2008 Court Watch Report

Atlanta, GA Courthouse

"Consumer law has cross-sections with property law, tort law, insurance law and even constitutional law. The exposure to so many areas gives the recipient of the Court Watch Fellowship a head start in real-world legal practice. I have seen, through these cases, the effects of a broadly structured pro-business body of law in Georgia, and how such laws work so harshly against the interests of consumers. I am now more aware of a law's effect on consumers, lawyers and lawmakers alike. That awareness will benefit my practice and those I fight for."

- 2008 Court Watch Fellow Mike Rodgers

INTRODUCTION

Appellate courts are vested with the duty to correct errors that occurred in trial court proceedings. They hear appeals based on a wide array of issues—from matters concerning service of process to statutory interpretation; from requests for attorneys' fees to constitutional challenges levied against a state law. Because of the broad spectrum of issues appellate courts regularly entertain, these courts have the opportunity to craft a substantial amount of law through their rulings.

The State of Georgia has two levels of appellate courts: the Supreme Court of Georgia and the Georgia Court of Appeals. 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. Unlike the Court of Appeals, which is required to hear almost any issue appealed to it, the Supreme Court of Georgia may exercise its power under the Georgia constitution to decline review of an issue. Any decisions made by the Supreme Court are binding in all courts of the State of Georgia.

The Supreme Court of Georgia has seven members: Chief Justice Leah Ward Sears; Presiding Justice Carol W. Hunstein; Justice Robert Benham; Justice George H. Carley; Justice Hugh P. Thompson; Justice P. Harris Hines; and Justice Harold Melton.

The Court of Appeals has twelve members who are divided into four three-judge divisions: Chief Judge M. Yvette Miller; Presiding Judge Gary Blaylock Andrews; Presiding Judge Edward H. Johnson; Presiding Judge G. Alan Blackburn; Presiding Judge J.D. Smith; Judge Anne Elizabeth Barnes; Judge John J. Ellington; Judge Herbert E. Phipps; Judge Charles B. Mikell; Judge A. Harris Adams; Judge Debra Bernes; and Judge Sara L. Doyle.

COURT WATCH 2008 ANNUAL REPORT

The Court Watch annual report examines various state appellate court decisions that affect consumer issues. This year's Court Watch report is slightly different in two respects from previous years.

First, there is greater emphasis on the facts of each case. The consumer's story often gets lost in the law – significance diminishes behind overarching legal issues heard on appeal. Even though the law and decisions of the cases are important, a full account of the consumer's experiences provides perspective when considering whether a result is fair.

Secondly, a greater number of Court of Appeals cases have been included. The Court of Appeals fields a larger volume of cases and explores more consumer issues than the Supreme Court of Georgia. Further, the disposition of the Court of Appeals is often the final result for many litigants, whereas the Supreme Court of Georgia is selective in the cases it accepts for review.

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American Home Products Corp. v. Ferrari, 284 Ga. 384 (2008)
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Amu v. Barnes, 283 Ga. 549 (2008)
"New injury" exception is still valid and applies to plaintiff's case

Ford Motor Co. v. Gibson, 283 Ga. 398 (2008)
Judicial sanctions imposed against Ford Motor Co. for failing to produce certain documents at trail were reasonable

Moreland v. Austin, 284 Ga. 730 (2008)
HIPAA prevents defense attorneys from making ex parte contact with a plaintiff's former treating physicians

Mikesell v. RP Motorsports, Inc., 283 Ga. 476 (2008)
Retroactive application of an award for attorney's fees under the Tort Reform Act was unconstitutional as applied

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Scott v. Bank of America, 292 Ga. App. 34 (2008)
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Consumer Losses

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Physician owes no duty to warn or protect a patient's relatives concerning any treatment which may result in adverse behavior

Clarendon Nat. Ins. Co. v. Johnson, 293 Ga. App. 103 (2008)
An independent contractor's agent is not a "statutory employer" under the Federal Motor Carrier Safety Regulations, barring a consumer's claim

Cook v. Covington Credit of Georgia, Inc., 290 Ga. App. 825 (2008)
Consumer has no emotional distress claim against collection agents who contacted him at his place of employment and called him racial slurs

Hawkins v. OB-GYN Associates, P.A., 290 Ga. App. 892 (2008)
Under Georgia's 2005 Tort Reform Act, an expert witness basing his testimony on differential diagnosis must also "rule in" the alleged cause of injury

League v. Citibank (South Dakota), 291 Ga. App. 866 (2008)
Credit card company's lack of response to consumer's request for accounting did not release the consumer from his $24,000 debt obligation on the account

Pottinger v. Smith, 293 Ga. App. 626 (2008)
Plaintiff did not present any "clear and convincing" evidence to state a claim against emergency room physician as required by Georgia's 2005 Tort Reform Act

SUPREME COURT OF GEORGIA

Consumer Wins

American Home Products Corp. d/b/a/ Wyeth v. Ferrari

284 Ga. 384, 668 S.E.2d 236

CARLEY, J. (Unanimous decision)

Occasionally, federal law will preempt, or prevent, a state law claim against a regulated entity. The Georgia Supreme Court declared in recent decision in *American Home Products Corp. v. Ferrari* that this is not the case for Georgia law regarding claims against vaccine manufacturers, a tremendous win for consumers.

