

# 2009 Court Watch Report



Atlanta, GA Courthouse

*"Although we understand consumer law to mean a concern for the practical effect of judicial decisions on the rights of individuals who purchase goods and services, it is not always clear what the impact of a particular decision will be, especially in a recessionary context. Yet it is clear that in 2009 the Georgia Court of Appeals rose to the challenge of reinforcing notice as a fundamental element of due process in contexts ranging from delinquent credit card accounts to wage garnishments."*

- 2008 Court Watch Fellow Matthew Bouillon

*The Court Watch report is a publication of Georgia Watch, a nonprofit, nonpartisan 501(c)(3) watchdog group focusing on consumer education and research in the areas of health care, insurance, identity theft, personal finance and energy issues.*

## INTRODUCTION

The appellate courts face the important task of correcting errors that occur in court proceedings throughout the state. Appeals may be based on a wide array of legal issues and frequently address many disparate points of law. It is thanks to this variety and their privileged role in our democratic system of government that the appellate courts enjoy great latitude to craft the development of the laws of the State of Georgia.

Georgia has two levels of appellate courts: the Supreme Court and the Court of Appeals. The composition of both Courts is determined by way of the electoral process. Founded in 1845, the Supreme Court of Georgia is the highest court in the state and reviews the decisions of both the state trial courts and the Court of Appeals. The Supreme Court exercises discretionary authority, declining or accepting applications for review as it sees fit, and any decisions of the Supreme Court are binding in all state courts. For its part, the Court of Appeals is a much younger institution and a much more prolific one. Created in 1906 during a time of parsimonious attitudes towards the judiciary, the Court of Appeals remains one of Georgia's most productive institutions, publishing an average of 1,461 opinions annually over the past several years. Decisions of the Court of Appeals are frequently – but certainly not necessarily – the last word on a controversy.

The Supreme Court of Georgia was expanded in 1945 to seven members. Currently, they are: Chief Justice Carol Hunstein, Presiding Justice George Carley, and Justices Robert Benham, Hugh Thompson, P. Harris Hines, Harold Melton, and following the retirement of Leah Ward Sears in June 2009, David Nahmias.

The Georgia Court of Appeals currently employs a rotational model in which the position of Chief Judge changes over a two-year period based on seniority. The Chief Judge is responsible for appointing the Presiding Judges to head each of four three-judge panels. The other Judges rotate through the panels every year. This procedure was designed to improve collegiality among the Judges and discourage judicial stereotyping by the public.

Presently, the members of the Court of Appeals are: Chief Judge M. Yvette Miller, Presiding Judges Gary Blaylock Andrews, Edward Johnson, G. Alan Blackburn, J.D. Smith, and Judges Anne Elizabeth Barnes, John Ellington, Herbert Phipps, Charles Mikell, A. Harris Adams, Debra Bernes, and Sara Doyle.

### 2009 COURT WATCH ANNUAL REPORT

This report derives from decisions of both the Georgia Supreme Court and the Court of Appeals. Due to the constant interplay between the legislature and judiciary, laws affecting the rights of consumers and regular citizens confronted with debt, foreclosure, or injury are in continuous flux. Unfortunately, even though these opinions are matters of public record, their manner of presentation is often too specialized for the general public and their import either too specific or simply understated.

The report was compiled and written by Matthew Bouillon, a 2010 graduate of Boston College Law School. The report was edited by a three person advisory committee:

*Nathan Gaffney*  
*Attorney and former Court Watch Fellow*

*Mark Budnitz*  
*Professor of Law*  
*Georgia State University College of Law*

*Wingo Smith*  
*Attorney*  
*Georgia Legal Services*

The Supreme Court of Georgia

## Consumer Wins

### **Thompson v. Allstate Insurance Co and Thompson v. Georgia Farm Bureau Casualty Insurance Co., 285 Ga. 24 (2009)**

*One spouse's acceptance of an insurance settlement payment does not necessarily show that the other spouse received any part of that money for the purposes of recovering underinsured motorist benefits pursuant to O.C.G.A. § 33-24-41.1.*

### **American Multi-Cinema v. Brown**, 285 Ga. 442 (2009)

*A business invitee who falls and is injured thanks to an ill-placed, collapsed 'Wet Floor' sign in a crowded area can avoid summary judgment by offering evidence of the same to show actual knowledge on the part of the business.*

### **Retention Alternatives, Ltd. v. Hayward**, 285 Ga. 437 (2009)

*In a controversy over the statute of limitations on service of process in the Uninsured Motorist Act, the Supreme Court acted in conformance with the Renewal Act, in that anyone who begins an action within the statutory period can dismiss and renew it within either six months of commencement or within the original statutory period, whichever is longer.*

### **Condra v. Atlanta Orthopaedic Group, P.C.** 285 Ga. 667 (2009)

*An expert witness's personal practices relative to his or her profession are now admissible for the purpose of assessing the expert's credibility.*

### **Smith v. Finch**, 285 Ga. 709 (2009)

*The "hindsight" jury instruction is no longer valid in Georgia due to its prejudicial effect in limiting liability for doctors in certain contexts.*

### **Beneke v. Parker et al. and vice versa**, 285 Ga. 733 (2009)

*In automobile accidents where the responsible party is also cited for a traffic violation, an injured plaintiff can file a claim at any point the criminal charge is still pending for up to six years.*

## Consumer Losses

### **Bragg v. Oxford Const. Co.**, 285 Ga. 98 (2009)

*The acceptance doctrine is still valid in Georgia. Contractors are protected from liability after delivering as long as they are not grossly negligent.*

### **Blotner v. Doreika**, 285 Ga. 481 (2009)

*Chiropractors are not required to disclose all possible risks of a procedure to their patients.*

### **McCord et al. v. Lee et al.**, 286 Ga. 179 (2009)

*The “new injury” exception is narrowed exclusively to situations where a previous harmful misdiagnosis is left untreated and “develops into a more serious and debilitating condition,” thereby excluding individuals who suffer negligence without misdiagnosis.*

**State Farm Mut. Auto. Ins. Co. v. Staton et al.**, 286 Ga. 23 (2009)

*To stack one’s own uninsured motorist insurance benefits, the plaintiff must be the “named insured” on the policies in question.*

## The Court of Appeals of Georgia

### **Consumer Wins**

**Parham v. Peterson, Goldman & Villani**, 296 Ga. App. 527 (2009)

*Creditors seeking to repossess property must provide the debtor with proper notice and a declaration of the debtor’s rights associated with the property.*

**Nyankojo v. North Star Capital Acquisitions**, 298 Ga. App. 6 (2009)

*A creditor seeking to collect on a debt must introduce competent evidence to show the chain of assignment actually leads back to the debtor.*

