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Georgia Supreme Court

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Georgia Power Co. v. Georgia Public Service Commission, No. A08A2106; 2009 Ga. App. LEXIS 270. [*Energy Law: Corridor rights created by the Territorial Act apply only to those entities that own power lines within a particular service territory at the time the territory was assigned under the Act*.] (Johnson, E., 3-0).

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CASE SUMMARIES

Shingler et al. v. Three Notch Electric Membership Corporation, No. S09C0053 (January 12, 2009). On January 12, 2009, the Supreme Court denied certiorari in this personal injury action in which the Petitioners sought to recover for the injuries that Leon T. Shingler sustained while fishing when his graphite fishing pole struck an admittedly visible power line owned and maintained by Three Notch. In early January of 2008, **Balch & Bingham lawyers Hugh B. McNatt** and **Anne Kaufold-Wiggins**, as well as lawyer Chip Stewart, spent over four days trying this case on behalf of Three Notch. The evidence presented showed Shingler had actual knowledge of the danger associated with contacting a power line, that he appreciated the risks involved in fishing under the line, and that he had been warned to avoid contact with the line at issue. The jury rendered a verdict in favor of Three Notch finding that Shingler assumed the risk of his injuries. On appeal, Petitioners argued the assumption of the risk charge and interrogatory verdict form were improper. On July 24, 2008, the Court of Appeals issued a Rule 36 decision affirming the jury verdict in favor of Three Notch. This matter was fully resolved on January 12, 2009 when the Supreme Court denied certiorari.

Troutman v. Troutman, No. A08A2138 (March 26, 2009). **Balch & Bingham attorneys David J. Marmins** and **Natalie M. Christensen** tried this case on behalf of Defendant Stinson Troutman, and won the case on appeal. Stinson Troutman held the deed to a 231-acre Wilcox County farm for over 15 years. His father had given him the deed following a family meeting with his six children because he needed to rid himself of assets while applying for government benefits. Stinson's father and five siblings later sued Stinson alleging that he had only been given the land to hold it in trust for the family. A jury agreed and the judge ordered the land be divided six ways among the siblings. On appeal, the Court reversed, ruling that the trial court should have granted Stinson's motion for directed verdict. The Court held that the facts of this case did not establish a constructive trust in favor of the siblings. The general rule is that the statute of frauds requires a written instrument to transfer an interest in property. A constructive trust is an exception, but only applies when there is evidence of fraud and an inequitable result. In this case, the Court found that there was no evidence Stinson had committed fraud. Further, the Court held that equity demanded Stinson keep ownership of the land, which he has lived on, farmed and for which he paid the vast majority of costs for over 15 years.

Meadows v. Diverse Power, Inc., A08A2039 (March 17, 2009). On March 17, 2009, the Court of Appeals affirmed summary judgment in favor of Diverse Power, Inc., holding that Diverse Power, Inc. was not the proximate cause of the wrongful death and other injuries where plaintiffs' vehicle left roadway and struck the Diverse Power, Inc. utility pole, which was located well off the traveled portion of a roadway, safe from ordinary danger of collision from vehicles on the roadway. **Balch & Bingham lawyers Hugh McNatt** and **Anne Kaufold-Wiggins** argued this case in the Court of Appeals. In this case, the evidence showed Plaintiff lost control of a truck, in which his mother and sister were passengers, and hit a utility pole located 24 feet away from the edge of the highway. The pole fell, leaving a live power line suspended about a foot off the ground. The mother knew the line might be live but stepped over it anyway, touched the wire, and was electrocuted. Both children were injured as they attempted to remove their mother from the line. Plaintiffs alleged Diverse Power, Inc.'s negligence caused the death of the decedent and injured her children. The trial court granted Diverse Power, Inc. summary judgment, finding that it was not liable for the injuries sustained when the car left the roadway and struck the pole, and that the death and injuries were not the result of the collision with the pole but the result of the mother's dangerous act of stepping over a live wire. The Court of Appeals affirmed.