Marcelo and Carolyn Ferrari sued several drug companies, alleging the vaccine additive thimerosal, which contains mercury, caused neurological damage in their son.[1] Thimerosal is a multiple-dose injectable drug that operates as an antiseptic and antifungal agent. Drug companies argued that any claims alleging the vaccines were negligently designed were preempted by the National Childhood Vaccine Injury Act of 1986 (Vaccine Act).[2]

The Supreme Court of Georgia unanimously held that the Vaccine Act does not preclude the Ferraris' design-defect claims under Georgia tort law. It relied upon two rationales to support its holding.

First, it observed the text of the Vaccine Act does not mandate preemption. In fact, it was modeled after a publication of legal guidelines concerning tort actions, the pertinent portion of which Georgia adopted to govern actions such as this one.[3] It recommends these types of claims be adjudicated *on a case-by-case basis* because many are so fact-intensive.

Additionally, the conditional nature of the provision, which states a vaccine manufacturer may not be liable for damages if injury or death resulted from unavoidable side effects, implies that some vaccine-related injuries or deaths *would* be avoidable, and thus would not receive the protection offered by the Act.

Turning to the legislative intent behind the Vaccine Act, the Court determined Congress did not intend to preempt all design-defect claims by relying mainly upon the Act's committee report. Rather, the language in the report stated an aggrieved party is provided a suitable alternative in the act's no-fault compensation system if he or she could not litigate a claim for manufacturing or warning defect.

In ruling this way, Georgia's Supreme Court becomes the first state supreme court to hold that this provision of the Vaccine Act does *not* preempt state defective design claims. In fact, two federal district courts and a New York state court came to the opposite conclusion. Amid these circumstances, this holding makes Ferrari's win arguably the greatest consumer victory of 2008.

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[1] In addition to the Wyeth family of brands, the Ferraris sued Smithkline Beecham Corporation and twenty other anonymous defendants.

[2] 42 U.S.C.A. § 300aa.

[3] See Restatement (Second) of Torts § 402A, comment k.

Amu v. Barnes

283 Ga. 549, 662 SE2d 113

CARLEY, J. (Unanimous decision; SEARS, C.J and MELTON, J. filed separate concurrences)

The Georgia Supreme Court affirmed the New Injury Exception for medical malpractice suits in *Amu v. Barnes*. It was the first case in which the New Injury Exception was at issue before the Court since *Kaminer v. Canas*.

In January 2000, Wilbert Barnes consulted Dr. C. Bato Amu concerning some recent abdominal discomfort. Amu prescribed suppositories and sent Barnes on his way. Because his symptoms subsided, Barnes assumed that he was healthy. However, in the spring of 2004, Barnes began experiencing recurrences of those symptoms and informed his physician. A colonoscopy revealed a large cancerous tumor, which his physician classified as terminal. Experts would later conclude that it likely began as a small but detectable polyp.

When Barnes filed suit in 2004 for medical misdiagnosis, Amu posed as an affirmative defense that the statute of limitations had expired, thus precluding the suit from litigation. Barnes argued that his case cannot be barred by the statute of limitations because it fell under the New Injury Exception for misdiagnosis cases. The trial court, and subsequently the Court of Appeals, ruled in favor of Barnes, leading Amu to appeal once more.

In an opinion issued June 2, 2008, the Georgia Supreme Court held in favor of Wilbert Barnes. The Court explained that the New Injury Exception should apply to his case because the original condition, a polyp, evolved into something more serious, a cancerous tumor. The Court determined that the two-year statute of limitations began running again from the date that the symptoms of the tumor became apparent in Barnes. He could thus seek damages for "pain, suffering and economic loss that is attributable" to the tumor – his "new injury."[4] The Court confirmed that Barnes also experienced a symptom-free period after Amu prescribed him suppositories

The Court distinguished the facts of this case from 2007's *Kaminer* decision by arguing Canas did not develop a new condition. Rather, his misdiagnosed illness, AIDS, worsened but it did not evolve into a different condition in the way that Barnes' polyp did. Because *Kaminer* cast serious doubt upon the continued validity of the New Injury Exception, the verdict in Amu vs. Barnes was a relief for Georgia patients.

[4] *Amu v. Barnes*, 283 Ga. 549, 553 (2008).

Ford Motor Company v. Gibson

283 Ga. 398, 659 SE2d 346

MELTON, J. (Unanimous decision)

Judicial sanctions imposed against Ford Motor Company for failing to produce certain documents relating to a case brought by a Georgia resident were appropriate, the Georgia Supreme Court held in *Ford Motor Company v. Gibson*.

The event that spawned the litigation was particularly unfortunate and gruesome. Anne Marie Gibson's Mercury Grand Marquis was stopped at an intersection when she was hit from behind by another driver. The impact forced her car into oncoming traffic, where she was hit by a second vehicle. The collisions jammed her car doors shut and caused two sharp Draw-Tite trailer hitch bolts to pierce the fuel tank.

A fire erupted and the gas tank exploded, engulfing Ms. Gibson in flames. She died moments after rescuers arrived. Her husband Artumus brought a negligence suit against Ford, Draw-Tite and the driver of the vehicle that rear ended his wife's car.

The central issue on appeal concerned a decision by the trial court requiring Ford Motor Company to produce documents requested by the plaintiff during "discovery", the phase of litigation which allows parties to learn information about their opponent. The documents were the result of Ford's crash tests of bumper fuel tanks and seat back performance. Ford refused the order and invited the court to hold the company in contempt.

