

Court of Appeals of the State of Georgia

ATLANTA, October 4, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0002. Robert D. Brock v. Alternative Staffing.

This is an application for discretionary appeal in a Workers' Compensation case. The issue upon which review is sought concerns the employer/ self-insurer's liability for medical expenses incurred when the claimant was treated by a physician neither approved by the employer nor authorized by the board pursuant to OCGA § 34-9-200 (b). The ALJ concluded the employer was providing medical treatment from Dr. Baker at the time the employee obtained treatment from Dr. Hodges without authorization. Accordingly, the ALJ correctly denied the employee's request for payment of those medical expenses. Wright v. Overnite Transportation Co., 214 Ga. App. 822 (1) (449 SE2d 167) (1994).

The claimant has not demonstrated reversible error in the superior court's order affirming the ALJ's decision. Accordingly, this application for discretionary appeal is denied.

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9500791
410-11-8197
93-001

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta OCT 4 1995

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mart, Jr.

Court of Appeals of the State of Georgia

ATLANTA, OCT 5 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0004. Sheron L. Davis, et al. v. Secretary for the Department of Veterans Affairs, et al.

Petitioners filed an application for discretionary appeal seeking review of the trial court's order granting respondents' motion to dismiss petitioners' appeal and the order denying petitioners' motion to recuse. This court lacks jurisdiction over petitioners' application.

A dismissal of an appeal by a lower court is directly appealable. Castleberry's Food Co. v. Smith, 205 Ga. App. 859 (424 SE2d 33) (1992). Therefore, petitioners were required to file a notice of appeal from the order granting respondents' motion to dismiss petitioners' appeal. Furthermore, the order denying petitioners' motion to recuse is not a final order. Warringer v. Warringer, 204 Ga. App. 86 (418 SE2d 446) (1992). As a result, petitioners should have filed an application for interlocutory appeal pursuant to OCGA § 5-6-34 (b) seeking review of the order denying their motion to recuse or should have enumerated the denial as error in their direct appeal of the dismissal of their appeal. See Stevens v. Myers, 190 Ga. App. 61 (378 SE2d 334) (1989). Moreover, petitioners' application reveals no basis for invoking

the discretionary application procedures under OCGA § 5-6-35 (b).
See OCGA § 5-6-35 (a) (1)-(11).

Accordingly, this court lacks jurisdiction to entertain this application for discretionary appeal and the application is hereby dismissed.

Court of Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

OCT 5 1995

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Clerk.

Will Z. Mart, Jr.

Court of Appeals of the State of Georgia

ATLANTA, September 3, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A97D0005. BADIE v. THE STATE.

In 1993 Nathan Badie was convicted of entering an automobile and was sentenced to four years' probation. However, on July 8, 1996, the State filed a petition to revoke that probation based on Badie's having committed new criminal offenses of giving false information to a police officer and obstruction of an officer, and the trial court revoked Badie's probation on July 12, 1996. This application for discretionary appeal followed.

On June 30, 1996, two police officers stopped Badie on the street because he matched the description of a party involved in a domestic disturbance to which the officers had responded earlier. Badie was holding a towel to his head at the time and had scratches and abrasions on his face. Badie told the officers his first name, but would not disclose his last name until repeatedly asked by the officers. He eventually indicated that his last name was "Phillips," which was his step-father's last name. After Badie acknowledged that he had been fighting, the officers requested that he go with them to the station, but Badie refused because the officers would not allow him to ride in the front seat of the patrol car. Badie then attempted to walk away and resisted the

officers when they prevented him from doing so.

The evidence of record was sufficient to establish by a preponderance of the evidence that Badie committed the new offenses as alleged, thus authorizing revocation of his probation. OCGA § 42-8-34.1 (a), generally; Gordon v. State, 217 Ga. App. 271 (456 SE2d 761) (1995). Badie contends that he had not understood that he was not free to leave during that stage of the officers' investigation, and suggests that revocation was too extreme of a consequence under the circumstances of this case. However, Badie's intent was a factual issue that the trial court decided adversely to him, and revocation of his probation was authorized by OCGA § 42-8-34.1.

Badie having shown no compelling reason to grant this appeal, the application for discretionary appeal is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP - 3 1996

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA,

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0007. Ware County Board of Commissioners et al. v. Preston E. Cox.

This is an application for discretionary appeal in a Workers' Compensation case. The employer/ self-insurer, Ware County Board of Commissioners, contends the ALJ's award of total disability income benefits to former Ware County fireman Preston Cox is based upon an erroneous determination that his respiratory condition is work-related, and the ALJ failed to determine whether the claimant's economic condition has improved since March 1993.

The record contains evidence to support the ALJ's determination that Cox suffered a job-related injury, the aggravation of a pre-existing asthmatic condition. Second, the Workers' Compensation Act defines "change in condition" as a change that occurs after the date on which the condition was last established by award or otherwise. OCGA § 34-9-104 (a).

The applicant not having demonstrated error in the trial court's order affirming the award of benefits to Cox, this application is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

OCT 10 1995

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Clerk.

Will Z. Mart

Court of Appeals of the State of Georgia

ATLANTA, OCT 12 1981

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0012. Ann Smith et al. v. Gwinnett Highway 120 Associates, Ltd. f/k/a Gwinnett-316 Associates, Ltd. et al.

The Smiths seek a discretionary appeal from the trial court's order in a declaratory judgment action. As an initial matter, the issues involved in the declaratory judgment action concern the parties' legal obligations to pay past due ad valorem taxes on certain real property. Ancillary to the declaratory judgment, applicants sought injunctive relief. Accordingly, this is not an equity case and the Court of Appeals rather than the Supreme Court has jurisdiction. Secondly, the applicants correctly sought a discretionary appeal because the trial court appointed an auditor to allocate the tax liability at issue between the parties. After an evidentiary hearing, the auditor's findings were adopted by the trial court over applicants' exceptions and were incorporated in the judgment. Accordingly, under OCGA § 5-6-35 (a) (1), the appeal is subject to discretionary review. C & S Nat. Bank v. Rayle, 246 Ga. 727, 731 (273 SE2d 139) (1980); see also Ravan v. Stephens, 248 Ga. 289 (282 SE2d 312) (1981).

The applicants contend that OCGA § 9-13-51 requires the tax liens to be satisfied against remaining property of the respondents after foreclosure and sale of a part of their property. OCGA § 9-13-51 applies where property is sold under an execution at a judicial sale; here, in contrast, the property was sold under a contractual power of sale. Thus, the terms agreed upon by the parties control their respective obligations. The security deed provides, in the case of default, the "Grantor's sole liability under the Note and under this Deed to Secure Debt shall be their interest in the property described in this Deed to Secure Debt." Thus, the applicants' only recourse under the Note was foreclosure and sale of the property. Outstanding liens not divested by the foreclosure become the obligation of the lender who, in this case, is also the new purchaser. See Druid Associates, Ltd. v. National Income Realty Trust, 210 Ga. App. 684 (436 SE2d 721) (1993).

Because the applicants have not shown error in the trial court's order, this application for discretionary appeal is hereby denied.

94002

Court of Appeals of the State of Georgia

94A41131

Clerk's Office, Atlanta OCT 12

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Will L. Mart 

Clerk.

Court of Appeals of the State of Georgia

ATLANTA,

OCT 5 - 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0014. NIXON V. NIXON.

Frederick W. Nixon filed this application for discretionary review of the lower court's order transferring to the juvenile court his action for contempt for alleged violations of the visitation provisions of the divorce decree by his ex-wife.

A transfer order to the juvenile court pursuant to OCGA § 15-11-6 is merely a continuation of the proceeding and is not a final order. Dept. of Family &c. Serv. v. Perkins, 244 Ga. 237, 240 (201 SE2d 158) (1979). Because the order is not final, the transfer order only can be reviewed by this court pursuant to the interlocutory appeal procedures of OCGA § 5-6-34 (b). The petitioner not having obtained a certificate of immediate review, the application is dismissed for lack of jurisdiction.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta OCT 5 - 1995

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, October 4, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0015. IN RE: ESTATE OF MANDISA FAVORS.

This application for discretionary appeal appears to seek review of the superior court's denial of a motion to set aside a judgment dismissing an appeal from the probate court. The application contains no materials from the record below by which this Court may be apprised of the appellate issues presented in this matter, and it contains no stamped "filed" copy of the order from which the appeal is sought.

Under OCGA § 5-6-35 (c), a copy of the order or judgment being appealed must be included with the application for discretionary appeal. Rule 32 (b) of the Rules of the Court of Appeals also requires such inclusion of a stamped "filed" copy of the order from which an appeal is sought.

The applicant has the responsibility of perfecting a discretionary appeal by complying with this Court's rules, as it is not the function of the appellate courts to prosecute appeals on behalf of appellants. Acker v. Jenkins, 178 Ga. App. 393 (343 SE2d 160) (1986). Accordingly, this application is hereby dismissed for the failure to comply with this Court's requirements for obtaining

discretionary review. Rule 7 of the Rules of the Court of Appeal.
See also, Williams v. Food Lion, 213 Ga. App. 865 (446 SE2d 221)
(1994).

E37523
95-002

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta OCT 4 1995

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Clerk.

Will Z. Mart...

**Court of Appeals
of the State of Georgia**

ATLANTA, OCTOBER 17 , 1995

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96D0017
ROBERT A. HUNTER V. THE STATE

Upon consideration of the Application for a Discretionary
Appeal, it is ordered that it be hereby DISMISSED.

98002

93CR24539

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

OCT 17 1995

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
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Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, OCT 19 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0018. CHATTAHOOCHEE CHASE CONDOMINIUM ASSOCIATION, INC. v.
RUBEN.

Chattahoochee Chase Condominium Association, Inc., applies for discretionary review of the grant of partial summary judgment in favor of defendant James Ruben, Jr., in this action for recovery of delinquent assessments. Generally, such judgments are directly appealable under OCGA § 9-11-56 (h). The Association petitions for discretionary review, however, based on OCGA § 5-6-35 (a) (6), which makes the discretionary appeal procedure applicable to "[a]ppeals in all actions for damages in which the judgment is \$10,000 or less." Id. Ruben argues that OCGA § 5-6-35 (a) (6) is not applicable in this case, and therefore this application is improper. We agree.

OCGA § 5-6-35 (a) (6) is inapplicable simply because no money judgment has yet been entered in this case to which that provision could apply. The trial court merely ruled on an issue affecting the extent of Ruben's potential liability. Specifically, the court agreed with Ruben that he may not be found liable in any amount greater than 1% of the total assessments under the circumstances

presented since he is only a 1% owner of the condominium unit at issue. Therefore OCGA § 5-6-35 (a) (6) is not applicable to the type of judgment at issue here, nor is any other subsection of OCGA § 5-6-35 (a).

Since the discretionary appeal statute does not apply in this case, and since the judgment at issue here is otherwise directly appealable under OCGA § 9-11-56 (h), it follows that the only appropriate method of appeal here is by filing a notice of direct appeal in the state court. Compare Jarrett v. Ford Motor Credit Co., 178 Ga. App. 600-601 (432 SE2d 642) (1993). Accordingly, this application for discretionary appeal is dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

OCT 19 1995

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William R. McArthur Clerk.

Court of Appeals of the State of Georgia

ATLANTA, September 18, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A97D0019. HARDWICK et al. v. LONDON COMMUNICATIONS et al.

This pro se application for discretionary appeal seeks review of the trial court's refusal to allow defendants-in-counterclaim, Bobby Hardwick and Carol & Kisha, Inc. to proceed in forma pauperis with an untimely appeal from the grant of summary judgment to plaintiff-in-counterclaim, London Communications, Inc., arising out of an action for approximately two million dollars in marketing consulting commissions allegedly due. In an order filed on Wednesday, July 3, 1996, the trial court granted summary judgment for London Communications. The deadline for filing a notice of appeal was Friday, August 2, 1996, but Hardwick did not file a notice of appeal until Monday, August 5, 1996. On August 12, 1996, Hardwick sought leave to proceed in forma pauperis but on August 16, 1996, the trial court entered an order finding the petition untimely and ruling that it would not consider it. Hardwick filed this application for discretionary appeal and "LEAVE TO FILE AND PROCEED ON HIS ORIGINAL NOTICE OF APPEAL," on August 28, 1996.

In the application, Hardwick seeks permission to proceed with his appeal from the grant of summary judgment as well as the trial court's order refusing to consider his request to proceed in forma

pauperis. Inasmuch as Hardwick's notice of appeal was untimely, the trial court correctly concluded that the petition to proceed in forma pauperis was fruitless and should not be considered. Accordingly, it is hereby ORDERED that this application for discretionary appeal be DENIED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

SEP 18 1996

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William R. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, NOV 07 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0020. FORT HOWARD PAPER COMPANY et al. v. HALLISEY.

By order dated October 19, 1995, this Court denied the application for discretionary appeal filed in this case. However, upon the appellant's motion for reconsideration, that previous order of October 19, 1995, is hereby vacated, and the application for discretionary appeal is granted.

The appellant may file a notice of appeal within ten days of the date of this order. The Clerk of the Superior Court of Effingham County is directed to include a copy of this order in the record transmitted to the Court of Appeals.

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Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **NOV 07 1995**

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Clerk.

Will Z. Mart. JR

Court of Appeals of the State of Georgia

ATLANTA, SEP 23 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A97D0022. WILLIAMS v. BEST MANUFACTURING, INC., et al.

Claimant Brandon Williams seeks an appeal from the order of the superior court entered on July 29, 1996, affirming the award of the appellate division of the State Board of Workers' Compensation. Williams' application was not physically received in this court until August 30, 1996, 32 days after the order complained of was entered. Furthermore, Williams does not show that his application was timely deposited with the United States Postal Service in the manner prescribed under Rule 4 of the Rules of the Court of Appeals. Accordingly, Williams' application is untimely and is therefore dismissed for lack of jurisdiction. OCGA § 5-6-35 (d).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP 23 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, September 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A97D0023. IN THE INTEREST OF: C. A. B., A CHILD.

The maternal grandparents of the minor child filed this application seeking discretionary review of the juvenile court's order dismissing their deprivation petition and returning custody of the minor child to her mother, Hellen Melissa Black. The Court, however, lacks jurisdiction to review the merits of the application.

The record reveals that the minor child's mother was incarcerated at the time the deprivation petition was filed and that her putative father has not married the mother or filed any action for the legitimation of the minor child. The juvenile court awarded temporary custody to the maternal grandparents due to the mother's incarceration. In its order dismissing the deprivation petition, the juvenile court found that there was no deprivation as the mother is no longer in jail and ordered that the custody of the minor child be returned to the mother.

Under OCGA § 5-6-35 (a) (2), appeals from judgments in child custody cases require an application for discretionary appeal. However, in In the Interest of A. L. L., 211 Ga. App. 767 (1) (440 SE2d 517) (1994), this Court found that appeals from a deprivation

proceeding do not involve child custody and therefore do not require an application to appeal. "Although the juvenile court is authorized to determine who will exercise custody over a 'deprived' child, the proceeding itself is to determine whether the child is deprived and is not an action brought to decide custody matters concerning the child Anderson v. Sanford, 198 Ga. App. 410, 411 (401 SE2d 604) (1991)." (Punctuation and emphasis omitted.) In the Interest of A. L. L., supra.

Accordingly, since this case is not a child custody case, but rather an appeal from a deprivation proceeding, applicants' application for discretionary appeal is hereby DISMISSED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP - 6 1996

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, September 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

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Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP - 6 1996

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Clerk.

William R. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, OCT 18 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0030. APAC-GEORGIA, INC. v. DEPARTMENT OF TRANSPORTATION et al.

This application for discretionary appeal seeks review of the trial court's grant of partial summary judgment for the Department of Transportation in this breach of contract action brought by APAC-Georgia, Inc. As the basis for filing this application, APAC-Georgia cited OCGA § 5-6-35 (a) (1), which requires the discretionary appeal procedures to appeal a decision of the superior court reviewing the decision of an administrative agency. However, that Code section does not require the discretionary procedures in an action filed initially in the superior court against an administrative agency.

The trial court's order granting partial summary judgment for the Department of Transportation in this breach of contract action was directly appealable. Bozard v. J. A. Jones Constr. Co., 148 Ga. App. 425 (251 SE2d 362) (1978). (APAC-Georgia acknowledges in its application that it has also filed a direct appeal in this matter.) Accordingly, this application for discretionary appeal is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta OCT 18 1995

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Clerk.

Will Z Mart

**Court of Appeals
of the State of Georgia**

ATLANTA, OCTOBER 25 , 1995

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96D0044

ANN SMITH ET AL V. GWINNETT HWY. 120 ASSOCIATES, LTD. ET AL

Upon consideration of the Application for a Discretionary
Appeal, it is ordered that it be hereby DISMISSED.

97005

94A041131

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

OCT 25 1995

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Clerk.

Will Z. Mart...

Court of Appeals of the State of Georgia

ATLANTA,

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0044. Ann Smith et al. v. Gwinnett Highway 120 Associates, Ltd. et al.

The applicants filed identical applications for review of the same order of the trial court, one in the Supreme Court and one in this court. The instant application was transferred to this court from the Supreme Court on October 16, 1995. In Case No. A96D0012, this court by order dated October 12, 1995, denied petitioners' application for review of the issues duplicated in this application transferred from the Supreme Court. Accordingly, this application for discretionary appeal is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

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Clerk.

S96D0009

SUPREME COURT OF GEORGIA

ATLANTA

OCT 13 1995

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ANN SMITH et al. v. GWINNETT HWY. 120 ASSOCIATES, LTD., et al.

It appears that the petitioners in the above-styled case seek permission to file a discretionary appeal from the final order in a declaratory judgment action wherein the grant or denial of injunctive relief was merely ancillary to the legal relief being sought. Pittman v. Harbin Clinic Professional Association, 263 Ga. 66 (1993). The case is not within this Court's equity jurisdiction simply because the trial court appointed an auditor. Universal Garage Co. Inc. v. Fowler, 184 Ga. 604 (1937). Accordingly, the same is hereby transferred to the Court of Appeals.



SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Raymond M. Hinchcomb, Chief Deputy Clerk.

Court of Appeals of the State of Georgia

ATLANTA, NOV 02 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0047. Allison, Inc. et al. v. Julian Forrest Armstrong.

Applicant Allison, Inc. (Allison) sought discretionary review of the superior court's order affirming the decision of the State Board of Workers' Compensation finding Allison liable for Mr. Armstrong's work related injuries and awarding total disability. The decision of the board should be affirmed if there is any evidence to support the decision. Atkinson v. Home Indemnity Company, 141 Ga. App. 687 (234 SE2d 359) (1977). Because there is evidence to support the decision of the ALJ, which decision was adopted by the appellate division and affirmed by the superior court, the application is denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

NOV 02 1995

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Clerk.

Will E. Mat. JR

Court of Appeals of the State of Georgia

ATLANTA, OCT 26 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0049. COLLINS V. HAYS MECHANICAL CONTRACTORS.

