2017 Georgia Corporation and Business Organization Case Law Developments

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I. INTRODUCTION

This survey catalogs decisions handed down in 2017 by Georgia state and federal courts addressing questions of Georgia corporate and business organization law. It includes both decisions with significant precedential value and others dealing with more mundane questions of law as to which there is little settled authority in Georgia. Even those cases in which the courts applied well-settled principles serve as a useful indication of trends in corporate and business organization disputes.

The year 2017 saw two notable decisions in the area of shareholder derivative and class actions, one granting a corporation's motion to dismiss a derivative suit based on the results of a special litigation committee investigation, the other upholding the denial of class certification on the grounds that the proposed class representative could not adequately represent the class. In addition, the Georgia appellate courts addressed matters of first impression regarding the duties of managing members of insolvent limited liability companies, as well as whether business entities can bring claims based on injuries typically thought to be personal in nature, such as intentional infliction of emotional distress. There were also a number of decisions interpreting the 2013 amendments to the Civil Practice Act's provisions for service of process on a corporation.

The decisions are organized first by entity type – those specific to business corporations, limited liability companies and partnerships. The remaining sections of the survey deal with (1) transactional issues potentially applicable to all forms of business organizations, and (2) litigation issues that are common to all business forms, including secondary liability, jurisdiction and venue, evidence questions, and insurance issues.

II. EXECUTIVE SUMMARY

Duties and Liabilities of Corporate Directors, Officers and Employees

The Northern District of Georgia dismissed a shareholder derivative action involving directors and officers of SunTrust, granting SunTrust's motion to dismiss the lawsuit based on a determination by a special committee of its board that the claims lacked merit and should not be pursued. The decision, in a case styled *LR Trust on behalf of SunTrust Banks, Inc. v. Rogers*, 270 F. Supp. 3d 1364 (N.D. Ga. 2017), is one of the most extensive opinions to date addressing the dismissal of shareholder derivative actions under O.C.G.A. § 14-2-744, and it serves as a useful guide to the sorts of issues that are (and are not) litigated when a corporation moves to dismiss under the statute. In response to a shareholder demand letter, SunTrust formed a "demand review committee" to investigate the shareholder's allegations. The committee submitted a comprehensive report of its investigation, in which it determined that no actionable conduct had occurred and that it would not be in the best interest of SunTrust to pursue claims based on the shareholder's allegations. SunTrust thereafter moved to dismiss a lawsuit brought by the shareholder based on the allegations that formed the basis for the demand. Under O.C.G.A. § 14-2-744, a court's consideration of a motion to dismiss is limited to evaluating the

independence of the committee and the reasonableness of its investigation. The court found that the members of SunTrust's demand review committee were sufficiently independent and that the committee conducted a thorough, good faith investigation, and therefore granted the motion to dismiss. The plaintiff has appealed the decision to the Eleventh Circuit.

Other decisions involving director and officer liability issues in 2017 include *HCC Insurance Holdings, Inc. v. Flowers*, 237 F. Supp. 3d 1341 (N.D. Ga. 2017), in which the Northern District addressed a breach of fiduciary duty claim based on an officer's plans to start a competing company while still employed by the corporation. The court granted summary judgment in favor of the defendant, holding that while the officer may have made preliminary plans to form a new business, there was no evidence that he acted upon those plans while he was employed by the plaintiff. In *In re Alpha Protective Services*, 570 B.R. 888 (Bankr. M.D. Ga. 2017), the Bankruptcy Court for the Middle District of Georgia held that the fact that a director advanced money to a corporation to help it make payroll did not establish as a matter of law that the director had "reasonable cause" to believe that the company was insolvent, and found that the director's testimony denying that he knew about the company's tax debts was sufficient to create a triable issue of fact. Finally, in *Lynchar, Inc. v. Colonial Oil Industries, Inc.*, 341 Ga. App. 489, 801 S.E.2d 576 (2017), the Georgia Court of Appeals held that a guaranty was unenforceable against two shareholders of a corporation who executed the guaranty, because it did not correctly identify the name of the corporation that was the principal debtor.

Limited Liability Company Developments

The year 2017 saw a number of notable decisions involving LLC issues. In *Georgia Commercial Stores, Inc. v. Forsman*, 342 Ga. App. 542, 803 S.E.2d 805 (2017), the Georgia Court of Appeals held that managing members of an insolvent LLC owe common law fiduciary duties to the LLC's creditors, similar to those owed by directors of an insolvent Georgia corporation. As a result, an LLC's creditors may bring a common law breach of fiduciary duty action against the managing members for their failure to conserve and manage the LLC's assets for the benefit of creditors. Georgia courts have long recognized such a duty in the corporate context, but it was an open question whether managing members of insolvent LLCs were under a similar duty not to engage in preferential transactions. The Court of Appeals held that it was only logical that LLC managing members be treated the same way as corporate directors, because they occupy a similar role within the business entity. While this ruling creates parity between Georgia corporate and LLC law on this point, it simultaneously creates a significant distinction between Georgia and Delaware LLC law. Delaware law allows breach of fiduciary duty claims by creditors of a insolvent corporation, but not an insolvent LLC.

Two decisions addressed the enforceability of LLC operating agreements. In *Practice Benefits, LLC v. Entera Holdings, LLC*, 340 Ga. App. 378, 797 S.E.2d 250 (2017), the Court of Appeals held that an LLC may be sued for breach of its own operating agreement regardless of whether the LLC signed the agreement. The panel held that O.C.G.A. § 14-11-101(18) unambiguously binds an LLC to its own operating agreement whether or not the LLC executes it. In *Souza v. Berberian*, 342 Ga. App. 161, 802 S.E.2d 401 (2017), the Court of Appeals held that an email discussing proposed terms of an LLC operating agreement did not create an enforceable operating agreement because it was too indefinite as to the material terms of the relationship,

including the percentage of equity that one of the founding parties would receive.

In *McCabe v. Rainey*, 343 Ga. App. 480, 806 S.E.2d 867 (2017), the Court of Appeals reversed a trial court's grant of summary judgment in favor of an LLC's managing member, holding that the other member raised a genuine factual question as to whether the managing member sold the LLC's assets fraudulently and without proper authorization. Although the governing documents contained broad exculpatory language and gave the defendant significant powers in selling assets, the court found that a jury could conclude from the evidence that the defendant intentionally breached those documents and used his powers to benefit himself and family members. In *Richardson v. Coverall North America, Inc.*, 2017 WL 6059208 (N.D. Ga. Dec. 7, 2017), the Northern District of Georgia held that an LLC's owner who signed a franchise agreement on behalf of the LLC was personally bound by the agreement's arbitration clause. As a result, the LLC owner was required to arbitrate statutory and tort claims against the franchisor, even though he was asserting the claims on his own behalf and not on the LLC's behalf. Finally, in *Echenblatt v. Piedmont/Maple, LLC*, 341 Ga. App. 761, 801 S.E.2d 616 (2017), the Court of Appeals held that an LLC equity holder's claims against its managing member were not barred by the doctrine of *res judicata* despite their similarity to claims that were litigated in a prior suit between the parties. The court held that the new claims all were based on conduct occurring after the first suit had ended.

Nonprofit Corporations

One of the more interesting Georgia Court of Appeals decisions from 2017 involved electric-membership corporations. In *Walker v. Oglethorpe Power Corporation*, 341 Ga. App. 647, 802 S.E.2d 643 (2017), the Court of Appeals affirmed the dismissal of two class action lawsuits brought by retail customers of various EMCs, who by virtue of being customers are members of the EMCs that serve them, alleging that the EMCs violated statutory and contractual duties to their members by failing to distribute revenues in excess of operating expenses (known as "patronage capital") to their members in a timely fashion. The court addressed questions of standing as well as whether the EMC Act, O.C.G.A. § 46-3-170 *et seq.*, imposes any duty on EMCs to return patronage capital to members at any particular time. As to the standing question, the court found that the EMC Act did not provide for a private right of action by EMC members to enforce its requirements. The court also noted that the plaintiffs had never been members of several of the EMCs who were defendants, and that this lack of privity deprived the plaintiffs of any claims against those EMCs. Turning to the merits, the court held that even if a private right of action existed, the EMC Act did not create any express or implied duty to return patronage capital on any particular schedule. Instead, the court interpreted the operative statute, O.C.G.A. § 46-3-340, as giving EMCs broad discretion to accumulate patronage capital for purposes such as maintaining reserves and meeting future capital needs.

In *Lathan v. Hospital Authority of Charlton County*, 343 Ga. App. 123, 805 S.E.2d 450 (2017), the Court of Appeals held that a hospital authority is not a corporation that is subject to service under § 9-11-4(e)(1)(A). Instead, even though such bodies are often referred to as public corporations, they are "public bodies" that must be served through their CEO or clerk pursuant to O.C.G.A. § 9-11-4(e)(5). In *McCoy v. Bovee*, 300 Ga. 759, 796 S.E.2d 679 (2017), the Georgia Supreme Court addressed a dispute between a homeowners' association and its president. The

Court affirmed a trial court's injunction removing the officer on the grounds that he had frustrated the work of a receiver that the court had previously appointed to manage the association's affairs. The Court's review was limited to whether there was any evidence to support the trial court's decision, meaning that it did not review whether the removal was authorized under the Nonprofit Corporations Code.

Stock Ownership and Transactional Cases

In *EMM Credit, LLC v. Remington*, 343 Ga. App. 710, 808 S.E.2d 96 (2017), the Georgia Court of Appeals held that a jury was authorized to find that the defendant in a fraudulent transfer action was the "true owner" of a corporation, meaning that he owned all of its stock. The defendant presented evidence that stock certificates had been issued to other people, and there was no evidence that the defendant himself ever received stock certificates. The corporation was unable to produce a complete and reliable stock ledger, however, and claimed instead that its records had been lost or stolen. Given the absence of such evidence, the Court of Appeals held that a reasonable jury could view the defendant's claims with suspicion, and that it did not need to be presented with direct evidence that the defendant was issued stock certificates in order to find that the defendant owned the corporation.

In *Wallace v. Wallace*, 301 Ga. 195, 800 S.E.2d 303 (2017), the Georgia Supreme Court vacated a trial court order, issued after a bench trial, resolving a dispute over the valuation of shares in a family-owned corporation. The dispute turned on whether the valuation was to be governed by the company's original bylaws or a later buy-sell agreement. This critical question was left unanswered by the trial court's order, which included no findings of fact or conclusions of law. The Court concluded that it could not meaningfully review the lower court order in the absence of such findings, and remanded the case with instructions to make such findings. Finally, in *One Buckhead Loop Condominium JE-067 Association v. Regent Tower Holdings, LLC*, 341 Ga. App. 5, 798 S.E.2d 633 (2017), the Court of Appeals held that the presence of a corporate seal on an agreement invoked the 20-year limitations period set forth under O.C.G.A. § 9-3-23. The defendant claimed that its only intent in affixing the seal to the document was to show that the signing officer had the ability to bind the corporation, but the court held that the defendant's stated reasons for affixing the seal were irrelevant.

Litigation Issues

1. <u>Standing and Capacity to Sue</u>.

The Georgia Court of Appeals issued two decisions in 2017 addressing the novel question of whether a business entity can bring claims for intentional infliction of emotional distress. In *Osprey Cove Real Estate, LLC v. SE-027 Towerview Construction, LLC*, 343 Ga. App. 436, 808 S.E.2d 425 (2017), the Court of Appeals held that Georgia law does not recognize such a claim, for the simple reason that business entities cannot experience emotions. The Court of Appeals later reaffirmed this holding in *Ortho Sport & Spine Physicians Savannah LLC v. Chappuis*, ___ Ga. App. ___, 808 S.E.2d 559 (2017), and also held that a business entity cannot bring an invasion of privacy claim because privacy is a personal right. The court distinguished the type of privacy claim asserted in *Ortho Sport*, which was based on an LLC's allegations that

its landlord was harassing it, from claims involving the misappropriation of trade names, which are permitted under Georgia law. An earlier decision involving some of the same parties addressed the corporate separateness doctrine in the context of applying the prior pending action rule. *See Oskouei v. Orthopaedic & Spine Surgery of Atlanta, LLC*, 340 Ga. App. 67 (2017).

2. Secondary Liability.

The Georgia courts continue to address—and reject—attempts by creditors to reach corporate assets to satisfy debts owed by their shareholders, a type of claim known as "reverse veil piercing." In *Community & Southern Bank v. Lovell*, 302 Ga. 375, 807 S.E.2d 444 (Ga. 2017), a unanimous Georgia Supreme Court held that a creditor could not use the Uniform Fraudulent Transfers Act (UFTA) as a basis for asserting a reverse veil piercing claim. The plaintiff sought to set aside transfers made by a corporation owned by the debtor, but the corporation was not alleged to have owed any money to the plaintiff. The Court held that the UFTA provided no basis for a departure from the settled rule against reverse veil piercing. In *Corrugated Replacements, Inc. v. Johnson*, 340 Ga. App. 364, 797 S.E.2d 238 (2017), the Court of Appeals held that the prohibition against reverse veil piercing is not subject to any exceptions. In that case, the plaintiffs argued unsuccessfully for an equitable exception that would apply when the plaintiff is otherwise without an adequate legal remedy.

Finally, in a more conventional veil piercing case, the Bankruptcy Court for the Middle District of Georgia rejected a customer's attempt to pierce the veil of a homebuilder's wholly-owned corporation in *Matter of Hilsman*, 576 B.R. 717 (Bankr. M.D. Ga. 2017). The record showed that the defendant had not strictly observed certain corporate formalities such as annual meetings, but the court found no evidence that the defendant had commingled funds or had otherwise abused the corporate form.

3. Jurisdiction, Venue and Service of Process.

There has been an interesting trend in Georgia federal courts towards more careful scrutiny of diversity jurisdiction cases where the citizenship of an LLC is involved. Unlike a corporation, which is a citizen of its state of incorporation and the state where it maintains its principal office, an LLC is a citizen of every state in which one of its members is a citizen. In *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218 (11th Cir. 2017), the Eleventh Circuit reviewed a sanctions order that was issued in a case that proceeded to summary judgment and an appeal before the parties realized that diversity was destroyed due to the citizenship of a member of a member of one of the parties. While the Eleventh Circuit held that counsel had acted in good faith and reversed the sanction on that basis, the panel nonetheless used its opinion to admonish attorneys handling diversity cases to be more proactive in resolving questions about the citizenship of LLCs at an early point in the litigation.

In other decisions involving jurisdiction and venue questions, the Eleventh Circuit held in *Life of the South Insurance Company v. Carzell*, 851 F.3d 1341 (11th Cir. 2017) that two Georgia corporations that were headquartered in Florida (and therefore were citizens of both states) could not remove a class action brought on behalf of a Georgia-only class by claiming that their Florida citizenship created the "minimal diversity" required under the Class Action Fairness Act's

removal provisions. The panel held that the defendants could only establish minimal diversity by showing that they were not citizens of Georgia, which as Georgia corporations they could not do. In *Burchfield v. West Metro Glass Company, Inc.*, 340 Ga. App. 324, 797 S.E.2d 225 (2017), the Georgia Court of Appeals addressed a case that had been removed under Georgia's corporate venue statute, O.C.G.A. § 14-2-510(b). The court held that a motion to transfer should have been denied because it was not made during the statute's 45-day window for removal.

There were a large number of noteworthy decisions involving the sufficiency of service of process under O.C.G.A. § 9-11-4. In *S.D.E. Inc. v. Finley*, 340 Ga. App. 684, 798 S.E.2d 303 (2017), the Court of Appeals affirmed a decision holding that a McDonald's franchisee's shift manager was a "managing agent" of the franchisee, and that the franchisee was properly served when a copy of the complaint and summons were delivered to the shift manager working behind the restaurant's counter. The court reasoned that the trial court was authorized to find that the shift manager had a supervisory or managerial role for the corporation due to the fact that she was generally in charge of the employees working on her shift. The decision suggests that courts may take a broad view of the "managing agent" as it is used in 2013 version of § 9-11-4(e). In *La Mara X, Inc. v. Baden*, 340 Ga. App. 592, 798 S.E.2d 105 (2017), the Court of Appeals held that a corporation operating a restaurant was not properly served, even though the complaint and summons were served on its CEO at its correct address, because the corporation was incorrectly identified in the complaint and summons. The documents identified an existing but different corporation whose separate existence could be proven from the Secretary of State's records. Because there was another corporation that went by the name on the documents, the court held that the misidentification was not a mere misnomer. In *Vasile v. Addo*, 341 Ga. App. 236, 800 S.E.2d 1 (2017), the Court of Appeals held that a plaintiff exercised "reasonable diligence" in attempting to serve an LLC as that term is used in O.C.G.A. § 14-11-209(f), even though the plaintiff made only one attempt to serve the LLC personally before exercising the option of making substitute service on the Secretary of State. One reason why the plaintiff's efforts were deemed to be reasonable was that the LLC's principal had stated to the plaintiff (who lived in the same house) that he was out of the country. Finally, in *Hunt v. Nationstar Mortgage, LLC*, 684 Fed. Appx. 938 (11th Cir. 2017), the Eleventh Circuit held that a plaintiff failed to serve a defendant through its receptionist, because the receptionist was not an authorized agent and she did not accept service.

4. Class Certification.

In *Lewis v. KNOLOGY, Inc.*, 341 Ga. App. 86, 799 S.E.2d 247 (2017), a divided nine-judge Court of Appeals panel affirmed a trial court order denying class certification in a putative shareholder class action challenging a corporate merger. The majority held that the trial court acted within its discretion when it found that the proposed class representative was inadequate. The trial court's decision was based largely on the plaintiff's deposition testimony, which indicated that she was unaware of basic facts regarding the lawsuit and did not understand her own claims. A dissenting opinion argued that the trial court's review should have been more narrowly confined to evaluating the adequacy of class counsel and the presence or absence of any conflicts of interest between the proposed representative and absent class members.

5. Indemnification and Insurance.

In *Georgia Dermatologic Surgery Centers v. Pharis*, 339 Ga. App. 764, 792 S.E.2d 747 (2017), the Georgia Court of Appeals upheld a trial court order granting a director's claim for mandatory indemnification following his successful defense against litigation brought by the corporation and its other director. The court rejected an argument by the corporation that the mandatory indemnification statute, O.C.G.A. § 14-2-852, did not apply because it could have asserted claims against the defendant solely in his capacity as an officer or in some other capacity.

