Construction Law

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This Article surveys construction law decisions handed down by Georgia appellate courts between June 1, 2003, and May 31, 2004. The cases discussed primarily fall within five categories: (1) contract; (2) tort; (3) mechanics' and materialmen's liens; (4) arbitration; and (5) legislation. The Article also includes a miscellaneous section covering noteworthy cases that do not fit neatly into the sections enumerated above.

I. CONTRACTS

The Georgia Court of Appeals decided several cases concerning claims for breach of contract during the survey period.

A. Contractor's Claim for Contract Balance; Substantiating Documentation

In *Department of Transportation v. Hardin-Sunbelt*,[1] the court of appeals affirmed the trial court's denial of defendant Department of

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1. 266 Ga. App. 139, 596 S.E.2d 397 (2004).

Transportation's ("DOT") motion for directed verdict.[2] Hardin-Sunbelt ("Hardin") sued the DOT to recover the contract balance on a $23 million Sugarloaf Parkway project in Gwinnett County.[3]

The contract anticipated that a lake adjacent to the project that was owned by Boeing Corporation could be used as a sediment basin during construction. Hardin was required to restore the lake to its original state by removing the silt that became deposited in the lake during construction.[4] The contract also required Hardin to construct a "rock check dam to collect most sediment before it entered the lake."[5] The lake restoration item was included as "lump sum" in the contract between the parties.[6]

Throughout the project, Hardin, through its subcontractor, constructed the rock check dam and periodically removed large quantities of silt from the lake. In September 1999 Boeing released the DOT, Hardin, and its subcontractor from any liability with respect to the lake restoration. Hardin subsequently sought payment of the lump sum stated in the contract for the lake restoration item. In March 2000 the DOT refused to make payment, stating that the lake restoration had not been performed and directing Hardin to perform no further work on the lake because Boeing had accepted it "as is." The DOT essentially based its decision to withhold payment on the fact that Hardin and its subcontractor had not substantiated with contemporaneous documentation the fact that the lake restoration work had actually been performed. However, Hardin's subcontractor did present a job diary entry showing that silt had been hauled out of the lake, and other employees of the subcontractor stated that they were present when the silt was hauled from the lake.[7]

The court of appeals held that the contract's provisions clearly and unambiguously entitled Hardin to the contract balance for the lake restoration portion of the work.[8] The DOT argued that the contract's "claims for adjustments and disputes" section required Hardin to provide substantiating backup documentation supporting that the lake restoration work was in fact completed.[9] The court of appeals disagreed with the DOT's argument because that portion of the contract applied only to

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2. *Id.* at 146, 596 S.E.2d at 403.
3. *Id.* at 140, 596 S.E.2d at 398-99.
4. *Id.*, 596 S.E.2d at 399.
5. *Id.*
6. *Id.*
7. *Id.* at 142-43, 596 S.E.2d at 400-01.
8. *Id.* at 144, 596 S.E.2d at 401-02.
9. *Id.* at 143-44, 596 S.E.2d at 401.

claims by the contractor for "additional compensation" and not to claims for work that was already part of the contract between the parties.[10]

In addition the DOT argued that the lake restoration work had been eliminated from the contract in accordance with a provision that allowed the DOT to eliminate, upon a written order, certain items from the scope of the contractor's work. The DOT based this argument on the March 6, 2000 letter which directed Hardin to perform no further work on the lake. However, all of Hardin's lake restoration work had been completed before March 6, 2000. Furthermore, the contract provision relied upon by the DOT also provided that Hardin would be reimbursed for actual work performed and all costs incurred, including mobilization of materials prior to any notification to eliminate items from the contract.[11]

Lastly, the DOT argued that the award of attorney fees against it was improper because there was no evidence to support it under the Official Code of Georgia Annotated ("O.C.G.A.") section 13-6-11.[12] Affirming the award of attorney fees, the court of appeals held that the DOT's refusal to pay for the lake restoration work during the course of the execution of the contract provided the jury with a basis for finding that the DOT was stubbornly litigious and caused Hardin unnecessary trouble and expense.[13]

B. Request for Equitable Adjustment for Disruption Damages

In *Atlantic Coast Mechanical v. R. W. Allen Beers Construction*,[14] R. W. Allen Beers Construction ("Beers") entered into a subcontract agreement with Atlantic Coast Mechanical ("ACM") for the mechanical and plumbing work on the Children's Medical Center in Augusta, Georgia. ACM submitted a request for equitable adjustment to Beers based on additional costs incurred by ACM as a result of Beers's disruptions to ACM's work. ACM subsequently filed suit based upon the damages set forth in its request for equitable adjustment, among other things. The trial court granted Beers's motion for summary judgment, and ACM appealed.[15]

The court of appeals reversed, disagreeing with Beers's arguments that the contract precluded ACM's recovery of the costs identified in the

10. *Id.*
11. *Id.* at 145, 596 S.E.2d at 402.
12. O.C.G.A. § 13-6-11 (1981).
13. *Hardin-Sunbelt*, 266 Ga. App. at 146, 596 S.E.2d at 402-03.
14. 264 Ga. App. 680, 592 S.E.2d 115 (2003).
15. *Id.* at 681-82, 592 S.E.2d at 116-17.

request for equitable adjustment.[16] Specifically, Beers argued that (1) ACM waived its claims by failing to object to Beers's April 29, 1998 letter within forty-eight hours; (2) ACM's claim was barred by article 3(b) of the subcontract because ACM was to take into account "'all hindrances and delays incident to its [w]ork'" upon entering into the subcontract; (3) ACM had waived claims that it held by executing certain change orders; and (4) ACM's claim was barred by the "no damages for delay" provision in the agreement between Beers and the project owner.[17]

The court of appeals disagreed with Beers's first argument because the subcontract provision relied upon by Beers only required an objection within forty-eight hours regarding "any dispute concerning a question of fact arising under this [a]greement."[18] The April 29, 1998 letter from Beers to ACM disputed whether ACM was legally entitled to assert its claim, and the letter did not address "a question of fact."[19] Therefore, under the plain language of the subcontract, ACM did not waive its claim by failing to respond to Beers's letter.[20]

The court of appeals also disagreed with Beers's argument that article 3(b) precluded additional compensation for disruptions.[21] The court concluded that the language of article 3(b) only applied to hindrances and delays that ACM could have foreseen upon entering into the subcontract.[22] ACM submitted evidence that the disruptions caused by Beers far exceeded what would normally be expected at the time the contract was executed.[23] In addition the court determined that article 3(b) and other cited provisions of the contract that Beers relied on were silent with respect to ACM's entitlement to additional compensation for unanticipated labor costs from disruptions or hindrances.[24]

Furthermore, the court of appeals disagreed that ACM had waived its claim for disruption by signing certain change orders.[25] Specifically, the change order signed by ACM stated that the amount of the change order included full compensation for delays encountered by ACM through the date of the change order.[26] The court of appeals determined that

16. *Id.* at 682, 592 S.E.2d at 117.
17. *Id.* at 681-82, 592 S.E.2d at 117-18.
18. *Id.* at 682, 592 S.E.2d at 117.
19. *Id.*
20. *Id.*
21. *Id.* at 683, 592 S.E.2d at 118.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 683-84, 592 S.E.2d at 118.
26. *Id.* at 684, 592 S.E.2d at 118.

ACM's claim was based upon "disruption of its work, resulting in loss of efficiency and increased labor costs" and not from delays.[27] Relying upon *U.S. Industries v. Blake Construction Co.*,[28] the court of appeals determined that the language in the change orders only addressed delays and not disruption.[29] Therefore, ACM's request for equitable adjustment was not barred by the change orders and Beers was not entitled to summary judgment.[30]

Finally, Beers argued that the "no damages for delay" provision in the contract between Beers and the project owner precluded ACM's request for equitable adjustment.[31] The court of appeals disagreed that the "no damages for delay" provision in the owner contract precluded recovery because it was inconsistent with a provision of the subcontract.[32] The contract between Beers and the owner contained a broad "no damages for delay" provision that only allowed damages for delays and hindrances caused solely by the owner's fraud or bad faith.[33] The subcontract provided that "[ACM] shall be entitled to compensation for such interruptions, interferences, inefficiencies, suspensions, or delays, not attributable to [ACM's] fault or neglect, to the extent, but only to the extent, [Beers] actually recovers compensation for same from the owner," which is arguably broader than the owner provision.[34] The subcontract also contained a provision, which stated that in the event of an inconsistency between the provisions of the subcontract and the owner contract, the subcontract would control.[35] The court of appeals held that summary judgment was improper because the provision of the subcontract, under certain circumstances, allowed ACM to recover compensation for claims like these in its request for equitable adjustment.[36]

C. Measure of Damages Where Repair is not Feasible

In *City of Atlanta v. Conner,*[37] the court of appeals vacated the trial court's damages award in favor of the homeowner, Mrs. Conner ("Conner"), because the evidence presented at trial did not support the

27. *Id.*
28. 671 F.2d 539 (D.C. Cir. 1982).
29. *Atlantic Coast*, 264 Ga. App. at 684-85, 592 S.E.2d at 118-19.
30. *Id.* at 684, 592 S.E.2d at 118.
31. *Id.* at 684-85, 592 S.E.2d at 118-19.
32. *Id.* at 685, 592 S.E.2d at 119.
33. *Id.* at 684-85, 592 S.E.2d at 118-19.
34. *Id.* at 685, 592 S.E.2d at 119.
35. *Id.*
36. *Id.* at 685-86, 592 S.E.2d at 119.
37. 262 Ga. App. 423, 585 S.E.2d 634 (2003).

$100,000 award.[38] Conner entered into a rehabilitation contract with the City of Atlanta ("City") to bring her house up to code and make certain badly needed repairs. Under the contract the City was responsible for selecting and hiring the builder. The City hired the builder based on his low bid of $38,396.50. However, the builder later defaulted on the contract, leaving the roof exposed and subjecting the interior of the house to water damage. Between 1998 and 2000, Conner made repeated attempts to get the City to finish the repair work. The City eventually informed Conner that she would have to obtain a private loan to finish the house, which by that time had suffered severe water damage, making the home completely uninhabitable.[39]

The trial court granted Conner's motion for summary judgment and held a bench trial on the issue of damages. There was conflicting evidence regarding the value of the home, the cost to repair, and the value of the lot. However, the trial court based its award of $100,000 essentially on the cost to rebuild and upgrade the home.[40]

The court of appeals determined that the trial court's calculation of damages was improper because returning the house to its original condition would be an "absurd undertaking."[41] The court of appeals held that when the property has been damaged as a result of a breach to the point it cannot be reasonably

> repaired, the measure of damages is "the property's value as diminished by irremediable defects . . . deducted from the value of the house as it should have been completed according to the contract . . . . If the damage cannot be repaired, it seems pointless error to insist the value be determined by cost of repair."[42]

The court further concluded that it was impossible to determine the fair market value of the property from the evidence that was presented at the trial.[43] "[T]he fair market value of the property must be proven, and, although exact figures are not necessary, the trier of fact must be able to 'reasonably estimate [the fair market value] without resort to guess work.'"[44] Although evidence was presented on the fair market value before and after the breach, the trial court made no findings on those values and thereby prevented the court of appeals from determin-

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38. *Id.* at 423, 585 S.E.2d at 634.
39. *Id.*, 585 S.E.2d at 634-35.
40. *Id.* at 425, 585 S.E.2d at 635.
41. *Id.*, 585 S.E.2d at 636.
42. *Id.*
43. *Id.*
44. *Id.*

ing the proper amount of damages.[45] Therefore, the court of appeals remanded the case with instructions to calculate damages as follows: "[A]dd the fair market value of the property if the contract had been properly performed plus the cost to Conner for removing the existing structure, then subtract the value of the existing structure following the breach, and subtract the value of the lot."[46]

