# **Construction Law**

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This Article surveys construction law decisions handed down by Georgia appellate courts between June 1, 2001, and May 31, 2002. The cases discussed fall primarily within seven categories: (1) contract; (2) tort; (3) mechanic's and materialman's liens; (4) payment and performance bonds; (5) workers' compensation; (6) arbitration; and (7) legislation. The Article also includes a miscellaneous section covering noteworthy cases that do not fit neatly into the sections enumerated above.

#### I. Contracts

The court of appeals decided many cases involving claims for breach of contract during the survey period. Most did not address novel issues. The court of appeals did, however, revise its earlier position on the applicable limitations period for a homeowner's breach of contract action for damages from the use of defective synthetic stucco.

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### A. Promissory Estoppel; Statute of Frauds

SKB Industries, Inc. v. Insite¹ arose out of the construction of the Georgia International Plaza for Atlanta's 1996 Summer Olympic Games. General contractor Beers Construction Company accepted bids from various sub-contractors to execute portions of the work. Insite, a hardscaping sub-contractor, prepared a bid to perform both the landscaping and hardscaping work. In connection with this endeavor, Insite accepted a bid from sub-subcontractor SKB to carry out the landscaping portion of the work. Because the landscaping component of Insite's proposal was substantially lower than others, Beers gave SKB an opportunity to confirm that its bid was based upon the specified materials. SKB initially stated that its bid was based upon the required materials. It subsequently conceded that its bid incorporated materials less expensive than those originally specified, however. Nevertheless, for reasons not discussed, Beers permitted SKB to perform the landscaping work using the less expensive materials.

Insite subsequently entered into a contract with Beers for approximately three million dollars, about one million dollars of which was for work to be performed by SKB. SKB failed to sign, however, a subcontract agreement with Insite. After beginning work, SKB failed to complete a significant portion of it. Insite refused to pay SKB \$392,150.

SKB brought suit against Beers and Beers's surety. Beers and its surety settled the action. Insite later sued SKB on the theory of promissory estoppel, claiming that it was damaged when SKB did not complete the work as promised. The jury awarded Insite \$711,573.42 on its promissory estoppel claim.<sup>3</sup>

On appeal, SKB maintained that Insite could not recover under the theory of promissory estoppel, arguing that there could be no justifiable reliance by Insite when no written agreement existed between the parties, as required by the statute of frauds.<sup>4</sup> The court of appeals rejected SKB's argument and held that the statute of frauds "does not operate to prevent use of the equitable principle of promissory estoppel to enforce a promise which was expected to and did induce detrimental reliance."

<sup>1. 250</sup> Ga. App. 574, 551 S.E.2d 380 (2001).

<sup>2.</sup> Id. at 575-76, 551 S.E.2d at 382-83.

<sup>3.</sup> Id. at 574-76, 78, 551 S.E.2d at 382-84.

<sup>4.</sup> Id at 577, 551 S.E.2d at 384.

<sup>5.</sup> Id. at 578, 551 S.E.2d at 384.

### B. Quantum Meruit; Action on Commercial Account

Wingate Land & Development, LLC v. Robert C. Walker, Inc., concerned an action by architect Walker against land developer Wingate. Walker sought payment for architectural services rendered in connection with the design and construction of a golf course. Initially, Walker submitted a proposal to Wingate to perform golf course design services. Wingate accepted it, but requested that Walker restructure the payment schedule so that the bulk of the services were paid for on the back end of the project. The project went forward, the parties operated in accordance with their agreed upon terms, but they never executed the agreement as modified.

Subsequently, a dispute arose regarding the amount of construction management services that the agreement required Walker to perform. As a result, Wingate refused to pay Walker the agreed upon amount. Walker sued, alleging claims based on quantum meruit and suit on account. The jury ultimately returned a verdict in his favor.<sup>8</sup>

On appeal, Wingate argued that the trial court erred in instructing the jury on both Walker's quantum meruit and commercial account theories given the existence of a written contract. The court of appeals disagreed noting that Georgia law permits a plaintiff to proceed to trial on alternative theories and that the evidence supported a possible finding that there had been no meeting of the minds between the parties and, thus, no contract between them. To

# C. Merger; Assignment of Warranties; Selection of Remedies; and Seller's Duty to Disclose Known Defects

In Ainsworth v. Perreault, <sup>11</sup> plaintiff homebuyers brought suit against defendant sellers alleging fraud and breach of contract arising out of plaintiffs' purchase of defendants' home. Plaintiffs alleged that defendants made misrepresentations of material fact and concealed defects in the swimming pool. Plaintiffs also argued that defendants breached the sales contract by failing to transfer the warranty on the pool. <sup>12</sup>

<sup>6. 252</sup> Ga. App. 818, 558 S.E.2d 13 (2001).

<sup>7.</sup> Id. at 818-19, 558 S.E.2d at 14-15.

<sup>8.</sup> Id. at 820, 558 S.E.2d at 15-16.

<sup>9.</sup> Id. at 820-21, 558 S.E.2d at 16.

<sup>10.</sup> Id. at 821, 558 S.E.2d at 16.

<sup>11. 254</sup> Ga. App. 470, 563 S.E.2d 135 (2002).

<sup>12.</sup> Id. at 470, 563 S.E.2d at 136.

In affirming the trial court's award of summary judgment to defendants, the court of appeals held that by electing to affirm the agreement, plaintiffs precluded their claim for willful misrepresentation because they had an option, either to "affirm the contract and sue for damages from the fraud or breach" or "rescind the contract and sue in tort for fraud."13 Regarding plaintiffs' claim that defendants committed fraud by failing to reveal on the disclosure statement material defects in the pool, the court of appeals held that there was no evidence that the parties incorporated the disclosure statement into the sales agreement and that the agreement contained a merger clause. 14 The court also rejected plaintiffs' contention that defendants actively or passively concealed defects in the pool, noting that there was no evidence that defendants possessed knowledge of any existing defects. Lastly, the court rejected plaintiffs' claim for breach of contract based upon defendants' failure to transfer the warranty on the pool because such warranty by its terms was nontransferable, and defendants only agreed to transfer such warranties "which by their terms may be transferable to Buyer."16

### D. Oral Settlement Agreement

In Robison v. George, 17 George filed suit against Robison, alleging, among other things, breach of contract. The parties' dispute arose out of construction work George was to perform at Robison's residence. Pursuant to an oral agreement, George agreed to work for an hourly wage plus an additional ten percent of the labor expenses to cover insurance costs. Suspecting that George was submitting inflated invoices, Robison at some point stopped making payments and offered to pay George a reduced figure on the disputed amounts. George agreed to accept the reduced amount, and Robison tendered several checks totaling \$20,925.76. When Robison did not receive back-up documentation to substantiate the reduced invoiced amounts, he stopped payment on all checks. George then brought suit against Robison alleging, among other things, breach of an oral settlement agreement. Robison counterclaimed for fraud, breach of contract, slander, conversion, and abusive litigation.<sup>18</sup>

<sup>13.</sup> Id. at 471, 563 S.E.2d at 137.

<sup>14.</sup> Id. at 472, 563 S.E.2d at 138.

<sup>15.</sup> *Id.* at 475, 563 S.E.2d at 139.

<sup>16.</sup> Id. at 476, 563 S.E.2d at 140.

<sup>17. 253</sup> Ga. App. 635, 560 S.E.2d 108 (2002).

<sup>18.</sup> Id. at 635-36, 560 S.E.2d at 109-10.

Affirming the trial court's award of summary judgment to George on both his claim for breach of contract and on Robison's various counterclaims, the court of appeals explained that oral settlement agreements between parties are enforceable in Georgia. Therefore, the court held that Robison's breach of the settlement agreement excused any future performance that may have been required previously. 20

#### E. Accord and Satisfaction

In Hawthorne Grading & Hauling v. Rampley, 21 a grading and hauling contractor appealed the trial court's award of summary judgment to defendant real estate developer. The dispute arose out of an oral agreement to clear certain rights-of-way in connection with a residential real estate development project. Hawthorne Grading & Hauling ("Hawthorne") began work on the project in the fall of 1998, but stopped work in March of the following year before the project was Hawthorne billed Rampley, the real estate developer, completed. \$26,400 for costs associated with clearing and burning twelve acres.<sup>22</sup> By letter, Rampley contested the invoiced amount, claiming that Hawthorne had cleared only 4.5 acres. Rampley, therefore, enclosed a check for a lesser amount of \$10,000 with the words "full payment of all sums owed to Hawthorne."23 Hawthorne subsequently endorsed the check "with reservations" and deposited it. 24 The trial court granted Rampley's motion for summary judgment on the basis of accord and satisfaction.<sup>25</sup>

On appeal, Hawthorne argued that there could be no accord and satisfaction because Rampley first communicated his dispute over the amount claimed by Hawthorne contemporaneously with (instead of prior to) his tender of a lesser amount. The court of appeals rejected Hawthorne's argument, holding that Hawthorne's acceptance of partial payment, with actual knowledge of the existence of a dispute over the total amount, constituted accord and satisfaction. The fact that Rampley first communicated his dispute over the amount claimed due

<sup>19.</sup> Id. at 637, 560 S.E.2d at 110.

