover, the Eleventh Circuit's participation in ECAPI II was not limited to its jurists. Tom Kahn, the Clerk of the Eleventh Circuit, gave a presentation on the operation of the Court, and Eleventh Circuit attorneys Amy Nerenberg and Sharon Strange Stepler gave a presentation (along with Judge Birch) on effective motions practice in the Eleventh Circuit. And we had a reception on Thursday evening honoring retired Circuit Executive of the Eleventh Circuit, Norman Zoller.

ECAPI II (like ECAPI I) was truly a unique legal conference because it was co-sponsored by the Appellate Practice Sections of the state bars of all three states that comprise the Eleventh Circuit: Alabama, Florida, and Georgia. The planning for ECAPI II was in the works for a year, and I would like to thank all the members of the Planning Committee for their hard work: Ivan B. Cooper, Program Vice Chair, Birmingham, Alabama; Matthew J. Conigliaro, St. Petersburg, Florida; Laurie Webb Daniel, Atlanta; Thomas D. Hall, Tallahassee, Florida; Adam M. Hames, Atlanta; Christopher J. McFadden, Decatur; Jill Pryor, Atlanta; Teresa Roseborough, Long Island City, New York; Scott Burnett Smith, Huntsville, Alabama; William H. Webster, Montgomery, Alabama; and Amy Levin Weil, Atlanta.

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Calendar

Section Lunch
State Bar Midyear Meeting
Friday, January 9, 2009
11:00 am to 1:00 am
State Bar Headquarters, Atlanta

State Appellate Practice Seminar
March 2009

Section Lunch
April 2009

Section Lunch
Bar Annual Meeting
June 2009

Eleventh Circuit Appellate Practice Institute (ECAPI II)

Adam M. Hames; **Justice Raoul Cantero**, Supreme Court of Florida; **Hon. Phyllis Kravitz**, Senior Judge, 11th Cir. Ct. of Appeals; **Justice Clarence Thomas**, Associate Justice, United States Supreme Court

Teresa W. Roseborough, Christopher J McFadden, Amy Levin Weil, Matthew J. Conigliaro, Justice Clarence Thomas, James F. Bogan, III, Ivan B. Cooper, William H. Webster, Adam M. Hames

Court Clarifies Definition of "Final Ruling"

by Aaron J. Ross

As a general matter, direct appeals only may be taken from final judgments. Georgia law provides in simple terms that a judgment is final "where the case is no longer pending in the court below." O.C.G.A. § 5-6-34 (a)(1) (2008). Until recently, there has been confusion in the case law regarding the application of this standard.

In *Re-Max Executives, Inc. v. Wallace*, 205 Ga. App. 170 (421 SE2d 540) (1992), real estate agencies sued the defendants for commissions owed and attorneys' fees. The trial court awarded summary judgment to the agencies for the commissions owed in a ruling it denominated as a "Final Order." The order made no mention of the claim for attorneys' fees, however, and the agencies did not seek clarification of the court's ruling. Instead, 50 days later, the agencies filed a motion for attorney fees. The trial court viewed the motion as an appeal of the "Final Order." Since the motion was not filed within 30 days of the "Final Order," the trial court concluded, the motion was not timely and had to be denied.

> "[T]he designation of an order as 'final' by a trial court should not render the order 'final' where an additional claim clearly remains pending and unresolved."

The Georgia Court of Appeals affirmed, deferring to the "Final Order" caption of the trial court's order. The appellate court explained that the trial court had before it a motion for summary judgment on all of the claims. The trial court's omission of any mention of attorneys' fees coupled with its deliberate use of the language "Final Order," therefore, could only be deemed an intentional effort by the trial court to issue a final ruling in the case. To rule otherwise, the court concluded, would disregard the clear intention of the trial judge.

Re-Max was later criticized by commentators and other courts. Christopher J. McFadden, et al., Georgia appellate practice § 10-7 (2d ed. 2007); see also, e.g., *Hughey v. Gwinnett Co.*, 278 Ga. 740 (609 SE2d 324) (2004). "Magic language" ought not determine whether a court's ruling is final, these critics argued. Id. at 741. Instead, appellate courts should look to the function and substance of the ruling to determine its finality. In other words, the designation of an order as "final" by a trial court should not render the order "final" where an additional claim clearly remains pending and unresolved. Otherwise, a party cannot make sense of the court's disposition on claims not mentioned by the ruling and may miss an opportunity to raise a meritorious appeal.

Fortunately, the Georgia Supreme Court recently addressed this issue and has explicitly overruled *Re-Max*. In *Rhymes v. East Atlanta Church of God, Inc.*, 284 Ga. 145 (663 SE2d 670) (2008), a church filed a complaint for damages and injunctive relief, as well as a petition to quiet title. The petition to quiet title was submitted to a special master; the master filed a report of his findings on the petition; defendants filed exceptions to the special master's report and certain other pleadings and sought a jury trial. The trial court adopted the special master's report in an order it denominated as a "Final Judgment and Order" and held that title to the real property at issue belonged to the church. In a separate order, the trial court found that the defendants had failed to request a jury trial prior to the special master's hearing, and granted a motion to strike the defendant's request for a jury trial. The defendants appealed. The issue before the Georgia Supreme Court was whether the "Final Judgment" by the trial court was actually a "final judgment" from which a direct appeal could be taken.

The Georgia Supreme Court rejected the holding in *Re-Max* in favor of the case law focusing on the

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"Final Ruling"

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function of a court's ruling over its form. According to the Supreme Court, Rule 54(b) makes clear that, in cases involving multiple claims or parties, a court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." O.C.G.A. § 9-11-54 (b) (2008). Merely designating an order or a judgment as "final," the court concluded, is neither an express determination nor an express direction; it is simply a denomination of the order. *Rhymes*, 284 Ga. at 146 (citing *Hadid v. Beals*, 233 Ga. App. 5, 6 (502 SE2d 798) (1998)).

In *Rhymes*, the special master was only authorized to address those issues related to the petition for quiet title. The trial court's order adopting the special master's ruling, therefore, only addressed the petition for quiet title. As a result, the plaintiff's claims for damages and injunctive relief were still pending in the trial court. Accordingly, the court held that the defendants' appeal was improper and dismissed the appeal.