D. Nominal Damages; Attorney Fees; Cross Examination

In *McEntyre v. Edwards*,[47] McEntyre entered into a contract with E/P Construction, LLC and its general manager, Edwards, for the construction of a residence. The relationship quickly deteriorated. During construction, the parties discovered cracks in the foundation wall, and each hired inspectors to examine the wall. Edwards offered to repair it, but McEntyre demanded that the wall be torn down and the foundation be completely replaced. Edwards suggested mediation when the parties could not reach an agreement on the appropriate repair. McEntyre responded by terminating the contract and filing suit for negligent construction, breach of contract, and fraud. The jury returned a verdict in favor of Edwards, ordering McEntyre to pay $1.00 in nominal damages and $75,000 in attorney fees and litigation expenses.[48]

On appeal McEntyre argued that the trial court erred in granting Edwards's motion for directed verdict on McEntyre's fraud claim.[49] The court of appeals disagreed, stating that the evidence showed that McEntyre was fully aware of the condition of the foundation wall, and there was no evidence that McEntyre relied on any statements made by Edwards.[50]

Next, McEntyre argued that her motion for directed verdict on Edwards's counterclaim for breach of contract should have been granted because, according to McEntyre, she could not have committed a breach by terminating the contract early.[51] The court of appeals again disagreed, concluding that the jury was authorized to find that McEntyre acted unreasonably in terminating the contract by insisting that the entire foundation be completely replaced.[52]

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45. *Id.* at 425-26, 585 S.E.2d at 636.
46. *Id.* at 426, 585 S.E.2d at 636.
47. 261 Ga. App. 843, 583 S.E.2d 889 (2003).
48. *Id.* at 843-44, 583 S.E.2d at 890.
49. *Id.* at 844, 583 S.E.2d at 890.
50. *Id.* at 844-46, 583 S.E.2d at 891-92.
51. *Id.*
52. *Id.* at 845, 583 S.E.2d at 891.

McEntyre also argued that her motion for directed verdict on the counterclaim should have been granted because Edwards could not prove that he had incurred any actual damages.[53] However, the court of appeals held that the award of nominal damages was properly based upon O.C.G.A. section 13-6-6,[54] which allows nominal damages for the cost of bringing an action.[55]

In addition McEntyre argued that the trial court erred in restricting her cross examination of Edwards regarding allegedly inconsistent pretrial arguments made by his attorneys for impeachment purposes.[56] The court of appeals held that the arguments of a party's counsel cannot serve as a basis for impeaching a party.[57]

Finally, the court of appeals rejected McEntyre's argument that the court improperly refused McEntyre's jury instruction which stated: "Even though the constructed product actually received under the contract may be suitable for the purpose, each contracting party is entitled to receive the constructed product anticipated by the contract, unless the party waives it."[58] The court of appeals concluded that the case upon which this instruction was based was inapplicable to the facts because there was no evidence that Edwards had substituted one product for another with respect to the construction of the foundation.[59]

E. Bona Fide Controversy; Attorney Fees

In *Clearwater Construction Co. v. McClung*,[60] McClung entered into a contract with Clearwater Construction Company for the purchase of a spec home constructed by Clearwater. The exterior of the home consisted of an "external foam installation system" ("EFIS"). Clearwater had very little experience with EFIS construction. The sales contract for the house stated that Clearwater was "'to furnish [McClung] in writing a binding warranty covering any and all defects of the structure for a period of one (1) year from date of closing.'"[61] The sales contract was further amended to state that Clearwater was "'to correct Drivet system at all windows, doors, openings and deck per the "Dryvit Corporation Installation Instructions" which are attached.'"[62] This amendment

53. *Id.*
54. O.C.G.A. § 13-6-6 (1982).
55. *McEntyre*, 261 Ga. App. at 846, 583 S.E.2d at 891.
56. *Id.*, 583 S.E.2d at 892.
57. *Id.* at 844-46, 583 S.E.2d at 891-92.
58. *Id.* at 847, 583 S.E.2d at 892.
59. *Id.*
60. 261 Ga. App. 789, 584 S.E.2d 61 (2003).
61. *Id.* at 790, 584 S.E.2d at 62.
62. *Id.*, 584 S.E.2d at 63.

language was ultimately marked out, and additional language was added reflecting that the Drivet system had been corrected in accordance with an inspection report.[63]

Shortly after moving in, McClung began to notice problems with the EFIS system. He retained inspectors and began exchanging letters with Clearwater. The last inspector recommended the removal and replacement of the EFIS and estimated that it would cost $41,051.18.[64]

A bench trial was held on McClung's claims for breach of warranty, fraud, and violations of the Georgia Fair Business Practices Act.[65] The trial court found for Clearwater on the fraud and Fair Business Practices Act claims but against Clearwater on the breach of warranty claim. Clearwater argued on appeal that attorney fees were improper because the court found in Clearwater's favor on two of McClung's claims, thereby showing a bona fide controversy, and precluding the grant of attorney fees in favor of McClung.[66] The court of appeals held that the authorities relied upon by Clearwater had been impliedly overruled, and Georgia law allowed an award of attorney fees even when the court found for the defendant on some claims and against the defendant on others.[67] The court of appeals concluded there was ample evidence in the record to support the trial court's finding that Clearwater adopted a "sue me" attitude and thereby caused unnecessary trouble and expense to McClung.[68]

F. Motion for New Trial; Late Discovery of Evidence and Damages

In *Hopper v. M & B Builders, Inc.*,[69] homeowners Cecil and Delores Hopper entered into a contract with M & B Builders for the construction of their home. Shortly after foundation construction began, the homeowners directed construction workers on the site to move the location of the foundation twenty-two feet back from its original location. Due to the severe slope of the lot, the movement of the house required additional truckloads of fill dirt and increased the cost of the home by $38,225. After learning of the homeowners' instructions to move the foundation, the builder notified the homeowners of the additional costs. The homeowners refused to pay, and the parties' relationship quickly deteriorated. The builder ultimately sold the house for $308,300 and

63. *Id.*
64. *Id.* at 791, 584 S.E.2d at 64.
65. O.C.G.A. § 10-1-390 (2000).
66. *McClung,* 261 Ga. App. at 792, 584 S.E.2d at 64.
67. *Id.* at 791-92, 584 S.E.2d at 63-64.
68. *Id.*, 584 S.E.2d at 64.
69. 261 Ga. App. 702, 583 S.E.2d 533 (2003).

sued the homeowners for $82,000 in losses. The homeowners filed a counterclaim for the return of their $5000 deposit. The jury returned a verdict in favor of the builder for $64,963.[70]

On appeal the homeowners argued that their motion for a new trial should have been granted because they discovered new evidence after the trial that revealed one of the builder's witnesses perjured himself.[71] The court of appeals disagreed, stating that the homeowners had not satisfied the six-prong test for a new trial.[72]

> To obtain a new trial based on newly discovered evidence, the evidence supporting the motion must satisfy six criteria: (1) it must have been discovered after the trial or hearing; (2) its late discovery was not due to lack of diligence; (3) it is so material that its introduction in evidence would probably produce a different result; (4) it is not merely cumulative; (5) the affidavit of the witness must be attached to the motion (or its absence accounted for); and (6) it does not operate only to impeach a witness.[73]

The court of appeals determined that the homeowners failed to use diligence because the newly discovered information could have been obtained from a witness who was listed during the discovery as having information pertaining to the facts and circumstances of the case.[74] Furthermore, the homeowners failed to show that the newly discovered evidence would produce a different verdict.[75]

G. Damages for Breach of Contract; Attorney Fees

In *Morrison Homes of Florida v. Wade*,[76] the court of appeals affirmed the trial court's denial of Morrison Homes of Florida, Inc.'s ("Builder") motion for judgment notwithstanding the verdict ("JNOV") following the jury's award of damages and attorney fees to the homeowners, the Wades.[77] Builder furnished a blanket warranty to the homeowners that provided for a series of post-closing inspections "at 40 days, 11 months and 22 months after closing."[78] The homeowners notified Builder of cracks in the concrete garage slab, front walkway and steps, and center column of the front garage wall. Builder responded by

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70. *Id.* at 702-03, 583 S.E.2d at 534-35.
71. *Id.* at 703, 583 S.E.2d at 535.
72. *Id.* at 704, 583 S.E.2d at 536.
73. *Id.*
74. *Id.* at 706, 583 S.E.2d at 537.
75. *Id.* at 704-05, 583 S.E.2d at 536.
76. 266 Ga. App. 598, 598 S.E.2d 358 (2004).
77. *Id.* at 598, 598 S.E.2d at 360.
78. *Id.*

installing crack gauges to monitor the expansion of the driveway cracks. Builder later notified the homeowners that the devices did not reveal crack thicknesses covered by the warranty. Builder also attempted to repair the front walkway and steps, but the homeowners were not satisfied with those efforts.[79]

The homeowners also retained a general contractor, structural engineer, and geotechnical engineer to inspect the home and perform various tests on the soil underneath the garage. The result of these inspections and tests revealed that there was no footing underneath the garage column, though it was a load-bearing structure. The homeowners also discovered other building code violations and Builder's failure to follow its own plans for the construction of the house. The homeowners presented this evidence at trial and the jury awarded the homeowners $68,460 in damages and $71,540 in attorney fees.[80]

On appeal Builder argued that its motion for JNOV should have been granted because the homeowners failed to introduce enough evidence at trial to allow the jury to ascertain damages within a reasonable degree of certainty.[81] The court of appeals disagreed, concluding that the homeowners' construction expert testified that the cost to repair the home would be $87,642, which was supported by his testimony and a written estimate.[82]

Builder also argued that the award of attorney fees was improper because the homeowners failed to prove bad faith. Specifically, Builder asserted that phone calls and correspondence with the homeowners indicated that Builder was trying to resolve any problems. Furthermore, one of the homeowners admitted that the cracks in the driveway were not of sufficient size to be covered by the Builder's warranty.[83] However, the court of appeals noted the homeowners introduced evidence showing that the communication between the homeowners and Builder was a delay tactic by the Builder to prevent the discovery of other problems before the end of the two year warranty.[84] In addition the court of appeals determined the evidence that Builder violated a number of building codes and its own design plans could also serve as a basis for the jury to find bad faith.[85]

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79. *Id.*
80. *Id.* at 598-99, 598 S.E.2d at 360.
81. *Id.* at 599, 598 S.E.2d at 360.
82. *Id.*, 598 S.E.2d at 361.
83. *Id.* at 600, 598 S.E.2d at 361.
84. *Id.* at 600-01, 598 S.E.2d at 361-62.
85. *Id.*

H. Takeover Agreements; Payment Bonds; Discussion of Subcontractor's Obligation to Perform

In *Carolina Casualty Insurance Co. v. Ragan*,[86] the court of appeals affirmed the trial court's grant of partial summary judgment in favor of the subcontractor Ragan.[87] The court held that Ragan's obligations under its subcontract were terminated when the owner of the project terminated the general contractor's performance, even though the owner had not terminated the entire general contract.[88]

During the project the board of education terminated the second contractor, Latco's, "right to proceed" on the project because Latco was in default. Latco had provided performance and payment bonds for the project, which were issued by co-sureties Carolina Casualty and Everest Reinsurance Company. Latco's co-sureties subsequently executed a takeover agreement with the board of education and agreed to complete Latco's general contract. In furtherance of the takeover agreement, the co-sureties engaged de Oplossing, Inc. to complete the project. De Oplossing in turn requested that each of Latco's subcontractors enter into a ratification agreement agreeing to complete their respective scopes of work on the project. Ragan declined to enter into the ratification agreement and, instead, requested payment for its work under the payment bond.[89]

On the cross motion for partial summary judgment, the co-sureties argued that Ragan was obligated to proceed with its work because the entire general contract between Latco and the School Board had not been terminated.[90] The applicable subcontract provision stated "'[s]hould [the Board of Education] terminate the [general] Contract or any part of the [general] Contract which includes the Subcontractor's Work, this Contract shall also be terminated and Subcontractor shall immediately stop Subcontractor's related work.'"[91]

The court of appeals concluded that the clear language of the subcontract showed that the parties intended that Ragan's work would be terminated upon the termination of "any part" of the general

86. 262 Ga. App. 6, 584 S.E.2d 646 (2003).
87. *Id.* at 6, 584 S.E.2d at 647.
88. *Id.* at 8, 584 S.E.2d at 648.
89. *Id.* at 6-7, 584 S.E.2d at 647.
90. *Id.* at 7, 584 S.E.2d at 647.
91. *Id.*

contract.[92] Therefore, the trial court correctly found that the subcontract had been terminated.[93]

II. TORTS

Georgia appellate courts decided a variety of tort-related construction cases during the survey period. The tort-related cases deal with the topics of non-delegable duties, fraud, merger clauses, and liability of independent contractors, among others.

