

# 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, 2006 and May 31, 2007. The cases this year are divided into four general categories: (1) contracts, (2) torts, (3) liens and bonds, and (4) arbitration. Recent legislation is summarized in Section V of this Article.

## I. CONTRACTS

### A. *Contractual Obligation to Maintain Liability Insurance*

Depending on the ultimate resolution of *Vakilzadeh Enterprises v. Housing Authority*,<sup>1</sup> termination for cause on a construction project may become more difficult if the nondefaulting party fails to act immediately upon the other party's breach. In addition, notwithstanding the standard construction contract provision that requires thirty days prior written notice of cancellation or nonrenewal of the contractor's or

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1. 281 Ga. App. 203, 635 S.E.2d 825 (2006).

subcontractor's liability insurance, the following case underscores the importance of calendaring the date when the required liability insurance coverage will expire so that notice of breach, if applicable, may be timely given.<sup>2</sup>

In *Vakilzadeh Affordable Housing Development Corporation of DeKalb* ("Affordable") hired *Vakilzadeh Enterprises, Inc.*, doing business as *Allstates Construction Co.* ("Allstates"), as its general contractor on a subdivision construction project and entered into a written construction agreement with Allstates. After Allstates allegedly breached its contract, the Housing Authority of DeKalb County ("Housing Authority"), as Affordable's assignee, terminated the agreement. Allstates subsequently sued the Housing Authority for wrongful termination. The trial court granted the Housing Authority's motion for summary judgment on the ground that the Housing Authority was authorized under the contract to terminate the agreement with Allstates because Allstates had failed to comply with a standard contract provision which required it to maintain liability insurance without interruption until the completion of the project.<sup>3</sup> Allstates appealed, and the court of appeals reversed, determining that there were material issues of fact (a jury question) about whether Allstates' noncompliance with the liability insurance provision entitled Affordable to terminate the parties' contract.<sup>4</sup>

In the underlying case, Affordable and Allstates entered into a construction agreement that required Allstates to provide all labor, materials, equipment, and services required to complete a residential subdivision for an adjustable contract price of approximately \$1.9 million. The subdivision was to be built in three phases. The parties agreed that before Affordable would authorize Allstates to proceed with the second two phases, Allstates had to satisfactorily complete construction of the first phase of the subdivision ("Phase One").<sup>5</sup>

The parties' construction agreement authorized Affordable to terminate Allstates if it refused to supply enough workers or materials, failed to pay its subcontractors for work performed, persistently disregarded any applicable laws, or substantially breached the contract. The agreement also required Allstates to (1) maintain liability insurance covering itself and its subcontractors without interruption from the time work commenced until completion of the project and (2) provide certificates of insurance prior to commencing work showing that coverage would not be cancelled or nonrenewed without thirty days prior

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2. *See generally id.*

3. *Id.* at 203-04, 635 S.E.2d at 825-26.

4. *Id.* at 204, 635 S.E.2d at 826.

5. *Id.*

written notice to Affordable. Allstates provided a certificate of general liability insurance for the period of November 15, 2001 through November 15, 2002 before beginning Phase One, which was completed in April 2003, about four months after the certificate expired.<sup>6</sup>

Allstates was then asked to start the second phase of the project (“Phase Two”), even though the previous certificate of insurance had expired; unlike before, the owner did not request Allstates to provide a current certificate of insurance. In September 2003, during the construction of Phase Two, a subdivision water line was broken, and the Housing Authority notified Allstates that it was going to hold Allstates, as general contractor, responsible for the damages. The Housing Authority also informed Allstates that it understood Allstates may have allowed its liability insurance to lapse and instructed Allstates to provide a certificate of current liability coverage immediately. The contractor produced a certificate of insurance for the period of December 1, 2003 through December 1, 2004 but did not provide the Housing Authority with any evidence showing that it had maintained insurance between November 15, 2002 and December 1, 2003. In January 2004 the Housing Authority terminated Allstates, citing several reasons, including Allstates’ failure to maintain continuous liability insurance coverage.<sup>7</sup>

Allstates then sued the Housing Authority, which then moved for summary judgment, contending that as a matter of law, good cause to terminate existed because Allstates had failed to maintain liability insurance during the entire contract period. Allstates argued that the parties had mutually departed from the requirement that it maintain insurance coverage and that the Housing Authority therefore waived the insurance requirement as a ground for termination.<sup>8</sup>

The court of appeals reversed the trial court’s grant of summary judgment to the Housing Authority on the basis that a genuine issue of material fact existed about whether the Housing Authority, knowing that the original certificate of insurance expired in November 2002, waived the general contractor’s obligation to maintain uninterrupted liability insurance by allowing Allstates to proceed with Phase Two of the project without ever receiving a current certificate of insurance.<sup>9</sup> The court concluded that another question for the jury was whether Allstates’ alleged breach of the contract provision which required it to maintain uninterrupted liability insurance coverage until completion of

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6. *Id.* at 204-05, 635 S.E.2d at 826.

7. *Id.* at 205, 635 S.E.2d at 826-27.

8. *Id.*, 635 S.E.2d at 827.

9. *Id.* at 206, 635 S.E.2d at 827.

the project constituted a “substantial breach of contract” that authorized termination of the agreement.<sup>10</sup>

*B. Verifying Contracting Authority on Public Works Projects*

In *Griffin Bros. v. Town of Alto*,<sup>11</sup> the town of Alto (the “Town”) decided to install a water pipeline and contacted Griffin Bros., Inc. (“Griffin”), a contractor, to provide a rough estimate of the cost. A few months later, Griffin was asked by a Town council member to provide a more detailed estimate in writing, which Griffin put together and supplied. Trying to avoid rising material costs, the Town mayor then telephoned Griffin and asked it to go ahead and order the pipe. After the materials were ordered, the mayor telephoned Griffin again and notified it that the Town intended to advertise the project for bid and that Griffin needed to submit a formal bid as part of that process.<sup>12</sup>

Only one company besides Griffin, Higgins Construction Co., (“Higgins”), submitted a formal bid. Griffin was the low bidder, but Higgins’s higher bid price included a longer run of pipe that was more consistent with the Town’s needs and bid solicitation. After the Town awarded the project to Higgins, Griffin filed a complaint against the mayor, the Town council members, and the Town, and it sought damages and injunctive relief.<sup>13</sup>

The defendants moved for summary judgment on the bases that the Town was not legally obligated to accept the lowest bid, and the mayor lacked authority to unilaterally bind the Town to a contract with Griffin. The trial court granted the defendants’ motion for summary judgment, and Griffin appealed, contending that (1) the Town was obligated by statute to accept the lowest bid, (2) the Town was estopped from denying it had a contract with Griffin, and (3) the Town’s prior course of conduct—having Griffin perform work based on informal instructions—justified Griffin’s reliance on the mayor’s request to purchase pipe for the Town’s new pipeline.<sup>14</sup>

The court of appeals disagreed, determining that each of Griffin’s contentions was without merit.<sup>15</sup> First, Georgia’s statutory requirement that public works construction contracts be awarded to the lowest responsible and responsive bidder through a competitive bid process does

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10. *Id.* at 207, 635 S.E.2d at 828.

11. 280 Ga. App. 176, 633 S.E.2d 589 (2006).

12. *Id.* at 177, 633 S.E.2d at 590.

13. *Id.*

14. *Id.* at 177-78, 633 S.E.2d at 590-91.

15. *Id.*

not apply to projects that can be performed for less than \$100,000.<sup>16</sup> The highest bid for the pipeline project, \$89,989, was well under \$100,000, so the Town was not required by statute to accept Griffin's lower bid.<sup>17</sup> In addition, the court reasoned that consistent with the Town's invitation to bid, the winning bid included more linear feet of pipe and better met the Town's needs.<sup>18</sup> Therefore, the court concluded that the Town acted properly and within the scope of its discretionary authority when it awarded the contract to the higher bidder, Higgins.<sup>19</sup>

Griffin next contended that the Town was estopped from denying that a contract existed between the Town and Griffin because Griffin had justifiably relied on the mayor's request to order pipe as an indication that it had been awarded the construction contract to perform the work.<sup>20</sup> Again, the court disagreed.<sup>21</sup> The cost of the pipe materials ordered at the mayor's request was \$15,729, but by resolution of the Town council, the mayor's unilateral authority to obligate the Town was limited to \$2,000.<sup>22</sup> The court explained that section 45-6-5 of the Official Code of Georgia Annotated<sup>23</sup> ("O.C.G.A.") provides that "[a]ll persons dealing with a public officer" have a duty to "ascertain the extent of" the officer's conferred authority.<sup>24</sup> As the court noted, those who fail to ascertain the extent of an officer's authority do so at their own peril.<sup>25</sup> If Griffin had endeavored to ascertain the extent of the mayor's authority before ordering the pipe, Griffin would have been able to determine that the mayor lacked authority to bind the Town to a contract with Griffin for expanding its water infrastructure.<sup>26</sup> Therefore, the court held that Griffin's purported contract with the Town was unauthorized and unenforceable, and the limitation established by the Town council on the mayor's unilateral authority to bind the Town to a contract was unaffected by any purported prior course of conduct on the part of the Town or Griffin's alleged detrimental reliance on the mayor's request.<sup>27</sup>

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16. *Id.* at 177, 633 S.E.2d at 590 (citing O.C.G.A. §§ 36-91-21 to -22 (2006)).

17. *Id.*

18. *Id.* at 177-78, 633 S.E.2d at 590.

19. *Id.* at 178, 633 S.E.2d at 590.

