

**FOURTH DIVISION  
SMITH, P. J.,  
ELDRIDGE and ELLINGTON, JJ.**

**NOTICE:** Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 14, 2000)  
<http://www.appeals.courts.state.ga.us/rules.html>

**June 10, 2002**

**In the Court of Appeals of Georgia**

A02A0076. JACKSON v. NORFOLK SOUTHERN RAILROAD. SM-004

SMITH, Presiding Judge.

After Norfolk Southern Railroad closed a railroad crossing leading to his house, William Forrest Jackson, Jr. brought suit claiming interference by the railroad with his easement rights. Jackson sought to compel the railroad to replace the crossing it had removed. The case proceeded to trial, and a jury returned a verdict in Jackson's favor. Subsequently, the trial court granted Norfolk Southern's motion for judgment notwithstanding the verdict. In this appeal, Jackson claims that the record contains evidence to support each of the elements required to obtain an easement by prescription. We find otherwise and affirm.

This litigation arose after Norfolk Southern removed an existing crossing over its railroad tracks in an area in front of Jackson's house in Johnson County. As part

using [the crossing] though, with the permission of the railroad?" Jackson responded, "I'd have to say that I was using it with their permission because they knew I was crossing it to get to my house." But mere use of a roadway is not enough to acquire prescriptive rights. *Trammell v. Whetstone*, 250 Ga. App. 503, 505-506 (1) (552 SE2d 485) (2001). "An owner's acquiescence in the mere use of his road establishes, at most, a revocable license [Cit.]." *Eileen B. White & Assoc. v. Gunnells*, 263 Ga. 360, 362 (434 SE2d 477) (1993). Moreover, the record is devoid of any evidence that Jackson did any maintenance or repairs to the crossing during the seven year prescriptive period. Compare *Trammell*, supra at 506 (1). Because Jackson did not establish all of the elements required for a prescriptive easement, the trial court properly entered judgment in favor of Norfolk Southern. See *Lopez v. Walker*, 250 Ga. App. 706, 708 (1) (551 SE2d 745) (2001).

*Judgment affirmed. Eldridge and Barnes, JJ., concur. Ellington, J., disqualified.*



# Court of Appeals

## Memorandum

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**To:** All Judges

**From:** Judge Phipps *HEP*

**Subject:** Circulation of A02A1388. OMAR GAY v. THE STATE.

**Date:** November 14, 2002

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In response to that portion of Judge Barnes's memo which objects to twelve-judge circulation of this case, I offer the following explanation.

This case was assigned to me to author, and Judge Mikell dissented, seeking to overrule an earlier opinion of this court.

IOM Section XV, Paragraph W, Subparagraph 1 says that "when an opinion seeks to overrule a prior decision, the author of the opinion overruling the prior decision should attach a memo so stating, showing the panel members of the case being overruled. If a Judge who participated in that opinion is still on the Court, the overruling opinion should be circulated first to the author of that opinion, and then to the other Judges on the panel of the case being overruled, if they are still on the Court, even before the opinion goes to the overruling author's panel members."

The question is whether a dissenting opinion seeking to overrule a prior decision constitutes an opinion which must be circulated to all twelve judges.

Paragraph W of IOM Section XV sets forth two situations in which questions are presented to all members of the court. Presumably under the principle of stare decisis, the court has said that, in any case where an earlier decision is challenged, all judges of the court should participate in the decision. The author of the case under challenge, assumed to be that case's strongest advocate, is afforded the first opportunity to respond to the challenge, and the ordinary course of circulation is set aside. The second opportunity for twelve-judge decision afforded by Paragraph W (Subparagraph 6) is when a panel majority agrees that some other question should be passed upon by all members of the court, and in that case a majority of the court must agree that all members should hear the case. In promulgating Subparagraphs 1 through 5 the court apparently decided that the issue of overruling a prior case is a question always so important that it should be submitted to all members of the court.

Although we commonly use only the word, "dissent," to refer to a dissenting opinion, a dissent is still an opinion.<sup>1</sup> Although the IOM does not mention dissenting - or specially

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<sup>1</sup>"A dissent . . . refers to a dissenting judicial opinion." A Dictionary of Modern Legal Usage, Bryan A. Garner (1987); "Dissenting Opinion: The opinion in which a judge announces his dissent from the conclusion held by the majority of the court, and expounds his own views." Black's Law Dictionary, Revised Fourth Edition.

concurring - opinions<sup>2</sup> in Paragraph W of Section XV, it seems to me that we can infer that the court's respect for the doctrine of precedent extends to all opinions.

Under IOM Section XV, Paragraph W, a case is circulated to all twelve judges whenever an opinion *seeks to* overrule an earlier case, not when a panel has already decided to overrule a case. The current procedure does not require the majority of a three-judge or seven-judge panel to agree on overruling before the case circulates to all judges for consideration. But Judge Barnes suggests that this case should be circulated first to a seven-judge panel to rule on Judge Mikell's dissent (a panel which would not include Judge Barnes, the author of the challenged opinion), and only thereafter, if Judge Mikell's dissenting opinion prevails, circulated to all twelve judges. It is hard to see how the interest of judicial economy would be served if seven judges must vote twice on this case, first on the judgment and later on whether to overrule. Nor can I envision how a seven-judge panel could vote on Judge Mikell's dissenting opinion without also considering its essential intent to overrule the earlier case - an issue which we have already said should be decided by all twelve judges. Judge Mikell's dissenting opinion may never become the majority opinion in this case, but the issue he raises of overruling an earlier decision should be addressed by all twelve judges. Where there is disagreement about whether to overrule an earlier decision, a preliminary vote cannot determine which position will prevail. Garnering four votes from the first panel does

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<sup>2</sup> "Write specially = to concur in a separate opinion." *A Dictionary of Modern Legal Usage*, Bryan A. Garner (1987).

not guarantee either position a majority of the eventual twelve-judge vote. Until Judge Mikell's dissenting opinion, which relies solely on overruling an earlier case, is considered by the whole court, there is no way of knowing whether it will become the majority opinion.

As our rules now stand, "one judge," to whom a case has been randomly assigned, can cause a case to go to all twelve judges at any time by suggesting we overrule an earlier case. I am in no way disturbed by the idea that one other judge, who did not win the lottery of case assignment, has that same opportunity. A judge writes not just for himself, but for the entire court. Interpretation of the IOM to require consideration of this dissenting opinion by the entire court would help preserve the integrity of this court's decisions. My purpose in circulating this case to all judges is only to provide full consideration of an issue I understand the court to hold very important. I wholeheartedly apologize for any inconvenience to any judge.

Perhaps this section of the IOM would be a good topic for discussion at our next banc meeting.

cc: Bill Martin



# Court of Appeals

## Memorandum

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To: THE CHIEF JUDGE AND ALL JUDGES OF THE COURT OF APPEALS

From: JUDGE BARNES *ARMS*

Subject: A02A1388. GAY v. THE STATE.

Date: November 14, 2002

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1. I have concurred with Judge Phipps' opinion, both on the merits of this appeal and on overruling *Ayiteyfo*. (For one thing, it's a little difficult to admit that my earlier opinion defies logic!) *Ayiteyfo* simply involves the time-honored rule of applying apples to apples, and oranges to oranges. Thus, when the trial judge says that he finds discriminatory intent because a black juror with a relative in law enforcement remained seated while a white juror with a relative in law enforcement, *in addition to other factors*, was struck, he is comparing an apple to an orange. Therefore, the trial judge's conclusion based on this obvious error was clearly erroneous. The trial judge in *Ayiteyfo* did not base his conclusion on the totality of the circumstances; he based it on his erroneous determination that the two jurors were similarly situated when they were not.

The dissent reads *Ayiteyfi* too broadly. Nothing in *Ayiteyfi* establishes a per se rule or limits a trial judge's discretion to accept, reject, or infer that any of the reasons proffered in support of a strike were or were not racially motivated. The case merely holds that when the trial court bases its finding on nothing more than a misapprehension of the facts, the finding will be held to be clearly erroneous.

2. Additionally, I object to this case going whole court on overruling *Ayiteyfi v. State* at this time. My understanding is that paragraph W, Section XV of our IOM is implicated when the author of an opinion proposes to overrule a case. Conversely, my understanding is that when a dissenting judge wishes to overrule a case, paragraph W is not implicated unless the dissent becomes the majority opinion. At that time, the case would circulate under paragraph W.

Adopting the procedure being used in this case will involve all twelve judges, perhaps unnecessarily, before we know that the dissent will become the majority. Moreover, this procedure would allow one judge to cause a case to go to all twelve judges at any time without regard to OCGA § 15-3-1 (c) (2), which sets out the rules for going to a 12 judge court, or subparagraph W. 6. of our IOM.



# Court of Appeals

## Memorandum

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**To:** Jan Kelley  
**From:** Chief Judge Blackburn *AAB*  
**Subject:** Travel/Dues Allocation  
**Date:** May 8, 2001

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The court has authorized an increase in the travel/dues allocation for the next budget

submitted to the legislature to the following levels:

\$4,000 per Judge  
\$6,000 for the Chief Judge  
\$10,000 other court personnel total

cc: All Judges  
Bill Martin



# Court of Appeals

## Memorandum

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**To:** Chief Judge Blackburn  
**From:** Jan Kelley, <sup>JK</sup> Director of Fiscal Services  
**Subject:** Proposed Increase in Travel Funds  
**Date:** April 18, 2001

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According to Court policy our travel budget is split into 15 parts. Each Judge receives one part, the Chief Judge receives two parts, and two parts are reserved for other staff travel. Our travel budget has been \$38,250 or \$2,550 for each part. In July, 1999 the policy was changed slightly for each Judge to have an allotment that would be used for travel and/or dues that were court-related based on the Judge's discretion. The allotment for travel/dues was increased to \$3,000.

Analysis of expenses from 1999 to current indicate that our travel budget may need to be increased. While we have not exceeded our overall travel budget during these years, the portion reserved for other staff travel has always exceeded the two portions allocated. Other staff travel for FY 1999 was \$8,629 or \$3,529 above budget. During FY 2000 we expended

Page 2

Memo to Chief Judge Blackburn

April 18, 2001

\$6,659 in other staff travel funds which exceeded the budget by \$1,559. It is projected that other travel expenses for FY 2001 will exceed \$7,000.

It is essential that our staff receive training on new technology, fiscal policies and regulations and legal requirements. We simply cannot meet all of the travel needs of the general staff (Clerk's office, Fiscal office, Information Technology, Reporter's Office [Scott Henwood- we pay ½ of expenses] and parking only for law assistants) without an increase in the allocation. I recommend that we increase the travel budget by one part and allocate it to other staff travel. This should allow us to meet our current anticipated expenditures.

Also, we may want to increase the allocation amounts for travel. While we have not exceeded our overall travel funds in the last few years, several judges traveling out-of-state have exceeded their allocation portions while numerous others have expended just below their \$3,000 travel/dues allocation. The budget was not exceeded only because some judges did not travel. I recommend that we increase each allocation to \$3,500 for travel/dues and \$3,000 for travel only (other staff).

Thank you for consideration of this request.



# Court of Appeals

## Memorandum

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To: Chief Judge J.D. Smith  
From: *W. L. Martin, III*  
Subject: Fee for Certificate of Good Standing  
Date: January 24, 2003

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Attached please find a survey I received from the Clerk and Court Administrator from the Supreme Court of California regarding the costs of Certificates of Good Standing in various states. As you will note, the fee for a Certificate of Good Standing in the Supreme Court of Georgia is \$3.00. The Court of Appeals charges \$1.25.

Given budgetary considerations, we may wish to raise our fee for Certificates of Good Standings, at least to \$3.00 to be uniform with the Supreme Court.

If you have any questions or would like to discuss the matter with me, please let me know.

Thank you.