Etowah Environmental Group et al. v Advanced Disposal Services, Inc. et al., No. A08A1660 (March 27, 2009). **Balch & Bingham lawyers Mike Bowers, Josh Archer,** and **Anne Kaufold-Wiggins** were successful in the Court of Appeals which affirmed the trial court's decision to compel arbitration in favor of their clients. Appellants filed this action asserting numerous claims arising from a merger pursuant to an operating agreement containing an arbitration provision. When Appellees filed a Motion to Compel Arbitration, Appellants amended their complaint to remove all references to the operating agreement, claimed the arbitration provision was unenforceable, and asserted that notwithstanding the arbitration provision their statutory and tort claims did not arise under the provision. The Court of Appeals disagreed and held that all of Appellants' claims "touch on the obligations" created in the operating agreement and must be arbitrated.

Legacy Investment Group, LLC v. Fulton County, No. A09A0371, A09A0372 (March 20, 2009). On March 20, 2009, the Georgia Court of Appeals favorably affirmed in part, vacated in part, and remanded a case **Balch & Bingham lawyers Matt Maguire** and **Robert Glass** successfully tried in May, 2008 on behalf of Legacy Investment Group, LLC. Legacy, a home developer, brought an action based on 28 U.S.C. § 1983 against Fulton County alleging that Fulton County was selectively enforcing a certain provision of the Fulton County Erosion and Sedimentation Code against Legacy. On appeal and cross-appeal, the court rejected Fulton County's argument that a property interest is a required element for an equal protection claim. Importantly, the court of appeals also held that a party can recover prevailing-party attorney's fees under O.C.G.A. § 13-6-11 even if there is no identifiable underlying state law claim. Finally, the court agreed with Legacy's favor that the trial judge erred by refusing to hear argument on Legacy's motion for declaratory judgment on the unconstitutionality of the Fulton County Code provision that formed the basis for Legacy's selective enforcement claim.

Schramm v. Lyon, S08G1391, S08G1418 (two cases) (Feb. 23, 2009). In Schramm v. Lyon, the Supreme Court held that the statute of repose did not bar the plaintiff's claims against physicians for failure to advise and warn. The plaintiff, Ms. Lyon, had her spleen removed in 1982. In 2004, Ms. Lyon developed overwhelming post-splenectomy infection (OPSI), which resulted in significant injuries. Ms. Lyon filed a medical malpractice action against eight physicians and their practices. All eight doctors had treated her in the five years prior to the filing of her case. Her complaint alleged that the doctors failed to advise and warn her about the risk of developing OPSI, which Ms. Lyon and her doctors could have prevented with medications and vaccinations.

Georgia Code section 9-3-71(b) provides for a five-year statute of repose for medical malpractice actions. This statute means no action for medical malpractice may be brought more than five years after the date on which the negligent act or omission occurred. Three of the doctors asked the court to dismiss the case against them because their initial consultations with Ms. Lyon were prior to 2001, which made their alleged negligent conduct time barred.

On appeal the Court was asked to decide when the five-year statute of repose period began to run. The doctors argued that the statute of repose commenced to run on the date they each first treated Ms. Lyon, and that any subsequent acts were part of their continuing treatment. Ms. Lyon argued that the doctors committed separate acts of professional negligence by failing to warn, treat and advise her every time she sought their counsel. The Court agreed with Ms. Lyon. The Court held that Ms. Lyon's complaint alleged that the doctors committed subsequent negligent acts causing new injuries, and each new act would trigger separate periods of repose.

Atmos Energy Corp. v. Georgia Public Serv. Comm'n, S08G1206 (Mar. 9, 2009). Atmos Energy is a natural gas distribution company subject to the jurisdiction of the PSC. When a utility company is regulated by the PSC and wants to change rates, charges, or services, it must notify the PSC pursuant to Georgia Code section 46-2-25. The PSC is authorized to suspend the proposed change for up to five months from the date when it would otherwise go into effect. The PSC uses this time to decide whether to approve the changes. If the PSC needs more than five months it can apply to the Superior Court of Fulton County for an extension of time. Once the PSC has issued a final decision, the utility may seek judicial review of that decision.

Atmos Energy began a rate-change proceeding on May 20, 2005. As permitted by law, the PSC suspended operation of the change and began a series of hearings on the desired changes. In November, on the last day of the statutory period, the PSC issued an order that authorized Atmos Energy to increase its rates in part. The November Order said it was a "final order," but also specifically provided that a "more detailed Order explaining each item will follow." Atmos Energy was not satisfied with the November Order and filed a petition asking the PSC to rehear and reconsider that order, which the PSC declined to do. Then Atmos Energy filed a petition in Fulton County Superior Court appealing the PSC's November Order. The PSC moved to dismiss the appeal because the November Order was not final and the utility could only appeal final orders. Atmos Energy argued that the November Order had to be final because if the PSC needed more time (more than the statutory five months), it had to move for more time from the Superior Court. Since the PSC did not move for more time and November was the deadline, the PSC's November Order was necessarily the final order.