**Horner v. Robinson**, 299 Ga. App. 327 (2009)

*In order to secure a valid lien on personal property, a creditor must strictly comply with the notice provisions in the statute in question.*

**TBF Financial, LLC v. Houston**, 298 Ga. App. 657 (2009)

*Plaintiff creditors seeking garnishment must make a prima facie showing of compliance with notice requirements in order to avoid sua sponte dismissal.*

**Wirth v. Cach, LLC**, 300 Ga. App. 488 (2009)

*A creditor must prove the entire chain of assignment of a debt by competent evidence in order to collect on it.*

**Bonner v. Peterson, et al.** 301 Ga. App. 443 (2009)

*Resident physicians are not students for the purposes of O.C.G.A. § 51-1-38 and therefore are not immune from liability.*

### **Consumer Losses**

**Cowart v. Widener**, 296 Ga. App. 712 (2009)

*Negligence suits involving “specialized medical questions” now require expert testimony in order to establish causation.*

**Tookes v. Murray**, 297 Ga. App. 765 (2009)

*In order to avail oneself of unlimited punitive damages, the plaintiff must show the defendant acted with specific intent to cause the harm in question.*

**Porter v. Guill**, 298 Ga. App. 782 (2009)

*A person who relies on government support to access healthcare from government physicians will have no cause of action against those physicians absent willful or wanton conduct.*

**Summit Automotive Group, LLC. v. Clark**, 298 Ga. App. 875 (2009)

*A car manufacturer is not subject to liability for the dishonest or criminal acts of its franchisees if liability is limited at the outset and there is no abuse of the corporate form.*

## SUPREME COURT OF GEORGIA

*Consumer Wins*

### **Thompson v. Allstate Insurance Co and Thompson v. Georgia Farm Bureau Casualty Insurance Co.**

285 Ga. 24, 673 S.E.2d 227. February 9, 2009.

CARLEY, J. (Unanimous decision)

The Supreme Court of Georgia may have made it easier for injured parties to recover uninsured or underinsured motorist coverage from insurance carriers by requiring releases for the insurance companies to be more specific as to what the injured party is receiving in consideration for their release of liability.

Richard and Laura Thompson brought suit against Randall Bacon for physical injuries they sustained as a result of an automobile collision. Bacon maintained only liability insurance, so the Thompsons sought underinsured motorist coverage from Allstate Insurance Co. and Georgia Farm Bureau Casualty Insurance Co. Underinsured motorist coverage is insurance which supplements a driver's existing policy to pay for injury to others for which his liability coverage is inadequate.

The Thompsons settled out of court with Bacon's insurance companies for \$100,000 per person. In return for the settlement, the Thompsons executed a waiver releasing Bacon from future liability, but insisted in continuing with their claims for underinsured motorist coverage from Bacon's insurers because Mr. Thompson's injuries exceeded the \$100,000 agreed to in the settlement. In order to recover underinsured motorist benefits, two requirements must be met: the plaintiff must 1) settle for the limits of the policy as stated in the policy, and 2) execute a limited release as specified in O.C.G.A. § 33-24-41.1. Reversing the Court of Appeals, the Georgia Supreme Court found that although Mr. Thompson had indeed executed the release as provided for in the statute, that release was ambiguous as to whether he had settled his bodily injury claim for less than the limit of the policy.

The Supreme Court noted that if any of Mr. Thompson's share of the settlement had gone to Mrs. Thompson, then he would in effect be settling for less than the limit of the policy. Despite this, the Court found that a joint release does not necessarily indicate that Mrs. Thompson received any part at all of the settlement, but rather that her release may have served as consideration for payment in full of her husband's injuries.

Thus, parties who sign joint releases are not necessarily admitting that they are both directly receiving insurance money. As here, one party may be giving up the right to sue in exchange for the settlement, but it is not necessary for her to say so explicitly in order for her spouse to recover.

**American Multi-Cinema v. Brown**

285 Ga. 442, 679 S.E.2d 25. June 1, 2009.

SEARS, C.J. (Unanimous decision)

As former Chief Justice Sears noted in this opinion, although accidents happen, many can be prevented with proper care. This now includes collapsible “Wet Floor” signs originally designed to warn and protect. If an employee were to place such a sign in the path of a mass of oncoming patrons who are not likely to see it, the sign can itself become a hazard, giving rise to possible negligence liability in Georgia. This case makes it easier for individuals injured in falls of this sort to proceed to a jury trial.

On Christmas Day 2003, Nancy Sue Brown took her daughter and grandchildren to the movies at the AMC 24-plex at Southlake Mall. When the movie ended, the patrons began leaving the cinema en masse. Unbeknownst to Brown, an AMC employee (acting in accordance with company policy) had placed a standard-size A-frame “Wet Floor” sign a short distance from the entrance to the theater because of a small spill. Due to the volume of people, Brown was unable to see that the sign had in fact toppled over and was lying on its side when she went to exit. While passing by, her foot hooked on the sign, causing her to lose her balance and fall onto the floor. Having just undergone back surgery, she was seriously injured by the fall. Brown brought suit for negligence against AMC who then moved for summary judgment. The trial court granted summary judgment, but the Georgia Court of Appeals reversed, finding that “Wet Floor” signs themselves can be the basis for liability in tort.

On certiorari, the Georgia Supreme Court detailed a brief history of the “pendulum-like” development of Georgia case law with respect to premises liability and its most common permutation, slips and falls. The justices recalled a time pre-1980 when there seemed to be a “drift” with slip and fall cases allowing every one, no matter how groundless, to proceed to a jury trial. This was then overcorrected in the 1980 case Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327, after which such cases very seldom made it past summary judgment. In 1997, the case of Robinson v. Kroger Co., 268 Ga. 735, 493 S.E.2d 403, gave us the current regime, affirming Alterman’s two-part test for premises liability but moderating the burden of production on summary judgment so as to allow more cases before the jury.

The two-part Alterman test still requires the plaintiff to plead and prove that: 1) the defendant had actual or constructive knowledge of the hazard, and 2) despite exercising ordinary control for his or her own personal safety, the plaintiff lacked knowledge of the hazard due to the defendant’s actions or to conditions under the defendant’s control.

The first prong of the test is in play here, and the Georgia Supreme Court came down on the side of the Browns, finding that their theory of liability rested on the assumption that placing an easily collapsible “Wet Floor” sign in a crowded area only moments before it was to be traversed by a large number of people could be sufficient to show AMC had actual knowledge of the hazard. As this constitutes a dispute of fact, the Georgia Supreme

Court affirmed the judgment of the Court of Appeals, thereby giving the Browns the opportunity to have a jury hear their case.