/ld  
Attachment



**SUPREME COURT OF CALIFORNIA**  
*Office of the Court Administrator/Clerk*

**MEMORANDUM**

Date: January 23, 2003

To: ncacc@lists.washlaw.edu

From: Frederick K. Ohlrich  
 Court Administrator and Clerk

Subject: Fee for Certificate of Good Standing—**FINAL SURVEY RESULTS**

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**Survey Results      26 Total      (20 States plus the District of Columbia and  
 the U.S. Supreme Court responded.)**

<p><b>States with No Fee (4)</b>            Alaska            Arkansas            Kansas            North Dakota</p> <p><b>States with a \$3.00 Fee (3)</b>            Georgia            Indiana            Wisconsin</p> <p><b>States with a \$7.00 Fee (1)</b>            Maryland            U.S. Supreme Court</p> <p><b>States with a \$15.00 Fee (1)</b>            Massachusetts</p>	<p><b>States with a \$1.00 Fee(4)</b>            California            Florida            New Mexico            Virginia</p> <p><b>States with a \$5.00 Fee (8)</b>            District of Columbia            Nebraska            New Hampshire            New York            North Carolina            Texas            Washington            West Virginia</p> <p><b>States with a \$10. Fee (3)</b>            Kentucky            Wyoming</p> <p><b>States with a \$25.00 Fee.(2)</b>            Pennsylvania            Tennessee</p>
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### Miscellaneous Appellate Fees - Other States

<u>Jurisdiction</u>	<u>Admission to Practice</u>	<u>Certificate of Good Standing</u>	<u>Certification of Document</u>
Alabama			\$1
Alaska			\$5
California			\$1
Connecticut		\$10	\$2
Delaware		\$2.30	
Florida			\$1
Illinois			\$1
Kansas			\$0
Louisiana			\$2
Maine		\$3	
Maryland	\$20 in state/\$25 out state	\$7	\$5
Michigan		\$5	
Missouri		\$5	
Mississippi	\$30, replacement \$15	\$10 replacement	\$2.50
Nebraska		\$5	\$1
Nevada	\$25		
Ohio		\$5 (by bar)	
Oregon			\$1
Pennsylvania	\$50 (for certificate)	\$25	\$8 + \$1 each page thereafter
Utah			\$4
Vermont	\$25	\$3	\$2
Virginia		\$1	
Wisconsin		\$3	
US Distr.Ct, N.D.GA.	\$15 replacement cert	\$15	\$7
US 11th Cir. Ct			\$7
<b>Average/Median</b>	<b>\$27.50/\$25</b>	<b>\$7.09/\$5</b>	<b>\$2.97/\$2</b>

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

See the other order Equal Division  
attached. therefore transfer  
3/13/85 is a letter to S.C.  
order.

ATLANTA, March 12, 1985

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

69128. JASON RUSTIN et al v. STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY

69129. JOSEPH P. SPAIN, III v. STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY

There being an equal division of the judges of this Court when sitting as a body in connection with the consideration of the above styled cases, it is ordered that said cases be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V, of the Constitution of the State of Georgia.

All judges concur except McMurray, P.J., disqualified.

# Court of Appeals of the State of Georgia

ATLANTA, MARCH 13, 1985

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

69128. RUSTIN et al. v. STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY

69129. SPAIN v. STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY

This will supplement the order of this court entered on March 12, 1985, transferring the above-styled cases to the Supreme Court pursuant to Article VI, § V, ¶ V of the Constitution of the State of Georgia. As stated, there is an equal division of the judges of this court on a dispositive issue in the above-styled cases, Birdsong, P.J., Sognier, Benham and Beasley, J.J., being for affirmance, and Banke, C.J., Deen, P.J., Carley and Pope, J.J., being for reversal. Presiding Judge McMurray is disqualified. Attached to this order are copies of the draft opinions of this court reflecting the views of the judges as to the dispositive issue.

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

ATLANTA,

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A89A0789. JACQUES D. HUTCHINS ET AL V. A. SIDNEY PARKER ET AL  
A89A0790. A. SIDNEY PARKER ET AL V. JACQUES D. HUTCHINS ET AL

Upon consideration of motions for rehearing filed in the above stated cases, it is hereby ordered that the opinion of this Court issued on and the judgment entered on July 14, 1989, be hereby vacated and that said opinion be withdrawn from the files.

There being an equal division of the Judges of this Court when sitting as a body in connection with the consideration of the above styled cases, it is ordered that said cases be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V, of the Constitution of the State of Georgia.

On dispositive issues in Case No. A89A0790, the Judges of this Court are equally divided as follows: Banke, P.J., Birdsong, Sognier and Benham, JJ., being for affirmance, and Carley, C. J., Deen, P. J., McMurray, P. J., and Pope, J., being for reversal. Beasley, J., not participating.

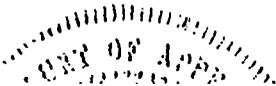
Attached to this order are copies of the draft opinions of this Court reflecting the views of the judges as to the dispositive issues.

OLD

EQUAL DIVISION  
TO SUPREME  
COURT

(REVISED 7/31/89)

July 31, 1989



Example

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

ATLANTA, July 16, 1997

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A97A0236. ROJAS v. STATE OF GEORGIA.**

There being an equal division of the Judges of this Court when sitting as a body in connection with consideration of the above-styled case, it is ordered that said case be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V of the Constitution of the State of Georgia.

On the dispositive issues of the above-styled case, the Judges of this Court are equally divided as follows: Judges Beasley, Blackburn, Smith, and Eldridge concur in the opinion authored by Senior Appellate Judge Harold R. Banke; Chief Judge Andrews, Presiding Judge Birdsong, Presiding Judge Pope, and Judge Johnson concur in the dissent authored by Presiding Judge McMurray. Judge Ruffin is not participating.

Attached to this order are copies of the draft opinions of the Court reflecting the Judges' views as to the dispositive issues of this case.

WHOLE COURT

**NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION** to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

July 16, 1997

In the Court of Appeals of Georgia

A97A0236. ROJAS v. STATE OF GEORGIA.

Judge Harold R. Banke.

The State filed this in rem forfeiture action against personalty claimed by Miguel Rojas and a co-defendant, who were arrested for selling cocaine to undercover agents at Rojas' workplace on three occasions. Rojas enumerates four errors on appeal.<sup>1</sup> Held:

1. The trial court properly denied Rojas' motion to dismiss the complaint for failure to comply with OCGA § 16-13-49's pleading requirements. Rojas maintains that the complaint was inadequate for failure to allege (1) the essential elements of the claimed violation and (2) the place of seizure.

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<sup>1</sup>Rojas' enumerations raise strictly procedural issues. This precludes us from addressing what appears at least superficially to be a tenuous connection between the offenses and the 32 items seized which included, inter alia, \$24,600, five tow trucks, one Isuzu Rodeo, electronics equipment, jewelry, and several bank accounts.

In concluding, I note that were it not for OCGA § 16-13-49 (o) (4)'s mandatory directive and the Supreme Court's construction of this statute in State of Georgia v. Alford, 264 Ga. 243, 244 (2), 245 (a), supra, I would fully concur in the majority opinion. See dissenting opinion in Lockett v. State of Georgia, 218 Ga. App. 289, 291, supra. But since, in my view, this superior authority does not allow room for this Court to do justice as Judge Eldridge so rightly and eloquently urges in his special concurrence, I reluctantly dissent.

I am authorized to state that Chief Judge Andrews, Presiding Judge Birdsong, Presiding Judge Pope, and Judge Johnson join in this dissent.

Monday through Friday, will be docketed to the date the documents were placed in the drop box. The Judicial Building is open from 7:30 a.m. until 5:30 p.m. Court personnel will remove the documents the morning of the following business day and clock documents to the present time and date and file the documents to the date they were placed in the drop box.

All filings requiring fees must be accompanied by a check or money order or a sufficient pauper's affidavit. The Clerk's office cannot be responsible for filings accompanied by cash.

If a stamped filed copy of the filed document is needed, parties filing such documents must include an extra copy and a pre-addressed stamped envelope with sufficient postage to have the document returned.

**Rule 3.** When an expiration date falls on Saturday, Sunday, or an official state or national holiday, the time is extended to the next business day.

**Rule 4.** A document shall be deemed filed when it is physically delivered to the Clerk's office, with sufficient costs, if applicable, and clocked in by the Clerk's office staff. 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, with sufficient costs, if applicable, provided that the official United States Postal Service postmark date appears either (1) on the transmittal envelope or container, 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. An office or private postage meter date is not sufficient.

Motions for reconsideration are deemed filed only on the date they are physically received in the Clerk's office. See Rule 37.

**Rule 5.** Costs in all cases are \$80.00 unless a sufficient pauper's affidavit is filed with the Court or contained in the record. Costs shall be paid upon filing of applications or, in direct appeals, upon filing of appellant's brief. Costs are incurred and appellant and appellant's counsel are liable for costs when the case is docketed. The Clerk shall not file any matter unless the costs have been paid or a sufficient pauper's affidavit has been filed.

**Rule 6.** All documents filed with the Clerk shall include an original and two copies and a Certificate of Service and service must be made on opposing counsel.

**Rule 7.** Breach of any rule of the Court of Appeals or failure to comply with the order of this Court subjects the offending party and/or attorney to contempt and may subject the appeal to dismissal or cause the appeal to be stricken. The Court may, upon a finding of contempt, impose a fine not to exceed \$1,000.00 and may suspend, revoke the license to practice in this Court, or

**Rule 8.** Cause for disqualification or recusal of a judge of this Court shall be brought to the attention of the Clerk as soon as practicable after the occurrence.

## II. ATTORNEYS

**Rule 9.**  
**(a)** Attorneys.  
Application and Oath.

Any member of the State Bar of Georgia may be admitted to practice in this Court upon written application, and the certificate of admission shall be signed by two attorneys of this Court, that such member is of good professional character. The oath, which is required to be taken before the Court or before a Judge in Chambers, and which shall be recorded in a book to be kept by the Clerk and known as the "Roll of Attorneys," follows:

"I do solemnly swear (or affirm) that I will conduct myself as an attorney or counselor of this Court truly and honestly, and according to law; and that I will support the Constitution of the State of Georgia and the Constitution of the United States. So help me God."

**(b)** Fee.  
The fee for admission is \$30.00, payable to the Clerk, who shall file the certificate of admission under the seal of the Court as evidence of application to practice.

**(c)** Appearance by Courtesy.  
As a matter of professional courtesy, a visiting attorney from another state, or from a district or territory, if admitted to practice in the highest court of the state, district, or territory of such attorney, by leave of court, may be heard as associate counsel or in a single case, without being admitted as a regular practitioner in this Court. A resident attorney, who is not a member of the State Bar of Georgia, may petition this Court for courtesy appearance if the attorney is certified in good-standing in the Bar of the highest court of another state.

sedeas shall be made on the opposing party or attorney before filing and so certified. A copy of the order being appealed and a copy of the Notice of Appeal must be included with the motion.

**Rule 10. BRIEFS: TIME OF FILING.** Appellant's and cross-appellant's briefs shall be filed within 20 days after the case is docketed (see also Rules 50 and 51, regarding requests for oral argument). Appellee's and cross appellee's briefs shall be filed within 40 days after the case is docketed or 20 days after the filing of appellant's or cross appellant's briefs, whichever is later. Appeal and cross appeal may be argued in one brief, but this shall not extend the time for filing.

Failure to comply with an order of the Court directing the filing of a brief may cause the appeal to be dismissed and may subject the offender to sanctions. See Rule 7.

**Rule 11. DUE DATE.** To determine the due date for filing, start counting with the day after docketing, including weekends and holidays. When an expiration date falls on a Saturday, Sunday, or an official state or federal holiday, the time for filing is extended to the next business day.

**Rule 12. EXTENSION OF TIME.** Extensions of time for filing petitions for certiorari, applications, and motions for reconsideration will be granted only in unusual circumstances and only if the request is filed before the time for filing the pleading has expired.

Requests for extension of time for filing briefs should be directed by letter to the Clerk sufficiently in advance of the due date so that if the request is denied the briefs can still be filed within the time fixed by these rules.

Requests not showing service on the opposing party will not be honored.

