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# Construction Law

by Frank O. Brown, Jr.\*

## I. INTRODUCTION

This Article focuses on noteworthy construction law decisions by Georgia appellate courts between June 1, 2007 and May 31, 2008 and significant construction-related legislation enacted by the Georgia General Assembly during the same period.

## II. MECHANICS' AND MATERIALMEN'S LIENS

### A. 2008 Statutory Amendments

Significant amendments to Georgia's mechanics' and materialmen's lien (M & M Lien) laws were passed by the 2008 Georgia General Assembly.<sup>1</sup> The amendments will come into effect on March 31, 2009.<sup>2</sup> All parties involved in the construction process, including attorneys, need to become familiar with these amendments.

1. *Deadline for Filing M & M Liens*: The amendments set the period for filing an M & M Lien at ninety days<sup>3</sup> rather than the somewhat confusing "three months" period under the current law.<sup>4</sup> Like the three-month period, the new ninety-day period is triggered by the completion of the work, services, materials, or machinery.<sup>5</sup>

2. *Interpretation of Deadlines*: The amended law *legislatively* settles two time calculation issues not expressly addressed by the current

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1. Ga. S. Bill 374, Reg. Sess. (2008) (amending O.C.G.A. §§ 44-14-360 to -67 (2002)).
2. *Id.* § 8.
3. *Id.* § 2 (amending O.C.G.A. § 44-14-361.1(a)(2) (2002)).
4. O.C.G.A. § 44-14-361.1(a)(2).
5. Ga. S. Bill 374, § 2 (amending O.C.G.A. § 44-14-361.1(a)(2)).

statute.<sup>6</sup> First, in calculating M & M Lien law deadlines, such as the three months mentioned above, the first day counted is the one following the event and not the date of that event.<sup>7</sup> For example, if work was completed on June 1, 2008, then the first day counted would be June 2, 2008. Second, if a deadline expires on a non-business day (a Saturday, Sunday, or legal holiday), the deadline is automatically extended to the next business day.<sup>8</sup>

3. *Rules for Mailing M & M Lien to Owner and/or Contractor:* Under the amended law, a lien claimant must mail a copy of the M & M Lien to the owner of the lien property within two business days after the M & M Lien is filed<sup>9</sup> rather than at the time of filing, as required by the current law.<sup>10</sup> It can be mailed to the principal office address or, for companies registered with the Georgia Secretary of State, to the registered agent address.<sup>11</sup> If an owner's address cannot be determined, a copy must be mailed within that two-day period to the general or pertinent prime contractor as agent for the owner.<sup>12</sup> Whenever the general or pertinent prime contractor has filed a Notice of Commencement, a copy must also be mailed to the contractor within two days at its address listed on that notice.<sup>13</sup> All copies must be mailed by registered or certified mail or statutory overnight delivery.<sup>14</sup>

4. *Deadline for Filing Lien Action:* The amended law changes the date a lien claimant must normally file a legal proceeding *against the party indebted to it* (not a lien foreclosure suit against the property owner) to keep a lien alive.<sup>15</sup> Instead of the current period of twelve months after the date that work or material was last provided,<sup>16</sup> the period will be 365 days from the date the lien was filed.<sup>17</sup> The amendments also clarify that the legal proceeding necessary to continue the lien, which the amended law defines as a "lien action,"<sup>18</sup> need not be a

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6. *See id.* § 7.

7. *Id.*

8. *Id.*

9. *Id.* § 2 (amending O.C.G.A. § 44-14-361.1(a)(2)).

10. O.C.G.A. § 44-14-361.1(a)(2).

11. Ga. S. Bill 374, § 2 (amending O.C.G.A. § 44-14-361.1(a)(2)).

12. *Id.*

13. *Id.*

14. *Id.*

15. *See id.*

16. O.C.G.A. § 44-14-361.1(a)(3).

17. Ga. S. Bill 374, § 2 (amending O.C.G.A. § 44-14-361.1(a)(3)).

18. *Id.* § 1 (amending O.C.G.A. § 44-14-360 (2002)).

lawsuit, but can, when appropriate, be a demand for binding arbitration or a bankruptcy proof of claim.<sup>19</sup>

5. *Deadline for Filing Notice of Lien Action:* Until the amendments become effective, a lien claimant must file a notice of a legal proceeding in the real estate records of the county in which the liened property is located within fourteen days after that proceeding is filed.<sup>20</sup> After the effective date of the amendments, that notice must be filed within thirty days after the lien action is filed.<sup>21</sup>

6. *Manner of Mailing Project Notice to Contractor:* The amended law does not change the requirement that if a Notice of Commencement has been filed, a potential M & M Lien claimant that is not in privity of contract with the general or prime contractor must send a Notice to Contractor to the owner and contractor to preserve its inchoate lien rights.<sup>22</sup> Under the amended law, however, that notice must be sent by registered or certified mail or statutory overnight delivery.<sup>23</sup>

7. *Forms for Valid Lien Waiver:* The amended law changes the mandatory content of legally effective interim and final lien waiver forms.<sup>24</sup> It also extends the period in which someone signing an M & M Lien waiver can file an Affidavit of Nonpayment from thirty to sixty days after the lien waiver is signed and changes the form of that affidavit.<sup>25</sup> An Affidavit of Nonpayment states that the payment for which the lien waiver was signed was not made.<sup>26</sup>

8. *Circumstances that Void Liens:* Under current law, if an M & M Lien claimant files a lien but then does not pursue a timely legal proceeding against the debtor or does not timely file a notice of that proceeding in the county real estate records, the M & M Lien does not automatically become void.<sup>27</sup> Instead, the property owner must file a request for it to be marked void and take a number of other steps.<sup>28</sup> The amended law automatically voids an M & M Lien 395 days after it is filed unless a notice of commencement of lien action has been filed within that time.<sup>29</sup>

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19. *Id.*

20. O.C.G.A. § 44-14-361.1(a)(3).

21. Ga. S. Bill 374, § 2 (amending O.C.G.A. § 44-14-361.1(a)(3)).

22. *See* O.C.G.A. § 44-14-361.5(c) (2002 & Supp. 2008).

23. Ga. S. Bill 374, § 3 (amending O.C.G.A. § 44-14-361.5(c) (2002)).

24. *See id.* § 5 (amending O.C.G.A. §§ 44-14-366(c)-(d) (2002)).

25. *Id.* (amending O.C.G.A. § 44-14-366(f)(2)(C) (2002)).

