The State Bar of Georgia

BUSINESS LAW SECTION

Newsletter

David A. Stockton, Chair | February 2006 | Elizabeth H. Noe, Editor

YEAR IN REVIEW: 2005 CASE LAW DEVELOPMENTS IN GEORGIA CORPORATE AND BUSINESS ORGANIZATION LAW

By Thomas S. Richey
Powell Goldstein LLP

This article will report on case law developments in corporate and business organization law reflected in decisions handed down by the Supreme Court of Georgia and the Georgia Court of Appeals during 2005.

Last year was characterized by a surprising level and range of appellate activity in business organization litigation. The Georgia appellate courts rendered decisions during 2005 involving a variety of forms of business organizations – business and nonprofit corporations, statutory close corporations, professional corporations, limited liability companies and general partnerships. Their decisions addressed a wide range of issues, such as piercing the corporate veil; dissolution; shareholder oppression; standing, settlement and special committee investigation and dismissal of derivative actions; fiduciary duties in the purchase and sale of businesses, oral contracts for the formation of partnerships and for the sale of an interest in a corporation; business opportunities and their renunciation; and the enforceability of buy-sell agreements. Many of these decisions apply well-settled principles in typical settings, but others break new ground. We think it would be helpful to survey the 2005 business organization case law generally, novel and settled issues alike, because it helps give practitioners a reading on where matters currently stand. To summarize these developments briefly:

Business Corporations. The Georgia Supreme Court in Baillie Lumber Co. v. Thompson, 279 Ga. 288, 612 S.E.2d 296 (2005), held that a corporation in bankruptcy or its bankruptcy representative can pierce the corporation's own veil and hold a shareholder liable for all its debts. In Infrasource, Inc. v. Hahn Yelena Corporation, 272 Ga. App. 703, 613 S.E.2d 144 (2005), the Georgia Court of Appeals held that parties negotiating the sale of a business did not enter into a confidential relationship giving rise to fiduciary duties and requiring disclosure. Bienert v. Dickerson, A05A2004, 2005 WL 3244288 (Ga. App., Dec. 2, 2005), finds on its facts that a fiduciary duty was owed by a business broker to her client. In Thompson v. Scientific Atlanta, Inc., 275 Ga. App. 680, 621 S.E.2d 796 (2005), the Court of Appeals affirmed a trial court's dismissal of a corporate derivative action based on an extensive report of a special litigation committee of the Board of Directors, appearing in the process to adopt the position of the Delaware courts that discovery on the committee's investigation and decision is a matter of the trial court's discretion, not a matter of right. Leventhal v. Post Properties, Inc., No. A05A1155, 2005 WL 3149258 (Ga. App., Nov. 23, 2005), restricted standing to object to a derivative action settlement only to those shareholders who owned shares at the time the acts giving rise to the action occurred. In Massih v. Mulling, 271 Ga. App. 685, 610 S.E.2d 657 (2005), the Court held an oral agreement for an officer to receive a percentage ownership interest in a corporation too indefinite to

enforce because it did not contain all material terms, e.g., a specific delivery date. In Ranier Holdings, Inc. v. Tatum, 275 Ga. App. 878, 622 S.E.2d 86 (2005), the Court held that a *pro se* answer filed by a corporation, while improper, is a curable defect.

Statutory Close Corporations. In Gallagher v. McKinnon, 273 Ga. App. 727, 615 S.E.2d 746 (2005), the Court of Appeals held that an ousted majority shareholder of a statutory close corporation need not demonstrate justifiable reliance in order to obtain relief under O.C.G.A. § 14-2-940 for shareholder oppression.

Professional Corporations. The Court of Appeals in Albany Bone & Joint Clinic, P.C. v. Hajek, 272 Ga. App. 464, 612 S.E.2d 509 (2005), decided that a provision in a professional corporation's bylaws requiring a member departing for other employment to sell his shares at book value was not an invalid restrictive covenant in restraint of trade.

Nonprofit Corporations. In Shorter College v. Baptist Convention of Georgia, 279 Ga. 466, 614 S.E.2d 37 (2005), the Supreme Court struck down a purported corporate dissolution under the Georgia Nonprofit Corporations Code as an impermissible "sham" attempt to evade membership representation restrictions in the corporation's bylaws. The Court of Appeals in Waverly Hall Baptist Church, Inc. v. Branham, No. A05A0893, 2005 WL 3046523 (Ga. App., Nov. 15, 2005), addressed the court's jurisdiction in church governance matters, attempting to determine when the courts may enforce rights and obligations under corporate bylaws and the Nonprofit Code, without infringing on religious doctrine or practices.

Limited Liability Companies. In Stoker v. Bellemeade, 272 Ga. App. 817, 615 S.E.2d 1 (2005), the Court held that a member of a closely-held LLC could bring a breach of fiduciary duty claim directly, rather than derivatively, without the need to show special individualized injury. In that case and in Alimenta (US) Inc. v. Oil Seed S, LLC, ___ Ga. App. ___, 622 S.E.2d 363, 2005 WL 2323345 (Ga. App., Sept. 23, 2005), the Court also rejected breach of fiduciary duty claims by enforcing contractual provisions in the LLCs' operating agreements permitting members to pursue opportunities in competition with the LLC.

Partnerships. In the partnership area, the Supreme Court in Accolades Apartments, L.P. v. Fulton County, 279 Ga. 257, 612 S.E.2d 284 (2005), held that a publicly-filed statement of partnership is conclusive evidence that a partnership rather than a joint venture exists. In two other decisions, Antoskow & Assoc., LLC. v. Gregory, No. A05A1626, 2005 WL 3416300 (Ga. App., Dec. 14, 2005), and Wnuk v. Doyle, No. A06A0023, 2005 WL 3149139 (Ga. App., Nov. 23, 2005), the Court of Appeals addressed the requirement of consideration in the formation of a partnership.

A. BUSINESS CORPORATIONS.

1. Supreme Court of Georgia Holds That a Corporation in Bankruptcy Can Pierce Its Own Veil – *Baillie Lumber Co. v. Thompson*

In Baillie Lumber Co. v. Thompson, 279 Ga. 288, 612 S.E.2d 296 (2005), the Georgia Supreme Court, answering a certified question from the Eleventh Circuit Court of Appeals, expanded the potential liability of shareholders of bankrupt Georgia corporations by allowing corporations to "pierce their own corporate veil" and seek to impose liability for their entire debt on controlling shareholders. The Supreme Court further held that such claims belong exclusively to the debtor-corporation or its representatives when it is in bankruptcy and cannot be pursued independently by individual creditors.

In the underlying proceedings, Piedmont Hardwood Flooring, LLC ("Piedmont") filed for Chapter 11 bankruptcy reorganization. Piedmont's bankruptcy representative sued Piedmont's former manager and sole shareholder Bert F. Thompson ("Thompson") in bankruptcy court to set aside

fraudulent conveyances, based on Thompson's alleged misappropriation of corporate assets. Outside of the bankruptcy proceeding, Baillie Lumber Co. ("Baillie"), a Piedmont creditor, brought suit against Thompson seeking to "pierce the corporate veil" and hold Thompson individually liable for Piedmont's debt to Baillie. Thompson applied to the bankruptcy court for an injunction against Baillie's suit, arguing that the veil-piercing claim belonged to the bankruptcy estate and that Baillie's state court lawsuit violated the Bankruptcy Code's automatic stay. Baillie argued in response that a Georgia corporation cannot pierce its own veil. The Supreme Court, hearing the issue at the Eleventh Circuit's request,[1] ruled that a bankrupt corporation could indeed pierce its own corporate veil and that the claim must be pursued exclusively by the bankrupt corporation or its bankruptcy representative for the benefit of all creditors.

