APPELLATE PRACTICE SUBSTANTIVE LAW COMMITTEE
CASE UPDATES OCTOBER – DECEMBER 2006

Consequences of failing to move for directed verdict on ground of insufficiency of evidence. Aldworth Company, Inc. v. England, 281 Ga. 197, 637 S.E.2d 198 (2006). The Supreme Court granted certiorari to consider whether a party waives her right to contest the sufficiency of evidence on appeal by failing to move for directed verdict on that ground at trial. The Court concluded that the failure to move for a directed verdict bars the party from contending on appeal that she is entitled to judgment as a matter of law because of insufficient evidence but does not bar her from contending that she is entitled to a new trial on that ground. Thus, if a party fails to move for a directed verdict at trial or move for a new trial on the basis of insufficiency of evidence, she can still raise insufficiency of evidence on appeal. If she prevails on that ground, she will be entitled only to a new trial and not judgment as a matter of law.

Notice of appeal from final judgment need not identify all orders being appealed. Mateen v. Dicus, __ Ga. __, 637 S.E.2d 377 (2006), recon. denied (Dec. 15, 2006). Overruling Bowers v. Lee, 259 Ga.App. 382, 577 S.E.2d 9, Miller v. Miller, 262 Ga.App. 546, 586 S.E.2d 36, and Hazelwood v. Adams, 235 Ga.App. 607, 510 S.E.2d 147, the Supreme Court held that the notice of appeal need not designate every order that gives rise to an issue on appeal. Where a direct appeal is taken from a final judgment, "all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court." OCGA § 5-6-34(d). Thus, pursuant to OCGA §§ 5-6-37 and 5-6-34(d), an appellant need only include in the notice of appeal the single judgment that entitles the appellant to take an appeal, and an appellate court must review other orders raised on appeal that may affect the proceedings below regardless of whether or not those orders are expressly included in the notice of appeal.

An order denying motion to compel arbitration is not directly appealable. In American General Financial Services v. Vereen, __ Ga.App. __, __ S.E.2d __, 2006 WL 3437812, *2 (2006), the Court of Appeals reaffirmed that prior to final judgment, orders denying a motion to stay proceedings and compel arbitration are not appealable except under the interlocutory appeal provisions of OCGA § 5-6-34(b). The Court rejected the appellant's arguments that the order was directly appealable under the collateral order doctrine discussed in In re Paul, 270 Ga. 680, 682-83, 513 S.E.2d 219 (1999). The Court further found that the order was not directly appealable under 9 U.S.C. § 16(a)(1)(B) of the Federal Arbitration Act ("[a]n appeal may be taken from an order denying a petition under section 4 of this title to order arbitration to proceed."), finding that Georgia procedural law, which permits a trial court to certify an order denying a motion to compel arbitration for immediate appeal, is not inconsistent with the legitimate objectives of the FAA to enforce arbitration agreements and, thus, is not preempted by the FAA. The Court then dismissed the appeal because it had no jurisdiction over the matter, having already denied the application for interlocutory review.

Pro Se Confusion over direct appeal v. discretionary appeal. In Ghee v. Target National Bank, 282 Ga.App. 28, 637 S.E.2d 742 (2006), recon. denied (Oct. 20, 2006), the pro se plaintiff filed a notice of appeal from a final judgment granting summary judgment against her. A month later, she filed a discretionary application for review of the summary judgment and of an order

denying her pauper status. The Court of Appeals granted the application as to the pauper's affidavit and gave her 10 days to file a notice of appeal as to that order but denied the application regarding the summary judgment order because it was already the subject of her timely direct appeal. Within 10 days, she filed a Notice of Appeal seeking to appeal not only the pauper status order but also the summary judgment order and a later order denying her motion to reconsider the summary judgment order. She then voluntarily dismissed the first notice of appeal she had filed. The Court held that it had no jurisdiction to hear her appeal from the summary judgment order because she had voluntarily dismissed that notice of appeal. It then dismissed her appeal altogether, holding that the appeal from the pauper status order, which was the only order properly before the Court, was moot after she voluntarily dismissed her appeal from the summary judgment order.

