

Real Property

by **Linda S. Finley***
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I. INTRODUCTION

This Article discusses case law and legislative developments in Georgia real property law during the current survey period. Obviously not every case decided nor every statute enacted can be discussed. The cases and legislation discussed below were chosen for their significance to Georgia's practicing attorneys. Of particular note is one piece of legislation enacted in the 2002 session—the Georgia Fair Lending Act.¹ This statute is far broader than similar legislation enacted in other states and is sure to be the subject of extensive litigation in the coming years.

II. FAIR LENDING ACT

On April 22, 2002, former Governor Roy Barnes signed the Georgia Fair Lending Act into law.² The Act applies to most loans that are secured by an interest in the borrower's principal residence.³ The Act

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1. O.C.G.A. § 7-6A-1 to -11 (Supp. 2002).

2. *A Victory for Georgia Consumers*, ATLANTA J. & CONST., Apr. 23, 2002, at A13.

3. O.C.G.A. § 7-6A-2(9). Loans that exceed the conforming loan size limit for a single family dwelling established by the Federal National Mortgage Association are excluded from the Act's coverage. *Id.* This limit is currently \$300,700. Fed. Nat'l Mort. Assoc., Announcement 01-10 (2001). Reverse mortgages, bridge loans, and loans primarily for

establishes the following three categories of loans: home loans,⁴ covered home loans,⁵ and high-cost home loans.⁶ The first category, home loans, is the broadest category established by the Act, encompassing every loan that is subject to the Act.⁷ The covered home loan and high-cost home loan categories are subsets of the home loan category, encompassing home loans that exceed thresholds⁸ for either the points and fees⁹ charged in originating the loan or the annual percentage rate¹⁰ of the loan.¹¹

The Act contains provisions that establish different rights and duties for each category of loan. All home loans are subject to restrictions on the financing of certain types of insurance, and lenders are banned from encouraging the borrower to default on his or her existing debts.¹² Home loans are also subject to restrictions on late payment charges and on the fee that may be charged for responding to a request for payoff quotation.¹³ In addition to the restrictions placed on all home loans, covered home loans are also subject to additional restrictions on the “flipping” of home loans.¹⁴ Covered loans are also subject to a provision that allows borrowers who receive a notice of acceleration or foreclosure, or who have been in default for more than sixty days, to assert violations of the Act against the creditor as an offset in an original action or as a defense or counterclaim in an action to collect the amount owed.¹⁵

The high-cost home loan category is subject to the most restrictions under the Act.¹⁶ High-cost home loans are subject to restrictions on prepayment penalties,¹⁷ balloon payments,¹⁸ and negative amortiza-

business, agricultural, or commercial purposes are also excluded. O.C.G.A. § 7-6A-2(9).

4. “Home loan” is defined at O.C.G.A. section 7-6A-2(9).

5. “Covered home loan” is defined at O.C.G.A. section 7-6A-2(6).

6. “High-cost home loan” is defined at O.C.G.A. section 7-6A-2(8).

7. O.C.G.A. § 7-6A-2(9).

8. The threshold for high-cost home loans is defined at O.C.G.A. section 7-6A-2(19).

The threshold for covered home loans is defined at O.C.G.A. section 7-6A-2(6).

9. “Points and fees” are defined at O.C.G.A. section 7-6A-2(13).

10. “Annual percentage rate” is defined at O.C.G.A. section 7-6A-2(3) and 15 U.S.C. § 1606(a) (2000).

11. See O.C.G.A. § 7-6A-3(6), -(8).

12. *Id.* § 7-6A-3.

13. *Id.*

14. *Id.* § 7-6A-4. Flipping occurs when a borrower refinances a covered home loan that was consummated within the prior five years and the borrower does not receive a “reasonable, tangible net benefit” from the transaction. *Id.* “Reasonable, tangible net benefit” is not defined by the Act.

15. *Id.* § 7-6A-6(c).

16. See *id.* § 7-6A-5.

17. *Id.* § 7-6A-5(1).

18. *Id.* § 7-6A-5(2).

tion.¹⁹ High-cost home loans cannot contain provisions that call for an increase in the interest rate of the loan after default²⁰ or contain provisions that require a borrower to prepay more than two payments from the loan proceeds.²¹ High-cost home loans are subject to restrictions on arbitration²² and on the methods by which home improvement loans may be disbursed.²³ Lenders may not make high-cost home loans unless a reasonable creditor would believe the borrower could repay the loan.²⁴ Borrowers cannot receive high-cost home loans unless they have participated in an approved counseling program.²⁵ High-cost home loans are subject to requirements concerning notices of default,²⁶ notices of foreclosure,²⁷ restrictions on attorney fees that may be charged to the borrower,²⁸ and restrictions on the amounts necessary to cure defaults.²⁹ A creditor cannot charge a borrower a fee to modify or defer payment on a high-cost home loan.³⁰ High-cost home loans cannot contain provisions that allow the creditor to accelerate the indebtedness at its discretion.³¹ The note and security deed establishing a high-cost home loan must contain a statutorily mandated notice to purchasers or assignees of potential liability.³²

The Fair Lending Act establishes a private right of action in favor of borrowers.³³ A successful plaintiff may receive actual damages, statutory damages for certain violations, punitive damages, and the costs and attorney fees incurred in bringing the action.³⁴ The Act also establishes a right of rescission for borrowers of high-cost home loans.³⁵ The Act establishes criminal penalties for violations made knowingly.³⁶ The Act explicitly preempts local ordinances concerning home loans and bars ordinances that make eligibility to do business with a local

19. *Id.* § 7-6A-5(3).

20. *Id.* § 7-6A-5(4).

21. *Id.* § 7-6A-5(5).

22. *Id.* § 7-6A-5(6).

23. *Id.* § 7-6A-5(9).

24. *Id.* § 7-6A-5(8).

25. *Id.* § 7-6A-5(7).

26. *Id.* § 7-6A-5(13)(C).

27. *Id.* § 7-6A-5(11).

28. *Id.* § 7-6A-5(13)(A).

29. *Id.* § 7-6A-5(12).

30. *Id.* § 7-6A-5(10).

31. *Id.* § 7-6A-5(14).

32. *Id.* § 7-6A-5(15).

33. *Id.* § 7-6A-7(a).

34. *Id.*

35. *Id.* § 7-6A-7(e).

36. *Id.* § 7-6A-8(b).

government dependent on the terms of home loans originated by a lender.³⁷ The Act applies to all home loans made or entered into after October 1, 2002.³⁸

III. TITLE TO LAND

In the last twelve months, the court has addressed several cases that should serve to remind practicing attorneys that clarity of agreements involving real property is important, even if those agreements only tangentially involve the property.

In *Andrews v. Boykin*,³⁹ Raymond and Naomi Boykin purchased property in DeKalb County as tenants in common. Thereafter they divorced, and Raymond remained on the property with his mother, Birdie Mae Boykin.⁴⁰ The divorce decree did not mention the real or personal property, but stated, “[E]ach party shall retain and have sole right to those properties now in his or her possession.”⁴¹ The agreement was recorded in Fulton County.⁴²

Naomi later married James Andrews, and, upon her death, Andrews became administrator of her estate. Andrews quitclaimed any interest he might have in the real property to Naomi’s other heirs.⁴³

Following the divorce, Raymond and his mother continued to reside on the property and did so until his death. Following his death, Raymond’s son and daughter quitclaimed their interest in the property to Raymond’s mother. Mrs. Boykin paid taxes, insurance, and the mortgage on the property. Later, another of her sons, Melvin Boykin, assisted with the payments. Upon Mrs. Boykin’s death, Melvin was named administrator, and he deeded the property to himself. Melvin brought an action to quiet title to the real property. Adopting the Special Master’s Report, the trial court declared that Melvin alone had fee simple title to the property.⁴⁴

On appeal, the Georgia Supreme Court found that because the real property was not specifically referenced in the divorce decree (or a preliminary settlement agreement), the divorce decree did not convey the property to Raymond.⁴⁵ After their divorce, Raymond and Naomi

37. *Id.* § 7-6A-11.

38. 2002 Ga. Laws 455, 468 § 2.

39. 273 Ga. 386, 543 S.E.2d 12 (2001).

40. *Id.* at 387, 543 S.E.2d at 13-14.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 386-87, 543 S.E.2d at 13-14.

45. *Id.* at 388, 543 S.E.2d at 14.

Boykin continued to hold the property as tenants in common.⁴⁶ The court found that filing the divorce decree in the Fulton County Real Estate Records did not evidence an intent by the parties to convey the real property because the property was located in DeKalb County.⁴⁷ The court found that the Special Master's finding for Melvin was based solely upon the settlement agreement and divorce decree and remanded the case to the trial court to consider Melvin's claim of adverse possession.⁴⁸

In *Mitchell v. Mitchell*,⁴⁹ four siblings filed suit against the fifth sibling. The suit arose because of their late father's attempt to provide some antecedent estate planning (without benefit of counsel).

Gene Mitchell owned acreage in Lamar County. Seven years before his death, he drew a diagram of the property showing how he intended to divide the property equally among his five children. Pursuant to that diagram, Gene deeded five-acre parcels of land to each of his children. Gene then showed his son Richard where on the land he wanted Richard to build a house. Richard, with the help of his siblings, built a house on the parcel of land that his father showed him. During the construction, no one told Richard that the construction was on the wrong lot. Gene Mitchell died in 1991. A few months later, Richard's siblings claimed that Richard had constructed the house on the wrong lot. The siblings filed suit in 1997, seeking declaratory and equitable relief. Defendants counterclaimed for damages.⁵⁰

At trial, plaintiffs established that the house was not built on the land that was actually deeded to Richard. The jury returned a verdict for defendants, giving defendants the property upon which the house was built and a money award of one thousand dollars or the amount of taxes that had been paid by defendants, whichever was greater. Plaintiffs appealed.⁵¹

The supreme court looked to the equities of the situation and affirmed in part and reversed in part.⁵² Regarding the construction of the home on the wrong parcel, the court found that plaintiffs were not prevented at the time of construction from determining that an error had been made.⁵³ They participated in its construction and made no complaint

46. *Id.*

47. *Id.*

48. *Id.* at 388-89, 543 S.E.2d at 14.

49. 274 Ga. 633, 555 S.E.2d 436 (2001).

50. *Id.* at 633, 555 S.E.2d at 438.

