Real Property

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I. INTRODUCTION

This Article discusses case law and legislative developments in Georgia real property law during the current survey period. Since the last survey period, a stringent predatory lending law has come and gone, and the courts have decided numerous cases with real property issues. Not every case decided nor every statute enacted can be discussed. The cases and legislation discussed below were chosen for their significance to real property law and their significance to any attorney who either regularly, or from time to time, practices in the field of real property.

II. LEGISLATION

A. *The Fair Lending Act*

Once again predatory lending proved to be a contentious issue for the Georgia General Assembly. Despite the charged nature of the debate, the general assembly passed significant amendments to the Georgia Fair Lending Act.[1] The most important of these amendments removed assignees from the Act's definition of "creditor" and thus limited the

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1. O.C.G.A. §§ 7-6A-1 to -13 (Supp. 2003).

potential liability of assignees of loans governed by the Act.[2] The damages available to a borrower on a high cost home loan from an assignee were capped at "the amount of all remaining indebtedness of the borrower under such loan"[3] plus the attorney fees incurred by the borrower.[4] The amendments eliminated the ability of borrowers to bring class actions against assignees.[5] The amendments also created a safe harbor for assignees who can demonstrate that they exercised due diligence in an effort not to purchase high-cost home loans.[6]

The amendments make the "anti-flipping" provisions of the Fair Lending Act applicable only when the new loan is a high-cost home loan.[7] The amendments also significantly modified the Act's definition of "points and fees" by removing fees paid to governmental agencies for mortgage insurance from the definition.[8] The amendments also added a parity provision to the Fair Lending Act, exempting state chartered depository institutions from compliance with the Act if similar federally chartered institutions are exempt due to federal preemption.[9]

B. Limitation of Damages When Foreclosure Sale of Property is Rescinded

Prior to the 2003 legislative session there was a "gray area" regarding rescission of foreclosure sales that should not have taken place because of bankruptcy or reinstatement or satisfaction of the loan. To correct this problem (and as a part of consumer-friendly legislation), the Georgia legislature enacted a statute that allows a seller to rescind a foreclosure sale within thirty days after that sale but before the deed or deed under power is delivered to the purchaser.[10] The statute does not address whether the deed is *recorded*; it speaks only to delivery of the deed.[11]

For an eligible sale to be rescinded, the seller must return all bid funds paid by the purchaser within five days of the sale.[12] The statute also provides for a limitation on damages recoverable by purchasers.[13]

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2. *Id.* § 7-6A-2(6).
3. *Id.* § 7-6A-6(c)(1).
4. *Id.*
5. *Id.*
6. *Id.* § 7-6A-6(b).
7. *Id.* § 7-6A-4(a).
8. *Id.* § 7-6A-2(12)(G)(iii). This change was intended to remove fees paid on Federal Housing Administration and Veterans Affairs loans from the calculation of points and fees.
9. *Id.* § 7-6A-12..
10. O.C.G.A. § 9-13-172.1(a) (Supp. 2003).
11. *Id.*
12. *Id.* § 9-13-172.1(b).
13. *Id.* § 9-13-172.1(c).

If the sale is rescinded because the borrower filed for bankruptcy protection, the buyer's damages are limited to the amount of the bid funds tendered at the sale.[14] If the sale is rescinded because (1) the statutory requirements were not fulfilled; (2) the default leading to the sale was cured prior to the sale; or (3) the lender and the borrower agreed prior to the sale to cancel the sale based upon an enforceable promise by the borrower to cure the default, then the damages that can be awarded to a purchaser are limited to the amount of the bid funds plus interest on the funds at the rate of eighteen percent annually, calculated daily.[15] Specific performance, that is, requiring the lender to conclude the sale, is specifically excluded by the statute as a remedy available to a third party purchaser.[16]

C. Title to Mobile Homes

In Georgia, until May 2003, manufactured (mobile) homes were considered personal property; no formal procedure was available to convert the title to mobile homes into title to real property. Mobile homes were treated as personal property for security purposes even though they may have served as collateral for deeds secured by real property.[17] By statute enacted in May 2003, a procedure was created to convert mobile homes from personal to real property.[18] Conversion of mobile home collateral from chattel to realty status was problematic for lenders because mortgage investor guidelines required that loan collateral be comprised of realty and not chattel.[19]

The statute provides that a mobile home as personal property shall convert to real property if the mobile home is or is to be permanently affixed to realty, and persons with ownership in the mobile home also have an ownership interest in the realty.[20] The owner of the mobile home and all holders of security interests must execute and file a Certificate of Permanent Location in the real estate records of the county where the land is located and with the commissioner of motor vehicle safety.[21] The clerk of court records the certificate in the same manner

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14. *Id.*
15. *Id.* § 9-13-172.1(d).
16. *Id.*
17. Ga. Op. Att'y Gen. No. 00-8 (2000).
18. O.C.G.A. § 8-2-181 (Supp. 2003).
19. *See* Announcement 03-06, Fannie Mae, Mortgage Eligibility and Servicing Procedures for Mortgages Secured by Manufactured Homes at 2 (June 3, 2003) [hereinafter Fannie Mae Announcement] (on file with the Mercer Law Review); Federal Home Loan Mortgage Corporation Announcement (2003).
20. O.C.G.A. § 8-2-181(b)(1) (Supp. 2003).
21. *Id.* § 8-2-181(b)(2).

as other instruments that affect real property and indexes the certificate under the name of the owner in the grantor and grantee indexes.[22] The clerk must provide the owner with a certified copy of the certificate upon the payment of fees typically charged for such copies.[23]

The Certificate of Permanent Location, when properly completed, includes the names and addresses of the owner of the mobile home and any lienholders.[24] The certificate also contains the title number of the home (vehicle identification number), a legal description of the land, and any other data the Department of Motor Vehicles (DMV) may require.[25]

Upon receipt of a certified copy of Certificate of Permanent Location and the certificate of title, the commissioner of the DMV must file and retain a copy of the certificates together with all other prior title records.[26] The statute requires no other filing of the title. When the Certificate of Permanent Location is filed, the DMV must issue confirmation to the superior court clerk that the certificate has been filed and the certificate of title has been surrendered.[27] The clerk then provides a copy of the Certificate of Permanent Location to the county tax assessors or other entity responsible for tax valuation, and the property should then be taxed as part of the realty.[28] The statute does not distinguish mobile homes used for rental from mobile homes used as homestead property.[29]

Once the preceding steps are completed, for all legal purposes, the mobile home is treated as a part of the realty where it is located.[30] Completion of these steps should satisfy the mortgage investor requirements of Fannie Mae and Freddie Mac.[31]

III. TITLE TO LAND

In *Bonner v. Norwest Bank Minnesota N.A.*,[32] Gertrude Paige, a widow, executed a warranty deed in 1990 conveying one hundred acres to her niece, Laura Bonner, creating a joint tenancy with a right of survivorship. At about the same time, the Phillips, who occupied the

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22. O.C.G.A. § 8-2-182(a) (Supp. 2003).
23. *Id.*
24. O.C.G.A. § 8-2-181(c)(1)-(2) (Supp. 2003).
25. *Id.* § 8-2-181(c)(3)-(5).
26. O.C.G.A. § 8-2-182(b) (Supp. 2003).
27. *Id.* § 8-2-182(c).
28. *Id.* § 8-2-182(d).
29. *See* O.C.G.A. § 8-2-180 (Supp. 2003).
30. O.C.G.A. § 8-2-183(a) (Supp. 2003).
31. *See* Fannie Mae Announcement, *supra* note 19, at 4-6; Federal Home Loan Mortgage Corporation Announcement, *supra* note 19.
32. 275 Ga. 620, 571 S.E.2d 387 (2002).