Declining, the trial court sanctioned the company by not allowing it to contest four important issues at trial. Ford was unable to contest the following

> (1) It had defectively designed the fuel system and seats on the Marquis;
> (2) The fuel system and seats were susceptible to failure in rear-impact collisions;
> (3) The acts and omissions of Ford in connection with the design, manufacture and sale of the Marquis' fuel system and seats met the exception to Georgia's statute of repose in that they amount to a willful, reckless or wanton disregard for life or property
> (4) Ford failed to adequately warn consumers, including Ms. Gibson, of these dangers. The jury subsequently found for the plaintiff on all counts.

Ford appealed, arguing the trial court abused its discretion in ordering it to turn over the crash test documents to Gibson and by disallowing it to contest those issues.

The Georgia Supreme Court rejected both contentions, noting a trial court's decisions will be given greater deference as they relate to matters of discovery. Further, Ford was given an opportunity to justify its deliberate refusal to produce the documents. Finally, the trial court simply could have directed a verdict against Ford in favor of the plaintiff, a far more serious sanction.

This case not only yields a positive result for consumers, it also shows that even large corporate defendants must respect the authority of the courts.

Moreland v. Austin

284 Ga. 730, 670 S.E.2d 68

THOMPSON, J. (Unanimous decision)

The Health Insurance Portability and Accountability Act (HIPAA) preempts Georgia law in regard to certain matters. The Georgia Supreme Court has held that this preemption prohibits a defendant's attorney from interviewing a plaintiff's physician without providing notice to the plaintiff in a medical malpractice case, a consumer friendly holding.

HIPAA is a federal law that protects patients' privacy in regard to their private medical information. Acting under the Congressional authorization in HIPAA, the Secretary of Health and Human Services created rules restricting medical providers' release of patient information in any format.

However, when a plaintiff sues on the basis of medical malpractice, he puts his health at issue. When this occurs, medical providers may then disclose sensitive information either by means of a court order or with the patient's consent. If either is absent, a provider may disclose information only when it receives "adequate assurance" that the person whose medical information has been requested was given notice and an opportunity to object. A provider may also obtain a protective order allowing the information to be used only at trial.

Unfortunately, under Georgia law no statutory protection for one's medical records exists when a plaintiff puts his health at issue. A defendant need only file discovery requests or simply speak to the plaintiff's physicians. This is called "ex parte" communication and it occurs when one party communicates with a witness outside the presence of the opposing party.

Amanda Moreland filed a medical malpractice suit in state court against Dr. Michael Austin seeking damages for the death of her husband. During discovery she released her husband's medical records made by three physicians who had previously treated her husband.

Upon receiving and reviewing these records, the defendant's attorneys made ex parte contact with each physician, inquiring about various matters relating to the plaintiff's husband's health. Moreland requested the court bar the defense attorneys from making such ex parte contacts because it violated HIPAA. The court granted Moreland's request leading the defendants to appeal, claiming HIPAA does not preempt Georgia law in this manner.

The Court considered two issues: whether HIPAA preempts Georgia law and, if so, whether those ex parte communications violated the act.

The Georgia Supreme Court recently declared that a patient will be given the protection of either Georgia law or HIPAA, depending upon which of the two offers a greater degree of control and privacy. Applying this rationale, the Court held that defense attorneys violate HIPAA provisions when they engage in such ex parte communications with a plaintiff's prior treating physicians. Additionally, it stated, trial courts are best situated to fashion remedies where a defendant has made ex parte communication with a

plaintiff's prior treating physician. Finally, the Court determined the trial court's grant of plaintiff's request was appropriate under the circumstances.

Control over one's personal information is central to the concept of consumer protection law. The relationships we hold with our doctors should remain confidential unless a patient waives his right to have such protections relaxed. This holding benefits all Georgians because it affirms that patients will receive the greater protection offered between either Georgia law or HIPAA.

Mikesell v. RP Motorsports Inc.

283 Ga. 476, 660 SE2d 534

THOMPSON, J. (Unanimous decision)

The Georgia Supreme Court struck down an award for attorneys' fees in *Mikesell v. RP Motorsports*. However, the decision merely limits the applicability of the statute to the parties before the court. It did not examine the statute itself allowing for the award.

Georgia's Tort Reform Act of 2005 entitles a defendant to recover reasonable attorney's fees and other legal expenses when a court finds either no liability or awards less than 75% of any settlement offer previously rejected by the plaintiff. [4] The provision encourages plaintiffs to settle to avoid paying the opposing party's legal fees, and may even discourage consumers from pursuing legal action at all. It also allows larger corporate defendants to make unreasonably low settlement offers to consumer plaintiffs.

In 2003, Carl Mikesell filed suit against RP Motorsports for faulty installation of certain automotive parts which allegedly caused his car to catch fire and burn beyond repair. The trial court judge decided the case in favor of RP Motorsports in April 2006. Under the recently enacted OCGA 9-11-68(b)(1), the court ordered Mikesell to pay RP Motorsports' attorney's fees and Mikesell appealed.

The Georgia Supreme Court held that applying the settlement offer law to this case was unconstitutional. Georgia's constitution prohibits retroactive use of laws, so the trial court therefore erred by applying the law to a case filed prior to its enactment.[7]

Even though the Court held favorably for a consumer in regard to the application of the settlement offer law, it refused to consider whether the statute is unconstitutional in its entirety. This follows an established principle that courts should limit their holdings to narrow issues with rules that are easily manageable. A previous version of this law had been struck down, but the rewritten statute will stand for now.

[4] O.C.G.A. § 9-11-68(b)(1).