This application for discretionary appeal seeks review of the superior court's order affirming the decision of the State Board of Workers' Compensation. This Court lacks jurisdiction to consider this application. Under OCGA § 5-6-35 (d), an application for discretionary appeal must be filed within 30 days after entry of the appealable judgment. In the instant case, the superior court entered its order denying Tommy E. Collins' claim for benefits on September 18, 1995, and the application was not filed until October 19, 1995, one day late. Accordingly, this application is hereby dismissed as untimely. See Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **OCT 26 1995**

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Clerk.

Will Z. Mart, Jr.

Court of Appeals of the State of Georgia

ATLANTA, OCT 26 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0055. CHARLES GENE ASKEW v. THE STATE.

This application for discretionary appeal seeks review of the trial court's revocation of Askew's probation. However, the application is untimely, which deprives this Court of the jurisdiction to consider it.

Askew was placed on probation in May 1995 for a violation of the Georgia Controlled Substances Act. The State filed a petition to revoke that probation in August 1995, alleging domestic battery as the predicate offense for revoking probation. The trial court entered its order revoking Askew's probation on September 18, 1995, and Askew filed this application on October 23, 1995.

Under OCGA § 5-6-35 (d), an application for discretionary appeal must be filed within 30 days of the entry of the appealable judgment. Scriven v. State, 179 Ga. App. 513 (346 SE2d 906) (1986). In the instant case, the deadline for filing an application for discretionary appeal of the revocation order was October 18, 1995. As Askew's application was filed five days late, the application is hereby dismissed as untimely.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta OCT 26 1995

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Clerk.

Will Z. Mat. JR

Court of Appeals of the State of Georgia

ATLANTA, NOV 29 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0058. IN THE INTEREST OF: H. L. W. and K. A. W., children.

The mother of H. L. W. and K. L. W., who were adjudged to be deprived by the juvenile court, has filed a motion for reconsideration from the order of this court issued November 7, 1995, dismissing her application for discretionary appeal. That order was based on her apparent failure to file a timely motion for new trial, but also because the order appealed from is subject to direct rather than discretionary appeal. In the Interest of A. L. L., 211 Ga. App. 767 (1) (440 SE2d 517) (1994).

On motion for reconsideration, the mother presents an exhibit showing that her motion for new trial was timely filed within 30 days of the final deprivation order, and that respondent (as well as the juvenile court's order denying the applicant's motion for new trial) misled this court as to the actual date on which the motion for new trial was filed. However, we find totally unpersuasive the applicant's attempt to distinguish In the Interest of A. L. L., supra. Our conclusion remains that this case is from a judgment not subject to OCGA § 5-6-35 (a) (2). Accordingly, the

applicant's motion for reconsideration of the order dismissing her application is hereby DENIED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **NOV 29 1995**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Will L. Mat. II

**Court of Appeals
of the State of Georgia**

ATLANTA, NOV 27 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0063. ARMOUR ALLOY, INC. et al. v. RUIZ.

Appellants seek to appeal the trial court's denial of their motion to set aside a judgment entered against them on August 21, 1991. Appellants filed their motion to set aside on January 27, 1995. OCGA § 9-11-60 (f) requires that "all motions to set aside judgments shall be brought within three years from entry of the judgment complained of." As appellants' motion was filed outside this time limit, the trial court correctly denied the motion. Therefore, appellants' application for interlocutory appeal is hereby DENIED.

98-007
8918657

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

NOV 27 1995

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, November 07, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0065. CITY OF ATLANTA v. WILLIAM WYANT.

This application for discretionary appeal seeks review of the superior court's order vacating the ten day suspension of William Wyant as ordered by the Atlanta Civil Service Board. This Court lacks jurisdiction to consider this application.

Under OCGA § 5-6-35 (d), an application for discretionary appeal must be filed within 30 days after entry of the appealable judgment. In the instant case, the superior court entered its order on September 28, 1995 making the application due on October 28, 1995. That date, however, fell on a Saturday, and thus, the City of Atlanta had until October 30, 1995 to file its application with this Court. The application was not filed until October 31, 1995, one day late. Accordingly, this application is hereby dismissed as untimely. See Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983).

92008
E37752

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **NOV 07 1995**

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, November 17, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0066. SPEED v. FULTON COUNTY BOARD OF EDUCATION et al.

This application for discretionary appeal seeks review of the superior court's affirmance of the Workers' Compensation award finding the applicant's claim barred under the doctrine of res judicata.

Henry Speed was employed initially as a teacher and then as a teacher's aide with the Fulton County Board of Education. After resigning his position on September 17, 1993, Speed filed a claim for benefits, alleging that he injured his lower back on August 26, 1992. On February 17, 1994, the claim was denied by award of an administrative law judge and affirmed by the Appellate Division of Workers' Compensation Board and the superior court.

Speed subsequently filed another claim, again alleging an injury date of August 26, 1992, and asserting a change of condition. The ALJ found the claim barred by the doctrine of res judicata, based on the February 1994 award. The Appellate Division and the superior court both affirmed, and this discretionary application followed.

The doctrine of res judicata is applicable to workers' compensation awards. Ga. Casualty & Surety Co. v. Randall, 162 Ga. App. 532 (292 SE2d 118) (1982). The ALJ properly applied that doctrine in the instant case, where the first award determined that Speed had not proven a compensable injury and the second claim was based on the same alleged injury considered in the first claim.

Accordingly, this application is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta NOV 17 1995

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

William L. Martin, Jr.

**Court of Appeals
of the State of Georgia**

ATLANTA, NOV 07 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0070. HOLLOWAY V. HOMELAND BUILDERS FOR COMMUNITY, et al.

This application seeks discretionary review of the superior court's order affirming the decision of the State Board of Workers' Compensation denying L.M. Holloway's claim for recommencement of payment of total disability income benefits. This Court lacks jurisdiction to review this application.

The record shows that the superior court entered its order on September 27, 1995 making Holloway's application due on October 27, 1995. Holloway mailed his application by priority mail on October 27, 1995 and the Clerk of this Court received the application on November 2, 1995. Rule 4 of the Rules of the Court of Appeals states that "[a] document shall be deemed filed when it is physically delivered to the Clerk's office . . . A document is also deemed filed in the Clerk's office when it is deposited in the United States Postal Service **registered or certified mail**, provided that the official United States Postal Service postmark date appears on the transmittal envelope or container." Priority mail is not registered or certified mail, and thus, the application was untimely filed and is hereby dismissed.

97008
95A053483
257-70-7110

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **NOV 07 1995**

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mart

**Court of Appeals
of the State of Georgia**

ATLANTA, NOV 15 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0075. HOUSTON V. OVERSTREET TIMBER CO., ET AL.

Carl Houston filed an application for discretionary appeal seeking review of the superior court's order affirming the decision of the State Board of Workers' Compensation which suspended compensation for Houston's failure to accept rehabilitation. Houston, however, did not include a stamped "filed" copy of the superior court's order as required by Rule 31 (c) of the Rules of the Court of Appeals. The applicant has the responsibility of perfecting the record. See Acker v. Jenkins, 178 Ga. App. 393, 394 (1) (343 SE2d 160) (1986). Failure to do so warrants dismissal of this application. Rule 7. See also, Williams v. Food Lion, 213 Ga. App. 865, 868 (446 SE2d 221) (1994).

94-009
95CV0383
256-92-4799

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta NOV 15 1995

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mat. [Signature]

7

Court of Appeals of the State of Georgia

ATLANTA, NOV 27 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A96D0077. R. G. BRUMBY, II v. BIG CANOE PROPERTY OWNERS
ASSOCIATION, INC.**

Applicant R. G. Brumby, II filed a pro se motion to set aside default judgment and request for declaratory judgment and dismissal claiming the default judgment was void because the plaintiff's complaint failed to set forth sufficient facts to establish venue. He filed this discretionary application from the trial court's September 27, 1995 order denying his motions.

Although OCGA § 9-11-8 (a) (2) provides that a complaint shall contain facts upon which venue is predicated, the failure to plead such facts is generally deemed waived unless asserted by responsive pleading. G & H Construction Co. v. Daniels Flooring Co., 173 Ga. App. 181, 192 (a) (325 SE2d 773) (1984). A properly served party who wishes to rely on the defense of lack of venue must bring it to the court's attention prior to allowing the case to go to default judgment or the defense is waived. McDonough Contractors, Inc. v. Martin & C. Co., 183 Ga. App. 428 (359 SE2d 200) (1987). Brumby has not shown improper service and has thus waived plaintiff's failure to assert sufficient facts to establish venue by failing to file an answer. See Hatfield v. Leland, 143 Ga. App. 528 (239 SE2d 169)

(1977). Accordingly, the trial court properly denied Brumby's motions and the application for discretionary review is hereby denied.

91-009
94CV163

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **NOV 27 1995**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Wick L. Mart

Court of Appeals of the State of Georgia

ATLANTA,

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0078. Daniel Fox et al. v. C & M Parts & Auto Service, Inc.

This application for discretionary review of an order entered in the trial court on October 4, 1995, was received by U. S. mail in the Court of Appeals on Monday, November 6, 1995, after the statutory period for timely filing had elapsed. See OCGA § 5-6-35 (d). A document mailed to the Court of Appeals is "deemed filed in the Clerk's Office when it is deposited in the United States Postal Service registered or certified mail, provided that the official United States Postal Service postmark date appears either (1) on the transmittal envelope . . . or (2) on the certified mail receipt provided by the United States Postal Service at the time the document is mailed, which receipt must be submitted upon request." Court of Appeals Rule 4 (effective August 1, 1995). No official United States Postal Service postmark date appears on the receipt for certified mail or on the transmittal envelope, nor has a receipt bearing an official postmark date been supplied in response to the request of the Clerk of Court.

Accordingly, this application is hereby dismissed as untimely.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

**Court of Appeals
of the State of Georgia**

ATLANTA, NOVEMBER 27 , 1995

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96D0078

DANIEL FOX ET AL V. C & M PARTS & AUTO SERVICE, INC.

Upon consideration of the Application for a Discretionary
Appeal, it is ordered that it be hereby DISMISSED.

95009

94C13173

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

NOV 27 1995

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Wick T. Mast, Jr.

**Court of Appeals
of the State of Georgia**

ATLANTA, NOV 15 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0080. MIDDLEBROOKS, ET AL. V. BLAND, ET AL.

Rachel and Ralph Middlebrooks filed an application for discretionary appeal seeking review of the superior court's order denying their motion for new trial. The Middlebrooks, however, did not include a stamped "filed" copy of the superior court's order as required by Rule 31 (c) of the Rules of the Court of Appeals. The applicants have the responsibility of perfecting the record. See Acker v. Jenkins, 178 Ga. App. 393, 394 (1) (343 SE2d 160) (1986). Failure to do so warrants dismissal of this application. Rule 7. See also, Williams v. Food Lion, 213 Ga. App. 865, 868 (446 SE2d 221) (1994).

98-009
13905

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **NOV 15 1995**

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, December 01, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0082. RONALD D. BROWN v. CITY OF ATLANTA.

Applicant Ronald D. Brown, a City of Atlanta police officer, was suspended for thirty (30) days for violating Atlanta Police Department Work Rules 2.50 (Unnecessary Force), 1.03 (Truthfulness), and 2.51 (Reporting Required When Force Used). The Civil Service Board upheld Brown's 30-day suspension and the superior court affirmed, finding the Board's decision was supported by substantial evidence. Brown filed this discretionary application from the superior court's order.

After consideration of the application, we find substantial evidence exists to support the Board's decision. OCGA § 5-4-12 (b); City of Atlanta v. Grier, 217 Ga. App. 251 (456 SE2d 751) (1995). Brown's admission that he hit the suspect in the head provides substantial evidence that he used unnecessary force since the suspect was unarmed and being held down on the ground by several other officers at the time Brown hit him. Substantial evidence existed that Brown was untruthful in his statement to the Office of Professional Standards (OPS) concerning the incident in question since his statement contradicted with Officer's Allen's

testimony which the Board found to be credible. Finally, Brown's own admission that he hit the suspect to subdue him supports the Board's finding that Brown used force to effect an arrest and was thus required to file a report. Accordingly, the superior court properly affirmed the Board's decision and the application for discretionary review is hereby denied.

92-010
E38378

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta DEC 01 1995

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Wick *met. E*

Court of Appeals of the State of Georgia

ATLANTA, DEC 11 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0083. Sargus Houston v. Emory University, d/b/a Emory University Hospital.

Plaintiff's counsel Taylor Jones seeks an appeal from the trial court's judgment against him awarding over \$10,000 in attorney fees to Emory Hospital pursuant to OCGA § 9-15-14 (b) upon finding that his improper conduct unnecessarily expanded litigation which was ultimately resolved by a settlement. The issues raised by the applicant concern whether the court's order adequately sets out its findings and, in turn, whether those findings support the award.

The trial court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action if, upon the motion of any party or the court itself, it finds that an attorney . . . unnecessarily expanded the proceeding by . . . improper conduct, including . . . abuses of discovery." OCGA § 9-15-14 (b). The standard for review of such awards is abuse of discretion. Sacha v. Coffee Butler Service, Inc., 215 Ga. App. 280 (450 SE2d 704) (1994). In its amended motion filed January 12, 1995, Emory Hospital sought fees totaling \$48,598.99 under both OCGA § 9-15-14 (a) and (b). It specified four categories of Jones' objectionable conduct and provided affidavits as to the reasonableness and necessity of the attorney's fees.

The court addressed each category of conduct in turn. Even after a hearing December 15, 1989, during which the court found Jones had violated certain prior orders, counsel's subsequent conduct continued to violate the pretrial order. Thus the court awarded \$3,639 for expansion of the proceedings occasioned by Jones' conduct after December 15, 1989. The record supports the court's finding and the reasonableness of the award. Second, the court found that Jones' remarks during his opening statement violated the court's rulings announced at a hearing on September 29, 1989, and resulted in a mistrial. The record supports the court's finding and the attorney's fees award of \$6,544.50 as occasioned by the mistrial. The award was not an abuse of the court's discretion.

The applicant has failed to demonstrate error in the trial court's order. Accordingly, the application for discretionary appeal is hereby denied.

93-010
D17621

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

DEC 11 1995
*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Wick E. Mat. JR

**Court of Appeals
of the State of Georgia**

ATLANTA, DECEMBER 19, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0104. SANDRA A. SEEGARS V. CORONET INDUSTRIES, INC., ET AL

Applicant's attorney has filed a voluntary dismissal of the discretionary application to appeal in the above styled matter. Since parties are not permitted to dismiss actions in this Court, the Court will treat the voluntary dismissal as a motion to withdraw the application and the same is hereby granted.

96-012

62672P 252-84-8657

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **DEC 19 1995**

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.



Court of Appeals of the State of Georgia

ATLANTA, January 2, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0113. Anthony D. Baldwin v. The State.

Anthony Baldwin seeks a discretionary appeal from the trial court's summary dismissal of his extraordinary motion for new trial on grounds of ineffective assistance of trial and appellate counsel, three enumerated errors by the court at trial, and the court's failure to review his extraordinary motion. Baldwin's conviction was affirmed by this court following the 1992 denial of his motion for new trial.

The application includes the Bibb County Superior Court Clerk's administrative memorandum on which the trial court noted its dismissal order dated October 10, 1995. OCGA § 5-6-35 (c). We presume the order was filed by October 13, the date of the Clerk's memorandum notice to Baldwin. The application for discretionary appeal, however, docketed in this court on December 1, 1995, was not filed within the thirty days required by OCGA § 5-6-35 (d).

Accordingly, this untimely application is hereby dismissed for lack of jurisdiction.

92CR37603
37603
91-013

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **JAN 02 1996**

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Wick E. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, DECEMBER 19, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0115. LAWSON S. MALLORY ET AL V. MISTY LEE BARNES

Applicant's attorney has filed a voluntary dismissal of the discretionary application to appeal in the above styled matter. Since parties are not permitted to dismiss actions in this Court, the Court will treat the voluntary dismissal as a motion to withdraw the application and the same is hereby granted.

97-013

93CV514

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **DEC 19 1995**

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the minutes of the Court of Appeals of Georgia.*

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Clerk.

Will L. Mantz

Court of Appeals of the State of Georgia

ATLANTA, DEC 13 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0120. RICE V. PHELPS.

Carol L. Rice has filed an application for discretionary appeal from the order of the superior court denying her motion for new trial filed after the superior reduced Michael E. Phelps' child support obligation as previously set forth in the parties' divorce decree. The superior court entered its order denying her motion on October 27, 1995. The Clerk of this Court received Rice's application for filing on November 28, 1995. The Clerk informs this Court that the previous attempted filing was not accepted and docketed but was returned for correction due to Rice's failure to tab and index the material from the record as required under Rule 32 (a) of the Rules of the Court of Appeals. Rice subsequently tabbed and indexed her application and it was accepted and docketed by the Clerk on December 1, 1995. A review of the corrected application reveals that this Court lacks jurisdiction to review this application.

Pursuant to Art VI, Sec. VI, Para. III of the Georgia Constitution of 1983, the Supreme Court has exclusive jurisdiction over all divorce and alimony cases. Since this application

involves a modification of a divorce decree reducing permanent alimony for the support of children, this application is an alimony case. Decker v. Decker, 256 Ga. 513 (350 SE2d 434) (1986); Terrell v. Fair, 224 Ga. 745 (164 SE2d 843) (1968); Perry v. Perry, 213 Ga. 847 (102 SE2d 534) (1958). Therefore, this application is hereby transferred to the Supreme Court.

94-014
93A033456

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

DEC 13 1995

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, JAN 04 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0122. Frank Johnson v. Bennie Royal Rogers.

Applicant seeks discretionary review of the trial court's denial of his motion to set aside judgment on the basis of lack of personal jurisdiction due to improper venue and improper service.

"[J]urisdiction and venue are very different matters; one concerns the right and power of a court to adjudicate a matter, while the other simply involves the place of the suit." Hoesch America v. Dai Yang Metal Co., 217 Ga. App. 845 (459 SE2d 187) (1995). The general rule is: "[o]ne who, being properly served, wishes to rely on the defense of lack of venue, must bring it to the attention of the court at a proper time or the defense is waived. 'Allowing a case to go to default judgment is no better than allowing a case to be tried on the merits before coming in with a technical defense.' [Cit.]." Cotton v. Ruck, 157 Ga. App. 824 (278 SE2d 693) (1981); see also McDonough Contractors, Inc. v. Martin & DeLoach Paving & Contracting Co., 183 Ga. App. 428, 429 (359 SE2d 200) (1987) and Bouldin v. Contran Corp., 167 Ga. App. 364 (306 SE2d 685) (1983). Improper venue is not a basis to set aside the default judgment in this case.