**Retention Alternatives, Ltd. v. Hayward**

285 Ga. 437, 678 S.E.2d 877. June 1, 2009.

BENHAM, J. (Unanimous decision)

The Georgia Supreme Court has made it easier for a plaintiff to correct procedural errors in her initial filing when she opts to dismiss her initial case and refiles within the six month time period allowed under Georgia law.

In September 2002, Stacey Hayward was involved in motor vehicle collision with William Stridiron. In September 2004, shortly before the expiration of the statute of limitations, Hayward commenced an action against Stridiron for negligence. At that time, she served a copy of the complaint on her primary uninsured motorist carrier (UMC), but not Retention Alternatives, Ltd. (RAL), her excess carrier. In May 2006, Hayward voluntarily dismissed her action, but renewed it less than six months later and served RAL with the renewed complaint.

RAL moved for summary judgment, arguing that the statute of limitations had tolled and that it had not been served within the time allotted in the Uninsured Motorist Act. O.C.G.A. § 33-7-11. However, O.C.G.A. § 9-2-61, the Renewal Statute, provides that anyone who begins an action within the statutory period can dismiss and renew it within either six months of commencement or within the original statutory period, whichever is longer.

The trial court granted the motion and the Court of Appeals reversed, clarifying that the 1998 amendment to the Uninsured Motorist Act meant that a UMC must be served in cases where the plaintiff has a reasonable belief that the defendant is uninsured.

The statute at issue makes service dependent upon the existence of the insured's reasonable belief that defendant is uninsured, and requires service on UMC within the time allowed by law for valid service on defendant. This includes any point in time at which valid service could be made on defendant, even after expiration of period of limitation. What's more, when the legislature amended the statute, it retained a phrase used in the pre-amendment version which required service of process "as prescribed by law" as though UMC were "a party defendant," and it used a phrase judicially declared to be its equivalent. In affirming the Court of Appeals, the Supreme Court held that Hayward's claim was thus not barred because she served the UMC within 90 days from her reasonable belief that the other driver had no automobile coverage.

**Condra v. Atlanta Orthopaedic Group, P.C.**  
285 Ga. 667, 681 S.E.2d 152. June 29, 2009.

HUNSTEIN, P.J. (Unanimous decision)

This case may be an example of the 2005 Tort Reform Act both helping and hurting its proponents. As a result of the Georgia Supreme Court's determination in this case, an expert witness's personal practices vis-à-vis his profession are now admissible for the purposes of assessing the expert's credibility. This has the effect of taking the emphasis off the practices of the profession at large and refocusing it on those of a particular individual who is testifying as to whether the defendant breached the standard of care. In effect it will open the door to allow attorneys at trial to inquire as to the personal practices of an expert witness.

Plaintiff Daphyne Condra sought treatment for body pains from her orthopedist, who prescribed a 30-day regimen of the drug Tegretol. Condra was to follow up the first 30-days with another 30-day prescription if her symptoms had not improved; however, she grew even more ill following the end of the first phase of treatment. She was hospitalized and diagnosed with aplastic anemia, a rare bone marrow disease. She then brought suit against her orthopedist and his group for medical malpractice, alleging that Tegretol had been a bad drug choice and that her doctor was negligent in not monitoring Condra's blood count. Had he done so, her experts opined at trial, they would have noticed her drop in white blood cells, discontinued the Tegretol, and reversed the development of aplastic anemia. Condra's expert neurosurgeon also expressed the belief that not monitoring her blood count was a breach of the standard of care owed to a patient by a physician.

The Defense called experts who acknowledged that much medical literature on the subject recommended blood count monitoring to detect possible adverse reactions with Tegretol. However, they went on to say that such monitoring was "reasonable" but not "mandatory or essential" and that failure to do so did not constitute a breach of care. Finally, even if monitoring had been conducted as recommended, the experts contended it was nonetheless unlikely the orthopedist would have been able to reverse the development of aplastic anemia.

Condra deposed one of the Defense experts, Dr. Richard Franco, during pre-trial discovery where he declared that it was his personal practice to conduct blood count monitoring of patients receiving Tegretol. The Defense filed a motion in limine before trial to exclude Franco's testimony, arguing in accordance with Johnson v. Riverdale Anesthesia Assocs., 275 Ga. 240, 563 S.E.2d 431 (2002), that a medical professional's personal practices were inadmissible both as substantive evidence and for impeachment purposes. The Johnson court reasoned that since the standard for gauging a physician's negligence is a question of the practices of the profession at large, rather than those of any particular doctor, such information was irrelevant. Likewise, since irrelevant information cannot be used to impeach, the only logical result was exclusion. This was the reasoning applied by the Court of Appeals affirming the trial court's decision, the result of which was a verdict in favor of Atlanta Orthopedic Group. Rejecting this approach "in light of recent statutory

developments” – namely, the Tort Reform Act of 2005 – the Court overruled Johnson and held that it would “defy logic” to categorically exclude information relevant to assessing an expert’s credibility when such information could be crucial to the jury’s determination in the case. The Tort Reform law placed particular emphasis on this, and the Court cited specific provisions in support of this view. See e.g. O.C.G.A. § 24-9-67.1.

The Court went one step further in shoring up the strength of its argument in favor of admitting an expert’s personal practices by citing other “foreign” jurisdictional authorities. Consequently, this opinion contained references to similar practices adopted by the appellate courts of Colorado, Illinois, Michigan, Mississippi, North Carolina, and West Virginia among others. The Court also directed readers to Smith v. Finch, an opinion issued the same day which revised the “hindsight” jury instruction.

**Smith v. Finch**

285 Ga. 709, 681 S.E.2d 147. June 29, 2009.

HUNSTEIN, P.J. (MELTON, J., filed an opinion concurring in part and dissenting in part, in which HINES, J., joined.)

This Georgia Supreme Court decision struck down a portion of a jury instruction that could have enabled doctors to evade liability for their failure to diagnose a rare disease. By advocating for a change in the instruction, the Court sought to allow claims based in the misdiagnosis of such diseases to proceed to adjudication on the merits. This opinion reinforces the notion that a failure to diagnose even rare illnesses can constitute negligence on behalf of the medical provider.

Plaintiffs Clay and Tracie Smith sued various physicians and medical providers for medical malpractice in their failure to diagnose their son, Justin, with Rocky Mountain Spotted Fever (RMSF). The Smiths presented expert testimony at trial contending that the standard of care in a case involving RMSF was to adopt a high index of suspicion, coupled with a low index of treatment. According to the Smiths, this entailed obtaining Justin’s detailed medical history and preventively treating him, considering that it was summertime and he was in Georgia where RMSF is endemic. Thus, the Smiths alleged Justin’s doctors’ failure to take these steps constituted a breach of the standard of care owed to him as a patient.