A. Intrinsically Dangerous Work; Non-Delegable Duty

In *Luther v. Wayne Frier Home Center of Tifton, Inc.*,[94] plaintiffs purchased a mobile home. The mobile home price included the cost of delivery and set-up. The mobile home seller hired a subcontractor to perform these tasks.[95]

Set-up of the new mobile home involved removal of the old one. While attempting this feat, a welder working for the subcontractor caused the old trailer to catch fire, destroying its contents. Plaintiff sued the mobile home seller for negligence, among other things. The mobile home seller moved for summary judgment, which the trial court granted. Plaintiff appealed, arguing that material questions of fact remained regarding the mobile home seller's own negligence, and whether it had a non-delegable duty regarding the welding, which plaintiff characterized as "intrinsically dangerous work."[96]

On review the court of appeals rejected plaintiff's argument.[97] The court noted that as a general rule, "the employer remains liable for negligence of a contractor if, 'according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed.'"[98] The court stated that no Georgia case had decided whether welding was an inherently dangerous activity.[99] Relying on authority from other jurisdictions, the court concluded that it was not and stated:

> The use of a cutting torch is an activity which, if carried on properly and by competent and careful operators, is not in itself inherently

92. *Id.* at 8, 584 S.E.2d at 648.
93. *Id.* at 9, 584 S.E.2d at 648.
94. 264 Ga. App. 827, 592 S.E.2d 470 (2003).
95. *Id.* at 827, 592 S.E.2d at 471.
96. *Id.* at 828, 592 S.E.2d at 471.
97. *Id.* at 828-29, 592 S.E.2d at 472.
98. *Id.* at 828, 592 S.E.2d at 472 (citations omitted).
99. *Id.*

> dangerous. It does not pose the risk and danger to others or others' property when properly conducted as does the use of explosives, corrosives or other similarly inherently dangerous activities and products.[100]

B. Fraudulent and Passive Concealment; Merger Clause

In *Browning v. Stocks*,[101] a contractor sold a home in which he had resided for a number of years. Plaintiff sued the contractor for hidden and undisclosed termite damage under the doctrines of fraudulent concealment and fraudulent inducement. During the time he lived in the home, the contractor had performed routine annual maintenance and, according to plaintiff, hid signs of termite damage.[102]

The court of appeals, sitting *en banc*, held that the buyer's claim of fraudulent inducement could not be based on any affirmative misrepresentations preceding the execution of the purchase agreement due to the agreement's merger clause.[103] The court concluded, however, that the merger clause did not prevent a claim based on "actively or passively concealed damage or defects in the purchased property."[104] The court observed that the "passive concealment" doctrine is applied to residential real estate transactions as an exception to the doctrine of *caveat emptor*.[105] The court further clarified the remedies available to a purchaser discovering such fraud, which include either promptly rescinding the subject contract and suing in tort for fraud, or affirming the contract and suing for damages due to breach.[106]

C. Independent Contractor

In *McCaskill v. Carillo,*[107] plaintiff worked for Compaq. Compaq hired a contractor to install carpeting in its offices. At one point the contractor ran out of carpet tiles. As a result, a hallway was only partially recarpeted, leaving the area in front of the entrance to the restroom with a bare concrete floor. Plaintiff had been in and out of the men's room while the floor was in this condition and had entered the restroom without incident the day of the accident. When he left the

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100. *Id.* at 829, 592 S.E.2d at 472 (quoting Woodward v. Mettille, 400 N.E.2d 934, 942 (1980)).
101. 265 Ga. App. 803, 595 S.E.2d 642 (2004).
102. *Id.* at 804, 595 S.E.2d at 644.
103. *Id.* at 803, 595 S.E.2d at 643-44.
104. *Id.* at 806, 595 S.E.2d at 646.
105. *Id.* at 804 n.2, 595 S.E.2d at 644 n.2.
106. *Id.* at 805-06, 595 S.E.2d at 645.
107. 263 Ga. App. 890, 589 S.E.2d 582 (2003).

restroom on that occasion, however, he tripped over the 3/8 inch height difference between the concrete floor and carpet and fell, suffering injuries.[108]

Plaintiff sued the carpet installer for negligence, who later moved for summary judgment. The trial court denied the motion and the carpet installer appealed. On review the carpet installer argued that it should have been entitled to summary judgment for two reasons: (1) it was an independent contractor, and (2) the simple fact that there was a height difference between the carpet and ground did not constitute negligence.[109]

The appellate court agreed.[110] First, the court held that because Compaq was in day-to-day control of the contractor's work, knew that the contractor had run out of carpet squares, and approved the carpet installer's leaving areas at the workplace with concrete abutting until more squares could be obtained, the contractor could not be held liable.[111] The court determined that "[w]here an independent contractor or supplier properly executes the directions of the owner, only the owner, not the contractor or supplier, may be liable for injury to a third party resulting therefrom."[112] Second, the court also agreed that the height difference between the carpet and ground did not constitute negligence as a matter of law: "[T]he 'mere existence or maintenance of a difference in floor levels or steps in a business building does not constitute negligence.'"[113]

D. Violation of Building Codes; Negligence Per Se

In *Hicks v. Walker,*[114] plaintiff, a two year old child, went with her family to a cookout at the home of friends. The cookout was on a deck. The deck collapsed and seriously injured the child. After the accident, plaintiff's family sent a professional home inspector to the home to review the deck. He testified by affidavit that the deck was not built according to the minimum standards required by Georgia building codes. The inspector's findings included:

> [T]he deck failed at the point at which the deck was attached to the house, and the deck had been attached to the house with carpentry

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108. *Id.* at 890-91, 589 S.E.2d at 582-83.
109. *Id.* at 891-92, 589 S.E.2d at 583-84.
110. *Id.*, 589 S.E.2d at 584.
111. *Id.* at 891, 589 S.E.2d at 584.
112. *Id.* (citations omitted).
113. *Id.* at 892, 589 S.E.2d at 584 (quoting Bramblett v. Earl Smith Floors, 227 Ga. App. 296, 297, 481 S.E.2d 766, 767 (1997)).
114. 262 Ga. App. 216, 585 S.E.2d 83 (2003).

> nails, though the codes require the use of hex bolts; contrary to code requirements, no flashing was used to protect the wood from water damage, and the wood was damaged as a result; the support posts were set on top of cinder blocks instead of being set into a foundation sufficient to support the weight load of the deck; and the posts were improperly "toe-nailed" into the deck.[115]

According to the inspector, the deck was unsafe and unfit for the use for which it was constructed, and it would not have passed inspection.[116]

Plaintiff filed suit and the homeowner moved for summary judgment. The trial court granted the homeowner's motion and plaintiff appealed.[117] On review, the court of appeals reversed.[118] The court noted that:

> A landowner is liable if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the conditions safe, or to warn the licensees of the condition and the risk involved. The test for liability here is the owner's superior knowledge of the hazard. In cases of defective construction, the owner is presumed to have notice of the danger.[119]

Second, the court concluded that this principle did not support the homeowner's motion for summary judgment:

> [G]iven an owner's presumed knowledge of a construction defect, an owner's duty to inspect the premises to discover possible dangerous conditions of which he does not have actual knowledge, an owner's duty to comply with building codes, the fact that noncompliance with code standards may be proof of an owner's superior knowledge of a defect, and the fact that the injured person was a child. Because a child may be unable to appreciate a danger, an owner may be held to a higher standard of care toward a child than toward an adult.[120]

Similarly, in *Johnston v. Ross*,[121] plaintiff rented a home. The home's front steps lacked handrails, which constituted a violation of the applicable building code. Plaintiff was injured in a fall from the steps and sued her landlord, claiming negligence. The landlord moved for

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115. *Id.* at 217, 585 S.E.2d at 85-86.
116. *Id.* at 217-18, 585 S.E.2d at 86.
117. *Id.* at 217, 585 S.E.2d at 85.
118. *Id.*
119. *Id.* at 218, 585 S.E.2d at 86.
120. *Id.* at 219, 585 S.E.2d at 87.
121. 264 Ga. App. 252, 590 S.E.2d 386 (2003).

summary judgment, arguing that plaintiff's claim was barred because plaintiff had been in the home for months and knew that the front steps lacked handrails before the fall. The trial court granted summary judgment and the court of appeals reversed.[122] On review the court noted that "'although the defect was obvious when [plaintiff] took possession of the apartment, that is not necessarily a bar to recovery when the defect is in violation of a duty created by applicable statute or administrative regulation.'"[123]

E. Fraud and Punitive Damages

In *Bowen & Bowen Construction Co. v. Fowler*,[124] the homeowner, Fowler, sued Bowen & Bowen Construction Company ("Builder") for breach of contract, fraud, and punitive damages when Builder failed to correct flooding problems in the backyard of a residence that homeowner purchased from Builder.[125] The court of appeals affirmed the jury verdict in favor of the homeowner in the amount of $100,000 in compensatory damages, $33,000 in attorney fees, and $500,000 in punitive damages, which was reduced to $250,000 pursuant to O.C.G.A. section 51-12-5.1(g).[126]

Before closing the home purchase, the seventy-nine year old homeowner and Builder walked through the house and compiled a "punch list" of items that Builder agreed to fix, including a problem of standing water in the backyard. During the two years following the closing, the homeowner made several demands that Builder repair the standing water problem. However, Builder made no meaningful attempts to repair the problem and ultimately informed the homeowner that it had no intention of repairing the problem.[127]

At trial the homeowner introduced ten videotapes starting in August 1998, which showed large areas of standing water in the backyard, in some places, almost one foot deep. The homeowner's expert witness testified that the backyard was essentially a "bowl" that collected water from the street and neighboring yards. Builder did not produce an expert at the trial. However, the jury heard evidence that Builder had hired an expert who had studied Fowler's property and made a report.[128]

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122. *Id.* at 253, 590 S.E.2d at 387.

123. *Id.* at 254, 590 S.E.2d at 386 (quoting Bastien v. Metro. Park Lake Ass'n, 209 Ga. App. 881, 434 S.E.2d 736 (1993)).

124. 265 Ga. App. 274, 593 S.E.2d 668 (2004).

125. *Id.* at 274, 593 S.E.2d at 668.

126. *Id.*, 593 S.E.2d at 669; O.C.G.A. § 51-12-5.1(g) (2000).

127. *Bowen*, 265 Ga. App. at 274-75, 593 S.E.2d at 670.

128. *Id.* at 275, 593 S.E.2d at 670.