In so ruling, the Georgia Supreme Court has clarified the law in this area. It is now clear that, borrowing the words of O.C.G.A. § 5-6-34 (a)(1), a ruling is only "final" "where the case [truly] is no longer pending in the court below."

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About the Appellate Practice Section

The purpose of the Appellate Practice Section of the State Bar of Georgia, as stated in its bylaws, is "to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process."Appellate advocacy is a distinct practice area that involves a unique set of skills, governed by independent sets of procedural rules very different than those that apply to trial practice. The Appellate Practice Section offers programs and activities focusing on appellate practice, and also provides all members of the bench and bar in Georgia with a source of valuable information about appellate practice in the state and federal court system.

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Supreme Court Muddles Rules for Exclusive Constitutional Jurisdiction:

A Comment on *City of Decatur v. DeKalb County* [1]

by Kenneth A. Hindman

In a recent opinion, the Georgia Supreme Court disregarded the fundamental rule that the Court of Appeals has jurisdiction to consider cases involving the application of constitutional principles which are not doubtful or ambiguous. In *City of Decatur v. DeKalb County*, the Court drastically curtailed the number of cases over which the Court of Appeals has jurisdiction and completely changed the nearly 100-year-old concept of what it means for a constitutional principle to be doubtful.

The case arose when DeKalb County contracted with the City of Decatur and other municipalities to divide sales tax revenue the County collected under the Homestead Option Sales and Use Tax (HOST) program ("Contract"). Under the Contract, DeKalb County would distribute a certain percentage of this revenue to the contracting towns and cities, but the County did not retain control over how the recipients used the money they received, other than through an agreement in which the recipients agreed to use the funds in a manner consistent with the requirements of the HOST program.

> The Georgia Supreme Court has "completely changed the nearly 100-year-old concept of what it means for a constitutional principle to

Several of the recipients sued the County seeking additional funds to which they contended they were entitled under the Contract. The County responded that the Contract was void. The trial court granted judgment on the pleadings to the County, on the ground that the HOST statute required that the County alone administer the tax funds. The Cities appealed to the Court of Appeals, which affirmed, holding that the Contract was invalid under the HOST statute. [2]

The Supreme Court of Georgia granted certiorari and reversed, holding that the Court of Appeals had erred in resolving the County's appeal based solely on whether the Contract was valid under the HOST statute. The Supreme Court stated that the enforceability of the Contract depended on whether it was valid under the "Intergovernmental Contracts" provision of the Georgia Constitution. Neither the trial court nor the Court of Appeals had addressed that issue. [3]

Back in the trial court, the County moved for summary judgment on the ground that the Contract was an invalid intergovernmental contract, and the Cities moved for summary judgment on issues including whether the Contract constituted an unlawful gratuity under the Georgia Constitution. The trial court denied summary judgment to the County, but granted summary judgment to the Cities.

The County again filed an appeal to the Court of Appeals. The Court of Appeals reversed, holding that summary judgment should have been granted to the County. [4] The Court of Appeals held that it had jurisdiction to address the County's constitutional argument based on the Intergovernmental Contracts Clause, under a series of cases allowing the Court of Appeals to address constitutional issues where doing so involved only "an application of unquestioned and unambiguous constitutional provisions."

The Court of Appeals determined that the Contract did not satisfy the conditions for a valid intergovernmental contract, since it was not a contract "for services." The Court cited a series of five cases in which the Supreme Court had found contracts valid

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under the Intergovernmental Contracts Clause. Those contracts involved the expansion of airport facilities, the operation of a water project, garbage and waste disposal, and construction of a recreational facility and a civic center. The Court contrasted three cases in which the Supreme Court had held that neither "simply loaning money, guaranteeing debt owed to bondholders, or waiving a tax commission" constituted a "service."

Rather, the Court of Appeals held that the Contract was a "revenue sharing agreement." Since it was "a contract for the sharing of tax revenues," the Court of Appeals held that the Contract could not be considered a "contract pertaining to the provision of 'services.'"

The Court of Appeals added that the HOST statute itself supported its conclusion that the Contract was not one for services. The Contract obligated the Cities to expend the HOST funds they received from the County for "capital outlay projects;" the Court noted that the statute did not treat the term "services" as synonymous with the term "capital outlays," which were the subject of the Contract.

The Supreme Court again granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals with direction to re-consider the trial court's denial of summary judgment, but without reference to the constitutional issue. The Supreme Court ordered that, if the Court of Appeals determined that the trial court had erred in finding that there were genuine issues of material fact governing the validity of the Contract, the Court of Appeals was to remand the case for the trial court to rule on the constitutional issue.[5]

The Supreme Court held that the Court of Appeals had erred in considering the constitutional issue for two reasons.

(1) The Supreme Court found that the trial court had not decided the constitutional issue, and that that issue was therefore not ripe for review.

The trial court had denied summary judgment because it found that whether the provision in the Contract requiring the Cities to expend HOST funds for capital outlays was a contract to provide services, or a tax sharing agreement, required resolving questions of material fact. The Supreme Court held that, since the trial court's order had not "specifically or directly pass[ed]" on whether or not the Contract violated the Intergovernmental Contracts Clause, that issue was not ripe for appellate review.

(2) The Supreme Court found that, even if the constitutional issue had been ripe for review, it had exclusive jurisdiction over that issue, and the Court of Appeals had never had jurisdiction to address the constitutional issue.

The Supreme Court explained that it had "exclusive jurisdiction of a case which requires the construction of a constitutional provision that has not been construed previously…." The Supreme Court held that the Court of Appeals erred in defining"services" and determining that the Contract was not a contract for services within the meaning of the Intergovernmental Contracts Clause. The Supreme Court also stated that, because it had not construed the term "services," as used in the Intergovernmental Contracts Clause, a determination of whether the Contract was valid under that Clause could not have constituted the "application of unquestioned and unambiguous constitutional provisions," as the Court of Appeals had stated in explaining why it had jurisdiction.