6. Evidentiary Issues.

In *Robles v. Yugueros*, 343 Ga. App. 377, 807 S.E.2d 110 (2017), the Georgia Court of Appeals reexamined its prior opinion on the admissibility of 30(b)(6) deposition testimony at trial in light of the Supreme Court's holding in *Yugueros v. Robles*, 300 Ga. 58, 793 S.E.2d 42 (2016) that the use of such testimony at trial is limited by other applicable evidentiary rules, including the rules governing expert testimony. Consistent with the Supreme Court's opinion, the Court of Appeals held that a corporate representative's 30(b)(6) testimony cannot be admitted at trial as expert testimony without independently satisfying the requirements of § 24-7-702. Because the proponent of the testimony relied only on Rule 30(b)(6) in arguing that the testimony should be admitted, the Court of Appeals held that the trial court correctly excluded the testimony.

Decisions of the Fulton County Business Court

In *Rollins v. LOR, Inc.*, No. 2014-cv-249480 (Ga. Super. Apr. 28, 2017), the Business Court granted in part and denied in part summary judgment in favor of the sons of O. Wayne Rollins in a lawsuit challenging their conduct as directors of LOR, Inc., a family corporation established to hold assets of the Rollins estate. The case is related to the *Rollins v. Rollins* litigation that has led to numerous appellate decisions in recent years. The plaintiffs, trustees of a marital trust that held shares of LOR stock, alleged that the defendants breached their fiduciary duties to the marital trust by approving certain transactions that depressed dividends, failing to pay dividends owed to the marital trust, and using LOR to purchase property, an airplane and other assets for their personal use. The court held that a number of claims were time barred, rejecting the plaintiffs' tolling argument on the grounds that the record failed to show fraudulent concealment and the plaintiffs should have exercised greater diligence. The court further held that many of the plaintiffs' claims were addressed to conduct that fell within the statutory safe harbor for conflicted interest transactions and/or the business judgment rule. The court denied summary judgment, however, as to the claims that the defendants used LOR funds to buy and manage assets for their personal use. The court also addressed a demand for inspection of books and records, which it found to be moot in light of the extensive discovery taken during litigation, and a claim for judicial dissolution of LOR, which it tabled for later consideration.

In *Gross Endowment Trust, LLC v. Inglesby*, No. 2015-cv-261031 (Ga. Super. Mar. 9, 2017), the Business Court granted summary judgment to the defendant in a dispute between former business partners that turned on whether the plaintiff could rescind a release the parties

executed in connection with the dissolution of their venture. The court held that the plaintiff's rescission claim was foreclosed by his five month delay in seeking rescission after learning of a potentially undisclosed business opportunity that formed the basis for his fraud claim. In *BSL Holdings, LLC v. Trinity Lifestyles Management, LLC*, No. 2016-cv-278256 (Ga. Super. Jan. 20, 2017), the Business Court granted in part and denied in part a motion to dismiss 17 counts a complaint involving the management of LLCs that own and operate senior living facilities. One highlight of the court's opinion is its discussion of operating agreement provisions that purport to eliminate the statutory prohibition on conflicting interest transactions, O.C.G.A. § 14-11-307. The Court observed that such provisions do not, without more, relieve members and managers of other duties, including the duty of care.

In *Obarski v. Elting*, No. 2016-cv-275799 (Ga. Super. May 9, 2017), the Business Court held that it lacked personal jurisdiction over a New York resident who was an officer of a Delaware corporation that maintained an Atlanta office. The case involved claims by an employee of the Atlanta office that the defendant promised him an ownership stake in the event of a sale. The court found that the defendant did not engage in any purposeful act in Georgia related to the plaintiff's claims. In *Strategic Jubilee Holdings, LLC v. Jubilee Development Partners, LLC*, No. 2016-cv-283484 (Ga. Super. Apr. 14, 2017), the Business Court denied a motion to strike a lawsuit seeking a declaratory judgment that the defendants were not members of an LLC. The motion was based on the anti-SLAPP statute and argued that the lawsuit had been filed in retaliation for an earlier lawsuit the defendants had filed in Florida. The court held that the lawsuit before it was strictly a corporate governance matter and was not sufficiently related to the Florida suit to raise any concerns under the anti-SLAPP statute.

III. REVIEW OF DECISIONS

A. DUTIES AND LIABILITIES OF CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES

LR Trust v. Rogers

270 F. Supp. 3d 1364 (N.D. Ga. 2017)—District court dismisses shareholder derivative suit on corporation's motion following special committee's investigation and report.

The Northern District of Georgia dismissed a shareholder derivative suit brought against certain directors and officers of SunTrust Banks, Inc. ("SunTrust") pursuant to a motion brought by SunTrust under O.C.G.A. § 14-2-744. That statute authorizes a court to dismiss a shareholder derivative action on the corporation's motion if, *inter alia*, a committee of independent directors (frequently termed a "special litigation committee") conducts a reasonable, good faith investigation of the claims and determines that maintaining them is not in the corporation's best interest. Here, the court found that SunTrust carried its burden under the statute in all respects. Accordingly, the court dismissed the action without reaching the question of whether the complaint stated a claim.

The lawsuit arose from allegations that the directors and officers allowed SunTrust's

wholly-owned mortgage subsidiary to engage in practices that allegedly violated the Consumer Financial Protection Act of 2010 and multiple other federal statutes, as well as HUD regulations, state consumer protection laws, and its contractual obligations with consumers. Similar alleged practices were the subject of an investigation by federal and state agencies that ultimately led to a settlement between the mortgage subsidiary and those agencies. The plaintiff, a SunTrust shareholder, sent a demand letter to SunTrust alleging that certain of its directors and officers had breached their fiduciary duties to SunTrust by allowing the alleged mortgage practices to occur, thus causing "enormous financial, regulatory, and reputation damage." In response to the demand letter, SunTrust formed a demand review committee ("DRC") comprised of three outside directors. The DRC ultimately submitted a 176-page report of investigation in which it determined that "the actions of the Directors and officers were reasonable and undertaken in the best interests of SunTrust and its shareholders," that the claims asserted in the demand letter were "without basis in fact" and "legally insufficient," and that it would not be in the best interests of SunTrust to pursue litigation or any other action based on the demand.

The plaintiff filed this action in November, 2016, naming as defendants SunTrust and the directors and officers named in the demand. In February, 2017, SunTrust, acting at the direction of the DRC, filed a motion to dismiss. The individual defendants also moved to dismiss.

The opinion, authored by District Judge Steve C. Jones, first addressed the plaintiff's standing to bring a derivative claim. The plaintiff showed that it first acquired SunTrust stock in 2008, but the demand and complaint alleged that SunTrust's mortgage subsidiary had engaged in wrongful practices as early as 2006. Under Federal Rule 23.1(b)(1), and also under analogous Georgia law, a plaintiff to a shareholder derivative action must be able to demonstrate continuous ownership of shares beginning from the time of the transaction complained of. The plaintiff argued that the relevant starting date for purposes of applying the rule should be 2014, because the alleged conduct forming the basis for the demand had not been disclosed until then, and its claim did not begin to accrue until then. The court held that the plaintiff had standing, but took a different approach. It found binding Fifth Circuit authority from prior to the 1981 circuit split holding that where a plaintiff alleges a continuing wrong, the fact that the wrong began prior to the plaintiff's acquisition of stock cannot be a basis for dismissal on standing grounds. *Bateson v. Magna Oil Corp.*, 414 F.2d 128 (5th Cir. 1969). Applying that rule, the court found that the complaint alleged wrongs that continued after the plaintiff purchased stock, and plaintiff therefore satisfied Rule 23.1. The court also found that the plaintiff satisfied Rule 23.1's particularity requirements.

The court then turned to SunTrust's motion for dismissal under § 14-2-744. Under the statute, when a corporation moves for dismissal on the basis of a recommendation by a committee of board members, the corporation bears the burden of showing that the committee was independent and that its determination resulted from a reasonable, good faith investigation. The court found the independence requirement to be easily met, in part because a Georgia Court of Appeals decision had already weighed in on the independence of the same committee members in another case, *Benfield v. Wells*, 324 Ga. App. 85 (2013). As it concerned this case, two of the DRC members became directors after the conduct complained of in the demand and complaint, and the third became a member in the final months of the period under investigation.

The more heavily contested issue was whether the DRC conducted a reasonable investigation. There was no question that the DRC and its independent counsel expended significant time and resources. The DRC's report indicated that DRC members and counsel spent nearly 6,500 hours in investigative time and reviewed over 1.8 million pages of documents. The plaintiff's chief contention was that the DRC's investigation was unreasonable because it never interviewed the government investigators who had investigated the mortgage practices. This, in the plaintiff's view, rendered the entire investigation to be "pro forma" and "half-hearted." The plaintiff pointed to cases from other federal districts (and applying other states' laws) finding that similar special committee investigations were rendered unreasonable by the committees' failure to interview people from outside the organization. In particular, the plaintiff pointed to high-profile investigations involving Google, Microsoft and Big Lots. The court noted that these decisions were not binding, and also that they were distinguishable on their facts. In the cases cited by the plaintiff, the outside investigators had uncovered information that did not come from the corporation itself. Here, on the other hand, the record showed that the government's investigation generally consisted of reviewing documents that were provided to it by SunTrust--essentially the same documents reviewed by the DRC. There was no showing that the government investigators possessed unique information that would have been material to the investigation. The court also found it significant that SunTrust publicly released its 176-page report to the plaintiff, something that had not happened in the other cases. In fact, a redacted version of the report was publicly filed. It concluded that the failure to interview the government investigators did not, by itself, render the investigation unreasonable.

The court separately addressed whether SunTrust carried its burden to show that the DRC's determination was made in good faith. As to this question, the plaintiff argued that a determination not to pursue any claims could not be considered good faith in light of SunTrust's prior acceptance of responsibility for certain conduct alleged in the demand and complaint. The plaintiff again drew a comparison to the Google case, in which the committee found "no wrongdoing or culpability." The court noted that the Google decision, which came from a California federal court, had been criticized in Delaware, and that Georgia courts would more likely find Delaware decisions to be persuasive on questions of good faith by corporate directors. The court also found Google to be distinguishable on its facts because the court in that case had not been provided with the committee's report and therefore did not know why the committee reached its conclusion. Here, the court had the DRC's report, which contained a section reconciling its finding of no "actionable" misconduct with the fact that SunTrust had settled its claims with the government rather than litigate them.

Having found that the committee was independent and that the investigation was reasonable and done in good faith, the Court granted the motion to dismiss. Because all claims were subject to dismissal under O.C.G.A. § 14-2-744, the court did not reach the question of whether the complaint stated a claim. The court also denied the plaintiff's request for discovery prior to the court's resolution of the motion under § 14-2-744, explaining that for purposes of a proceeding under the statute, discovery is only appropriate as an aid to the court, not as a preparation tool for the parties, and finding that additional discovery would not aid it in its review of the motion. The dismissal order has been appealed to the Eleventh Circuit.

HCC Insurance Holdings, Inc. v. Flowers

237 F. Supp. 3d 1341 (N.D. Ga. 2017)—Employees' preliminary plans to form competitor did not breach any fiduciary duty to the corporation.

The Northern District of Georgia entered summary judgment against an insurance company who claimed that its former employee breached fiduciary duties to the company by making plans to form a competing business and soliciting another employee to join him. While the evidence clearly showed that the employee made plans to form a competitor while still employed with the plaintiff and shared these plans with the second employee, the court found that the plaintiff did not establish either that the employee had a fiduciary duty or that he engaged in conduct constituting a breach. The court also entered summary judgment in favor of the two departed employees and their new company as to the insurance company's trade secret, breach of contract and tortious interference with contract claims based on the same events.

The case arose from the abrupt resignation of Remeika and Flowers, two employees of the plaintiff, who thereafter formed their own insurance company which competes with the plaintiff. The summary judgment record showed that Remeika, who held the title "Regional Vice-President of Sales," had been considering the idea of forming his own business when Flowers approached him to tell him she was unhappy with her job and considering leaving the company to become an Uber driver. Remeika then told Flowers of his desire to start a new company. Thereafter, the two researched the possibility of creating their own business, developed a business plan, discussed potential vendors, set up a domain name, and made other plans. The defendants claimed that all of this planning activity took place on their own time, and that they did not solicit potential customers or otherwise compete with the company while they were still employed.

The plaintiff brought a breach of fiduciary duty claim against Remeika based on his conduct directed towards forming a competing business while still employed by the plaintiff and his alleged solicitation of Flowers. On the defendants' motion for summary judgment, the district court first examined whether the plaintiff had presented evidence of the existence of a fiduciary duty. The court noted that an employee does not owe fiduciary duties to the employer merely by virtue of holding a particular title; rather, it is the employee's job responsibilities and ability to bind the company that matter. Here, the evidence showed only that Remeika had a job title suggestive of a high position in the company, which was insufficient to show that he actually had the authority to bind the plaintiff with respect to any matters.

The court then concluded that regardless of whether Remeika could be considered a corporate officer, the plaintiff's evidence was insufficient to establish that he could have breached any duty. Citing the general proposition that "[a] corporate officer does not breach fiduciary duties owed to the corporation simply by making plans to start a competing company while still employed by the corporation," *Gresham & Assocs., Inc. v. Strianese*, 265 Ga. App. 559, 595 S.E.2d 82, 84 (2004), the court found that there no evidence of activity that crossed the line from permissible planning activities to conduct that could constitute a breach. Specifically, the court compared the situation to two other cases in which the Georgia Court of Appeals had found sufficient evidence to raise a jury question as to whether a breach occurred. In *E.D. Lacey Mills, Inc. v. Keith*, 183 Ga. App. 357, 359 S.E.2d 148 (1987), employees of a company that was

in bankruptcy took steps to purchase company property from the bankruptcy trustee, contacted sales representatives about their plans, and engaged in various activities that took them away from the office while they were still employed. In *Gresham & Assocs., supra*, the defendant actively solicited various employees to join a new company he was forming with a third party. Here, the most analogous fact seemed to be that Remeika discussed and planned the new venture with Flowers. The court held that this did not serve as evidence of active solicitation comparable to the other cases, emphasizing that the contact was initiated by Flowers, who had stated that she intended to leave her employment anyway. The court found no evidence that Remeika "used his position to provide financial incentives or other help to induce Flowers to leave her employment."

The other claims were largely based on allegations that Flowers improperly moved emails and other electronic files to her computer's local hard drive shortly before resigning, and engaged in other activities that the plaintiff found to be suspicious. The court granted summary judgment to the defendants, finding among other things that the plaintiff had failed to establish that any trade secret was misappropriated or that Flowers ever subsequently transferred files to her personal computer. The court also held that the plaintiff's "Business Confidentiality Policy," which forbade employees from using and disclosing the plaintiff's confidential information, was unenforceable under Georgia law because it did not contain any time limitation.

In re Alpha Protective Services

570 B.R. 888 (Bankr. M.D. Ga. 2017)—Factual issues precluded summary judgment on preference claim against director of debtor corporation.

In this bankruptcy court adversary proceeding, the court addressed a preference claim based on a corporation's repayment of a cash advance made to it by one of its directors. On the bankruptcy trustee's motion for summary judgment, the court found that the trustee had established that the defendant was an insider at the time of the challenged transfer, but did not establish as a matter of law that the debtor was insolvent at the time or that the defendant had reasonable cause to believe that the debtor was insolvent.

The defendant was a director of a security firm, Alpha Protective Services ("Alpha"). In early 2011, one of Alpha's two bank accounts at Bank of America was frozen due to a garnishment involving a $1.8 million judgment entered on March 23, 2011. At the time, Alpha also owed the IRS over $400,000. The defendant had advanced $100,000 to Alpha in January, 2011 to help the company make its March payroll. On March 11, 2011, Alpha repaid the full amount of the cash advance. Under applicable bankruptcy law, a bankruptcy trustee may avoid a preferential transfer to an insider if it is made for an antecedent debt, the debtor was insolvent at the time of the transfer, and the insider had reasonable cause to believe that the debtor was insolvent. 28 U.S.C. § 3304(a)(2).

The court's analysis of the question of reasonable cause was noteworthy. The court noted that (unlike the objective standards that govern a director's duty of care) the "reasonable cause" inquiry is a subjective one that is heavily dependent on the circumstances of the case. The court further pointed out that reasonable cause is a lower threshold than actual knowledge.

The trustee's argument focused on the defendant's access to financial information and the fact that he had advanced money to help the company make payroll. In response, the defendant gave an affidavit denying that he had any knowledge of the IRS debts and certain details about Alpha's bank accounts that were central to the trustee's argument. He further testified that Alpha's board did not meet in the first quarter of 2011, and that financial statements shown to directors did not reveal serious financial problems. The defendant argued that Alpha was not insolvent but rather was "low capital" because it had aging receivables that were nonetheless likely to be collected because they related to government contracts.

In concluding that the evidence created a jury issue, the bankruptcy court found that even though reasonable cause is a lower threshold than knowledge, the trustee had not met this lower standard as a matter of law. Curiously, the trustee's argument invoked Georgia's business judgment rule—i.e., the presumption that a director has acted on an informed basis and exercised due care—in support of his argument that the defendant had reasonable cause to know of Alpha's financial distress. The bankruptcy court quickly dismissed this sort of use of the business judgment rule as a sword rather than a shield, noting that a plaintiff is not entitled to a corresponding presumption of knowledge when it is the plaintiff's burden to prove the director's knowledge of a fact.

Lynchar, Inc. v. Colonial Oil Industries, Inc.

341 Ga. App. 489, 801 S.E.2d 576 (2017)—Shareholder's guaranty held unenforceable due to incorrect identification of corporate debtor.

In this case, the Court of Appeals held that a guaranty was unenforceable against two shareholders of a corporation because it did not correctly identify the corporation as the debtor, using a d/b/a name rather than the corporation's legal name. In so doing, it reversed the trial court's grant of summary judgment against the two shareholders, which was based on a finding that the guaranty was enforceable.

This was a suit to collect over $1.4 million owed on an account for the sale and delivery of fuel and related products. The plaintiff alleged that it entered into a contract with Lynchar, Inc. d/b/a T&W Oil Company, and that in connection with this agreement, two of Lynchar's shareholders signed personal guaranties. The plaintiff produced a "New Account Data Sheet" showing "Lynchar Inc. d/b/a T&W Oil Co." as the billing name, as well as an "Account Data Sheet and Agreement" dated several months later listing "T&W Oil Co." as the billing name. The guaranties for the two shareholders both identified "T&W Oil, Inc." as the "Debtor" and "Borrower." The operative language of the guaranties provided that the guarantors were liable to pay "Obligations," which included all indebtedness and liability of the "Borrower."