The doctrine of piercing the corporate veil allows a court, where the corporate form has been abused, to disregard the separate existence of a corporation and to hold the person who controls the company personally liable to creditors, finding the corporation to be the mere "alter ego" of the shareholder. While these cases often involve individuals who improperly use the corporation to conduct their personal affairs, the corporate veil between parent and subsidiary corporations can also be pierced.

In rejecting the argument that a corporation lacked standing to bring an alter ego claim, the Georgia Supreme Court noted that veil-piercing claims have evolved over time beyond suits brought by individual third party creditors. Alter ego claims may be asserted where necessary to "remedy injustices which arise where a party has . . . [abused the] corporate entity in order to defeat justice, perpetrate fraud or evade contractual or tort responsibility." Id. at *3. The Court concluded that a corporation could pierce its own corporate veil under limited circumstances where necessary to avoid an injustice. Bankruptcy is one such appropriate circumstance. Id. Indeed, the Supreme Court hinted that the applicability of its holding may be limited to bankruptcy, since alter ego claims are equitable in nature and can only be used where no other legal theories are available to provide complete relief.

The Supreme Court further ruled that the claim constituted "property of the [bankruptcy] estate,"[2] observing that the Bankruptcy Code generally prohibits creditors from exercising control over property of the bankruptcy estate.[3] Baillie thus

---

[1] Bankruptcy courts generally look to state law to determine whether a bankrupt corporation (or its trustee or other representative) can pursue alter ego or veil-piercing claims. There are not many decisions on the issue and the courts in other jurisdictions have reached different conclusions. Compare In re Ozark Restaurant Equip. Co., Inc., 816 F.2d 1222 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987) (under Arkansas state law, alter ego claims belong to creditors of the corporation, rather than to the corporation itself); In re RSC Engineered Products, 102 F.3d 223 (6th Cir. 1996) (under Michigan law, a corporation does not have standing to sue its shareholders under an alter ego theory), with Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339 (7th Cir. 1987) (affirming dismissal of alter ego lawsuits by creditors and holding that Illinois and Indiana law allowed the debtor's bankruptcy trustee to bring such claims); In re SI Acquisition, Inc., 817 F.2d 1142 (5th Cir. 1987) (holding bankruptcy trustee had standing to pursue an alter ego claim on behalf of the debtor corporation based upon Texas law); In re Toe, 173 B.R. 197 (Bankr. D. Mont. 1994) (Chapter 7 trustee has standing under Montana law to bring alter ego claim), aff'd., 195 B.R. 137 (D. Mont. 1996).

[2] 11 U.S.C. § 541. Under Section 541 of the Bankruptcy Code, property rights belonging to a debtor under state law become assets of the bankruptcy estate. Butner v. United States, 440 U.S. 48 (1979).

[3] 11 U.S.C. § 362(a) (referred to commonly as the "automatic stay"); In re S.I. Acquisition, 817 F.2d 1142, 1153 (5th Cir. 1987) (under Texas law, an alter

could not pursue an alter ego claim against Thompson for its own benefit. The Supreme Court agreed with the bankruptcy court that, in bankruptcy, the greatest equity would be achieved by allowing only the debtor corporation to pursue any alter ego suit against its principal.

Importantly, the Court also held, with no discussion, that, where a principal is found at fault in an alter ego suit brought by the debtor corporation, the "measure of damages" should be the imposition of liability for the entire debt of the corporation.[4]

The full ramifications of this new development remain to be seen. It may increase the frequency and risk of alter ego suits in bankruptcy liquidation cases. Bankruptcy trustees and creditors' committees have access to corporate records and information regarding company finances and observance or abuse of the corporate form, not typically available to creditors attempting to collect their individual claims. Georgia bankruptcy trustees can be expected to consider adding an alter ego claim and a veil-piercing remedy whenever they find evidence of fraudulent transfers and self-dealing.

Bankruptcy trustees are also motivated by the desire to see company debts satisfied and to reach beyond inadequate resources of the estate. This decision certainly increases the exposure of a controlling shareholder by allowing liability for all of the company debts to be imposed, not merely the debt owed to a single creditor or the defendant's liability for specific transfers or proximately caused losses. Bankruptcy therefore now poses a significantly greater risk for controlling shareholders of Georgia corporations where corporate formalities and finances have not been properly respected, and bankruptcy is more likely to be avoided or resisted by those who are aware of the risk.

2. No Confidential Relationship or Duty of Disclosure Between Parties in Failed Arms-Length Sale Transaction – *Infrasource, Inc. v. Hahn Yelena Corporation*

In Infrasource, Inc. v. Hahn Yelena Corporation, 272 Ga. App. 703, 613 S.E.2d 144 (2005), the Court of Appeals of Georgia reversed the trial court's denial of a motion for directed verdict and a judgment entered on a jury verdict in a suit by a corporate acquisition target against the proposed acquirer for fraudulent concealment, holding that there was no evidence of a confidential relationship between parties negotiating a sale of a business on which the target company could base a duty to disclose and a fraudulent concealment claim.

The plaintiff in the trial court entered negotiations with the defendant in early 1999 for the sale of the plaintiff to the defendant. There was no dispute that the parties failed to reach an agreement; the plaintiff admitted that "there were some items left for them to do." After some time, the defendant renewed talks with a previous acquisition target. The defendant informed the plaintiff of this development but did not identify the company. In the meantime, the plaintiff had begun to work with a sister company of the defendant on a project, even though no contract was ever signed with this sister company. The plaintiff eventually walked off of that job. The plaintiff sued, claiming in part that the defendant's failure to reveal the identity of its other acquisition target was fraudulent. The jury ruled in the plaintiff's favor.

---

ego action was property of the bankruptcy estate, and any such suits by creditors ran afoul of the automatic stay). Under 11 U.S.C. §§ 550(a) and 1123(b)(3)(B), avoidance claims can be pursued by a "representative" of the bankruptcy estate.

[4] The significance of this ruling can be seen in how it increased the exposure to the shareholder in Baillie Lumber. The bankruptcy representative apparently only sought to recover specific assets allegedly fraudulently transferred by Piedmont's controlling shareholder to himself. Baillie Lumber Company sought to impose liability on Thompson only for Piedmont's debt to Baillie Lumber Company. As a result of the Supreme Court's decision, Thompson is now potentially liable for all of Piedmont's debts.

On appeal, the Court found that the defendant had no obligation under the law to disclose the identity of its other acquisition target, given that the parties were no more than parties to an arm's-length transaction that was never consummated. The Court noted that under Georgia law, unless there is an existing duty of disclosure, fraud claims cannot be based on a failure to disclose and that, in the absence of a confidential relationship, there is no duty of disclosure between parties engaged in arm's-length business negotiations. The Court reiterated its past holdings that "an arm's length relationship by its nature excludes a confidential relationship" and that parties negotiating the sale of a business are presumed to be dealing at arm's length. The fact that one party reposes trust and confidence in another does not suffice to create a confidential relationship. The Court found that the evidence showed the parties to be sophisticated and represented by counsel and that the plaintiff negotiated for provisions in the agreement that would allow it to maintain its independence in the relationship. In fact, the Court noted that the plaintiff believed that its desire for independence contributed to the breakdown of the relationship, a position that the Court found to be "wholly inconsistent with the existence of a confidential relationship." Finally, the Court rejected plaintiff's argument that its relationship with the defendant's sister corporation was evidence of a "common business objective," finding that the evidence supported nothing more than the finding of a failed attempt to negotiate such a relationship.