51. *Id.*

52. *Id.*

53. *Id.* at 634, 555 S.E.2d at 437.

about its location until their father died.⁵⁴ Then, plaintiffs waited another six years before filing suit.⁵⁵ Therefore, the court ruled that the trial court properly exercised its inherent equity power.⁵⁶ However, the court reversed the money judgment award on the ground that the award was not supported by the evidence, but was based on guesswork.⁵⁷

Justice Carley concurred in part and dissented in part, stating that a judgment based on equity was inappropriate when there was an applicable rule of law.⁵⁸ Defendants had relied upon theories of adverse possession and equitable estoppel, and the trial court charged the jury with respect to those theories.⁵⁹ Justice Carley analyzed the law of adverse possession, finding that “[t]he same certainty of description which is requisite to constitute an instrument a conveyance of title is required in an instrument which is relied on as color of title.”⁶⁰ Because the disputed property was not described in the deed to defendants, Justice Carley opined that defendants could not successfully claim title by adverse possession under color of title.⁶¹ Defendants would have had to rely on a claim of prescriptive title by adverse possession for twenty years; therefore, Justice Carley believed that the trial court improperly extended the description in the deed to embrace the theory of a claim by color of title.⁶²

*Dodd v. Scott*⁶³ is another case that demonstrates why it is dangerous to transfer real property as a means of estate planning without consulting an attorney familiar with real estate title issues. In this case, Dodd held fee simple title in ten acres on which he had built a home. In 1984, without consideration, he conveyed six acres to his daughter, Jenifer Scott, and her husband, David Scott. When Dodd died, his wife claimed that the six acres belonged to Dodd’s estate and were being held by the Scotts in an implied trust. Dodd’s wife, as assignee of the estate, sued to have the property declared part of the estate. The Scotts maintained that the property was theirs and denied the existence of an implied trust. The trial court entered summary judgment for the Scotts,

54. *Id.*

55. *Id.*, 555 S.E.2d at 437-38.

56. *Id.*, 555 S.E.2d at 438.

57. *Id.*

58. *Id.* (Carley, J., dissenting).

59. *Id.* at 635, 555 S.E.2d at 438 (Carley, J., dissenting).

60. *Id.* (Carley, J., dissenting) (quoting *Mull v. Allen*, 202 Ga. 176, 179, 42 S.E.2d 360, 362 (1947)).

61. *Id.*, 555 S.E.2d at 438-39 (Carley, J., dissenting).

62. *Id.* at 635-36, 555 S.E.2d at 439 (Carley, J., dissenting).

63. 250 Ga. App. 32, 550 S.E.2d 444 (2001).

holding that the evidence proffered by Dodd's wife to show an implied trust was inadmissible hearsay. Therefore, the trial court determined that the only evidence before the court established that the property was a gift to the Scotts.⁶⁴

The question on appeal concerned both issues of evidence and implied trust. The court of appeals wrote a lengthy dissertation regarding the law of implied trusts, which included an analysis of the Georgia Trust Act.⁶⁵ The court considered whether the transaction between Dodd and the Scotts constituted a resulting trust pursuant to Official Code of Georgia Annotated ("O.C.G.A.") section 53-12-91 or a constructive trust pursuant to O.C.G.A. section 53-12-93(a).⁶⁶ The court held that the transaction was not a resulting trust because in order to create a resulting trust, the evidence must have shown that Dodd paid consideration for legal title in the property transferred to the Scotts.⁶⁷ But, no evidence showed that Dodd paid consideration for the transfer.⁶⁸ Rather, it showed that Dodd purchased the property two years before he transferred the property to the Scotts.⁶⁹ Thus, the court concluded that the evidence could not establish a purchase money resulting trust.⁷⁰

The court then considered whether the transaction resulted in a constructive trust and whether a trust was implied due to the circumstances, stating:

"[T]he person holding legal title to the property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principal of equity. Thus, where a person who receives property agrees to hold it for the benefit of another, that person may not use or sell it for his or her own benefit, for to do so would result in that person's unjust enrichment, a violation of an equitable principle."⁷¹

Under these circumstances, the court determined that a constructive trust is formed and the person who received the property must hold it in trust for the intended beneficiary.⁷² Therefore, the issue was whether the evidence proffered by Ms. Dodd showed that when the

64. *Id.* at 32-33, 550 S.E.2d at 446.

65. 1991 Ga. Laws 810 § 1 (codified at O.C.G.A. §§ 53-12-1 to -394 (1991)).

66. 250 Ga. App. at 33-34, 550 S.E.2d at 446-47 (construing O.C.G.A. §§ 53-12-91, -93(a)).

67. *Id.*, 550 S.E.2d at 447.

68. *Id.*

69. *Id.* at 34, 550 S.E.2d at 447.

70. *Id.*

71. *Id.* (quoting O.C.G.A. § 53-12-93(a)).

72. *Id.*

Scotts received the property, they had agreed to hold the six acres in trust for Dodd or his estate.⁷³

The court then analyzed the evidentiary rules regarding hearsay and how such rules would apply to the issue of whether a constructive trust to the title of the real property had been created.⁷⁴ In reversing the trial court's order of summary judgment, the court found that "[i]n all cases in which a trust is sought to be implied, the court may hear parol evidence of the nature of the transaction, the circumstances, and the conduct of the parties, either to imply or rebut the trust."⁷⁵ The ultimate issue becomes, therefore, "whether there was . . . a mutual understanding [for the creation of a trust], *not* whether such an understanding was expressed in plain and unambiguous terms. . . . Any evidence which might cast light upon this issue should be admitted to aid the jury in its factual determination."⁷⁶ The court further held that the conduct and declarations of the parties subsequent to the transfer of the real property was relevant to prove whether the transferor intended to create a trust.⁷⁷

In *Lionheart Legend, Inc. v. Norwest Bank Minnesota National Ass'n*,⁷⁸ Norwest sued Jacqueline Fowler and Lionheart Legend, Inc. ("Lionheart") to set aside an allegedly fraudulent security deed. The evidence showed that Fowler incorporated Lionheart in 1994 and that she and her mother were the company's two initial shareholders. Fowler personally loaned Lionheart the funds to purchase an investment property located near the Georgia governor's mansion that was valued at over one million dollars. Under an agreement between Fowler and Lionheart, Fowler and her mother were to provide funding for renovation, and Lionheart was to provide construction, design time, and expertise to implement the renovation.⁷⁹

In June 1995, Lionheart transferred the property to Fowler and her mother by quitclaim deed so they could use the property as collateral to obtain a loan. Fowler obtained a \$900,000 loan from Merrill Lynch and transferred the proceeds to Lionheart. The property served as collateral in a security deed to Merrill Lynch. After obtaining the loan, Fowler conveyed the property back to Lionheart via a quitclaim deed, but the

73. *Id.*

74. *Id.* at 34-35, 550 S.E.2d at 447-48.

75. *Id.* at 37, 550 S.E.2d at 449 (quoting O.C.G.A. § 53-12-94 (1991)).

76. *Id.*, 550 S.E.2d at 450 (quoting *Harrell v. Harrell*, 249 Ga. 170, 172, 290 S.E.2d 906, 907 (1982)).

77. *Id.*

78. 253 Ga. App. 663, 560 S.E.2d 120 (2002).

79. *Id.* at 663, 560 S.E.2d at 121-22.

quitclaim deed was never recorded. Fowler then transferred her shares in Lionheart to her ex-husband, James Holloway.⁸⁰

Almost two years later, in April 1997, Fowler gave a promissory note to Lionheart for three million dollars. In June 1997, Fowler pledged the property to secure the promissory note, executing a security deed in favor of Lionheart. No funds were exchanged between Fowler and Lionheart. According to Fowler, the promissory note was executed to compensate Lionheart for renovation of the property.⁸¹

On November 19, 1997, Lionheart recorded the security deed. Meanwhile, Fowler was already trying to use the property as collateral to obtain another loan. Fowler did not reveal the existence of the security deed in favor of Lionheart during the application process.⁸²

On the basis of a title examination and the loan application, Norwest agreed to lend Fowler one million dollars. The loan closed on December 30, 1997, and Fowler executed a security deed pledging the property as collateral to Norwest. The agreement expressly provided that the Norwest security deed was a second mortgage that was junior in priority only to the Merrill Lynch security deed.⁸³

When Fowler defaulted on the loan, Norwest accelerated the debt. However, before Norwest could foreclose, Merrill Lynch did so. The foreclosure by Merrill Lynch resulted in excess proceeds. Trying to recover the surplus before Lionheart, Norwest sued Fowler and Lionheart for fraud, negligent misrepresentation, and breach of contract. Norwest requested, among other relief, that the Lionheart security deed be set aside as a fraudulent conveyance.⁸⁴

Norwest moved for, and was granted, partial summary judgment, and the trial court ordered Fowler to pay Norwest the entire loan amount with interest. The court ruled that the Lionheart security deed was a fraudulent conveyance, declared the deed null and void, and found that Norwest was entitled to all surplus proceeds. Lionheart appealed. Fowler did not.⁸⁵

The court of appeals found that in order to establish fraud, "a creditor must prove both that the grantor had fraudulent intent and that the grantee either had actual knowledge or reason to believe that the grantor's intent was fraudulent."⁸⁶ The court of appeals overruled the

80. *Id.* at 663-64, 560 S.E.2d at 122.

81. *Id.* at 664, 560 S.E.2d at 122.

82. *Id.*

83. *Id.*

84. *Id.*, 560 S.E.2d at 122-23.

85. *Id.* at 665, 560 S.E.2d at 123.

86. *Id.*

trial court, stating that “it is peculiarly the province of the jury to pass on these circumstances showing fraud. Except in plain and indisputable cases, scienter in actions based on fraud is an issue of fact for jury determination.”⁸⁷

The court disagreed with Norwest’s contention that Fowler’s failure to disclose the security deed held by Lionheart proved that the conveyance was fraudulent.⁸⁸ “In determining whether a conveyance is fraudulent, [the court] look[s] to the intention of the parties, which is ascertained from the facts and circumstances at the time of the conveyance.”⁸⁹ The court held that, although Fowler’s failure to disclose the existence of the prior security deed six months after its execution may be circumstantial evidence that the conveyance was fraudulent and may have established that Fowler was engaging in fraud at the time she closed the Norwest loan, such inaction did not establish, as a matter of law, that the earlier conveyance was fraudulent at the time it was made.⁹⁰

Norwest further argued that the security deed was a fraudulent conveyance under O.C.G.A. section 18-2-22(3)⁹¹ due to a lack of “valuable consideration.”⁹² The court, however, found that the value of the work Lionheart was to perform on the property was a question of fact and that the trial court erred in granting partial summary judgment on the basis of fraudulent conveyance.⁹³

Norwest also argued that Lionheart’s security deed was a nullity; therefore, it was entitled to summary judgment. After Fowler executed the Merrill Lynch security deed, she conveyed the property to Lionheart by a quitclaim and warranty deed that was not recorded.⁹⁴ The court’s initial inquiry was “whether a third party may assert the existence of an unrecorded deed.”⁹⁵

“Georgia’s recording acts are intended to protect bona fide purchasers of property who first record their deed without notice of a prior unrecorded interest in the same property.” Since the recording requirement is intended to protect innocent parties, it would produce

87. *Id.* (quoting *Remax N. Atlanta v. Clark*, 244 Ga. App. 890, 894-95, 537 S.E.2d 138, 142 (2000)).

