Construction Law

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This Article surveys construction law decisions handed down by Georgia courts and construction-related legislation enacted by the Georgia General Assembly between June 1, 2005 and May 31, 2006. As in prior years, the cases discussed are divided into five categories: (1) contracts, (2) torts, (3) mechanics and materialmen's liens, (4) arbitration, and (5) miscellaneous. Recent legislation is highlighted and summarized in Section VI, including a brief overview of the General Assembly's substantial revisions to Georgia's "Right to Repair" Act, the mandatory alternative dispute resolution framework that the legislature put in place in 2004 for residential construction defect claims in Georgia.

I. CONTRACTS

A. Quantum Meruit and the Doctrine of Sovereign Immunity

During the survey period, the Georgia Court of Appeals noted an exception to the doctrine of sovereign immunity whereby a general contractor was allowed to recover damages from a county school district and other defendants on the theory of quantum meruit, despite a

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Georgia statute requiring that all contracts with county governing authorities be in writing and entered in the county's minutes.

In *Brown v. Penland Construction Co.*,[1] Penland Construction Company, Inc. ("PCC") sued the Walker County School District, the Walker County Board of Education (the "Board"), Ridgeland High School's booster club, and Michael Brown, the high school's former baseball coach, seeking payment for PCC's construction of an indoor baseball practice facility to be used for baseball training and summer camps. Although construction of the facility was approved by the Board and built at Brown's request, no written contract was ever executed by the parties. Upon completion, PCC attempted to recover its expenses from the Board, but the Board refused to pay for the building or to allow PCC to disassemble the prefabricated structure and remove it from the Board's property. PCC then brought this action for quantum meruit against the defendants.[2]

The case was tried before a jury in the Walker County Superior Court, which found that no oral contract existed between the general contractor and any of the defendants. Nonetheless, the jury determined that the general contractor was entitled to recover $150,000 on the theory of quantum meruit. The defendants appealed the jury verdict, asserting, inter alia, that (1) recovery in quantum meruit is prohibited by the doctrine of sovereign immunity, (2) Brown, the former coach, did not receive any personal benefit from the construction of the building, and (3) the jury's verdict was against the weight of the evidence.[3] Based upon principles of constitutional law, the court of appeals rejected the appellants' enumerations and affirmed the jury's judgment against all appellants.[4]

As a general rule, the court stated that recovery in quantum meruit is equivalent to recovery based upon an implied contract, which is statutorily prohibited under Georgia law when a county or its subdivision is a defendant.[5] According to Official Code of Georgia Annotated ("O.C.G.A.") section 36-10-1, "'all contracts entered into by the county governing authority with other persons in behalf of the county shall be in writing and entered on its minutes.'"[6] Thus, for a contract with a county or county subdivision to be valid and enforceable, it must comply

1. 276 Ga. App. 522, 623 S.E.2d 717 (2005).
2. *Id.* at 522-24, 623 S.E.2d at 717-19.
3. *Id.* at 523-24, 623 S.E.2d at 718-19.
4. *Id.*, 623 S.E.2d at 719.
5. *Id.* at 524, 623 S.E.2d at 719.
6. *Id.* (quoting O.C.G.A. § 36-10-1 (2006)).

with the statutory requirements.[7] Nevertheless, the court stated that the shield of sovereign immunity does not bar recovery of just and adequate compensation from a county where property is taken for a public purpose.[8] This principle, however, applies only where the complainant has a valid property interest in the property that is taken.[9]

Here, the court determined there was no question that the general contractor had a valid property interest in the building because he had paid for all of the materials and labor to erect it.[10] The school officials admitted that the facility was a benefit to the school and that the school district had utilized the building for public purposes (as a classroom and athletic facility).[11] In addition, the court held that the former baseball coach had benefited economically from use of the facility to recruit and train high school athletes and by receiving monetary compensation for operating baseball camps in the new building.[12] Accordingly, the court concluded that the school district's refusal to pay for a facility it used for public purposes constituted a taking under the Georgia Constitution.[13] As a result, PCC was entitled to just compensation and relief from the appellants for their use of the facility.[14] Based on this "constitutional" exception to the doctrine of sovereign immunity, the court affirmed the jury verdict in favor of the general contractor.[15]

B. Contractual Right to Set-off

In *Foster & Co. General Contractors v. House HVAC/Mechanical, Inc.*,[16] the Georgia Court of Appeals determined that Foster & Company General Contractors, Inc. ("Foster") was entitled under its subcontract with House HVAC/Mechanical, Inc. ("House") to withhold final payment from House pending satisfaction of the subcontractor's payment obligations to its suppliers, despite having received a lien waiver form from House promising that it had either already paid or would use the monies from the final payment to pay all of its outstanding obligations related to its work on the project.[17]

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7. *Id.*
8. *Id.* at 524-25, 623 S.E.2d at 720.
9. *Id.* at 525, 623 S.E.2d at 720.
10. *Id.*
11. *Id.*
12. *Id.* at 526, 623 S.E.2d at 721.
13. *Id.* at 525, 623 S.E.2d at 720; *see* GA. CONST. art. I, § 3, para. 1(a).
14. *Brown*, 276 Ga. App. at 525, 623 S.E.2d at 720.
15. *Id.* at 527, 623 S.E.2d at 721.
16. 277 Ga. App. 595, 627 S.E.2d 188 (2006).
17. *Id.* at 600, 627 S.E.2d at 192.

Foster and House entered into a subcontract for the provision and installation of a heating, ventilation, and air conditioning system for the Clayton County Board of Education Building Complex (the "Project") being constructed by Foster.[18] As a condition precedent to final payment, the subcontract required House to provide satisfactory evidence to Foster that "'all known indebtedness connected with [House's] Work [had] been satisfied.'"[19] The subcontract also provided that the general contractor had an "absolute right" to set-off from monies due or owing to the subcontractor for

> "all claims, debts, costs, expenses, damages, liabilities or other obligations which [Foster] has incurred or might incur as a result of any acts, omissions, breaches, or negligence by [House] arising out of or related to any and all agreements, contracts, subcontracts, . . . by and between [Foster] and [House], . . . the Project, . . . or any other matters or dealings of any kind between [Foster] and [House]."[20]

After a dispute arose between the parties regarding nonpayment of House's sub-subcontractors and suppliers, Foster asserted its right under the subcontract to withhold final payment from House until House had paid all bills associated with its work on the Project.

When Foster received final payment from the owner, House requested immediate release of the remainder of its retainage, even though House continued to have unpaid suppliers and had not yet completed all items on the punch list. When Foster refused, the subcontractor made a claim on the general contractor's payment bond for final payment of retainage. After the surety denied the claim, House then filed an action for breach of contract and failure to honor the payment bond against both Foster and the surety.[21]

In the trial court House moved for summary judgment on the basis that it had satisfactorily completed all of the work called for under its subcontract and was, therefore, entitled to final payment in full.[22] House also contended that the "Unconditional Waiver and Release Upon Final Payment" that it executed showed that the parties contemplated that all unpaid suppliers would be paid out of Foster's final payment to House, and thus Foster breached its contract when it withheld funds from House pending satisfaction of all of House's obligations to its

18. *Id.* at 595, 627 S.E.2d at 189.
19. *Id.* at 595-96, 627 S.E.2d at 189 (brackets in original).
20. *Id.* at 596, 627 S.E.2d at 189 (brackets and omissions in original).
21. *Id.* at 596-97, 627 S.E.2d at 190.
22. *Id.* at 596, 627 S.E.2d at 190.