20. *Id.*

21. *Id.*

22. *Id.*

23. O.C.G.A. § 45-6-5 (2002).

24. *Griffin Bros.*, 280 Ga. App. at 178, 633 S.E.2d at 590-91 (quoting *City of Atlanta v. Black*, 265 Ga. 425, 426, 457 S.E.2d 551, 552 (1995)).

25. *Id.*, 633 S.E.2d at 590.

26. *Id.*, 633 S.E.2d at 591.

27. *Id.* at 178-79, 633 S.E.2d at 591.

C. *Quantum Meruit and Official Immunity*

Authorization to commence construction work on a public works project was also an issue in *Brown v. Penland Construction Co.*<sup>28</sup> In the underlying case, Penland Construction Co. (“PCC”) constructed an indoor baseball hitting facility for a high school on land owned by the Walker County Board of Education (the “Board”). No written construction agreement was ever executed even though the facility was approved by the Board and built at the request of the former varsity baseball coach, Michael Brown. When the Board refused to pay, PCC sued Brown, the Board, the school district, and the school’s athletic booster club. The trial court denied the defendants’ motions for directed verdict, and a jury eventually awarded \$150,000 to PCC against Brown, the Board, and the school district, jointly and severally, under the theory of quantum meruit.<sup>29</sup> The court of appeals affirmed.<sup>30</sup> The Georgia Supreme Court then granted certiorari to determine whether the trial court erred in denying Brown’s motion for directed verdict, in which Brown argued he was not liable to PCC in quantum meruit.<sup>31</sup> The supreme court reversed in favor of Brown.<sup>32</sup>

As a threshold matter, the supreme court noted:

[A]ny suit against a public official in his or her individual capacity is barred by official immunity where the public official has engaged in discretionary acts that are within the scope of his or her authority, and the official has not acted in a wilful or wanton manner[,] with actual malice[,] or with the actual intent to cause injury.<sup>33</sup>

Here, the record contained no allegations that Brown acted in a willful, malicious, or wanton manner, or with any intent to cause injury, or that he had acted beyond the scope of his discretionary authority.<sup>34</sup>

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28. 281 Ga. 625, 641 S.E.2d 522 (2007).

29. *Id.* at 625, 641 S.E.2d at 523. Quantum meruit, meaning “as much as he has deserved,” is an equitable doctrine that permits a contractor to recover compensation for the reasonable value of its services under an implied contract. BLACK’S LAW DICTIONARY 1276 (8th ed. 2004).

30. *Brown*, 281 Ga. at 625, 641 S.E.2d at 523 (citing *Brown v. Penland Constr. Co.*, 276 Ga. App. 522, 623 S.E.2d 717 (2005)).

31. *Id.*

32. *Id.*

33. *Id.* at 625-26, 641 S.E.2d at 523 (citing *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994); GA. CONST. art. I, § 2, para. 9(d)).

34. *Id.* at 626, 641 S.E.2d at 523.

Therefore, the court held that a quantum meruit claim against Brown was barred by official immunity.<sup>35</sup>

In addition, the court concluded that even if Brown had acted beyond the scope of his authority, a quantum meruit action against him still could not prevail because the construction services provided by PCC were valuable to the Board, not Brown, and it was the Board, not Brown, who accepted the services.<sup>36</sup> Because Brown did not individually accept the services, he did not implicitly agree to pay for them.<sup>37</sup> Further, the court reasoned, Brown was not unjustly enriched because there was no evidence that he personally obtained any benefit from PCC's construction of the facility.<sup>38</sup> Because all of the benefits of PCC's services were conferred on the Board or the school, not Brown, the court ruled that there was no valid claim against Brown for quantum meruit or unjust enrichment.<sup>39</sup>

#### *D. Allocation of Risk in Contracts for Construction*

In *Holder Construction Group, LLC v. Georgia Tech Facilities, Inc.*,<sup>40</sup> Holder Construction Group ("Holder") and Georgia Tech Facilities ("GTF") entered into a guaranteed maximum price contract ("GMP") to construct a fast-track apartment project for Georgia Tech. As the construction manager at risk, Holder agreed to hold the trade contracts and to assume the risks attendant to large GMP construction projects, including cost overruns, construction deficiencies, and delays. After construction began, Holder encountered difficulties due to a dramatic increase in steel prices and late delivery of steel materials. Holder requested, but was denied, a time extension from GTF. Holder then filed a declaratory judgment action, contending it was due additional compensation under the contract, as well as a time extension. Holder later amended the complaint, seeking more than \$3 million under breach of contract, quantum meruit, and unjust enrichment theories. GTF filed a motion for summary judgment in response to Holder's claims. The trial court granted GTF's motion in part and denied it in part, and Holder appealed.<sup>41</sup>

On appeal, Holder asserted that both its time extension and acceleration cost claims resulted from delays caused by the industry-wide steel

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 627, 641 S.E.2d at 524.

39. *Id.*

40. 282 Ga. App. 796, 640 S.E.2d 296 (2006).

41. *Id.* at 796-97, 640 S.E.2d at 297.

crisis and that it was entitled to \$3.1 million in acceleration costs due to GTF's refusal to grant a time extension.<sup>42</sup> However, as the court of appeals pointed out, under Holder's construction contract's *force majeure* clause, late delivery of steel was not listed as a cause that entitled Holder to a time extension.<sup>43</sup> In fact, the contract expressly specified that late deliveries of materials, for reasons other than those set forth in the *force majeure* clause, did not justify a time extension.<sup>44</sup>

Holder argued, nonetheless, that there were other delays, apart from the steel crisis, that were caused by the owner and for which Holder should have been granted a time extension.<sup>45</sup> The court of appeals determined, however, that there was no evidence in the record that Holder had requested a time extension for any purported owner-caused delay prior to the steel crisis delay.<sup>46</sup> Further, the court of appeals noted that there was no evidence in the record that but for the other owner-caused delays, the price of steel would have remained stable and the steel would have been timely delivered.<sup>47</sup> The court noted an affidavit from Holder's operations manager stating that but for the owner-caused delays, Holder might have been able to procure adequate amounts of steel for the project before the price of steel changed so dramatically.<sup>48</sup> However, the court dismissed the affidavit as mere speculation that was insufficient to create a genuine issue of material fact.<sup>49</sup> The court of appeals also determined that there was no basis in the construction contract to award damages from the project owner to Holder due to the rise in steel prices because the contract contained no price escalation clause, and there was evidence Holder had already been paid for that claim from a construction contingency fund.<sup>50</sup>

Holder also claimed damages for allowances and \$1.7 million in allegedly unpaid change order requests. The trial court granted GTF summary judgment on these claims, finding that Holder was contractually obligated to follow the change order procedure as set out in its agreement but failed to do so for fifty-four out of sixty-seven change order requests.<sup>51</sup> On appeal, the court of appeals agreed that Holder had not met its burden to show by the record that it was entitled to

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42. *Id.* at 798, 640 S.E.2d at 297.

43. *Id.*, 640 S.E.2d at 298.

44. *Id.*

45. *Id.*

46. *Id.* at 799, 640 S.E.2d at 298.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 800, 640 S.E.2d at 299.

recover on those claims.<sup>52</sup> The court of appeals determined, however, that the trial court's order on those claims was internally inconsistent with respect to several change order requests.<sup>53</sup> The court accordingly identified this inconsistency as an issue that would need to be addressed before trial on Holder's remaining claims.<sup>54</sup>

Finally, Holder asserted that the trial court erred in granting summary judgment to GTF on Holder's quantum meruit claim. Holder argued that because the final scope of work was never added to the contract in accordance with a particular provision, there was no express contract governing the completion of the project.<sup>55</sup> The court of appeals disagreed, noting that Holder contemplated performing all of the work necessary to complete the project from the time of its bid, and thus the contract, not quantum meruit, governed the rights and responsibilities of the parties.<sup>56</sup>

## II. TORTS

### A. *Effect of Continuous Employment on Workers' Compensation Damages Arising out of an Automobile Accident*

Construction companies that temporarily house employees near geographically distant construction projects, rather than open a local office, should take note of the recent Georgia Supreme Court decision in *Ray Bell Construction Co. v. King*.<sup>57</sup> In the broadest application to date of Georgia's doctrine of continuous employment, the court held a contractor liable for workers' compensation dependency benefits after one of its relocated supervisors, who was on sick leave at the time, died as a result of injuries sustained in a Sunday afternoon traffic accident while returning from a purely personal mission.<sup>58</sup>

In 2006 the Georgia Court of Appeals affirmed the award of dependency benefits to the minor child of a deceased construction superintendent, Howard King ("King" or "decedent"), determining that at the time of his death, King was in the continuous employment of his employer, Ray Bell Construction Co. ("Ray Bell").<sup>59</sup> The Georgia Supreme Court granted Ray Bell's writ of certiorari to determine whether the court of appeals

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52. *Id.*

53. *Id.*

54. *Id.* at 801, 640 S.E.2d at 300.

55. *Id.*

56. *Id.* at 802, 640 S.E.2d at 300.

57. 281 Ga. 853, 642 S.E.2d 841 (2007).

58. *Id.* at 857, 642 S.E.2d at 845.

