

# Construction Law

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This Article surveys construction law decisions handed down by Georgia appellate courts between June 1, 2002, and May 31, 2003. The cases discussed primarily fall within five categories: (1) contract; (2) tort; (3) mechanic's and materialman's liens; (4) workers' compensation; and (5) arbitration. The Article also includes a miscellaneous section covering noteworthy cases that do not fit neatly into the sections enumerated above.

## I. CONTRACTS

The Georgia Court of Appeals decided several cases concerning claims for breach of contract during the survey period. This section includes a few cases that are not directly related to construction but nevertheless

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deal with general principles of law that contractors, subcontractors, and material suppliers typically encounter on construction projects.

A. *Government Contracts and Ultra Vires Acts*

In *Howard v. Brantley County*,<sup>1</sup> the court of appeals affirmed the trial court's grant of summary judgment in favor of the plaintiff County in its action against the defendant contractor for money had and received because the County's arrangement with the contractor did not comply with Georgia's competitive bidding requirements<sup>2</sup> or the requirement that "all contracts entered into by the county . . . shall be in writing and entered on its minutes."<sup>3</sup>

The Chairman of the County Board of Commissioners negotiated with the defendant contractor to perform road striping work on certain county roads. The contractor performed the work and submitted six invoices to the County in the cumulative sum of \$190,600, which the County paid.<sup>4</sup> The court of appeals held that the County was entitled to the return of its payments because the work performed by the contractor should have been competitively bid upon in accordance with the Official Code of Georgia Annotated ("O.C.G.A.") section 32-4-64.<sup>5</sup> Contractor argued that it was excused from the competitive bid requirement because "road striping is a specialized service under [O.C.G.A. section] 32-4-63(5), allowing the instant negotiation for its road striping services."<sup>6</sup> However, O.C.G.A. section 32-1-3(6) specifically includes road striping as a form of road construction and, therefore, road striping is not a "special service within the meaning of [O.C.G.A. section] 32-4-63(5)."<sup>7</sup> The court of appeals also found that the voluntary payment doctrine did not apply "to circumstances in which public funds were illegally paid in that the contract in issue, had it been written, was ultra vires as beyond the legal authority of the county to enter."<sup>8</sup>

B. *Environmental Remediation Contract*

In *Barranco v. Welcome Years, Inc.*,<sup>9</sup> the court of appeals reversed the trial court's grant of summary judgment to defendant-seller of contami-

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1. 260 Ga. App. 330, 579 S.E.2d 758 (2003).
  2. *Id.* at 330, 579 S.E.2d at 758; O.C.G.A. § 32-4-63(5) (2001).
  3. 260 Ga. App. at 330, 579 S.E.2d at 759 (quoting O.C.G.A. § 36-10-1 (2000)).
  4. *Id.*
  5. *Id.* at 332, 579 S.E.2d at 760-61; O.C.G.A. § 32-4-64 (2001).
  6. 260 Ga. App. at 331, 579 S.E.2d at 760; O.C.G.A. § 32-4-63(5) (2001).
  7. 260 Ga. App. at 331, 579 S.E.2d at 760; O.C.G.A. § 32-1-3(b) (2001).
  8. 260 Ga. App. at 332, 579 S.E.2d at 760.
  9. 260 Ga. App. 456, 579 S.E.2d 866 (2003).

nated real property because the contract's terms, as interpreted in light of the parties' conduct, required seller to obtain a "no further action letter" with respect to the Georgia Hazardous Site Response Act<sup>10</sup> from the Environmental Protection Division ("EPD") prior to closing the sale.<sup>11</sup> Plaintiff-buyer entered into a contract with seller for the purchase of certain real estate that contained underground storage tanks. The contract, as amended by the parties, contained two provisions: one dealing with EPD approval under the Georgia Underground Storage Tank Act,<sup>12</sup> the other dealing with EPD approval under the Georgia Hazardous Site Response Act.<sup>13</sup> Each separate provision referenced a "no further action letter (or its equivalent) authored by the EPD."<sup>14</sup>

Seller argued it was only required to obtain one "no further action letter" from the EPD, which it did.<sup>15</sup> However, the court of appeals found seller's argument to be without merit because after obtaining an EPD letter stating that no further action was required for underground storage tanks, seller continued to engage in communications with the EPD and the buyer. This evidence showed that seller believed its requirements for "no further action" letters were not fulfilled.<sup>16</sup> "It is well settled that 'the construction placed upon a contract by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them.'"<sup>17</sup>

### C. *Setoff and Counterclaim*

In *Long v. Reeves Southeastern Corp.*,<sup>18</sup> the court of appeals affirmed the trial court's grant of summary judgment in favor of plaintiff, who supplied materials to defendant builder.<sup>19</sup> Builder signed a credit application and guaranteed payment of any invoices for materials purchased from supplier. It was undisputed that the materials were delivered, and the invoices remained unpaid. Builder argued on appeal that he was entitled to recoup damages from an injury he suffered when supplier's employee dropped a steel pipe on his foot during a delivery.

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10. O.C.G.A. § 12-8-90 (2001).

11. 260 Ga. App. at 464, 579 S.E. 2d at 873.

12. O.C.G.A. § 12-13-1 (2001).

13. 260 Ga. App. at 458, 579 S.E.2d at 869.

14. *Id.*

15. *Id.* at 459, 579 S.E.2d at 869.

16. *Id.* at 460-63, 579 S.E.2d at 870-72.

17. *Id.* at 460, 579 S.E.2d at 870 (quoting *Scruggs v. Purvis*, 218 Ga. 40, 42, 126 S.E.2d 208, 209 (1962)).

18. 259 Ga. App. 257, 576 S.E.2d 641 (2003).

19. *Id.* at 257, 576 S.E.2d at 641-42.

Furthermore, the builder argued that the supplier breached its duty to deliver the pipe with care and that there were issues of material fact regarding the builder's recoupment.<sup>20</sup>

The court of appeals held that the builder was not entitled to recoupment because the damages for personal injury were incidental to the contract but did not arise out of the contract.<sup>21</sup> "Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages because the plaintiff has not complied with the cross-obligations or independent covenants arising under the contract upon which suit is brought."<sup>22</sup>

While damages resulting from the plaintiff's breach of a contract sued on may be set off by plea of recoupment, still this right of set-off is not broad enough to include damages alleged to have arisen from the plaintiff's wrongful act in connection with a transaction legally distinct from the contract sued on, even though closely connected with it in point of time.<sup>23</sup>

The court reasoned that the builder's recoupment defense was more properly characterized as a negligence claim and, barring equitable considerations, could not be asserted as a defense to a breach of contract claim.<sup>24</sup>

#### D. Home Remodeling and Insurance

In *C & F Services, Inc. v. First Southern Bank*,<sup>25</sup> the court of appeals reversed the trial court's denial of a home remodeling contractor's motion for a new trial, holding that the trial court made several erroneous evidentiary rulings.<sup>26</sup> Homeowner engaged the contractor to repair a fire-damaged home for \$125,000. Contractor had completed almost all of the work on the home when the parties first disagreed. Homeowner was funding the home repairs with a joint check from homeowner's insurance company made payable to the homeowner and his mortgage company. However, the homeowner forged the mortgage company's endorsement and deposited the check in his personal account.<sup>27</sup>

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20. *Id.* at 258, 576 S.E.2d at 641.

21. *Id.* at 258-59, 576 S.E.2d at 642.

22. *Id.* at 258, 576 S.E.2d at 641 (citing O.C.G.A. § 13-7-2 (1982)).

23. *Id.* at 259, 576 S.E.2d at 642 (quoting *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 721, 177 S.E. 727, 730 (1934)).

24. *Id.*, 576 S.E.2d at 641-42.

25. 258 Ga. App. 71, 573 S.E.2d 102 (2002).

26. *Id.* at 71, 573 S.E.2d at 104.

27. *Id.* at 71-72, 573 S.E.2d at 104.