Johnson alleges in his OCGA § 9-11-60 (d) motion that he was not properly served because he was served at his business as opposed to his personal residence. Service may be made personally or by leaving copies of the summons and complaint at the dwelling house or usual place of abode with someone of suitable age and discretion then residing therein. OCGA § 9-11-4(d)(7). Johnson not having alleged he was not personally served, there is no basis to find improper service of process.

There being no error in denial of the motion to set aside the default judgment, the application is denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **JAN 04 1996**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Will Z. Mart...

Court of Appeals of the State of Georgia

ATLANTA, DEC 19 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0124. FLATT v. FLATT.

This application for discretionary appeal is from an order in which the superior court held that neither party was in contempt under the terms of a final divorce decree entered on December 11, 1986. Petitioner's position in this application is that the superior court erroneously modified the final divorce decree in reaching this conclusion. The question of whether the superior court impermissibly modified or merely clarified the terms of the parties' final divorce decree necessarily turns on the proper interpretation of the original divorce decree itself. Moreover, applicant's contention is that, under the terms of that decree as she interprets it, respondent owes applicant over \$19,000 in back alimony. Accordingly, jurisdiction over the merits of this application is with the Supreme Court rather than this court. Ga. Const. Art. VI, § VI, ¶ III (6); see generally Boyett v. Wester, 265 Ga. 387 (456 SE2d 504) (1995); Wagan v. Wagan, 263 Ga. 376 (434 SE2d 475) (1993); Harper v. Smith, 261 Ga. 286 (404 SE2d 120) (1991); Kaufmann v. Kaufmann, 246 Ga. 266 (271 SE2d 175) (1980).

For the foregoing reasons, this application is hereby TRANSFERRED to the Supreme Court.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

DEC 19 1995

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, December 21, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0128. Dowling Textile Manufacturing Company et al. v. Tina Brookins.

Dowling Textile Manufacturing Company, the employer in a Workers' Compensation case, filed this application for discretionary appeal from the trial court's order affirming an award of benefits to Brookins. Court of Appeals Rule 32 (b) provides that "[d]iscretionary appeals must have a stamped 'filed' copy of the order from which the appeal is sought in the application."

Because no stamped "filed" copy of the court's order has been submitted in this application as required, the application is hereby dismissed for failure to comply with Court of Appeals Rule 32 (b).

95V3871
252-31-8771

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **DEC 21 1995**

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, December 15, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0131. BELL v. BELL.

Ray and Lora Bell were divorced on July 28, 1995. On August 28, 1995, Lora Bell filed a motion to vacate and set aside that judgment, along with a motion for new trial and a motion for judgment notwithstanding the verdict. The trial court denied that combined motion on October 24, 1995, and Lora Bell submitted to this Court an application for discretionary appeal on November 29, 1995.

The application could not be docketed and instead was returned to the applicant, because it was not tabbed and indexed as required by Rule 32 (a) of the Rules of the Court of Appeals. Lora Bell corrected the application and resubmitted it to this Court on December 8, 1995, and the application was then docketed.

However, under Ga. Const. 1983, Art. VI, Sec. VI, Par. III, the Supreme Court has jurisdiction over appeals in divorce and alimony cases. Accordingly, inasmuch as the instant application for appeal arises from a divorce case, the application is hereby transferred to the Supreme Court.

91-015
95245

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

DEC 15 1995

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will Z. Martz, Jr.

Court of Appeals of the State of Georgia

ATLANTA, December 19, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0134. DRIVER v. VULCAN MATERIALS, et al.

Claimant Charles Driver has filed an application for discretionary appeal from the judgment of the superior court affirming the award of the State Board of Workers' Compensation. The order appealed from was entered on November 10, 1995, and Driver's application was filed in this court on December 13, 1995. Since Driver's application was not filed within 30 days of the judgment complained of as required under OCGA § 5-6-35 (d), this court is without jurisdiction to consider it. Accordingly, Driver's application is hereby dismissed.

98-015
95CV1705
259-31-2610

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **DEC 19 1995**

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will Z. Mart

**Court of Appeals
of the State of Georgia**

ATLANTA, January 11, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0135. GEORGIA BOARD OF DENTISTRY v. DEBORAH L. PENCE

It appearing the order of this Court issued January 9, 1996 is incorrect due to clerical error, it is hereby ordered that the attached order hereto be substituted for the original order issued on January 9, 1996.

*Court of Appeals of the State of Georgia
Clerk's Office, Atlanta January 11, 1996*

*I certify that the above is a true extract
from the minutes of the Court of Appeals of
Georgia.*

*Witness my signature and the seal of said
court hereto affixed the day and year last
above written.*

Clerk.

Will Z. Mart...

**Court of Appeals
of the State of Georgia**

ATLANTA, JANUARY 09 , 1996

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96D0135

GEORGIA BOARD OF DENTISTRY V. DEBORAH L. PENCE

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of SUPERIOR COURT is directed to include a copy of this order in the record transmitted to the Court of Appeals.

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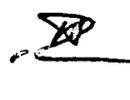
Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JAN 09 1996

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the minutes of the Court of Appeals of Georgia.*

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Will E. Mant 
Clerk

**Court of Appeals
of the State of Georgia**

ATLANTA,

JAN 11 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0146. GANT v. GANT.

This application for discretionary appeal seeks review of the trial court's final judgment and decree of divorce between the parties entered on October 5, 1995, and the trial court's denial of the applicant's motion for reconsideration entered on November 29, 1995. However, under Ga. Const. 1983, Art. VI, Sec. VI, Par. III, the Supreme Court has jurisdiction over divorce and alimony cases. Accordingly, this application for discretionary appeal is hereby transferred to the Supreme Court.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JAN 11 1996

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Clerk.

Wick E. Mast...

Court of Appeals of the State of Georgia

ATLANTA, January 19, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0157. STAMITOLES et al. v. POULOS.

Eugenia Poulos brought this action for damages against defendants-appellants alleging dental malpractice, battery, and fraud. On August 22, 1995, the trial court entered judgment for Poulos in the amount of \$10,000, plus costs, plus interest at the legal rate of twelve percent (12%). Appellants filed a timely motion for judgment notwithstanding the verdict or for new trial, which the trial court denied on December 8, 1995. Appellants then filed this discretionary application with this Court on January 9, 1996.

Pursuant to OCGA § 5-6-35 (a) (6), the discretionary appeal procedures are required in appeals of all actions for damages in which the judgment is \$10,000 or less. Batchelor v. ISFA Corp., 191 Ga. App. 238 (383 SE2d 434) (1989). This Court has held, however, that for the purpose of "establishing jurisdiction pursuant to OCGA § 5-6-35 (a) (6), a judgment is comprised of principal, plus costs, plus interest at the legal rate accrued from the date of filing of the judgment until the date of the filing of the notice of appeal." Castleberry's Food Co. v. Smith, 205 Ga.

App. 859, 861 (1) (424 SE2d 33) (1992). Because the award of costs plus interest at the rate of twelve percent raises the amount of the judgment in excess of \$10,000, appellants should have filed a direct appeal rather than a discretionary application. Savage v. Thomaston-Upson County Office Bldg Author., 205 Ga. App. 634 (422 SE2d 896) (1992). Accordingly, this application for discretionary appeal is hereby dismissed. See Artis v. Gaither, 199 Ga. App. 114 (404 SE2d 322) (1991).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JAN 19 1996

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Clerk.

Will Z. Mart

**Court of Appeals
of the State of Georgia**

ATLANTA, FEB 06 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0161. PITTS v. GEORGIA STATE BOARD OF PARDONS AND PAROLES.

Upon consideration of the Motion for Reconsideration filed on behalf of appellant in the above styled case, said Motion for Reconsideration is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 06 1996**

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Clerk.

Will L. Mart

Court of Appeals of the State of Georgia

ATLANTA, January 17, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0161. PITTS v. GEORGIA STATE BOARD OF PARDONS AND PAROLES.

In 1987 Wilton Pitts was convicted of voluntary manslaughter and sentenced to 20 years' imprisonment. The State Board of Pardons and Parole granted Pitts a parole on January 25, 1993, but revoked it on November 23, 1994, because Pitts failed to comply with certain conditions of that parole. On January 9, 1996, Pitts filed this application for discretionary appeal seeking review of that parole revocation.

OCGA § 5-6-35 (a) (5) authorizes discretionary appeal of orders revoking probation, but that Code section does not apply to parole revocations. Whereas the revocation of probation is a judicial function which can be reviewed by this Court, the revocation of parole is an executive function which is not subject to such review.

Under Ga. Const. 1983, Art. IV, Sec. II, Par. II, "the State Board of Pardons and Paroles shall be vested with the power of executive clemency, including the powers to grant reprieves, pardons, and paroles. . . ." OCGA § 42-9-1 emphasizes the separation of the executive, legislative, and judicial branches of

government, and provides that "no other body is authorized to usurp or substitute its functions for the functions imposed by this chapter upon the [State Board of Pardons and Paroles.]" Accordingly, this Court having no power to review the revocation of Pitts's parole, this application for discretionary appeal is hereby dismissed.

A84280

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **JAN 17 1996**

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Clerk.

Will L. Mart...

Court of Appeals of the State of Georgia

ATLANTA, January 25, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0165. ROLLINS v. ROLLINS.

Russell Scott Rollins filed an application for discretionary appeal seeking review of the superior court's order denying his motion for new trial in his change of custody action. Rollins, however, did not include a stamped "filed" copy of the superior court's order as required by Rule 32 (b) of the Rules of the Court of Appeals. The applicant has the responsibility of perfecting the record. See Acker v. Jenkins, 178 Ga. App. 393, 394 (1) (343 SE2d 160) (1986). Failure to do so warrants dismissal of this application. Rule 7. See also, Williams v. Food Lion, 213 Ga. App. 865, 868 (446 SE2d 221) (1994). Accordingly, this application is hereby dismissed.

93-019
D94638

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JAN 25 1996

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hereto affixed the day and year last above written.*

Clerk.

Wick E. Mast

Court of Appeals of the State of Georgia

ATLANTA, January 22, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0167. SOUTHEASTERN FURNITURE WHOLESALE, INC. v. BIBBS.

Southeastern Furniture Wholesale, Inc. filed this application for discretionary appeal from the superior court's order affirming the award of the State Board of Workers' Compensation. However, the application does not contain a stamped "filed" copy of the order being appealed as specifically required by Court of Appeals Rule 32 (b). The applicant bears the responsibility of perfecting the record. See Acker v. Jenkins, 178 Ga. App. 393, 394 (1) (343 SE2d 160) (1986). Failure to do so warrants dismissal of this application. Court of Appeals Rule 7; see also Williams v. Food Lion, 213 Ga. App. 865, 868 (446 SE2d 221) (1994). Accordingly, this case is hereby DISMISSED.

Court of Appeals of the State of Georgia

E43327
252-47-1454

Clerk's Office, Atlanta **JAN 22 1996**

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the minutes of the Court of Appeals of Georgia.*

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Clerk.

Will Z. Mat. [Signature]

Court of Appeals of the State of Georgia

ATLANTA, FEB 09 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0168. PIPER v. THE STATE.

It appearing that the order of this Court issued January 30, 1996 is incorrect due to clerical error, it is hereby ordered that said order is vacated and that this order is hereby substituted therefore.

Defendant-applicant Priscilla Piper filed the instant application for discretionary appeal pursuant to OCGA § 5-6-35 from the trial court's December 15, 1995 order denying her motion for reduction of pretrial bond. However, an order denying a motion for pretrial bond or a motion to reduce pretrial bond is not final and is thus subject to the interlocutory appeal procedures set forth in OCGA § 5-6-34 (b). Howard v. State, 194 Ga. App. 857 (392 SE2d 562) (1990); see also Howard v. State, 197 Ga. App. 693, 694 (399 SE2d 283) (1990). Because Piper failed to follow the requisite interlocutory appeal procedures, this Court lacks jurisdiction to review her case and her discretionary application is hereby DISMISSED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta FEB 09 1996

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Clerk.

Will E. Mart

Court of Appeals of the State of Georgia

ATLANTA, January 25, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0170. HILL v. THE STATE.

This application for discretionary appeal seeks review of the trial court's revocation of Cedric Hill's probation on August 18, 1995. Hill originally filed a direct appeal from that order, which this Court dismissed on October 12, 1995, for the failure to comply with the discretionary appeal procedures required under OCGA § 5-6-35 (a) (5).

Hill subsequently filed a motion with the trial court seeking permission to file an out-of-time application for discretionary appeal. The trial court granted that motion on December 21, 1995, and this application was filed on January 16, 1996.

However, applications for discretionary appeal are addressed to the appellate courts, and any request for permission to file an untimely application necessarily would also be addressed to the appropriate appellate court rather than the trial court. This Court has already noted the lack of any authority to grant such a request. See Dept. of Offender Rehabilitation v. Meeks, 165 Ga. App. 269 (299 SE2d 757) (1983). Accordingly, this untimely application for discretionary appeal is dismissed for lack of jurisdiction.

97-019
34241 34357 34392
34463 35409

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **JAN 25 1996**

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Clerk.

Will E. Mat. JR

Court of Appeals
of the State of Georgia

ATLANTA, FEB 16 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0171. Caecer Lydell JOHNS a/k/a Kevin Nunnally v. THE STATE.

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby GRANTED as to the judgment entered in case number Z-51837. However, since it appears that no orders revoking probation have been entered in Case Nos. Z-06868 and Z-22649, Johns must apply separately for appeal in those cases within 30 days of the date on which the respective probation revocation orders are entered.

The Clerk of SUPERIOR COURT is directed to include a copy of this order in the record transmitted to the Court of Appeals.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta FEB 16 1996

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Calvin - [Signature]

**Court of Appeals
of the State of Georgia**

ATLANTA, FEBRUARY 14, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0173. JOHN SCOTT MASSEY V. THE STATE

Applicant's attorney has filed a motion to withdraw the petition for discretionary appeal and the same is hereby granted.

92-020

94CR2121

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 14 1996**

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Clerk.

Wick L. Martin

3

Court of Appeals of the State of Georgia

ATLANTA, February 2, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0177. Raymond L. Wheeler et al. v. Dynalectric Company et al.

Applicant Raymond L. Wheeler seeks discretionary review of the trial court's decision which affirmed a decision of the Appellate Division of the State Board of Workers Compensation. The appellate division reversed the decision of the ALJ thereby denying income and medical benefits. Wheeler first alleges the appellate division failed to apply the proper standard of review under OCGA § 34-9-103(a) and Clinical Arts v. Smith et al., 218 Ga. App. 681 (462 SE2d 757) (1995), in that it applied a "de novo" review instead of the "preponderance of competent and credible evidence" standard.

The appellate division found that a preponderance of the competent and credible evidence showed that Wheeler's job possibly contributed to his stroke. Since the employee, Wheeler, had the burden of proof to establish a compensable claim by a preponderance of the evidence, and since all of the medical testimony only showed that his job was a possible contributing factor, the appellate division found that a preponderance of the competent and credible evidence did not support a compensable claim. This finding applied the proper standard under OCGA § 34-9-103(a) and Clinical Arts.

Wheeler also alleges that the appellate division applied the improper burden of proof under Reynolds Const. Co. v. Reynolds, 218 Ga. App. 23 (459 SE2d 612) (1995) which allows consideration of a "natural inference through human experience" as credible evidence. However, the appellate division has the discretion to review the findings of fact of the ALJ and determine whether a preponderance of the competent and credible evidence supports the ALJ's decision, and in this case, the appellate division found, after reviewing all of the evidence in the record, that Wheeler failed to prove a compensable award. Since there is evidence to support this finding, this Court must accept that decision. Therefore, the application for discretionary review is denied.

91-020
E43696 257-62-5807

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta FEB 02 1996

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Clerk.

W. Z. Mart

Court of Appeals of the State of Georgia

ATLANTA, February 2, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0178. WILLINGHAM v. TAYLOR.

Clarence Dale Willingham has filed an application for an appeal from the grant of summary judgment to defendant W. Lynn Taylor in this malicious prosecution action. Such a judgment is directly appealable as a final judgment and as a grant of summary judgment. See OCGA §§ 5-6-34 (a); 9-11-56 (h). Moreover, Willingham's application reveals no basis for invoking the discretionary appeal procedure under OCGA § 5-6-35. See OCGA §§ 5-6-35 (a) (1)-(11). We specifically note that "[a]s a general rule, the provisions of OCGA § 5-6-35 (a) (6) do not apply to an appeal from a judgment in favor of a defendant. [Cit.]" Robinwood, Inc. v. Baker, 206 Ga. App. 202 (425 SE2d 353) (1992).

Since it appears the only available method of appealing the grant of summary judgment is by filing a notice of direct appeal in the superior court, this application for discretionary appeal is hereby dismissed.

95-020
95v470

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 02 1996**

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Clerk.

W. L. Martin

Court of Appeals
of the State of Georgia

ATLANTA, February 1, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0179. C.B. WRIGHT v. COVERALL SERVICES.

C.B. Wright seeks a discretionary appeal from a money judgment entered against him on December 28, 1995, in an amount less than \$10,000. However, OCGA § 5-6-35 (d) requires that applications for discretionary appeal be filed with this court within 30 days of the entry of the judgment from which the applicant seeks to appeal. Wright therefore had until Monday, January 29, 1996, to file his application. Wright failed to do so, instead mailing his application by regular mail the following day.

Accordingly, since Wright's application was not timely filed, it is hereby DISMISSED for lack of jurisdiction.

94A877444
97-020

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 0 1 1996**

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Clerk.



Court of Appeals of the State of Georgia

ATLANTA, February 7, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0182. JOSEPH ALVIN LEAPHART, JR. V. WILFREIDA H. LEAPHART.

Applicant Joseph Alvin Leaphart, Jr. filed an application for discretionary appeal from the superior court's denial of his motion for a new trial arising out of his petition for modification of alimony. The jury's verdict denied applicant's petition for downward modification of alimony and further denied respondent's counterclaim for an upward modification of alimony, such that the previous decree "remains as is and . . . neither party is entitled to a modification."

This application concerns a petition for "modification of [an] alimony judgment . . . and is [consequently] an alimony case within the meaning of the Constitution giving [the Georgia Supreme Court] jurisdiction of divorce and alimony cases." Perry v. Perry, 213 Ga. 847, 848 (1), 849 (102 SE2d 534). "Unless otherwise provided by law, the Supreme Court shall have appellate jurisdiction of the following classes of cases: . . . (6) All divorce and alimony cases." Georgia Constitution of 1983, Article VI, Section VI, Paragraph III (6). Accordingly, this application is hereby TRANSFERRED to the Georgia Supreme Court. The Clerk will please include a copy of this order with the record as transmitted to the Georgia Supreme Court.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 07 1996**

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Clerk.

Wick E. Mart

**Court of Appeals
of the State of Georgia**

ATLANTA, FEB 14 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0187. LEE v. MUGERDITCHIAN.