subcontractors and suppliers.[23] The trial court granted House's motion for summary judgment, and Foster appealed.[24]

On appeal Foster contended that the subcontract provided that Foster could withhold final payment from House until House had paid "'all known indebtedness connected with [House's] Work,'" and House openly acknowledged it owed suppliers outstanding debts related to the Project at the time Foster requested final payment.[25] Foster also contended that the parties' subcontract afforded Foster an "'absolute right'" to set-off against monies owed all claims or other obligations Foster might incur as a result of acts, omissions, or breaches by House.[26] Finally, Foster asserted that the subcontract authorized Foster, in the event of a default by House, to deduct the cost of making good any deficiencies from payments due to House.[27] The court of appeals agreed with Foster's contentions.[28]

The court observed that under O.C.G.A. section 13-11-3,[29] a subcontractor is entitled to payment for performance in accordance with its contract only upon satisfaction of the subcontract's conditions precedent to payment.[30] Here, the subcontract granted Foster the right to withhold final payment from House until House had paid all known indebtedness related to House's work.[31] Construing the contract as a whole, the court concluded that the parties intended for the general contractor to remain entitled to withhold final payment pending the subcontractor's satisfaction of all known obligations related to work performed on the project.[32] Instead of eliminating the general contractor's right to withhold final payment as a set-off to outstanding indebtedness of the subcontractor, the court determined that the final lien release and waiver merely reinforced the subcontractor's obligation to pay its suppliers from monies received from final payment by the general contractor.[33]

The court also rejected House's contention that allowing the general contractor to withhold final payment exposed the subcontractor to

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23. *Id.* at 598, 627 S.E.2d at 191.
24. *Id.* at 597, 627 S.E.2d at 190.
25. *Id.* at 598, 627 S.E.2d at 191 (brackets in original).
26. *Id.* at 599, 627 S.E.2d at 191-92.
27. *Id.*, 627 S.E.2d at 192.
28. *Id.* at 600, 627 S.E.2d at 192.
29. O.C.G.A. § 13-11-3 (Supp. 2006).
30. *Foster*, 277 Ga. App. at 598, 627 S.E.2d at 191-92.
31. *Id.*, 627 S.E.2d at 191.
32. *Id.* at 599, 627 S.E.2d at 191.
33. *Id.* at 598-99, 627 S.E.2d at 191.

"double liability."[34] House contended that it should not be required to forfeit part of its final payment on account of the fact that its sub-subcontractor had failed to pay for materials provided by a supplier.[35] The court disagreed, noting that the language of the subcontract required House to pay for "'all materials, equipment and labor used in, or in connection with, the performance of [the] Subcontract through the period covered by the previous payments received from [Foster].'"[36] Moreover, as between Foster and House, the subcontract allocated the risk of nonpayment of suppliers to House, not Foster.[37] Thus, the court concluded that it was House, not Foster, who breached the parties' subcontract when House failed to make sure its subcontractors and suppliers were fully paid.[38]

II. TORTS

A. Negligent Entrustment

In *Webb v. Day*,[39] the Georgia Court of Appeals declined to hold a construction company liable for personal injuries caused by a third party who borrowed the construction company's forklift after-hours.[40] The plaintiff, Webb, was employed by one defendant, Pike Creek Turf Farms ("Pike"), who had contracted with another defendant, W. Day Construction, Inc. ("Day"), for the construction of a house on Pike's property. Day rented a forklift from a rental company and told the rental company that Day intended to use the forklift for its construction work and that Pike intended to use it to trim tree limbs. On the day of Webb's injuries, Day lifted a Pike employee in the forklift to trim tree limbs. After Day left the job site at the end of the work day, the Pike employee decided to use the forklift to continue trimming. When the Pike employee lifted Webb into the air to trim the limbs with a chainsaw, Webb fell and was injured.[41]

In response to Day's motion for summary judgment, Webb argued that there were material issues of fact regarding whether Day had negligently entrusted the forklift to the Pike employee.[42] The court stated that

34. *Id.* at 599, 627 S.E.2d at 192.
35. *Id.*
36. *Id.*, 627 S.E.2d at 191-92 (brackets in original).
37. *Id.*, 627 S.E.2d at 192.
38. *Id.* at 599-600, 627 S.E.2d at 192.
39. 273 Ga. App. 491, 615 S.E.2d 570 (2005).
40. *Id.* at 493, 615 S.E.2d at 572.
41. *Id.* at 491-92, 615 S.E.2d at 571-72.
42. *Id.* at 493, 615 S.E.2d at 572.

"'[u]nder the doctrine of negligent entrustment, a party is liable if he entrusts someone with an instrumentality, with *actual* knowledge that the person to whom he has entrusted the instrumentality is incompetent by reason of age or inexperience.'"[43] The court of appeals disagreed, holding that there was no negligent entrustment where the Pike employee was entitled to use the forklift and where Day had no control over the use of the forklift because Day had already left the job site.[44]

B. Negligent Failure to Enforce Alcohol Policy

In the case of *Dale v. Keith Built Homes*,[45] the court of appeals affirmed the trial court's grant of summary judgment in favor of the defendant contractor, holding that the contractor's alleged failure to enforce a no-drinking-on-the-job policy did not increase the risk that a sub-subcontractor's employee would consume alcohol during his lunch hour and, while driving after work, strike a child who was skateboarding.[46] The general contractor for a construction project subcontracted the drywall work to a subcontractor, who in turn sub-subcontracted the work to McCain. McCain employed Wadsworth for the project. During his lunch break, Wadsworth, unbeknownst to McCain, drank six of McCain's beers. After work, the two returned to McCain's home, and sometime later Wadsworth drove to a convenience store. While driving back to McCain's, Wadsworth struck and injured the plaintiff who was riding a skateboard.[47]

The plaintiff asserted that the contractor "voluntarily undertook to detect and prevent the consumption of alcohol by workers on its jobsites" and that the contractor's failure to do so was the proximate cause of the plaintiff's injuries.[48] The court of appeals noted that in order for a plaintiff to recover from a defendant who voluntarily, or even gratuitously, performs an act, the plaintiff "must show either detrimental reliance or an increased risk of harm."[49] The court of appeals refused, however, to extend liability to the contractor in this case, noting that "'failing to take all possible actions to prevent an occurrence is not the same as increasing to the risk of the occurrence.'"[50]

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43. *Id.* (quoting Murphy v. Blue Bird Body Co., 207 Ga. App. 853, 859, 429 S.E.2d 530, 535-36 (1993)).

44. *Id.*

45. 275 Ga. App. 218, 620 S.E.2d 455 (2005).

46. *Id.* at 219-20, 620 S.E.2d at 456-57.

47. *Id.* at 218-19, 620 S.E.2d at 456.

48. *Id.* at 219, 620 S.E.2d at 456.

49. *Id.*

50. *Id.* at 220, 620 S.E.2d at 457 (quoting Griffin v. AAA Auto Club South, 221 Ga. App. 1, 3, 470 S.E.2d 474, 477 (1996)).