land (the occupants), became interested in purchasing a one-acre tract. The occupants contacted Alvin Paige, Ms. Paige's brother-in-law, and asked him to negotiate with his sister-in-law on their behalf. According to the occupants, an agreement was reached to purchase the acre for $1000, after which the occupants sought financing to build a house on the property. The sale of the property went forward, and Mr. Paige attended the closing, claiming he had authority to execute all documents on behalf of Ms. Paige and his deceased brother to convey the one-acre tract. The deed of transfer was notarized and recorded. Actually, Mr. Paige had no such authority, and the transaction was made without the knowledge of either Ms. Paige or Ms. Bonner. In February 1992 Ms. Paige and Ms. Bonner discovered that the occupants had built a home and were residing on the property. Neither, however, took action at the time of the discovery. Ms. Paige died in 1994.[33]

In 1998 the occupants refinanced the loan secured by the one-acre tract and executed a security deed in favor of Norwest Bank and Ameriquest Mortgage Company (the lenders). The loan went into default, and the lenders foreclosed in September 1999. The lenders obtained title to the property pursuant to the power of sale provision in the security deed and recorded a deed under power to evidence the foreclosure and transfer of title. Subsequently, Ms. Bonner informed the lenders that she claimed the property, and she brought suit to quiet title. After a hearing, the trial court granted summary judgment in favor of the lenders.[34]

The supreme court's analysis of the transaction determined that the fact that the original conveyance to the occupants was fraudulent was immaterial.[35] Instead, the court focused on the legitimacy of the transaction by the lenders and the deed after foreclosure, which transferred title to the lenders.[36] The court held that the foreclosure deed (as opposed to the original deed purportedly from Ms. Paige and her late husband to the occupants) was not fraudulent or forged, noting that it was undisputed that the lenders were bona fide purchasers for value.[37] Accordingly, "'[a] grantee in a security deed who acts in good faith stands in the attitude of a bona fide purchaser, and is entitled to the same protection.'"[38] The analysis of bona fide purchasers continued

33. *Id*. at 620-21, 571 S.E.2d at 387.
34. *Id*. at 621, 571 S.E.2d at 387-88.
35. *Id.* at 622, 571 S.E.2d at 388.
36. *Id.* at 621-22, 571 S.E.2d at 388.
37. *Id*. at 621, 571 S.E.2d at 388.
38. *Id.* (quoting Roop Grocery Co. v. Gentry, 195 Ga. 736, 745, 25 S.E.2d 705, 711 (1943)).

with the court holding that "'[w]here a purchaser of land from one in possession, who holds a deed thereto that is absolute on its face, has paid the purchase-price and taken possession, parties claiming an equity therein of which the purchaser had no notice are not entitled to have the purchaser's deed cancel[l]ed.'"[39] Therefore, the court concluded that in this matter, whether the occupants' deed was fraudulent was irrelevant.[40] Further, whether the occupants themselves had knowledge of the fraud was of little consequence because the "'general rule is that a bona fide purchaser for value at a judicial sale will be protected although the grantee in a security deed is guilty of fraud.'"[41]

In *Hartwell Railroad Co. v. Barnes*,[42] the supreme court reversed the trial court's judgment based on a special master's findings and held that an award of property as year's support was insufficient to divest a railroad of its interest in property.[43] Although the documents found in the county real estate records were unclear, the records showed that when Samuel Knox died in 1870, his wife Mary Knox received a life estate in the homeplace with the couple's children holding the remainder interest. In 1878 the Elberton Air Line Railroad, appellant's predecessor in interest (the Railroad Company), received a deed from Mary Knox conveying, in fee simple, a two-hundred-foot strip across the property. Mary Knox died in 1886, and the property was treated by all parties as if she had owned it in fee simple rather than merely as a life estate. Records indicate that an order was sought and granted whereby the "homeplace was divided into nine lots and sold at public sale in fee simple to nine separate purchasers, including a predecessor in title to"[44] Barnes, the appellee.[45]

The trial court appointed a special master, who was called upon to determine how Mary Knox, who inherited only a life estate, obtained fee simple title to the property by the time of her death.[46] After reviewing the deed book records and probate records, "the special master reasoned that the change in Mary Knox's ownership interest in the property, from life estate to fee simple, was the result of Mary Knox exercising her right to a year's support and obtaining fee simple title to the property as part

39. *Id*. (quoting Beecher v. Carter, 189 Ga. 234, 234, 5 S.E.2d 648, 649 (1939)).
40. *Id.* at 622, 571 S.E.2d at 388.
41. *Id.* (quoting Kouros v. Sewell, 225 Ga. 487, 488, 169 S.E.2d 816, 817 (1969)).
42. 276 Ga. 246, 577 S.E.2d 566 (2003).
43. *Id.* at 248, 577 S.E.2d at 568.
44. *Id.* at 247, 577 S.E.2d at 567.
45. *Id*. at 246-47, 577 S.E.2d at 567.
46. *Id.* at 247, 577 S.E.2d at 567.

of the award."[47] The trial court adopted the special master's conclusion and found in favor of Barnes.[48]

The supreme court agreed with the special master's conclusion "that an award of year's support provide[d] the best explanation, in light of the documentary evidence available for why Mary Knox owned the property in fee simple at the time of her death."[49] The court, however, did not agree that this explanation demanded the special master's conclusion that the "award divested the railroad of its interest in the property it purchased from Mary Knox"[50] prior to her death.[51] The exclusion of the roadbed from the year's support was significant, and while the special master properly concluded how Mary Knox could have obtained a fee simple title, the special master should have analyzed further to determine "whether the roadbed property was excluded from the year's support award and, if so, whether that exclusion also encompassed the disputed property."[52] Accordingly, the supreme court reversed the trial court's order.[53]

In *Ponder v. Ponder*,[54] the supreme court addressed multiple land estate issues.[55] There, Stanley Ponder brought a quiet title action against his deceased father's second wife and her children to establish ownership interest in four tracts of land that had been owned by the father who died intestate in 1980. Ponder was the son of the decedent and his first wife, whose brief marriage ended in divorce. At the time of his death, decedent was survived by his wife, Kyoto, and her three children, as well as Ponder.[56]

In 1981 Kyoto filed a petition in probate court for an order declaring no administration necessary. The petition listed herself and her three children as the decedent's only heirs at law. Ponder was not named as an heir, nor was he notified of the proceeding.[57] "Following notice and advertisement, the probate court entered an order declaring no administration necessary."[58] Just two months before Kyoto filed the petition, Ponder attended the wedding of one of Kyoto's children. Kyoto

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47. *Id.*, 577 S.E.2d at 567-68.
48. *Id.*, 577 S.E.2d at 568.
49. *Id.* at 247-48, 577 S.E.2d at 568.
50. *Id.* at 248, 577 S.E.2d at 568.
51. *Id*.
52. *Id.*
53. *Id*. at 248-49, 577 S.E.2d at 568.
54. 275 Ga. 616, 571 S.E.2d 343 (2002).
55. *Id.* at 616-20, 571 S.E.2d at 343-47.
56. *Id.* at 616, 571 S.E.2d at 344.
57. *Id.*, 571 S.E.2d at 345.
58. *Id*.

was present, but she did not notify Ponder of the petition. Soon after the probate court's order, Kyoto and her children exchanged various documents to establish a division of the fee simple title among themselves, and those instruments were duly recorded.[59]

That Ponder was recognized by decedent as his child in a divorce proceeding and that Kyoto knew of Ponder's existence was not disputed. Evidence was also presented that in 1954, Ponder's mother relieved the decedent from paying child support and in 1977, Ponder visited with his father and in Kyoto's presence discussed whether decedent was, in fact, Ponder's biological father.[60]