[7] Ga. Const. Art. I, § 1, ¶ 2; U.S. Const. amend. XIV, § 1.

Consumer Losses

Mason v. The Home Depot

283 Ga. 271, 658 SE2d 603

BENHAM, J. (A dissent was filed by HUNSTEIN, P.J., in which CARLEY, J. joined in part)

The Georgia Supreme Court, in deciding *Mason v. Home Depot*, has upheld a statute which makes introducing expert testimony at trial far more difficult. In so doing, it becomes the first of any state supreme court to hold that criminal and civil litigants are not similarly situated under the state constitution and may therefore be subject to disparate governmental treatment.

Georgia's Tort Reform Act of 2005 drastically changed many areas of civil litigation. Most of these changes operate against the interests of consumers who seek to file suit in state court. The provision at issue in *Mason*, O.C.G.A. § 24-9-67.1, makes it substantially more difficult for a civil litigant to introduce expert witness testimony at trial.

Prior to its inception, Georgia courts allowed expert witness testimony if it could assist the judge or jury in deciding the case. Essentially, both sides would put forth their witnesses and the jury would make its decision based on the testimony. However, the new statute lays out a more rigid framework for allowing expert witness testimony, but applies it only to civil trials. Testimony must be based upon:

- Sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
- Testimony as the product of reliable principles and methods;
- The witness's reliable application of principles and methods to facts in the case.

Therefore, instead of leaving such considerations of veracity in the hands of the jury, as they were before, judges now determine whether experts will testify at all.

The plaintiffs, Arvin Mason and his wife Claudia, filed suit against The Home Depot, Inc. and Fletco Company for injuries Arvin sustained as a result of breathing toxic fumes while applying Varathane to his floors. Varathane is a product manufactured by Fletco and sold by The Home Depot. The Masons asserted both companies should be held liable for Mason's injuries.

During trial, the Masons sought to introduce testimony from two expert witnesses. The first expert diagnosed and treated Mason; the second would testify on the toxicity of the agents used in Varathane. The defendants moved to have the testimony of the experts excluded, arguing they did not qualify to testify under the new statute. The trial court agreed and the Masons lost the case.

The Georgia Supreme Court upheld the trial court's ruling. The Masons' primary argument was that the new statute violates equal protection because it forces civil litigants to meet higher evidentiary standards than criminal litigants. The equal protection clause, however, guarantees all similarly situated persons will be treated in a consistent manner by

government.[5] They also argued the legislation is completely arbitrary, serving no legitimate governmental purpose. Finally, the Masons claimed the statute could not be applied retroactively to them, as their litigation had begun before the law was put into effect.

The Court rejected all of the Masons' contentions, noting first that in order to claim an equal protection violation the plaintiff must show that he or she is similarly situated to another class of persons from which they are differently treated, which it stated the Masons failed to do. This doctrine guarantees, for example, that persons of all races will be treated equally by government. The Masons alleged they were similarly situated with criminal litigants, a class of persons against whom this new evidentiary standard was not imposed. The Court, however, stated the Masons failed to show any similar situation and dismissed their argument that the law was arbitrary, deferring to the judgment of the legislature. Finally, it noted that issues pertaining to courtroom evidence are matters of process, and as such any pertinent rules may be applied retroactively.

This result is representative of a larger trend of judicial decisions largely supporting the Tort Reform Act. Unfortunately, both that statute and this decision stand firmly against the ideal of consumer protection.

Georgia Public Service Commission v. Turnage

284 Ga. 610, 669 S.E.2d 138

CARLEY, J. (Unanimous decision)

The Georgia Supreme Court has held that the Public Service Commission (PSC) has no duty to review properly filed petitions submitted by Georgia residents contesting the placement of electrical substations near their homes, even though the PSC regulates the placement of those substations. This can be taken to mean that even where certain public agencies possess the right to review the actions of quasi-governmental entities over which they have authority, those agencies may decline to do so solely according to their discretion.

Jeff Turnage and several of his neighbors formally requested that the PSC order Georgia Power to terminate construction of an electrical substation located near their residences. The PSC refused to consider the petition, stating that the placement of the substation had no relation to the policy purposes of the commission and no standards existed to guide their determination of the issue.

Turnage appealed to a Georgia state court, which ordered the PSC to take jurisdiction and to formulate reasonable standards for deciding the matter. The PSC appealed to the Georgia Supreme Court, which accepted review and issued this decision.

The Court ruled the PSC has the authority to regulate substation placement, but that it has not exercised that power. Such an absence of governmental regulation in a particular

area, it continued, does not require it to take the case and formulate standards for deciding it. As the Court stated, “In this case, there is simply a power which may or may not be exercised.”

The principle taken from this decision can be relied upon by Georgia public agencies in refusing to field citizens’ petitions on legitimate issues of public interest. The rule emerging from this case, that the authority to regulate does not necessarily include the obligation to review, yields yet another blow to consumers across the state.

GEORGIA COURT OF APPEALS

Consumer Wins

City of Atlanta v. Hofrichter-Stiakakis

291 Ga. App. 883, 663 SE2d 379

MIKELL, J. (Unanimous decision)

The City of Atlanta is liable to a consumer because it failed to maintain and repair a storm drainage pipe that crossed underneath her property. The faulty pipe flooded her property on several occasions causing considerable damage to her home.