The Defense for their part maintained that Justin’s symptoms were initially consistent with a viral diagnosis as they had suggested. Furthermore, they claimed they did not frequently encounter RMSF in their patients and in any case had been trained to look for petichial rashes in RMSF cases instead of the macular type that Justin exhibited.

In its jury charge, the Court gave the relevant instructions and included the “hindsight jury instruction” over objections from the Defense. The Supreme Court struck down the instruction on the basis that it directed jurors to find that negligence could not exist where doctors failed to foresee and guard “against that which is only remotely and slightly possible.” The Court interpreted the third sentence of the instruction as effectively telling

the jury that since RMSF is a rare disease, it would not be possible to find that the doctors were negligent in their differential diagnoses. In other words, as RMSF is itself something “only remotely and slightly possible,” the last sentence of the instruction gutted the Smiths’ expert testimony as to the applicable standard of care. This is a win for patients who are stricken with an uncommon ailment that gets worse due to an improper diagnosis.

**Beneke v. Parker et al. and vice versa**

285 Ga. 733, 684 S.E.2d 243. September 28, 2009.

HUNSTEIN, C.J. (Unanimous decision)

Plaintiffs injured in an automobile crash in which the defendant was also cited for a traffic violation now have more time to file their claims against the defendant. Following this decision, the Georgia Supreme Court has held that claims are now tolled for the entire period of time a criminal charge is pending, which can be up to six years.

On April 27, 2005, Patricia Parker was injured in an automobile collision with a car driven by Alan Beneke. Beneke was following too closely and was issued a citation. Parker filed a personal injury action against Beneke on May 11, 2007. The trial court initially granted summary judgment in favor of Beneke on statute of limitations grounds and Parker appealed.

The Georgia Supreme Court addressed the question of whether Beneke must have committed a ‘crime’ within the meaning of O.C.G.A. § 16-2-1(a), i.e. whether his illegal act had to be a product of either criminal intent or criminal negligence, rather than merely a violation of the Uniform Rules of the Road. Following the plain language of the statute, the Court held that a violation of the Uniform Rules is a crime.

Originally part of HB 172 (the “Crime Victims Restitution Act of 2005”), § 9-3-99 serves to protect accident victims by extending the statute of limitations covering their claims. In so doing, injured plaintiffs are not obliged to pursue their claims until the defendant has been fully criminally prosecuted. This prevents criminal defense attorneys at trial from asking questions that give the impression the victim has a monetary interest in seeing the defendant prosecuted.

*Consumer Losses*

**Bragg v. Oxford Const. Co.**

285 Ga. 98, 674 S.E.2d 268. February 9, 2009.

MELTON, J. (HUNSTEIN, P.J., dissented and filed an opinion which SEARS, C.J., and BENHAM, J., joined.)

Contractors continue to receive the benefit of the acceptance doctrine in Georgia, preventing them from being sued after completing a project which is accepted by the

owner unless they are grossly negligent in their construction work. This Georgia Supreme Court case exposed philosophical fault lines between the conservative majority who voted to keep the more restrictive doctrine in place and the dissenting justices who would have preferred to replace it with the modern rule which allows plaintiffs more possibilities to recover for their loss and injuries.

Ken and Francesca Bragg were involved in a serious car accident that resulted in the stillbirth of their daughter. They brought suit against Oxford Construction Co., alleging negligent construction of the road where the accident took place. Oxford had been hired by Dougherty County to repave and patch the road, which was owned by the county. The apportionment of liability in the case directly concerns the acceptance doctrine, and the 4-3 majority chose to continue its application in Georgia.

The acceptance doctrine provides that:

“Where a contractor who does not hold itself out as an expert in the design of work such as that involved in the controversy, performs its work without negligence, and the work is approved or accepted by the owner or the one who contracted for the work on the owner’s behalf, the contractor is not liable for injuries resulting from the defective design of the work. The exceptions for inherently or intrinsically dangerous work, for nuisances per se, and for work so negligently defective as to be imminently dangerous to third persons, apply in cases where the contractor is guilty of negligence in the performance of its work.”

Because there was no evidence that Oxford was negligent in its repair of the road, no liability rested with them for any defective design. Instead, the Georgia Supreme Court suggested that liability, if any, would belong to the entity that “hired Oxford, ordered it to patch the road, and accepted Oxford’s completed work.” If that entity was Dougherty County, it is likely that the Braggs sued the wrong defendant. Thus, the acceptance doctrine in this case acted as a shield for the contractor.

In distinguishing its approach to the acceptance doctrine from that of the three-justice minority, the majority appealed to sentiments of judicial modesty and rejected the notion that the Bragg case was an “opportunity” to abrogate established law. The majority emphasized that the facts of Bragg should be what justify the continued application of the doctrine and noted the conspicuous absence of legislative intent that the doctrine be overruled.

The minority – led by Presiding Justice Hunstein and joined by Justices Sears and Benham – for its part contended that the acceptance doctrine is an antiquated rule (“a fishbone in the throat of the law”) that not only evolved long before modern negligence doctrines, but also has been displaced in a majority of states in favor of the modern rule. That rule, more favorable to tort plaintiffs, states that “a building or construction contractor is liable for injury or damage to a third person *even after* completion of the work and its acceptance by the owner where it was reasonably foreseeable that a third person would be injured by such work” (emphasis added).

**Blotner v. Doreika**

285 Ga. 481, 678 S.E.2d 80. June 8, 2009.

HUNSTEIN, P.J. (Unanimous decision; CARLEY, J., filed a special concurrence, which SEARS, C.J., joined.)

Chiropractors (or any other health practitioner not listed specifically in the law) cannot be sued for their failure to disclose all the possible risks of their procedures to their patients. This Georgia Supreme Court decision will make future negligence suits based on a lack of informed consent likely to fail and leave those injured with fewer remedies if their medical professional is not covered under the law.

Paul Doreika sought out professional chiropractic services from Gregg Blotner for neck pains. Doreika later brought this suit alleging that Blotner's negligence in failing to warn him of the risks associated with such procedures either caused a herniated disk in Doreika's neck or aggravated a preexisting condition. After a jury trial returned a verdict in favor of Blotner, Doreika appealed and maintained that the trial court's refusal to instruct the jury as to the law on informed consent constituted error. The Court of Appeals reversed, and the case went to the Georgia Supreme Court.