The defendants argued, unsuccessfully in the trial court but successfully on appeal, that they were not associated with any entity known as "T&W Oil, Inc.", that no legal entity having that name existed, and that their guaranties were therefore barred by the Statute of Frauds. Under the Statute of Frauds, a promise to answer for the debts of another is enforceable if it identifies the debt, the principal debtor, the promisor, and the promisee. Under the facts presented, the Court of Appeals found that the guaranties failed to identify the principal debtor.

The Court found its 2011 decision in *PlayNation Play Systems v. Jackson*, 312 Ga. App. 340, 718 S.E.2d 568 (2011) to be controlling. In both cases, the guaranty agreement used the company's fictitious d/b/a name rather than its corporate name, without making any reference to the actual corporate entity. As it did in *PlayNation*, the court reasoned that to allow enforcement of the guaranties under the circumstances "would extend a guarantor's liability by implication or interpretation—an act forbidden to the courts." It concluded, as it did in *PlayNation*, that the failure to identify the actual corporate entity was unambiguous, meaning that the trial court had erred in considering parol evidence of the parties' intent. (That evidence, which included emails between the parties, tax returns, the shareholders' deposition testimony and admissions in an answer that was later withdrawn, all appeared to strongly indicate that the shareholders intended to personally guarantee payment of the debts incurred in connection with the sale contract.)

B. LIMITED LIABILITY COMPANY DEVELOPMENTS

Georgia Commercial Stores, Inc. v. Forsman

342 Ga. App. 542, 803 S.E.2d 805 (2017)—Georgia Court of Appeals holds that managing members of insolvent LLCs may owe common law fiduciary duties to creditors.

In what appears to be a matter of first impression in Georgia, the Court of Appeals held that the fiduciary duties owed by directors and officers of an insolvent corporation are also owed by managing members of an insolvent limited liability company. As a result, creditors may bring a common law breach of fiduciary duty action against the managing members of an insolvent LLC for their failure to conserve and manage the LLC's assets for the benefit of those creditors. This remedy, like its counterpart in the corporate context, appears to be limited to situations in which the managing member intentionally seeks to obtain an improper preferential payment, as was alleged in the case here.

The plaintiff, Georgia Commercial Stores, Inc., served as a landlord to Pargar, LLC ("Pargar"), a realty company structured as a Georgia LLC having two members: the defendant Forsman, who managed Pargar's day-to-day affairs and was its sole director and officer, and Prudential Real Estate Financial Services of America, Inc. ("Prudential"), who provided most of the funding for the realty business through a secured $11,750,000 loan and who had to approve all of Pargar's significant payments. In 2012, Prudential's loan to Pargar matured. Pargar, unable to pay the debt, became insolvent on both a "going concern" basis and a balance sheet basis. During the same time period that the Prudential loan matured, Forsman caused Pargar to repay the remaining balance of an unsecured $250,000 loan that he had made to the LLC, a payment that Prudential approved. In March, 2013, Prudential foreclosed on its security interest, sold Pargar's remaining assets, and began to wind down the LLC's affairs. The same month, Pargar vacated the property it leased from the plaintiff and ceased making payments on its lease. The plaintiff was informed of the foreclosure and sale of Pargar's assets, but not of the payment of the loan to Forsman. The plaintiff obtained a consent judgment against Pargar for the amounts owed under the lease and thereafter conducted post-judgment discovery, where it learned of the payment to Forsman for the first time. The plaintiff then filed suit against Forsman for breach of fiduciary duty and fraudulent transfer under the Uniform Fraudulent Transfer Act. On cross-motions for summary judgment, the trial court entered summary

judgment in favor of Forsman as to the breach of fiduciary duty claim, finding that the plaintiff had not demonstrated causation. The trial court denied the motions as to the UFTA claim, finding that there were unresolved issues of fact. Both parties appealed—the plaintiff from the trial court's grant of summary judgment against it on the breach of fiduciary duty claim, and Forsman from the court's denial of his summary judgment motion relating to the UFTA claim.

Although the trial court's ruling on the breach of fiduciary duty claim was based on a question of causation, and not on the existence or nonexistence of a breach of fiduciary duty claim in favor of an LLC's creditors, the panel's opinion, authored by Judge Barnes, began with a lengthy discussion of the common law doctrine that recognizes such a claim in the corporate context. This doctrine, rooted in cases from the early 20th century, holds that directors and officers of an insolvent corporation become "quasi-trustees" who are bound to manage the corporation's remaining assets for the benefit of creditors. As such, the directors and officers have a fiduciary duty not to use their position for the purpose of preferring themselves over any creditor. We are unaware of any previous Georgia appellate decision explicitly extending this rule to the context of LLCs. The court reasoned that because the management duties of an LLC's managers are generally "similar to the duties of the directors of a corporation," the managers of an insolvent LLC have the same duty as directors and officers of an insolvent corporation. This meant, in the court's view, that the creditors of an insolvent LLC have the same ability as their counterparts in the corporate context to bring a breach of fiduciary duty suit. The court found support for its conclusion from an Illinois bankruptcy court opinion, *In re McCook Metals*, 319 B.R. 570 (Banks. N.D. Ill. 2005), which found that the duties of directors of Illinois corporations to manage assets during insolvency are "fully applicable" to managers of Illinois LLCs.

The opinion then addressed each of the elements of a breach of fiduciary duty claim applicable to insolvent LLCs, finding that the plaintiff had presented sufficient evidence to create a jury question as to each. Specifically, the plaintiff had shown evidence that Forsman caused Pargar to repay his loan at a time when Pargar was insolvent and faced foreclosure, and that this transaction had been concealed from the plaintiff when Pargar informed the plaintiff about the Prudential foreclosure. Turning to the issue of causation that had led the trial court to enter summary judgment against the plaintiff, the court found that the payment from Pargar to Forsman left the plaintiff unable to look to those funds in recovering on its judgment, and therefore was a proximate cause of the plaintiff's injury. The trial court had held that the evidence failed to support a finding of causation because Prudential and another secured creditor would have been entitled to the entire amount that was transferred. The panel disagreed with this analysis, citing the rule that there may be more than one proximate cause of an injury, and finding that the plaintiff only needed to establish that the breach of fiduciary duty was a proximate cause, not the sole cause.

Turning the UFTA claim, the panel affirmed the trial court's decision that questions of fact precluded summary judgmen, noting that the evidence supported the existence of at least three of the "badges of fraud" frequently cited in fraudulent transfer cases. First, the payment was made to an insider, Forsman. Second, there was evidence showing that the payment was concealed from the plaintiff. Finally, the payment occurred at a time when Pargar had defaulted on its debts and was insolvent. These facts were sufficient to create a jury issue as to whether

Pargar acted with actual intent to defraud its creditors.

An interesting implication of this decision is that while it creates some parity between creditors of an insolvent Georgia LLC and an insolvent Georgia corporation, it also creates a significant distinction between Georgia and Delaware LLC law. In Delaware, a corporation's creditors can bring an action against directors when the corporation becomes insolvent, but the Delaware Supreme Court has held that creditors of an LLC do not have the same right. *See CML V, LLC v. Bax*, 28 A.3d 1037 (Del. 2011).

Practice Benefits, LLC v. Entera Holdings, LLC

340 Ga. App. 378, 797 S.E.2d 250 (2017)—LLC member may sue LLC for breach of operating agreement regardless of whether LLC signed the agreement.

In this case, the Court of Appeals reversed a trial court's dismissal order, holding that an LLC member could pursue breach of contract claims against the LLC based on alleged breaches of its operating agreement. The Court of Appeals also held that the member sufficiently alleged a direct injury and therefore could assert its own breach of fiduciary duty claim against the LLC's manager without following the procedures for a derivative action.

According to the complaint, in 2010, Entera Holdings, LLC ("Entera") was formed by four individuals. The four owners' initial intent was for each of them to have one vote in LLC matters, either individually or through a designated entity. Because of an unspecified conflict that occurred during the organization process, the interest of two of the owners was combined into a single entity, Practice Benefits LLC ("Practice Benefits"). At first, the other members allowed Practice Benefits to exercise two votes. In 2013, however, Entera's new manager, Fain, discontinued this practice and refused to allow Practice Benefits to cast two votes. Later that year, Entera returned the other two owners' initial capital contributions to them, but did not do the same for Practice Benefits. In 2014, Entera made distributions to all members except for Practice Benefits. Practice Benefits thereafter sued Entera and Fain, alleging that Entera breached the operating agreement and that Fain breached his fiduciary duties. Both defendants moved to dismiss. Entera argued that Practice Benefits could not maintain a breach of contract action against it because it was not a party to the operating agreement. Fain argued that the breach of fiduciary duty claim was derivative in character and therefore had to be brought pursuant to the procedures set forth in O.C.G.A. § 14-11-801 and § 14-11-802, which require, *inter alia*, that the plaintiff make a pre-suit demand on the LLC's managers or members with authority to cause the LLC to sue in its own right. The trial court granted the motions, and this appeal followed.

The Court of Appeals held, with regard to the breach of contract claim against Entera, that O.C.G.A. § 14-11-101(18) unambiguously binds an LLC to its own operating agreement. The statute provides in relevant part: "A limited liability company is not required to execute its operating agreement and, except as otherwise provided in the operating agreement, is bound by its operating agreement whether or not the limited liability company executes the operating agreement." Since there was no question that the operating agreement, when construed in the light most favorable to Practice Benefits, gave rise to a breach of contract claim, the court

concluded that it should not have been dismissed.

Turning to the breach of fiduciary duty claim, the court recognized that as a general matter, claims that an LLC's manager breached fiduciary duties to the LLC and its members are derivative in character. The court found a departure from the general rule to be warranted under the circumstances, however, because Practice Benefits had sufficiently alleged a "separate and distinct" injury not shared by Entera's other members. Specifically, Practice Benefits had alleged that it was the only LLC member that was deprived of votes and that was not returned its capital or paid distributions. Applying the same analysis that is used to determine whether a claim is direct or derivative in the corporate context, the court concluded that Practice Benefits could proceed directly, and reversed the trial court's dismissal based on its failure to do so. In what appears to be dicta, the panel also observed that the typical reasons for a derivative suit did not appear to be present here; namely, that there was any concern about a multiplicity of suits, or a need to protect creditors or absent shareholders, or a need to compensate injured shareholders for loss of value of their shares. In making this observation, the court suggests that the rule in *Thomas v. Dickson,* 250 Ga. 772, 774, 301 S.E.2d 49 (1983), allowing corporate shareholders to forego derivative action requirements where the traditional reasons for requiring a derivative suit are not present, may be equally applicable to LLCs.

Souza v. Berberian

342 Ga. App. 161, 802 S.E.2d 401 (2017)—Proposed LLC operating agreement held unenforceable due to parties' lack of agreement to material terms.

This Court of Appeals panel ruling affirmed the trial court's grant of summary judgment holding that an email outlining proposed terms of a potential LLC operating agreement did not create an enforceable contract because it was too indefinite as to material terms, such as the size and nature of the plaintiff's interest in the LLC. The court's opinion emphasized that the email itself described the terms as subject to further revision, and that the parties continued to negotiate the terms after the email was sent and never reached a clear agreement.

The plaintiff, Souza, and the defendant, Berberian, planned to form an LLC that would enter into a contract to provide allergy testing services for a medical practice. Souza claimed that the terms of the arrangement were set out in an email sent by Berberian in August, 2014. That email set out certain details of the contemplated operating agreement and stated that the parties "came to terms of what the deal points are." But it also stated that the parties "will need to go over [the agreement] in detail to maybe add or change some points." It further stated, "I'm certain I have not covered all the points, nor is this set in stone," and referred to its contents as "a high level view of what we have discussed." On the important question of Souza's interest in the LLC, the email stated that he would receive 21% of "equity," subject to change. Two days after the email was sent, Berberian formed the LLC, which entered into a contract with the medical practice and began to perform services under the contract. Souza and Berberian continued to discuss terms of their relationship, directly and through counsel. These discussions continued through the rest of 2014 and into early 2015. At some point during these discussions, it was determined that Souza's interest would be 16%, not 21%, and disagreement ensued over what the 16% would apply to (either net profits or gross receipts). In January, 2015, Souza's counsel

wrote to Berberian's counsel that the parties had an enforceable oral agreement that Souza would get 16% of revenue and 16% of the proceeds of any sale of the company. Souza filed the complaint shortly thereafter, asserting contract-based and breach of fiduciary duty claims. The trial court granted Berberian's motion for partial summary judgment as to the claims that were premised on the existence of a contract giving Souza an interest in the LLC.

The Court of Appeals agreed with the trial court that the August, 2014 email did not create or evidence an enforceable contract as to the material terms of the parties' relationship, and could not be enforced. The panel found it particularly significant that there was never any clear agreement as to either the amount of Souza's percentage interest or to what that percentage would apply, stating that "the size of Souza's interest in any venture with Berberian is a material term."

Addressing a separate claim for breach of a non-disclosure agreement, the panel again affirmed the trial court, which held that Souza could not enforce a non-disclosure agreement against Berberian because neither of them were parties to the agreement. Instead, the parties were both LLCs that were associated with the two individuals.

McCabe v. Rainey

343 Ga. App. 480, 806 S.E.2d 867 (2017)—Issues of fact precluded summary judgment in dispute over managing member's sale of LLC's assets.

In this dispute between co-owners of a group of LLCs that operated a car wash, the Georgia Court of Appeals held that issues of fact precluded summary judgment in favor of the defendant, notwithstanding the presence of broad exculpatory language in the LLCs' operating agreements. The court found that the evidence could support a finding that the defendant breached the operating documents intentionally, and perhaps fraudulently, and that the defendant may have earned a personal benefit since his family members had an interest in some of the transactions forming the basis for the lawsuit. Because the trial court had entered summary judgment for the defendant, the panel reversed and remanded the case. It also held that the plaintiff's claims were not barred by res judicata, reversing the trial court on this point as well.

At the time of the actions complained of in the complaint, the plaintiff and defendant were 50/50 members and owners of Car Wash Partners LLC, which in turn was the sole owner and member of two LLCs, one of which (Carnett's LLC) owned land and other assets for the parties' car wash business and the other of which served as an operating company. The operating agreement for Carnett's LLC contained fiduciary duty language that mostly tracked the language of O.C.G.A. § 14-11-305, providing that the LLC's members and managers "shall perform their duties in good faith, in a manner they reasonably believe to be in the best interests of the [Carnett's] LLC, and with such care as an ordinary prudent person in a like position would use under similar circumstances." It also contained an exculpatory clause providing that "[n]o Member or Manager shall be liable to the LLC or to any other Member" unless the losses at issue "shall have been the result of fraud, deceit, gross negligence, willful misconduct, or a wrongful taking by the Member or Manager." Finally, the operating agreement provided that someone vested with discretionary powers under it "shall be entitled to consider only such interests and

factors as it desires, including its own interests, and shall have no duty or obligation to give any consideration to any interest of or factors affecting the LLC or any other person."

When the operating agreements were written, the plaintiff was the manager of Carnett's LLC and had a 60% interest in Car Wash Partners. That changed in October, 2012 after Carnett's defaulted on a secured loan and was sued (along with both the plaintiff and defendant) by the lender. In the 2012 lawsuit, Carnett's asserted cross-claims against both the plaintiff and defendant, alleging that they breached their fiduciary duties to the LLC. As part of their effort to settle with the bank, the plaintiff and defendant entered into their own settlement agreement with Carnett's whereby the plaintiff transferred at 10% interest in Car Wash Partners LLC to the defendant (to make them 50/50 owners) and the defendant was installed as the manager of Carnett's LLC. The settlement agreement also authorized the defendant to secure new financing for Carnett's, and permitted him to self-finance, on the condition that if he self-financed he could not charge the company higher than market rate. Another condition of the settlement agreement which would prove to be significant prohibited the defendant from hiring his wife to work at the car wash. Finally, the defendant was vested with broad discretion to sell the assets of the LLCs. Having resolved their own internal dispute, the parties and Carnett's then entered into a settlement with the bank whereby it was agreed that the defendant would secure new financing from his family "in his sole discretion and in accordance with his fiduciary duties" to Carnett's.

The defendant obtained a loan from his family in September, 2013. Thereafter, the car wash business continued to experience financial problems including both worsening revenues and increasing expenses. In July, 2015, the defendant notified the plaintiff that the car wash had defaulted on its new loan and that this triggered his right to sell the company's assets. The plaintiff filed this action in November, 2015, seeking an injunction to block a foreclosure sale of the LLC's assets. Apparently unbeknownst to the plaintiff when he filed the action, the defendant had found a purchaser for Carnett's LLC's land, fixtures and equipment for $1.9 million, slightly less than what the company owed the defendant's family on its loan. The defendant proceeded with the sale, executing documents that represented that he was the "owner" and "sole member" of Carnett's LLC and that there were no lawsuits pending against it. The defendant executed these documents unilaterally, without seeking or obtaining the plaintiff's signature. The sale closed in February, 2016, and virtually all of the proceeds were applied towards the company's loan.

In this action, the plaintiff brought claims for fraud, breach of the settlement agreement and breach of fiduciary duty based on allegations that the defendant hired his wife to work at the car wash despite the settlement agreement's prohibition against such a hiring, that he made false representations in the sale documents regarding his ownership and membership of Carnett's LLC, that he failed to obtain the plaintiff's signature on the sale documents, and that he mismanaged the car wash. The trial court entered summary judgment for the defendant on all counts except for a claim for judicial dissolution.

The Court of Appeals began its analysis by finding that the settlement agreement could be read as supplementing the Carnett's operating agreement. It based this decision on language in the settlement agreement providing that it would control over the operating agreement in the event of any conflict. Thus the court determined that it would read the operating agreement,

including its exculpatory language and broad grants of discretionary authority, together with the settlement agreement. The court then proceeded to find that all of the plaintiff's claims were supported by some evidence that could support a finding that the defendant willfully breached the settlement agreement and/or obtained a personal benefit. For instance, there was evidence showing that the defendant not only hired his wife to work at the car wash, but took measures to conceal this hiring by diverting income to his son. With respect to the sale of the company's assets, the court found that the evidence supported a finding that the defendant misrepresented facts about his ownership and membership interest in Carnett's LLC in order to push through the sale, which could support a finding of intentional breach. It is clear that the court was persuaded that the evidence of concealment was significant enough to render the exculpatory language in the operating agreement inapplicable.