Eva Hofrichter-Stiakakis and her husband purchased a home in the City of Atlanta in 1985. The two were unaware of an underground storm pipe that crossed their property and connected to a catch basin owned and maintained by the City. Between 1997 and 2000 Hofrichter experienced flooding on at least three occasions as a direct result of the faulty pipe. In 2002, Hofrichter reported to the city that a geyser had erupted in her yard. The City sent specialists to the property twice but offered no resolution.

By the time Hofrichter sold the house in January 2005, the flooding had gotten so bad that trash was washing into her yard, her home was infested with ants and rats, and she was experiencing migraines as a result of the substantial accumulation of mold.

Hofrichter sued the City of Atlanta on a theory of nuisance. To prevail in a nuisance action, a plaintiff contends that her right to quiet enjoyment of her property has been unreasonably disrupted by the manner in which another has used his or her own property.

Hofrichter would need to show that the storm pipe was property of the City. However, not only was it part of the City's sewer system, the City was also prevented from denying ownership because it used the pipe for its own benefit, willingly maintained the pipe, and never stated to Hofrichter that the pipe was her responsibility. The trial court ruled in favor of Hofrichter, awarding her money damages and ordering the City of Atlanta to pay her attorney's fees.

On appeal the court determined whether or not the City exercised enough control over the storm pipe to be held liable for any harm the pipe caused to Hofrichter's property. The City may not be held liable if it could show that the only reason it attempted to maintain the pipe was to protect the integrity of the sewer system.

The Georgia Court of Appeals found that the City's numerous attempts to repair the pipe over the course of seven years was enough to establish liability. The court also considered it important that the City never denied having control over the pipe until Hofrichter filed suit. Furthermore, it held there was sufficient evidence of bad faith litigation on the City's part shown by Hofrichter to sustain the award of attorneys' fees.

This case illustrates a good example of how government keeps itself in check - where one branch of government fails in its responsibilities to a citizen or consumer, another branch, here, the judiciary, should stand ready to correct that mistake.

Daniel v. Allstate Insurance Co. Inc.

290 Ga. App. 898, 660 SE2d 765

RUFFIN, J. (Unanimous decision)

The Georgia Court of Appeals has affirmed a broad definition of residency as it relates to insurance policies, a holding which may extend coverage to some uninsured and underinsured motorists. This may be so even when a policy's language attempts to limit the residency definition.

On March 13, 2004, Stanley Daniel suffered serious injuries in a two-car accident and subsequently sued the other party's insurer. Even though the policy allowed a payout of $25,000, Daniel's medical expenses far exceeded that. Daniel sued Allstate Insurance Company, his father's insurer, and the insurer of the van he was driving at the time of the accident.

In its motion for summary judgment, Allstate pointed out that both of its policies extended to "resident relatives", or a person who maintains a "physical presence in [the insured's] home with the intention to continue living there." Daniel regularly split his time between his mother and step-father's home, his father's home and his grandmother's home. Allstate argued Daniel cannot fairly be considered a "resident" of his mother's household because there was no real intention on his part to continue living there.

The trial court granted summary judgment in favor of Allstate on this issue. A summary judgment is a final ruling by the court issued only by the judge, without a jury. Summary judgments may be issued where the court is considering only questions of law and not a dispute over facts. By granting the summary judgment in favor of Allstate, the trial court necessarily held that no issues of fact existed between the parties.

The Court of Appeals, however, overturned the trial court's decision. Its rationale noted that issues pertaining to residence are typically ones for a jury to consider because they contain matters of both law and fact. The court also recited the Georgia rule that "one who physically maintains permanent or frequently utilized living accommodations" is considered a resident under the policy.[8] Therefore, because issues exist as to whether Daniel was *in fact* an individual who "frequently utilized living accommodations" at the Gaithers', the Court of Appeals sent the case back to the trial court for further consideration.

This case is positive for consumers because courts often make determinations of residence without jury deliberation.

[8] 290 Ga. App. 898, 902 (2008).

Long v. Hogan

289 Ga.App. 347, 656 SE2d 868

BLACKBURN, P.J. (Unanimous decision)

The Georgia Court of Appeals has held that language in contracts requiring the reimbursement of certain costs in an attempt to collect a debt may be preempted by state law restrictions on those amounts.

Hogan sued Long, seeking the balance of principal and interest on a promissory note held by Hogan. The total amount sought by Hogan came to $4800 in principal and $1,459 in interest. Hogan also sought compensation for attorney's fees, which totaled $10,195. Hogan argued he was entitled to all amounts because the note executed between the two stated that Long would pay all "actual expenditures in any attempt to collect the amount due." The trial court ruled in favor of Hogan on both requests. Long appealed, arguing the language of the contract is preempted by certain provisions of the Georgia code.

In Georgia, such provisions are enforceable, but only up to a certain amount. OCGA §13-1-11 allows a party to be awarded 15% of the balance attempting to be collected on the note. And where there is not a certain percentage laid out in the note for attorney's fees, the holder of the note may collect 15% of the first $500 (or $75) plus 10% of the remaining amount.[9] The Court of Appeals employed §13-1-11 in determining that the most Long could be forced to pay was $650.91 (15% of $500 plus 10% of $5,759.12, or $575.91.)

This decision aids consumers by limiting the amount they may be asked by contract to pay. A strict interpretation of the contract in this case would have essentially placed no cap on the amount to which the creditor was entitled, particularly because of its use of the word "actual." However, even though the trial court was overturned on appeal, the consumer had to incur even more expenses by appealing the decision to a higher court.

[9] OCGA § 13-1-11.