In the same case, the Court found that the plaintiff failed justifiably to rely on the claimed fraudulent concealment, because it failed to investigate further when placed on notice of the existence of another acquisition target. Further, it found that there was no evidence that the defendant made promises to the plaintiff with no intent to perform, stating that the re-appearance of the second acquisition target was an unforeseen change in circumstances.

3. Business Brokers Are Held to Owe Fiduciary Duties to Seller of Business – *Bienert v. Dickerson*

Bienert v. Dickerson, 2005 WL 3244288 (Ga. App. Dec. 2, 2005) is not technically a business organization case, but is included because it addressed, among other things, whether a fiduciary duty was owed by a business broker to her client. It provides a different perspective on fiduciary duties in the purchase and sale of businesses from that in the Infrasource, Inc. v. Hahn Yelena Corporation case discussed above.

In Bienert, a business owner wanted to sell her insurance personnel business, the assets of which included two condominiums. The owner orally hired a business broker to assist with the sale. The broker found a potential buyer and worked for months on the sale. As the closing approached, there was disagreement over the amount of commission that the owner was to pay the broker. The broker filed a lien on the business assets and in order to execute the lien, she made a false statement that she was a party to the sales agreement. Though the broker removed the lien, it delayed the closing and forced the owner to expend money to resolve the matter. The sale eventually closed, with the buyer paying the owner $1.8 million for her business and its assets.

The broker sued to recover her alleged commission. The owner counterclaimed for breach of fiduciary duty for the broker's filing of the false lien and sought punitive damages. The jury awarded the owner over $81,000 on her breach of fiduciary duty claim. The broker appealed; the Court of Appeals affirmed on the fiduciary duty claim.

The principal issue presented by the appeal relevant to this survey was whether the broker, in fact, owed a fiduciary duty to the business owner. At trial, the broker admitted that as the owner's broker, "in the facts of this particular case," she owed a fiduciary duty of allegiance to put the owner's interests above her own. The broker also testified that as a business broker she engaged in a "long-term,

in-depth relationship" with the owner so as to "understand the workings of [the owner's] business."

The broker argued on appeal, however, that by statute no fiduciary duty existed, citing O.C.G.A. § 10-6A-4(a), which states that "[a] broker shall not be deemed to have a fiduciary relationship with any party or fiduciary obligations to any party." O.C.G.A. § 10-6A-3(2), defines "broker" to mean "any individual or entity issued a broker's real estate license by the Georgia Real Estate Commission." The Court found no difficulty in holding that the term "broker," for purposes of O.C.G.A. § 10-6A-4(a), does not include business brokers, but applies only to real estate brokers.

The Court instead applied the general standards for the creation and existence of a confidential relationship under O.C.G.A. § 23-2-58.[5] The Court stated that "Representing Dickerson's interests, Bienert played an intimate role in the negotiations and was not a mere middleman," and held that those facts supported a finding of a confidential or fiduciary relationship.

The clear import of this decision is that a business broker may have fiduciary duties, depending on the relationship created and the role the broker plays. The decision also demonstrates the importance of brokers' defining their relationship and responsibilities in situations where both a traditional business enterprise and real estate transactions are at issue.

[5] "Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc."

4. Dismissal of Derivative Action on Special Litigation Committee's Report and Recommendation Affirmed; Limitation on Discovery Discussed – *Thompson v. Scientific Atlanta, Inc.*

In Thompson v. Scientific Atlanta, Inc., 275 Ga. App. 680, 621 S.E.2d 796 (2005), the Court of Appeals addressed the special statutory procedure, authorized under O.C.G.A. § 14-2-744, for dismissal of a derivative action if a majority of independent directors, a special committee or a panel of independent persons makes "a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation."

The shareholder plaintiff submitted a derivative demand to the Scientific Atlanta, Inc. ("SA") Board of Directors, claiming that insider selling followed by an announcement of declining orders and a drop in the company' s stock resulted from breaches of fiduciary duty by the Board. The company began by requesting additional information from Thompson, who did not respond. The Board next appointed a special litigation committee ("SLC") consisting of non-selling independent directors to investigate and respond to the demand. Thompson filed suit before the SLC concluded its work. The Court described the SLC process:

> On May 15, 2002, the Board approved a resolution that provided the SLC with full power and authority to make final binding determinations on the Board's behalf regarding the derivative action. The SLC had full access to all SA personnel, advisors, and records, and SA directed all officers and employees to cooperate with the SLC. The SLC retained independent legal counsel and a special accounting advisor. . . .
>
> On February 9, 2004, after

> interviewing numerous witnesses, reviewing voluminous documents, and consulting with independent legal counsel and financial advisors, the SLC issued its report, which determined that Thompson's claims were without merit and contrary to the best interests of SA and its shareholders.
>
> Pursuant to this report, the Board of Directors adopted the SLC's recommendations and a motion to dismiss Thompson's lawsuit was filed on March 18, 2004.

The plaintiff failed to respond to the motion and failed to initiate discovery, but appeared at a hearing on the motion and made a belated oral request for discovery. In ruling on the plaintiff's appeal of the dismissal of the complaint, the Court of Appeals first noted that the standard of review was abuse of discretion. The Court found that the Committee's 900-page report "reflected a detailed and documented investigation." The Court ultimately held that the plaintiff had waived his right to respond.

Addressing the request for discovery, the Court cited Delaware decisions to the effect that discovery into the independence, good faith of the committee and the reasonableness of the investigation is "not by right, but by order of the Court, with the type and extent of discovery left totally to the discretion of the Court." The Court of Appeals found that Thompson had failed to show any abuse of discretion in the trial court's denial of his request for discovery.

This case unfortunately also documents the very considerable effort spent and the tremendous expense undoubtedly incurred in responding to a derivative demand when, whether because of delay or a simple loss of interest, the shareholder fails to pursue or effectively abandons the claims asserted.

5. Derivative Standing Rules and Rules Barring Lay Representation of Corporate Interests in Court Apply to Shareholders Objecting to Derivative Action Settlement — *Leventhal v. Post Properties, Inc.*

Leventhal v. Post Properties, Inc., No. A05A1155 2005 WL 3149258 (Ga. App. Nov. 23, 2005) reaffirms the rules that (a) in order to participate in any way in a shareholder derivative action, even if only to object to a settlement, a shareholder must have held shares at the time the acts giving rise to the action occurred, and (b) because any claims in a derivative action belong to the company, a shareholder cannot pursue objections to a derivative settlement on a *pro se* basis since corporate interests can only be represented in court through a licensed attorney.

In Leventhal, with knowledge of a pending derivative lawsuit, the plaintiff Ronald Leventhal purchased shares of Post Properties, Inc. ("Post") stock. He later filed an objection to a proposed settlement agreement in the derivative action and filed his own separate *pro se* action against Post and many of its directors. Leventhal subsequently filed a second objection to the derivative action settlement and moved to intervene in order to protect his own suit. The trial court overruled Leventhal's objections to the settlement and denied his motion to intervene. Leventhal appealed.

Although the opinion is not entirely clear, the Court of Appeals appears to have affirmed both rulings relying on the rule, under O.C.G.A. § 14-2-741, that a shareholder who did not own shares in the corporation at the time the actions giving rise to the derivative action occurred has no standing to participate in the action. Leventhal asserted that despite not being a shareholder at the time the events arose, he was entitled to intervene under O.C.G.A. § 9-11-24(a)(2). The appellate court affirmed the trial court's finding that Leventhal did not satisfy the requirements for intervention, because he failed to prove that (1) his interests related to the property or transaction that was the subject matter of the action,

(2) an impairment of his interest may result from the disposition of the action, and (3) there was inadequate representation of his interest by already existing parties and counsel.

