Real Property

by Linda S. Finley*

The Author believes it appropriate to dedicate this Article to a man who has served as a mentor and expert for hundreds (perhaps thousands) of real estate lawyers in the State of Georgia. Affectionately known as "The Death Ray" by his students, who at one time or another admired or feared him, Professor James C. Rehberg had the knack for making a somewhat dry topic come alive (perhaps the exception being the *Rule Against Perpetuities*). Professor Rehberg was honored in early 2004 by students, faculty, and alumni at his official retirement. While the Author can do little to make this survey come alive as Professor Rehberg surely would have done, nonetheless, it is presented with our friend, mentor, and colleague, James C. Rehberg, in mind.

I. INTRODUCTION

This Article discusses case law and other developments in Georgia real property law from June 1, 2003 through May 31, 2004. In the interest of space, however, much must be omitted. The decisions 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. Perhaps the most significant opinion in the area of real property law during the survey period was the Georgia Supreme Court's opinion that only attorneys licensed in the state, with a minor exception, may conduct real property closings in Georgia.[1] Both advocates seeking non-attorney closings and attorneys seeking a mandate that only Georgia lawyers be allowed to preside over real estate closings, claimed they were protecting the consumer. The supreme court ultimately settled the issue as is discussed below.

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1. *In re* UPL Advisory Opinion 2003-2, 277 Ga. 472, 588 S.E.2d 741 (2003).

II. UNAUTHORIZED PRACTICE OF LAW

The Georgia Supreme Court, in a unanimous opinion, decided that the preparation and execution of a deed of conveyance for another and the facilitation of its execution by anyone other than a licensed Georgia attorney constituted the unauthorized practice of law.[2] The ruling put an end to the issue of whether "witness-only closings" would violate the rule prohibiting the unauthorized practice of law.[3] The court noted that it had previously

> issued formal advisory opinions which confirmed that a lawyer cannot delegate responsibility for the closing of a real estate transaction to a non-lawyer and required the physical presence of an attorney for the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt).[4]

The proponents of "lay conveyancing" (described by the court as "the practice by which non-lawyers close real estate transactions, provide settlement services, or select, prepare and complete certain real estate closing documents")[5] or witness only closings (described by the court as closings where "notaries, signing agents and other individuals who are not a party to the real estate closing preside 'over the execution of the deeds of conveyance and other closing documents, but purport to do so merely as a witness and notary, not as someone who is practicing law'"),[6] argued that requiring the services of a Georgia attorney for real estate closings and the execution of deeds of conveyance harmed the public interest by increasing costs and stifling competition.[7] The court rejected this argument, determining that the public interest was best protected when an attorney trained to recognize the issues at closing oversees the transaction.[8] The court stated that should attorneys fail in their duties, the attorneys could be held accountable through a malpractice or bar disciplinary action.[9] "In contrast, the public has little or no recourse if a non-lawyer fails to close the transaction properly. It is thus clear that true protection of the public interest in Georgia requires that an attorney licensed in Georgia participate in the

2. *In re* UPL Advisory Opinion 2003-2, 277 Ga. at 472-73, 588 S.E.2d at 741.
3. *Id.* at 473, 588 S.E.2d at 741.
4. *Id.*
5. *Id.* at 473 n.2, 588 S.E.2d at 742 n.2.
6. *Id.* at 473 n.3, 588 S.E.2d at 742 n.3.
7. *Id.* at 473, 588 S.E.2d at 742.
8. *Id.* at 473-74, 588 S.E.2d at 742.
9. *Id.* at 474, 588 S.E.2d at 742.

real estate transaction."[10] The opinion, however, did not change section 15-19-52 of the Official Code of Georgia Annotated ("O.C.G.A."),[11] which allows non-lawyers to prepare documents to which they are a party so long as no fee is charged.[12]

III. TITLE TO LAND

In *Mansour Properties, LLC v. I-85/Ga. 20 Ventures, Inc.*,[13] the parties owned approximately 110 acres of undeveloped land in Gwinnett County. I-85/Ga. 20 Ventures, Inc. ("I-85"), the assignee of a fifty-percent interest in the property, petitioned for statutory partition of that real property. The property was jointly held by the owners as tenants in common pursuant to a tenancy in common agreement. Under the agreement each party agreed to be responsible for its share of promissory notes. Mansour took the role of investor, providing the cash for closing, while I-85 was to market the property for sale. The agreement prohibited either party from transferring or encumbering the property without the permission of the other. A party could transfer its interest in the property if it had paid its portion of the notes held. First, however, that party was to notify the other party of the potential purchase, the price, and certify that the purchaser would assume the selling party's rights and obligations. The non-selling party would have a right of first refusal.[14]

I-85 sought to partition the property without first offering to sell its interest to Mansour. The trial court determined that partitioning of the property would depreciate its value. The trial court ruled that the property would be sold at public sale unless Mansour deposited $12,202,666.67 into the court's registry, which represented Mansour's portion of the appraised value.[15]