Scott v. Bank of America

292 Ga. App. 34, 663 SE2d 386

BARNES, C.J. (Unanimous decision)

Scott v. Bank of America is instructive because of what consumers may learn from the extraordinary facts of the case, not the law. The circumstances leading up to the litigation center on the unbelievable actions of a consumer's mortgage company. They illustrate how consumers must be proactive and persistent when dealing with large corporate entities.

Usually when a consumer signs a mortgage the lender will request the right to establish an escrow account. Escrow accounts are funded by the buyer in monthly installments that accompany the house note. Property taxes or homeowners' insurance premiums are paid out of that account when due. The following year's taxes and policies are then estimated by the lender based upon the current year's amount - the monthly installment is then adjusted accordingly.

In 1999, Betty Scott entered into a mortgage agreement with Bank of America. The agreement listed a street address for Scott of "3424 West Stubbs Road." However, a construction agreement two years later listed the property at "3444 West Stubbs Road." Later in 2001, perhaps as a result of this discrepancy, Bank of America paid property taxes on the wrong property. Scott sued Bank of America to correct this error and obtained a favorable result in 2003.

Shortly after the suit concluded, Scott was notified by Bank of America that her escrow payment would be increasing by almost $350 to compensate for the shortage accrued from its most recent tax disbursement. Scott refused to pay the amount, and instead requested that Bank of America reevaluate its information. Bank of America disregarded her requests and began foreclosure proceedings.

Scott sued the bank a second time. She alleged Bank of America paid property taxes in the wrong amount for the wrong property and improperly increased her monthly payment amount. The trial court judge decided the case without a jury in the bank's favor.

The Georgia Court of Appeals overturned the trial court's decision. It noted that "[t]he appellate record in this case is extremely confusing, made all the more so by the fact that the exhibits to the affidavit of [Bank of America's] records are scattered and placed backward in the middle of the document."

The court also observed that Bank of America apparently had a *third* address listed for Scott: "[w]with no explanation, the record [stated] that the correct address of the property intended as security for the note is 3414 West Stubbs Road." The confused – and confusing – brief submitted by Bank of America was enough to show that the judge should have left the case in the hands of a jury.

Even though the Court of Appeals only sent the case back to the trial court, Betty Scott is a step closer to having a jury hear her case. Unfortunately, for her and many consumers, she has already tolerated enough and the issue is still not resolved.

Consumer Losses

Bruscato v. Gwinnett-Rockdale-Newton Community Service Board

290 Ga.App. 638, 660 SE2d 440

BERNES, J. (Unanimous decision)

The Georgia Court of Appeals has held that a psychiatrist has no duty either to warn or to protect a patient's relatives. This is so even where the psychiatrist is aware of certain violent tendencies in the patient and impending danger toward others.

Medical malpractice suits allege negligence on the part of the physician. In order to win a negligence action a plaintiff must show that her injuries were caused by a defendant's breach of his duty of care. "Duty" in the legal sense defines the responsibilities owed by one person to another. For example, one owes a duty of "reasonable care" to other motorists and pedestrians when driving an automobile. In *Bruscato*, the court considered whether a psychiatrist owes a duty to the parents of a patient.

On August 15, 2002, Victor Bruscato murdered his mother, Lillian. He had moved in with his parents in 1999 after being released from the Gwinnett-Rockdale-Newton Community Service Board (GRN). Just prior to the murder, Victor's doctor, Derek J. O'Brien, had removed Victor from almost all of his medication at the repeated requests of Victor's mother. O'Brien later testified that he had warned Ms. Bruscato against this.

Vito Bruscato, Victor's father, subsequently filed a wrongful death suit against O'Brien and GRN. He claimed it was the defendants' duty to protect Mrs. Bruscato from harm and warn her of the potential side effects that might result from removing Victor from his medications. He argued that a breach of this duty led to her untimely death.

The Georgia Court of Appeals disagreed that O'Brien had a duty to protect Mrs. Bruscato from any harm her son may possibly cause due to the doctor's treatment. The court stated that such a duty will exist only where a doctor has the legal authority to *physically control* a mental patient, and the patient must be known to be violent. It also held O'Brien had no duty to warn Mrs. Bruscato of subsequent danger following the removal of Victor from his medication.

Furthermore, the court noted that "there is no duty to warn of the obvious, or of that which the plaintiff already knew or should have known."[7] There was plenty of evidence presented at trial, the court explained, showing that Mrs. Bruscato was well aware of Victor's violent tendencies.

This case presents a textbook example of how a doctor's legal duty does not often extend beyond his or her patients. The result is tragic yet instructive as it presents the concept of duty as it relates to negligence suits – only defendants who owe a duty of care to the plaintiff will be held liable for their harmful actions.

[7] 290 Ga. App. 638, 643 (2008).

Clarendon National Ins. Co. v. Johnson

293 Ga. App. 103, 666 SE2d 567

SMITH, P.J. (Unanimous decision)

The Georgia Court of Appeals has overturned a jury verdict in a driver's claim against a major trucking company arising out of an automobile accident in which he was seriously injured.

Wesley Carnley was delivering a shipment of carpet in his box truck from Calhoun to Chatsworth when he veered into oncoming traffic. Carnley negligently hit Brent Johnson's pick-up truck, which he admitted was due to his high rate of speed and failure to negotiate a turn. Carnley is legally blind in his right eye and did not have a commercial driver's license at the time of the incident. Johnson required several surgeries and is now permanently disabled. Carnley was contracted out for the delivery by C & C Motor Freight, a company that had previously signed on as an independent sales agent under American Trans-Freight (ATF).