Georgia statutory law does not impose a duty upon all health practitioners to disclose all material risks of a proposed procedure; instead, it circumscribes the class of people required to make disclosure. According to the Court, the appeals court's expansion of the common law duty to inform was in this sense misplaced: "Because Georgia does not recognize a common law duty to inform patients of the material risks of a proposed treatment or procedure; because chiropractic treatment is not included among the matters for which informed consent is required by O.C.G.A. § 31-9-6.1; and because the Legislature has not otherwise required informed chiropractic treatment, we reverse the holding of the Court of Appeals."

**McCord et al. v. Lee et al.**

286 Ga. 179, 684 S.E.2d 658. October 19, 2009.

MELTON, J. (HUNSTEIN, C.J., filed a dissenting opinion in which BENHAM, J., joined.)

This case represents an adverse result for patients' rights by narrowing the "new injury" exception under which one can recover for injuries suffered in a physician's care.

Floyd Lee was diagnosed with prostate cancer and sought treatment from Dr. Dale McCord at Atlanta Oncology Associates (AOA). A physicist employed by AOA was involved in the development of Lee's cancer treatment, which provided for the implantation of radioactive seeds into his prostate. The treatment was executed on December 28, 2001, but on March 14, 2002, the physicist noticed that the seeds were not properly positioned. In support of Lee's medical malpractice action, his expert testified that McCord breached the applicable standard of care.

The Georgia Court of Appeals held that the “new injury” exception to the rule for determining the beginning of the limitations period in negligent misdiagnosis cases was applicable even in cases not involving misdiagnoses, and therefore the two-year statute of limitations did not toll. The Georgia Supreme Court reversed, interpreting the provision narrowly and finding that it constituted an exception to the two-year statute of limitations only when a preexisting condition “as a proximate result of being misdiagnosed is left untreated, and subsequently develops into a much more serious and debilitating condition.”

This is in contrast to the more broad approach adopted by the Court of Appeals. The effect of restricting the application of the new injury exception to only misdiagnosis cases will be to limit recovery for those who experience acts of medical negligence not resulting in immediate manifestations of injury. If, as in Mr. Lee’s case, the statute of limitations runs before the manifestation of the injury is apparent, such plaintiffs would be subject to a motion for summary judgment and could not recover for their injuries.

**State Farm Mut. Auto. Ins. Co. v. Staton et al.**

286 Ga. 23, 685 S.E.2d 263. October 19, 2009.

THOMPSON, J. (CARLEY, P.J., filed a dissenting opinion in which HUNSTEIN, C.J., joined.)

In order to avail oneself of all the available uninsured motorist coverage that a person or corporation might possess, the person seeking to stack the coverage must be the “named insured” on the policy. Any other construction will not suffice in Georgia to permit such coverage to be cumulative.

Plaintiff Cecil Staton was severely injured in an automobile collision. The vehicle he was driving was owned by his employer, Smith & Helwys, and insured by State Farm. Staton’s insurance policy stated that the “named insured” was the “first person named” on the declarations page. Smith & Helwys was the only entity named on that page. Staton sought recovery for \$300,000 worth of uninsured motorist (UM) coverage because Smith & Helwys had \$100,000 UM coverage on each of two other vehicles not involved in the collision. State Farm moved for summary judgment, arguing that Staton should only be allowed to recover UM benefits for the car in which he was riding at the time.

Staton, the Court held, was not entitled to stack the uninsured motorist coverage from his employer’s insurance policies for two other automobiles not involved in the accident in which he was injured. Interpreting the plain language of the policy, contra the Court of Appeals, the Court noted that Staton had to be the first person named in the policy in order to stack his uninsured motorist coverage pursuant to O.C.G.A. § 33-7-11.

The Georgia Supreme Court decided this case on the basis of strict statutory interpretation. Nonetheless, Justices Hunstein and Carley’s dissent noted that, “The result today deprives Staton of his right to stack the limits of all of the available uninsured motorist coverage provided by the policies as properly construed by the Georgia Court of Appeals.”

## GEORGIA COURT OF APPEALS

*Consumer Wins*

### **Parham v. Peterson, Goldman & Villani**

296 Ga. App. 527, 675 S.E.2d 275. March 10, 2009.

ADAMS, J. (Unanimous decision)

The Georgia Court of Appeals sent a message to debt collectors seeking to repossess collateral from defaulting consumers by requiring them to follow to the notice and disclosure requirements under the law. The company repossessing the property must provide the consumer with a timely notice of intent to file a claim against her as well as notice of the consumer's rights in connection with the repossession. These notices are especially important in today's economic times where repossession is more common and consumers need to be aware of their rights in order to safeguard their property and their way of life. Failure by creditors and debt collectors to follow these procedures and provide these notices gives the consumer the power to throw the claim out of court.

Carl Parham appealed the trial court's grant of summary judgment to Peterson, Goldman & Villani (PGV) in their suit seeking to recover on a promissory note signed by Parham. Parham originally executed the note on about August 16, 2002 in favor of The CIT Group/Equipment Financing, Inc. (CIT) in connection with his purchase of equipment. In April 2003, Parham had become delinquent on the note and CIT responded by sending him a "Notice of Default–Demand for Payment and Intention to Accelerate." Another letter followed on June 10, 2003 demanding payment and requesting Parham sign a voluntary release form, ostensibly to help reduce "legal and repossession expenses" that would otherwise be charged to Parham's CIT account. Parham signed and returned the release to CIT, acknowledging he was in default. CIT then sent him two more letters around August 27, 2003 notifying Parham of CIT's intention to sell the equipment privately and to pursue a deficiency judgment against him for the amount left on the note.

CIT assigned its interest in Parham's note to PGV on August 31, 2006 and PGV initiated this action to recover the deficiency amount from Parham on March 29, 2007. In response, Parham claimed that as CIT's assignee PGV's motion should have been denied because of CIT's failure to provide notice within ten days of the equipment's repossession that it intended to pursue a deficiency judgment against him.

Under O.C.G.A. § 10-1-10, the Retail Installment and Home Solicitation Sales Act, a creditor cannot pursue a claim for a deficiency judgment following the sale of collateral unless the creditor provides the debtor timely notice, in the prescribed manner, of the creditor's intention to pursue such a claim, and informs the debtor of his rights in connection with the sale of the repossessed property. Notice of this sort is especially important in today's economic times where repossession is common.

Reversing the trial court's grant of summary judgment to PVI, the Court of Appeals found that the August notices that CIT sent to Parham did not meet the requirements of §10-1-10 because they 1) failed to fall within 10 days of the repossession; 2) lacked any indication they were delivered by certified or registered mail or statutory overnight delivery; and 3) failed to inform the customer of his rights of redemption, as well as his right to demand a public sale of the repossessed goods.