O.C.G.A. § 14-2-741(1), which the parties to the consolidated derivative action cited as the ultimate reason that Leventhal was barred from intervening and objecting, states that "[a] shareholder may not commence or maintain a derivative proceeding unless the shareholder was a shareholder of the corporation at the time of the act or omission complained of or become a shareholder through transfer by operation of law from one who was a shareholder at that time." The Court concluded that O.C.G.A. § 9-11-24(a)(2) does not change the requirements of Section 14-2-741(1) and in fact, the first prong of Section 9-11-24(a)(2), an interest in the subject matter of the action, in this context, requires fulfillment of Section 14-2-741(1). Because Leventhal was not a shareholder at the time of the events at issue in the derivative case, he lacked an interest that would support intervention.

Another problem for Leventhal was that he was seeking to represent the interests of the corporation through his settlement objection and motion to intervene on a *pro se* basis. The court affirmed the long standing rule, exemplified in the Ranier decision discussed below, that corporations must be represented by legal counsel and held, as a matter of first impression in Georgia, that this rule also applies to derivative actions and their settlements.

Leventhal's petition for certiorari is currently pending in the Georgia Supreme Court.

6. The Georgia Court of Appeals Finds an Agreement to Acquire an Interest in a Corporation Too Indefinite to Enforce – *Massih v. Mulling*

In Massih v. Mulling, 271 Ga. App. 685, 610 S.E.2d 657 (2005), the Court of Appeals held that an oral agreement to acquire a percentage ownership interest in a corporation that did not contain all material terms, e.g., a specific delivery date, was too indefinite to enforce. Id. at 659.[6]

The plaintiff claimed she had an agreement with her employer to form a company together, to serve as its president and "own" twenty percent (20%) of the company. The new company was formed and the plaintiff became president. Shortly thereafter, she resigned. She then sued her employer for breach of contract because he did not transfer her 20% ownership interest to her upon her departure.

The Court resolved the claims based on the basic principle of contract law that "[a] contract cannot be enforced if its terms are incomplete, vague, indefinite or uncertain. In addition, the party asserting the existence of a contract has the burden of proving its existence and its terms." Id. (citations omitted). With little further analysis or discussion, the Court found that the oral agreement at issue was too indefinite to enforce.

This case reiterates that in order to create an enforceable shareholder agreement in Georgia, an agreement, whether oral or written, must contain all material terms. At the same time, the decision shows how readily oral promises on which a promisee acts, can lead to enforceable agreements.

7. *Pro Se* Answer by Corporation Is a Curable Defect — *Ranier Holdings, Inc. v. Tatum*

Business entities can only act through representatives – officers, directors, employees and agents – and hence cannot appear in legal

---

[6] Although the agreement in Massih was oral, this fact did not play a role in the Court's ruling. Indeed, since July 1998, a writing is not required to create an enforceable agreement to buy or sell securities, O.C.G.A. § 11-8-113, and an oral agreement can also be the basis of an action under the Securities and Exchange Commission's Rule 10b-5. Wharf (Holdings) Ltd. v. United Intern. Holdings, Inc., 532 U.S. 588, 121 S. Ct. 1776 (2001).

proceedings *pro se*. An answer filed by an officer on behalf of a corporation is therefore improper, unless the officer is admitted to practice law. In Ranier Holdings, Inc. v. Tatum, 275 Ga. App. 878, 622 S.E.2d 86 (2005), an officer timely filed an answer on behalf of the corporate defendant. The plaintiff moved to strike the answer. In response, a lawyer appeared and filed a second answer for the corporation. The second answer was filed four months after the filing of the original answer. The trial court struck the corporation's answer and entered a default judgment against it. Citing Peachtree Plastics v. Verhine, 242 Ga. App. 21, 528 S.E.2d 837 (2000), the Court of Appeals reversed, stating:

> An answer filed by a corporation's non-attorney principal on behalf of the corporation is a defect curable by a properly filed amended answer, with such amendment relating back to the date of the original answer pursuant to OCGA § 9-11-15(c).

This principle should be equally applicable to other business organizations that would similarly be prohibited from litigating on a *pro se* basis.

B. STATUTORY CLOSE CORPORATIONS.

8. Justifiable Reliance Not Necessary for Statutory Close Corporation Shareholder Protections under O.C.G.A. § 14-2-940; Fiduciary Duty to Determine Consideration for Stock Issuance Enforced – *Gallagher v. McKinnon*

In Gallagher v. McKinnon, 273 Ga. App. 727, 615 S.E.2d 746 (2005), the Court of Appeals of Georgia addressed the special anti-oppression provisions of the Georgia Business Corporation Code for statutory close corporations. The Court held that neither fraud by the defendant nor justifiable reliance on the part of a shareholder are necessary requirements for the shareholder protections of O.C.G.A. § 14-2-940. A shareholder may obtain court relief under the statute, including an order setting aside the defendant's issuance of stock to himself, based on the defendant's oppressive conduct alone, despite the absence of findings of fraud or justifiable reliance. The Court also found a breach of fiduciary duty in the defendant's failure to comply with the requirements of O.C.G.A. § 14-2-641(c) that the board of directors determine whether the consideration to be received in exchange for the issuance of stock is adequate.

The parties to the suit had been equal principal shareholders (48% apiece) and the sole directors of Peliton, Inc., a corporation that apparently had made the election for treatment as a statutory close corporation.[7] The plaintiff offered evidence showing that the defendant schemed to take control of the corporation. The scheme involved fabricating a sexual harassment claim against the plaintiff by another employee in order to coerce the plaintiff into agreeing to an issuance of additional stock to the defendant, a transaction that would give the defendant a controlling interest in the corporation. The jury found that the defendant lied in telling the plaintiff that sexual harassment allegations had been made against him; however, it found that the plaintiff did not justifiably rely on these false representations. Nonetheless, the jury found that the plaintiff agreed to the issuance of new shares under duress and coercion, and the trial court entered judgment against the defendant setting aside the issuance of new shares.

---

[7] Statutory close corporations are an elective category of corporations that are subject to special provisions of Chapter 9 of the Georgia Business Corporation Code, O.C.G.A. §§ 14-2-901 *et seq.* Section 14-2-940 provides special protection for statutory close corporation shareholders that has no counterpart in the rest of the GBCC and is inapplicable to other closely-held Georgia business corporations. The Court did not focus on Peliton, Inc.'s election or special status as a statutory close corporation or mention the distinctions between statutory close corporations and other business corporations.

On appeal, the Court of Appeals turned to the language of O.C.G.A. § 14-2-940(a)(1), which states in relevant part that a finding of "illegal, oppressive, fraudulent, or unfairly prejudicial conduct" is sufficient to trigger the statute's protections. Furthermore, O.C.G.A. § 14-2-941, which lists the types of relief available to a plaintiff bringing a claim under § 14-2-940, explicitly states that relief is available if the court finds that "one or more" of the grounds for relief described in § 14-2-940(a) are present. Because the jury affirmatively found the defendant's conduct to be illegal, oppressive and unfairly prejudicial, the Court held that the motion for directed verdict was properly denied.