In his pleadings, Ponder averred that he did not learn of the probate proceedings until 1998. Ponder brought suit against Kyoto and her three children in 1999. On cross-motions for summary judgment, a special master found as a matter of law that Ponder was a legal heir of decedent and inherited a child's portion of the estate. The special master also found that Ponder's interest was not divested by the probate court's order of no administration necessary because Ponder's existence had been concealed from the probate court. The special master further found no fraud in the concealment because Kyoto had a reasonable belief that Ponder was not her late husband's child; Kyoto and her children acquired the land based on adverse possession under color of title; and Ponder's claim was not barred by laches or a statute of limitations defense. Based on the special master's findings, the trial court granted summary judgment to Kyoto and her children and denied Ponder's summary judgment motion. All parties appealed.[61]

The trial court determined that Ponder was an heir at law of the decedent and, therefore, was a tenant in common to the property with Kyoto and her children.[62] The trial court, therefore, considered the law governing adverse possessions by cotenants that

> [a] party who asserts a claim of title by adverse possession against a cotenant has the burden of proving not only the usual elements of prescription . . . but also at least one of the elements of [the Official Code of Georgia Annotated ("O.C.G.A.") section] 44-6-123, which provides as follows: "There may be no adverse possession against a cotenant until the adverse possessor effects an actual ouster, retains

59. *Id.* at 616-17, 571 S.E.2d at 345.
60. *Id*.
61. *Id.* at 617, 571 S.E.2d at 345.
62. *Id*. at 618, 571 S.E.2d at 345.

> exclusive possession after demand, or gives his cotenant express notice of adverse possession."[63]

However, in applying this exception, "'[t]he key factor to be considered is whether the party in possession either expressly or impliedly recognizes his status as cotenant. If he does not and holds possession under a deed which purports to convey the entire fee, the conditions of [O.C.G.A. section 44-6-123] do not apply.'"[64] Accordingly, the supreme court reasoned that although Kyoto and her children openly and continuously used the property, questions of fact remained as to whether they took the property with knowledge that there was a tenancy in common with Ponder.[65] Without such knowledge, the cotenancy exception of O.C.G.A. section 44-6-123 would not apply.[66]

The court also considered whether Kyoto and her children's "possession originated in fraud which would prevent the running of prescriptive title,"[67] and whether they satisfied at least one of the statutory conditions.[68] The court held that the trial court erred in determining as a matter of law that Kyoto and the children acquired prescriptive title against Ponder because "exclusive possession by a cotenant alone will be presumed not an adverse holding, but simply one in support of the common title."[69]

The supreme court next reviewed whether the order declaring no administration necessary and the deeds between Kyoto and her children were sufficient "writings to constitute color of title upon which prescriptive title could be based under O.C.G.A. [section] 44-5-164."[70] Recognizing that color of title is a writing that, among other things, requires that the possessor of land in good faith claim title, the court opined that

> [t]he type of fraud which would vitiate the good faith requirement . . . of prescription has been described as "not legal but moral fraud, a consciousness of doing wrong. To defeat prescriptive title, the fraud of the party claiming thereunder must be such as to charge his conscience. He must be cognizant of the fraud, not by constructive but by actual notice."[71]

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63. 275 Ga. at 618, 571 S.E.2d at 346 (quoting Wright v. Wright, 270 Ga. 530, 532, 512 S.E.2d 618, 620 (1999)).

64. *Id.* (quoting Mattison v. Barbano, 249 Ga. 271, 272, 290 S.E.2d 41, 42-43 (1982)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id*. at 619, 571 S.E.2d at 346 (citing Erwin v. Miller, 203 Ga. 58, 45 S.E.2d 192 (1947)).

70. *Id*.

71. *Id.* (quoting Graham v. Lanier, 179 Ga. 744, 745-46, 177 S.E. 574, 575 (1934)).

Whether Kyoto and her children swore falsely in the probate court was a question of fact, and accordingly, summary judgment was inappropriate.[72]

The court reviewed whether the equitable defense of laches was applicable to Ponder's claim and held that because Ponder had no notice that appellees were claiming to be the exclusive owners of the property until shortly before filing the action, Ponder could not be held conclusively guilty of laches.[73] The jury should make such a determination.[74] Finally, the appellees' argument that Ponder's claim was barred by a seven-year statute of limitations was inapplicable because "'[i]n suits to recover land, there is no statute of limitations in this [s]tate, title by prescription having been substituted for such statutes.'"[75]

IV. EASEMENTS, COVENANTS & BOUNDARIES

In *Lake Arrowhead Property Owners Ass'n v. Dalton*,[76] the developer and owners' association alleged violations of the community's restrictive covenants and filed a complaint to enjoin a real estate agent from placing "for sale" signs on lots within the community. The restrictive covenant provided that no such signs were allowed on any lots without the written consent of the developer, with the exception that the developer could place his own signs and advertising within the development as reasonably necessary to sell property. In a bench trial, the trial court denied the petition for injunction.[77]

Dalton was a real estate agent and property owner at Lake Arrowhead and as part of his business placed signs within the development on lots that he had listed for sale. That Dalton did not place the signs on his own property was undisputed. Dalton placed signs only on lots belonging to other property owners. The trial court found that Dalton did not have permission from the developer to place the signs but denied a request for injunction finding that the restrictive covenant prohibited only the "allowance" of signs upon the lots; therefore, the covenant was directed at the property owner, not realtors. In short, the trial court found that the association and developer requested the injunction

72. *Id.*, 571 S.E.2d at 347.
73. *Id.* at 620, 571 S.E.2d at 347.
74. *Id.*
75. *Id.* (quoting Latham v. Fowler, 192 Ga. 686, 691, 16 S.E.2d 591, 595 (1941)).
76. 257 Ga. App. 655, 572 S.E.2d 25 (2002).
77. *Id.* at 655, 572 S.E.2d at 26.

against the wrong party because the restrictions applied to the homeowners and not to third parties such as a realtor.[78]

After analyzing the language of the restrictive covenant, the court of appeals affirmed, holding that

> [b]ecause restrictive covenants are simply specialized contracts that run with the land, we begin by looking at the language of the covenants in question. In so doing, we bear in mind that since restrictions on private property are generally not favored in Georgia, they will not be enlarged or extended by construction, and any doubt will be construed in favor of the grantee.[79]

"Therefore, '[r]estriction on the use of land must be clearly established, not only as to the restrictions, but also as to the land restricted, and restrictions will be strictly construed.'"[80]

The key to the analysis of the covenant was the use of the word "allow."[81] The court held that "the term 'allow' implies that the covenant is meant to bar those with the authority to allow signs on the property,"[82] that is, the property owners, not the world in its entirety such as Dalton in his role as a realtor.[83] To the extent that the meaning was not clear from the language of the covenant, it was construed against the association and the developer.[84]

In *Bickford v. Yancey Development Co.*,[85] adjoining landowners brought an action to determine if a 65.1-acre tract owned by a developer was subject to a restrictive covenant recorded in 1977 requiring a minimum of two-acre lots. After motions, the trial court found that there was no restrictive covenant in force.[86]

The court of appeals held that the facts regarding the real property itself were not in dispute.[87] The issue was whether the covenants recorded in 1977 were automatically renewed in 1993 by enactment of O.C.G.A. section 44-5-60(d)(1).[88] The court determined that the statute

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78. *Id*. at 655-56, 572 S.E.2d at 26.
79. *Id*. at 656, 572 S.E.2d at 26 (quoting Duffy v. Landings Ass'n, 245 Ga. App. 104, 106-07, 536 S.E.2d 758, 761 (2000)).
80. *Id*. (quoting Roth v. Connor, 235 Ga. App. 866, 867 510 S.E.2d 550, 555 (1999)).
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. 258 Ga. App. 371, 574 S.E.2d 349 (2002).
86. *Id*. at 371-72, 574 S.E.2d at 350.
87. *Id.* at 372, 574 S.E.2d at 350.
88. *Id*.; O.C.G.A. § 44-5-60(d)(1) (1993).