59. *Ray Bell Constr. Co. v. King*, 277 Ga. App. 144, 144-45, 625 S.E.2d 541, 542 (2006).

applied the proper two-prong test for a compensable injury, which the supreme court reiterated in a previous case: “[T]he injury by accident must arise in the course of employment and out of the course of employment, ‘two independent and distinct criteria . . . .’”<sup>60</sup> Unless an accidental injury satisfies both prongs, it is not compensable.<sup>61</sup>

The facts of *Ray Bell Construction* were that King, a Florida resident, lived in a company-provided apartment in Fayetteville, Georgia, and worked as a superintendent on a project site in Jackson, Georgia.<sup>62</sup> King’s employer, Ray Bell, also provided King with a company truck “as a term and condition of his employment.”<sup>63</sup> One Sunday, King was returning in the company truck from a personal mission delivering family furniture to a storage shed in Alamo, Georgia, when he was injured in a traffic accident. He died from his injuries the next day. An administrative law judge awarded dependency benefits to the decedent’s child, a decision later affirmed by the State Board of Workers’ Compensation (“State Board”), the Superior Court of Monroe County, and the Georgia Court of Appeals. The appellate division of the State Board held that King suffered a compensable injury because at the time of the accident, King, a continuous employment employee driving an employer-provided vehicle, had concluded his personal mission and was returning either to the project site or to his employer-provided housing.<sup>64</sup> The Georgia Supreme Court limited its review to the question of whether the decedent was covered by the doctrine of continuous employment if he was returning to the general vicinity of the job site, the employer-provided housing, or both.<sup>65</sup>

Under Georgia’s continuous employment or “traveling employee” doctrine, broad workers’ compensation coverage is afforded to an employee who must lodge near his or her employer’s job site and be available for work.<sup>66</sup> For purposes of the Workers’ Compensation Act,<sup>67</sup> such an employee is, “in effect, in continuous employment, day and night, . . . and activities performed . . . for the health and comfort of the employee, including recreational activities, arise out of and are in

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60. *Ray Bell Constr.*, 281 Ga. at 853-54, 642 S.E.2d at 843 (alteration in original) (quoting *Mayor of Savannah v. Stevens*, 278 Ga. 166, 166, 598 S.E.2d 456, 457 (2004)).

61. *See id.*

62. *Id.* at 853, 642 S.E.2d at 843.

63. *Id.*

64. *Id.* at 853-54, 642 S.E.2d at 843.

65. *Id.* at 854, 642 S.E.2d at 843.

66. *Id.* at 855, 642 S.E.2d at 844.

67. O.C.G.A. §§ 34-9-1 to -421 (2004 & Supp. 2007).

the course of the employment.”<sup>68</sup> “Workers’ compensation coverage is not afforded a traveling employee in continuous employment when the employee is engaged in a personal mission not related to the health and comfort of the employee.”<sup>69</sup> However, the continuous employment resumes when the employee turns back from his personal mission by returning to “the general proximity” of the place of employment “at a time he was employed to be in that general proximity.”<sup>70</sup>

Construing the evidence most favorably to King, the supreme court concluded that because King sustained his injuries in the Fayetteville-Jackson area, that meant that he had returned from his trip to the general proximity of the project site.<sup>71</sup> Therefore, his continuous employment coverage as a traveling employee had resumed whether he was returning to the employer’s job site or to his employer-provided lodging.<sup>72</sup>

In a spirited dissent, three justices asserted that the majority’s reliance on the “turning back” doctrine was misplaced because the doctrine was intended to apply only in those cases when an employee starts a business mission, deviates from the mission, and then returns to the mission.<sup>73</sup> According to the dissent, the doctrine has no application when the decedent’s mission (for example, moving family furniture to a storage shed in Alamo, Georgia) was “wholly personal *from its inception*.”<sup>74</sup> The dissent opined, “On a given mission, one cannot go back into or resume something one has never started.”<sup>75</sup> Of particular significance to the dissent was the fact that at the time of King’s accident, King was on sick leave from his employment.<sup>76</sup> Because King was neither on Ray Bell business at the time of the accident nor in the process of returning to the scope of his employer’s business, the undisputed facts, according to the dissent, demanded a determination

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68. *Ray Bell Constr.*, 281 Ga. at 855, 642 S.E.2d at 844 (quoting *Wilson v. Ga. Power Co.*, 128 Ga. App. 352, 354, 196 S.E.2d 693, 694 (1973)).

69. *Id.* at 856, 642 S.E.2d at 844 (citing *Thornton v. Hartford Accident & Indem. Co.*, 198 Ga. 786, 790, 32 S.E.2d 816, 819 (1945)).

70. *Id.* (quoting *London Guarantee & Accident Co. v. Herndon*, 81 Ga. App. 178, 181, 58 S.E.2d 510, 512 (1950)).

71. *Id.*, 642 S.E.2d at 845.

72. *Id.*

73. *Id.* at 859-60, 642 S.E.2d at 847 (Melton, J., dissenting) (citing *Lavine v. Am. Ins. Co.*, 179 Ga. App. 898, 899-900, 348 S.E.2d 114, 116 (1986)).

74. *Id.* at 860, 642 S.E.2d at 847 (emphasis added).

75. *Id.*

76. *Id.* at 861, 642 S.E.2d at 848.

that King's injuries did not arise out of or in the course of King's employment.<sup>77</sup>

*B. The "Borrowed Servant" Doctrine*

In *Southway Industrial Services, Inc. v. Boyd*,<sup>78</sup> the Georgia Court of Appeals held that the borrowed servant doctrine entitled Southway Industrial Services, Inc. ("Southway") to summary judgment.<sup>79</sup> A general contractor, Entech Corporation ("Entech"), leased from Southway a crane, along with a crane operator, to move large steel plates for a construction project.<sup>80</sup> The lease agreement provided that the crane operator would remain "under [Entech's] exclusive jurisdiction, supervision and control," that Entech "has the right to exercise complete direction and control over the Operator, that [Southway] will exercise no control over the Operator," and that Entech "has the exclusive right to discharge the Operator."<sup>81</sup>

One morning when the crane operator was moving the large steel plates into position, a strong gust of wind caused some of the steel plates to hit and injure Gary Boyd, a laborer. Boyd brought suit against Southway, claiming that Southway was responsible for the crane operator's alleged negligence under the theory of respondeat superior.<sup>82</sup> Southway moved for summary judgment on the basis that under Georgia law, the crane operator was a borrowed servant, and therefore, Southway could not be held vicariously liable for the operator's negligence. The trial court denied Southway's motion but issued a certificate for immediate appellate review of the decision.<sup>83</sup>

As set forth in the recent case *Tim's Crane & Rigging, Inc. v. Gibson*,<sup>84</sup> the borrowed servant rule is a widely recognized exception to the doctrine of respondeat superior.<sup>85</sup> Under the borrowed servant rule generally, "If a master lends his servants to another[,] then the master is not responsible for any negligence of the servant committed within the

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77. *Id.*

78. 283 Ga. App. 850, 642 S.E.2d 889 (2007).

79. *Id.* at 851, 642 S.E.2d at 890.

80. *Id.*

81. *Id.* at 851-52, 642 S.E.2d at 890.

82. *Id.* at 852, 642 S.E.2d at 891. Respondeat superior is a doctrine under which an employer is liable for injury to a person or property of another proximately resulting from acts of the employee done within the scope of his or her employment in the employer's service. BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).

83. *Southway*, 283 Ga. App. at 851, 642 S.E.2d at 890.

84. 278 Ga. 796, 604 S.E.2d 763 (2004).

85. *Id.* at 797, 604 S.E.2d at 765.

scope of his employment by the other.”<sup>86</sup> Under Georgia law, an employee is considered a borrowed servant if (1) the borrowing entity exercises complete control and direction over the employee for the occasion, (2) the lending entity has no such control, and (3) the borrowing entity has the exclusive right to discharge the employee.<sup>87</sup>

Here, all three elements were satisfied. First, the lease agreement between Entech and Southway expressly gave Entech the “right to exercise complete direction and control over the [crane] Operator.”<sup>88</sup> Second, the lease agreement explicitly provided that “[Southway] will exercise no control over the Operator.”<sup>89</sup> In fact, as the court pointed out, there were no Southway employees at the project site supervising the work of the crane operator at the time of the accident.<sup>90</sup> Finally, the lease agreement stated that Entech “has the exclusive right to discharge the Operator,” thereby establishing the third element of the borrowed servant analysis.<sup>91</sup> The third element was further supported by the testimony of Entech’s construction foreman who stated in his deposition that he believed he had the authority to discharge the crane operator if he felt the operator was not performing satisfactorily.<sup>92</sup> As a result, the court held that the crane operator was a borrowed servant, and Entech, rather than Southway, was liable for any alleged negligence on the part of the crane operator.<sup>93</sup>

### C. *Negligent Design and Limitation of Damages by Contract*

In *Lanier at McEver L.P. v. Planners & Engineers Collaborative, Inc.*,<sup>94</sup> the owner and developer of an apartment complex sued a professional engineering firm for negligent design after noticing pavement settling and cracking, erosion, and subsidence in a stormwater drainage system designed by the engineering firm. In a motion for

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86. *Southway*, 283 Ga. App. at 852, 642 S.E.2d at 891 (quoting *Staffing Res., Inc. v. Nash*, 218 Ga. App. 525, 525, 462 S.E.2d 401, 403 (1995)).

87. Henry L. Balkcom IV, Dana R. Grantham & Devin H. Gordon, *Construction Law*, 57 MERCER L. REV. 79, 91 (2005) (citing *Tim’s Crane*, 278 Ga. at 797, 604 S.E.2d at 765).

88. *Southway*, 283 Ga. App. at 853, 642 S.E.2d at 891; see also *Tim’s Crane*, 278 Ga. at 797, 604 S.E.2d at 765. In *Tim’s Crane*, the court stated that where the contract between two employers explicitly sets forth each element of the borrowed servant rule, “the contract between the parties is controlling as to their responsibilities thereunder.” 278 Ga. at 798, 604 S.E.2d at 765 (quoting *Montgomery Trucking Co. v. Black*, 231 Ga. 211, 213, 200 S.E.2d 882, 884 (1973)).