Mansour appealed and claimed that the tenancy in common agreement prohibited partitioning.[16] Relying on *Rhodes v. Lane,*[17] the supreme court agreed and held that the right to first refusal in the agreement implicitly precluded partitioning until Mansour was given the opportunity to purchase I-85's interest.[18] The agreement also required I-85 to

10. *Id.*
11. O.C.G.A. § 15-19-52 (2001).
12. *Id.*
13. 277 Ga. 632, 592 S.E.2d 836 (2004).
14. *Id.* at 633, 592 S.E.2d at 836-37.
15. *Id.* at 633-34, 592 S.E.2d at 837.
16. *Id.* at 634, 592 S.E.2d at 837.
17. 202 Ga. 608, 44 S.E.2d 114 (1947).
18. *Mansour*, 277 Ga. at 635, 592 S.E.2d at 838.

certify that a potential purchaser would assume I-85's duties, which included its duty to market the property. Certification would not be possible if the property was offered for public sale.[19]

In *1845 La Dawn Lane, LLC v. Bowman*,[20] the supreme court considered who had proper title to a parcel of land originally planned as a street, but never opened.[21] Sarah O. Bowman and Dorothy P. Bryant lived next door to one another on Cardova Street in Atlanta. Running between their properties was the land in dispute, a rectangular parcel originally planned as a street. Both Bowman and Bryant's deeds described one boundary of their respective properties by referencing the land strip as a "future street."[22]

The subdivision where Bowman and Bryant lived was originally developed in the 1940s by B.A. Martin. The chains of title descended to Bowman and Bryant from Martin.[23] The strip of land between Bowman and Bryant was designated on the subdivision plat as "Future Street," but the parcel was "never . . . accepted as a public street, either expressly or implicitly, by either Fulton County or the City of Atlanta following annexation."[24] Subsequently, 1845 La Dawn Lane, LLC ("La Dawn") purchased a 3.29 acre tract known as Little Woods, which had not been part of the subdivision and was never owned by Martin. La Dawn claimed that Martin never transferred title to the parcel designated as the future street. Rather, La Dawn claimed that title to the strip remained in Martin's daughter as Martin's beneficiary under his will. By quitclaim deed, Martin's daughter transferred all rights to the strip to Southern Investments Associates from which La Dawn claimed the future street parcel along with Little Woods.[25]

Bowman and Bryant brought a quiet title action to establish that each had fee simple title to the centerline of the future street parcel. Following a hearing before a special master, the special master found that fee simple title resided in Bowman and Bryant because, as a matter of law, when Martin sold the lots that Bowman and Bryant now owned, he also conveyed the fee interest to the centerline of the undeveloped street. The trial court adopted the special master's report and La Dawn appealed.[26]

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19. *Id.*
20. 277 Ga. 741, 594 S.E.2d 373 (2004).
21. *Id.* at 741, 594 S.E.2d at 374.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 741-42, 594 S.E.2d at 374.

The supreme court held that designation of the parcel as a "future" street was insufficient to serve as a grantor's express intent to reserve title in himself.[27] Further, fee interest of the parcel passed when the grantor conveyed title to the abutting property owners' predecessors-in-title; thus, the later quitclaim deed from grantor's daughter could pass no title to La Dawn.[28] La Dawn also argued that the parcel had been abandoned by the adjoining owners, but the court held that title to that parcel could not pass from abutting property owners by mere abandonment.[29] Finally, La Dawn argued that it had a right of access over the parcel onto its property because the parcel was dedicated as a road.[30] The court determined that "[a] right of public access to a road does not occur until the road has been dedicated and accepted, either expressly or impliedly, by the governing body."[31] Because the parcel had never been accepted as a road, La Dawn's argument failed.[32]

In *Parks v. Stepp,*[33] two adjoining land owners disputed the ownership of a tract of land granted to both by a common grantor. A 2000 survey revealed that the metes and bounds of the property deeded to the parties overlapped by 3.93 acres. Parks filed a complaint in ejectment that concerned the disputed land.[34]

The evidence at trial established that Stepp had obtained title through his predecessor who had entered into a contract with the original developer of the land. A plat of the property, certified by a registered land surveyor, was attached and incorporated into the original contract for sale.[35] "[The] contract with the attached plat was filed and recorded in the office of the clerk of the superior court of Dawson County on January 30, 1978."[36] When Stepp obtained the property from his predecessor, the developer executed a warranty deed to Stepp that was recorded.[37]

The Parks also claimed ownership through a predecessor in title who had entered into a contract with the original developer. This original contract was executed six days before Stepp's contract but was never recorded. The original contract was transferred to the Parks. The

27. *Id.* at 742, 594 S.E.2d at 375.
28. *Id.*
29. *Id.* at 743, 594 S.E.2d at 375.
30. *Id.*
31. *Id.* (citing Healey v. City of Atlanta, 125 Ga. 736, 54 S.E.2d 749 (1906)).
32. *Id.*
33. 277 Ga. 704, 594 S.E.2d 364 (2004).
34. *Id.* at 704-05, 594 S.E.2d at 365-66.
35. *Id.* at 704, 594 S.E.2d at 365.
36. *Id.*
37. *Id.*

developer then executed a warranty deed to the Parks that was recorded. The Parks' deed was recorded a few weeks before the developers deeded property to Stepp.[38]