In a companion appeal, the Court affirmed the trial court's grant of summary judgment in favor of the plaintiff rescinding the issuance of the new shares. The Court found that no consideration had been given for the issuance of new stock. It also found the stock had been issued in breach of the defendant's fiduciary duty under O.C.G.A. § 14-2-621(c) to the corporation and its shareholders to determine that the shares were issued for adequate consideration:

> It is clear from the record now before us that, prior to the issuance of additional shares to Gallagher, there was no attempt to determine their value. Gallagher was interested in his control of Peliton, not the well-being of its shareholders. As he failed to make any real determination that the consideration for the issued shares was adequate, he breached his fiduciary duties to the existing shareholders.

C. PROFESSIONAL CORPORATIONS.

9. Shareholder Agreement Held Not to Constitute an Unlawful Restraint of Trade – *Albany Bone & Joint Clinic v. Hajek*

In Albany Bone & Joint Clinic, P.C. v. Hajek, 272 Ga. App. 464, 612 S.E.2d 509 (2005), the Court of Appeals of Georgia held that a provision in a professional corporation's bylaws requiring that a member departing for other employment be paid book value for his shares was not an invalid restrictive covenant in restraint of trade.

The Albany Bone & Joint Clinic, P.C. ("Clinic"), a professional corporation of doctors, was incorporated in Georgia in 1999. In 2003, one shareholder, Dr. Hajek, left the Clinic to take another position and sought compensation for his shares. The parties disagreed over the method of valuation and the doctor filed a declaratory action to determine the value of his shares. The Clinic's bylaws provided that shares of departing members would be redeemed at book value, while upon death, permanent disability or retirement, shares of members could be determined by agreement or arbitration, a potentially higher value. The doctor asserted, and the trial court agreed, that the book value redemption imposed on the doctor who ended his employment with the Clinic and took up a position in a competing practice was, in essence, a penalty and thus operated as an illegal restrictive covenant.

The Court of Appeals reversed the trial court's ruling and held that the bylaws were valid and therefore governed. The Court began by reviewing the types of restrictive covenants recognized in Georgia, noting that they generally impose restrictions on future business activities and arise most frequently in employment contexts. The Court distinguished the bylaw provision before it from restrictive covenants, finding that the bylaw was not an employment contract, but rather an agreement governing stockholders and their shares that conformed to Georgia's requirement that only an active member may hold shares in a professional corporation. Further, the provision did not limit the doctor's future business activities but merely specified the compensation to be received by departing shareholders. Finally, the Court rejected the lower court's characterization of the provision as a penalty, noting that it did not single out those who

left the Corporation to seek out new employment for disparate treatment, but rather applied to members whose departure from the corporation was caused by bankruptcy, loss of license and other reasons as well. Thus, the Court enforced the bylaws and found the doctor was only owed the book value of his shares.

D. NONPROFIT CORPORATIONS.

10. Supreme Court of Georgia Declares that Nonprofit Dissolutions Are Subject to Same Standards as For-Profit Dissolutions – *Shorter College v. Baptist Convention of Georgia*

In Shorter College v. Baptist Convention of Georgia, 279 Ga. 466, 614 S.E.2d 37 (2005), the Supreme Court of Georgia rejected an attempted dissolution of a nonprofit corporation found to have been effectuated to avoid requirements in the organization's bylaws, because it resulted in the transfer of assets to a new corporation, not the winding up of the dissolved corporation's business. In the process, the Court held that the dissolution of a nonprofit corporation is subject to the same fundamental principles applicable to the dissolution of for-profit corporations.[8]

Shorter College's bylaws gave the Baptist Convention of the State of Georgia ("GBC") sole authority to name the College's Board of Trustees. GBC was a "member" of the nonprofit corporation. In 2001, this arrangement threatened the College's accreditation, and a dispute arose between the College and GBC, after which the College rejected two trustees named by the Convention and named its own replacements. The disputes continued and the old Board approved a plan that purported to dissolve the College and then transfer the corporation's name and all its assets for no consideration to another entity, the Shorter College Foundation, which would carry on the College's operations. When the College and Foundation sought to recover certain funds from GBC, it responded by seeking to enjoin the dissolution.

In a 4-3 decision, the Supreme Court found that the attempted transaction was not an actual dissolution. Unlike a true dissolution, which would have ended the school's existence, the intent of the plan was to preserve assets and continue the College, while altering the governing authority. The Court held that, "Such a 'reorganization' fails to qualify as a valid 'dissolution' of a for-profit corporation because the end result is not the extinction of any former business, but the mere transfer of the same business to another entity which thereafter will continue its operation."

In so holding, the Court found that there was no meaningful distinction between the provisions of the Georgia Nonprofit Corporation Code governing dissolution of nonprofit corporations and the counterpart provisions of the Georgia Business Corporation Code. The Court noted that the legislature intended the Georgia Nonprofit Corporation Code to conform generally to the GBCC and that the specific sections governing dissolution were nearly identical between the two Codes.

In so ruling, the Court rejected arguments based on differences between the Business and Nonprofit Codes in the eligible recipients for distribution of a dissolved corporation's assets. The Court found that the statutory language governed and evidenced a legislative intent to apply the same standards.

> [T]he differences in the composition of the class of those who have the

---

[8] The Supreme Court affirmed the Court of Appeals' decision in Baptist Convention of the State of Georgia v. Shorter College, 266 Ga. App. 312, 596 S.E.2d 761 (2004), which held that only the Board could determine whether to dissolve the College, but found that the dissolution was not a true dissolution, but rather a merger or disposition of assets. The Court of Appeals also held that the College could not petition for a judicial dissolution under O.C.G.A. § 14-3-1430 on the basis of a management deadlock; only a member had the right to seek a judicial dissolution on that basis.

> ultimate claim on the assets of a dissolving corporation and in the procedures regarding the distribution of the assets to them do not have any material bearing on whether the underlying transaction upon which the distribution is based complies with the substantive requirements for accomplishing a corporate dissolution. The differences in the composition of the class of those who have the ultimate claim on the assets of a dissolving corporation and in the procedures regarding the distribution of the assets to them do not have any material bearing on whether the underlying transaction upon which the distribution is based complies with the substantive requirements for accomplishing a corporate dissolution.

In the process, the Court noted that the end result of the Board's actions in transferring the College's assets intact might well be possible under the dissolution provisions of the Business Corporation Code, but in this respect, the differences between for-profit and nonprofit procedures worked against the College. O.C.G.A. § 14-3-1403(b) requires and permits assets received and held for charitable purposes to be transferred to nonprofit organizations "engaged in activities substantially similar to those of the dissolving corporation." The Court conceded that under § 14-3-1403(b), Shorter College's assets could have been conveyed intact to another educational institution. However, the Court held, that "unlike for-profit corporations," the Nonprofit Code does not permit a dissolving nonprofit corporation "to perpetuate *its* business by means of a transfer of all assets to another corporation which will then continue to carry on the *identical* pre-dissolution activity." 279 Ga. at 472, 614 S.E.2d at 41 (emphasis in original).[9]

The Court further held that the fact that the former Board called the transaction a dissolution rather than a merger was not controlling, nor was the fact that the former Board's actions were motivated by a good faith concern and effort to preserve the College's accreditation. The Court found that the transfer of assets to the Foundation was simply "an unauthorized effort on the part of the Board to reorganize the College so as to operate the school as before, but with a new set of trustees," not a bona fide dissolution followed by a statutorily permitted transfer of assets to a similar nonprofit institution, as the College and Foundation argued. Notably, the Court found that the College's trustees complied with their required standard of care under O.C.G.A. § 14-3-830(1)(A), but "the underlying good faith of the trustees cannot substitute for objective compliance with applicable statutory requirements."