did not renew the covenant, citing *Canterbury Forest Ass'n v. Collins*,[89] which held that

> "the automatic renewal provision of [O.C.G.A. section] 44-5-60(d), as amended in 1993, does not apply to the covenants [that arose prior to 1993], so that the covenants expired [on November 2, 1997,] after 20 years pursuant to [O.C.G.A. section] 44-5-60(b). This finding is based upon the fact that the covenants were adopted in [1977], before the automatic renewal provision was adopted in 1993."[90]

The automatic renewal statute cannot be applied retroactively because doing so would be unconstitutional.[91] Therefore, the restrictions lapsed, and the adjoining landowner was not required to abide by the two-acre lot requirement.[92]

In *Patterson v. Powell*,[93] the court of appeals analyzed permanent, irrevocable easements as appurtenant to the purchase of property.[94] In 1974 the Powells purchased property adjoining Lake Frank from C. T. Wessinger, the developer of the subdivision. The Powells were the first purchasers in the subdivision, and Wessinger relocated his driveway so the Powells could take advantage of the lake. A subdivision plat shows the Powells' property as adjoining the lake, but Wessinger maintained title to the lake itself. A 1971 protective covenant provided that Lake Frank homeowners could use the lake. This covenant expired on its own terms in 1996.[95]

In 1989 Wessinger sold a lot to Patterson. The Patterson tract included the lake and a parcel of the land adjoining the lake. As the new owner of the lake, Patterson informed the Powells that they could no longer use the lake.[96] "The Powells sued to establish their right to use the lake and to enjoin [Patterson] from interfering with that right."[97] The trial court found that "the Powells were entitled to use the lake because they acquired a permanent easement as an appurtenance to the purchase of their property."[98] The trial court held that

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89. 243 Ga. App. 425, 426-27, 532 S.E.2d 736, 738 (2000).
90. *Bickford*, 258 Ga. App. at 373, 574 S.E.2d at 351 (quoting *Collins*, 243 Ga. App. at 426-27, 532 S.E.2d at 739).
91. *Id.*
92. *Id.*
93. 257 Ga. App. 336, 571 S.E.2d 400 (2002).
94. *Id.* at 336-40, 571 S.E.2d at 400-03.
95. *Id.* at 336, 571 S.E.2d at 401.
96. *Id.*
97. *Id.*
98. *Id.*

"the Powells' right to use and enjoy the lake was an express grant and an irrevocable property right . . . ."[99]

On appeal, the Pattersons contended that the Powells' right to use the lake was limited to those rights set forth in the protective covenants which had expired in 1996.[100] The court of appeals affirmed the trial court, holding that because the Powells' easement rights were not established by the covenant but by the subdivision plat, an irrevocable easement was created.[101]

> "It is well-established that where a developer sells lots according to a recorded plat, the grantees acquire an easement in any areas set apart for their use. An easement acquired in this manner is considered an express grant, and is an irrevocable property right. The rationale is that the grantees of the property have given consideration for its enhanced value in the increased price of their lots."[102]

The subdivision plat, rather than an easement, created the right of the Powells; therefore, the new owners could not interfere with that right.[103]

V. CONTRACTS & BROKERS

A defective swimming pool was at issue in *Ainsworth v. Perreault*.[104] The Perreaults had the pool installed in 1989. In 1994 the bottom of the pool ruptured, requiring extensive repairs by the company that had installed the pool. After the repairs, the Perreaults had no further problems with the pool. The Perreaults sold the property to the Ainsworths in 1996. As part of the sale, the Perreaults provided a seller's property disclosure statement, which did not mention the prior problems with the pool. Prior to the sale, an inspector hired by the Ainsworths determined that the pool was in good condition. The sales contract contained a standard merger clause. In the fall of 1997, the Ainsworths observed that one corner of the pool was settling. They hired a geotechnical engineer who determined that the pool was constructed on uncompacted fill and that there was a subsurface cavity under the pool's foundation caused by the large volume of water that had previously escaped from the pool.[105]

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id*. at 337, 571 S.E.2d at 401 (quoting Walker v. Duncan, 236 Ga. 331, 332, 223 S.E.2d 675, 677 (1976)).
103. *Id.* at 338, 571 S.E.2d at 402.
104. 254 Ga. App. 470, 563 S.E.2d 135 (2002).
105. *Id.* at 470-71, 563 S.E.2d at 136-37.

The Ainsworths did not repair the pool; instead in 1998, they offered to rescind the sales contract. The Perreaults refused. In 1999 the Ainsworths sued the Perreaults for damages for fraud and breach of contract. The superior court granted summary judgment to the Perreaults.[106]

The court of appeals affirmed, focusing on the merger clause in the sales contract.[107] The court held that due to the merger clause, the Ainsworths could not base their fraud claim on representations that did not appear in the contract.[108] The court held that the fact that the seller's property disclosure statement was attached to and mentioned in the contract did not change this result.[109] The disclosure statement was not incorporated into the contract, and thus, evidence regarding it had to be excluded due to the merger clause.[110] The court also held that the Perreaults were not required to disclose the prior repairs to the swimming pool.[111] Instead, sellers are only required to inform potential buyers about current defects of which they are aware.[112]

In *Lifestyle Family, L.P. v. Lawyers Title Insurance Corp.*,[113] the court faced a dispute over real estate commissions.[114] In 1996 Eastern Airline Pension Fund retained Carter Holdings, Inc. (Carter) to find a buyer for a 130-acre tract of land. Carter began negotiations with Lifestyle Family, L.P. and Mansour Properties, L.L.C. to purchase the entire property. Southeastern Partners, Inc. (Southeastern), a real estate brokerage, contacted Carter on behalf of Unisource Worldwide, Inc. (Unisource), which wanted to purchase a thirty-acre portion of the property. The pension fund, however, wanted to sell the entire property and entered into an agreement to sell the property to Lifestyle and Mansour for $3.5 million.[115]

Prior to finalizing this agreement, Carter notified Lifestyle and Mansour of Unisource's interest in purchasing a portion of the property. Lifestyle's principal, Sam Leveto, requested that Carter solicit an offer from Unisource. Southeastern, acting on behalf of Unisource, submitted an offer of $2.25 million. The offer required the sellers to pay a commission of ten percent to the two brokers. Lifestyle and Mansour

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106. *Id.* at 471, 563 S.E.2d at 137.
107. *Id.* at 477, 563 S.E.2d at 141.
108. *Id*. at 472, 563 S.E.2d at 138.
109. *Id.*
110. *Id*.
111. *Id*. at 474, 563 S.E.2d at 139.
112. *Id*. at 475, 563 S.E.2d at 140.
113. 256 Ga. App. 305, 568 S.E.2d 171 (2002).
114. *Id.* at 305-13, 568 S.E.2d at 171-78.
115. *Id.* at 305-06, 568 S.E.2d at 173.

held a meeting with Unisource but decided not to negotiate with Unisource until after their purchase of the property closed.[116]

Following the closing, Lifestyle and Mansour contacted Southeastern for a meeting. Carter's representative was not at the meeting, in which Lifestyle and Mansour informed Southeastern that Carter represented them. Lifestyle and Mansour demanded $3 million for the tract and offered a commission of $80,000. Ultimately, Lifestyle and Mansour agreed to sell the property to Unisource for $3 million and to pay Southeastern a commission of $110,000. The contract also called for Southeastern to hold Lifestyle and Mansour harmless from the claims of any other real estate brokers. Neither Southeastern nor Carter signed this contract.[117]