C. Acceptance Doctrine and Negligent Design of a Public Road

The court of appeals considered several issues related to public road construction in the case of *Ogles v. E.A. Mann & Co.*,[51] one of which is discussed below. The plaintiff was injured in a single car accident on a county road in Jones County, Georgia and sued the Department of Transportation ("DOT"), Jones County, and several contractors, including E.A. Mann & Co.—a paving contractor—on various theories, including that the work was not properly designed, inspected, or maintained.[52] The court of appeals agreed that summary judgment for E.A. Mann was proper because its work had been accepted by the owner of the road and its paving work did not fall into the "inherently dangerous" exception to the acceptance doctrine.[53] The court observed:

> The "acceptance doctrine" provides that when "the work of an independent contractor is completed, turned over to, and accepted by the owner, the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work, even though he was negligent in carrying out the contract, at least, if the defect is not hidden but readily observable upon reasonable inspection."[54]

The court recited numerous facts showing that E.A. Mann's work had been accepted prior to the plaintiff's accident.[55] However, the court also noted that the acceptance doctrine does not apply where the contractor's work is "'inherently or intrinsically dangerous'" or "'so negligently defective as to be imminently dangerous to third persons.'"[56] The court did not agree with the plaintiff's argument that factual issues remained regarding whether paving was an inherently dangerous activity because paving has never been included in the list of what Georgia courts typically recognize as inherently dangerous activities, and the undisputed evidence showed that any potholes that had existed prior to acceptance had been repaired.[57] The plaintiff's expert's statements,

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51. 277 Ga. App. 22, 625 S.E.2d 425 (2005).
52. *Id.* at 22-23, 625 S.E.2d at 427.
53. *Id.* at 24-25, 625 S.E.2d at 428-29.
54. *Id.* at 24, 625 S.E.2d at 428 (quoting Peachtree N. Apts. Co. v. Huffman-Wolfe Co., 126 Ga. App. 594, 595, 191 S.E.2d 485, 486 (1972) (citations and punctuation omitted)).
55. *Id.* at 23, 625 S.E.2d at 428.
56. *Id.* at 24, 625 S.E.2d at 428 (quoting *Peachtree*, 126 Ga. App at 594, 191 S.E.2d at 485).
57. *Id.* at 25, 625 S.E.2d at 429.

which the court found to be factually unsupported and conclusory, were not sufficient to create a genuine issue of material fact.[58]

D. Effect of Continuous Employment on Workers' Compensation Damages Arising out of an Automobile Accident

In recent years, the trend for many construction companies has been to temporarily relocate employees to geographic areas for particular construction projects rather than opening an office in the location of every project. The case of *Ray Bell Construction Co. v. King*[59] is an important case because the court of appeals held a contractor liable for workers' compensation dependency benefits after one of its relocated employees died as the result of a traffic accident on a Sunday afternoon while the employee was not directly engaged in company business.[60]

Ray Bell Construction Co. ("Ray Bell") employed the decedent, Howard, as a superintendent for a project in Butts County, Georgia. In order for Howard to be located closer to the project, Ray Bell provided company housing located in Fayetteville, Georgia. Ray Bell also provided Howard with a company truck to use for business and for his own personal use. Howard was severely injured one Sunday afternoon on his way back from delivering some family furniture to a storage area located on his family's property in Alamo. Howard died the next day. The evidence showed that Howard was returning either to his company housing or to the job site.[61]

The court of appeals affirmed the award of dependency benefits to Howard's widow and child on the basis that Howard was continuously employed by Ray Bell, and thus his death arose out of and in the course of his employment.[62] Ray Bell contended that Howard was on a personal mission and therefore could not be deemed to be acting in the course of his employment.[63] In upholding the award of dependency benefits, the court of appeals noted that

> "[t]he proper test to be applied is whether an employee while working away from his home is required by his employment to lodge and work within an area geographically limited by the necessity of being

58. *Id.* at 25-26, 625 S.E.2d at 429.
59. 277 Ga. App. 144, 625 S.E.2d 541 (2006).
60. *Id.* at 145, 625 S.E.2d at 542.
61. *Id.*
62. *Id.* at 145-46, 625 S.E.2d at 542.
63. *Id.*

> available for work on the employer's job site and is, in effect, in continuous employment."[64]

The rationale for this rule is that such an employee is "required by their employment to lodge and work within a particular geographic area different from where they would otherwise be, and are therefore exposed to the '*perils of the highway* and the *hazards of hotels*' while traveling for work."[65] Ray Bell was not successful in arguing that Howard had deviated from his employment by undertaking a personal mission because all of the evidence showed that Howard was returning either to the company apartment or to the job site.[66]

III. MECHANICS' AND MATERIALMEN'S LIENS

During the survey period, the court of appeals attempted to clarify the law on what constitutes "improvement of real estate" within the meaning of Georgia's Mechanics' and Materialmen's Lien statute, Official Code of Georgia Annotated ("O.C.G.A.") sections 44-14-361 to -367.[67] That decision was later nullified by the Georgia General Assembly.[68] The court of appeals also addressed the issue of whether O.C.G.A. section 44-14-361(a)[69] requires potential lien claimants not in privity with the general contractor to send statutory notices to both the owner and the general contractor where the owner is also the general contractor.

A. Improvement of Real Estate

In *Trench Shoring Services of Atlanta, Inc. v. Westchester Fire Insurance Co.*,[70] Trench Shoring Services of Atlanta ("Trench Shoring") and Campbell Brown Construction, LLC ("CBC") entered into a written agreement whereby Trench Shoring would supply CBC equipment to be used to connect a sewer main in a public right-of-way to a new sewer system being constructed in a private residential subdivision. Although Trench Shoring's equipment was used to connect to the sewer in the subdivision, the sewer construction took place completely within the public right-of-way immediately adjacent to the subdivision, and no

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64. *Id.* at 146, 625 S.E.2d at 542 (quoting Boyd Bros. Transp. Co. v. Fonville, 237 Ga. App. 721, 722, 516 S.E.2d 573, 574 (1999)).

65. *Id.*, 625 S.E.2d at 543 (quoting Hartford Accident & Indem. Co. v. Welker, 75 Ga. App. 594, 599, 44 S.E.2d 160, 164 (1947)).

66. *Id.* at 147, 625 S.E.2d at 543.

67. O.C.G.A. §§ 44-14-361 to -367 (2002 & Supp. 2006).

68. The General Assembly's action nullifying the court of appeals decision is discussed *infra* part VI.E. of this Article.

69. O.C.G.A. § 44-14-361(a).

70. 274 Ga. App. 850, 619 S.E.2d 361 (2005).

Trench Shoring equipment was provided directly on the private residential property in question.[71]

After the sewer construction was completed, CBC failed to pay Trench Shoring for the use of its equipment, and Trench Shoring filed a lien against the private residential property pursuant to O.C.G.A. section 44-14-361.1,[72] despite the fact that its equipment was used solely on the public right-of-way and not in the subdivision.[73] The owner discharged the lien by securing a bond from Westchester Fire Insurance Co. and then filed for bankruptcy protection. Trench Shoring filed an action to foreclose on the bond.[74] The trial court later granted Westchester's motion for summary judgment on the basis that "'the lien does not identify the right-of-way property for which Plaintiff supplied materials.'"[75] Trench Shoring appealed.[76]

The court of appeals observed that under Georgia's Mechanics' and Materialmen's Lien Statute, as it existed at the time the case was decided,[77] suppliers who furnished equipment for the improvement of real estate had a "'special lien on the real estate . . . or other property for which they furnish[ed] labor, services, or materials.'"[78] The question before the court was whether "persons who furnish materials under contract with a private owner" have a materialmen's lien under O.C.G.A. section 44-14-361 against the owner's private property for work performed off-site on an adjoining public right-of-way.[79] Trench Shoring urged the court to adopt a broad reading of the statute, such that work performed off-site on public land would qualify the adjacent but privately-held land for a special lien.[80] Trench Shoring argued that even though its equipment was used for sewer construction on public land, it improved the adjacent residential property as specified in O.C.G.A. section 44-14-361.[81]

