The Appellate Review

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State Bar of Georgia
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The Road to the Supreme Court: Taking a Traffic Case All the Way

by Ben Goldberg

What can you do when a client has a traffic citation for violating a confusing law? Ben Goldberg cracked the books and took this case as far as it could go, and the Georgia Supreme Court declared the statute unconstitutional.

Most of us have been cited for traffic infractions. Many of us have been aggrieved by these citations. Few of us have been able to fight these tickets all the way up to Georgia's highest court. When Todd McNair turned left onto Highway 41 in Dalton, a four-lane road with two eastbound lanes and two westbound lanes, he did not realize that by turning into the right-most of the eastbound lanes he would end up changing Georgia law.

> *"The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle. Whenever practicable, the left turn shall be made to the left of the center of the intersection and so as to leave the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as such vehicle on the roadway being entered."*

The basis for the stop of McNair's vehicle, recorded from the officer's patrol car, was questionable. The officer first saw McNair's vehicle as he pulled into a parking lot where McNair was waiting, pursuant to a red light, to take the left turn. The officer later testified that it was his routine to circle the entire parking lot before leaving. But on this occasion he immediately turned around and pulled behind McNair's vehicle.

McNair used his turn signal and did not effectuate the turn in an unsafe or abrupt manner. Nevertheless, the officer stopped him. McNair laughed when the officer told him that he had been pulled over for making an improper left turn. The officer told him that he was required to turn into the left-most of the eastbound lanes and had illegally proceeded into the right-most lane.

McNair applied and financially qualified for representation by the Conasauga Judicial Circuit Public Defender's Office. I was assigned his case and the left turn allegation immediately caught my attention. I realized that I had made the same turn hundreds of times without thinking twice about it. Everyone who heard about the case had the same reaction. My research began with an examination of the law.

I opened up my code book and this is what I found:

> The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle. Whenever practicable, the left turn shall be made to the left of the center of the intersection and so as to leave the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as such vehicle on the roadway being entered.

When I first read the statute, I did a double take and thought to myself, "What in the world does this mean?" I was just as dumbfounded after reading it a few more times. The first sentence is clear enough: a driver must commence a left turn from the left-most lane. But the second sentence reads like gibberish. I was surprised to see that no one had ever challenged the constitutionality of the vague and confusing language in this statute.

See The Road on page 10

Message from the Chair:

by Amy Weil
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I am honored to have the opportunity to lead the Appellate Practice Section, and was overwhelmed by the tremendous turnout (30+ in attendance) that we had at the Section's November 4 planning meeting. The most exciting news is that we have 9 fully functioning committees, already up and running with excellent leadership to chart the course of the Section for the coming year.

Our State Practice & Legislation Committee will focus on state appellate court proposals and comments on legislation and rules changes, and consider whether to file amicus briefs. Our Federal Practice Committee will focus on similar issues relating to appellate practice in the federal court system and will oversee the biennial ECAPI conference. Our State Seminar Committee will coordinate the Section's seminars and events concerning issues of state appellate practice. Our Events/Luncheon Program Committee is responsible for administering the Section's luncheon programs and other special events. Our Media Committee is responsible for publishing the Section's newsletter, *The Appellate Review*, which is published on a quarterly basis, as well as exploring other possible outlets (blog, list serve, Twitter, etc.). The Website Committee is responsible for designing and updating the Section's website. Our Pro Bono Committee is in charge of taking the lead in providing appellate assistance in indigent cases. And our Middle & Southern Georgia Committee will coordinate luncheons and events outside of Atlanta, as well as ensure that attendance at Atlanta based events is available remotely. We enthusiastically encourage you to become involved in the Section. If you are not already on a committee, join one. If you have an idea for an event or activity, or for any Section opportunity, let's explore it. This is going to be a tremendous year for the Appellate Section – kicking off with a luncheon at noon on Jan. 8, 2010, at the State Bar of Georgia Midyear Meeting at the W Hotel, Atlanta—Midtown.

I hope to see you there!