Billy Joe Lee seeks an appeal from the judgment of the superior court modifying the final divorce decree entered between Lee and respondent Dianne S. Mugerditchian and awarding attorney's fees. Appeals from judgments modifying a final decree of divorce, including those governed under OCGA § 19-6-19 (a), are within the exclusive jurisdiction of the Supreme Court. Ga. Const. 1983, Art. VI, § VI, ¶ III (6). Accordingly, Lee's application for discretionary appeal is hereby TRANSFERRED to the Supreme Court.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 14 1996**

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Clerk.

William Z. Mart

Court of Appeals of the State of Georgia

ATLANTA, February 27, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0194. Pony Express Courier Corp., et al. v. Timothy Bozeman.

Applicant Pony Express Courier Corp. ("Pony Express") seeks review of the trial court's decision which affirmed a decision of the Appellate Division of the State Board of Workers' Compensation. The appellate division's award, which gave rise to this appeal, was issued following a grant of a motion by Pony Express to vacate the previous final order based upon the fact that Counsel for Pony Express' did not receive a copy of the appellate division's June 20, 1995 award until after the twenty day period for appeal had run.

However, the appellate division did not vacate and issue the amended order within twenty days of the date of its previous final award; therefore, it was without jurisdiction to issue an amended award. See OCGA § 34-9-103 (b). Thus, Pony Express' appeal to the trial court was untimely and cannot support an appeal to this Court. Travelers Insurance Company v. Adkins, 200 Ga. App. 278, 279-280 (407 SE2d 775) (1991); Aetna Casualty & Surety Company v. Barden, 179 Ga. App. 442 (346 SE2d 588) (1986). Accordingly, this appeal is hereby dismissed for lack of jurisdiction.

96-022

95CV336 254-76-0551

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 27 1996**

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Clerk.

Will E. Mart

Court of Appeals of the State of Georgia

ATLANTA, March 5, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0195. IN THE INTEREST OF: S. A. R., a child.

The child's maternal grandparents initiated the above styled action alleging the child to be deprived and seeking to terminate the parental rights of both parents. The applicants seek a discretionary appeal from the order of the juvenile court adjudicating their child to be deprived and removing the child from their custody. Generally, however, only actions governed under Title 19 of the Code are considered "domestic relations" cases within the meaning of OCGA § 5-6-35 (a) (2). In particular, deprivation and termination of parental rights cases governed under Chapter 11 of Title 15 have been determined not to be domestic relations cases within the meaning of that Code section. In the Interest of A. L. L., 211 Ga. App. 767 (1) (440 SE2d 517) (1994); In the Interest of R. L. Y., M. R. Y. & R. A. Y., 180 Ga. App. 559 (349 SE2d 800) (1986). Moreover, the order appealed from is interlocutory since the juvenile court has not yet entered a final order disposing of all issues in the case, and the appellants have not followed the procedure for filing an interlocutory appeal.

OCGA § 5-6-34 (b); see In the Interest of M. K. C., 166 Ga. App. 261 (304 SE2d 430) (1983).

For the foregoing reasons, the parents' application for discretionary appeal is hereby DISMISSED.

Court of Appeals of the State of Georgia

91-022
13295J233

Clerk's Office, Atlanta **MAR 05 1996**

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William L. Martin

Court of Appeals of the State of Georgia

ATLANTA, March 5, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0198. DAVID L. CONOVER V. FEDERAL HOME LOAN BANK ET AL.

This discretionary appeal sought review of a decision of the ALJ as affirmed by the Appellate Division of the State Board of Workers' Compensation. The appellate division issued its decision on September 28, 1995 and David L. Conover timely filed a notice of appeal on October 18, 1995. While the Superior Court did issue an order on January 11, 1996, because it failed to set a hearing or render a decision on the appeal within 60 days of the filing of the notice of appeal, the decision of the appellate division became final by operation of law on December 18, 1995. OCGA § 34-9-105 (b); Buschel v. Kysor/Warren, 213 Ga. App. 91 (444 SE2d 105) (1994).

An application for discretionary review must be filed within 30 days of the entry of the order, decision, or judgment complained of. OCGA § 5-6-35 (d). In this case, since the decision of the appellate division became final on December 18, 1995 by operation of law, Conover was required to file his application by January 17, 1996. Conover filed his application on February 12, 1996, 56 days after the appellate division's decision became final, thus the application is untimely. Therefore, this application is hereby dismissed for lack of jurisdiction.

98-022
E43780 507-50-9809

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 05 1996**

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Clerk.

Will Z. Mart

Court of Appeals of the State of Georgia

ATLANTA, February 29, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0200. ARNOLD BOWEN v. CHESTER BALL et al.

Arnold Bowen filed this application for discretionary appeal seeking review of the trial court's order denying his motion for extraordinary relief. This case was initiated in the Magistrate Court of Rockdale County, where, following a jury trial, Chester Ball received a judgment against Bowen in the amount of \$1723.00. Bowen timely filed a motion for new trial which the magistrate court denied. Bowen's appeal to the state court was dismissed as untimely and Bowen appealed that decision to this Court. In Bowen v. Ball, 215 Ga. App. 640 (451 SE2d 502) (1994), this Court held that because magistrate courts do not have the power to grant a new trial, Bowen's motion for new trial did not toll the time for filing an appeal to state or superior court. Accordingly, we affirmed the dismissal of Bowen's appeal. Id. at 642. The Supreme Court denied Bowen's petition for writ of certiorari.

On September 18, 1995, Bowen filed his motion for extraordinary relief contending the magistrate court should have transferred his case to another court of competent jurisdiction since the magistrate court could not grant a motion for new trial.

The state court denied his motion on November 8, 1995 on the grounds that the issues raised had already been decided by this Court. Bowen subsequently filed a "motion for new trial and reconsideration" on December 5, 1995 in which he again argued the magistrate court should have transferred his case. On December 21, 1995, the state court awarded Ball attorney fees finding Bowen asserted a defense with respect to which there exists a complete absence of any justifiable issue of fact or law in view of this Court's previous opinion in this case. On January 16, 1996, Bowen again raised the same transfer argument in another "motion for new trial and reconsideration." The state court denied both motions on January 22, 1996 and Bowen then filed this application.

This application, however, must be dismissed. While Bowen designated his motion as a "motion for new trial and reconsideration" and filed it within 30 days of the trial court's order denying his motion for new trial, his motion did not toll the period for applying for appellate review under OCGA § 5-6-35 (a) (7). Bowen's motion is deemed a motion for reconsideration and not a motion for new trial because none of the grounds routinely associated with a motion for new trial were included in Bowen's motion.

Further, even if the motion could be deemed a motion for new trial, it did not toll the time to file an application as a motion for new trial is not a proper vehicle in which to challenge a denial of a motion for extraordinary relief. The grounds cited in Bowen's motion consisted not of contested facts but of the trial court's conclusions of legal results emanating from the undisputed

facts, namely whether the magistrate court should have transferred his case upon the filing of his original motion for new trial. "Objections which go to the judgment only, and do not extend to the verdict cannot properly be made grounds of a motion for new trial. A motion for new trial seeks to set aside the verdict. No new trial is necessary to correct a judgment or decree. If a judgment or decree is erroneous or illegal, direct exception should be taken to it at the proper time." Barber v. Barber, 157 Ga. 188 (1) (121 SE2d 317).

In this case, because the judgment denying his motion for extraordinary relief is one of law, Bowen's "motion for new trial and reconsideration" did not toll the time for filing his application for appellate review. The application having been filed in this case over two months after the entry of the factually undisputed judgment denying Bowen's motion for extraordinary relief, this Court is without jurisdiction. Accordingly, this application is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 29 1996**

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Will L. Martin

Court of Appeals of the State of Georgia

ATLANTA, March 1, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0203. EMBRY-RIDDLE AERONAUTICAL UNIVERSITY v. SAPP.

Embry-Riddle Aeronautical University ("Embry-Riddle") seeks to appeal from a default judgment entered in its favor on May 15, 1995, to the extent that the judgment does not include attorney's fees and collection costs. However, Embry-Riddle failed to apply for an appeal within 30 days of the judgment it complains of as required under OCGA § 5-6-35 (d). We are therefore without jurisdiction to consider the merits of Embry-Riddle's application. The fact that Embry-Riddle filed a motion for reconsideration makes no difference, since such a motion is not among those specified under OCGA § 5-6-35 (d), as extending the time for filing for filing an application for discretionary appeal. It likewise makes no difference for present purposes that defendant Sapp may have filed a petition for bankruptcy in September, 1995, since the time for Embry-Riddle to petition for an appeal had already passed months before any stay in bankruptcy took effect.

For the foregoing reasons, Embry-Riddle's application for discretionary appeal is hereby DISMISSED as untimely.

94-023
95CV58

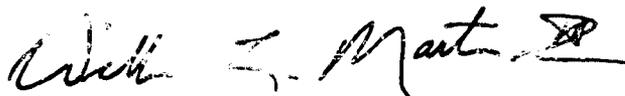
Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 01 1996**

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the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
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Clerk.



Court of Appeals of the State of Georgia

ATLANTA, March 5, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A96D0204. JOHN NELSON V. BUCKHEAD BROKERS OF GEORGIA, INC., D/B/A
BUCKHEAD BROKERS REALTOR.**

Applicant John Nelson seeks review of the trial court's grant of summary judgment to Buckhead Brokers of Georgia, Inc. ("Buckhead Brokers"). Nelson filed suit against Buckhead Brokers seeking the return of his \$500.00 earnest money deposit paid pursuant to a contract to purchase a new home which he and his wife entered into with the builder and Buckhead Brokers. Buckhead Brokers counterclaimed for its real estate commission of 4% of the \$82,900.00 purchase price. The trial court found that Nelson and his wife breached the contract and that Buckhead Brokers was entitled to its commission plus interest and costs.

Nelson and his wife, pursuant to the contract, agreed to apply for a loan within seven days of the Contract becoming effective. Although Nelson was pre-approved for a loan with Unity Mortgage Company prior to signing the Contract, he transferred his application to Rivercrest Mortgage Company. Rivercrest required both Nelson and his wife to apply for the loan as Nelson would not have been approved. Prior to Nelson and his wife submitting the loan application to Rivercrest, they learned that the furnace was being installed in the attic contrary to what they wanted, and therefore decided not to submit the application and not to go forward with the purchase.

The Contract specifically states that the plans and specifications for construction would be in accordance with the Chesire plan built on lot 5 of the Horseshoe Village subdivision with the addition of a basement. It is undisputed that the model home on lot 5 had a furnace in the attic and that all the Chesire plan homes in the subdivision Nelson and his wife visited before signing the Contract had furnaces located in the attic, and that none of the homes had a basement.

The Special Stipulations section of the Contract provided for modifications from the model home of the Chesire plan to include a basement and to omit the front porch, but did not mention the furnace being relocated to the basement. Nelson and his wife signed the Contract which does not contain an ambiguity in that it "assumes the plans and specifications for construction of the Chesire will be the same as the Chesire built on lot 5 of Horseshoe Village Subdivision" with certain specific modifications. The Nelsons are thus bound by the terms of their agreement. Hall v. World Omni Leasing, Inc., 209 Ga. App. 115 (433 SE2d 297) (1993). Because there is no ambiguity in the contract, a jury question is not raised and the trial court's grant of summary judgment was proper. See Derosa v. Shiah, 205 Ga. App. 106, 107 (421 SE2d 718) (1992). Accordingly, this application is hereby denied.

91-023
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Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 05 1996**

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Clerk.

Will Z. Mast, Jr.

Court of Appeals of the State of Georgia

ATLANTA, March 5, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A96D0204. JOHN NELSON V. BUCKHEAD BROKERS OF GEORGIA, INC., D/B/A
BUCKHEAD BROKERS REALTOR.**

Applicant John Nelson seeks review of the trial court's grant of summary judgment to Buckhead Brokers of Georgia, Inc. ("Buckhead Brokers"). Nelson filed suit against Buckhead Brokers seeking the return of his \$500.00 earnest money deposit paid pursuant to a contract to purchase a new home which he and his wife entered into with the builder and Buckhead Brokers. Buckhead Brokers counterclaimed for its real estate commission of 4% of the \$82,900.00 purchase price. The trial court found that Nelson and his wife breached the contract and that Buckhead Brokers was entitled to its commission plus interest and costs.

Nelson and his wife, pursuant to the contract, agreed to apply for a loan within seven days of the Contract becoming effective. Although Nelson was pre-approved for a loan with Unity Mortgage Company prior to signing the Contract, he transferred his application to Rivercrest Mortgage Company. Rivercrest required both Nelson and his wife to apply for the loan as Nelson would not have been approved. Prior to Nelson and his wife submitting the loan application to Rivercrest, they learned that the furnace was being installed in the attic contrary to what they wanted, and therefore decided not to submit the application and not to go forward with the purchase.

The Contract specifically states that the plans and specifications for construction would be in accordance with the Chesire plan built on lot 5 of the Horseshoe Village subdivision with the addition of a basement. It is undisputed that the model home on lot 5 had a furnace in the attic and that all the Chesire plan homes in the subdivision Nelson and his wife visited before signing the Contract had furnaces located in the attic, and that none of the homes had a basement.

The Special Stipulations section of the Contract provided for modifications from the model home of the Chesire plan to include a basement and to omit the front porch, but did not mention the furnace being relocated to the basement. Nelson and his wife signed the Contract which does not contain an ambiguity in that it "assumes the plans and specifications for construction of the Chesire will be the same as the Chesire built on lot 5 of Horseshoe Village Subdivision" with certain specific modifications. The Nelsons are thus bound by the terms of their agreement. Hall v. World Omni Leasing, Inc., 209 Ga. App. 115 (433 SE2d 297) (1993). Because there is no ambiguity in the contract, a jury question is not raised and the trial court's grant of summary judgment was proper. See Derosa v. Shiah, 205 Ga. App. 106, 107 (421 SE2d 718) (1992). Accordingly, this application is hereby denied.

91-023
931197205

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 05 1996**

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Clerk.

William Z. Mast

Court of Appeals of the State of Georgia

ATLANTA, February 28, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0210. JIMMY LEE MCCOY v. THE STATE.

This application for discretionary appeal seeks review of the trial court's denial of a motion to withdraw a guilty plea. It appears that Jimmy Lee McCoy was charged in 1990 with driving under the influence, habitual violator, and giving a false name. The application materials do not contain copies of his convictions, but it appears that McCoy entered guilty pleas in May of 1995. Subsequently, McCoy filed an "extraordinary motion for withdrawal of plea," which the trial court denied in an order filed on November 20, 1995.

On January 26, 1996, McCoy filed this pro se application with the Supreme Court of Georgia, which transferred the matter to the Court of Appeals of Georgia. The instant application is, however, untimely as it was not filed within 30 days after entry of the appealable judgment. In the absence of a timely application for discretionary appeal from the order denying defendant's extraordinary motion to withdraw his guilty plea, this Court has no jurisdiction to consider the merits of the appeal. There being no legal basis for this Court to consider this matter, it is hereby ORDERED that the application in Case Number A96D0210 must be, and hereby is, DISMISSED as untimely.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **FEB 28 1996**

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Clerk.

Wick Z. Mart

**Court of Appeals
of the State of Georgia**

ATLANTA,

MAR 13 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0212. CUMMINGS v. DONALDSON.

1. Arthur Cummings, Sr., seeks an appeal from the order of the superior court entered denying his motion to set aside a default judgment. However, as respondent correctly argues, since Cummings failed to apply for an appeal within 30 days of the judgment complained of as required under OCGA § 5-6-35 (d), we are without jurisdiction to consider his application for discretionary appeal. Accordingly, Cummings' application is hereby DISMISSED as untimely.

2. The respondent has moved for a frivolous appeal penalty under OCGA § 5-6-6. However, that Code section may be applied only where a judgment for a sum certain is affirmed on appeal, and not where, as here, a petition for an appeal is dismissed as untimely. Respondent's motion is therefore denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 13 1996

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William L. Martin

Clerk.

Court of Appeals of the State of Georgia

ATLANTA, March 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A96D0214. SNOW v. THE STATE.
A96D0215. SNOW v. THE STATE.**

On March 25, 1993, Ricky Snow pled guilty to theft by shoplifting, for which he was placed on three years' probation. On December 5, 1995, he pled guilty to aggravated stalking and was placed on three years' probation for that conviction as well. A special condition of the latter probation prohibited Snow from having any contact with his ex-wife except for child visitation and child support.

On January 11, 1996, the State filed petitions to revoke both probated sentences, asserting that Snow had committed a new felony offense of aggravated stalking of his ex-wife on December 11, 1995, and December 15, 1995. The trial court revoked both probated sentences on January 26, 1996, and these applications for discretionary appeal followed.

To authorize revocation of probation, the State must establish the violation of a condition of probation by a preponderance of the evidence. OCGA § 42-8-34.1; State v. Jones, 196 Ga. App. 896 (397 SE2d 209) (1990). In the instant case, Snow exercised his child visitation rights on one occasion after the probation order of

December 5, 1995, but he never paid any child support. The evidence also showed that within a ten-day period of time, Snow approached his ex-wife on three other occasions unrelated to the exercise of child visitation. This evidence established by a preponderance of the evidence Snow's violation of his probation as alleged. Accordingly, this application is hereby denied.

95880 93423

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 06 1996**

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Clerk.

Wick L. Martin

Court of Appeals of the State of Georgia

ATLANTA, March 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A96D0214. SNOW v. THE STATE.
A96D0215. SNOW v. THE STATE.**

On March 25, 1993, Ricky Snow pled guilty to theft by shoplifting, for which he was placed on three years' probation. On December 5, 1995, he pled guilty to aggravated stalking and was placed on three years' probation for that conviction as well. A special condition of the latter probation prohibited Snow from having any contact with his ex-wife except for child visitation and child support.

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To authorize revocation of probation, the State must establish the violation of a condition of probation by a preponderance of the evidence. OCGA § 42-8-34.1; State v. Jones, 196 Ga. App. 896 (397 SE2d 209) (1990). In the instant case, Snow exercised his child visitation rights on one occasion after the probation order of

December 5, 1995, but he never paid any child support. The evidence also showed that within a ten-day period of time, Snow approached his ex-wife on three other occasions unrelated to the exercise of child visitation. This evidence established by a preponderance of the evidence Snow's violation of his probation as alleged. Accordingly, this application is hereby denied.

95880 93423

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 06 1996

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Clerk.

William Z. Martin

Court of Appeals of the State of Georgia

ATLANTA, May 29, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0218. SCHOLL v. THE STATE.

Dernell E. Scholl filed this application for discretionary review from the order revoking his probation. Because we found the application untimely, we dismissed it on March 7, 1996.

After considering Scholl's motion for reconsideration, it appears that Scholl's application was timely. Accordingly, the March 7, 1996 order dismissing Scholl's discretionary appeal is vacated.

Having now considered the application on the merits, the application is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta May 29, 1996

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hereto affixed the day and year last above written.*

William R. Martin Clerk.