26. *Id.*

27. O.C.G.A. § 44-14-367(a) (2002).

28. *Id.*

29. Ga. S. Bill 374, § 6 (amending O.C.G.A. § 44-14-367(a)). The 395-day period is the sum of the 365-day period for filing a lien action and the thirty-day period for filing notice

9. *Mandatory Statement in M & M Liens:* In order to provide clear notice of the automatic voiding of an M & M Lien after 395 days, any lien filed after March 31, 2009 must include the following statement in at least twelve point bold font: "This claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action is filed in that time period."<sup>30</sup> The absence of that statement prevents the lien from even being filed and, if mistakenly filed, from being valid.<sup>31</sup>

10. *Manner of Contesting Liens:* Significantly, under the amended law, an owner or contractor may elect to shorten the time for the M & M Lien claimant to file a lien action, which is normally 365 days from the lien filing date, by filing a Notice of Contest of Lien in the superior court clerk's office.<sup>32</sup> That notice, which states that the owner or contractor contests the M & M Lien, must be substantially similar to the form provided in the amended law.<sup>33</sup> It must also be served on the lien claimant within seven days after the Notice of Contest of Lien is filed.<sup>34</sup> Service is deemed complete upon mailing by registered or certified mail or statutory overnight delivery to the address noted on the face of the lien.<sup>35</sup> If the lien claimant does not file a Notice of Commencement of Lien Action within ninety days after the filing of the Notice of Contest of Lien, the M & M Lien is extinguished.<sup>36</sup> Importantly, proof of delivery must also be filed in the superior court clerk's office.<sup>37</sup> However, when it must be filed is unclear. Subsection (a) seems to require that the proof of delivery be filed with the Notice of Contest of Lien since it states that the Notice of Contest of Lien must be filed "along with proof of delivery upon the lien claimant."<sup>38</sup> But as noted above, subsection (b) allows service to occur within seven days after the Notice of Contest of Lien is filed.<sup>39</sup> Perhaps, "along with" does not mean contemporaneously but instead simply means that both documents must be recorded. It is more likely, however, that subsections (a) and (b) are inconsistent and will need to be amended. Until that time, it may be prudent to serve the Notice of Contest of Lien on the same date as filing

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of the action.

30. *Id.*

31. *Id.*

32. *Id.* § 7 (adding O.C.G.A. § 44-14-368(a) (Supp. 2008)).

33. *Id.*

34. *Id.* (adding O.C.G.A. § 44-14-368(b)).

35. *Id.*

36. *Id.* (adding O.C.G.A. § 44-14-368(c)).

37. *Id.* (adding O.C.G.A. § 44-14-368(a)).

38. *Id.*

39. *Id.*

it and to contemporaneously file a short affidavit of counsel swearing to that service and attaching a copy of the envelope sent by registered or certified mail or statutory overnight delivery.

### B. Suit Deadline

Counsel for construction equipment suppliers should note *Central Atlanta Tractor Sales, Inc. v. Athena Development, LLC*.<sup>40</sup> The opinion also provides guidance to counsel for general contractors, owners, sureties, and all M & M Lien claimants. Central Atlanta Tractor Sales, Inc. (CATS) rented construction equipment to general contractor West Georgia Excavation, Inc. (WGE), which WGE used on a project for Athena Development, LLC (Athena). The equipment was not used for the project on or after February 16, 2004. On March 12, 2004, within the three-month period for filing liens, CATS filed its lien. Thereafter, Athena removed the lien from the project with a discharge bond obtained from Accredited Surety & Casualty Company, Inc. (Accredited Surety).<sup>41</sup>

On February 16, 2005, CATS filed suit against WGE, exactly one year from the date on which the equipment was returned to CATS. CATS obtained a default judgment against WGE and then filed suit against Athena and Accredited Surety to recover on the discharge bond. Athena and Accredited Surety moved for summary judgment, contending that CATS's suit against WGE had not been filed within the twelve-month period specified in Official Code of Georgia Annotated (O.C.G.A.) § 44-14-361.1(a)(3).<sup>42</sup> This subsection states that to maintain an effective lien, a lien claimant must file suit against its debtor "within 12 months from the time the same shall become due."<sup>43</sup>

In opposition to the motion, CATS argued that WGE's debt had not become due until the equipment had been inspected by CATS for damage, which occurred on February 18, 2004, two days after its last use on the project. Not until then, CATS argued, could the amount owed by WGE be determined and thus not until then had WGE's debt become due.<sup>44</sup> The trial court granted Athena's and Accredited Surety's motion for summary judgment, and CATS appealed.<sup>45</sup>

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40. 289 Ga. App. 355, 657 S.E.2d 290 (2008).

41. *Id.* at 356, 657 S.E.2d at 292.

42. *Id.* at 355-56, 657 S.E.2d at 291-92; O.C.G.A. § 44-14-361.1(a)(3).

43. O.C.G.A. § 44-14-361.1(a)(3).

44. *Cent. Atlanta Tractor Sales*, 289 Ga. App. at 356-57, 657 S.E.2d at 292.

45. *Id.* at 355, 657 S.E.2d at 291-92.

The Georgia Court of Appeals affirmed,<sup>46</sup> holding that the inspection period did not extend the beginning of the twelve-month period in O.C.G.A. § 44-14-361(a)(3).<sup>47</sup> To hold otherwise, it reasoned, would create two problems.<sup>48</sup> One problem would be inconsistent commencement dates for the calculation of the three-month period for filing liens and the twelve-month period for filing suit against the debtor.<sup>49</sup> Because, according to the court, the same commencement date should apply and O.C.G.A. § 44-14-361.1(a)(2) makes it clear that the three-month period begins when the equipment “is furnished,” (or last furnished), the twelve-month period should begin at the same time.<sup>50</sup> The second problem the court believed would be created by accepting CATS’s argument is that CATS’s lien rights would be preserved for an indefinite time until the inspection occurred.<sup>51</sup> That would be unfair to property owners, secured creditors, and sureties and would be contrary to the rule of strict statutory construction against M & M Lien claimants.<sup>52</sup>

Significant as a reminder of earlier decisions, although only dicta in this case, the court stated that the last date the equipment was furnished is the controlling date for commencement of the three-month and twelve-month periods, “even if the parties agree on a different due date.”<sup>53</sup> Thus, a supplier, as well as other lien claimants, cannot contractually extend the lien commencement date. Instead, the commencement date is statutorily set.

### C. Notice of Commencement

At issue in *General Electric Co. v. North Point Ministries, Inc.*<sup>54</sup> was the degree to which a Notice of Commencement had to meet the content requirements of O.C.G.A. § 44-14-361.5(b)<sup>55</sup> to defeat an M & M Lien claim for which no Notice to Contractor had been provided.<sup>56</sup> Under O.C.G.A. § 44-14-361.5(b), a property owner, its agent, or a contractor having a contract with the owner is required to file a Notice of Commencement in the superior court of the county where the subject project

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46. *Id.*, 657 S.E.2d at 292.

47. *Id.* at 358, 657 S.E.2d at 293.

48. *Id.*

49. *Id.*

50. *Id.* (quoting O.C.G.A. § 44-14-361.1(a)(2)).

51. *Id.*

52. *Id.* at 358-59, 657 S.E.2d at 293-94.

53. *Id.* at 358, 657 S.E.2d at 293.

54. 289 Ga. App. 382, 657 S.E.2d 297 (2008).

55. O.C.G.A. § 44-14-361.5(b) (2002 & Supp. 2008).

56. *Gen. Elec.*, 289 Ga. App. at 384, 657 S.E.2d at 299.

is located within fifteen days after the contractor physically commences work on the property.<sup>57</sup> According to that code subsection, the Notice of Commencement “shall include” the following:

- (1) The name, address, and telephone number of the contractor; (2) The name and location of the project being constructed and the legal description of the property upon which the improvements are being made;
- (3) The name and address of the true owner of the property;
- (4) The name and address of the person other than the owner at whose instance the improvements are being made, if not the true owner of the property;
- (5) The name and the address of the surety for the performance and payment bonds, if any; and
- (6) The name and address of the construction lender, if any.<sup>58</sup>

A Notice of Commencement is required in order to provide information necessary for a potential M & M Lien claimant to send a Notice to Contractor and to file an M & M Lien.