It is reasonable to assume that many debt collectors and creditors use the sort of waivers at issue in this case, and it is significant that the Supreme Court did not come down harder on Parham. Instead of finding the waiver ambiguous, the Court could have found in favor of PVI under the theory that § 10-1-10 has not yet been amended to reflect revised Art. 9 provisions of the Uniform Commercial Code when § 10-1-10 incorporates that article. The Court's interpretation of §10-1-10 is sensible in that it continues this incorporation without insisting that the legislature amend the law.

**Nyankojo v. North Star Capital Acquisitions**

298 Ga. App. 6, 679 S.E.2d 57. May 15, 2009.

PHIPPS, J. (Unanimous decision)

The Georgia Court of Appeals requires debt collectors to do a more thorough job in proving a consumer is liable for a particular debt. Affidavits alone, without supporting documentation, are insufficient to show a consumer's liability or the debt collector's ownership of a debt. The Court reinforced the existing rule that when a witness testifies as to the content of business records and no basis for the testimony exists in the records themselves, the testimony is inadmissible hearsay if the witness lacks personal knowledge of the facts in question.

North Star brought suit to collect the amount of \$1,132.62 on an account between Elias Nyankojo, the purchaser of furniture, and Leather World, the seller. In his answer, Nyankojo alleged that North Star was not the proper assignee of Nyankojo's debt. Nyankojo filed a motion for partial summary judgment and North Star filed a cross-motion for the same, alleging that it had offered sufficient proof of its status as Wells Fargo's assignee, the original party to the agreement with Nyankojo. The trial court denied Nyankojo's motion and granted partial summary judgment in favor of North Star. The Georgia Court of Appeals reversed both determinations.

North Star's agent and chief executive officer, David Paris, produced two affidavits in support of its motion for partial summary judgment. In the first, Paris testified that North Star is in the business of buying delinquent accounts receivable, that it had done so from Wells Fargo, and that Nyankojo's debt was among those purchased. In the second, Paris likewise testified that in the regular course of business North Star purchased and was assigned all rights to Nyankojo's debt.

Despite this evidence, the Court found that Paris's affidavits were sufficient only to show that North Star had indeed purchased a portfolio of accounts from Wells Fargo including

Nyankojo's upon which there remained a balance of \$1,132.62. However, the documentation did not show that the account was number 48400529, corresponding to Nyankojo's specific agreement with Leather World. Furthermore, it appeared from his testimony that Paris lacked personal knowledge of this fact.

The Court of Appeals thus required more evidence to establish the essential elements of North Star's case. This result foreshadowed the finding in October's *Wirth* case, which is also discussed in this report, by showing that there can be no gap in the chain of assignment between the original creditor and the plaintiff.

**Horner v. Robinson**

299 Ga. App. 327, 682 S.E.2d 578. June 12, 2009.

BERNES, J. (Unanimous decision)

The Georgia Court of Appeals enforced a law meant to protect consumers by continuing to require strict adherence to notice provisions in order to create a valid lien on the personal property of another. These provisions are spelled out in statute, and failure to comply could subject the taking party to liability. Such protections are necessary in order to protect the true owner's interest in his property.

Plaintiff Grady Lanier Robinson filed a conversion action against Kenneth John Horner, Jr. for the return of Robinson's racecar. The facts show that Robinson purchased the car in 2003, but that it was stolen in June 2006 from a trailer behind Robinson's residence. Due to human error, the vehicle identification number was improperly entered into the police database for recording stolen vehicles and therefore the car was never registered as stolen. After thieves stripped the vehicle, it was left on a road in DeKalb County. Horner's towing company, Top Cat Towing & Recovery, Inc., towed and stored the car pursuant to a police request.

Horner then sought the names and addresses of any lien holders on the car, but because of the error in the VIN, the car's record did not contain the fact that it had been stolen. The only owner who appeared was the one previous to Robinson who did not respond to inquiries. In August 2006, Horner initiated foreclosure proceedings and obtained a lien in his favor from a DeKalb County magistrate authorizing the sale of the vehicle. Horner then bought the vehicle himself. Once Robinson learned of Horner's acquisition on the racecar circuit, he initiated this action.

The Georgia Court of Appeals found that Top Cat's notice, issued through Horner, was insufficient because it did not comply with O.C.G.A. § 40-11-1, the Abandoned Motor Vehicle Act. Specifically, the notice did not include an itemized list of the charges underlying the lien and it neglected to notify the recipient that his failure to petition the court for a judicial hearing would waive his right to a hearing prior to the public sale. Because Horner did not strictly comply with the notice provision and because Robinson had no actual notice of the sale, the Court held that Top Cat could not create a valid lien upon which it could defend against Robinson's conversion suit.

The notice provisions of Georgia's Abandoned Motor Vehicle Act operate to protect consumers in much the same way as they protected Robinson. Consumers are entitled to notice before their property is sold in order that they might contest that sale legitimately.

**TBF Financial, LLC v. Houston**

298 Ga. App. 657, 680 S.E.2d 662. July 1, 2009.

ADAMS, J. (Unanimous decision)

Debt collectors and other creditors increasingly use garnishment as their primary method of collecting a judgment debt in Georgia. This decision by the Georgia Court of Appeals represents a concrete step towards safeguarding the due process rights of the consumer in such collection actions by requiring the debt collector to follow the law which requires timely notice of the garnishment be sent to the consumer.

In initiating a garnishment action against the defendant Derek Houston, TBF Financial, LLC was required by O.C.G.A. § 18-4-64(a)(2) to send Houston notice of the garnishment by registered or certified mail within three days of service on the garnishee bank. TBF admits to not having done so, as Houston received notice more than six months after service on the bank took place. Even so, TBF presented an affidavit purporting to show that Houston had received the summons but failed to respond to it. Houston, acting *pro se*, did in fact fail to respond to the summons. However, the trial court dismissed the garnishment *sua sponte* for lack of timely service over TBF's assertions that Houston waived all defenses by failing to respond.

Affirming the decision of the trial court, the Georgia Court of Appeals remained steadfast in its insistence that notice is an essential element of due process. The Court went on to note specific ways in which TBF could have complied with the statutory notice provisions but did not.

Most notably, the Court stated that plaintiffs in garnishment actions must make a *prima facie* showing of compliance with the requirements of notice before a defendant is permitted to raise a defense that service or notice was improper. Moreover, due to the particular nature of garnishment actions, in the absence of proper notice the trial court is indeed *unable* to grant relief for want of jurisdiction.

**Wirth v. Cach, LLC**

300 Ga. App. 488, 685 S.E.2d 433. October 15, 2009.

MILLER, C.J. (Unanimous decision)

Debts are often bought and sold several times before anyone attempts to collect them by filing a lawsuit. This decision by the Georgia Appellate Court will help prevent a consumer from being sued by a party who does not legally own the right to sue on the debt, but who nevertheless files suit to collect on it. A debt collector must prove each link in the

chain of assignment between itself and the original creditor when a consumer challenges its ownership of the debt.