<sup>20.</sup> Id. at 637-38, 560 S.E.2d at 111.

<sup>21. 252</sup> Ga. App. 771, 556 S.E.2d 912 (2001).

<sup>22.</sup> Id. at 771, 556 S.E.2d at 912.

<sup>23.</sup> Id.

<sup>24.</sup> Id. at 772, 556 S.E.2d at 912.

<sup>25.</sup> Id.

<sup>26.</sup> Id., 556 S.E.2d at 913.

<sup>27.</sup> Id. at 773, 556 S.E.2d at 913-14.

contemporaneously with his tender of a lesser amount, the court explained, was of no legal consequence.<sup>28</sup>

## F. EIFS: Accrual of Statute of Limitations

In *Colormatch Exteriors, Inc. v. Hickey*, <sup>29</sup> defendant builders constructed a house. The county finished all home inspections on April 26, 1995 and issued a certificate of occupancy in July 1995. Subsequently, defendant builders sold the property to plaintiffs, a husband and wife. The plaintiffs discovered moisture damage under the synthetic stucco cladding. On April 26, 1999, they sued defendant builders and the synthetic stucco manufacturer. Plaintiffs asserted product liability claims against defendant manufacturer and negligent construction, breach of warranty, and negligent misrepresentation claims against defendant builders.

At the trial court, both defendants moved for summary judgment, arguing that plaintiffs' claims were time-barred. In support, they maintained that the statute of limitations for damage to real property was four years, the home was substantially complete by April 26, 1995, and plaintiffs did not file their claims within four years of this date. The trial court granted the motions.<sup>30</sup> The court of appeals reversed.<sup>31</sup>

On review, the Supreme Court of Georgia had to decide when plaintiffs' causes of action began to accrue, among other issues. It ultimately reached two conclusions. First, it held that where a contractor improves his own property for the purpose of sale, the four-year statute of limitations for damage to realty does not begin to accrue until the contractor initially sells the improved property, regardless of the date of substantial completion. Second, the court determined that the limitations period begins to run against a manufacturer of materials used for the improvement on the date of substantial completion, which the court held was not dependent upon the issuance of a cetificate of occupancy.

# G. Notice to Contractor on Public Project

In *J. Kinson Cook, Inc. v. Weaver*, <sup>34</sup> sub-subcontractor Weaver filed suit against the subcontractor, the general contractor, and the surety on

<sup>28.</sup> Id.

<sup>29. 275</sup> Ga. 249, 569 S.E.2d 495 (2002).

<sup>30.</sup> Id. at 250, 569 S.E.2d at 496.

<sup>31.</sup> Id.

<sup>32.</sup> Id.

<sup>33.</sup> Id.

<sup>34. 252</sup> Ga. App. 868, 556 S.E.2d 831 (2001).

a public school project. During trial, the court denied the surety's and general contractor's motions for directed verdict on the notice of commencement, notice to contractor issues, and Weaver's quantum meruit claim. The jury later returned a verdict for Weaver.<sup>35</sup>

On review, the court of appeals reversed on two grounds: (1) Weaver failed to provide the statutory notice to contractor; and (2) a quantum meruit claim cannot lie when a materialman or sub-subcontractor has no implied contractual relationship with a general contractor or owner. In construing former O.C.G.A. sections 36-82-104(b), (g) and (f), now codified in O.C.G.A. sections 36-91-92 and 36-91-93, and applying the rules of statutory construction to the ambiguities contained therein, "[the court] conclude[d] that the statute, when read as a whole, requires posting of the notice but imposes the [fifteen]-day requirement only upon the filing of the notice in order to give effect to the Notice to Contractor requirements of former O.C.G.A. [section] 36-82-104(b)(2)."

The court of appeals also reversed the jury's verdict on quantum meruit because "[u]nder Georgia law, a materialman or a subcontractor may not recover against an owner or general contractor with whom it has no contractual relationship, based on the theory of unjust enrichment or implied contract; rather, it is limited to the statutory remedies provided by Georgia's lien statute." The court noted that this rule, which had first been applied to private projects, also has been applied to public works contracts. 42

#### II. TORT

Georgia appellate courts decided a variety of tort-related construction cases during the survey period, including those addressing issues of

<sup>35.</sup> Id. at 868, 556 S.E.2d at 831-32.

<sup>36.</sup> Id., 556 S.E.2d at 832.

<sup>37.~</sup> O.C.G.A.  $\S$  36-82-104 (1993) (codified as amended in O.C.G.A.  $\S$  36-91-92, 93 (Supp. 2001)).

<sup>38.</sup> Id. § 36-91-92 (Supp. 2001).

<sup>39.</sup> Id. § 36-91-93.

<sup>40. 252</sup> Ga. App. at 870, 556 S.E.2d at 833.

<sup>41.</sup> *Id.* at 871-72, 556 S.E.2d at 833-34 (citation omitted). The trial court also erred in allowing Weaver's claim to go to the jury on the basis of quantum meruit. "Under Georgia law, a materialman or subcontractor may not recover against an owner or general contractor with whom it has no contractual relationship, based on the theory of unjury enrichment or implied contract; rather, it is limited to the statutory remedies provided by Georgia's lien statute." Hussey, Gay & Bell v. Ga. Ports Auth., 204 Ga. App. 504, 506, 420 S.E.2d 50 (1992). In *Hussey* this court applied the longstanding rule applicable to private contracts and the Georgia mechanics to a public works contract.

<sup>42. 252</sup> Ga. App. at 872, 556 S.E.2d at 834.

nuisance and nondelegable duties. The cases tended to follow existing rules of law. Notably, however, the court of appeals made an unprecedented ruling on the issue of punitive damages.

# A. Homeowner Nuisance

In Segars v. Cleland,<sup>43</sup> defendant Segars, an experienced home-builder, staked out a vacant lot next door to plaintiff Cleland's home. Segars planned to pour the foundation for a new home. Cleland noticed that the stakes were too close to her home and notified defendant Segars before the foundation was poured, but he responded in a "threatening, intimidating, and demeaning manner."<sup>44</sup> Cleland asked Segars to confirm that his plans complied with local ordinances by checking with the county. Segars refused to do so, however, and continued building the house. During construction, Cleland called the county and was informed of a requirement that houses must have ten feet between rooflines and be five feet from lot lines. Because Segars did not meet these requirements, the county ultimately issued a stop work order in August 1995.<sup>45</sup>

While admitting that the distance between rooflines was less than ten feet, Segars attempted to obtain a variance, claiming that he forgot about the setback requirement. The county refused the request, noting that the roofline requirement was recorded both on the subdivision plat and as a general note. Segars appealed the county's decision to the Zoning Board of Appeals ("Board") on the grounds that the house was sixty percent complete. The Board denied Segars's petition.<sup>46</sup>

Segars later admitted in a letter to the county that the rooflines were too close together, but assured officials that he had devised a plan to make his house comply. Segars planned to cut a "notch" out of the part of the roof closest to Cleland's home. Segars also planned to install siding rather than shingles. The county concluded that Segars's plan was unacceptable, reasoning that the roofline distance required is measured by comparing the entire lengths of the roofs, not the distance at one discrete location. Segars again appealed the county's decision to the Board. Because the house was almost complete, Segars argued that although he had made a mistake by building too close to Cleland's home, removing or adjusting the house at this point would present a hardship.

<sup>43. 255</sup> Ga. App. 293, 564 S.E.2d 874 (2002).

<sup>44.</sup> Id. at 293, 564 S.E.2d at 876.

<sup>45.</sup> Id. at 293-94, 564 S.E.2d at 876.

<sup>46.</sup> Id. at 294, 564 S.E.2d at 877.

The Board agreed and granted Segars a hardship variance. After cutting a notch out of the roof, Segars sold the house to the Nesbitts.<sup>47</sup>

On appeal to the trial court, Cleland argued that the Board's decision was arbitrary and capricious and she suffered diminished property values as a result. Cleland also alleged that Segars wilfully and wantonly constructed a nuisance. She sought an injunction, compensatory damages, punitive damages, and attorney fees. Segars moved for summary judgment, but the court denied the motion. Ultimately, the trial court found that the Board's decision "fit[] the very definition of arbitrary and capricious in every respect" and reversed the Board. Deland later amended her complaint to include the Nesbitts, who purchased the house from Segars. She alleged that by filing a notice of lis pendens on the property, the Nesbitts were put on notice of her claims against Segars. The Nesbitts denied notice of the lis pendens and also cross-claimed against Segars for fraud, breach of warranty of title, punitive damages, and attorney fees.