Comment: [6]

While determining which "constitutional" cases fall within the Supreme Court's exclusive jurisdiction has never been cut and dried, the Georgia appellate courts have adhered to several general principles over the 90+ years of their coexistence.

(1) The Court of Appeals has appellate jurisdiction in all cases, unless jurisdiction is specifically reserved to the Supreme Court by the Georgia Constitution,

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which provides that the Supreme Court hears all cases construing the federal or state constitution. [7]

(2) The Court of Appeals has jurisdiction to decide cases "that involve the application, in a general sense, of unquestioned and unambiguous provisions of the Constitution to a given set of facts and that do not involve construction of some constitutional provision directly in question - *and* doubtful either under its own terms or under the decisions of the Supreme Court of Georgia or the Supreme Court of the United States;" (emphasis supplied).[8]

(3) The phrase "construction of the Constitution" "is not to be construed as denying to the Court of Appeals jurisdiction of cases which involve mere application of unquestioned and unambiguous provisions of the constitution to a given set of facts."[9]

(4) The fact that resolving a case involves applying a provision of the constitution, or that a party makes a claim based on the constitution, does not mean that the case lies within the Supreme Court's exclusive jurisdiction. For one thing, "if the mere insistence that a particular constitutional question was involved would be sufficient to give exclusive jurisdiction over a case to the Supreme Court, it would be easy to inject into any case a constitutional question of that kind, by contending that some perfectly plain provision of the constitution, which perhaps had not been previously construed by the Supreme Court, because susceptible of but one construction, should have some special or strained construction given to it, and thus create a constitutional question in the case."[10] (underlining added). This would in effect enable any litigant to choose the appellate forum he preferred.[11]

"In its 2008 *City of Decatur* decision, however, the Supreme Court disregarded the fundamental rule that the Court of Appeals has jurisdiction to apply constitutional provisions, so long as their meaning is clear

(5) The Court of Appeals frequently decides cases involving constitutional provisions by applying existing Supreme Court authority to the facts of the case, which often requires interpretation of that authority, or extrapolation from it. The fact that the Court of Appeals is required to exercise judgment in applying prior Supreme Court authority does not constitute "construction" of the constitution, which would require transferring the case to the Supreme Court. Among many examples, the Court of Appeals has decided that requiring a father, but not a mother, to legitimate a child did not violate the Equal Protection Clause;[12] –rejected a zoning challenge which it found did not violate the constitution;[13] and held that a sex offender registration law was not ex post facto.[14] The Supreme Court denied certiorari in the first two cases, and dismissed the writ in the other.

(6) When deciding a case requires that the court resolve a conflict about the meaning of a constitutional provision, however, (reconciling two apparently conflicting provisions of the constitution, for example [15]), the Court of Appeals will recognize that it does not have jurisdiction, and transfer the case to the Supreme Court.

From these principles, appellate practitioners could reasonably predict that cases in which the constitutionality of a statute was being attacked, and cases in which an obvious conflict existed concerning the meaning of a constitutional provision, would fall within the Supreme Court's exclusive jurisdiction. On the other hand, they could assume that cases which required application of a clearly-worded constitutional provision, or a provision which the Supreme Court had already applied, could be resolved by the Court of Appeals.

While these were only rules of thumb, they were borne out over time in the two courts' caselaw. In its 2008 *City of Decatur* decision, however, the Supreme Court disregarded the fundamental rule that the Court of Appeals has jurisdiction to apply constitutional provisions, so long as their meaning is clear and not "doubtful" or "ambiguous."

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The Supreme Court facially acknowledged this well-established limit on its exclusive jurisdiction, but then ignored it in holding that it had jurisdiction. Its opinion also appears to have inaccurately characterized the bases given by the Court of Appeals for its decision, and the holdings of its own cases.

In essence, the Supreme Court decreed, without citation of authority, that it had exclusive jurisdiction over any case "which requires the construction of a constitutional provision that has not been construed previously," without regard to whether the provision was clear or "doubtful," or whether the Supreme Court had explained the provision or applied it in earlier cases.

The constitutional issue in the *City of Decatur* case was whether the contract between the County and the Cities was valid under the Georgia constitution's Intergovernmental Contracts Clause. Such a contract would only be valid under that clause if it pertained to the provision of services, or the joint or separate use of facilities or equipment.

The Court of Appeals' opinion cited several cases in which the Supreme Court and the Court of Appeals determined that particular types of contracts did or did not meet the criteria of the Intergovernmental Contracts Clause. The upshot of these cases was that contracts that simply set up methods for fund distribution, but did not include any requirement that "services" be provided, were not valid; contracts which included provisions for "services," in the common sense of that word, generally were valid.

In particular, the Supreme Court had previously held that a contract for building a civic center was valid because it included the "service" of hiring a manager to consult on construction of the building;[16] that an agreement for constructing the Georgia Dome was valid because the promotion of tourism was a local government service;[17] and that a contract by which a county obtained "services for garbage and solid waste disposal" was valid.[18]

The Court of Appeals also pointed out that the Supreme Court had previously declared invalid a contract that committed the City of Atlanta to use tax revenue to make up any shortfall in the amount due bondholders for the Underground Atlanta project. The Supreme Court had held that the guarantee was a loan of the City's credit for the benefit of the developers, not "an activity, service, or facility" which the City was authorized by law to undertake.[19] The Supreme Court had also previously declared invalid a contract providing loans to political subdivisions on the grounds that it was not a "facility or service of the state."[20] The Supreme Court further invalidated a contract obligating a county to withhold collection of property taxes, as part of a real estate transaction. While the subject of the contract was waiver of tax collections, the Supreme Court held that: "[T]he contract has absolutely no effect on the County's tax collection service, but only affects the commission to be turned over to the Board of Commissioners. Thus, the contract does not involve the provision of services as contemplated by the intergovernmental contracts clause."[21]

The Court of Appeals noted that the term "service" was defined in a legal dictionary as "[t]he act of doing something useful for a person or a company for a fee." The Court of Appeals also noted that this definition described the contracts which the Supreme Court had upheld as valid intergovernmental contracts; those contained agreements in which "one party has agreed to perform a specific undertaking in return for receiving some type of payment, financing, or guarantee from the other party,"

The Court of Appeals observed that the Supreme Court had earlier held that the wording of the contract itself was significant in determining whether it was valid.[22] It therefore pointed out that the Contract appeared quite clearly to distinguish between "services" and the capital outlays.