The court's decision was not based entirely on this evidence of concealment, however, and two of its other findings are worthy of mention. First, the court found that the plaintiff may have a meritorious claim based on the defendant's failure to obtain his signature, reasoning that the settlement agreement required the plaintiff's signature on any agreement to sell the company's assets. The court based this decision on language in the agreement that apparently required the plaintiff "to cooperate…in executing loan documents, releases and dismissals…in a timely matter in order to obtain appropriate financing." Arguably, such language does not apply to sale documents at all, and to the extent it does, it addresses only the plaintiff's duty to cooperate and not the plaintiff's authority to bind the company. It is not clear whether other provisions of the governing agreements may have restricted the plaintiff from unilaterally executing sale documents. Second, addressing the mismanagement claim, the court held that the evidence of rising wages, interest and other expenses, coupled with declining revenues, "rais[e] a genuine question of material fact as to whether [defendant] intentionally mismanaged the business." This suggests that the intent needed to survive an exculpation defense could be inferred from the company's financial results themselves. The court did address other evidence that could be pertinent to exculpation, including the fact that the defendant had obtained his family's loan to Carnett's at an above-market rate and had given his family significant powers to foreclose on company assets.

Richardson v. Coverall North America, Inc.

2017 WL 6059208 (N.D. Ga. Dec. 7, 2017)—LLC owner personally bound by arbitration clause in franchise agreement he signed on behalf of the LLC.

This Northern District of Georgia decision illustrates how officers, directors and owners of a corporation can be, and often are, personally bound by arbitration clauses that they sign on behalf of a business entity (and even some that they do not sign). Here, the district court ordered the owner of a limited liability company to arbitrate various federal and Georgia statutory claims that he brought on his own behalf, based on arbitration language in a franchise agreement signed by the plaintiff on behalf of the LLC.

The plaintiffs, Janitorial Tech, LLC and its principal, alleged that the defendant engaged in a scheme to avoid liability under the federal Fair Labor Standards Act ("FLSA") by requiring its janitors to create limited liability companies and enter into franchise agreements with the

defendant. Through this arrangement, the plaintiffs alleged, the defendant was able to misclassify its employees as independent contractors. Janitorial Tech was a party to one such franchise agreement, which the individual plaintiff signed on behalf of the LLC. The plaintiffs sought to represent a class of similarly situated persons and companies who were allegedly injured by the defendant's practices.

The franchise agreement contained an arbitration clause which provided, in relevant part, that "all controversies, disputes or claims between [defendant]…and Franchisee…arising out of or related to this Agreement or the validity of this Agreement or any provision thereof…shall be submitted promptly for binding arbitration." The district court held that this provision could be enforced by the defendant not only against Janitorial Tech, but also against the individual plaintiff, rejecting his argument that he did not agree to arbitrate any claims in his individual capacity. In its opinion, the court surveyed Georgia appellate decisions recognizing that non signatories may be bound to arbitration agreements in certain situations. Relevant to this case was the doctrine of estoppel, under which a non signatory whose claim for relief is intertwined with a contract containing an arbitration agreement is bound by the arbitration clause. Here, the individual plaintiff's claims all depended on existence and terms of the franchise agreements that he alleged were part of a fraudulent scheme to avoid the FLSA's obligations. The court found further support for its decision in the text of the franchise agreement. One provision directly stated that the "shareholders" or "members" of a franchisee that was a corporate entity agreed to be bound by certain enumerated paragraphs, including the arbitration clause. Finally, the court noted that the individual plaintiff had personally guaranteed Janitorial Tech's performance of its obligations under the franchise agreement, citing that fact as a further indication that he agreed to be personally bound by the arbitration clause.

Eichenblatt v Piedmont/Maple

341 Ga. App. 761, 801 S.E.2d 616 (2017)—LLC member's mismanagement claims not barred by res judicata or collateral estoppel where based on events occurring after resolution of prior suit.

In this case, the Court of Appeals held that an LLC interest holder's claims against the LLC's only member were not barred by res judicata or collateral estoppel principles, despite their similarity to claims that were brought and resolved in an earlier round of litigation between the same parties. The court also held that the interest holder had presented sufficient evidence to survive summary judgment on his claim that the member violated the LLC's operating agreement by entering into an unfair loan transaction with the LLC. Since the trial court had held to the contrary as to both points and granted summary judgment to the member, the Court of Appeals reversed.

The dispute involved Piedmont/Maple LLC, which was formed in 1995 to own and operate commercial real estate properties in Atlanta. The parties were originally both members of the LLC, but in 2000, the operating agreement was amended to remove one of the members. The departing member, Eichenblatt, retained the right to receive up to 40 percent of the LLC's quarterly cash flow distributions, as he had done before the amendment. The remaining member, Kaufman Development Partners, L.P. ("KDP"), continued to manage the LLC's affairs. The

amended operating agreement provided that the LLC was permitted to enter into transactions with any member, "provided that the price and other terms of such transactions…are fair to [the LLC] and are not less favorable to [the LLC] than those generally prevailing with respect to comparable transactions." In 2005, in connection with a debt refinancing, KDP split up ownership of the LLC's parcels of property into two separate newly-formed LLCs. As the real estate market soured in the late 2000s, Eichenblatt complained that KDP should have sold the property and that the property would have more value if sold as a single package. These concerns led Eichenblatt to sue KDP for mismanagement of the LLC. Following a trial in 2011, Eichenblatt obtained a money judgment on his claims. The following year, KDP entered into a loan with the LLC to enable the LLC to pay off outstanding debts on one of the properties. The KDP loan carried a higher principal balance than the existing indebtedness and a significantly higher rate than the loan it replaced. A year later, KDP sold the properties in two separate transactions and took steps towards dissolving the LLC. When KDP tendered to Eichenblatt his 40% share, Eichenblatt refused to accept the tender. The LLC, KDP and KDP's general partner filed a new lawsuit seeking a declaration as to the proper amount of the payment to Eichenblatt. Eichenblatt counterclaimed, alleging *inter alia* that the KDP loan agreement was unfair and therefore breached the operating agreement, and that KDP mismanaged the sale of the properties by failing to sell them in a combined bundle.

The trial court had held that the claims relating to the sale of the property were barred by res judicata, since the earlier lawsuit had addressed Eichenblatt's allegations that the properties should be sold as a combined package. KDP and the other appellees argued that even if the claims in the two lawsuits were not identical (as they clearly were not, since the sales did not occur until after the earlier lawsuit concluded), the doctrine of claim preclusion should apply since the issue of unbundling the properties was addressed in the earlier suit. The Court of Appeals disagreed, finding that it was irrelevant that the issue in both suits could be distilled to a common theme. The court wrote: "At issue here is whether sale of the [LLC's] property breached the amended operating agreement or any fiduciary duty. This issue was not and could not have been litigated during the 2011 trial because the April 2013 and November 2013 sales—and the market conditions under which they occurred—had not yet taken place."

Turning to the claims relating to the KDP loan, the court found that the trial court erred in holding that there was no evidence that the loan was unfair. It cited Eichenblatt's testimony regarding the market conditions at the time, finding it to be competent in light of Eichenblatt's 30 years of experience in the real estate industry. The court also cited the significant differences between the terms of the KDP loan and the existing loan, holding that a jury could conclude that the terms were unreasonable.

C. NONPROFIT CORPORATIONS

Walker v. Oglethorpe Power Corporation

341 Ga. App. 647, 802 S.E.2d 643 (2017)—Court of Appeals affirms dismissal of class action suits against electric-membership corporations based on alleged failure to return capital to members.

The Court of Appeals held that two putative class actions brought against a group of electric-membership corporations ("EMCs") asserting claims under the EMCs' bylaws and the Georgia Electric Membership Corporation Act, O.C.G.A. § 46-3-170 (the "EMC Act") as well as common law unjust enrichment and conversion claims, were properly dismissed by the trial court. The panel's opinion, authored by Judge Dillard, addresses interesting questions regarding the management of EMCs and the rights of EMC members.

EMCs are private, non-profit electric utilities formed under the EMC Act. They are owned by their customers, who are considered members of the EMC that serves them. The named plaintiffs in this case are or were retail customers (and therefore members) of local "distribution EMCs." The distribution EMCs involved in the case are all members of two electric cooperatives from whom they purchase power wholesale, Oglethorpe Power Company ("Oglethorpe") and Georgia Transmission Corporation ("GTC"). Oglethorpe and GTC are also structured as EMCs. The gravamen of both complaints was that the EMCs wrongfully and systematically failed to distribute "patronage capital" to the named plaintiffs and class members. Under the EMC Act, all EMCs are required to operate on a non-profit basis. Any EMC earnings that are in excess of its operating costs and expenses are termed "patronage capital". The EMC Act requires EMCs to account for each member's pro rata share of patronage capital. The key question raised by these lawsuits was whether this means that EMCs are also required to *return* patronage capital to the members from time to time. The complaints alleged that Oglethorpe has not returned patronage capital to its members since 1997, even though it has continued to accumulate and account for patronage capital, and that the distribution EMCs likewise have not returned patronage capital (including the amounts they received from Oglethorpe until 1997). The plaintiffs estimated that the defendants have accumulated nearly $2 billion in patronage capital that have not been returned to members. The former members alleged that the defendants were required by the EMC's bylaws and by the EMC Act to return them their pro rata shares of patronage capital upon termination of their membership or some time thereafter. The current members, meanwhile, alleged that the bylaws and EMC Act require the return of capital from time to time according to a "reasonable" schedule.

The trial court dismissed the complaints after appointing a special master, who issued a report recommending dismissal. The trial court cited numerous independent grounds for dismissal, including lack of standing, statute of limitations, failure to state a claim, and absence of any legal duty on the EMCs' part to distribute patronage capital. The Court of Appeals, reviewing *de novo*, found no error in the trial court's findings.

Taking up the former members' appeal first, the court held that the plaintiffs lacked standing to pursue claims against Oglethorpe, GTC, and any of the distribution EMCs of which

they were never members. The court noted that the plaintiffs asserted breach of contract claims and tort claims that depended on the existence of a contractual duty to return patronage capital, but had not identified any contract other than the EMCs' respective bylaws. Those bylaws, however, clearly stated that they constituted a contract between the EMC "and its members," thus foreclosing any argument that the plaintiffs were in privity with any defendant other than the particular EMC that it belonged to. The court further found that the plaintiffs lacked standing to pursue claims directly under the EMC Act because the statute did not expressly provide a private cause of action. Finally, the court rejected the plaintiffs' arguments that they had standing to sue all of the EMCs as co-conspirators, under third-party beneficiary principles, under agency principles, or under the "juridicial-link doctrine" recognized by federal courts.

While lack of standing alone was a sufficient reason to affirm the trial court's decision (since it represented a complete defense for Oglethorpe and GTC, the only defendants residing in the forum county), the Court of Appeals affirmed as to all of the issues raised on appeal. Most notable was the court's treatment of the threshold question of an EMC's alleged duty to return patronage capital to its members. Plaintiffs argued that the EMC Act requires an EMC to return patronage capital. The panel's opinion held that even if the EMC Act were enforceable through a private right of action (an issue already resolved in the defendants' favor), the plain language of the statute did not expressly or implicitly create any duty to return patronage capital. Specifically, the court cited provisions of O.C.G.A. § 46-3-340 expressly permitting EMCs to accumulate funds beyond those necessary for costs and operating expenses "to establish and maintain reasonable reserves" and "for future capital needs and…the purpose of establishing and maintaining a reasonable capital structure." Moreover, the statute enabled the EMC, through its bylaws, to establish provisions for "accounting for, allocating, assigning and disposing of its revenues and assets," without dictating how the bylaws should regulate these matters. The panel wrote: "In essence, the appellants ask this Court (or a jury) to create a mandate that EMCs adopt a particular schedule for refunding patronage capital prior to dissolution based solely on the Act's general principles regarding the cooperative and nonprofit nature of EMCs, rather than based on the statutory text itself. We are not at liberty to do so."

The court then addressed the viability of a breach of contract claim based on the individual EMCs' bylaws, and noted that the plaintiffs had not identified any particular provision of the bylaws requiring the EMC to refund patronage capital at any particular time or on any particular schedule. Instead, the plaintiffs relied on language in the bylaws generally addressing an EMC's promise to "operate on a nonprofit cooperative basis for the mutual benefit of the members who are their customers." The court rejected the notion that this general statement of purpose could create an enforceable duty to distribute patronage capital in the absence of any specific provision imposing such a duty.

The court also agreed that the plaintiffs could not assert an unjust enrichment claim, because such a claim can only exist in the absence of a legal contract, and only where the plaintiff has conferred a benefit on the defendant. Since the plaintiffs could only allege that they conferred a benefit on the particular EMC to which they belonged, and the bylaws are a legal contract between an EMC and its own members, there was no possible basis for an unjust enrichment claim against any defendant. Finally, the court found that the plaintiffs' conversion claim, which was based on the distribution EMCs' retention of funds received from Oglethorpe

in the 1990s, was time barred. Indeed, the court found that *all* of the former members' claims were time barred, since their membership ended more than six years before they filed suit. The court rejected the plaintiffs' tolling argument based on fraudulent concealment, noting that the bylaws were not concealed from the plaintiffs, and that the plaintiffs could have made a books and records request on the EMCs during the period in which they were members.

The trial court's dismissal of the current members' lawsuit was affirmed for largely the same reasons, except that the statute of limitations analysis did not apply to the current members. The court's discussion of the current members' appeal focused on the trial court's finding that the EMCs "have absolute discretion to never retire patronage capital, except upon dissolution." This discussion was arguably dicta since the current members' claims were held to be inadequate for various other reasons. Nonetheless, the court found that the trial court's finding of "absolute discretion" was consistent with the bylaw provisions addressing patronage capital, which state in absolute terms that the EMC must allocate patronage capital to a capital account, but only provide that the EMC *may* retire patronage capital prior to dissolution. The court also reiterated that the EMC Act contains no language mandating the return of patronage capital at any particular time.

Lathan v. Hospital Auth. of Charlton County

343 Ga. App. 123, 805 S.E.2d 450 (2017)—Court of Appeals holds that hospital authorities are not "corporations" for purpose of Civil Practice Act's service of process rules.

This case addresses whether a hospital authority is a "corporation" such that it can be served with process in the same manner as other types of corporations under O.C.G.A. § 9-11-4(e)(1)(A), which authorizes service on a corporation's president, other officer, managing agent or registered agent. The Court of Appeals answered this question in the negative, holding that a hospital authority is a public body that must be served through its CEO or clerk pursuant to O.C.G.A. § 9-11-4(e)(5), even if it is formed as a public corporation.

The plaintiff brought a medical malpractice and wrongful death action against the Hospital Authority of Charlton County d/b/a Charlton Memorial Hospital and several other defendants in January, 2015, based on an incident that occurred at the hospital in February, 2013. The plaintiff served process on a member of the hospital authority's board who also served as its legal counsel. The hospital authority entered a special appearance and asserted that it had not been properly served with process. The plaintiff voluntarily dismissed the suit in July, 2015, and filed a new suit in January, 2016. This time, the plaintiff served not only the hospital authority board member she had previously served, but also its former and current CEOs. The hospital authority argued that the plaintiff's wrongful death and loss of consortium claims were time-barred, because more than two years had passed since the incident, and the new suit could not be treated as a renewal of the original suit due to the plaintiff's failure to perfect service in the earlier action. It was undisputed that the claims were time barred unless the plaintiff could show that her service of the original complaint was effective.

The plaintiff argued that because the hospital authority was considered to be a public corporation formed under Georgia law, she was entitled to perfect service under O.C.G.A. § 9-

11-4(e)(1)(A) and had done so through her service of the hospital authority's board member and legal representative. (Since the case was decided on other grounds, it is unclear whether the plaintiff had truly satisfied O.C.G.A. § 9-11-4(e)(1)(A), since a corporation's "board member and legal representative" is not necessarily a "president, other officer, managing agent, or registered agent.") The trial court found that the original complaint had not been properly served and dismissed the claims carrying a 2-year statute of limitations.

The panel's opinion, written by Judge Barnes, examined O.C.G.A. § 9-11-4 to determine whether a hospital authority can be a type of corporation that may be served under subsection (e)(1)(A). The panel observed that this subsection applies only to corporations that are "incorporated or domesticated under the laws of this state" or to foreign corporations that are authorized to do business in Georgia. Although the term "incorporated…under the laws of this state" is not specifically defined in the statute, the Court reasoned that its meaning could be determined by reading the provision *in pari materia* with the rest of the statute. The rest of the subsection discusses the role of the Secretary of State as an agent of the corporation if other service methods have failed, and references the plaintiff's duty to deliver service to the corporation's last registered office or registered agent as reflected in the Secretary of State's records if process is served in this manner. From this and other provisions, the court concluded that subsection (e)(1)(A) was intended to refer to the types off corporations that are formed through the filing of organizational documents with the Secretary of State, and whose records are maintained by the Secretary of State. A hospital authority in Georgia is not formed in this manner. Instead, hospital authorities are formed by law pursuant to O.C.G.A. § 31-7-72, and as such they do not file organizational documents with the Secretary of State. The court observed that this was true even if the hospital authority is construed to be a public corporation for other purposes. It cited previous decisions recognizing a general proposition that hospital authorities and other public corporations are not treated as corporations for all purposes. For instance, it has previously been held that hospital authorities are not eligible for Chapter 11 bankruptcy protection and are not subject to the Worker's Compensation Act in the same manner as other corporations.

The court concluded that service of a hospital authority must be conducted pursuant to O.C.G.A. § 9-11-4(e)(5), which provides that a "public body or organization" may be served through its chief executive officer or clerk. Since the plaintiff had not done that with respect to her original complaint, the dismissal of the time-barred claims was affirmed.

McCoy v. Bovee

300 Ga. 759, 796 S.E.2d 679 (2017)—Supreme Court affirms injunction removing officer of homeowners' association.

In this case, the Georgia Supreme Court unanimously affirmed a trial court's preliminary injunction removing the president of a homeowners' association on the grounds that he and the association's board were frustrating the work of a court-appointed receiver who had previously been appointed to manage the association's affairs and finances. The Court found that the injunction was supported by evidence that it was necessary to preserve the status quo.

