Real Property

by Linda S. Finley*

I. INTRODUCTION

This Article surveys case decisions and other developments in Georgia real property law during the current survey period (June 1, 2004 through May 31, 2005). The court decisions, legislation, and other information discussed below were chosen for their significance to real property law and, perhaps, their relevance to the day-to-day law practice. Unfortunately, it is not possible to review each important decision due to space limitations. Instead, the author seeks to identify new trends as well as changing law. Perhaps the most important trend in real property law is the criminalization of mortgage fraud relating to residential home loans.[1] The real property practitioner—particularly the closing attorney—is best forewarned to review the new legislation (discussed below) to avoid potential criminal liability and prosecution.

II. 2005 LEGISLATION—THE GEORGIA RESIDENTIAL MORTGAGE FRAUD ACT

On May 5, 2005, the Governor signed Senate Bill 100, the Georgia Residential Mortgage Fraud Act,[2] into law. The statute created a new crime under the provisions now existing for theft.[3] The statutory provisions governing residential mortgage fraud are found in section 16-

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1. O.C.G.A. §§ 16-8-100 to -106 (2003 & Supp. 2005).
2. *Id.*
3. *Id.*

8-100 through section 16-8-106 of the Official Code of Georgia Annotated ("O.C.G.A.").[4]

Specifically, the new statute defines residential mortgage fraud as when a person with intent to defraud "[k]nowingly makes a deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intention that [the false information] be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process."[5] Further, a violation of the statute occurs when a person uses or facilitates the use of such false information with the intent that the false information be used by anyone during the mortgage lending process.[6]

A violation of the criminal statute occurs when a person receives proceeds or any other funds in connection with the closing of a residential mortgage loan if that person knows the funds resulted from misstatements, misrepresentations, or omissions during the lending process.[7] Closing attorneys and others who take part in the lending and real estate closing practice should also be aware that the statute provides a separate prosecution for conspiracy,[8] should the party conspire with others to violate the statute.[9] Finally, violation of the statute occurs when any written instrument that contains a deliberate misstatement, misrepresentation, or omission is recorded in the real estate records of any Georgia county.[10] However, prosecution of this offense cannot "be predicated solely upon information lawfully disclosed under federal disclosure laws, regulations, and interpretations related to the mortgage lending process."[11]

Venue for the offense is broad and includes the county where the secured realty is located;[12] any county in which a fraudulent act is committed;[13] any county in which the proceeds obtained from the fraud have been held;[14] the county in which the loan closing occurred;[15] or

4. *Id.*
5. O.C.G.A. § 16-8-102(1).
6. *Id.* § 16-8-102(2).
7. *Id.* § 16-8-102(3).
8. O.C.G.A. § 16-4-8 (2003).
9. O.C.G.A. § 16-8-102(4).
10. *Id.* § 16-8-102(5).
11. *Id.* § 16-8-102.
12. O.C.G.A. § 16-8-103(1).
13. *Id.* § 16-8-103(2).
14. *Id.* § 16-8-103(3).
15. *Id.* § 16-8-103(4).

in any county in which a document containing false or fraudulent information is recorded in the real estate records.[16]

The statute provides authority for both the district attorney of each judicial circuit and the Georgia Attorney General to investigate and prosecute the offense.[17]

As for punishment for commission of residential mortgage fraud, the statute provides for imprisonment, probation, fines, and seizure of personal and real property.[18] Conviction for this crime imposes punishment as a felony and may include imprisonment for one to ten years and a fine of up to $5000.[19] If the violation involves multiple instances of residential mortgage fraud, those convicted face imprisonment for up to twenty years and fines up to $100,000.[20]

The last punishment identified is perhaps the most severe. The statute provides that "[a]ll real and personal property . . . used or intended for use in the course of [the crime] derived from, or realized through a violation, . . . is subject to forfeiture . . . ."[21] Finally, the statute defines residential mortgage fraud as a specific act which may be prosecuted either criminally or civilly pursuant to the Georgia Racketeer Influenced and Corrupt Organizations Act ("RICO").[22]

III. TITLE TO LAND

In *Crawford v. Simpson*,[23] the Georgia Supreme Court reviewed issues concerning title to land acquired by adverse possession.[24] Crawford brought suit against his neighbor, appellee L. Simpson Charitable Remainder Unitrust ("Simpson"), to quiet title to a 1.32 acre tract and establish a proper boundary line.[25] The trial court appointed a special master who found that "a 1950 deed into Daughtry, a farmer who was [Simpson's] predecessor[] in title, [described] a boundary line . . . between the two properties."[26] The deed placed the disputed property into Crawford's predecessor in interest, Watson. However, early aerial photos of the property taken for use in county tax maps

16. *Id.* § 16-8-103(1)-(5).
17. *Id.* § 16-8-104.
18. *Id.* §§ 16-8-105 to -106.
19. *Id.* § 16-8-105(a).
20. *Id.* § 16-8-105(b).
21. *Id.* § 16-8-106.
22. O.C.G.A. § 16-14-3(9)(A)(xxxix) (2003 & Supp. 2005). *See* O.C.G.A. §§ 16-14-1 to -15 (2003).
23. 279 Ga. 280, 612 S.E.2d 783 (2005).
24. *Id.* at 280, 612 S.E.2d at 783.
25. *Id.*
26. *Id.* at 281, 612 S.E.2d at 783.

showed the disputed property being used in a manner that was consistent with Daughtry's (now Simpson's) claim.[27] The evidence also showed that Daughtry had paid the taxes on the disputed parcel and had consistently used the property for planting hay and pine trees.[28] "[A] 1970 plat showed the disputed tract as part of the Daughtry property and a plat of Daughtry's property prepared after his death included the disputed tract."[29] The title records indicate that "when [Crawford] acquired his property, the [grantor] did not warrant the disputed boundary line . . . and when [Crawford] installed a fence along that 1950 boundary line, [Simpson] had the fence removed."[30]

The special master found that Simpson owned the disputed property pursuant to both O.C.G.A. section 44-5-163[31] (adverse possession for twenty years) and O.C.G.A. section 44-5-164[32] (adverse possession under color of title for seven years). The trial court adopted the special master's findings.[33]

Reviewing the statutory requirements to establish adverse possession, the Georgia Supreme Court held, "'[t]o establish title by adverse possession, whether by twenty years or seven years under color of title, a party must show possession not originated in fraud that is public, continuous, exclusive, uninterrupted and peaceable, and accompanied by a claim of right.'"[34] On appeal, Crawford argued that the evidence was insufficient to show that Daughtry (and Simpson's other predecessors in interest) possessed the property "publicly, exclusively and continuously or that Daughtry's use of the property was accompanied by a claim of right."[35] The court did not agree, holding that Daughtry cultivated the property beginning at least in 1963 and paid taxes on it.[36] The court also held that ownership was warranted to Simpson in a 1992 conveyance, and Simpson removed Crawford's fence when he erected it in 2001.[37] Accordingly, the trial court's adoption of the special master's findings was authorized by the evidence.[38]

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27. *Id.*
28. *Id.*
29. *Id.*, 612 S.E.2d at 784.
30. *Id.*
31. O.C.G.A. § 44-5-163 (1991).
32. O.C.G.A. § 44-5-164.
33. *Crawford*, 279 Ga. at 280, 612 S.E.2d at 783.
34. *Id.* at 281, 612 S.E.2d at 784 (quoting O.C.G.A. § 44-5-161(1) (1991)) (citing Cooley v. McRae, 275 Ga. 435, 436, 569 S.E.2d 845, 846 (2002)).
35. *Id.*
36. *Id.* at 281-82, 612 S.E.2d at 784.
37. *Id.* at 282, 612 S.E.2d at 784.
38. *Id.*

In *Burnett v. Holroyd*,[39] the Georgia Supreme Court reviewed the necessary elements to establish an implied trust in land.[40] Following his estranged wife's death, Burnett filed a petition to quiet title to four parcels of land in Jackson County, Georgia. Burnett sought to have the trial court impose an implied trust on the land in derogation of his wife's will, which left her real estate and personal property to her children from a previous marriage.[41] Prior to her death, Burnett and his wife held title to deeds to three parcels (95 acres, 14 acres, and 152 acres), and the late Mrs. Burnett held the title to the fourth tract (20 acres).[42] Holroyd, the executrix and one of the beneficiaries under Mrs. Burnett's will, claimed her mother acquired an undivided one-half interest in the 95 acre, the 14 acre, and the 152 acre parcels and was the sole owner of the 20 acre parcel.[43]

A jury found in favor of Mr. Burnett as to the 152 acre parcel, but found for Mrs. Burnett's children as to the 95 acre and 14 acre parcels.[44] Holroyd sought a