With respect to the claims against Segars, a jury awarded Cleland \$31,000 in attorney fees, \$30,000 in compensatory damages, and \$81,742 in punitive damages. It also awarded \$1 in nominal damages against the Nesbitts. As to the Nesbitts' cross-claims against Segars, the jury awarded \$8,200 in attorney fees and \$7,500 in compensatory damages. <sup>51</sup>

On appeal, Segars argued, among other things, that (1) there was not sufficient evidence to support the jury's finding that a nuisance existed to support the \$30,000 in damages awarded to Cleland, (2) the Nesbitts failed to present a prima facie claim of fraud, and, (3) the Nesbitts failed to present any evidence of actual damages caused by the fraud.<sup>52</sup> On review, the court first affirmed Cleland's compensatory damage award on the nuisance claim noting that

"[A] nuisance is anything that causes hurt, inconvenience, or damage to another . . . . The inconvenience complained of shall not be fanciful, or such as would affect one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man." In this case, the evidence support[ed] a finding that Segars built the house in violation of Gwinnett County zoning requirements. This violation continues

<sup>47.</sup> Id

<sup>48.</sup> Id. at 294-95, 564 S.E.2d at 877.

<sup>49.</sup> *Id.* at 295, 564 S.E.2d at 877.

<sup>50.</sup> Id.

<sup>51.</sup> Id.

<sup>52.</sup> Id. at 295, 297, 564 S.E.2d at 876, 879.

unabated[] because simply cutting a notch from the roof did not bring the house into compliance with the county's requirements.<sup>53</sup>

Additionally, the court noted that under O.C.G.A. section 51-12-2(a),<sup>54</sup> "general damages are those presumed to flow from a tortious act and may be recovered without specific proof of any amount."<sup>55</sup> Hence, Cleland had to proffer no evidence of damage other than the evidence of the nuisance itself.<sup>56</sup>

Second, the court concluded that the Nesbitts failed to produce evidence of actual damage and, therefore, could not state a prima facie case of fraud. The court decided that the evidence showed that, when the Nesbitts looked at the house in January 1996, Mr. Nesbitt asked Segars why the roof was notched out. Segars told him that there had been a dispute about the placement of the house with the neighbor, but that it had been resolved. Segars Apparently, the court believed that this suggested an intentional misrepresentation of a material fact by the defendant upon which the plaintiff justifiably relied to his detriment. However, the court pointed out that the Nesbitts sought only nominal damages based upon the misrepresentation and attorney fees. Relying on the rule that "nominal damages for fraud are improper, as the party must show that actual, not just nominal, damages flowed from the alleged fraud," the court reversed.

#### B. Attorney Fees for Nuisance

In Foxchase LLP v. Cliatt, <sup>62</sup> a landowner brought a lawsuit against owners and former owners of a golf course adjacent to his property, alleging that the golf course owners caused and maintained a nuisance. <sup>63</sup> Plaintiff claimed that due to construction of the golf course, "excess water, sediment, sand and debris flowed into the creek[s]," eroded the creek beds and banks, and damaged his property. <sup>64</sup> The trial court found for the plaintiff and defendants appealed, alleging that

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53. Id. at 295, 564 S.E.2d at 877-78 (quoting O.C.G.A. § 41-1-1 (1998 & Supp. 2001)).
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<sup>54.</sup> O.C.G.A. § 51-12-2(a) (1998 & Supp. 2001).

<sup>55. 255</sup> Ga. App. at 296, 564 S.E.2d at 878.

<sup>56.</sup> *Id*.

<sup>57.</sup> Id. at 297, 564 S.E.2d at 879.

<sup>58.</sup> Id.

<sup>59.</sup> Id.

 $<sup>60. \</sup>quad Id.$ 

<sup>61.</sup> Id. (citing Stiefel v. Schick, 260 Ga. 638, 398 S.E.2d 194 (1990)).

<sup>62. 254</sup> Ga. App. 239, 562 S.E.2d 221 (2002).

<sup>63.</sup> Id. at 239, 562 S.E.2d at 223.

<sup>64.</sup> Id.

the trial court erred in denying their respective motions for directed verdict and judgment notwithstanding the verdict.<sup>65</sup>

The court of appeals affirmed based on the "any evidence" standard. <sup>66</sup> The court stated that "[u]nder this standard we must construe the evidence in the light most favorable to the party who obtained a verdict, and if there is any evidence to support the verdict, we will not disturb it." The court of appeals also affirmed the award of attorney fees because there was evidence that defendants acted in bad faith by failing to take appropriate action to alleviate the damage to plaintiff's property. <sup>68</sup> For example, the attorney for one defendant failed to respond to one of plaintiff's letters requesting that defendant reduce the flow of water and debris onto plaintiff's property. <sup>69</sup> The attorney responded to plaintiff's second letter by stating "that he could discuss the matter with him or file a lawsuit."

### C. Punitive Damages for Fraud

In *Kent v. A.O. White, Jr., Consulting Engineer, P.C.*, <sup>71</sup> a nonconstruction, yet generically significant case, the court of appeals vacated and remanded a jury's award of \$750,000 in punitive damages and \$18,407 in compensatory damages in an action concerning attorney Kent's failure to pay an expert witness for services rendered. <sup>72</sup> The court explained that punitive damages awarded for fraud would comport with the strictures of substantive due process so long as the award was limited to a multiple of 4.67 times the amount of the compensatory award—in this case, \$85,964.19, or 4.67 multiplied by \$18,407. <sup>73</sup> The court selected the 4.67 multiplier after examining the average ratio of punitive damages to compensatory damages in similar fraud cases that have survived constitutional scrutiny. <sup>74</sup>

<sup>65.</sup> Id. at 239-40, 562 S.E.2d at 223.

<sup>66.</sup> Id. at 240, 562 S.E.2d at 223.

<sup>67.</sup> *Id*.

<sup>68.</sup> Id. at 240-41, 562 S.E.2d at 224.

<sup>69.</sup> Id. at 241, 562 S.E.2d at 224.

<sup>70.</sup> Id.

<sup>71. 253</sup> Ga. App. 492, 559 S.E.2d 731 (2002).

<sup>72.</sup> Id. at 492-95, 559 S.E.2d at 733-35.

<sup>73.</sup> Id. at 503, 559 S.E.2d at 740.

<sup>74.</sup> Id.

### D. High Voltage Safety Act—Wrongful Death

In *Smith v. Jackson Electric Membership Corp.*, <sup>75</sup> the court of appeals determined that a power company ("Jackson EMC") and a utilities protection center ("UPC") were subject to liability under Georgia's High Voltage Safety Act<sup>76</sup> ("HVSA"). <sup>77</sup> The case involved two construction workers who were electrocuted when their equipment came into contact with power lines that were in close proximity to the construction site. <sup>78</sup>

On April 18, 1997, in connection with a water pipeline construction project, the general contractor provided the initial notice to UPC, as required by the HVSA, requesting protection from both overhead and underground power lines. Originally, the work was scheduled to be completed in two weeks. The project, however, was delayed and the general contractor contacted UPC to request additional protection from the underground lines. The contractor failed to request additional protection with respect to the overhead lines, though.<sup>79</sup>

On May 30, 1997, two subcontract construction workers accidentally came into contact with an overhead power line and were electrocuted. Their respective representatives brought actions for wrongful death against Jackson EMC and UPC, alleging that both were negligent in the processing of requests for protection from overhead power lines in accordance with HVSA.<sup>80</sup> The trial court granted defendants' motions for summary judgment on the grounds (1) that the general contractor failed to submit a "new notice" to UPC, extending its previous request for protection from overhead power lines, and (2) that plaintiffs' recovery for negligence was barred because the damages posed by the power line were open and obvious.<sup>81</sup>

On appeal, the court of appeals first considered the issue of whether the general contractor's failure to submit a "new notice" to UPC pursuant to O.C.G.A. section 46-3-34(d)<sup>82</sup> following a delay to the anticipated completion date insulated UPC and Jackson EMC from liability pursuant to the HVSA.<sup>83</sup> In reversing the trial court's decision, the court of appeals held that the general contractor was not required to

<sup>75. 253</sup> Ga. App. 575, 560 S.E.2d 26 (2002).

<sup>76.</sup> O.C.G.A. §§ 46-3-30 to -40 (1998 & Supp. 2000).

<sup>77. 253</sup> Ga. App. at 575, 560 S.E.2d at 27.

<sup>78.</sup> Id. at 577, 560 S.E.2d at 28.

<sup>79.</sup> Id. at 576-77, 560 S.E.2d at 28.

<sup>80.</sup> *Id.* at 575-77, 560 S.E.2d at 27.

<sup>81.</sup> Id. at 575, 560 S.E.2d at 27.

<sup>82.</sup> O.C.G.A. § 46-3-34(d) (1998).