The Court of Appeals and the Supreme Court found that the November Order was an interim decision and not a final order. Atmos Energy cannot appeal an interim decision so the Superior Court had to dismiss Atmos Energy's petition. The Court held that the statute only permits the PSC to *suspend* rate changes for five months but does not require it to *decide* rate cases within five months.

Ferdinand v. City of Atlanta, No. S08A2102 (Mar. 9, 2009). In Ferdinand v. City of Atlanta, the City of Atlanta filed a petition for writ of mandamus, declaratory and injunctive relief, seeking, inter alia, a temporary restraining order and/or preliminary injunctive relief. The City wanted the court to require Arthur Ferdinand, the Fulton County Tax Commissioner, to maintain the status quo of paying school tax receipts to various Tax Allocation Districts (TADs). The City filed its petition on February 22, 2008, and on February 25, 2008, Atlanta filed a "notice of emergency hearing" giving Ferdinand notice that a hearing would be held on February 27, 2008 – five days after the City filed the petition. At that hearing, the court entered an order granting a permanent injunction and writ of mandamus.

The Supreme Court held that the trial court erred in several procedural ways. The February 27 hearing was only supposed to be on the interlocutory injunction. When Ferdinand appeared for the interlocutory injunction hearing, the court informed him that it would be deciding all the issues – mandamus and a permanent injunction. Georgia Code section 9-6-27, requires that a hearing for mandamus relief be no sooner than ten days from an application for mandamus. Moreover, the defendant shall be served at least five days before the time fixed for the mandamus hearing. In this case, the court scheduled the hearing five days after the City filed the petition, five days less than the statute requires. Therefore, the trial court did not follow statutory requirements as to notice and time periods and the Supreme Court reversed and remanded the trial court's judgment.

Bragg et al. v. Oxford Construction Company, No. S08G1031 (February 9, 2009). On February 9, 2009, the Supreme Court of Georgia issued a 4-to-3 decision, upholding the "acceptance doctrine." The acceptance doctrine provides that:

> **where a contractor who does not hold itself out as an expert** in the design of work such as that involved in the controversy, **performs its work without negligence, and the work is approved and accepted by the owner or the one who contracted for the work** on the owner's behalf, **the contractor is not liable for injuries resulting from the defective design of the work.** The exceptions [to this rule] for inherently or intrinsically dangerous work, for nuisances per se, and for work so negligently defective as to be imminently dangerous to third persons, apply in cases where the contractor is guilty of negligence in the performance of its work.

In this Dougherty County case, following a serious car accident, Ken and Francesca Bragg, individually and co-administrators of the estate of their stillborn daughter, sued Oxford Construction Company ("Oxford") for negligent construction of the road where the accident took place, arguing Oxford should be held liable and the archaic "acceptance doctrine" overturned. The trial court applied the acceptance doctrine and ruled in favor of Oxford. The Court of Appeals affirmed.

In the Supreme Court's decision, the majority written by Justice Harold Melton and joined by Justices George Carley, Hugh Thompson and Harris Hines, agreed. The Court held that Oxford was not responsible for the design of the road and never said it was an expert in designing such repairs. "Oxford just did what it was instructed to do by the County, and the County accepted Oxford's work when the work was completed." The Court found that there is no evidence that Oxford performed negligently. If anyone should be held liable, it should be the County – "the entity that hired Oxford, ordered it to patch the road, and accepted Oxford's completed work." In this case, the majority found that the "[a]pplication of the acceptance doctrine makes sense." "The fact that other jurisdictions have rejected the rule, however, does not mandate that Georgia do the same."

In her dissent, Presiding Justice Carol Hunstein disagrees, arguing that the acceptance doctrine is "based on principles long since disapproved" and rooted in an 1842 English decision that predates the "rec ognition of negligence as an independent basis of liability and of the distinction between tort and contract." Joined by Chief Justice Leah Ward Sears and Justice Robert Benham, Justice Hunstein argues the "acceptance doctrine" should be abandoned for a "modern rule" that states that "a building or construction contractor is liable for injury or damage to a third person even after completion of the work and its acceptance by the owner where it was reasonably foreseeable that a third person would be injured by such work . . . ." The dissent indicates that 33 of the 44 states that have considered this issue adopted the modern rule.