Soon thereafter, the mortgage company threatened homeowner's bank for negligently depositing a forged check. As a result, the bank agreed to fund the completion of the home repairs in exchange for the mortgage company's promise to release the bank from liability resulting from the bank's negligence in depositing the forged check. Subsequently, the bank persuaded the contractor to complete the repairs under a new contract with the bank, assuring the contractor that the bank would freeze the homeowner's accounts and ensure that the contractor would get paid. The bank and contractor agreed that the remaining repairs would be completed for \$23,000. The bank made a partial payment of \$13,600, and the contractor submitted its final request for payment after obtaining a certificate of occupancy. However, upon submission of its final bill, the contractor learned that the homeowner was allowed to withdraw the remaining \$9400 from the bank, which would have been used to pay the contractor. The bank refused to pay the contractor and insisted that it would have to get the money directly from the homeowner. The homeowner refused to pay the contract balance, alleging that the work was unsatisfactory.<sup>28</sup>

Contractor's first lawsuit was voluntarily dismissed after the court granted partial summary judgment to the bank on the contractor's claim of conversion and its claims for punitive damages and attorney fees. After a mistrial in 1998, a new judge presided over the second trial in 2000, during which the bank moved to exclude any evidence of events that transpired before the contractor and the homeowner signed the second contract for \$23,000. The court overruled the contractor's objections and, in direct conflict with the pretrial order, precluded evidence of the forgery of the insurance check, the bank's negligence in handling the check, the mortgage company's threats against the bank, and any other communications prior to the second contract. Furthermore, the court refused to allow the contractor's president to explain why he entered into the second contract. The court also excluded evidence that the homeowner and the bank failed to provide a "punch list" of repairs to be performed upon receipt of the certificate of occupancy. The trial court directed a verdict in favor of the bank on contractor's fraud, punitive damages, and attorney fees claims. In addition, the trial court refused to charge the jury on any tort theories and *sua sponte* directed a verdict for defendant's bank and homeowner on the negligence claims.<sup>29</sup>

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28. *Id.* at 72, 573 S.E.2d at 104-05.

29. *Id.* at 73-74, 573 S.E.2d at 105-06.

The court of appeals found that the trial court abused its discretion in refusing to admit evidence of events prior to the second contract.<sup>30</sup> In addition, the court found that the trial court erred in refusing to admit evidence supporting contractor's claims of fraud, negligence, and punitive damages.<sup>31</sup>

*E. Residential Construction and Contractor's Affidavit*

In *Vintson v. Lichtenberg*,<sup>32</sup> the court of appeals affirmed the trial court's grant of partial summary judgment to homeowners on the contractor's claims for extra work.<sup>33</sup> Contractor agreed to build a house for \$686,200, but that price did not include the cost of the swimming pool, tennis court, and fencing. The contract provided that the contractor would be paid the contract balance, including amounts due on change orders, upon the substantial completion of contractor's work.<sup>34</sup> The contract also provided:

As a condition precedent to final payment, [contractor] shall submit to [the homeowners] an affidavit in accordance with [O.C.G.A. section] 44-14-362 (or other applicable law) stating that all labor, materials and equipment and other indebtedness connected with the Work for which the Property might be responsible or encumbered by lien have been paid in full.<sup>35</sup>

After moving into the house, the contractor gave the homeowners an invoice for upgrades and other charges for overages in the amount of \$65,925, which the homeowners paid.<sup>36</sup> Contemporaneously, the contractor executed the Contractor's Affidavit, stating

That [the] improvements or repairs have been fully completed according to the terms of the contract therefore . . . . That the agreed price or the reasonable value of the labor, services and materials incorporated into the improvements or repairs upon the real property . . . has been paid. This affidavit is made under the provisions of [s]ection 44-14-361.2 of the [O.C.G.A.].<sup>37</sup>

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30. *Id.* at 75, 573 S.E.2d at 106.

31. *Id.*, 573 S.E.2d at 107.

32. 256 Ga. App. 489, 568 S.E.2d 795 (2002).

33. *Id.* at 489, 568 S.E.2d at 796.

34. *Id.*

35. *Id.*

36. *Id.* at 490, 568 S.E.2d at 796.

37. *Id.*, 568 S.E.2d at 796-97; O.C.G.A. § 36-1-2 (2001).

Several months later, contractor sent a letter to the homeowners demanding an additional \$55,832.72 for change-order work and extra items listed in the letter.<sup>38</sup>

Homeowners moved for partial summary judgment, arguing that the contractor's claim was barred based upon the contractor's affidavit. Contractor responded with a second affidavit, stating that the first affidavit was only given to accommodate the homeowners in the closing of their loan and was not given for the purpose of acknowledging payment. The trial court granted partial summary judgment for the homeowners on contractor's claim because the statements in contractor's affidavits were contradictory, and contractor offered no reasonable explanation for the contradiction.<sup>39</sup>

The court of appeals was not persuaded by the contractor's argument that he offered a reasonable explanation for the contradictory affidavits.<sup>40</sup>

As a general rule, if a party offers self-contradictory testimony on a motion for summary judgment, then the conflicting testimony must be construed most strongly against the party offering it. Testimony "is contradictory if one part of the testimony asserts or expresses the opposite of another part of the testimony."<sup>41</sup>

Contractor testified that the invoice submitted with the affidavit and the overall financial accounting of the project concerned overages incurred during construction. Furthermore, the contractor was an experienced builder who had executed contractor's affidavits in the past.<sup>42</sup> The court found it very unlikely that the contractor would have remained silent about an additional \$54,000 claim merely as an accommodation to the homeowners.<sup>43</sup> Therefore, contractor's subsequent contradictory affidavit did "not create a genuine issue of material fact as to whether"<sup>44</sup> contractor was owed additional money after executing the first contractor's affidavit.<sup>45</sup>

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38. 256 Ga. App. at 490, 568 S.E.2d at 797.

39. *Id.* at 490-91, 568 S.E.2d at 797.

40. *Id.* at 491-92, 568 S.E.2d at 797-98.

41. *Id.* at 491, 568 S.E.2d at 797 (quoting *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 30, 343 S.E.2d 680, 683 (1986)).

42. *Id.* at 492, 568 S.E.2d at 798.

43. *Id.*

44. *Id.*

45. *Id.*

*F. Waiver of Subrogation*

In *Colonial Properties Realty Ltd. Partnership v. Louder Construction Co.*,<sup>46</sup> the court of appeals decided a case of first impression, holding that a waiver of subrogation clause in a construction contract remained in effect after the completion of the project.<sup>47</sup> The owner hired the construction manager to construct an apartment complex. One year after the complex was completed, one of the buildings was damaged by fire. Owner's insurance company paid for the loss and brought a subrogation action against the construction manager, asserting negligent supervision, negligence per se, gross negligence, and breach of contract. The trial court granted the construction manager's motion for summary judgment.<sup>48</sup>

The parties used the American Institute of Architects' 1992 Construction Manager-Adviser Edition standard form, which provided that the "Owner and Contractor waive all rights against each other and against the Construction Manager . . . for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work."<sup>49</sup> The contract also provided that in the event the owner obtained property insurance on the completed project, "the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance."<sup>50</sup>

The court of appeals agreed with the trial court, holding that the language of the contract clearly provided that the parties agreed to waive subrogation claims to the extent covered by insurance, even after the project was completed.<sup>51</sup> The court was not persuaded by owner's argument that the contract provisions were against public policy.<sup>52</sup> In addition, the court of appeals held that the contract language did not violate O.C.G.A. section 13-8-2(b)<sup>53</sup> because the contract provisions at issue did not purport to "indemnify the promisee for damages resulting from the promisee's negligence"<sup>54</sup> but rather "shift[ed] the risk of loss

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46. 256 Ga. App. 106, 567 S.E.2d 389 (2002).

47. *Id.* at 109-10, 567 S.E.2d at 392.

48. *Id.* at 106, 567 S.E.2d at 390.

49. *Id.* at 107, 567 S.E.2d at 390 (quoting contract, subpara. 11.3.7).

50. *Id.* (quoting contract, subpara. 11.3.5).

51. *Id.* at 109, 567 S.E.2d at 391-92.

52. *Id.* at 111-12, 567 S.E.2d at 393.

53. O.C.G.A. § 13-8-2(b) (2001).

54. 256 Ga. App. at 111, 567 S.E.2d at 393 (quoting *Glazer v. Crescent Wallcoverings*, 215 Ga. App. 492, 493, 451 S.E.2d 509, 511 (1994)).

to the insurance company regardless of which party . . . [was] at fault.”<sup>55</sup>

*G. Uniform Commercial Code and Predominant Purpose*

Although the facts of *Heart of Texas Dodge, Inc. v. Star Coach, LLC*<sup>56</sup> do not relate directly to construction, the principles of law discussed are instructive for situations in which subcontractors and suppliers are supplying products and services for a construction project.

Plaintiff car dealership sued an automobile conversion company for breach of contract in connection with the conversion of a Dodge Durango sport utility vehicle into a “Shelby SP 360 custom performance vehicle.”<sup>57</sup> The car dealership stopped payment on its \$15,768 check two days after receiving the converted vehicle when the car dealership determined that the workmanship was faulty. This determination was evidenced by loud noises emanating from the car’s front end, the car’s instability, improper exhaust routing, and poor paint quality. The trial court charged the jury on two provisions from the Uniform Commercial Code (“UCC”), and the jury returned a verdict for the conversion company. The car dealership appealed, arguing that the UCC did not apply because the contract was for services, not for the sale of goods.<sup>58</sup>

The court of appeals agreed and reversed the decision of the trial court, holding that it was error to charge the jury on UCC provisions because the predominant purpose of the contract was for services and not the sale of goods.<sup>59</sup>

When the predominant element of a contract is the sale of goods, the contract is viewed as a sales contract and the UCC applies, even though a substantial amount of service is to be rendered in installing the goods. When, on the other hand, the predominant element of a contract is the furnishing of services, the contract is viewed as a service contract and the UCC does not apply. A contract for services and labor with an incidental furnishing of equipment and materials is not a transaction involving the sale of goods and is not controlled by the UCC.<sup>60</sup>

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55. *Id.*

56. 255 Ga. App. 801, 567 S.E.2d 61 (2002).