Cach, the alleged assignee of Providian, brought suit against Wirth to collect the principal amount of \$2,310.72. Attached to its complaint, Cach included a copy of Providian's standard credit card account agreement. Wirth responded that Cach was not a real party in interest to the suit and filed a counterclaim under the Fair Debt Collection Practices Act. In turn, Cach filed a motion for summary judgment to which it attached a statement by its authorized agent declaring that Providian had assigned its interest in Wirth's debt to Cach. The trial court granted summary judgment in favor of Cach in the amount specified plus interest, attorney fees, and court costs. Wirth appealed, claiming that Cach's interest was not supported by the necessary written documentation. The Court of Appeals agreed and reversed the trial court's decision in favor of Cach.

Specifically, the Court of Appeals noted that Cach's affidavit failed to refer to or attach any written agreements proving the chain of assignment from Wirth to Cach. Interestingly, the original affidavit filed by Cach shows that Wirth's account existed initially not with Providian, but with Washington Mutual, for which there is no documentary evidence in the record at all.

Thus, the Court of Appeals held that the chain of assignment must be proved by competent evidence. An affidavit that fails to attach actual written agreements to this effect is insufficient. By requiring this sort of proof, it is less likely that debtors will incur suits from parties who do not in fact own the debt.

**Bonner v. Peterson, et al.**

301 Ga. App. 443, 687 S.E.2d 676. December 8, 2009.

BLACKBURN, P.J. (Unanimous decision)

In this case the Court of Appeals held that individuals who are harmed through the acts or omissions of a resident physician can go to court for redress of their injuries because residents are not students and therefore not immune from liability under Georgia law.

On January 5, 2006, Moswen Bonner went to the dermatology clinic at the Medical College of Georgia (MCG) for treatment of a bump on his chin. He was seen by Dr. Daniel Sheehan, the attending physician, and Dr. Letty Peterson, a resident. Bonner elected for a shave biopsy of the area, which entailed shaving the area and removing the bump for laboratory analysis. Dr. Sheehan informed Bonner that Dr. Peterson would perform the procedure and then proceeded to leave the room. Dr. Peterson removed the affected area and then applied a substance she believed to be aluminum chloride to it. In reality, the substance was potassium hydrochloride and caused a more severe lesion to develop on Bonner's chin.

On January 3, 2008, Bonner brought suit against both physicians alleging claims against Dr. Peterson for professional negligence, battery, intentional infliction of emotional

distress, and against Dr. Sheehan for respondeat superior. The trial court dismissed the claims against Dr. Peterson on the grounds that the Georgia Tort Claims Act exempted her from liability as a public employee and that O.C.G.A. § 51-1-38 gave her immunity as a resident physician akin to a medical student. The Court of Appeals agreed on the first point, but not on the latter.

Following the holding in this case, a resident physician who has already received her medical degree and is provisionally authorized to practice medicine is not considered a student for the purposes of § 51-1-38. Therefore, Peterson was ineligible for tort immunity typically conferred to medical students, even though residents are similar to students in that they are still undergoing training. Presumably, residents working at private hospitals can also be subject to liability. The Court's focus on the language of O.C.G.A. § 43-34-33(a), expressly limiting immunity to students working towards a medical degree was crucial to the outcome.

### *Consumer Losses*

#### **Cowart v. Widener**

296 Ga. App. 712, 675 S.E.2d 591. *Judgment aff'd*, 2010 WL 2718046. July 12, 2010.

ANDREWS, P.J. (Unanimous decision).

According to the Georgia Supreme Court, negligence cases involving “specialized medical questions” now require expert testimony in order to establish causation. A “specialized medical question” is essentially a situation in which it is not clear to the average person whether the defendant’s negligence actually caused the harm in question. The effect of this decision could mean fewer recoveries in negligence for plaintiffs already suffering chronic illnesses.

The heirs of Roby Cowart, Sr. brought an action for wrongful death against Cowart’s brother-in-law Nathan Widener and Widener’s employer after Cowart died of natural causes while an unauthorized passenger in Widener’s rig. On November 30, 2003, Cowart and Widener departed from Thomson, Georgia en route to Columbus, Ohio. Cowart had fallen on hard times and had begun to avail himself of the Wideners’ benevolence for food, clothes, and companionship. As the two men traveled north on Interstate 75 near the Tennessee-Kentucky border, Cowart reported that his throat was “closing in on him.” He suffered from severe erosive esophagitis, a condition brought on by damage to the esophagus from gastric acid, and had begun to bleed internally. Widener pulled over and called his wife, Cowart’s sister, who instructed him to give Cowart water and check his breathing. Cowart was unresponsive. Upon reaching Lexington, Kentucky, Widener noticed a foul odor characteristic of diarrhea accompanying substantial internal bleeding. He attempted to revive Cowart again without success.

Around midnight on December 2, Widener’s truck rolled backwards into another truck at a rest stop in Delaware, Ohio. A state trooper responded to the scene and noticed Widener

was acting nervously and looking repeatedly at the closed curtain in his cab. He asked Widener if he could take a look to “make sure he didn’t have any dead bodies” in the truck. The trooper discovered Cowart who by this time had become cold to the touch. The cause of death was exsanguination, or internal bleeding.

Although the general rule for proving simple negligence is that one need not produce expert evidence as to causation, there are exceptions. The most relevant one applies where “medical questions” relating to causation are involved. The Georgia Supreme Court acknowledged that most medical questions are perfectly capable of being resolved by ordinary people with common knowledge and experience. However, in so-called “specialized medical questions” where it is not possible for a layperson to determine whether the defendant’s negligence proximately caused the plaintiff’s harm, expert testimony is necessary to prove causation. That particular circumstance applied in this case.

The majority points out that neither Cowart’s heirs nor the dissent can point to the specific moment when Widener knew or should have known Cowart needed immediate medical attention. This is especially relevant given that Cowart frequently coughed up blood and there did not appear to be anything in particular to set this instance apart from previous ones. Furthermore, internal bleeding is separate and distinct from external manifestations of physical harm, which would unquestionably place the injury within the common knowledge and experience of the ordinary person.

As a result of this decision, expert testimony is required to avoid summary judgment when the issue involves a “specialized medical question” of the type addressed here. The Court’s opinion resulted in a finding that there was no liability for Widener because no expert testimony was put forth to prove that he knew or should have known that Cowart needed medical attention.