88. *Id.* at 665-66, 564 S.E.2d at 123.

89. *Id.* at 666, 560 S.E.2d at 123 (citing *Oxford v. Hasty*, 213 Ga. App. 539, 541, 445 S.E.2d 276, 278 (1994)).

90. *Id.*, 560 S.E.2d at 124.

91. O.C.G.A. § 18-2-22(3) (1999).

92. 253 Ga. App. at 666, 560 S.E.2d at 124.

93. *Id.*

94. *Id.* at 667, 560 S.E.2d at 124.

95. *Id.*

an anomalous result to allow the parties to an unrecorded deed to profit by their failure to record the deed.⁹⁶

Because Fowler had signed and delivered the quitclaim and warranty deed to Lionheart, the court determined that it was binding upon the parties.⁹⁷ That is, Fowler had no title, and any security deed to Lionheart was a nullity.⁹⁸ Accordingly, the court affirmed the grant of summary judgment in favor of Norwest.⁹⁹

IV. EASEMENTS, COVENANTS, AND BOUNDARIES

In *Sloan v. Sarah Rhodes LLC*,¹⁰⁰ Rhodes and others owned real property through which ran an easement of access to and from a one-acre parcel belonging to appellants. Issues regarding the easement had long been litigated,¹⁰¹ but an issue of the easement's width arose when appellees cut trees and erected buildings within the easement's boundaries, which appellants claimed to be sixty feet. Appellants sought an injunction, and, after hearing the evidence, the trial court found that appellants were entitled to only the amount of land reasonably necessary for full enjoyment of their easement and concluded that a twenty-five foot right-of-way was sufficient. Appellants appealed, contending that the trial court erred by determining the amount of land necessary for full enjoyment of the easement.¹⁰² The court of appeals affirmed,¹⁰³ and the Supreme Court of Georgia granted certiorari.¹⁰⁴

"The question of what additional land or interest may be necessary . . . [for the] complete enjoyment of a road is a separate and distinct inquiry from the dimensions of the actual easement itself."¹⁰⁵ In this case, the supreme court held that the trial court and court of appeals had prematurely turned to the question of whether twenty-five feet was adequate for the full enjoyment of the easement.¹⁰⁶ The court stated that as a matter of law, enjoyment cannot be decided prior to a determination that the roadway had no fixed dimensions.¹⁰⁷ Instead,

96. *Id.* (quoting *Hardin v. City Wide Wrecker Serv.*, 232 Ga. App. 617, 618, 502 S.E.2d 548, 550 (1998)).

97. *Id.* at 668, 560 S.E.2d at 125.

98. *Id.*

99. *Id.*

100. 274 Ga. 879, 560 S.E.2d 653 (2002).

101. *See* *Martin v. First State Bank & Trust Co.*, 231 Ga. 511, 202 S.E.2d 447 (1973).

102. 274 Ga. at 879, 560 S.E.2d at 654.

103. *Martin v. Sarah Rhodes, LLC*, 248 Ga. App. 654, 548 S.E.2d 365 (2001).

104. 274 Ga. at 879, 550 S.E.2d at 654.

105. *Id.*

106. *Id.* at 880, 550 S.E.2d at 655.

107. *Id.* at 881, 550 S.E.2d at 655.

the court stated the initial focus should have been a determination of the width of the road on or about the time the street was established, which in this case was 1969.¹⁰⁸ When the trial court determined that the road width was not the full sixty feet claimed by appellants, it should have made an additional finding as to whether a narrower dimension had ever been made.¹⁰⁹ The trial court's failure to do so, according to the supreme court, was error.¹¹⁰

In *Morrison v. Derdziak*,¹¹¹ Derdziak sought a right-of-way easement across Morrison's property, alleging that it was the only way to egress and ingress Derdziak's property. Morrison introduced evidence showing that Derdziak had long used a lengthy dirt road as an alternate means to reach her property; therefore, a right-of-way across Morrison's property was not necessary.¹¹² The superior court approved Derdziak's right-of-way petition and named two assessors to address compensation to Morrison. Thereafter, the parties and the assessors agreed that the right-of-way was worth \$1,500. The assessors made no findings and did not file or record the award in the superior court. Derdziak did, however, pay the sum into the court's registry. She then built a roadway with a locked gate on Morrison's property.¹¹³

Morrison learned that Derdziak had constructed the roadway, and she appealed to a jury the trial court's order authorizing the right-of-way and appointment of assessors. Derdziak moved to dismiss the appeal because the superior court's evidentiary hearing was a bench trial; therefore, the court's finding, by necessity, was a final judgment capable of direct appeal. Derdziak claimed that the issue of the necessity of a right-of-way was *res judicata* in superior court. The court below agreed and dismissed Morrison's appeal to a jury.¹¹⁴

The court of appeals held that a superior court evidentiary hearing to determine whether a right-of-way is authorized is not a "bench trial."¹¹⁵ Georgia statute provides that a hearing in superior court is to be a "show cause hearing wherein the burden is on the respondent to show why a right-of-way should not be granted based on the declaration of necessity put forth in the petition."¹¹⁶ According to the court of appeals, "when . . . Morrison failed to show that a right-of-way should

108. *Id.* at 880, 550 S.E.2d at 655.

109. *Id.* at 881, 550 S.E.2d at 655.

110. *Id.*

111. 255 Ga. App. 89, 564 S.E. 2d 500 (2002).

112. *Id.* at 90, 564 S.E.2d at 501.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 91, 564 S.E.2d at 502.

not be granted out of necessity, the [trial] court correctly submitted the issue of compensation . . . to a board of assessors named in the court's order."¹¹⁷ But, even though the parties reached an agreement, the assessors' findings and award must have been filed and recorded before the right-of-way was granted.¹¹⁸ Because the assessors had not filed and recorded the assessors' award, the court determined that the appeal was not ripe under O.C.G.A. section 44-9-44.¹¹⁹ The court of appeals also noted that a notice of appeal to a jury in superior court filed within ten days of the filing and recording of the assessors' award is timely.¹²⁰

In *State Soil & Water Conservation Commission v. Stricklett*,¹²¹ the State Conservation Commission and the Broad River Soil and Water Conservation District ("the District") brought a complaint for equitable relief to force homeowners to remove their residence built near a dam because it allegedly interfered with the floodwater easement. The homeowners counterclaimed for intentional infliction of emotional distress, abusive litigation, and attorney fees.¹²²

In 1961 the District acquired a written easement over forty-nine acres. The easement allowed the District to construct a dam and impound waters, gave the District ingress and egress to maintain and operate the dam, and included a floodwater easement. Grantors of the easement could continue to use their land in any manner they chose as long as it was not inconsistent with the District's full use and enjoyment of the land.¹²³

In 1995 the Strickletts acquired a 5.78 acre tract of land that was, in part, burdened by the easement. In October 1995 the Strickletts began building a house upstream of the dam, above the normal level of the impounded water. The house was completed in February 1996. Prior to construction, the Strickletts consulted agents, likely of the National Resource and Conservation Service, to determine whether building restrictions existed, and they were told there were none. During construction, agents visited the Strickletts' home and told them everything looked fine. Six days following the completion of construction, the District informed the Strickletts that their home encroached on

117. *Id.*

118. *Id.*

119. *Id.* at 92, 564 S.E.2d at 503 (citing O.C.G.A. § 44-9-44 (2002) (requiring an appeal be filed within ten days of the filing and recording of the award)).

120. *Id.*

121. 252 Ga. App. 430, 555 S.E.2d 800 (2001).

122. *Id.* at 430, 555 S.E.2d at 801-02.

123. *Id.* at 431, 555 S.E.2d at 802.

the floodwater easement. A month later, the Strickledds were told their home would have to be removed.¹²⁴

In the trial court, the Strickledds moved for summary judgment on the District's equitable relief claim, arguing that, as a matter of law, their residence did not interfere with the District's easement and that equitable estoppel and laches barred the action. The court granted the Strickledds' summary judgment motion but dismissed their counter-claims. Both parties appealed.¹²⁵

The court of appeals reversed the trial court's granting of summary judgment.¹²⁶ While the court found that the encroachment of the District's floodwater easement was minor and did not substantially interfere with the easement, it did find some evidence showing the home interfered with the District's ability to operate and maintain the dam.¹²⁷ The dam, the court found, was likely to be reclassified under the Georgia Safe Dams Act.¹²⁸ Because the Strickledds' home might limit the District's options in bringing the dam into compliance with the Act, might alter the dam and spillway, and might create erosion problems, the court concluded that factual questions remained about whether the home affected the District's easement.¹²⁹

The court found that equitable estoppel and laches were not applicable due to public policy considerations.¹³⁰ While the District had knowledge of the Strickledds' construction plans both before and during the construction, it did not inform the Strickledds of the problem until after the completion of their home.¹³¹ Though laches and equitable estoppel might normally apply, the court found it was in the public's interest for the District to operate a safe dam.¹³² The court held that laches and equitable estoppel were not applicable because the public interest outweighed the Strickledds' claims.¹³³

Addressing the Strickledds' appeal, the court held that the trial court erred in dismissing their claim for intentional infliction of emotional distress.¹³⁴ While a frivolous lawsuit is not a sufficient basis for the tort claim, the court pointed out that the Strickledds alleged facts that

124. *Id.* at 432-35, 555 S.E.2d at 802-05.

125. *Id.* at 430, 555 S.E.2d at 801.

126. *Id.*

127. *Id.* at 433, 555 S.E.2d at 803-04.

128. *Id.* at 432, 555 S.E.2d at 803 (citing O.C.G.A. §§ 12-5-370 to -385 (2001)).

129. *Id.* at 433, 555 S.E.2d at 804.

130. *Id.* at 435, 555 S.E.2d at 805.

131. *Id.* at 434-35, 555 S.E.2d at 804-05.

132. *Id.* at 435, 555 S.E.2d at 805.

133. *Id.* at 436, 555 S.E.2d at 805.