57. *Id.* at 801-02, 567 S.E.2d at 62.

58. *Id.*, 567 S.E.2d at 62-64.

59. *Id.* at 804, 567 S.E.2d at 64.

60. *Id.* at 802, 567 S.E.2d at 63 (citing *J. Lee Gregory, Inc. v. Scandinavian House*, 209 Ga. App. 285, 287-88, 433 S.E.2d 687, 689 (1993); *Crews v. Wall, C.P.A., P.C.*, 238 Ga. App. 892, 900, 520 S.E.2d 727, 733 (1999)).

The court of appeals found that the conversion company was in the business of providing labor and expertise to convert automobiles and was not in the business of selling automobile parts.<sup>61</sup> Indeed, the car dealership ordered the conversion parts and shipped the parts to the conversion company for its use in converting the vehicle.<sup>62</sup> Furthermore, the car dealership's complaints about the vehicle stemmed primarily from the labor performed and not the parts used in the conversion.<sup>63</sup> The court considered the totality of the circumstances and was unpersuaded by the conversion company's argument that the labor accounted for less of the contract price than the parts.<sup>64</sup> The trial court's error was harmful because the jury was instructed that the car dealership was obligated to provide the conversion company with a reasonable opportunity to cure any defects.<sup>65</sup> Such obligation does not exist under the common law of contracts.<sup>66</sup>

#### H. *Action on Commercial Account; UCC*

In *Imex International, Inc. v. Wires Engineering*,<sup>67</sup> plaintiff-seller brought several actions against defendant-buyer in connection with the sale of a diamond wire coating machine and related components. Buyer contended that it was not obligated to pay because the coating machine and related materials were defective, and buyer believed that the contract price was to be negotiated after the delivery of the goods, consistent with European business customs.<sup>68</sup> The court of appeals affirmed the trial court's grant of summary judgment to the seller on each of its counts because the buyer made a partial payment and did not give a seasonable notice of rejection.<sup>69</sup>

Prior to delivery of the wire coating machine, buyer's representative visited seller's facility and inspected the wire coating machine for three hours. After delivery, the buyer used the wire coating machine for about one month, after which it discontinued use because the new machine appeared to be no better than the buyer's existing machines. However, buyer waited nearly six months to inform the seller that it was rejecting the machine. The wire coating machine was delivered C.O.D., which,

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61. *Id.* at 803, 567 S.E.2d at 63.

62. *Id.*, 567 S.E.2d at 63-64.

63. *Id.*

64. *Id.* at 804, 567 S.E.2d at 64.

65. *Id.*, 567 S.E.2d at 64-65.

66. *Id.*, 567 S.E.2d at 65.

67. 261 Ga. App. 329, 583 S.E.2d 117 (2003).

68. *Id.* at 330, 583 S.E.2d at 119-20.

69. *Id.* at 333-34, 583 S.E.2d at 120-22.

under O.C.G.A. section 11-2-513(3)(a), denied the buyer the right to inspect the machine prior to acceptance.<sup>70</sup> Therefore, buyer accepted the machine on delivery in accordance with O.C.G.A. section 11-2-606(1).<sup>71</sup> Buyer was not allowed to revoke its acceptance because buyer did not notify the seller within a reasonable time after the buyer discovered, or should have discovered, any nonconformity with the wire coating machine, in accordance with O.C.G.A. section 11-2-608.<sup>72</sup> Furthermore, the court of appeals held that the buyer's argument that the purchase price was in dispute lacked merit because the buyer received the invoice for \$89,000 and failed to object within ten days of receiving the invoice, as required by O.C.G.A. section 11-2-201(2).<sup>73</sup>

### *I. Statute of Limitations for Breach of an Express Warranty*

In *Feinour v. Ricker Co.*,<sup>74</sup> the court of appeals held that the six year statute of limitations applies to a claim for breach of an express warranty and begins to run "from the date on which the builder attempted to repair the construction defect covered by the warranty, which repair was inadequate."<sup>75</sup> Homeowner filed a breach of an express warranty claim against the builder of a home constructed with an exterior insulation and finish system ("EIFS"). The builder gave a one-year limited warranty on the project, which began to run on September 30, 1993. The builder was notified of several water leakage problems during the one year warranty period. On October 3, 1994, the builder made some temporary cosmetic repairs and represented that the defect was remedied. Homeowner sued the builder on September 28, 2000. The trial court granted summary judgment to the builder, holding that the breach of warranty claims expired on September 23, 1999, six years after the certificate of occupancy was issued.<sup>76</sup>

The court of appeals reversed the trial court's dismissal of the breach of express warranty claim because Georgia courts apply a different statute of limitations for breach of express warranties than for breaches of implied warranties and breaches of sale or construction contracts.<sup>77</sup> Specifically, the court of appeals cited Georgia cases that held the statute of limitations runs from the time the express warranty is

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70. *Id.* at 329-34, 583 S.E.2d at 119-22 (citing O.C.G.A. § 11-2-513(3)(a) (2002)).

71. *Id.* at 334, 583 S.E.2d at 122 (citing O.C.G.A. § 11-2-606(1) (2002)).

72. *Id.* at 338, 583 S.E.2d at 125 (citing O.C.G.A. § 11-2-608 (2002)).

73. *Id.* at 333, 583 S.E.2d at 121-22 (citing O.C.G.A. § 11-2-201(2) (2002)).

74. 255 Ga. App. 651, 566 S.E.2d 396 (2002).

75. *Id.* at 651-52, 566 S.E.2d at 396.

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

77. *Id.* at 653, 566 S.E.2d at 397-98.

breached—the time that the builder abandoned its warranty obligations, refused to perform, or made inadequate repairs.<sup>78</sup> The court reasoned that the statute of limitations could not have begun to run before the date on which the builder received notice of the defects because the builder could not have breached the warranty until after it received notice.<sup>79</sup>

### *J. Performance Bond and Notice*

In *Commercial Casualty Insurance Co. of Georgia v. Maritime Trade Center Builders*,<sup>80</sup> a subcontractor sued the general contractor for payment, and the general contractor counterclaimed against the subcontractor and its surety under a performance bond. The surety responded, denying liability and asserting as a defense the general contractor's failure to provide proper notice of the subcontractor's default, as required by the terms of the bond. The performance bond required that the general contractor undertake several actions before the surety's obligations would be triggered. The general contractor sent four documents to the surety regarding the subcontractor's poor performance, including statements that the subcontractor was far behind schedule, the general contractor had to supplement the subcontractor's work, the subcontractor's superintendent was removed from the job, and the subcontractor was not paying its bills on the project. The subcontractor was insisting that the surety pay for the damages suffered by the general contractor in completing the subcontractor's work.<sup>81</sup>

The performance bond incorporated the subcontract, which provided that the contractor could supplement the subcontractor's work after providing a forty-eight hour notice to the subcontractor. The subcontract also provided that the surety would pay for losses, damages, expenses, and attorney fees incurred because of the subcontractor's breach or failure to perform.<sup>82</sup> The court construed the plain meaning of the documents and found that "the contractor was not required to give the surety notice before supplementing the subcontractor's labor or materials to collect under the performance bond."<sup>83</sup> Therefore, the trial court properly denied the surety's motion for summary judgment on the issue of coverage under the performance bond.<sup>84</sup>

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78. *Id.* at 653-54, 566 S.E.2d at 398.

79. *Id.* at 655, 566 S.E.2d at 398.

80. 257 Ga. App. 779, 572 S.E.2d 319 (2002).

81. *Id.* at 779-80, 572 S.E.2d at 319-21.

82. *Id.* at 781, 572 S.E.2d at 321-22.

83. *Id.* at 783, 572 S.E.2d at 322.