Builder argued that the trial court erred in denying its motion for directed verdict on the homeowner's fraud claim.[129] The court of appeals affirmed the fraud award because the homeowner had presented evidence on each of the elements of fraud, including misrepresentation.[130] Specifically, the court of appeals determined that there was evidence that Builder had promised to repair the standing water problem, and that an employee of Builder later informed the homeowner that Builder had no intention of repairing the problem.[131]

Builder also argued that the punitive damages award was excessive.[132] The court of appeals disagreed, concluding that the award complied with the guideposts set forth in *BMW of North America v. Gore*.[133] Furthermore, the court determined that

> In reviewing punitive damage awards, courts are required to consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual 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."[134]

The court noted that the award of punitive damages was less than four times the amount of compensatory damages and, therefore, was within constitutional limitations.[135] Furthermore, the Georgia Fair Business Practices Act[136] authorizes treble damages for similar violations.[137] Because the punitive damages award of $250,000 was only two and one-half times the $100,000 compensatory damages amount, the punitive damages award was not excessive as a matter of law.[138]

III. MECHANICS' AND MATERIALMEN'S LIENS

During the survey period, the Georgia Court of Appeals broke no new ground in the area of lien law. The court did, however, take the opportunity to clarify the law on slander or defamation of title.

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129. *Id.* at 276, 593 S.E.2d at 671.
130. *Id.*
131. *Id.* at 276-77, 593 S.E.2d at 671.
132. *Id.* at 277, 593 S.E.2d at 671-72.
133. *Id.* at 277-78, 593 S.E.2d at 671; 517 U.S. 559 (1996).
134. *Bowen*, 265 Ga. App. at 277-78, 593 S.E.2d at 671 (citation omitted).
135. *Id.* at 278, 593 S.E.2d at 672.
136. O.C.G.A. § 10-1-390 (2000).
137. *Bowen*, 265 Ga. App. at 278, 593 S.E.2d at 672.
138. *Id.*

A. Defamation Concerning Land

In *Premier Cabinets, Inc. v. Bulat*,[139] Joseph Bulat and Premier Cabinets, Inc. ("Premier") entered into a written agreement for the installation of custom designed and built cabinets. After a dispute arose between the parties over Premier's alleged deficient fabrication and installation of the cabinets, Bulat filed suit against Premier and two of its principals alleging, among numerous other claims, a wrongful lien against his property and slander of title. Premier counterclaimed for breach of contract, recovery of commercial account, foreclosure of materialman's lien, and litigation expenses pursuant to O.C.G.A. section 13-6-11.[140]

At trial the jury found in favor of Premier in the amount of $6,064.44. The jury also found in favor of Bulat for his claim of negligent construction, bond fees, and attorney fees, in a total amount of approximately $21,000. After the jury trial, the trial court granted Premier's motion for directed verdict on the slander of title claim. Both parties appealed.[141]

With regard to the slander of title directed verdict, the court of appeals affirmed, concluding there was no error.[142] O.C.G.A. section 51-9-11[143] defines slander of title to land as follows: "'The owner of any estate in lands may bring an action for libelous or slanderous words which falsely and maliciously impugn his title if any damage accrues to him therefrom.'"[144]

As the court reiterated, the essential elements of this tort are: "(1) publication of slanderous or libelous words; (2) that they were malicious; (3) that the plaintiff sustained special damages thereby; and (4) that the plaintiff possessed an estate in the property slandered or libeled."[145] The slander of title claim that Bulat filed was based on the allegation that Premier wrongfully filed a materialman's lien against his property.[146]

In reviewing Bulat's appellate brief, however, the court determined there was no evidence that Premier acted with malice in filing the lien notice to protect its right to recover its contract balance.[147] Nor was

139. 261 Ga. App. 578, 583 S.E.2d 235 (2003).
140. *Id.* at 578-79, 583 S.E.2d at 236-37; O.C.G.A. § 13-6-11 (Supp. 2004).
141. *Premier Cabinets*, 261 Ga. App. at 579, 583 S.E.2d at 236.
142. *Id.* at 583, 583 S.E.2d at 239.
143. O.C.G.A. § 51-9-11 (2000).
144. *Id.*
145. *Premier Cabinets*, 261 Ga. App. at 583, 583 S.E.2d at 239.
146. *Id.*
147. *Id.*

there any evidence that the amount Premier set forth in the lien notice was inaccurate in any way, or that Premier, "knowing of any alleged false statement, acted in a fashion inconsistent with its statutory privilege to file a lien to protect its right of recovery."[148] On the contrary, the evidence showed that Premier believed the balance of the contract was due "upon delivery" and not "upon completion."[149]

Although Bulat cited *Melton v. Bow*[150] to support his assertion that malice may be inferred from the totality of the circumstances, the court determined the case to be wholly inapplicable to the present dispute.[151] First, *Melton* did not involve the filing of a materialman's lien.[152] Second, unlike Mr. Bulat, the complaining party in *Melton* did not actually request that the alleged slanderous statement be made.[153] The court determined it was significant that Bulat had ordered Premier to "go ahead and file a lien against the property [because Premier] wouldn't get the [balance of] . . . their money in 30 years."[154]

Based on the court's determination that there were no false statements in the notice of lien that Premier filed and that its principals either authorized or signed, the court concluded that the directed verdict on Bulat's slander of title claim had been correctly granted.[155]

In *Simmons v. Futral*[156] a property owner, Simmons, brought an action against a surveyor for defamation of title after the surveyor, Futral, was hired to survey and subdivide three lots. Simmons became unhappy with the surveyor's work, and the parties could not agree on Futral's fee. Futral recorded his surveyor's lien on all three parcels even though Futral had allegedly received payment for his services on two of the lots surveyed. In response Simmons sued Futral for, among other claims, libel, libel per se, and defamation of title. The trial court granted summary judgment to Futral on the defamation and slander of title action, and Simmons appealed, contending that the trial court erred in according the language contained in the surveyor's lien absolute privilege under O.C.G.A. section 51-5-8.[157]

As stated above, "[d]efamation of title requires: (1) publication of slanderous or libelous words; (2) with malice; (3) causing special

148. *Id.*
149. *Id.*, 583 S.E.2d at 240.
150. 145 Ga. App. 272, 243 S.E.2d 590 (1978).
151. *Premier Cabinets*, 261 Ga. App. at 584, 583 S.E.2d at 240.
152. *Id.*
153. *Id.*
154. *Id.* at 583-84, 583 S.E.2d at 240.
155. *Id.* at 584, 583 S.E.2d at 240.
156. 262 Ga. App. 838, 586 S.E.2d 732 (2003).
157. *Id.* at 838, 586 S.E.2d at 733; O.C.G.A. § 51-5-8 (2000).

damages; and (4) regarding property in which the plaintiff has an ownership interest."[158] Furthermore, "A false lien may support a cause of action for defamation of title . . . but the statements in the lien must be false, and the lien claimant must be aware of their falsity."[159]

The record below showed that Futral did in fact receive payment for his work on two of the lots. The record also showed, however, that the surveyor later performed additional work on those lots at the property owner's request. Simmons presented no evidence that he paid the surveyor for the additional work or that no additional payment was owed.[160]

Futral argued that pursuant to O.C.G.A. section 51-5-8, statements in liens should be absolutely privileged as a matter of public policy because filing such a lien is a statutory prerequisite to bringing an action to enforce the lien.[161]

Historically, in Georgia, persons who make defamatory statements in pleadings are granted absolute privilege from suit.[162] Even if such charges, allegations, or averments are false and malicious, for public policy reasons they are not deemed to be libelous.[163] The Georgia Supreme Court has reasoned that without such a broad privilege, "every complaint filed could generate a counterclaim for defamation."[164] The privilege promotes the public welfare by giving room for participants to speak their minds without the risk of "a criminal prosecution or an action for the recovery of damages."[165]

Posing a potential conflict for the court were two past, seemingly contradictory court of appeals cases dealing with allegedly defamatory mechanic's liens. In *Carl E. Jones Development, Inc. v. Wilson*,[166] the court held that the absolute privilege did not apply to an allegedly defamatory mechanic's lien.[167] This holding was based on the proposition that a lien is not a pleading, but merely evidence.[168] Later cases

158. *Simmons*, 262 Ga. App. at 842, 586 S.E.2d at 735 (citing O.C.G.A. § 51-9-11).

159. *Id.* (citing Lincoln Log Homes Mktg. v. Hollbrook, 163 Ga. App. 592, 594, 295 S.E.2d 567, 569 (1982); Daniels v. Johnson, 191 Ga. App. 70, 73, 381 S.E.2d 87, 90-91 (1989)).

160. *Id.*

161. *Id.* at 838-39, 586 S.E.2d at 733.

162. *Id.* (citing O.C.G.A. § 51-5-8 (2003)).

163. *Id.* at 839, 586 S.E.2d at 733 (citing Fedderwitz v. Lamb, 195 Ga. 691, 696, 25 S.E.2d 414, 418 (1943)).

164. *Id.* (quoting Stewart v. Walton, 254 Ga. 81, 82, 326 S.E.2d 738, 739 (1985)).

165. *Id.*

166. 149 Ga. App. 679, 255 S.E.2d 135 (1979).

167. *Simmons*, 262 Ga. App. at 839, 586 S.E.2d at 733 (citing *Carl E. Jones Dev.*, 149 Ga. App. at 679, 255 S.E.2d at 135).

168. *Id.*

extended the absolute privilege not just to pleadings, but also to certain statements made during trial, as well as valid *lis pendens*.[169] In *Eurostyle, Inc. v. Jones*,[170] the court determined that filing a lien and an action to enforce that lien were privileged under O.C.G.A. section 51-5-8.[171]

The court, however, determined that these cases were not irreconcilable because their holdings were worded very generally, and their facts were distinguishable.[172] Citing related Georgia precedent, guidance from sister states, and Georgia's own lien statutes, the court declared that a lien and the statements made within it are not afforded absolute privilege until the lien is attached to a lawsuit and verified notice of the suit is filed.[173] Because the surveyor, Futral, never filed a verified notice following the filing of his counterclaim, the court held that the statements made in his lien were not subject to the absolute privilege under O.C.G.A. section 51-5-8.[174] Nevertheless, despite the absence of absolute privilege, the court affirmed the lower court's ruling because Simmons failed to establish that Futral's lien statements were false.[175]

IV. ARBITRATION

During the survey period, the Georgia Court of Appeals rendered a number of decisions relative to the issue of arbitration. No issues of first impression came before the court. However, the court did render opinions regarding the validity and enforceability of a party's agreement to arbitrate, waiver of the right to arbitrate, the arbitrability of appeal-related attorney fees, and restated the conditions under which an arbitration award may be vacated.