<sup>83. 253</sup> Ga. App. at 577, 560 S.E.2d at 29.

provide any additional notice pursuant to O.C.G.A. section 46-3-34(d) when Jackson EMC did not comply with O.C.G.A. section 46-3-34(c), which required Jackson EMC to make arrangements with the general contractor for the completion of certain safety precautions.<sup>84</sup> The court next determined that the trial court erred in its application of the open and obvious rule because it could not be said as a matter of law that the dangers posed by the overhead power line were open and obvious.<sup>85</sup>

# E. Synthetic Stucco: Negligent Construction and Nondelegable Duties

In Stancliff v. Brown & Webb Builders, Inc., 86 the court of appeals reversed the trial court's decision granting summary judgment to defendant builder-seller on plaintiff homebuyer's negligent construction claims based on defects in an Exterior Insulation and Finish System ("EIFS"). 87 In 1996 the Stancliffs purchased a house from its original owners. The home was built and sold by Brown & Webb Builders, Inc. ("B&W"). Shortly thereafter, the Stancliffs noticed that the doors and windows had begun to warp and that water was seeping in around the doors. An investigation revealed that the EIFS had been improperly installed and had caused extensive damage to the residence. The Stancliffs then brought an action against B&W and the EIFS installers. 88

B&W moved for and was granted summary judgment on two grounds: (1) that independent contractors, not B&W, installed the EIFS, and (2) that B&W did not supervise or have knowledge of the defective work. Reversing the trial court's decision, the court of appeals explained:

"[S]ince the builder-seller holds himself out as having the ability and expertise to build a fit and workmanlike residence, he cannot escape liability simply by claiming that an independent contractor he hired was wholly responsible for the negligent work . . . . . . . . . [O]therwise, "[i]t would be too easy for a builder-seller of a house to avoid liability by hiring inexperienced crews, providing little or no supervision, and

<sup>84.</sup> Id. at 577-78, 560 S.E.2d at 29.

<sup>85.</sup> Id. at 578, 560 S.E.2d at 29.

<sup>86. 254</sup> Ga. App. 224, 561 S.E.2d 438 (2002).

<sup>87.</sup> Id. at 224, 561 S.E.2d at 438-39.

<sup>88.</sup> Id., 561 S.E.2d at 438.

<sup>89.</sup> Id.

<sup>90.</sup> *Id.* at 225, 561 S.E.2d at 439 (quoting Seely v. Loyd H. Johnson Constr. Co., 220 Ga. App. 719, 720-21, 470 S.E.2d 283, 286 (1996)).

then claiming the culprit of any negligence was an independent contractor." $^{91}$ 

The court also noted that a claim for negligent construction does not require privity of contract. 92

In *Pfeiffer v. Department of Transportation*, <sup>93</sup> plaintiff sued the Georgia Department of Transportation ("DOT") alleging that its negligence caused an accident that killed her husband. Mr. Pfeiffer was killed when a large concrete form, which was braced only on one side, fell on him. <sup>94</sup> The DOT had entered into a contract with Rosiek, which provided:

[Rosiek] and any of its subcontractors shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards [29 Code of Federal Regulations 1926]<sup>95</sup> promulgated by the Secretary of Labor. <sup>96</sup>

Plaintiff argued that 23 C.F.R. section 630.1010(b)<sup>97</sup> "imposed a nondelegable duty on DOT to make certain that the safety aspects of the contract were effectively administered by the contractor." The court of appeals affirmed summary judgment in favor of the DOT, holding that the contract unambiguously provided that Rosiek was primarily responsible for maintaining worker safety on the project and that 23 C.F.R. section 630.1010(b) only applied to traffic safety and not work safety. Section 630.1010(b) provided that "[t]he highway agency [DOT] shall designate a qualified person at the project level who will have the primary responsibility and sufficient authority for assuring that the TCP [traffic control plan] and other safety aspects of the contract are effectively administered." In reviewing four of the five subsections of 23 C.F.R. section 630.1010, the court found that they all dealt exclusively with traffic control plans, so that subsection (b)'s "other

<sup>91.</sup> Id. (citations omitted) (third alteration in original).

<sup>92.</sup> Id. at 226, 561 S.E.2d at 439-40.

<sup>93. 250</sup> Ga. App. 643, 551 S.E.2d 58 (2001).

<sup>94.</sup> Id. at 644, 551 S.E.2d at 60.

<sup>95. 29</sup> C.F.R. 1926 (2001).

<sup>96. 250</sup> Ga. App. at 644, 551 S.E.2d at 59.

<sup>97. 23</sup> C.F.R. § 630.1010(b) (2002).

<sup>98. 250</sup> Ga. App. at 645, 551 S.E.2d at 60.

<sup>99.</sup> Id. at 647, 551 S.E.2d at 61.

<sup>100.</sup> Id. (quoting 23 C.F.R. § 630.1010(b)) (alterations in original).

safety aspects" referred to the safety aspects of traffic plans, and not the other non-traffic aspects of the construction. 101

# F. Negligent Construction; Breach of Implied Warranty; Waiver; Statute of Limitations

In Nulite Industries Co., LLC v. Horne<sup>102</sup> Anne Horne ("Horne") sued Nulite Industries Co., LLC ("Nulite") for damages sustained to her home as a result of negligently installed windows and vinyl siding. Nulite contracted with Horne to install vinyl siding and new windows on Horne's mobile home and engaged an independent contractor to perform the actual installation. After the work was completed, Nulite issued a "non-limited one year" warranty and obtained a certification from Horne that the work had been completed satisfactorily. Horne lived in the home for the next twenty-one months, noticing no defects in the installation during that period. Horne then left the home for eleven months. When she returned, she discovered significant problems caused by water leaking in around the windows. After receiving what she perceived to be an inadequate response from Nulite, Horne brought an action against the company. The court granted plaintiff's motion for directed verdict, and defendant appealed. 103

On appeal, Nulite contended that it could not be liable for negligent construction because the installation was carried out by an independent contractor.<sup>104</sup> The court of appeals rejected this argument, explaining:

"Implied in every contract by building contractors is the obligation to perform in a fit and workmanlike manner[,]" and that while "[g]enerally, employers are not responsible for torts committed by independent contractors[,] . . . an exception to that rule . . . [exists] where the wrongful act violates a duty imposed by an express contract upon the employer." 105

The court stated that because Nulite undertook by contract to install the siding and the windows, it could not avoid liability by maintaining that an independent contractor performed its contractual obligations. <sup>106</sup>

Similarly, the court rejected Nulite's contention that by certifying that the work had been performed satisfactorily, Horne waived her right to

<sup>101.</sup> Id

<sup>102. 252</sup> Ga. App. 378, 556 S.E.2d 255 (2001).

<sup>103.</sup> Id. at 378-79, 556 S.E.2d at 256-57.

<sup>104.</sup> Id., 556 S.E.2d at 257.

<sup>105.</sup> Id. at 379-80, 556 S.E.2d at 256-57 (citations omitted).

<sup>106.</sup> Id. at 380, 556 S.E.2d at 257.

recover under the contract.<sup>107</sup> Finally, the court rejected Nulite's argument that the "non-limited one year" warranty barred Horne's claim for breach of implied warranty, explaining that the defect occurred during the one-year warranty period, and Horne filed her claim within the applicable six-year limitations period.<sup>108</sup>

### G. Damage to Realty; Statute of Limitations

In *DeKalb County v. C.W. Matthews Contracting Co.*, <sup>109</sup> the County sued a contracting company to recover damages sustained in repairing a sewer pipe. The contracting company had damaged the pipe during a construction project. The trial court granted the contracting company's motion for summary judgment on the County's claims for negligence and fraudulent concealment on the ground that the County's claims were time barred.

On appeal, the County argued that the four-year limitations period did not begin to run until such time that the pipe collapsed, which was less than four years from the time the County filed its complaint. The court of appeals rejected the County's argument and held that the statute of limitations began to run when the sewer pipe was punctured, not when it collapsed. The panel determined, however, that the trial court failed to consider whether the statute was tolled by the alleged fraudulent concealment by the contracting company and, consequently, remanded the case for re-consideration. The panel determined is consequently.

### H. Unincorporated Association

In *Piney Grove Baptist Church v. Goss*, <sup>113</sup> plaintiff Goss was injured when a scaffold constructed by his father collapsed at the Piney Grove Fellowship Hall expansion project. The Church undertook the project using volunteers from its congregation and, ultimately, chose Goss's father to oversee it. The trial court denied the Church's motion for summary judgment. <sup>114</sup>

On appeal, the Church argued that Goss should not have been allowed to bring suit because "a member of an unincorporated association cannot

<sup>107.</sup> Id. at 379, 556 S.E.2d at 257.

<sup>108.</sup> Id. at 380, 556 S.E.2d at 257.

<sup>109. 254</sup> Ga. App. 246, 562 S.E.2d 228 (2002).

<sup>110.</sup> *Id.* at 247, 562 S.E.2d at 230.

<sup>111.</sup> Id. at 248, 562 S.E.2d at 230.