> new trial/judgment notwithstanding the verdict contending, among other things, that [Mr. Burnett's] claim to fee simple ownership of the 152-acre farm by means of the equitable remedy of imposition of an implied trust was barred by appellant's unclean hands. In May 2003, the trial court granted the j.n.o.v., and Mr. Burnett [appealed].[45]

To determine whether the equitable remedy of implied trust was available, the court reviewed how each of the properties was brought into the marriage as well as certain facts regarding Mr. Burnett's retirement benefits and tax liabilities. The facts showed Mr. Burnett purchased the 152 acre farm prior to his marriage to Mrs. Burnett. Later, he deeded an undivided one-half interest to his wife for $10 "'and other valuable consideration.'"[46] He did so to obtain a title insurance policy required for the purchase of the 95 acre parcel the Burnetts were purchasing with financing secured by the 152 acre farm. Later, when Mr. Burnett reached the age of 62, he put an egg-producing business that he and Mrs. Burnett ran on the 152 acre farm solely in his wife's name to obtain tax benefits and to avoid the loss of retirement and other

39. 278 Ga. 470, 604 S.E.2d 137 (2004).
40. *Id.* at 472, 604 S.E.2d at 138.
41. *Id.* at 470-71, 604 S.E.2d at 137.
42. *Id.* at 471, 604 S.E.2d at 137.
43. *Id.*, 604 S.E.2d at 137-38.
44. *Id.*, 604 S.E.2d at 138.
45. *Id.*
46. *Id.*

income.[47] Holroyd introduced as evidence federal income tax returns from 1995-1998, which reflected that Mr. and Mrs. Burnett filed a joint tax return, which identified Mrs. Burnett as proprietor of the egg business and showed deductions of the mortgage interest as a deductible business expense of Mrs. Burnett.[48]

Although it is permissible for one spouse to minimize or eliminate tax liability, "it is improper for the parties to agree that notwithstanding the deed and claimed tax reduction, the grantee holds the property in trust for the grantor. . . ."[49] Accordingly, the trial court properly determined that Mr. Burnett, having "unclean hands," was not entitled to the equitable relief that a resulting trust would provide.[50]

Further, the court concluded that Mr. Burnett failed to produce proof of the existence of an implied trust.[51] The court reasoned: "An implied trust is statutorily defined as 'a trust in which the settlor's intention to create the trust is implied from the circumstances, and which meets the requirements of Code Sections 53-12-90 through 53-12-93.'"[52] Further, "'[a]n implied trust is either a resulting trust or a constructive trust.'"[53] The court explained that the statute defined a resulting trust as:

> a trust implied for the benefit of the settlor . . . when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have the beneficial interest in the property, under any of the following circumstances: (1) A trust is created but fails, in whole or in part, for any reason; (2) A trust is fully performed without exhausting all the trust property; or (3) A purchase money resulting trust as defined in subsection (a) of Code Section 53-12-92 is established.[54]

The court continued, "'[a] purchase money resulting trust is a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property.'"[55] "'A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 472, 604 S.E.2d at 138.
51. *Id.*
52. *Id.* (quoting O.C.G.A. § 53-23-213 (1997)).
53. *Id.* (quoting O.C.G.A. § 53-12-90 (1997)).
54. *Id.* (quoting O.C.G.A. § 53-12-91 (1997)).
55. *Id.* (quoting O.C.G.A. § 53-12-92(a) (1997)).

otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity.'"[56]

The court held that Mr. Burnett satisfied the first element of an implied resulting trust when he testified that he intended for his wife to hold only the legal title but not the beneficial interest to the property.[57] However, he failed to prove any of the three circumstances required by statute that would prove the necessity of an implied trust:

> there [was] no evidence of the creation of an express trust, or a trust that has fully performed without exhausting all the trust property, or a purchase-money resulting trust, i.e., that Mr. Burnett paid consideration for legal title [to] the undivided one-half interest to be transferred from him to his wife.[58]

The court held that in the absence of the statutory requirement, the trial court properly granted the j.n.o.v. to Holroyd.[59]

IV. EASEMENTS, COVENANTS, AND BOUNDARIES

In *Mosteller Mill, Ltd. v. Georgia Power Co.*,[60] Georgia Power sought to condemn a 150 foot wide easement for an electric transmission line across Mosteller's property.[61] The trial court appointed a special master to determine the need for the easement and the value of the property to be taken. The special master returned an award of $134,100 to Mosteller as compensation for the easement and consequential damages.[62]

Mosteller filed a notice of appeal and exceptions in the trial court to the rulings made by the special master seeking a jury trial on the value of the property condemned.[63] The trial court denied ten of thirteen exceptions sought by Mosteller, but found that Georgia Power failed to consider certain environmental and historical resources on the Mosteller property and, therefore, set aside the special master's award.[64]

Following a second hearing before the special master, Mosteller was awarded $134,000 as compensation for the condemnation of the easement.[65] Mosteller filed an appeal and exceptions to the revised

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56. *Id.* (quoting O.C.G.A. § 53-12-93(a) (1997)).
57. *Id.*, 604 S.E.2d at 138-39.
58. *Id.*, 604 S.E.2d at 139.
59. *Id.* at 473, 604 S.E.2d at 139.
60. 271 Ga. App. 287, 609 S.E.2d 211 (2005).
61. *Id.* at 287, 609 S.E.2d at 212.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*, 609 S.E.2d at 213.

award.[66] The trial court denied the exceptions, finding that the maintenance clause relied upon by Georgia Power "did not constitute a vague and indefinite appropriation of the property because the 'rights acquired must be exercised for the maintenance of the electric transmission lines.'"[67] Mosteller filed an interlocutory appeal.[68]

The court of appeals reversed the trial court, explaining that this case presented an issue of first impression:

> the extent to which a utility may, by perpetual easement, obtain the right to go onto nonspecific and unidentified lands adjacent to its transmission line easement in order to "cut away, remove and dispose of dead, diseased, weak or leaning trees on lands adjacent thereto [the condemned property] which may now or hereafter, in falling, strike the conductor of said lines . . . ."[69]

This type of easement is commonly referred to as a "danger tree" easement.[70]

The court reasoned a "condemnation proceeding operates as a purchase of the land or an interest [in it] . . . and [Mosteller] is entitled to have an accurate, definite description of the property" subject to condemnation.[71] The court held Georgia Power failed to sufficiently describe the lands to be condemned for the maintenance of its lines.[72] The easement must be described with specificity, and Mosteller was entitled to additional compensation for the additional easement on his land.[73]

In *Danos v. Thompson*,[74] the homeowners in a subdivision brought an action to set aside a quitclaim deed that transferred lakefront lots, maintaining that the transfer of property violated the subdivision's restrictive covenants. The facts at trial were that Peter Danos purchased a lakefront lot in the Thunder Point Subdivision. He also purchased two lots from another subdivision which bordered his Thunder Point property. Thereafter, Danos transferred a portion of the Thunder Point property to his brother, Thomas Danos by quit claim deed. Peter Danos retained the remainder of the property, which provided him access to the lake from the other lots. Both brothers obtained lake

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66. *Id.*
67. *Id.* at 287-88, 609 S.E.2d at 213.
68. *Id.* at 288, 609 S.E.2d at 213.
69. *Id.*
70. *Id.*
71. *Id.* at 289, 609 S.E.2d at 214.
72. *Id.*
73. *Id.* at 289-90, 609 S.E.2d at 214.
74. 272 Ga. App. 69, 611 S.E.2d 678 (2005).

access from their respective lots after the transfer and each obtained dock permits from the Army Corps of Engineers.[75]

After construction of the docks was completed, the homeowners sought to set aside the quitclaim deed between the brothers, alleging that a conveyance resulted in a "resubdivision" of the Thunder Point lot in violation the restrictive covenants.[76] "The homeowners also petitioned the court to rescind the boat dock permits and to enjoin the [brothers]" from using the existing docks or building docks in the future.[77] The trial court found that the homeowners were entitled to judgment and set aside the quitclaim deed, and also enjoined the brothers from use of the docks and from applying for future permits.[78]

On appeal, the trial court's decision was affirmed in part and reversed in part.[79] The provisions of the covenant provided "[n]o residential lot shall be resubdivided into building plots of lesser size than the original lot, except that part of a lot may be sold to the owner of the adjoining lot in which event, the part sold shall thereafter be considered a part of such adjoining lot."[80] "The Danoses [contended] that they did not resubdivide the lot, but [only] added a portion of [one] lot to an adjoining lot," which was permissible under the restrictive covenants.[81] The court pointed out that, in this instance, the provision could not apply because Thomas Danos did not own a lot that adjoined the Thunder Point property.[82] The court then held even if Thomas Danos had owned one of the neighboring lots, transfer was forbidden under the covenants.[83] The court examined the covenants as a whole and concluded that they applied expressly to Thunder Point Subdivision.[84] The covenants define "lots" as only those contained within that subdivision. One property owner was permitted to sell a portion of the land to an adjoining Thunder Point property owner only.[85] The court reasoned that if it adopted the Danoses' argument, which would allow the transfer of property to those outside Thunder Point, then the property would no