The Court of Appeals thus appears to have taken care to back up its conclusion that it had jurisdiction, by listing prior Supreme Court decisions which explained how the criteria for valid intergovernmental contracts were applied in analogous situations.

The Supreme Court found, however, that determining

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whether the Contract met the criteria for a valid intergovernmental contract was not a matter of applying an unquestioned and unambiguous constitutional provision. It cited a number of cases in which it suggested that the Court of Appeals had properly exercised its jurisdiction by applying "unquestioned" constitutional provisions. In those cases, however, the Court of Appeals used the same tools which it applied in the *City of Decatur* case to ascertain the meaning of constitutional provisions, sometimes having considerably less authority upon which to rely.

> "The harsh and admonitory tone of the Supreme Court's *City of Decatur* opinion would naturally suggest to the public a lack of respect for the Court of Appeals which is both inappropriate and unwarranted."

For example, the Supreme Court had not ruled on whether personal property held on consignment was subject to ad valorem tax in Georgia. The Court of Appeals reasoned that a Supreme Court case declaring taxation of property located outside the state to be unconstitutional was factually distinguishable and that taxing consigned property did not violate the Due Process Clause.[23] In another case, the Court of Appeals reasoned that a sex offender registration statute was constitutional, based on the Supreme Court's having found that a different, but sufficiently similar statute, did not violate the constitution.[24]

The Supreme Court's chief basis for finding that the Court of Appeals had erred in *City of DeKalb* was that it gave a definition of "services," although the Supreme Court did not dispute that that definition fairly reflected the sense in which it had used the term in its own prior cases. The Supreme Court also provided no explanation of how the term "services" was in any way confusing or "doubtful," either as applied to this case, or as used in its own prior cases. The Supreme Court, after stating that its exclusive jurisdiction depended on the existence of such factors, simply ignored them and went on.

The Supreme Court then stated the basis for its criticism of the Court of Appeals' decision as follows:

> Instead, [the Court of Appeals] construed a constitutional provision that has not been construed by this Court and then applied the newly-construed constitutional provision to the facts of the case before it. None of the cases decided by this Court has construed "services" as used in the Clause.

To this observer, the Supreme Court's statement is cause for some concern. It was simply incorrect for the Supreme Court to say that it had never previously "construed" the Intergovernmental Contracts Clause. In the cases cited by the Court of Appeals in its decision and in others discussed in this comment, the Supreme Court analyzed in some detail what that provision meant, and the types of contract terms that made the contracts valid or not. In particular, a number of the cases discussed above illustrated what it meant for a contract to provide "services" or not.

As illustrated by the cases cited by the Supreme Court, a constitutional provision is not "doubtful" if its meaning is obvious, even without the Supreme Court's having addressed the provision, or where prior Supreme Court cases explain its meaning. As the Supreme Court has itself recognized, the meaning of constitutional provisions may be determined by reference to prior enactments or to analogous statutes and cases, utilizing the tools of interpretation familiar to all lawyers.[25]

In its *City of Decatur* decision, the Supreme Court appears to hold that the Court of Appeals can never have jurisdiction of a case in which there is any arguably significant term in a constitutional provision which has not been specifically "construed" by the Supreme Court, since the meaning of any such term will ipso facto be considered "doubtful." In the *City of Decatur* case, for example, there was no genuine dispute about the meaning of the term "services" in the Intergovernmental Contracts Clause, as applied to

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the Contract; the Supreme Court's own prior decisions showed clearly that contracts for the allocation of funds simply would not be considered "services."

The Supreme Court's rulings drastically curtail the number of cases over which the Court of Appeals has jurisdiction, and completely change the nearly 100-year-old concept what it means for a constitutional provision to be "doubtful."[26] It is surprising that the Supreme Court was not even forthright enough to acknowledge that it was changing the existing interpretation of its exclusive jurisdiction.

Equally important in this observer's view, the harsh and admonitory tone of the Supreme Court's *City of Decatur* opinion would naturally suggest to the public a lack of respect for the Court of Appeals which is both inappropriate and unwarranted. While the Supreme Court always has "the last word," the Court of Appeals' opinion in this case appears to have followed the law much more consistently than the Supreme Court's; its explanation of the reasoning supporting its decision is certainly a great deal clearer. Given what appear to be departures from prior law, it is difficult to see how practitioners and judges will be able to apply the Supreme Court's *City of Decatur* opinion to future cases unless the Supreme Court in some manner reconciles that decision with the governing law.

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Endnotes

[1] 2008 Ga. LEXIS 822 (Case No. S08G0105, decided October 6, 2008).

[2] *City of Decatur v. DeKalb County*, 255 Ga. App. 868 (567 SE2d 332) (2002).

[3] *City of Decatur v. DeKalb County*, 277 Ga. 292 (589 SE2d 561) (2004).

[4] *DeKalb County v. City of Decatur*, 287 Ga. App. 370 (651 SE2d 774) (2007).

[5] *City of Decatur v. DeKalb County*, 2008 Ga. LEXIS 822

[6] This Comment will address only the part of the Supreme Court's opinion concerning its exclusive jurisdiction.

[7] *Gulf Paving Co. v. City of Atlanta*, 149 Ga. 114, 117 (99 S.E. 374) (1919); *Atlanta Independent School System v. Lane*, 266 Ga. 657 (469 SE2d 22) (1996)

[8] *Pollard v. State*, 229 Ga. 698 (194 SE2d 107) (1972)

[9] *Gulf Paving*, supra, 149 Ga. at 117.