The Parks' claim arose because their warranty deed was recorded first in time.[39] However, the supreme court held that a deed filed pursuant to a sales contract that was recorded before the recordation of the deed of transfer took priority over a later-filed deed.[40] The court looked to the language of the statute,[41] which provided:

> [T]he filing and recording of the "contract to sell" shall "be notice of the interest and equity of the holder" from the date of filing and that a deed will only take priority over a bond for title or a contract to sell or convey realty from the same grantor if the deed is "filed for record first *and* is taken without notice of the former instrument."[42]

Second, the Parks contended that the trial court had incorrectly applied statutory law.[43] The court determined that the statute addressing priority of contracts for sale of land, O.C.G.A. section 44-2-6, not the statute addressing voluntary conveyances, O.C.G.A. section 44-2-3,[44] governed the dispute because the parties had paid valuable consideration for their lots.[45]

IV. EASEMENTS, COVENANTS, AND BOUNDARIES

In *Boyer v. Whiddon*,[46] Edward Whiddon sought an easement by implication for ingress and egress across property owned by Boyer and Singleton.[47] The court of appeals reversed the trial court's decision and concluded that the record was insufficient to create the easement by implication.[48] The court first analyzed the statute[49] that outlines the methods by which a private way can be acquired.[50] Then the court reviewed *Pindar's* real estate treatise,[51] which provided that "[w]hen

38. *Id.* at 704-05, 594 S.E.2d at 365-66.
39. *Id.* at 705, 594 S.E.2d at 365.
40. *Id.* at 706, 594 S.E.2d at 367.
41. O.C.G.A. § 44-2-6 (Supp. 2004).
42. *Parks*, 277 Ga. at 705-06, 594 S.E.2d at 366.
43. *Id.* at 706, 594 S.E.2d at 367.
44. O.C.G.A. § 44-2-3 (Supp. 2004).
45. *Parks*, 277 Ga. at 706, 594 S.E.2d at 367.
46. 264 Ga. App. 137, 589 S.E.2d 709 (2003).
47. *Id.* at 137, 589 S.E.2d at 710.
48. *Id.*
49. O.C.G.A. § 44-9-1 (1999 & Supp. 2004).
50. *Boyer*, 264 Ga. at 137, 594 S.E.2d at 710.
51. DANIEL F. HINKEL, PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE § 8-16 (5th ed. 1998).

determining whether an easement arose by implication after the division of lands by the same owner, the order in which the dominant and servient estates [are] transferred is critical to the analysis."[52]

The record showed that the property at issue was owned by one individual until both parcels were foreclosed upon. The parties had differing accounts of how the property was subsequently divided. The record, however, failed to show critical transfer information (i.e., security deed, assignments, and the dates of such purported assignments).[53] "Without this critical information about the timing of the property transfers, the trial court could not properly determine whether an easement by implication of law was created, when any such easement was created, and whether it was extinguished by foreclosure."[54] As a result, it was error for the trial court to find that Whiddon was entitled to an easement by way of implication for ingress and egress across defendants' property.[55]

In *Reece v. Smith*,[56] the Reeces owned a tract of undeveloped land bordering a public road in Bartow County. They brought suit against Smith, an adjoining landowner, for declaratory and injunctive relief after Smith asserted the right to an easement across their land. After a bench trial, the court determined that three adjoining landowners, including Smith, had an easement across the Reece property.[57]

Each of the parcels had at one time been part of an undivided tract of land that was bound by Rock Fence Road, a public road. The property was deeded intact several times until the Curtis family partitioned the larger parcel in 1984. Ultimately, Smith acquired one of the parcels.[58]

The court of appeals affirmed in part and reversed in part, concluding that the adjacent landowners who were landlocked had acquired an easement by implication of law for the necessity of providing reasonable access from a public road to their property.[59] However, the trial court erred when it ruled that the third landowner, who was not landlocked, had the right to use the easement across Reece's property.[60]

The court reasoned that common law created an easement by necessity when a grantor conveyed land without providing a means of egress and

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52. *Boyer*, 264 Ga. App. at 137, 589 S.E.2d at 710.
53. *Id.* at 139, 589 S.E.2d at 711.
54. *Id.*
55. *Id.*
56. 265 Ga. App. 497, 594 S.E.2d 654 (2004).
57. *Id.* at 497, 594 S.E.2d at 656.
58. *Id.* at 498-99, 594 S.E.2d at 656.
59. *Id.* at 499-500, 594 S.E.2d at 657.
60. *Id.* at 500, 594 S.E.2d at 657.