75. *Id.* at 69-70, 611 S.E.2d at 678-79.
76. *Id.* at 70, 611 S.E.2d at 679.
77. *Id.*
78. *Id.* at 70-71, 611 S.E.2d at 679.
79. *Id.* at 69, 611 S.E.2d at 678.
80. *Id.* at 71, 611 S.E.2d at 679.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 71-72, 611 S.E.2d at 679-80.
85. *Id.*

longer be subject to those covenants.[86] Accordingly, the trial court did not err in its construction of the covenants.[87]

The court of appeals reversed the trial court's decision enjoining the brothers from using the docks or applying for future dock permits.[88] The court held there was no evidentiary basis to support the trial court's order: "'[A] trial judge manifestly abuses his discretion when he grants an injunction adverse to a party without any evidence to support such judgment and contrary to the law and equity.'"[89] The covenants "provide that the location of boat docks must be approved by the owners; the covenants do not limit the number of docks on a property."[90] The brothers could "seek, and possibly obtain, approval from the homeowners to build additional docks. . . ."[91] Therefore, the appellate court saw "no basis for [preventing] their use of the docks."[92]

In *Vickers v. Meeks*,[93] the parties reached a settlement prior to trial regarding a complaint requesting a permanent injunction. The complaint, filed by Meeks (and others), alleged that Vickers was cutting trees from Meeks's property. Meeks claimed ownership of the property at issue as the sole heir of Wilmer Glynn Meeks. Vickers answered that he and the other heirs of Spencer Kiritz rightfully owned the property on which the trees had been cut.[94]

The settlement agreement provided that counsel for the parties were to select a registered surveyor to perform a survey of the disputed property. The survey was to be in a form suitable for recording and would place appropriate monuments to establish the boundary line by which the parties, in the terms of the agreement, agreed to be bound.[95]

The surveyor completed the survey. The recordable plat was dated May 29, 2003, and was later revised on February 6, 2004. Vickers rejected the survey and Meeks filed a motion to enforce the settlement agreement.[96] The trial court granted the motion, incorporated the survey into its order to establish the boundary, and issued a writ of possession to Meeks.[97]

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86. *Id.*
87. *Id.* at 72, 611 S.E.2d at 680.
88. *Id.*
89. *Id.* (quoting Harris v. Gilmore, 265 Ga. App. 841, 843, 595 S.E.2d 651, 653 (2004)).
90. *Id.*
91. *Id.*
92. *Id.*
93. 273 Ga. App. 293, 615 S.E.2d 158 (2005).
94. *Id.* at 293, 615 S.E.2d at 159.
95. *Id.*
96. *Id.*
97. *Id.*

Vickers appealed on the grounds that the survey was not legally sufficient to establish the boundary line.[98] Vickers contended the "survey [did] not satisfy [O.C.G.A. section] 15-6-67(b)(4), because the plat 'did not have the necessary attestations to be relied upon by subsequent title examiners concerning closure, type of mechanism and deviation of error.'"[99] The appellate court reviewed the survey plat and determined "that it contain[ed] the signature and seal of the surveyor, the date of the plat, a revision date, and the equipment used."[100] The survey was in proper form because it was performed to determine a common land line and "not intended to be a boundary survey under [O.C.G.A. section] 15-6-67(b)(4)(D)."[101] The fact that the survey identified the closure as "N/C," no closure, was not fatal. Further, the court held that even if the plat had failed to meet the statutory requirements, it remained admissible because O.C.G.A. section 15-6-67[102] only addresses recordation of plats but does not address the admissibility of plats.[103] The settlement agreement and the trial court's order clearly identified a line between the two properties.[104] Further, the trial court's order described the location of the line with particularity.[105] Therefore, the trial court did not err.[106]

V. BROKERS AND REALTORS

In *D.R. Horton, Inc.-Torrey v. Tausch*,[107] Tausch, a real estate agent, sued D. R. Horton, Inc.–Torrey d/b/a Torrey Homes ("Torrey Homes") seeking payment of real estate commissions that she alleged had been earned after she was fired from her position. The commissioned sales agreement allowed Tausch to sell homes in a community developed and owned by Torrey Homes provided she would act as its exclusive agent. The agreement provided for a structured commission payment if Tausch was terminated by Torrey Homes and, specifically, for any of her sales that closed up to ninety days after termination. The commission structure entitled Tausch to receive one hundred percent of the commission only for sales that closed within seven days of termina-

98. *Id.* at 293-94, 615 S.E.2d at 159.
99. *Id.* at 294, 615 S.E.2d at 160.
100. *Id.*
101. *Id.*
102. O.C.G.A. § 15-6-67 (2005).
103. 273 Ga. App. at 294, 615 S.E.2d at 160 (citing Purcell v. C. Goldstein & Sons, 264 Ga. 443, 444, 448 S.E.2d 174, 175 (1994)).
104. *Id.* at 294-95, 615 S.E.2d at 160.
105. *Id.* at 294, 615 S.E.2d at 160.
106. *Id.* at 295, 615 S.E.2d at 160.
107. 271 Ga. App. 511, 610 S.E.2d 151 (2005).

tion. Thereafter, the commission reduced incrementally down to twenty percent for closings occurring between sixty-one and ninety days after termination.[108]

At the time Tausch was terminated, she had negotiated contracts for fourteen home purchases. She sued Torrey Homes for the full commission on all fourteen properties, although only three of the purchases closed within the ninety-day period, arguing that she was the "procuring cause" of those respective home sales and therefore, under O.C.G.A. section 10-6-21,[109] entitled to the full commission.[110] Following a bench trial, the trial court awarded Tausch the full commissions and her attorney fees. Torrey Homes appealed.[111]

The court of appeals reversed the judgment of the trial court, holding Torrey Homes had properly paid Tausch pursuant to its employment contract with her and that Tausch was not entitled to commissions in excess of those outlined in the contract.[112] The provisions of O.C.G.A. section 10-6-32 were not applicable as that statute

> embodies the implied obligation of a property owner to pay a commission to his broker when there has been a simple listing of the property with the broker, and is not applicable when the obligation to pay a commission has been expressly agreed upon; in such cases the terms of the express agreement control.[113]

In *Killearn Partners, Inc. v. Southeast Properties, Inc.,*[114] Southeast Properties, Inc. ("Southeast") sought to recover compensation for real estate services against Killearn Partners, Inc. ("Killearn"). Southeast claimed it had acted as Killearn's agent to acquire property in Fulton County and had undertaken significant professional services on Killearn's behalf, including performing an assessment of the feasibility of Killearn's acquisition of the property.[115] Southeast alleged it had an understanding with Killearn that in exchange for these services, Southeast would receive a commission of "not less than seven percent of the transaction's value."[116]

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108. *Id.* at 511-12, 610 S.E.2d at 151-52.
109. O.C.G.A. § 10-6-32 (2000).
110. *Tausch*, 271 Ga. App. at 512-13, 610 S.E.2d at 152.
111. *Id.* at 512, 610 S.E.2d at 152.
112. *Id.* at 513, 610 S.E.2d at 153.
113. *Id.* (quoting O'Brien's Irish Pub v. Gerlew Holdings, 175 Ga. App. 162, 164, 332 S.E.2d 920, 922 (1985)) (quotations omitted).
114. 279 Ga. 144, 611 S.E.2d 26 (2005).
115. *Id.* at 144, 611 S.E.2d at 27.
116. *Id.* at 145, 611 S.E.2d at 28.