11. Jurisdiction Over a Religious Organization's Corporate Governance Is Limited – *Waverly Hall Baptist Church, Inc. v. Branham*

In Waverly Hall Baptist Church, Inc. v. Branham, No. A05A0893, 2005 WL 3046523 (Ga. App., Nov. 15, 2005), the Georgia Court of Appeals further defined the scope of a court's jurisdiction in church governance matters, with reference both to the

---

[9] The dissent argued that the differences in the two Codes regarding permissible recipients of assets distributed on dissolution demonstrated that the two provisions should not be interpreted to impose the same requirements for a valid dissolution. The dissent also argued that the more fundamental distinction between the types of corporations should determine whether a transaction met the spirit of the law: "Because the College was a nonprofit, the Board owed its fiduciary duties to the College's mission, not to GBC as member. GBC's contrary contention mistakenly equates 'members' of a nonprofit corporation with 'shareholders' of a for-profit corporation. In for-profit corporations, the predominant view is that the board of directors owes its fiduciary duties to the corporation's shareholders. In nonprofit corporations, however, these duties are owed not to the members, but to the nonprofit's mission." (Citations omitted.)

Georgia Nonprofit Code and to principles of non-interference with the exercise of religious freedom.

In 2004, a group of members of the congregational Waverly Hall Baptist Church filed suit against the church, three deacons and the pastor, alleging that the pastor was improperly elected, that the members were being thwarted in efforts to remove certain deacons, that a school affiliated with the church was being mismanaged, and that the pastor and deacons had improperly added members to the church to solidify their control. The plaintiffs asked for a myriad of relief, including a restraining order and a determination of church membership. The trial court, citing nonprofit law, ordered that a meeting, consisting of members admitted before the disputes arose, be held to determine issues raised by the lawsuits and enjoined the defendants from admitting new members. The church appealed. The Court of Appeals affirmed certain rulings of the trial court, but reversed others.

The Court began by noting that while it lacked jurisdiction to inquire into religious matters, it could hear disputes that did not involve an excessive intrusion upon religious matters. The Court then cited Bolden v. Barton, 278 Ga. 831 (2005), a recent decision by the Georgia Supreme Court involving an unincorporated church, holding that a dispute entirely focused on the continued service of the pastor, without more, could not be heard by the courts. The Bolden case reiterated the established principle that courts should not involve themselves in doctrinal issues, but can adjudicate property rights of religious institutions. In contrast, the Waverly Hall complaint did not expressly allege that the current pastor should not serve, but instead challenged the church's unwillingness to hold a new vote. The Court found no bar against such a suit and held that allegations in the complaint reflecting a dispute over church property sufficed to provide jurisdiction. The fact that certain issues were beyond the trial court's power did not prevent it from adjudicating the issues over which jurisdiction was permissible.

The church further argued jurisdiction was improper because the dispute could not be resolved using neutral principles of law. The opinion notes that the Georgia Nonprofit Corporation Code can govern certain disputes in religious institutions. The Court focused on the church's bylaws, which it treated as contractual in nature. It sided with the appellants on the members' efforts to remove the deacons. Citing the exclusively spiritually-focused duties of the deacons set forth in the church's bylaws and the vesting of management authority in officers, the Court held that neutral principles of law could not be used in this aspect of the dispute and that the trial court abused its discretion in treating the deacons as directors subject to dismissal under the Nonprofit Code. However, the appeals court upheld the order requiring the church to hold a meeting pursuant to the bylaws and the Nonprofit Code, finding no impermissible religious entanglement.

The appeals court then considered a number of issues relating to church membership, attempting to draw a fine line between permissible and impermissible judicial involvement. It is a requirement for jurisdiction that cases involving congregational churches be brought on behalf of a majority of members. Under the circumstances, where the eligibility of many of the members was questioned and only a small number had voted for the pastor, and giving effect to requirements in the bylaws that members, to be qualified as such, must actively participate in church, the appeals court refused to overturn the lower court's conclusion that the twenty-six plaintiffs constituted a majority of the membership sufficient to file suit.

However, for reasons that are somewhat unclear, the appeals court reversed the trial court's ruling that all of the nearly 200 members of record would be eligible to vote at the meeting it ordered. Although acknowledging that the church's bylaws were to be construed by ordinary contract principles, the Court found that the failure to define certain terms of membership qualification in the bylaws rendered it unable to determine membership without impermissibly delving into internal church

procedures. In contrast, considering allegations that certain members, including the pastor, were not properly admitted, the appeals court held that the trial court could determine from church documents whether members were properly admitted.

Finally, the appeals court considered two challenges regarding voting rights. First, it held that the trial court abused its discretion in issuing a temporary restraining order prohibiting the admission or termination of new church members, finding that it violated freedom of religion to impose such limits. Second, the Court upheld a finding that the church had obstructed the plaintiffs' attempts to call a church meeting, citing provisions in the bylaws authorizing them to do so.

The Waverly Hall decision illustrates that Georgia courts must treat disputes involving religious institutions with great care, sorting out methodically which issues are amenable to judicial consideration and which are not. The result of that examination will often depend on the church's bylaws, and in particular, whether they are susceptible to interpretation and enforcement in accordance with "neutral" contractual principles, without intruding on religious doctrines and practices. The decision also illustrates how difficult the courts' task can be in practice.[10]

Both parties have filed petitions for certiorari to the Georgia Supreme Court. That court has not, at the time of this writing, decided whether to hear the case.

[10] It is curious that the Court of Appeals in Waverly Hall does not cite any of the provisions of the Georgia Nonprofit Corporation Code and other corporate law statutory provisions that expressly apply to religious institutions, including O.C.G.A. § 14-3-180, which gives precedence to religious doctrine when it conflicts with the provisions of the Code, O.C.G.A. § 14-5-45, which expresses the reluctance of courts to interfere with management of the "temporalities" of the church and O.C.G.A. § 14-5-43, which provides that "The majority of those who adhere to its organization and doctrines represent a church."

E. LIMITED LIABILITY COMPANIES.

12. Members of Closely Held LLCs May Have Standing To Assert Direct Claims for Breach of Fiduciary Duty – *Stoker v. Bellemeade, LLC*

In Stoker v. Bellemeade, LLC, 272 Ga. App. 817, 615 S.E.2d 1 (2005), the Georgia Court of Appeals, sitting *en banc*, held that in a closely held LLC, a breach of fiduciary duty claim could be brought directly by a member without a showing of special, individualized injury. However, the Court, relying in part on language in the LLC operating agreement, found that no breach occurred and upheld the grant of summary judgment in favor of the defendants.

Plaintiffs, a developer and his company, agreed to form several LLCs with owners, managers and developers of a large tract of land in Houston County. The LLCs were formed to develop various parcels of the tract for residential purposes. Stoker claimed that the other member of the LLCs, Westbury Properties, Inc., orally agreed to allow Stoker to participate in the future residential and commercial development of the property to induce him to join the LLCs. Subsequently, Stoker and the LLCs were allegedly excluded from participating in the tract's commercial development.

Stoker, therefore, filed suit against Westbury for unjust enrichment, breach of contract, usurping LLC opportunities and other breaches of fiduciary duty and defamation.