84. *Id.*

*N. Notice to Surety Under Georgia's Little Miller Act and Statute of Limitations*

In *Southern Electric Supply Co. v. Trend Construction, Inc.*,<sup>85</sup> plaintiff electrical supplier sued defendant general contractor for breach of contract and sued the surety on the payment bond in connection with a public project.<sup>86</sup> The court of appeals reversed the trial court's grant of summary judgment to defendants because the electrical supplier gave sufficient and timely notice of its claim and, hence, created a genuine issue of material fact as to the completion date and acceptance date for the project.<sup>87</sup>

Georgia's Little Miller Act<sup>88</sup> requires a supplier to give "written notice to the contractor within 90 days from the day on which such person . . . furnished the last of the material . . . for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied."<sup>89</sup> Furthermore, "the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill."<sup>90</sup> The court of appeals held that the supplier's multiple telephone conversations regarding the outstanding amounts and a faxed copy of the supplier's statement of account on the project to the general contractor constituted sufficient notice to recover under the payment bond.<sup>91</sup>

"It is not necessary that the writing relied on be signed by the supplier, and *it is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor.* When this appears[,] the object of the statute, . . . is attained and the statute is sufficiently complied with."<sup>92</sup>

The court of appeals also agreed with the electrical supplier's argument that issues of material fact remained as to whether the statute

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85. 259 Ga. App. 666, 578 S.E.2d 279 (2003).

86. *Id.* at 667, 578 S.E.2d at 280.

87. *Id.* at 671, 578 S.E.2d at 282-83.

88. O.C.G.A. § 13-10-60 (Supp. 2003).

89. 259 Ga. App. at 668, 578 S.E.2d at 280 (quoting O.C.G.A. § 36-82-104(b)(1) (2000) (current version at O.C.G.A. § 13-10-63(a)(1) (Supp. 2003)).

90. *Id.* (citing *Amcon, Inc. v. S. Pipe & Supply, Co.*, 134 Ga. App. 655, 657, 215 S.E.2d 712, 714 (1975)).

91. *Id.* at 671, 578 S.E.2d at 281.

92. *Id.* at 669-70, 578 S.E.2d at 281 (quoting *Fireman's Fund Ins. Co. v. Foster Remodeling Co.*, 177 Ga. App. 711, 713, 340 S.E.2d 668, 669 (1986)).

of limitations had run.<sup>93</sup> Specifically, former O.C.G.A. section 36-82-105 stated that “no action on payment or performance bonds required by [O.C.G.A. section] 36-82-101 (public works contracts) may be instituted ‘after one year from the completion of the contract *and* the acceptance of the . . . public work by the proper public authority.’”<sup>94</sup> Supplier’s complaint was filed on February 20, 2001, and the project architect testified that the general contractor’s work was not completed until September 2000.<sup>95</sup>

## II. TORTS

During the survey period, Georgia appellate courts decided a variety of tort-related construction cases, including those addressing issues of agency, Georgia’s High-Voltage Safety Act,<sup>96</sup> and termite claims.

### A. Agency

In *Enviromediation Services, LLC v. Boatwright*,<sup>97</sup> the court of appeals affirmed the trial court’s refusal to grant defendants’ motions for directed verdict and upheld the jury’s verdict in favor of plaintiffs.<sup>98</sup> Plaintiffs, motor vehicle accident victims and estate representatives of victims who died in the accident, brought an action against a truck driver (“Harris”), his employer (“Prince”), a subcontractor that employed Prince (“Enviromediation”), and the general contractor that employed the subcontractor (“GBI”), for damages sustained when Harris drove a dump truck across the center line of Highway 140 and collided with several vehicles. At trial, Enviromediation moved for directed verdict on the ground that plaintiffs did not present sufficient evidence to demonstrate that Harris was its employee or agent at the time of the accident, but the court denied the motion.<sup>99</sup>

Affirming the trial court’s refusal to grant defendant a directed verdict and upholding the jury’s verdict in favor of plaintiffs, the court of appeals explained that the record contained ample evidence to suggest that there was at least a factual issue on whether Harris was an agent of defendant at the time of the accident.<sup>100</sup>

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93. *Id.* at 671, 578 S.E.2d at 283.

94. *Id.* at 672, 578 S.E.2d at 283 (quoting *United States Fid. & Guar. Co. v. Rome Concrete Pipe Co.*, 256 Ga. 661, 662-63, 353 S.E.2d 15, 15 (1987)).

95. *Id.*

96. O.C.G.A. §§ 46-3-30 to -40 (1992).

97. 256 Ga. App. 200, 568 S.E.2d 117 (2002).

98. *Id.* at 203, 568 S.E.2d at 119.

99. *Id.* at 200-01, 568 S.E.2d at 117-18.

100. *Id.* at 202, 568 S.E.2d at 118.

*B. High-Voltage Safety Act*<sup>101</sup>

In *Jackson Electric Membership Corp. v. Smith*,<sup>102</sup> the Georgia Supreme Court reversed the court of appeal's determination that a power company ("Jackson EMC") and the utilities protection center ("UPC") were subject to liability under Georgia's High-Voltage Safety Act ("HVSA").<sup>103</sup> The case concerned two construction workers who were electrocuted when their equipment came into contact with power lines that were in close proximity to the construction site.<sup>104</sup>

On April 18, 1997, in connection with a water pipeline construction project, the general contractor provided the initial notice to the UPC, as required by the HVSA, requesting protection from both overhead and underground power lines. Originally, the work was scheduled to be completed in two weeks. However, the project was delayed, and the general contractor again contacted the UPC to request additional protection from the underground lines. The contractor, however, failed to request additional protection from the overhead lines.<sup>105</sup>

Thereafter, two subcontract construction workers accidentally came into contact with overhead power lines and were electrocuted. The parents of the deceased workers brought wrongful death actions against Jackson EMC and the UPC, alleging both were negligent in the processing of the requests for protection from overhead power lines in accordance with the HVSA. The trial court granted defendants' motions for summary judgment on two grounds. First, the general contractor failed to submit a "new notice" to UPC, extending its previous request for protection from overhead power lines. Second, plaintiffs' recovery for negligence was barred because the dangers posed by the power lines were open and obvious.<sup>106</sup>

The court of appeals reversed the trial court's decision, holding that the general contractor was not required to provide any additional notice pursuant to O.C.G.A. section 46-3-34(d) when Jackson EMC did not comply with O.C.G.A. section 46-3-34(c), which required Jackson EMC to make arrangements with the general contractor for the completion of certain safety precautions.<sup>107</sup> Likewise, the court of appeals determined that the trial court erred in its application of the open and

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101. O.C.G.A. §§ 46-3-30 to -40 (1992).

102. 276 Ga. 208, 576 S.E.2d 878 (2003).

103. *Id.* at 208, 567 S.E.2d at 879; O.C.G.A. §§ 46-3-30 to -40.

104. 276 Ga. at 209, 576 S.E.2d at 879.

105. *Id.*

106. *Id.*

107. *Id.*

obvious rule because it could not be said as a matter of law that the dangers posed by the overhead power lines were open and obvious.<sup>108</sup>

Reversing the decision of the court of appeals, the supreme court explained that the general contractor was required to seek renewal of its original request for overhead protection after having specifically represented that such protection was no longer needed for the project.<sup>109</sup>

### C. Termite Claims

In *Economic Exterminators of Savannah, Inc. v. Wheeler*,<sup>110</sup> the court of appeals affirmed the jury's verdict in favor of homeowners for losses sustained as a result of termite damage to their home.<sup>111</sup> Homeowners engaged Economic Exterminators of Savannah, Inc. ("Economic") to inspect their recently purchased home for termite damage. Economic found termites in the home, treated the infestation, and determined that the damage associated with the infestation was so minimal that repairs were unnecessary. Thereafter, the homeowners discovered additional infestations and reported the discoveries to Economic. After treating the infestations, Economic issued a new warranty which covered retreatment of the house, but not the repaired damage. Homeowners filed suit against Economic to recover losses sustained as a result of the termite damage, alleging fraud. After a jury trial, the trial court entered judgment in favor of plaintiffs. Economic appealed, alleging the trial court erred in entering judgment on a verdict that was excessive and that included an award of general damages.<sup>112</sup>

Affirming the trial court's decision, the court of appeals noted that the award of general damages was not improper, and the verdict was within the range of evidence and not flagrantly excessive.<sup>113</sup>

## III. MECHANIC'S AND MATERIALMAN'S LIENS

During the survey period, Georgia's appellate courts broke no new ground in the area of mechanic's and materialman's lien law. However, the courts clarified the law on liens against a landlord's interest and restated what constitutes proper statutory notice of a materialman's lien against real property.

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108. *Id.*

109. *Id.* at 210, 576 S.E.2d at 880.

110. 259 Ga. App. 192, 576 S.E.2d 601 (2003).

111. *Id.* at 194, 576 S.E.2d at 604.

112. *Id.* at 192-93, 576 S.E.2d at 602-03.

113. *Id.* at 193, 576 S.E.2d at 603.