Killearn sought summary judgment on the grounds that the Brokerage Relationships in Real Estate Transactions Act[117] ("BRRETA") (as amended in 2000) precluded Southeast from recovering compensation because there was no written contract between the parties.[118] The trial court held that "Southeast had acted as Killearn's real estate agent by providing [it with] services that were more than mere ministerial acts," notwithstanding the absence of a written brokerage agreement between the parties.[119] The trial court denied Killearn's motion for summary judgment based on its finding that under BRRETA, "no written brokerage engagement agreement is required before an agency relationship exists between a real estate professional and a client."[120] The lack of a written agreement did not bar Southeast from seeking recovery of its commission.[121]

Killearn appealed, arguing that BRRETA required a written contract before a real estate agent may be compensated.[122] The court of appeals affirmed the trial court's decision.[123]

The Georgia Supreme Court then affirmed the court of appeals decision, noting that the 2000 amendment to BRRETA required, for the first time, that the broker-client relationship be created by a written agreement.[124] However, the court rejected Killearn's argument that a real estate professional who operates without a written agreement, but provides services to a client that involve professional judgment and skill, is without any remedy, and deprived of its right to seek compensation for services rendered.[125] The court opined that BRRETA was a statute in derogation of the common law, and therefore, the express language of the statute must be followed literally with no exceptions read into the statute by the courts.[126] There is no mention in BRRETA "of when or under what circumstances a real estate agent may assert a claim for payment owed in exchange for services rendered," nor of whether a written agreement must be in place before an agent makes a claim for compensation.[127] The court interpreted the silence of BRRETA on these issues to mean that the legislature "did not intend for BRRETA to

117. O.C.G.A. §§ 10-6A-1 to -16 (2000).
118. *Killearn Partners*, 279 Ga. at 144, 611 S.E.2d at 27.
119. *Id.* at 145, 611 S.E.2d at 27.
120. *Id.*, 611 S.E.2d at 27-28.
121. *Id.*, 611 S.E.2d at 28.
122. *Id.*
123. *Id.*
124. *Id.* at 147, 611 S.E.2d at 28.
125. *Id.* at 146-47, 611 S.E.2d at 28-29.
126. *Id.* at 146, 611 S.E.2d at 28.
127. *Id.* at 146-47, 611 S.E.2d at 28-29.

regulate real estate commissions or remuneration payments," but instead to regulate whether and under what circumstances a customer relationship exists.[128]

VI. FORECLOSURE OF REAL PROPERTY

As real estate practitioners are frequently called upon to confirm or object to confirmation of foreclosure,[129] it is prudent to review evidentiary standards and the standard of review. In *Daniels Mortuary & Crematory, Inc. v. Business Loan Center, LLC*,[130] the court reviewed an order confirming a foreclosure sale.[131] The evidence showed that in February 2002, Robert S. Hauck and Christine M. Hauck paid $650,000 to purchase Daniels Mortuary & Crematory, Inc., a funeral home and cemetery located in Clayton, Georgia.[132] To finance the purchase, the Haucks obtained a loan of $430,000 from Business Loan Center, LLC ("BLC"), which, at the time of the loan origination, furnished the Haucks with two appraisals.[133] Within a year of the loan's origination, the Haucks defaulted in repayment. BLC initiated foreclosure, purchasing the funeral home parcel (without the cemetery) at public sale for $185,000. BLC then brought an action to confirm the foreclosure sale.[134]

At the confirmation hearing, "the parties stipulated that the single issue before the court was the fair market value of the funeral home parcel."[135] BLC presented evidence from an appraiser who had provided the Haucks with an appraisal at the origination of the loan.[136] Robert Hauck, on his own behalf, testified as to his opinion of the value.[137] The trial court confirmed the foreclosure sale.[138]

On appeal, the Haucks attacked the credibility of the lender's expert witness and contested "the trial court's finding that Mr. Hauck's

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128. *Id.* at 147, 611 S.E.2d at 29.

129. Confirmation of foreclosure is required only in the context of preserving a lender's right to seek a deficiency judgment against his debtor. *See* O.C.G.A. § 44-14-184 (2002).

130. 270 Ga. App. 875, 608 S.E.2d 545 (2004).

131. *Id.* at 875, 608 S.E.2d at 546.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* A confirmation hearing is a non-jury matter. The sole relevant issues at confirmation of foreclosure are whether the foreclosing party complied with the statutory requirements of the sale, and whether the property sold for its true market value. *See* O.C.G.A. § 44-14-161 (2002).

136. *Daniels*, 270 Ga. App. at 875, 608 S.E.2d at 546.

137. *Id.* at 876, 608 S.E.2d at 546.

138. *Id.*

testimony was 'not entitled to any significant weight.'"[139] The court of appeals, affirming the trial court, held the Haucks had stipulated that the lender's witness was an expert and had testified that as of the date of the foreclosure sale, the property had a value of $185,000—the foreclosure sale price.[140] The stipulation and expert's testimony were sufficient for the trial court to issue its order of confirmation.[141]

The court next reviewed the Haucks' contention that "the trial court erred in excluding [Mr.] Hauck's testimony as to how he formed his opinion . . . [of] value by the comparable sales method."[142] The court reviewed an exception to the hearsay rule, that although

> a nonexpert can offer a hearsay opinion of the value of real property, "[v]alue is a matter of opinion, and any witness may testify as to his opinion provided that he gives his reasons therefor. While hearsay has no probative value, opinions as to value may be based on hearsay . . . . The fact that the opinions were based upon hearsay goes merely to their weight and not their admissibility."[143]

The court concluded that because Hauck was a layman and not an appraisal expert, he was not competent to testify about his use of the comparable sales method.[144] Hauck's opinion could be admitted as an exception to the hearsay rule, but the court was not required by law to hear Hauck's testimony to bolster his hearsay opinion, nor to give the opinion any significant weight.[145]

In *Heritage Creek Development Corp. v. Colonial Bank*,[146] a real estate developer, Heritage, sued its lender, Colonial Bank, and its foreclosure attorney for loss of equity in its property after the bank foreclosed. Heritage alleged, among other claims, wrongful foreclosure, breach of duty of good faith, foreclosure fraud, and damages for failure to timely cancel a security deed. The superior court granted summary judgment to the bank and its attorneys.[147]

Heritage obtained a mortgage loan from Colonial Bank to finance construction of a residential subdivision. Colonial Bank secured the loan

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139. *Id.*
140. *Id.*, 608 S.E.2d at 547.
141. *Id.*
142. *Id.*
143. *Id.* (quoting Braswell v. Henderson, 234 Ga. App. 504, 505, 507 S.E.2d 237, 238 (1998)).
144. *Id.*
145. *Id.*
146. 268 Ga. App. 369, 601 S.E.2d 842 (2004).
147. *Id.* at 371, 601 S.E.2d at 844.

with a security deed covering the real property.[148] Heritage defaulted in repayment of the loan and Colonial Bank began foreclosure, accelerating and declaring due and payable the entire balance of the loan pursuant to the terms of the loan instruments.[149]

Subsequently, Heritage brought the loan current and foreclosure halted. Colonial Bank and Heritage then executed a loan modification agreement to modify some of the terms of the note and security instrument. Later, Heritage again defaulted in repayment of the loan, and Colonial Bank again accelerated the loan and notified Heritage that if the arrearage were not cured, foreclosure would commence. Shortly before the scheduled foreclosure sale, a representative of Heritage contacted Colonial Bank and made an offer to pay the past due amount and late fees. The offer was not acceptable to Colonial Bank, however, as it was not for the full, accelerated amount. Foreclosure took place on June 6, 2000, with Colonial Bank being the sole bidder for the property for its full debt, $235,000.[150]

Following foreclosure, Heritage made an offer to Colonial Bank to purchase the property. Colonial Bank, through its counsel, responded by letter and offered to sell the property to Heritage for $240,000, provided the full price was tendered by June 16, 2000. Heritage failed to tender that price by the deadline and ultimately Colonial Bank sold the property to RMT Construction, Inc. for $220,000.[151] Heritage then sued Colonial Bank, its attorney, and RMT Construction for "damages for, among other things, loss of equity in the eight subdivision lots which were the subject of the foreclosure sale."[152] Heritage moved for partial summary judgment on its claims for wrongful foreclosure and failure to cancel a security deed. Heritage claimed it was entitled to damages because the foreclosure advertisement was defective, and because it had suffered damages due to the bank's failure to timely transmit a cancellation of the security deeds to the clerk of court for subdivision lots previously sold pursuant to O.C.G.A. section 44-14-3(b)(1).[153]

Colonial Bank, its attorneys, and RMT Construction filed cross-motions for summary judgment as to all counts of the complaint. The trial court denied Heritage's motion and granted the defendants' motions for summary judgment.[154]

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148. *Id.* at 369, 601 S.E.2d at 843.
149. *Id.*
150. *Id.* at 369-70, 691 S.E.2d at 843-44.
151. *Id.* at 370, 691 S.E.2d at 844.
152. *Id.*
153. *Id.* at 370-71, 691 S.E.2d 844. *See* O.C.G.A. § 44-14-3(b)(1) (2002).
154. *Heritage Creek Dev. Corp.*, 268 Ga. App. at 371, 691 S.E.2d at 844.