With regard to the breach of fiduciary duty claims, the *Stoker* decision makes a significant contribution to Georgia law in its discussion regarding standing in LLC governance litigation. The Court reiterated the general rule in the corporate context that a shareholder suit seeking to recover damages for breach of fiduciary duty must be brought as a derivative suit on behalf of the corporation. A

shareholder has standing to bring a direct action if the suit alleges some kind of special injury or a wrong involving a shareholder's contractual right. The Court articulated these policy reasons as follows:

> (1) to prevent multiple suits by shareholders; (2) to protect corporate creditors by insuring that the recovery goes to the corporation; (3) to protect the interest of all the shareholders by insuring that the recovery goes to the corporation, rather than allowing recovery by one or a few shareholders to the prejudice of others, and (4) to adequately compensate injured shareholders by increasing their share values.

The Court found that those principles should apply in the context of suits involving closely-held LLCs as well. However, in the context of a closely-held corporation and closely-held LLCs, if the circumstances show that the policy reasons for the general rule favoring derivative suits do not apply, a direct action is permitted.

Turning to the case at hand, the Court found that there was no reason to require Stoker to bring the action as a derivative suit because none of the policy reasons for requiring an action to be brought derivatively applied. It noted that as to each of the two-member LLCs involved in the case, the plaintiff was one of the members and the defendant the other; thus all interested parties were before the Court. There was no evidence that creditors needed protection. Given the lack of any market in the LLCs' membership interests, an increase in share value would not be adequate compensation. Furthermore, routing the recovery through the LLC would mean that the defendants would benefit from the recovery.

In the process of reaching its decision, the Court clarified the law regarding derivative actions in the close corporation context by considering and rejecting an argument that the rule permitting direct actions in close corporations applies only to statutory close corporations created under O.C.G.A. § 14-2-901.[11] The Court cited past decisions allowing direct actions where there was no evidence that the corporation involved was formed as a statutory close corporation. The Court recognized that two of its decisions had suggested that the direct action exception applied only to statutory close corporations; it overruled those two decisions.[12]

The Court ultimately found that summary judgment should be granted on Stoker's breach of fiduciary duty claims. The Court cited O.C.G.A. § 14-11-305(4)(A) and stated that "the LLC members were free to adopt contractual provisions to control, expand, or eliminate duties otherwise set forth under the LLC Act." It noted that the LLC operating agreements contained a provision permitting members to pursue other opportunities, "even if the business or activity competes" with the LLC.[13] The Court also rejected claims that Westbury, who bore primary responsibility to supervise construction, had failed to prevent cost overruns, relying in part on

---

[11] The Court noted that the GBCC expressly authorizes direct actions in statutory close corporations under certain circumstances. O.C.G.A. § 14-2-940(a)(1).

[12] Later in its opinion, the Court held that counterclaims by the LLCs against Stoker should be dismissed because the LLCs each required that their actions be authorized by a "majority" of the members, Stoker and Westbury had equal shares and rights as members, and thus the LLCs could not file suit without Stoker's consent. If the LLCs' claims against Stoker were to be pursued, Westbury would have to pursue them either derivatively or directly if one of the exceptions to the derivative action requirements was available.

[13] More recently, the Court of Appeals gave effect to a similar provision in dismissing breach of fiduciary duty claims in Alimenta (US) Inc. v. Oil Seed S, LLC, ___ Ga. App. ___, 622 S.E.2d 363, 2005 WL 2323345 (Ga. App. Sept. 23, 2005), discussed below.

exculpatory language in the operating agreements stating:

> A member shall not be liable, responsible, or accountable, in damages or otherwise, to any other Member or to the [LLC] for any act not performed by the Member with respect to [LLC] matters, except for fraud, gross negligence, or an intentional breach of this Agreement.

The Court in reaching its decision emphasized the right of LLC members to exercise their statutory rights to determine the scope of their duties to each other.

13. Waiver of Conflict Provisions in LLC Operating Agreement Upheld; Merger Clause Bars Member Liability for Fraud under O.C.G.A. § 14-11-305 — *Alimenta (US), Inc. v. Oil Seed South, LLC*

The Georgia Court of Appeals decision in Alimenta (US), Inc. v. Oil Seed South, LLC, ___ Ga. App. ___, 622 S.E.2d 363, 2005 WL 2323345 (Ga. App. Sept. 23, 2005), involved a dispute between members of a joint venture LLC, Mid Georgia Processing, LLC, that they formed to construct and operate a cottonseed oil plant. The managing member, Alimenta (US), Inc. advanced loans to Mid Georgia not matched by Oil Seed South, LLC, that were converted to capital contributions. It sought to collect half of these advances from Oil Seed South and its principals under indemnification provisions in the operating agreement and personal guarantees of the principals. The defendants counterclaimed for fraud in the inducement and breach of fiduciary duty based on conduct, not specified in the Court of Appeals' opinion, that occurred at least in part before the operating agreement was signed. The trial court entered summary judgment against both the plaintiff and the defendants on their respective claims.

The Court of Appeals affirmed. In addressing Alimenta's indemnification claim, the Court held that the indemnification obligation applied to third party liabilities Alimenta incurred, not member loans it made to the LLC. The Court disposed of the defendants' fraud claims by holding them barred by a merger clause in the LLC's operating agreement.

As in the Bellemeade case discussed above, the Court rejected breach of fiduciary duty claims in part by enforcing contractual provisions in the operating agreement waiving conflicts of interest and permitting members to compete with the LLC. In enforcing the provisions of the LLC agreement over conflicting provisions of the Georgia Limited Liability Company Code, it held that where language of an LLC operating agreement is more specific than the statutory provisions, the operating agreement prevails. This decision is of limited utility as precedent because of the Court's omission of information regarding the facts underlying the counterclaim and the lack of any analysis of the legal principles applied, but it further exemplifies the appellate courts' willingness to enforce LLC agreements as written and to give full effect to waiver of conflict provisions.

F. PARTNERSHIPS.

The decisions in the partnership area concerned the formation of general partnerships – whether a partnership, as opposed to a joint venture, was formed and whether the agreement reached by the putative partners was sufficient complete to create a partnership. No 2005 Georgia appellate decisions regarding Georgia's Revised Uniform Limited Partnership Act came to our attention.

14. A Statement of Partnership Filed Pursuant to O.C.G.A. § 14-8-10.1 Is Conclusive Evidence of Partnership Existence – *Accolades Apartments, L.P. v. Fulton County*

In Accolades Apartments, L.P. v. Fulton County, 279 Ga. 257, 612 S.E.2d 284 (2005), the Georgia Supreme Court held that a publicly-filed statement of partnership is conclusive evidence that a partnership exists and that, accordingly, as a partnership the defendant could not be held liable and

its assets could not be reached by a judgment entered against one of the individual partners.

Consolidated Equities Corporation ("CEC") owned certain real property in Fulton County. In 1987, CEC transferred the property to Accolades Apartments Joint Venture ("AJV"), a venture between John Hancock Mutual Insurance Company and CEC. In 1993, AJV executed a quitclaim deed in favor of John Hancock. In 1995, John Hancock transferred the property by special warranty deed to a separate entity, Accolades Apartments, L.P. ("Accolades"). Four years later, in April 1999, Accolades filed a "Statement of Partnership of Accolades Apartments Joint Venture" in Fulton County. This statement provided in pertinent part:

> Whereas, the undersigned, as participants in said Joint Venture, desire, by this Statement of Partnership, to evidence of public record the Joint Venture Agreement and to further evidence their desire to be treated as an entity under the Uniform Partnership Act as enacted in the State of Georgia for the purposes of owning the Project.