At closing Southeastern signed a wavier of any claims against Lifestyle and Mansour in exchange for the $110,000. This sum, along with approximately $40,000, was placed in escrow with Lawyers Title Insurance Corp. After attempts to settle the commission dispute failed, Lawyer's Title filed an interpleader action. The trial court dismissed Lawyer's Title and realigned the parties with Carter as plaintiff, Lifestyle and Mansour as defendants, and Southeastern as third-party defendant. Carter and Southeastern settled with each other before trial. At trial the court directed a verdict for Southeastern in the amount of $110,000. The jury returned a verdict for Carter on a breach of contract claim against Lifestyle and Mansour in the amount of $150,000. The jury also found that no indemnification agreement existed between Southeastern and Lifestyle and Mansour. Lifestyle and Mansour filed a motion for new trial as to Carter and a motion for judgment notwithstanding the verdict as to Southeastern. The trial court denied both motions.[118]

On appeal Lifestyle and Mansour argued that they had not entered into a contract to pay commissions to Carter.[119] The court of appeals found no evidence to support the jury's verdict that Lifestyle and Mansour had contracted to pay commissions to Carter.[120] The court remanded for a retrial on Carter's quantum meruit claim, holding that the Brokerage Relationships in Real Estate Transactions Act did not eradicate the common law concept of procuring cause and, thus, did not

116. *Id.* at 306, 568 S.E.2d at 173.
117. *Id.* at 306-07, 568 S.E.2d at 173-74.
118. *Id.* at 307-08, 568 S.E.2d at 174.
119. *Id.* at 308, 568 S.E.2d at 175.
120. *Id.* at 309, 568 S.E.2d at 176.

eliminate Carter's quantum meruit claim.[121] The court of appeals affirmed the directed verdict in favor of Southeastern.[122]

VI. FORECLOSURE

Venue was the issue in *First American Title Insurance Co. v. Broadstreet*.[123] Washtenaw Mortgage Company loaned Mr. Broadstreet $40,000, secured by a security deed on residential property in Carroll County. Washtenaw purchased title insurance from First American as part of the transaction. Later, First American purchased Washtenaw's interest in the loan as part of a settlement of a title insurance claim. When First American initiated foreclosure proceedings, Ms. Broadstreet filed suit in Carroll County seeking to set aside the security deed and to enjoin the foreclosure. First American moved to dismiss or transfer venue, arguing that venue was not proper in Carroll County. Following a hearing on Ms. Broadstreet's motion for an interlocutory injunction to prohibit the foreclosure, Ms. Broadstreet amended her complaint to add a quiet title claim. The superior court denied First American's motion to dismiss or transfer venue and granted Ms. Broadstreet's motion for an interlocutory injunction. First American then sought an interlocutory appeal.[124]

The court of appeals held that the superior court erred in finding that venue was proper in Carroll County under O.C.G.A. section 33-4-1(2).[125] That statute allows a plaintiff to sue an insurance company in any county where it has an agent or a place of business.[126] The court of appeals, however, held that the plain language of the statute limited this venue provision to claims that arose out of the defendant's role as an "insurer."[127] Because Ms. Broadstreet's claim arose out of Washtenaw's alleged wrongdoing in the origination of the mortgage, her claim failed to arise out of First American's role as an insurer.[128] The court of appeals held that O.C.G.A. section 33-4-1(2) did not apply to the case and that Carroll County was improper venue for an action against a foreign corporation.[129] Instead, venue against such a corporation lied

121. *Id.* at 311, 568 S.E.2d at 177.
122. *Id.* at 313, 568 S.E.2d at 178.
123. 260 Ga. App. 705, 580 S.E.2d 676 (2003).
124. *Id.* at 705-06, 580 S.E.2d at 677.
125. *Id.* at 707, 580 S.E.2d at 678; O.C.G.A. § 33-4-1(2) (2000).
126. 260 Ga. App. at 706, 580 S.E.2d at 677-78; O.C.G.A. § 33-4-1(2).
127. 260 Ga. App. at 706, 580 S.E.2d at 678.
128. *Id.*, 580 S.E.2d at 677.
129. *Id.* at 707, 580 S.E.2d at 678.

"'in the county where its attorney in fact [was] a resident.'"[130] Because "a court without venue lacks authority to issue an injunction,"[131] the court of appeals held that the superior court erred in granting Ms. Broadstreet's motion for an interlocutory injunction.[132]

In *Boaz v. Latson,*[133] the court of appeals addressed claims of fraud, wrongful foreclosure, and slander of title.[134] Darrell Boaz retained attorney Latson to represent him in a legal matter. In August 1994 a third party told Darrell that Latson needed his signature on an affidavit for his case. The third party had Darrell sign a piece of paper containing only a signature line and a blank notary stamp. The Boazes alleged that Latson used this signature to create a promissory note in favor of Latson in the amount of $20,246.44. Latson recorded the promissory note on the public record in March 1995. In 2001 Latson sought payment on the note and commenced foreclosure proceedings against property jointly owned by Darrell and his wife, Carolyn Boaz. The Boazes sued alleging fraud, wrongful foreclosure, and slander of title. The superior court granted summary judgment to Latson.[135]

The court of appeals affirmed the grant of summary judgment on the fraud claim, finding that the claim was barred by the applicable statute of limitations.[136] The court also noted that the Boazes had not adduced any evidence to show that the security deed Latson was attempting to foreclose on had been obtained by fraud.[137]

The court reversed the summary judgment on the wrongful foreclosure claim.[138] The court determined that the Boazes' claim that Latson began foreclosure proceedings on an allegedly fraudulent debt constituted a claim for wrongful foreclosure under Georgia law.[139] The court rejected Latson's argument that Carolyn Boaz lacked standing to bring the wrongful foreclosure claim because she was not a party to the promissory note at issue.[140] The court held that Carolyn Boaz had an interest in the property being foreclosed, and that interest gave her

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130. *Id.* (quoting Lingo v. Worcester County Inst. for Sav., 171 Ga. App. 892, 892, 321 S.E.2d 744, 745 (1984)).
131. *Id.* (citing Miller v. Bryant, 266 Ga. 584, 468 S.E.2d 762 (1996)).
132. *Id.*
133. 260 Ga. App. 752, 580 S.E.2d 572 (2003).
134. *Id.* at 752-60, 580 S.E.2d at 572-79.
135. *Id.* at 752-54, 580 S.E.2d at 574-75.
136. *Id.* at 754-55, 580 S.E.2d at 575-76.
137. *Id.* at 755, 580 S.E.2d at 576.
138. *Id.* at 756, 580 S.E.2d at 577.
139. *Id.* at 757, 580 S.E.2d at 577.
140. *Id.*

standing to sue for wrongful foreclosure.[141] The court also rejected Latson's argument that the wrongful foreclosure claim was barred by the applicable statute of limitations.[142] The court held that the wrongful foreclosure claim did not accrue until Latson initiated foreclosure proceedings and that the Boazes' suit, brought a scant two days after that occurrence, was timely.[143]

The court also rejected Latson's arguments regarding the Boazes' slander of title claim.[144] Latson argued that this claim was also barred by the statute of limitations and that his foreclosure notice was privileged.[145] The court rejected the privilege argument, holding that no authority precluded a slander of title claim based on a published foreclosure notice.[146] Because the foreclosure notice had been published within the applicable statute of limitations, the court of appeals reversed the superior court's ruling that the slander of title claim was time-barred.[147]