[10] *Cox v. State*, 19 Ga. App. 283, 289 (91 SE 422) (1917)

[11] *The Krystal Co. v. Carter*, 256 Ga. 43, 44 (343 SE2d 490) (1986) (quoting *Cox*)

[12] *In the Interest of V.M.T*, 243 Ga. App. 732, 734-735 (534 SE2d 452) (2000)

[13] *White v. Bd. of Comm.*, 252 Ga. App. 120, 122-123 (555 SE2d 45) (2001)

[14] *Watson v. State*, 283 Ga. App. 635, 637 (642 SE2d 328) (2007)

[15] *Kolker v. State*, 193 Ga. App. 306, 307 (387 SE2d 597) ((1989)

[16] *Frazer v. City of Albany*, 245 Ga. 399, 400 (265 SE2d 581) ((1980)

[17] *Youngblood v. State*, 259 Ga. 864, 866-867 (388 SE2d 671) (1990)

[18] *Ambac Indemnity Co. v. Akridge*, 262 Ga. 773, 775-776 (425 SE2d 637) (1993)

[19] *Nations v. Downtown Development Auth.*, 255 Ga. 324, 328 (338 SE2d 240) (1985)

[20] *Mulkey v. Quillian*, 213 Ga. 507, 508-509 (100 SE2d 268) (1957)

[21] *Greene County School District v. Greene County*, 278 Ga. 849, 851 (607 SE2d 881) (2005)

[22] *Hay v. Newton County*, 246 Ga. App. 44, 47 (538 SE2d 181) (2000), quoting *Clayton County v. State*, 265 Ga. 24, 25 (453 SE2d 8) (1995): "The only requirement is that the intergovernmental contract itself 'must deal with activities, services, or facilities which the contracting parties are authorized by law to undertake.'"

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[23] *Brown & Co. Jewelry, Inc. v. Fulton County Bd. of Assessors*, 248 Ga. App. 651, 654-655 (548 SE2d 404) (2001)

[24] *Watson v. State*, 283 Ga. App. 635, 637 (642 SE2d 328) (2007)

[25] See, for example, *Atlanta Independent School System* , supra, 266 Ga. at 659, stating that meaning of current statute could be ascertained from "settled judicial interpretation" of predecessor statute, since wording was the same, and legislature is deemed to have incorporated language with knowledge of its interpretation.

[26] The Supreme Court's rulings in the *City of Decatur* essentially make the dissenting opinion in *Oswell v. State*, 181 Ga. App. 35, 36-37 (351 SE2d 221) (1986) the law. The dissenting judges, one of whom wrote the *City of Decatur* opinion, argued that even applying federal law on the Fourth Amendment to interpret an identical provision in the Georgia constitution was "construction" of the provision, and therefore outside the jurisdiction of the Court of Appeals.

To contribute to this newsletter, please contact the editor,

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Minefields

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now afford equal treatment to those who file an interlocutory application when they are entitled to a direct appeal. The courts will a grant a timely application under these circumstances,[32] although they refused to do so previously.[33]

Presumably, if you follow the interlocutory appeal procedure of OCGA § 5-6-34 (b) when you were required to merely follow the discretionary appeal procedure of OCGA § 5-6-35, the appellate courts will simply ignore the extra paperwork and will treat your submission as an application for discretionary appeal.

Where to File. The next stop along the application road is to determine where to file your application for appeal. Applications for appeal – both discretionary and interlocutory – are filed in either the Georgia Supreme Court or Court of Appeals.[34] Our state constitution specifies which is the appropriate appellate body by delineating the types of cases the Georgia Supreme Court hears and leaving the rest to the Court of Appeals.[35] Under our constitution, the Georgia Supreme Court has exclusive jurisdiction to determine:

(1) the construction of a provision of a treaty or of the federal or Georgia constitutions, or the constitutionality of a law, ordinance or constitutional provision,[36] but only if the issue is raised before the trial court, and the court distinctly ruled on it.[37]
(2) election contests.[38]

The Supreme Court has also has general appellate jurisdiction to determine:

(1) cases involving title to land.[39] For purposes of determining its appellate jurisdiction, the Supreme Court has determined that "[c]ases involving 'title to land,' as that term is used in the Constitution . . ., refer to and mean actions at law, such as ejectment and statutory substitutes, in which the plaintiff asserts a presently enforceable legal title against the possession of the defendant for the purpose of recovering the land."[40]
(2) equity cases.[41] Note, however, that cases in which the grant or denial of equitable relief is "merely ancillary to underlying issues of law, or would [be] a matter of routine once the underlying issues of law [are] resolved," do not fall within the Supreme Court's jurisdiction over "equity cases."[42] Moreover, an appeal from a decree granting equitable *relief* is not, for that reason alone, within the Supreme Court's jurisdiction.[43] At this juncture, the net effect is that the Supreme Court rarely – if ever – assumes jurisdiction on this grounds.

(3) cases involving wills,[44] meaning, "those cases in which the will's validity or meaning is in question."[45]

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(4) habeas corpus cases.[46]
(5) cases involving extraordinary remedies,[47] including "mandamus, prohibition, quo warranto, and the like."[48]
(6) divorce and alimony cases,[49] but not any other domestic relations cases, including child custody matters.[50]
(7) cases certified to it by the Court of Appeals.[51]
(8) cases in which a sentence of death was imposed or could be imposed.[52]

The constitution provides that the Court of Appeals has appellate jurisdiction in all cases not reserved to the Supreme Court of Georgia.[53] If an appellate court determines that your application is not properly before that court, it will simply transfer the application to the other appellate court.[54] Note that because the Supreme Court has exclusive appellate jurisdiction to construe provisions of the state constitution, including those relating to jurisdiction,[55] and because decisions of the Supreme Court bind all other courts as precedents, including the Court of Appeals,[56] the ultimate responsibility for determining appellate jurisdiction rests with the Supreme Court and "results in a binding and conclusive determination of the jurisdiction of the Court of Appeals."[57] Thus, if you are seriously stumped about which appellate court has jurisdiction to rule on your application, file it with the ultimate jurisdictional arbiter, the Supreme Court, which will simply transfer the case if it determines it does not have jurisdiction.[58]

"[W]hatever you do, do *not* file your application in both courts! Although it is not fatal to your application to do so, it is a "pothole" along the way that you will want to avoid."