On appeal, Heritage contended the trial court erred in requiring it to show that Colonial Bank had caused it to default on the loan. The appellate court held that this position was meritless.[155] Although the trial court agreed the foreclosure advertisement was technically defective, it found that Heritage had failed to show any causal connection between the errors and Heritage's alleged injury: the loss of its equity in the eight foreclosed lots. "Georgia law requires a plaintiff asserting a claim of wrongful foreclosure to establish a legal duty owed to it by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury it sustained, and damages."[156] Contrary to its theory for damages, Heritage did not show that Colonial Bank caused its injury.[157] In fact, the evidence showed Heritage's "alleged injury was solely attributable to its own acts and omissions both before and after the foreclosure," including multiple acts of default in repayment of the loan, failure to cure the default, failure to bid on the property at the foreclosure sale, and later failure to tender the purchase price pursuant to Colonial Bank's offer to sell.[158]

Regarding the defective legal advertisement, the court noted that "[n]ot every irregularity or deficiency in a foreclosure advertisement will void a sale."[159] Heritage could not show it was harmed in any way by the inclusion of two unavailable lots in the advertisement and accordingly failed to prove damages.[160]

The trial court also found that Colonial Bank had failed to timely release the security deeds on two lots pursuant to O.C.G.A. section 44-14-3.[161] The statue provides, "[W]hen a secured debt is paid in full, the holder of the security deed shall, within 60 days of the date of full payment, transmit to the superior court clerk documentation authorizing the cancellation of the security instrument of record."[162] The statute further provides, "[U]pon the failure of the holder to transmit the cancellation, the holder shall, *upon written demand*, be liable to the grantor for liquidated damages of $500 plus additional sums for losses

155. *Id.*

156. *Id.* (citing Calhoun First Nat'l Bank v. Dickens, 264 Ga. 285, 286, 443 S.E.2d 837, 839 (1994)).

157. *Id.* at 372, 691 S.E.2d at 844.

158. *Id.*

159. *Id.*, 691 S.E.2d at 845 (citing Oates v. Sea Island Bank, 172 Ga. App. 178, 179, 322 S.E.2d 291, 293 (1984)).

160. *Id.*

161. *Id. See* O.C.G.A. § 44-14-3 (2002).

162. *Heritage Creek Dev. Corp.*, 268 Ga. App. at 372, 691 S.E.2d at 845 (citing O.C.G.A. § 44-14-3(b)(1)).

caused to the grantor."[163] However, it was more than four years after the sale of the lots in question before Heritage made a written demand to Colonial Bank.[164] Once the written demand was made, Colonial Bank transmitted the cancellations to the court clerk.[165] Moreover, Heritage was unable to show that any losses it allegedly incurred were due to the tardy transmission of the satisfactions of deed.[166]

Heritage also argued that the flawed legal advertisement had a "chilling" effect on the bidding, and Colonial Bank and its attorneys "may have" made remarks to potential bidders which dissuaded other bids at the foreclosure sale.[167] The appellate court noted that there was no evidence in the trial record to support this contention and concluded that these two arguments were based on "speculation and conjecture."[168]

The court held Colonial Bank was also entitled to summary judgment as to Heritage's claim of breach of duty of good faith.[169] The court reasoned,

> there is no independent cause of action for a breach of duty of good faith in . . . a contract governed by the UCC. Inasmuch as Heritage Creek cannot prevail on its breach of contract claim, it cannot prevail on a cause of action based on the failure to act in good faith in performing the contract.[170]

As to the breach of contract claim specifically, Heritage argued the bank had calculated interest and late charges using a method prohibited by statute.[171] But Heritage, when it executed the modification agreement at the time of its first default, expressly waived any claims arising prior to the modification without objecting to or challenging the method used to calculate the fees.[172] Therefore, the release provisions in the modification barred the breach of contract claim.[173]

Finally, Heritage contended Colonial Bank had used the foreclosure process to deprive Heritage of its equity so the bank could acquire the

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163. *Id.* (citing O.C.G.A. § 44-14-3(c)(1)).
164. *Id.* at 373, 691 S.E.2d at 845.
165. *Id.*
166. *Id.*, 691 S.E.2d at 846.
167. *Id.* at 374, 691 S.E.2d at 846.
168. *Id.*
169. *Id.*, 691 S.E.2d at 847.
170. *Id.*
171. *Id.* at 375, 691 S.E.2d at 847.
172. *Id.* at 375-76, 619 S.E.2d at 847.
173. *Id.* at 376, 619 S.E.2d at 847.

property to ultimately sell to RMT Construction.[174] Specifically, Heritage alleged Colonial Bank's offer to sell the lots to Heritage after foreclosure was fraudulent and the bank never had any intent to sell to Heritage.[175] Once again the court held that Heritage's argument was based upon mere speculation and not upon evidence.[176]

At the conclusion of its opinion, the court of appeals held the appeal to be frivolous pursuant to Georgia Court of Appeals Rule 15(b),[177] noting that given the circumstances of the case, the clear state of the evidence, and the applicable law, neither Heritage nor its attorney could have reasonably believed that the appeal could result in reversal of the trial court's judgments.[178] The court imposed a $1000 penalty constituting a money judgment against Heritage and its attorney in favor of Colonial Bank, its attorneys, and RMT Construction.[179]

VII. TRESPASS

In *Sorrow v. Hadaway*,[180] the court of appeals reviewed liability and damages attributable to trespass by a contractor.[181] Sorrow lived in a subdivision developed by Hadaway Realty Company ("Hadaway"). She also purchased from Hadaway a vacant lot adjacent to her home. Her intent was to keep the adjacent lot undeveloped and in its natural state.[182]

In 1996 Hadaway contracted with Carlton North, doing business as North Development and Construction (collectively "North"), to remove the undergrowth from lots he continued to own in the subdivision. North, in turn, subcontracted the work to Jonas Bailes, who actually removed the undergrowth.[183]

Bailes mistakenly removed the undergrowth from part of Sorrow's undeveloped property and in doing so destroyed vegetation, knocked down trees, and damaged a creek. Upon discovery, Sorrow immediately ordered Bailes to halt the work, which he did. "Neither North nor Hadaway was present when Bailes [cleared] Sorrow's land."[184]

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174. *Id.* at 375, 619 S.E.2d at 847.
175. *Id.*
176. *Id.*
177. Ga. App. R. 15(b).
178. *Heritage Creek Dev. Corp.*, 268 Ga. App. at 376, 691 S.E.2d at 848.
179. *Id.*
180. 269 Ga. App. 446, 604 S.E.2d 197 (2004).
181. *Id.* at 446, 604 S.E.2d at 197.
182. *Id.* at 446-47, 604 S.E.2d at 197.
183. *Id.* at 447, 604 S.E.2d at 198.
184. *Id.*

Sorrow sued Hadaway and North, alleging that they had caused their agent, Bailes, to trespass on and damage her property. Sorrow further alleged damages against Hadaway for his refusal to reseed the cleared lot and for failure to remove a silt fence from her property. She prayed for compensatory and punitive damages.[185]

The trial court granted Hadaway and North summary judgment on the grounds that they were not responsible for the actions of an independent contractor. Further, judgment was granted to Hadaway, who "argued that the silt fence referenced in [the] complaint was not located on Sorrow's property and had been removed."[186]

The appellate court first analyzed whether Bailes worked as an independent contractor.[187] Under Georgia law, "'[a]n employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the direction and control of the employer.'"[188] Although Sorrow did not challenge the characterization of Bailes as an independent contractor, she argued Hadaway and North could be held liable for failing to determine the whereabouts of the boundary between her and Hadaway's land and for failing to communicate its whereabouts to the independent contractor.[189] She further claimed the defendants' conduct fell within O.C.G.A. section 51-2-5(1),[190] the exception to the rule shielding employers from liability for torts of independent contractors. The court of appeals disagreed.[191]

As to the failure to communicate to the subcontractor, the trial court record included North's deposition and affidavit. Sorrow argued North's testimony presented a question of fact regarding whether he actually knew where the property line was located, precluding summary judgment.[192] However, Sorrow could not point to any evidence that North or Hadaway actually failed to identify or misidentified the boundaries in communication with Bailes and accordingly, failed to show conduct by Hadaway or North that ultimately led Bailes to damage her property.[193]

Sorrow's argument that O.C.G.A. section 51-2-5(1) applied was based on her theory that Bailes's activities were "wrongful" because he had no

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185. *Id.*
186. *Id.*
187. *Id.* at 447-48, 604 S.E.2d at 198.
188. *Id.* at 447, 604 S.E.2d at 198 (quoting O.C.G.A. § 51-2-4 (2000)).
189. *Id.* at 448, 604 S.E.2d at 198.
190. O.C.G.A. § 51-2-5(1) (2000).
191. *Sorrow*, 268 Ga. App. at 448, 604 S.E.2d at 198.
192. *Id.* at 449, 604 S.E.2d at 199.
193. *Id.* at 449-50, 604 S.E.2d at 199.

right to be on her property in the first place. The court reasoned that Hadaway's employment of North to clear brush was not "wrongful in itself."[194] Accordingly, the court held Sorrow's reliance upon the statutory exception was misplaced.[195]