A. Validity and Enforceability of Agreement to Arbitrate

In *Laird v. Risbergs,*[176] the court of appeals reversed the trial court's decision ordering the parties to submit to arbitration.[177] The plaintiffs, Kent and Andrea Laird, entered into an agreement with Peter Risbergs for the construction and purchase of a new home. The agreement

169. *Carl E. Jones Dev.*, 149 Ga. App. at 681, 255 S.E.2d at 135.
170. 197 Ga. App. 188, 397 S.E.2d 620 (1990).
171. *Simmons,* 262 Ga. App. at 840, 586 S.E.2d at 734 (quoting Eurostyle, Inc. v. Jones, 197 Ga. App. 188, 397 S.E.2d 620 (1990)).
172. *Id.*
173. *Id.*
174. *Id.* at 841, 586 S.E.2d at 734.
175. *Id.* at 842, 586 S.E.2d at 735.
176. 266 Ga. App. 107, 596 S.E.2d 412 (2004).
177. *Id.* at 109, 596 S.E.2d at 414.

provided that Risbergs would supply to the homeowners at closing, or soon thereafter, a builder's warranty and that the homeowners would waive any implied warranties in favor of those provided in the express warranty. The only mention of arbitration in the parties' agreement referred to *voluntary* arbitration as follows:

> All parties to this Agreement acknowledge that, in the event of a dispute arising after execution of this Agreement, there is a *voluntary* "Binding Arbitration Procedure" available to the parties to this Agreement in accordance with the Official Code of Georgia (O.C.G.A.) Sec. 9-9-1 et seq., *provided all parties to this Agreement concur in writing to abide by same*.[178]

The Lairds did not put their initials next to the arbitration clause in the agreement. Although the agreement referenced the warranty, it did not disclose that any additional arbitration provision would be included as part of the warranty. Within a few months, the closing took place and the Lairds received the warranty, which contained a separate *mandatory* arbitration provision requiring that disputes about the quality of the home construction and other issues covered under the warranty be submitted for arbitration before the homeowners could initiate litigation. There was no evidence in the record showing that the homeowners ever signed a document indicating they were aware of this separate mandatory arbitration provision contained in the warranty.[179]

After a dispute arose between the parties concerning defects in the home construction, the Lairds filed a lawsuit against Risbergs for, among other claims, fraud, defective workmanship, and negligent construction. They did not sue on the warranty. After litigating for a year, Risbergs demanded arbitration pursuant to the warranty's arbitration provision, which the trial court granted. After the homeowners' motion for reconsideration was denied, they appealed.[180]

On appeal the Lairds contended that because they elected not to sue under the warranty and they never initialed the arbitration provision in the sale agreement, they could not be compelled to submit to arbitration.[181] The court of appeals agreed.[182] In reversing the trial court's decision, the court of appeals explained that the Georgia Arbitration Code, O.C.G.A. section 9-9-1,[183] provides the exclusive means by which

178. *Id.* at 107-08, 596 S.E.2d at 413 (emphasis added).
179. *Id.* at 108, 596 S.E.2d at 413-14.
180. *Id.*, 596 S.E.2d at 414.
181. *Id.*
182. *Id.* at 109, 596 S.E.2d at 414.
183. O.C.G.A. § 9-9-1 (1982 & Supp. 2004).

agreements to arbitrate disputes may be enforced.[184] "Arbitration cannot be compelled pursuant to the statute with respect to '[a]ny sales agreement or loan agreement for the purchase or financing of residential real estate *unless* the clause agreeing to arbitrate is initialed by all signatories'" when the document is executed.[185] Because the arbitration provision in the agreement had never been initialed by the Lairds, the court stated it could not be enforced.[186] The court further concluded that even if the Lairds had initialed the provision, they never agreed in writing to submit to arbitration as required by the agreement.[187] Thus, under Georgia law, the homeowners could not be compelled to submit to binding arbitration.[188]

Although Risbergs argued that the mandatory arbitration provision in the warranty applied rather than the voluntary arbitration provision in the sale agreement, the court was not persuaded.[189] Because the parties' sale agreement referred only to voluntary arbitration, gave no notice of the warranty's mandatory arbitration provision, and the Lairds had neither expressly agreed in writing to the mandatory arbitration provision in the warranty nor elected to sue pursuant to the warranty, the court held that they were not bound by the warranty's mandatory arbitration provision.[190]

B. Waiver by Inconsistent Conduct

In *Macon Water Authority v. City of Forsyth*,[191] the court was faced, once again, with the task of determining the enforceability of a party's agreement to arbitrate. In *Macon Water Authority*, the Macon Water Authority ("MWA") entered into a contract with the City of Forsyth for the provision of electricity to a water treatment plant, which MWA was planning to renovate. The agreement required mandatory arbitration in the event of default or dispute by either party on any issue. There was no contract provision that provided for either party to unilaterally terminate the agreement.[192]

After the parties' contract was executed, in what later became known as the Great Flood of 1994, the Ocmulgee River surged over its banks

184. *Laird*, 266 Ga. App. at 108, 596 S.E.2d at 414.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 109, 596 S.E.2d at 414.
190. *Id.*
191. 262 Ga. App. 224, 585 S.E.2d 131 (2003).
192. *Id.* at 224, 585 S.E.2d at 132-33.

and flooded MWA's water treatment plant, leaving MWA's customers without service for almost a month. Realizing that the site remained at risk for repeated flooding, MWA decided to abandon its plans to renovate its existing site and to build, instead, a new water treatment plant on higher ground in a nearby county on the other side of the river. MWA cancelled its contracts to improve the existing water treatment plant because of the risk of future flooding, and MWA defaulted on its contract with the City of Forsyth without submitting the issue of termination to arbitration as required by the contract. After construction was complete on MWA's new water treatment plant, MWA entered into a new contract with a different electricity supplier, Tri-County EMC, to provide electric services to the new water treatment plant.[193]

In response, the City of Forsyth brought an action before the Public Service Commission ("PSC") against Tri-County EMC, a non-party to its arbitration agreement, for violation of the Georgia Territorial Electric Service Act (the "Act").[194] MWA was not a party to the proceedings. The administrative hearing determined that Tri-County EMC was free to contract with MWA because the new facility was not the same premises under the Act for which the City of Forsyth had contracted to supply electric services. The PSC proceedings did not adjudicate either directly or indirectly whether the contract between the City of Forsyth and MWA had been terminated by default or other reasons.[195]

An arbitration was held on November 13 and 14, 2001, regarding the contract to provide electric services between the City of Forsyth and MWA, with the arbitrators awarding the City of Forsyth nearly $1 million in damages against MWA for its default under the contract. The arbitration award was confirmed, and MWA appealed from the trial court's order compelling arbitration under the contract to supply electricity. MWA contended that the City of Forsyth had waived or abandoned its right to arbitrate by filing its proceeding before the PSC. MWA further argued that the flood constituted a *force majeure*, which served to nullify the parties' contract, including its arbitration clause.[196] The court rejected both contentions.[197]

Under Georgia law the right to arbitrate may be waived by inconsistent conduct, such as previously litigating specific legal or factual claims or issues that the party subsequently seeks to arbitrate.[198] Georgia

193. *Id.* at 224-25, 585 S.E.2d at 133.
194. O.C.G.A. § 46-3-1 (2004).
195. *Macon Water Auth.*, 262 Ga. App. at 225-26, 585 S.E.2d at 133-34.
196. *Id.* at 224-27, 585 S.E.2d at 132-34.
197. *Id.* at 225-27, 585 S.E.2d at 133-34.
198. *Id.* at 226, 585 S.E.2d at 134.

courts have held that proceeding to trial over the agreement with the opposite party and not demanding a stay of litigation to arbitrate are "inconsistent actions."[199] Here, the court concluded the City of Forsyth had not waived its agreement to arbitrate.[200] The court concluded that although the City of Forsyth did file an action before the PSC, its alleged inconsistent action was with a non-party in a regulatory proceeding that lacked jurisdiction to compel arbitration.[201] Furthermore, the parties' contract dispute was not before the PSC, and the PSC's sole determination was that the new water treatment plant was not subject to the Georgia Territorial Electric Service Act.[202] In fact the superior court, in the appeal from the PSC determination, expressly ruled that the case was not "in the posture of a contract dispute between the two parties [(the City of Forsyth and MWA)] to the contract, MWA not being before the Court."[203] Because MWA's breach of contract by default was never litigated, and MWA had expressly abandoned its defense of collateral estoppel with regard to the PSC proceedings, the court held that the City of Forsyth did not waive its right to arbitrate.[204] Moreover, the court concluded that even though the parties' contract for the provision of electric services expressly contemplated that the contract's performance might be disrupted by a flood, the agreement did not provide for nullification of the contract by a flood, or for the flood to be substituted for performance of the agreement.[205] Therefore, the court determined that the arbitration provision remained enforceable, and the question of whether the contract was terminated by the flood should have been submitted to arbitration.[206]

By contrast, the court in *Phil Wooden Homes, Inc. v. Ladwig*[207] determined that the right to mandatory arbitration was waived by inconsistent conduct.[208] After a dispute arose concerning the homeowners' alleged nonpayment for "extras" on a home built for them by Phil Wooden Homes, the construction company filed suit against the homeowners, who in turn asserted a counterclaim for breach of contract and expenses of litigation. Even though the homeowners asserted nine affirmative defenses in their answer, they failed to assert that they were

199. *Id.* at 225, 585 S.E.2d at 133 (citations omitted).
200. *Id.*
201. *Id.* at 226, 585 S.E.2d at 134.
202. *Id.*
203. *Id.*
204. *Id.* at 227-28, 585 S.E.2d at 134-35.
205. *Id.* at 227, 585 S.E.2d at 134.
206. *Id.*
207. 262 Ga. App. 792, 586 S.E.2d 697 (2003).
208. *Id.* at 792, 586 S.E.2d at 698.

entitled to mandatory arbitration of their dispute. Additionally, the homeowners served interrogatories, requests for production of documents, and, eventually, requests for admissions. It was not until after the discovery period had ended, during which the parties had mutually sought and obtained a consent order from the trial court extending the discovery period, that the homeowners first asserted their right to mandatory arbitration. Despite the delay, the trial court granted their motion to compel arbitration and dismissed the builder's complaint.[209]

The court of appeals reversed, concluding that the homeowners' actions waived any entitlement they may have had to submit their dispute to arbitration.[210] The court cited its decision from the last survey period, *Wise v. Tidal Construction Co.*,[211] which held that defendant in a construction contract dispute waived a mandatory arbitration clause by conducting discovery, moving for summary judgment, and entering a consolidated pre-trial order, despite having raised the issue of mandatory arbitration in its answer.[212] Here, the court reasoned that the homeowners waived their right of arbitration by inconsistent conduct when they filed a counterclaim and delayed their demand for mandatory arbitration.[213] Therefore, the trial court erred by dismissing the case and ordering the parties to submit to mandatory arbitration.[214]

C. Vacation or Modification of Arbitration Award

Waiver of a different sort was the determining factor in an appeal from the confirmation of an arbitration award in a residential construction dispute between homeowners and their remodeling contractor. In *Brown v. Premiere Designs, Inc.*,[215] homeowners Mason and Jeanne Brown filed a breach of contract action against Premiere Designs, Inc., their home remodeling contractor, in July 2001. Premiere answered the complaint, asserted multiple defenses, and also filed a counterclaim. Premiere later filed a motion to compel arbitration. The trial court ordered the parties to submit to arbitration, which resulted in an award of $15,101 to Premiere. The Browns, who had formerly been represented by counsel, filed a pro se application asking the court to vacate the arbitration award. Instead, the court confirmed the award in March

209. *Id.* at 792-93, 586 S.E.2d at 698.
210. *Id.* at 793, 586 S.E.2d at 698.
211. 261 Ga. App. 670, 583 S.E.2d 466 (2003).
212. *Id.* at 674-75, 583 S.E.2d at 469-70.
213. *Phil Wooden Homes*, 262 Ga. App. at 793, 586 S.E.2d at 698.
214. *Id.*
215. 266 Ga. App. 432, 597 S.E.2d 466 (2004).