VII. LANDLORD AND TENANT

In *Cannon v. Wesley Plantation Apartments*,[148] the court of appeals addressed a fight over a security deposit.[149] Cannon rented an apartment at Wesley Plantation in April 1998, paying a $100 security deposit. Cannon informed Wesley Plantation that he intended to surrender the apartment on September 1, 1999. That same day, a Wesley Plantation employee conducted a walk-through of Canon's apartment and noted damage beyond normal wear and tear. The employee filled out a form noting the damaged areas and asked Cannon to sign it. Cannon refused to sign the form.[150]

The cost of the needed repairs exceeded the amount of Cannon's security deposit. Within three days of the walk-through, Wesley Plantation mailed Cannon notice that it intended to retain his security deposit and demanded funds to cover the additional cost of repairs. In May 2000 Cannon sued Wesley Plantation seeking return of his security

141. *Id.*
142. *Id.* at 758, 580 S.E.2d at 578.
143. *Id.*
144. *Id.* at 759, 580 S.E.2d at 579.
145. *Id.*
146. *Id.*
147. *Id.*
148. 256 Ga. App. 244, 568 S.E.2d 137 (2002).
149. *Id.* at 244, 568 S.E.2d at 138.
150. *Id.* at 245, 568 S.E.2d at 138.

deposit. After a bench trial, the superior court granted judgment to Wesley Plantation.[151]

Cannon appealed, alleging that the trial court erred in finding that Wesley Plantation had complied with O.C.G.A. section 44-7-33.[152] That statute requires landlords to inspect the apartment within three days after a tenant surrenders it and to notify the former tenant of its intent to retain the security deposit within one month of the later of the surrender of the property or the termination of the lease.[153] Cannon argued that Wesley Plantation had not complied with the statute because he never received a copy of the notice.[154] The court of appeals rejected this argument, holding that the statute merely required the landlord to mail the notice to the former tenant at his or her last known address via first class mail.[155] The statute does not require that the notice actually be received by the tenant.[156] The court of appeals therefore affirmed the judgment of the trial court.[157]

In *Wilbanks v. Arthur*,[158] the court of appeals addressed a tenant's challenge to his landlord's title in the context of a summary dispossessory proceeding.[159] The landlord, Elizabeth Arthur, and the tenant, Sandy Wilbanks, were sister and brother. The property at issue had been owned by their father. Upon the father's death in 1968, the property was awarded as year's support to his wife, Wilda, and their minor child, Elizabeth Arthur. In 1969 all interested parties, including Sandy, deeded the property to Arthur, reserving a life estate for Wilda Wilbanks. In 1972 Wilda Wilbanks deeded her remaining interest in the property to Arthur.[160]

Wilda Wilbanks continued to live on the property. In 1995 Sandy moved to the property at his mother's request. Subsequently, his sister, Arthur, filed a dispossessory proceeding against him. Sandy's defense claimed that Arthur had lost title to their mother's property through adverse possession. The trial court found that Sandy Wilbanks was a tenant at sufferance and could not raise an alleged defect in his landlord's title as a defense to a dispossessory proceeding. Sandy

151. *Id.*
152. *Id.* at 246-47, 568 S.E.2d at 138-39; O.C.G.A. § 44-7-33 (1991).
153. 256 Ga. App. at 247, 568 S.E.2d at 139; O.C.G.A. § 44-7-33.
154. 256 Ga. App. at 247, 568 S.E.2d at 139.
155. *Id.*, 568 S.E.2d at 139-40.
156. *Id.*
157. *Id.*, 568 S.E.2d at 140.
158. 257 Ga. App. 226, 570 S.E.2d 664 (2002).
159. *Id.* at 226-28, 570 S.E.2d at 664-66.
160. *Id.* at 226, 570 S.E.2d at 664-65.

appealed, alleging that the trial court erred by not addressing his claim of adverse possession.[161]

The court of appeals reversed the trial court, holding that Sandy's claim that there was no landlord-tenant relationship was an appropriate defense to the dispossessory proceeding.[162] The court held that the trial court erred in not addressing Sandy's adverse possession claim.[163] Because evidence concerning that claim was conflicting, the court remanded the case and ordered the trial court to determine whether Arthur lost title through adverse possession.[164]

VIII. ZONING

In *Cherokee County v. Greater Atlanta Homebuilders Ass'n,*[165] a developers' association "challenged Cherokee County's impact fee ordinance . . . as unconstitutional and contrary to the enabling statute."[166] The central issue was "the county's failure to impose impact fees on new developments in incorporated portions of the county even though those developments would benefit from new facilities constructed with the impact fees obtained from new developments in unincorporated portions."[167] The court of appeals first noted that the county did not have the statutory power to impose impact fees on new developments in incorporated portions of the county.[168] Therefore, "the county acted rationally and reasonably in imposing impact fees on only those developments over which it had the power to impose fees."[169] To reach this conclusion, the court reviewed Cherokee County's impact fee ordinance, which closely tracked the language of O.C.G.A. section 36-71-1[170] and "required persons constructing new developments in the county to pay an impact fee before receiving a building permit."[171]

The Greater Atlanta Homebuilders Association ("the Association"), which represented local developers, "sought a declaratory judgment that the ordinance as applied did not comport with the enabling statute and

161. *Id.* at 226-27, 570 S.E.2d at 665.
162. *Id.* at 227, 570 S.E.2d at 665.
163. *Id.* at 228, 570 S.E.2d at 666.
164. *Id.*
165. 255 Ga. App. 764, 566 S.E.2d 470 (2002).
166. *Id.* at 764, 566 S.E.2d at 472.
167. *Id.*
168. *Id.*
169. *Id.*
170. O.C.G.A. §§ 36-71-1 to -13 (2002).
171. 255 Ga. App. at 765, 566 S.E.2d at 472; Cherokee County Ordinance Code § 25; *see also* O.C.G.A. §§ 36-71-1 to -13.

violated due process and equal protection principles."[172] The trial court denied the Association's motion for summary judgment. After a bench trial, the trial court upheld the ordinance as constitutional and consistent with the statute. The trial court found unfair the portion of the ordinance that did not impose the fees on developments in incorporated portions of the county that would benefit from the facilities generated by the fees. The court therefore restrained the county from collecting the impact fees designated for libraries, road services, and parks and recreation until the county devised a system to exclude the non-fee payers from benefitting from these improvements. Both parties appealed.[173]

The court of appeals looked to Georgia's enabling statute, which authorizes counties and cities that have adopted a Capital Improvements Element in their comprehensive county plans to collect impact fees for new developments.[174] The fees imposed by the counties

> are not to exceed a proportionate share of the cost of system improvements . . . and are to be calculated on the basis of (i) service areas defined by the county on the basis of sound planning or engineering principles . . . and (ii) levels of service for public facilities applicable to existing development and to new growth and development.[175]

The court held that the Cherokee County ordinance closely tracked the language of the statute and established the service areas for each category as required by the statute.[176]

Regarding the Association's primary complaint that the county improperly imposed the fees only on new developments in the unincorporated portions of the county, the court held that due process and equal protection provisions were not violated as such constitutional guarantees do "'not prevent a reasonable classification relating to the purpose of the legislation.'"[177] The enabling statute authorized Cherokee County to impose an impact fee as a condition of development approval. The impact fee was to be collected when the county issued the building permit. The county's authority to require development approval through a building permit was restricted to development in unincorporated

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172. 255 Ga. App. at 765, 566 S.E.2d at 472.
173. *Id.*, 566 S.E.2d at 472-73.
174. *Id.* at 766, 566 S.E.2d at 473; *see* O.C.G.A. § 36-71-3(a) (2000).
175. 255 Ga. App. at 766, 566 S.E.2d at 473 (citations omitted).
176. *Id.*
177. *Id.* at 766-67, 566 S.E.2d at 474 (quoting Reed v. Hopper, 235 Ga. 298, 300, 219 S.E.2d 409, 412 (1975)).