In 2012, a group of homeowners sued their homeowners' association and its president, claiming that the defendants were mismanaging the association. Specifically, the plaintiffs alleged that the president was converting association funds to his own use by, among other things, causing the association to enter into contracts for landscaping and other services with companies owned by the president's wife and stepson. The trial court held and appointed a receiver to take control over the association's finances. Later on, the receiver reported to the trial court that the president and board were undermining his authority, causing the resignation of the management company he had hired and making it difficult for him to hire a replacement. (Interestingly, it appears that the president continued to be re-elected by the association's members during this time.) In 2015, a new petition was filed, seeking to enjoin the president and board from exercising any management authority. The president responded by moving for recusal and to dismiss the petition. The court denied these motions and entered an order removing the president and calling for an election in accordance with the association's bylaws. The president appealed from this order.

The justices limited their review to the question of whether there was evidence to support the trial court's 2015 decision to remove the president. Notably, the Court did not analyze the issue under O.C.G.A. § 14-3-810, which authorizes a superior court to remove directors of nonprofit corporations upon a petition brought by members holding at least 10% of the corporation's voting interest, if the director has engaged in fraud or dishonesty or has committed a gross abuse of discretion. The defendant may have had an argument that removal was not permitted under the statute because the plaintiffs held less than 10% of the association's voting interest, but the Court found that he had waived this argument by failing to raise it in the court below. The Court also did not revisit whether the appointment of the receiver in 2012 was proper, because no appeal had been taken from that order. Instead, the Court looked only at whether the removal of the president maintained the status quo, finding that there was evidence to support the conclusion that removal was needed to prevent the further waste of assets.

D. TRANSACTIONAL CASES

EMM Credit, LLC v. Remington

343 Ga. App. 710, 808 S.E.2d 96 (2017)—Evidence supported jury's finding that defendant owned corporation in light of credibility questions regarding corporation's stock records.

This Court of Appeals panel decision addressed a fraudulent transfer and declaratory judgment action which turned in part on whether the debtor was the "true owner" of a corporation to which he transferred a valuable piece of real estate. In the trial court, the jury found that the debtor was the corporation's true owner, despite a lack of evidence that the debtor had ever been issued stock certificates, and despite the testimony of other individuals that they were the corporation's shareholders. The trial court then granted the defendants' motion for directed verdict/motion for judgment notwithstanding the verdict, holding that the other individuals claiming to be shareholders, who were not parties to the action, were indispensable parties who had not been joined. Finding that the other purported shareholders were not indispensable and that there was some evidence in the trial record supporting the jury's verdict, the Court of Appeals reversed the trial court's order as to the declaratory judgment claim. Its

opinion illustrates that in some situations, determining the ownership of a corporation can be highly fact-intensive and juries can have wide latitude in deciding questions of ownership, particularly where (as here) there were significant questions about the corporation's recordkeeping history.

This protracted dispute began in the late 1990's, when it was discovered that the debtor had engaged in a broad embezzlement scheme which eventually led to his conviction for federal mail and wire fraud. The victims of the scheme obtained a $2.5 million judgment in a California court against the debtor, which was later assigned to the plaintiff. During the California litigation, it was learned that the debtor had purchased an industrial building in Gwinnett County in 1996, and immediately transferred the property to American National Holding Corporation ("ANHC"). The trial record included documents from the property sale indicating that ANHC was wholly owned by the debtor, but those words had been crossed out prior to the closing. At the closing, the debtor and ANHC were both represented by the same counsel, and no other person was present to represent ANHC. The closing documents included various documents referencing the debtor as an ANHC officer, including a corporate resolution of ANHC. The attorney executed the sale and financing documents on behalf of ANHC, while the corporate resolution was executed by the attorney, the debtor and the debtor's girlfriend.

At trial, the plaintiff sought a declaration that the debtor was the "true owner" of ANHC, meaning whether he held all of its stock. Two of the debtor's brothers testified that they too were shareholders and had been shareholders of ANHC since the company's inception in 1992, while the debtor's girlfriend testified that she held stock in ANHC as well. The brothers also claimed that they wired the funds used by the debtor to purchase the property. These claims could not be corroborated by documentary evidence however. No complete stock ledger was produced, and the girlfriend testified that she believed the original stock certificates and ledger were lost or stolen. ANHC's counsel testified that in October, 2006, by which time the present action was well underway, it reconstructed the company's stock transfer records, having determined that the original records were lost, stolen or destroyed. The jury was not presented with evidence that the defendant was issued stock certificates. Nonetheless, it found that the debtor was the true owner of ANHC.

On appeal, the Court of Appeals first addressed the trial court's determination that the two brothers, who were never parties to the action, were indispensable parties because "evidence was presented that they were issued shares of ANHC." Under O.C.G.A. § 9-11-19, a nonparty is indispensable if (1) in his absence complete relief cannot be afforded among those who are already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest. The court held that the two brothers were not indispensable because even if it were assumed that they were shareholders, their interests were adequately protected by the other defendants (namely, the debtor, his girlfriend and ANHC). Reviewing the trial record, the court found that the defendants had presented a "thorough case" that was consistent with their claim that they held stock in ANHC. In addition, the brothers' own testimony was presented to the jury. The court thus concluded that it was error for the trial court to grant the defendants' post-trial motions on the basis that the brothers were indispensable parties.

Turning to the jury's determination that the debtor owned all of ANHC's stock, the court applied the deferential "any evidence" standard and held that a jury could conclude from the evidence presented that the debtor was the true owner of ANHC. The court's analysis began with a reminder that "one may have an ownership interest in a corporation without having received stock certificates." The court then recognized that other evidence supported the jury's verdict, including the closing documents and who attended on ANHC's behalf. The court also reasoned that it was fair for a jury to view the defendants' countervailing evidence with suspicion, given the "arguably suspicious" timing of the reconstruction of the stock ledger. In the court's view, even "substantial" countervailing evidence will not support granting a directed verdict if it "could be disbelieved by the jury."

As to the plaintiff's fraudulent transfer claim, the Court of Appeals sided with the defendants and the trial court, finding that under the version of the UFTA that governed the plaintiff's claims, former O.C.G.A. § 18-2-70 *et seq.*, fraudulent transfer claims were not assignable. The court rejected the plaintiff's argument that prior decisions reaching the same conclusion were distinguishable because the plaintiff's claim involved the assignment of a judgment rather than the assignment of a debt. As the Court notes, the UFTA was amended in 2015 to become the Uniform Voidable Transactions Act ("UVTA"). The UVTA, unlike the UFTA, explicitly provides successors and assignees who acquire a claim with a right of action under it.

Wallace v. Wallace

301 Ga. 195, 800 S.E.2d 96 (2017)—Supreme Court remands stock valuation dispute due to lack of findings as to whether bylaws or subsequent shareholders agreement governed dispute.

The Supreme Court of Georgia unanimously vacated a bench trial ruling in a dispute over the value of shares in a family-owned corporation, holding that the absence of findings of fact or conclusions of law accompanying the trial court's decision rendered it impossible for the justices to conduct a meaningful review.

At issue was whether the company's original bylaws or a subsequent buy-sell agreement governed the method of valuation of the plaintiff's shares. The company, Wallace Electric, was incorporated in 1959 by the parties' father. Later on, the father gave two of his sons a 25% share each and the third son, who was the plaintiff in this case, a 16.67% share, while retaining the rest of the company's shares. It was undisputed that the family intended for ownership of stock in Wallace Electric to be reserved for people who worked for the company. The plaintiff ceased to work for Wallace Electric in 1994, but he retained his shares. The record was disputed as to whether and when the other brothers offered to buy the stock. The key legal question was what document governed the parties' conduct after the plaintiff ceased to be employed. The plaintiff argued that the governing document was Wallace Electric's original bylaws, enacted in 1959, which provided that upon the termination of any shareholder's employment, "the corporation shall have the right and duty to purchase all the stock of said employee or officer and the former officer or employee shall be obligated to sell his stock pursuant to these by-laws." The bylaws

further provided that the purchase price would be the book value of the stock at the time that notice was given, based on accepted accounting practices. The plaintiff argued that no offer had ever been made and that he was therefore entitled to the book value of his stock at the time the litigation began, which was approximately $2 million. The defendants, his two brothers, argued that the bylaws constituted a shareholder agreement that had expired pursuant to O.C.G.A. § 14-2-732(b)(3), which provides that shareholder agreements shall be valid for no more than 20 years, and that they should not be bound to the bylaws because they were not shareholders in 1959. They further argued that the operative document was a 1988 Buy-Sell Agreement, executed by the brothers, providing for the sale of a shareholder's stock upon termination of employment. According to the defendants, the plaintiff was obligated to sell pursuant to the 1988 agreement when he stopped working for the company in 1994, and therefore should only be allowed to recover the value of the stock as it was in 1994. The plaintiff countered that the Buy-Sell Agreement was inapplicable because it expired in 2008 and the defendants had made no effort to obtain his stock before then.

The trial court rendered its decision orally from the bench following a bench trial. The trial court stated that because the plaintiff had not "contributed in any meaningful way to the growth and development of the company since 1994," it was reasonable that he should receive what he would have received at that time "had he done what he was supposed to do, which was to return the stock to the company." It found that this value was $54,200, and awarded the plaintiff this amount. The trial court refused the plaintiff's request to enter findings of fact and conclusions of law, instead issuing a written order that referenced the oral ruling.

Writing for the Court, Justice Grant held that it was error for the trial court to render its decision without making sufficient findings of fact and conclusions of law. The Court observed that the trial court "seem[ed] to recognize that the outcome may depend on whether the governing documents gave the parties a right to buy or sell or a duty to buy or sell. Absent a determination of which document applied, if any, and what the terms of that document demanded of the parties, this Court cannot provide meaningful appellate review." Noting that the trial court relied on principles of equity to reach its result, the Court pointed out that "equity follows the law" and that it "does not permit a court to substitute its own notion of what is right in a particular case for a determination of what the law demands." The case was remanded with directions to the trial court to making findings of fact and conclusions of law, "including whether the Bylaws, Buy-Sell Agreement, or any other document governs the parties' dispute."

One Buckhead Loop Condominium JE-067 Association v. Regent Tower Holdings, LLC

341 Ga. App. 5, 798 S.E.2d 633 (2017)—Court of Appeals holds that existence of corporate seal on contract invoked 20-year statute of limitations regardless of corporation's stated reason for affixing the seal.

In this action for breach of an easement agreement, the Court of Appeals held that the presence of a contracting party's corporate seal on the original document was sufficient to establish that the corporation executed the agreement "under seal" for purposes of determining the correct statute of limitation. Breach of contract actions are subject to a six-year statute of

limitations, but under O.C.G.A. § 9-3-23, actions on an instrument under seal are subject to a 20 year limitations period. This action was filed in 2015 by a homeowners' association against the property owner for breach of an easement agreement for the use of a private roadway that had been executed in 1995. The homeowners' association claimed that the defendant breached the agreement by restricting access to the roadway during rush hours in an arbitrary manner to the prejudice of the association's members. The trial court entered summary judgment in favor of the defendant on an independent ground that did not implicate the statute of limitations issue, but because the Court of Appeals held that issues of fact precluded summary judgment on this ground, the limitations issue became dispositive. The court cited settled law holding that "to constitute a sealed instrument, there must be both a recital in the body of the instrument of an intention to use a seal and the affixing of the seal or scroll after the signature." The easement agreement stated that the parties' duly authorized representatives "have signed and sealed this Agreement as of the date and year first above written." On its signature line, the defendant had placed its corporate seal, bearing the word "SEAL," next to the signature. The defendant argued that it had not affixed its seal in the manner contemplated by O.C.G.A. § 9-3-23, but rather had only done so for the limited purpose of showing that the signing officer had the authority to bind the corporation. The court disagreed, holding that the case was controlled by two earlier appellate decisions, *McCalla v. Stuckey*, 233 Ga. App. 397, 504 S.E.2d 269 (1998) and *Donalson v. Coca-Cola Co.*, 164 Ga. App. 712, 298 S.E.2d 25 (1982). Finding that the easement agreement contained both the necessary recital language indicating the intent to use a seal and the seal itself, the court ruled that the action was timely.

E. LITIGATION ISSUES

1. Standing and Capacity to Sue.

Osprey Cove Real Estate, LLC v. SE-027 Towerview Construction, LLC

343 Ga. App. 436, 808 S.E.2d 425 (2017)—Business entities cannot assert intentional infliction of emotional distress claims.

In a case of first impression, the Court of Appeals held that limited liability companies and other business organizations cannot maintain a cause of action for intentional or negligent infliction of emotional distress because, as the Court put it, "business entities lack the cognizant ability to experience emotions." On the basis of this determination, the court held that the trial court should have dismissed an LLC's claim for intentional infliction of emotional distress.

The plaintiff, a construction company, brought a 14-count complaint against the owner of four residential lots that it agreed to develop for the defendant. The plaintiff alleged that after entering into construction loan agreements with the defendant for the four properties, the defendant proceeded to interfere with its work in an effort to cause delays that would trigger the default provisions of the construction loans. For instance, the defendant allegedly would contact subcontractors directly with instructions that were inconsistent with the plaintiff's pre-approved plans. The plaintiff further alleged that the defendant withheld payments from it and blocked its efforts to list the properties for sale. The plaintiff characterized the defendant's entire conduct as a "fraudulent scheme" designed to deprive it of payments and declare the parties' contracts in

default. One of the 14 counts in the complaint was for intentional infliction of emotional distress. The trial court denied the defendant's motion to dismiss this count.

The panel's opinion, authored by Judge Self, observed that there was no Georgia authority on point discussing whether corporations and other business entities can assert claims to recover for alleged emotional distress. Surveying decisions from other jurisdictions, the court found that similar claims were consistently rejected on the ground that business entities cannot experience emotions. As one court put it in a case involving an LLC, such a plaintiff "certainly cannot suffer emotional distress; such would stretch the bounds of the legal fiction of corporate personhood too far."). The panel did not identify any case from any jurisdiction taking the contrary view that corporations can bring claims based on alleged emotional distress. It did acknowledge, however, that Georgia permits business entities to recover damages for "discomfort and annoyance" in nuisance cases, while maintaining that such damages are different from emotional distress. Because the plaintiff only brought claims on its own behalf, the court did not address whether the plaintiff's individual members might be able to state claims for intentional or negligent infliction of emotional distress.

Ortho Sport & Spine Physicians Savannah LLC v. Chappuis

___ Ga. App. ___, 808 S.E.2d 559 (2017)—Court of Appeals reaffirms rule that business entities cannot bring claims based on emotional distress, also dismisses LLC's invasion of privacy claim.

Not long after *Osprey Cove* was decided, the same panel of the Court of Appeals issued another decision involving intentional infliction of emotional distress claims, as well as other tort claims commonly thought of as involving personal rights. Here, the court reiterated that corporations cannot maintain claims based on alleged infliction of emotional distress.

The plaintiff in this case is a medical practice in Savannah. Its principal previously practiced with one of the defendants in Atlanta, but left after what he alleges was harassing and abusive conduct on the part of that defendant, including a death threat. The principal moved to Savannah and formed the plaintiff as an LLC to set up his new practice. The plaintiff leased space in a medical building that had only one other tenant. A year later, an LLC owned by the former Atlanta partner purchased the medical building and thereby became the plaintiff's landlord. The plaintiff alleges that the defendants (the former partner, his medical practice and another individual) thereafter engaged in conduct similar to what had happened in Atlanta, including racial epithets and threats, stalking and attempts to solicit the plaintiff's patients to use a different doctor. The plaintiff filed a multi-count complaint, alleging that the defendants were engaged in a "deliberate attempt to destroy [plaintiff's] business, as an end in and of itself, as well as for the pecuniary benefit of the Defendants." The complaint's counts included civil conspiracy, alter ego liability, breach of warranty of quiet enjoyment and constructive eviction, intentional infliction of emotional distress, trespass, invention of privacy, slander, and tortious interference with business relations. One of the defendants, an individual who was not the former Atlanta partner and whose relationship to the other defendants is unclear from the opinion, moved to dismiss. The trial court granted the motion, without explaining its reasoning.

On appeal, the Court of Appeals reversed the dismissal in several respects, but it affirmed the dismissal of the intentional infliction of emotional distress claim. Once again writing for the panel, Judge Self explained that a corporation cannot maintain such a claim because it lacks the ability to experience emotions. The court further held that the plaintiff also could not maintain a claim for invasion of privacy, citing the Restatement view that the tort of invasion of privacy is addressed to the protection of a personal right, and a recent Illinois federal court decision holding that corporations "have no right to seclusion that is protected by tort law." *Meyer Technology Solutions v. Kaegem Corp.*, 2017 WL 4512918, at *3 (N.D. Ill. Oct. 10, 2017). In so holding, the court acknowledged that corporations may assert privacy claims based on a defendant's misappropriation of a trade name, but concluded that the plaintiff's complaint did not allege such a claim.

Oskouei v. Orthopaedic & Spine Surgery of Atlanta, LLC

340 Ga. App. 67 (2017)—Prior pending action rule did not bar prosecution of claims by sibling corporation of plaintiff in earlier filed action.

This Court of Appeals decision, in an earlier related appeal to the aforementioned *Ortho Sport* case, discusses some basic principles of corporate separateness and how they apply to the prior pending action rule, O.C.G.A. § 9-2-5(a). Under the prior pending action rule, no plaintiff may prosecute two actions in court at the same time for the same cause of action against the same party. On August 3, 2015, Ortho Sport & Spine Physicians Savannah LLC ("Ortho Savannah") filed an action in the Superior Court of Fulton County against four defendants: two individuals and two LLCs. Two weeks later, a group that included some of the defendants to the August 3 lawsuit filed their own lawsuit in the same court against Ortho Sport & Spine Physicians, LLC ("Ortho Atlanta") and a doctor who was the controlling member of both Ortho Atlanta and Ortho Savannah. Ortho Atlanta and the doctor filed a counterclaim against the plaintiffs to the second action, asserting claims that were similar to those that had been asserted by Ortho Savannah in the August 3 lawsuit. It was undisputed that despite their similar names and common ownership, the two Ortho entities were separate and distinct companies. The plaintiffs to the second action moved to dismiss the counterclaims, arguing that they were essentially identical to the claims at issue in the first lawsuit. The trial court granted the motion. The Court of Appeals reversed, holding that "the parties that function as plaintiffs in the [August 3] Lawsuit and, for purposes of the counterclaim, in the Second Lawsuit are not identical." The court explained that O.C.G.A. § 9-2-5(a) does not anywhere prohibit separate plaintiffs from maintaining separate actions against the same defendants for the same causes of action. Thus the prior pending action rule did not bar the counterclaim in the second lawsuit since neither of the counterclaim plaintiffs were parties to the first suit.