A. *Lien Against the Property Interest of a Landlord*

In *Worley v. Cowper Construction Co.*,<sup>114</sup> a commercial tenant leased a space in a shopping center. Fourteen years later, the parties expanded the lease to include adjacent space and executed an amendment to the lease which obligated the tenant to renovate and remodel the adjacent premises at its sole cost and expense. The landlord had the right to review and approve work plans and specifications.<sup>115</sup>

After the general contractor failed to pay the subcontractor \$112,898.80 for labor and materials, the subcontractor brought an action seeking a special lien against the landlord's interest in the property. Because the lease agreement requiring the tenant to pay for the improvements to the property was undisputed, the trial court granted the landlord's motion for summary judgment, and the subcontractor appealed.<sup>116</sup>

On review, the court of appeals affirmed, noting that under O.C.G.A. section 44-14-361(b),<sup>117</sup> a materialman's lien may attach to the real estate for which the labor, services, or materials were furnished only if they were furnished "at the instance of the owner' or 'some person acting for the owner.'"<sup>118</sup> The court cited *F.S. Associates, Ltd. v. McMichael's Construction Co.*,<sup>119</sup> which recognized that a materialman's lien can be enforced against the property interest of the landlord only to the extent that the tenant was the agent of the landlord in contracting for the work.<sup>120</sup>

The court determined that no lien attached to the landlord's property interest because the tenant was responsible for paying for the improvements to the property, and the tenant acted for its own benefit and not as the landlord's agent in contracting for the work.<sup>121</sup> The landlord's retention of the right to approve plans for the improvements and to

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114. 259 Ga. App. 263, 576 S.E.2d 645 (2003).

115. *Id.* at 263-64, 576 S.E.2d at 646.

116. *Id.* at 263, 576 S.E.2d at 646.

117. O.C.G.A. § 44-14-361(b) (2002).

118. 259 Ga. App. at 264, 576 S.E.2d at 646 (quoting O.C.G.A. § 44-14-361(b)).

119. *Id.* (quoting *Meco of Atlanta, Inc. v. Super Valu Stores, Inc.*, 215 Ga. App. 146, 148, 449 S.E.2d 687, 690 (1994)).

120. *Id.* (citing *F.S. Assoc., Ltd. v. McMichael's Constr. Co.*, 197 Ga. App. 705, 706, 399 S.E.2d 479, 480-81 (1990)).

121. *Id.* (citing *Meco of Atlanta, Inc. v. Super Valu Stores, Inc.*, 215 Ga. App. 146, 148, 449 S.E.2d 687, 690 (1994) (holding that by contracting for improvements to be made upon leased premises, tenant does not create basis for imposing materialman's lien against landlord's interest absent landlord's express or implied consent to contract for improvements)).

receive additional rent if the tenant's revenues exceeded a certain amount did not change that result.<sup>122</sup>

### B. Defamation Concerning Land

In *Amador v. Thomas*,<sup>123</sup> a property owner filed a quiet title action against two materialman's lien claimants. Although the contractor and subcontractor later cancelled their liens, the owner's claim against them for defamation of title remained pending, as did the original lien claimants' counterclaims for breach of contract and fraud. A special master was appointed pursuant to O.C.G.A. section 23-3-63.<sup>124</sup> The special master conducted a hearing and concluded that the owner held unrestricted fee simple title to the property and the property was not subject to either materialman's lien. Over the objection of the contractor and subcontractor, a court later entered an order adopting the special master's report.<sup>125</sup> Despite the special master's conclusion, the question of whether the liens had been properly filed was submitted to the jury, along with questions relating to damages, breach of contract, and fraud. The jury returned a verdict in part for the owner and in part for the contractor.<sup>126</sup>

On appeal, the contractor argued that the lower court erred by informing the jury, in response to a question about lien claim notice rules, that violation of such a rule renders the lien invalid and makes the claimant liable for damages.<sup>127</sup> The court of appeals agreed, stating that in Georgia "there is no tort for the wrongful filing of a claim of materialman's or mechanic's lien."<sup>128</sup> Instead, "where a materialman's or mechanic's lien is improperly filed, the cause of action, if any, is for defamation concerning land under [O.C.G.A. section] 51-9-11."<sup>129</sup> To successfully recover in a defamation action, plaintiff must allege and prove that (1) defendant uttered and published the slanderous words; (2) the words were false; (3) the words were malicious; (4) plaintiff sustained special damage; and (5) plaintiff possessed an estate in the property slandered.<sup>130</sup> As a result, the court of appeals reversed, holding that the lower "court erred in instructing the jury that failure

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122. *Id.*

123. 259 Ga. App. 835, 578 S.E.2d 537 (2003).

124. O.C.G.A. § 23-3-63 (1982).

125. 259 Ga. App. at 836, 578 S.E.2d at 538-39.

126. *Id.*, 578 S.E.2d at 539.

127. *Id.* at 837, 578 S.E.2d at 539-40.

128. *Id.*, 578 S.E.2d at 540 (citing *Hicks v. McLain's Bldg. Materials, Inc.*, 209 Ga. App. 191, 192, 433 S.E.2d 114, 115 (1993)).

129. *Id.* (citing *Hicks*, 209 Ga. App. at 192, 433 S.E.2d at 115-16).

130. *Id.* (citing *Daniels v. Johnson*, 191 Ga. App. 70, 73, 381 S.E.2d 87, 91 (1989)).

to provide the property owner with statutory notice renders the lien claimant liable for damages.”<sup>131</sup>

*C. Defect in the Notice of Lien Claim*

In *Phillips, Inc. v. Historic Properties of America, LLC*,<sup>132</sup> a flooring subcontractor filed suit against the contractor seeking payment of amounts owed, and against the owner to perfect its materialman’s lien against the property. The trial court granted a default judgment against the contractor. The owner filed a motion for summary judgment, contending that the subcontractor failed to provide it with proper notice of its lien as required by O.C.G.A. section 44-14-361.1(a)(2).<sup>133</sup> The trial court agreed that the notice to the owner, which was sent via facsimile transmission, was not authorized under the statute, which is strictly construed and whose language is “mandatory, clear and unequivocal.”<sup>134</sup> As the court of appeals explained, O.C.G.A. section 44-14-361.1(a)(2) provides in pertinent part, as follows:

(a) To make good the liens specified in paragraphs (1) through (8) of subsection (a) of Code Section 44-14-361, they must be created and declared in accordance with the following provisions, and on failure of any of them the lien shall not be effective or enforceable: . . . (2) . . . At the time of filing for record of his claim of lien, the lien claimant *shall* send a copy of the claim of lien by registered or certified mail or statutory overnight delivery to the owner of the property or contractor, as the agent of the owner.<sup>135</sup>

On appeal, the subcontractor argued that because the court previously allowed, in its view, a “flexible’ construction of the [statutory] notice requirement,”<sup>136</sup> the court similarly should permit the subcontractor to send a copy of the lien by facsimile transmission. The subcontractor also argued that service via facsimile met or exceeded the statutory requirements.<sup>137</sup> The court of appeals declined to hold that facsimile transmission satisfies the statutory notice requirement and agreed with the trial court “that the inherent unreliability of service via facsimile

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131. *Id.*

132. 260 Ga. App. 886, 581 S.E.2d 389 (2003).

133. *Id.* at 886, 581 S.E.2d at 389; O.C.G.A. § 44-14-361.1(a)(2) (2002).

134. 260 Ga. App. at 886, 581 S.E.2d at 390.

135. *Id.* (quoting O.C.G.A. § 44-14-361.1(a)(2) (2002)).

136. *Id.* (citing *Grubb v. Woodglenn Properties, Inc.*, 220 Ga. App. 902, 905, 470 S.E.2d 455, 458 (1996)) (holding that notice given by personal service of a copy of the lien on homeowner’s wife was sufficient because it exceeded the statutory requirement that notice be sent by registered or certified mail or statutory overnight delivery).

137. *Id.* at 887, 581 S.E.2d at 390.

does not serve the purpose of ensuring that the owner timely receives notice of a lien.<sup>138</sup> The court found instructive the supreme court's analysis in a prior case, which determined that notice sent by facsimile transmission did not constitute substantial compliance with the statute, and that a facsimile transmission was not the equivalent of registered or certified mail.<sup>139</sup> Noting certain problems inherent with notice sent by facsimile transmission, such as the inability to determine who received the notice and if the notice was received by the proper person, the court affirmed the grant of summary judgment to the owner based on the subcontractor's failure to comply strictly with the Georgia materialman's lien statute.<sup>140</sup>

#### IV. WORKERS' COMPENSATION

During the survey period, the court of appeals issued several decisions concerning workers' compensation. While such decisions were not groundbreaking, they do provide a recent discussion of the law.