If a Notice of Commencement “setting forth therein the information required”<sup>59</sup> in O.C.G.A. § 44-14-361.5(b) has been filed, then pursuant to O.C.G.A. § 44-14-361.5(a),<sup>60</sup> a potential lien claimant not in privity of contract with the contractor must give a written Notice to Contractor.<sup>61</sup> The Notice to Contractor must comply with the content requirements of O.C.G.A. § 44-14-361.5(c) and must be sent to the owner or its agent and to the contractor within thirty days from the later of the filing of the Notice of Commencement or the first delivery of labor, services, or materials to the property by the potential lien claimant.<sup>62</sup> The Notice to Contractor is intended to alert the owner and contractor to the potential lien claimant’s participation in the project and to provide them an opportunity to take steps aimed at ensuring that the potential lien claimant is paid and signs lien waivers.

When a Notice to Contractor is required but not provided, the potential lien claimant’s inchoate lien rights terminate.<sup>63</sup> On the flipside, O.C.G.A. § 44-14-361.5(d) states that “[t]he failure to file a Notice of Commencement shall render the provisions of this Code section

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57. O.C.G.A. § 44-14-361.5(b).

58. *Id.*

59. *Id.*

60. O.C.G.A. § 44-14-361.5(a) (2002 & Supp. 2008).

61. *Id.*

62. *Id.*

63. *See id.*

inapplicable,<sup>64</sup> which means that in the absence of a Notice of Commencement, a Notice to Contractor is not required to preserve inchoate lien rights.

With this statutory background, we can now return to *General Electric*. The general contractor, Garrard Construction Interiors, LLC (Garrard) contracted with North Point Ministries, Inc. (NPMI) to construct improvements to NPMI's church. Garrard filed a Notice of Commencement and subcontracted the electrical work to Miller Electric, LLP (Miller). In turn, Miller ordered supplies from General Electric (GE). GE did not provide a Notice to Contractor to Garrard or NPMI. When Miller failed to pay GE, GE filed an M & M Lien against the project. Because Miller filed bankruptcy, GE was excused from pursuing a judgment against it. GE then filed suit against NPMI to foreclose GE's lien against the project.<sup>65</sup>

NPMI filed a motion for summary judgment, arguing that GE's lien was unenforceable because it had not provided a Notice to Contractor. In response, GE contended it was not required to provide a Notice to Contractor because Garrard's Notice of Commencement was defective in that it failed to provide all of the information required by O.C.G.A. § 44-14-361.5(b). The trial court granted NPMI's motion and GE appealed.<sup>66</sup>

The court of appeals framed the issue as whether the Notice of Commencement "sufficiently complied" with O.C.G.A. § 44-14-361.5(b), thereby triggering an obligation by GE to provide a Notice to Contractor.<sup>67</sup> The court held that the Notice of Commencement did not sufficiently comply because it deviated in "two essential ways" from the requirements of O.C.G.A. § 44-14-361.5(b), either of which alone would have rendered it "fatally deficient."<sup>68</sup> First, although Garrard included a street address for the subject property, it omitted the "legal description" required by O.C.G.A. § 44-14-361.5(b)(2).<sup>69</sup> Second, Garrard failed to list NPMI as the "true owner" of the property as required by O.C.G.A. § 44-14-361.5(b)(2), referring instead to "North Point Community Church."<sup>70</sup> Elaborating, the court stated:

To be sure, "generally speaking, when there is actual compliance as to all matters of substance[,] then mere technicalities of form or variations in the mode of expression should not be given the stature of

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64. *Id.* § 44-14-361.5(d) (2002 & Supp. 2008).

65. *Gen. Elec.*, 289 Ga. App. at 382-84, 657 S.E.2d at 298-99.

66. *Id.* at 382-83, 657 S.E.2d at 298.

67. *Id.* at 384, 657 S.E.2d at 299.

68. *Id.* at 384-85, 657 S.E.2d at 299.

69. *Id.* at 384, 657 S.E.2d at 299 (citing O.C.G.A. § 44-14-361.5(b)(2)).

70. *Id.* at 384-85, 657 S.E.2d at 299 (citing O.C.G.A. § 44-14-361.5(b)(2)).

noncompliance.” But the requirement to furnish a legal description of the property and the name of the true owner are matters of substance, “not mere technicalities.”<sup>71</sup>

In describing deviations fatal to a Notice of Commencement, the court in *General Electric* employed both the phrase “matter[] of substance”<sup>72</sup> and the word “essential.”<sup>73</sup> Whether it used those terms interchangeably or as dual requirements is not entirely clear.<sup>74</sup>

### III. QUANTUM MERUIT

*Lane Supply, Inc. v. W.H. Ferguson & Sons, Inc.*,<sup>75</sup> involved quantum meruit, promissory estoppel, and equitable lien claims. Nonparty Motiva Enterprises, LLC (Motiva) owned the Shell brand. W.H. Ferguson & Sons, Inc. (Ferguson) was a wholesale fuel supplier who bought fuel from Motiva and then sold it to independent retail service stations. Ferguson entered into a contract with Motiva to convert twenty-five stations, which were owned by others, to the Shell brand. In turn, Ferguson contracted with SEF Construction Company, Inc. (SEF) to perform related construction work. SEF subcontracted some of that work to Lane. While the owners of the stations clearly knew of the work being performed, they were not parties to any of these contracts. After SEF failed to pay Lane, the latter filed materialmen’s liens against the stations. When settlement negotiations failed, Lane sued Ferguson,<sup>76</sup> asserting quantum meruit, equitable lien, and promissory estoppel claims. The trial court granted Ferguson’s motion for summary judgment on all claims, and Lane appealed.<sup>77</sup>

The Georgia Court of Appeals agreed with the trial court’s grant of summary judgment on the quantum meruit claim because Lane could not demonstrate an essential element of that claim—that Lane expected payment from Ferguson at the time the work was performed.<sup>78</sup>

71. *Id.* at 385, 657 S.E.2d at 299 (alteration in original) (quoting *Sierra Craft, Inc. v. T.D. Farrell Constr.*, 282 Ga. App. 377, 384, 638 S.E. 2d 815, 821 (2006)).

72. *Id.*

73. *Id.* at 384, 657 S.E.2d at 299.

74. *Sierra Craft* stands for the proposition that the failure of a contractor to comply with “substantive and essential requirements” of the lien discharge bond statute renders the bond ineffective. 282 Ga. App. at 384, 638 S.E.2d at 821.

75. 286 Ga. App. 512, 649 S.E.2d 614 (2007).

76. During the construction, Premier Petroleum, Inc. took over Ferguson’s role for some of the stations and thereafter had roughly the same relationship with Lane as did Ferguson. *Id.* at 513, 649 S.E.2d at 616. For sake of simplicity, the body of this article refers only to Ferguson.

77. *Id.* at 512-14, 649 S.E.2d at 615-16.

78. *Id.* at 514-15, 649 S.E.2d at 616.