2003. The Browns appealed, arguing that the award should be vacated due to errors committed by the arbitrator and because the arbitrator had failed to maintain a record of the proceedings.[216]

At the time of the parties' dispute, the Georgia Arbitration Code set forth four statutory grounds for vacating an arbitration award upon the application of a party subject to the award under O.C.G.A. section 9-9-13(b).[217] The statute provided that an arbitration award shall be vacated only

> if the court finds that the rights of the applying party were prejudiced by: (1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) A failure to follow the procedure of [the] (Code), unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.[218]

In 2003 the Georgia General Assembly amended the Georgia Arbitration Code to add a fifth ground: "The arbitrator's manifest disregard of the law."[219] Because the Browns' suit was filed prior to that amendment taking effect, the court concluded it did not apply.[220]

O.C.G.A. section 9-9-8(e)[221] provides that "[t]he arbitrators shall maintain a record of all pleadings, documents, testimony, and other matters introduced at the hearing. The arbitrators or any party to the proceeding may have the proceedings transcribed by a court reporter."[222] The parties may waive this requirement by written consent or by continuing with the arbitration without objection.[223]

Here, the court noted that the parties had waived the statutory requirement in two ways: (1) the arbitration award showed that prior to the arbitration hearing, both sides had waived the statutory requirement that the arbitrator preserve a record of the arbitration proceedings; and (2) the parties continued with the arbitration without objection.[224] Consequently, the court held that the arbitration award was not subject

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216. *Id.* at 432-33, 597 S.E.2d at 467.
217. O.C.G.A. § 9-9-13(b) (2004).
218. *Id.*
219. *Brown*, 266 Ga. App. at 433 n.6, 597 S.E.2d at 468 n.6.
220. *Id.*
221. O.C.G.A. § 9-9-8(e) (2004).
222. *Id.*
223. *Brown*, 266 Ga. App. at 433, 597 S.E.2d at 467; O.C.G.A. § 9-9-8(f) (2004).
224. *Brown*, 266 Ga. App. at 433, 597 S.E.2d at 467.

to being vacated under O.C.G.A. section 9-9-13(b)(4) based on the arbitrator's failure to record the proceeding.[225]

Although Premiere had moved to dismiss the Browns' appeal on the grounds that there was no transcript of the arbitration hearing, the court denied Premiere's motion, ruling that the absence of a transcript is a ground for affirmance of the judgment rather than dismissal of the appeal.[226] Because the absence of a record or transcript precluded the court's review of the Browns' claims of error allegedly committed by the arbitrator, the court consequently affirmed the state court's refusal to vacate the arbitration award on any of the asserted grounds.[227]

In yet another residential construction dispute, *Marchelletta v. Seay Construction Services*,[228] the homeowners, Gerard and Sandy Marchelletta, appealed from two superior court orders stemming from a contract dispute with Seay Construction Services, Inc. ("Seay") over the construction of the Marchelletta's new home in Fulton County, Georgia. In November 1999 the parties entered into a written contract for the construction of an upscale stone home. Almost immediately, the homeowners began requesting numerous and significant changes to the project, including grading changes, an increase in the size of their home, and high-end upgrades to the floors, slate steps, and custom kitchen cabinets. Costs rose, coordination problems occurred, and the homeowners' indecision about where to place a specialty brick pizza oven caused months of delay to the structural framing, electrical and HVAC inspections, as well as installation of the sheetrock and insulation. When the parties' differences reached an impasse, the homeowners terminated their contract.[229] Seay filed a lien and demanded arbitration under the parties' contract pursuant to the following arbitration clause: "All claims and disputes arising out of, or relating to this agreement, or breach thereof, shall be decided by binding arbitration in accordance with the Rules and Procedures of Construction Arbitration Associates, Ltd."[230]

Seay sought payment of its fee, plus out-of-pocket costs, for a total of $84,412.74. The homeowners filed a counterclaim in the arbitration, seeking setoffs of $327,000 for what they claimed were structural deficiencies and other construction defects. An arbitration was scheduled and directed by the arbitrator to proceed at the Marchelletas'

225. *Id.* at 434, 597 S.E.2d at 468.
226. *Id.*
227. *Id.*
228. 265 Ga. App. 23, 593 S.E.2d 64 (2004).
229. *Id.* at 23-24, 593 S.E.2d at 65.
230. *Id.* at 23-24 n.1, 593 S.E.2d at 65 n.1.

home so that the defects could be seen by the arbitrator and witnesses. The Marchelletas sought two continuances of the arbitration, then filed an action in the Superior Court of Fulton County asking: (1) to have the provision of the Georgia Arbitration Code, which permits the arbitrator to set the venue for the hearing, declared unconstitutional; (2) to recover damages for trespass relating to an effort by Seay and a building inspector to determine if a subcontractor was working without a license; and (3) to receive an injunction prohibiting any future trespasses.[231]

Seay filed a motion for summary judgment, which was granted in part in March 2002, and the construction contract dispute was returned to arbitration. The homeowners were ordered to make their premises available for inspection both before and during the arbitration. Seay was granted summary judgment on the trespass, venue, and punitive damages allegations. The arbitration was conducted, and an award was issued that found the homeowners owed Seay $78,959 on the contract, and $5400 in arbitrator and administrative fees, for a total of $84,359. The arbitration award, including fees, was confirmed by the trial court, which also awarded Seay $3000 in attorney fees pursuant to O.C.G.A. section 9-15-14.[232] In addition the court added St. Paul Fire & Marine Insurance Company as a party because it was the surety on a bond that the homeowners posted in order to discharge Seay's lien on their property. The court entered an amended judgment in March 2003, foreclosing the special lien on the proceeds of the bond posted by St. Paul Fire & Marine.[233]

In response to Seay's motion to confirm the award, the Marchellettas filed a motion to vacate on the grounds, among others, that "'the award is vague and imperfect, and on the grounds the Arbitrator failed to follow the procedure of [O.C.G.A. section] 9-9-11,'" which deals with the circumstances under which an award may be changed by the arbitrator upon motion of a participant.[234] The Marchellettas claimed that, regarding the alleged construction defects, the arbitrator's award failed to reflect how the arbitrator ruled on the homeowners' counterclaim. In addition the homeowners asserted that Seay was requesting interest not legally permissible under the award; the award did not establish the lien; and joinder of St. Paul as a necessary party was not permitted under O.C.G.A. section 9-11-14.[235]

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231. *Id.* at 24-25, 593 S.E.2d at 66.
232. O.C.G.A. § 9-15-14 (Supp. 2004).
233. *Marchelletta*, 265 Ga. App. at 25, 593 S.E.2d at 66.
234. *Id.* at 26, 593 S.E.2d at 66.
235. *Id.*, 593 S.E.2d at 67; O.C.G.A. § 9-11-14 (1993).

Citing the "severely curtailed" role of the trial court in deciding whether to confirm or vacate an arbitration award, the court again enumerated the four statutory grounds for vacating an award pursuant to O.C.G.A. section 9-9-13(b), which were applicable to the parties' dispute.[236] As in *Brown*, the fifth ground added by the Georgia General Assembly by amendment in 2003—the arbitrator's manifest disregard of the law—did not apply.[237] The court restricted its consideration to the only two statutory grounds raised by the homeowners: overstepping authority/imperfect execution; and failure to follow procedure of the statute, O.C.G.A. sections 9-9-13(b)(3) and (4).[238]

The court of appeals denied the homeowners' motion to vacate on all grounds.[239] First, the court stated that no pre-award interest was included in the amount awarded to Seay, and even if it had been included, under current Georgia law, that would not be grounds for vacating the award.[240] Second, the court did not believe that the arbitrator's award was imperfect in execution, or that there was any legal mandate that the award include specific findings with regard to the homeowner's counterclaim.[241] According to the court, the record showed that the arbitrator considered, and rejected, the homeowner's counterclaim, except for an amount that the arbitrator credited for a construction defect in the homeowners' residence.[242] Third, the court of appeals concluded the joinder of St. Paul was not a reversible error because even if St. Paul was not strictly an indispensable party, the homeowners' counsel had acknowledged they were "a necessary party whose joinder could have been ordered by the court absent a motion."[243]

Finally, because in the court's view, the homeowners' legal arguments during the initial litigation, the subsequent arbitration, and on appeal were wholly without merit and provided no basis for vacating the arbitrator's award, the court affirmed the trial court's award of attorney fees to the construction company.[244] The court also granted Seay's request for the ten percent penalty provided by O.C.G.A. section 5-6-6[245] for frivolous appeal.[246]

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236. *Marchelletta,* 265 Ga. App. at 26-27, 593 S.E.2d at 67.
237. *Id.* at 26 n.3, 593 S.E.2d at 67 n.3.
238. *Id.* at 27, 593 S.E.2d at 67.
239. *Id.* at 29-30, 593 S.E.2d at 68.
240. *Id.* at 28, 593 S.E.2d at 68.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. O.C.G.A. § 5-6-6 (1995).

D. Arbitrability of Appellate Attorney Fees

In *Yates Paving & Grading Co. v. Bryan County*,[247] the Superior Court of Chatham County denied Yates Paving & Grading Company, Inc.'s ("Yates") motion to compel further arbitration on the issue of attorney fees and costs incurred after Bryan County ("County") appealed an arbitration award with regard to a road construction contract between the parties. The parties had entered into a construction contract to build and improve public roads in a subdivision in Richmond Hill.[248] The agreement contained a termination clause specifying how Yates would be paid upon termination, as well as the following binding arbitration clause: "All claims, disputes and other matters in question between OWNER and CONTRACTOR arising out of, or relating to the Contract Documents or the breach thereof . . . will be decided by arbitration."[249]

Yates was terminated after construction began, and the County hired a third party to complete the project. As provided under its contract with the County, Yates demanded arbitration, and notified the County of its intent to seek enforcement of its claims under the Georgia Prompt Pay Act ("Act"), O.C.G.A. section 13-11-1,[250] as well as attorney fees pursuant to the Act.[251] The Act provides that the prevailing party may recover "a reasonable fee for the services of its attorney including but not limited to *trial and appeal and arbitration*, in an amount to be determined by the court or the arbitrators, as the case may be."[252] An arbitration hearing was scheduled, but the County withdrew from the proceedings at the last minute, contending that due to lack of the requisite governmental authority, it could not submit to binding arbitration. The County filed an action in superior court seeking injunctive relief, stay of the arbitration proceedings, and a declaratory judgment on the question of governmental authority. Yates moved to lift the stay and counterclaimed for recovery of its costs and attorney fees under the Georgia Prompt Pay Act, as well as recovery of its costs and attorney fees under its contract. The trial court found that the County had authority to enter into a binding agreement to arbitrate, and

246. *Marchelletta*, 265 Ga. App. at 29-30, 593 S.E.2d at 69.
247. 265 Ga. App. 578, 594 S.E.2d 756 (2004).
248. *Id.* at 579, 594 S.E.2d at 758.
249. *Id.*
250. O.C.G.A. § 13-11-1 (Supp. 2004).
251. *Yates Paving*, 265 Ga. App. at 579, 594 S.E.2d at 758.
252. *Id.* (citing O.C.G.A. § 13-11-8 (2004)) (emphasis added).

ordered the parties to arbitrate their dispute, but did not rule on Yates's counterclaim.[253]

After the arbitration hearing, Yates was awarded $430,335, plus fees, including attorney fees, and the superior court confirmed the award. The County appealed to the court of appeals, once again arguing that it lacked authority to enter into binding arbitration.[254] The court of appeals affirmed the arbitration award and the lower court's holding that the County did not exceed its authority in executing a contract that provided for arbitration, and that arbitration was expressly provided for in the parties' contract.[255]

Yates then filed a motion seeking a second arbitration, which related solely to the issue of appellate attorney fees and costs that it had incurred in defense of the original arbitration award. The lower court denied Yates's motion, finding that despite a provision in the parties' arbitration agreement for the award of attorney fees and costs, that provision did not encompass appellate attorney fees.[256]

The court of appeals reversed, determining that the parties' valid and enforceable arbitration clause at issue was unambiguous and clearly provided that "*all* claims, disputes, and 'other matters' relating to the contract will be decided by arbitration," which included the issue of appellate attorney fees.[257] The court pointed out that the contract's arbitration clause made no distinction on the type of attorney fees.[258] Moreover, Yates's counterclaim against the County sought to enforce Yates's claims under the Georgia Prompt Pay Act, which expressly provides for the recovery of attorney fees on appeal, regardless of whether such claims are litigated or arbitrated.[259] Thus, the court stated, "[s]ince Yates is entitled to seek appellate attorney fees under the Prompt Pay Act, and . . . 'the parties' contract explicitly required arbitration of all disputes . . . the fee issue must be resolved by further arbitration.'"[260]

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253. *Id.* at 579-80, 594 S.E.2d at 758.
254. *Id.* at 580, 594 S.E.2d at 758.
255. *Id.*
256. *Id.* at 580-81, 594 S.E.2d at 759.
257. *Id.* at 581, 594 S.E.2d at 759.
258. *Id.* at 582, 594 S.E.2d at 759.
259. *Id.* (citing O.C.G.A. § 13-11-1).
260. *Id.*, 594 S.E.2d at 760 (quoting Doman v. Stapleton, 256 Ga. App. 383, 388-89, 568 S.E.2d 509, 513 (2002)).