portions of the county by the limitations in O.C.G.A. section 36-71-11.[178]

The Association also argued that the county ordinance and Capital Improvements Element of the county's comprehensive plan did not comply with the enabling statute and that the fees were improperly calculated.[179] The court disagreed, noting that the county had procedures in place to carefully project the county's growth and then properly calculated the impact fees on the basis that all new development throughout the county, not just in unincorporated areas, would pay impact fees to cover county improvements.[180]

In *Garden Hills Civic Ass'n v. Metropolitan Atlanta Rapid Transit Authority,*[181] the court of appeals held that a local civic organization and homeowner's association lacked standing to challenge rezoning.[182] The Garden Hills Civic Association ("the Association") and six homeowners sued Atlanta's rapid transit authority, the city of Atlanta, and others (collectively "MARTA"), "alleging that the rezoning of approximately forty-seven acres in Atlanta was illegal and unconstitutional."[183] Following a bench trial, the court found that the Association and homeowners lacked standing to bring the zoning claims and even if they had standing, no legal basis for reversing the zoning decision existed.[184] The trial court based its conclusion that the Association and homeowners lacked standing on the fact that the only homeowner who testified at trial "failed to demonstrate that she sustained special damages as a result of the zoning decision. With respect to the [Association], the trial court concluded that the [A]ssociation lacked independent standing to file suit because [the Association itself] did not own property affected by the rezoning."[185]

The court of appeals looked to the two-part test established by the supreme court to test standing in rezoning cases.[186] "First, the aggrieved party 'must have a substantial interest in the zoning decision, and second, . . . this interest [must] be in danger of suffering some special damage or injury not common to all property owners similarly

178. *Id.* at 767-68, 566 S.E.2d at 474.
179. *Id.* at 770, 566 S.E.2d at 476.
180. *Id.*
181. 256 Ga. App. 367, 568 S.E.2d 586 (2002).
182. *Id.* at 369, 568 S.E.2d at 590.
183. *Id.* at 367, 568 S.E.2d at 586.
184. *Id.*, 568 S.E.2d at 586-87.
185. *Id.*, 568 S.E.2d at 587.
186. *Id.* (citing Dekalb County v. Wapensky, 253 Ga. 47, 48, 315 S.E.2d 873, 875 (1984)).

situated.'"[187] The court held that the record did not support the Association and homeowners' argument that they were harmed in such a way as to demonstrate the required special damages.[188] The homeowner who testified at trial stated that because the rezoned property was being developed for use as offices, housing, and retail shopping, she would suffer from an increase in the level of noise, light, traffic, crime, and pollution. A real estate appraiser also testified that the development would decrease the value of the homeowners' property. Appellants' argument, therefore, was that the rezoning led to the development, which thus diminished their property values.[189] The court, however, held that appellants failed to acknowledge that the property could have been developed as proposed under existing zoning and that "appellants were subject to the same harm regardless of whether the property was rezoned."[190] The court ended its opinion stating that "appellants' true complaint is not that the property was rezoned, but that it will be developed at all. However, such development is to be expected in a thriving urban community. And the increase in inconveniences stemming from urban growth—such as increased traffic—is insufficient to confer standing."[191]

IX. TRESPASS

In *Sumitomo Corp. of America v. Deal*,[192] Deal and Montgomery were downstream neighbors who brought suit against Sumimoto, SMG Development Associates, and Atlantic Hills Corporation (collectively "SMG") for damage to their property allegedly caused by surface water runoff from developer's manmade detention pond. After trial the jury found SMG liable for continuing trespass, nuisance, and damages for surface water invasion onto the Deal and Montgomery land. A jury awarded the Deals compensatory damages, attorney fees, and punitive damages. The Montgomerys were awarded compensatory damages and attorney fees. The trial court reduced the jury award for punitive damages awarded to the Deals. SMG and the Deals appealed.[193]

At trial, the court instructed the jury as follows:

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187. *Id.* (quoting *Wapensky*, 253 Ga. at 48, 315 S.E.2d at 875).
188. *Id.* at 368, 568 S.E.2d at 587.
189. *Id.* at 367-68, 568 S.E.2d at 587.
190. *Id.* at 368, 568 S.E.2d at 587.
191. *Id.* at 368-69, 568 S.E.2d at 587-88 (citations omitted).
192. 256 Ga. App. 703, 569 S.E.2d 608 (2002).
193. *Id.* at 703-04, 569 S.E.2d at 611.

> One landed proprietor has no right to concentrate and collect water and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality or in a manner different from that in which the water would be received by the lower property if it simply ran down upon it from the upper property by the law of gravitation.[194]

SMG argued that the instruction was in error and claimed that Georgia law governing surface water invasion was "arcane" and that it "'stifles potential development and subjects project developers to liability for converting raw, rural land to modern urbanized development.'"[195] SMG sought the replacement of the Georgia rule with the reasonable use rule of other states, which allows "'the benefits and burdens of development to be shared by the community.'"[196] SMG specifically pointed to Missouri's law as guidance.[197] The court of appeals noted that even if it agreed with SMG's argument, the court had no authority to overrule a decision of the Georgia Supreme Court.[198] The court therefore held that the trial court did not err in failing to charge a Georgia jury on Missouri's law.[199]

In a second enumeration of error, SMG contended that because Sumitomo was only a shareholder in the developer's corporate investors, the trial court erred in failing to direct a verdict or enter a judgment notwithstanding the verdict in favor of Sumitomo.[200] After analyzing whether Sumitomo could be held liable for nuisance, the court of appeals held that the trial court did not err in failing to direct a verdict or enter judgment notwithstanding the verdict.[201] Under Georgia law to be liable for nuisance, "'[o]wnership of land by the tortfeasor is not an element, but control is; the essential element of nuisance is control over the cause of the harm. The tortfeasor must be either the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance.'"[202]

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194. *Id.* at 705, 569 S.E.2d at 611. *See* Gill v. First Christian Church, 216 Ga. 454, 117 S.E.2d 164 (1960).

195. 256 Ga. App. at 705, 569 S.E.2d at 612.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 706, 569 S.E.2d at 612-13.

201. *Id.* at 706-07, 569 S.E.2d at 613.

202. *Id.* at 707, 569 S.E.2d at 613 (quoting Fielder v. Rice Constr. Co., 239 Ga. App. 362, 366, 522 S.E.2d 13, 16 (1999)).

Trial testimony showed that Sumitomo had an eighty percent ownership interest in Atlantic Hills, and other evidence showed that these parties were closely related in business.[203] The court of appeals held that the "any evidence" standard applied and that there was sufficient evidence for the jury to find that Sumitomo exercised enough control in the decision regarding the detention pond to hold it liable for damages.[204]

SMG's third enumeration of error claimed that the trial court erred in failing to grant either a directed verdict or judgment notwithstanding the verdict (j.n.o.v.) in favor of all defendants on the Deals' nuisance theory of liability.[205] Based on the proposition

> "[t]hat which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance,"[206] . . . SMG argue[d] that the development of Hamilton Mill was a lawful and permissible use of its property, and that no part of the project was done unlawfully or contrary to what the appropriate governing authorities permitted. In other words, "[t]he project was authorized and executed in accordance with law and cannot, therefore, be a nuisance."[207]

The court looked to the statutory definition of nuisance and found that the statute itself contradicted SMG's argument.[208] O.C.G.A. section 41-1-1 provides: "A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance."[209]

"In its fourth enumeration of error, SMG contend[ed] that the trial court erred in permitting the Deals' trespass theory to go to the jury because trespass requires proof of the property's value before and after the trespass, and the Deals failed to provide"[210] such evidence.[211] The court rejected this argument and cited to precedent, which held, "'the cost of repair often has been held to be an appropriate measure of damages in cases involving a continuing nuisance or trespass.'"[212] The trial record showed that the Deals presented extensive testimony on the