Thompson v. Allstate Ins. Co., No. S08G1594, S08G1595 (February 9, 2009; on remand to Court of Appeals, Nos. A08A0115, A08A0116 (March 16, 2009). Richard and Laura Thompson ("Plaintiffs") brought suit against Randall Bacon ("Bacon") for physical personal injuries they sustained as a result of a vehicular collision and for Mrs. Thompson's loss of consortium. Plaintiffs also sued Allstate Insurance Company and Georgia Farm Bureau Casualty Insurance Company ("Excess Insurers") in their capacities as underinsured motorist (UM) carriers. Bacon was covered by a liability insurance policy with limits of $100,000 per person and $300,000 per accident. For consideration of $100,000, Plaintiffs executed a limited release that released Bacon and the liability insurer, but reserved Plaintiffs' rights to proceed against their UM carriers. After the limited release was executed, Excess Insurers filed motions for summary judgment arguing that Georgia law required Plaintiffs to exhaust all available liability coverage before proceeding against their UM carriers. Excess Insurers argued that $100,000 was solely available to Mr. Thompson from the liability insurance carrier to settle his claim. Because Mr. Thompson and Mrs. Thompson released both of their claims against the liability insurance carrier for $100,000, Excess Insurers argued a portion of the $100,000 was for Mrs. Thompson's claims, thereby establishing as a matter of law that Mr. Thompson had not exhausted all available liability coverage to him prior to proceeding against the UM carriers. The trial court denied Excess Insurers' motion for summary judgment as to Mr. Thompson's claim, which was reversed by the Court of Appeals. On certiorari, the Supreme Court noted that "a party must exhaust available liability coverage before recovering under a UM policy." The Court held that when the per person maximum has been paid on account of injury to a husband, the wife's loss of consortium claim is deemed in excess of the maximum covered and paid, and the liability insurer is not liable therefore. Because the liability insurer paid the per person maximum to Mr. Thompson, the Court held that the liability insurer was not liable for Mrs. Thompson's loss of consortium claim. Therefore, Mrs. Thompson could not have received any of the settlement

proceeds for her loss of consortium claim. For this reason, the Court held that Mrs. Thompson's loss of consortium claim did not prevent Mr. Thompson from exhausting all available liability coverage from the liability insurer.

In examining Excess Insurers' argument as to Mrs. Thompson's personal injury claim, the Court noted that "consideration need not be a benefit accruing to the promisor, but may be a benefit accruing to another." For this reason, the Court held the "joint release does not necessarily indicate that Mrs. Thompson received a portion of the proceeds for her own physical injuries." The Court therefore held that the limited release was ambiguous as to whether Mr. Thompson settled his bodily injury claim for less than the available coverage due to Mrs. Thompson releasing her personal injury claim. Finally, the Court held that even if the release was unambiguous, parole evidence regarding its scope is nevertheless admissible because Excess Insurers were strangers to the limited release. On remand in Allstate Ins. Co. v. Thompson, 2009 Ga. App. LEXIS 297, the Court of Appeals adopted the Supreme Court's decision, but disapproved of the Supreme Court's reasoning as it related to the potential consideration for Mrs. Thompson's personal injury claim. The Court of Appeals also disapproved the Supreme Court's decision to allow parole evidence against strangers to an unambiguous contract. The Court of Appeals was concerned allowing parole evidence against strangers to an unambiguous release would encourage parties who have signed a release to later collude and to submit post hoc oral evidence that would narrow the clear language of the scope of the release to the detriment of third parties.

ABM Realty Co. v. Board of Regents of the University System of Georgia, No. A08A2195; 2009 Ga. App. LEXIS 298 (March 16, 2009). The Board of Regents condemned real property that ABM Realty Co. leased and operated a business upon. ABM intervened into the condemnation suit and sought compensation for damage to its business, arguing that the business was unique in part because a comparable relocation site was unavailable. The trial court instructed the jury that evidence of difficulty in replacing the building was not evidence of "uniqueness" required under Georgia law. The Court of Appeals reversed the trial court, holding that "testimony about the unavailability of a comparable relocation site in the area and lack of comparable sales in the area sufficed to show the uniqueness of the condemned property for purposes of establishing business losses."