Instead, the court reasoned that Lane expected payment from SEF, the party with which it had contracted.<sup>79</sup> Lane's equitable lien argument was based on the contention that it had refrained from taking actions to preserve its liens because Ferguson had promised to pay Lane. What specific actions were not taken is unclear from the opinion, but one such action was probably a decision not to sue SEF within the one-year period set by O.C.G.A. § 44-3-361.1(a)(3).<sup>80</sup> While acknowledging that a party entitled to a statutory lien, such as an M & M Lien, may have an equitable lien on improvements made when the owner of property has taken action to prevent the statutory lien from being perfected,<sup>81</sup> the court of appeals rejected Lane's equitable lien argument because Ferguson was not the owner of the improved stations.<sup>82</sup>

Lane's promissory estoppel claim was also premised primarily on its contention that it had foregone its lien rights because of Ferguson's promises to pay.<sup>83</sup> The court disagreed with that claim, reasoning that Lane's liens were invalid anyway.<sup>84</sup> Quoting O.C.G.A. § 44-3-361(b),<sup>85</sup> the court stated that an M & M Lien only attaches "to the real estate of the owner for which the labor, services, or materials are furnished if they are furnished at the instance of the owner, contractor, or some other person acting for the owner or contractor."<sup>86</sup> There was no evidence, the court determined, that Lane's work "was furnished at the instance of the station owners, or for some other person acting on their behalf."<sup>87</sup> The owners did not have a contract with Lane and were not otherwise in the chain of contracts for the work.<sup>88</sup> Their knowledge and consent to the work was alone insufficient to establish lien rights.<sup>89</sup>

#### IV. LIQUIDATED DAMAGES

The Georgia Court of Appeals in *Turner v. Atlanta Girls' School, Inc.*<sup>90</sup> addressed liquidated damages, which is often an issue in construction disputes. The opinion provides an important reminder of

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79. *Id.* at 515, 649 S.E.2d at 616-17.

80. *Id.*, 649 S.E.2d at 617; O.C.G.A. § 44-3-361.1(a)(3) (2002).

81. *Lane Supply*, 286 Ga. App. at 515, 649 S.E.2d at 617.

82. *Id.* at 516, 649 S.E.2d at 617.

83. *Id.*, 649 S.E.2d at 617-18.

84. *Id.* at 517, 649 S.E.2d at 618.

85. O.C.G.A. § 44-14-361(b) (2002).

86. *Lane Supply*, 286 Ga. App. at 517, 649 S.E.2d at 618 (quoting O.C.G.A. § 44-14-361(b)).

87. *Id.*

88. *Id.*

89. *Id.*

90. 288 Ga. App. 115, 653 S.E.2d 380 (2007).

the burden of proof when a liquidated damage provision is alleged to be unenforceable. The Turners signed a contract for their daughter to attend the Atlanta Girls' School. The contract stated that subject to limited and inapplicable exceptions, the obligation to pay the tuition for the full academic year was unconditional. When the Turners decided to enroll their daughter in another school and refused to pay the one-year of tuition specified in the contract, the Atlanta Girls' School sued them, and the trial court granted its motion for summary judgment. The Turners appealed, asserting that the contract's requirement that they pay a full year's tuition was a penalty, not liquidated damages.<sup>91</sup>

The court of appeals rejected the Turners' argument.<sup>92</sup> Significantly, the court began its analysis noting that "[t]he party who defaults on a contract has the burden of proving that a liquidated damages provision is an unenforceable penalty."<sup>93</sup> The court stated that the Turners had failed to meet their burden.<sup>94</sup> Therefore, even though the Atlanta Girls' School had the general burden of proof, the Turners, as defaulting party, had the burden in challenging the validity of the provision.<sup>95</sup>

#### V. LOST PROFITS

The Georgia Court of Appeals in *Building Materials Wholesale, Inc. v. Triad Drywall, LLC*<sup>96</sup> reinforced that lost profits can be recovered in construction disputes and also helped clarify how the profits must be proven. Triad installs drywall, metal studs, and acoustic ceilings. The jury found that Triad had contracted with Building Materials Wholesale, Inc. (BMW) to purchase supplies for a project on which it would serve as subcontractor to a third party, that BMW had breached that contract by failing to provide those supplies, and consequently, that Triad could not complete the project with the third party. The jury awarded Triad \$160,000 in lost profit damages. BMW appealed, contending in part that Triad had failed to prove the amount of its lost profits.<sup>97</sup> The court agreed.<sup>98</sup>

At trial, Triad had offered proof of the amount of revenue it expected to receive from the project. With limited exception, it had not, however,

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91. *Id.* at 115-16, 653 S.E.2d at 381-82.

92. *Id.* at 115-16, 653 S.E.2d at 381-82.

93. *Id.* at 116, 653 S.E.2d at 382 (citing *Caincare, Inc. v. Ellison*, 272 Ga. App. 190, 192, 612 S.E.2d 47, 50 (2005)).

94. *Id.*

95. *Id.*

96. 287 Ga. App. 772, 653 S.E.2d 115 (2007).

97. *Id.* at 772-75, 653 S.E.2d 116-18.

98. *Id.* at 775, 653 S.E.2d at 118.

offered evidence of the expenses it would likely incur in performing that work. Instead, its agents testified that Triad planned to make a thirty percent profit and that it had historically made that level of profit.<sup>99</sup> Significantly, the court began its analysis noting the rule that anticipated profits for projects that were not completed because of a defendant's breach are "too speculative to be recovered."<sup>100</sup> Having reaffirmed the rule, the court acknowledged the long-standing exception for established businesses with profitable histories and that Triad's proof of historical profits was relevant to whether it fell within that exception.<sup>101</sup> Turning to the proof required for establishing the amount of damages, the court concluded that, while "exact mathematical certainty" was not required, a plaintiff seeking lost profits must normally prove anticipated revenues and expenses with "great specificity."<sup>102</sup> The court held that Triad's evidence was "insufficient as a matter of law" because it did not prove its anticipated expenses.<sup>103</sup> The court reversed and remanded for a new trial on the issue of damages.<sup>104</sup>

## VI. ARBITRATION

### A. Common Law Contribution and Indemnity

It is difficult to read the opinion in *Harris v. Albany Lime & Cement Co.*<sup>105</sup> without the adage "bad facts make bad law" coming to mind. Given the public policy favoring arbitration under both the Georgia Arbitration Code<sup>106</sup> and the Federal Arbitration Act,<sup>107</sup> the opinion adopts a surprisingly narrow interpretation of one form of the most common arbitration-triggering contract provisions. Attorneys who draft arbitration clauses will need to carefully consider the opinion's implications.

In *Harris*, which unquestionably involved bad facts,<sup>108</sup> the Georgia Court of Appeals held that an agreement between investor owners of property and a home renovation contractor to arbitrate "[a]ny disagree-

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99. *Id.* at 776, 653 S.E.2d at 118-19.

100. *Id.*, 653 S.E.2d at 119 (quoting *KAR Printing, Inc. v. Pierce*, 276 Ga. App. 511, 511, 623 S.E.2d 704, 705 (2005)).

101. *Id.* at 776-77, 653 S.E.2d at 119.

102. *Id.* (quoting *KAR Printing*, 276 Ga. App. at 511, 623 S.E.2d at 705).

103. *Id.* at 777, 653 S.E.2d at 119 (citing *KAR Printing*, 276 Ga. App. at 512, 623 S.E.2d at 705).

104. *Id.*, 653 S.E.2d at 120.

105. 291 Ga. App. 474, 662 S.E.2d 160 (2008).

106. O.C.G.A. §§ 9-1-1 to 9-9-18 (2007).

107. 9 U.S.C. §§ 1 to 307 (2006).