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203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* (quoting City of Douglasville v. Queen, 270 Ga. 770, 773, 514 S.E.2d 195, 199 (1999)).
207. *Id.* (citation omitted)
208. *Id.* at 707-08, 569 S.E.2d at 613.
209. *Id.*
210. 256 Ga. App. at 708, 569 S.E.2d at 614.
211. *Id.*
212. *Id.* (quoting Kiel v. Johnson, 179 Ga. App. 43, 45, 345 S.E.2d 131, 133 (1986)).

costs of repairing the damage to their property caused by water flowing from the detention pond.[213] Accordingly, the trial court did not err.[214]

Regarding the reduction of the punitive damages, the court applied a de novo standard of review.[215] The three criteria for reviewing punitive damages are: "'(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'"[216] Applying this three-prong test, the court held that the trial court erred in reducing the punitive damages and remanded the case to that court for reinstatement of the damages.[217]

X. TAXATION

Attorney fees for a successful appeal from the board of equalization's assessment of property value were at issue in *Morrison v. Cobb County Board of Tax Assessors*.[218] The Morrisons filed an appeal of the assessed value of their property to the board of equalization in 1999. The board of equalization upheld the assessment, and the Morrisons appealed that ruling to the superior court. The Morrisons were successful in their superior court appeal and subsequently moved for costs and attorney fees incurred pursuant to O.C.G.A. section 48-5-311(g)(4)(B)(ii).[219] The trial court denied the motion for attorney fees, holding that the statute did not apply to the Morrisons' appeal.[220]

The court of appeals affirmed the ruling of the trial court.[221] The court found that prior to the enactment of O.C.G.A. section 48-5-311(g), no statutory provision allowed recovery of costs or attorney fees in tax appeals.[222] The 1999 act, which became O.C.G.A. section 48-5-311(g), stated that "'[t]his Act shall become effective on January 1, 2000, and shall be applicable to all assessments and proceedings commenced on or

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213. *Id.*
214. *Id.*
215. *Id.* at 709, 569 S.E.2d at 614.
216. *Id.*, 569 S.E.2d at 614-15 (quoting Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 440 (2001)).
217. *Id.* at 711, 569 S.E.2d at 616.
218. 258 Ga. App. 697, 697-99, 574 S.E.2d 888, 888-89 (2002).
219. O.C.G.A. §48-5-311(g)(4)(B)(ii) (2000).
220. 258 Ga. App. at 698, 574 S.E.2d at 888-89.
221. *Id.* at 699, 574 S.E.2d at 889.
222. *Id.* at 698, 574 S.E.2d at 889.

after that date.'"[223] The Morrisons argued that because their superior court appeal was filed after January 1, 2000, the attorney fees provision should apply to their appeal.[224] The court of appeals rejected this argument, holding that the Morrisons commenced their proceedings when they filed their appeal to the board of equalization, not when they appealed the board of equalization's ruling to the superior court.[225] Because their appeal to the board of equalization was filed in 1999, O.C.G.A. section 48-5-311(g) did not apply, and they could not recover costs or attorney fees.[226]

Attorney fees for a successful tax appeal were also at issue in *Fulton County Board of Tax Assessors v. Butner*.[227] The county board of tax assessors valued Butner's property at $1,222,600. Butner appealed this valuation to the county board of equalization, which valued the property at $1,129,100. Butner appealed that valuation to the superior court. A jury verdict valued the property at $950,000. As this amount was less than eighty-five percent of the board of equalization's valuation, Butner moved for attorney fees under O.C.G.A. section 48-5-311(g)(4)(B)(ii). Butner's motion was supported by an affidavit from her counsel with statements of her account attached. The board of tax assessors responded to the motion, alleging that Butner was not entitled to attorney fees because she had not returned the property for taxation as required by O.C.G.A. section 48-5-311(g)(4)(B)(ii). Without holding a hearing, the trial court granted Butner's motion and awarded attorney fees of $7515. The board of tax assessors appealed.[228]

The court of appeals held that the trial court erred by awarding attorney fees without first holding an evidentiary hearing.[229] The court held that such a hearing was required to allow the board of tax assessors to "'challenge testimony as to the value and need for legal services.'"[230] The court rejected Butner's arguments that no hearing was required under Uniform Superior Court Rule 6.3 and that the board had waived its right to a hearing.[231]

The court of appeals also held that the trial court did not err in finding that O.C.G.A. section 48-5-20(a)(2)[232] applied to the case.[233]

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223. *Id.*, 574 S.E.2d at 888 (quoting 1999 Ga. Laws 1062).
224. *Id.*, 574 S.E.2d at 889.
225. *Id.*
226. *Id.*
227. 258 Ga. App. 68, 68-71, 573 S.E.2d 100, 100-02 (2002).
228. *Id.* at 68-69, 573 S.E.2d at 100-01.
229. *Id.* at 69, 573 S.E.2d at 101.
230. *Id.* (quoting Mitcham v. Blalock, 214 Ga. App. 29, 32-33, 447 S.E.2d 83, 86 (1994)).
231. *Id.*
232. O.C.G.A. § 48-5-20(a)(2) (1999).

That statute provides that a property has been returned for taxation if real estate transfer tax was paid on the property, and a properly completed real estate transfer tax form was filed in the preceding tax year.[234] Because the trial court did not hold an evidentiary hearing, however, no evidence of record existed to demonstrate that Butner fulfilled the requirements of O.C.G.A. section 48-5-20(a)(2).[235] The court of appeals remanded the case for an evidentiary hearing.[236]

In *Burt, Burt & Rentz Retirement Pension Trust v. Dougherty County Tax Assessors*,[237] the court of appeals addressed an allegation that the county tax assessor failed to properly assess the property of utility companies.[238] Appellants alleged that the county tax assessor failed to assess the value of easements held by Georgia Power Company and Colonial Pipeline Company. The evidence showed that the county tax assessor relied upon valuations of the utilities' property prepared by the Georgia Department of Revenue. The revenue department arrived at that valuation by calculating an overall value of the utility company and then apportioning that value among the various counties according to the utility's original investment in each county. The revenue department's focus was on the utility's gross investment in the county because the department did not have the expertise to value individual assets. The tax assessor accepted the revenue department's valuation without further investigation. The superior court, finding nothing wrong with this practice, granted summary judgment to the tax assessor.[239]

The court of appeals rejected appellants' argument that the tax assessor was required make its own assessment of the value of the utilities' property.[240] The court held that O.C.G.A. section 42-2-18[241] authorized the tax assessor to either adopt or modify the revenue department's assessment.[242] The tax assessor was entitled to rely entirely upon the revenue department's assessment.[243] Therefore, the court affirmed the grant of summary judgment to the tax assessor.[244]

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233. 258 Ga. App. at 70, 573 S.E.2d at 102.
234. *Id.*; O.C.G.A. § 48-5-20(a)(2) (1999).
235. 258 Ga. App. at 70, 573 S.E.2d at 101-02.
236. *Id.* at 71, 573 S.E.2d at 102.
237. 256 Ga. App. 648, 569 S.E.2d 557 (2002).
238. *Id.* at 648, 569 S.E.2d at 557.
239. *Id.* at 648-50, 569 S.E.2d at 557-59.
240. *Id.* at 650, 569 S.E.2d at 559.
241. O.C.G.A. § 42-2-18 (2000).
242. 256 Ga. App. at 650-51, 569 S.E.2d at 559.
243. *Id.* at 651, 569 S.E.2d at 559.
244. *Id.* at 652-53, 569 S.E.2d at 561.