State Farm Fire & Casualty Co. v. Walnut Ave. Partners, LLC, Nos. A08A2059, A08A2139, & A08A2146; 2009 Ga. App. LEXIS 296 (March 16, 2009). A dry cleaning business and its owners were sued for damages allegedly caused by the release of dry cleaning chemicals into the parking lot of the dry cleaning company's landlord. State Farm Fire & Casualty, the dry cleaner's insurance carrier, initially assumed the defense and later informed the dry cleaning company it would no longer defend because the claim was not covered under either of the dry cleaning company's insurance policies. The trial court disagreed, and found the two policies to be ambiguous, and therefore construed the policies against the insurer. The Court of Appeals agreed with the trial court, holding that "State Farm's interpretation of the Umbrella Policy to exclude from coverage even those damages arising out of a quick, abrupt and accidental discharge of pollutants renders meaningless the Amendatory Endorsement's exemption of such discharges from exclusion." Accordingly, where one policy appears to disallow coverage and the other permits it, courts will find policies provide coverage because they need to be read together.

Hardwick v. Fortson, No. A08A2262; 2009 Ga. App. LEXIS 308 (March 17, 2009). The underlying suit involved claims for specific performance, breach of contract, unjust enrichment, injunctive relief, and attorneys' fees claims. After the entry of final judgment, plaintiff moved for attorneys' fees and expenses of litigation pursuant to O.C.G.A. § 9-15-14 against defendants and their attorney, Hardwick. In response to that motion, the trial court increased the amount of attorneys' fees awarded, but never expressly ruled on the request that attorneys' fees be awarded against Hardwick. The underlying defendant appealed the judgment and then filed for bankruptcy. As part of the settlement agreement in the bankruptcy court, the bankruptcy trustee agreed to "request dismissal of the appeal and dismissal of all pending state court proceedings." After the case returned to the trial court, the plaintiffs requested the trial court rule on their request for attorneys' fees against Hardwick, and the trial court awarded fees against Hardwick. Hardwick appealed, arguing the fee award against him was barred by the settlement agreement reached in the bankruptcy court. The Court of Appeals agreed, and reversed the trial court holding that, "when the parties settle all claims in a case, they must expressly reserve their right to bring a O.C.G.A. § 9-15-14 claim against an attorney involved in a case."

Kennedy v. Mathis, No. A08A2054; 2009 Ga. App. LEXIS 302 (March 16, 2009). A motorcyclist was injured when a driver backed out of her parent's driveway onto a county road in front of the motorcyclist. The motorcyclist settled his personal injury claim against the driver, but alleged the county road superintendent was negligent in performing a ministerial duty for failing to trim vegetation along the county road that blocked the driver's view. The county had an unwritten policy that only required the superintendent to trim vegetation along the county road from ditch to ditch. The trial court granted summary judgment to the superintendent, finding that the decision to trim vegetation from ditch to ditch only was a discretionary duty, and the superintendent was thus entitled to official immunity. The motorcyclist appealed, arguing that the duty to trim vegetation was ministerial, and the superintendent was therefore not entitled to official immunity. The Court of Appeals found the task was discretionary, and thus the superintendent was entitled to official immunity because "[i]n the absence of standards or guidelines dictating the manner, method, and time limit for completing the task, [the superintendent] necessarily was vested with discretion."

Santaniello v. Bennett, No. A08A2361 (March 10, 2009). In Santaniello v. Bennett, Santaniello brought an action for breach of contract against Bennett and his company after Bennett refused to return the earnest money Santaniello put forth towards the purchase of Bennett's recycling business. Santaniello requested the real estate broker contact Bennett and request an extension for closing on the transaction because Santaniello was busy with a site remediation his recycling plant in New Jersey. There was conflicting testimony about Santaniello's request for an extension of the closing date. In early August 2005, Bennett's attorney wrote a letter to the broker informing him that if closing did not occur within five days, Bennett would demand the $200,000 being held as earnest money. Santaniello never received the word about the letter, and on August 22, 2005, contacted Bennett to close on the contract. Bennett informed Santaniello that the extension had expired and that he was working with another buyer. Santaniello brought suit to recover his earnest money. The Georgia Court of Appeals reversed the trial court, holding that a genuine issue of material fact existed as to whether the broker, as Bennett's agent, orally waived the closing date provision of the purchase agreement and extending the time to close by setting a new closing date. The Court of Appeals also held that the question of whether the broker had actual or apparent authority to bind Bennett to a waiver of the closing date was a jury question.

