

APPELLATE
PRACTICE
SECTION
State Bar of Georgia

The APPELLATE REVIEW

September/October, 2002

A Quarterly Publication of the Appellate Practice Section of the State Bar of Georgia

Letter from the Chair

David Webster

These are heady times for the Appellate Practice Section. Although we are barely more than 2 years old, we already have over 300 members. We have won acceptance from the appellate courts, and continue to offer good value for our membership fees.

We will offer three CLE seminars this year, each one of importance to different practitioners. We will offer both federal and state seminars. Alston & Bird, which prepared the materials for the state practice seminar, has agreed to undertake a major revision and update under the leadership of Jim Grant. Thanks, A&B!

We also will offer an advanced appellate seminar, focusing this time on how to win as appellant. These strategy discussions should be helpful to lawyers who have a steady diet of appeals.

We will continue with our monthly lunches, alternating full membership lunches with invited speakers, and lunches for section leaders. A schedule of those meetings is included in this newsletter. Thanks to Teresa Roseborough for scheduling and obtaining our distinguished guests.

We are continuing this year our unfinished legislative efforts. Last year we proposed a bill to expand certification of issues from the federal courts to the Supreme Court. Specifically, we sought to expand the certifying courts to include the federal district courts as well as the court of appeals. That bill died a quiet death on the last day of the session, but we will work

to get it passed this year.

The state practice committee is also considering re-proposing a bill to preserve appeals when the petitioner uses the interlocutory appeals procedure instead of a direct appeal. This would complement the present law, which avoids dismissal of appeals by application when the appellant was entitled to a direct appeal. The committee is considering other revisions as well.

Finally, the section is working on possible changes to the legislation governing appeals from inferior tribunals to the superior courts.

The committee structure remains the focal point for our most important and useful activity. I am creating a new committee this year, at the suggestion of Judge Blackburn, chief judge of the Georgia Court of Appeals.

The new panel is called the Suggestion Box Committee. Its purpose is to collect recommendations from our membership and from members of the bar generally, as to how the appeals courts might change their rules and procedures; and to pass along worthwhile ideas to the court or courts affected. This approach should serve lawyers who would like to obtain additional impressions before forwarding ideas; to those who would like the weight of the section behind their thoughts; and to those who would like to speak with anonymity, for whatever reason.

I have appointed Eric Kane to head this committee. He is with Owen, Gleaton, Egan, Jones & Sweeney in Atlanta. 404/688-2600 Email: kane@og-law.com

In general, please check out our web page on the state bar web site for more information on our committees and the work of the section. Please let me know of your own interests.

Highlights of this Issue -

-Message from the Chair	1-2
-When Does Filing A Motion For New Trial Secure Additional Time To Appeal?	2-3
-Calendar of Events	4
-Invitation From Lawyers Advisory Committee of the Eleventh Circuit, includes CLE 2 Hours	5
-Important Note To Members	6

And please forward to me directly your ideas for what the section can and should be doing. I am at (404) 681-3070; FAX (404) 658-1567; e-mail dawebster_alas@yahoo.com.

WHEN DOES FILING A MOTION FOR NEW TRIAL SECURE ADDITIONAL TIME TO APPEAL?

BY KENNETH A. HINDMAN

Most lawyers know that, under certain circumstances, they can file a motion for new trial, and still have the right to file an appeal if the motion for a new trial is denied. O.C.G.A. § 5-6-38(a) requires that a notice of appeal be filed within thirty days after entry of the order or sentence being appealed from. The statute goes on to provide that, where a motion for new trial has been filed, the deadline for filing a notice of appeal is within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion. This statute obviously contemplates that the point where an extension of time to appeal begins will be defined by the entry of an "order" which "disposes of" a motion for new trial, although it does not explicitly say that there can be no extension based on the disposition of such a motion without an order. As a result of this ambiguity, the Georgia courts devoted more than thirty years and at least ten reported decisions to wrestling with the question whether a motion for new trial which is voluntarily withdrawn without a court order nevertheless creates the right to an additional thirty days to file an appeal under O.C.G.A. § 5-6-38(a).

This seemingly academic question is vitally important to trial advocates, since "[t]he proper and timely filing of the notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court"; *Rowland v. State*, 264 Ga. 872, 452 S.E.2d 756, 758 (1995) (citations omitted) (emphasis in the original). An advocate could therefore lose the right to appeal if he or she withdrew a motion for a new trial under the wrong circumstances. The evolution of the cases exploring this issue shows the courts appearing unable to set down a consistently-applied rule, but "getting it right," in the end.