Johnson sued ATF and its insurer, Clarendon National Insurance Company on a theory of vicarious liability, which holds an employer legally responsible for the negligent acts of its employees performed during work hours.

Alternatively, Johnson's claim relied on the Federal Motor Carrier Safety Regulations (FMCSR), under which he argued that ATF was Carnley's "statutory employer," and should therefore be liable.

The FMCSR states that an employer is "any person engaged in a business affecting interstate commerce that owns or leases a commercial vehicle in connection with that business, or assigns employees to operate it."[8] It defines an employee as anyone "who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. This term includes a driver of a commercial motor vehicle (*including an independent contractor while in the course of operating a commercial motor vehicle*)...."[9] The jury found in Johnson's favor, leading ATF to appeal.

Without citing any Georgia case law in its discussion of this issue, the Court of Appeals overturned the verdict, ruling in favor of ATF. It stated that no evidence was presented at trial that ATF knew of Carnley's employment for C & C and that Carnley himself owned the truck in which the accident occurred, not C & C. Due to these circumstances, the court decided no lease existed that should make ATF vicariously liable for Carnley's negligent acts. The Court noted that it was "troubled by the result in this case" because "the federal regulations simply do not provide a mechanism for Johnson, an injured member of the public, to recover adequate compensation for his injuries."[10]

Public safety is an issue on the forefront of consumer law. This case highlights the lack of protection offered to persons in situations like Mr. Johnson's. The court recognized this, but noted that its hands were bound in regard to the law.

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[8] 49 C.F.R. § 390.5

[9] Id. (Emphasis added.)

[10] 293 Ga. App. 103, 110 (2008).

Cook v. Covington Credit of Georgia

290 Ga. App. 825, 660 SE2d 855

BLACKBURN, P.J. (Unanimous decision)

The Court of Appeals' decision in *Cook v. Covington Credit of Georgia* allows debt collection agencies to harass borrowers at their places of work through the use of racial slurs without fear of penalty under an emotional distress claim.

When Charles Cook fell behind on his loan payments to Covington Credit, two of its employees traveled to Cook's workplace, a hospital, and confronted him about the loan. The two collectors interrogated him in front of his co-workers, ignoring his request that they leave. Cook became upset and pushed one of the representatives to the ground, sparking a fight between the collectors and Cook – one of the collectors addressed Cook with a racial slur during the altercation. As a result of the incident, Cook was suspended from work for three days and was required to undergo financial counseling. He subsequently filed suit against Covington Credit and the two collectors for emotional distress among other claims.

As plaintiff, Cook brought an intentional infliction of emotional distress claim. To win an emotional distress claim, a plaintiff must show that the defendant's conduct was intentional, or at least reckless; the conduct was extreme and outrageous; the defendant's wrongful conduct was the cause of the emotional distress; and the plaintiff's emotional distress was severe. Essentially, the plaintiff must show that the defendant's conduct exceeded all bounds of what may be tolerated in a civil society.

The trial court judge directed a verdict in favor of the defendants on the issue of whether their actions constituted an intentional infliction of emotional distress. Cook appealed the decision, but the Georgia Court of Appeals agreed with the trial judge. It noted that in previous cases, even involving debt collection, the use of insults or threatening language did not sustain a claim for intentional infliction of emotional distress. Further, the use of racial slurs in such a context, the court declared, can not support Cook's claim. Additionally, it argued, Cook presented no evidence of severe emotional distress. This case shows that one's chances of recovery under similar circumstances for emotional distress are very slim. The principle behind the holding gives lenders an unjustifiably broad protection when dispatching representatives who sometimes employ unsavory debt collection practices.

Hawkins v. OB-GYN Associates, AP

290 Ga. App. 892, 660 SE2d 835

MILLER, J. (Unanimous decision)

Differential diagnosis is a method of determining the cause of an illness or injury by ruling out any unreasonable possibilities. Differential diagnosis may be testified to by an expert only if he also successfully "ruled in" the asserted cause of an injury under the state's new expert witness testimony standards, according to a recent Georgia Court of Appeals opinion.

Devi Hawkins filed suit against Dr. Goodman Espy and his practice for injuries allegedly sustained by her son, Trenton, when she gave birth to him. Specifically, she contended that Espy employed excessive force when he attempted to correct a case of shoulder dystocia, a complication that arises during delivery when a mother's pubic bone obstructs a child's shoulder. The excessive force allegedly damaged a system of nerves in Trenton's right shoulder.

At trial, the defendants obtained a directed verdict in their favor. A directed verdict may be granted by a judge if a party fails to produce any evidence to reasonably support its case during trial.

Hawkins appealed, arguing that the directed verdict was incorrect. She cited the testimony of her expert witness who testified that his employment of differential diagnosis led him to believe that negligence on the part of Espy was "more probably than not" the cause of Trenton's injury. A differential diagnosis is made by enumerating all possible causes of a condition and eliminating them based upon circumstance or other evidence. In effect, the expert "rules out" the implausible causes of an injury.

The Court rejected this contention, citing the requirements for expert testimony in Georgia's Tort Reform Act, which mirrors federal standards and allows courts to consult authority from federal courts. Under those standards, an expert's differential diagnosis must not only rule out the implausible causes of an injury, it must also "rule in" the alleged cause. [14]

Therefore, because Hawkins' expert did not "rule in" Espy's alleged negligence as the cause of the injury, and because doing so is required under the federal standards, the Court of Appeals held that the testimony essentially presented no evidence.