108. *See Harris*, 291 Ga. App. at 474-75, 662 S.E.2d at 161-62.

ment arising out of this contract or from the breach thereof” did not apply to contribution and indemnity claims by the investor owners against the contractor.<sup>109</sup> According to the court, the arbitration provision did not apply because the common law claims for contribution and indemnity do not arise from a contract, but “by operation of law, *independently of contract.*”<sup>110</sup>

### B. Court’s Role

The continuing roles of the trial court in determining arbitrability, as well as jurisdiction and venue, are addressed in *Panhandle Fire Protection, Inc. v. Batson Cook Co.*<sup>111</sup> Batson Cook Company (BCC), a Georgia corporation, was the general contractor for a construction project in Alabama. It entered into a subcontract with Panhandle Fire Protection, Inc. (Panhandle), a Florida entity. After a dispute arose, BCC filed a demand for arbitration with the American Arbitration Association (AAA) in Atlanta. In doing so, BCC relied upon a version of the subcontract containing an arbitration clause.<sup>112</sup> That subcontract also stated it would “be governed by the law of the state of Georgia” and that the location of the arbitration would be “the city of [BCC’s] headquarters or Atlanta, Georgia.”<sup>113</sup> By letters to AAA and the arbitrator, Panhandle objected to the arbitration, contending that the subcontract actually agreed on did not require arbitration in Georgia, but instead stated that “[a]ll or any legal disputes will be handle[d] in a Florida court.”<sup>114</sup> The arbitrator found that the parties had agreed on BCC’s subcontract and issued an order to that effect. Panhandle did not participate in the arbitration hearing. The arbitrator issued a monetary award in favor of BCC. BCC then filed a motion to confirm the award in the Superior Court of Troup County, its principal place of business. Panhandle filed a motion to dismiss, contesting personal jurisdiction and venue. The superior court confirmed the award and entered judgment in favor of BCC. Panhandle appealed.<sup>115</sup>

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109. *Id.* at 478, 662 S.E.2d at 163-64 (alteration in original) (internal quotation marks omitted).

110. *Id.* (quoting *Nguyen v. Lumbermens Mut. Cas. Co.*, 261 Ga. App. 553, 556, 583 S.E.2d 220, 224 (2003)).

111. 288 Ga. App. 194, 653 S.E.2d 802 (2007).

112. *Id.* at 195, 653 S.E.2d at 804.

113. *Id.* (internal quotation marks omitted).

114. *Id.* at 195-96, 653 S.E.2d at 804 (alterations in original) (internal quotation marks omitted).

115. *Id.* at 196, 653 S.E.2d at 804.

The Georgia Court of Appeals vacated the judgment and remanded the case with instructions to the superior court.<sup>116</sup> The court reasoned that it could not properly review Panhandle's jurisdictional defense, or even whether the parties had agreed to arbitrate, until the superior court conducted a de novo examination into which subcontract was binding.<sup>117</sup> If the superior court determines that BCC's version of the subcontract is binding, it would, according to the opinion, have personal jurisdiction over Panhandle because "[u]nder Georgia law, personal jurisdiction is conferred over a nonresident if the nonresident enters into a contract containing a Georgia choice of forum and arbitration clause."<sup>118</sup>

If BCC's version of the subcontract governs, then according to the court of appeals, venue in the Superior Court of Troup County would be proper under O.C.G.A. § 9-9-4(b)(3)<sup>119</sup> of the Georgia Arbitration Code (GAC).<sup>120</sup> The court reasoned that even though the transaction involved interstate commerce, the GAC, rather than the Federal Arbitration Act (FAA), would apply because BCC's version of the subcontract contained a general Georgia choice of law clause and an arbitration clause.<sup>121</sup> Drafting counsel should note that the court's opinion does not require that the GAC be specifically designated. According to the opinion, the GAC will be triggered by an arbitration clause in combination with a generic Georgia choice of law provision.<sup>122</sup> Counsel wishing to trigger the FAA, rather than the GAC, should specifically provide for the FAA's application.

If Panhandle's version of the subcontract is adopted by the superior court, then according to the opinion, personal jurisdiction and venue in the Superior Court of Troup County would not exist because Panhandle is a Florida entity and the project was in Alabama.<sup>123</sup> Furthermore, by mailing AAA its objections to the demand for arbitration, Panhandle did not confer personal jurisdiction on the superior court.<sup>124</sup>

The court rejected as binding the arbitrator's order that BCC's version of the subcontract controlled and, therefore, that the parties had agreed to arbitrate their dispute.<sup>125</sup> The court reasoned that "the threshold

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116. *Id.* at 199, 653 S.E.2d at 807.

117. *Id.* at 196, 653 S.E.2d at 804-05.

118. *Id.*, 653 S.E.2d at 805.

119. O.C.G.A. § 9-9-4(b)(3) (2007).

120. *Panhandle Fire Prot.*, 288 Ga. App. at 196, 653 S.E.2d at 805.

121. *Id.* at 196-97, 653 S.E.2d at 805.

122. *Id.* at 197, 653 S.E.2d at 805.

123. *Id.*

124. *Id.*

125. *Id.* at 197-98, 653 S.E.2d at 805-06.

question of whether parties to a contract agreed to arbitrate a dispute is normally a matter for a court, rather than an arbitrator, to decide.”<sup>126</sup> It continued: “Absent clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability, a trial court reviewing an arbitration decision should independently determine whether the parties contractually agreed to the arbitration.”<sup>127</sup> The court concluded that the record did not show such evidence.<sup>128</sup>

### C. *Res Judicata*

*Yates Paving & Grading Co. v. Bryan County*<sup>129</sup> appears to end the long-running dispute between Yates Paving & Grading Co., Inc. (Yates) and Bryan County (the County), Georgia. Yates and the County entered into a contract for Yates to make improvements to public roads in a subdivision. The County ordered Yates to stop and hired another contractor to finish the project. Yates pursued arbitration and obtained a favorable award, which was confirmed by the trial court and affirmed on appeal. About three years later, Yates filed another demand for arbitration. In short, it contended that as a result of the County’s wrongful call of the bond instruments, Yates was unable to obtain other surety bonds and thereby was effectively prevented from bidding on government contracts. The County’s insurer then sought declaratory relief regarding its obligation to defend the County against the new arbitration demand. The County, which along with Yates was named as a defendant in that declaratory judgment action, cross-claimed against Yates, asserting that the new arbitration claim was barred by res judicata. The trial court granted the County’s motion for summary judgment on the res judicata claim and permanently enjoined Yates from filing further demands for arbitration. Yates appealed.<sup>130</sup>

In an earlier decision on the same trial court order, the court of appeals reversed, concluding that the res judicata effect of the first arbitration award should be decided by the arbitrator, not the court.<sup>131</sup> The Georgia Supreme Court reversed the court of appeals, ruling that the trial court should make that decision.<sup>132</sup>

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126. *Id.* at 197, 653 S.E.2d at 805.

127. *Id.* at 197-98, 653 S.E.2d at 805-06.

128. *Id.* at 198, 653 S.E.2d at 806.

129. 287 Ga. App. 802, 652 S.E.2d 851 (2007).

130. *Id.* at 803-05, 653 S.E.2d at 853.

131. *Yates Paving & Grading Co. v. Bryan County*, 275 Ga. App. 347, 347, 620 S.E.2d 606, 607 (2005).