##### A. *General Contractor as Statutory Employer*

In *Reynolds v. McKenzie-Perry Homes, Inc.*,<sup>141</sup> the court of appeals affirmed the trial court's grant of summary judgment to the general contractor in a personal injury action by a subcontractor on the grounds that the general contractor was entitled to immunity as the statutory employer.<sup>142</sup> Plaintiff Reynolds was employed as an independent contractor by a plumbing subcontractor in connection with a construction project for which defendant McKenzie-Perry Homes, Inc. was the developer and general contractor. After plaintiff was injured in a work-related accident, Travelers Insurance Company, the plumbing subcontractor's workers' compensation provider, paid weekly wage benefits to plaintiff under the plumbing subcontractor's workers' compensation coverage. Thereafter, plaintiff brought suit against the general contractor. The trial court granted defendant's motion for summary judgment on the grounds that defendant was immune from suit as the statutory employer under O.C.G.A. section 34-9-8(a).<sup>143</sup>

On appeal, plaintiff alleged that the trial court erred in finding that defendant was entitled to immunity as the statutory employer.<sup>144</sup>

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138. *Id.*

139. *Id.* (citing *Clater v. State*, 266 Ga. 511, 512-13, 467 S.E.2d 537, 539 (1996)).

140. *Id.* (citing O.C.G.A. § 44-14-361.1(a)(2) (2002)).

141. 261 Ga. App. 379, 582 S.E.2d 534 (2003).

142. *Id.* at 381-82, 582 S.E.2d at 536.

143. *Id.* at 379-80, 582 S.E.2d at 534-35; O.C.G.A. § 34-9-8(a) (1998).

144. 261 Ga. App. at 380, 582 S.E.2d at 535.

Contrary to plaintiff's suggestion that as an independent contractor/sole-proprietor plaintiff was providing his own workers' compensation coverage, the court explained that by failing to obtain his own workers' compensation coverage, failing to give notice of such election to his own workers' compensation insurer, and failing to pay an additional premium to be treated as an employee, plaintiff failed to satisfy the criteria necessary to establish that he was providing his own workers' compensation coverage.<sup>145</sup> Instead, the court indicated that

[w]here an independent contractor/sole-proprietor contracts with his principal, the subcontractor for the general contractor, for his workers' compensation coverage to be included under the principal's workers' compensation coverage and he receives benefits, the general contractor-subdivision developer is deemed to be the statutory employer of the injured sole-proprietor/independent contractor of the subcontractor.<sup>146</sup>

Thus, the court concluded that defendant was immune from tort liability as the statutory employer.<sup>147</sup>

#### B. Tort Immunity

In *Coker v. Deep South Surplus, Inc.*,<sup>148</sup> the court of appeals reversed the trial court's grant of summary judgment to a safety inspector because the lower court based its judgment on the safety inspector being immune from tort liability pursuant to the Workers' Compensation Act.<sup>149</sup> Plaintiff, Coker, an employee of Mayo Company ("Mayo"), was injured on the job while operating a hydraulic shearing machine. Plaintiff brought suit against defendant Deep South Surplus of Georgia, Inc. ("Deep South"), claiming that Deep South negligently performed its safety inspections of Mayo's facilities prior to the injury. The trial court granted summary judgment to defendant on the basis that defendant performed its inspection services pursuant to Mayo's workers' compensation program and consequently was immune from tort liability under O.C.G.A. section 34-9-11 of the Workers' Compensation Act.<sup>150</sup>

On appeal, plaintiff contended that the trial court erred in granting summary judgment to defendant, claiming that Deep South was not entitled to immunity under the statute.<sup>151</sup> Reversing the trial court's

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145. *Id.* at 381, 582 S.E.2d at 535-36.

146. *Id.* (citing *Sykes v. Smolek Grading, Inc.*, 204 Ga. App. 633, 634, 420 S.E.2d 85, 87 (1992)).

147. *Id.* at 381-82, 582 S.E.2d at 536.

148. 258 Ga. App. 755, 574 S.E.2d 815 (2002).

149. *Id.* at 755, 574 S.E.2d at 816; O.C.G.A. § 34-9-11 (1998).

150. 258 Ga. App. at 755, 574 S.E.2d at 816; O.C.G.A. § 34-9-11.

151. 258 Ga. App. at 755, 574 S.E.2d at 816.

grant of summary judgment, the court of appeals indicated that because Deep South was not Mayo's workers' compensation carrier and had no contract with defendant to provide Mayo with workers' compensation benefits, defendant did not fall within the ambit of the statute.<sup>152</sup> The court further explained that because the Workers' Compensation Act is in derogation of the common law, its provisions must be strictly construed; under such a construction, defendant was but a third party, with no agreement to provide workers' compensation benefits to Mayo's injured employees, and thus not entitled to immunity under the statute.<sup>153</sup>

## V. ARBITRATION

During the survey period, Georgia's appellate courts rendered a number of decisions relating to arbitration. Although such decisions did not concern any issues of first impression, the courts did render opinions regarding the enforcement of a party's agreement to arbitrate, as well as a party's attempt to vacate or modify an arbitration award.

### A. *Waiver of Agreement to Arbitrate*

In *Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*,<sup>154</sup> the court of appeals affirmed the trial court's decision which dismissed the action without prejudice and ordered the parties to submit to arbitration.<sup>155</sup> Plaintiff Moore & Moore Plumbing, Inc. ("Moore") entered into a subcontract agreement with Tri-South Contractors, Inc. ("Tri-South"), the general contractor, requiring Moore to perform certain plumbing work in connection with the construction of an apartment complex. Moore fell behind schedule and, as provided for in the subcontract agreement, Tri-South put Moore on notice that Moore had twenty-four hours to correct the deficiencies. When Moore failed to bring the project back on schedule, Tri-South provided Moore with a second notice. Subsequently, Tri-South terminated Moore and hired another subcontractor to complete the work. Tri-South refused to pay Moore's third draw request.<sup>156</sup>

After being terminated from the job, Moore sent a letter to Tri-South demanding arbitration to resolve their dispute. Moore then filed an action against Tri-South, claiming that Moore rescinded the parties'

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152. *Id.* at 756, 574 S.E.2d at 816-17.

153. *Id.*, 574 S.E.2d at 817.

154. 256 Ga. App. 58, 567 S.E.2d 697 (2002).

155. *Id.* at 58-59, 567 S.E.2d at 698.

156. *Id.* at 59-60, 567 S.E.2d at 698-99.

subcontract when Tri-South refused to pay its third draw request. Tri-South denied that Moore rescinded the subcontract and asked the court to compel arbitration. Moore, however, argued that the agreement to arbitrate was no longer valid because the subcontract had been rescinded. The trial court disagreed, ordering the parties to arbitrate and dismissing the case without prejudice.<sup>157</sup>

On appeal, Moore contended that the trial court erred by failing to find that the subcontract was rescinded and in compelling the parties to arbitrate.<sup>158</sup> Affirming the trial court's decision, the court of appeals explained that because there was "no evidence that Tri-South operated outside of the express terms of the contract when it notified Moore of the problems with the work, withheld money from Moore, and completed the work through another subcontractor, there was no basis for Moore to rescind the contract."<sup>159</sup>

Similarly, in *Wise v. Tidal Construction Co.*,<sup>160</sup> the court was faced, once again, with the task of determining the enforceability of a party's agreement to arbitrate. In *Wise* the plaintiffs, home purchasers, sued defendants builder-sellers for negligence, breach of implied warranty, and breach of contract for damages allegedly sustained as a result of builder-sellers' construction of plaintiffs' home over a buried wood debris field.<sup>161</sup> One of the defendants answered, stating, "[t]his matter may be subject to mandatory binding arbitration pursuant to the contract or contracts between this [sic] parties and should be dismissed."<sup>162</sup> The parties proceeded with the litigation, engaging in extensive discovery that lasted over sixteen months, after which defendant filed a motion for summary judgment. Subsequently, defendant filed a motion to stay the proceedings pending arbitration. The trial court granted defendant's motion to stay the proceedings and compelled arbitration.<sup>163</sup>

Plaintiffs filed an interlocutory appeal, alleging that the trial court erred because: (1) the agreement to arbitrate was contained in a "Home Buyers Warranty Booklet," and plaintiffs did not allege a breach of the Home Owner's Warranty, thus avoiding the invocation of the mandatory arbitration clause; (2) defendant waived its right to arbitration by its conduct throughout the course of the litigation; and (3) the court applied the Federal Arbitration Act ("FAA"), but the parties' disputes did not

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157. *Id.* at 60, 567 S.E.2d at 699.

158. *Id.*

159. *Id.* at 61, 567 S.E.2d at 699.

160. 261 Ga. App. 670, 583 S.E.2d 466 (2003).

161. *Id.* at 671, 583 S.E.2d at 467.

162. *Id.*, 583 S.E.2d at 467-68.