The trouble began in 1971 with the Court of Appeals' decision in *Golden v. Credico, Inc.*, 124 Ga. App. 700, 185 S.E.2d 578 (1971). The court observed in dicta that a motion for a new trial could be "disposed of" in

four ways: the court could (1) overrule the motion, (2) grant the motion, or (3) dismiss the motion; or (4) the movant could withdraw the motion. In various cases over the next thirty years, the Court of Appeals cited this observation as authority for extending the time for appeal after voluntary withdrawal of a motion for a new trial. See *Richards v. State*, 247 Ga. App. 345, 346, 542 S.E.2d 622, 623-24 (2000), in which the Court of Appeals acknowledged that "...the express language of the Code section [5-6-38(a)] appears to require the entry of a court order to 'dispose' of the motion." The Court of Appeals had concluded in *Golden* and several other cases that a motion for new trial could be "disposed of" by withdrawing the motion. Not until last year did the Georgia Supreme Court finally "get it right" in *Heard v. State*, 274 Ga. 196, 197 n.3, 552 S.E.2d 818, 821 n.3 (2001). Justice Benham correctly pointed out that, while a motion for a new trial may be "disposed of" by the four means cited in the *Golden* case (including voluntary withdrawal of the motion), "only the first three involve the entry of [an] order . . . finally disposing of the motion." (emphasis in the original). That seemingly obvious point, however, eluded the courts for several decades.

Even though the *Golden* court's dictum that withdrawal of a motion for a new trial "disposed of" a motion later came to be adopted by the Court of Appeals in some cases, that court at first appeared clearly to adopt the opposite. In *Taylor v. State*, 173 Ga. App. 745, 327 S.E.2d 860 (1985), the Court of Appeals squarely held (without mentioning the *Golden* case) that voluntarily abandonment of a motion for a new trial did not result in any extension of time to appeal, because there was no order disposing of the motion. Three years later, however, the Court of Appeals (without mentioning the *Taylor* case) held that (based on the *Golden* case) withdrawal of a motion for a new trial was a "disposition of the motion," and commenced a thirty day period for filing an appeal. *Booker v. Amdur*, 186 Ga. App. 276, 367 S.E.2d 94, 95 (1988). Four years after that, the Court of Appeals followed *Taylor* (without mentioning *Golden*). *Marshall v. State*, 205 Ga. App. 531, 422 S.E.2d 677, 678 (1992) (abandonment of motion does not extend time to appeal).

In the midst of this inconsistency, one panel of the Court of Appeals "got it right," although their decision was essentially ignored until the Supreme Court adopted its reasoning in the 2001 *Heard* decision.

See *Ailion v. Wade*, 190 Ga. App. 151, 154, 378 S.E.2d 507, 509 (1989) (holding that a voluntary withdrawal of a motion for a new trial extended the time for appeal only if the trial court issued an order confirming the withdrawal).

At the same time, the Georgia Supreme Court contributed to the confusion on this issue. In *Johnson v. State*, 263 Ga. 395 n.1, 435 S.E.2d 195 n.1 (1993), the Court accepted without comment a criminal appeal filed more than four months after sentencing. The Court did not acknowledge that the appeal was untimely, that the appellant had apparently filed a timely motion for a new trial, then withdrawn it, nor the effect of those facts on whether it had jurisdiction. The Court's failure to address this issue would appear to have been an oversight, except for a dissent explicitly arguing that the appeal should have been dismissed under *Taylor*, since the withdrawn motion for a new trial did not extend the time for appeal. The Court's decision thus suggested that the withdrawn motion for a new trial had tolled the time for appeal, though the Court gave no explanation for that result. See also *Bailey v. State*, 264 Ga. 300, 443 S.E.2d 836 (1994) (the Court's description of the case's procedural history showed that appeal was filed more than thirty days after sentencing, on the same day the appellant withdrew his motion for a new trial). The Court again did not address its apparent lack of jurisdiction, and there was no dissent, again implying that the withdrawn motion for a new trial had tolled the time for filing appeal.

Meanwhile, the issues remained confused in the Court of Appeals. The Court's 1993 decision in *Heard v. State*, 210 Ga. App. 805, 806, 437 S.E.2d 496, 497 (1993), held that withdrawal of a motion began the thirty day period to file appeal, while its 1994 decision

in *Hall v. State*, 213 Ga. App. 242, 243, 445 S.E.2d 578, 579 (1994), held to the contrary.