134. *Id.* at 437, 555 S.E.2d at 806.

could be construed as extreme and outrageous behavior on the part of the District.¹³⁵ For example, the Strickleths alleged the District waited until the completion of the home to demand its removal, that lesser remedies existed, and that the District had not attempted to remove similar residences.¹³⁶ Evidence also supported the Strickleths' claim that the source of the dispute was a political rivalry rather than a genuine encroachment.¹³⁷

Finally, the court reversed the dismissal of the Strickleths' claim for litigation expenses because its dismissal was dependent upon dismissal of the claim of intentional infliction of emotional distress.¹³⁸ The Strickleths conceded that the abusive litigation claim was properly dismissed.¹³⁹ The court directed the trial court to consider attorney fees in light of the evidence produced at trial on the equitable relief action.¹⁴⁰

V. CONTRACTS AND BROKERS

A series of three contracts was at issue in *Bulloch South, Inc. v. Gosai*.¹⁴¹ The first contract called for the sale of a hotel and five acres of adjoining land for \$1.6 million. The first contract also called for the buyer, Gosai, to deposit \$10,000 in earnest money with the seller. The earnest money was to be refunded if the buyer could not obtain financing for the purchase within sixty days. The first contract did not establish a required interest rate for the financing and did not contain a legal description of the property.¹⁴²

The second contract was signed two months after the first and consisted of a sixty day option on the property and an agreement for the payment of an additional \$10,000 by the buyer. The second contract also stated that half of the money deposited with the seller would be refundable if the transaction did not close. The third contract was signed approximately two weeks after the second and extended the buyer's right to purchase the property for thirty days from the date the third contract was executed.¹⁴³ The third contract further stated that the buyer was giving the seller \$10,000 as "a [second] refundable deposit

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 437-38, 555 S.E.2d at 806-07.

139. *Id.* at 438, 555 S.E.2d at 807.

140. *Id.* at 436, 555 S.E.2d at 805.

141. 250 Ga. App. 170, 550 S.E.2d 750 (2001).

142. *Id.* at 171, 550 S.E.2d at 752-53.

143. *Id.* at 171-72, 550 S.E.2d at 753.

on the date the third contract was signed and that [] half of the deposit was refundable.”¹⁴⁴

The buyer was unable to obtain the necessary financing for the transaction and demanded the return of the \$20,000 he had given to the seller. The seller refused to return the money, stating that the first \$10,000 was refundable only if the buyer had made a good faith effort to obtain the required financing. The seller denied that the second \$10,000 payment was refundable, stating it was payment for the option(s) on the property. The buyer sued for the return of the money. The court granted the buyer’s motion for partial summary judgment on the ground that all of the contracts were unenforceable due to the lack of a description of the property to be sold.¹⁴⁵

The court of appeals held that the contracts were not unenforceable due to the failure to describe the property.¹⁴⁶ The court stated that “the legal sufficiency of a description [of property] is a question of law for the court.”¹⁴⁷ The court further held that when specific performance is not an issue, a postal address provides a legally sufficient description of the property.¹⁴⁸ Because the first contract contained a postal address for the property, the contracts were not unenforceable on this basis.¹⁴⁹ The court then examined an alternative argument raised by the buyer—that the contract was unenforceable because it did not establish an interest rate for the required financing.¹⁵⁰ The seller argued that parol evidence could be used to explain this ambiguity.¹⁵¹ The court disagreed and held that the absence of an interest rate rendered the first contract too indefinite to be enforced.¹⁵² Accordingly, the buyer was entitled to the return of the first \$10,000.¹⁵³

The court then turned to the question of the second \$10,000.¹⁵⁴ The court found that the second contract contained a reiteration of the contract on the property and an option contract.¹⁵⁵ While the second contract’s provisions regarding the sale of the property were unenforce-

144. *Id.* at 172, 550 S.E.2d at 753.

145. *Id.*

146. *Id.*

147. *Id.* at 173, 550 S.E.2d at 754 (quoting *Swan Kang, Inc. v. Kang*, 243 Ga. App. 684, 688, 534 S.E.2d 145, 148 (2000)).

148. *Id.*

149. *Id.*

150. *Id.* at 174, 550 S.E.2d at 754.

151. *Id.*, 550 S.E.2d at 754-55.

152. *Id.*, 550 S.E.2d at 755.

153. *See id.*

154. *Id.*

155. *Id.*

able due to the lack of a specified interest rate, the court stated that the option required no such provision to be valid.¹⁵⁶ The court held that the option could be severed from the sale provision of the second contract and that the option was enforceable.¹⁵⁷ The court reached a similar result in its review of the third contract.¹⁵⁸ The court held that the seller could retain the second \$10,000 as payment for the option.¹⁵⁹

A dispute over earnest money was also at issue in *Sheridan v. Crown Capital Corp.*¹⁶⁰ Crown contracted to purchase 2.26 acres of commercial real estate and buildings from Sheridan. The contract called for the purchaser to deposit \$25,000 with an escrow agent and gave the buyer 120 days to inspect the property to determine if it was satisfactory for the buyer's intended use. Another section of the contract limited the intended use of the property to a commercial shopping center development. At the conclusion of the 120 day period, the buyer was required by the contract to deposit additional earnest money if it had not given prior notice of its intent to terminate the contract.¹⁶¹ After the withdrawal of a prospective anchor tenant rendered its development plan economically unfeasible, the buyer gave notice of its intent to terminate the contract because "the Property [was] unsuitable for the intended use."¹⁶² After both parties demanded the earnest money, the escrow agent interpleaded the earnest money.¹⁶³

The court granted the buyer's motion for summary judgment, finding that the contract made the buyer's intended use of the property any discretionary use by the buyer. The court concluded that the contract allowed the buyer the right to terminate the contract at its discretion. The court also held that the contract was unenforceable for lack of mutuality.¹⁶⁴

The court of appeals held that the superior court erred by reading the contract's terms in isolation from the whole and by failing to adopt an interpretation that upheld the validity of the contract, if possible.¹⁶⁵ The court first noted that it was a court's duty to construe a contract so that it would be binding on both parties, so long as this could be done

156. *Id.* at 175, 550 S.E.2d at 756.

157. *Id.*, 550 S.E.2d at 755-56.

158. *Id.* at 176, 550 S.E.2d at 756.

159. *Id.*

160. 251 Ga. App. 314, 554 S.E.2d 296 (2001).

161. *Id.* at 314, 554 S.E.2d at 297-98.

162. *Id.* at 314-15, 554 S.E.2d at 298.

163. *Id.* at 314, 554 S.E.2d at 297.

164. *Id.* at 315-16, 554 S.E.2d at 298-99.

165. *Id.* at 316-17, 554 S.E.2d at 299-300.

without violating any rule of law.¹⁶⁶ The court held that the contract's terms regarding intended use should be read in *pari materia* with its provisions establishing the use of the property as a commercial shopping center development.¹⁶⁷ The court further held that the inspection term was limited to the physical condition of the property and did not encompass the economic feasibility of the proposed development.¹⁶⁸ Further, the court held that the buyer's termination of the contract based on considerations other than physical condition of the property was improper and that the seller was entitled to the earnest money.¹⁶⁹

The issue in *Conway v. Romarion*¹⁷⁰ was whether the buyers had waived the right to rescind their purchase of a house. The buyers, the Conways, purchased a house from the Romarions. The home had extensive damage and a persistent smell due to the seller's cats urinating and defecating in a suspended ceiling and air ducts in the house. The buyers first noticed the odor a few days after closing.¹⁷¹ Further investigation revealed "cat markings" throughout the house.¹⁷² The buyers spent approximately \$32,000 in an attempt to repair the damage and eliminate the odor. Ultimately, approximately one month after closing, the buyers demanded rescission of the sale of the house. After the sellers refused to rescind, the buyers filed suit for fraud, seeking \$32,000 in damages. The court granted summary judgment to the sellers, holding that the buyers had waived their rescission claim and had failed to exercise due diligence to discover the defects.¹⁷³

The court of appeals held that the buyers had not waived their rescission claim.¹⁷⁴ The court noted that the buyers made their rescission claim promptly and had not taken any action inconsistent with the intent to rescind.¹⁷⁵ The court rejected the argument that the buyers' claim for damages amounted to an election of remedies, stating that the buyers had made only those repairs necessary to make the house liveable until the dispute was resolved.¹⁷⁶ The court also brushed aside the sellers' argument that the buyers had not actually asserted a rescission claim in their complaint, finding that the state

166. *Id.* at 316, 554 S.E.2d at 299.

167. *Id.*

168. *Id.* at 317, 554 S.E.2d at 299-300.

169. *Id.* at 317-19, 554 S.E.2d at 299-301.

170. 252 Ga. App. 528, 557 S.E.2d 54 (2001).

171. *Id.* at 528-29, 557 S.E.2d at 55-56.

172. *Id.* at 530, 557 S.E.2d at 56.

173. *Id.*

174. *Id.*

175. *Id.* at 531, 557 S.E.2d at 57.

176. *Id.*

court should have allowed the buyers to amend the complaint to include the rescission claim.¹⁷⁷ The court also rejected the sellers' argument that the buyers' rescission claim was barred by the merger clause in the contract, noting that the sellers' disclosure statement was incorporated into the contract and that misrepresentations contained in it or in other portions of the contract would remain actionable under the merger clause.¹⁷⁸ Finally, the court found that there was sufficient evidence the sellers had taken active steps to conceal the pet damage to create a jury question on the issue of the buyers' due diligence.¹⁷⁹

Fraudulent inducement to contract was also at issue in *Payne v. Harbin*.¹⁸⁰ In that case, Harbin owned real property known as Bogan Mountain. Harbin decided to sell the property and had the property appraised by a broker named Kelley.¹⁸¹ Later, Harbin requested that Kelley sell the property as a "pocket listing," without any advertising or official posting. A partner of Kelley's, Anderson, contacted one of his clients, Powers, concerning the property. Powers was interested in the property and attempted to obtain financing from O'Hearn. O'Hearn could not finance the purchase but gave Powers permission to use O'Hearn's name in negotiating the purchase. O'Hearn refused to sign any documents related to the transaction so that he would not become legally obligated in any way. Powers, using O'Hearn's name, offered to purchase the property for approximately \$429,000. Harbin then sought an offer from Bain, a neighbor who had expressed an interest in purchasing the property. Bain offered \$650,000 for the property.¹⁸²

Harbin asked Kelley to determine Bain's creditworthiness. Kelley contacted a local banker and determined that Bain's credit was good, but because of the appraised value of the property, Bain could borrow only \$300,000 to purchase the property. Harbin, fearing that Bain could not raise the funds to purchase the property, accepted the offer Powers had made in O'Hearn's name. Harbin signed documents memorializing the sale to O'Hearn.¹⁸³ Around the same time Bain offered to purchase the property from Powers for \$700,000. Powers accepted Bain's offer. Anderson then signed O'Hearn's name to those documents and the

177. *Id.* at 532, 557 S.E.2d at 57-58.

178. *Id.*, 557 S.E.2d at 58.

179. *Id.* at 533-34, 557 S.E.2d at 59.

180. 254 Ga. App. 402, 562 S.E.2d 772 (2002).

181. *Id.* at 402, 562 S.E.2d at 774. The appraisal valued the property at \$496,000. *Id.*

182. *Id.* at 402-03, 562 S.E.2d at 774.