Amy Weil
Chair, Appellate Practice Section

Inside This Issue

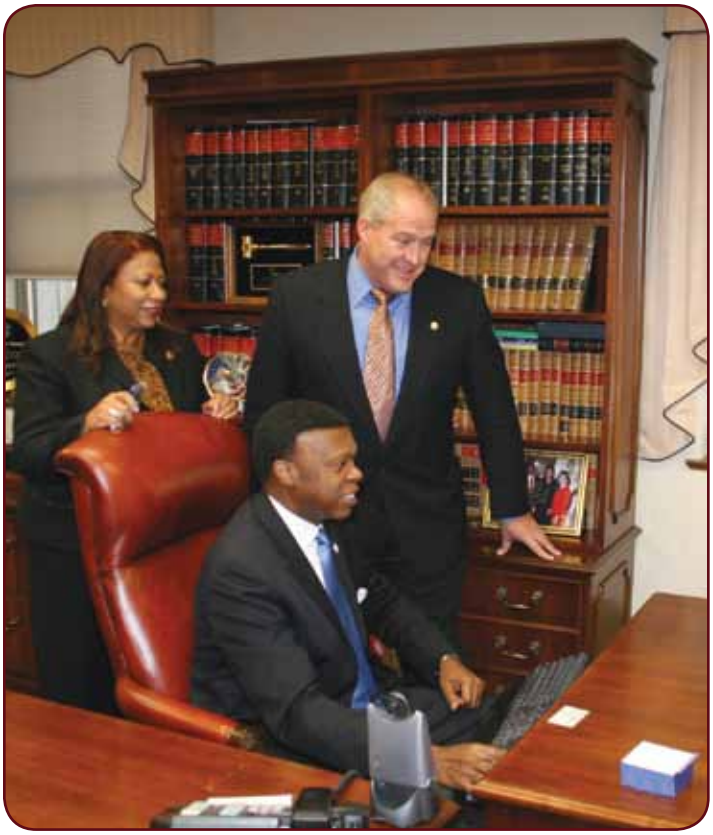
E-Filing in the State Appellate Courts

The State appellate courts have made great progress with new systems that will improve the courts' efficiency and make appellate practice easier for lawyers all over the state.

Beginning Dec. 1, 2009, the Court of Appeals of Georgia will accept electronic briefs through a public portal at http://efast.gaappeals.us. The Court began testing the new e-filing system this fall and went live in November with a small group of testers. The Court received its first electronically filed brief on Nov. 4, 2009, from S. Cindy Wang of the Georgia Public Defenders Standard Council Appellate Division, with Judge Herbert E. Phipps, Deputy Clerk Holly Sparrow and Director of Information Services John Ruggeri in attendance. The Court is working toward the next phase of e-filing, which will allow it to receive motions and issue orders electronically.

Meanwhile, change is also coming to the Supreme Court of Georgia, according to Chief Deputy Clerk Lynn Stinchcomb. The Supreme Court is in the final stages of testing its new electronic system, and once in place, attorney registration for e-filing will begin. Attorneys then will be able to e-file all documents with the Court. Moreover, attorneys will be able to access all filings, except for the appellate record, online. The Supreme Court will set up a portal on its website and attorneys will then have to register to use the system. But once attorneys subscribe to the service, they will be designated "e-filers." "Once you're an e-filer, you will always be an e-filer," says Stinchcomb, "and you'll only receive documents from the Court electronically." The Supreme Court estimates that the new system will be up and running early next year.

Chief Judge M. Yvette Miller, of the Court of Appeals of Georgia and Attorney General Thurbert Baker following the Attorney General's successful registration on the Court of Appeals of Georgia EFAST system.



Attorney General Thurbert Baker registers on the EFAST system with Chief Judge M. Yvette Miller, Court of Appeals of Georgia and Representative Chuck Martin observing.

Attorney Cindy Wang, Georgia Public Defender Standards Council, prepares to send the first brief to the Court of Appeals through the EFAST system with Judge Herbert E. Phipps, Court of Appeals of Georgia, John Ruggeri, Information Technology Director, Court of Appeals of Georgia and Attorney Jimmonique Rogers observing.

Filing Fee Focus

M. Katherine Durant
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Effective July 1, 2009, filing fees in the state's appellate courts went up nearly fourfold. Katherine Durant recently spoke with the clerks of both appellate courts to discuss their thoughts on the changes and the effects of the increase on parties and the courts.

As Appellate Practice Section members are undoubtedly aware, all filing fees for the state Supreme Court and Court of Appeals, except for criminal cases and most habeas matters, increased from $80 to $300 as of July 1, 2009. The increase codified at O.C.G.A. § 5-6-4[1] applies to all direct appeals, applications for discretionary and interlocutory appeals, and applications for writ of certiorari. It does not apply to criminal appeals or habeas corpus cases brought by people who are incarcerated. The rule allowing for fee waivers based on pauper status remains unchanged. Both appellate courts amended their respective rules to comport with the new legislation.[2]

Therese S. "Tee" Barnes, Clerk of Court for the Supreme Court of Georgia, and William L. "Bill" Martin III, Clerk and Court Administrator for the Court of Appeals of Georgia, both stated that this fee increase was initiated in the Legislature B not by the appellate courts. Martin noted that the filing fee is supposed to cover the cost of docketing the appeal, opening the file, mailing all docketing and other notices, issuing opinions and orders, postage, and all other costs associated with an appeal. Since appellate court filing fees were last increased in 1991[3], it was past time to increase the fee, according to Martin. Before the amendment was enacted, the Court of Appeals Clerk's Office had surveyed other states and federal courts. Those findings indicate that Georgia's current fees are still less than those of many other jurisdictions.

When asked if the increase was sufficient, Martin stated that he thought it was high enough and is now in line with other costs these days. The filing fee should be reasonable, he observed, not punitive, and it should not dissuade people from filing their appeals.