The Court of Appeals here adopted the federal standard in its entirety even though the Tort Reform Act allows Georgia courts to only "consult" federal authority on pertinent evidentiary issues. This case shows how quick the Georgia courts are to impose the federal evidentiary standards in state law, casting aside decades of reliable, consistent jurisprudence. The downside for consumers is the adoption of the federal standard often works to deny relief to those who genuinely need it most.

[14] 290 Ga. App. 892, 894 (2008).

League v. Citibank (South Dakota)

291 Ga.App. 866, 663 S.E.2d 266

PHIPPS, J. (Unanimous decision; BARNES, C.J., concurring specially)

The Georgia Court of Appeals' decision in *League v. Citibank* highlights the problems that may be encountered when attempting to represent oneself without an attorney. The unique facts of this case should serve as a warning to the public and media because the plaintiff relied upon an unsavory company peddling a "debt relief plan" in preparing his litigation.

Joseph League, an 86 year old resident of Georgia, stopped making monthly payments on his Citibank credit card account in February 2006. Citibank sued League to recover the balance he had allegedly incurred on the account – more than $24,000. The trial court issued a summary judgment in favor of Citibank for the full delinquent amount.

League argued that he was not required to make any further payments because Citibank never responded to a letter he had sent regarding his account. His letter demanded that Citibank adjust the balance reflected on his February 2006 statement, citing an "agreement" made between himself and the company. This alleged agreement required Citibank to credit the account for certain "prepayments" made by League. It also maintained that Citibank had agreed to "accept [his] signed note(s) or other similar instrument(s) as money." He also demanded an explanation of Citibank's alleged accounting error. League's requests went unanswered.

In fact, League may have been entitled to an explanation. The Fair Credit Billing Act allows a consumer 60 days to contest a charge on a statement as a "billing error." The creditor must reply to the consumer's inquiry if such a dispute arises. If the creditor fails to reply to the consumer's charge of a billing error, it essentially forfeits its right to collect on the alleged error. However, the most that may be legally withheld is $50 – not the full $24,000 owed by League. Furthermore, he failed to articulate any particular transactions or the nature of the alleged "agreement." Due to these errors, the court held that Citibank had no duty to respond to League's allegations.

The most alarming portion of the opinion was then-Chief Judge Barnes' concurrence. She cited several cases involving consumers in similar situations, each of which involved the consumer using a "debt relief plan" from North American Educational Services. The plan requires the consumer pay an initial fee to NAES in exchange for advice and paperwork. In fact, many other state appellate courts have taken note of factually similar cases involving NAES in at least some form.

There is a strong possibility, given the facts of the case, that League was the victim of identity theft. Matters only became worse when he was led to believe that he could successfully litigate a case *pro se* against a major banking institution simply by using forms provided by NAES. Ultimately, the consumer here lost much more than the case with this result.

Pottinger v. Smith

293 Ga. App. 626, 667 SE2d 659

ANDREWS, J. (Unanimous decision)

The Georgia Court of Appeals has substituted policy preference for what should have been the verdict of a jury in a medical malpractice case. The ruling also illustrates how impossibly high the burden of proof is when suing emergency room physicians.

Marshall Lee Smith was injured in a motorcycle accident and taken by ambulance to the emergency room at Floyd Medical Center, where he was treated by Dr. Jill Pottinger, an emergency room physician. A radiologist's report on the results of the x-rays explicitly noted a fracture on Smith's fibular head. However, upon reviewing the report Pottinger declined to offer the results to an orthopedic surgeon for a consult. Smith was released from the hospital four days later with instructions to apply weight to his leg to the extent that he could tolerate it. Mr. Smith followed these orders, but continued to experience severe pain in his left leg over the next three weeks. He consulted an orthopedic surgeon who, after reviewing the same x-rays, advised him not only of his fibular fracture but also of a more serious fracture which required surgery.

Smith sued the emergency room physician who first treated him, Pottinger. A recently enacted Georgia statute requires that in order for a plaintiff to recover in a suit against any hospital's emergency room staff, he must show clear and convincing evidence that its members' actions were grossly negligent.[11] Thus, this higher standard requires Smith to introduce substantially more evidence in order to obtain a favorable verdict.

Pottinger asked the trial court judge to decide the case without a jury and rule in her favor as a matter of law. Judges may decide questions of law only where the facts of the case are neither in dispute nor at issue. However, because negligence cases are very fact-intensive juries are considered superior to judges in rendering such a decision, and only in plain and indisputable cases may a judge issue a ruling on a negligence case as a matter of law. The trial court judge likely had these considerations in mind when he denied the defendant's request. Pottinger appealed this ruling.

The Georgia Court of Appeals overturned the lower court's decision. After presenting the evidence proffered by both sides, the court simply stated that the plaintiff did not meet his burden. The court engaged in no argument or analysis, but instead summarily decided that the case was "plain and indisputable."[12]

A model appellate court judge should never substitute his policy preferences for the deliberation of a jury in these types of fact-intensive cases. The only justification for ruling in this manner is that the evidence offered by Smith came nowhere close the standard of evidence a plaintiff is required to show under this new legislation – a standard that is incredibly high.

There is no compelling justification for requiring patients injured at the hands of emergency room staff to produce evidence of gross negligence. This level of blatant fault is required in very few civil cases.

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[11] O.C.G.A. § 51-1-29.5

[12] Pottinger v. Smith, 293 Ga. App. 626, 629 (2008).