183. *Id.* at 403-04, 562 S.E.2d at 774. No closing was held. *Id.* at 404, 562 S.E.2d at 774. The documents were presented to Harbin in her home, and she was told that O'Hearn would sign later. *Id.*

documents memorializing the sale to Bain.¹⁸⁴ Upon discovering the details of the two transactions, Harbin sued Kelley, Kelley's brokerage firm, Powers, and Payne, who was the attorney who drafted the documents and presented them to Harbin.¹⁸⁵

Harbin asserted claims for fraud, negligence, breach of contract, and breach of fiduciary duty. Defendants moved for summary judgment, which the court denied. An interlocutory appeal followed.¹⁸⁶ The court of appeals described the case as one of "cold feet and subsequent regret."¹⁸⁷ The court found that Harbin was unwilling to take the risk that Bain would not be able to fund his offer and had chosen to accept the lower offer from O'Hearn.¹⁸⁸ Although it was uncontroverted that Powers had used O'Hearn as a straw man, the court did not find the identity of the purchaser to be a material fact.¹⁸⁹ Harbin, the court stated, was only interested in the ability of the purchaser to pay cash, not in the purchaser's identity.¹⁹⁰ Because there was no misrepresentation of material fact, the court held that Harbin's fraud claim failed as a matter of law.¹⁹¹ Because Harbin had gotten what she contracted for, her breach of contract claim failed as well.¹⁹² Harbin's negligence and fiduciary duty claims failed because none of the defendants violated a duty to her.¹⁹³

VI. FORECLOSURE

The issue in *Dorsey v. Mancuso*¹⁹⁴ was the res judicata effect of the confirmation of a nonjudicial foreclosure sale. In *Dorsey* the executor of an estate borrowed money from defendant, Mancuso. To secure the debt, the executor executed a security deed on property owned by the estate. The security deed did not indicate the executor's representative capacity. After the executor defaulted on repayment of the debt, defendant conducted a nonjudicial foreclosure of the property. Defendant was the only bidder at the foreclosure sale. The Superior Court of Fayette County subsequently confirmed the sale. After a new administrator was

184. *Id.* at 403-04, 562 S.E.2d at 774-75. O'Hearn subsequently executed a quitclaim deed to Bain to alleviate any potential clouds on title. *Id.*

185. *Id.*, 562 S.E.2d at 775.

186. *Id.* at 402-04, 562 S.E.2d at 773-75.

187. *Id.* at 405, 542 S.E.2d at 775.

188. *Id.*

189. *Id.* at 404-05, 542 S.E.2d at 775.

190. *Id.* at 405, 542 S.E.2d at 775.

191. *See id.* at 405-06, 542 S.E.2d at 775-76.

192. *Id.* at 406, 542 S.E.2d at 776.

193. *Id.* at 405-06, 562 S.E.2d at 775-76.

194. 249 Ga. App. 259, 547 S.E.2d 787 (2001).

appointed for the estate, the administrator and heirs sued to set aside the foreclosure sale.¹⁹⁵ The administrator and heirs argued that the former executor had signed the security deed in his individual capacity and had conveyed only his “expected inheritance” in the property.¹⁹⁶ The court granted summary judgment for defendant, finding that the confirmation proceeding barred the action under the doctrines of res judicata or collateral estoppel or both.¹⁹⁷

The court of appeals reversed, finding that confirmation proceedings determine only whether a foreclosure “was properly advertised and brought the fair market value of the land.”¹⁹⁸ The court held that the issue of whether the former executor could use an undivided interest in estate property to secure his personal debt could not have been litigated in the confirmation proceeding and, thus, was not barred by res judicata or collateral estoppel.¹⁹⁹

In *Reeves v. Sanderlin Agricultural Services, Inc.*,²⁰⁰ the court of appeals examined the doctrine of merger of estates.²⁰¹ Reeves borrowed money from Sanderlin. The debt was secured, inter alia, by a security deed on a tract of land owned by Reeves and on a tract of land owned by Reeves’s daughter. After the debt went into default, Sanderlin threatened to foreclose the property owned by the daughter. The daughter subsequently quitclaimed the property to Sanderlin. After obtaining a default judgment in a suit on the note, Sanderlin initiated foreclosure of the tract of land owned by Reeves. Reeves filed a motion to enjoin the foreclosure, arguing that, under the doctrine of merger of estates, the debt was extinguished. The superior court denied the motion.²⁰²

The court of appeals found that a merger of estates would not take place unless the parties intended a merger to occur.²⁰³ The court held that “unless a clear intent to the contrary is expressed, the existence of more than one piece of collateral is in itself evidence that the parties did

195. *Id.* at 259-60, 547 S.E.2d at 788.

196. *Id.* at 260-61, 547 S.E.2d at 788.

197. *Id.* at 259-60, 547 S.E.2d at 788.

198. *Id.* at 261, 547 S.E.2d at 789 (quoting *Harris & Tilley, Inc. v. First Nat’l Bank*, 157 Ga. App. 88, 91, 276 S.E.2d 137, 140 (1981)).

199. *Id.* at 262, 547 S.E.2d at 789.

200. 249 Ga. App. 882, 549 S.E.2d 837 (2001).

201. *Id.* at 883-84, 549 S.E.2d at 838-39. The doctrine of merger of estates is codified at O.C.G.A. section 44-6-2 (1991 & Supp. 2002), which states: “If two estates in the same property shall unite in the same person in his individual capacity, the lesser estate shall be merged into the greater.”

202. *Id.* at 882-83, 549 S.E.2d at 838.

203. *Id.* at 883-84, 549 S.E.2d at 838-39.

not intend for the debt to be extinguished upon the foreclosure or voluntary surrender of less than all the collateral.”²⁰⁴ Finding that both parties had continued to treat the debt as valid after the execution of the quitclaim deed, the court of appeals affirmed the decision of the superior court.²⁰⁵

In *Jones v. Bank of America Mortgage*,²⁰⁶ the court of appeals decided whether unsubstantiated affidavits by the plaintiffs in a wrongful foreclosure action were sufficient to create an issue of material fact for trial.²⁰⁷ When Bank of America instituted nonjudicial foreclosure proceedings against property owned by Jones, Jones disputed that the loan was in default. The bank continued the foreclosure and was the successful bidder at the foreclosure sale. Jones filed suit, seeking to set aside the foreclosure and to recover damages from the bank. The bank moved for summary judgment, submitting business records and affidavits showing that Jones had defaulted by failing to make the monthly payments on the debt as they came due. In response, Jones and his wife submitted affidavits stating that the loan was not in default and that the bank had accepted all payments made before foreclosure was initiated. The superior court granted the bank’s motion for summary judgment.²⁰⁸ The court of appeals affirmed the judgment of the superior court, holding that Jones’s affidavits were “self-serving and conclusory” and, in the absence of facts to substantiate them, the affidavits were insufficient to create an issue of fact for a trial.²⁰⁹

VII. LANDLORD/TENANT

In *Insurance Industry Consultants v. Essex Investments, Inc.*,²¹⁰ the court of appeals considered the enforceability of a renewal provision in a commercial lease.²¹¹ The lease provision at issue granted the lessee two options to renew the lease for three-year periods. The lessee was required to give written notice of its intent to renew four months prior to the expiration of the lease.²¹² The renewal provision stated the rental rate would be for “fair market rental with fair market escalations” based on “comparable premises in comparable properties within the

204. *Id.* at 884, 549 S.E.2d at 839.

205. *Id.*

206. 254 Ga. App. 217, 561 S.E.2d 867 (2002).

207. *Id.* at 219, 561 S.E.2d at 868.

208. *Id.* at 217-19, 561 S.E.2d at 867-68.

209. *Id.* at 219, 561 S.E.2d at 868.

210. 249 Ga. App. 837, 549 S.E.2d 788 (2001).

211. *Id.* at 840-43, 549 S.E.2d at 791-93.

212. *Id.* at 837, 549 S.E.2d at 790.

Northwest office submarket.”²¹³ The parties held discussions concerning renewal, and the landlord sent a proposal for renewal to the tenant. No renewal was executed, and the tenant never gave written notice of intent to renew. When the landlord informed the tenant that it would not renew the lease, the tenant stated that it would not vacate the premises at the end of the lease. The landlord then filed an action for declaratory judgment.²¹⁴

The trial court found that the tenant had sufficiently exercised its renewal option, but concluded that the renewal provision of the lease was not enforceable. The trial court also denied both parties’ requests for attorney fees.²¹⁵ The court of appeals affirmed the trial court’s ruling that the renewal provision was unenforceable.²¹⁶ The court found that a renewal provision had to specify the terms and conditions of renewal “with such definite terms and certainty that the court may determine what has been agreed on.”²¹⁷ The court elaborated that a renewal provision could either specify both the length of the renewal and the rent to be paid, or it could “furnish a certain and definite method for their ascertainment.”²¹⁸ The court found the renewal provision at issue did not provide a sufficient key to determining the rent for the term of the renewal.²¹⁹ The renewal provision did not define the terms it used and did not provide an objective method to determine the amount of “fair market rent” or what “comparable properties” might be.²²⁰ The renewal provision also failed to specify the person or agency charged with defining those terms and determining the fair market rental rate.²²¹

213. *Id.* at 838, 549 S.E.2d at 790.

214. *Id.* at 838-39, 549 S.E.2d at 790-91.

215. *Id.* at 839, 549 S.E.2d at 791.

216. *Id.* at 843, 549 S.E.2d at 793.

217. *Id.* at 840, 549 S.E.2d at 792 (quoting *McCormick v. Brockett*, 167 Ga. App. 325, 325, 306 S.E.2d 344, 345 (1983)).

218. *Id.* at 841, 549 S.E.2d at 792 (quoting *McCormick*, 167 Ga. App. at 325, 306 S.E.2d at 345).

219. *Id.*

220. *Id.* at 842, 549 S.E.2d at 793.