As to Sorrow's remaining arguments, the court held Sorrow failed to present any evidence to support her argument that the silt fence was placed on her property.[196] Also, the court determined Sorrow's argument that the trial court erred in granting summary judgment to the defendants as to her claim for punitive damages was meritless, as both defendants were entitled to judgment on Sorrow's underlying liability claims.[197]

In *Bullard v. Bouler*,[198] the court again looked at trespass by a contractor. Bullard brought an action for trespass against her neighbor, Bouler, and his contractor for cutting down her red-tip photinia trees, which were located adjacent to the property line between the two properties.[199] The evidence showed that "Bouler did not discuss property boundaries with the contractor nor did he inform the contractor that the trees were located on [his neighbor's] property."[200] Bullard discovered the contractor cutting down the trees and demanded he stop and get off her property. The contractor did not respond to the demand, so Bullard knocked on Bouler's door and demanded that he instruct the contractor to halt the work and get off her property. Bouler did not comply, and the contractor completely cut down the trees. At trial, a jury found in favor of Bullard and awarded her $4500 for damages to her peace, happiness, and feelings. On the issue of liability, the jury found in favor of the contractor and against Bouler. The court entered judgment according to the verdict, which Bullard appealed.[201]

For the most part, this decision centers on these procedural issues: (1) extension of the discovery period, (2) the evidentiary and procedural standard of review of the trial court's denial of Bullard's motion for judgment notwithstanding the verdict, (3) damages awarded by the jury, and (4) impeaching the jury's verdict through affidavit.[202] However, of interest in this real property law survey is the court's analysis of the "innocent trespasser" rule. The contractor's primary defense was that

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194. *Id.* at 450, 604 S.E.2d at 199-200.
195. *Id.*, 604 S.E.2d at 200.
196. *Id.*
197. *Id.* at 450-51, 604 S.E.2d at 200.
198. 272 Ga. App. 397, 612 S.E.2d 513 (2005).
199. *Id.* at 397, 612 S.E.2d at 515.
200. *Id.*
201. *Id.* at 397-98, 612 S.E.2d at 515.
202. *Id.* at 398-400, 612 S.E.2d at 515-18.

he unknowingly entered Bullard's land. The innocent trespasser rule states

> [a]n unintentional and nonnegligent entry onto another's land does not automatically subject an individual to liability even though the entry causes harm to the possessor.[203] Georgia law indeed recognizes the doctrine of the innocent trespasser, which protects individuals who enter the land of another under the mistaken belief that it is permissible to do so.[204]

Because Bouler did not inform the contractor about the property line or inform him that the trees belonged to Bullard, there was evidence supporting a finding that the contractor was an innocent trespasser.[205] Bouler being found liable for the trespass, rather than the contractor, does not render the verdict inconsistent.[206]

In *Navajo Construction, Inc. v. Brigham,*[207] the court analyzed continuing trespass and the damages associated therewith.[208] In 2001 Russell Hall Construction built a "spec" house in a new subdivision. Russell Hall determined the design and placement of the house on the lot. In that same year, the Brighams bought the house from Russell Hall. The Brighams did not obtain a survey before the purchase. The following year, Navajo Construction Company ("Navajo") purchased the lot next door to the Brighams, intending to build its own spec house on the lot. Navajo did not obtain a survey before purchasing its lot.[209] Subsequently, Navajo obtained a survey that showed the Brigham's home encroached upon the Navajo lot by approximately two feet, and that "the fence line encroached over five feet."[210] Navajo filed suit against Russell Hall and the Brighams for trespass and negligence. Russell Hall did not respond to the complaint and initiated bankruptcy, thus staying the action against it.[211]

In ruling on cross-motions for summary judgment, the trial court denied Navajo's motion and granted judgment in favor of the Brighams, finding that there was "no evidence [they] had any responsibility for

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203. *Id.* at 399, 612 S.E.2d at 516 (quoting C.W. Matthews Contracting Co. v. Wells, 147 Ga. App. 457, 458, 249 S.E.2d 281, 282 (1978)).

204. *Id.* (quoting Nichols v. Ga. Television Co., 250 Ga. App. 789, 790, 552 S.E.2d 550, 552 (2001)).

205. *Id.* at 399-400, 612 S.E.2d at 517.

206. *Id.* at 400, 612 S.E.2d at 517.

207. 271 Ga. App. 128, 608 S.E.2d 732 (2005).

208. *Id.* at 128, 608 S.E.2d at 732.

209. *Id.*

210. *Id.*

211. *Id.*

where or how the house and fence were constructed" and no evidence that Russell Hall had acted as the agents of the Brighams.[212] Therefore, the Brighams could not be liable for Russell Hall's trespass.[213]

In reversing the trial court in part, the appellate court held that the encroachment by the Brighams' home constituted "'a continuing trespass and nuisance which may be abated as such.'"[214] The encroachment interfered with Navajo's right to the exclusive use and benefit of the property, and as such, Navajo could recover damages arising from "'any wrongful, continuing interference with a right to the exclusive use and benefit of a property right.'"[215] There was no dispute that the home encroached upon the neighboring lot, although the Brighams did not cause the encroachment.[216] However, their use of the home constituted a continuing trespass and it was error to grant the Brighams' motion for summary judgment.[217] Because there was evidence that the encroaching structure was already in place before Navajo purchased the property and that Navajo failed to obtain a survey of the land before its purchase, the trial court correctly denied Navajo's motion for summary judgment.[218]

VIII. TAX DEEDS

Issues regarding the sale, voidance, redemption, and barment of redemption of deeds resulting from the foreclosure of real property for unpaid taxes, particularly in the metro Atlanta area, continue to be hot topics. In *Harpagon Co. v. Gelfond*,[219] the Georgia Supreme Court reviewed what effect multiple errors in the legal advertisement for foreclosure would have on the tax deed foreclosure.[220]

Following the foreclosure of the tax deed, and expiration of the period in which the property could be redeemed from the sale,[221] the Harpagon Company filed a petition to quiet title to real property it acquired by quitclaim deed.[222] At the hearing, the evidence showed the advertise-

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212. *Id.* at 128-29, 608 S.E.2d at 733.
213. *Id.* at 129, 608 S.E.2d at 733.
214. *Id.* (quoting DANIEL HINKEL, PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE § 14-3 (6th ed. 2004)).
215. *Id.* (quoting Lanier v. Burnette, 245 Ga. App. 566, 570, 538 S.E.2d 476, 480 (2000)).
216. *Id.*, 608 S.E.2d at 734.
217. *Id.* at 130, 608 S.E.2d at 734.
218. *Id.* at 129-30, 608 S.E.2d at 73.
219. 279 Ga. 59, 608 S.E.2d 597 (2005).
220. *Id.* at 60-61, 608 S.E.2d at 600.
221. *See* O.C.G.A. § 48-4-45 (1999).
222. *Harpagon*, 279 Ga. at 59-60, 608 S.E.2d at 597.

ment for sale of the tax deed inaccurately reflected THR Development Group I, Inc. ("THR") as the owner and defendant in fi. fa. and the legal advertisement contained an inaccurate legal description of the realty to be auctioned.[223] In fact, the owner of the property and the proper defendant in fi. fa. was William A. Gelfond, deceased.[224]

The Fulton County Sheriff levied upon the real property and sold it to the highest bidder, Heartwood 11, Inc. ("Heartwood"). The prepared tax deed of the sale inaccurately named THR as the owner of the property and failed to properly describe the property.[225] Thereafter, Heartwood conveyed its interest in the property to Harpagon. Two days after Harpagon filed its petition to quiet title, "the Sheriff of Fulton County 'administratively cancelled' the tax deed at the request of Gelfond's estate [(collectively, "Gelfond")], citing the error in the conducting of the sale."[226]

In response to the petition, "Gelfond moved for judgment on the pleadings, or in the alternative, for summary judgment, asserting that Harpagon had no title [to the property] . . . because the tax deed had been cancelled."[227] Harpagon moved for partial summary judgment on grounds that the sheriff lacked the authority to "administratively cancel" the tax deed, and that Gelfond's right of redemption had been barred pursuant to O.C.G.A. section 48-4-45 before the sheriff cancelled the deed.[228] The trial court granted summary judgment to Gelfond, concluding that Harpagon's title was defective because Harpagon did not acquire title from the proper grantor of the property, Gelfond, who had superior title.[229] The trial court ordered that both "the tax sale and tax deed were void" and awarded title to the real property to Gelfond free and clear of any adverse claims.[230]

On appeal, Harpagon first argued that the trial court erred in relying on *Canoeside v. Livsey*[231] for the proposition that "'when property is sold at a tax sale as the property of someone other than the actual title holder, the sale is void'"[232] because that precedent applied only to non-