The Court of Appeals finally called the question in *Richards v. State*. The Court acknowledged that there were two irreconcilable lines of cases, exemplified by *Golden* and *Taylor*. The Court also found that the Supreme Court had effectively followed the "Golden" cases. The Court of Appeals reasoned that the Supreme Court would never have addressed the merits of the appeal in *Johnson*, when the appeal was obviously untimely, unless it had necessarily found that the time for appeal had been extended by the filing of a motion for a new trial, even though that was later withdrawn. The Court of Appeals thereupon overruled the *Hall*, *Marshall* and *Taylor* cases, going back to 1989.

The Supreme Court finally ruled in its 2001 *Heard* decision that withdrawal of a motion for new trial would not trigger the thirty day period for filing an appeal unless the withdrawal were "memorialized in a court order." The Court acknowledged that its *Johnson* decision "may have led appellate counsel to believe" that no such court order was necessary, and that it had addressed the merits of the *Johnson* appeal, despite a dissent pointing out the exact anomaly that action created. The Court went on to reverse *Richards*, because it relied on *Johnson*, which the Court said was not "binding precedent."

After the Supreme Court's *Heard* decision, it is clear that a motion for a new trial preserves the thirty day period to appeal following disposition of that motion only if the "disposition" is by way of a court order. If the motion is withdrawn without a court order, at a point past the original thirty day period for appeal, the fact that a motion for a new trial had been filed would

Visit this Section's web page at www.gabar.org Under Member Resources

click on Sections and proceed to the Appellate Practice Page

not extend that period.

Section Calendar of Events



STATE BAR APPELLATE PRACTICE SECTION

- *Membership lunches (w/speaker(s))
Separate leadership meetings (State Bar HQ)
- *Friday, October 11 - Noon at Sutherland Asbill/Cost: \$5/person
Justice Robert Benham, Supreme Court of Georgia
- Friday, November 8 - Bar Headquarters Leadership Meeting
- *Friday, December 6 - Host Firm To Be Announced
- *Friday, January 10 - State Bar Midyear Meeting Swissotel, Atl.
- Friday, February 14 - Leadership Meeting, Bar Headquarters
- *Friday, March 14- Host Firm To Be Announced
- Friday, April 18 -Leadership Meeting, Bar Headquarters
- *Friday, May 1 - Bar Headquarters for Membership
- State Bar Annual Meeting, Amelia Island, FI, June 12-14, 2003

Section members are encouraged to submit items they believe would be of general interest to Section members. Please submit comments on this issue or contributions to future issues to ewasmuth@sgrlaw.com

Ed Wasmuth, Editor 404-815-3503

The Lawyers Advisory Committee of the Eleventh Circuit
invites you to attend

Inside the Eleventh Circuit

Second Annual Dialogue with the Clerk of Court on the Appellate Process

Welcome by the Honorable J. L. Edmondson, Chief Judge

Discussion with Thomas K. Kahn, Clerk of Court, and staff

Wednesday, October 23, 2002

8:30 am to 10:30 am

En Banc Courtroom, Eleventh Circuit Court of Appeals
56 Forsyth Street, NW, Atlanta, Georgia 30303

Complimentary pastries and coffee beginning at 8:00 am

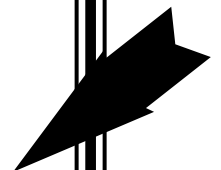
2.0 hours Georgia Bar CLE credit available

To register, please call 404-335-6654

Eleventh Circuit Lawyers Advisory Committee

Amy Levin Weil, Chair

George W. Royer, Jr. Richard Cohen Sandy G. Robinson Robert R.
Thomas E. Scott Jill A. Pryor Thomas F. Richardson Ted H. Clarkson
Reuben Cahn



IMPORTANT Note To Members

We need your email address in order to send you section notices (like this newsletter), information and meeting reminders!

You can go to the State Bar's web site www.gabar.org to the Membership Department's "Address Change Form" and verify if we have your correct address information and email. Currently 91 of our Appellate members do not list their email addresses with the State Bar. If you know of someone that would like to join our section, instructions are on the State Bar's web site.

<http://www.gabar.org>--Member Resource--
Sections

A note from the State Bar of Georgia

The State Bar of Georgia' has just redesigned its Web site. The site has just been redesigned and refocused to provide quick and easy access to everything members and the public need to know about the State Bar. Members can check their CLE online, make changes to their membership information, order publications, search the online membership directory and obtain up-to-the-minute updates on Bar events and meetings. The Bar welcomes your comments and suggestions regarding our new look. Please e-mail us at webmaster@gabar.org.