

Appellate Case Law Update

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Beneke v. Parker **285 Ga. 733** **September 28, 2009**

The supreme court has ruled that the 2005 crime-victim tolling statute, O.C.G.A. § 9-3-99, automatically applies to a defendant who has been cited for alleged violation of the Uniform Rules of the Road, because those are misdemeanors. Therefore, in all accidents in which the defendant has been charged, the personal injury statute of limitation does not begin to run until the prosecution has become final or otherwise terminated, regardless of whether the defendant had any criminal intent.

Furthermore, it should be noted that the rationale of this holding is not limited to vehicle accidents, and the tolling will apply to any tort matter in which the defendant has been charged with the violation of any statute which constitutes a misdemeanor.

O.C.G.A. § 9-3-99 was enacted for victims of alleged crimes, tolling the statute of limitation for tort claims until the prosecution has become final or otherwise terminated (provided that such time does not exceed six years).

In *Beneke*, the defendant was involved in a rear-end collision with the plaintiff on April 27, 2005. The defendant was cited under O.C.G.A. § 40-6-49 for following too closely. The citation was disposed of on May 19, 2005. The plaintiff filed suit for personal injuries on May 11, 2007, more than two years after the date of the collision and accrual of the cause of action.

The defendant raised the defense that the action was barred by the statute of limitations and filed a motion for summary judgment, which was initially granted by the trial judge. Then, upon motion for reconsideration, the trial court reversed and denied the motion for summary judgment, applying O.C.G.A. § 9-3-99, which tolls the statute of limitation for tort claims filed by a victim of a crime. The defendant filed an appeal, and the court of appeals affirmed the denial of the motion for summary judgment. The court of appeals held that

violation of a traffic statute can cause a tolling under O.C.G.A. § 9-3-99, so long as the defendant had acted with criminal intent or with criminal negligence, which are required for a "crime" under O.C.G.A. § 16-2-1. Therefore, the court ruled that it was a jury issue as to whether the requisite criminality was involved.

The defendant obtained certiorari from the supreme court, which upheld the court in part and reversed in part. In a unanimous decision, the court concluded that the plain language in O.C.G.A. § 9-3-99 tolls the statute of limitation whenever the defendant is cited for a violation of the Uniform Rules of the Road. The court held that there is no need for a jury to determine whether the defendant acted with criminal intent or criminal negligence, because any violation of the Rules of the Road is automatically a misdemeanor, and all misdemeanors are crimes under O.C.G.A. § 16-1-3. The supreme court noted that it is constrained by the plain language of the statute, which is not limited to felonies or specific-intent crimes, and "any undesirable result" is a matter "properly addressed to the General Assembly rather than the courts."

State of Georgia Dept. of Transportation v. Douglas Asphalt Co.

297 Ga. App. 511, April 16, 2009

The court of appeals in an *en banc* ruling overturned the case of *MARTA v. Harrington, George & Dunn, P.C.*, 208 Ga. App. 736 (1993), on the issue of whether a cross-appeal survives the dismissal of the main appeal.

In the GDOT case, a dispute had arisen over alleged breach of contracts and non-payment involving an interstate project between GDOT and Douglas Asphalt Co. After the trial court granted in part Defendant GDOT's motion for summary judgment, Douglas filed a direct appeal to the court of appeals. Thereafter, Defendant GDOT also filed a cross-appeal on the trial court's denial in part of its motion

for summary judgment and certain trial court rulings granting Douglas' motions in limine.

The court of appeals dismissed the main appeal by Douglas for failure to file its brief and enumerations pursuant to O.C.G.A. § 5-6-48(e). The cross-appeal for GDOT was dismissed by the court, holding that a cross-appeal may survive the dismissal of a main appeal only if the cross-appeal can stand on its own merits.

Because the cross-appeal by GDOT involved only the trial court's denial of part of its motion for summary judgment and certain rulings on Douglas' motions *in limine*, none of the errors raised by GDOT were final appealable errors. Therefore, all errors alleged by GDOT had required an application for interlocutory review, so the court of appeals dismissed *sua sponte* the GDOT cross-appeal for lack of appellate jurisdiction.