In the meantime, in 1998, the property had been condemned by Fulton County, which paid $200,000 as compensation for the taking. Creditors of CEC, one of the "partners" in AJV and Accolades, sought to enforce their post-1987 judgment liens on the Accolades' condemnation proceeds to satisfy their outstanding judgments. Accolades claimed that the joint venture was a partnership and that the funds were partnership property and therefore outside the reach of CEC creditors. In a prior appeal, the Georgia Supreme Court had decided that joint ventures could be separate legal entities whose property would be beyond the reach of a joint venturer's creditors. Accolades Apartments, L.P. v. Fulton County, 274 Ga. 28, 549 S.E.2d 348 (2001).

On remand from the first appeal, the Court of Appeals found that AJV's Certificate of Partnership was only "some evidence" that a partnership exists, that the court must determine the "actual business relationship" and subsequently upheld the trial court's decision, finding that no partnership existed.[14] The Supreme Court reversed these rulings, finding that the Certificate of Partnership was conclusive evidence of the existence of a partnership.

In its holding, the Court reaffirmed that a partnership can be formed by express or implied agreement and that the statement of partnership is a form of express agreement. The Court stated that "there is no discernable reason for parties to execute and publicly file such a document other than to agree among themselves, and to put third parties on notice, that they are in fact a partnership. . . ." The Court further found support from the Uniform Partnership Act, which provides that any property included in a recorded statement of partnership is presumed to be partnership property. It also found that its position best supported the policy goal of adding certainty to publicly-filed documents. The Court did not address the question of how the 1999 filing of the statement of partnership could affect the transactions and events that took place years earlier.

15. Assent to Partnership Is Sufficient Consideration for a Partnership Agreement – *Antoskow & Assoc., LLC v. Gregory*

In Antoskow & Assoc., LLC. v. Gregory, No. A05A1626, 2005 WL 3416300 (Ga. App., Dec. 14, 2005), the Georgia Court of Appeals held that the defendant's agreement with the plaintiff to form a partnership to hold certain real property was sufficient consideration to support the contract awarding the defendant an interest in the real property.

Christopher Antoskow, as owner of Antoskow, LLC., and Carolyn Gregory entered into a contract purporting to convey to Gregory a percentage of ownership in certain real property that varied, depending on the status of their romantic

[14] 252 Ga. App. 501, 502, 556 S.E.2d 552 (2001), aff'd. after remand, 267 Ga. App. 197, 598 S.E.2d 910 (2004).

relationship. The contract stated that Gregory would receive "a percentage as a partner in ownership of this property" (emphasis added) and that upon sale of the property Gregory would receive her applicable percentage of the total sales price of the property.

In September 2002 Antoskow, LLC entered into a contract to sell the real property, subject to the aforementioned agreement. He was unable to close the sale because a title search disclosed an order providing Antoskow could not sell, encumber, or otherwise dispose of property owned by Gregory. Antoskow filed suit seeking a declaratory judgment that Ms. Gregory did not own an interest in the property and that the partnership contract was unenforceable for lack of consideration flowing from Ms. Gregory. The trial court granted summary judgment for Ms. Gregory and denied it to Antoskow.

In affirming, the Georgia Court of Appeals stated that the true test in determining whether a partnership has been created is the intention of the parties. The Court held that the contract unambiguously stated that Ms. Gregory was a partner in ownership of the real property and her assent to partnership itself was sufficient consideration to form a valid partnership, because allowing oneself to be held out as a partner binds the partner to partnership contracts. [15] The Court also looked to Accolades Apartments, L.P. v. Fulton County, discussed above, where the Georgia Supreme Court held that "[w]here parties distinctly agree among themselves to become partners, there is no reason why the law should not take them at their word, even though an agreement falls short of the facts from which the law would otherwise have inferred a partnership." 279 Ga. at 259 (2005).

The appellant has filed a motion for rehearing, which at this writing has not been decided.

[15] The court did not discuss whether Gregory's participation in her relationship with Antoskow would constitute consideration for the partnership agreement.

16. Alleged Oral Partnership Agreement Too Indefinite to Enforce – *Wnuk v. Doyle*

In Wnuk v. Doyle, A06A0023, 2005 WL 3149139 (Ga. App. Nov., 23, 2005), the Georgia Court of Appeals reached a somewhat different result from the Antoskow & Assoc., LLC. v. Gregory case, holding the omission of an agreed-upon specified monetary contribution from an alleged oral partnership agreement rendered the alleged verbal agreement too indefinite to be enforced.

Leta Doyle and Larry Garner were joint fifty-percent owners of property. However, Garner decided to sell his one-half interest in the land and signed a contract of sale with the plaintiff, Carol Wnuk, contingent upon financing. Doyle agreed to assist Wnuk in obtaining financing. Wnuk alleged that while working together to obtain the financing, she and Doyle entered into an oral partnership agreement to develop the property. However, Wnuk admitted that there was never any discussion concerning her financial contribution for her fifty-percent partnership interest. When the financing was not obtained by a May 13, 2003 deadline, the contract of sale terminated. Doyle later formed a limited liability company with other parties, and the LLC purchased Garner's interest in the property.

Wnuk brought suit against Doyle, among others, alleging that Doyle breached the alleged oral partnership agreement between them. The trial court granted Doyle summary judgment and Wnuk appealed. The Georgia Court of Appeals noted Wnuk's admission that there was never any discussion in the alleged oral partnership agreement regarding the amount of monetary contribution that Wnuk would have to make to the partnership. The Court held that the omitted monetary contribution was an essential term of contract, without it the agreement lacked consideration and its omission rendered the oral partnership agreement too indefinite to enforce. The Court did not mention the principle that validated the partnership agreement in Antoskow, namely, that "assent to partnership" alone

provides sufficient consideration to support a partnership agreement.

REPORT FROM CHAIR OF CORPORATE CODE REVISION COMMITTEE

By Tom McNeill

Powell Goldstein LLP

The Corporate Code Revision Committee has had an active 2005. Through various meetings of subcommittees of our group, we have taken a careful look at a number of proposals for improvements in the Georgia Business Corporation Code. We formulated a position with respect to several proposals, including provisions with respect to director liability and indemnification, the interface between the Corporate Code and its counterpart LLC and LLP Codes and other recent amendments or revisions to the Model Business Corporation Code and relevant Delaware statutes. In the fall of 2005, we met with the State Bar's Advisory Committee on Legislation and received approval to submit our proposals to the Board of Governors of the State Bar. In January, we presented seven proposals to the State Bar and received endorsement on all but one of the proposals.

We are now moving these proposals through the legislature process in hopes of having them adopted during the current legislative session. Given the early stage of the process, we cannot say for certain which of our proposals will become law.

If you would like a copy of the proposals that we have submitted to the Advisory Committee on Legislation, please send me an email (tmcneill@pogolaw.com) and I will make sure that you receive a copy. As importantly, if you have interest in participating in the work of our Committee, please let me know that, as well. We are always looking for additional folks to help us make sure that the Georgia Business Corporation Code and related codes are as up-to-date as possible.

SHARE YOUR KNOWLEDGE – GET PUBLISHED

We are accepting submissions for publication in this newsletter. Contact Elizabeth Noe by e-mail at (elizabethnoe@paulhastings.com) as soon as possible to reserve space and to obtain a copy of our submission guidelines. If you have encountered an interesting legal development or issue recently, please consider sharing your knowledge with your colleagues by submitting a piece for publication in this newsletter.

THANK YOU TO OUR SUPPORTERS

On behalf of the Section, we want to express our gratitude to **ICLE in Georgia, Bowne of Atlanta, Inc.** and the **Staff of the State Bar of Georgia** for their assistance in printing and mailing this newsletter, which reaches 1,500 members throughout Georgia and in other states. We depend on the assistance of these supporters to produce this newsletter and value their continued support.