**Rule 13. FILING BY MAIL.** Except as provided hereafter, the contents of properly addressed mail shall be deemed filed as of the date such mail is received in the Clerk's office. The contents of properly addressed, registered or certified mail shall be deemed filed on the official United States Postal Service postmark date. If there is no clear official or cancellation date stamped, the filing date shall be the date the filing is received. Alternatively, a document will be deemed filed

as of the date on which it is delivered to the United States Postal Service or a commercial delivery company for overnight delivery as evidenced by the receipt provided by the Post Office or commercial delivery company.

**Rule 14. SERVICE.** Prior to filing, including filing by facsimile, service on opposing attorneys or pro se parties, stating their names and addresses, shall be certified. Briefs, petitions for certiorari, applications for appeal, and all motions and requests not so certified will not be accepted for filing.

In appeals involving death penalties, murder, aircraft hijacking, and treason, copies of the notice of appeal, briefs, motions, and all other filings must be served on the Attorney General, the District Attorney, and the attorney for the accused.

**Rule 15. NUMBER OF COPIES.** An original and seven copies shall be filed of briefs, petitions for certiorari, applications for appeal, motions, and responses.

**Rule 16. TYPE.** All filings shall be printed or typed with not less than double-spacing between the lines, except in block quotations or footnotes. Margins shall be no less than one inch at the top, bottom and sides. The type size shall not be smaller than standard pica or elite type or 12-point courier font.

**Rule 17. DOCUMENTS: FORMAT.** Except for requests which should be made by letter to the Clerk, see Rules 12, 20 and 51, petitions, applications, enumeration of errors and motions shall be on letter size (8<sup>1</sup>/<sub>2</sub>" x 11") paper with a back cover of recyclable paper that is heavier than regular stationery and shall be STAPLED at the top.

Responses should be filed as briefs, see Rule 18.

**Rule 18. BRIEFS: FORMAT.** All briefs and responses shall be typed or printed on letter size (8<sup>1</sup>/<sub>2</sub>" x 11") paper with covers on the front and back, STAPLED on the left-hand side in booklet form. Covers shall be of recyclable paper, heavier than regular stationery, and shall bear the style of the case, the case number, and the name or names of the persons preparing the brief, along with their bar numbers, if attorneys.

A90A1575. HUMANA, INC. v. DAVIS et al.

There being an equal division of the Judges of this Court when sitting as a body in connection with the consideration of the above-styled case, it is ordered the said case be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V of the Constitution of the State of Georgia.

On the dispositive issue in the above case, the Judges of this Court are equally divided as follows: Banke, P. J., Carley, Pope and Beasley, JJ., being for affirmance, and Sognier, C. J., McMurray, P. J., Birdsong, P. J., and Andrews, J., being for reversal. Judge Cooper is disqualified from participating in this case.

Attached to this order are copies of the draft opinions of this Court reflecting the views of the judges as to the dispositive issues.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 14 2018

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.

*Victoria McLaughlin*

Clerk.

In the Court of Appeals of Georgia

A90A1575. HUMANA, INC. v. DAVIS et al.

S-101

SOGNIER, Chief Judge.

Robert and Jean Davis brought suit against Hugo Moreno, M.D. and Angelo Gonzales, M.D. alleging medical malpractice in their treatment of the Davises' daughter, Sherberry Joy Davis, and seeking damages for her wrongful death. Two days before the expiration of the statute of limitation the Davises filed an amended complaint adding Dr. Michael Johnson, Dr. C. Kendall, Humana, Inc., and Primary Care Physicians Group, P.C., ("Primary Care") as additional defendants. The trial court granted summary judgment to Johnson and Kendall on two grounds, and in Davis v. Johnson, 193 Ga. App. 19 (386 SE2d 900) (1989), this court affirmed the grant of summary judgment to those physicians, addressing only one ground, which we found to be dispositive. Id. Humana then filed its motion for summary

have been put in issue and facts which could have been offered in support of those matters. Williams v. Summit Psychiatric Centers, 185 Ga. App. 264, 266 (3) (363 SE2d 794) (1987).

In cases involving the doctrine of respondeat superior, although suit against a servant is not always barred by a judgment in favor of the master, Porterfield v. Gilmer, 132 Ga. App. 463, 465-466 (208 SE2d 295) (1974), aff'd 233 Ga. 671 (212 SE2d 842) (1975), a judgment in favor of the servant is always res judicata in favor of the master. Roadway Express, Inc. v. McBroom, 61 Ga. App. 223 (1) (6 SE2d 460) (1939). As there is no suggestion in the record of an independent ground for holding appellant liable, and the nonliability of the doctors has been conclusively established, thus barring appellant's derivative liability, the trial court erred by denying appellant's motion for summary judgment. See Williams, supra at 266-267 (4).

2. Our decision in Division 1 renders unnecessary consideration of appellant's remaining enumerations of error.

Judgment reversed. ~~McMurray, P. J., and Carley, J.~~

~~concur.~~ (Leave off Judge's name.)

judicata. ROADWAY EXPRESS, INC. v. ROBERTSON, 31 Ga. App. 225 (1939) (6 SE2d 460) (1939). However, such is not the case. Appellant was a joint defendant in the suit who did not join in its joint-defendants' motion for summary judgment. The anomalous effect of the majority opinion is to grant summary judgment in favor of appellant nunc pro tunc based upon the state of the record as of the time that Dr. Johnson's and Dr. Kendall's motion was previously granted. Under the applicable principle of the "law of the case," that prior grant of summary judgment in favor of some of the parties did not freeze the record and preclude appellees from adducing additional evidence to support its pending claim as against a remaining party. The majority opinion rests upon an erroneous reliance upon the wholly inapplicable principle of res judicata and I must, therefore, respectfully dissent.

# Court of Appeals of the State of Georgia

ATLANTA, NOV 13 2003

*The Court of Appeals hereby passes the following order:*

## **A03A1203. MUNROE v. UNIVERSAL HEALTH SERVICES, INC.**

There being an equal division of the Judges of this Court when sitting as a body in connection with the consideration of the above-styled case, it is ordered that said case be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V of the Constitution of the State of Georgia.

As to Division 1, the Judges of this Court are equally divided as follows: Smith, C.J., Andrews, P.J., Johnson, P. J., Blackburn, P. J., Ruffin, P. J., and Mikell, J., being for affirmance, and Eldridge, Barnes, Miller, Ellington, Phipps and Adams, JJ., being for reversal.

As to Division 2, the Judges of this Court Smith, C.J., Andrews, P.J., Johnson, P. J., Blackburn, P.J. Ruffin, P. J., and Eldridge, Barnes, Miller, Ellington, Phipps, Mikell, and Adams, JJ. concur, being for affirmance.

Attached to this order are copies of the draft opinion of this Court reflecting the view of the Judges.

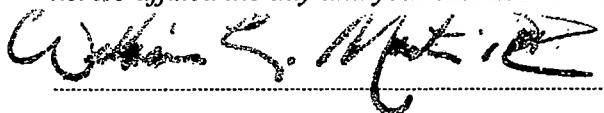
*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta*

**NOV 13 2003**

*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.

## WHOLE COURT

**NOTICE:** Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 14, 2000)  
<http://www.appeals.courts.state.ga.us/rules.html>

**November 13, 2003**

### In the Court of Appeals of Georgia

A03A1203. MUNROE v. UNIVERSAL HEALTH SERVICES, INC.

ANDREWS, Presiding Judge.

Christine Munroe appeals the grant of summary judgment to Universal Health Services, Inc., d/b/a Anchor Hospital (Anchor). Her action sought compensatory and punitive damages and alleged negligent hiring, assault, battery, false imprisonment, and intentional infliction of emotional distress arising from her alleged rape by Love, an employee of Anchor, while she was hospitalized. The trial court granted summary judgment to Anchor, finding that Anchor was entitled to judgment on the issue of negligent hiring and that the acts allegedly committed by Love were not within the scope of his employment.

Pursuant to *Lau's Corp. v. Haskins*, 261 Ga. 491 (405 SE2d 474) (1991), when ruling on a motion for summary judgment, the opposing party should be given the

benefit of all reasonable doubt, and the evidence and all inferences and conclusions therefrom are construed most favorably toward the party opposing the motion. *Moore v. Goldome Credit Corp.*, 187 Ga. App. 594, 596 (370 SE2d 843) (1988). Further, this court conducts a de novo review of the law and the evidence. *Clark v. Cauthen*, 239 Ga. App. 226, 227 (1) (520 SE2d 477) (1999); *Desai v. Silver Dollar City, Inc.*, 229 Ga. App. 160, 163 (1) (493 SE2d 540) (1997).

Viewing the evidence under the *Lau*'s, supra, standard, it was that Anchor hired Love as a mental health assistant, using Anchor's normal hiring procedure. Shearron, Anchor's Director of Human Resources, screened applicants for an open position and coordinated interviews with the Director of Nursing or her assistant. Following the interviews, the interviewer would make recommendations to the Director of Human Resources, who generally followed these recommendations. At this point, the applicant is required to submit to a criminal and employment background check as well as undergo a drug screening. Anchor retained ChoicePoint, an outside agency, to conduct its criminal and background checks.

Love applied with Anchor in February 2001, and his application listed prior experience at a personal care home and several employment references, including his current employment at Marriott. As a reference, he listed an Anchor employee who

gave him a very good recommendation. Love was interviewed and evaluated as to his ability to interact with patients and then Anchor referred his application to ChoicePoint to conduct its criminal and background check.

This check confirmed Love's current employment with Marriott Hotels and he was given a very good recommendation by his supervisor there. Although ChoicePoint could not confirm the personal care home employment, this was not considered unusual because Love had stated on his application that the company had gone bankrupt. No other efforts were made by Anchor personnel to further investigate the personal care home employment. ChoicePoint found no criminal record for Love in the two counties which had been his residence for the prior eight years, Pierce County, Washington, and Clayton County, Georgia.

Love was hired as an "on call when needed" mental health assistant and was given four days of classroom instruction regarding Anchor's policies and procedures. Following this, Love spent three days in a clinical orientation, overseen by senior mental health assistants. Having successfully completed these programs, Love began his 90-day probationary period. As a mental health assistant, Love observed and monitored patients and assisted nursing staff. He was not authorized or allowed to administer medication and the only physical exam he could administer was the

checking of vital signs. Prior to the incident with Munroe, no complaints had been received from patients or staff regarding Love.

On May 23, 2001, Munroe voluntarily admitted herself to Anchor as a result of depression and alcohol abuse. Munroe contends that Love made inappropriate sexual comments and advances toward her, although she did not complain to anyone initially. On May 25, 2001, however, Munroe contends that Love entered her room and had forcible sex with her, having earlier administered medication to her which made her drowsy. Munroe did not tell anyone about this incident until May 27th, when she told nurse Evans there had been a sexual encounter between Love and her. No mention of rape was made until Monday, May 28th, when Munroe placed a 911 call from Anchor and the police became involved. Anchor dismissed Love, who refused to cooperate with the inquiry.

Although ChoicePoint did not find any criminal record for Love, he did have a number of convictions, including drug possession and distribution convictions, in Pierce County, Washington. There is nothing in the record indicating any prior history of sexual assault.

Munroe's sole enumeration of error is that the trial court erred in granting summary judgment to Anchor, based on a number of different legal theories.

1. First, Munroe argues that there are remaining issues of material fact that must be resolved by a jury on her negligent hiring and retention claim.

To show that an employer was negligent in retaining an employee “with violent and criminal propensities,” a plaintiff must show that the employer “knew or should have known of those dangerous propensities alleged to have resulted in [the plaintiff’s] injuries.” *Edwards v. Robinson-Humphrey Co.*, 164 Ga. App. 876, 880 (3) (298 SE2d 600) (1982). See also OCGA § 34-7-20; *Bunn-Penn v. Southern Regional Med. Corp.*, 227 Ga. App. 291, 294 (2) (488 SE2d 747) (1997).