The court recognized that in Georgia, materialmen's liens are in derogation of the common law and thus are strictly construed by Georgia

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71. *Id.* at 850, 619 S.E.2d at 362.
72. O.C.G.A. § 44-14-361.1.
73. *Trench Shoring*, 274 Ga. App. at 850, 619 S.E.2d at 362.
74. *Id.*
75. *Id.* at 851, 619 S.E.2d at 362.
76. *Id.*
77. For a discussion of the new amendment to Georgia's Mechanics' and Materialmen's Lien statute, see *infra* part VI of this Article.
78. *Trench Shoring*, 274 Ga. App. at 851, 619 S.E.2d at 362 (quoting O.C.G.A. § 44-14-361(a)).
79. *Id.*
80. *Id.*
81. *Id.*

courts in favor of property owners and against materialmen.[82] The court stated that in order to constitute "improvements" to real estate, materials such as "'nails, glass, hardware, etc.'" must go into and become a part of the finished structure or building.[83] Because Trench Shoring's equipment was utilized exclusively off-site in the sewer construction and not on the private development property itself, the court, in accordance with well-established case law, determined that under Georgia's mechanic's lien statute, such off-site work may not be classified as an "'improvement to the property.'"[84] The court declined to broaden the meaning of the statute absent an act by the legislature to include off-site work.[85]

After the court's decision in *Trench Shoring*, the General Assembly amended the statute to broaden its application.[86] The amended version provides that a special lien may now attach to an owner's adjoining real property if the work done or materials furnished in an easement or public right-of-way adjoining the property are the subject of the owner's contract for the improvements and the work or materials are for the benefit of that adjoining private property.[87]

B. Statutory Notice Requirements

In *Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc.*,[88] Forrest Homes, Inc. (the "owner") filed notices of commencement for certain subdivision projects, listing itself as the owner and general contractor, and entered into a contract with a roofing subcontractor. The roofing subcontractor then bought materials from Roofing Supply of Atlanta, Inc. ("RSA") for the projects. RSA did not give the "Notice to Contractor" required under O.C.G.A. section 44-14-361(a) to Forrest Homes.[89] After the roofing subcontractor failed to pay RSA for its materials, RSA filed claims of lien against the owner's property. When RSA refused to remove the liens, the owner sued RSA to quiet title and asserted claims against RSA for tortious interference with business relations and slander of title. The owner also sought attorney fees and punitive damages.[90]

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82. *Id.*, 619 S.E.2d at 362-63.
83. *Id.*, 619 S.E.2d at 363 (quoting Amador v. Thomas, 259 Ga. App. 835, 838, 578 S.E.2d 537, 540 (2003)).
84. *Id.* (quoting O.C.G.A. § 44-14-361).
85. *Id.* at 852, 619 S.E.2d at 363.
86. Ga. S.B. 530, § 1, Reg. Sess. (2006) (amending O.C.G.A. § 44-14-361(b)).
87. *Id*.
88. 279 Ga. App. 504, 632 S.E.2d 161 (2006).
89. O.C.G.A. § 44-14-361(a).
90. *Roofing Supply*, 279 Ga. App. at 504-05, 632 S.E.2d at 162-63.

Because RSA had not sent a Notice to Contractor to the owner or to the contractor, the trial court found that RSA's claims of lien were invalid and that it had forfeited its rights to materialmen's liens. The trial court entered summary judgment in favor of the owner, quieting title, removing the liens, and dismissing all remaining claims. Both parties appealed.[91]

The court of appeals affirmed the trial court's judgment.[92] Under O.C.G.A. section 44-14-361.5(b),[93] an owner, or the owner's agent or contractor, must file with the clerk of the superior court in the county where the project is located a "Notice of Commencement" no later than fifteen days after the contractor starts work on the property.[94] The notice must contain information relevant to the lien rights of potential lien claimants on the project and other information listed in O.C.G.A. section 44-14-361.5(b), including but not limited to the names, addresses, and telephone numbers of the contractor, the owner, and the lender, as well as the legal description of the property.[95] To be effective, a copy of the Notice of Commencement must be posted at the job site throughout the duration of the project and given to any subcontractor, materialman, or person making a written request to the contractor for a copy.[96]

The purpose of the Notice of Commencement is to identify potential lien claimants who do not have a direct contract with the contractor.[97] A subtle side-effect of the notice is that it cuts off the lien rights of any remote supplier or materialman not in "privity of contract with the contractor" who fails to properly respond to a recorded and posted Notice of Commencement by sending both the owner *and* the contractor a Notice to Contractor "within 30 days from the filing of the Notice of Commencement or 30 days following the first delivery of labor, services, or materials to the property, whichever is later . . . ."[98] For purposes of the Notice of Commencement, a "contractor" is "a contractor having privity of contract with the owner of the real estate."[99]

In the main appeal, RSA contended that its liens were not invalidated by its failure to provide Forrest Homes with a Notice to Contractor. RSA argued that under the mechanic's lien statute, the contractor and owner cannot be the same entity because an entity cannot be in privity with

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91. *Id.*
92. *Id.*
93. O.C.G.A. § 44-14-361.5(b).
94. *Id.*
95. *Id.*
96. *Id.*
97. *See* O.C.G.A. § 44-14-361.5(a).
98. *Id.*
99. O.C.G.A. § 44-14-360(1).

itself, and therefore Forrest Homes's Notice of Commencement was defective. RSA also contended that the "true" contractor was not Forrest Homes, but the roofing subcontractor with whom it had a contract; therefore, the statute did not require RSA to send a Notice to Contractor to Forrest Homes.[100] The court of appeals disagreed, concluding that RSA's contentions were without merit.[101]

The court of appeals noted that "'the legislature has mandated strict compliance with'" the mechanic's lien statute and that "'[the Georgia Supreme] Court has followed the rule that lien statutes in derogation of the common law must be strictly construed in favor of the property owner and against the materialman.'"[102] As a result, failure to comply with the lien statute's provisions may result in a lien claim being unenforceable.[103] The court stated that the language of the notice provision was designed to do two things: (1) protect owners and general contractors from unfair surprise "by unknown debts of subcontractors" and (2) ensure that remote subcontractors and materialmen are paid for their work and materials supplied to a project.[104] Here, the court concluded that Forrest Homes had complied with the statute's requirements by filing and posting a Notice of Commencement.[105] Likewise, RSA could have complied with the statute by giving notice to Forrest Homes that it was supplying roofing materials.[106] Because RSA failed to give the requisite notice, its liens were invalid and unenforceable.[107]

The court dismissed all of the owner's remaining claims,[108] including but not limited to, its claim for tortious interference with business relations, which was premised upon RSA's refusal to remove its liens after receiving written notice to do so.[109] The court reiterated that in Georgia, there is no tort for filing a wrongful claim of lien.[110] If a mechanics' or materialmen's lien is not properly filed, the cause of action is not a tort claim but rather a claim for defamation concerning land

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100. *Roofing Supply*, 279 Ga. App. at 505, 632 S.E.2d at 163.
101. *Id.* at 506, 632 S.E.2d at 163.
102. *Id.* (brackets in original) (quoting Few v. Capitol Materials, 274 Ga. 784, 785, 559 S.E.2d 429, 430 (2002)).
103. *See id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 507, 632 S.E.2d at 164.
108. *Id.* at 507-08, 632 S.E.2d at 164-65.
109. *Id.*, 632 S.E.2d at 164.
110. *Id.* at 507, 632 S.E.2d at 164.

under O.C.G.A. section 51-9-11.[111] To prove defamation of title, the plaintiff must show that the statements in the lien were false and the claimant was aware of their falsity.[112] The court concluded that even though RSA's claims of lien were improperly filed, the owner did not meet its burden to show that the statements in the lien notices were false.[113] In dicta, the court also noted that under O.C.G.A. section 51-5-8[114] and prior Georgia case law, RSA's filing of the lien notice would have been privileged.[115]

IV. ARBITRATION

During the survey period, the court of appeals rendered several decisions regarding arbitration of construction disputes, including an issue of first impression relating to the arbitrability of the res judicata effect of a prior arbitration. The decisions underscore the court's continued reluctance to vacate or modify an arbitration award for manifest disregard of the law in the absence of an arbitration hearing transcript or detailed findings of fact in the arbitration award.