2. Secondary Liability.

Community & Southern Bank v. Lovell

302 Ga. 375, 807 S.E.2d 444 (Ga. 2017)—Georgia Supreme Court holds that fraudulent transfer statute does not provide any basis for a reverse veil-piercing claim.

This is the latest in a long line of Georgia appellate decisions holding that creditors cannot reach the assets of a corporation to satisfy the debts of one of its shareholders (and similarly cannot reach the assets of an LLC to satisfy an individual debt of one of its members or owners. This type of claim, commonly called "reverse veil piercing," was held to be contrary to Georgia law in *Acree v. McMahan*, 276 Ga. 880 (2003). In *Lovell*, a unanimous Georgia Supreme Court held that a creditor cannot circumvent the rule against reverse veil piercing by asserting claims under the Uniform Fraudulent Transfers Act ("UFTA"). The plaintiff acquired a judgment against an individual from a failed bank that was placed into receivership with the FDIC. The plaintiff then filed a lawsuit against the individual defendant, his wife, and several companies he owned, seeking to set aside transfers among the defendants under the UFTA. The trial court dismissed the UFTA claims asserted against two of the businesses (a corporation and an LLC), holding that the UFTA only permits the avoidance of fraudulent transfers of a debtor's property, and the two companies were not judgment debtors of the plaintiff. Writing for the Court, Justice Blackwell agreed with the trial court that the UFTA did not provide a basis to depart from the settled *Acree* rule.

Corrugated Replacements, Inc. v. Johnson

340 Ga. App. 364, 797 S.E.2d 238 (2017)—Court of Appeals holds that prohibition against "reverse veil piercing" is not subject to exceptions.

In this tort action arising from a fatal accident involving a company owned truck, caused by a company employee (and son of the company's owner) who was using the truck for personal reasons, the Court of Appeals reiterated that Georgia does not recognize "reverse veil piercing," under which creditors would be able to satisfy an individual's debts out of the assets of a corporation. The court further held that Georgia's prohibition against "outsider" reverse veil piercing claims is not subject to exceptions. In the same opinion, the court rejected the plaintiffs' attempt to hold the company responsible for the accident under a joint venture theory.

In July 2011, the son of the owner of Corrugated Replacements, Inc., driving the truck while under the influence, struck a van, killing a child and injuring other family members. It was undisputed that the van was owned by the company, that the son used it for both business and personal reasons, and that he was not on business when the crash occurred. The deceased child's parents sued Corrugated Replacements and its owner under a variety of secondary liability theories. The defendants moved for summary judgment on several grounds, including that there was no basis for joint venture liability and that the plaintiffs' reverse veil piercing claim was foreclosed by law. The trial court denied the defendants' motion. The Court of Appeals granted the defendants' application for interlocutory appeal, and reversed.

Regarding the plaintiffs' claims based on reverse veil piercing, the panel held that outsider reverse veil piercing claims are completely barred under *Acree v. McMahan*, 276 Ga. 880, 585 S.E.2d 873 (2003). An outsider reverse veil piercing claim is one in which a third-party creditor (such as a plaintiff in a tort action) attempts to pierce the veil in order to satisfy the debts of a corporate insider out of the corporation's assets. The plaintiffs argued that *Acree* permits a narrow exception allowing outsiders to proceed against the corporation in cases where the outsider would otherwise be left without an adequate legal remedy. In support of this proposition, the plaintiffs pointed to the Supreme Court's statement in *Acree* that veil piercing "is appropriately granted only in the absence of adequate remedies at law," arguing that this left the door open for some reverse veil piercing claims. The panel rejected this argument, noting that *Acree* elsewhere found that traditional remedies and standard judgment collection procedures provided an adequate remedy for injured third parties like the plaintiffs. It wrote that the "strong language [in *Acree*] rejecting reverse piercing leaves no door open for an exception to exist. The Supreme Court firmly closed that door, and we are in no position to carve a hole in it."

The court also held that the defendants could not be liable for torts committed by the son while operating the company's truck under a joint venture theory. Here, it found that "for a joint venture to exist, there must be not only a joint interest in the objects and purpose of the enterprise, but also an equal right, express or implied, to direct and control the conduct of one another in the activity causing the injury." While there may have been some evidence of a joint undertaking by Corrugated Replacements, the owner and the son to purchase a car that would be used by the son for both business and personal matters, the court found no evidence to satisfy the necessary element of mutual control. The record showed that the company had the right to use the vehicle whenever it needed it, but that the son did not have a corresponding right to prevent the company from using the vehicle whenever it wanted to do so.

In the same opinion, the Court of Appeals also held in favor of the defendants as to the plaintiffs' claims based on negligent entrustment and respondeat superior. The court found that the negligent entrustment claim was not viable since there was no evidence that the defendants knew of the son's use of alcohol and inhalants, and that the respondeat superior claim was foreclosed by the undisputed evidence showing that the son was using the truck for purely personal reasons.

Matter of Hilsman

576 B.R. 717 (Bankr. M.D. Ga. 2017)—Bankruptcy court rejects creditor's attempt to pierce veil of debtor to reach assets of its sole shareholder.

In this adversary proceeding, the Bankruptcy Court for the Middle District of Georgia denied a creditor's attempt to pierce the veil of a corporation in which the debtor was the sole officer, director and shareholder, rejecting a litany of arguments based on the manner in which the debtor conducted business as well as his actions during the bankruptcy proceeding himself.

The debtor was a homebuilder who conducted business through his corporation, Pilot Builders, Inc. The plaintiff, a family trust, entered into a contract with Pilot for the construction

of a house on Lake Oconee. Hilsman and Pilot encountered financial difficulties during construction which prevented them from completing the project. The plaintiff filed a claim to recover certain amounts that were advanced to Pilot pursuant to the construction contract that were alleged to be in excess of the value of the labor and materials provided. The plaintiff sought to have these amounts declared nondischargeable under Section 523 of the Bankruptcy Act. In addition to a "false representations" claim that was evaluated under federal law and decided in favor of the debtor, the plaintiff claimed that Pilot was the debtor's alter ego under Georgia law.

The bankruptcy court addressed this claim under settled Georgia veil piercing principles. It noted at the outset that there was no evidence that the debtor had commingled funds, that he and Pilot had always maintained separate bank accounts, that Pilot had an office, filed its own tax returns, maintained insurance, and had a current registration with the Secretary of State until it was dissolved. The court clearly found these facts to be persuasive evidence that the debtor had not abused the corporate form. The plaintiff, on the other hand, noted several instances in which corporate formalities had not been followed. For instance, the debtor had failed to hold annual meetings for Pilot. In addition, the debtor could not locate certain corporate records after Pilot had been dissolved. The court found that the failure to hold meetings and the inability to find records did not, by themselves, indicate an abuse of the corporate form. The plaintiff also pointed out that Pilot had borrowed funds without passing any sort of corporate resolution allowing it to do so, but the court found this unpersuasive, noting that nothing in the Corporate Code or Pilot's articles of incorporation would have required a corporate resolution.

The plaintiff also argued that the closely intertwined financial relationship between the debtor and Pilot justified piercing the veil. It was undisputed that the debtor had personally guaranteed almost all of Pilot's debts, and that he exerted complete control over Pilot's financial decisions as its sole officer, director and shareholder. The court was unpersuaded by this as well, finding that these circumstances were not at all unusual in the context of small, closely held corporations.

Finally, the plaintiff cited several items in the debtor's bankruptcy filings that it viewed as evidence of the sort of commingling that justifies piercing the veil. For instance, the debtor's schedule of assets and liabilities listed deposits in Pilot's checking account and Pilot's office furniture as his personal property. His schedules also listed debts that were actually Pilot's business debts, regardless of whether he had personally guaranteed those debts. The court found that this was not evidence of commingling but rather a sound tactic on the debtor's part, because listing Pilot's business creditors in the schedules would ensure that they received notice of the bankruptcy filing. The Court concluded that the evidence, when viewed individually and as a whole, failed to support a finding that the debtor abused the corporate form.

3. Jurisdiction, Venue and Service of Process.

Purchasing Power, LLC v. Bluestem Brands, Inc.

851 F.3d 1218 (11th Cir. 2017)—Eleventh Circuit vacates sanctions award, finding no bad faith in counsel's failure to discover evidence that LLC's citizenship destroyed diversity jurisdiction.

We have observed a trend in recent years towards more careful scrutiny of federal court lawsuits premised on diversity jurisdiction in which one or more of the parties is an LLC. Unlike a corporation, an LLC is deemed to be a citizen of every state in which one of its members is a citizen. If the members are themselves LLCs, as is often the case, the LLC will also be deemed to be a citizen of the state of citizenship of its members' members (and their members, and so on). This significantly adds to the difficulty in determining whether complete diversity of citizenship exists, and also makes it substantively harder for many LLCs to satisfy the complete diversity test. In this case, a simple contract dispute proceeded all the way to summary judgment and an appeal before the parties realized that one of the plaintiffs' members destroyed diversity. Interestingly, even though this was a removal action brought to federal court by the defendant, the district judge blamed *plaintiff*'s counsel for failing to raise the issue sooner, and ordered plaintiffs' counsel to pay over $500,000 as a sanction. In this order, the Eleventh Circuit reversed and vacated the sanction order, finding that plaintiffs' counsel had not acted in bad faith. The panel agreed, however, that the parties' failure to resolve questions of citizenship at an earlier point in the case had created a "colossal waste of time and effort," and it admonished future litigants and their counsel to be proactive in verifying that diversity jurisdiction exists.

The plaintiff, Purchasing Power LLC, filed this action in state court in December, 2011. Defendant Bluestem Brands Inc., a corporation that was a citizen of Minnesota and Delaware, removed the case to the Northern District. Prior to filing its notice of removal, defendant's counsel reached out to Purchasing Power's counsel to determine its citizenship. After consulting with their client, plaintiffs' counsel informed the defense that Purchasing Power LLC had a single member, Purchasing Power Holdings LLC, whose members included several Georgia residents and three LLCs (Rockbridge Growth Equity LLC, Falcon Investment Advisors LLC and Stephens-Purchasing Power LLC), none of whom resided in either Minnesota or Delaware. The defendant thereafter proceeded with its removal petition, stating in that petition that Purchasing Power had no members that destroyed diversity. The removal petition attached an email from Purchasing Power's counsel conveying what they had learned from their client. As the case progressed, Purchasing Power's discovery responses seemed to indicate that it did not actually know the identity of all of its members' members, but neither party took any further steps to evaluate the jurisdictional issue at that time. Instead, the case continued on, and in May, 2014, the district court granted the defendant's summary judgment motion. Plaintiffs appealed, and the Eleventh Circuit, *sua sponte*, noted that the pleadings had not sufficiently alleged a basis for diversity jurisdiction. A more fulsome investigation ensued, during which it was learned that Falcon Investment Advisors LLC did not hold its membership interest in Purchasing Power Holdings directly, but instead held that interest through Falcon, Inc., a Delaware corporation. Purchasing Power therefore had a member that was a Delaware citizen, thus destroying diversity and stripping the federal courts of jurisdiction.

Citing its inherent power and Federal Rule 26(g)(3) (which authorizes certain discovery sanctions), the district court ordered plaintiff's counsel to pay $582,385 in fees and costs to the defendant. The district court found that plaintiff's counsel had misrepresented to defendant and the court that Purchasing Power did not have any members who were citizens of Delaware, both at the time of the removal petition and during the course of discovery. The Eleventh Circuit found that the district court applied the wrong standard and that the record did not reveal any evidence of bad faith on the part of counsel. The district court had applied an objective recklessness standard, relying on Rule 11 and federal law regarding vexatious litigation. The Eleventh Circuit explained that inherent power sanctions are governed by a subjective bad faith standard. Applying that standard, the court concluded that several factors counseled against a finding of bad faith. First, since this was a removal action, it was not the plaintiff's burden to establish that diversity of citizenship exists, but instead fell on the defendant to bring questions about citizenship to the court's attention. Second, the defendant's removal petition stated that Purchasing power *had* no members that destroyed diversity, but plaintiff's counsel had qualified its representation regarding citizenship, stating only that it did not know of any members that destroyed diversity. Third, the defendant's own submissions during discovery, like the plaintiff's, did not alert the district court to a potential issue regarding Purchasing Power's citizenship, even though the plaintiff's discovery responses suggested that an issue might exist. Fourth, the court found that plaintiff's counsel did take meaningful steps to determine their client's membership structure and citizenship, even though more could have been done.

Though the Eleventh Circuit found that no sanction was warranted in this case, it issued a clear call to future litigants and their counsel to devote more time and energy to addressing the requirements of federal diversity jurisdiction in cases involving LLCs: "No party in this case acted with bad intentions, but the result was a colossal waste of time and effort. We trust that the damage done to the parties' credibility, finances, and time is enough of a sanction to curb their conduct and to serve as a warning to future diversity jurisdiction litigants. In the end, when the parties do not do their part, the burden falls on the courts to make sure parties satisfy the requirements of diversity jurisdiction. We must be vigilant in forcing parties to meet the unfortunate demands of diversity jurisdiction in the 21st century."

Life of the South Ins. Co. v. Carzell

851 F.3d 1341 (11th Cir. 2017)—Corporation's "dual citizenship" did not entitle it to argue existence of minimal diversity requiring removal of class action to federal court.

In this putative class action that was removed from the Superior Court of Fulton County to federal court, the Eleventh Circuit held that a corporate defendant cannot avail itself of its "dual citizenship" (i.e., as a Georgia corporation headquartered in another state) as a way to meet the minimal diversity requirements of the Class Action Fairness Act ("CAFA") when the class consists entirely of citizens of one of the two states. The court's opinion affirms the principle that for federal jurisdiction purposes, a corporation is a citizen of *both* its state of incorporation and the state in which it maintains its principal office.

The plaintiffs, three Georgia residents, filed this lawsuit in Fulton County on behalf of

themselves and a class of only "Georgia citizens" who were sold certain insurance policies by the defendants, two Georgia corporations that are headquartered in Florida. (A prior suit on behalf of a broader class was successfully removed to federal court; the case was then voluntarily dismissed and refiled on behalf of this more narrowly defined class). The complaint asserted only state law claims. The defendants removed the action to the Northern District of Georgia, stating that federal jurisdiction was authorized under CAFA because, *inter alia*, they were Florida citizens and therefore minimally diverse with the putative class members. Unlike the general federal diversity statute which requires complete diversity of citizenship between the parties, CAFA allows for jurisdiction when "any member of a class of plaintiffs is a citizen of a State different from any defendant." It was undisputed that every class member was a Georgia citizen and that the defendants, as Georgia corporations, were also Georgia citizens. The defendants' argument boiled down to the contention that their dual citizenship made it possible to consider them minimally diverse from the class.

The Eleventh Circuit held that in order to demonstrate minimal diversity, the corporate defendants would have to prove that they are not Georgia citizens, which they could not do. In so holding, the court followed the reasoning of the Fourth Circuit in a 2008 decision involving analogous facts. The Fourth Circuit had found that 28 U.S.C. § 1332(c)(1), the statute defining corporate citizenship, "gives dual, not alternative, citizenship to a corporation whose principal place of business in a State different from the State where it is incorporated." The Eleventh Circuit agreed that under the plain meaning of the statue, a corporation that is a dual citizen cannot ignore one of the two states. The panel's opinion also addressed the policy goals of diversity jurisdiction, stating that it was unconcerned about the possibility of the defendants facing "local bias" in a Georgia state court because they were Georgia corporations.

The Eleventh Circuit noted that several other federal decisions were in agreement with its decision. However, a previous Northern District of Georgia decision, *Fuller v. Home Depot Svcs., LLC*, 2007 WL 2345257 (N.D. Ga. Aug. 14, 2007), had found minimal diversity to exist under similar circumstances. *Life of the South* now stands as clear binding precedent for cases removed from Georgia state courts.

Burchfield v. West Metro Glass Company, Inc.

340 Ga. App. 324, 797 S.E.2d 225 (2017)—Court of Appeals holds that corporation's motion to transfer venue was untimely.

In this case, the Court of Appeals held that a corporate defendant's motion to remove a tort action to its home county under O.C.G.A. § 14-2-510(b)(4) should not have been granted because the motion was not made during the statute's 45-day window for removal. The case illustrates the limited nature of the removal right.

This was a personal injury lawsuit arising from a truck accident in Fulton County. The plaintiff sued the truck driver and his employer in the State Court of Fulton County and served the corporate defendant on April 8, 2015. The employer, who was not a Fulton County resident, filed an answer asserting improper venue as a defense, but did not ask for any relief with respect to venue until it filed a motion to transfer venue on November 11, 2015. O.C.G.A. § 14-2-

510(b)(4) provides that where venue against a corporation is predicated solely on allegations that the cause of action originated in the forum county, the defendant "shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business. A notice of removal shall be filed within 45 days of service of the summons."

Although the motion to transfer was clearly made outside of the 45-day window, the trial court granted the motion, finding that venue was improper since none of the defendants resided in Fulton County. The Court of Appeals reversed. The court first explained that venue was proper in Fulton County under the statute, contrary to the trial court's finding that it was not, because the complaint alleged a cause of action originating in Fulton County, where the accident occurred. Since venue was initially proper, the case could only be removed by filing a timely notice of removal. The court then addressed whether the defendants' answer, which asserted that venue was improper, could be treated as the functional equivalent of a notice of removal. It held that it could not, because the statutory removal remedy is designed to apply only to situations in which venue is initially proper. Finding that neither the answer nor the November motion satisfied the statutory requirement of a timely notice of removal, the court held that the case should remain in Fulton County.

S.D.E. Inc. v. Finley

340 Ga. App. 684, 798 S.E.2d 303 (2017)—Fast food restaurant's shift manager held to be a "managing agent" for purpose of Civil Practice Act's service of process rules.