Barnes stated that the Supreme Court had made every effort to notify appellants of the increased fees, especially pro se parties. Martin noted with disappointment, however, that some lawyers and pro se parties continue to send in the $80 filing fee when $300 is due, despite the fact that all the local Bar associations, all of the clerks' associations, and all superior and state court clerks received notice of the increase. Moreover, the announcement was prominently posted in both appellate courts and on their websites.

Citing *Hood v. State*[4] (the court, not the clerk, should determine the viability of a filing), Barnes said her office will docket an appeal even if the fee is not included with a filing, but that the justices are notified when fees have not been paid. She emphasized that it is rare that someone forgets to include a check and that the Court calls the attorney or pro se party immediately about the omission. "We always get our money," Barnes added.

Martin stressed, however, that the Court of Appeals takes the stricter view that it is without jurisdiction to review a case on appeal when costs are not paid and no pauper's affidavit is filed.[5] In support, he cites the last sentence of O.C.G.A. § 5-6-4, which states, "The clerk is prohibited from receiving the application for appeal or the brief of the appellant unless the costs have been paid or a sufficient affidavit of indigence is filed or contained in the record."

When asked if the number of appellate filings has fallen since the fee increase, Barnes responded that the caseload had in fact increased since that time. Moreover, there have been more death penalty cases and more granted writs of certiorari.

In Martin's opinion, the Legislature should have avoided the two-tier filing fee system: there was no need to continue to require the $80 filing fee in criminal cases, since, according to Martin's estimate, 75 percent of all criminal appellants are indigent, and if they are not indigent, he believes they should pay the $300 filing fee.

But Barnes stated that according to Supreme Court numbers, less than 50 percent of criminal appellants qualify for pauper status. She opined that crimes are not only committed by the wealthy or the poor. She felt that keeping the $80 filing fee for criminal matters was a "smart compromise."

One issue that arose was whether probation revocation and juvenile delinquency cases were to be treated as criminal cases on appeal, thus entitling them to the lower $80 filing fee. Both types of cases are normally filed in the Court of Appeals. Neither of these types of appeal are addressed in the amendment to O.C.G.A. § 5-6-4. Evidence produced at a revocation proceeding need only establish the violation of probation by a preponderance of evidence, not beyond a reasonable doubt,[6] and, in Martin's view, this burden of proof makes a probation revocation hearing sound more like a civil rather than a criminal proceeding. Moreover, a juvenile delinquency case is technically neither a criminal nor a civil case.[7] Thus, it is unclear from the statute whether the $80 or $300 filing fee should apply to

these cases. The Court of Appeals resolved the issue for itself by amending its Rule 5 to state, "For purposes of this rule, appeals from probation revocation and juvenile delinquency cases shall be deemed criminal cases and the costs for filing an application or a direct appeal in such cases shall be $80."

Despite the State's budget crunch, Martin was of the opinion that the fees would not be raised again anytime soon, and as far as Barnes knew, the Supreme Court was not seeking a fee increase. Barnes and Martin both pointed out, however, that all fees collected by the appellate courts are not kept by those courts for their own budgetary requirements but are instead passed on to the State's general fund.[8] Accordingly, any increase in collections would not necessarily help the appellate courts with their own budgetary crises.[9]

Implementing the new law has not been a problem for either court, but Barnes and Martin both stressed that attorneys should feel free to contact them should they have any questions about the Courts' rules or procedures, including filing fee issues.

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1 The statute now provides: "The bill of costs for every application to the Supreme Court for a writ of certiorari or for applications for appeals filed in the Supreme Court or the Court of Appeals or appeals to the Supreme Court or the Court of Appeals shall be $80 in criminal cases and in habeas corpus cases for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court and $300 in all other civil cases. The costs shall be paid by counsel for the applicant or appellant at the time of the filing of the application or, in the case of direct appeals, at the time of the filing of the original brief of the appellant. In those cases in which the writ of certiorari or an application for appeal is granted, there shall be no additional costs. Costs shall not be required in those instances when at the time the same are due counsel for the applicant or appellant shall file a statement that an affidavit of indigence has been duly filed or file an affidavit that he or she was appointed to represent the defendant by the trial court because of the defendant's indigency. The clerk is prohibited from receiving the application for appeal or the brief of the appellant unless the costs have been paid or a sufficient affidavit of indigence is filed or contained in the record."

2 The Supreme Court's Rule 5 provides:

Costs in all civil cases are $300, unless pauper's status has been granted in the trial court and the record so reflects. Costs in all criminal cases and in habeas corpus cases for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court are $80, unless pauper's status has been granted in the trial court and the record so reflects. Costs shall be paid upon filing, except in direct appeals when the costs, which accrue on docketing, shall be paid upon filing of the original brief. Costs need not be paid again where a discretionary or interlocutory application, an application for interim review, a certificate of probable cause, or a petition for certiorari has been granted. Costs are not required for certified questions or in disciplinary cases.

Attorneys are liable for costs. Failure to pay costs subjects the offender to sanctions. See Rule 7.