But whatever you do, do *not* file your application in both courts! Although it is not fatal to your application to do so, it is a "pothole" along the way that you will want to avoid, potentially creating docketing nightmares and terrible confusion between the two appellate court clerks' offices.

When To File: The appellate courts dismiss applications filed out of time;[59] untimeliness is in fact the primary reason that applications – discretionary and interlocutory – are dismissed. Both the Supreme Court and Court of Appeals, however, have made it easier for you to meet your application filing deadlines. Both courts now allow you to file by regular mail or courier service, and the application is deemed to be filed on the date you mailed your application or the date you tendered it to the courier.[60] (Word to the wise: *keep your receipt.*) The Supreme Court also allows applications to be submitted by facsimile, but only with prior approval; the application is then filed as of the date of receipt of the fax, but only after the original has been received by mail.[61] The Court of Appeals never allows fax filing.[62]

Discretionary: You must file a discretionary application within thirty days of entry[63] of the order being appealed.[64] A discretionary application involving a dispossessory action must be filed within seven days of the entry of the trial court's order.[65] Although a trial court may grant extensions of time for filing notices of direct appeal and other documents relating to appeals,[66] it has no authority to grant an extension of time to file a discretionary application.[67] The filing of a motion for new trial, in arrest of judgment, or for judgment notwithstanding the verdict extends the time for filing a discretionary application,[68] but the filing of a motion for reconsideration does not;[69] moreover, an order denying a motion for reconsideration is not itself an appealable judgment.[70] Remember: nomenclature does not control:[71] If a document captioned, for example, as a "motion for new trial" is in substance a motion for reconsideration, it will not extend the time for filing a discretionary application.[72] The converse is also true: a discretionary application would be permitted if timely filed from the denial of a motion denominated as one for reconsideration but which, for

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example, raised the grounds for a motion to set aside under OCGA § 9-11-60 (d).[73]

Interlocutory: OCGA § 5-6-34 (b) requires that within ten days of entry of the order you seek to appeal, you must obtain a certificate of immediate

review from the trial court, which certifies that the order "is of such importance to the case that immediate review should be had."[74] The appellate courts may allow some wiggle room with this language, but it is best to track it exactly to be certain that the certification process complies with the statute. Failure to obtain the certificate within ten days of the order you seek to appeal will result in dismissal;[75] moreover, the denial of an application for a certificate of immediate review is not an appealable judgment.[76] The certificate of immediate review must also be "stamp filed" with the date it is filed in the lower court clerk's office, and you must file the application in the appeals court within ten days of that date in order to avoid dismissal.[77]

Unlike a discretionary application, the denial of a motion for reconsideration of an interlocutory order may serve as the basis for an application for interlocutory review.[78] This is, of course, because the denial of the motion for reconsideration is simply another interlocutory order – there is no concern about extending the time for filing an appeal, as there would be from a final judgment.

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Endnotes

[1] Lewis Carroll, *Alice's Adventures in Wonderland.*

[2] *Spring-U Bonding Co. v. State*, 200 Ga. App. 533 (408 SE2d 831) (1991) (citation and punctuation omitted).

[3] See, e.g., OCGA § 5-6-34 (a) (2)-(11) (orders subject to direct appeal other than final judgments); OCGA § 9-11-56 (h), and *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 243 (248 SE2d 641) (1978) (grant of complete or partial summary judgment on any issue or as to any party); OCGA § 9-9-16 (arbitration confirmation); OCGA § 9-11-54 (b) (trial court dismisses fewer than all of claims or parties and expressly determines that there is no just reason for delay); OCGA § 9-11-23 (g) (order certifying or refusing to certify a class for class action). **Note:** this list is not exhaustive.

[4] See, e.g., *In re: T.L.C.*, 266 Ga. 407 (467 SE2d 885) (1996) (adjudication of delinquency and disposition in juvenile court); *Patterson v. State*, 248 Ga. 875 (287 SE2d 7) (1982) (denial of plea in bar on double jeopardy grounds); and *Hubbard v. State*, 254 Ga. 694 (333 SE2d 827) (1985), and *Callaway v. State*, 275 Ga. 332 (567 SE2d 13) (2002) (violation of speedy trial rights); **Note:** this list is not exhaustive.

[5] OCGA § 5-6-35 (a) (1).

[6] But note that no discretionary application is required for appeals in workers' compensation cases involving OCGA § 34-9-11.1, where the employee's injury "is caused under circumstances creating a legal liability against some person other than the employer."

[7] *O S Advertising Co. of Georgia, Inc. v. Rubin*, 267 Ga. 723, 724 (1) (482 SE2d 295) (1997) *overruled on other grounds, Ashkouti v. City of Suwanee*, 271 Ga. 154 (516 S.E.2d 785) (1999); but see *Sprayberry v. Dougherty County*, 273 Ga. 503 (543 SE2d 29) (2001) (no discretionary application need be filed in zoning cases not involving superior court review of an administrative decision); *overruled in part*, *Ferguson v. Composite State Board of Medical Examiners*, 275 Ga. 255 (564 SE2d 715) (2002) (overruled *Sprayberry* to the extent it held that a litigant is not seeking "review" of an administrative decision by filing a mandamus action in superior court to attack or defend that decision).

[8] OCGA § 5-6-35 (a) (2).

[9] See OCGA § 5-6-34 (a) (11). This provision suggests that the Legislature intended to take child custody matters outside of the discretionary appeal requirements of OCGA § 5-6-35 (a). The language of OCGA § 5-6-34 (a) (11), however, does not actually achieve this end. OCGA § 5-6-35 (a) (2) would have to be amended to allow for it. There has apparently been discussion of addressing this obvious oversight in the 2009 General Assembly.

[10] OCGA § 5-6-35 (a) (3).

[11] OCGA § 5-6-35 (a) (4).

[12] OCGA § 5-6-35 (a) (5).