Munroe’s argument that a jury question is presented because of Anchor’s failure to affirmatively verify that there was a Heaven’s Help Personal Care Home and that Love had worked there is not persuasive. Munroe relies on *C. K. Security Systems v. Hartford Accident & Indem. Co.*, 137 Ga. App. 159, 161 (2) (223 SE2d 453) (1976). There, C. K. was hired to provide security for Days Inn premises and stated that it would provide “skilled” uniformed personnel to patrol. One of those personnel stole a Days Inn check, forged an official’s name to the check, and made it payable to himself for \$11,000.

There, unlike Anchor's situation, in moving for summary judgment, C. K. failed to produce evidence that it did not know of the employee's prior arrests and that it did not know any predilection to steal of the employee. Id. at 160 (1).

While acknowledging that an employer is only under a duty to exercise ordinary care in selecting its employees, and "while the standard of ordinary care is invariable [Cit.]," this Court stated in *C. K.*, supra, that "yet circumstances of the case may require a greater *amount* of care to meet the *degree* or standard of care required by law. [Cits.]" (Emphasis in original.) Id. at 161 (2). Because C. K. was providing a security service and use of its "skilled" employees to protect persons and property, this Court said that, in selecting its employees, "it *may* have been duty bound to exercise a greater amount of care to ascertain its employees were honest and were not likely to commit thefts, where one employing others to perform a different type of service may meet the standard of care required with a lesser amount or quantum of care." (Emphasis supplied.) Id. at 161-162 (2).

Aside from the fact that this statement is dicta and that the primary holding was that the employer failed to produce any evidence on its motion for summary judgment that it did not know about the employee's prior theft difficulties, subsequent cases make clear that the duty owed is that of ordinary care and, generally, the employer is

under no obligation to perform an affirmative background or criminal search. *Worstell Parking v. Aisida*, 212 Ga. App. 605, 606 (2) (442 SE2d 469) (1994) (“plaintiff’s argument that defendant had a duty to investigate the attendant’s past before they employed the attendant is without merit”); *Diaconescu v. Hettler*, 210 Ga. App. 191, 193 (2) (435 SE2d 489) (1993); but see *Piney Grove &c. Church v. Goss*, 255 Ga. App. 380, 383-384 (3) (565 SE2d 569) (2002).

Further, even assuming such a duty, Anchor did have ChoicePoint conduct such an investigation. Munroe’s argument that the investigation may not be delegated to another is unpersuasive. See *Fortune v. Principal Financial Group*, 219 Ga. App. 367, 371 (1) (465 SE2d 698) (1995) (use of Equifax to conduct employee investigation); *Patterson v. Southeastern Newspapers*, 243 Ga. App. 241, 244 (2) (533 SE2d 119) (2000) (use of outside company to conduct driver’s license check).

Had ChoicePoint discovered that Love had prior drug-related offenses, that would not have given Anchor the required prior knowledge of Love’s propensity to commit sexual assault. Compare *Bunn-Penn*, supra at 294 (3) and *Worstell Parking*, supra at 606 (2) with *Harper v. City of East Point*, 237 Ga. App. 375, 376-377 (2) (515 SE2d 623) (1999).

Munroe further argues that there remain questions of Love's veracity concerning the prior personal care home employment as well as other employments. In addition to the fact that Munroe has come forward with no evidence proving such falsity, even had it been shown that Love lied about his qualifications, that alone would not provide any question regarding the required knowledge of his tendency to commit sexual assault. *Harper*, supra at 376 (2); *Fortune*, supra at 371 (1).

There was no error in the trial court's grant of summary judgment to Anchor on the negligent hiring/retention claim.

2. Munroe also contends that jury questions exist regarding whether Anchor is liable for Love's act of sexual assault under *respondeat superior*.

The test of a master's liability for his servant's tort is whether the act was done within the scope of the actual transaction of the master's business for accomplishing the ends of his employment. If a servant steps aside from his master's business to do an act entirely disconnected from it, and injury to another results from a doing of the act, the servant may be liable, but the master is not liable. Where the tort of the employee is wholly personal to himself, it is not within the scope of his employment, and the master is not liable.

(Citations, punctuation and emphasis omitted.) *Rogers v. Fred R. Hiller Co. of Ga.*, 214 Ga. App. 448 (1) (448 SE2d 46) (1994); *Rucker v. Troll Book Fairs*, 232 Ga. App. 189, 190 (1) (501 SE2d 301) (1998).

Munroe's argument on this issue, based on *Palladino v. Piedmont Hosp.*, 254 Ga. App. 102 (561 SE2d 235) (2002), was recently rejected by the Supreme Court in its reversal of that case. *Piedmont Hosp. v. Palladino*, 276 Ga. 612 (580 SE2d 215) (2003). There, the Supreme Court found that sexual manipulation of a patient's genitals by an employee who was authorized to check an incision in this area was done purely for personal reasons of the employee and Piedmont was entitled to summary judgment on this issue.

There was no error in the trial court's grant of summary judgment to Anchor on this basis.

3. Munroe also argues here that Anchor was responsible under OCGA § 51-3-1. A review of the record, however, reveals that this argument was neither presented to nor ruled upon by the trial court.

Accordingly, we cannot consider this argument for the first time on appeal. "We are limited to considering only those grounds raised and ruled on below by the trial

court and may not consider a basis for appeal not presented at [the trial level]. [Cit.]”

*Ramsay v. State*, 220 Ga. App. 618, 623-624 (469 SE2d 814) (1996).

*Case transferred to the Supreme Court.*

A03A1203. MUNROE v. UNIVERSAL HEALTH SERVICES, INC.

BARNES, Judge, concurring in part and dissenting in part.

Because Munroe has presented evidence raising a jury issue on whether Universal exercised ordinary care in hiring Sean Love, whom she alleges subsequently assaulted her while she was a hospital patient in a rehabilitation ward, I must respectfully dissent from Division 1 of the majority opinion. I agree, however, with Division 2 holding that Munroe has not presented evidence that Love's actions fell within the scope of his employment, and with Division 3 holding that Munroe did not argue a violation of OCGA § 51-3-1 to the trial court, which therefore did not rule on the issue. Finally, because neither party argued Munroe's false imprisonment count, and the trial rule did not on it, Universal is not entitled to summary judgment on that count.

Two lines of Georgia case law have developed on what evidence is necessary to establish liability for negligent hiring. One holds that the standard in a negligent hiring case is whether the employer knew or in the exercise of ordinary care should have known that the employee was not suited for the particular employment. Another line, which has become increasingly narrow, holds that the standard is whether the employer knew or should have known that the employee had the violent or criminal

propensity to commit the crime that forms the underlying basis for the third party's suit against the employer.

A historical review of negligent hiring's evolution helps explain the state of the law today. Early Georgia cases address the issue in the context of a servant's suit against his master for the incompetence of his fellow servant. "[T]he liability of the master arises because of his omission of duty to provide the injured employee with a competent fellow-servant. . . ." *Ingram v. Hilton & Dodge Lumber Co.*, 108 Ga. 194, 197 (33 SE 961) (1899). "The burden in all such cases is upon the servant seeking a recovery to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in the employment of the servant. . . ." *Gunn v. Willingham*, 111 Ga. 427, 434 (36 SE 804) (1900). Civil Code (1910) § 3131 provided: "A master owes to each servant the duty to exercise ordinary care in the selection of other servants engaged in the same enterprise, and not to retain them after knowledge of their incompetency." *Camilla Cotton Oil &c. v. Walker*, 21 Ga. App. 603 (94 SE 855) (1918). The master also owed that duty to the public at large. "Where a servant departs from the prosecution of his business and commits a tort while acting without the scope of his authority, the person employing him may still be liable if he failed to

exercise due care in the selection of his servant.” *Renfro v. Fouche*, 26 Ga. App. 340 (3) (106 SE 303) (1921) (automobile bailment).

This provision was recodified in Civil Code 1933, § 66-301. In *Estridge v. Hanna*, 54 Ga. App. 817 (189 SE 364) (1936), a widow sued a landowner for negligently hiring and retaining a game warden “of a bloodthirsty and dangerous disposition” who shot and killed her husband. *Id.* at 819. This court held that the widow alleged sufficient facts to show that the defendants

did not use ordinary care in selecting and retaining Hawthorne for service as a game warden. Code, § 66-301. As the occupation was one involving danger to human life, the employer should use discretion in the selection of the servant, and should select a servant who would use discretion in the execution of such duties.

*Id.* at 820.

This court has considered the ordinary care standard for various occupations: an armed railroad detective and investigator, *Pope v. Seaboard Air Railroad Co.*, 88 Ga. App. 557, 563 (2) (77 SE2d 55) (1953) (widow stated claim by alleging that employer knew its employee abused alcohol and had a bad temper); an unlicensed hospital orderly, *Hipp v. Hospital Authority of Marietta*, 104 Ga. App. 174, 178 (121 SE2d 273) (1961) (jury question “whether the [Authority] should have inquired to determine

if orderly was a competent person to be employed in the capacity of an orderly with ‘general run’ of the hospital”); a lifeguard, *YMCA v. Bailey*, 107 Ga. App. 417, 420 (1) (130 SE2d 242) (1963) (“no tests of investigation of qualifications were made by the employing officer for these employees who occupied such sensitive and responsible positions”); and insurance agents, *Jester v. Hill*, 161 Ga. App. 778, 784 (2) (288 SE2d 870) (1982) (jury question whether employer’s failure to make inquiries which would have revealed employee’s poor general reputation was negligence “and whether plaintiff was thereby damaged”).

In a 1982 whole-court decision, this court used the “violent and criminal propensities” language that has subsequently been put to use so many times as a shortcut to summary judgment for the employer, taking what had been one method of proving failure to use ordinary care – knowledge of the propensity to do the tortious act – and making it a requirement. *Edwards v. Robinson-Humphrey Co.*, 164 Ga. App. 876, 880 (3) (298 SE2d 600) (1982). In *Edwards*, an investor sought damages from the company based on allegations that its employee had stolen her paintings, and had threatened and coerced her into buying unprofitable bond units four years earlier. *Id.* at 877-878. After determining that plaintiff had no respondeat superior claim because

she had declined the company's offer to refund the entire bond price, the court addressed the negligent hiring claim, holding:

While there were inaccuracies and misstatements in Quinn's applications concerning his private and professional history, it is undisputed that the applications and investigations contained absolutely no evidence of a violent or criminal background. While the evidence might show that Quinn had a propensity for lying and that appellee knew or should have known of this propensity, it is not appellee's negligence in hiring and retaining a liar as an employee that underlies appellant's claim. Appellant's claim of negligence against appellee is based upon Quinn's tortious acts of violence and his criminal acts of theft of appellant's art work. *For appellee to be negligent in hiring and retaining an employee with violent and criminal propensities, it would be necessary that appellee knew or should have known of those dangerous propensities alleged to have resulted in appellant's injuries.* See generally *Henderson v. Nolting First Mtg. Corp.*, 184 Ga. 724, 733 (2) (193 SE 347) (1937); *C. K. Sec. Systems v. Hartford Acc. &c. Co.*, 137 Ga. App. 159 (223 SE2d 453) (1976); *Cunningham v. Hodges*, 150 Ga. App. 827, 830 (258 SE2d 631) (1979).

(Emphasis supplied.) *Id.* at 880.

The cases on which *Edwards* relied are much more general in their discussion of the level of proof necessary for a negligent hiring action. In *Cunningham v. Hodges*, *supra*, the court held that the plaintiffs stated a claim for negligent retention in their suit against their landlord for damages resulting when an employee tried to remove cobwebs with a gasoline torch. *Id.* at 830 (5) (b). The court further held that, "moreover," there was evidence that the defendant knew of certain prior acts from which a jury could

conclude she had notice of the employee's propensity for negligence with fire. In other words, the knowledge of propensity was a second piece of evidence that was a ground for reversing the grant of a directed verdict to the defendant, not a requirement for the negligent hiring claim. In a much earlier case involving a suit against the owners of an apartment building for injuries caused by the building janitor, the Supreme Court held in 1937:

[I]n order that a party may be liable as for negligence, "it is not necessary that he should have contemplated or even be able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." 21 Am. & Eng. Enc. Law (2d ed.), 487 (b), quoted and applied in *Mitchell v. Schofield's Sons Co.*, 16 Ga. App. 686, 690 (85 SE 978). See also 45 C. J. 918, § 484; 22 R. C. L. 125, § 12.