In one of the first notable decisions addressing the 2013 version of O.C.G.A. § 9-11-4(e), governing the method of service of a corporation, the Court of Appeals affirmed a trial court order finding that the owner of a McDonald's franchise was properly served when the complaint and summons were hand delivered to a shift manager working behind the counter at the restaurant. Applying the deferential "any evidence" standard of review, the court held that there was sufficient evidence to support the trial court's finding that the shift manager was a "managing agent" of the franchise owner by virtue of her supervisory responsibilities. The decision indicates that courts may take a broad view of the term "managing agent" as it is used in the revised version of § 9-11-4(e).

This action arose from an alleged slip and fall incident at a McDonald's owned and operated by the defendant, S.D.E., Inc. ("S.D.E."). S.D.E. owns four McDonald's restaurants and employs approximately 250 people, including over 80 at the restaurant where the alleged incident occurred. Shortly after the complaint was filed in December, 2014, a deputy sheriff served the restaurant's shift manager, who later testified that she did not understand the significance of the papers, that she took them to the office in the back of the restaurant because that was generally what she did when signing papers delivered to her, that she did not inform upper management about the service, and that she did not know what happened to the papers thereafter. S.D.E. never responded to the complaint, and a $250,000 default judgment was eventually entered against it. In March, 2015, S.D.E. moved to set aside the judgment, arguing *inter alia* that it had not been properly served under O.C.G.A. § 9-11-4(e). The trial court denied the motion, finding that when the shift manager was served with the complaint and summons, "she was, in fact, the corporate agent of the Defendant and, at all times relevant, was exercising a

managerial and supervisory role of her principal, [S.D.E.].”

O.C.G.A. § 9-11-4(e)(1)(A) provides that a Georgia corporation may be served by delivering a copy of the complaint and summons to its president or other officer or a “managing agent” or “registered agent” of the corporation. The pre-2013 version of the statute considered service to be effective when delivered to “the president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof.” In this case, the effectiveness of service depended on whether the shift manager was a “managing agent.” That term was previously undefined in the statute, but the 2013 amendment added a specific definition: “a person employed by a corporation or a foreign corporation who is at an office or facility in this state and who has managerial or supervisory authority for such corporation or foreign corporation.” S.D.E. submitted an affidavit of the shift manager, who stated that she did not have a supervisory or managerial role at the restaurant, did not make any significant decisions without the restaurant manager’s approval, and had no specific responsibilities to relay information to higher officials at the company. The trial court noted, however, that the shift manager also testified at her deposition that she was generally responsible for supervising the other employees during her shift, and that her job responsibilities included handling customer service issues, ensuring food quality and cleanliness of the facilities, reporting accidents during her shift to upper management, and handling bank deposits. The trial court found this to be sufficient evidence that her position was “of a supervisory or managerial nature” for purposes of O.C.G.A. § 9-11-4(e)(1)(A).

On appeal, the Court of Appeals’ role was limited to determining whether there was any evidence to support the trial court’s finding. The court found that the aforementioned deposition testimony was sufficient. Notably, the court cited a handful of cases decided under the pre-2013 version of the statute in which a similar “managerial or supervisory authority” test even though those words were not then part of the statute. This suggests that the court views these cases as having some continuing vitality and may provide further guidance as to where the line between effective and ineffective service is to be drawn.

La Mara X, Inc. v. Baden

340 Ga. App. 592, 798 S.E.2d 105 (2017)—Complaint’s identification of existing but wrong corporation was not mere misnomer, but instead required leave of court to fix.

This appeal addresses the question of when a court order is necessary to amend a complaint filed in Georgia state court that incorrectly identifies a corporate defendant. Naming the wrong corporate entity can have significant implications in some cases. Here, a complaint and summons were served on the proper corporation through its registered agent, but the documents identified a different, unrelated corporation whose existence could be proven from the Secretary of State’s records. Because of this, the service was deemed by the Court of Appeals to be ineffective, as was the plaintiff’s later attempt to amend the complaint without leave of court for the stated purpose of correcting a misnomer.

The case arose from an alleged slip and fall incident leading to the death of a restaurant patron. The appellant, La Mara X, Inc. d/b/a El Rodeo Restaurant #3 (“La Mara”), operated the

restaurant where the incident occurred. The initial complaint identified an entity called "El Rodeo Mexican Restaurant, Inc." as the defendant. On November 4, 2015, the complaint and summons (which also identified "El Rodeo Mexican Restaurant, Inc." as the defendant) were served on La Mara's CEO at the restaurant's address. On December 1, 2015, an attorney for La Mara notified plaintiff's counsel that the wrong entity had been sued and that La Mara had no relationship with El Rodeo Mexican Restaurant, Inc. The attorney further notified plaintiff's counsel that La Mara would not be answering the complaint. After no answer was filed, on January 19, 2016, the plaintiff amended the complaint, without seeking leave, to change the name of the defendant to La Mara, stating that the change was intended to correct a misnomer as to the identity of the defendant. On the same day, on the plaintiff's motion, the court entered a default judgment against La Mara, finding that La Mara had been properly served with the original complaint on November 4. La Mara then entered a special appearance and moved to open default. Its submission to the court included records from the Secretary of State showing that there actually was a Georgia corporation called El Rodeo Mexican Restaurant, Inc., having a different address, different CEO and different registered agent than La Mara. La Mara's CEO gave an affidavit stating that he had nothing to do with this corporation. The affidavit also addressed the merits of the lawsuit and stated that the La Mara was prepared to defend against the lawsuit on the merits. The trial court denied the motion to open default, and this appeal followed.

The Court of Appeals held that La Mara had never been properly served and that the plaintiff's amendment to the complaint was ineffective. The panel found that the change to the defendant's name in the complaint had the substantive effect of adding a new defendant and was not the correction of a mere misnomer. Under the Civil Practice Act, amendments to the complaint to add a new party require leave of court, and no such leave was sought or given here. Critical to the court's analysis was the fact that the original named defendant was a real corporation whose existence was reflected in the Secretary of State's records. The court cited multiple prior appellate decisions holding that where the incorrectly named corporate defendant and the real defendant are both actually in existence when the action is filed, the naming of the incorrect corporation is not a simple misnomer, and correcting the error requires a court order. *See, e.g., Dollar Concrete Const. Co. v. Watson*, 207 Ga. App. 452, 428 S.E.2d 379 (1993); *Smith v. Vencare, Inc.*, 238 Ga. App. 621, 519 S.E.2d 735 (1999). The court concluded that, at least in cases where a wrong but real corporation is named in the complaint, leave of court must be sought to change the party's name. The opinion does not address whether the outcome would be the same if the original complaint had identified a fictitious or nonexistent corporation and the correct defendant accepted service.

Finally, the court found that La Mara had met the remaining requirements for opening a default, in that it presented evidence that it had raised a meritorious defense, filed an answer with its motion, and announced that it was ready to proceed to trial. The court found it irrelevant that La Mara knew about the lawsuit and brushed away the trial court's suggestion that it had made a strategic decision not to answer, since La Mara had not been properly served.

Vasile v. Addo

341 Ga. App. 236, 800 S.E.2d 1 (2017)—Court of Appeals explains meaning of "reasonable diligence" for purposes of rules governing service of an LLC.

In this case, the Court of Appeals addressed the meaning of "reasonable diligence" in the context of attempting service on a limited liability company. O.C.G.A. § 14-11-209(f) provides that "[w]henever a limited liability company shall fail to appoint or maintain a registered agent in this state or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such limited liability company upon whom any process, notice, or demand may be served." The statute goes on to provide a procedure for perfecting service in this situation. Affirming the trial court's denial of a motion to set aside a default judgment, the Court of Appeals held that it was within the trial court's discretion to find that the plaintiff had exercised "reasonable diligence" even though it was undisputed that the plaintiff had made only a single attempt to serve the LLC through its registered agent prior to serving the Secretary of State.

The plaintiff and the LLC's principal and registered agent were well acquainted; in fact, they lived in different sections of the same house. The plaintiff, Addo, claimed that he and the individual defendant, Vasile, reached an agreement in which Vasile's company Roga Import Export, LLC ("Roga") would receive a check on behalf of Addo and then forward the money to Addo, but that Vasile instead caused Roga to forward the money to himself. On September 10, 2015, Addo attempted to serve a copy of the summons and complaint on Vasile individually and as the registered agent for Roga, but the service was returned with a note that Vasile was "possibly" out of the country. That was the only time that Addo attempted to serve Roga through Vasile as its registered agent. In the weeks that followed, Addo claimed that he received various text messages from Vasile that alternated between making threats and asking questions about the lawsuit, and that Vasile at one point claimed to be "in a Mexican jail." In October, 2015, Addo successfully moved the trial court to allow him to serve Vasile (but apparently not Roga) by publication, which he attempted to do during December, 2015.

On December 11, 2015, Addo effected substitute service on Roga by serving the Secretary of State via certified mail. The defendants failed to answer, and Addo thereafter obtained a default judgment. The defendants then appeared and moved to set aside the default judgment. They claimed that Addo had misled the court regarding Vasile's whereabouts, that he had been in Romania during the entire relevant period, and that Addo knew this because he was renting Vasile's basement apartment. The trial court denied the motion to set aside, and also denied a motion to set aside the default judgment for lack of personal jurisdiction based upon improper service.

On appeal, the defendants appeared to have backed away from any claim that Addo had misled the trial court. Roga's appeal centered on the fact that Addo had made only one attempt to serve it before effecting substitute service on the Secretary of State. Roga argued that a single attempt at service could not possibly constitute "reasonable diligence" under O.C.G.A. § 14-11-209. Applying an abuse of discretion standard of review, the Court of Appeals affirmed. The court noted that "reasonable diligence" is not defined in the statute, and turned to the Black's Law Dictionary definition: "diligence reasonably expected from, and ordinarily exercised by, a

person who seeks to satisfy a legal requirement or to discharge an obligation. Also termed reasonable diligence; common diligence." The court found that there was evidence to support a finding that Addo exercised reasonable diligence, given the possibility that Vasile was not in Georgia but was either in a Mexican jail (as he told Addo at the time) or in Romania (as he later claimed), thus making it impossible for Addo to perfect service on Roga at the address of its registered agent. The court also found that Addo had correctly followed all of the steps for substitute service.

Hunt v. Nationstar

684 Fed. Appx. 938 (11th Cir. 2017)—Service of defendant through its receptionist held insufficient.

Addressing another dispute involving the sufficiency of service on corporations, the Eleventh Circuit affirmed an order from the Northern District of Georgia denying a default judgment to the plaintiff on the grounds that he failed to satisfy Federal Rule 4(h) and Georgia law. The plaintiff attempted to serve two financial institutions through certified mail and by delivering a copy of the complaint and summons to a third defendant, a law firm, through its receptionist. The Eleventh Circuit noted that a significant question existed as to whether the other defendants could be served through the law firm under the circumstances of the case. But it was unnecessary for the court to rule on that question, because service was improper in other significant respects: the receptionist was not an "authorized agent" for service of process, the receptionist apparently declined to accept service, and the plaintiff did not follow the statutory procedures for serving corporations through the Secretary of State. The panel also affirmed the trial court's dismissal of the plaintiff's complaint, finding that all of the plaintiff's claims were either time-barred or did not state a cognizable claim.

4. Class Certification.

Lewis v. KNOLOGY, Inc.

341 Ga. App. 86, 799 S.E.2d 247 (2017)—Order denying class certification in shareholder action based on shareholder's lack of involvement and understanding of case affirmed.

This Court of Appeals decision affirmed an order of the Superior Court of Troup County denying class certification in a putative merger challenge class action on the ground that the proposed class representative had not demonstrated typicality or her own adequacy to represent the class. By a vote of 5-4, with two justices filing a dissenting opinion and two others joining only in the judgment of the dissent, the court held that the trial court acted within its discretion in denying class certification based on evidence that the proposed representative did not understand the theory of her case, was not aware that a suit had been filed on her behalf in Georgia, was unfamiliar with certain of her lawyers, and had unique circumstances regarding the disposition of her shares that left her exposed to potential individual defenses.

The litigation relates to a merger between Knology, Inc. ("Knology") and WideOpenWest Finance, LLC, whose announcement in 2012 led to the filing of lawsuits in

Georgia and Delaware claiming that the Knology board breached its fiduciary duties by approving the merger and by disseminating proxy materials in advance of the shareholder vote that were allegedly inadequate. The deal was approved by Knology shareholders in June, 2012 and closed shortly thereafter. Lewis, an individual shareholder whose holdings were worth under $500 at the merger price, was named as a plaintiff in a complaint filed on June 4, 2012 in Delaware Chancery Court by a national firm that is a prominent filer of merger challenge lawsuits. The Delaware suit was voluntarily dismissed on August 15, 2012, and Lewis was named as plaintiff in a new complaint filed in Troup County a few weeks later. The case was consolidated with a previously filed Troup County action, and proceeded as a post-closing action for damages. The parties engaged in class certification discovery. Lewis gave a deposition in January, 2014, at which she testified that she did not know anything about the merger, the potential bidders, or the process engaged in by the Knology board. She also stated that she was unaware that a lawsuit had been filed on her behalf in Georgia, and that she thought her lawsuit was in Delaware. Lewis expressed familiarity with the national firm that filed the Delaware suit, saying that she retained that firm after responding to an Internet solicitation, but stated that she had never heard of the Georgia counsel serving as liaison counsel. When asked about the substance of her claims, Lewis admitted that she had never read the proxy statement and gave answers suggesting that she thought the claim was about her not being paid any money for her shares. As it turned out, Lewis had *not* been paid—it was discovered as a result of her testimony that Lewis's shares did not appear in the transfer agent's records. The issue was resolved and Lewis received (and accepted) payment of her shares. As a result of her unusual circumstance, Lewis had never received a proxy statement or ballot, and it was undisputed that she never voted on the merger.

The majority's opinion, written by Judge McMillan, emphasized that Georgia trial judges have broad discretion to grant or deny a motion for class certification, and concluded that there was sufficient evidence supporting the trial court's conclusion to affirm. Though the trial court had cited several grounds in its order, the majority focused on adequacy of representation and typicality. The Court relied on federal cases decided under the federal counterpart to O.C.G.A. § 9-11-23 holding that class certification may be denied based on the proposed class representative's lack of involvement in the prosecution of a case. One Eleventh Circuit case cited by the majority, *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003), held that a class representative is inadequate where "participation is so minimal that they have abdicated to their attorneys the conduct of the case." Regarding the typicality element, the majority wrote that in light of Lewis' testimony about her reasons for being involved in the case and the fact that she later accepted payment for her shares, "the record is unclear as to what, if anything, Lewis still hopes to obtain through this litigation…."

Judge McFadden wrote a dissenting opinion that Justice Reese joined in. The dissent found that the trial court had made clearly erroneous factual findings that were not entitled to deference on appeal. Specifically, the dissent criticized both the trial court and the majority for focusing on the plaintiff's experience and competence rather than that of plaintiff's counsel. A petition for certiorari to the Georgia Supreme Court was denied in September, 2017. Under the rules of the Court of Appeals in effect at the time of the decision, the majority's opinion serves as binding precedent because a majority of the nine judges hearing the case fully concurred with the judgment. See Court of Appeals Rule 33 (2017).

5. Indemnification and Insurance.

Georgia Dermatologic Surgery Centers v. Pharis

339 Ga. App. 764, 792 S.E.2d 747 (2017)—Director of professional corporation entitled to mandatory indemnification based on wholly successful defense of suit against corporation.

This short Court of Appeals opinion addressed a dispute over the scope and meaning of Georgia's mandatory indemnification statute for corporate directors, O.C.G.A. § 14-2-852. Under the statute, a corporation is required to indemnify a director "who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he or she was a party because he or she was a director of the corporation" against reasonable expenses incurred in connection with that defense. The court held that the former director of a professional corporation was entitled to mandatory indemnification based on his successful defense of litigation brought against him by the corporation, even though he was sued in multiple capacities.

The appellee, Pharis, was sued by the corporation and its other member, Baucom, after he left the practice and formed his own practice. In the underlying lawsuit, Baucom and the corporation alleged that Pharis breached fiduciary duties that he owed as a shareholder, officer, director and partner. Pharis was granted summary judgment on all of the claims, meaning that he was "wholly successful" as required under the statute. The practice nonetheless refused to indemnify him, arguing that it was not obligated to do so because all of the claims in the underlying lawsuit could have been brought against Pharis solely in his capacity as an officer or in some other capacity. The Court of Appeals held that Pharis was entitled to mandatory indemnification. Explaining that the statute requires indemnification whenever a director is sued because he or she is a director and "leaves no room for discretion" as to this point, the court found that the underlying suit was brought against Pharis because he was a co-director, and that this was "not negated" by the fact that claims were also asserted against him in other capacities.

6. Evidentiary Issues.

Robles v. Yugueros

343 Ga. App. 377, 807 S.E.2d 110 (2017)—Rule permitting use of testimony of corporate representative against corporation "for any purpose" is limited by applicable evidentiary rules, including expert testimony requirements.

This case returned to the Court of Appeals on remand from the Georgia Supreme Court, which held in late 2016 that the 30(b)(6) testimony of a representative of a medical practice could not be offered at trial as expert testimony since the deponent had not been qualified as an expert. We reviewed that decision in last year's survey. *Yugueros v. Robles*, 300 Ga. 58, 793 S.E.2d 42 (2016).

This was a medical malpractice action brought against a plastic surgeon and the practice that employed her. One of the critical issues in the case was that the surgeon, while treating the

patient for post-surgery pain, failed to order a CT scan. During discovery, the plaintiff took the deposition of the founder and co-owner of the practice pursuant to O.C.G.A. § 9-11-30(b)(6). When asked whether it would have been part of the standard of care to order a CT scan under the circumstances, the deponent stated that it would have been. The trial court excluded this testimony at trial, sustaining a motion *in limine* brought by the practice group, which argued that the deponent was not qualified to give expert testimony in the matter because, among other things, she had not been provided all data necessary to form an opinion. The trial resulted in a verdict for the defense. The Court of Appeals initially reversed the trial court's evidentiary ruling, holding that the testimony should have been admitted as an admission against interest under O.C.G.A. § 9-11-32(a)(2), reading the statute to allow the testimony at issue here to be offered as expert testimony regardless of whether it satisfied the rules for admission of expert testimony. *See Yugueros v. Robles*, 335 Ga. App. 324, 779 S.E.2d 139 (2016). The Supreme Court held that this "does not accurately reflect the law" as it regards the use of 30(b)(6) testimony, explaining that the statement in § 9-11-32(a)(2) permitting the testimony of a corporate representative to be used "for any purpose" was qualified by the prefatory language in § 9-11-32(a) stating that a deposition may be used against a party "so far as admissible under the rules of evidence applied as though the witness were then present and testifying." This meant that the testimony had to independently qualify as expert testimony under § 24-7-702, Georgia's version of the *Daubert* standard.