89. *Southway*, 283 Ga. App. at 853, 642 S.E.2d at 891.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. 285 Ga. App. 411, 646 S.E.2d 505 (2007).

partial summary judgment, the engineering firm, Planners & Engineers Collaborative, Inc. ("PEC"), argued that according to the terms of the parties' agreement, any damages determined to be owed by PEC should be limited to the amount of fees paid to PEC by the developer, Lanier at McEver, L.P. ("Lanier").<sup>95</sup> The parties' agreement contained a limitation on damages clause, which provided that "the total aggregate liability of PEC and its subconsultants to all those named shall not exceed PEC's total fee for services rendered on this project."<sup>96</sup> Finding this provision to be enforceable, the trial court granted PEC's motion.<sup>97</sup>

On appeal, Lanier argued that the damages limitation clause should be invalidated for a number of reasons. First, relying on the decision in *Emory University v. Porubiansky*,<sup>98</sup> Lanier argued that the clause was unenforceable and void as against public policy.<sup>99</sup> In *Porubiansky* an exculpatory clause in a contract for dental services was deemed to be void as against public policy because it essentially relieved the dentist of his duty to exercise reasonable care in contravention of a statute requiring dentists to exercise reasonable care and skill.<sup>100</sup> Unlike the clause at issue in *Porubiansky*, however, the court of appeals determined that the damages limitation clause at issue in this case did not release the engineer from liability but simply capped damages at the amount of fees paid under the contract.<sup>101</sup>

Lanier next argued that the clause violated O.C.G.A. section 13-8-2(b),<sup>102</sup> Georgia's nonproportional fault, anti-indemnity provision, which, at the time of the appeal, provided:

"[an] . . . agreement relative to the construction, alteration, repair, or maintenance of a building structure . . . purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee is against public policy and is void and unenforceable."<sup>103</sup>

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95. *Id.* at 412, 646 S.E.2d at 507.

96. *Id.*, 646 S.E.2d at 506.

97. *Id.* at 412-13, 646 S.E.2d at 507.

98. 248 Ga. 391, 282 S.E.2d 903 (1981).

99. *Lanier at McEver*, 285 Ga. App. at 413, 646 S.E.2d at 507 (citing O.C.G.A. § 13-8-2(a) (1981 & Supp. 2007)). According to O.C.G.A. section 13-8-2(a), "A contract which is against the [public] policy of the law cannot be enforced." O.C.G.A. § 13-8-2(a).

100. *Lanier at McEver*, 285 Ga. App. at 413, 646 S.E.2d at 507; *see also* O.C.G.A. § 51-1-27 (2000).

101. *Lanier at McEver*, 285 Ga. App. at 414, 646 S.E.2d at 507-08.

102. O.C.G.A. § 13-8-2(b) (1982 & Supp. 2007).

103. *Lanier at McEver*, 285 Ga. App. at 414, 646 S.E.2d at 508 (alterations in original) (brackets in original) (quoting O.C.G.A. § 13-8-2(b) (Supp. 2005)). Subsequently, O.C.G.A.

Lanier's argument was rejected based on the fact that the damages limitation clause did not exculpate PEC from any wrongful conduct but "merely limit[ed] the amount of damages Lanier [could] recover from PEC."<sup>104</sup>

The court was also unpersuaded by Lanier's final argument that the limitation of liability clause constituted an unenforceable liquidated damages penalty under Georgia law.<sup>105</sup> The court noted that although the parties agreed to a *limit* on the amount of damages recoverable from PEC, they did not agree to a fixed measure of damages.<sup>106</sup> The amount of damages would still have to be determined by the trier of fact.<sup>107</sup> The court of appeals therefore affirmed the judgment of the trial court.<sup>108</sup>

#### D. Duty To Warn

The Georgia Court of Appeals clarified the duty to warn in the case of *McKinney v. Regents of the University System of Georgia*.<sup>109</sup> David McKinney, an employee of LF Pipeline who was hired to install the gas line at a construction project at Georgia State University, was severely burned when the jackhammer he was using struck an electrical line.<sup>110</sup> He subsequently filed suit against the Regents of the University System of Georgia, the Turner Mitchell Joint Venture, and the electrical subcontractor, Mark Henderson, Inc. ("Henderson"), alleging they had "negligently failed to mark the location of the underground power lines, to notify him of the existence of the lines, and to keep the worksite safe."<sup>111</sup>

Although there was conflicting evidence regarding whether LF Pipeline had received notice of the buried electrical line, the supervisor for LF Pipeline testified at his deposition that a superintendent of either the water company or the plumbing contractor had notified him that power cables encased in concrete were installed between the transformer

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section 13-8-2(b) was amended in the 2007 Session of the Georgia General Assembly by House of Representatives Bill 136, which became effective July 1, 2007. Ga. H.R. Bill 136, § 1 (2007); see also *infra* Part V.

104. *Lanier at McEver*, 285 Ga. App. at 414, 646 S.E.2d at 508.

105. *Id.* at 414-15, 646 S.E.2d at 508.

106. *Id.* at 415, 646 S.E.2d at 508.

107. *Id.*

108. *Id.*

109. 284 Ga. App. 250, 643 S.E.2d 736 (2007).

110. *Id.* at 250, 643 S.E.2d at 737.

111. *Id.* at 252, 643 S.E.2d at 738.

and the building.<sup>112</sup> According to the supervisor, McKinney was present at this meeting but apparently “[was not] listening.”<sup>113</sup> At his deposition, McKinney testified that no one told him there were power lines encased in concrete between the transformer and the building.<sup>114</sup>

Based on the supervisor’s testimony, the court of appeals affirmed the trial court’s decision to grant the defendants’ motion for summary judgment.<sup>115</sup> Without deciding whether the defendants owed a duty to McKinney, the court held that any such duty was discharged by the fact that the supervisor had actual knowledge of the location of the electrical lines.<sup>116</sup> The discrepancy regarding “[t]he source of the warning [was] immaterial, as the sole issue [was] whether LF Pipeline had knowledge of the electrical lines.”<sup>117</sup> Moreover, the court held that whether McKinney himself had notice of the electrical lines was irrelevant because the supervisor’s knowledge of the hazard was sufficient to discharge any duty owed directly to McKinney.<sup>118</sup>

According to the court, the fact that a superintendent on the project had answered “okay” when McKinney informed him that he had planned to use a jackhammer did not render summary judgment improper.<sup>119</sup> “Having informed LF Pipeline of the existence of the electrical lines, the superintendent was not required to further instruct how to do the job or of the risks inherent in the use of its equipment.”<sup>120</sup>

The court of appeals also rejected McKinney’s argument that the cases relied upon by the trial court in reaching its decision<sup>121</sup> applied only to open and obvious dangers rather than hidden dangers such as the one at issue in this case.<sup>122</sup> The court disagreed that the holdings in the

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112. *Id.* at 251, 643 S.E.2d at 737.

113. *Id.* (brackets in original).

114. *Id.*, 643 S.E.2d at 738.

115. *Id.* at 252, 643 S.E.2d at 738.

116. *Id.* at 252-53, 643 S.E.2d at 738-39 (citing *Douberly v. Okefenokee Rural Elec. Membership Corp.*, 146 Ga. App. 568, 569-70, 246 S.E.2d 708, 709 (1978)).

117. *Id.* at 253, 643 S.E.2d at 739 (citing *Douberly*, 146 Ga. App. 568, 246 S.E.2d 708).

118. *Id.* at 252-53, 643 S.E.2d at 738 (citing *Long Leaf Indus. v. Mitchell*, 252 Ga. App. 343, 344, 556 S.E.2d 242, 244 (2001) (holding that an owner can satisfy its duty to warn of a hazard by notifying the employer of someone working on its premises)).

119. *Id.* at 253, 643 S.E.2d at 739.

120. *Id.*

121. The trial court relied upon *Douberly v. Okefenokee Rural Electric Membership Corp.*, 146 Ga. App. 568, 246 S.E.2d 708 (1978), and *Brown v. American Cyanamid & Chemical Corp.*, 372 F. Supp. 311 (S.D. Ga. 1973).

122. *McKinney*, 284 Ga. App. at 253, 643 S.E.2d at 739.

cited cases were restricted to open and obvious dangers only and refused to impose any such limitation upon them.<sup>123</sup>

Finally, McKinney unsuccessfully argued that the defendants had a separate duty to install red magnetic warning tape above the electrical lines.<sup>124</sup> Although McKinney contended that industry standards require the installation of warning tape in a situation such as this, he offered no support for that proposition.<sup>125</sup> He also failed to prove that a requirement to install warning tape was contained in the project specifications.<sup>126</sup> According to the court, even if such a showing had been made, summary judgment would nevertheless have been proper because the supervisor had actual knowledge of the location of the power lines.<sup>127</sup>

#### *G. Discretionary Acts of Public Officers and Qualified Immunity*

The court of appeals addressed the distinction between ministerial and discretionary acts of public officers and employees in *Golden v. Vickery*.<sup>128</sup> Several days prior to installing siding on a building, Southern Heritage Construction (“Southern”) notified the electric department of the City of Calhoun that the work was to occur near the city’s high-voltage lines and requested that the lines be de-energized. Because the lines carried power to a number of electricity users, the superintendent of the electric department, Larry Vickery, chose to install protective covering on the lines rather than de-energize them. The protective covering failed, and Charles Golden, an employee with Southern, suffered severe burns when the metal bucket lift he was using came into contact with the lines.<sup>129</sup>

Golden and his wife brought suit against Vickery and several other employees of the electric department to recover for personal injuries and loss of consortium. The trial court granted Vickery’s motion for summary judgment, finding his decision to use protective covering was a discretionary act entitling him to qualified immunity.<sup>130</sup>

“Qualified immunity protects individual public agents from personal liability for *discretionary actions* taken within the scope of their official

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123. *Id.*

124. *Id.* at 253-54, 643 S.E.2d at 739-40.

