GDLA APPELLATE PRACTICE SUBSTANTIVE LAW COMMITTEE
CASE LAW UPDATES AUGUST – SEPTEMBER 2006

Penalty for filing frivolous appeal. Kurtz v. Brown Shoe Co., 206 WL 2773167 (Ga. App. September 28, 2006). A business invitee brought a negligence action against a shoe company for compensatory and punitive damages. The trial court granted the shoe company's motion for partial summary judgment on the punitive damage claim, and the business invitee appealed. On appeal, the Court of Appeals affirmed the summary judgment. The shoe company requested the Court to impose a penalty on the plaintiffs for filing a frivolous appeal, as provided in Court of Appeals Rule 15(b). Such a penalty may be imposed in cases where the appellant could have no reasonable basis to anticipate that the Court of Appeals would reverse the trial court's judgment. Because the law was indisputably clear regarding the issues raised on appeal and because the plaintiff could have no reasonable basis upon which to anticipate that the Court would reverse the trial court's judgment, the shoe company's motion for frivolous appeal penalties was granted. The Court assessed a penalty against the plaintiffs in the amount of $1,000 for filing a frivolous appeal.

Non-Compliance With Court Of Appeals Rules. In Luca v. State Farm, 2006 WL 2729660 (Ga. Ct. App. September 26, 2006), while addressing a service by publication issue related to an automobile collision lawsuit, the Court of Appeals took the opportunity to "remind" counsel for the defendant that the failure to abide by Georgia Court of Appeals Rule 23(b), requiring the brief of Appellee to be filed within 40 days of appeal docketing or 20 days after the filing of the Appellant's brief, "may result in the non-consideration of the brief and may subject counsel to contempt." Id. at *4. While Appellee's brief was filed late, the Court of Appeals exercised its discretion and considered the merits the brief. Id.

Appellate Review of Dismissal Based on Sovereign Immunity. Georgia Department of Juvenile Justice v. Cummings, 2006 WL 2729648 (Ga. Ct. App. September 26, 2006) involved an action against the State for injuries sustained in a car accident. A number of the Defendants moved to dismiss the action on jurisdictional grounds citing sovereign immunity and the Plaintiff's failure to provide *ante litem* notice. The Georgia Court of Appeals affirmed that a trial court's ruling on a motion to dismiss under a sovereign immunity analysis would be reviewed by the court *de novo*, since whether sovereign immunity applies is purely a matter of law. Id. at *1. The Court of Appeals also found that any factual findings by the trial court would be sustained on appeal as long as there is evidence supporting them, and that the burden of proof would be on the party seeking a waiver of sovereign immunity. Id

Raising new grounds in appellate brief. In All Tech Co. v. Laimer Unicorn, LLC, 2006 WL 2663807 (Ga. App. September 18, 2006), a seller of pumping equipment and components brought an action seeking payments for goods sold to a buyer, and the buyer raised a statute of limitations defense. The trial court granted summary judgment to the buyer, and the Court of Appeals affirmed. In doing so, the court found that the seller had

failed to preserve for appellate review its claim that the statute of limitations upon which the trial court granted summary judgment to the buyer did not apply. The seller had not raised this argument in the trial court but, rather, raised it only in a footnote in its appellate brief. Consequently, the Court found that this argument provided no grounds for reversal. The Court went on to discuss that the purpose behind summary judgment is to dispose of litigation expeditiously and avoid useless time and expense of going through a jury trial. It held that this purpose is thwarted when a party withholds meritorious legal arguments until appeal. Allowing a party to raise new arguments also ignores the duties and responsibilities placed on the parties by O.C.G.A. § 9-11-56.

Appeal from Magistrate Court. Abushmais v. Erby, 2006 WL 2567210 (Ga. App. September 7, 2006). This was a dispossessory action filed in Magistrate Court. After a default judgment was entered against the defendant for failure to answer the summons, the defendant filed a notice of appeal to the Superior Court. He also filed a motion to set aside and vacate the default judgment. The matter was set down for hearing in the Magistrate Court, and a hearing was held. Upon agreement of the parties, the case was then transferred to the Superior Court to resolve issues that could only be resolved by the Superior Court. The Superior Court ultimately granted the defendant's motion for summary judgment against third-party defendants. On appeal, the third-party defendants contended that the Superior Court lacked subject matter jurisdiction because the defendant was required to apply for a writ of certiorari, pursuant to O.C.G.A. § 15-10-41(b), rather than to file a notice of appeal from the entry of the default judgment. The Court of Appeals disagreed, holding that since no action was taken on the defendant's notice of appeal and since it was premature anyway and rendered a nullity by the Magistrate Court's subsequent order transferring the action to Superior Court, the Superior Court properly exercised jurisdiction pursuant to the transfer order, not the notice of appeal. The Court of Appeals ultimately affirmed the Superior Court's summary judgment granted to the defendant.

Effect of Omissions in Appellate Record. Tanks v. The Green Owners Association, Inc., 2006 WL 2455747 (Ga. App. August 24, 2006). This case involves the grant of a summary judgment for the defendant in a personal injury action. At the hearing, the court noted that while a court reporter was present, the hearing was not reported, and thus there was no transcript of the hearing. The trial court granted summary judgment without an explanation. Plaintiff appealed. The Court of Appeals affirmed the summary judgment. The court noted that the "appellant must include in the record those items which will enable the appellate court to ascertain whether a genuine issue of material fact remains or, if the record establishes there is no such issue of fact, whether the moving party is entitled to judgment as a matter of law." Id. at *1. "The burden is on the party alleging error to show it by the record. Where the proof necessary for determination of the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm." Id. In this case, since there was no record of the summary judgment hearing, the appellant court could not ascertain what evidence the trial court erroneously relied on in granting summary judgment. In this case, the plaintiff attempted to create an appellate record under O.C.G.A. § 5-6-41(g), which allows for a narrative transcript of an unreported summary judgment hearing prepared from

recollection. However, since a narrative transcript requires an agreement by both sides, and both sides could not agree on the narrative, "the decision of the trial judge on the proposed narrative transcript from recollection shall be final and not subject to review." Id. Thus, because there was no proper record for the appellate court to review, the trial court's decision was affirmed.