*Henderson v. Nolting First Mortgage*, 184 Ga. 724, 737 (2) (193 SE 347 (1937)).

Finally, in the third case cited by *Edwards*, we held that,

The defendant is only under a duty to exercise ordinary care in selecting its employees; and while the standard of ordinary care is invariable, yet circumstances of the case may require a greater amount of care to meet the degree or standard of care required by law. We think this is a case where such rule is applicable. The defendant was offering a security

service and the use of its employees to patrol the premises for the purpose of protecting persons and property. In the selection of its employees it may have been duty bound to exercise a greater amount of care to ascertain its employees were honest and were not likely to commit thefts, where one employing others to perform a different type of service may meet the standard of care required with a lesser amount or quantum of care. Whether or not the employer exercised such care is ordinarily a jury question.

(Citation and punctuation omitted.) *C.K. Sec. Systems v. Hartford Acc. &c. Co.*, supra, 137 Ga. App. at 161-162 (2).

Another case often relied on as a shortcut to summary judgment for the defendant is *Southern Bell v. Shahara*, 167 Ga. App. 665 (307 SE2d 129) (1983). *Shahara* was actually a negligent retention case, in which the employer had received no complaints about its installer for the 11 years he had been employed. After citing *Edwards*, the court explained the lack of evidence to support the plaintiff's claims that the employer should have submitted the employee to psychological testing:

Where, as in the instant case, an employee has absolutely no background of prior criminal or dangerous propensities and, during his employment for a substantial number of years, he has had a good work record without a single complaint from customers, his employer may not be found negligent in hiring and retaining such employee because of a failure to require such employee to submit to psychological testing or interviews.

Id. at 666-667 (1).

After *Edwards* and *Shahara*, numerous cases have confirmed the basic premise that “[t]he appropriate standard of care in a negligent hiring/retention action is whether the employer knew or should have known the employee was not suited for the particular employment. *Cherry v. Kelly Svcs.*, 171 Ga. App. 235 at 236 (319 SE2d 463) (1984).” *Harvey Freeman & Sons v. Stanley*, 189 Ga. App. 256, 258 (2) (a) (375 SE2d 261) (1988); overruled in part on other grounds, 259 Ga. 233 (378 SE2d 857) (1989). Accord, *Patterson v. Southeastern Newspapers*, 243 Ga. App. 241, 245 (2) (533 SE2d 119) (2000); *Green v. Johnston Realty*, 212 Ga. App. 656, 659 (3) (442 SE2d 843) (1994); *Sparlin Chiropractic Clinic v. Tops*, 193 Ga. App. 181 (1) (387 SE2d 411) (1989); *Hutcherson v. Progressive Corp.*, 984 F2d 1152, 1155 (1) (11th Cir. 1993).

We acknowledged in *Kemp v. Rouse-Atlanta*, 207 Ga. App. 876, 878 (1) (429 SE2d 264) (1993), that negligent hiring may be proved two ways, either by showing a failure to use ordinary care in hiring, or by showing the employer had actual or constructive knowledge of the requisite propensity. We again acknowledged the two methods in *Bunn-Penn v. Southern Regional Hospital*, 227 Ga. App. 291, 294 (2) (488 SE2d 747) (1997). And in *Piney Grove Baptist Church v. Goss*, 255 Ga. App. 380

(565 SE2d 569) (2002), we affirmed the denial of summary judgment to a church which had made no attempt to investigate its contractor's qualifications, summing up the requirements for a negligent hiring claim as follows:

“Pursuant to OCGA § 34-7-20, an employer must exercise ordinary care in the selection of employees, must not retain them after knowledge of incompetency, and must warn other employees of dangers incident to employment that the employer knows or ought to know but which are unknown to the employee. In order to sustain a claim for negligent hiring and retention, a claimant must show that the employer knew or should have known of the employee's propensity to engage in the conduct which caused the plaintiff's injury. Proof of such propensity must consist of evidence substantially related to the injury-causing conduct. Generally, the determination of whether an employer used ordinary care in hiring an employee is a jury issue.” (Citations and punctuation omitted.) *Tecumseh Products Co. v. Rigdon*, 250 Ga. App. 739, 740 (1) (552 SE2d 910) (2001).

Id. at 383 (2).

On the other hand, numerous cases have cited *Edwards* and its progeny for the narrow proposition that an injured party in a negligent hiring case is required to show that the employer knew or should have known of the employee's dangerous and violent propensity to commit the specific underlying crime, thereby establishing a much higher standard for victims to overcome. *Brown v. Trefz & Trefz*, 173 Ga. App. 586, 587 (2)

(327 SE2d 556) (1985); *Slaton v. B & B. Gulf Service Center*, 178 Ga. App. 701, 702 (2) (344 SE2d 512) (1986); *Odom v. Hubeny*, 179 Ga. App. 250, 252 (2) (345 SE2d 886) (1986); *Big Brother/Big Sister &c. v. Terrell*, 183 Ga. App. 496, 497 (1) (359 SE2d 241) (1987); *Kelly v. Baker Protective Services*, 198 Ga. App. 378, 379 (401 SE2d 585) (1991); *Doe v. Village of St. Joseph*, 202 Ga. App. 614, 616 (2) (415 SE2d 56) (1992); *Diaconescu v. Hettler*, 210 Ga. App. 191, 193 (2) (435 SE2d 489) (1993); *Worstell Parking v. Aisida*, 212 Ga. App. 605, 606 (2) (442 SE2d 469) (1994); *Fortune v. Principal Financial Group*, 219 Ga. App. 367, 371 (1) (465 SE2d 698) (1995) (dicta); *Alpharetta First United Methodist Church v. Stewart*, 221 Ga. App. 748, 753 (3) (472 SE2d 532) (1996); *Grand Union Co. v. Miller*, 232 Ga. App. 857, 863 (6) (503 SE2d 49) (1998), overruled on other grounds, *Miller v. Grand Union Co.*, 270 Ga. 537 (512 SE2d 887) (1999); *Kaiser v. Tara Ford*, 248 Ga. App. 481, 489 (4) (546 SE2d 861) (2001) (dicta); *Walter Champion Co. v. Dodson*, 252 Ga. App. 62, 63-64 (1) (555 SE2d 519) (2001).

In these cases, for example, a rape victim must show that an employer has or should have had more specific knowledge about its employee than a mere negligence victim, who only has to show that the employer failed to exercise “ordinary care.” We have held that even knowledge of different previous crimes – theft instead of arson –

is insufficient evidence in a negligent hiring or retention claim. *Walter Champion Co. v. Dodson*, supra, 252 Ga. App. at 63.

We should return to the “ordinary care” concept of liability, and address the anomaly that has developed in the law over the last decade by disapproving cases implying that an injured party must show that the employer knew or should have known of his employee’s vicious and criminal propensity to commit the complained-of crime before the employee can withstand a summary judgment or a directed verdict. Those cases are listed above.

In this case, Shawn Love, the alleged rapist, was hired as a “mental health assistant” working with patients who had been committed to a psychological hospital for treatment of addiction disease. According to Anchor’s director of nursing, “Mental health assistants spend probably more direct time with the patients than any other staff. They’re responsible first and foremost for maintaining checks on the patient, all patients.” They are assigned ten or twelve patients, and they note the patients’ location and activities on a chart at the designated intervals, as well as accompany them to meals, groups, or on errands outside the hospital. The assistants take vital signs, such as blood pressure, temperature and heart rate, orient patients when they first come in, and walk patients through the discharge procedure when they leave.

At least some patients, such as Munroe, are medicated with phenobarbital and sleeping pills. The assistants were not closely supervised, because the nature of the job required them to be constantly on the move, which the nursing director said was “part of why one makes a great effort to hire people who, you know, have a good idea of what they’re doing and have no sorts of issues that might cause problems. . . .” Generally, to qualify for the position, an applicant should have some experience in a health-related field.

Love completed an application, and apparently was interviewed by either the nursing director or the nurse manager, although nothing in his file confirmed that fact and neither nurse remembered doing so. Reviewing his application, the nursing director testified that Love was qualified for the position because of his job history showing that he worked more than two years as a house parent in a personal care home, his familiarity with 12-step recovery programs, his volunteer work at a residential program, and his recommendation by a current employee. Anchor’s CEO testified that, without the personal care home experience, Love probably would not have been qualified for the job. He further acknowledged that discrepancies uncovered in a background check would raise a red flag, because it would indicate the applicant was untruthful and Anchor did not want to hire untruthful employees. The nurse manager confirmed that

truthfulness was an important quality in an employee, and both she and the nursing director confirmed that Anchor would not hire someone who lied on his job application. While a misdemeanor conviction would not necessary disqualify an applicant, it would “raise an issue,” and any felony conviction would automatically disqualify someone.

Love’s application was sent to the director of human resources, who forwarded it along with Love’s release to ChoicePoint, an independent company, to perform a background check of Love’s education, job history, and criminal record. On the background investigation questionnaire, Love completed his social security number incorrectly, but ChoicePoint verified the correct number with Anchor. ChoicePoint’s initial report and all subsequent addendums indicated that Love’s date of birth was October 25, 1961, when his actual date of birth was October 25, 1969, and using that incorrect birth date, ChoicePoint’s criminal background check uncovered no convictions in either of the two counties where Love had resided for the past seven years. The initial report confirmed his current employment but could not verify his two years’ employment at a personal care home, which was the only qualification Love had for this position, according to Anchor’s CEO. ChoicePoint also could not verify Love’s 1997 employment with Orion Industries, his six years’ employment with a landscaping company, or his high school attendance or graduation.

ChoicePoint's first addendum dated three days later showed that Love was employed by Orion Industries for two weeks from December 15, 1998 to December 29, 1998. The payroll administrator stated he was terminated and ineligible for rehire due to poor attendance. The second ChoicePoint addendum 30 days later indicated that the high school Love identified had no record of his enrollment. Despite these discrepancies, the record contains no indication that Anchor followed up with either ChoicePoint or Love, or that anyone in the company even reviewed the reports critically.

Anchor's human resources director testified that Anchor was switching to another company for background investigations because Anchor had a national account with the other company and because "ChoicePoint was not a very – was not giving us very good service. . . ." ChoicePoint's reports were incomplete, too many reports indicated that the company could not find additional information, and Anchor was "having problems with this company in verifying information."

Love was suspended the day Munroe made her allegation, and failed to show up for Anchor's subsequent investigation. When the CEO then contacted him by phone, Love denied everything, but that was his last contact with Anchor. Love was subsequently terminated approximately six weeks after he was hired.

Using Love's correct date of birth, Munroe introduced evidence that Love pled guilty to cocaine possession in July 1999 in the Washington county where he had lived and which ChoicePoint checked, and that Love was accused of probation violation in May 2000, less than a year before he applied to Anchor. Further discovery uncovered at least a dozen additional convictions in Tacoma Municipal Court, ranging from criminal assault and trespass in 1992 and 1993 to consuming liquor in public in November 1999.

The majority narrows the issue considerably, and holds that Munroe may overcome summary judgment only by showing that the defendant knew or should have known Love had a propensity to commit sexual assault, citing *Bunn-Penn v. Southern Regional Medical Corp.*, supra, 227 Ga. App. at 293-294 (2), which cites *Edwards v. Robinson-Humphrey Co.*, supra, 164 Ga. App. at 880. In *Bunn-Penn*, unlike the case before us, the plaintiff sought to hold a hospital responsible for the negligent hiring of an emergency room technician who allegedly committed a sexual battery on the plaintiff, but presented no evidence to rebut the hospital's showing that the technician "went through an application and interview process which verified that he was a trained, licensed, and experienced emergency medical technician." Id. at 291-292 (1).