125. *Id.* at 254, 643 S.E.2d at 739.

126. *Id.* at 253-54, 643 S.E.2d at 739.

127. *Id.* at 254, 643 S.E.2d at 740.

128. 285 Ga. App. 216, 645 S.E.2d 695 (2007).

129. *Id.* at 217, 645 S.E.2d at 696.

130. *Id.* at 216-17, 645 S.E.2d at 696.

authority . . . .”<sup>131</sup> However, public agents “may be personally liable . . . for *ministerial* acts negligently performed or acts performed with malice or an intent to injure.”<sup>132</sup> The court of appeals described the distinction between ministerial and discretionary acts as follows:

A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.<sup>133</sup>

Although the court surveyed a number of cases in which the distinction between ministerial and discretionary acts was explored, its decision ultimately hinged on its interpretation of the High-Voltage Safety Act (“HVSA”).<sup>134</sup> The HVSA provides that, in the event the operator of a high-voltage line is given notice of work occurring within ten feet of the line, it may choose to de-energize the line or install protective covering, “whichever safeguard is deemed by the owner or operator to be feasible under the circumstances.”<sup>135</sup> This statute clearly gave Vickery the discretion to decide what protective measure to take.<sup>136</sup> The discretionary nature of Vickery’s decision was further supported by the fact that the Calhoun Electric Department had no policy or procedure for its employees to follow in deciding what protective measure to take.<sup>137</sup> Because Vickery exercised a discretionary function within the scope of his official authority, he was entitled to qualified immunity, and the trial court’s grant of summary judgment to Vickery was affirmed.<sup>138</sup>

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131. *Id.* at 217, 645 S.E.2d at 696 (emphasis added).

132. *Id.* (emphasis added) (citing *Middlebrooks v. Bibb County*, 261 Ga. App. 382, 385, 582 S.E.2d 539, 543 (2003)).

133. *Id.* at 217-18, 645 S.E.2d at 696.

134. *Id.* at 220-21, 645 S.E.2d at 698; O.C.G.A. § 46-3-33 (2004).

135. *Golden*, 285 Ga. App. at 221, 645 S.E.2d at 698 (quoting O.C.G.A. § 46-3-33).

136. *Id.*

137. *Id.* at 220-21, 645 S.E.2d at 698-99 (citing *Stone v. Taylor*, 233 Ga. App. 886, 506 S.E.2d 161 (1998) (holding that a county commissioner’s decision not to level the shoulder of a resurfaced road was a protected discretionary act because the county had no policy or procedure regarding leveling, and the decision necessarily involved the official’s judgment and deliberations)).

138. *Id.* at 221, 645 S.E.2d at 699.

## III. LIENS AND BONDS

A. *Payment Bond Not Substitute Collateral*

In *Sierra Craft, Inc. v. T.D. Farrell Construction*,<sup>139</sup> T.D. Farrell Construction ("Farrell") was hired as the general contractor on a construction project for Wal-Mart. Farrell subcontracted the fire sprinkler work to the VP Group ("VP"), which in turn purchased various materials for its work from Sierra Craft, Inc., doing business as Pacific Fire Protection ("Sierra"). Pursuant to its contract with Wal-Mart, Farrell obtained a payment bond in the full amount of its contract price from its surety, Travelers Casualty and Surety Company of America ("Travelers"). Sierra sent Farrell a notice to the contractor, which stated that it was providing materials to VP for a contract price of \$20,000 on the project. VP, however, subsequently failed to complete the sprinkler system or to pay Sierra in full for the materials it purchased. Sierra demanded payment from Farrell and Travelers in the amount of \$79,692.10 and filed a claim of lien against the project property for the same amount. Farrell then filed an action for a declaratory judgment that any claim or lien by Sierra was limited to \$20,000, the amount specified in its notice to contractor, and that the payment bond should serve as substitute collateral and discharge Sierra's lien. After a hearing, the trial court denied Sierra's motions to dismiss the defendants' declaratory judgment actions, ruling that Sierra's bond claim was limited to \$20,000 and that the bond discharged Sierra's materialmen's lien. Sierra appealed.<sup>140</sup>

The court of appeals affirmed the trial court's ruling that Farrell's declaratory judgment action was properly before the court, but disagreed that Sierra's claim was limited to the dollar amount estimated in its notice to contractor.<sup>141</sup> When they were filed, both Farrell's notice of commencement and Sierra's notice to contractor incorrectly stated that they were provided pursuant to the Georgia mechanic's and materialmen's lien statute, O.C.G.A. sections 44-14-361 and 44-14-361.5.<sup>142</sup> Both the trial court and the court of appeals concluded that the respective notices, though mislabeled, adequately complied with the notice requirements as contemplated by Georgia's payment bond statute,

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139. 282 Ga. App. 377, 638 S.E.2d 815 (2006).

140. *Id.* at 377-79, 638 S.E.2d at 817-18.

141. *Id.* at 377, 638 S.E.2d at 817.

142. *Id.* at 380, 638 S.E.2d at 819; O.C.G.A. §§ 44-14-361, -361.5 (2002 & Supp. 2007).

O.C.G.A. section 10-7-31.<sup>143</sup> A notice to contractor must include, among other things, “the contract price or anticipated value of the labor, material, machinery, or equipment to be provided.”<sup>144</sup> The court construed the statute and determined, however, that the payment bond statute does not limit future claims of a notifying supplier, such as Sierra, for three reasons: (1) the statute does not expressly limit bond claims to the amount stated in the notice to contractor as the contract price; (2) the intent of the statute is to provide notice to a contractor soon after work begins, not to provide the contractor with an exact value of the material or services to be provided; and (3) the statute does not contemplate any additional notice in the likely event that the contract price or value changes.<sup>145</sup>

Farrell asserted that it was also entitled to rely on the amount stated in Sierra’s notice as a fixed contract price under the principles of promissory or equitable estoppel.<sup>146</sup> The court was not persuaded, however, because Sierra’s notice made no actual promise to Farrell, only a representation of fact, and Farrell did not change its position in reliance thereon.<sup>147</sup> Moreover, the court remarked that Sierra’s notice did not ultimately cause VP’s alleged failure to perform or pay Sierra for materials.<sup>148</sup>

Next, Sierra contended that Farrell’s payment bond was not substitute collateral for the owner’s property and therefore did not effectively discharge Sierra’s lien.<sup>149</sup> The court of appeals agreed, holding that the lien was not discharged because Farrell’s payment bond did not fully satisfy the statutory requirements for a lien release bond set forth in O.C.G.A. section 44-14-364.<sup>150</sup> According to the court, the lien release statute contemplates that a lien release bond will be filed in connection with a pre-existing lien claim and be “specifically tailored to apply to that claim.”<sup>151</sup> Here, Farrell’s payment bond was obtained prior to Sierra filing its lien claim; therefore, it was not specifically tailored or designed to compensate Sierra for monies it was allegedly due.<sup>152</sup> In

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143. *Sierra Craft*, 282 Ga. App. at 381, 638 S.E.2d at 819; O.C.G.A. § 10-7-31 (2000 & Supp. 2007).

144. *Sierra Craft*, 282 Ga. App. at 381, 638 S.E.2d at 819 (quoting O.C.G.A. § 10-7-31(a)(4)).

145. *Id.*

146. *Id.* at 382, 638 S.E.2d at 819-20.

147. *Id.*, 638 S.E.2d at 820.

148. *Id.*

149. *Id.*

150. *Id.* at 384, 638 S.E.2d at 821; O.C.G.A. § 44-14-364 (2002 & Supp. 2007).

151. *Sierra Craft*, 282 Ga. App. at 383, 638 S.E.2d at 821.

152. *Id.* at 383-84, 638 S.E.2d at 821.

addition, the lien release bond statute requires that the bond be twice the amount of the particular lien claim.<sup>153</sup> Although Farrell's payment bond amount far exceeded twice the amount of Sierra's claim, the bond did not satisfy other substantive requirements of a lien release bond under O.C.G.A. section 44-14-364.<sup>154</sup> Thus, the bond did not discharge the real estate from Sierra's lien.<sup>155</sup>

Finally, Sierra claimed that the trial court erred in denying its motion for summary judgment on its payment bond claim, but the court of appeals disagreed.<sup>156</sup> Based on the affidavits and invoices provided, it appeared that VP may have removed some materials from the project that had previously been delivered and that VP's total contribution to the project might have been less than the amount claimed by Sierra.<sup>157</sup> As a result, the court concluded that a genuine issue of material fact existed about whether Sierra supplied the full \$79,692.10 worth of materials as claimed, and summary judgment was properly denied by the trial court.<sup>158</sup>

#### *B. Payment Bond v. Equitable Lien*

In *McArthur Electric, Inc. v. Cobb County School District*,<sup>159</sup> a general contractor, Manhattan Construction Co. ("Manhattan"), hired McArthur Electric, Inc. ("McArthur") to perform the electrical work on a Cobb County high school construction project. Manhattan provided a payment bond but subsequently declared McArthur to be in default and terminated its subcontract. In response, McArthur filed a federal lawsuit against Manhattan and its sureties under the payment bond. In addition, McArthur filed a complaint in Cobb County Superior Court, seeking an equitable lien on unpaid funds allegedly due from the school district to Manhattan. After the parties filed motions for summary judgment, the trial court granted summary judgment in favor of the school district, concluding that McArthur was not entitled to an equitable lien, and McArthur appealed.<sup>160</sup>

In Georgia, payment bonds are required for all construction contracts on public works construction projects when the estimated contract

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153. *Id.*

154. *Id.* at 384, 638 S.E.2d at 821.