Roberts v. Nessim, No. A08A2341, A08A2342 (March 10, 2009). In Roberts v. Nessim, the Georgia Court of Appeals affirmed the trial court's grant of summary judgment for the defendant-doctor but refused to dismiss the plaintiff's fraud count against the defendant-hospital. Plaintiff's decedent was admitted to defendant-hospital with a history of serious medical problems. Defendant-doctor intended to place a feeding tube in the decedent's stomach, but x-rays showed before his death that the tube was actually located in his lungs. After the decedent's death, plaintiff-widow filed a medical malpractice action against the doctor individually and brought an action for fraud against the hospital, alleging that the hospital committed fraud by attempting to conceal the events that led to the decedent's death. The Georgia Court of Appeals affirmed the trial court's finding that plaintiff had not established both a violation of the applicable standard of care and that the violation was the proximate cause of the injury. Because the defendant-doctor submitted a medical affidavit stating that the alleged deviation from the standard of care had no causal connection to the injury, the burden shifted to plaintiff to come forward with material issues of fact, which plaintiff failed to do. The court also affirmed the trial court's refusal to grant defendant's motion to dismiss plaintiff's fraud count because defendant could not establish that "it appears beyond doubt" that plaintiff could establish no set of facts in support of her fraud claim. Instead of moving to dismiss, the court held, defendant should move for a more definite statement or wait for the outcome of discovery.

American National Property and Casualty Co. v. Amerieast, Inc., No. A08A1882 (March 12, 2009). In American National Property and Casualty Co. v. Amerieast, Inc., Amerieast brought an action against an aircraft repair company to recover Amerieast's log books and records, which it claimed the repair company lost while performing maintenance on Amerieast's aircraft. In response, the repair company's insurance carrier brought an action for declaratory judgment against the repair company and the aircraft owner, arguing that its policy did not cover the claim. On cross-motions for summary judgment, the trial court found that the policy covered the alleged loss and granted the aircraft owner attorney fees in connection with its effort to strike a portion of the insurer's motion for summary judgment. On appeal, the Georgia Court of Appeals reversed in part, holding that the policy did not cover the claim. The court examined the contractual language and concluded that the contractual exclusion at issue was unambiguous, and that the trial court erred by granting summary judgment to Amerieast and not granting summary judgment to the insurer on this issue. The court also affirmed the grant of attorney's fees to Amerieast incurred in connection with Amerieast's motion to strike a portion the insurer's motion for summary judgment argument concerning judicial admissions. Amerieast provided the insurer with prevailing legal authority that the statements at issue were not judicial admissions, but the insurer did not amend its argument. The court held that the insurer "unnecessarily expanded the proceedings by improper conduct," pursuant to O.C.G.A. § 9-15-14 and affirmed the grant of attorney's fees.

CSX Transportation, Inc. v. Howell, No. A08A2172 (March 12, 2009). In CSX Transportation, Inc. v. Howell, the Georgia Court of Appeals affirmed the trial court's order holding that the issue of whether judicial estoppel acted as a bar to litigation filed under the Federal Employers' Liability Act (FELA) was procedural in nature and thus governed by Georgia, not federal law. Plaintiff in this matter neglected to include his lawsuit against defendant, and defendant alleged that plaintiff was judicially estopped form pursuing the FELA claim because he did not disclose that claim or his contingent right of recovery in his subsequent Chapter 7 declaration of bankruptcy. Considering whether state or federal law applies to the question of whether plaintiff was judicially estopped from proceeding with the FELA claim, the trial court denied defendant's motion for summary judgment, concluding that judicial estoppel is procedural in nature and the law of the forum should be applied to determine whether the plaintiff is barred from proceeding with the FELA action.