163. *Id.*, 583 S.E.2d at 468.

involve interstate commerce.<sup>164</sup> Reversing the trial court's decision compelling arbitration, the court of appeals determined that although the arbitration clause was broad enough to encompass the parties' disputes and that the FAA properly applied to the disputes, by participating in nearly sixteen months of discovery, filing a motion for summary judgment, and participating in the selection of a jury, defendant waived its contractual right to arbitration.<sup>165</sup>

*B. Vacation and Modification of Arbitration Award*

In *Henderson v. Millner Developments, LLC*,<sup>166</sup> the court of appeals affirmed the trial court's decision confirming an arbitration award and denying a petition to vacate and modify the award.<sup>167</sup> Plaintiff Henderson entered into a "New Construction Purchase and Sale Agreement" with defendant Millner Developments, LLC ("Millner"), pursuant to which Millner agreed to construct a new home for plaintiff. During construction, plaintiff requested that defendant make certain changes to the home's design.<sup>168</sup> Subsequently, a dispute arose concerning the requested changes and defendant sent a letter to plaintiff explaining

(1) that it was unilaterally extending the closing date from July 31, 1999, to January 15, 2000, due to the requested changes, (2) that it would not perform any changes on which it had not already begun work, and (3) that it would demand arbitration to resolve the parties' dispute as to the price of the changes.<sup>169</sup>

Thereafter, defendant demanded that plaintiff pay for the requested changes or defendant would seek another buyer for the property.<sup>170</sup>

In response, plaintiff demanded arbitration, seeking specific performance of the contract or return of his earnest money deposit. Defendant filed a counterclaim for the unpaid costs of the changed work and also sought to recover liquidated damages under the agreement in the amount of plaintiff's earnest money deposit. After a hearing, the arbitrator found that defendant breached the agreement by unilaterally extending the closing date for a period in excess of thirty days (as permitted by the agreement) and by seeking an alternate purchaser.

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164. *Id.* at 672-75, 583 S.E.2d at 467-70.

165. *Id.* at 674, 583 S.E.2d at 469.

166. 259 Ga. App. 709, 578 S.E.2d 289 (2003).

167. *Id.* at 709, 578 S.E.2d at 290.

168. *Id.*

169. *Id.* at 710, 578 S.E.2d at 290.

170. *Id.*

The arbitrator concluded that defendant was not entitled to retain the earnest money as liquidated damages. In addition, the arbitrator found that defendant was entitled to its actual damages for the reasonable value of the changed work plus a fifteen percent markup for profit.<sup>171</sup>

Henderson petitioned the trial court to vacate or modify the arbitrator's award, alleging the arbitrator overstepped his authority by awarding Millner actual damages because the contract's liquidated damages provision provided defendant's sole and exclusive remedy. In addition, Henderson claimed the award should be modified because the parties did not submit the issue of actual damages to the arbitrator.<sup>172</sup> Affirming the trial court's refusal to vacate or modify the award, the court of appeals explained that "[o]verstepping' like the other grounds for vacating arbitration awards is very limited in scope . . . [and] has been described as 'addressing issues not properly before the arbitrator.'"<sup>173</sup> Because the liquidated damages clause was not applicable to the facts presented to the arbitrator, the court of appeals determined that an award of actual damages was not precluded.<sup>174</sup> The court also concluded that by submitting the change order issue to the arbitrator, the parties put the issue of the actual costs associated with the change orders squarely before the arbitrator.<sup>175</sup>

## VI. MISCELLANEOUS

This section discusses cases that share little, thematically speaking, with the previously discussed topics. Perhaps the one common theme in this section is that all the cases, at least tangentially, relate to a party's noncompliance with state laws or county ordinances or both.

### A. *County Government Building Project Not Subject To City Zoning Regulations*

In *Decatur v. DeKalb County*,<sup>176</sup> DeKalb County owned a piece of property in the City of Decatur ("the City") on which it decided to build the new DeKalb County Courthouse. In the past, the County applied for building or other permits from the City when constructing within city limits. This time, however, the County accepted a bid from a contractor

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171. *Id.*, 578 S.E.2d at 290-91.

172. *Id.* at 711, 578 S.E.2d at 291.

173. *Id.* (quoting *Haddon v. Shaheen & Co.*, 231 Ga. App. 596, 598, 499 S.E.2d 693, 696 (1998)).

174. *Id.* at 712, 578 S.E.2d at 291.

175. *Id.* at 173, 578 S.E.2d at 292.

176. 256 Ga. App. 46, 567 S.E.2d 376 (2002).

to commence construction on the courthouse before obtaining permits.<sup>177</sup>

In response to threats from the City that it would seek to enforce its zoning and building ordinances against the County, the County filed a complaint seeking a declaratory judgment and injunctive relief, asking the court to enjoin the City from enforcing these ordinances with respect to the County's governmental building construction project.<sup>178</sup> The trial court heard the matter and noted that because

(1) all of the ordinances that would necessarily apply to the construction projects (i.e., building codes for plumbing, electrical, heating and air conditioning, sanitary sewer, storm water drainage, etc.) fell under the broad category of "zoning," and (2) counties have already been exempted from municipal zoning regulation of property owned by the county and used for a governmental purpose, . . . [that] "as a general rule . . . municipal ordinances do not control county construction, where the county is performing an essential function of government such as the construction, remodeling or modification of a courthouse or court facilities."<sup>179</sup>

The court entered a declaratory judgment in favor of the County and permanently enjoined the City "from enforcing its zoning and building ordinances with respect to the DeKalb County Courthouse."<sup>180</sup>

On appeal, the City argued that the trial court erred by ruling that the City "was without jurisdiction to apply or enforce any of its municipal ordinances to property of DeKalb County located within the city and used for governmental purposes."<sup>181</sup> The court affirmed in part and reversed in part.<sup>182</sup> It held that "county government building projects are not subject to city zoning regulations, but that they are subject to other municipal regulations[,]"<sup>183</sup> such as building, housing, plumbing, and electrical codes, and those involving "[s]torm water and sewage collection and disposal systems."<sup>184</sup>

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177. *Id.* at 46-47, 567 S.E.2d at 377.

178. *Id.* at 47, 567 S.E.2d at 378.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 46, 567 S.E.2d at 377.

184. *Id.* at 48, 567 S.E.2d at 378 (quoting GA. CONST. art. IX, § 2, para. 3(a)(6)).

*B. Condemnation; Easement of Access*

In *Department of Transportation v. Robinson*,<sup>185</sup> plaintiffs purchased land on a United States highway in Polk County, Georgia, and built an automotive repair shop. Plaintiffs, under an agreement with the Georgia Department of Transportation (“DOT”), constructed an acceleration/deceleration lane along the highway for access to and from the shop’s driveway. Plaintiffs later deeded the lane to the DOT.<sup>186</sup>

In November 2000, the DOT, in connection with a road-widening project, condemned a permanent slope easement along the entire frontage of the property and a temporary driveway easement to allow for reconstruction of the existing driveway. The existing driveway was approximately nine years old and made of concrete. As part of the condemnation, the DOT agreed to construct a new concrete driveway in the same location, but planned to make it six feet wider than the existing one. The road expansion, however, would eliminate the acceleration/deceleration lane.<sup>187</sup>

Plaintiffs contended that the DOT’s elimination of the lane would interfere with their easement of access to the property. Plaintiffs testified that eliminating the lane would hinder large trucks from entering the property and require them to devote more of the property to a driveway to make such access possible. The DOT claimed its elimination of the lane was not a taking because plaintiffs did not own the lane—they dedicated it to the DOT approximately ten years earlier. The DOT also contended that, because plaintiffs’ driveway was being reconstructed in the same location, plaintiffs could not claim that elimination of the acceleration/deceleration lane would interfere with their easement of access.<sup>188</sup>

Plaintiffs appealed the DOT’s condemnation declaration, and the jury awarded them additional compensation. The trial court denied the DOT’s motion for new trial. On appeal, the DOT asserted that the trial court erred in denying a motion for a directed verdict.<sup>189</sup> The court of appeals disagreed, holding:

The easement of access is a property right, of which the land owner cannot be deprived upon the ground that the safety of the public traveling upon the highway may be endangered by the exercise of this

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185. 260 Ga. App. 666, 580 S.E.2d 535 (2003).

186. *Id.* at 666, 580 S.E.2d at 536.

187. *Id.*

188. *Id.* at 666-67, 580 S.E.2d at 536-37.