155. *Id.*

156. *Id.*

157. *Id.* at 385, 638 S.E.2d at 821-22.

158. *Id.*

159. 281 Ga. 773, 642 S.E.2d 830 (2007).

160. *Id.* at 773, 642 S.E.2d at 831.

amount for work to be performed is greater than \$100,000.<sup>161</sup> Even though subcontractors and materialmen on public projects have no viable lien claim as an alternative remedy to recovering unpaid amounts from general contractors, the Georgia Supreme Court noted that a comparable statutory remedy is available “in the form of an action on the general contractor’s payment bond.”<sup>162</sup> In the event the requisite payment bond is not available, Georgia law permits an unpaid subcontractor or materialman to proceed directly against the owner.<sup>163</sup>

The court determined that with regard to this public works project, Manhattan had provided a proper payment bond that was available to McArthur, and it held that McArthur had an adequate remedy at law.<sup>164</sup> Therefore, McArthur was not entitled to bring a direct cause of action against the school district or to assert an equitable lien against funds held for payments otherwise due to the general contractor.<sup>165</sup> Significantly, nothing was presented to the court to suggest that McArthur’s legal remedy against the sureties on the payment bond was inadequate.<sup>166</sup> Finally, the court reasoned that permitting an equitable lien in addition to the legal remedy of an action on the payment bond would contravene Georgia’s pre-judgment garnishment statute, O.C.G.A. section 18-4-40,<sup>167</sup> as well as undermine the ability of public owners to avoid becoming entangled in pay disputes between the general contractor and its subcontractors.<sup>168</sup>

#### *E. Municipalities’ Obligation to Require Bonds*

In *Jacks v. City of Atlanta*,<sup>169</sup> the court of appeals reversed the trial court’s decision regarding the City of Atlanta’s (the “City”) obligation to require its contractors to obtain a bond on a project allegedly necessitated by an emergency.<sup>170</sup> Following an explosion of decomposing methane gas at an Atlanta city park, the City hired R&D Testing and Drilling (“R&D”) as its general contractor on the remediation project without requiring that R&D obtain a payment and performance bond. R&D then subcontracted with C&S Environmental Services (“C&S”),

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161. *Id.* at 774, 642 S.E.2d at 831 (citing O.C.G.A. § 36-91-90 (2006 & Supp. 2007)).

162. *Id.* at 773-74, 642 S.E.2d at 831.

163. *Id.* at 774, 642 S.E.2d at 831 (citing O.C.G.A. § 36-91-91 (2006 & Supp. 2007)).

164. *Id.*

165. *Id.*

166. *Id.* at 775, 642 S.E.2d at 832.

167. O.C.G.A. § 18-4-40 (2004).

168. *McArthur Electric*, 281 Ga. at 775, 642 S.E.2d at 832.

169. 284 Ga. App. 200, 644 S.E.2d 150 (2007).

170. *Id.* at 200, 644 S.E.2d at 151.

which in turn hired Lindsey Jacks. Although the project began in July 2001, it was halted two months later due to a lack of funds.<sup>171</sup>

Approximately a year and a half later, an auditor for the City discovered that R&D had been overpaid approximately one million dollars and that C&S had never been paid in full. In June 2003 the City agreed to pay \$373,529 to C&S in exchange for a release of claims, which provided that C&S would guarantee that each and every supplier, subcontractor, and subconsultant to C&S would be paid in full. One month later, Jacks notified the City that it was still owed \$183,587. The City did not respond, and Jacks filed suit against the City and others on August 28, 2003. Jacks later moved for partial summary judgment against the City, asserting that the City violated the Georgia Local Government Public Works Construction Law<sup>172</sup> by failing to require R&D to obtain a bond for the project and that, consequently, the City was liable to Jacks directly. In response, the City argued that in emergency situations such as this one, contractors were not required to provide bonds, and in any event, the City was not liable because Jacks had not complied with the statutory requirement to give ante litem notice within six months after his work was completed.<sup>173</sup>

The court noted that O.C.G.A. section 36-91-22(e)<sup>174</sup> creates an exception to a municipality's obligation to require bonds on public projects.<sup>175</sup> The statute provides in part: "The requirements of this chapter shall not apply to public works construction projects necessitated by an emergency; provided, however, that the nature of the emergency shall be described in the minutes of the governing authority."<sup>176</sup> The trial court found that a question of fact existed regarding the project's status as an emergency and denied Jacks's motion for summary judgment on the issue of whether the City was obligated to require R&D to obtain a bond for the project.<sup>177</sup>

On appeal, the court of appeals concluded that the City failed to meet the requirements of O.C.G.A. section 36-91-22(e) and reversed the trial court's denial of Jacks's summary judgment motion on this issue.<sup>178</sup> Under the statute, the City was required to describe the nature of the emergency "in the minutes of the governing authority."<sup>179</sup> Here, the

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171. *Id.* at 201, 644 S.E.2d at 151.

172. O.C.G.A. §§ 36-91-1 to -95 (2006 & Supp. 2007).

173. *Jacks*, 284 Ga. App. at 201, 644 S.E.2d at 151-52.

174. O.C.G.A. § 36-91-22(e) (2006).

175. *Jacks*, 284 Ga. App. at 202-03, 644 S.E.2d at 152.

176. *Id.* at 203, 644 S.E.2d at 152 (quoting O.C.G.A. § 36-91-22(e)).

177. *Id.* at 201, 644 S.E.2d at 152.

178. *Id.* at 203, 644 S.E.2d at 152-53.

179. *Id.* (quoting O.C.G.A. § 36-91-22(e)).

original city ordinance authorizing the project made no mention of an emergency, and even though a later ordinance passed more than four years after the methane explosion referred to the initial authorization as “emergency authorization for the clean-up,” the City failed to produce any meeting minutes contemporaneous with the project’s inception that described the project as an emergency.<sup>180</sup> The court required strict compliance with the meeting minutes requirement in the statute, explaining that its purpose is to protect subcontractors and material suppliers from loss by requiring the governing authority to prove that it “treated the situation as an emergency *at the time it occurred*.”<sup>181</sup>

The court of appeals also reversed the trial court’s decision that Jacks’s claim was untimely under the applicable ante litem statute, noting that “[t]he time within which the notice must be given in order to comply with the statute begins to run on the day the breach of the city’s duty occurred.”<sup>182</sup> Here, the court concluded that the date of the breach was June 3, 2003, when both the City and C&S refused to pay Jacks pursuant to their settlement and release of claims.<sup>183</sup> Because Jacks presented written notice to the City shortly thereafter, the court held that the claim was timely brought.<sup>184</sup>

#### IV. ARBITRATION

During the survey period, Georgia courts (1) expanded the role of trial courts in determining whether res judicata is an arbitrable issue under agreements to arbitrate, (2) broadened the application of res judicata to prior arbitration awards, and (3) restated the rule on what constitutes manifest disregard of the law under Georgia’s arbitration code.

##### A. *Arbitrability of the Res Judicata Effect of Prior Arbitration*

In Fall 2006 the long-running saga of *Bryan County v. Yates Paving & Grading Co.* (“*Yates II*”)<sup>185</sup> finally ended with the Georgia Supreme Court’s determination that despite the existence of an otherwise valid arbitration agreement, when parties do not expressly reserve the issue

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180. *Id.*, 644 S.E.2d at 152.

181. *Id.*, 644 S.E.2d at 153 (emphasis added).

182. *Id.* at 202, 644 S.E.2d at 152 (quoting *Schaefer v. Mayor of Athens*, 120 Ga. App. 301, 302, 170 S.E.2d 339, 341 (1969)).

183. *Id.*

184. *Id.*

185. 281 Ga. 361, 638 S.E.2d 302 (2006).

for arbitration, the procedural question of whether a claim is barred by res judicata is for the trial court, not the arbitrator, to decide.<sup>186</sup>

The underlying dispute arose out of a public works contract between Bryan County (the “County” or “owner”) and Yates Paving & Grading Co., Inc. (“Yates” or “contractor”) to construct and improve public roads in a local subdivision.<sup>187</sup> The contract included a broad arbitration clause which provided that “[a]ll claims, disputes and other matters in question between [the parties] arising out of, or relating to the Contract Documents . . . will be decided by arbitration.”<sup>188</sup> Prior to completion of the project, the owner ordered Yates to cease construction and hired a third party to complete the project. Yates filed a demand for arbitration and eventually obtained an award of money damages that was later confirmed by the trial court and affirmed on appeal. Thereafter, Yates filed a motion seeking a second arbitration relating to the issue of appellate attorney fees and costs that it incurred defending the original arbitration award. Three years later, the contractor filed a third demand for arbitration, asserting that the County’s wrongful conduct effectively rendered the contractor unable to bid on other governmental contracts requiring bonds.<sup>189</sup>

In its defense to the third demand for arbitration, the County asserted that the new claims were barred by res judicata because they could have been raised in the first arbitration. The trial court agreed and entered an injunction precluding arbitration.<sup>190</sup> Yates appealed, taking the position that under the terms of its contract with the County, the issue of res judicata was an issue for the arbitrators, not the trial court.<sup>191</sup> In a case of first impression, the court of appeals agreed that the res judicata effect of the final award issued in the first arbitration should be decided by the arbitrators, not the trial court, “because it arises out of the contract.”<sup>192</sup>

The Georgia Supreme Court granted certiorari and reversed, concluding that the language of the parties’ arbitration agreement did not indicate that the parties had expressly intended for only an

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186. *Id.* at 361, 638 S.E.2d at 302; *see also* Yates Paving & Grading Co. v. Bryan County (*Yates I*), 275 Ga. App. 347, 620 S.E.2d 606 (2005); Henry L. Balkcom IV, Dana R. Grantham & Devin H. Gordon, *Construction Law*, 58 MERCER L. REV. 55, 69 (2006); Dennis J. Webb, Jr., Henry L. Balkcom IV & Dana R. Grantham, *Construction Law*, 56 MERCER L. REV. 109, 140-41 (2004).