In this case, Love was hired to fill a position that was not closely supervised. The hospital's hiring procedures were a sham because apparently no one reviewed and evaluated the results of the background check. As a result, the hospital had no procedure for determining whether Love was competent for the position. Munroe has presented evidence that the hospital's application, interview and follow-up process was inadequate and incomplete, and that the employee was completely unsuited for a job with direct supervision over vulnerable patients.

Munroe has also presented evidence that this unqualified employee made inappropriate comments to her, such as asking her not to cross her legs when she sat down, asking her to sit closer, and telling her that her eyes were pretty and her skin was soft. The next evening Love came to Munroe's room, closed the door, told her she was beautiful, and grabbed and kissed her, leaving only when Munroe's roommate walked in. Later that evening, after Munroe had received her medication at the nurse's station, Love came to her room and gave her additional medication that he said the nurse had forgotten. Love later returned to Munroe's room, dragged her out of bed by her arm, pushed her "wobbly self" into the bathroom, forced her to bend over the sink, pulled her pants down, and had sex with her. Munroe has presented sufficient evidence to

establish a genuine issue of material fact as to whether Anchor used ordinary care in hiring Love for the position of mental health assistant.

For these reasons, I respectfully dissent in part to the majority opinion in this case.

I am authorized to state that Judge Eldridge, Judge Miller, Judge Ellington, Judge Phipps and Judge Adams join in this opinion.

A90A1575. HUMANA, INC. v. DAVIS et al.

There being an equal division of the Judges of this Court when sitting as a body in connection with the consideration of the above-styled case, it is ordered the said case be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V of the Constitution of the State of Georgia.

On the dispositive issue in the above case, the Judges of this Court are equally divided as follows: Banke, P. J., Carley, Pope and Beasley, JJ., being for affirmance, and Sognier, C. J., McMurray, P. J., Birdsong, P. J., and Andrews, J., being for reversal. Judge Cooper is disqualified from participating in this case.

Attached to this order are copies of the draft opinions of this Court reflecting the views of the judges as to the dispositive issues.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 14 2001

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.

  
*Victoria M. Langston*

Clerk.

In the Court of Appeals of Georgia

A90A1575. HUMANA, INC. v. DAVIS et al.

S-101

SOGNIER, Chief Judge.

Robert and Jean Davis brought suit against Hugo Moreno, M.D. and Angelo Gonzales, M.D. alleging medical malpractice in their treatment of the Davises' daughter, Sherberry Joy Davis, and seeking damages for her wrongful death. Two days before the expiration of the statute of limitation the Davises filed an amended complaint adding Dr. Michael Johnson, Dr. C. Kendall, Humana, Inc., and Primary Care Physicians Group, P.C., ("Primary Care") as additional defendants. The trial court granted summary judgment to Johnson and Kendall on two grounds, and in Davis v. Johnson, 193 Ga. App. 19 (386 SE2d 900) (1989), this court affirmed the grant of summary judgment to those physicians, addressing only one ground, which we found to be dispositive. Id. Humana then filed its motion for summary

for interlocutory appeal.

The record reveals that appellant owns and operates several Medfirst outpatient medical clinics in Atlanta. Primary Care is a Georgia professional corporation that contracted to staff Humana's outpatient facilities in metropolitan Atlanta, and Drs. Johnson and Kendall contracted with Primary Care to staff the Medfirst clinic on Greenbrier Parkway. On January 18, 1985, the decedent sought treatment for abdominal pain at that clinic, and was seen by Johnson, who prescribed medication and instructed her to return. She returned as scheduled, and was seen by Kendall. Johnson saw her again, for the last time, on January 21, 1985. On January 22, 1985 she was admitted by Moreno on an emergency basis to South Fulton Hospital. After several days of tests, laparoscopic surgery was performed by Moreno and Gonzales and a perforated colon was discovered and repaired, but she developed respiratory failure and died.

The two grounds on which the trial court based its grant of summary judgment to Johnson and Kendall were: (1) that the Davises had failed to establish due diligence in attempting to secure prompt service of process; and (2) that the sworn

the averments in the movant doctors' affidavits that they had met the proper standard of care and was insufficient to create a jury question because it did not show that Gonzales was familiar with the standard of care or that the treatment rendered by Johnson and Kendall had deviated from that standard.

1. Appellant contends the trial court erred by denying its motion for summary judgment. Appellant argues that the only basis for holding it liable is its responsibility under the doctrine of respondeat superior for any negligence of Johnson and Kendall, and because the nonliability of the doctors has been conclusively established, res judicata bars an adjudication of liability on its part.

OCGA § 9-12-40 provides that "[a] judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside." The statute has been held to apply only where the prior judgment reached the merits of the case. Sumner v. Sumner, 186 Ga. 390-391 (2), 392-393 (197 SE 833) (1938)

appeal, appellees' lack of due diligence, did not reach the merits of appellees' claims against the doctors, and thus cannot be binding against appellant. *Id.* However, the other ground on which the trial court granted summary judgment to the doctors addressed the merits of appellees' claim, and as such it is binding as to appellant. Although this court did not reach that ground in affirming the grant of summary judgment, "OCGA § 9-12-40 does not require appellate review of a judgment before it can act as a bar to a later action. [Cit.]" McCracken v. City of College Park, 259 Ga. 490, 491 (384 SE2d 648) (1989); See Quarterman v. Memorial Medical Center, 176 Ga. App. 92-93 (335 SE2d 589) (1985).

We find without merit appellees' argument that the evidentiary posture of this case has changed since the prior summary judgment motion and thus the trial court could consider newly offered evidence of the doctors' negligence in determining appellant's liability. Appellees erroneously base their argument on the principle that when a case is appealed, all questions as to pleadings and the effect of evidence adjudicated by this court are binding, as the law of the case, on this court

However, the law of the case is "distinguishable from res judicata and stare decisis. [Cit.]" Bradley v. Tattnall Bank, 170 Ga. App. 821, 822 (1) (318 SE2d 657) (1984). The former applies while a case is pending, as the "[l]egal proceedings are 'in fieri' - 'in process of formation or development; hence, incomplete or inchoate' until judgment is entered. [Cit.]" Id. at 822-823. The latter applies to final judgments. See OCGA § 9-12-40. In the case sub judice, a final judgment was entered in favor of Drs. Johnson and Kendall, and the issue presented here is not one of the law of the case, but rather whether the final judgment in favor of Drs. Johnson and Kendall operates as a bar to derivative liability on the part of appellant. We hold that it does.

"The effect of a [summary] judgment cannot be avoided by a difference in the [evidence proffered], when [that] in the first case could and should have been as full as [that] in the second, though in fact [it was] not. No party, plaintiff or defendant, is permitted to stand his case before the court on some of its legs, and if it falls, set it up again on the rest

limbs only, that the final judgment takes hold upon. . . [.]

[One] must discharge all of [one's] weapons, and not reserve a part of them for use in a future rencounter. [One] must realize that one defeat will not only terminate the campaign, but end the war.'" Booker v. Booker, 107 Ga. App. 339, 341 (130 SE2d 260) (1963).

We cannot agree with the dissent that this principle would be applicable only if appellees had filed suit against appellant after the grant of summary judgment to Johnson and Kendall. "[I]n modern legal practice, the central issue in determining whether the doctrines of res judicata and collateral estoppel apply is whether the party against whom the plea is raised has had full opportunity to litigate the issues. [Cits.]" Winters v. Pund, 179 Ga. App. 349, 352 (346 SE2d 124) (1986). There is no question that at the time they opposed Johnson and Kendall's motion appellees could have obtained the affidavit they now allege provides sufficient evidence of the doctors' negligence. They simply failed to do so, and that failure resulted in a final judgment in favor of the doctors. That judgment is now conclusive between appellees and the

have been put in issue and facts which could have been offered in support of those matters. Williams v. Summit Psychiatric Centers, 185 Ga. App. 264, 266 (3) (363 SE2d 794) (1987).

In cases involving the doctrine of respondeat superior, although suit against a servant is not always barred by a judgment in favor of the master, Porterfield v. Gilmer, 132 Ga. App. 463, 465-466 (208 SE2d 295) (1974), aff'd 233 Ga. 671 (212 SE2d 842) (1975), a judgment in favor of the servant is always res judicata in favor of the master. Roadway Express, Inc. v. McBroom, 61 Ga. App. 223 (1) (6 SE2d 460) (1939). As there is no suggestion in the record of an independent ground for holding appellant liable, and the nonliability of the doctors has been conclusively established, thus barring appellant's derivative liability, the trial court erred by denying appellant's motion for summary judgment. See Williams, supra at 266-267 (4).

2. Our decision in Division 1 renders unnecessary consideration of appellant's remaining enumerations of error.

Judgment reversed. McMurray, P. J., and Carley, J.

concur. (Leave off Judge's name.)

CARLEY, Judge, dissenting.

Holding that the prior grant of summary judgment in favor of Dr. Johnson and Dr. Kendall is to be given res judicata effect, the majority concludes that it was error to deny appellant-defendant's subsequent motion for summary judgment. In my opinion, however, the principle of res judicata has no applicability whatsoever in the instant case and is not a viable basis for reversing the trial court's denial of appellant's motion for summary judgment. Accordingly, I must respectfully dissent.

"Before the doctrine of res judicata can be applied, it must appear that a judgment has been rendered in a court of competent jurisdiction in a former litigation between the same parties, based upon the same cause of action, in which event the litigants are bound to the extent of all matters put in issue

(Emphasis supplied in part and omitted in part, Investment Corp., 91 Ga. App. 837, 838 (1) (87 SE2d 236) (1955).

The prior grant of summary judgment in favor of Dr. Johnson and Dr. Kendall was not rendered in a "former or previous litigation." When Dr. Johnson's and Dr. Kendall's motion was granted, appellant was already a joint-defendant in the case and, therefore, the prior order granting summary judgment in favor of Dr. Johnson and Dr. Kendall was rendered in the context of the instant litigation. Accordingly, the principle of res judicata has no applicability here. The only possible applicable principle is that of the "law of the case," which principle has been legislatively abolished insofar as judgments and orders of trial courts are concerned, but which remains viable insofar as judgments and orders of appellate courts are concerned. OCGA § 9-11-60 (b); Medlock v. Allison, 224 Ga. 648 (164 SE2d 112) (1968).

Appellant, as a party to the instant litigation, could have joined in Dr. Johnson's and Dr. Kendall's previous motion for summary judgment, but it did not do so. Accordingly, upon the affirmance of the grant of Dr. Johnson's and Dr. Kendall's motion for summary judgment, the case remained pending against

summary judgment in favor of Dr. Johnson and Dr. Kendall would not be relevant to a resolution of appellant's motion for summary judgment. The principle of the "law of the case" "only establishes the law of the case in its then existing evidentiary posture. "When a case is brought to this court . . . , all questions as to pleadings and the effect of evidence adjudicated by this court are binding as the law of the case on this court and . . . in the court below, unless additional pleadings and evidence prevail to change such adjudications." [Cit.] . . . Thus, if subsequent to an appellate decision, the evidentiary posture of the case changes in the trial court, the law of the case rule does not limit or negate the effect that such change would otherwise mandate. "Where the second motion for summary judgment is based on matters not involved in the decision on the first motion, 'the law of the case' is not involved. [Cit.]" [Cits.]' [Cit.]" (Emphasis in original.) Modern Roofing & Metal Works, Inc. v. Owen, 174 Ga. App. 875-876 (1) (332 SE2d 14) (1985).

If appellees had filed suit against appellant only after affirmance of the grant of summary judgment in favor of Dr.

(6 SE2d 460) (1939). However, such is not the case. Appellant was a joint defendant in the suit who did not join in its joint-defendants' motion for summary judgment. The anomalous effect of the majority opinion is to grant summary judgment in favor of appellant nunc pro tunc based upon the state of the record as of the time that Dr. Johnson's and Dr. Kendall's motion was previously granted. Under the applicable principle of the "law of the case," that prior grant of summary judgment in favor of some of the parties did not freeze the record and preclude appellees from adducing additional evidence to support its pending claim as against a remaining party. The majority opinion rests upon an erroneous reliance upon the wholly inapplicable principle of res judicata and I must, therefore, respectfully dissent.