A. Arbitrability of Res Judicata Effect of Prior Arbitration

The Georgia Court of Appeals was presented with an issue of first impression in *Yates Paving & Grading Co. v. Bryan County.*[116] This was the parties' third appearance before the court and Yates's third demand for arbitration with Bryan County. The original dispute arose out of Yates Paving & Grading Co., Inc.'s ("Yates") written contract with Bryan County (the "County") to build and improve public roads in a subdivision. Before the project was completed, the County ordered Yates to cease working and hired a different contractor to finish the project. Yates filed a demand for arbitration and won an award that was later confirmed by the trial court and on appeal.[117]

Yates then filed a motion seeking a second arbitration relating solely to the issue of appellate attorney fees and costs that it had incurred in

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111. *Id.* (citing *Amador*, 259 Ga. App. at 837, 578 S.E.2d at 540); O.C.G.A. § 51-9-11 (2000).

112. *Roofing Supply*, 279 Ga. App. at 507, 632 S.E.2d at 164.

113. *Id.*

114. O.C.G.A. § 51-5-8 (2000).

115. *Roofing Supply*, 279 Ga. App. at 508, 632 S.E.2d at 164-65 (citing Premier Cabinets v. Bulat, 261 Ga. App. 578, 584, 583 S.E.2d 235, 240 (2003)).

116. 275 Ga. App. 347, 620 S.E.2d 606 (2005). If the case sounds familiar, an earlier iteration appeared in the Mercer Law Review construction law survey in 2004. *See* Dennis J. Webb, Jr., Henry L. Balkcom IV & Dana R. Grantham, *Construction Law*, 56 MERCER L. REV. 109, 140-41 (2004).

117. *Yates*, 275 Ga. App. at 347, 620 S.E.2d at 607.

defense of the original arbitration award. The trial 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.[118] On appeal, the court of appeals reversed again, holding that the parties' valid and enforceable arbitration clause was unambiguous and clearly provided that "*all* claims, disputes, and 'other matters' relating to the contract will be decided by arbitration," including the issue of appellate attorney fees.[119] In that round, the court pointed out that the contract's arbitration clause made no distinction about the type of attorney fees.[120] In addition, Yates's counterclaim against the County sought to enforce Yates's claims under the Georgia Prompt Pay Act,[121] which expressly provides for the recovery of attorney fees on appeal, regardless of whether such claims are litigated or arbitrated.[122]

Yates then filed a third demand for arbitration for damages arising out of the County's "'wrongful call of the bond instruments,'" which Yates alleged resulted in the surety refusing to issue Yates any further bonds—effectively precluding Yates from bidding on any government contracts requiring bonds.[123] The County's insurer filed a declaratory action seeking a stay of arbitration. The County asked for a permanent injunction against Yates's third arbitration, contending that the doctrine of res judicata barred Yates's request for arbitration on the issue of damages caused by the bond recall. The trial court granted summary judgment to the County on the res judicata claim and entered an injunction precluding arbitration of the bond issue.[124]

Yates appealed, asserting that under the terms of its contract with the County, the issue of res judicata was for the arbitrators to decide, not the court.[125] Under the facts of this case, in an issue of first impression, the court of appeals agreed.[126] In doing so, the court was persuaded by several prior decisions by the Third, Seventh, and Ninth Circuit Courts of Appeal, which concluded that the preclusive effect of

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118. Yates Paving & Grading Co. v. Bryan County, 265 Ga. App. 578, 580, 594 S.E.2d 756, 758-59 (2004).
119. *Id.* at 581-82, 594 S.E.2d at 759.
120. *Id.* at 582, 594 S.E.2d at 759.
121. O.C.G.A. §§ 13-11-1 to -11 (Supp. 2006)
122. *Yates*, 265 Ga. App. at 582, 594 S.E.2d at 760.
123. *Yates*, 275 Ga. App. at 347, 620 S.E.2d at 607.
124. *Id.* at 348, 620 S.E.2d at 608.
125. *Id.*
126. *Id.* at 350, 620 S.E.2d at 608-09.

a first arbitrator's decision is an issue for a later arbitrator to consider, rather than an issue for the court's determination.[127]

In the instant case, as the court previously noted, the parties' agreement contained the following binding and unambiguous arbitration clause: "'All claims, disputes and other matters in question between [the parties] arising out of, or relating to the Contract Documents . . . will be decided by arbitration.'"[128] The court held that where, as here, the arbitration clause is valid and enforceable, the res judicata effect of the final award issued in the first arbitration should be decided by the arbitrators, not the court, because it arises out of the contract.[129]

B. Manifest Disregard of the Law

In *Ordner Construction Co. v. Parkside Crossing, 300, LLC*,[130] the court of appeals declined to vacate an arbitration award entered in a building contract dispute between the contractor, Ordner Construction Company, Inc. ("Ordner"), and the property owner, Parkside Crossing, 300, LLC ("Parkside"), in the absence of a transcript of the arbitration hearing or detailed findings of fact by the arbitrator.[131]

Ordner entered into a standard American Institute of Architects agreement with Parkside for the construction of an office building. After a dispute arose between the parties, Ordner filed a demand for arbitration seeking the unpaid balance of its contract. Parkside counterclaimed for damages for negligent construction, use of poor quality materials, attorney fees, costs, and interest.[132]

At the hearing, the arbitrator awarded Ordner $70,000 for its contract balance, and Parkside was awarded $165,000 for lost rents, cost to complete the project, repairs, attorney fees, and other expenses, which resulted in a net award to Parkside of $95,000.[133] The parties did not have the underlying arbitration hearing reported.[134]

When Parkside filed its petition in superior court to confirm the award, Ordner moved to vacate or modify the award.[135] After a

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127. *Id.* at 349-50, 620 S.E.2d at 608-09 (citing Chiron Corp. v. Ortho Diagnostic Sys., 207 F.3d 1126, 1132-34 (9th Cir. 2000); Indep. Lift Truck Builders Union v. NACCO Materials Handling Group, 202 F.3d 965, 968 (7th Cir. 2000); John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 139-40 (3d Cir. 1998)).

128. *Id.* at 350, 620 S.E.2d at 609 (omission and last alteration in original).

129. *Id.*

130. 276 Ga. App. 753, 624 S.E.2d 206 (2005).

131. *Id.* at 755, 624 S.E.2d at 208.

132. *Id.* at 753, 624 S.E.2d at 207.

133. *Id.*

134. *Id.* at 754, 624 S.E.2d at 208.