In doing so, the court expressly overturned its earlier decision in *MARTA v. Harrington, George & Dunn, P.C.*, concluding that it had been wrongly decided because it had relied upon *First Union Nat'l Bank v. Floyd*, 198 Ga. App. 99, 100 (1990), which had provided physical precedent only and had contradicted long-established precedent that a cross-appeal survives dismissal of the main appeal only if the cross-appeal has independent grounds for jurisdiction. See *Serco Co. v. Choice Bumper*, 199 Ga. App. 846, 847 (1991).

In overturning *MARTA v. Harrington, George & Dunn, P.C.*, the court of appeals upheld its long-established preference that cases be concluded in the courts below before entertaining appeals and thus avoid piecemeal litigation.

Long v. Greenwood Homes, Inc. **285 Ga. 560, June 17, 2009**

In a split decision, the supreme court held that a plaintiff can dismiss an appeal from magistrate court and then re-file the suit in a court of record under the renewal statute, O.C.G.A. § 9-11-61, thus cir-

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cumventing the judgment which had been entered in magistrate court.

Long had initially filed a claim in magistrate court against Greenwood Homes, Inc., a builder from which Long had purchased a home. A pipe had burst, and Long alleged negligence against Greenwood.

The magistrate court judge entered judgment in favor of Defendant Greenwood, and Long appealed to superior court pursuant to O.C.G.A. § 15-10-41(b)(1). After the case was assigned to superior court, the appellant dismissed the case without prejudice under O.C.G.A. § 9-11-41(a)(1)(A). Three months later, Long utilized the renewal statute, O.C.G.A. § 9-11-61, and refiled the same claims against Greenwood in state court.

Greenwood answered and filed a motion for summary judgment on the ground that when Long dismissed the superior court action, O.C.G.A. § 5-3-7 applied and barred Long from renewing the action, because a valid judgment had been entered on the same claims by the magistrate court judge. The state court judge denied Greenwood's motion for summary judgment, and Greenwood pursued an interlocutory appeal. The court reversed the trial court's decision, holding that O.C.G.A. § 5-3-7 and O.C.G.A. § 9-11-41(a) were in conflict with each other in this case. Applying rules of statutory construction, the court of appeals concluded that O.C.G.A. § 5-3-7 was a specific statute, rather than a general statute; therefore, its application in this case governed. O.C.G.A. § 5-3-7 states that an appeal suspends a lower court's judgment and does not invalidate the judgment. If appeal is withdrawn or dismissed, the lower court's judgment is reinstated, and the rights of the parties are fixed as if there had never been an appeal.

The Supreme Court of Georgia granted certiorari to Appellant Long. The majority, in an opinion by Justice Benham, concluded that the dismissal of the appeal in superior court was not a dismissal of the appeal but of the case. The court concluded that the *de novo* nature

of an appeal from magistrate court to state court or superior court allowed the appellant to utilize the Georgia Civil Practice Act to its fullest extent, including the provisions of O.C.G.A. § 9-11-41(a) and O.C.G.A. § 9-11-61. Therefore, the appellant was allowed to dismiss the superior court action without prejudice and to refile the action.

However, Justices Melton, Hines and Thompson joined in dissent. Justice Melton wrote that the "plain and unambiguous" terms of O.C.G.A. § 5-3-7 applied. Justice Melton applied the statutory construction principle that the plain language of a statute must be followed unless the language produces an absurd, impractical, or contradictory result, "regardless of the desire to relieve a party of some real or imagined hardship."

He further noted that the *de novo* standard was a standard of review which by nature is an instruction to the reviewing court of how to proceed in review of the lower court's decision, but the standard of review does not change the fact that the appellant has appealed the decision of a lower court and seeks to have that lower court's decision altered. Because the appeal does not invalidate the lower court's decision but only suspends it, any dismissal of the matter in the higher court is a dismissal of the appeal and reinstates the lower court's judgment.

Justice Melton noted that the majority's opinion allows any losing party in magistrate court to appeal the lower court's judgment to state or superior court and then dismiss and refile the action so as to allow the losing party to invalidate the lower court's judgment in the matter. The prevailing party can do nothing but watch as its favorable judgment is rendered meaningless. Justice Melton expressed concern this makes any judgment by a magistrate court judge uncertain and unreliable.