The Georgia Court of Appeals Rule 5 provides:

Costs in all criminal cases are $80 and $300 in all civil cases. Costs shall not be required where there is either a sufficient pauper's affidavit or a form showing a public defender has been appointed to represent the party has been filed with the Court or contained in the record. Costs shall be paid upon filing of applications or, in direct appeals, upon filing of Appellant's Brief. Costs are not required to file an Appellant's Brief in a direct appeal which is filed pursuant to an order of this Court granting an Interlocutory or Discretionary Application. Costs are incurred and appellant's counsel are liable for costs when the case is docketed. The clerk shall not receive a Brief of the Appellant or an application unless the costs have been paid, a sufficient pauper's affidavit has been filed, or a form showing appointment of a public defender to represent the appellant on appeal has been filed or evidence of indigency is contained in the record.

For purposes of this rule, appeals from probation revocation and juvenile delinquency cases shall be deemed criminal cases and the costs for filing an application or a direct appeal in such cases shall be $80.

3 See Ga. L. 1991, p. 411, § 1.

4 282 Ga. 462 (2007).

5 See, e.g., *Carson v. Automobile Financing*, 96 Ga. App. 336 (99 SE2d 903) (1957).

6 O.C.G.A. § 42-8-34.1 (b); see *Strozier v. State*, 248 Ga. App. 306, 308 (2) (546 SE2d 290) (2001).

7 See, e.g., O.C.G.A. § 15-11-50; 15-11-65.

8 See Ga. Const. 33 Art. 7, § 3, Para. 3. See also "State uses funds anyplace it wants: Intended for one thing, most of the dollars get spent for other things," by James Salzer and Aaron Gould Sheinin, The Atlanta Journal Constitution, p. A1 (Nov. 8, 2009). ©The Atlanta Journal Constitution.

9 See, e.g., "Courts' debt may violate state law: State auditor has asked the AG to look at the constitutional limitations on overextending the budget'" by Andy Peters, Staff Reporter, Daily Report, Oct. 28, 2009. ©ALM Media Properties, LLC.

Doctrine of Forum Non Conveniens: The Georgia Story So Far

by Simon Weinstein
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In considering the doctrine of forum non conveniens, courts in other jurisdictions have emphasized the traditional deference to a plaintiff's choice of forum. In 2001, the Supreme Court of Georgia first adopted the common-law doctrine in a limited way, and the legislature enacted a broad forum non conveniens statute in 2005. Georgia courts are still developing this area of the law.

In *AT&T Corp. v. Sigalia*, 274 Ga. 137 (549 SE2d 373) (2001), the Supreme Court of Georgia adopted the common-law doctrine of forum non conveniens for use in lawsuits by nonresident aliens who suffer injury outside this country. As recognized in *Sigalia*, "[t]he common-law doctrine of forum non conveniens is an equitable principle by which a court having jurisdiction may decline to exercise it on considerations of convenience, efficiency, and justice." 274 Ga. at 138 (footnote and punctuation omitted). As *Sigalia* further recognized,

> *Cases interpreting and applying O.C.G.A. § 9-10-31.1, which was enacted only five years ago, have yet to fully consider forum non conveniens principles that have the potential to significantly impact the statute's operation.*

> The U.S. Supreme Court has identified relevant public and private interests to be considered in determining whether the plaintiff's choice of forum should be honored. The private interests include the relative ease of access to sources of proof, the relative availability of compulsory process to secure the attendance of witnesses, the cost of obtaining willing witnesses, the need to view the premises, the ability to enforce judgments, and other factors that make trial expeditious and inexpensive. When courts are required to adjudicate disputes that have little connection to the chosen forum, the public interest factors include issues involving court congestion, jury duty, and choice of law.
>
> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. There is a local interest in having localized controversies decided at home. There is appropriateness, too, in having the trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in foreign law itself.

Id. (footnotes and punctuation omitted).

Although the majority in *Sigalia* acknowledged that "specific statutes codifying the doctrine will prevail over the common law," the majority held that "the absence of a statute generally permitting dismissal based on forum non conveniens does not prohibit us from adopting the doctrine in this international tort action." Id. at 141. The majority distinguished prior cases which had declined to adopt the doctrine, on grounds that those cases involved residents or citizens of Georgia or another state. See id. at 139, citing *Brown v. Seaboard Coast Line R.R. Co.*, 229 Ga. 481, 482 (192 SE2d 382) (1972) (privileges and immunities clause of U.S. Constitution prohibits Georgia courts from applying forum non conveniens doctrine to nonresident citizens of other states in suit under federal statute with special venue provision); *Atlantic Coast Line R.R. v. Wiggins*, 77 Ga. App. 756, 759-760 (49 SE2d 909) (1948) (refusing to apply doctrine to Georgia resident). The trial court in *Sigalia* indicated that it was inclined to grant a defense motion to dismiss under the doctrine, but that it lacked the power to do so because of the lack of statutory authorization. 274 Ga. at 137. The Supreme Court adopted the doctrine relying on its inherent judicial power, held that the trial court similarly possessed inherent power to dismiss the case under the doctrine, and reversed. Id. at 139-141.