189. *Id.* at 666, 580 S.E.2d at 536.

easement by the abutting landowner, without just and adequate compensation being first paid to the owner. While the landowner is not entitled to access at all points on the boundary between his property and the public right-of-way, he is entitled to *convenient access*, and the *existing means of ingress and egress* may not be substantially interfered with without compensation. The measure of damages is any diminution in the market value of the property by reason of such interference.<sup>190</sup>

The court concluded that the DOT's actions constituted interference under this rule.<sup>191</sup> "With the acceleration/deceleration lane, the [plaintiffs'] customers have unimpeded access to the property . . . . [I]t is clear that the existing means of access will be impaired."<sup>192</sup>

### C. Official Immunity

In *Happoldt v. Kutscher*,<sup>193</sup> plaintiffs, a motorist and the estate of his deceased passenger, appealed summary judgments in their personal injury and wrongful death actions arising from a vehicular collision at the intersection of a subdivision road and a county road. Plaintiffs alleged that as their vehicle approached the intersection, its right front tire dropped off the side of the pavement and into a rut created by improperly diverted storm-water runoff, causing the vehicle to spin out of control and collide with another automobile. The driver of plaintiffs' vehicle was seriously injured, and his passenger was killed. Plaintiffs sued a Monroe County subdivision review officer, claiming that the subdivision road that intersected the county road was constructed improperly, and that the officer failed to inspect and take enforcement action to ensure compliance with county road construction standards. Plaintiffs further alleged that the subdivision road was not constructed or maintained according to the storm-water control measures required by the county ordinance, that the road did not comply with county grading requirements, and that the rights-of-way of the subdivision and county roads were not maintained after construction.<sup>194</sup>

Monroe County's policy required "its subdivision review officer to inspect subdivision construction sites and to review subdivision plats to

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190. *Id.* at 667, 580 S.E.2d at 537 (quoting *DeKalb County v. Glaze*, 189 Ga. App. 1, 2, 375 S.E.2d 66, 67-68 (1908); *Dougherty County v. Hornsby*, 213 Ga. 114, 116, 97 S.E.2d 300, 302 (1957)).

191. *Id.*, 580 S.E.2d at 538.

192. *Id.* at 667-68, 580 S.E.2d at 537.

193. 256 Ga. App. 96, 567 S.E.2d 380 (2002).

194. *Id.* at 96-97, 567 S.E.2d at 381-83.

ensure compliance with all requirements of the county ordinance.”<sup>195</sup> The trial court determined that the review officer breached his official duty to perform those tasks by failing to inspect the subdivision road to determine compliance with any county ordinance provision other than the one relating to the right-of-way requirements, and by not giving his approval to the final plat for the subdivision.<sup>196</sup>

However, the trial court concluded that under the doctrine of official immunity, the review officer could not be held liable for negligent performance or nonperformance of those duties because his determination was discretionary in nature. Furthermore, the trial court held that the review officer had no duty to conduct post-construction inspections.<sup>197</sup>

Although the court of appeals determined that the review officer was not entitled to official immunity from liability resulting from his alleged failure to ensure that the subdivision road complied with the grading requirements in the county ordinance because such duty is ministerial, plaintiffs presented no evidence that proximately linked the washout to the road’s lack of compliance with the grading requirements.<sup>198</sup> Accordingly, the court of appeals affirmed the trial court’s grant of summary judgment to the review officer on the issue of proximate cause.<sup>199</sup>

#### D. *Theft by Taking*

In *McMahon v. State*,<sup>200</sup> a homebuilder appealed his conviction of theft by taking stemming from his agreement to build a home for a man and his wife.<sup>201</sup> The court of appeals affirmed.<sup>202</sup> Before the couple became involved, defendant’s construction company had a contract to build a house on a subdivision lot in Gwinnett County. Defendant obtained a construction loan from a bank, which was secured by the subdivision lot through a deed to secure debt. When the purchase contract fell through, the lot sat empty for a number of months.<sup>203</sup>

Subsequently, defendant entered into an agreement with the aforementioned couple to build a custom home on defendant’s lot for

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195. *Id.* at 98-99, 567 S.E.2d at 382-83.

196. *Id.* at 97-98, 567 S.E.2d at 382-83.

197. *Id.* at 100, 567 S.E.2d at 383.

198. *Id.*, 567 S.E.2d at 384.

199. *Id.* at 101, 567 S.E.2d at 384.

200. 258 Ga. App. 512, 574 S.E.2d 548 (2002).

201. *Id.* at 512, 574 S.E.2d at 549.

202. *Id.* at 517, 574 S.E.2d at 553.

203. *Id.* at 512, 574 S.E.2d at 549.

\$295,500. The couple tendered checks totaling \$38,000 to reserve the lot and begin the construction process. The couple agreed to make future payments in cash, and the purchase contract executed between the parties established the construction and payment schedule. The parties agreed the construction would be completed by October 31, 1997, and the closing date was set for a month later.<sup>204</sup>

Unbeknownst to the home buyers, defendant then took an altered copy of the parties' agreement to the bank to obtain a renewal on his earlier construction loan. Neither the bank nor the home buyers knew defendant was receiving money from the other, so defendant was able to obtain monthly draws on the construction loan from the bank while simultaneously receiving cash payments for his work from the home buyers.<sup>205</sup>

Although construction initially proceeded on schedule, the house remained incomplete at the closing date. In early January 1998, the home buyers learned that five subcontractors had placed liens on the property because they were not being paid. The home buyers then met with defendant, who acknowledged he was having financial difficulties. Defendant assured the home buyers that he would finish building the house within thirty days and take care of all encumbrances, but this never happened. Ultimately, defendant's construction company failed to repay its construction loan, and the bank foreclosed on the property in March 1998. The home buyers bought the property from the bank for approximately \$182,000 and paid an additional \$75,000 to complete the construction. In all, the couple spent over \$507,000 to complete their home.<sup>206</sup>

The State indicted defendant and charged him with multiple counts of theft by taking. Evidence was presented to show that defendant unlawfully obtained the home buyers' cash payments because "he knew and failed to disclose the presence of the first mortgage on the property."<sup>207</sup> A jury found defendant guilty of seven counts of theft by taking.<sup>208</sup> On appeal, his conviction was upheld.<sup>209</sup>

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204. *Id.*, 574 S.E.2d at 549-50.

205. *Id.*, 574 S.E.2d at 550.

206. *Id.* at 513, 574 S.E.2d at 550.

207. *Id.* at 516, 574 S.E.2d at 552.

208. *Id.* at 513, 574 S.E.2d at 550.

209. *Id.* at 517, 574 S.E.2d at 553.

*E. County Ordinances and Codes*

In *Carter v. State*,<sup>210</sup> Fayette County issued a homeowner a building permit to place a prefabricated residence on a parcel of land that he owned. After the home was moved to the site, the homeowner installed a water supply line and requested that the county inspect the line. When the inspector arrived, he discovered that the line had been constructed with used PVC pipe and corroded metal couplings with mismatched threads. After the inspector went back to his office to investigate whether such materials were authorized for use under the county plumbing code, the homeowner apparently proceeded to bury the water supply line. When the inspector returned the following day, the inspector left the homeowner a notice that the line was rejected for not meeting code. The county, however, was never called back to reinspect the water supply line.<sup>211</sup>

A similar sequence of events transpired concerning the homeowner's installation of a sewage disposal system. Under the Fayette County Code,<sup>212</sup> a homeowner may not bury or use a septic system before the county conducts a final inspection.<sup>213</sup> When the county health department inspector arrived to inspect the installation of the septic system, he discovered evidence that the homeowner had already installed and buried the system. The homeowner later acknowledged that he had also installed a twenty-five-foot drain field and a "functional temporary toilet."<sup>214</sup>

A third violation was identified after the county engineering department received numerous complaints that the homeowner was clearing and excavating land on or near a county right-of-way without a land disturbance permit, causing water to back up onto a neighbor's land and the right-of-way. Although the county issued a stop-work order requiring the homeowner to cease all construction on the property and served the homeowner with citations for violating the county ordinance, the homeowner continued to excavate the property without obtaining the required land disturbance permit.<sup>215</sup>

Because of the homeowner's conduct and repeated infractions, the State brought charges against him for violating the county ordinances and the stop-work order. The homeowner was sentenced to sixty days

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210. 259 Ga. App. 798, 578 S.E.2d 508 (2003).

211. *Id.* at 798-99, 578 S.E.2d at 509.

212. FAYETTE COUNTY, GA. CODE OF ORDINANCES § 290-5-26.03(5) (1992).

213. *Id.*

214. 259 Ga. App. at 799-800, 578 S.E.2d at 510.

215. *Id.* at 800-01, 578 S.E.2d at 510-11.

incarceration for each of his five ordinance violations, and fined \$1000.<sup>216</sup> On appeal, the court of appeals upheld the conviction, holding there was sufficient evidence and no reversible error.<sup>217</sup>

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216. *Id.* at 802, 578 S.E.2d at 511-12.

217. *Id.* at 798, 578 S.E.2d at 509.