132. *Bryan County v. Yates Paving & Grading Co.*, 281 Ga. 361, 361, 638 S.E.2d 302, 303 (2006).

In the most recent decision, the court of appeals reviewed the trial court's order granting summary judgment to the County on its res judicata defense.<sup>133</sup> The court began its analysis by citing the res judicata doctrine set forth in O.C.G.A. § 9-12-40,<sup>134</sup> which states that

[a] judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.<sup>135</sup>

The court then cited authority supporting that the defense of res judicata applies to arbitration proceedings.<sup>136</sup> The opinion includes an important reminder that the party asserting a res judicata defense bears responsibility for introducing “those parts of the record of the prior proceeding, duly certified, which are necessary to prove the defense.”<sup>137</sup>

Turning to whether res judicata applied to the current claims by Yates, the court stated that

“it is only where the merits were not *and* could not have been determined under a proper presentation and management of the case that res judicata is not a viable defense. If, pursuant to an appropriate handling of the case, the merits were *or* could have been determined, then the defense is valid.”<sup>138</sup>

Yates argued that the damages sought in the current arbitration proceeding were for lost income caused by the wrongful calling of the bond and therefore involved a different subject matter than the first arbitration, which asserted damages from the wrongful termination of the contract.<sup>139</sup> The court disagreed, concluding that both claims arose out of the County's wrongful termination of the construction contract.<sup>140</sup> The County's decision to call the bond was, according to the court, premised on a default by Yates under the contract resulting in a

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133. *Yates*, 287 Ga. App. at 803, 652 S.E.2d at 853.

134. O.C.G.A. § 9-12-40 (2006).

135. *Id.*

136. *Yates*, 287 Ga. App. at 805, 652 S.E.2d at 854 (citing *Dalton Paving & Constr. v. South Green Constr. of Ga.*, 284 Ga. App. 506, 508, 643 S.E.2d 754, 756 (2007); *Bennett v. Cotton*, 244 Ga. App. 784, 785, 536 S.E.2d 802, 804 (2002)).

137. *Id.* (quoting *Boozer v. Higdon*, 252 Ga. 276, 277, 313 S.E.2d 100, 102 (1984)).

138. *Id.* (quoting *Piedmont Cotton Mills, Inc. v. Woelper*, 269 Ga. 109, 110, 498 S.E.2d 255, 256 (1998)).

139. *Id.* at 806, 653 S.E.2d at 854.

140. *Id.*

breach of that contract.<sup>141</sup> The court concluded that once that breach occurred, which was before the first arbitration, Yates could have asserted a claim for resulting damages.<sup>142</sup>

Yates also asserted that the parties and arbitration panel had expressly directed, and the parties had also agreed, that the first arbitration would be limited to termination damages, and therefore, Yates was excused from pursuing damages arising from the bond calling.<sup>143</sup> The court noted the absence of evidence in the certified record supporting that contention and the denial by the County of any such direction or agreement.<sup>144</sup> Even if the evidence supported that contention, the court reasoned that Yates would be precluded by res judicata from pursuing its current claims because it had successfully sought confirmation of the first arbitration award without contesting the arbitrators' decision to limit issues.<sup>145</sup> In doing so, the court said, Yates "acted at its own peril."<sup>146</sup>

#### VII. GENERAL LIABILITY INSURANCE

*Marchant v. Travelers Indemnity Co. of Illinois*<sup>147</sup> highlights the coverage perils of providing inaccurate information to general liability and other insurance carriers. When Marchant originally secured general liability coverage from another carrier, he correctly represented that his business consisted of "carpentry, interior trim-new construction."<sup>148</sup> Within about a year, however, Marchant also began performing high-end custom home construction, which involved a higher level of risk of claims under his policy. Marchant did not advise his insurer of this change. Thereafter, his insurance account was transferred, or "rolled over," to Travelers, which issued its first policy to Marchant in reliance on the original insurer's files regarding Marchant's business. In early 2001, Marchant indicated on renewal questionnaires provided to Travelers that there had been no change in the nature of his business. The Travelers policy was renewed for another year in mid-2001. Shortly after its renewal, Travelers discovered through an audit that Marchant's business

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141. *Id.*, 653 S.E.2d at 854-55.

142. *Id.*

143. *Id.* at 807, 653 S.E.2d at 855.

144. *Id.*, 653 S.E.2d at 856.

145. *Id.* at 807-08, 653 S.E.2d at 856.

146. *Id.* at 808, 653 S.E.2d at 856.

147. 286 Ga. App. 370, 650 S.E.2d 316 (2007).

148. *Id.* at 372, 650 S.E.2d at 318 (emphasis omitted) (internal quotation marks omitted).

also included custom home construction. Travelers proceeded to terminate his general liability coverage.<sup>149</sup>

Compounding Marchant's misfortunes, he was sued in 2002 for construction defects relating to one of his homes, which he had begun constructing shortly before the renewal of his policy in 2001. Marchant sought coverage from Travelers, which defended under a reservation of rights, but also sought a declaratory judgment regarding its obligations under the policy.<sup>150</sup> The trial court granted summary judgment to Travelers, apparently relying on O.C.G.A. § 33-24-7(b),<sup>151</sup> which states,

Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless: (1) Fraudulent; (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.<sup>152</sup>

On appeal of the grant of summary judgment to Travelers, Marchant asserted two principal arguments: (1) that O.C.G.A. § 33-24-7(b) only applies to applications and not to Travelers' renewal questionnaire; and (2) the job classification on his original application provided to the predecessor insurer, "carpentry, interior trim-new construction," was subject to interpretation and therefore presented a question of fact for the jury.<sup>153</sup> The court of appeals rejected both of Marchant's arguments and affirmed the trial court's grant of summary judgment to Travelers.<sup>154</sup> In response to the first argument, the court stated that it was not critical whether the renewal questionnaires were "applications" within the meaning of O.C.G.A. § 33-24-7(b) because material representations of fact by an insured, whether written or verbal, that induce insurance coverage, must be true.<sup>155</sup> Significantly, the court also stated,

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149. *Id.*

150. *Id.* at 372-73, 650 S.E.2d at 318.

151. O.C.G.A. § 33-24-7(b) (2005).

152. *Id.*

153. *Marchant*, 286 Ga. App. at 372-73, 650 S.E.2d at 319.

154. *Id.* at 373-74, 650 S.E.2d at 319-20.

155. *Id.* at 373, 650 S.E.2d at 319.

In cases where the application for insurance is attached to and becomes a part of the policy,<sup>156</sup> in order to avoid the policy for a misrepresentation of the applicant made in the application, the *insurer need only show that the representation was false and that it was material in that it changed the nature, extent, or character of the risk*. This is true although the applicant may have acted in good faith, not knowing that a representation is untrue.<sup>157</sup>

#### VIII. CONSTRUCTION LOANS

Given the number of contractors encountering financial difficulties in the current real estate market, *Fielbon Development Co. v. Colony Bank of Houston County*<sup>158</sup> is a timely reminder of the one-sided nature of construction loan documents and, as discussed below, the general absence of negligence claims against a lender for alleged mismanagement of construction loan funds. Colony Bank made construction loans to Fielbon Development Co. (Fielbon), which were guaranteed by its principal. One of the loans was not paid and Colony Bank filed suit. The trial court directed a verdict against the defendants on their various contract-based defenses. The trial court denied Colony Bank's motion for directed verdict on Fielbon's counterclaim for negligent management of the construction loan. The alleged negligence by Colony Bank included providing construction funding on the wrong lot and providing funding even though it allegedly knew that another principal of Fielbon was using some of those funds to pay personal expenses. The jury awarded \$50,000, plus attorney fees, to Fielbon on its counterclaim. Both parties appealed.<sup>159</sup>

The Georgia Court of Appeals affirmed the directed verdict in favor of Colony Bank on the contract defenses<sup>160</sup> but reversed the trial court's denial of Colony's motion for directed verdict on the negligence claim.<sup>161</sup> Colony Bank asserted that it should have been granted a directed verdict on the negligence claim because it did not owe Fielbon a duty independent of its contract duties.<sup>162</sup> While acknowledging that

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156. The opinion does not specifically state that the questionnaire was attached to or became part of Travelers' policy.