135. *Id.*, 624 S.E.2d at 207.

hearing, the court modified the award, striking Parkside's damages for lost rental income on the basis that the "'arbitrator overstepped his authority by awarding consequential damages expressly not allowed by the contract.'"[136]

Ordner appealed the court's decision on two grounds: (1) the superior court should have vacated the entire arbitration award pursuant to O.C.G.A. section 9-9-13(b)(5)[137] because the arbitrator exhibited manifest disregard of the law by awarding significantly less than the parties' stipulated contract balance and (2) under O.G.C.A. section 13-6-11,[138] Parkside was not entitled to an award of attorney fees because it lost its status as the nonprevailing party when the court struck lost rental income from the arbitration award.[139]

Without a hearing transcript or an arbitrator's detailed findings of fact, the court of appeals stated that it had "no means of discerning the basis for the arbitrator's decision;" therefore, the court could not determine whether the lower court erred when it refused to vacate the arbitration award.[140] The court reiterated that under Georgia law, "'[T]he absence of a . . . transcript precludes review of . . . claims of error committed by the arbitrator, thereby necessitating an affirmance of the [superior court's] refusal to vacate the arbitration award.'"[141]

In *McGill Homes, Inc. v. Weaver*,[142] the appellant's failure to fulfill its burden of showing by the record that the arbitrator manifestly disregarded the law again resulted in the court of appeals affirming the trial court's denial of the appellant's motion to vacate the award.[143] McGill Homes (the "builder") and Weaver (the "purchaser") entered into a purchase and temporary occupancy agreement by which the purchaser would occupy the house pending closing. The parties' agreement specified that all claims arising out of or related to the purchase agreement would be resolved by binding arbitration.[144]

After a dispute arose between the parties, the purchaser filed for arbitration, and a hearing was held. The arbitrator found the builder liable for defective and incomplete construction and also required the

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136. *Id.*
137. O.C.G.A. § 9-9-13(b)(5) (Supp. 2006).
138. O.C.G.A. § 13-6-11 (1982 & Supp. 2006).
139. *Ordner*, 276 Ga. App. at 754-55, 624 S.E.2d at 207-08.
140. *Id.* at 755, 624 S.E.2d at 208.
141. *Id.* at 754, 624 S.E.2d at 208 (omission and brackets in original) (quoting Brown v. Premiere Designs, 266 Ga. App. 432, 434, 597 S.E.2d 466, 468 (2004)); *see also* Humar Props. v. Prior Tire Enters., 270 Ga. App. 306, 308, 605 S.E.2d 926, 927-28 (2004).
142. 278 Ga. App. 622, 629 S.E.2d 535 (2006).
143. *Id.* at 624, 629 S.E.2d at 537.
144. *Id.* at 623, 629 S.E.2d at 536.

builder to satisfy a mechanic's lien that had been filed against the property.[145] The builder then filed a motion to vacate the award on the basis of the arbitrator's manifest disregard of the law, contending that damages awarded by the arbitrator were, among other deficiencies, "not in proportion to the actual costs of completing the walk through list . . . ."[146] The court of appeals affirmed the lower court's order, which denied the builder's motion to vacate the arbitration award.[147] The court again based its decision on the failure of the builder to provide a transcript of the arbitration proceedings and thereby fulfill its burden of showing by the record that the arbitrator manifestly disregarded the law.[148]

V. MISCELLANEOUS

This section contains cases which do not fall neatly into one of the other previously discussed topics or categories.

A. The Fair Business Practices Act

In a 2005 decision case, *Tiismann v. Linda Martin Homes Corp.* ("*Tiismann II*"),[149] the Georgia Supreme Court reversed the court of appeals in an action brought by Tiismann, the homeowner, against Linda Martin Homes Corporation (the "builder") ("*Tiismann I*")[150] for, *inter alia*, violations of the Fair Business Practices Act (the "FBPA").[151] The supreme court determined that the statute of limitations did not bar Tiismann's cause of action and remanded the case for consideration of the alternative reasonable reliance ground.[152]

Tiismann's underlying claims arose from a dispute between the parties with regard to alleged defects and building code violations in the construction of Tiismann's home. After an arbitration hearing, the arbitrator granted Tiismann an award on his claims relating to the code violations. Tiismann then pursued an FBPA action against the builder, alleging that the builder's construction contract was duplicitous because it contained contradictory language guaranteeing that the builder would construct the home in accordance with the building codes while simultaneously incorporating a limited warranty disclaiming responsibil-

145. *Id.*
146. *Id.*
147. *Id*. at 624, 629 S.E.2d at 537.
148. *Id.* at 623-24, 629 S.E.2d at 537.
149. 279 Ga. 137, 610 S.E.2d 68 (2005).
150. *Tiismann I*, 268 Ga. App. 787, 603 S.E.2d 45 (2004).
151. O.C.G.A. §§ 10-1-390 to -407 (2000 & Supp. 2006).
152. *Tiismann II*, 279 Ga. at 140, 610 S.E.2d at 69, 70.

ity for any violations of the code.[153] The trial court granted the builder's motion for summary judgment on the basis that (1) Tiismann's FBPA claim was barred by the running of the statute of limitations and (2) as a matter of law, Tiismann could not show that he reasonably relied on the conflicting contract terms.[154] The court of appeals affirmed the grant of summary judgment on the statute of limitations ground, and Tiismann appealed.[155] The Supreme Court reversed the court of appeals decision and remanded the case.[156]

On remand, in *Tiismann v. Linda Martin Homes Corp.* ("Tiismann III"),[157] Tiismann asserted that the builder had a legal duty, independent of the contract, to comply with all building codes, and that the builder violated the FBPA by refusing responsibility for its code violations, not for any misrepresentations the builder may have made in the purchase agreement.[158] After vacating its prior opinion, the court of appeals affirmed the trial court's grant of summary judgment on the basis that Tiismann could not have reasonably relied on the conflicting contract terms.[159] The court stated that under Georgia's FBPA statute,

> Unless it can be said that the defendant's actions had or has [sic] potential harm for the consumer public[,] the act or practice cannot be said to have "impact" on the consumer marketplace and any "act or practice which is outside that context, no matter how unfair or deceptive, is not directly regulated by the FBPA."[160]

Moreover, under *Zeeman v. Black*,[161] the court stated that reasonable reliance is in fact an essential element of an FBPA claim, contrary to Tiismann's assertion.[162] If, as Tiismann contended, he knew that the builder's "express warranty disclaiming responsibility for building to code was legally invalid at the time he signed it," then Tiismann's actual knowledge of the purported falsity showed that his reliance was unjustifiable.[163] Accordingly, the court of appeals affirmed the trial court's grant of summary judgment to the builder on the ground that

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153. *Id.* at 137, 610 S.E.2d at 69.
154. *Id.*
155. *Tiismann I*, 268 Ga. App. 787, 603 S.E.2d 45.
156. *Tiismann II*, 279 Ga. at 137-38, 610 S.E.2d at 69.
157. 276 Ga. App. 846, 625 S.E.2d 32 (2006).
158. *Id.* at 848, 625 S.E.2d at 35.
159. *Id.* at 847, 851, 625 S.E.2d at 34, 37.
160. *Id.* at 848, 625 S.E.2d at 35 (quoting Zeeman v. Black, 156 Ga. App. 82, 84, 273 S.E.2d 910, 915 (1980)).
161. 156 Ga. App. 82, 273 S.E.2d 910 (1980).
162. *Tiisman III,* 276 Ga. App. at 849, 625 S.E.2d at 36.
163. *Id.* at 851, 625 S.E.2d at 37.