Example

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

ATLANTA, July 16, 1997

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

**A97A0236. ROJAS v. STATE OF GEORGIA.**

There being an equal division of the Judges of this Court when sitting as a body in connection with consideration of the above-styled case, it is ordered that said case be immediately transferred to the Supreme Court of Georgia in accordance with Article VI, Section V, Paragraph V of the Constitution of the State of Georgia.

On the dispositive issues of the above-styled case, the Judges of this Court are equally divided as follows: Judges Beasley, Blackburn, Smith, and Eldridge concur in the opinion authored by Senior Appellate Judge Harold R. Banke; Chief Judge Andrews, Presiding Judge Birdsong, Presiding Judge Pope, and Judge Johnson concur in the dissent authored by Presiding Judge McMurray. Judge Ruffin is not participating.

Attached to this order are copies of the draft opinions of the Court reflecting the Judges' views as to the dispositive issues of this case.

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

**JUL 16 1997**

*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 R. McTigue*

# WHOLE COURT

**NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)**

**July 16, 1997**

In the Court of Appeals of Georgia

A97A0236. ROJAS v. STATE OF GEORGIA.

Judge Harold R. Banke.

The State filed this in rem forfeiture action against personalty claimed by Miguel Rojas and a co-defendant, who were arrested for selling cocaine to undercover agents at Rojas' workplace on three occasions. Rojas enumerates four errors on appeal.<sup>1</sup> Held:

1. The trial court properly denied Rojas' motion to dismiss the complaint for failure to comply with OCGA § 16-13-49's pleading requirements. Rojas maintains that the complaint was inadequate for failure to allege (1) the essential elements of the claimed violation and (2) the place of seizure.

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<sup>1</sup>Rojas' enumerations raise strictly procedural issues. This precludes us from addressing what appears at least superficially to be a tenuous connection between the offenses and the 32 items seized which included, inter alia, \$24,600, five tow trucks, one Isuzu Rodeo, electronics equipment, jewelry, and several bank accounts.

To be legally sufficient, a forfeiture complaint must "allege the essential elements of the violation which is claimed to exist." OCGA § 16-13-49 (o) (1). The instant complaint alleges that on three specified dates undercover agents purchased cocaine from Rojas or his co-defendant at Universe. The property at issue was seized incident to Rojas' arrest and pursuant to a search warrant.

These allegations state the essential elements of sale of cocaine sufficiently to satisfy OCGA § 16-13-49 (o) (1)'s pleading requirements. OCGA § 16-13-30 (b). We find no authority supporting Rojas' contention that the essential elements requirement codified at OCGA § 16-13-49 (o) (1) equates with probable cause. Rojas' reliance on cases interpreting the pleading requirements under the federal forfeiture statute is misplaced.

We reject Rojas' contention that the complaint fails to allege a sufficient nexus between the seized property and a controlled substances violation. Under OCGA § 16-13-49 (d) (2), a broad range of property is subject to forfeiture, including any items directly or indirectly used or intended for use in any manner to facilitate a violation of the controlled substances statutes or any proceeds derived from such violation. The complaint alleges a sufficient nexus between the drug transaction and the seized property to bring this case within the purview of this subsection, asserting that the cocaine sales occurred on Universe's premises and the property was either used to facilitate a violation of the Controlled Substances Act, seized in close proximity to the cocaine, or purchased with

proceeds derived from violations of the drug laws. These allegations, if proved by a preponderance of the evidence, are sufficient to establish a prima facie case for forfeiture. See State of Ga. v. Banks, 215 Ga. App. 828, 832 (2) (452 SE2d 533) (1994).

2. We reject Rojas' contention that he received insufficient notice of the conduct giving rise to the forfeiture. The record shows that Rojas was served with the complaint in September 1995. The complaint lists each item of property seized and alleges that Rojas or his codefendant sold cocaine three times to undercover agents at Universe. This is sufficient to satisfy OCGA § 16-13-49 (i) (3)'s requirement that owners or interest holders in the seized property receive notice of the conduct giving rise to the forfeiture. See Tant v. State of Ga., 247 Ga. 264, 266 (1) (275 SE2d 312) (1981) (sufficiency of notice apparent from the timely filing of a response).

3. The trial court properly denied Rojas' motion to suppress the order of seizure. Rojas' sole argument in this enumeration is that the complaint was not framed with sufficient particularity. As we concluded in Division 1, the complaint satisfied OCGA § 16-13-49's pleading requirements.

4. Rojas does not contest the trial court's finding that his initial answer failed to satisfy the particularity requirements of OCGA § 16-13-49 (n) (4). He argues instead that his amended answer, which was filed beyond the 30-day limitations period

codified at OCGA § 16-13-49 (o) (3), related back to his timely filed, but insufficient initial answer. We agree.

Other than Jarrett v. State of Ga., 220 Ga. App. 559, 561 (2) (472 SE2d 315) (1996), an apparent anomaly, no other case has dealt directly with the relation back issue.<sup>2</sup> Without explanation or citation to authority, Division 2 of Jarrett summarily concluded that OCGA § 16-14-49 (o) (4) prohibited amended answers from relating back. Jarrett, 220 Ga. App. at 561 (2). But nothing in OCGA § 16-13-49 (o) (4) requires that result.<sup>3</sup> In the absence of a factual or legal basis for its harsh conclusion, Jarrett deserves no deference. Accordingly, we address this issue on its merits for the first time.

Statutes must be construed to implement their legislative intent. Johnson v. Housing Authority of Atlanta, 198 Ga. App. 816, 816-817 (403 SE2d 97) (1991). The General Assembly chose to make the Civil Practice Act applicable "to all special statutory proceedings except to the extent that specific rules of practice

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<sup>2</sup>Neither Tuggle v. State of Ga., 224 Ga. App. 353, 354-355 (1) (480 SE2d 353) (1997), nor Howard v. State of Ga., 223 Ga. App. 323, 324-325 (477 SE2d 605) (1996), rely on the division in Jarrett which prohibits the relation back of amended answers. Instead, they both address the sufficiency of an initial answer. The dissent's obvious misperception of the meaning of State of Ga. v. Alford, 264 Ga. 243 (444 SE2d 76) (1994) apparently triggered the misstatement that Howard and Tuggle must be overruled.

<sup>3</sup>OCGA § 16-13-49 (o) (4) states, "If at the expiration of the [30-day] period set forth in paragraph (3) of this subsection no answer has been filed, the court shall order the disposition of the seized property as provided for in this Code section."

and procedure in conflict herewith are expressly prescribed by law. . . ." OCGA § 9-11-81; see, e.g., Christopher v. State, 185 Ga. App. 532 (364 SE2d 905) (1988). The legislature clarified the Civil Practice Act's reach by adding, "but in any event, the provisions of this chapter governing the sufficiency of pleadings, defenses, [and] amendments, . . . shall apply to all such proceedings." *Id.* (Emphasis added.) Because nothing in the forfeiture statute addresses whether amended answers filed after the expiration of the statutory limitations period relate back to the initial, timely filed answer, the provisions of the Civil Practice Act permitting that procedure necessarily fill the void. OCGA § 9-11-15 (c); see, e.g. Security Ins. Co. v. Gill, 141 Ga. App. 324, 325-326 (233 SE2d 278) (1977).

The legislature expressly mandated that we liberally construe the forfeiture statute to effectuate the statute's remedial purposes of protecting the property interests of innocent owners and promoting the prompt disposition of property. OCGA § 16-13-49 (z); State of Ga. v. Jackson, 197 Ga. App. 619, 621 (1) (399 SE2d 88) (1990). In applying the statute to give effect to the latter, it must be kept in mind that the prompt disposition of property safeguards more than just the State's obvious interest in preventing guilty parties from further misusing property. State of Ga. v. Sewell, 155 Ga. App. 734 (1) (272 SE2d 514) (1980). It also "protects the property owner's rights to possession where the State fails to promptly dispose of the property." Yoder v. State of Ga.,

211 Ga. App. 226, 228 (438 SE2d 689) (1993). Prohibiting the relation back of amended answers obstructs the statute's remedial purposes, leaving innocent owners unable to obtain information necessary to timely satisfy the forfeiture law's strict pleading requirements, correct clerical errors, or prevent ineffective counsel from irretrievably damaging their cases.

Nor would permitting the relation back of amended answers lessen the State's control over the proceedings or cause delay. The State's many options for moving cases forward remain undiminished. For example, the State may choose to move to strike the answer, seek a judgment on the pleadings, or request the hearing required under OCGA § 16-13-49 (o) (5). See Summer-Minter & Assoc. v. Giordano, 231 Ga. 601, 604-605 (203 SE2d 173) (1974) (amendment not permitted after adjudication). In any event, the avoidance of delay does not appear to be a driving factor in the prosecution of this case. Although the complaint was filed in July 1995, the final order disposing of the case was not issued until June of 1996. The State cannot seriously argue that prompt resolution was achieved here inasmuch as the amended answer did not cause the delay.

The dissent erroneously concludes that Alford's holding disallowed the relation back of answers. Alford, 264 Ga. at 24. In truth, Alford addressed the sufficiency of an answer and did not speak to whether an amended answer could relate back. Moreover,

Alford specifically permitted an amendment to an answer filed well beyond the 30-day statutory limitations period.

Further, the dissent's conclusion, citing Alford, that "the forfeiture statute's pleading requirements override the Civil Practice Act's standards" affronts established precedent. In a line of cases beginning with State of Ga. v. Croom, 168 Ga. App. 145 (308 SE2d 427) (1983), this court has applied the Civil Practice Act in forfeiture proceedings to allow amendments to complaints. Accord Griffin v. State of Ga. 211 Ga. App. 750 (1) (440 SE2d 483) (1994); State of Ga. v. Walls, 202 Ga. App. 899, 900 (415 SE2d 921) (1992); see also McMichen v. State of Ga., 209 Ga. App. 169, 170 (1) (433 SE2d 92) (1993). Because the State is permitted to amend its complaint, equal treatment to claimants seems only fair. The selective application of strict pleading requirements solely on claimants permits the State to take property without satisfying its evidentiary burden of showing that the property was subject to forfeiture and without allowing innocent owners the opportunity to be heard. This result plainly contradicts the legislature's express directive to liberally construe the forfeiture act to protect innocent owners.

Lee v. State of Ga., \_\_ Ga. App. \_\_ (Case No. A97A0312, decided March 26, 1997), a recent opinion permitting the relation back of an answer to correct a clerical error, executes this directive by allowing fundamental fairness to triumph over hypertechnicality. This directive is also reflected in a cogent

opinion by Presiding Judge McMurray, relying on Alford, which implicitly approved the relation back of amended answers. State of Ga. v. Gonzales, 213 Ga. App. 661, 662 (445 SE2d 808) (1994). The claimant in Gonzales was permitted to amend his answer after the expiration of the statutory limitations period, a result clearly at odds with Jarrett. Id. The fact that this court in Gonzales implicitly endorsed the relation back of an amended answer plainly contradicts the dissent's present position that Alford stands for the proposition that filing a defective answer is equivalent to filing no answer at all.

Jarrett's harsh result offends the letter and spirit of OCGA § 16-13-49 (z). Jarrett defies the express legislative mandate to liberally construe the Civil Forfeiture Act to effectuate its remedial purpose of protecting innocent property owners. Given Jarrett's total lack of legal authority for its holding on the relation back of amendments to answers and the high stakes for both the State and claimants in forfeiture proceedings, Jarrett must be overturned to the extent that it is inconsistent with this opinion.

Case transferred to the Supreme Court.

BEASLEY, Judge, concurring specially.