157. *Marchant*, 286 Ga. App. at 374, 650 S.E.2d at 319 (internal quotation marks omitted) (quoting *Davis v. John Hancock Mut. Life Ins. Co.*, 202 Ga. App. 3, 5, 413 S.E.2d 224, 226 (1991)).

158. 290 Ga. App. 847, 660 S.E.2d 801 (2008).

159. *Id.* at 847, 660 S.E.2d at 803.

160. *Id.* at 851, 660 S.E.2d at 806.

161. *Id.* at 856, 660 S.E.2d at 809.

162. *Id.* at 855, 660 S.E.2d at 808.

Colony Bank may have negligently managed and monitored the loan, the court of appeals agreed with Colony Bank, stating that any duty owed by Colony to Fielbon arose from their contractual relationship, and therefore, there was not an independent duty on which a negligence claim could be based.<sup>163</sup>

#### IX. CONTRACTOR ASSOCIATION STANDING

*Newton County Home Builders Ass'n v. Newton County*<sup>164</sup> demonstrates some of the standing challenges facing contractor associations in seeking to effectively challenge government action. In 2005 the Newton County Board of Commissioners adopted a development impact fee ordinance. It required building permit applicants to pay impact fees when obtaining permits. The fees would be used to pay certain future improvement costs. In late 2005, Newton County Home Builders Association, Inc. and Home Builders Association of Georgia, Inc. (homebuilders associations) sued Newton County (the County), alleging that the impact fee program was illegal. In one count of their suit, the homebuilder associations sought an interlocutory order requiring the County to determine the amount of impact fees thus far collected and to create an escrow account for all impact fees until the final outcome of the case. They asked that the escrow account be designated as a common fund from which they and others similarly situated could recover if the court declared the impact fees illegal and ordered that they be returned. The County contended that the homebuilders associations lacked standing to pursue that relief and sought partial summary judgment on the count seeking that relief, which the superior court granted. The homebuilders associations appealed.<sup>165</sup>

The Georgia Court of Appeals, which affirmed the trial court's ruling, began its opinion noting that because the homebuilders associations had not paid any impact fees, their standing, if any, had to be on behalf of their members.<sup>166</sup> The opinion then continues: "Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. . . ."<sup>167</sup> The associations may have standing to seek declaratory, injunctive, and other forms of prospective relief, the court determined, because those types of relief "will inure to the benefit of those

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163. *Id.* at 856, 660 S.E.2d at 808-09.

164. 286 Ga. App. 89, 648 S.E.2d 420 (2007).

165. *Id.* at 89-90, 648 S.E.2d at 420-21.

166. *Id.* at 90, 648 S.E.2d at 421.

167. *Id.*

members of the association actually injured.”<sup>168</sup> On the other hand, the court noted, associations normally do not have standing to seek damages on behalf of their members.<sup>169</sup> According to the court, “by seeking the collection of impact fees paid by their members and others similarly situated, the homebuilders associations are clearly seeking monetary damages.”<sup>170</sup>

The court noted that the rule against association standing to seek damages for its members is even more compelling when not all association members have incurred any damage (because some of the members are nonbuilders, like real estate agents, who do not pay impact fees);<sup>171</sup> when the amount of damages vary among the builder members depending on the amount of impact fees paid;<sup>172</sup> and when the homebuilders associations are seeking to recover the impact fees paid, not only by their members, but by similarly situated nonmembers for which they “clearly” lack standing.<sup>173</sup>

#### X. PERSONAL INJURY

Owners of projects under construction can take comfort in the Georgia Court of Appeals decision in *Dalton v. 933 Peachtree, L.P.*<sup>174</sup> There, two employees of a glass and window subcontractor working on a condominium project owned by 933 Peachtree, L.P. (Owner) suffered serious electrical burns when an aluminum slab edge cover they were lifting contacted high-voltage power lines operated by Georgia Power Company. The employees asserted premises liability claims against the Owner.<sup>175</sup> Their motions for summary judgment were granted by the trial court.<sup>176</sup>

On appeal, the employees contended that the Owner was liable because it maintained control over the project during construction. They cited provisions, which were not specified in the opinion, from the

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168. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).

169. *Id.*

170. *Id.* at 91, 648 S.E.2d at 421.

171. *Id.*, 648 S.E.2d at 421-22.

172. *Id.*, 648 S.E.2d at 421.

173. *Id.*, 648 S.E.2d at 422.

174. 291 Ga. App. 123, 661 S.E.2d 156 (2008).

175. *Id.* at 123-28, 661 S.E.2d at 157-59. The employees also asserted negligence claims against Georgia Power. The trial court granted summary judgment in its favor due to lack of notice to Georgia Power in accordance with the High-voltage Safety Act, O.C.G.A. §§ 46-3-30 to -46 (2004). *Dalton*, 291 Ga. App. at 128, 661 S.E.2d at 159. The Georgia Court of Appeals affirmed. *Id.* at 129, 661 S.E.2d at 159.

176. *Dalton*, 291 Ga. App. at 123, 661 S.E.2d at 157.

contract between the Owner and R.J. Griffin and Company (Griffin), the general contractor.<sup>177</sup>

The court cited other provisions, including a provision stating that

“[t]he Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. *The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures* and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.”<sup>178</sup>

The court also cited various provisions relating to protection of persons and property, including that “[t]he Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: .1 employees on the Work and other persons who may be affected thereby. . . .” and “[t]he Contractor shall provide and maintain temporary protection, public utilities, etc. as required by the Contract Documents.”<sup>179</sup>

Citing O.C.G.A. § 51-3-1,<sup>180</sup> the court set forth the general rule that “[a] landowner is liable in damages to invitees who are injured on his property due to his failure to exercise ordinary care to keep the premises safe.”<sup>181</sup> This general rule applies, the court noted, if the owner “retains the right to direct or control the time and manner of executing the independent contractor’s work or interferes with the work to a sufficient degree.”<sup>182</sup> But, when an owner surrenders possession and control of his property to an independent contractor, the owner is generally not liable for injuries to that contractor’s employees due to unsafe conditions on the property.<sup>183</sup>

The employees also argued that the Owner was liable for the injuries because it had the right to visit the site, ensure that the work complied with contract requirements, and even stop work.<sup>184</sup> The court disagreed, stating that these rights were insufficient to impose liability because they did not amount to a right by the Owner to control the contractor’s methods of work.<sup>185</sup>

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177. *Id.* at 123-24, 661 S.E.2d at 157.