**Court of Appeals
of the State of Georgia**

ATLANTA,

MAR 13 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0219. CITY OF ATLANTA v. JOHNNY WEEMS et al.

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby DENIED. Appellee's motion to impose penalty is hereby DENIED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 13 1996

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William R. Martini Clerk.

Court of Appeals of the State of Georgia

ATLANTA, MAR 14 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0220. THOMPSON v. THE STATE.

Applicant Oscar Thompson was convicted of possession of cocaine and was sentenced to five years, one year to serve and the balance on probation. On December 1, 1995, the trial court entered an order revoking Thompson's probation and sentencing him to two years confinement. On December 5, 1995, Thompson filed both a notice of appeal in the trial court from the order revoking his probation and a request for appointment of counsel. The trial court granted Thompson's request for counsel on February 14, 1996.

On February 26, 1996, Thompson's counsel filed this application for discretionary appeal from the trial court's December 1, 1995 order revoking his probation. Pursuant to OCGA § 5-6-35 (a) (5), Thompson was required to file an application for discretionary appeal to this Court rather than a direct appeal in the trial court. However, a discretionary application must be filed within thirty (30) days of the entry of the order being appealed. OCGA § 5-6-35 (d). Because Thompson's application was filed well outside this 30-day period and the trial court was without authority to grant him an extension of time to file a

discretionary application, Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983), the instant application is untimely. Accordingly, it is hereby dismissed for lack of jurisdiction. See Hill v. State, 204 Ga. App. 582 (420 SE2d 393) (1992).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 14 1996**

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Clerk.

William S. Marti

Court of Appeals of the State of Georgia

ATLANTA, MAR 14 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0220. THOMPSON v. THE STATE.

Applicant Oscar Thompson was convicted of possession of cocaine and was sentenced to five years, one year to serve and the balance on probation. On December 1, 1995, the trial court entered an order revoking Thompson's probation and sentencing him to two years confinement. On December 5, 1995, Thompson filed both a notice of appeal in the trial court from the order revoking his probation and a request for appointment of counsel. The trial court granted Thompson's request for counsel on February 14, 1996.

On February 26, 1996, Thompson's counsel filed this application for discretionary appeal from the trial court's December 1, 1995 order revoking his probation. Pursuant to OCGA § 5-6-35 (a) (5), Thompson was required to file an application for discretionary appeal to this Court rather than a direct appeal in the trial court. However, a discretionary application must be filed within thirty (30) days of the entry of the order being appealed. OCGA § 5-6-35 (d). Because Thompson's application was filed well outside this 30-day period and the trial court was without authority to grant him an extension of time to file a

discretionary application, Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983), the instant application is untimely. Accordingly, it is hereby dismissed for lack of jurisdiction. See Hill v. State, 204 Ga. App. 582 (420 SE2d 393) (1992).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 14 1996

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Clerk.

William S. Martin

Court of Appeals of the State of Georgia

ATLANTA, March 4, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0225. BOWEN v. THE STATE.

Applicant Arnold Bowen was convicted in the State Court of Gwinnett County of two counts of violating the septic tank regulations. His judgment of conviction was filed on October 10, 1995, and he filed a timely motion for new trial on November 2, 1995, which the trial court denied in an order entered January 30, 1996. Bowen filed this pro se application for discretionary appeal from the order denying his motion for new trial on February 23, 1996. However, his judgment of conviction and the denial of his timely motion for new trial are directly appealable under OCGA § 5-6-34 and are not subject to the discretionary appeal procedures of OCGA § 5-6-35. See OCGA § 5-6-35 (a) (1) - (11). Accordingly, this application for discretionary appeal is hereby DISMISSED. This dismissal does not affect appellant's direct appeal filed in the trial court on February 28, 1996.

97-025
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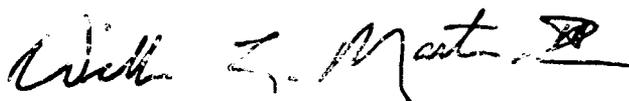
Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 04 1996**

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Clerk.



Court of Appeals of the State of Georgia

ATLANTA,

MAR 12 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0234. DELLI-GATTI v. MANSFIELD.

In February 1994 Kathy Mansfield, M.D., and Kevin Delli-Gatti, M.D., entered an employment contract which contained a non-competition clause. Dr. Mansfield subsequently filed a petition seeking declaratory judgment that the non-compete agreement was unenforceable. In response, Dr. Delli-Gatti sought a temporary restraining order and a permanent injunction enforcing the non-competition clause.

On February 12, 1996, the trial court entered declaratory judgment for Dr. Mansfield, finding that the non-compete clause was overbroad and unenforceable and denying Dr. Delli-Gatti's request for temporary and permanent injunctive relief. Dr. Delli-Gatti then filed this application for discretionary appeal.

OCGA § 5-6-35 (a) (9) requires the discretionary appeal procedures in appeals from orders granting or denying temporary restraining orders. The instant case includes the denial of a request for a temporary restraining order, but the judgment involves much more than that subsidiary ruling. The actual appealable judgment is the trial court's grant of declaratory

judgment for Dr. Mansfield, invalidating the non-compete clause at issue.

"[T]he underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal." Rebich v. Miles, 264 Ga. 467, 469 (448 SE2d 192) (1994). In the instant case, the underlying subject matter was the final disposition of a declaratory judgment action concerning the validity of a non-compete clause. As such, the judgment was directly appealable under OCGA § 5-6-34 (a), and this discretionary application must be dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 12 1996**

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W. L. Martin 

Clerk.

Court of Appeals of the State of Georgia

ATLANTA, April 15, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0241. Travel World, Inc. v. Ann Cooper, et al.

It appearing that the order of this Court issued April 5, 1996, is incorrect due to clerical error, it is hereby ordered that said order is vacated and that this order is hereby substituted therefore.

Travel World moved this Court for reconsideration of its March 26, 1996, Order dismissing this application for discretionary appeal. The application was dismissed because it was untimely. Travel World contends the application was initially timely filed on January 18, 1996. However, the exhibits submitted in support of the motion for reconsideration reveal that the Clerk of Court clearly apprised Travel World that the initial application was insufficient as it failed to comply with the rules of this Court and that it would not, therefore, be filed. Travel World did not resubmit its application until March 8, 1996, by which date it was 42 days late. Therefore, the motion for reconsideration is hereby DENIED.

Further, the Court finds the motion to be frivolous and imposes a penalty pursuant to Rule 15 (b). The trial court is

directed to enter judgment against the applicant in the amount of \$250.00. See *Brown v. Benham*, 218 Ga. App. 518 (462 SE2d 184) (1995).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **APR 15 1996**

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William L. Martin

Court of Appeals of the State of Georgia

ATLANTA, March 26, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0241. Travel World Inc. v. Ann Cooper, et al.

The trial court entered judgment for the respondents against Travel World in the amount of \$2,617.00 on July 18, 1995. Travel World filed a motion for judgment notwithstanding the verdict, which the court denied on December 27, 1995. On March 8, 1996, Travel World filed its discretionary application with this Court.

Pursuant to OCGA § 5-6-35 (d), applications for discretionary appeal must be filed with this Court within 30 days of the entry of the final order, decision or judgment. In this case, the application was due on January 26, 1996. The application, filed 42 days late, is untimely and, therefore, **DISMISSED** for lack of jurisdiction. See *Hill v. State*, 204 Ga. App. 582 (420 SE2d 393) (1992). The respondent's motion for penalties pursuant to Rule 15 (b) is denied.

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Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 26 1996

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Clerk.

Will L. Martin

Court of Appeals of the State of Georgia

ATLANTA, MAR 13 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0243. JIMMY LEE SULLIVAN v. THE STATE.

Jimmy Lee Sullivan filed a discretionary application asking this Court to review the trial court's order denying his motion for reconsideration of his probation revocation. Sullivan's application, however, is untimely which deprives this Court of the jurisdiction to consider it.

The trial court revoked Sullivan's probation on October 27, 1995. Sullivan then filed a motion for reconsideration, but the trial court denied that motion on February 14, 1996. Sullivan then filed this application for discretionary appeal on March 7, 1996.

The only appealable order of record is the order revoking Sullivan's probation. Sullivan did not file an application within 30 days of the revocation order pursuant to OCGA § 5-6-35 (a) (5) but rather filed his application subsequent to the denial of a motion for reconsideration of the revocation order several months later. OCGA § 5-6-35 (d) requires that applications be filed within 30 days after entry of the appealable judgment. A motion for reconsideration does not extend the time for filing a notice of appeal. Telephone Advertising Corp. of America v. Aaron Rents, 206 Ga. App. 493 (426 SE2d 54) (1992). Likewise, such a motion does not extend the time for filing an application. Further, although

a trial court has the authority under OCGA § 5-6-39 to grant a 30-day extension of time for filing a notice of appeal, no comparable authority exists for granting an extension of time to file an application for discretionary appeal. Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983).

Moreover, Sullivan's motion for reconsideration cannot be considered as a motion to set aside and therefore appealable by an application for discretionary appeal. OCGA § 5-6-35 (a) (8). Sullivan's motion was not based upon a nonamendable defect which appears upon the face of the record and it was not based upon lack of jurisdiction. OCGA § 9-11-60 (d). Further, the motion did not contain a prayer that the revocation order be set aside or vacated. The motion was nothing more than a request for reconsideration of the trial court's order revoking Sullivan's probation.

Therefore, in the instant case, since the only appealable judgment was the trial court's revocation order that was entered on October 27, 1995, Sullivan's application filed on March 7, 1996 is untimely. Accordingly, this application is hereby dismissed for lack of jurisdiction.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 13 1996

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William L. Martin

Clerk.

**Court of Appeals
of the State of Georgia**

ATLANTA, **MAR 13 1996**

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0244. ROBERTS v. THE STATE.

In September 1995, John Roberts was convicted of armed robbery and making a false statement. On November 2, 1995, the trial court granted Roberts permission to file an out of time motion for new trial, and on February 20, 1996, denied the motion for new trial Roberts filed pursuant to that grant. Roberts then filed this application for discretionary appeal under OCGA § 5-6-35 (a) (7).

However, although the discretionary appeal procedures are required to appeal an order denying an extraordinary motion for new trial that is separate from an original appeal, this case actually involves a motion for new trial filed pursuant to the trial court's grant of an out of time appeal. See, e.g., Ponder v. State, 260 Ga. 840 (400 SE2d 922) (1991). As such, the trial court's denial of Roberts's motion for new trial is subject to direct appeal, and this discretionary application must be dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 13 1996**

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William R. Martin Clerk.

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Court of Appeals
of the State of Georgia

ATLANTA, March 29, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0250. MELINDA G. WEEKS V. QUEEN CARPET.

Applicant Melinda G. Weeks seeks discretionary review of the decision of the administrative law judge ("ALJ"), as affirmed by the State Board of Workers' Compensation and the superior court. It denied her claim for temporary total disability benefits ("TTD") from February 10, 1994 through April 20, 1994, and temporary partial disability benefits ("TPD") from April 20, 1994 to the present. Weeks was a winder for Queen Carpet, Inc. on the date of her accident on June 4, 1992. She continued performing her regular job until February 10, 1994, when she stopped working for the alleged reason that she was unable to work due to work related injuries to her arms and shoulders. Weeks subsequently became employed with Dairy Queen on April 20, 1994, and has worked there since.

The ALJ denied Weeks both TTD and TPD benefits. In denying TTD benefits, the ALJ found that Weeks was not totally disabled and had not attempted to secure other employment within her medical restrictions. In denying TPD benefits, the ALJ found Weeks was earning less money at Dairy Queen not because of her on-the-job injury but because less hours were offered and for family reasons.

In all claims for compensation under the Georgia's Workers' Compensation Act, the employee carries the burden of proof to show a compensable disabling injury occurred out of and in the course of her employment. Dasher v. City of Valdosta, 217 Ga. App. 351 (457 SE2d 259) (1995). To be entitled to TTD benefits under OCGA § 34-9-261, the employee must show by a preponderance of credible evidence that there has been a loss of earning capacity due to the injury and not to the employee's unwillingness to work. *Id.* at 352-353. The incapacity is total only if the employee is unable to do any work of any character. *Id.* at 353. As to TPD benefits under OCGA § 34-9-262, the employee must show that her inability to secure suitable employment was due to the work related injury. See Gilbert/Robinson, Inc. v. Meyers, 214 Ga. App. 510 (448 SE2d 246) (1994). This is so whether she is seeking TPD benefits after an injury or when there has been a change of condition from a previous award.

This Court must affirm the decision below if there is any evidence to support it. Independent Life & Accident Insurance Co. v. Cox, 207 Ga. App. 402 (427 SE2d 862) (1993). While there is some medical evidence to support Weeks' allegation that she was unable to continue work as a winder, there is no medical evidence that Weeks was totally disabled and thus unable to obtain another job. There is thus some evidence to support the denial of TTD benefits.

There is also evidence to support the ALJ's finding that Weeks did not meet her burden of proving entitlement to TPD benefits. While Weeks alleged she made less money at Dairy Queen because of her on-the-job injury, she testified that she made less money there because fewer hours were offered and for family

reasons. There is thus some evidence to support the denial of TPD benefits. Because there is evidence to support the findings of the ALJ as affirmed at each level of review, the application is denied.

91-028
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Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 29 1996**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Will Z. Mart

Court of Appeals
of the State of Georgia

ATLANTA, April 10, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0252. LEEANNE TATE V. RENTEX, INC., ET AL

It appearing that the order denying the application for discretionary appeal in the above styled case on April 9, 1996 is incorrect due to clerical error, it is hereby ordered that said order is hereby vacated and that the order attached hereto be substituted therefor, and judgment shall issue accordingly.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta April 10, 1996

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the minutes of the Court of Appeals of Georgia.*

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Clerk.

William L. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, APRIL 10 , 1996

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96D0252
LEEANNE TATE V. RENTEX, INC., ET AL

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of SUPERIOR COURT is directed to include a copy of this order in the record transmitted to the Court of Appeals.

97028

96CV50072 259-02-8159

To:92

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

APR 10 1996

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, April 2, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0259. PARRISH v. COMPOSITE STATE BOARD OF MEDICAL EXAMINERS.

This application for discretionary appeal seeks review of the superior court's affirmance of the revocation of a physician's license to practice medicine.

In January 1995 the Composite State Board of Medical Examiners scheduled a hearing over the following charges against Cherlyn Parrish, M.D.: (1) the suspension of Dr. Parrish's license to practice medicine in Kentucky; (2) inadequate diagnosis, treatment, and record keeping with regard to a specific patient; (3) submission of forged letters of reference in conjunction with an application for hospital privileges; and (4) prescription of medicine in a misleading fashion. A hearing officer found all charges to be substantiated by the evidence and recommended revocation of Dr. Parrish's license. The Composite State Board adopted the hearing officer's findings and recommendation, and the superior court affirmed.

1. It is uncontroverted that the Kentucky Board of Medical Licensure revoked Dr. Parrish's license to practice medicine in Kentucky based on gross incompetence, gross ignorance, and gross neglect, as well as instances of unprofessional, unethical, and dishonest conduct. Under OCGA § 43-1-19 (a) (5) and § 43-34-37 (a), the revocation of the Kentucky license alone authorized the revocation of Dr. Parrish's Georgia license.

2. In response to an investigative subpoena of the Composite State Board, Dr. Parrish produced 10 pages of records pertaining to treatment of the patient in question. A few days before the hearing, Dr. Parrish sought to supplement those records, claiming that at the time of the subpoena she had not realized that a portion of the patient's record was filed in a different location. However, the hearing officer rejected that explanation as incredible, and refused to consider the additional records. In this application, Dr. Parrish complains of that omission but does not show how the hearing officer's determination was erroneous, and this omission thus provides no basis for granting the application.

3. The hearing officer found that in conjunction with an application for hospital privileges filed in 1992, Dr. Parrish submitted forged letters of reference from two physicians. On appeal to the superior court, Dr. Parrish requested permission to present additional evidence in the form of a short notation purportedly signed by one of the above two doctors in 1992, authorizing his signature to "positive, complimentary references" for Dr. Parrish, and an affidavit of the patient in question who denies ever having told anyone that Dr. Parrish's office claimed to have hospital privileges at DeKalb Medical Center. The superior court denied that request on the grounds that Dr. Parrish had not shown that the evidence was material or that there were good reasons for her failure to submit it during the agency proceeding.

Dr. Parrish claims that the physician's authorization was not discovered until after the Board review and suggests that it should be admitted as material to the determination of the charges against her. However, the notation by the physician primarily authorizes his signature for billing purposes related to an entity called Medical Imaging, Ltd.; the note is unclear as to its scope with regard to Dr. Parrish, whereas the physician testified directly that he did not recall writing a letter of reference for Dr. Parrish and would never have written the recommendation in question. Further, this additional evidence does not even attempt to controvert the evidence regarding the forgery of the other physician's signature in another letter of reference submitted by Parrish.

With regard to the patient's statement, contrary to Dr. Parrish's explanation that the patient could not be located until after the Board's review, the patient's affidavit is dated July 10, 1995, which followed the Board's hearing on the matter on July 6, 1995, but preceded the Board's decision by almost three weeks. There is no explanation for why the affidavit was not submitted to the Board.

"OCGA § 50-13-19 (f) establishes a two-prong test that must be met before a superior court can grant an application for leave to present additional evidence. The evidence sought to be introduced must be material, and good reason for failure to present such evidence at the hearing must be shown." Golden v. Georgia Bureau of Investigation, 198 Ga. App. 115, 117 (400 SE2d 668) (1990). In the instant case, the superior court did not err in denying the request to submit the additional evidence.

For the above reasons, this application for discretionary appeal is hereby denied.

91-029
E41535

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **APR 02 1996**

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Clerk.

Will L. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, April 4, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0266. ELENA S. BAKER v. JOHN W. BAKER.

Appellant's motion to withdraw the application for discretionary appeal in the above styled case is hereby granted.

94-030
E30121

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

APR 04 1996

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, March 29, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0268. PREMIUM PET PRODUCTS, INC. V. WEEKS CORPORATION.

Premium Pet Products, Inc filed this application for discretionary appeal seeking review of the trial court's order denying both its "motion to stay" and "motion to set aside foreign judgment" and granting Weeks Corporation's "motion for award of attorney fees." As set forth below, this Court lacks jurisdiction to review this application.

Final orders denying motions to set aside are appealable pursuant to the discretionary application procedures set forth in OCGA § 5-6-35 (a) (8) and (b). However, in the instant case, the order appealed is not final in that it did not determine all of the issues which are to be resolved in the case. While the superior court determined that Premium Pet Products, Inc. was liable for attorney fees, it did not determine the amount thereof and expressly directed Weeks Corporation to submit an affidavit supporting its request for an award of attorney fees. Because the order appealed is not a final judgment as the amount of attorney fees remains to be litigated, Premium Pet Products, Inc. was required to follow the interlocutory application procedures in OCGA

§ 5-6-34 (b) by obtaining a certificate of immediate review from the trial court and complying with the time limitations therein. Scruggs v. Dept. of Human Resources, 261 Ga. 587 (408 SE2d 103) (1991); Rogers v. Dept. of Human Resources, 195 Ga. App. 118 (392 SE2d 713) (1990).