<sup>112.</sup> Id., 562 S.E.2d at 230-31.

<sup>113. 255</sup> Ga. App. 380, 565 S.E.2d 569 (2002).

<sup>114.</sup> Id. at 381, 565 S.E.2d at 570.

sue that corporation under any circumstances."<sup>115</sup> The court of appeals disagreed, finding that O.C.G.A. section 9-2-25(d)<sup>116</sup> clearly rests upon the fact that an unincorporated association and its individual members are separate legal entities that have "separate rights and interests."<sup>117</sup> In addition, the court of appeals affirmed the trial court's denial of the motion for summary judgment on Goss's negligence claim because an issue of fact existed concerning "whether the Church negligently selected [Goss's] father as foreman."<sup>118</sup> The court of appeals noted that the record demonstrated that the Church did not investigate Goss's father's qualifications. <sup>119</sup> In addition, Goss's father "testified that he had no background, experience, education or training in commercial construction."<sup>120</sup> Furthermore, a structural engineer concluded that the scaffolding built by Goss's father was "wholly insufficient for its intended purpose."<sup>121</sup>

Lastly, the court of appeals rejected, on the basis of premises liability, the Church's argument that Goss's equal knowledge of the danger removed the Church from liability for his injury. The court noted that Goss asked his father if the platform was safe before he stepped onto it. Goss's father assured him that it was. Therefore, an issue of fact existed as to whether the Church, acting through Goss's father, "negligently created a hazard on the property which precipitated Goss's injuries."

# III. MECHANIC'S AND MATERIALMAN'S LIENS AND PAYMENT AND PERFORMANCE BONDS

During the survey period, the court broke no new ground on the issue of mechanic's and materialmen's liens. The court did, however, make two interesting rulings in the area of payment and performance bonds, one under the Little Miller Act and the second on the issue of agency.

<sup>115.</sup> Id. at 381-82, 565 S.E.2d at 571.

<sup>116.</sup> O.C.G.A. § 9-2-25(d) (1998).

<sup>117. 255</sup> Ga. App. at 382, 565 S.E.2d at 571.

<sup>118.</sup> *Id.* at 384, 565 S.E.2d at 572.

<sup>119.</sup> Id.

<sup>120.</sup> Id.

<sup>121.</sup> Id.

<sup>122.</sup> Id. at 384-85, 565 S.E.2d at 572-73.

<sup>123.</sup> Id. at 385, 565 S.E.2d at 572.

<sup>124.</sup> Id., 565 S.E.2d at 573.

<sup>125.</sup> Id.

#### A. Mechanic's and Materialman's Liens

- 1. **Default by Subcontractor.** In Little Tallapoosa Development, Inc. v. Baldwin Paving Co., 126 the court of appeals held that summary judgment in favor of Baldwin Paving (the sub-subcontractor) on its mechanic's lien foreclosure claim was proper because Baldwin Paving met its prima facie burden by showing that the subcontractor had defaulted.<sup>127</sup> Baldwin Paving worked for the paving subcontractor. The subcontractor was hired to pave a subdivision owned by one of the defendants. When Baldwin Paving filed suit against the subcontractor and property owner, the subcontractor defaulted, and the trial court entered judgment against it. The property owner defendants argued that Baldwin Paving had the burden of coming forward with evidence to negate the owner's defense of payment. 128 The court of appeals disagreed, stating that "the default judgment against [subcontractor] is prima facie evidence that Baldwin Paving complied with its contract with [the subcontractor] and furnished labor and materials to the improvement of the property."129 The court also reasoned that the property owners failed to produce any lien waivers or other documentation showing that Baldwin Paving had been paid for the labor and materials that it furnished; therefore, the property owners failed to rebut Baldwin Paving's prima facie case. 130 Thus, summary judgment was proper. 131
- **2.** Condition Precedent in Bond Activity in Suit Against Contractor. In *Few v. Capitol Materials, Inc.*, <sup>132</sup> Capitol, a material supply company, filed suit against Few, the property owner, to collect on a bond that Few filed. The bond discharged the mechanic's lien. Capitol had supplied materials to a contractor performing work for Few. However, Capitol did not file an action against the contractor to whom it had supplied the materials because the contractor declared bankrupt-cv. <sup>133</sup>

The Georgia Supreme Court reversed the court of appeals, holding that the filing of a bond by a property owner to discharge a mechanic's

<sup>126. 251</sup> Ga. App. 238, 553 S.E.2d 860 (2001).

<sup>127.</sup> Id. at 238, 553 S.E.2d at 861.

<sup>128.</sup> Id. at 238-39, 553 S.E.2d at 861.

<sup>129.</sup> Id. at 239, 553 S.E.2d at 862.

<sup>130.</sup> Id.

<sup>131.</sup> Id.

<sup>132. 274</sup> Ga. App. 784, 559 S.E.2d 429 (2002).

<sup>133.</sup> Id. at 784, 559 S.E.2d at 429.

lien did not relieve the lien claimant of its obligation to follow the procedures of O.C.G.A. section 44-14-361.1, which includes the requirement that the lien claimant must "commence an action against the contractor to recover the amount of the claim within [twelve] months of when the claim became due." 135

Capitol argued that the "bankrupt" exception to O.C.G.A. section 44-14-361.1 allowed it to file suit directly against Few without filing against the contractor. Citing a prior appellate case, the court found that because the contractor had filed bankruptcy a few days before Capitol sold the materials to the contractor, Capitol's claim was not included in the bankruptcy proceeding; therefore, the "bankrupt" exception could not apply. The section of the contractor of the "bankrupt" exception could not apply.

## B. Payment and Performance Bonds

1. Little Miller Act. In *Gulf Insurance Co. v. GFA Group, Inc.*, <sup>138</sup> the Washington County Board of Education hired a contractor to re-roof a number of schools. The contractor obtained a payment bond from Gulf Insurance Co. in accordance with Georgia's "Little Miller Act." Pursuant to an earlier contract, GFA Group, Inc. had agreed to provide payroll services and workers' compensation insurance to the [c]ontractor." The contractor ultimately was terminated and owed GFA approximately seventy thousand dollars under the Payroll Services Agreement. GFA sued its principal shareholder, the contractor, and Gulf Insurance Co. on the payment bond to recover the monies owed. <sup>141</sup>

On cross motions for summary judgment, the trial court found that GFA was an eligible claimant under the payment bond. The court of appeals reversed, however, holding that a payroll services provider is not a proper claimant under the Little Miller Act Bond when the contractor and the payroll service provider have agreed that the contractor is solely responsible for "acquiring and terminating employees," and when the payroll services provider "will not retain control over the employees nor direct their behavior in any way." <sup>143</sup>

<sup>134.</sup> O.C.G.A. § 44-14-361.1 (1998 & Supp. 2001).

<sup>135. 274</sup> Ga. at 784-85, 559 S.E.2d at 420.

<sup>136.</sup> See id. at 784, 559 S.E.2d at 429.

<sup>137.</sup> Id. at 787, 559 S.E.2d at 431.

<sup>138. 251</sup> Ga. App. 539, 554 S.E.2d 746 (2001).

<sup>139.</sup> O.C.G.A. § 13-10-1 to 13-11-11 (1998).

<sup>140. 251</sup> Ga. App. at 539, 554 S.E.2d at 747.

<sup>141.</sup> Id. at 539-40, 554 S.E.2d at 747.

<sup>142.</sup> Id. at 540, 554 S.E.2d at 747.

<sup>143.</sup> Id. at 541, 554 S.E.2d at 748.

The Little Miller Act allows claims on payment bonds by persons "supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the contract." The court of appeals was persuaded by the fact that GFA, as a payroll services provider, was more like a lender of money because it advanced payments to employees. The court noted that several Federal Miller Act cases declined to allow lenders to claim under the Public Works Payment Bond because those lenders could not fairly be said to provide labor, materials, machinery, or equipment to the project. 146

2. Agency. In Multi-State Contracting Corp. v. Midwest Indemnity Corp., 147 plaintiff, Multi-State Contracting Corporation ("Multi-State"), entered into a construction contract with the United States Air Force, which required Multi-State to obtain a payment and performance bond on the project. The bond was issued by National American Insurance Company ("National American"), which used Midwest Indemnity Corporation ("Midwest Indemnity") as its underwriter. American and Midwest Indemnity required that Multi-State use a disbursing and escrow agent as a condition of obtaining the payment and performance bond. Multi-State responded by entering into a disbursement agreement with Contractors Risk Management Corporation ("CRMC"). 148 Under this disbursement agreement, "CRMC received funds payable to Multi-State under its contract with the Air Force and disbursed funds to pay for project-related labor, services, and materials as directed by Multi-State." In addition, CRMC was to hold five percent of the construction proceeds for the additional protection of National American. 150

After Multi-State completed the project, it requested that CRMC release the \$71,100 that had been accumulated in the five percent reserve fund. However, CRMC had lost the money in failed investments. Multi-State sued Midwest Indemnity and National American to recover the money on the basis that Midwest and National American were principals acting through their agent, CRMC, and were, therefore, responsible for the loss of the escrowed funds. <sup>151</sup>

<sup>144.</sup> Id. at 540, 554 S.E.2d at 748.