178. *Id.* at 124-25, 661 S.E.2d at 158 (alteration in original).

179. *Id.* at 125, 661 S.E.2d at 158 (ellipsis in original).

180. O.C.G.A. § 51-3-1 (2000).

181. *Dalton*, 291 Ga. App. at 126, 661 S.E.2d at 159 (citing O.C.G.A. § 51-3-1).

182. *Id.* at 127, 661 S.E.2d at 159 (citing *Grey v. Milliken & Co.*, 245 Ga. App. 804, 804, 539 S.E.2d 186, 188 (2000)).

183. *Id.* at 126-27, 661 S.E.2d at 159 (citing *Grey*, 245 Ga. App. 804, 539 S.E.2d 186).

184. *Id.* at 127, 661 S.E.2d at 159.

185. *Id.*

## XI. STATUTE OF LIMITATIONS

The statute of limitations for a breach of an oral contract claim is four years,<sup>186</sup> while the statute of limitations for a breach of a written contract claim is six years.<sup>187</sup> What is the statute of limitations for a breach of a contract claim based on a contract when the essential terms are partly written and partly oral? In *Harris v. Baker*,<sup>188</sup> the Georgia Court of Appeals discussed this question.

Harris sued Baker for breach of a contract to construct his house. The suit was filed five years and a few months after its substantial completion. The parties agreed that a contract existed, but they disagreed about whether all of its essential terms were in writing. Baker contended that they were not and, therefore, that the four-year statute of limitations applied. Harris argued that all of the essential terms were reflected in two documents, which together formed the written contract. One of those documents was an untitled and unsigned list of construction items and individual item prices that had Baker's name and address at the top and was addressed to Harris. The document also stated that Harris would pay permit costs and listed a total contract price. The second document was a set of form construction blueprints, which expressly stated that they did not address a specific site. The trial court disagreed with Harris and granted Baker's motion for summary judgment based on the four-year statute of limitations.<sup>189</sup> The court of appeals affirmed.<sup>190</sup>

In the opinion, the court of appeals recognized that a contract can consist of several contemporaneous documents or documents that reference one another.<sup>191</sup> Here, however, the court noted, not only were neither of the documents at issue signed but neither document referred to specific property, indicated whether a new home or remodeling was involved, stated the payment terms, or provided specifications (other than those on the blueprints).<sup>192</sup> The court of appeals acknowledged that if the oral terms and those implied from conduct were considered, there might have been a binding contract between the parties.<sup>193</sup> Since not all of the essential terms were in writing, howev-

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186. O.C.G.A. § 9-3-25 (2007).

187. O.C.G.A. § 9-3-24 (2007).

188. 287 Ga. App. 814, 652 S.E.2d 867 (2007).

189. *Id.* at 814-16, 652 S.E.2d at 868-69.

190. *Id.* at 817, 652 S.E.2d at 870.

191. *Id.* at 816, 652 S.E.2d at 869.

192. *Id.* at 817, 652 S.E.2d at 869-70.

193. *Id.*, 652 S.E.2d at 870.

er, the claims by Harris were subject to a four-year statute of limitations and were, therefore, time barred.<sup>194</sup>

## XII. STATUTORY MINIMUM RESIDENTIAL WARRANTY

Almost all Georgia contractors and construction lawyers are aware that the Georgia General Assembly adopted a comprehensive residential and general contractor licensing law in 2004, which after several delays, became effective on July 1, 2008.<sup>195</sup> Quite a few contractors and construction lawyers may be unaware that this licensing law includes the first statewide minimum warranty requirements.<sup>196</sup>

In pertinent part, O.C.G.A. § 43-41-7<sup>197</sup> states that “[t]he residential contractor division shall establish the minimum requirements of such warranty.”<sup>198</sup> The State Licensing Board has now applied those statutory requirements.<sup>199</sup> They only apply to a “single-family residence,”<sup>200</sup> which is defined as a “‘one or two family residence’ as defined in the current edition of the state minimum standard International Residential Code (IRC).”<sup>201</sup> They also only apply when a “covered contract” is involved.<sup>202</sup> That term is defined as “any contract to construct, or superintend or manage the construction of, any single family residence where the total value of the work or activity or the compensation to be received by the contractor for such activity or work exceeds \$2,500.00.”<sup>203</sup>

Pursuant to this regulation, “[a] licensed residential contractor and any affiliated entities shall offer a written warranty in connection with each covered contract.”<sup>204</sup> Unfortunately, the term “affiliated entities” is not defined and will likely be the source of confusion and litigation. The regulation states that the written warranty must “describe[], at a minimum,”<sup>205</sup> certain information regarding the warranty. The required information includes the following:

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194. *Id.*

195. 2004 Ga. Laws 786 (codified at O.C.G.A. § 43-41-7 (2008)).

196. *Id.*

197. O.C.G.A. § 43-41-7 (2008).

198. *Id.*

199. GA. COMP. R. & REGS. § 553-7-.01 (2006). The current regulation is actually the second warranty regulation adopted by the residential contractor division.

200. *Id.* § 553-7-.01(1)(b).

201. *Id.*

202. *Id.* § 553-7-.01(1)(a).

203. *Id.*

204. *Id.* § 553-7-.01(2).

205. *Id.* § 553-7-.01(3).

(a) Covered work and activities; (b) Covered exclusions;<sup>206]</sup> (c) Standards for evaluating work and activities, which standards shall be those set forth in the current edition of the Residential Construction Performance Guidelines as published by the National Association of Home Builders; (d) The term of the warranty, including commencement date(s) or event(s); (e) Claim procedures; (f) Contractor response options (such as repair, replace or compensate); [and] (g) Assignable manufacturer warranties.<sup>207</sup>

Significantly, most of these requirements only impose disclosure obligations on the licensed residential contractor. The one exception is for the standards to apply in evaluating work and activities. Those standards must, at a minimum, be the Residential Construction Performance Guidelines as published by the National Association of Home Builders.<sup>208</sup> But because the contractor is free to determine the “covered work and activities”<sup>209</sup> and the “covered exclusions,”<sup>210</sup> those minimum standards need only be used in connection with work that is covered under the warranty.

This regulation also states that “[p]rior to the execution of a covered contract, a licensed residential contractor shall attach a complete copy of the written warranty (or an identical blank standard form of it) to the covered contract or otherwise make same available for review.”<sup>211</sup> This requirement is intended to provide a meaningful opportunity for the buyer or homeowner to evaluate the warranty in advance of executing the covered contract.

The regulation itself does not address the consequences of a residential contractor’s failing to comply with this regulation. Because in most part the regulation requires disclosure rather than content, its requirements do not create a comprehensive default warranty in the event of noncompliance.

### XIII. CONCLUSION

The period covered by this Article, June 1, 2007 to May 31, 2008, has been an exciting time for Georgia construction law. With contractor licensing having become effective on July 1, 2008 and the revisions to

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206. The term “covered exclusions” was almost certainly intended to be “coverage exclusions.”

207. GA. COMP. R. & REGS. §§ 553-7-.01(3)(a)-(g).

208. *Id.* § 553-7-.01(3)(c).

209. *Id.* § 553-7-.01(3)(a).

210. *Id.* § 553-7-.01(3)(b).

211. *Id.* § 553-7-.01(4).

□

Georgia's mechanics' and materialmen's lien laws becoming effective on March 31, 2009, the ensuing year should bring more of the same.