Tiismann entered the contract with full knowledge of its contents, and thus could not have reasonably relied on the contract's contradictory language when he signed the agreement.[164] The Georgia Supreme Court granted Tiismann's petition for a writ of certiorari, and affirmed the court of appeals' opinion in its entirety on October 25, 2006.[165] The supreme court confirmed that *Zeeman v. Black* remains viable authority as to the proper interpretation and construction of Georgia's FBPA statute.[166]

B. General Liability Insurance Coverage for Defective Construction Work

In *McDonald Construction Co. v. Bituminous Casualty Corp.*,[167] the court of appeals affirmed the trial court's grant of partial summary judgment to a commercial general liability ("CGL") insurance carrier and denied the general contractor's claim for reimbursement for the various costs it incurred to repair and replace defective flooring installed on a construction project.[168] The court clarified the rule governing design and construction defect cases: repair and replacement of the insured's defective work does not qualify as "property damage."[169]

A general contractor, McDonald Construction Company, Inc. ("McDonald"), entered into a contract with the Augusta Housing Authority to upgrade and remodel an Augusta public housing complex containing twenty-six buildings. McDonald then subcontracted with a flooring subcontractor for the installation of vinyl composition tile ("VCT") flooring.[170] After the project experienced significant problems with delamination of the VCT flooring during and after construction, the project architect issued an order of condemnation with regard to the unsuitable tile and "instructed McDonald to correct the problem."[171]

In order to fulfill its obligations under its contract with the housing authority, McDonald then hired a second flooring subcontractor to replace the VCT flooring and submitted a claim under its CGL policy seeking recovery of the costs it had incurred in replacing the tile, as well as costs for testing, lost overhead and profit, attorney fees, gas and

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164. *Id.*
165. Tiismann v. Linda Martin Homes Corp., No. S06G0848, 2006 WL 3019550, at *5 (Ga. Oct. 25, 2006).
166. *Id.* at *2.
167. 279 Ga. App. 757, 632 S.E.2d 420 (2006).
168. *Id.* at 757, 632 S.E.2d at 420.
169. *Id.* at 762, 632 S.E.2d at 423.
170. *Id.* at 757, 632 S.E.2d at 421.
171. *Id.* at 758, 632 S.E.2d at 421.

travel costs, and lodging. McDonald did not submit any claim based on tort liability from the loose tiles, such as injury to a third party or damage to property. When the CGL carrier denied its claims, McDonald filed suit for breach of contract.[172]

The trial court granted the CGL carrier partial summary judgment on McDonald's claim for the cost of the tile replacement effort, finding that the costs of replacement were part and parcel of McDonald's contractual obligation to conform with the project requirements and that the additional work did not arise from any tort liability. The trial court denied summary judgment, however, for other costs incurred by the general contractor as a result of the defective work, such as the cost to remove the furniture so the new tile subcontractor could gain access to the areas to replace the tile.[173] The trial court concluded that those costs "might be considered 'damage to other property' under the contract," and thus potentially covered under the terms of the CGL insurance policy.[174] Both parties appealed from the court's order.[175]

Because the facts were largely uncontested, the court of appeals confined its analysis to whether McDonald's CGL policy covered McDonald's claim.[176] The court reiterated that "'[T]he purpose of . . . comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the *completed product*, but not for replacement and repair of that product.'"[177] Moreover, CGL coverage is not intended to cover the contractual liabilities of the insured for costs incurred to meet its contractual obligations.[178] Rather, general liability insurance coverage is designed to protect the insured party from the "'potentially limitless liability'" associated with the risk that the completed construction work will cause bodily injury or property damage for which the insured may be liable.[179] The court concluded that "[f]or there to be coverage under a CGL policy for faulty workmanship, there would have to be damage to property other than the work

172. *Id.* at 758-59, 632 S.E.2d at 421-22.
173. *Id*. at 759, 632 S.E.2d at 422
174. *Id*.
175. *Id.*
176. *Id.* at 760, 632 S.E.2d at 422.
177. *Id.* at 761, 632 S.E.2d at 423 (omission in original and emphasis added) (quoting Elrod's Custom Drapery Workshop v. Cincinnati Ins. Co., 187 Ga. App. 670, 670, 371 S.E.2d 144, 145 (1988)).
178. *Id.*
179. *Id.* (quoting SawHorse, Inc. v. S. Guar. Ins. Co. of Ga., 269 Ga. App. 493, 495, 604 S.E.2d 541, 544 (2004)).

itself and the insured's liability for such damage would have to arise from negligence, not breach of contract."[180]

In the case at bar, the general contractor repeatedly acknowledged that it repaired the defective flooring pursuant to its obligations under the construction contract. No evidence was presented indicating that any bodily injuries or injuries to other property had resulted from the defective flooring or that any property had been damaged in the process of removing the furniture to gain access to the defective tile.[181] Instead, the evidence showed that all costs incurred by the general contractor "arose under its construction contract with the Housing Authority, not from any tort liability that arose outside of the construction contract."[182] Concluding that there was no evidence in the record that any damage occurred to the Augusta Housing Authority property or that any personal injuries resulted from the delamination or replacement of the tile, the court of appeals held that as a matter of law, none of the costs incurred by McDonald were covered under its CGL policy.[183]

C. Public Contract Bid Protest

In the case of *R. D. Brown Contractors, Inc. v. Board of Education of Columbia County*,[184] the Georgia Supreme Court held that the losing bidder on a public school project could not enjoin the school board's contract with the winning bidder simply because the winning bidder did not provide a list of subcontractors as required by the bid documents.[185] R. D. Brown Contractors, Inc. ("Brown") brought a claim seeking injunctive relief and a temporary restraining order after it was denied a contract with the Columbia County Board of Education ("school board").[186] The supreme court affirmed the trial court's denial of Brown's petition for an interlocutory injunction.[187]

Brown's bid was $11,318,000 compared to the winning bid of $11,259,000 submitted by another contractor, Brown and McKnight Construction Co. ("McKnight").[188] The bid documents provided, among other things, (1) that bids would be opened and read aloud at 2:00 p.m.

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180. *Id.* at 761-62, 632 S.E.2d at 423.
181. *Id.*
182. *Id.*, 632 S.E.2d at 424.
183. *Id.* at 762, 764, 632 S.E.2d at 424-25.
184. 280 Ga. 210, 626 S.E.2d 471 (2006).
185. *Id.* at 213-14, 626 S.E.2d at 475.
186. *Id.* at 211, 626 S.E.2d at 473.
187. *Id.* at 210, 626 S.E.2d at 473.
188. *Id.* at 211, 626 S.E.2d at 473.

on a given date; (2) that the bids should contain a list of all major subcontractors with which the bidder would propose to build the project; (3) that no changes in the subcontractor list could be made post-bid without the approval of the school board; and (4) that the school board reserved "the right to reject any or all bids and to waive technicalities and informalities and to award the project on whatever basis is in the interest of [the school board]."[189] The bid submitted by McKnight at 2:00 p.m. did not contain a list of the major subcontractors that it proposed to use, but McKnight later supplied its list to the school board at 3:45 p.m. that same day.[190]

At the hearing on Brown's temporary restraining order, the trial court concluded that Brown was unlikely to prevail on the merits of its claims.[191] On appeal, the supreme court agreed, basing its decision on the public bidding statutes, which give a public body discretion to waive technicalities and informalities and to accept a bid that "conforms to the invitation for bids 'in all material respects.'"[192] Specifically, O.C.G.A. section 36-91-21(b)(4)[193] provides that "'a contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.'"[194] In addition, O.C.G.A. section 36-91-2(12)[195] defines the "'responsive bidder'" as the bidder that "'has submitted a bid or proposal that conforms in all material respects to the requirements set forth in the invitation for bids or request for proposals.'"[196] Finally, O.C.G.A. section 36-91-20(c)[197] provides that a public body "'shall have the authority to reject any and all bids or proposals and to waive technicalities and informalities.'"[198]