223. *Id.* at 59, 608 S.E.2d at 598.
224. *Id.*
225. *Id.* at 59-60, 608 S.E.2d at 598.
226. *Id.* at 60, 608 S.E.2d at 598.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. 277 Ga. 425, 589 S.E.2d 116 (2003).
232. *Harpagon*, 279 Ga. at 59-60, 608 S.E.2d at 598 (quoting *Canoeside*, 277 Ga. 425, 428, 589 S.E.2d 116, 118 (2003)).

judicial sales.[233] Harpagon further argued that "the owner of the property at the time of the tax sale is irrelevant because the tax liability attaches to the property at the time fixed by law for its valuation in each year and remains until the taxes are paid."[234] The court was not persuaded.[235]

The court's analysis concerned whether Harpagon's predecessor in interest (Heartwood) validly acquired the realty via the tax sale and the resulting tax deed.[236] The court held that Heartwood had not validly acquired the realty as the tax deed was itself fatally defective.[237] The tax deed failed to name the proper owner and the legal description was inaccurate to the degree that it was "impossible to determine with certainty the parcel" that it purported to convey.[238]

The court held it was unnecessary to address Harpagon's remaining arguments, so it remains unclear whether a county sheriff has authority to administratively cancel a tax deed.[239] Of note to real estate practitioners is the discussion in Justice Carley's concurring opinion regarding inconsistencies in legal descriptions. The concurrence serves as an excellent review of law where inconsistencies exist in legal descriptions.[240]

The court again reviewed potential damages where a tax sale was later declared void in *Lines v. City of Bainbridge*.[241] Lines, Schoenfisch, and Williams (collectively, "Lines") were the successful bidders on thirty-six properties at a municipal tax sale held by the city of Bainbridge. Less than a week later, Lines returned to Bainbridge to check on whether any additional municipal taxes were due. At that time, Lines was informed that the city had voided the tax sale due to its failure to give proper notice to the properties' lienholders before the sale took place.[242]

Lines brought suit against the city, seeking lost profits calculated as the sums they would have received from the sale of the thirty-six properties purchased.[243] Lines also claimed attorney fees in the complaint, contending "they were entitled to such fees for having 'been

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233. *Id.* at 60, 608 S.E.2d at 598.
234. *Id.*
235. *Id.*
236. *Id.*, 608 S.E.2d at 598-99.
237. *Id.* at 60-61, 608 S.E.2d at 599.
238. *Id.* at 61, 608 S.E.2d at 599.
239. *Id.* at 59, 608 S.E.2d at 597.
240. *Id.* at 62-63, 608 S.E.2d at 599-600 (Carley, J., dissenting).
241. 273 Ga. App. 420, 615 S.E.2d 235 (2005).
242. *Id.* at 420, 615 S.E.2d at 236.
243. *Id.*

required to retain the services of an attorney to seek reimbursement for the damages suffered.'"[244]

The trial court granted the city's motion for summary judgment and Lines appealed.[245] The court of appeals held it was undisputed that the tax sale was void because of inadequate notice to the lienholders.[246] It was also undisputed that Lines received a full refund of the sums paid to the city.[247] There was never a true "sale," therefore Lines could not expect profits—"[t]here can be no 'lost profits' from a sale that was void from the beginning."[248]

The court also noted that Lines's claim for attorney fees was not adequately pleaded.[249] Lines should have made a claim for such fees either under O.C.G.A. section 13-6-11,[250] or Lines should have set forth the criteria under which fees were sought in the complaint.[251] Lines's failure to accomplish either resulted in a finding that they had not adequately pled for such an award under the statute.[252] Further, even if Lines had properly pled for fees, there was no evidence that the city engaged in conduct that would authorize an award.[253]

In *Barrett v. Marathon Investment Corp.*,[254] the Fulton County Sheriff appealed an order requiring her to pay Marathon Investment Corporation ("Marathon") funds held by the sheriff following foreclosure of property for unpaid taxes, interest thereon, attorney fees, and costs.[255] Marathon filed a money rule[256] petition against the sheriff seeking to recover excess funds collected by the sheriff and retained as a result of the sale of a certain piece of realty pursuant to a levy for unpaid taxes.[257] Marathon was the highest bidder at the sheriff's sale of the property.[258] Following the tax sale, Marathon obtained "all the right, title and interest of the Defendant in tax fi[.] fa[.], as shown on the tax sale deed, through a quit-claim deed. . . ."[259] As the successor to

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244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. O.C.G.A. § 13-6-11 (1981).
251. *Lines*, 273 Ga. App. at 422, 615 S.E.2d at 236-37.
252. *Id.*, 615 S.E.2d at 237.
253. *Id.*
254. 268 Ga. App. 196, 601 S.E.2d 516 (2004).
255. *Id.* at 196, 601 S.E.2d at 517.
256. O.C.G.A. §§ 15-13-3 to -4 (2005).
257. *Barrett*, 268 Ga. App. at 197, 601 S.E.2d at 517.
258. *Id.*
259. *Id.*

the defendant in fi. fa., Marathon demanded the sheriff pay it the funds the sheriff held in excess of the sum sufficient to satisfy the taxes and penalties due. The sheriff refused to disburse the excess proceeds.[260]

Marathon brought suit seeking the excess proceeds plus interest, attorney fees, and costs on account of the sheriff's purported stubborn litigiousness and bad faith resulting in unnecessary delay and expense. The sheriff defended on the grounds of sovereign immunity and that Marathon had not established that it was entitled to the funds held.[261] The trial court found that Marathon had obtained the "right, title and interest of the Defendant in tax fi[.] fa[.]" and had provided the sheriff with documentation showing such right.[262] Accordingly, the sheriff's refusal to disburse the funds to Marathon was "wilful and stubbornly litigious, was in bad faith, and had caused Marathon unnecessary delay and expense."[263] The trial court ordered the sheriff to pay Marathon the excess proceeds plus interest and awarded Marathon attorney fees.[264]

On appeal, the sheriff contended that the trial court erred in its determination that Marathon was "'the person authorized to receive the excess.'"[265] The sheriff argued that the statute defined the proper party to receive the funds as "the party owning the property and his lien holders as of the date of the tax sale."[266]

The court of appeals declined to hold that a defendant in fi. fa. could not transfer its interest in excess funds from the sale of real property at a tax execution.[267] The sheriff argued that because Marathon did not present a copy of the quitclaim deed at the hearing, the evidence was insufficient to award Marathon the funds.[268] Because there was no transcript of the proceedings, the court of appeals relied on the presumption of the regularity of court proceedings and assumed the evidence supported the trial court's finding.[269]

The sheriff then contended that the trial court erred in awarding interest from the date of Marathon's initial application for the excess funds.[270] The sheriff argued there was neither evidence that Marathon

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260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* (citing O.C.G.A. § 48-4-5 (1999)).
266. *Id.* at 197-98, 601 S.E.2d at 517.
267. *Id.* at 198, 601 S.E.2d at 517-18.
268. *Id.*
269. *Id.*
270. *Id.*

was entitled to the funds, nor was she neglectful in refusing to pay the sums. The sheriff further argued that the date selected by the trial court for the interest to commence was in error, and the trial court abused its discretion in awarding attorney fees.[271]

The appellate court clearly reminded practitioners that a hearing transcript is a necessity. Because there was no transcript, the appellate court "must assume that the trial court's findings were supported by sufficient competent evidence."[272]

Finally, the sheriff argued that the trial court erred in failing to rule that Marathon's claims were "barred by the defense of sovereign immunity."[273] However,

> the General Assembly waived such immunity in [O.C.G.A. section] 15-13-2(4), which provides that "[a]ny sheriff shall be liable to an action for damages . . . whenever it appears that the sheriff has injured the party by . . . [n]eglecting to pay over to the plaintiff or his attorney any moneys collected by the sheriff by virtue of any fi. fa. or other legal process."[274]

However, because Marathon's claim was based on the sheriff's failure to disburse the funds, the defense of sovereign immunity was not applicable.[275]

The court of appeals again reviewed whether an interest in excess proceeds from a tax sale could be conveyed by a quitclaim deed in *Georgia Lien Services, Inc. v. Barrett*,[276] but came to a different conclusion than the earlier decision in *Barrett v. Marathon Investment Corp.*[277]

In *Georgia Lien Services*, just as in the earlier case, the Sheriff of Fulton County conducted a sale of real property for delinquent taxes. The property sold in 2001 for an amount greater than the taxes due, generating excess proceeds for distribution to the proper claimants. The sheriff's department notified the taxpayer that he was entitled to the excess funds, but the taxpayer failed to make application to receive those funds.[278]

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271. *Id.* at 199, 601 S.E.2d at 518-19.
272. *Id.*, 601 S.E.2d at 518. *See* Kirkendall v. Decker, 271 Ga. 189, 576 S.E.2d 73 (1999).
273. 268 Ga. App. at 199, 601 S.E.2d at 518.
274. *Id.* (quoting O.C.G.A. § 15-13-2(4) (2005)).
275. *Id.*
276. 272 Ga. App. 656, 613 S.E.2d 180 (2005).
277. 268 Ga. App at 196, 601 S.E.2d at 516.
278. *Georgia Lien Servs.*, 272 Ga. App. at 656-57, 613 S.E.2d at 182.