<sup>145.</sup> *Id.* at 541, 554 S.E.2d at 748.

<sup>146.</sup> Id. at 542-43, 554 S.E.2d at 749.

<sup>147. 252</sup> Ga. App. 449, 556 S.E.2d 524 (2001).

<sup>148.</sup> Id.

<sup>149.</sup> Id., 556 S.E.2d at 525-26.

<sup>150.</sup> Id. at 449-50, 556 S.E.2d at 526.

<sup>151.</sup> *Id.* at 450, 556 S.E.2d at 526.

The court of appeals affirmed the trial court's grant of summary judgment in favor of Midwest and National American on the grounds that CRMC was not an agent for either defendant. 152 The court of appeals noted that CRMC was selected by Multi-State and was not acting on behalf of and subject to the control of National American and Midwest Indemnity. 153 The court defined agency as "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."154 CRMC, as the disbursing agent, "was an independent corporation that did not act under the control or direction of Midwest Indemnity or National American in performing its duties under the disbursement agreement, and . . . acted without the direction or knowledge of Midwest Indemnity or National American in diverting the funds in the surety reserve."155 Therefore, the court ruled that the grant of summary judgment to Midwest Indemnity and National American was proper. 156

#### IV. WORKERS' COMPENSATION

In the area of workers' compensation, the appellate courts issued one ruling. Although not groundbreaking, the opinion provides a recent discussion on the issue of statutory employers.

In Murph v. Maynard Fixturecraft, Inc., <sup>157</sup> Mapco, the owner and developer of the Mapco Express Travel Center, hired Maynard Fixturecraft, Inc. to furnish and install certain refrigeration equipment for the project. Maynard, in turn, hired Carlton Huff d/b/a Huff Refrigeration to install the refrigeration equipment. A salaried employee of Huff Refrigeration, plaintiff Murph was seriously injured when he fell from a ladder at the construction site. Murph filed a claim with the State Board of Workers' Compensation against Mapco, Murphy & Sons, Maynard, and Huff Refrigeration as employers. The State Board of Workers' Compensation, appellate division and the superior court affirmed the administrative law judge's dismissal of defendants, and Murph appealed, contesting only the dismissal of Mapco and Maynard. <sup>158</sup>

<sup>152.</sup> Id.

<sup>153.</sup> Id. at 449, 556 S.E.2d at 525.

<sup>154.</sup> Id. (citation omitted).

<sup>155.</sup> Id. at 451, 556 S.E.2d at 526.

<sup>156.</sup> Id.

<sup>157. 252</sup> Ga. App. 483, 555 S.E.2d 845 (2001).

<sup>158.</sup> Id. at 483, 555 S.E.2d at 846.

Murph argued that Mapco was a statutory employer under O.C.G.A. section 34-9-8<sup>159</sup> because Mapco was performing the construction work on behalf of Baskin-Robbins USA Co. with whom it had a franchise agreement. 160 "[A]n owner is a statutory employer when the owner acts as a contractor for another, that is, where the owner owes a contractual duty to another to perform certain work and then hires a third entity to perform the work on the premises."161 However, the evidence showed that Mapco did not enter into the franchise agreement with Baskin-Robbins until after Murph's injury. 162 Therefore, the court ruled that Mapco could not have been a statutory employer of Murph, and the dismissal was proper. 163

With regard to Maynard, the court of appeals reached a different result. Reversing the trial court's dismissal of Maynard, the court of appeals held that when a contractor agrees to ensure that its employees and subcontractors are covered by workers' compensation insurance, the contractor and its insurer are estopped from denving coverage to persons performing work on behalf of the contractor.<sup>164</sup> Maynard agreed in its contract with Mapco to perform the following:

Require all subcontractors to obtain, maintain, and keep in force during the time in which they are engaged in performing Services hereunder the same insurance coverage as required of Contractor, unless Owner agrees in writing to lesser coverage, and upon request furnished Owner acceptable evidence of such insurance. Thus, under the master field services contract, Maynard had a contractual obligation to ensure that Huff Refrigeration had workers' compensation coverage. 165

Even though Huff Refrigeration was not required by law to maintain workers' compensation insurance because it lacked the requisite number of employees, Maynard nevertheless had agreed to ensure that this coverage was provided. As a result, Murph became a third-party beneficiary of Maynard's agreement to require its subcontractors to obtain workers' compensation insurance. 166 Therefore, Maynard was a statutory employer of Murph and was improperly dismissed. 167

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159. O.C.G.A. § 34-9-8 (1998 & Supp. 2001).
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<sup>160. 252</sup> Ga. App. at 484, 555 S.E.2d at 847.

<sup>161.</sup> Id.

<sup>162.</sup> Id.

<sup>163.</sup> Id.

<sup>164.</sup> Id. at 485, 555 S.E.2d at 847.

<sup>165.</sup> Id., 555 S.E.2d at 848 (citations omitted).

<sup>166.</sup> Id. at 485-86, 555 S.E.2d at 848.

<sup>167.</sup> Id. at 486, 555 S.E.2d at 848.

#### V. Arbitration

During the survey period, the court of appeals rendered a number of decisions on the issue of arbitration. Most importantly, the court overruled a case-law basis for challenging an arbitration award: manifest disregard of the law.

## A. New Appellate Standard for Vacating Arbitration Award

In *Progressive Data Systems*, *Inc. v. Jefferson Randolph Corp.*, <sup>168</sup> the supreme court "granted a writ of certiorari to the court of appeals . . . to determine whether an arbitration award could be vacated because of the arbitrator's 'manifest disregard of the law.'" The court concluded that it could not. <sup>170</sup> In doing so, the supreme court noted that the Georgia Legislature provides four statutory grounds for vacating an arbitration award:

(1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping of the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) A failure to follow the procedure of this [Code], unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.<sup>171</sup>

Noting that the statutory list did not include "manifest disregard of the law," 172 the court concluded that this ground provided no basis for vacating an arbitration award, absent future action by the Legislature:

Our legislature set forth four statutory grounds for vacating an arbitration award. Significantly, it did not include "manifest disregard of the law" as one of those grounds. Whatever the merits of the "manifest disregard of the law" principle, we should not be so bold as to *judicially* mandate its use as an additional ground for vacatur, especially since . . . our Arbitration Code is in derogation of the common law and must be strictly construed.<sup>173</sup>

<sup>168. 275</sup> Ga. 420, 568 S.E.2d 474 (2002).

<sup>169.</sup> Id. at 420, 568 S.E.2d at 474.

<sup>170.</sup> Id. at 421, 568 S.E.2d at 475.

<sup>171.</sup> Id. at 420, 568 S.E.2d at 474 (quoting O.C.G.A. § 9-9-13(b) (1998 & Supp. 2001)).

<sup>172.</sup> Id. at 421, 568 S.E.2d at 475.

<sup>173.</sup> Id.

### B. Arbitration by a County

In *Bryan County v. Yates Paving & Grading Co.*, <sup>174</sup> Yates Paving & Grading was hired by Bryan County to construct and make improvements to public roads in a subdivision. The County ultimately ordered Yates to stop the project and hired a third party to complete it. Yates demanded arbitration as provided for in its contract with Bryan County. <sup>175</sup> On the date that the arbitration was to begin, Bryan County withdrew from the proceedings and filed an action in superior court "seeking a preliminary injunction, a stay of the arbitration proceedings, and a declaratory judgment." The superior court found in favor of Yates, and an arbitration panel ultimately awarded Yates \$430,335 plus fees. The County appealed on the basis that it was without authority to enter into binding arbitration. <sup>177</sup>

The court of appeals disagreed and affirmed the trial court's order confirming the arbitration award. The court found that O.C.G.A. section 32-4-42 gave the County broad power with regard to building roads, including, but not limited to, the following:

the authority to enter into contracts . . . the power to provide for specifications and other things necessary in constructing and maintaining a county road system, or any activities incident thereto; and the authority to adopt and enforce rules and to perform all other acts which are necessary, proper, or incidental to the efficient operation and development of the county road system. 179

Furthermore, the court stated that, "Title 32 is to be liberally construed to this end: the efficient operation and development of the county road system." Given this broad grant of authority and the State's public policy favoring arbitration, the court held that the County was well within its authority to agree to binding arbitration in its contract with Yates Paving. 181

<sup>174. 251</sup> Ga. App. 441, 554 S.E.2d 584 (2001).

<sup>175.</sup> Id. at 441, 554 S.E.2d at 585.

<sup>176.</sup> Id., 554 S.E.2d at 585.

<sup>177.</sup> Id.

<sup>178.</sup> Id. at 441-42, 554 S.E.2d at 585-86.