Invited error rule. Harper v. Hurlock, 2006 WL 2455374 (Ga. App. August 24, 2006). This was a breach of contract and negligence action relating to the construction of a home. The builder appealed the jury verdict rendered in favor of the homeowner claiming that the trial court erred by permitting the jury to deliberate after a witness removed "a critical piece of evidence" from the courtroom. The Court of Appeals affirmed under the invited error rule. The "critical piece of evidence" was a handwritten rough diagram created by an expert while waiting to testify. He had written this diagram on the back of another exhibit containing the expert's cost estimates. The cost estimate exhibit was submitted into evidence but the handwritten diagram was not because the expert had taken the handwritten diagram home with him after he testified. The builder's counsel agreed that the court could admit into evidence the cost estimates without the diagram that was on the back and then explain to the jury that the witness took the other one home with him. The judge instructed the jury what had happened and told them to use their collective memory about the drawing since it could not be provided to them during their deliberations. The builder's attorney did not object to the court's instruction. The Court of Appeals held that "pretermitting whether the diagram was 'a critical piece of evidence,' the record clearly reflects that [the builder's] counsel not only stated that he had no objection to the evidence, but actually suggested that plaintiff's counsel substitute exhibit 29 for the missing diagram. [Thus, the builder] 'cannot now complain on appeal of alleged error which [she] induced and in which [she] specifically acquiesced.' Self-induced errors furnish no grounds for reversal."

Notice of Appeal Filed by Non-Attorney for pro se defendant. Jaheni v. State, 2006, WL 2382790 (Ga. App. August 19, 2006). In this case, the Court of Appeals dismissed the notice of appeal because it was not filed by an attorney but instead by an individual "with express permission" of counsel. Although a person has a state constitutional right to legal "self representation," counsel for a represented litigant generally must be a licensed attorney. Under Georgia Court of Appeals Rule 1(a), only a duly licensed attorney may file a notice of appeal to the Court of Appeals on behalf of an individual who does not appear pro se. Because the defendant's notice of appeal was filed by a person not authorized to practice law in this state, the notice of appeal was deemed ineffectual and the appeal dismissed.

Denial of oral argument as grounds for reversal. Mitchell v. Georgia Dept. of Community Health, 2006 WL 2372983 (Ga. App. August 17, 2006). In this case, the appellant claimed that the trial court erred in denying her oral argument. The court held that while as a general rule it is reversibly erroneous for a trial court to deny oral argument, it found no such error in that case. The parties were all present at the summary judgment hearing and allowed to present oral argument although limited to the specific areas about which the court had questions. At no point did the appellant object to the

procedures followed at the hearing nor did she request additional time to present oral argument on any issue. Her failure to object precluded consideration of her appellate claims.

Effect of Omissions in Appellate Record. Hattaway v. Conner, 2006 WL 2255830 (Ga. App. August 8, 2006), this case involved a dispute between an insured under a mobile home insurance policy and the insurance agent. An employee of an insurance agency had assisted the plaintiff in preparing an application for insurance on a mobile home. One question on the application asked whether the person seeking insurance had suffered any mobile home loss claims within the preceding five years. The plaintiff had informed the agency that he had suffered a partial loss, but not a total loss, within the last five years. The agent advised that the question only asked for total losses. Thus, upon this representation, the plaintiff indicated "none" on this question. The plaintiff's mobile home was then destroyed by fire, and the insurance company denied plaintiff's claim, asserting that he previously made a material representation when indicated that he had not suffered any previous losses on his application. Because of the denial, the plaintiff sued the insurance agency for negligent misrepresentation. The insurance company moved for summary judgment, claiming that plaintiff had a duty to read the policy to insure that his responses were correct. The trial court granted summary judgment. On appeal, the Court of Appeals affirmed. The Court ruled that in order to review the trial court's decision that there was no issue of fact for the for a claim of negligent misrepresentation, the court would be required to undergo a "review of the insurance application to determine what language the application employed and what information the application requested, followed by a comparison of the information with the statements attributed to [the insurance agency]." However, because the plaintiff failed to include a copy of the application in the appellant record, the Court "cannot determine whether a jury question exists as to a possible misrepresentation of the application's terms." Therefore, the Court affirmed the trial court's grant of summary judgment.

Citations to the record and appellate briefs. Cleveland Campers, Inc. v. R. Thad McCormack, P.C., __ Ga.App. ___, 635 S.E. 2d 274 (Ga. App. August 3, 2006). This was an appeal from a grant of summary judgment to the defendant. The court began its opinion by chastising the appellant for failing to comply with Court of Appeals Rule 25(a)(1), which provides that "[r]ecord and transcript citations must be to the volume or part of the record or transcript and the page numbers that appear on the appellate records or transcript *as sent from the court below*." The appellants referenced only the record, e.g. "affidavit of John Smith," without including the pages of the record *as sent from the court below*, and even referred to deposition testimony that was not included in the record at all. The Court stated that: "this practice is entirely inadequate and nominally helpful as it requires the court to cull the record on behalf of the parties, something we decline to do. Accordingly, if we have omitted any facts or failed to locate some evidence in the record, the responsibility rests with counsel." 635 S.E.2d at 275. Ultimately, the Court of Appeals, not surprisingly, affirmed this summary judgment.