ingress as is embodied by O.C.G.A. section 44-9-1.[61] A non-landlocked neighbor, however, did not acquire a right to use an implied easement across Reece's property merely because the path of a road from the landlocked tracts led across the non-landlocked property.[62] The Reeces were entitled to limit use of the easement across their property to those with a legal right of passage, which did not include Smith.[63] The court, however, determined that the easement to those landlocked owners was not limited simply to ingress and egress but was "available for uses that are necessary to the reasonable enjoyment of any lawful development of the land, and that do not unreasonably burden the . . . rights [of the] owners of the servient estate."[64] Accordingly, the landlocked owners' running of underground utilities across Reece's property was necessary to the reasonable enjoyment of their residence and did not unreasonably burden Reece's rights.[65]

V. CONTRACTS & BROKERS

In *Mills v. Parker*,[66] the purchaser of real estate brought an action against the seller and sought specific performance of the sales contract or, in the alternative, damages for breach of contract and fraud. Parker sued Mills for breach of contract for her failure and refusal to close on the property. Mills had attempted to avoid the breach of contract claims by quit claiming the property to her husband before the closing to avoid performance under the contract. Through a lengthy appeal process and multiple court proceedings,[67] the quitclaim deed was eventually set aside as a fraudulent conveyance used in an attempt to avoid a creditor. Mills was found in breach of the sales contract for her failure to close.[68] The trial court awarded the purchaser damages for the breach of contract. Those damages included sums for the cost of a trip to Atlanta (as he had already moved from the area), lost interest on the earnest money, the costs of moving, the costs of lost income due to the court proceeding, and long distance telephone charges. Attorney fees were also awarded.[69]

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 500-01, 594 S.E.2d at 658.
66. 267 Ga. App. 334, 599 S.E.2d 301 (2004).
67. *See* Mills v. Parker, 253 Ga. App. 620, 560 S.E.2d 42 (2002).
68. *Mills*, 267 Ga. App. at 334, 599 S.E.2d at 303.
69. *Id.* at 335-36, 599 S.E.2d at 303.

On appeal Mills challenged the sums that could be awarded to a purchaser in a breach of a real estate contract suit.[70] The appellate court ruled in favor of Mills and stated the measure of damages, in a case such as this, was the difference between the contract price and the fair market value at the time of the breach.[71] The court stated "[t]his [was] so because the sum representing the difference between the [fair] market value of the land and the contract price is the [true] measure of the injuries and damage sustained by the purchaser because of the buyer's failure to fulfill his obligations under the contract."[72] The other damages awarded the purchaser could not be properly recovered and the appellate court remanded the case back to the trial court with directions.[73]

In *Mitchell Realty Group, LLC v. Holt,*[74] Holt entered into a contract to purchase property from James Garrett. Mitchell Realty Group ("Mitchell") served as the agent for both the buyer and the seller. Holt later determined that the property would not be a choice location for a car dealership and refused to close on the property. Mitchell sued Holt for its brokerage commission.[75]

Mitchell relied upon the contract language that stated "[i]n the event the sale is not closed because of buyer's . . . failure or refusal to perform any of their obligations herein, the non-performing party shall immediately pay the Broker(s) the full commission the Broker(s) would have received had the sale closed . . . ."[76] Holt, on a motion for summary judgment, claimed that the contract was silent regarding the amount of commission to be paid. The trial court granted Holt's motion because it found the purchase and sale agreement did not identify the amount of the commission to be paid, although the agreement did refer to a commission.[77]

The Georgia Court of Appeals affirmed the trial court's decision and concluded that under the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"), the legislature intended the amount of commission be stated in writing.[78] Mitchell asserted that the commission was set in writing, and two sets of documents listed the property. The first document listed four properties, their sales prices, and an offer

70. *Id.* at 335, 599 S.E.2d at 303.
71. *Id.*
72. *Id.*
73. *Id.* at 336, 599 S.E.2d at 304.
74. 266 Ga. App. 217, 596 S.E.2d 625 (2004).
75. *Id.* at 217-18, 596 S.E.2d at 626.
76. *Id.* at 218, 596 S.E.2d at 626.
77. *Id.*
78. *Id.* at 218-19, 596 S.E.2d at 626.

of a ten percent commission.[79] The court rejected this document because it did not identify the parties to the contract or its terms.[80] Further, the court determined that the ten percent commission was an offer regarding the other three properties listed and not the subject property.[81] The court also rejected a "listing sheet" where the information was placed under "Sale Com," concluding that the document constituted an offer rather than a contract.[82]

VI. FORECLOSURE

In *Butler v. Household Mortgage Services, Inc.*,[83] Butler sued Household Mortgage Services, Inc. ("Household") and Fleet Mortgage Group ("Fleet") in an attempt to halt a foreclosure instituted by Fleet. Butler alleged that the mortgage companies wrongfully repudiated an agreement to roll Butler's debt into a new loan. The trial court granted Butler a temporary restraining order in 1996 that prevented Fleet from proceeding with the foreclosure.[84]