187. *Yates II*, 281 Ga. at 362, 638 S.E.2d at 303.

188. *Id.* at 363, 638 S.E.2d at 304 (alteration in original) (brackets in original).

189. *Id.* at 362, 638 S.E.2d at 303.

190. *Id.*

191. *Yates I*, 275 Ga. App. at 348, 620 S.E.2d at 608.

192. *Id.* at 350, 620 S.E.2d at 609.

arbitrator to resolve the issue of res judicata, “which is a principle of law that does not arise out of the contract documents.”<sup>193</sup> The court noted that despite the existence of an otherwise valid arbitration agreement, there was no contractual or other legal basis for making res judicata an arbitrable issue.<sup>194</sup> Because arbitration had already taken place on the issues previously raised, the court concluded there was “nothing left for an arbitrator to resolve relating to those same issues”—or in other words, no arbitrable claims remained that could be submitted to an arbitrator.<sup>195</sup> Moreover, the court reasoned that “forcing trial courts to submit procedurally barred matters to arbitration” undermined, rather than enhanced, the policy of the Georgia Arbitration Code.<sup>196</sup>

In a spirited dissent, three justices sided with the judgment of the court of appeals that “issues of procedural arbitrability are presumptively for the arbitrator,” not the trial court, to decide.<sup>197</sup> The dissent concluded that the majority’s holding ignored not only “the arbitration scheme established by the [Georgia General Assembly],” but also “the policy favoring arbitration of disputes, and the language of the parties’ arbitration agreement.”<sup>198</sup>

#### *B. Finality of Claims Decided in Prior Arbitration*

In *Dalton Paving & Construction, Inc. v. South Green Construction of Georgia, Inc.*,<sup>199</sup> the court of appeals, citing the rule enunciated above in *Yates II*, concluded that res judicata barred a subcontractor’s claims against a project’s owner, developer, and others despite the fact that none of the defendants other than the general contractor were parties to the prior arbitration proceeding between the general contractor and the subcontractor or signatories to the arbitration agreement.<sup>200</sup>

A contractor, South Green Construction of Georgia, Inc. (“South Green”), hired a subcontractor, Dalton Paving & Construction, Inc. (“Dalton Paving”), to perform grading, curb, and gutter work on an apartment construction project. After a dispute arose, the parties submitted their claims to arbitration in accordance with the arbitration clause in their contract.<sup>201</sup> Following a hearing, the arbitrator award-

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193. *Yates II*, 281 Ga. at 363, 638 S.E.2d at 304.

194. *Id.* at 364 n.3, 638 S.E.2d at 305 n.3.

195. *Id.* at 363, 638 S.E.2d at 304.

196. *Id.* at 364 n.3, 638 S.E.2d at 305 n.3; O.C.G.A. §§ 9-9-1 to -84 (2007).

197. *Id.* at 366, 638 S.E.2d at 306 (Hunstein, J., dissenting).

198. *Id.* at 364, 638 S.E.2d at 305.

199. 284 Ga. App. 506, 643 S.E.2d 754 (2007).

200. *Id.* at 510, 643 S.E.2d at 757.

201. *Id.* at 506, 643 S.E.2d at 755.

ed the subcontractor its contract balance, interest, and attorney fees, but denied its remaining claims, including its request that the arbitrator “pierce South Green’s corporate veil and ‘find that South Green and the Owner acted as a joint venture.’”<sup>202</sup>

After the arbitration was completed, the subcontractor sued the general contractor, owner, developer, and others in a five-count complaint and also requested that the court confirm the arbitrator’s award. The trial court granted the defendants’ motion for summary judgment on Dalton Paving’s claims regarding piercing the corporate veil and acting as a joint venture but denied the motion for summary judgment on Dalton Paving’s remaining conversion and conspiracy claims. All parties appealed.<sup>203</sup>

Under Georgia law, a judgment in a prior case or arbitration “shall be conclusive between the same parties and their privies.”<sup>204</sup> Privies include “all persons who are represented by the parties . . . [and] all who are in privity with the parties; the term privity denoting mutual or successive relationship to the same rights of property.”<sup>205</sup> Here, the court determined that even though South Green was technically the only defendant who was a party in the prior arbitration, for res judicata purposes, the remaining defendants were in privity with South Green as holders of an ownership interest in the apartment complex and third party beneficiaries of the subcontract.<sup>206</sup>

Under Georgia law, claim preclusion doctrines apply equally to arbitration and court proceedings, even if the subsequent cause of action includes additional relief or a new defendant is added.<sup>207</sup> Here, the subcontract required the parties to arbitrate “[a]ny claim arising out of or related to this Subcontract.”<sup>208</sup> Accordingly, the court of appeals determined that Dalton Paving was precluded by res judicata from raising in a separate court action any and all claims that it raised or could have raised during its prior arbitration.<sup>209</sup> Because Dalton Paving had raised the pierce the corporate veil and joint venture claims in its post-hearing brief in the prior arbitration, res judicata barred those claims as well as its new claims for conversion and conspiracy that

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202. *Id.* at 506-07, 643 S.E.2d at 755.

203. *Id.* at 507, 643 S.E.2d at 755-56.

204. *Id.* at 508, 643 S.E.2d at 756 (quoting O.C.G.A. § 9-12-40 (2006 & Supp. 2007)).

205. *Id.* (quoting *Bennett v. Cotton*, 244 Ga. App. 784, 785, 536 S.E.2d 802, 804 (2000)).

206. *Id.*

207. *Id.* (citing *Bennett*, 244 Ga. App. at 785, 536 S.E.2d at 804).

208. *Id.* at 509 n.2, 643 S.E.2d at 757 n.2.

209. *Id.* at 509, 643 S.E.2d at 757.

it was aware of but failed to assert in the prior arbitration proceedings.<sup>210</sup>

*C. Manifest Disregard of the Law*

In *Dan J. Sheehan Co. v. McCrory Construction Co.*,<sup>211</sup> the Georgia Court of Appeals addressed the recurring questions of who is a prevailing party and what constitutes manifest disregard of the law under Georgia's arbitration statute, O.C.G.A. section 9-9-13(b)(5).<sup>212</sup> In *Sheehan McCrory Construction Co.*, ("McCrory" or "contractor") entered into a subcontract with Dan J. Sheehan Co. ("Sheehan" or "subcontractor") to install tile on a construction project at the Oglethorpe Mall in Savannah, Georgia.<sup>213</sup> The construction agreement provided that "[t]he prevailing party in any . . . arbitration shall be entitled to recover, in addition to its damages, all costs and expenses incurred in connection with the arbitration," including attorney and arbitrator fees.<sup>214</sup> After a dispute arose between the parties, Sheehan demanded arbitration, claiming it was owed the outstanding balance of its subcontract, as well as additional monies for removing and replacing tile work. The subcontractor also sought attorney fees, interest, and costs. McCrory filed a counterclaim for a set-off of damages allegedly incurred during the tiling project.<sup>215</sup>

At the conclusion of the arbitration, the parties briefed the arbitrator on the proper legal standard for identifying the prevailing party, along with several other issues. The subcontractor's claims for additional monies and interest were denied, but the arbitrator ultimately awarded \$117,997 to Sheehan under its subcontract, less a \$16,062 set-off award to McCrory on its counterclaim. Even though the net award to Sheehan was larger, the arbitrator identified McCrory as the prevailing party and awarded it attorney fees and costs because Sheehan's final award was less than one-fourth of what McCrory had offered the subcontractor to settle the dispute. The trial court subsequently denied Sheehan's motion to vacate the arbitrator's award on the basis that he manifestly disregarded the law by naming McCrory as the prevailing party and considering evidence of a settlement offer.<sup>216</sup> The court of appeals affirmed, reiterating that under Georgia law, a trial court may not

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210. *Id.* at 510, 643 S.E.2d at 757.

211. 284 Ga. App. 159, 643 S.E.2d 546 (2007).

212. *Id.* at 161, 643 S.E.2d at 548; O.C.G.A. § 9-9-13(b)(5) (2007).

213. *Dan J. Sheehan Co.*, 284 Ga. App. at 160, 643 S.E.2d at 547.

214. *Id.*

215. *Id.*, 643 S.E.2d at 547-48.

216. *Id.* at 160-61, 643 S.E.2d at 548.

vacate an arbitrator's award on the ground of manifest disregard of the law unless the claimant first proves that the allegedly disregarded law was well-defined, explicit, and clearly applicable, and the arbitrator was aware of the law but deliberately chose to ignore it.<sup>217</sup> Under both federal and Georgia law, "[A]n error in interpreting the applicable law does not constitute manifest disregard. The applicable law must have been deliberately ignored."<sup>218</sup>

The court concluded that because both parties recovered damages, both effectively were prevailing parties, and the only relevant question was whether the arbitrator's decision that the party who recovered the least damages was the prevailing party resulted from a deliberate, manifest disregard of the law.<sup>219</sup> Here, the court determined that the arbitrator had used the correct prevailing party standard in reaching his decision, namely that the arbitration award "[did] not materially alter the legal relationship between the parties beyond that which was previously offered by McCrory."<sup>220</sup> Because the arbitrator used the correct legal standard in rendering his decision, the award was not the result of a manifest disregard of the applicable law.<sup>221</sup>

Finally, the court pointed out that judicial review of arbitration awards is statutorily limited in Georgia.<sup>222</sup> In addition, Sheehan's failure to include a transcript of the arbitration proceedings meant that Sheehan could not meet its burden to show by the record that the arbitrator manifestly disregarded the law.<sup>223</sup>

## V. LEGISLATION

There was significantly less construction-related legislation enacted during the survey period than in recent years. The Georgia General Assembly, however, did make a number of changes and amendments to existing statutes, the most notable of which are discussed briefly below,

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217. *Id.* at 161, 643 S.E.2d at 548 (citing *Johnson Real Estate Invs., L.L.C. v. Aqua Industrials, Inc.*, 282 Ga. App. 638, 639-40, 639 S.E.2d 589, 592-93 (2006)).