In 2005, four years after *Sigalia* was decided, the Georgia General Assembly enacted a forum non conveniens statute as part of the Tort Reform Act of 2005. The statute, codified at O.C.G.A. § 9-10-31.1, provides in the opening sentence of subsection (a).

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a

different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens.

O.C.G.A. § 9-10-31.1, unlike *Sigalia*, thus applies to both intrastate and interstate lawsuits, as well as international litigation. Concerning interstate or international litigation, the second sentence of O.C.G.A. § 9-10-31.1 (a) states: "As to a claim or action that would be more appropriately heard in a forum outside this state, the court shall dismiss the claim or action." Concerning intrastate litigation, the third sentence of subsection (a) states: "As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county."

Subsection (a) next provides that "[i]n determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

(1) Relative ease of access to sources of proof;

(2) Availability and cost of compulsory process for attendance of unwilling witnesses;

(3) Possibility of viewing of the premises, if viewing would be appropriate to the action;

(4) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy;

(5) Administrative difficulties for the forum courts;

(6) Existence of local interests in deciding the case locally; and

(7) The traditional deference given to a plaintiff's choice of forum."

Thus, statutory factors (1), (2), (3), (5), and (6) were expressly recognized in *Sigalia*. Statutory factor (4) B "[u]nnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy" B was not expressly recognized in Sigalia. Instead, *Sigalia*, unlike O.C.G.A. § 9-10-31.1 (a), identified as other private interest factors: "the cost of obtaining willing witnesses," "the ability to enforce judgments," and "other factors that make trial expeditious and inexpensive." And *Sigalia*, unlike the statute, recognized conflict of law problems as a public interest factor. O.C.G.A. § 9-10-31.1 (a), on the other hand, recognizes "traditional deference given to a plaintiff's choice of forum" as a private interest factor not set forth in *Sigalia*.

Later in 2005, after O.C.G.A. § 9-10-31.1 had become effective, the Court of Appeals decided *Hewett v. Raytheon Aircraft Co.*, 273 Ga. App. 242 (614 SE2d 875) (2005), involving an action for wrongful death and survival damages arising from an airplane accident in Australia. *Hewett* recognized that the public and private interest factors discussed in *Sigalia* are not identical, and that O.C.G.A. § 9-10-31.1 (a), unlike *Sigalia*, expressly requires trial courts to consider each and every identified factor in every case involving forum non conveniens. Id. at 247 (2). Drawing guidance from numerous case holdings (both in and out of state), *Hewett* also held that, although O.C.G.A. § 9-10-31.1 does not explicitly require it, "a trial court must make specific findings either in writing or orally on the record demonstrating that the court has considered all seven of the factors set forth in O.C.G.A. § 9-10-31.1 (a)." Id. at 248-249. Because the trial court in *Hewett* had dismissed the action under the doctrine of forum non conveniens without making the requisite findings, *Hewett* vacated the dismissal order and remanded the case for further proceedings.

The following year, the Supreme Court decided *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333 (626 SE2d 482) (2006). EHCA Cartersville was an intrastate medical malpractice suit in which a defendant, sued in the county of the residence of a joint tortfeasor, claimed inconvenient forum and moved to transfer venue to the county of his own residence, where the torts occurred. Plaintiff opposed the motion contending that O.C.G.A. § 9-10-31.1 violated the joint tortfeasor venue provision of our Constitution, Art. VI, Sec. II, Par. IV of the Ga. Const. of 1983. The trial court held the statute constitutional and transferred venue. The Supreme Court affirmed. The Supreme Court held that by providing that superior courts have power to change venue in the manner provided by law, Art. VI, Sec. II, Par. VIII of the Ga. Const. plainly contemplates that, even though the plaintiff has filed his or her action in an appropriate venue by suing in the county of residence of any joint tortfeasor (as per Art. VI, Sec. II, Par. VI), the court has the authority to change the venue selected by the plaintiff if the General Assembly has enacted a statute authorizing it to do so. 280 Ga. at 337 (2).

Several months after *EHCA Cartersville* was decided, the Supreme Court recognized in *R.J. Taylor Memorial Hosp. v. Beck*, 280 Ga. 660 (631 SE2d 684) (2006), that under O.C.G.A. § 9-10-31.1 a movant to transfer venue has the burden to show that the statutory factors support the transfer and that the burden on appeal is to demonstrate that the trial court abused its discretion in making the decision. 280 Ga. at 663 (3). In *R.J. Taylor*, the trial court had denied a hospital's motion to transfer a medical malpractice action from Bibb County (where some of the defendant doctors resided) to nearby Pulaski County (where the hospital was located and where the alleged tortious acts occurred). Engaging in its own balancing of the statutory factors, the Supreme Court in *R.J. Taylor* found no abuse of discretion by the trial court in refusing to transfer venue in the case. Id.