[13] OCGA § 5-6-35 (a) (6). Note that this provision is equally applicable where the trial court awards damages of $10,000 or

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less in judgments on a *counterclaim*. An appeal of the counterclaim judgment will be dismissed for failure to comply with these procedures, when this is the only ruling challenged in the appeal. *Harpagon Co., LLC v. Davis*, 283 Ga. 410 (658 SE2d 633) (2008).

[14] *Whitley v. Bank South*, 185 Ga. App. 896, 897 (1) (366 S.E.2d 182) (1988).

[15] OCGA § 5-6-35 (a) (7).

[16] OCGA § 5-6-35 (a) (8); see also *Okekpe v. Commerce Funding Corp.*, 218 Ga. App. 705 (463 SE2d 23) (1995) for further elucidation of this provision.

[17] OCGA § 5-6-35 (a) (9).

[18] OCGA § 5-6-35 (a) (10).

[19] *Haggard v. Board of Regents*, 257 Ga. 524, 426 (4) (a) (360 SE2d 566) (1987). Note that this provision only applies to appeals of attorney fee awards under OCGA § 9-15-14, and not to those awarded under other Code sections, such as OCGA § 13-6-11 (expenses of litigation in contract actions) or OCGA § 19-6-2 (attorney fees in alimony and child support cases).

[20] OCGA § 5-6-35 (a) (11). This code specifically states that "***so long as the subject matter is not otherwise subject to a right of direct appeal***," appeals from state court orders reviewing magistrate court decisions by de novo proceedings must be brought by discretionary application. (Emphasis supplied.) No cases have construed the italicized language, but it appears to be extraneous, signifying nothing, since no law removes cases outside the scope of OCGA § 5-6-35 – the statute instead takes directly appealable orders and renders them subject to appeal by application.

[21] OCGA § 5-6-35 (a) (12). Note: on September 22, 2008, the Supreme Court granted certiorari to determine "[w]hether the Court of Appeals erred in interpreting the effective date of the legislative enactment that amended OCGA § 5-6-35 to require a discretionary application to appeal from orders terminating parental rights. See Act 264, H.B. No. 369." *In re K. R. et al., children*, S08C1611.

[22] OCGA §§ 42-12-3; 42-12-8. But see *In re K. W.*, 233 Ga. App. 140 (503 SE2d 394) (1998) (if the action was not filed while appellant was imprisoned, or was filed by a party other than appellant, direct appeal is proper).

[23] *Rebich v. Miles*, 264 Ga. 467, 468 (448 S.E.2d 192) (1994). See also *Ferguson v. Composite State Bd. of Med. Examiners*, 275 Ga. 255, 257 (1) (564 SE2d 715) (2002) ("Where both the direct and discretionary appeal statutes are implicated, it is always the underlying subject matter that will control whether the appeal must be brought pursuant to OCGA § 5-6-34 or § 5-6-35….Were our precedent to hold otherwise, litigants could avoid OCGA § 5-6-35's discretionary application requirements by seeking relief in the trial court that triggers the right to direct appeal, regardless of the underlying subject matter at issue. Our precedent has repeatedly emphasized that this is not permitted, as litigants cannot under any circumstances dictate the procedural or jurisdictional rules of this Court. [Cits.]")

[24] But see OCGA § 5-6-34 (a) (12), which purportedly allows for direct appeals from contempt orders in cases involving child custody; and see n.9, supra.

[25] *Russo v. Manning*, 252 Ga. 155 (312 SE2d 319) (1984).

[26] See, e.g., OCGA § 9-11-56 (h) (allowing a direct appeal from the grant of partial summary judgment); OCGA § 9-11-54 (b) (where trial court directs entry of final judgment as to a party or an issue); OCGA § 9-4-2 (a), and *Sunstates Refrigerated Svcs. v. Griffin*, 215 Ga. App. 61, 62 (1) (449 S.E.2d 858) (1994) (appeal from non-final order in declaratory judgment action). **Note:** this list is not exhaustive.

[27] *Scruggs v. Ga. Dept. of Human Resources*, 261 Ga. 587, 589 (408 SE2d 103) (1991).

[28] See *Mitchell v. Oliver*, 254 Ga. 112, 113 (1) (327 SE2d 216) (1985). Note, however, that the same is not true if you defectively attempt a direct appeal from the partial grant of summary judgment under OCGA § 9-11-56 (h): "[A] losing party on summary judgment who puts the machinery of immediate appellate review under OCGA § 9-11-56 (h) into motion, yet commits a procedural default fatal to his appeal, is foreclosed from thereafter resubmitting the matter for review on appeal of the final judgment." *Mitchell v. Oliver*, 254 Ga. at 114 (1).

[29] *Rivera v. Housing Authority of Fulton County*, 163 Ga. App. 648 (295 SE2d 336) (1982) (failure to follow interlocutory appeal procedure of OCGA § 5-6-34 (b) results in dismissal of direct appeal); *Georgia Water Resources, Inc. v. Department of Labor*, 193 Ga. App. 252 (387 SE2d 374) (1989) (failure to follow discretionary appeal procedure where required results in dismissal of appeal).

[30] See n.27, supra.

[31] OCGA § 5-6-35 (j) provides, "When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to

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subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section."

[32] See *Spivey v. Hembree*, 268 Ga. App. 485, 486 n.1 (602 SE2d 246) (2004): "This Court will grant a timely application for interlocutory review if the order complained of is subject to direct appeal and the applicants have not otherwise filed a notice of appeal." See also *Threatt v. Rogers*, 269 Ga. App. 402, 403 (604 SE2d 269) (2004).

[33] See, e.g., *Artis v. Gaither*, 199 Ga. App. 114 (404 SE2d 322) (1991).

[34] OCGA § 5-6-34 (b); OCGA § 5-6-35 (d).

[35] Ga. Const. of 1983, Art. VI, § V, ¶ III

[36] Ga. Const. of 1983, Art. VI, § VI, ¶ II (1).

[37] *Grice v. State*, 199 Ga. App. 829 (1) (406 S.E.2d 262) (1991). Note also that the exclusive appellate jurisdiction of the Supreme Court does not extend to questions concerning the constitutionality of an administrative regulation. *Ga. Oilmen's Assn. v. Ga. Dept. of Revenue*, 261 Ga. App. 393, 394 (582 SE2d 549) (2003).