It is obvious from a reading of State of Georgia v. Alford, 264 Ga. 243 (444 SE2d 76) (1994), that the Supreme Court construes OCGA § 16-13-49 to accommodate the relation back provision of OCGA § 9-11-15 (c). Sarah Alford was served with the State's complaint on November 20, 1991. She filed a cursory answer on December 10 and an amended answer on January 16, 1992. Alford v. State of Georgia, 208 Ga. App. 595 (431 SE2d 393) (1993), aff'd in part and rev'd in part, State of Georgia v. Alford, supra. The amended answer was filed decidedly beyond the "30 days after the service of the summons and complaint" set by the forfeiture statute. OCGA § 16-13-49 (o) (3). This court raised the issue of the applicability of OCGA § 9-11-15, Alford v. State of Georgia, 208 Ga. App. 597. The Supreme Court directly considered the sufficiency of the amended answer. There would have been no point in doing so if it did not relate back for timeliness purposes. In the first place, that was a threshold matter. In the second place, a ruling that OCGA § 9-11-15 did not apply to forfeiture proceedings would have established the law for all cases on an issue which could not be seen as arising infrequently, particularly given the extremely detailed requirements of the law for answers. The Supreme Court's ruling was instead very case-specific, simply applying the requirements to the particular amended answer in that case. The

amended answer was given efficacy; its problem instead was content. The Court recognized that the Civil Practice Act applied, with additional requirements. Moreover, it had no problem granting Alford "a reasonable time in which to file a second amended answer" which would strictly comply with OCGA § 16-13-49 (o) (3). State of Georgia v. Alford, 264 Ga. at 246. Since it is clear that the relation back provision does not conflict with the special statutory proceeding per se, it applies. OCGA § 9-11-81.

The Supreme Court has found that the legislative intent in enacting the procedural rules for forfeiture is "to provide for the prompt disposition of property subject to forfeiture and protect the interests of innocent property owners." State of Georgia v. Alford, 264 Ga. at 245. Often a substantial amount of valuable property is at stake, as in Alford and in this case. If it in truth belongs totally or partially to an innocent owner, then to disallow altogether, as a matter of law, any post-30-day amendment to the answer, which must be in strict compliance with the statute, would contravene the stated public policy of liberally construing OCGA § 16-13-49 "to effectuate its remedial purposes." OCGA § 16-13-49 (z).

The harm in not allowing amendments to relate back is severe: total loss of property by innocent owners. The harm to the State in allowing relation back is negligible if there is any at all. It is merely a delay in final disposition. If there is no sufficient answer within 30 days after service of the summons and complaint,

the State is entitled to a court order disposing of the property upon request. OCGA § 16-13-49 (o) (4). If the State does not obtain such an order of disposition before a defective answer is cured by amendment, then the State can obtain disposition within 60 days after the amendment renders the answer sufficient. State of Georgia v. Alford, 264 Ga. at 244-245 (2). In fact, absent a continuance for good cause, it must do so, to protect the property rights of the owner; failure to assure a timely hearing subjects the State's forfeiture complaint to dismissal on the defendant's motion. State v. Henderson, 263 Ga. 508 (436 SE2d 209) (1993).

The State itself has an interest in assuring that property which it seizes is not forfeited if it belongs to people who come forth and prove innocent ownership. The very second paragraph of the Georgia Bill of Rights heralds: "Protection to person and property is the paramount duty of government." Ga. Const. of 1983, Art. I, Sec. I, Par. II.

A97A0236. ROJAS v. STATE OF GEORGIA.

ELDRIDGE, Judge, concurring specially.

I concur totally with Senior Appellate Judge Harold R. Banke's majority and particularly with the last division which required a reversal of the trial court. However, I wish to make several additional observations. District attorney's have systematically attacked any answer of the respondent as being deficient in meeting the statutory special pleading requirements under OCGA § 16-13-49 (o) (3) and (4) and moved to strike the answer. If the trial court dismisses the answer, then the prosecutor does not have to put up any evidence to prove OCGA § 16-13-49 (d) (2) forfeiture of "[a]ll property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article or any proceeds derived or realized therefrom," because the respondents were in default. This court has affirmed forfeitures over and over where the State never had to put up evidence and prove the case by a simple preponderance of the evidence. See, e.g, Harris v. State, 222 Ga. App. 267 (474 SE2d 201); Williams v. State, 222 Ga. App. 270 (474 SE2d 98) (1996).

When cash, car, or other property is seized during an arrest, and is in the immediate vicinity of the contraband, and is clearly

used in assisting the furtherance of the crime, no serious problem of proof exists under OCGA § 16-13-49 (2) and (5). However, in the case sub judice, the State goes further and seeks to forfeit savings accounts, certificates of deposits, and other property, which property is physically remote from the contraband, without proving a nexus or any of the conditions precedent to forfeiture under OCGA § 16-13-49 (d) (2); the State seeks to do this by striking the amended answer, thereby putting up no evidence that shows such assets come within OCGA § 16-13-49 (d) (2). This is extremely dangerous.

This procedure of striking the amended answer as not relating back to the time the original answer was timely filed establishes a very dangerous precedent for prosecutorial abuse and over-reaching to gain assets, which procedure has the potential to sweep away the assets of innocent third parties without a trial. It must be remembered that the various law enforcement agencies involved have a direct financial interest in the forfeiture of assets, which may cloud their perception and judgment and which may influence their testimony. The State's evidence can only be evaluated as to weight and credibility by a judge hearing the evidence. The only safe-guard that innocent third parties have is when a fair, impartial, and detached superior court judge hears the State's evidence and judges the weight and credibility of that evidence.

One of the purposes of the forfeiture statute is to protect the innocent. State v. Henderson, 263 Ga. 508, 513 (436 SE2d 209)

(1993). This act must be strictly construed to reach such purpose as set forth by its plain meaning. Georgia v. Henderson, supra at 509; State of Georgia v. Cannon, 214 Ga. App. 897, 898 (449 SE2d 519) (1994). Short-circuiting this safe-guard by the procedural device of striking the amended answer and taking a default when the answer was timely amended is a clear violation of civil procedure under the Civil Practice Act as governed by OCGA §§ 9-11-15 (c) and 9-11-81. See, e. g., Christopher v. State, 185 Ga. App. 532 (364 SE2d 905) (1988). This procedural slight of hand, consisting of striking an amended answer and declaring a default to avoid putting up evidence so that the property can be forfeited, is abhorrent to traditional notions of fair play and substantial justice and does violence to the perception of even-handed justice. This Court would not tolerate for a moment such conduct by a trial court in any other type of civil case other than a forfeiture, because such conduct is fundamentally unfair and causes disrespect for the judicial process.

The State is not harmed by being required to prove its case as provided by statute. Fairness and justice will be preserved for the potentially innocent third party by letting the trial court hear the case on the merits. If the State proves a forfeiture and shows that the third party is not innocent, then the State will get the property. "Let justice be done, though the heavens should fall," and there will result not only justice, but also the appearance of justice by the rule of law.

A97A0236. ROJAS v THE STATE.

McMURRAY, Presiding Judge, dissenting.

As reflected in my lone dissent in Lockett v. State of Georgia, 218 Ga. App. 289, 291 (460 SE2d 857), (apparently Lockett did not apply for certiorari), I sympathize with the majority's view that OCGA § 9-11-15 (c)'s relation back doctrine should apply in forfeiture proceedings. Such an interpretation, however, is at odds with the Supreme Court's holding in State of Georgia v. Alford, 264 Ga. 243, 244 (2), 245 (a) (444 SE2d 76) (the forfeiture statute's pleading requirements override the Civil Practice Act's pleading standards) and is contrary to OCGA § 16-13-49 (o) (4)'s mandatory directive that "the court shall order the disposition of the seized property" if no answer has been filed within 30 days after service of the summons and complaint.<sup>4</sup> On the other hand, Jarrett v. State of Georgia, 220 Ga. App. 559, 561 (2) (472 SE2d

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<sup>4</sup> That is, if OCGA § 9-11-15 (c)'s relation back doctrine applies in forfeiture proceedings then OCGA § 16-13-49 (o) (4)'s mandatory directive - i.e., "the court shall order the disposition of the seized property" - is meaningless. Although this anomaly was not before the Supreme Court in State of Georgia v. Alford, 264 Ga. 243, 245, supra, Judge Beasley, when Alford was before the Georgia Court of Appeals, predicted that "the State could argue that an amendment after the 30-day period for filing the answer should not be allowed." Alford v. State of Georgia, 208 Ga. App. 595, 597 (3) (431 SE2d 393).

315), cert. denied at 220 Ga. App. 914, is in harmony with this statutory directive and is in line with the forfeiture statute's intended directive "to protect the interest of innocent property owners [while providing] for prompt disposition of contraband property. State of Georgia v. Alford, supra [at 245.]" Howard v. State of Georgia, 223 Ga. App. 323, 325 (477 SE2d 605). Moreover, as Judge Eldridge recently opined, quoting Jarrett and relying on Alford, "[f]ailure to comply with the strict pleading requirements prescribed by OCGA § 16-13-49 (o) (3) when answering an in rem forfeiture petition is equivalent to filing no answer at all. (Cit.)' Jarrett v. State of Ga., supra at 560; State of Ga. v. Alford, supra." Howard v. State of Georgia, 223 Ga. App. 323, 325, supra. From here, the syllogism is simple. If filing a defective answer in an in rem forfeiture proceeding is equivalent to filing no answer at all, then there is nothing to amend in cases - such as the case sub judice - where it is undisputed that the claimant's initial answer was defective. OCGA § 9-11-15 (c)'s relation back doctrine therefore cannot apply.

Since Howard v. State of Georgia, 223 Ga. App. 323, 325, supra, and Tuggle v. State of Georgia, 224 Ga. App. 353, 354 (1), 355 (480 SE2d 353), rely on and restate this Court's holding in Division 2 of Jarrett, these decisions must also be affirmed or overruled upon transmittal of the case sub judice to the Georgia Supreme Court pursuant to Article 6, Section, 5, Paragraph 5 of Constitution of the State of Georgia of 1983.

In concluding, I note that were it not for OCGA § 16-13-49 (o) (4)'s mandatory directive and the Supreme Court's construction of this statute in State of Georgia v. Alford, 264 Ga. 243, 244 (2), 245 (a), supra, I would fully concur in the majority opinion. See dissenting opinion in Lockett v. State of Georgia, 218 Ga. App. 289, 291, supra. But since, in my view, this superior authority does not allow room for this Court to do justice as Judge Eldridge so rightly and eloquently urges in his special concurrence, I reluctantly dissent.

I am authorized to state that Chief Judge Andrews, Presiding Judge Birdsong, Presiding Judge Pope, and Judge Johnson join in this dissent.

# Court of Appeals of the State of Georgia

ATLANTA,

*The Court of Appeals hereby passes the following order:*

**A03A0843. SECURITY LIFE INSURANCE COMPANY v. CLARK et al.**

Appellees have moved this Court to dismiss this appeal as moot or, in the alternative, to substitute St. Paul Fire and Marine Insurance Company (“St. Paul”) in lieu of Gordon B. Clark and Clarice J. Clark as appellees.

Appellees’ motion to dismiss is denied. Security Life Insurance Company’s (“Security”) appeal is not moot even though co-defendant St. Paul, as surety on the supersedeas bond, paid the full amount of the judgment awarded to the Clarks, since St. Paul has demanded indemnification from Security, and a reversal of the judgment on the grounds urged by Security will reduce any potential obligation that Security may have to St. Paul to indemnify it for payment of the judgment. See *Johnson & Harber Constr. Co. v. Bing*, 220 Ga. App. 179 (469 SE2d 697) (1996) (appeal not moot even though co-defendant tortfeasor settled with plaintiff after the notice of appeal was filed, as the right of contribution still existed between the appellant and settling co-defendant); *Seaton v. Aetna Casualty & Surety Co.*, 189 Ga. App. 546, 547-548 (379 SE2d 712) (1988) (test of mootness is whether the appellant, in the case of reversal, could claim or enforce the rights insisted upon).

However, the Clarks have transferred and assigned the judgment appealed from and the fi. fa. issued thereon to St. Paul. Therefore, it is St. Paul, not the Clarks, who has the right to enforce that judgment and execution against Security. Therefore, St. Paul is substituted as the appellee, and the Clarks are dismissed as parties to this appeal.

The Reporter of Decisions is hereby directed to publish this order.

*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.