221. *Id.* The court of appeals reversed the trial court’s ruling that the landlord was not entitled to recover the costs and attorney fees incurred in bringing the action. *Id.* at 844, 549 S.E.2d at 794. The court found that the action was one to enforce the provisions of the lease and, thus, fell within the lease provision requiring the tenant to pay expenses the landlord incurred in enforcing the lease. *Id.* The court of appeals rejected the tenant’s argument that the landlord was required to give notice under O.C.G.A. section 13-1-11 (1982 & Supp. 2002) before enforcing the attorney fees provision of the lease. *Id.*

A renewal provision was also at issue in *AMB Property, L.P. v. MTS, Inc.*²²² The lease at issue in that case contained a provision that set the rental rate upon renewal at the greater of the base rent for the last year of the original lease term or the then existing market rental rate for comparable shopping centers. After the tenant exercised its renewal option, a dispute arose over the rental rate for the renewal. The landlord insisted on a “market rate” that it had calculated; the tenant insisted that the base rent for the last year of the original lease term be the renewal rate. When no agreement was reached, the tenant filed a declaratory judgment action, and the landlord initiated a dispossessory proceeding. The superior court consolidated the two actions and ruled for the tenant.²²³

On appeal, both parties agreed that the lease language regarding “market rental rate” lacked a mechanism to determine the market rate and was unenforceable. The question presented to the court of appeals was whether the court could excise the unenforceable language concerning market rent, but retain the language regarding last year’s base rent. The superior court had found it could preserve the base rent language.²²⁴ Relying upon O.C.G.A. section 13-1-8(a),²²⁵ the court of appeals reversed.²²⁶ The court focused on the issue of what was a “distinct part” of the lease within the meaning of the statute.²²⁷ The court held that use of the words “the greater of” indicated an intent by the parties that renewal rent be determined by use of an integrated formula that required “two components be compared and [t]he greater of those two components be the amount of rent.”²²⁸ The court stated that removing the unenforceable component destroyed the formula because there would be nothing against which to compare the other component.²²⁹ The tenant argued that the court could excise the “greater of” language as well, leaving the last-year’s-base-rent language to stand alone.²³⁰ The court of appeals rejected this argument on the ground that it would result in a pricing term different from that

222. 250 Ga. App. 513, 551 S.E.2d 102 (2001).

223. *Id.* at 513, 551 S.E.2d at 103-04.

224. *Id.* at 513-14, 551 S.E.2d at 104.

225. O.C.G.A. section 13-1-8(a) (1982 & Supp. 2002) states, “A contract may be either entire or severable. In an entire contract, the whole contract stands or falls together. In a severable contract, the failure of a distinct part does not void the remainder.”

226. 250 Ga. App. at 515, 551 S.E.2d at 105.

227. *Id.* at 514, 551 S.E.2d at 104.

228. *Id.*

229. *Id.*

230. *Id.* at 514-15, 551 S.E.2d at 104.

intended by the parties.²³¹ The court of appeals ruled that the entire renewal provision constituted a “distinct part” of the lease and had to be stricken as unenforceable.²³²

The duties of a building management company were at issue in *O’Connell v. Cora Bett Thomas Realty, Inc.*²³³ In that case, plaintiff, O’Connell, leased the basement and first floor of a historic building in Savannah. Cora Bett Thomas Realty, Inc. acted as the management company for the owner of the building.²³⁴ The lease provided that the landlord and manager were responsible for maintaining the foundation, roof, and walls of the building, including “keeping same water tight.”²³⁵ The lease also provided that the tenant would accept the premises “as is” and would repair and maintain all interior, nonstructural portions of the building.²³⁶ Finally, the lease contained a provision requiring the owner and manager to repair the leaking roof and gutters within thirty days after the lease was signed to keep the roof from leaking into the tenant’s space.²³⁷ All parties were aware at the time the lease was executed that the roof leaked. The lease was signed by O’Connell and the owner of the building, but not by Cora Bett Thomas Realty.²³⁸

Three days after he signed the lease, the ceiling of the building collapsed, pinning O’Connell under the rubble and breaking his neck. O’Connell sued the management company for negligence and breach of contract. The court granted summary judgment for the management company on both claims. O’Connell appealed, arguing that the management company had a duty to inspect the roof. O’Connell relied upon several cases regarding a landlord’s duty to inspect leased premises.²³⁹ The court of appeals distinguished those cases, stating that a management company could not be held liable to the same degree as a landlord unless the management company had assumed total control over the premises.²⁴⁰ Because the management company presented uncontroverted evidence that it was not in total control of the premises and that the owner of the building remained responsible for ensuring repairs were

231. *Id.* at 515, 551 S.E.2d at 104. Removing the fair market language and the “greater of” language would transform the last year’s base rent language from a floor, or minimum rent, for renewal into a ceiling, or maximum rent, on renewal. *Id.*

232. *Id.*

233. 254 Ga. App. 311, 563 S.E.2d 167 (2002).

234. *Id.* at 311, 563 S.E.2d at 168.

235. *Id.* at 312, 563 S.E.2d at 168.

236. *Id.*

237. *Id.*

238. *Id.* at 311, 563 S.E.2d at 168.

239. *Id.* at 312-13, 563 S.E.2d at 169.

240. *Id.* at 313, 563 S.E.2d at 169.

made, the court of appeals affirmed the grant of summary judgment on the negligence issue.²⁴¹ The court also affirmed the grant of summary judgment on O'Connell's breach of contract claim, holding that the management company could not be held liable for breaching a contract it had not signed.²⁴²

VIII. ZONING

Within the survey term, the Georgia Supreme Court came full circle on the method by which a zoning appeal may be brought. The rule had been that if the subject matter of an appeal was zoning, an application for discretionary appeal was required.²⁴³ In *Sprayberry v. Dougherty County*,²⁴⁴ the Georgia Supreme Court altered this bright line rule.²⁴⁵ In *Sprayberry* appellants brought a mandamus action seeking to compel the county to rescind the rezoning of property neighboring their own. After the superior court denied mandamus, appellants brought a direct appeal.²⁴⁶ The Georgia Supreme Court examined its jurisdiction over the appeal sua sponte.²⁴⁷ The court stated that “[w]here a zoning case does not involve superior court review of an administrative decision, the trial court’s order does not come within the purview of O.C.G.A. [section] 5-6-35(a)(1) and no application for appeal need be filed.”²⁴⁸ Despite a strong dissent by Justice Hines warning that “under the majority’s decision, parties will not pursue resolution of administrative disputes in the proper administrative forums, but will file ‘original’ actions such as petitions for writs of mandamus and declaratory judgments challenging the constitutionality of ordinances, thus improperly securing a right of direct appeal,”²⁴⁹ the court held that a direct appeal was proper.²⁵⁰

It did not take long for practitioners to take advantage of the opportunity created by *Sprayberry*. In *White v. Board of Commissioners of McDuffie County*,²⁵¹ a group of McDuffie County residents filed two actions seeking to reverse the rezoning of nearby property. Defendants

241. *Id.*

242. *Id.* at 314, 563 S.E.2d at 170.

243. *O.S. Adver. Co. v. Rubini*, 267 Ga. 723, 724, 482 S.E.2d 295, 296 (1997).

244. 273 Ga. 503, 543 S.E.2d 29 (2001).

245. *See id.* at 504, 543 S.E.2d at 30.

246. *Id.* at 503, 543 S.E.2d at 29.

247. *Id.* at 503-04, 542 S.E.2d at 29-30.

248. *Id.* at 504, 543 S.E.2d at 30 (quoting *King v. City of Bainbridge*, 272 Ga. 427, 428, 531 S.E.2d 350, 351 (2000)).

249. *Id.* at 507, 543 S.E.2d at 32.

250. *Id.* at 504, 543 S.E.2d at 30. The court affirmed the trial court’s denial of mandamus due to the absence of a transcript of the proceedings below. *Id.*

251. 252 Ga. App. 120, 555 S.E.2d 45 (2001).

moved for summary judgment in both actions, and the trial court consolidated the two actions for ruling on the motions. The trial court granted defendants' motions for summary judgment, and plaintiffs appealed.²⁵² Defendants moved to dismiss the appeal, arguing that because the case involved zoning issues, plaintiffs were required to apply for discretionary review.²⁵³ The court of appeals rejected defendants' argument, stating, "The discretionary appeal procedure does not apply to this case, which involves no appeal from a local administrative decision."²⁵⁴ Because plaintiffs filed original actions seeking injunctive and declaratory relief, rather than appealing the decisions of the county commissioners, they were entitled to a direct appeal.²⁵⁵

The Georgia Supreme Court reversed course in *Ferguson v. Composite State Board of Medical Examiners*.²⁵⁶ In *Ferguson* appellant filed a direct appeal from the superior court's denial of mandamus relief from a decision of the Composite State Board of Medical Examiners that denied reinstatement of his medical license.²⁵⁷ The Georgia Supreme Court examined the question of jurisdiction sua sponte and found that the direct appeal was improper.²⁵⁸ Dismissing the appeal, the court held that "[w]hile mandamus may be subject to a direct appeal as a matter of procedure, if the underlying subject matter requires an application to appeal, then the discretionary appeal procedures must be followed."²⁵⁹ The court explicitly overruled the holding in *Sprayberry* that no application for discretionary appeal was required when review was sought of a denial of mandamus from a zoning decision.²⁶⁰

IX. TRESPASS

In *Hollifield v. Monte Vista Biblical Gardens, Inc.*,²⁶¹ Hollifield owned land adjacent to that owned by Monte Vista Biblical Gardens and Frost. Hollifield constructed a fence and a driveway that he knew

252. *Id.* at 121, 555 S.E.2d at 47. Plaintiffs filed both a direct appeal and an application for discretionary review, which was denied. *Id.* at 121 n.5, 122, 555 S.E.2d at 47 n.5, 48.

253. *Id.* at 121, 555 S.E.2d at 47.

254. *Id.* at 122, 555 S.E.2d at 48 (citing *Sprayberry*, 273 Ga. at 504, 543 S.E.2d at 30).

255. *Id.*

256. 275 Ga. 255, 257, 564 S.E.2d 715, 717 (2002).

257. *Id.* at 255-56, 564 S.E.2d at 716-17. Appellant sought review by both direct appeal and an application for discretionary review. The application for discretionary review was denied. *Id.* at 256, 564 S.E.2d at 717.

258. *Id.*

259. *Id.* at 257, 564 S.E.2d at 717.

260. *Id.* at 258, 564 S.E.2d at 718.

261. 251 Ga. App. 124, 553 S.E.2d 662 (2001).

encroached on the neighboring property, and he had begun construction on a building addition that also encroached on his neighbors. Hollifield claimed he intended to purchase the land and had spoken previously with Frost about such a purchase, but a sales price was never agreed upon. Monte Vista and Frost demanded the removal of the driveway. Hollifield promised to remove it, but failed to do so. Additionally, Hollifield knew that his addition violated the county building code because it was within five feet of his property line. However, he had not obtained a survey to locate the line. According to plaintiff's survey, the building encroached upon the adjacent land.²⁶²

Monte Vista and Frost sued Hollifield for ejectment and trespass. Hollifield counterclaimed to recover the cost of the improvements he made to the neighboring land. The trial court granted summary judgment in favor of Monte Vista and Frost on the writ of ejectment and Hollifield's improvement claim. Hollifield appealed.²⁶³

The court of appeals affirmed the summary judgment on the writ of ejectment, in part, because Hollifield could not claim estoppel as he failed to exercise reasonable diligence in identifying the property line.²⁶⁴ Further, the court found that Frost and Monte Vista had not waived their property rights under adverse possession because they protested within the seven years required for adverse possession under color of title.²⁶⁵ The court affirmed the trial court's grant of summary judgment to Monte Vista and Frost on Hollifield's counterclaim.²⁶⁶ Hollifield asserted that he had spent \$50,000 in landscaping the adjacent land. He claimed to have spent these sums because the adjacent property was an eyesore.²⁶⁷ However, the court rejected Hollifield's claim that he should recover the money under theories of quantum meruit and unjust enrichment.²⁶⁸ The court explained that Hollifield's claim failed under both theories because he did not anticipate receiving compensation when he rendered the landscaping service.²⁶⁹ He admitted that he landscaped the property for his own benefit, and the improvements were made without plaintiffs' knowledge.²⁷⁰ The claim also failed, the court asserted, because Hollifield did not demonstrate

262. *Id.* at 124-25, 553 S.E.2d at 665-66.