The supreme court concluded that the statutes clearly contemplate that "some provisions of a bid may be considered immaterial and constitute the sort of 'technicalities and informalities' that the governmental entity can waive."[199] Indeed, the subcontractor list was an item that could be changed post-bid with the school board's consent.[200]

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189. *Id.* at 210-11, 626 S.E.2d at 473.
190. *Id.* at 211, 626 S.E.2d at 473.
191. *Id.*
192. *Id.* at 213, 626 S.E.2d at 474-75 (quoting O.C.G.A. § 36-91-2(12) (2006)).
193. O.C.G.A. § 36-91-21(b)(4) (2006).
194. *Brown*, 280 Ga. at 212, 626 S.E.2d at 474 (quoting O.C.G.A. § 36-91-21(b)(4)).
195. O.C.G.A. § 36-91-2(12).
196. *Brown*, 280 Ga. at 212, 626 S.E.2d at 474 (quoting O.C.G.A. § 36-91-2(12)).
197. O.C.G.A. § 36-91-20(c) (2006).
198. *Brown*, 280 Ga. at 212, 626 S.E.2d at 474 (quoting O.C.G.A. § 36-91-20(c)).
199. *Id.* at 213, 626 S.E.2d at 475.
200. *Id.*

Therefore, the court held that the trial court did not err in ruling that the subcontractor list was an immaterial item that could be waived and that was, in fact, waived by the school board.[201]

VI. LEGISLATION

During the survey period, the Georgia General Assembly amended a number of construction-related statutes, including substantial revisions to the Georgia "Right to Repair" Act,[202] Georgia's mandatory alternative dispute resolution framework for residential construction defect claims. The newly enacted 2006 amendments to the "Right to Repair" Act became effective on April 28, 2006, and will apply to all residential construction defect claims arising on or after that date.[203]

A. Private Inspectors

The Georgia General Assembly amended Title 8, Buildings, of the Georgia Code—changing provisions related to state building, plumbing, and electrical codes—to provide for employment of private professional providers to perform building plan reviews and inspections when the state or local fire marshal, state inspector, or designated code official cannot timely perform such services.[204]

B. Condominium Sales, Construction and Development

The Georgia legislature also changed certain provisions relating to condominium sales and repairs.[205] As amended, the Georgia Code now provides that a seller of condominiums may use escrow funds in excess of one percent of the purchase price from the sale of units for construction and development of the condominium property.[206]

C. Residential Construction Defects Claims

As mentioned above, the General Assembly also amended the mandatory dispute resolution framework instituted in 2004 for resolution of residential construction defect claims occurring in Georgia.[207] Because the General Assembly struck the entire Part 2A

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201. *Id.* at 214, 626 S.E.2d at 475.
202. O.C.G.A. §§ 8-2-35 to -43 (2004 & Supp. 2006).
203. *Id*. § 8-2-35.
204. Ga. H.B. 1385, §§ 1 to -4, Reg. Sess. (2006) (amending O.C.G.A. § 8-2-26 (2004) and O.C.G.A. § 25-2-14 (2003)) (effective January 1, 2007).
205. Ga. S.B. 573, Reg. Sess. (2006) (amending O.C.G.A. §§ 8-2-35 to -43 and O.C.G.A. § 44-3-112 (1991)).
206. *Id.* § 2 (amending O.C.G.A. § 44-3-112 (1991)).
207. O.C.G.A. §§ 8-2-35 to -43.

and replaced it with an amended version, there does not appear to be a redline version readily available to show specifically what language has been changed from the prior statute.[208] Residential construction practitioners, therefore, are left with the task of carefully reviewing the new Part 2A for all significant changes from the prior version. Unfortunately, the basic statutory scheme appears to have been left relatively untouched, which means that homeowners, contractors, and construction lawyers will continue to have to try and navigate between Scylla and Charybdis in an effort to comply with the statute's labyrinthian requirements with regard to notice, offers, responses, and rejections.

Overall, the Georgia Right to Repair Act's language was amended to broaden the statute's reach by adding "or common area" after the word "dwelling" in multiple sections, including O.C.G.A. sections 8-2-36(1), (5), (6), and (6)(B), and sections 8-2-38(b)(2), (e), and (n).[209] Many of the definition provisions were either modified or added.[210]

O.C.G.A. section 8-2-38(c) was amended to add the following language at the end:

> A contractor that does not respond to a notice of claim within the time prescribed by subsection (b) of this Code section may not claim or assert that the absence of documents required to be provided with the notice of claim under subsection (a) of this Code section relieved the contractor from the contractor's obligation to respond to the notice of claim.[211]

New language has also been added to O.C.G.A. subsections 8-2-38(e) and (h).[212] O.C.G.A. section 8-2-38(m) was amended to clarify the period within which a claimant must accept an offer of the contractor to remedy a construction defect, providing that the offer must be accepted within 30 days after receipt of the offer,[213] rather than "within a reasonable period after receipt."[214]

O.C.G.A. section 8-2-39 has a new subsection (b), which provides that if a construction defect "is discovered during the pendency of an action filed in compliance with [the statute]" it may be added as a supplemental or additional claim.[215]

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208. Ga. S.B. 573, § 1.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *See* O.C.G.A. § 8-2-38(m) (2004).
215. Ga. S.B. 573, § 1.

O.C.G.A. section 8-2-41 was reenacted without change and continues to require the contractor to provide conspicuous statutory notice to the homeowner of the statutory right to resolve defects.[216] Interestingly, however, the statute does not require that the notice be in the parties' contract.[217]

Finally, certain provisions in O.C.G.A. sections 8-2-42 and -43 were changed relating to "the prohibition against bribery of property or association managers" and "relating to causes of action being created and the contractor's right to seek recovery from subcontractors or other professionals."[218]

D. Contractor Licensing

The effective date by which persons must qualify and apply for licensing as a residential or general contractor without an examination has been extended to January 1, 2007.[219] Persons seeking to be licensed as a residential or general contractor through reciprocal agreements with other states can apply starting January 1, 2007.[220] The date when the licensing requirements and sanctions become effective was changed to January 1, 2008.[221]

E. Lien Law

Effective July 1, 2006, the Georgia Mechanics' and Materialmen's Lien law was amended to provide that a special lien may attach to the real property of a private owner for the value of work done or materials furnished in an easement or public right-of-way adjoining the property, if the work is for the benefit of the private property and within the scope of the owner's contract for such improvements.[222] This amendment effectively nullifies the court's holding in *Trench Shoring Services of Atlanta, Inc. v. Westchester Fire Insurance Co.*,[223] which was discussed earlier.[224]

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216. *Id.*
217. O.C.G.A. § 8-2-41(b) (2004 & Supp. 2006).
218. Preamble to Ga. S.B. 573; Ga. S.B. 573, § 1.
219. Ga. H.B. 1542, § 2, Reg. Sess. (2006) (amending O.C.G.A. § 43-41-17(a), (b) (2004)).
220. *Id.* § 1 (amending O.C.G.A. § 43-41-8(a)(3)(D) (2004)).
221. *Id.* § 2 (amending O.C.G.A. § 43-41-17(a), (b)).
222. O.C.G.A. § 44-14-361(b) (Supp. 2006).
223. 274 Ga. App. 850, 619 S.E.2d 361 (2005).
224. *See supra* Part III.A.