City of LaGrange v. Georgia Public Service Commission, No. A08A1646 (March 13, 2009). The City of LaGrange filed a petition against Diverse Power Incorporated ("DPI") with the Georgia Public Service Commission (the "Commission") alleging a violation of the Georgia Territorial Electric Service Act (the "Act"). In its petition, LaGrange alleged that DPI was not authorized to provide electric service to the Troup County High School's newly constructed Fine Arts Auditorium because that property was within LaGrange's exclusive service territory. At the administrative hearing, the hearing officer concluded that DPI was authorized to pro-

vide service to the Auditorium. The Commission thereafter adopted the hearing officer's conclusion as its final decision and LaGrange appealed the Commission's decision to the Superior Court. The Superior Court affirmed the Commission's decision and LaGrange appealed to the Court of Appeals. On appeal, LaGrange argued that the Auditorium was an expansion of the school "premises." Thus, LaGrange argued that the Auditorium remained within the exclusive service territory of LaGrange and could not be serviced by DPI. DPI alleged that the Auditorium was considered a new "premises," rather than an expansion, thereby giving DPI the right to service the Auditorium. The Court of Appeals reviewed the definition of "premises" as defined in O.C.G.A. § 46-3-3 and concluded that the evidence below supported the Commission's determination that the Auditorium was considered a new "premises." For this reason, the Court of Appeals affirmed the Superior Court's decision upholding the Commission's original decision.

Giannotti v. Beleza Hair Salon, Inc. d/b/a Beleza Salon, No. A08A1728 (March 16, 2009). In Giannotti v. Beleza Hair Salon, Inc. d/b/a Beleza Salon, the Court of Appeals held that the trial court did not abuse its discretion in: (1) excluding Plaintiff's chemistry expert under O.C.G.A. 24-9-67.1(b) where the expert did not utilize reliable principles and methods to test the products at issue and did not apply those principles and methods reliability to the facts of the case; and (2) granting Defendant's motion in limine to exclude Plaintiff's expert on these grounds after the deadline set out in O.C.G.A § 24-9-67.1 had passed. Plaintiff and her husband filed suit against Beleza Hair Salon, Inc. d/b/a Beleza Salon ("Beleza Salon") and Eunice Kai Amaral-Marrs ("Amaral-Marrs") for personal injury and loss of consortium. Plaintiff alleged that Amaral-Marrs negligently performed hair coloring procedures on Plaintiff, causing Plaintiff to sustain chemical burns. Plaintiff's chemistry expert proposed to testify as to the "identification and characteristics of the hair coloring products" at issue. On appeal, the Court noted that O.C.G.A. § 24-9-67.1(b) not only requires expert testimony to be "the product of reliable principles and methods," but it also requires these principles and methods to be applied "reliably to the facts of the case." In arriving at his opinion, Plaintiff's chemistry expert, among other things, failed to conduct any tests related to the effect of hair products on human hair or skin, tested a peroxide product that was not applied to Plaintiff's hair, and used a different type of heat source than the one used on Plaintiff's hair. In view of these facts, the Court held that the record did not establish that Plaintiff's expert utilized reliable principles and methods to test the hair products or that he applied his principles and methods reliably to the facts of the case. In addressing Plaintiff's second argument, the Court noted that O.C.G.A. § 24-9-67.1(d) requires motions to exclude expert testimony to be filed before the final pretrial conference. However, the Court held that the trial court did not abuse its discretion in granting Defendant's motion in limine to exclude Plaintiff's expert after this deadline because the expert was made available for deposition only one week before trial.

Azzouz v. Prime Pediatrics, P.C., No. A08A2340 (March 12, 2009). Azzouz entered into an employment contract with Prime Pediatrics, P.C. that prohibited him from practicing pediatric medicine in a five-county area for two years should his employment terminate for any reason. After Azzouz announced that he intended to quit and start his own practice in the prohibited area, Prime brought suit against Azzouz and sought an interlocutory injunction, which the trial court granted. Azzouz argued that the trial court erred by granting the interlocutory injunction because the employment contract was ambiguous and, as a consequence, overly broad and unenforceable. The relevant portion of Azzouz's employment contract provided that: "prohibited competition shall include maintaining pediatric privileges at any hospital located in the prohibited area, advertising in any form . . . within the prohibited area." Azzouz argued this language was ambiguous and overly broad because it could be read to mean either: (1) he was only barred from working as a pediatrician and advertising his services within the prohibited area; or (2) he was barred from working in any hospital that advertises within the prohibited area regardless of whether the hospital was physically located within the prohibited area. Surprisingly, Azzouz admitted that he "favor[ed] a construction that expands the limitations of the agreement if such construction would render the agreement unenforceable." Based partially on Azzouz's admission, the Court held that "a contract should be given a reasonable construction that will uphold the agreement rather than a construction that will render the agreement meaningless and ineffective." Applying this principle, the Court concluded that there was no ambiguity in the contract and affirmed the trial court's issuance of the interlocutory injunction.