263. *Id.* at 124, 553 S.E.2d at 665.

264. *Id.* at 126, 553 S.E.2d at 666.

265. *Id.* at 128, 553 S.E.2d at 667-68.

266. *Id.* at 124, 553 S.E.2d at 665.

267. *Id.* at 128, 553 S.E.2d at 668.

268. *Id.* at 128-32, 553 S.E.2d at 668-70.

269. *Id.* at 129, 131, 553 S.E.2d at 669, 670.

270. *Id.* at 128, 131, 553 S.E.2d at 668, 670.

that his improvement had any value to the recipients.²⁷¹ Because the measure of damages under quantum meruit and unjust enrichment is the benefit to the recipient rather than the cost incurred, the court found that Hollifield failed to show any damages.²⁷²

In *Denton v. Browns Mill Development Co.*,²⁷³ the Supreme Court of Georgia granted certiorari to determine whether trespass is a tort that falls outside of Georgia's anti-SLAPP (Strategic Litigation Against Public Participation) statute.²⁷⁴ Defendant Denton was a DeKalb County resident who organized DeKalb Citizens for a Better Environment to preserve the county's natural areas. Browns Mill Development Company and Peach State Development Group (collectively "Browns Mill") were real estate development companies that developed projects on private property. Denton sought to inform citizens and the media of what he perceived to be the reluctance of state and local agencies to enforce soil erosion and water protection laws. He focused on developments and builders in DeKalb County, including Browns Mill. Denton prepared an assessment report that documented the alleged failure of Browns Mill and other developers to follow environmental regulatory law—complete with photos and statistics, which he sent to the media and select government officials.²⁷⁵

After the report was released, attorneys for Browns Mill sent letters to Denton referring to Denton's trespass upon their land, defamatory statements, and delivery of illegally obtained photographs to state and federal agencies. The letters threatened litigation. Thereafter, Browns Mill filed a complaint asserting causes of action for trespass, libel, slander, and intentional interference with business operations.²⁷⁶

Denton informed Browns Mill that the anti-SLAPP statute applied, noting that plaintiffs failed to comply with the statute because they had not filed the required verification.²⁷⁷ Browns Mill did not provide the verification, and Denton successfully moved to dismiss the complaint.²⁷⁸ Browns Mill appealed, and the court of appeals affirmed the trial court's dismissal of the slander, libel, and intentional interference with business relation claims, but reversed the dismissal of the trespass

271. *Id.* at 130, 131, 553 S.E.2d at 669.

272. *Id.*

273. 275 Ga. 2, 561 S.E.2d 431 (2002).

274. *Id.* at 2-3, 561 S.E.2d at 432. See O.C.G.A. § 9-11-11.1 (1993 & Supp. 2002).

275. 275 Ga. at 3, 561 S.E.2d at 432.

276. *Id.*

277. *Id.* See O.C.G.A. § 9-11-11.1.

278. 275 Ga. at 3, 561 S.E.2d at 432.

claim, holding that trespass was not within the scope of the anti-SLAPP statute.²⁷⁹

The Supreme Court of Georgia granted certiorari and a divided court affirmed the court of appeals.²⁸⁰ The majority construed the statute strictly, finding that its intent was to encourage the exercise of free speech regarding public issues while providing protections to the speaker.²⁸¹ The majority also concluded that the right of free speech does not include the right to trespass, even if the trespass was to collect information to use in a public debate because the act of trespass is completed before any act of communication occurs.²⁸²

In a three-member dissent, Justice Fletcher took a broader interpretation of the anti-SLAPP statute.²⁸³ Specifically, the dissent found that the statute is broad and that it requires verification for “‘any claim’ that arises from an act that ‘could reasonably be construed as an act in furtherance of the right of free speech or the right to petition the government . . . in connection with an issue of public interest or concern.’”²⁸⁴ The dissent interpreted the statute to include all acts of free speech and acts of petitioning the government as well as any acts that are taken to promote or advance such acts.²⁸⁵ Justice Fletcher wrote, “Looking at the plain language of the statute and the legislature’s intent, Denton’s act of walking on the Developers’ property can reasonably be construed as furthering the exercise of his rights [sic] to free speech and petition the government, and the Developers’ trespass claim therefore should have been verified.”²⁸⁶

X. TAXATION

The Georgia Legislature reviewed Title 48 in its 2002 session and significantly amended the title regarding tax execution, tax sale, redemption, and recovery of excess proceeds.²⁸⁷

O.C.G.A. section 48-4-1 relates to the procedure for sale under tax executions and was amended to provide that if two or more tax executions were levied against a defendant or a property, the tax

279. *Id.*

280. *Id.* at 2, 7, 561 S.E.2d at 430, 435.

281. *Id.* at 6, 561 S.E.2d at 434.

282. *Id.*

283. *See id.* at 7, 561 S.E.2d at 435.

284. *Id.* at 8, 561 S.E.2d at 435 (Fletcher, C.J., dissenting) (quoting O.C.G.A. § 9-11-11.1(b)).

285. *Id.* at 7-8, 561 S.E.2d at 435 (Fletcher, C.J., dissenting).

286. *Id.* at 10, 561 S.E.2d at 437 (Fletcher, C.J., dissenting).

287. 2002 Ga. Laws 1481 § 4 (codified at O.C.G.A. §§ 48-4-1, 48-3-19, 48-4-5, and 48-4-42 (2002)).

executions may be aggregated and a single sale may be conducted for the total amount due. The twelve-month period of redemption shall commence as to all executions on the date of the sale.²⁸⁸

Formerly, O.C.G.A. section 48-4-5, concerning payment of excess proceeds, provided that if the tax commissioner or tax collector received excess sums after paying taxes, costs, and expenses of the tax sale, then those sums “shall” be immediately paid to the person authorized to receive the excess. The statute was amended to provide that if there are excess proceeds, the tax commissioner or tax collector “may” file an interpleader action in superior court for the payment of the excess proceeds. The excess proceeds would then be distributed by order of the court to the intended parties.²⁸⁹

The amendments to Title 48 also changed the amount that a purchaser of a tax deed may demand for redemption of the property. With respect to sale of tax deeds after July 1, 2002, a person wishing to redeem property sold at a tax sale must pay the purchaser of the deed the following amounts: (1) the amount paid for the property at the tax sale as shown in the tax deed; (2) any taxes paid on the property by the purchaser after the sale for taxes; (3) any special assessments on the property; plus, (4) twenty percent of the sum of the amount paid for the property at tax sale for the first year or fraction of a year that has elapsed between the sale date and the redemption date. However, the amendment changed the former statute by decreasing the amount that must subsequently be paid to ten percent for each year or fraction of a year thereafter. Previously, the redemption penalty was twenty percent for each year until redeemed.²⁹⁰

Finally, the legislature deleted O.C.G.A. section 48-3-19, which had set forth the procedure for the transfer of tax executions to persons in exchange for payment of the execution. The provision was deleted in its entirety and reserved.²⁹¹ These amendments became law as of May 21, 2002.²⁹²

In addition to the recent legislation, the Georgia Supreme Court also reviewed tax redemption issues during the survey period. In *Mark Turner Properties, Inc. v. Evans*,²⁹³ Evans was the winning bidder at a tax sale in 1995 and was listed as the grantee in a recorded tax deed. In 1996 she tried to foreclose the right of redemption. However, also in

288. 2002 Ga. Laws 1481 § 2 (codified at O.C.G.A. § 48-4-1).

289. 2002 Ga. Laws 1481 § 3 (codified at O.C.G.A. § 48-4-5).

290. 2002 Ga. Laws 1481 § 4 (codified at O.C.G.A. § 48-4-42).

291. 2002 Ga. Laws 1481 § 1 (codified at O.C.G.A. § 48-3-19).

292. 2002 Ga. Laws 1483 § 5.

293. 274 Ga. 547, 554 S.E.2d 492 (2001).

1996, the title holders of record executed quitclaim deeds in favor of Mark Turner Properties, Inc. ("Mark Turner"). Appellant, Mark Turner, attempting to redeem the property, brought an action to cancel the tax deed, to enjoin Evans from foreclosing its right to redeem, and for damages. The trial court found that Mark Turner did not acquire a right to redeem from the quitclaim deeds and that it had not made the proper tender. But, the trial court held that the right to redeem had not been foreclosed, and appellant brought suit a second time on January 4, 1999, seeking the same remedies as in the first suit. Mark Turner then paid into the court registry a sum that it contended was sufficient for redemption.²⁹⁴

Both parties moved for summary judgment. The evidence showed that Evans paid the property taxes from 1994 to 1996 and again in 1998. Mark Turner paid the taxes in 1997. In January 1998, Mark Turner obtained a quitclaim deed that conveyed the right to redeem the property. In September 1998, Evans received a certified letter from Mark Turner asking her to inform it of the amount required to redeem the property. Evans did not respond to this inquiry or a number of others by appellant.²⁹⁵

The trial court found that by not responding to Mark Turner's letter, Evans had waived the requirements of tender. But the trial court also found that the amount Mark Turner had tendered into the court's registry was insufficient, that the tax deed had ripened by prescription on January 3, 1999, and, therefore, Mark Turner's right of redemption expired on that same day. Mark Turner appealed.²⁹⁶

The Georgia Supreme Court held, "The title acquired by a purchaser of a tax deed 'is not a perfect fee-simple title, but an inchoate or defeasible title, subject to the right of the owner to redeem within the time prescribed by the statute.'²⁹⁷ Accordingly, the court determined that "[a]ppellant's predecessors had an absolute right to redeem the property 'at any time within [twelve] months from the date of the sale' but . . . failed to exercise that right."²⁹⁸ However, the court explained that Evans had not given the statutorily required notice of foreclosure of the right to redeem; therefore, she could not have obtained fee-simple title to the property through statutory barment.²⁹⁹ Thus, the court

294. *Id.* at 547, 554 S.E.2d at 493.