The interlocutory application procedures not having been followed, this application for discretionary appeal is hereby DISMISSED. Rogers, supra at 119.

91-030
E43383

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 29 1996

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Clerk.

Will L. Martin

Court of Appeals of the State of Georgia

ATLANTA, April 8, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A96D0275. GEORGE S. WEST V. EQUIFAX CREDIT INFORMATION SERVICES,
INC.**

George S. West ("West") seeks discretionary review of the trial court's decision denying his motion to set aside and vacate an order dismissing his complaint for failure to make discovery. However, this Court lacks jurisdiction to review this application because the trial court's order cannot be appealed pursuant to the discretionary review procedures.

Pursuant to OCGA § 5-6-35 (a) (8), appeals from orders denying a motion to set aside a judgment under OCGA § 9-11-60 (d) are subject to the discretionary appeal procedure; however, in his motion, West does not rely upon the provisions of OCGA § 9-11-60 to set aside the judgment but rather upon the inherent power of the trial court to modify or set aside its judgment within the same term of court. Harbor Light Marina v. Ellis, 190 Ga. App. 389 (378 SE2d 746) (1989).

Although in his motion West cites to OCGA § 9-11-60 (b) (sic) alleging a judgment can be set aside based upon a mistake of fact, the determination of facts is a matter to be developed by the evidence and is not a nonamendable defect under OCGA § 9-11-60 (d).

See First Baptist Church v. King, 208 Ga. App. 250, 252 (430 SE2d 635) (1993). To be a motion to set aside under OCGA § 9-11-60 (d), the motion must be based upon a nonamendable defect which appears on the face of the record. Daniels v. McRae, 180 Ga. App. 732 (350 SE2d 317) (1986). In this case, a nonamendable defect on the face of the record is not alleged, and thus West erroneously filed a discretionary application instead of a direct appeal.

Further, appeals from the "discretionary" or inherent power of the trial court to modify or set aside a judgment are directly appealable. Allstate Insurance Co. v. Clark, 186 Ga. App. 58, 59 (366 SE2d 394) (1988). Accordingly, West was required to file a direct appeal and this application for discretionary appeal is dismissed for lack of jurisdiction.

94-031
94VS88517B

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **APR 08 1996**

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hereto affixed the day and year last above written.*

Clerk.

William L. Martin

Court of Appeals of the State of Georgia

ATLANTA, April 24, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0285. FONTE D. ROBINSON v. THE STATE.

Applicant Fonte D. Robinson was convicted of theft by receiving stolen property. The trial court denied his motions for new trial and this court affirmed his conviction on appeal. Robinson v. State, 215 Ga. App. 125 (449 SE2d 679) (1994). He was also convicted of burglary on December 14, 1993. He filed a pro se extraordinary motion for new trial in May 1995 and apparently filed an amended new trial motion in July 1995. On September 27, 1995, the trial court entered an order denying his "Motions for New Trial and for Out-of-Time Appeal." He moved for reconsideration which the trial court denied in an order entered January 24, 1996. On March 18, 1996, Robinson filed this pro se application for discretionary appeal under OCGA § 5-6-35 (a) (7) from the September 27, 1995 order denying his extraordinary motion for new trial.

However, applications for discretionary appeal must be filed within 30 days of the entry of the order being sought to be appealed. OCGA § 5-6-35 (d). To the extent Robinson seeks review of the denial of his extraordinary motion for new trial, this application is untimely because it was not filed within 30 days of the order denying the motion. See Hill v. State, 204 Ga. App. 582 (420 SE2d 393) (1992). Further, to the extent Robinson seeks review of the denial of his motion for out of time appeal, the

denial of such motion is subject to direct appeal rather than by discretionary application. See Rowland v. State, 264 Ga. 872, 876 (452 SE2d 756) (1995). Accordingly, this application is hereby DISMISSED for lack of jurisdiction.

96-032
Z45894 Z48091

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **APR 24 1996**

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William L. Martin

Court of Appeals of the State of Georgia

ATLANTA, April 18, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0294. DENT v. PEEK PAVEMENT MARKING, INC. et al.

On August 5, 1991, Paul Dent injured his back in the course of his employment as a truck driver with Peek Pavement Marking, Inc. Dent's injury was compensable and Peek commenced payment of Workers' Compensation benefits.

Dent's authorized treating physician released him to return to full duty work without restrictions in January 1992; however, Dent's complaints of pain, headaches, and numbness persisted, and he quit work in June 1992 and continued to receive benefits. The treating physician examined Dent again in December 1994 and concluded that Dent could work as a truck driver with no repetitive bending of his back or lifting more than 25 pounds. In April 1995 Peek offered Dent a job as backup truck driver subject to the light duty and lifting restrictions recommended by the physician.

Dent refused the offer because he felt the job was not suitable to his physical limitations. The ALJ and the Appellate Division of the State Board of Workers' Compensation found that Peek's job offer was suited to Dent's physical capacity and that Dent's refusal was unjustified. The Board suspended Dent's

benefits effective August 1995. The superior court affirmed based on the "any evidence" rule.

In this application, Dent contends that there is no evidence to support the suspension of his Workers' Compensation benefits. However, the evidence as summarized by the ALJ and the superior court indicates otherwise. The State Board's findings of fact, when supported by any evidence, are conclusive and binding upon this Court. Dasher v. City of Valdosta, 217 Ga. App. 351 (457 SE2d 259) (1995). Accordingly, this application is hereby denied.

E47026

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

APR 18 1996

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Clerk.

William L. Martin

Court of Appeals of the State of Georgia

ATLANTA, April 25, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0303. PENNY LEE CRUSE WEBSTER v. MARK DANIEL HENDERSON.

Penny Lee Cruse Webster filed this discretionary appeal seeking review of the trial court's order changing custody of her three minor children. The Court, however, lacks jurisdiction to review this application.

"Generally, an order is final and appealable when it leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court. [Cit.]" Thomas v. Douglas Co., 217 Ga. App. 520 (457 SE2d 835) (1995). In the instant case, while in the March 12, 1996 order, the trial court determined that material change of circumstances existed warranting a change in custody and set forth a visitation schedule for Webster, the trial court clearly stated that its order was "a temporary order entered until such time that a Final Hearing can be had on said matter [child support] to allow the Mother an opportunity to adjust her budget in order to pay child support." The matter was thus not fully resolved at the time of the March 12, 1996 order and does not

constitute the trial court's final ruling on the merits of the action.

Because the order appealed is not a final order, Webster was required to follow the interlocutory application procedures in OCGA § 5-6-34 (b) by obtaining a certificate of immediate review from the trial court and complying with the time limitations set forth therein. Scruggs v. Dept. of Human Resources, 261 Ga. 587 (408 SE2d 103) (1991); Rogers v. Dept. of Human Resources, 195 Ga. App. 118 (392 SE2d 713) (1990).

The interlocutory procedures not having been followed by Webster, this application for discretionary appeal is hereby DISMISSED. Rogers, supra at 119.

96-034
95CV90

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

APR 25 1996

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Clerk.

William L. Martin

Court of Appeals of the State of Georgia

ATLANTA, May 1, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0304. VEAL v. THE STATE.

In 1994 the Superior Court of Athens-Clarke County placed Cynthia Veal on probation following her conviction for a violation of the Georgia Controlled Substances Act. On November 3, 1995, the trial court modified her probation and placed her in the custody of a probation detention center in Evans County. On February 26, 1996, the Superior Court of Evans County revoked Veal's probation for engaging in homosexual activity with another detainee at the detention center.

Pursuant to OCGA § 42-8-38 (d), the Clerk of the Evans County court forwarded the revocation order to the Athens-Clarke County court for the processing of Veal's formal commitment to the Department of Corrections. That order was filed in the Athens-Clarke County superior court on March 7, 1996. Veal then filed this application for discretionary appeal on April 9, 1996.

Under OCGA § 5-6-35 (d), an application for discretionary appeal must be filed within 30 days after entry of the order complained of. In the instant case, inasmuch as the revocation order was entered on February 26, 1996, the deadline for seeking

discretionary appeal of that revocation was March 27, 1996. Veal's application thus is untimely and her failure to comply with that requisite discretionary appeal procedure deprives this Court of the jurisdiction to consider the case. Scriven v. State, 179 Ga. App. 513 (346 SE2d 906) (1986). Accordingly, this application is hereby dismissed.

91-034
SU94CR0815

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAY 01 1996

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Clerk.

William S. Martin

Court of Appeals of the State of Georgia

ATLANTA, May 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0305. STORMS v. STUCKEY et al.

Applicant Tommie Storms filed this application for discretionary appeal from the trial court's order denying her motion to reconsider the denial of her request for attorney fees. The trial court entered an order denying applicant's motion for costs and attorney fees pursuant to OCGA § 9-15-14 on February 12, 1996. On February 22, 1996, applicant moved for reconsideration, which the trial court denied in an order entered March 11, 1996. Storms filed this discretionary application on April 10, 1996.

However, an application for discretionary appeal must be filed within 30 days of the entry of the order sought to be appealed. Here, the only appealable judgment was the February 12 order denying applicant's motion for costs and attorney fees, and her motion for reconsideration did not extend the time to file a discretionary application from that order. OCGA § 5-6-35 (a) (10), (d). Because applicant failed to file her application within 30 days of the February 12 order as required by § 5-6-35 (d), the application is hereby DISMISSED for lack of jurisdiction.

95-034
948053

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAY 06 1996

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Clerk.

William R. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, MAY 02 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0307. HAAS v. HAAS.

Marshall Haas seeks a discretionary appeal from the judgment of the superior court finding him in contempt for his failure to pay temporary child support and alimony as ordered during the pendency of the parties' divorce action. However, since the order complained of arises in the context of a pending divorce action, jurisdiction to consider the merits of Haas' application lies with the Supreme Court. Ga. Const. 1983, Art. VI, § VI, ¶ III (6). Accordingly, Haas' application is hereby TRANSFERRED to the Supreme Court for disposition.

D97942

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAY 02 1996**

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, May 2, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0308. FRANK JACKSON, JR. et al v. WINDEMERE TRUST et al.

Frank and Carol Jackson, Jr. filed an application for discretionary appeal seeking review of the trial court's order denying their motion for reconsideration of the order granting Windemere Trust's motion for summary judgment and awarding \$4,600.00. The Court lacks jurisdiction to review this application.

While the Jacksons correctly filed an application for discretionary appeal from the order granting summary judgment for less than \$10,000.00, Covrig v. Campbell, 187 Ga. App. 39 (369 SE2d 293) (1988), their application is untimely. OCGA § 5-6-35 (d) provides that the application must be filed within 30 days of the entry of the order complained of. Motions for reconsideration, however, do not extend the time for filing an application. Id.

In the instant case, the record shows that the order granting summary judgment was entered on January 5, 1996. The Jacksons, however, did not file their application until April 10, 1996, 30 days after the entry of the order denying their motion for reconsideration but nearly three months after the order granting

summary judgment to Windemere Trust. The application thus being untimely, the Court lacks jurisdiction and the application is hereby dismissed.

90-034
95CV16422

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAY 02 1996**

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

A handwritten signature in black ink, appearing to read "William R. Martin". The signature is written in a cursive style with a large, stylized initial "W".

Court of Appeals
of the State of Georgia

ATLANTA, APRIL 23, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0309. R.D. SHARMA V. J & A SHIPPING CO., INC.,

Applicant's attorney has filed a motion to withdraw the petition for discretionary appeal and the same is hereby granted.

92-035

93VS76186B

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **APR 23 1996**

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, April 24, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0312. BARNETT BANK v. PELLO BODY SHOP.

Barnett Bank seeks a discretionary appeal from the order of the superior court denying its petition for writ of possession to recover a certain automobile from defendant Pello Body Shop. However, the order appealed from is not of a type specifically enumerated under OCGA § 5-6-35 (a) (1)-(11), and appellant does not suggest otherwise. Moreover, appellant informs this court that it has filed a notice of direct appeal in the superior court.

Accordingly, since it appears the discretionary appeal procedure does not apply in this case, Barnett Bank's application is hereby DISMISSED.

96-034R
9600075

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **APR 24 1996**

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, April 25, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0318. GRAYLON CONEY v. GEORGIA DEPARTMENT OF HUMAN RESOURCES et al.

Graylon Coney filed this application for discretionary appeal seeking review of a trial court's order in a child support contempt action brought by the Georgia Department of Human Resources. As set forth below, this Court lacks jurisdiction to review this application.

Final orders holding persons in contempt of child support orders are appealable pursuant to the discretionary application procedures set forth in OCGA § 5-6-35 (a) (2) and (b). However, in the instant case, the contempt order appealed is not final in that it did not determine all of the issues which are to be resolved in the case. While the superior court determined that Coney was in contempt for failing to pay \$11,893.44 in child support, the trial court expressly ordered another hearing for Coney to show cause why he should not be incarcerated for such contempt and for a determination of court costs. Because the order appealed is not a final contempt judgment, Coney was required to follow the interlocutory application procedures in OCGA § 5-6-34 (b) by obtaining a certificate of immediate review from the trial court

and complying with the time limitations therein. Scruggs v. Dept. of Human Resources, 261 Ga. 587 (408 SE2d 103) (1991); Rogers v. Dept. of Human Resources, 195 Ga. App. 118 (392 SE2d 713) (1990).

The interlocutory application procedures not having been followed, this application for discretionary appeal is hereby DISMISSED. Rogers, supra at 119.

92-036
960162F

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **APR 25 1996**

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William R. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, May 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0323. FLYNN v. FLYNN.

Jennifer T. Roper Flynn seeks to appeal from a final judgment and decree of divorce. Since the Supreme Court has jurisdiction over divorce and alimony cases, this application is hereby TRANSFERRED to the Supreme Court for disposition. Ga. Const. 1983, Art. VI, § VI, ¶ III (6).

91-036
9550401

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAY 06 1996**

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, May 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0324. PATTAROZZI v. DAVIS.

Terry M. Pattarozzi filed an application to appeal the trial court's order granting Laurie C. Davis' motion to dismiss Pattarozzi's complaint in which he sought damages against his former attorney. While it is unclear whether Pattarozzi sought interlocutory review under OCGA § 5-6-34 (b) or discretionary review under OCGA § 5-6-35 (a), this Court lacks jurisdiction to review this application.

First, the order appealed from is not of a type specifically enumerated as orders subject to the discretionary appeal procedure under OCGA § 5-6-35 (a) (1)-(11), and Pattarozzi does not suggest otherwise. Second, the order dismissing the complaint for failure to state a cause of action is not an interlocutory order, but rather a final order directly appealable pursuant to OCGA § 5-6-34 (a).

Accordingly, since it appears that neither the discretionary appeal procedure nor the interlocutory appeal procedure applies in this case, Pattarozzi's application is hereby **DISMISSED**.

95-036
951340599

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAY 06 1996**

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hereto affixed the day and year last above written.*

Clerk.

William L. Martin

Court of Appeals
of the State of Georgia

ATLANTA, MAY 8, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0328. AUBREY JACKSON OSTEEEN V. DREW HODGES OSTEEEN

Applicant's attorney has filed a motion to withdraw the petition for discretionary appeal and the same is hereby granted.

93-037

E39148

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAY 08 1996**

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William S. Martin

Court of Appeals of the State of Georgia

ATLANTA, May 15, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0343. SARAH L. KELLERHALLS BLEVINS v. RAYMOND E. STANCIL.

Raymond E. Stancil filed an action against Sarah L. Kellerhalls Blevins seeking to set aside a deed allegedly conveyed fraudulently to Blevins and seeking to recover damages for conversion. The record shows Blevins was properly served and she failed to file an answer within the appropriate time. Accordingly, on February 24, 1995, the trial court entered a final default judgment against Blevins in the amount of \$2,000.00.

On March 27, 1995, Blevins filed various motions seeking to set aside the default judgment or open default. Blevins contended the default judgment should be set aside because Stancil's attorney did not comply with USCR 15 which requires the party seeking entry of default to attach to the proposed default judgment a certificate stating the date and type of service and that there has been no filed defensive pleading from the opposing party. The clerk's records showed that while the default judgment was filed on February 24, 1995, the certificate was not signed by Stancil's attorney until February 27, 1995, three days later. Blevins argued the failure to comply with USCR 15 was a nonamendable defect under

OCGA § 9-11-60 (d) (3) sufficient to set aside the default judgment. Blevins' motion to open default was based on the same ground as well as Blevins' contention that her attorney's failure to file a defensive pleading because he thought he did not have her authority to do so constitutes excusable neglect. Following service of these motions, Stancil's attorney, without notice to Blevins, presented a proposed corrected default judgment to the trial court to reflect the date of February 24, 1995 on the certificate. The trial court entered the corrected default judgment on April 3, 1995 and denied Blevins' motions on March 1, 1996 as well as her motion to set aside the corrected default judgment based on lack of notice. Blevins filed this discretionary application requesting review of the trial court's order denying her motions to set aside default judgment, to open default and to set aside the corrected default judgment.

The trial court properly denied Blevins' motion to open default. Once a final judgment is entered by the trial court, the provisions of OCGA § 9-11-55 (b) regarding opening default are inapplicable, and the case proceeds under OCGA § 9-11-60. Archer v. Monroe, 165 Ga. App. 724 (302 SE2d 583) (1983). Pursuant to OCGA § 9-11-60 (b), a judgment may be set aside upon some nonamendable defect which does appear upon the fact of the pleading or record. We find that even if there was a defect in the default judgment due to the date of the certificate as alleged by Blevins, such defect clearly was amendable either sua sponte or upon motion. This Court has consistently upheld the inherent power of the trial court to correct, revise, or modify its own judgment during the

term at which it was rendered even upon its own motion and with or without notice to the parties in order to promote justice in the exercise of sound legal discretion. LeCraw v. Atlanta Arts Alliance, Inc., 126 Ga. App. 656 (191 SE2d 572) (1972). Therefore, in the instant case, we find no abuse of the trial court's discretion in denying Blevins' motions to set aside the original default judgment and the corrected default judgment based on the misdating of the certificate by Stancil's attorney.

Accordingly, the application is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAY 15 1996**

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the minutes of the Court of Appeals of Georgia.*

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Clerk.

William R. Martin

91-038
94CV28344

Court of Appeals of the State of Georgia

ATLANTA, May 8, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0344. OLIVER v. WAL-MART STORES, INC. et al.

This application for discretionary appeal seeks review of an order granting a motion to enforce a settlement agreement in an action for damages. The application is untimely and must be dismissed.