Upon remand, and following the Supreme Court's guidance, the Court of Appeals held that in light of the Supreme Court's opinion, the trial court had not committed reversible error. The Court of Appeals noted that the plaintiff had chosen to seek admission of the testimony solely on the ground that it was obtained pursuant to a 30(b)(6) deposition, and had made no showing that the testimony was admissible as expert testimony under § 24-7-702.

F. DECISIONS OF THE FULTON COUNTY BUSINESS COURT

Rollins v. LOR, Inc.

No. 2014-cv-249480 (Ga. Super. Apr. 28, 2017) (Order on Motion for Summary Judgment)

This case is related to the highly publicized dispute over the administration of the Rollins family fortune by the two sons of O. Wayne Rollins, Randall and Gary Rollins. As we know from the many appellate decisions in *Rollins v. Rollins*, which we have addressed in prior surveys, Randall and Gary Rollins have served simultaneously as trustees of family trusts, managing partners of family partnerships, and directors of family corporations, and in those capacities were subject to multiple different standards of conduct. This case concerns their conduct as directors of LOR, Inc. since 1993.

The plaintiffs, all grandchildren of Wayne Rollins, are the trustees of a marital trust that is a minority shareholder of LOR. The plaintiffs' allegations fell into four categories. First, they alleged that the defendants caused LOR to enter into tax related transactions beginning in 2002 and 2003 that eventually caused distributions to the marital trust to be reduced. They contended that the statute of limitations was tolled as to these transactions because the defendants misled them for years about LOR's affairs and governance, including the fact that they were trustees of

the marital trust. Second, the plaintiffs challenged the defendants' distribution decisions, which were made pursuant to a distribution policy enacted in 2004. Third, the plaintiffs alleged that the defendants diverted funds that should have been distributed to the marital trust in order to pay personal tax liabilities owed by Gary Rollins. Fourth, they alleged that the defendants caused LOR to purchase various assets, including a ranch, a private jet and other vehicles, for their own personal use.

Following discovery, the defendants moved for summary judgment. The court granted the motion in part and denied it in part. The court first addressed the plaintiffs' argument that the statute of limitations was tolled by the defendants' alleged concealment of information about LOR's affairs. The plaintiffs alleged that they received only piecemeal information about LOR prior to 2010, and that when they were asked to sign documents (including documents in which the marital trust as shareholder was approving the transactions at issue in this lawsuit), they were provided only the signature pages. Under O.C.G.A. § 9-3-36, a statute of limitations can be tolled by the defendant's fraudulent concealment if the plaintiff shows that the defendant committed actual fraud, the fraud concealed the cause of action from the plaintiff, and the plaintiff exercised reasonable diligence to discover the cause of action. The court found that the plaintiffs failed to establish either actual fraud or their own reasonable diligence. As to actual fraud, the court found that while the defendants may have been secretive, the evidence did not suggest any fraudulent intent. One fact the court found particularly significant is that while the plaintiffs were provided only signature pages, those pages clearly indicated that the plaintiffs were signing in a fiduciary capacity on behalf of the marital trust. In the court's view, this not only showed a lack of intent to conceal facts from the plaintiffs, but also triggered a duty on the plaintiffs' part to inquire into the purpose of the documents, which they did not do. The court concluded that the applicable statutes of limitation were not tolled.

The court then turned to the plaintiffs' claim that the defendants breached their fiduciary duties by entering into transactions in 2002 and 2003 that adversely affected their distributions. The defendants argued that they entered into these transactions, in which LOR's holdings in public company stock were transferred to various investment partnerships, for tax reasons and on the advice of counsel. In 2016, with this lawsuit already pending, the defendants appointed two new independent directors, who were then asked to investigate the transactions and determine whether to approve them. The two directors approved and ratified the transactions on April 22, 2016, just days before the defendants moved for summary judgment. Although the court had already determined that the plaintiffs' claims based on the 2002 and 2003 transactions were time barred, it decided whether to review whether the defendants had also satisfied the safe harbor provision in O.C.G.A. § 14-2-862, which allows a corporation to ratify a conflicted interest transaction if at least two qualified directors affirm the transaction after receiving required disclosures. (The transactions were found to be conflicting interest transactions because some of the defendants' family members stood to benefit from the way in which the partnerships were set up at the time they were set up). The plaintiffs argued that the transactions could not be ratified under § 14-2-862 under the circumstances because litigation challenging the transactions was underway and utilizing the statutory safe harbor would "subvert the role of the judiciary." The court disagreed, holding that the Code does not place any limitations on when a conflicted interest transaction can be affirmed under the safe harbor provision. The plaintiffs also argued that the two new directors were not "qualified" because they receive a salary from LOR. The

court again disagreed, noting that most corporate directors receive at least some compensation from the corporation, and it would not make sense to read the statute to disqualify such directors. The court further found that there was no evidence of a "familial, financial, professional, or employment relationship" between the two directors and the defendants, and that these are the sorts of relationships that are relevant under § 14-2-862. Finally, the court held that the two directors received sufficient disclosure and exercised the diligence required under the *Loudermilk* standard in investigating the transactions.

Having found that the transactions were duly affirmed under § 14-2-862, the court briefly addressed whether the transactions were a valid exercise of business judgment by the defendants. The court held that they were, citing evidence that the transactions were designed to address legitimate tax concerns and that the defendants relied on outside counsel and experts.

Regarding the later distribution decisions, which related back to a distribution policy enacted in 2004, the court again addressed the substance of the claims even though it held that they were time barred. Here, the court agreed with the defendants that the plaintiffs were estopped from challenging distribution decisions because they specifically approved the distribution policies as members of a related entity. The plaintiffs argued that their approval was meaningless because they were only provided with signature pages. The court found this unpersuasive, citing the rule that a party to a contract has an obligation to read it.

The plaintiffs' claim that distributions were diverted to pay Gary Rollins' tax liability was also found to be time barred, but the court again addressed the claim on the merits. Here, it found that summary judgment would have been denied if the claim had not been barred by the statute of limitations. In contrast to the claims stemming from the 2004 distribution policy, there was a genuine question of fact as to whether these transactions were properly approved.

Finally, the court addressed the claims that the defendants committed corporate waste by purchasing assets that they eventually put to their own personal use. For instance, the defendants hunted and built houses on land owned by one of LOR's businesses, and were permitted to rent and use the land at below market rates. The defendants also bought a private jet and a corporate bus through LOR, which they used for both business and personal trips, and they obtained personal loans from LOR at below market rates. The court found that to the extent these claims were not time barred, the plaintiffs met their burden to show a genuine issue of material fact. The court held that these transactions were subject to an entire fairness standard and that a question remained as to whether the amounts paid by the defendants to LOR were fair.

In the same order, the court addressed a petition by the plaintiff for inspection of LOR's records under O.C.G.A. § 14-2-1602. The court found the plaintiff's demand for inspection to be moot in light of the significant amounts of discovery that had taken place. The court also denied the defendants' motion for summary judgment as to the plaintiff's claim for judicial dissolution of LOR under O.C.G.A. § 14-2-1430(2)(D), holding that it could not yet rule on the motion because there remains an issue of fact as to whether the defendants committed corporate waste, which is one of the grounds allowing for judicial dissolution.

Gross Endowment Trust, LLC v. Inglesby

No. 2015-cv-261031 (Ga. Super. Mar. 9, 2017) (Order on Motion for Summary Judgment)

In this case, the business court granted a defendant's motion for summary judgment based on the plaintiffs' prior release of the claims they were asserting. In granting summary judgment, the court rejected the plaintiffs' attempt to rescind the release on the grounds that they waited too long to seek rescission, and the evidence failed to establish multiple elements of a fraud in the inducement claim.

This was a dispute between former partners in a real estate venture. The defendant managed GCA, a three member LLC in which the plaintiffs were the other members, whose business involved locating and pursuing various commercial real estate deals for a second LLC who would provide investment capital for those deals. After GCA had failed to be profitable for some time, the members discussed ending their relationship. In connection with the winding up process, the defendant sent the plaintiffs a "pipeline report" in April, 2014 containing a list of GCA's "active deals," which the defendant defined to mean deals that were in progress and being pursued. In early May, 2014, the other partners decided that they would dissolve GCA, believing that there were not enough active deals in the pipeline to continue their business relationship.

At the time of the pipeline report, the defendant was aware of another potential deal not disclosed in the pipeline report (the "Lenox Park Transaction") whereby Fortress Investment Group would advance funds to a new entity being formed by the defendant and Fortress, named Crescent. The defendant had by March, 2014 received a letter of intent relating to the Lenox Park Transaction, and he had described the transaction to Fortress as being "in the pipeline" shortly before sending the plaintiffs the GCA pipeline report omitting the Lenox Park Transaction. The transaction eventually closed in October, 2014, and Crescent received a $2.9 million fee.

Two months later, in December, 2014, the GCA members formally wound up GCA's affairs. In connection with the windup, one of the plaintiffs learned of the Lenox Park Transaction and sought further details about Crescent's involvement in that transaction. The defendant notified the plaintiffs that the deal had not been presented until after the GCA members agreed to dissolve GCA, and stated that he had been transparent about the fact that he would form a new company and continue to work on real estate deals. The plaintiffs reviewed some of the documentation relating to the Lenox Park Transaction and indicated to the defendant that he agreed with the defendant's description of the timing of the opportunity. The parties then executed broad releases in connection with an agreement to buy out the members' respective interests in GCA.

Five months after the releases were signed, the plaintiffs notified the defendant that they were rescinding the releases and other documents they signed to effectuate the winding up of GCA. Shortly thereafter, the plaintiffs sued the defendant and Crescent. The defendants moved for summary judgment on the grounds of release, and the plaintiffs argued in response that the releases were ineffective because they were seeking rescission.

The court found that the plaintiffs had waited too long to seek the remedy of rescission, citing O.C.G.A. § 13-4-60's requirement that a party seeking rescission offer to restore the parties to their original positions "promptly" upon discovery of the fraud, and several Georgia appellate decisions holding that a delay of as little as five months can defeat a rescission claim. The court was unpersuaded by the plaintiffs' argument that they needed five months to investigate whether they had an actionable fraud claim, finding that they had conducted a thorough investigation in December, 2014 and knew of the key facts forming the basis for their claim by January, 2015, four months before seeking rescission.

The court further found that even if rescission had been sought in a timely fashion, the evidence in the summary judgment record did not support a fraud claim. In particular, the court cited a lack of evidence that the defendant made any false representation, given that the defendant made the plaintiffs aware of the existence of his new business and made documents relating to the Lenox Park Transaction available to them. The court also found the plaintiffs' evidence of causation and damages to be lacking, finding that there was no evidence that Fortress would have entered into the same deal with GCA as it had done with Crescent.

BSL Holdings, LLC v. Trinity Lifestyles Management, LLC

No. 2016-cv-278256 (Ga. Super. Jan. 20, 2017) (Order on Motion to Dismiss)

This case involved the management of two LLCs that develop manage senior living facilities for itself and other investors. The two LLCs, Trinity Lifestyles Management, LLC ("Trinity I") and Trinity Lifestyles Management II, LLC ("Trinity II") were comprised of two members, BSL Holdings, LLC ("BSL") and SSL, who held a 30% and 70% ownership interest in the LLCs, respectively, and were managed by SSL's owner. The Trinity entities would often work with other investors and owners of senior living facilities, and new entities would be formed in connection with those business opportunities. BSL, the plaintiff, alleged that when these entities were formed, it was understood that these new entities would either be fully owned by Trinity or that ownership would be split 70/30 between the two Trinity members, but it was ultimately deprived of its 30% membership entities in several of these new entities.

BSL brought a 17-count complaint against 25 defendants, alleging claims both directly and derivatively on behalf of the two Trinity entities. This order addresses a motion to dismiss 13 of the 17 counts by SSL's owner, who allegedly was responsible for handling all of the Trinity entities' legal and development needs as their manager.

One of the more interesting issues addressed in the decision was whether BSL's breach of fiduciary duty claim against the manager was barred by language in the Trinity operating agreements that permitted the manager to engage in other ventures, and further provided that neither Trinity nor any member "shall have any right by virtue of this Agreement in such other ventures or to the income or profit derived therefrom." The operating agreements also permitted the manager to become involved in businesses that competed with Trinity. Under O.C.G.A. § 14-11-307, an LLC operating agreement may eliminate the statutory prohibition against conflict of interest transactions. The defendant claimed that any breach of fiduciary duty claim was foreclosed by this language. But the business court disagreed, holding that this language only

addressed conflicted interest transactions under O.C.G.A. § 14-11-307 and did not appear to absolve the defendant of his duty of care under O.C.G.A.§ 14-11-305.

The opinion also addressed the demand requirements for derivative claims in the LLC context. BSL asserted derivative claims on behalf of the Trinity entities against two of the related entities, Ariel I and Ariel II, from whom Trinity leased office space. BSL alleged that these entities were required to provide office space for the exclusive use of Trinity but did not do so, overcharged Trinity for rent and other charges, and allowed other related businesses to use the office space without charging rent. The court dismissed these claims, holding that BSL failed to meet the demand requirements of O.C.G.A. § 14-11-801. While BSL served a demand letter demanding that SSL and its owner take action against "others" for "breach of fiduciary duty and other claims," it did not specifically mention the two Ariel entities or the leases in question.

The rest of the order generally addressed whether the BSL had sufficiently alleged all of the elements of various claims under Georgia's notice pleading standards. The court also addressed statute of limitations arguments, as well as an argument by the defendant that the alleged oral agreement regarding the ownership of newly formed entities violated the statute of frauds. The court rejected this argument, holding that the statute of frauds was inapplicable because the alleged agreement was not a contract "incapable of being performed within a year." Instead, the court found that the alleged agreement was indefinite as to term.

Obarski v. Elting

No. 2016-cv-275799 (Ga. Super. May 9, 2017) (Order on Motion to Dismiss)

This action involves claims by a Georgia-based employee of TransPerfect, a Delaware corporation headquartered in New York, against the company's officers for breach of contract. The business court granted a motion to dismiss filed by one of the officers, a New York resident, on the grounds that the court lacked personal jurisdiction over that officer.

The plaintiff, a senior vice president of TransPerfect who worked out of its Atlanta office, alleged that the defendants, the company's two senior officers, broke a promise to offer him an ownership interest in the company if it was ever put up for sale. The company was ordered by a Delaware court to undergo a forced sale as a result of a separate dispute between the two defendants. The plaintiff alleged that the forced sale triggered the defendants' alleged promise to offer him a stake. The movant showed, in support of her motion to dismiss on jurisdictional grounds, that she performed her duties as chief executive officer of TransPerfect from her home state of New York, and that she had never traveled to Georgia except on one occasion in the 1990s for purposes of finding a location for the Atlanta office. During limited jurisdictional discovery, the defendant admitted to having telephone communications with the plaintiff while he was located in Georgia, but she claimed that those communications were infrequent (a few times a year during the last two years) and denied making the promise alleged by the plaintiff. Discovery also revealed that the defendant had general supervisory responsibility over the Atlanta office, that she made hiring decisions for the Atlanta office, that she signed checks to pay expenses for the Atlanta office, and that she filed Georgia tax returns.

The court applied the settled test for evaluating personal jurisdiction under Georgia's long-arm statute, O.C.G.A. § 9-10-91, which states in relevant part that a nonresident may be subject to personal jurisdiction in Georgia if she "transacts business" in the state. The court further recognized that the scope of activities that can fall within the definition of "transacts business" is constrained by federal due process considerations. Applying these principles, the court found that the defendant's total contacts with Georgia could not be considered "continuous and systematic" and therefore did not make the defendant subject to general jurisdiction in Georgia. The court recognized that TransPerfect might have had sufficient contacts with Georgia to be subject to general jurisdiction, but TransPerfect's contacts cannot be imputed to the defendant. The court then held that the evidence was insufficient to show that the defendant purposely performed some act or consummated a transaction in Georgia from which the plaintiff's cause of action arose. Since the defendant testified by affidavit that she never made the promise described in the plaintiff's complaint, the court found that it was incumbent on the plaintiff to demonstrate that the defendant at least initiated some communications relevant to his claim. Finding that the defendant had not done so, the court held that the defendant was not subject to specific jurisdiction in Georgia.

Strategic Jubilee Holdings, LLC v. Jubilee Development Partners, LLC

No. 2016-cv-283484 (Ga. Super. Apr. 14, 2017) (Order on Motion to Strike)

In this case, the business court denied a motion to strike the complaint on the grounds that it was retaliatory in nature and violated Georgia's anti-SLAPP statute, O.C.G.A. § 9-11-11.1. The movants were the five defendants: two LLCs who claimed to be members of one of the plaintiffs, Jubilee Manager, LLC ("JM"), along with three individuals who were the managers of the two defendant LLCs. In November, 2016, the five defendants filed a lawsuit against one of the plaintiffs and other related parties in Florida, alleging that they had mismanaged a different LLC formed by the parties. JM and one of its other members then sued the five defendants in Fulton County, seeking a declaration that the two defendant LLCs were not members of JM.

The defendants claimed that the Georgia lawsuit was filed in retaliation for the Florida suit, as well as for a letter sent by one of the defendant managers to a county attorney in Florida. Under the anti-SLAPP statute, a party may strike a claim for relief against a person or entity arising from an act by that person or entity "which could reasonably be construed as an act in furtherance of the person's or entity's right of petition or free speech" under the U.S. or Georgia constitutions. The court recognized that it was questionable whether the lawsuit and the letter to the county attorney constituted acts of free speech, but did not resolve that question. Instead, the court found that the motion to strike had to be denied because the claims in the case before it were not sufficiently related to the claims in the Florida lawsuit or the issues raised in the letter. Instead, the Florida case was a contract dispute dealing with alleged mismanagement of a separate LLC, whereas the case before the court was strictly a "dispute about corporate governance and membership in JM, a Georgia LLC."