In 2001 Butler's attorney contacted the lender's counsel to discuss the terms of a settlement offer. In that conversation Butler's attorney questioned the rationale behind a proposed lump-sum payment by Butler to settle the case. The lender's attorney indicated that he would speak with his client about the terms of the proposed settlement. In that same conversation, Butler's attorney attempted to negotiate forgiveness of prepayment penalties and removal of negative credit reporting from Butler's credit report. Later, the lender's attorney sent a revised settlement offer to Butler. Butler's attorney responded by stating that Butler accepted the offer of settlement, even though the offer failed to reflect two agreed upon aspects of the settlement terms, and that those agreed upon terms needed to be included in the final settlement agreement. Butler's attorney then wrote a follow-up letter indicating that a settlement had been reached and that the foreclosure could not proceed. The lender's attorney responded by letter that no settlement had been reached. The lender's attorney then moved the court to find that no settlement had been reached and find that the lack of settlement would allow the foreclosure to proceed.[85] "[T]he court determined that

79. *Id.* at 219, 596 S.E.2d at 627.
80. *Id.*
81. *Id.* at 219-20, 596 S.E.2d at 626-27.
82. *Id.* at 220, 596 S.E.2d at 627.
83. 266 Ga. App. 104, 596 S.E.2d 664 (2004), *cert. dismissed*, No. S04C1208, 2004 Ga. LEXIS 560 (Ga. June 28, 2004).
84. *Id.* at 105, 596 S.E.2d at 665.
85. *Id.* at 105-06, 596 S.E.2d at 665.

'there was no meeting of the minds, and, therefore, no settlement between the parties.'"[86]

The court of appeals held that there was no valid agreement because

> an agreement alleged to be in settlement and compromise of a pending lawsuit must meet the same requisites of formation and enforceability as any other contract. In this regard, it is well settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject matter, and in the same sense.[87]

Butler did not accept the terms of the settlement offer; instead, he made a counteroffer by insisting on additional terms. Accordingly, the foreclosure properly proceeded.[88]

In *McCain v. Galloway*,[89] Galloway sought confirmation of a foreclosure on a junior lien secured by real property owned by McCain. Galloway initiated proceedings to confirm the foreclosure sale, the first step in seeking a deficiency judgment against McCain. The trial court confirmed the sale. McCain appealed, contending that Galloway lacked standing and authority to conduct the foreclosure and that the fair market value of the property was not proven. McCain alleged that Galloway was not the real party in interest because the senior lienholder had subsequently foreclosed its lien.[90] The court, however, held that "'[t]he issue [of] whether [Galloway] was a real party in interest [was] not relevant to [the] confirmation proceeding, which was commenced in accordance with [O.C.G.A. section] 44-14-161(a) by the person instituting the foreclosure proceedings [i.e., Galloway].'"[91]

During the confirmation hearing, McCain also argued that Galloway failed to prove that the property sold for its true market value at the foreclosure sale. At the hearing Galloway did not present the testimony of an official appraiser of the property; instead, he testified about his experience with the property, how much he had invested in it, how much he had borrowed against it, and its condition at the time of foreclosure. McCain also testified about the value. Galloway stated his opinion that he bid the fair market value for the property. Taken together, the

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86. *Id.* at 106, 596 S.E.2d at 666.

87. *Id.* (citing S. Med. Corp. v. Liberty Mut. Ins. Co., 216 Ga. App. 289, 291, 454 S.E.2d 180, 182 (1995)).

88. *Id.*

89. No. A04A0032, 2004 WL 1119478 (Ga. App. May 20, 2004).

90. *Id.* at *1-2.

91. *Id.* at *3 (quoting Sparti v. Joslin, 230 Ga. App. 346, 346, 496 S.E.2d 490, 491 (1998)).

testimony was sufficient to show that the fair market value at the time of sale and the confirmation of the foreclosure were both proper.[92]

In *Tunnelite, Inc. v. Estate of Sims*,[93] the court of appeals analyzed the priority of judgment creditors.[94] One creditor obtained a judgment against a debtor in a federal district court located in Georgia, did not domesticate the judgment, and recorded the federal judgment on the general execution document of Fulton County. Subsequently, a second creditor obtained a judgment against the same debtor in the Fulton County Superior Court and recorded the judgment on the general execution document. In an action for declaratory judgment filed by the second creditor, the trial court held that the federal court judgment was a foreign judgment because it was not domesticated, and that the Georgia judgment lien had priority.[95]

The court of appeals reversed, holding that domestication of the federal judgment was not required.[96] Specifically, the court held that a judgment obtained in federal court did not have to be domesticated, and that it had priority over a state court judgment.[97]

VII. LANDLORD AND TENANT

In *Baker v. Housing Authority of Waynesboro,*[98] the court of appeals reviewed the policy and contractual obligations of a city housing authority's policy on accepting payment of rent.[99] Baker entered into a lease agreement with the Housing Authority. A dispossessory action was filed when she failed to pay rent for two consecutive months. Baker responded that she had paid the rent by mailing it, but the payment was refused.[100]

Both parties filed for summary judgment. Baker argued that the Housing Authority's policy of accepting payment by mail was unclear. Baker's general position was that she had "mailed" the rent on July 10th and mailing by that date was in compliance with the terms of the lease.[101]