Cheryl Oliver commenced this action against Wal-Mart Stores, Inc., and two Wal-Mart employees, contending that they wrongly accused her of taking a ten-cent cup of ice without paying for it. On a previous appeal, this Court reversed the trial court's grant of summary judgment for the defendants. Oliver v. Wal-Mart Stores, 209 Ga. App. 703 (434 SE2d 500) (1993).

Subsequently, counsel for Oliver and the defendants engaged in settlement negotiations, culminating in the defendants' motion to enforce a settlement agreement whereby Oliver agreed to dismiss the action in exchange for \$2000. The trial court granted the motion and dismissed Oliver's complaint on October 3, 1995, and Oliver then filed a notice of appeal on November 2, 1995. That appeal was docketed with this Court as Case No. A96A0607 on November 29, 1995, but before its disposition the matter was remanded on January 12,

1996, for supplementation of the record. On March 27, 1996, the trial court entered an order stating that the record was complete, and Oliver then filed this application for discretionary appeal on April 29, 1996.

Under OCGA § 5-6-35 (a) (6), the discretionary appeal procedures are required in appeals in all actions for damages in which the judgment is \$10,000 or less, and under OCGA § 5-6-35 (d), such an application must be filed within 30 days after entry of the judgment being appealed. Inasmuch as the trial court's order granting the motion to enforce the settlement agreement was entered on October 3, 1995, the deadline for filing this application for discretionary appeal was November 2, 1995. Oliver's having filed a notice of appeal on that date did not extend the time for following the proper appellate procedure.

Oliver's failure to comply with the requisite discretionary appeal procedures deprives this Court of the jurisdiction to consider this case. Fabe v. Floyd, 199 Ga. App. 322 (405 SE2d 265) (1991). Accordingly, this application is hereby dismissed.

95-038
941035I

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAY 08 1996**

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*Witness my signature and the seal of said court
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Clerk.

William E. Martin

**Court of Appeals
of the State of Georgia**

ATLANTA, May 13, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0352. RHODES v. ABC SCHOOL SUPPLY, INC.

Plaintiff Thomas A. Rhodes, Sr., applies for an appeal from the order of the state court granting defendant ABC School Supply's motion for summary judgment. However, generally such a judgment is directly appealable. See Green v. Johnston Realty, 212 Ga. App. 656, 657 (442 SE2d 843) (1994). Since the judgment complained of here does not appear to be one to which the discretionary appeal procedure is made applicable (see OCGA § 5-6-35 (a) (1)-(11)), Rhodes' application is inappropriate and is hereby DISMISSED. See Cora v. Wagner, 196 Ga. App. 774 (397 SE2d 46) (1990).

95-039
95C57114

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAY 13 1996

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Clerk.

C. William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, May 21, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0358. DESSE POWERS v. LAYDEN CUSTOM CABINETRY, INC. et al.

Desse Powers filed this application seeking discretionary review of the superior court's order affirming the State Board of Workers' Compensation's decision denying his claim for benefits.

The record reveals that on August 30, 1994, when Powers and his son returned home from buying food, he began moving his personal tools as well as some tools of his employer, Layden Custom Cabinetry, Inc., to the cab of his truck. When he removed a plastic squeeze bottle of lacquer thinner, it sprayed on him and was ignited by the cigarette he was smoking, catching him on fire. Powers received burns on approximately 60 percent of his body. The administrative law judge and the board held that this accident did not arise out of and in the course of his employment. The superior court affirmed applying the any evidence test.

In his application, Powers contends the ALJ erred in basing its award primarily on the finding that he was not an employee at the time of his accident contrary to the stipulations entered into by the parties. Powers contends that the sole issue was whether his injuries arose out of and in the course of his employment with Layden and the evidence does not support the finding that his injury was not work-related.

A review of the record, however, shows that the both the ALJ and the board did not ignore or contradict the stipulation

concerning the employer/employee relationship but correctly focused on the issue of whether the injury arose out of and in the course of Powers' employment. A determination of that issue necessarily involves a consideration of the employee's work habits prior to the accident as there must be a causal connection between the employment and the injury. Borden Foods Co. v. Dorsey, 112 Ga. App. 838 (146 SE2d 532) (1965). We have held that an injury arises out of the employment, "when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions which the work is required to be performed and the resulting injury. [Cits]." Maxwell v. Hosp. Authority of Dade, Walker & Catoosa Counties, 202 Ga. App. 92, 94 (413 SE2d 205) (1991). Applying this test to the record produced in the application, there is evidence to support the ALJ's and the board's finding that Powers' injuries did not arise out of or in the scope of his employment.

Accordingly, this application is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAY 21 1996

91-040
CV960370MI
255-27-4077

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Clerk.



Court of Appeals of the State of Georgia

ATLANTA, MAY 21 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0359. WESTBURY SQUARE TOWNHOUSES ASSOCIATION, INC. v. BRYAN.

Richard Bryan commenced this action against the Westbury Square Townhouses Association, Inc., seeking an order requiring the Association to allow Bryan to inspect various corporate records pursuant to OCGA § 14-3-1602. The superior court granted the petition and awarded Bryan \$500 attorney fees, and the Association then filed this application for discretionary appeal under OCGA § 5-6-35 (a) (6).

However, the underlying subject matter generally controls in determining the proper appellate procedure. Rebich v. Miles, 264 Ga. 467 (448 SE2d 192) (1994). OCGA § 5-6-35 (a) (6) pertains to appeals in actions for money damages in which the judgment is for \$10,000 or less. In the instant case, although Bryan sought and obtained attorney fees for the corporation's refusal to allow him to inspect various corporate records, the actual subject matter of the action was the enforcement of the statutory right to inspect. It was not an action for damages and thus did not fall within the ambit of OCGA § 5-6-35 (a) (6). For that reason, this discretionary application is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta MAY 21 1996

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Clerk.



Court of Appeals of the State of Georgia

ATLANTA, May 31, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0361. D. ROBERT AUTREY, JR. P. C. v. BAKER

D. Robert Autrey, Jr. P. C. ("Autrey") sued his former client, Elena S. Baker, pursuant to OCGA § 44-14-550, in an action to enforce attorneys liens. The liens did not arise by virtue of an order or judgment in his client's divorce proceeding. Rather, the liens came into being pursuant to OCGA § 15-19-14 (a) based upon a contract of representation. The amount of fees owed is alleged to be \$31,221.94. After a full hearing, the superior court entered a judgment prohibiting the enforcement of the liens. This application for appeal followed. Autrey also filed a notice of appeal with the trial court.

No basis for discretionary appeal appears. The order appealed is not one awarding attorney fees pursuant to OCGA § 9-15-14, nor is it an order arising from a domestic relations case. See OCGA §§ 5-6-35 (a) (2) and (10). Based upon the information contained in the application, the order appears to be a final judgment from which a direct appeal would lie. See *Kelly v. Pierce Roofing*, 220 Ga. App. 391 (SE2d) (1996). As no other provision of OCGA § 5-6-35 has been urged or cited by Autrey as a basis for discretionary appeal, and as no such basis appears to exist, the application is hereby ordered DISMISSED.

Court of Appeals of the State of Georgia

97-040
E43971

Clerk's Office, Atlanta

MAY 31 1996

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 Clerk.

Court of Appeals of the State of Georgia

ATLANTA, May 28, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0364. OWENS v. GEORGIA UNDERWRITING ASSOCIATION.

Ronald Owens commenced this action against Georgia Underwriting Association to recover under a fire insurance policy. Georgia Underwriting Association moved for summary judgment on the grounds that it had already fully paid Owens \$12,696.87 under the policy in question. The trial court granted that motion on April 25, 1996, and Owens then filed this application for discretionary appeal.

Ostensibly, Owens filed this application pursuant to OCGA § 5-6-35 (a) (6), which requires such discretionary procedures for appeals in all actions for damages in which the judgment is \$10,000 or less. However, where the appealing party recovers nothing, as in the instant case, the judgment remains directly appealable. Robinwood, Inc. v. Baker, 206 Ga. App. 202 (425 SE2d 353) (1992). Accordingly, this application for discretionary appeal is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta MAY 28 1996

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the minutes of the Court of Appeals of Georgia.*

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, June 17, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A96D0367, A96D0369. ALL SOUTH WAREHOUSE et al., v. PROTHRO; and
vice versa.**

In this workers' compensation case, the claimant and employer/insurer each apply for appeal from the detailed judgment entered by the superior court.

The superior court's analysis of the employer/insurer's claims of error is correct except in one respect. Specifically, Prothro is arguably correct in stating that the "job search burden" discussed in Maloney v. Gordon County Farms, 265 Ga. 825 (462 SE2d 606) (1995), does not apply to his case. But this is so because Prothro's position before the ALJ was that he had become physically unable to work due to his deteriorating condition, not that he was unable to find work. Therefore the ALJ's finding that Prothro was physically able to work was alone fatal to Prothro's claim for disability benefits, since Prothro freely admits "[h]e is not alleging an economic change in condition." Moreover, Prothro's premise is his bare assertion that the ALJ based his evaluation of Prothro's physical ability to work on the fact that Prothro did not conduct a job search. The award itself reveals that this assertion is without merit.

For the foregoing reasons, the parties' respective applications for discretionary appeal are DENIED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUN 17 1996

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

William R. Martin ^{Clerk.}

Court of Appeals of the State of Georgia

ATLANTA, June 18, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0372. ANTHONY J. BAUMANN, SR. v. LISA S. PATTERSON.

Anthony J. Baumann, Sr. filed this discretionary appeal seeking review of the trial court's order changing custody of his minor children. This Court, however, lacks jurisdiction to review this application.

"Generally, an order is final and appealable when it leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court." Thomas v. Douglas Co., 217 Ga. App. 520 (457 SE2d 835) (1995). Although the trial court determined in its April 23, 1996 order that a material change of circumstances existed warranting a change in custody, the trial court failed to address all of the issues raised in the plaintiff's complaint. For example, the court did not address payment of child support or attorney fees. Further, the applicant also concedes that the court's order is "interlocutory in nature." Thus, this action was not fully resolved at the time the order was entered. Therefore, the order does not constitute the trial court's final ruling on the merits of the action.

Because the order appealed is not a final order, the applicant was required to follow the interlocutory application procedures in OCGA § 5-6-34 (b) by obtaining a certificate of immediate review from the trial court within the requisite time period. Scruggs v. Dept. of Human Resources, 261 Ga. 587 (408 SE2d 103) (1991); Rogers v. Dept. of Human Resources, 195 Ga. App. 118 (392 SE2d 713) (1990). Because the applicant followed none of the interlocutory appeal procedures, this Court lacks jurisdiction to entertain this appeal at this time. Rogers, supra at 119. Therefore, the application is hereby ordered DISMISSED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUN 18 1996

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William R. Martin

Clerk.

**Court of Appeals
of the State of Georgia**

ATLANTA, JUNE 19, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96D0379
NATIONSBANK, N.A. V. JONAH BUNDRICK

Upon consideration of the Application for a Discretionary
Appeal, it is ordered that it be hereby DISMISSED.

98042

SC96CV82

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JUN 19 1996

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the minutes of the Court of Appeals of Georgia.*

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William R. Martineau Clerk.

**Court of Appeals
of the State of Georgia**

ATLANTA, JUNE 19 , 1996

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96D0379
NATIONSBANK, N.A. V. JONAH BUNDRICK

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby DISMISSED.

98042

SC96CV82

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JUN 19 1996

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William L. Martine Clerk.

Court of Appeals of the State of Georgia

ATLANTA, June 19, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0389. ADAMS v. THE STATE.

Donald Kenneth Adams seeks a discretionary appeal from the order of the superior court denying his late-filed motion to modify that portion of his probationary sentence banishing him from the Oconee Circuit for ten years. Adams applies for appeal based on OCGA § 5-6-35 (a) (5), which requires that appeals from orders revoking probation be taken by application for discretionary appeal. However, Adams' revocation has not been revoked, and therefore OCGA § 5-6-35 (a) (5) does not apply to the order from which Adams seeks to appeal, nor does any other provision of OCGA § 5-6-35 (a) (1)-(11).

Accordingly, since the discretionary appeal procedure is inapplicable in this case, Adams' application is hereby **DISMISSED**. Cora v. Wagner, 196 Ga. App. 774 (397 SE2d 46) (1990).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUN 19 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, June 11, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0390. CECIL B. HULSEY v. FIRST NATIONAL BANK OF PAULDING COUNTY.

Cecil Hulsey filed an application seeking discretionary review of the trial court's order denying his motion to reopen and a motion to set aside the order dismissing his complaint. The Court, however, lacks jurisdiction to review his application.

Pursuant to OCGA § 5-6-35 (d), discretionary applications shall be filed with the clerk of the Court within 30 days of the entry of the order complained of. In the instant case, the order denying Hulsey's motions was filed on February 15, 1996. Hulsey's application, however, was not filed with the clerk of this Court until June 4, 1996, almost four months later. Therefore, since the application is untimely, the Court lacks jurisdiction and the application is hereby DISMISSED. See e.g. Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUN 11 1996

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the minutes of the Court of Appeals of Georgia.*

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William R. Martin, Clerk.

Court of Appeals of the State of Georgia

ATLANTA, June 20, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0394. BOWEN v. DEKALB COUNTY.

Arnold Bowen seeks a discretionary appeal from the order of the recorders court adjudicating him guilty of a violation of the DeKalb County Code. However, Brown did not include a stamped "filed" copy of the order appealed from, nor did he timely comply with the order of this court issued the date his application was docketed directing him to do so. Therefore, even assuming that Bowen's application was timely filed and is from an order not otherwise subject to direct appeal, it is nevertheless dismissed due to Bowen's failure to comply with a prior order of this court. Rule 7 of the Rules of the Court of Appeals.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUN 20 1996

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William L. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, June 19, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0395. RICK F. ELLIS v. JACKIE BAGLEY et al.

Rick F. Ellis filed an application seeking discretionary review of the trial court's order denying his motion to set aside a previous order denying his prior motion to set aside. The trial court had previously entered a default judgment against Ellis on September 15, 1994 and denied Ellis' motion to set aside the default judgment on May 30, 1996.

Ellis contends the trial court erred in denying his second motion to set aside because the trial court did not hold a hearing following his request for a hearing. In 1985, with the enactment of the Uniform Superior Court Rules, the superior courts have the authority to decide all motions in civil actions, including those for summary judgment, without oral hearing except for motions for new trial and motions for judgment notwithstanding the verdict. USCR 6.3. However, the rule provides that in cases involving summary judgment motions, a hearing shall be permitted upon written request. *Id.* Since Ellis' motion was not one of those listed motions entitling him to a hearing, the trial court correctly decided Ellis' motion to set aside without oral hearing.

Ellis' final contention concerns the inappropriateness of the respondents' motion to dismiss his motion to set aside. The trial court correctly ruled that the motion to dismiss is not technically appropriate. Howland v. Weeks, 133 Ga. App. 843 (212 SE2d 487) (1975). However, regardless of the form of the document, the substance of the motion to dismiss was a response in opposition to Ellis' motion to set aside. The trial court thus properly had before it a motion and a response and thus had jurisdiction to make a ruling. Based on the information produced in the application, it appears the trial court did not err in denying the motion to set aside.

Accordingly, Ellis' application is hereby DENIED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JUN 19 1990

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, June 17, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0396. OWENS v. PEDRO.

On September 21, 1995, the trial court dismissed this tort action that was filed against Cassandra Owens, based on the statute of limitations. Owens subsequently filed a motion for attorney fees and expenses of litigation under OCGA § 9-15-14, which the trial court denied on January 24, 1996. Owens filed a motion for reconsideration, and the trial court denied that motion on May 7, 1996. Owens then filed this application for discretionary appeal on June 6, 1996.

However, an application for discretionary appeal must be filed within 30 days after entry of the judgment for which an appeal is sought. OCGA § 5-6-35 (d). A motion for reconsideration does not extend the time for instigating such a discretionary appeal. Cf. Morton v. Morton, 163 Ga. App. 830 (296 SE2d 362) (1982). In the instant case, Owens filed her application well beyond the 30-day period following entry of the order denying her § 9-15-14 motion. Owens's failure to comply with that requisite discretionary procedure deprives this Court of the jurisdiction to consider this case, and the application is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUN 17 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, June 17, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0402. BRUCE JOHN RAMSHAW V. ATHENA BETH COX.

Bruce John Ramshaw filed this application for discretionary appeal seeking review of the trial court's order finding him in wilful contempt of a settlement agreement incorporated into a divorce decree entered on April 14, 1993. The trial court found Ramshaw had failed to make certain payments to his former wife as required by a property settlement under the agreement and decree.

Under the state constitution, the Supreme Court has exclusive jurisdiction over all divorce and alimony cases. Art. VI, Sec. VI, Par. III (6) of the Ga. Const. of 1983. In Eickhoff v. Eickhoff, 263 Ga. 498 (435 SE2d 914) (1993), the Supreme Court held that an unincorporated settlement agreement was not a divorce action but simply a contract action. But see Crotty v. Crotty, 219 Ga. App. 408 (1) (465 SE2d 517) (1995). In the present application, the settlement agreement was incorporated into the parties' divorce decree. Moreover, an action for contempt arising out of a party's failure to make certain payments required under a settlement agreement, incorporated into a divorce decree, has been held to be ancillary to the divorce action and thus jurisdiction to hear such

an appeal is in the Supreme Court. Griffin v. Griffin, 243 Ga. 149 (253 SE2d 80) (1979); compare Ashburn v. Baker, 256 Ga. 507 (350 SE2d 437) (1986) (jurisdiction over appeal of contempt action involving child custody issues, but not issues relating to divorce and alimony, is within the Court of Appeals, even though such action involves an action for contempt for violation of a divorce decree). For these reasons, this case is hereby transferred to the Supreme Court.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JUN 17 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, July 18, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0413. JAMES H. WILHOITE V. COMPOSITE STATE BOARD OF MEDICAL EXAMINERS.

Applicant James H. Wilhoite ("Dr. Wilhoite") seeks discretionary review of the superior court's dismissal of his interlocutory appeal from a decision of the administrative law judge for the Composite State Board of Medical Examiners (the "Board"). In August of 1995, the Board filed a notice of hearing which alleged that Dr. Wilhoite's diagnosis and treatment for 16 patients fell below the minimum standard of acceptable and prevailing medical practice. On October 30, 1995, Dr. Wilhoite filed a motion for summary determination claiming the Board's action was barred by various statutes of limitation or by the doctrine of laches.

The ALJ denied Dr. Wilhoite's motion, and on February 23, 1996, Dr. Wilhoite filed a Petition for Interlocutory Appeal in the superior court. The superior court issued a stay of the ALJ proceedings and on March 6, 1996 the parties agreed to a consent order. In the consent order, the Board agreed to a stay and Dr. Wilhoite agreed to cease prescribing controlled substances. Dr. Wilhoite violated the consent order by issuing several prescriptions for controlled substances, and upon a filing of a motion for contempt by the Board, the superior court ordered Dr. Wilhoite to cease the practice of medicine.