218. *Id.* (quoting *Johnson Real Estate*, 282 Ga. App. at 640, 639 S.E.2d at 593); *see also* *B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006).

219. *Dan J. Sheehan Co.*, 284 Ga. App. at 161, 643 S.E.2d at 548.

220. *Id.* at 162, 643 S.E.2d at 549.

221. *Id.*

222. *Id.*; *see also Johnson Real Estate*, 282 Ga. App. at 639-40, 639 S.E.2d at 593. The court in *Johnson Real Estate* stated that "O.C.G.A. [section] 9-9-13(b) of the Georgia Arbitration Code lists five grounds for vacating arbitration awards, including manifest disregard of the law, and these statutory grounds provide the exclusive bases for vacating an arbitration award under Georgia law." 282 Ga. App. at 639-40, 639 S.E.2d at 593 (citing O.C.G.A. § 9-9-13(b)).

223. *Dan J. Sheehan Co.*, 284 Ga. App. at 163, 643 S.E.2d at 549.

along with highlights of some of the key provisions of the recently enacted residential and general contractor licensing scheme, which, as amended, is scheduled to take effect next summer.

#### A. *Contractor Licensing*

The date on which the new licensing requirements for residential and general contractor licensing, sanctions, and related consequences will become effective and enforceable was extended from January 1, 2008 to July 1, 2008.<sup>224</sup> As currently drafted, the statutory definitions of contractor and contracting are extremely broad and include not only performing construction work for an owner but also offering to perform construction or construction management services for an owner by submitting a bid or proposal.<sup>225</sup>

After July 1, 2008, as a matter of public policy, if an unlicensed contractor enters into a contract for the performance of work for which a residential or general contractor license is required and not otherwise exempted, that contract is unenforceable.<sup>226</sup> Under those circumstances, the unlicensed contractor is also precluded from recovering on any lien or bond claim for labor, services, or materials provided under the contract or any amendment to the contract.<sup>227</sup> The subsection, however, does not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor or provide any defense to a claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed.<sup>228</sup>

Once the licensing deadline has passed, unlicensed persons who engage in construction activities in Georgia without first obtaining a license will also be subject to criminal penalties, fines, or both.<sup>229</sup> In addition, architects and engineers will also be subject to criminal penalties, fines, or both for knowingly recommending that an owner award a construction contract to an unlicensed contractor.<sup>230</sup>

Persons seeking licensure and exemption from examination under O.C.G.A. section 43-41-8(a)<sup>231</sup> may submit an application, including all required proof of the basis for exemption from examination, starting

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224. Ga. S. Bill 115, § 9, Reg. Sess. (2007) (amending O.C.G.A. § 43-41-17 (2005 & Supp. 2007)).

225. O.C.G.A. §§ 43-41-2(3) to (4) (2005 & Supp. 2007).

226. O.C.G.A. § 43-41-17(b).

227. *Id.*

228. *Id.*

229. O.C.G.A. § 43-41-12(a) (2005 & Supp. 2007).

230. *Id.* § 43-41-12(b).

231. O.C.G.A. § 43-41-8(a) (2005 & Supp. 2007).

January 1, 2007.<sup>232</sup> The exemption provisions, however, are poorly drafted and do not give much, if any, guidance on what types of proof must be submitted.<sup>233</sup> For example, the statute requires that applicants seeking exemption from examination must prove that they have “successfully engaged” in construction projects in Georgia by giving “evidence of three successful projects located in Georgia which were successfully completed over the period of five years immediately prior to the time of application.”<sup>234</sup> In addition to other deficiencies, the terms “successful” and “successfully completed” are not defined in the statute.

Contractors holding a current and valid license from another state that requires contractors to be licensed may apply for licensure by way of reciprocity, provided that a similar privilege is afforded to Georgia residents by their licensing state.<sup>235</sup>

As currently enacted, the licensing scheme establishes a joint system of licensing whereby each business organization applying for licensure must also have at least one licensed qualifying agent (“QA”) “who is actually engaged by ownership or employment in the practice of residential or general contracting for such business organization or entity and provides adequate supervision and is responsible for the projects of such business organization or entity.”<sup>236</sup> The QA must be an individual, not a company, but the QA may serve in that capacity for multiple contracting firms.<sup>237</sup> The QA by definition must “supervise, direct, manage, and control all of the contracting activities” of the business organization,<sup>238</sup> as well as supervise “all operations of the business organization.”<sup>239</sup> The QA must be responsible for “all field work at all sites,” and is also responsible for financial matters for each project and the business organization as a whole.<sup>240</sup> The QA is required to be “actually engaged” in the business organization’s contracting,<sup>241</sup> and must also hold final approval authority for all construction work, all contracts, contract performance, the financial affairs, and all other business matters of the business organization.<sup>242</sup>

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232. O.C.G.A. § 43-41-17(a).

233. See O.C.G.A. § 43-41-8(a)(2).

234. *Id.*

235. O.C.G.A. §§ 43-41-5, -8(3) (2005 & Supp. 2007).

236. O.C.G.A. § 43-41-9(a) (2005 & Supp. 2007).

237. *Id.*

238. O.C.G.A. § 43-41-2(7).

239. O.C.G.A. § 43-41-9(h).

240. *Id.*

241. *Id.* § 43-41-9(a).

242. *Id.* § 43-41-9(b), (h).

When a firm has more than one QA, the statute mandates that all QAs are

jointly and equally responsible for supervision of all operations of the business organization, for all field work at all sites, and for financial matters within the State of Georgia, both for the organization in general and for each specific job for which his or her license was used to obtain the building permit.<sup>243</sup>

This scheme raises a number of practical but unanswered questions, such as how multiple QAs will be permitted to allocate supervisory responsibilities, how final approval authority can be shared, and so on.

The spectre of unanticipated liability looms large. Although the statute attempts to limit a QA's legal liability to the extent to which the individual would ordinarily be subject, the litany of statutory responsibilities suggests that in actual practice there may be significantly increased liability for persons serving as a QA.

Contractors should also be aware that the Board's decision to deny a license or a request for reinstatement of a revoked license appears to be conclusive; the statute currently provides for no formal hearing or appeal rights under the Georgia Administrative Procedure Act<sup>244</sup> to contractors whose application for licensure or license by reciprocity is denied.<sup>245</sup> Contractors may be entitled to appear before the Board informally to challenge a ruling, but the statute as currently enacted does not provide any formal right or process to challenge an unfavorable Board decision.<sup>246</sup> Questions about procedure and other issues will need to be worked out as the licensing requirements begin to take effect and the Board fully assumes the powers and duties of its delegated responsibilities.

### *B. Contractor Licensing Board*

The number of members appointed by the Governor to the State Licensing Board for Residential and General Contractors was increased from fourteen to fifteen, and the date by which residential and general contractor members must be licensed was extended to January 1, 2008.<sup>247</sup>

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243. *Id.* § 43-41-9(h).

244. O.C.G.A. §§ 50-13-1 to -44 (2006 & Supp. 2007).

245. O.C.G.A. § 43-41-5(f).

246. *Id.*

247. Ga. H.R. Bill 224, § 1, Reg. Sess (2007) (amending O.C.G.A. § 43-41-3(a) to -3(c) (2005)).

*C. Georgia's Right to Repair Act*

Even though the July 1, 2008 deadline for contractor licensing has not yet arrived, Georgia's mandatory dispute resolution framework for residential construction defect claims, known colloquially as Georgia's Right to Repair Act,<sup>248</sup> was amended in 2006 to limit its application to only those contractors who are required to be licensed under the new Georgia contractor licensing law.<sup>249</sup>

*D. Indemnification*

Georgia's "anti-indemnity" statute, O.C.G.A. section 13-8-2,<sup>250</sup> was modified in part but remains a nonproportional fault provision that voids, for public policy reasons, any construction contract provision that requires one party to indemnify, hold harmless, insure, or defend the other party for personal injury or property losses or damages arising from the indemnitee's sole negligence.<sup>251</sup> The prior language that permitted one party, by contract, to shift its loss to an insurance company regardless of which party was at fault was deleted and replaced by new language that allows one party, by contract, to require another party to obtain project-specific insurance.<sup>252</sup> The statute, as amended, applies to all contracts entered into, extended, or renewed on or after July 1, 2007.<sup>253</sup>

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248. O.C.G.A. §§ 8-2-35 to -43 (2004 & Supp. 2007).

249. *Id.*; Ga. S. Bill 115, § 9, Reg. Sess. (2007) (amending O.C.G.A. § 43-41-17).

250. O.C.G.A. § 13-8-2 (1981 & Supp 2007).

251. Ga. H.R. Bill 136, § 1, Reg. Sess. (2007) (amending O.C.G.A. § 13-8-2(b)).

252. *Id.*

253. *Id.*