V. LEGISLATION

The Georgia General Assembly passed several pieces of legislation relevant to construction law. Contractors are now required to be licensed.[261] Additionally, the General Assembly adopted a law that requires homeowners to send general contractors specific notice of construction defects ninety days prior to initiating an "action," which is defined as litigation or arbitration.[262]

A. Licensing and General Contractors

The Georgia General Assembly amended Chapter 41 of Title 43 of the O.C.G.A.[263] The act requires both residential and general contractors to seek licensure from the State.[264] The party seeking a license must meet certain criteria and take an examination.[265] The act also creates a State Licensing Board to oversee the licensure process.[266]

B. ADR Process for Homeowner Claims

The Georgia General Assembly has created an alternative dispute resolution process for homeowner construction defect claims.[267] The statute outlines a procedure whereby a homeowner notifies a contractor of defects so the contractor has an opportunity to either pay for repairs or cure, all in the hope that the parties might avoid the time and expense of litigation or arbitration.[268] Most importantly, the statute requires a homeowner to provide written notice of a claim ninety days before initiating an "action" against a contractor.[269] "Action" is defined as "any civil lawsuit, judicial action, or arbitration proceeding asserting a claim in whole or in part for damages or other relief in connection with a dwelling caused by an alleged construction defect."[270]

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261. O.C.G.A. § 43-41-6 (2004).
262. O.C.G.A. § 8-2-38(a) (2004).
263. O.C.G.A. § 43-41-1 (2004).
264. O.C.G.A. § 43-41-6 (2004).
265. *Id.*
266. O.C.G.A. § 43-41-3 (2004).
267. O.C.G.A. §§ 8-2-35 to -43 (2004).
268. *Id.*
269. O.C.G.A. § 8-2-38(a).
270. O.C.G.A. § 8-2-36(1).

C. *Change to State Minimum Standard Codes for Construction*

The legislature amended Part 2 of Article 1 of Chapter 2 of Title 8 of the O.C.G.A.[271] The legislature took this action to change the State Minimum Standard Codes for Construction, delete obsolete provisions, and to revise provisions in accordance with new codes.[272] Most importantly, the legislature redefined what constitutes "state minimum standard codes."[273]

D. *Manufactured Homes*

The Georgia legislature adopted "The Uniform Standards Code for Manufactured Homes Act."[274] The Act is designed to establish new guidelines regarding manufactured home construction and safety standards.[275]

E. *Utility Contractors*

The legislature amended Chapter 14 of Title 43 of the O.C.G.A., relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors.[276] Most importantly, the legislature added language requiring persons holding utility manager and utility foreman certificates to "submit proof to the division of completion of a safety training course approved by the division at least every two years from the date of the completion of the initial safety training course."[277]

VI. MISCELLANEOUS

This section contains cases that do not fall neatly into one of the other previously discussed topics or categories. Noncompliance with state law and indemnification are the two main topics.

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271. O.C.G.A. § 8-2-20 (2004).
272. *Id.*
273. *Id.* § 8-2-20(9)(A)(i).
274. O.C.G.A. § 8-2-130 (2004).
275. O.C.G.A. § 8-2-132 (2004).
276. O.C.G.A. § 43-14-8.4(b) (2004).
277. *Id.*

A. Contractor Theft

In *Smith v. State*,[278] a contractor was convicted of theft by taking under O.C.G.A. section 16-8-2[279] for failing to perform construction work as promised. The victim hired Jimmy Smith, who claimed to employ a crew of thirty men, to build a garage. The parties' written contract provided that the homeowner would pay half the contract amount as a downpayment, and the balance as the work progressed.[280]

Work was scheduled to begin the next day, and Smith promised to be finished within eight weeks. Instead of beginning work as promised, Smith allowed three weeks to pass with only one laborer showing up for a day and a half to prepare the site. When confronted about the lack of progress, Smith lied to the victim, claiming that the lumber and other materials were back-ordered. Later, Smith, a laborer, and a subcontractor spent two more days pouring footings for the foundation, but the footings failed inspection twice. After the footings finally passed inspection, the concrete slab for the garage was poured. With one minor exception, no further work was performed.[281]

The homeowner called Smith repeatedly throughout the eight week period, first trying to get the work completed, and later to get his money back. Smith failed to return his calls. When the homeowner finally confronted Smith at his house, Smith promised to complete the garage, arrived the next day on the site, and worked till lunch, but never returned. Months went by with no contact from Smith. By chance, the victim ran into Smith one day at a local store. Smith, in front of witnesses, promised to pay the money back the next day at the victim's home, but he never showed up.[282]

Smith was charged with theft by taking, and a trial was scheduled. Just prior to trial, Smith contacted the victim and once again promised to pay the money he owed the victim if the victim would drop the criminal charges.[283] Although he apologized to the victim and his wife, telling them, "I'm sorry I ripped you off," he once again failed to follow through with a refund of the money.[284]

O.C.G.A. section 16-8-2 provides that "[a] person commits the offense of theft by taking when he unlawfully takes or, being in lawful

278. 265 Ga. App. 57, 592 S.E.2d 871 (2004).
279. O.C.G.A. § 16-8-2 (2004).
280. *Smith*, 265 Ga. App. at 58, 592 S.E.2d at 872.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*, 592 S.E.2d at 872-73.

possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated."[285] The last phrase, "regardless of the manner in which the property is taken or appropriated,"[286] has been broadly interpreted to encompass a wide variety of schemes for depriving people of their property.[287] If a contractor accepts or retains a homeowner's money with no intention of satisfying his obligations under the construction contract, under Georgia law, a jury is authorized to find him guilty of theft by taking.[288]

Here, the court of appeals concluded that Smith was guilty of theft by taking when he accepted the victim's downpayment, but abandoned the project.[289] Though Smith promised to return the unearned portion of the amount he had been paid, he failed to do so. Smith's conduct was also part of a pattern. Over Smith's protest, the trial court admitted evidence of two similar transactions that did not result in criminal charges. In each transaction Smith misrepresented to homeowners how quickly he could begin work, and that he had a crew of thirty men. He accepted downpayments, but barely started work before abandoning the projects entirely. He avoided the customers' phone calls and failed to refund the unearned portions of the downpayments.[290] Determining that the trial court met the three-prong test for admitting evidence of similar transactions, the court held the trial court did not abuse its discretion in admitting such evidence.[291]

B. Indemnification

In *CSX Transportation, Inc. v. City of Garden City*,[292] a Georgia municipality, Garden City, executed agreements with CSX Transportation, Inc. and its affiliates ("CSX") to use a railroad right-of-way to install water and sewer lines. Garden City agreed to indemnify and hold harmless CSX for all liabilities the company incurred in connection with the project for which the company was not the sole cause. Garden City also agreed to maintain insurance to cover its indemnity obligations. After a passenger train collided with a tractor trailer operated by one of Garden City's subcontractors, causing significant property damage to

285. O.C.G.A. § 16-8-2.
286. *Id.*
287. *Smith*, 265 Ga. App. at 59, 592 S.E.2d at 873.
288. *Id.* (citations omitted).
289. *Id.*
290. *Id.* at 60, 592 S.E.2d at 874.
291. *Id.*
292. 277 Ga. 248, 588 S.E.2d 688 (2003).

CSX and subjecting CSX to third party claims, CSX sought indemnification from Garden City pursuant to its agreements. Garden City refused, contending that the indemnification provision constituted an impermissible waiver of the City's sovereign immunity.[293] The Georgia Supreme Court agreed.[294]

Georgia municipalities are creatures of the state, and allocations of power are strictly construed.[295] Sovereign immunity applies to all actions when a Georgia municipality is a party.[296] The question whether Garden City was authorized to enter into an indemnification agreement with a private third party, thereby waiving its sovereign immunity, is controlled by specific legislative provisions authorizing the waiver of sovereign immunity.[297] In the context of tort liability and insurance coverage, the Georgia General Assembly, through O.C.G.A. section 36-33-1(a),[298] has authorized only a narrow waiver of sovereign immunity:

> A municipal corporation shall not waive its [sovereign] immunity by the purchase of liability insurance, except as provided in Code Section 33-24-51, or unless the policy of insurance issued covers an occurrence for which the defense of sovereign immunity is available, and then only to the extent of the limits of such insurance policy.[299]

When a municipal contract is beyond the power or authority of the local government to perform under any circumstances, it is void as an *ultra vires* contract.[300]

Here, the agreements between Garden City and CSX required Garden City to provide indemnification for "all liability, loss, claim, suit, damage, charge, or expense which CSX may suffer, sustain, incur or in any way be subjected to . . . except when caused solely by the fault or negligence of CSX."[301] Construing O.C.G.A. section 36-33-1, the court determined there was no statutory authority that permitted Garden City to waive its sovereign immunity by contracting to indemnify a private

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293. *Id.* at 248, 588 S.E.2d at 688-89.
294. *Id.* at 249-50, 588 S.E.2d at 689.
295. *Id.* at 249, 588 S.E.2d at 689 (citing O.C.G.A. § 36-34-1 (2004)).
296. *Id.* (citations omitted).
297. *Id.*
298. O.C.G.A. § 36-33-1(a) (2004).
299. *CSX Transp.*, 277 Ga. at 250, 588 S.E.2d at 689 (quoting O.C.G.A. § 36-33-1(a) (quoted in part)).
300. *Id.*, 588 S.E.2d at 690 (citing Newsome v. City of Union Point, 249 Ga. 434, 436, 291 S.E.2d 712, 714 (1972); R. Perry Sentell, Jr., *Local Government and Contracts that Bind*, 3 GA. L. REV. 546 (1968)).
301. *Id.*

third party.[302] Thus, the indemnification agreement between the parties was void as an *ultra vires* contract.[303]

However, to the extent the facts behind CSX's action against Garden City fell within the scope of insurance coverage provided by Garden City's participation in the Georgia Interlocal Risk Management Agency (GIRMA), a multi-government insurance fund, and sovereign immunity would otherwise apply to that cause of action, the court held that Garden City's sovereign immunity would be waived to the extent of such liability coverage.[304]

Public policy and indemnification again played a pivotal role in *Federated Department Stores v. Superior Drywall & Acoustical, Inc.*[305] In *Federated*, a contractor, Orion Building Corporation ("Orion"), was hired by Federated's Rich's department store in Macon ("Federated") to perform extensive renovations. Superior Drywall & Acoustical, Inc. ("Superior") was hired to install the drywall. To ensure that the store remained open for business during the renovation project, a series of temporary sheetrock walls known commonly in the industry as "dust walls" were erected to separate and block the construction areas from public access, as well as to insulate the public areas from construction dust and noise.[306]

To make the shopping areas more attractive for customers, Federated directed that Orion cover the dust walls with decorative curtains. Floor-length curtains were suspended along the outside of the dust walls from metal rods connected to free-standing poles in metal bases, which were only partially hidden behind the curtains. Orion's superintendent did not pass the task of hanging the curtains along to Superior.[307]