**Tookes v. Murray**

297 Ga. App. 765, 678 S.E.2d 209. May 12, 2009.

JOHNSON, P.J. (Unanimous decision)

Plaintiffs who seek the award of unlimited punitive damages must introduce evidence showing that the defendant acted with specific intent to cause the harm in question. Punitive damages may still be awarded even in the absence of evidence of this sort, but they will be capped at \$250,000.

On November 3, 2005, Eddie James Tookes visited Dr. Joseph Murray for a consultation about dental implants to replace his missing teeth. Dr. Murray recommended Tookes undergo a full dental restoration. While at Murray’s office, Tookes applied for a loan from Capital One to finance the procedure. Capital One gave Tookes a loan in the amount of \$18,300 and Murray commenced work on November 8, 2005.

On January 13, 2006, Tookes filed suit against Murray in magistrate court claiming he was not satisfied with the work, but he soon withdrew his suit and allowed Murray to continue. On August 26, 2006, the work was finally completed when Murray permanently cemented the restored pieces into place. However, Tookes continued to suffer discomfort and difficulty chewing, so he sought the advice of Dr. Jonathan Goldstein, who found defects in Murray's work and recommended a full replacement. On October 17<sup>th</sup>, Tookes sought the advice of a third dentist who gave a similar prognosis. Tookes then brought suit against Dr. Murray for dental malpractice, breach of warranty, and violations of the Fair Business Practices Act.

Based on the evidence, the Court of Appeals concluded that reasonable jury could find that Murray's treatment of Tookes demonstrated such a want of care as to give rise to a presumption of conscious indifference, thereby justifying the award of punitive damages under O.C.G.A. § 51-12-5.1(b). This was true despite the heightened "clear and convincing" standard of proof. However, the Court also held that punitive damages must be limited to \$250,000 (rather than being unlimited) due to the absence of evidence demonstrating Murray acted with specific intent to cause harm. Summary judgment as to that part of the trial court decision was thus affirmed.

**Porter v. Guill**

298 Ga. App. 782, 681 S.E.2d 230. July 8, 2009.

BLACKBURN, P.J. (Unanimous decision)

In Georgia, persons who rely on government support to access healthcare from government physicians will almost always have no cause of action against the governmental entity absent a showing of willful or wanton conduct on the part of the defendant.

Rhonda Berrian Porter and Andre Porter brought claims for medical malpractice and wrongful death against the physicians who treated their five-month old son, Jabaris. After dismissing their suit against other entities, Drs. Kimberly Megow and Margaret Guill filed separate motions for summary judgment. The trial court granted Dr. Guill's motion, finding that she was entitled to official immunity for her treatment of Jabaris, but denied Dr. Megow's motion because a genuine issue of material fact remained as to her liability. The present case arose out of the Porters' decision to appeal the grant of summary judgment to Dr. Guill.

The facts show that Dr. Megow was Jabaris's primary physician for the period from his birth on November 24, 2002 to April 12, 2003 when he was admitted into the Medical College of Georgia's pediatric pulmonology department. Dr. Megow treated Jabaris's persistent breathing problems until they showed no signs of improvement, at which point she referred him to MCG. Dr. Guill was the physician on-call in the pediatric pulmonology department at the time Jabaris was admitted and assumed care of him for the remainder of the weekend. On April 14<sup>th</sup>, Dr. Valerie Hudson became the on-call physician and assumed care of Jabaris. The following day, Dr. Hudson discharged Jabaris with instructions to meet immediately with Dr. Megow and to schedule a follow-up

appointment with Dr. Guill at the MCG location in Valdosta. Jabaris died suddenly the following morning.

Following Keenan v. Plouffe, 267 Ga. 791, 482 S.E.2d 253 (1997), the Porters maintained that Dr. Guill should be excepted from immunity under the Georgia Tort Claims Act because she was a state employee who acted outside the scope of her official duties as an MCG physician and faculty member. The Court in this instance distinguished Keenan on the grounds that: 1) it dealt with an MCG physician who performed surgery on an individual insured by a third party who the physician was not obliged to treat; 2) the physician's treatment did not call into question governmental allocation of medical resources but was left to "his sole medical discretion"; and, 3) there was no evidence of legislative intent to extend liability to private-pay patients.

Applied to the facts in this case, the Court found that Dr. Guill was obliged to treat Jabaris by virtue of her position as an employee and faculty member of MCG; that as a recipient of Medicaid, Jabaris's treatment did call into question public distribution of medical resources; and finally, that the legislature did intend to immunize state-employed physicians such as Dr. Guill under the Tort Claims Act.

**Summit Automotive Group, LLC. v. Clark**

298 Ga. App. 875, 681 S.E.2d 681. July 10, 2009.

BERNES, J. (Unanimous decision)  
July 10, 2009.

When you walk into a dealership, you trust the brand, created by the manufacturer, to provide you with a certain experience in buying and maintaining your car over its life. However, recent trends in Georgia have called that brand confidence into question. This case shows that manufacturers may continue to use franchising agreements to protect themselves from liability for the dishonest acts of its franchisees who bear their logo.

From July 2002 to April 2005, Southern Georgia and its affiliate, Georgia Imports, operated two auto dealerships known as Kia of Waycross and Waycross Mitsubishi. Southern Georgia's operation was authorized by a franchise agreement with Kia Motors, Inc., which set forth the general standards of quality for Southern Georgia's operations and business plan.

Between October 2002 and October 2004, the plaintiffs purchased automobiles from both dealerships and traded in vehicles which had outstanding liens in favor of third party creditors. The dealership agreed to pay off the remaining balance from profits from the sale but neglected to do so. Other customers purchased gap insurance and extended warranties, but the dealerships themselves never obtained the policies, instead using the funds to pay off their own third party creditor. These customers brought suit to recover for the money they lost.

Summit Automotive Group, LLC entered into a purchase agreement with Southern Georgia for its share of the dealerships on December 31, 2004. The closing took place in April 2005 and Summit subsequently took over operations. It is thus a named party to the suit. The plaintiffs allege that Summit and Kia Motors conspired with the other defendants to defraud them. Summit and Kia moved for summary judgment and both were denied at the trial court. On appeal, Summit files for interlocutory review and Kia cross-appeals. The Georgia Court of Appeals reversed in both instances.

Ultimately, the Court of Appeals declined to impose liability on Kia Motors, the franchisor, for the alleged conspiratorial acts of Summit Automotive, the franchisee. The franchise agreement limited the franchisor's liability for the acts of the franchisee, and the franchisee was not the alter ego of the franchisor because there was no evidence the parties acted adversely to the agreement, nor did the franchisor exercise control over franchisee's expenditures.

This case conforms with established precedent preventing the franchisor/franchisee relationship from conferring liability to motor vehicle manufacturers for the acts or omissions of their dealers.