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92. *Id.*
93. 266 Ga. App. 476, 597 S.E.2d 555 (2004).
94. *Id.* at 476, 597 S.E.2d at 556.
95. *Id.*
96. *Id.* at 477, 597 S.E.2d at 557.
97. *Id.* at 478, 597 S.E.2d at 558.
98. 268 Ga. App. 122, 601 S.E.2d 350 (2004).
99. *Id.* at 123, 601 S.E.2d at 351.
100. *Id.* at 122, 601 S.E.2d at 350-51.
101. *Id.*

The terms of the lease provided that rent was due on the first day of the month "during normal business hours" and "delinquent if not paid by the close of business (5:00 p.m.) on the tenth day" of the month.[102] Late payment would be accepted only twice in any twelve month period, but in any event, not later than the twentieth day of the month. Violations of these terms would result in a written note to the tenant and cancellation of the lease.[103]

The court determined no ambiguity existed in the terms of the lease itself, as terms such as "normal hours of business" and "by 5:00 p.m." implied that receipt of the rent was a lease requirement rather than mere tender.[104] "The grant of summary judgment to the Housing Authority was appropriate because there was no dispute that the Housing Authority accepted timely mailed payments; that Baker failed to pay her rent timely on at least two prior occasions within the twelve months preceding the payment at issue; and that Baker [failed to mail] the payment in dispute" until the 10th of the month.[105] The trial court's grant of summary judgment to the Housing Authority was proper because "[t]he construction of a lease is generally a question for the court to determine as a matter of law. However, '[w]here the language of a contract is clear, unambiguous, and capable of only one reasonable interpretation, no construction is necessary or even permissible.'"[106] In *Baker*, the lease was clear.

In *TGM Ashley Lakes, Inc. v. Jennings*,[107] an apartment tenant was strangled to death by Oliver, an employee of the landlord. Oliver had previously been convicted of rape, armed robbery, residential burglary, and other crimes. At the time he was hired, Oliver informed the leasing manager that he had been in jail, but the manager performed no background check. After hiring Oliver there were reports of numerous unforced entry burglaries at the apartment complex. Residents believed that an employee was committing the crimes. One resident found Oliver in her home when she returned home unexpectedly. Oliver claimed he was there to perform repairs but later the tenant found property missing. The deceased tenant's parents ("Jennings") brought a wrongful death action against the owner of the apartment complex, the manage-

102. *Id.* at 123, 601 S.E.2d at 351.
103. *Id.*
104. *Id.* at 123-24, 601 S.E.2d at 351.
105. *Id.* at 124, 601 S.E.2d at 352.
106. *Id.* at 123, 601 S.E.2d at 351.
107. 264 Ga. App. 456, 590 S.E.2d 807 (2003).

ment company, the property manager, and the leasing manager (collectively, "TGM").[108]

Following a jury verdict in favor of Jennings, defendants appealed.[109] The court of appeals affirmed, rejecting defendants' seven counts of error.[110] Defendants argued that the trial court should have directed a verdict on the negligent hiring and retention claim.[111] However, "the manager who recommended Oliver for employment as a maintenance worker knew that Oliver had been in trouble with the law, including time spent in jail. This simple fact raises a jury issue of whether TGM should have further inquired into Oliver's past criminal record prior to hiring him."[112]

Although TGM argued that a claim for negligent hiring or retention could not stand because Oliver acted outside the scope of his employment, the court found plaintiffs' case was even stronger for that claim.[113]

> TGM learned that a series of unforced entries and burglaries had occurred at the premises since Oliver had been hired; that some residents suspected an employee; and that Oliver had been discovered in one apartment without authorization. Also, one resident had even suggested that criminal background checks be performed because she was positive that an employee was the culprit.[114]

These facts were sufficient to raise an issue "for the jury of whether TGM, acting reasonably, should have taken additional steps to investigate the criminal background of their employees, including Oliver."[115]

The court rejected TGM's position that it could not be liable for premises liability because it did not have actual knowledge that Oliver was a criminal.[116] TGM had a duty to keep the complex reasonably safe.[117] "'It is sufficient if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.'"[118] Oliver's past included multiple felony convic-

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108. *Id.* at 456-58, 590 S.E.2d at 811-13.
109. *Id.* at 456, 590 S.E.2d at 811.
110. *Id.*
111. *Id.* at 459, 590 S.E.2d at 813.
112. *Id.*
113. *Id.*
114. *Id.* at 459-60, 590 S.E.2d at 814.
115. *Id.* at 460, 590 S.E.2d at 814.
116. *Id.*
117. *Id.* at 462, 590 S.E.2d at 815.
118. *Id.* at 460, 590 S.E.2d at 814 (quoting Henderson v. Nolting First Mort. Corp., 184

tions. Had TGM investigated further, they would have seen a pattern of property crimes and violence. A jury was authorized to conclude that a violent attack on a tenant of the apartment complex was foreseeable.[119]

TGM also contended that it could not be liable for negligent hiring because the trial court dismissed the claim of *respondeat superior*. TGM argued that without *respondeat superior* liability, the claim was "conceptually inapplicable."[120] The court disagreed and overruled its holding in three previous cases.[121]