After sustaining a serious injury as a result of tripping over one of the metal bases while shopping, a customer filed a complaint against Federated and Orion. Although the drywall contractor did not cause the fall, Superior was joined as a third-party defendant based upon a contractual provision in its contract with Orion which provided that Superior would be responsible for performing not only the drywall work, but also the installation of the temporary dust partitions and Federated-furnished dust curtains. The trial court granted Superior's motion for

302. *Id.*
303. *Id.*
304. *Id.* at 250-51, 588 S.E.2d at 690.
305. 264 Ga. App. 857, 592 S.E.2d 485 (2003).
306. *Id.* at 858, 592 S.E.2d at 486.
307. *Id.* at 858-59, 592 S.E.2d at 486.

summary judgment, which was premised upon Orion's and Federated's sole liability for plaintiff's injuries. Orion and Federated appealed.[308]

Under O.C.G.A. section 13-8-2(b),[309] it is against public policy to indemnify or hold harmless a party to a contract for the construction, alteration, repair, or maintenance of a building against liability for damages arising out of bodily injury to persons resulting from the sole negligence of the promisee.[310] Here, by contract, Superior was required to purchase contractor's general liability insurance to cover Superior against its own negligent acts in its execution of the work. The insurance Superior purchased did not cover claims made against Orion or Federated.[311] Superior's contract, however, also contained an indemnification clause, which stated:

> Subcontractor hereby assumes entire responsibility and liability for all damage or injury of any kind or nature (including death resulting therefrom) to all persons, whether employees of Subcontractor or otherwise, and to all property caused by, resulting from, arising out of or occurring in connection with the execution of the Work, [e]xcept to the extent, if any, expressly prohibited by statute, should any claims for such damage or injury, including direct attorney[] fees and any judgments or disbursements, that Orion, Owner [(Federated)], their officers, agents, and employees may directly or indirectly incur as a result thereof.[312]

Federated argued that an "insurance exception" to Georgia's public policy prohibition rendered Superior's indemnity provision enforceable under precedent established by the Georgia Court of Appeals and the Georgia Supreme Court, and that the parties had mutually agreed the risk of loss would be shifted to the insurance coverage obtained by Superior.[313] The court was not persuaded.[314] Despite having agreed to such a broad sweeping contractual indemnification provision, Superior prevailed.[315]

Although the court stated that the type of insurance and the intent of the parties plays a part in the analysis, the court examined no evidence that indicated anything in Superior's agreement with Orion expressed a mutual intention that the insurance would cover the negligent acts of

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308. *Id.* at 860, 592 S.E.2d at 487.
309. O.C.G.A. § 13-8-2(b) (2004).
310. *Id.*
311. *Federated*, 264 Ga. App. at 860-61, 592 S.E.2d at 487-88.
312. *Id.* at 859, 592 S.E.2d at 487.
313. *Id.* at 861, 592 S.E.2d at 488 (citations omitted).
314. *Id.* at 861-62, 592 S.E.2d at 488.
315. *Id.* at 862-63, 592 S.E.2d at 489.

Federated.[316] Instead, the record indicated that Superior procured, and was asked to procure, contractor's general liability insurance solely for its own protection.[317] Also cutting against Federated's "mutual intent" argument was that Federated had agreed to provide its own Builder's Risk insurance, which covered Federated's liability "'for any injuries allegedly occurring on the premises that would be the result of negligence or fault'" of Federated.[318] Absent an insurance clause demonstrating the parties' mutual intent for Superior's insurance to provide coverage for loss or damages incurred by *both* parties, the court held that Superior's indemnity clause was void and unenforceable pursuant to O.C.G.A. section 13-8-2(b).[319]

In *National Gypsum of Georgia v. Ploof Carriers Corp.*,[320] a trucking company employee tripped and fell on National Gypsum's loading dock while trying to cover a load of wallboard with a tarp. The trucking company, Ploof Carriers ("Ploof"), had contractually agreed to indemnify and hold harmless National Gypsum for all injuries to Ploof's employees that occurred on National Gypsum's property, except when the indemnitee, National Gypsum, was solely negligent.[321]

Ploof's employee sued National Gypsum, who sought indemnity and attorney fees from Ploof in a third party claim. The trial court granted Ploof's motion for summary judgment, finding that no evidence had been presented that Ploof was negligent, even if its employee had failed to exercise ordinary care for his own safety. On appeal National Gypsum contended that the trial court erred in granting partial summary judgment to Ploof on its indemnity obligation because National Gypsum had submitted adequate proof that Ploof was negligent.[322]

The agreement between Ploof and National Gypsum contained the following indemnity clause:

> [Ploof] shall be solely responsible for and agrees to indemnify, defend and hold [National Gypsum] harmless from any claims, demands, damages, costs, attorney[] fees, expenses and legal proceedings of any type for injury to, the death of, or damage to the property of, *any employee*, contractor, or agent of [Ploof] who performs any work for [Ploof] pursuant to this agreement, whether such injury, death or damage occurs on [National Gypsum's] property or anywhere else, and

316. *Id.*
317. *Id.* at 862, 592 S.E.2d at 488.
318. *Id.*, 592 S.E.2d at 489.
319. *Id.* at 862-63, 592 S.E.2d at 489.
320. 266 Ga. App. 565, 597 S.E.2d 597 (2004).
321. *Id.*, 597 S.E.2d at 598.
322. *Id.* at 565-66, 597 S.E.2d at 598-99.

> *even if such injury, death or damage is claimed to have been caused by [National Gypsum's] acts or omissions*; provided that nothing herein shall require [Ploof] to be responsible to indemnify [National Gypsum] for the amount of any final judgment in which it has been found that such injury, death or loss or damage to property was caused solely by [National Gypsum's] negligence.[323]

The court of appeals agreed that the trial court erred, but for a different reason.[324] Acknowledging that a conflict between two previous court of appeals opinions had created confusion with regard to indemnity obligations, the court took the opportunity to overrule its opinion in *Proctor & Gamble Paper Products Co. v. Yeargin Construction Co.*[325] The court in *Proctor & Gamble* held that the indemnified party must show negligence on the part of the employer/indemnitor, rather than contributory negligence on the part of the employee, before the employer's indemnification obligation was triggered.[326] The court expressly overruled that holding based on the specific indemnity language at issue in that case.[327]

Instead, the court clarified that Ploof's indemnity obligation turned not on the question of whether Ploof was negligent, but rather on whether plaintiff's injury was due to National Gypsum's sole negligence.[328] Because National Gypsum had submitted evidence that created a genuine issue of material fact on whether plaintiff employee failed to exercise ordinary care for his own safety, the court held that partial summary judgment for the trucking company on the wallboard manufacturer's indemnity claim should not have been granted.[329]

In *Anderson v. United States Fidelity & Guaranty Co.*,[330] U.S. Fidelity and Guaranty Company ("USF&G") issued performance and payment bonds on behalf of Eagle Construction Company of Georgia, Inc. ("Eagle") for construction contracts by and between Eagle, various owners, and prime contractors on projects throughout the southeastern United States. The bonds guaranteed that Eagle would complete its construction contracts and pay its suppliers and subcontractors. In return Eagle executed a master surety agreement ("indemnity agreement") in favor of USF&G, which indemnified and held harmless the surety from any and all liabilities, including, among others, all amounts

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323. *Id.* at 565, 597 S.E.2d at 598.
324. *Id.* at 567, 597 S.E.2d at 599.
325. 196 Ga. App. 216, 396 S.E.2d 38 (1990).
326. *Id.* at 218, 396 S.E.2d at 40.
327. *Ploof*, 266 Ga. App. at 569, 597 S.E.2d at 600.
328. *Id.*
329. *Id.*
330. 267 Ga. App. 624, 600 S.E.2d 712 (2004).

paid by the surety in good faith under the belief that it was or might be liable.[331]

After Eagle suffered financial difficulties and became unable to complete certain projects or pay its subcontractors and suppliers, USF&G received claims on some of the bonds it had issued. Eventually, USF&G filed an action seeking reimbursement of its expenses pursuant to its obligations under the bonds and moved for summary judgment. In support of its summary judgment motion, USF&G filed affidavits showing the damages, including an itemized statement of losses, expenses, and costs that USF&G had incurred from the bonds it had issued on behalf of Eagle.[332]

Eagle challenged the court's judgment in favor of USF&G on three bases: (1) that the billing summaries and statements contained in USF&G's affidavits were inadmissible hearsay; (2) that two affidavits submitted by USF&G were not sworn to by an officer of USF&G as allegedly required by the parties' indemnity agreement; and (3) the affidavits contained documents that were inherently unreliable. Eagle did not dispute that they were bound by the indemnity agreement.[333]

The court determined that Eagle's arguments were without merit.[334] By signing the indemnity agreement, the court stated Eagle expressly agreed that the evidence of USF&G's payments on behalf of Eagle, and itemized statements sworn to by an officer of USF&G, would be prima facie evidence of the fact and extent of Eagle's liability.[335] Moreover, the enforceability of the indemnity agreement, not the underlying bonds, was the issue before the court.[336] Once USF&G met its burden, the burden shifted to Eagle to point to evidence of bad faith on the part of USF&G.[337] Because there was no evidence of bad faith on the surety's part, the court affirmed the trial court's grant of summary judgment on the issue of liability and damages.[338]

C. EIFS; Insurance; Garnishment

In *Dowse v. Southern Guaranty Insurance Co.,*[339] plaintiffs filed suit against a contractor for defective construction in the installation of an

331. *Id.* at 624, 600 S.E.2d at 713.
332. *Id.*
333. *Id.* at 625, 600 S.E.2d at 714.
334. *Id.*
335. *Id.* at 626, 600 S.E.2d at 714.
336. *Id.*
337. *Id.*
338. *Id.*
339. 263 Ga. App. 435, 588 S.E.2d 234 (2003).

"exterior insulation and finishing system" ("EIFS") on their home, alleging negligence, breach of warranty, and bad faith. The contractor, who was insured under a general commercial liability policy, gave timely notice of the suit to its insurer. The insurer responded by advising the contractor that the claims brought against it by plaintiff were not covered by the general commercial liability policy it had issued to the contractor, and declined to defend or indemnify the contractor. After the insurer refused to provide a defense or indemnification, the contractor entered into a settlement agreement with plaintiff. As part of the agreement, the contractor dismissed its answer to plaintiff's complaint. Plaintiff then filed for entry of a default and requested a hearing on damages. The trial court tried the issue of damages, and a judgment was rendered for plaintiff in the amount of $83,040.29, together with interest and costs.[340]

Plaintiff subsequently filed a garnishment action against the insurer, claiming that the insurance policy issued to the contractor was a garnishable asset. The insurer answered, maintaining that it was not in possession of any funds that were subject to the garnishment and also moved for summary judgment. The trial court granted the insurer's motion for summary judgment, and plaintiff appealed. Plaintiff argued that the trial court erred in holding that the release of the contractor had the effect of releasing the insurer from any liability under the insurance policy.[341] The appellate court agreed because:

> [I]n Georgia, "[w]hen an insurer denies coverage and absolutely refuses to defend an action against an insured when it could do so with reservation of its rights as to coverage, the legal consequence of such refusal is that it waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement made in good faith, plus expenses and attorney[] fees."[342]

340. *Id.* at 435-36, 588 S.E.2d at 235.

341. *Id.* at 436-37, 588 S.E.2d at 235.

342. *Id.* at 439, 588 S.E.2d at 237 (quoting Ga. S. & Fla. Ry. Co. v. U.S. Cas. Co., 97 Ga. App. 242, 244, 102 S.E.2d 500, 502 (1958)).