[38] Ga. Const. of 1983, Art. VI, § VI, ¶ II (2).

[39] Ga. Const. of 1983, Art. VI, § VI, ¶ III (1).

[40] (Citation and punctuation omitted.) *Cole v. Cole*, 205 Ga. App. 332 (1) (422 SE2d 230) (1992).

[41] Ga. Const. of 1983, Art. VI, § VI, ¶ III (2).

[42] *Beauchamp v. Knight*, 261 Ga. 608, 609 (409 S.E.2d 208) (1991).

[43] *Saxton v. Coastal Dialysis & Medical Clinic*, 267 Ga. 177, 178-179 (476 SE2d 587) (1996).

[44] Ga. Const. of 1983, Art. VI, § VI, ¶ III (3).

[45] *In re Estate of Lott*, 251 Ga. 461 (306 SE2d 920) (1983).

[46] Ga. Const. of 1983, Art. VI, § VI, ¶ III (4).

[47] Ga. Const. of 1983, Art. VI, § VI, ¶ III (5).

[48] *Spence v. Miller*, 176 Ga. 96, 99 (167 SE 188) (1932).

[49] Ga. Const. of 1983, Art. VI, § VI, ¶ III (6).

[50] *Eickhoff v. Eickhoff*, 263 Ga. 498, 499 (1) (435 SE2d 914) (1993), overruled on other grounds, *Lee v. Green Land Co.*, 272 Ga. 107, 108 (527 SE2d 204) (2000).

[51] Ga. Const. of 1983, Art. VI, § VI, ¶ III (7).

[52] Ga. Const. of 1983, Art. VI, § VI, ¶ III (8). In *State v. Thornton*, 253 Ga. 524 (1) (322 SE2d 711) (1984), the Supreme Court directed, as a matter of policy, that the Court of Appeals transfer appeals from all cases in which either a sentence of death or of life imprisonment has been imposed upon conviction of murder, and all pre-conviction appeals in murder cases, whether or not the district attorney gave timely notice that he was seeking the death penalty.

[53] Ga. Const. of 1983, Art. VI, § V, ¶ III.

[54] Georgia Supreme Court Rules 32, 35; Georgia Court of Appeals Rules 11 (b) & (c); 32 (c).

[55] Ga. Const. of 1983, Art. VI, § VI, II (1).

[56] Ga. Const. of 1983, Art. VI, § VI, ¶ VI.

[57] *Saxton v. Coastal Dialysis & Medical Clinic*, 267 Ga. supra at 178.

[58] Georgia Supreme Court Rules 32, 35.

[59] *Hill v. State*, 204 Ga. App. 582 (420 SE2d 393) (1992).

[60] OCGA § 5-6-35 (a) (7).

[61] Georgia Supreme Court Rule 2.

[62] Georgia Court of Appeals Rule 1 (e).

[64] OCGA § 5-6-35 (d); Supreme Court Rule; Court of Appeals Rule 32 (b).

[63] "The filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment" for purposes of the Appellate Practice Act. OCGA § 5-6-31.

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[65] OCGA § 44-7-56; Court of Appeals Rule 32 (b). Note that as long as the issue of possession is unresolved, an appeal in a dispossessory action must be filed within seven days after entry of the order appealed from. *Ray M. Wright, Inc. v. Jones*, 239 Ga. App. 521 (521 SE2d 456) (1999); compare *America Net, Inc. v. U.S. Cover, Inc.*, 243 Ga. App. 204 (532 SE2d 756)

(2000) (seven-day time limitation of OCGA § 44-7-56 for filing an appeal does not apply in an action begun as a dispossessory proceeding, where the issue of possession was resolved prior to appeal).

[66] OCGA § 5-6-39 (a). Although the Supreme Court Rule 12 and Court of Appeals Rule

[67] *Rosenstein v. Jenkins*, 166 Ga. App. 385 (304 SE2d 740) (1983). Supreme Court Rule 12 provides that "[e]xtensions of time for filing . . . applications . . . will be granted only in unusual circumstances and only if the request is filed before the time for filing the pleading has expired." This provision is apparently rarely, if ever, utilized by the Court. Note, however, that the Supreme Court recently granted certiorari to consider the following: "Did the Court of Appeals err in dismissing as untimely petitioner's application for discretionary appeal from the order revoking his probation where the trial court had granted petitioner's motion for out-of-time appeal finding that he had been deprived of his original appeal by the ineffective assistance of counsel." *Demarcus Marshall v. State*, S08C1549 (September 22, 2008).

[68] OCGA § 5-6-35 (d).

[69] *Harris v. State*, 278 Ga. 280, 282 n.3 (600 SE2d 592) (2004); *Cheeley-Towns v. Rapid Group*, 212 Ga. App. 183 (441 SE2d 452) (1994).

[70] *Savage v. Newsome*, 173 Ga. App. 271 (326 SE2d 5) (1985); *Bell v. Cohran*, 244 Ga. App. 510 (536 SE2d 187) (2000).

[71] *Howell Mill/Collier Assoc. v. Pennypackers*, 194 Ga. App. 169 (1) (390 SE2d 257) (1989).

[72] For example, a "motion for new trial" is an improper vehicle for challenging the grant of summary judgment because the motion is in reality a motion for reconsideration; the denial of the motion does not extend the time for filing an appeal. See *Pillow v. Seymour*, 255 Ga. 683, 684 (341 SE2d 447) (1986).

[73] See *Ferguson v. Freeman*, 282 Ga. 180, 181 (1) (646 SE2d 65) (2007).

[74] OCGA § 5-6-34 (b).

[75] *Van Schallern v. Stanco*, 130 Ga. App. 687 (204 SE2d 317) (1974).

[76] *Price v. State*, 237 Ga. 352 (227 SE2d 368) (1976).

[77] *Id.*; *Genter v. State*, 218 Ga. App. 311 (460 SE2d 879) (1995).

[78] *Ferguson v. Freeman*, 282 Ga. at 181 (1).