Despite Justice Melton's broad concern about any party being able to avoid the consequences of the magistrate court judgment through this maneuver, it should be noted that only a plaintiff can dismiss

without prejudice an action and utilize the renewal statute. Therefore, a defendant who appeals a magistrate court judgment to state or superior court cannot dismiss and refile.

Armstrong v. Rapson **299 Ga. App. 884** **August 28, 2009**

The court of appeals affirmed the denial of the defendants' motion for summary judgment in this medical malpractice action brought by Rapson. Rapson had filed suit for damages arising out of a surgery by orthopedist Dr. Armstrong, and against his professional corporation, Orthopedic Surgery, P.C. The defendants filed a motion for summary judgment contending that there was no evidence to show that Dr. Armstrong has acted negligently during the surgery. The motion was denied by the trial court, and the defendants filed an interlocutory appeal.

The court of appeals affirmed the lower court's denial because the defendant had failed to meet his burden to affirmatively prove the error in the appellate record. The trial court's order denying the motion for summary judgment stated that it had relied upon the "entire record" in reaching its decision. However, the defendant had omitted portions of the trial record. When the defendant filed his notice of appeal, the notice was not in the form directed by O.C.G.A. § 5-6-37, wherein the notice designates portions of the record to be *omitted* on appeal. Instead, the notice instructed that only the items listed on the notice of appeal be included in the record.

The statutory scheme provides the appellate courts with information about what is specifically omitted on appeal. However, designating the items to be included in the record does not provide the appellate courts with this information and places the courts in the position of not knowing what is omitted and whether or not the omitted portions are relevant to the issues on appeal. Therefore, the court concluded that in absence of a complete appellate record to review, the judgment

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below is presumably correct and must be affirmed.

In support of its decision to affirm the lower court's judgment, the court noted that the brief of the appellee referred to deposition testimony by a nurse which appeared relevant to the issue of summary judgment. This deposition was not one of the items designated to be included in the appellate record by defendants and remained with the trial court.

Sunbelt Asphalt Products, Inc. v. American Saturated Felt, Inc.
A09A1821, October 7, 2009

The court of appeals affirmed judgment for American Saturated Felt, Inc. and the denial of Sunbelt Asphalt Products, Inc.'s motion for directed verdict, motion for J.N.O.V., and certain evidentiary rulings by the trial court.

The appellate court needed to review the evidence and testimony at trial in order to rule, but the appellant had failed to submit a transcript with the appellate record. Therefore, the court concluded that the appellant had failed to meet its burden to affirmatively prove its enumerations in the record, and the judgments and rulings were presumed correct.

The court noted that the notice of appeal had made no mention of the record or trial transcript, although the transcript was cited in the appellant's brief. The court communicated with the trial court clerk, who averred that his records indicated that a trial transcript was never filed. However, the docket did reflect that the trial court had granted appellant additional time to file the trial transcript of evidence and proceedings. Because the transcript was not sent to the court of appeals, the court could not review the proceedings to determine if there were any errors by the lower court. Therefore, the judgment against the appellant was affirmed.

Owens v. St. Victor
A09A1488, October 2, 2009

The appellant proceeded *pro se* in his appeal of certain orders by the lower court related to a discovery dispute between the parties. The

court of appeals dismissed the appeal *sua sponte* because the appellant had failed to obtain a certificate of immediate review. Although the court had entered sanctions against other defendants, including striking of those defendants' respective answers, the action was still pending below. Therefore, the appellant's use of direct appeal did not grant the appellate court jurisdiction, and the court dismissed the appeal.

Silman v. Associates Bellemeade

S09G0490, October 19, 2009

The supreme court granted certiorari to determine whether the court of appeals had erred by failing to apply the supreme court's recent decision in *Baxley v. Hakiel Industries*, 282 Ga. 312 (2007) on the issue of spoliation. The supreme court affirmed the decision of the court of appeals, even though the court of appeals decision had not discussed the *Baxley* case.

The action arose out of a claim for damages by filed by the plaintiff after a deck at a friend's rental home had collapsed while the appellant was standing on it. After the deck collapsed, the defendants (property owner and property management company) had the debris from the deck removed. At the time of the removal, there was no pending litigation, and no evidence was submitted that there was actual contemplation of litigation.