295. *Id.* at 547-48, 554 S.E.2d at 493.

296. *Id.* at 548, 554 S.E.2d at 494.

297. *Id.* (quoting *Whitaker Acres v. Schrenk*, 170 Ga. App. 238, 240, 316 S.E.2d 537, 539 (1984)).

298. *Id.* (quoting O.C.G.A. § 48-4-40(1) (1999)).

299. *Id.*

stated, “the only remaining method by which the right to redeem could have been barred [was] the ripening of prescriptive title.”³⁰⁰ Contrary to the trial court’s order, the supreme court held that the fact that Evans had paid the property taxes, absent any conduct that would amount to adverse possession, was not sufficient to assert title by adverse possession.³⁰¹

Finally, the court considered how the amount to be tendered to bar redemption would be calculated.³⁰² Mark Turner relied on a previous version of O.C.G.A. section 48-4-42,³⁰³ which was the law at the time the sale took place, to calculate the sums.³⁰⁴ However, the court held that the tender amount should be calculated at the rate of the 1996 amendment to the statute because neither Evans nor Mark Turner’s right to the property had fully vested prior to the effective date of that amendment.³⁰⁵ Thus, the court held that the application of the amendment was not unconstitutionally retroactive.³⁰⁶ Practitioners should note that this holding is contrary to the 2002 amendments to the tax sale statute, because the statute specifically sets out that the redemption amount payable for all sales after July 1, 2002 shall be calculated pursuant to the 2002 amendment.³⁰⁷

XI. STUCCO

Construction issues regarding the use of stucco continue to be a hot topic among consumers and the Bar alike, particularly issues regarding the statute of limitations period.

In *Colormatch Exteriors, Inc. v. Hickey*,³⁰⁸ the supreme court attempted to settle prior limitation inconsistencies. In this case, the builders completed construction of a house before they obtained a purchaser. In April 1995, the Chatham County Building Inspections Department completed an inspection of the property. The builders contracted with the Hickeys to sell the property in June 1995 although the county did not issue the certificate of occupancy until July 1995.

300. *Id.*

301. *Id.* at 549, 554 S.E.2d at 494.

302. *Id.* at 550-51, 554 S.E.2d at 495-96.

303. O.C.G.A. § 48-4-42 (1997) (amended by O.C.G.A. § 48-4-42 (2002)).

304. 274 Ga. at 551, 554 S.E.2d at 495.

305. *Id.*

306. *Id.*

307. 2002 Ga. Laws 148 § 4 (codified at O.C.G.A. § 48-4-42).

308. 275 Ga. 249, 569 S.E.2d 495 (2002).

The purchase closed on July 26, 1995, after the certificate of occupancy was issued.³⁰⁹

The Hickeys discovered moisture damage beneath the synthetic stucco used in the construction of their home, and on April 26, 1999 filed suit against the builders and Colormatch, the manufacturer of the stucco. Against the builders, the homeowners asserted claims for negligent construction, breach of express and implied warranties, and negligent misrepresentation. Against the manufacturer, the homeowners asserted claims for product liability, negligent design and marketing, and negligent misrepresentation.³¹⁰ Finding that the four-year statute of limitations period for actions to realty provided in O.C.G.A. section 9-3-30³¹¹ had expired, the trial court granted summary judgment in favor of the builder and manufacturer on all counts. The homeowner appealed the order contending that the trial court failed to apply the correct statute of limitations to their claim for breach of implied warranty and had erred in determining when the cause of action accrued. The court of appeals reversed, concluding that the trial court should have applied the six-year limitation period for contract claims to the breach of implied warranty, and that the four-year statute of limitations for damage to realty did not preclude the remaining tort, fraud, and products liability claims.³¹²

The builder and manufacturer each appealed and the supreme court granted certiorari.³¹³ The supreme court reversed the court of appeals in part and affirmed in part holding that where a contractor had initially built the property for the purposes of sale and the property was sold, the limitation period would not commence until the date that purchasers bought the property. That is, the purchaser must bring suit against the builder within four years of the date of sale.³¹⁴

The court's analysis of the limitation period with regard to those claims brought against the manufacturer was entirely different, concluding that the period of limitation would expire as measured from the date of substantial completion.³¹⁵ Finding the court of appeals conclusion that the certificate of occupancy was a prerequisite to substantial completion was inconsistent with that court's own prece-

309. Hickey v. Bowden, 248 Ga. App. 647, 648, 548 S.E.2d 347, 348 (2001).

310. 275 Ga. at 249-50, 569 S.E.2d at 496.

311. O.C.G.A. § 9-3-30(a) (1982 & Supp. 2002).

312. 275 Ga. at 250, 569 S.E.2d at 496.

313. *Id.*

314. *Id.* at 252, 569 S.E.2d at 498.

315. *Id.* at 252-53, 569 S.E.2d at 498.

dent,³¹⁶ the supreme court concluded that the issuance of a certificate of occupancy by a governmental agency is not required to establish substantial completion.³¹⁷ Instead, “[a] building is substantially complete where the actual construction is finished and it could be physically used, despite some delay in the issuance of a certificate of occupancy.”³¹⁸ That is, against a manufacturer of a component of the house, homeowners are tied to the same limitation period as builders, which period commences at the time construction is completed.³¹⁹ Accordingly, the court of appeals was reversed.³²⁰

*Feinour v. Ricker Co.*³²¹ again looked at the limitation periods. Feinour contracted to buy a house Ricker was building that was covered on the exterior in synthetic stucco. The houses's certificate of occupancy was issued on September 23, 1993, and Feinour closed on the house later that month. Ricker agreed to a one-year limited warranty on the house beginning September 30 and was obligated to repair or replace construction defects. Shortly before the expiration of the limited warranty period, on September 18, 1994, Feinour notified Ricker of problems with water leakage. Ricker told Feinour that a workman would be sent over shortly, and a workman came to the property on October 3. The workman informed Feinour that the problem had been fixed, but in fact, he had only temporarily or cosmetically corrected the underlying problem which apparently arose out of the improper installation of the stucco.³²²

Six years later, an expert hired by Feinour determined that the improper installation of the stucco had resulted in major water damage to the infrastructure of the house. Feinour sued Ricker on September 28, 2000 “for breach of the construction contract, breach of implied warranty, breach of express warranty, fraud in concealing the defects, and negligent construction.”³²³ The trial court granted summary judgment to Ricker because it found that the tort claims had expired four years after the certificate of occupancy was issued, which was in 1997. According to the trial court, the contract, implied warranty, and express warranty claims had expired in 1999, six years after the certificate of occupancy had issued. Furthermore, the trial court

316. *Id.* at 253-54, 569 S.E.2d at 499 (citing *Hanna v. McWilliams*, 213 Ga. App. 648, 446 S.E.2d 741 (1994)).

317. *Id.*

318. *Id.* at 254, 569 S.E.2d at 499.

319. *Id.* at 253, 569 S.E.2d at 498-99.

320. *Id.* at 254, 569 S.E.2d at 499.

321. 255 Ga. App. 651, 566 S.E.2d 396 (2002).

322. *Id.* at 652, 566 S.E.2d at 397.

323. *Id.*

determined that there was no evidence of fraud by Ricker that prevented Feinour from discovering the defects prior to the expiration of the statute of limitations. Feinour appealed, asserting that her express warranty claim did not arise until the date of the attempted repair on October 3, 1994, and that the workman's superficial repairs delayed her discovery of the truth.³²⁴

The court of appeals once more reviewed the six-year versus the four-year statutes of limitation periods. The Court agreed with Feinour that the breach of Ricker's express warranty obligation did not occur until Ricker attempted unsuccessfully to remedy the defect on October 3, 1994.³²⁵ Because the suit on the express warranty was filed within six years of that date, summary judgment was improper.³²⁶ The court explained: "Since an express warranty to repair is not breached until the warrantor refuses to repair or inadequately repairs the defect, the statute of limitation[s] on that claim does not commence to run until that obligation is breached."³²⁷

In *Stancliff v. Brown & Webb Builders, Inc.*,³²⁸ the court of appeals reversed the trial court finding that it had misapplied authority regarding the responsibility of builders to provide fit and workmanlike construction to purchasers when the construction is in reality completed by subcontractors whose work builders do not supervise or control.³²⁹ In 1996 the Stancliffs purchased a home the defendant builders had constructed. The Stancliffs bought the home from owners who had purchased directly from builders. Once in the house, the Stancliffs discovered water seeping into the residence around the doors causing the doors and windows to warp. An inspection of the home revealed that the synthetic stucco, with which the house had been constructed, was improperly installed and that there was extensive water damage to the property.³³⁰

The Stancliffs sued the builders, its principals, and the company that had installed the stucco. They claimed the builders were negligent in constructing the home, supervising the subcontractors, and failing to adhere to industry standards. The builders moved for summary judgment and introduced affidavits of its principal officers stating that independent contractors had built the house without supervision by the

324. *Id.*

325. *Id.* at 653, 566 S.E.2d at 397.

326. *Id.* at 654, 566 S.E.2d at 398.

327. *Id.* at 655, 566 S.E.2d at 398-99.

328. 254 Ga. App 224, 561 S.E.2d 438 (2002).

329. *Id.* at 224-25, 561 S.E.2d at 438-39.

330. *Id.* at 224, 561 S.E.2d at 438.

principals who were unaware of any defects to the home. The Stancliffs responded by submitting a home inspector's affidavit stating that the residence had suffered damage due to the improper installation of the stucco and the failure to comply with applicable building code, among other construction defects. The affidavit of Ned Stancliff was also submitted, and it stated that the inspection report generated before his purchase of the home did not notify him that the house was constructed with defective stucco. Relying on the affidavits submitted by the builder's principals, the trial court granted summary judgment to the builders, and the Stancliffs appealed.³³¹

The court of appeals reversed, finding that genuine issues of fact remained for the jury.³³² Because a “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.”³³³ The court observed that were it “otherwise, [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 then claiming the culprit of any negligence was an independent contractor.”³³⁴ The court noted that the affidavits submitted by the builders addressed only the issues of the subcontractors and failed to address the alleged breach of duty to build a fit and workmanlike house.³³⁵ Furthermore, the appellate court did not agree with the builders that because there was no privity between the current homeowner and the builder, summary judgment was proper.³³⁶ Instead, the court held that a negligence claim does not depend upon privity of contract.³³⁷

331. *Id.*, 561 S.E.2d at 438-39.

332. *Id.*, 561 S.E.2d at 439.

333. *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)).

334. *Id.* (quoting *Hudgins v. Bacon*, 171 Ga. App. 856, 862, 321 S.E.2d 359, 366 (1984)).

335. *Id.*

336. *Id.* at 226, 561 S.E.2d at 439-40.

337. *Id.*, 561 S.E.2d at 440.