<sup>179.</sup> Id., 554 S.E.2d at 585.

<sup>180.</sup> Id. at 442, 554 S.E.2d at 585.

<sup>181.</sup> Id., 554 S.E.2d at 585-86.

#### C. Arbitration Clause v. Termination Clause

In *Saturna v. Bickley Construction Co.*, <sup>182</sup> defendant homeowners appealed the trial court's order that the parties proceed to arbitration in accordance with their contract. When the Saturnas refused to submit to arbitration, Bickley filed a petition to compel arbitration, which was granted. Bickley prevailed, and the Saturnas filed an application for interlocutory appeal. <sup>183</sup>

The Saturnas argued that they were not subject to arbitration because two paragraphs of the contract were in conflict. One paragraph consisted of a standard arbitration clause and the other included a termination provision. 184 "The Saturnas d[id] not contend that the arbitration clause itself [was] invalid; rather, they argue[d] that because paragraph 9 offer[ed] an alternative avenue of redress to Bickley in the event that the contract [was] terminated, the arbitration clause in paragraph 8 [was] unenforceable." The court found this reasoning unpersuasive, determing that the language of the arbitration clause unambiguously expressed the parties' intent to arbitrate. 186 Furthermore, the court concluded that the arbitration clause was not in conflict with the termination provision just because the termination provision only provided for a variety of remedies to Bickley and not the Saturnas. 187 The court also found that the arbitration provision was not unconscionable simply because there was a lack of mutuality of The court stated, "Thus, the fact that Bickley had additional means of redress available did not render the contract unenforceable due to unconscionability."189

#### D. Modified Arbitration

City of Demorest v. City of Baldwin, 190 involved a dispute between the City of Demorest and the City of Baldwin arising out of an agreement to construct a water treatment plant to provide water to both cities. After several modifications to the cities' agreement, Demorest

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182. 252 Ga. App. 140, 555 S.E.2d 825 (2001).
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<sup>183.</sup> Id. at 140, 555 S.E.2d at 826.

<sup>184.</sup> Id. at 140-41, 555 S.E.2d at 826.

<sup>185.</sup> Id. at 141, 555 S.E.2d at 826.

<sup>186.</sup> Id.

<sup>187.</sup> *Id.* at 142, 555 S.E.2d at 827.

<sup>188.</sup> Id.

<sup>189.</sup> Id.

<sup>190. 251</sup> Ga. App. 855, 554 S.E.2d 824 (2001).

filed suit to enjoin Baldwin from enforcing the contract as modified. Baldwin, on the other hand, sought to enforce the contract and pursuant to O.C.G.A. section 9-15-14<sup>192</sup> filed a counterclaim for attorney fees. 193

Prior to trial, the parties prepared a consent order pursuant to which they agreed to submit the entire dispute to a "modified arbitration," whereby an arbitrator would make certain conclusions of law and findings of fact that the trial court subsequently would adopt. "The purported 'purpose of [the] modified arbitration' [was] to allow both parties to appeal [the] Court's order." In accordance with the parties' agreement, the trial court adopted the arbitrator's findings of fact and conclusions of law and entered a judgment in favor of Baldwin, and also awarded Baldwin its attorney fees. Rejecting Demorest's contention that the trial court erred in its adoption of the arbitrator's allegedly erroneous findings of fact and conclusions of law, the court of appeals explained that the trial court did exactly what the parties requested it to do, and any error in the result was of the parties' own making. 197

## E. Prejudgment Interest and Attorney Fees

In *Bush v. Northside Trucking, Inc.*, <sup>198</sup> plaintiff/subcontractor, Northside Trucking, Inc. ("Northside"), filed a mechanic's lien in the amount of \$23,105.58. Thereafter, Northside sued the contractor, ESFD, for breach of contract and sued the owner to foreclose the mechanic's lien. <sup>199</sup> In the court-ordered, nonbinding arbitration, the arbitrators found that "[Northside] is entitled to enforce a materialman's lien against the [Bushes'] property . . . in the sum of \$24,722.97 principal & [interest plus] \$6,000 [attorney fees]. [The arbitrators] award[ed] [ESFD] the sum of \$16,110[] to be paid by [the Bushes] unless the lien amount [was] paid by the Bushes."

Thereafter, the property owners failed to timely file a demand for trial, thereby consenting to the award under Atlanta Judicial Circuit Local

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191. Id. at 855, 554 S.E.2d at 825.
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<sup>192.</sup> O.C.G.A. § 9-15-14 (1998 & Supp. 2001).

<sup>193. 251</sup> Ga. App. at 855, 554 S.E.2d at 825.

<sup>194.</sup> Id.

<sup>195.</sup> *Id.* (alterations in original).

<sup>196.</sup> Id.

<sup>197.</sup> *Id.* at 856, 554 S.E.2d at 825.

<sup>198. 252</sup> Ga. App. 729, 556 S.E.2d 909 (2001).

<sup>199.</sup> Id. at 729-30, 556 S.E.2d at 910.

<sup>200.</sup> Id. at 730, 556 S.E.2d at 910 (alterations in original).

Procedure 1000(13j).<sup>201</sup> The Bushes argued on appeal that (1) prejudgment interest was not proper because the amount was not liquidated, (2) attorney fees were not proper because plaintiff had not alleged bad faith against the Bushes, and (3) the arbitration award was "confusing" and "open to interpretation" and should, therefore, be set aside.<sup>202</sup> The court of appeals agreed that because the amount of the debt was not liquidated, prejudgment interest was improper under Georgia law.<sup>203</sup> Furthermore, the court found that plaintiff's complaint had not alleged bad faith against the Bushes, and, therefore, the award of attorney fees against the Bushes was improper.<sup>204</sup> Finally, based on the court of appeals rulings on prejudgment interest and attorney fees, the court found that there was no confusion in the award, and that the Bushes were required to pay over the sum of \$16,100 to either Northside or ESFD.<sup>205</sup>

#### VI. LEGISLATION

The Georgia General Assembly passed several pieces of legislation relevant to construction law. Two stand out. First, the Assembly changed the scope of the "Redevelopment Powers Law," expanding it to include nonurban as well as urban areas. Second, the Assembly redefined the role of architects in certain activities.

#### A. Non-Urban Redevelopment

The Georgia General Assembly amended Chapter 44 of Title 36 of the Official Code of Georgia Annotated called the "Redevelopment Powers Law." The Assembly changed "the legislative purpose [of the Chapter] to include encouraging the redevelopment of economically and socially depressed nonurban areas within counties and municipalities." The Assembly also changed certain definitions, expanding the meaning of redevelopment and changing the characteristics of areas eligible for designation as redevelopment areas, among other things. 208

<sup>201.</sup> Id. (citing Atlanta Jud. Cir. Local P. 1000 (13j) (1997)).

<sup>202.</sup> Id. at 731-32, 556 S.E.2d at 911.

<sup>203.</sup> Id. at 731, 556 S.E.2d at 911.

<sup>204.</sup> Id

<sup>205.</sup> Id. at 731-32, 556 S.E.2d at 911.

<sup>206.</sup> Act of Apr. 18, 2001, No. 173, § 1, 2001 Ga. Laws 304 (codified as amended at O.C.G.A. §§ 36-44-2, -3, -8 (2001)).

<sup>207.</sup> Id.

<sup>208.</sup> Id.

#### B. Architecture

The Assembly also amended O.C.G.A. section 43-4-1 relating to general provisions applicable to architects.<sup>209</sup> The Assembly changed provisions regarding particular structures that do not require the seal of a registered architect and provided that the Article did not require construction contract administration services to be performed exclusively by architects, among other things.<sup>210</sup>

# C. Landscaping on Public Projects

In addition, the Assembly amended O.C.G.A. section 50-16-1.<sup>211</sup> This statute relates to general provisions regarding public property. The law now requires the state to provide for landscape plans to retain or replace trees on public development sites.<sup>212</sup>

#### VII. MISCELLANEOUS

This section mentions three cases that share little, thematically speaking, with the topics previously discussed. The cases fall into three categories: (1) bid on public projects; (2) private statute of limitations under an insurance contract; and (3) attorney fee award based on refusal to pay after the filing of a materialmen's lien.

#### A. Bid on Public Project

In *Letchas v. Sims Asphalt Co.*, <sup>213</sup> a city allotted \$225,000 for the construction of a softball field and parking lot. It then advertised for construction bids. <sup>214</sup> "The advertisement expressly stated that the City reserved the right to reject all bids and waive any formalities and that the City would not reimburse any bidder for its bid preparation costs." <sup>215</sup> Five companies bid on the project. Each bid was more than \$100,000 over the allotted budget, with defendant Sims's bid being the lowest. The City rejected all bids, reduced the scope of the project, and asked each company to rebid based on the revised scope. Each company did. Nonparty Lewis submitted the lowest revised bid, followed by

<sup>209.</sup> Act of April 26, 2001, No. 218, § 1, 2001 Ga. Laws 741 (codified as amended at O.C.G.A. § 43-4-1 (2001)).