Over two years later, in 2003, Georgia Lien Services ("GLS") obtained a quit claim deed from the taxpayer which purported to give GLS "all the rights, entitlements, and obligations that grantor may have in the property, including but not limited to any rights, entitlements or obligations under [the] tax deed. . . ."[279] GLS applied for the excess funds based upon the interest it was granted in the quitclaim deed, but the application was denied by the sheriff. The sheriff did not contest whether the taxpayer was entitled to the funds, but only whether the quitclaim deed created an interest in the funds to which GLS was entitled. Following the sheriff's refusal to convey the funds, GLS filed a petition for a money rule judgment seeking payment of the funds and its attorney fees and costs. The sheriff moved to dismiss the petition, which the trial court granted, "concluding that [GLS] had not acquired an interest in the excess funds [from the] quitclaim deed;" subsequently, GLS appealed.[280]

In its decision, the court of appeals reviewed the nature of the quitclaim deed into GLS and whether that deed had actually conveyed an interest in the excess funds themselves.[281] The court alluded to a chronology of the events, particularly the fact that the quitclaim deed into GLS was executed two years after the tax sale, and determined that at the time of the execution, the tax payer no longer had an interest in the real property.[282] Generally, "after a tax sale, the record owner of the real property at the time of the tax sale loses his interest in the subject real property, instead retaining a right to redeem the property for a limited period until the tax sale purchaser invokes the state barment statutes, O.C.G.A. section 48-4-40 et seq."[283]

The court then went on to analyze the vesting deed determining that "an assignment contract, rather than a quitclaim deed, would have been the preferred instrument for conveying" an interest in the excess funds.[284] The court reasoned that even if a quitclaim deed could convey an interest in funds, (as opposed to conveying only an interest in real property) the particular deed used by GLS was insufficient to convey an interest in the funds held by the sheriff.[285] While the deed used by GLS provided for the "transfer of any 'rights' or 'entitlements' created 'under th[e] . . . tax deed,'" the quitclaim deed did not specify

279. *Id.* at 657, 613 S.E.2d at 182.
280. *Id.*
281. *Id.* at 657-58, 613 S.E.2d at 182-83.
282. *Id.* at 658, 613 S.E.2d at 183.
283. *Id.*, 613 S.E.2d at 182.
284. *Id.*, 613 S.E.2d at 183.
285. *Id.*

that the taxpayer's interest in the proceeds from the tax sale were transferred to GSL.[286] The "rights or entitlements created under a tax deed run only to the purchaser of the real property at the tax sale, whom the [tax] deed vests with a fee interest in the real property."[287] Accordingly, the language of the quitclaim deed into GSL could not be interpreted as conveying an interest in the funds and GLS was not entitled to obtain the funds from the sheriff's department.[288]

Finally, GLS argued that the sheriff waived its argument that the quit claim deed was insufficient to convey an interest in the funds because GLS had relied upon the advice of a county attorney that GLS should "'be very clear in [the] Quitclaim Deed as to what [it was] acquiring.'"[289] The court concluded that this argument was meritless, reasoning that even if the county attorney had provided incorrect advice, GLS did not follow the advice because it failed to include language in the quitclaim deed specifically setting out that an interest in the excess funds was transferred.[290]

IX. ZONING

Each year the court is called upon to review municipal zoning ordinances that prohibit or limit adult and sexually-explicit businesses. Last year was no exception. In *105 Floyd Road, Inc. v. Crisp County*,[291] the Georgia Supreme Court reviewed a "constitutional challenge on vagueness grounds to the phrase 'substantial business purpose' in the definition of 'sexually-oriented adult use' contained in . . . the Crisp County Unified Land Development Code."[292] The business, 105 Floyd Road, Inc., sold sexually-explicit materials, as well as other adult-themed merchandise that is not sexually explicit.[293] The business purchased the leasehold and assets of the prior owner, Love Stuff, LLC, after that owner was "denied a special use permit to operate a sexually-oriented adult use."[294] The appellant's predecessor company sold sexually-explicit materials to a mostly male clientele. After the business was purchased, it changed the inventory by reducing the number of sexually-explicit items and offering adult-themed but non-sexually-explicit

286. *Id.*
287. *Id.* (citing Nat'l Tax Funding v. Harpagon Co., 277 Ga. 41, 586 S.E.2d 235 (2003)).
288. *Id.*
289. *Id.* at 659, 613 S.E.2d at 183.
290. *Id.*
291. 279 Ga. 345, 613 S.E.2d 632 (2005).
292. *Id.* at 345, 613 S.E.2d at 632.
293. *Id.*, 613 S.E.2d at 633.
294. *Id.*

merchandise.[295] After appellant began operating without a special use permit, Crisp County sought injunctive relief, asserting that a special use permit was required because the business qualified as a sexually-oriented adult use due to its "substantial business purpose" of selling sexually-explicit material.[296]

At a hearing, the trial court heard testimony from an investigator who had visited the store in the course of investigating pornography charges.[297] The investigator testified as to rough estimates regarding the amount of sexually explicit material she observed and the amount of store space used to display such inventory. The investigator admitted she made no measurement and undertook no inventory of the business's stock. She examined the sexually explicit material to investigate the pornography charges, not to inquire into its substantial business purpose.[298] Crisp County's planning director, who enforced the development code, testified that it was her job to determine whether a business is a sexually-oriented adult use.[299] She testified "that she had no difficulty distinguishing appellant's business from 'convenience stores in Crisp County [that] sell some Playboys and things like that' because 'that's not a part of their regular business.'"[300] The business's principal testified that it had substantially reduced the sexually explicit inventory of its predecessor business so that it could operate without a special use permit. The sexually explicit material comprised only twelve to thirteen percent of its total inventory. Further, only 700 feet of the 4000 square foot building was used for such material, and its removal from the business would cause irreparable harm.[301]

The trial court, in finding for Crisp County, rejected the business's constitutional challenges to the development code and found that the substantial business purpose of appellant was to offer sexually explicit material for sale. An appeal ensued.[302]

The Georgia Supreme Court first recognized "that a local government, . . . may constitutionally regulate commercial establishments within its boundaries that offer sexually-explicit material by enacting content-neutral time, place and manner restrictions designed to advance a substantial government interest, where reasonable alternative avenues

295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* at 345-46, 613 S.E.2d at 633.
299. *Id.* at 346, 613 S.E.2d at 633.
300. *Id.*
301. *Id.*
302. *Id.*

of communication remain available."[303] However, the court then analyzed the language of the development code to determine whether it was vague to the extent that it violated basic principles of due process.[304]

In holding the language of the development code was unconstitutionally vague, the court reasoned that the phrase "substantial business purpose" was not further defined in the development code and that even if regular definitions exist for each word in the phrase, the code was vague.[305] Crisp County's definition failed to look to stock-in-trade, sales figures, floor space, or any other readily quantifiable standard.[306] The definition only looked to the purpose of the business without providing further guidelines as to what amount of "purpose" qualified as "substantial."[307] The development code left business owners in the position of being forced to guess as to what point their offering of sexually-explicit material became a substantial part of their business.[308] Accordingly, the challenged definition contained "'insufficient objective standards and guidelines to meet the requirement of due process'" because it failed to give adequate notice to reasonable persons whether their establishments would be defined as sexually-oriented adult uses, requiring them to obtain a special permit in order to operate legally.[309] Furthermore, the definition failed to provide guidelines to Crisp County employees who were to enforce the development code, resulting in the possibility of subjective and discriminatory application.[310]

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303. *Id.*, 613 S.E.2d at 633-34. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

304. *105 Floyd Road, Inc.,* 279 Ga. App. at 346-47, 613 S.E.2d at 634.

305. *Id.* at 348, 613 S.E.2d at 634.

306. *Id.*, 613 S.E.2d at 635.

307. *Id.*

308. *Id.* at 349, 613 S.E.2d at 635.

309. *Id.* at 350, 613 S.E.2d at 636 (quoting Jekyll Island-State Park Auth. v. Jekyll Island Citizens Ass'n, 266 Ga. 152, 153, 464 S.E.2d 808, 810 (1996)).

310. *Id.*