Georgia law provides that a negligent hiring and retention claim can be based on a tort that occurred outside the scope of employment.[122]

> With regard to tortious conduct, a claim of negligent hiring and retention is very similar to a claim of premises liability. "The presence of a mischievous human being on premises may constitute the danger against which the law requires of the occupant reasonable care to protect his invitee." Thus, it is the dangerous nature of the person in general, not simply the person acting within the scope of his duties, that is a concern.[123]

Previously, the court attempted to define the outer limit of liability for negligent hiring and held that the theory of negligent hiring was conceptually inapplicable if the tortious act did not occur "'during the tortfeasor's working hours or the employee was acting under [the] color of employment.'"[124] Here, however, the court determined that it had incorrectly construed the prior ruling to mean that there could be no liability for negligent hiring and retention if the tort was committed outside the scope of employment.[125] The court overruled its prior decisions, to the extent that those opinions held that a claim of negligent hiring and retention was conceptually inapplicable when the employee has committed a tort outside of the scope of employment.[126]

Ga. 724, 737, 193 S.E. 347, 354 (1937)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* (quoting *Henderson*, 184 Ga. at 736, 193 S.E. at 353).

124. *Id.* at 461, 590 S.E.2d at 814-15 (quoting Lear Siegler, Inc. v. Stegall, 184 Ga. App. 27, 28, 360 S.E.2d 619, 620 (1987)).

125. *Id.*, 590 S.E.2d at 815.

126. *Id.* at 462, 590 S.E.2d at 815 (to the extent that they followed this holding in *Dester v. Dester*, 240 Ga. App. 716, 523 S.E.2d 635 (1999), *Spencer v. Gary Howard Enterprises, Inc.*, 256 Ga. App. 599, 568 S.E.2d 763 (2002), and *Stephens v. Greensboro Properties, Ltd., L.P.*, 247 Ga. App. 670, 544 S.E.2d 464 (2001), are also overruled by *TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 590 S.E.2d 807 (2003)).

VIII. TAXATION

In *National Tax Funding, L.P. v. Harpagon Co.,*[127] the court reviewed competing delinquent tax liens and the title held by the purchaser of such liens.[128] Both National Tax Funding ("NTF") and Harpagon held tax liens against property located in Fulton County. Heartwood 11 obtained writs of *fieri facias* ("fi. fa.") from the county Tax Commissioner, levied upon the liens, and acquired the tax deeds to the properties. Heartwood 11 then quitclaimed the property to Harpagon. Harpagon served notice upon the delinquent taxpayers and others that claimed an interest in the property, including NTF, and asserted the statutory bar to the right to redeem the property from the tax sale. Harpagon then sought to quiet title and a declaration that it owned the property free and clear of all other claims, including the claim of NTF. NTF argued its tax liens had never been paid and remained valid.[129]

The trial court adopted the findings of a special master and found that "a tax sale divests all liens except the one levied upon from the property sold, so as to give the tax sale purchaser marketable title."[130] By virtue of Heartwood 11's tax sale purchase of the property (and its transfer to Harpagon), Harpagon held title to the property free and clear of NTF's tax liens.[131]

Upon review, the supreme court held that

> the trial court erred by concluding that the tax sale of the property held to satisfy Harpagon's predecessor's tax lien divested NTF's tax lien interest from the property sold. By obtaining a tax sale deed to the property, Harpagon may have obtained a defeasible fee interest in the property, but its title was subject to encumbrance for at least one year after purchase due to the other interested parties' statutory rights of redemption.[132]

However, once Harpagon gave notice of the barment and the barment period expired, the nature of Harpagon's interest in the property vested Harpagon "'with an absolute and unconditional title to the land, provided that such title was owned by the [original owner], and the tax

127. 277 Ga. 41, 586 S.E.2d 235 (2003).
128. *Id.* at 41, 586 S.E.2d at 237.
129. *Id.* at 41-42, 586 S.E.2d at 237.
130. *Id.* at 42, 586 S.E.2d at 235.
131. *Id.*
132. *Id.* at 43, 586 S.E.2d at 238.

sale was valid.'"[133] After the expiration of the barment period, Harpagon held indefeasible fee simple title to the property.[134]

The court saw another issue, however, and that was "whether Harpagon's title to the property remained encumbered by NTF's tax lien after NTF's failure to redeem the property" after notice of barment.[135] NTF argued the tax lien was enforceable until the tax obligation was paid and relied upon O.C.G.A. section 48-2-56(a),[136] which provides that "except as otherwise provided, liens for all taxes arise at the time the taxes become due and 'shall cover all property in which the taxpayer has an interest from the date the lien arises until such taxes are paid.'"[137] The court, however, determined that once the right to redeem expired, NTF could not claim its right through the taxpayer because the taxpayer's interest terminated when the property was not redeemed.[138]