Shortly after the Supreme Court's *R.J. Taylor* decision, the Court of Appeals in *Federal Ins. Co. v. Chicago Ins. Co.*, 281 Ga. App. 152 (635 SE2d 411) (2006) recognized that, as held in Hewett, supra, a court applying O.C.G.A. § 9-10-31.1 (a) "must make oral and written findings of fact

reflecting an analysis of the >procedural framework' of the statute, specifically considering and weighing each of the seven factors enumerated." 281 Ga. App. at 153. Federal Ins. further held that that these seven factors coalesce into the more fundamental (and penultimate) consideration of whether "in the interest of justice" and "for the convenience of the parties and witnesses" a claim or action would be more properly heard in an alternative, adequate forum. Id. at 154. Because the trial court in Federal Ins. had failed to make such findings, its dismissal order was vacated and the case remanded for further proceedings.

Although statutory factor (7) (traditional deference to a plaintiff's choice of forum) was specifically recognized and applied in *Hewett*, 273 Ga. App. at 247 (2); *R.J. Taylor Memorial Hosp. v. Beck*, supra, 280 Ga. at 663 (3); *The John Hardy Group v. Cayo Largo Hotel Assocs.*, 286 Ga. App. 588, 591 (2) (649 SE2d 826) (2007); and B*lackmon v. Tenet Healthsystem Spalding*, 288 Ga. App. 137, 149 (6) (653 SE2d 333) (2000), the Georgia appellate courts have yet to recognize the preeminent role played by this factor in other jurisdictions.

In this regard, courts in other jurisdictions have described the doctrine of forum non conveniens as "a drastic remedy to be exercised with caution and restraint." 20 Am Jur 2d Courts, p. 496, ' 116 (2005); see *Temlock v. Temlock*, 898 A2d 209, 216 (Conn. App. 2006). "Emphasis on the trial court's discretion does not . . . overshadow the central principle of the forum non conveniens doctrine that unless the balance is strongly in favor of the defendants, the plaintiff[>s] choice of forum should rarely be disturbed." Temlock, supra (citation and punctuation omitted).

The trial court does not have unchecked discretion to dismiss cases from a plaintiff's chosen forum simply because another forum, in the court's view, may be superior to that chosen by the plaintiff[]. Although a trial court applying the doctrine of forum non conveniens must walk a delicate line to avoid implicitly sanctioning forum-shopping by either litigant at the expense of the other[,] it cannot exercise its discretion in order to level the playing field between the parties. The plaintiff['s] choice of forum, which may well have been chosen precisely because it provides the plaintiff[] with certain procedural or substantive advantages, should be respected unless equity weighs strongly in favor of the defendants. Id. (citation and punctuation omitted).

Accordingly, the trial court, in exercising its structured discretion, should place its thumb firmly on the plaintiff's side of the scale, as a representation of the strong presumption in favor of the plaintiff[>s] chosen forum, before attempting to balance the private and public interest factors relevant to a forum non conveniens motion.

Id. (citation, punctuation, and footnote omitted).

"Deference is to be given to the plaintiff's choice of forum; unless the balance [of conveniences], upon weighing the relative advantages and obstacles to a fair trial, is strongly in favor of the defendant, the plaintiff's choice of forum should not be disturbed." Am Jur, supra at p. 500, ' 120 (footnotes omitted, emphasis supplied); see *SME Racks, Inc. v. Sistemas Mecanicos Electronica, SA*, 382 F3d 1097, 1100-1101 (11th Cir. 2004). "[T]he plaintiff's choice of forum should rarely be disturbed. . . ." SME Racks, supra, at 1101 (citation and punctuation omitted).

"Under the balancing of interests, the standard is whether the defendant will suffer overwhelming hardship if required to litigate the action in the forum state." Am Jur, supra at p. 503, ' 123 (emphasis supplied); see *Aveta, Inc. v. Colon*, 942 A2d 603, 608 (Del. Ch. 2008). "Indeed, despite linguistic appearance to the contrary, forum non conveniens is not a doctrine of convenience; it a doctrine of significant, actual hardship." *Aveta*, supra (footnote omitted).

CONCLUSION

Cases interpreting and applying O.C.G.A. § 9-10-31.1, which was enacted only five years ago, have yet to fully consider forum non conveniens principles that have the potential to significantly impact the statute's operation.

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Upcoming Events

Jan. 8, 2010
State Bar of Georgia Midyear Meeting
Section Lunch - Noon - 2 p.m.
W Atlanta - Midtown
188 14th St., NE, Atlanta, GA
Speaker - Judge Debra H. Bernes
Court of Appeals of Georgia

Feb. 26, 2010
State Appellate Practice Seminar

Oct. 21-22, 2010
Eleventh Circuit Appellate Practice Institute (ECAPI 3)

Pro Bono Project Gets Recognized

by Thomas J. Mew

The Pro Bono Project began approximately two years ago when Section member James C. Bonner of the Georgia Public Defender Standards Council became concerned about potentially "lost" appeals in a number of criminal cases. Bonner noticed that, after changes in Georgia's public defender system, some appeals that were initiated before the change could potentially fall by the wayside as local public defender offices struggled with how to staff and address these appeals.