After the plaintiff filed her complaint for damages and defendants answered, the defendants filed a motion for summary judgment on the grounds that there was no evidence that the defendants had actual or constructive knowledge regarding a defect in the construction or condition of the deck. The plaintiff moved for sanctions, arguing that by removing the debris the defendants had destroyed or failed to preserve the evidence which was necessary to show a defect, despite the likelihood that the potential for litigation existed.

The trial court granted the motion for summary judgment and denied the motion for sanctions. The trial court entered findings,

inter alia, that the removal of the debris did not create a presumption that the debris contained evidence harmful to the defendants, because at the time of removal there was no actual pending or contemplated litigation. The plaintiff appealed, contending that the language "potential for litigation" found in the opinion of *Baxley v. Hakiel Industries* expanded the spoliation standard. The plaintiff argued that "potential for litigation" can include situations beyond where litigation is pending or contemplated.

In *Baxley*, the supreme court had concluded that the destruction by a bar manager of a videotape of the environs of the bar on the night an intoxicated bar patron left and was later involved in a motor vehicle collision was spoliation of evidence. The destruction of the videotape raised the rebuttable presumption that the contents of the videotape were harmful to defendant. The court concluded that the bar manager was aware of the potential for litigation when he made the decision to destroy the tape and failed to preserve any evidence which may have been caught on tape tending to show that the patron would soon be driving. Appellants contended that this language of "potential for litigation" applied in the circumstances where the debris from the collapsed deck was removed.

However, the supreme court in *Silman* rejected the expansion, concluding that the plaintiff had taken the phrase out of its proper context. The court held that the *Baxley* phrase "potential for litigation," when taken in its proper context, did not expand previous case law and referred merely to litigation which is actually pending or contemplated. The court affirmed that spoliation refers to the destruction of or failure to preserve evidence that is necessary to contemplated or pending litigation.

Akuoko v. Martin
298 Ga. App. 364
June 16, 2009

The plaintiff was involved in a motor vehicle collision on March 6, 2006. The plaintiff filed a complaint for bodily injury arising out of the

collision on February 29, 2008. The plaintiff failed to perfect service until after the expiration of both the statute of limitations and the five-day grace period. Service was perfected on March 19, 2008.

After filing a timely answer, the defendant filed a motion for summary judgment on the grounds that the late service did not toll the expiration of the statute of limitations, and that the plaintiff could not establish that the plaintiff had acted diligently and with reasonable efforts to ensure the defendant was served as quickly as possible.

The plaintiff submitted an affidavit which generally stated the actions that had been taken, including several phone calls to the sheriff's office, during which the plaintiff was told that the sheriff had been out several times but had been unable to perfect service. The affidavit did not contain specific details about the specific date on which the plaintiff had notice from the sheriff's office of the difficulty in perfecting service and what actual steps the plaintiff had then taken to ensure that service was effectuated as quickly as possible.

The trial court granted the motion for summary judgment, finding that the plaintiff was guilty of laches and had failed to demonstrate on the evidentiary record that the plaintiff had acted with due diligence to ensure the defendant was given notice of the complaint as quickly as possible after the statute of limitations expired. Thus, the late service could not relate back to the filing of the complaint, and the cause of action was barred by the statute of limitations.

The court of appeals affirmed the grant of summary judgment, noting that the evidence submitted by the plaintiff must demonstrate with specificity the actual dates and details of what actions were taken especially once the plaintiff was on notice from the sheriff's office of the difficulty in perfecting the service. "Once the plaintiff becomes aware of a problem with service, ... his duty is elevated to an even higher duty of the greatest possible diligence to ensure proper and timely service." It was within the trial court's discretion to find that the plaintiff had not complied with that duty. The court distinguished this case from *Lee v.*

Kim, 275 Ga. App. 891 (2005), in which the plaintiff had relied upon the sheriff to execute his duty to perfect the service upon defendant in a timely manner within the five-day period and was without notice that the sheriff had failed to do so.

The court stressed that its decision here is not to be taken to encourage a plaintiff to fail to affirmatively check with the sheriff's office on the status of the service, but rather that the plaintiff should

understand the duty to demonstrate with specificity, rather than general statements, that the plaintiff acted with due diligence to effect service as quickly as possible.

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