Next, the court analyzed the steps that tax lienholders may take to protect their interest in property sold at a tax sale to another lienholder.[139] Lienholders have two options: they may either file a claim to collect against any proceeds from the sale, or they may assert their right following the sale, via a statutory claim for redemption to obtain a first priority interest in the property.[140] "With these two options, the legislature has ensured that holders of competing tax liens can take adequate steps to protect their interest in property sold at a tax sale to another lienholder."[141] The court summarized as follows:

> [W]here property is encumbered by competing tax liens and one lienholder levies upon the property and obtains a tax deed to it, holders of competing tax liens may either seek to collect from the tax sale proceeds or may assert their rights to redeem the property from the tax sale purchaser. If, however, the tax sale purchaser gives valid notice under the barment statutes and the competing tax lienholder allows the redemption period to mature and pass without taking any action,

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133. *Id.* (quoting DANIEL F. HINKEL, PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE § 4-5 (5th ed. 1998)).

134. *Id.*

135. *Id.*

136. O.C.G.A. § 48-2-56(a) (Supp. 2004).

137. *National Tax Funding*, 277 Ga. at 43-44, 586 S.E.2d at 238-39 (quoting O.C.G.A. § 48-2-56 (1999 & Supp. 2004)).

138. *Id.* at 44, 586 S.E.2d at 239.

139. *Id.*

140. *Id.*

141. *Id.*

> its lien is divested from the property and no longer encumbers the tax sale purchaser's title interest.[142]

In *Edwards v. Heartwood 11, Inc.*,[143] another case that concerned the redemption of a tax deed, the court analyzed the interested parties' rights and duties following the sale of real property for taxes.[144] The appellate court held that a taxpayer's bankruptcy would invoke the automatic stay[145] and render a tax sale held during the bankruptcy void *ab initio*.[146]

Ralph Kirk owned property that was subject to a deed to secure debt in favor of Wells Fargo Credit Corporation ("Wells Fargo"). In March 1995, Kirk filed for bankruptcy protection. Unaware of the bankruptcy, Wells Fargo foreclosed on Kirk's property and recorded a deed under power evidencing such sale. Based upon the deed, the Gwinnett Tax Commissioner's office noted that Wells Fargo had become the owner (and taxpayer) of the property.[147]

When Wells Fargo discovered Kirk's bankruptcy in April 1995, its foreclosing attorney filed an affidavit in the real estate records of Gwinnett County voiding the foreclosure sale. The Tax Commissioner was unaware that the affidavit had been filed. Despite the bankruptcy, and without approval of the bankruptcy trustee, Kirk purported to sell the property to Edwards on March 31, 1995. Edwards did not record the warranty deed evidencing his purchase until January 2000, after Kirk's bankruptcy was closed. Also in January 2000, Edwards obtained a mortgage loan from GMAC Mortgage Corporation ("GMAC"), which was secured by the realty and satisfied the Wells Fargo mortgage.[148]

Finding the ad valorem property taxes delinquent, Gwinnett County notified Wells Fargo (based on its information that Wells Fargo was the owner) of its intent to issue a writ of fi. fa. The taxes remained unpaid and Gwinnett County issued the tax fi. fa. to Wells Fargo. Later, Heartwood 88 (a different entity from Heartwood 11) purchased the writs.[149]

Heartwood 88 requested that a tax sale be conducted. A title examination revealed that Edwards appeared to be the owner of the property. Notices were sent to Wells Fargo, GMAC, and Edwards

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142. *Id.* at 45, 586 S.E.2d at 240.
143. 264 Ga. App. 354, 590 S.E.2d 734 (2003).
144. *Id.* at 354, 590 S.E.2d at 735.
145. 11 U.S.C. § 362 (2000).
146. *Edwards*, 264 Ga. App. at 354, 590 S.E.2d at 736.
147. *Id.*, 590 S.E.2d at 735.
148. *Id.* at 354-55, 590 S.E.2d at 735-36.
149. *Id.* at 355, 590 S.E.2d at 736.

informing each of the upcoming tax sale. The tax sale took place on June 6, 2000, and Heartwood 11 purchased the property as the high bidder at the sale.[150]

Edwards and GMAC paid the statutory redemption price for the property and then sued Heartwood 11, the Gwinnett County Tax Commissioner, and the Gwinnett County Sheriff to set aside the tax sale. On cross-motions for summary judgment, the trial court ruled in favor of Heartwood 11 and against plaintiffs.[151]

The court of appeals did not reach the issue of whether the tax sale should have been set aside.[152] Instead, the court analyzed the issues created by Kirk's bankruptcy and whether plaintiffs now had standing to have the sale set aside.[153] The court determined that Kirk's sale of the property to Edwards was void *ab initio* due to the bankruptcy, and that at no time could Edwards have legitimately owned the property.[154] GMAC, therefore, could not have obtained a valid security interest based on Edwards' title. Without title, the parties had no right to challenge the sale and the trial court did not err in granting summary judgment to Heartwood 11.[155]

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 355-56, 590 S.E.2d at 736.
154. *Id.* at 355, 590 S.E.2d at 736.
155. *Id.* at 356, 590 S.E.2d at 736.