On May 10, 1996, the superior court dismissed Dr. Wilhoite's interlocutory appeal as premature, lifted the stay, and ordered Dr. Wilhoite to comply with the March 6, 1996 consent order to cease prescribing controlled substances during the pendency of the administrative process. Dr. Wilhoite then filed this application for discretionary review which seeks review of the order dismissing his interlocutory appeal as premature and requiring him to comply with the terms of the prior consent order.

The dismissal of the interlocutory appeal by the superior court effectively remanded the case back to the ALJ. A superior court order remanding a case back to the administrative tribunal does not constitute a final judgment and this Court lacks jurisdiction of any appeal. State Health Planning Review Board v. Piedmont Hospital, Inc., 173 Ga. App. 450 (326 SE2d 814) (1985). The order requiring Dr. Wilhoite to cease issuing prescriptions during the pendency of the administrative process only continued the limitation to which Dr. Wilhoite had already agreed. It did not prevent him from practicing medicine during the administrative process. Further, on June 25, 1996, the Board voted to impose the same limitation imposed by the superior court thereby mooting this alleged error.

The application for discretionary review is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 18 1996

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William R. Martin, Jr. Clerk.

Court of Appeals of the State of Georgia

ATLANTA, July 8, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0414. HENSON v. THE STATE.

This application for discretionary appeal seeks review of a trial court order filed May 21, 1996, revoking the applicant's probation. Under OCGA § 5-6-35 (d), an application for discretionary appeal must be filed within 30 days after the entry of the appealable judgment. Here, although the application for appeal was sent by certified mail dated June 20, 1996, the applicant failed to pay costs at that time. Pursuant to Court of Appeals Rule 5, costs must be paid upon filing of applications and "[t]he Clerk shall not file any matter unless the costs have been paid or a sufficient pauper's affidavit has been filed." Because applicant provided no pauper's affidavit and did not pay costs until June 25, 1996, this application was not considered filed until that date. Therefore, the application is untimely and is ordered DISMISSED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL - 8 1996

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

William R. Martin

Clerk.

Court of Appeals of the State of Georgia

ATLANTA, July 8, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0416. MICHAEL CARL PRIDE v. THE STATE.

This is an application for discretionary appeal from an order dated May 23, 1996 revoking Michael Carl Pride's probation. "Appeals from orders revoking probation must be made by application filed with the appropriate court within 30 days of the date of the revocation order. See OCGA § 5-6-35 (a) (5) & (d)." Scriven v. State, 179 Ga. App. 513 (346 SE2d 906) (1986). Pride, however, did not file this application until June 27, 1996, 35 days later. Since the application for discretionary appeal was not filed within 30 days, it is untimely and the Court lacks jurisdiction to review the merits of the application. Accordingly, the application is hereby ordered DISMISSED. Cf. Bigham v. Wright, 194 Ga. App. 194 (390 SE2d 109) (1990).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL - 8 1996

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Clerk.

William R. Martin

Court of Appeals of the State of Georgia

ATLANTA, July 16, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0428. THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH v. ADAMS.

The superior court entered its order affirming a Workers' Compensation award in this case on May 30, 1996, and the deadline for pursuing discretionary appeal was July 1, 1996. This application was submitted on that date by certified mail, and was physically received by this Court on July 3, 1996. However, the application could not be docketed as received because it did not contain a copy of the order for which an appeal was sought.

Upon realizing the omission, the applicant's attorney attempted to submit the requisite copy by delivery service, but the document was misdelivered to the 11th Circuit Court of Appeals. This Court finally received the copy of the superior court's order on July 9, 1996, thereby enabling the application to be docketed.

Under OCGA 5-6-35 (d), an application for discretionary appeal must be filed within 30 days after entry of the order complained of, and under OCGA § 5-6-35 (c) the application must contain a copy of the order being appealed. Because the application could not be docketed until its completion on July 9, 1996, which was beyond the 30 days allowed for seeking a discretionary appeal, the application is hereby dismissed as untimely. Hill v. State, 204 Ga. App. 582 (420 SE2d 393) (1992).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 16 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0431, A96D0448. DARBY, et al. v. SPRINGS.

Lana M. Gary Darby seeks a discretionary appeal from the order of the superior court granting William T. Springs' petition for legitimation, denying Darby's petition for termination of Springs' parental rights, and reserving for further review the remaining issues of custody and/or visitation. However, although the subject matter of the order appealed from is included under OCGA § 5-6-35 (a) (2), this does not exempt Darby from the requirement of OCGA § 5-6-34 (b), that she obtain a certificate of immediate review before seeking review of an interlocutory order. Cf. Craighead v. Davis, 162 Ga. App. 145 (290 SE2d 358) (1982); see generally Scruggs v. Dept. of Human Resources, 261 Ga. 587 (408 SE2d 103) (1991); Rogers v. Dept. of Human Resources, 195 Ga. App. 118 (392 SE2d 713) (1990).

Because the case remains pending below and the trial court has not certified the order complained of as one from which an immediate appeal is warranted, application no. A96D0431 is premature and is therefore dismissed. Superfluous application no. A96D0448, which was originally filed in the Supreme Court and subsequently transferred to this court, is likewise dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG - 6 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0431, A96D0448. DARBY, et al. v. SPRINGS.

Lana M. Gary Darby seeks a discretionary appeal from the order of the superior court granting William T. Springs' petition for legitimation, denying Darby's petition for termination of Springs' parental rights, and reserving for further review the remaining issues of custody and/or visitation. However, although the subject matter of the order appealed from is included under OCGA § 5-6-35 (a) (2), this does not exempt Darby from the requirement of OCGA § 5-6-34 (b), that she obtain a certificate of immediate review before seeking review of an interlocutory order. Cf. Craighead v. Davis, 162 Ga. App. 145 (290 SE2d 358) (1982); see generally Scruggs v. Dept. of Human Resources, 261 Ga. 587 (408 SE2d 103) (1991); Rogers v. Dept. of Human Resources, 195 Ga. App. 118 (392 SE2d 713) (1990).

Because the case remains pending below and the trial court has not certified the order complained of as one from which an immediate appeal is warranted, application no. A96D0431 is premature and is therefore dismissed. Superfluous application no. A96D0448, which was originally filed in the Supreme Court and subsequently transferred to this court, is likewise dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG - 6 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 6, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0444. RODNEY M. JONES V. DOUG SCHWENDY.

Rodney M. Jones filed this discretionary application seeking review of the trial court's May 14, 1996 order denying his motion to open a default judgment awarding damages in the amount of \$5,313.19 principal, \$743.85 interest, \$796.98 attorney fees, plus costs of court. Jones, however, did not file his application until July 17, 1996, more than 30 days after entry of the order complained of. Contemporaneously with the filing of his application, Jones also filed an application for appellate review out-of-time. The basis of Jones' request for leave to file an out of time appeal is that he had previously sought to file an application for discretionary appeal on June 14, 1996, 31 days after entry of the order denying his motion to open default. The Clerk's office informs the court that the first application was returned to Jones because it was submitted on Jones' behalf by a lawyer not admitted to practice law in Georgia.

An application for discretionary appeal must be filed within 30 days after entry of the judgment for which an appeal is sought. OCGA § 5-6-35 (d). Although a trial court has authority under OCGA

§ 5-6-39 to grant a 30-day extension of time for filing a notice of appeal, no comparable authority exists for granting an extension of time to file an application for discretionary appeal. Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983).

In this case, neither the first attempted filing nor the July 17 filed application were within the 30 day period following the order denying the motion to open default. Thus, the Court lacks jurisdiction to consider this case, and the application must be dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG - 8 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 19, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0450. PLATTE VALLEY FUNDING, L.P. v. EVANS.

Samuel Evans commenced this action against Platte Valley Funding, L.P., seeking compensatory and punitive damages for wrongful foreclosure, and on September 18, 1995, obtained a default judgment for \$3100 when Platte Valley failed to answer the complaint.

Platte Valley subsequently filed a motion to set aside the default judgment pursuant to OCGA § 9-11-60 (d) (2), which the trial court denied on March 26, 1996. Platte Valley then filed a motion for reconsideration of that denial on April 22, 1996, and the trial court denied the motion on June 19, 1996. In that order, the trial court also indicated that Evans's claim for punitive damages remained pending. This application for discretionary appeal was filed on July 19, 1996.

Generally, the denial of a motion to set aside a judgment requires the discretionary appeal procedures. OCGA § 5-6-35 (a) (8); Agency Mgt. Servs. v. Escape Travel/Tour Servs., 199 Ga. App. 882 (406 SE2d 285) (1991). However, inasmuch as the determination of the issue of punitive damages remains pending before the trial

court, no final judgment has been entered and it appears that the interlocutory appeal procedures instead were required in this case. Avco Lycoming v. Newton Aero, Inc., 146 Ga. App. 609 (247 SE2d 135) (1978); see also, Scruggs v. Ga. Dept. of Human Resources, 261 Ga. 587, 589 (408 SE2d 103) (1991). Because of Platte Valley's failure to comply with the interlocutory appeal procedures set forth in OCGA § 5-6-34 (b), this application to appeal is premature and must be dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta 455 19 111

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 19, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0450. PLATTE VALLEY FUNDING, L.P. v. EVANS.

Samuel Evans commenced this action against Platte Valley Funding, L.P., seeking compensatory and punitive damages for wrongful foreclosure, and on September 18, 1995, obtained a default judgment for \$3100 when Platte Valley failed to answer the complaint.

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Generally, the denial of a motion to set aside a judgment requires the discretionary appeal procedures. OCGA § 5-6-35 (a) (8); Agency Mgt. Servs. v. Escape Travel/Tour Servs., 199 Ga. App. 882 (406 SE2d 285) (1991). However, inasmuch as the determination of the issue of punitive damages remains pending before the trial

court, no final judgment has been entered and it appears that the interlocutory appeal procedures instead were required in this case. Avco Lycoming v. Newton Aero, Inc., 146 Ga. App. 609 (247 SE2d 135) (1978); see also, Scruggs v. Ga. Dept. of Human Resources, 261 Ga. 587, 589 (408 SE2d 103) (1991). Because of Platte Valley's failure to comply with the interlocutory appeal procedures set forth in OCGA § 5-6-34 (b), this application to appeal is premature and must be dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 19 1991

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Witness my signature and the seal of said court hereto affixed the day and year last above written.

William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 14, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0459. FREDERICKS v. WHITFIELD, et al.

E. Wayne Fredericks seeks an appeal from the order of the superior court denying his motion to set aside the order granting appellees' cross motion for summary judgment. Fredericks first attempted to appeal the judgment directly but that appeal was dismissed due to Fredericks' failure to follow the discretionary appeal procedure. OCGA § 5-6-35. Fredericks' belated attempt to apply for a discretionary appeal must likewise fail because such an application must be brought within 30 days of the entry of the judgment complained of in order to authorize this court to consider the application on its merits. OCGA § 5-6-35 (d). Because Fredericks' application is untimely, it is dismissed for lack of jurisdiction. See Hill v. State, 204 Ga. App. 582-583 (420 SE2d 393) (1992).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 14 1996

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William E. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 15, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0462. WILLIAM D. BRADBURY V. SUSAN M. SHAPIRO.

William D. Bradbury filed an application for discretionary review of a decision of the trial court which dismissed his case against Susan M. Shapiro. The order granting Shapiro's motion to dismiss was filed with the clerk of the superior court on June 20, 1996. Bradbury filed a motion for reconsideration which was denied as to the issue appealed in this application. Bradbury's application was filed with this Court on July 25, 1996.

An application for discretionary review must be filed within 30 days after entry of the order appealed. 5-6-35 (d). Entry means the date the order, signed by the judge, is filed with the clerk of court. Joiner v. Perkerson, 160 Ga. App. 343 (287 SE2d 327) (1987). In this case, the order appealed was filed with the clerk of the superior court on June 20, 1996. Bradbury was required to file his application for discretionary review within 30 days, i.e., by July 22, 1996. However, Bradbury did not file his application until July 25, 1996, three days late. Further, his motion for reconsideration did not extend the time for filing the

application. See Tel. Advertising Corp. v. Aaron Rents, 206 Ga. App. 493 (426 SE2d 54) (1992).

Because Bradbury failed to file his application within 30 days of the entry of the order appealed, this Court lacks jurisdiction over this appeal. Accordingly, the application for discretionary appeal is DISMISSED for lack of jurisdiction.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 15 1996

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William L. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 20, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0466. ALBANY APPLIANCE SERVICE v. MAYS.

This application for discretionary appeal seeks review of the superior court's order entered on June 26, 1996, holding that the workers' compensation award in this case was affirmed by operation of law because no hearing in the matter was scheduled within 60 days as required by OCGA § 34-9-105 (b). However, under OCGA 5-6-35 (d), an application for discretionary appeal must be filed with the appropriate appellate court within 30 days after entry of the appealable judgment. Inasmuch as this application was not filed with the Court of Appeals until July 30, 1996, it is untimely. Although the application was mailed by certified mail, no official postmark date appears on the envelope or on the certified mail receipt and the mailing date thus may not be deemed the filing date pursuant to Rule 4 of the Court of Appeals Rules.

The applicant's failure to comply with the time requirement for filing an application for discretionary appeal deprives this Court of the jurisdiction to consider the case. Fabe v. Floyd, 199 Ga. App. 322 (405 SE2d 265) (1991). Accordingly, this application is hereby dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 20 1996

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William R. Martin

Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 20, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0467. 1ST FA, INC., A GEORGIA CORPORATION ET AL. V. M & B PRODUCTS, INC., A FLORIDA CORPORATION.

1st FA, Inc. (1st FA) seeks an appeal from the April 24, 1996 order of the trial court vacating an order which had granted 1st FA's motion to vacate a foreign judgment. M & B Products, Inc. (M & B) obtained a judgment against 1st FA in Florida. M & B domesticated the judgment and filed a garnishment against the principal of 1st FA who had signed as a guarantor on the debt. 1st FA then filed a motion to vacate the foreign judgment which was granted. M & B sought reconsideration of the grant of the motion to vacate the foreign judgment. The trial court did reconsider and vacated its order vacating the foreign judgment.

1st FA first attempted to appeal the judgment directly, but that appeal was dismissed due to 1st FA's failure to follow the discretionary appeal procedures. OCGA § 5-6-35 (a) (8). 1st FA's belated attempt to apply for a discretionary appeal must likewise fail because such application must be brought within 30 days of the entry of the judgment complained of in order to authorize this Court to consider the application on its merits. OCGA § 5-6-35 (d). Because 1st FA's application is untimely, it is dismissed for lack of jurisdiction. See Hill v. State, 204 Ga. App. 582-583 (420 SE2d 393) (1992).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 20 1996

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William R. Martini

Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 22, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0473. MARTY M. MURPHY V. THE STATE.

On August 2, 1996 Marty M. Murphy filed this discretionary application seeking review of the trial court's order entered on June 28, 1996 which denied his extraordinary motion for new trial. An application for discretionary appeal, however, must be filed within 30 days after entry of the judgment from which an appeal is sought. OCGA § 5-6-35 (d). Although a trial court has authority under OCGA § 5-6-39 to grant a 30-day extension of time for filing a notice of appeal, no comparable authority exists for granting an extension of time to file an application for discretionary appeal. Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983). In this case, because Murphy filed his application five days beyond the 30-day period following the order denying his extraordinary motion for new trial, this Court lacks jurisdiction to consider this case. Accordingly, this application is ordered dismissed.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 22 1996

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William R. Martin

Clerk.

Court of Appeals of the State of Georgia

ATLANTA,

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0476. IN RE PETITION OF BRAGG et al.

This application for discretionary appeal seeks review of the denial of a petition to adopt a child filed by the maternal grandparents of the child. However, orders granting or denying adoption petitions do not fall within the operation of OCGA § 5-6-35 (a) (2) and are directly appealable. In Re J. S. J., 180 Ga. App. 873 (350 SE2d 843) (1986). Accordingly, this application is hereby dismissed for lack of jurisdiction.

It is noted that inasmuch as the trial court denied the adoption petition on July 24, 1996, the applicants may still instigate direct appeal of this matter by filing a notice of appeal within 30 days of that denial.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 19 1996

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William R. Martin Clerk.

Court of Appeals of the State of Georgia

ATLANTA, September 4, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0483. Angie Tran v. Excel Temporary Services, Inc. et al.

Applicant Angie Tran sought by this application a discretionary appeal from an order of the Superior Court of Gwinnett County entered on July 8, 1996. On August 16, 1996, the Clerk of this Court received the application. However, pursuant to Rule 4, the application was deemed filed on August 8, 1996, as that date appeared on the official United States Postal Service postmark and the applicant's certificate of service.

An application for discretionary appeal must be filed within 30 days of the entry of the order appealed. OCGA § 5-6-35 (d). This application was filed 31 days after the entry of the order appealed. Therefore, it is untimely. This Court lacks jurisdiction to entertain an untimely application. Fabe v. Floyd, 199 Ga. App. 322 (405 SE2d 265) (1991). For this reason, the application is hereby ordered DISMISSED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP - 4 1996

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William R. Martin

Clerk.

Court of Appeals of the State of Georgia

ATLANTA, August 22, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A96D0485. STEPHEN F. CARLEY v. FRANCIS PEOPLE et al.

Stephen F. Carley ("Carley") filed this application seeking review of the trial court's order disbursing \$30,000.00 in settlement proceeds to plaintiff Francis People and attorneys, Carley and Gordon L. Joyner. The Court lacks jurisdiction to review this application as no basis for discretionary appeal exists.

The order appealed is not one involving a judgment for \$10,000.00 or less nor is it an order awarding attorney fees pursuant to OCGA § 9-15-14. See OCGA §§ 5-6-35 (a) (6) and (10). Based on the information contained in the application, the order appears to be a post-judgment order from which a direct appeal would lie. See Petty v. Chrysler Credit Corp., 169 Ga. App. 418 (312 SE2d 874) (1984). As no other provision of OCGA § 5-6-35 has been urged or cited by Carley as a basis for discretionary appeal, and as no such basis appears to exist, the application is ordered DISMISSED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

AUG 22 1996

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William R. Mantel, Clerk.

Court of Appeals of the State of Georgia

ATLANTA, MAR 08 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

Motions Docket 221. IN THE INTEREST OF J. N. T., a child.

On March 7, 1996, William Gosney and Claudia Gosney filed their motion for emergency supersedeas in a child custody case. They also filed an application for discretionary review of the trial court's order (A96D0239). However, OCGA § 15-11-64 provides that no final order of a juvenile court judge "shall be superseded except in the discretion of the judge; rather, the judgment or order of the court shall stand until reversed or modified by the reviewing court." It appears, therefore, that the granting of supersedeas in the present case is a matter left entirely in the judge's discretion, and that we are without jurisdiction to grant supersedeas in such a case. The Gosneys' motion for supersedeas is denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 08 1996**

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William R. Martin  Clerk.