The denial of a Motion to Reconsider, Set Aside, and Open Default is not directly appealable. In Jim Ellis Atlanta, Inc. v. Adamson, __ Ga.App. __, __ S.E.2d __, 2006 WL 3718021, *1 (2006), Jim Ellis Atlanta, Inc. directly appealed an order entered by the Superior Court denying its "Motion To Reconsider, Set-Aside, and To Open Default." The Court of Appeals dismissed the appeal, holding that the trial court's order is not directly appealable under OCGA § 5-5-34(a). In situations where a final judgment has been entered, default cannot be opened unless and until the final judgment has been set aside pursuant to OCGA § 9-11-60(d). Further, the denial of a motion to set aside a final judgment under OCGA § 9-11-60 is not directly appealable and instead requires the filing of an application for discretionary appeal under OCGA § 5-6-35(b). Since Jim Ellis Atlanta had not filed such an application, its appeal was dismissed.

Failure to include evidence in appellate record. In State v. Winther, 282 Ga.App. 289, 638 S.E.2d 428 (2006), the Court affirmed the trial court's ruling granting the defendant's motion to suppress a videotape of the defendant's arrest taken by one of the arresting officers. Because the State did not proffer the videotape for inclusion in the record, there was no evidence for the court to review. In so holding, it stated the general rule: "Where the error alleged is that certain evidence has been wrongfully excluded, the rule is well settled that there must have been a proffer or offer of a definite sort so that both the trial court and the appellate court can know whether the evidence really exists. In the absence of such a proffer, the assignment of error is so incomplete as to preclude its consideration by this court." The presumption at that point is that the trial court's ruling was correct, and the ruling will be affirmed by the Court of Appeals in every case in which there is a failure to proffer evidence for its review.

Effect of Court of Appeals Reversal of Judgment. Strickland & Smith, Inc. v. Williamson, 281 Ga.App. 784, 637 S.E.2d 170 (2006), was the second appearance of that case before the Court of Appeals. In the first appearance, the Court reversed the verdict awarded to S&S. On remand, the trial court granted judgment in favor of Williamson rather than holding a new trial. S&S appealed, claiming that the only relief available to Williamson after the first reversal was a new trial. The Court of Appeals agreed, holding that when an appellate court reverses a judgment, the effect is to nullify the judgment below and place the parties in the same position in which they were before judgment. As a general rule, where there is a judgment of reversal but no express direction of the appellate court to the lower court, the case stands as reversed, and a new trial must be had on the issues therein raised. This case is consistent with

Aldworth Company, Inc. v. England, summarized above. Because Williamson had not moved for a directed verdict on the basis of insufficiency of the evidence, he was entitled to a new trial but not to a judgment as a matter of law.

Sanctions for filing frivolous appeal. Vaughn v. Roberts, __ Ga.App. __, __ S.E.2d __, 2006 WL 2796498 (2006), is another case in which the Court sanctioned the appellant and her attorney, jointly and severally, with a $250 fine for filing a frivolous appeal. "Our review of the record, both in this appeal and in Vaughn's previous appeal, the cursory nature of the brief, and Vaughn's failure to provide a complete record all indicate that Vaughn's appeal lacks merit and was brought for purposes of delay." The Court was also disturbed with the "woefully inadequate" brief filed by the appellant. Because I found the Court's analysis to be very instructive for appellate practitioners, I cite it in full here (omitting the footnotes):

> Initially, we note that Vaughn has filed a woefully inadequate brief, less than two pages in length. Our rules require that an appellant's brief contain three parts: a statement of the proceedings below and relevant material facts, with citation to the record; an enumeration of errors; and argument and citation of authorities. Vaughn's brief has a section labeled "Part I," which is blank. This is followed by a one-sentence enumeration of error and a two-paragraph "Citation of Authority." The brief cites an inapplicable code section and contains no citation to the record.
>
> The inadequacy of Vaughn's brief, *inter alia,* dooms her appeal. Vaughn apparently argues that the trial judge was biased and should have recused herself rather than rule on the contempt motion. But Vaughn points to no evidence of this bias, and the record contains no transcripts for us to review. The trial court's order found that Vaughn had willfully failed to comply with its previous order, which is a sufficient basis for a finding of contempt. Because Vaughn has not complied with the rules of this Court and has failed to carry her burden of showing error, we affirm the trial court's finding of contempt.