<sup>210.</sup> Id.

<sup>211.</sup> Act of Apr. 18, 2001, No. 170, § 1, 2001 Ga. Laws 299 (codified as amended at O.C.G.A. § 50-16-1 (2001)).

<sup>212.</sup> Id.

<sup>213. 250</sup> Ga. App. 179, 550 S.E.2d 721 (2001).

<sup>214.</sup> Id. at 179, 550 S.E.2d at 721.

<sup>215.</sup> Id. at 179-80, 550 S.E.2d at 722.

defendant Sims. The City ultimately awarded the contract to nonparty Lewis. <sup>216</sup>

"Sims sued the city, the mayor, the members of the city council, and Lewis ([hereinafter] collectively the 'City'), seeking to enjoin construction . . ., to be awarded the construction contract, and to recover, among other damages, its bid preparation costs." Defendant Sims later moved for partial summary judgment on its claim for bid preparation costs, relying on a paragraph found in the instructions to bidders stating that, "if the lowest bid is above the City's budget, then the City will adjust the project scope with the apparent lowest qualified bidder by deleting construction items." The City moved for summary judgment on all of defendant Sims's claims. <sup>219</sup>

The trial court granted defendant Sims's motion and denied the City's, which the appellate court reversed.<sup>220</sup> In doing so, it reached two conclusions. First, the court decided that:

[t]he purpose of a bidding process for public project contracts is to assure the taxpayers receive quality work and goods for the lowest possible price . . . . But when a governmental entity frustrates the bidding process and awards the contract to an unqualified bidder, the injured low bidder may bring an action to recover its reasonable costs of bid preparation. <sup>221</sup>

Hence, defendant Sims could not recover its bid preparation costs without presenting evidence that Lewis was "unqualified," a burden defendant Sims failed to carry.<sup>222</sup>

Second, rejecting defendant Sims's reliance on the paragraph in the bid instructions, the court noted that "[a] governmental entity may reserve the authority to reject any or all bids, and the exercise of that authority is not improper."<sup>223</sup> Therefore, the court ruled as follows:

While the City might have chosen to adjust the scope of the project only with Sims after it submitted the initial lowest bid, the City was not obligated to do that given the City's clear right—established in the

<sup>216.</sup> Id. at 180, 550 S.E.2d at 722.

<sup>217.</sup> Id.

<sup>218.</sup> Id., 550 S.E.2d at 723.

<sup>219.</sup> Id., 550 S.E.2d at 722.

<sup>220.</sup> Id. at 181, 550 S.E.2d at 723.

<sup>221.</sup> *Id.* at 180, 550 S.E.2d at 722 (citing City of Atlanta v. J.A. Jones Constr. Co., 260 Ga. 658, 398 S.E.2d 369 (1990)).

<sup>222.</sup> Id., 550 S.E.2d at 723.

<sup>223.</sup> *Id.* at 181, 550 S.E.2d at 723 (citing Peeples v. Byrd, 98 Ga. 688, 25 S.E. 677 (1896)).

advertisement for bids—to reject all the bids and waive any formalities in the bidding process.  $^{224}$ 

#### B. Private Statute of Limitations Under an Insurance Contract

In Ogden v. Auto-Owners Insurance Co., 225 the homeowner appealed from the trial court's grant of summary judgment to Auto-Owners Insurance Co. ("Auto-Owners"). When the homeowner's house was damaged by fire on May 25, 1992, the homeowner made a claim against Auto-Owners to recover the damages. The proof of loss form showed that the full cost of repair or replacement would be \$45,595. Homeowner, at the instruction of Auto-Owners, hired Livingston Construction Company to perform the repair work. Auto-Owners subsequently issued a joint check to Ogden, Livingston Construction, and Ogden's mortgagee totaling \$32,506.92. Auto-Owners held back \$12,689 as "depreciation" until Ogden had signed the proof of loss statement. Thereafter, Auto-Owners sent several letters requesting that Ogden execute the proof of loss form, to which Ogden made no response. In the meantime, Livingston Construction sued Ogden for \$31,000 allegedly owed on the repair contract. Ogden counter-sued, claiming that Livingston failed to perform the work in a workman-like manner. On August 18, 1993, Auto-Owners wrote to Ogden's attorney, stating that it would not become involved in Livingston Construction's lawsuit and would not pay the depreciation amount of \$12,689 because the one-year statute of limitations in the insurance contract had expired. 226 However, communications continued between Auto-Owners and Ogden's attorney, and on March 3, 1994, Auto-Owners stated that "it was possible that Auto-Owners . . . would consider payment" of the \$12,689 amount. 227 Ogden sued Auto-Owners about six months later for its failure to have the repair work performed in a workman-like manner.<sup>228</sup>

On October 17, 1995, a jury ruled in favor of Livingston Construction in the amount of \$23,400, and for Ogden in the amount of \$3,800. As a result, Auto-Owners moved for summary judgment in its lawsuit with Ogden. The trial court found that Ogden's claim was time barred because Ogden had not filed suit within the one year following May 25, 1992, the date on which the fire occurred. Ogden appealed, arguing that Auto-Owners had waived its right to rely on the contractual statute of

<sup>224.</sup> Id.

<sup>225. 251</sup> Ga. App. 723, 554 S.E.2d 575 (2001).

<sup>226.</sup> Id. at 723-24, 554 S.E.2d at 576-77.

<sup>227.</sup> Id. at 724, 554 S.E.2d at 577.

<sup>228.</sup> Id.

limitations provision in the insurance contract.<sup>229</sup> The court of appeals agreed with Ogden, finding that an issue of fact with regard to Auto-Owners's waiver of the contractual limitations period existed because Auto-Owners "denied liability based on the limitation period, then, despite expiration of that period, engaged in further discussions and informed Ogden's counsel that Auto-Owners might consider payment. These particular circumstances raise[d] a question of fact as to waiver."<sup>230</sup>

Auto-Owners also argued that Ogden's claim was barred because of the doctrine of res judicata as applied to Ogden's lawsuit with Livingston Construction. However, the court of appeals found that res judicata did not bar Ogden's claim against Auto-Owners. The court stated:

"The doctrine of res judicata prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies and identical causes of action." Res judicata thus requires a claimant to bring in one action all claims against a party or its privies that arise out of a particular set of circumstances. 234

### C. Attorney Fees

In *Ishak v. Lanier Contractors Supply, Inc.*, <sup>235</sup> Lanier Contractors Supply, Inc. ("Lanier") sued contractor/developer and several homebuyers (1) to recover payment for materials supplied in the construction of the homes, and (2) to foreclose on the materialman's lien. <sup>236</sup> Lanier later added the individual owners of the contractor/developer as defendants, charging them with liability for the debts of the corporation under the theory of "piercing the corporate veil." The court of appeals found that there was ample evidence to support the trial court's judgment that the individual corporation owners should be held liable for the corporation's debts. <sup>238</sup> The court relied on the fact that the owners of the

<sup>229.</sup> Id. at 724-25, 554 S.E.2d at 577.

<sup>230.</sup> Id. at 726, 554 S.E.2d at 578 (citation omitted).

<sup>231.</sup> Id.

<sup>232.</sup> Id. at 727, 554 S.E.2d at 578.

<sup>233.</sup> *Id.* at 726, 554 S.E.2d at 578 (quoting Waldroup v. Greene County Hosp. Auth., 265 Ga. 864, 865, 463 S.E.2d 5, 6 (1995)).

<sup>234.</sup> Id.

<sup>235. 254</sup> Ga. App. 237, 561 S.E.2d 883 (2002).

<sup>236.</sup> Id. at 237, 561 S.E.2d at 884.

<sup>237.</sup> Id.

<sup>238.</sup> Id., 561 S.E.2d at 885.

contractor/developer had conveyed significant assets to themselves and had appropriated corporate funds for their own use.<sup>239</sup>

The court of appeals also affirmed the trial court's award of attorney fees and expenses to Lanier under O.C.G.A. section 13-6-11. The court explained:

In this case, there is evidence that [contractor/developer] acted in bad faith by automatically discontinuing all payments to Lanier for materials supplied upon the filing of a materialmen's lien, even though some payment was indisputably due. Moreover, Ishak caused Lanier unnecessary trouble and expense by helping strip the corporation of assets after suit was filed. The court based the amount of the fee award on documentation showing the tasks performed by counsel and the hourly charge, together with expert testimony concerning the reasonableness of the overall fee. The weight to be given this evidence was a matter for the trial court to determine. The fee awarded was authorized by the evidence.<sup>241</sup>

<sup>239.</sup> Id. at 238, 561 S.E.2d at 885.

<sup>240.</sup> Id. (quoting O.C.G.A. § 13-6-11 (1998 & Supp. 2001)).

<sup>241.</sup> Id., 561 S.E.2d at 885-86.