Bonner discussed the situation with then-Section Chair Adam M. Hames and the two men realized that a number of attorneys would appreciate the experience of working on these appeals. Bonner located six appellants who needed representation and Hames recruited volunteers to pursue the appeals. The Georgia Court of Appeals publically recognized the project in *Bynum v. State*, Case No. A09A1623, published Sept. 22, 2009, in which Bynum was represented by volunteer David A. Sirna of Krevolin & Horst, LLC, in Atlanta.

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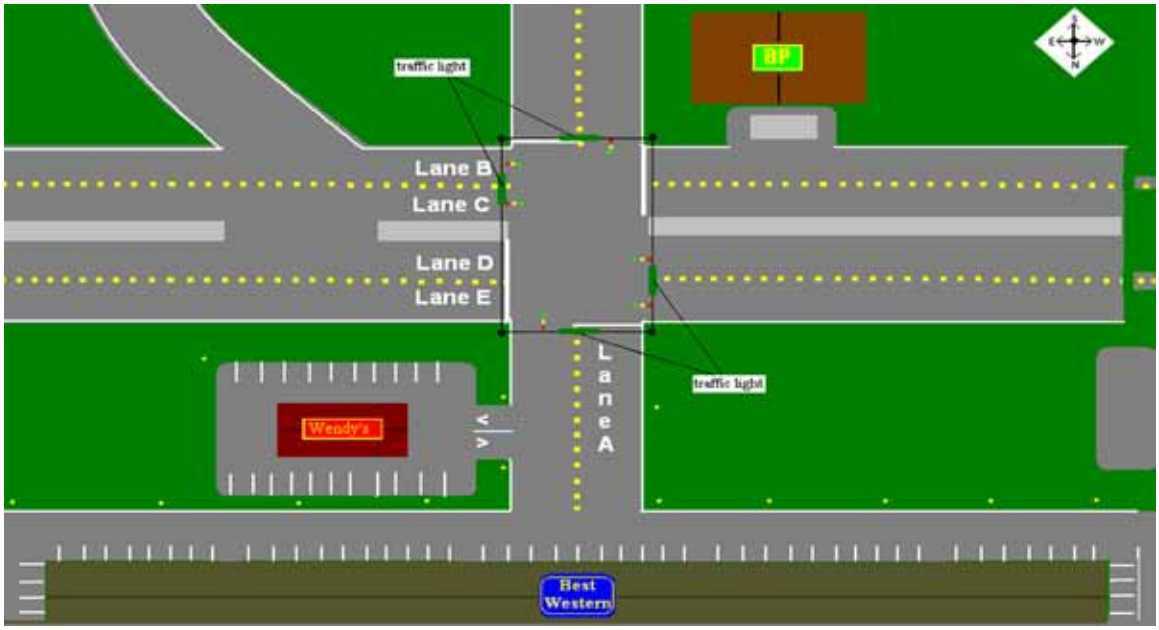
The Nov. 4, 2009, planning meeting of the Appellate Practice Section drew a big crowd. Members reviewed and reorganized the section committees.

The Road continued from page 1

I considered a number of things about this law. I was concerned about the fact that the law only had to be complied with "whenever practicable" because of the subjectivity that this language invited regarding its application. Most troubling, however, was that the statute could be interpreted in two completely contradictory ways based on how the word "leave" is defined.

Among others, one definition of "leave" is "to go away from." Applying this definition to the statute, it would mean that McNair was required "to go away from" the intersection in the left-most available lane. This is what the officer believed the law provided and was what the state contended.



However, another definition of "leave" is "to cause or allow to be or remain available." Applying this definition to the statute, it would mean that McNair was required to leave "available" for other vehicles the left-most lane by proceeding into the right-most lane of his new direction of travel. This was exactly what he had done.

Our position was not that the statute meant one thing and not the other. Nor was our position that the law should mean one thing and not the other. Our position was that a law that means two contradictory things is a law that is meaningless.

To preserve the issue for any future appeal, I filed a general demurrer challenging the constitutionality of the statute and a motion to suppress challenging the legality of the initial stop. I argued to the trial court that the vague, confusing and contradictory language in the statute left people of common intelligence to guess as to its meaning and differ as to its proper application. I further argued that this was a due process violation under both the Constitution of the United States and the Constitution of the State of Georgia because citizens cannot be expected to defend themselves against laws that they cannot understand the meaning of. The trial court overruled the demurrer and denied the motion.

This turn of events did not discourage McNair or me from wanting to further challenge this law. We believed that a jury would surely be able to perceive the injustice in enforcing such a law. At the very least, we hoped that the confusing language would create reasonable doubt in the jury's mind. We announced ready for trial.