American Material Services, Inc., Charles Chambers and Transportation Casualty Insurance Company v. Jolene C. Giddens, No. A08A1978 (March 16, 2009). In a car wreck case, Plaintiff Giddens sued the driver of a tractor-trailer, Charles Chambers ("Chambers") and his employer, American Material Services, Inc. ("American"). Reversing the trial court's denial of American's motion for directed verdict on the issue of punitive damages, the Court of Appeals held that where an employer's liability depends solely upon the doctrine of respondeat superior, recovery cannot be had against the employer for damages resulting from the alleged wrongful or negligent act of its employee after the employee has been discharged from personal liability. In reviewing the record, the Court held that because the jury did not award punitive damages against Chambers (employee), and because American's (employers) liability was based solely on respondeat superior, it was error to deny Appellants' motion for directed verdict and motion for judgment notwithstanding the verdict on the issue of punitive damages against American.

Pascal v. Prescod, No. A08A2184 (March 2, 2009). Plaintiff, acting *pro se*, sued Defendant for injuries Plaintiff allegedly sustained in an automobile accident involving both parties. Defendant's attorney noticed Plaintiff's deposition on three separate occasions, and each time, Plaintiff refused to appear. After the third notice of deposition, Plaintiff informed Defendant's counsel that he would

not schedule a deposition until Defendant's counsel addressed certain rules and conditions set forth in a "discovery plan" proposed by Plaintiff. Defendant moved to dismiss the case as a sanction for Plaintiff's refusal sit for deposition, and the trial court granted the motion. The Court of Appeals affirmed the trial court's dismissal of the case, holding that defense counsel was not required to address Plaintiff's proposed discovery plan, and his failure to do so did not excuse Plaintiff's failure to attend his properly noticed depositions.

Georgia Power Co. v. Georgia Public Service Commission, No. A08A2106 (March 11, 2009). A dispute arose between the Georgia Power Company ("Georgia Power") and the Sumter Electric Membership Corporation ("SEMC") over the right to provide electrical service to two office buildings near Leesburg, Georgia. The owner of the office buildings wanted SEMC to provide electrical service to the buildings, but Georgia Power objected, arguing that it was the designated electrical services provider in the Leesburg area under the Georgia Territorial Electric Service Act, O.C.G.A. § 46-3-1 *et seq.* (the "Territorial Act"). The Georgia Public Service Commission ("PSC") rejected Georgia Power's argument, finding that SEMC had a "corridor right" under the Territorial Act to supply electricity to the two buildings because SEMC had an ownership interest in a power line that passed within 500 feet of the buildings. The superior court affirmed the PSC's ruling, and Georgia Power appealed. The Court of Appeals reversed the ruling of the superior court and the PSC. The Court held that the corridor rights created by the Territorial Act applied only to those entities that owned power lines within a particular electrical service territory at the time the territory was assigned under the Act. The territory around Leesburg was assigned to Georgia Power in 1975, and the SEMC did not acquire an ownership interest in the power line in question until 1982. Accordingly, the Court ruled that the SEMC did not possess a corridor right to supply electricity to the office buildings in question under the Territorial Act.

Hanson Staple Co. v. Eckelberry, No. A08A2268 (March 10, 2009). Plaintiff sued Defendant, a former sales representative for Plaintiff, for breach of fiduciary duty and breach of the duty of loyalty after Defendant resigned from his employment with Hanson Staple Co. ("Hanson") and began working for a competitor. The evidence showed that, prior to resigning, Defendant had mentioned to several of Hanson's customers that he was considering leaving Hanson. After his resignation, Defendant successfully solicited the business of two of Hanson's customers whom he had serviced while at Hanson. Undisputed evidence established that Defendant did not solicit Hanson's customers on behalf of his new employer until after he had resigned, and Defendant was not bound by a noncompete or nonsolicit agreement with Hanson. The trail court granted Defendant's motion for summary judgment on both of Plaintiff's claims, and the Court of Appeals affirmed. The Court of Appeals held that because there was no evidence that Defendant used his position while employed at Hanson to his own gain and to Hanson's detriment, there was no question of fact to support Plaintiff's breach of fiduciary duty claim. The Court also affirmed summary judgment on the breach of loyalty claim, holding that breach of loyalty claims rise and fall with breach of fiduciary duty claims.