I argued to the jury that as citizens we are entitled to know exactly what conduct the government forbids and commands. I showed the jury the statute on an overhead projector and literally argued that the language was "gobbledygook." I asked them how someone could be guilty of violating a law that no one could decipher the meaning of. In the end, my argument was unavailing. McNair was convicted of making an improper left turn.

I spoke to one of the jurors after the trial and learned that the jury had never heard of the law before. They were confused by the language of the statute and could not come to a consensus on its meaning. Nevertheless, they presumed that the officer's understanding of the law was correct.

The jury's apparent lack of concern over this nonsensical law fueled our desire to appeal McNair's conviction. Because the case involved a challenge to the constitutionality of a statute, this would be my first experience with the Georgia Supreme Court.

I researched the left turn laws of other states and was surprised by what I found. Twelve states have left turn statutes with the very same "leave the intersection or other location in the extreme left-hand lane lawfully available" language. Two of these statutes have been challenged and upheld. Eighteen other states have left turn statutes with similarly confusing and ambiguous language. This information worried me. If most other states had basically

the same left turn laws, why would the Supreme Court find Georgia's unconstitutional?

Additionally, at first I was somewhat embarrassed to take such a case in front of Georgia's highest court. I joked that it was the least important case that the Court will ever consider. I worried that the Court would chastise me for pursuing such a seemingly inconsequential appeal.

But the more I thought about it, the more I realized that this case was tremendously important and had wide-ranging implications. No area of the law impacts more people than traffic law. According to the Georgia Department of Driver's Services, there are approximately 6 million Georgians with valid driver's licenses.

By the time of oral argument, I had read the statute over 100 times and still had no idea what it meant. Every time I turned left I wondered if I was breaking the law. As I watched others turn left as McNair had, I wondered if they knew that they were breaking the law. Was I the only person who did not understand the law? Was I not a person of common intelligence? These concerns made me nervous and consumed my thoughts in the days leading up to my date in front of the Court.

My nerves did not subside until after I said "may it please the court." At that point, the amount of preparation that I had put into the case made me confident of my position. After all, no one knew more about, or had thought more about, the left turn law. I was ready for any question that came my way. In the end, I argued as if this were the most important case ever ruled upon by the Court. McNair and I waited three months for the Court's decision.

I felt vindicated when the Court unanimously agreed that the law was unconstitutionally void for vagueness. I was not surprised that the case was covered in my local paper. I was surprised that it was covered in the Atlanta Journal-Constitution and even more surprised that the story was picked up by the Associated Press and run in newspapers across the state.

One reason this case captured so much attention may be that the law in question affects so many people. For me, as a public defender sworn to protect the constitutional rights of individuals who cannot afford legal counsel, this case was a perfect illustration of the principle that the violation of one person's rights is a violation of everyone's rights. As lawyers, we will not always have the perfect case, but when we become aware of laws that are ambiguous and/or likely to be applied unfairly, we have to be ready to examine and challenge them. . .even in the highest courts.

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Section Officers

Appellate Practice Section Committees

State Practice & Legislation Committee

This committee focuses on issues relating to will focus on practice before the Georgia Supreme Court and Georgia Court of Appeals, including state appellate court proposals and comments on legislation and rules changes, and consider whether to file amicus briefs.

Paul James Kaplan(chair), Christina Cooley Smith, Jeffrey Jerry Swart, Christopher J. McFadden, James C. Bonner Jr., Brian Richard Dempsey, Joshua Barrett Belinfante, Keith R. Blackwell

Federal Practice Committee

This committee focuses on issues relating to appellate practice in the federal court system. Proposes and comments on legislation and rules changes and considers amicus briefs. Comments to the Eleventh Circuit on Rules Amendments/Proposals and oversees the Eleventh Circuit Appellate Practice Institute.

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This committee coordinates the Section's seminars and events concerning issues of state appellate practice (seminar Feb. 26, 2010).

Ronan Patrick Doherty (chair), Simon Weinstein, Paul James Kaplan, Stephen Louis A. Dillard

Events/Luncheon Program Committee

This committee is responsible for is responsible for administering the Section's luncheon programs and other special events.

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Media Committee

This committee is responsible for publishing the Section's newsletter, *The Appellate Review*, which is published on a quarterly basis, and exploring other possible outlets (blog, list serve, Twitter, etc.). The newsletter provides information about the Section's activities, discusses new rules and aspects of procedure affecting state and federal appellate practice, and features articles about practice pointers and recent cases of interest.

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Website Committee

This committee is responsible for designing and updating the Section's website. The website provides immediate access to information about the Section's leadership, structure, and activities and serves as a library for the Section's newsletter, *The Appellate Review*.

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Pro Bono Committee

This committee is in charge of taking the lead in providing appellate assistance in indigent cases.

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This committee coordinates luncheons and events outside of Atlanta, and ensures that attendance at Atlanta-based events is available remotely.

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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.

To get more involved in Section activities, please contact the section chair:
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