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Real Property

by Linda S. Finley*

I. INTRODUCTION

The survey period proved to be an active one for cases and legislation involving real property. Particularly, the Georgia General Assembly, in apparent reaction to the housing and foreclosure crisis faced by the entire country, enacted consumer-friendly changes to the long-standing foreclosure statute.¹ The courts were also active in review of real property issues, and as the number of cases involving real property issues continues to increase, it becomes more difficult to determine which cases should be contained in this Survey. Nevertheless, this Article discusses caselaw and legislative developments in Georgia real property law from June 1, 2007 through May 31, 2008. The cases and legislation discussed in this Article were selected either for their legal significance, to update practicing attorneys, or in some cases to recognize trends. As the reader may see, however, some cases surveyed were selected for their unusual, thought-provoking, and sometimes entertaining facts.

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1. See O.C.G.A. §§ 44-14-160 to -303 (2002 & Supp. 2008).

II. LEGISLATION²

The year 2007-2008 has proven to be a volatile period for the economy of the United States and particularly the lending and housing markets. Georgia has suffered its share of pain, and in 2007 it was ranked seventh nationally in the number of foreclosures conducted.³ In an apparent reaction to the crisis, on the last day of the 2008 legislative session, lawmakers passed amendments to the statutes governing the procedure to foreclose real property.⁴ The amendments gave borrowers additional time to react to potential foreclosures by increasing the required number of days between written notice to the borrower and the date of the foreclosure sale from fifteen to thirty days.⁵ The amendments also made consumer-friendly changes to assure that borrowers, whether consumer or commercial, could readily ascertain the identity of the foreclosing party by requiring that the contact information of the individual or entity having the “full authority to negotiate, amend, and modify all terms of the mortgage,”⁶ be provided and that instruments vesting title into the foreclosing party “be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located.”⁷ The amendments allowed some protection to lenders by assuring that the secured creditor would not be required to “negotiate, amend, and modify all terms of the mortgage”⁸ instrument on account of the amendments found at Official Code of Georgia Annotated (O.C.G.A.) §§ 44-14-162 to -162.4.⁹

In reaction to the bankruptcy of a major Georgia lender in which closing attorneys were caught between covering the lender’s bounced checks or risking bar violations,¹⁰ the Georgia General Assembly

2. See Patrise Perkins-Hooker, *2008 Legislative Update*, in 1 REAL PROPERTY INSTITUTE PROGRAM MATERIALS (Institute of Continuing Legal Education in Georgia 2008).

3. Realtytrac.com, U.S. Foreclosure Activity Up 75 Percent in 2007, *available at* <http://www.realtytrac.com/ContentManagement/RealtyTracLibrary.aspx?a=b&ItemID=4118&acct=64953>.

4. See O.C.G.A. §§ 44-14-162, -162.2 (Supp. 2008).

5. O.C.G.A. § 44-14-162.2(a).

6. *Id.*

7. O.C.G.A. § 44-14-162(b).

8. O.C.G.A. § 44-14-162.2(a).

9. O.C.G.A. §§ 44-14-162 to -162.4 (2002 & Supp. 2008).

10. Andy Peters, *Closing Attorneys See Red: Lawyers Scramble to Cover Homebank Mortgage's Bounced Checks or Face Bar Violations*, FULTON COUNTY DAILY REPORT, Aug. 16, 2007, available on Westlaw at 8/16/2007 FULTONDAILY 1.

amended O.C.G.A. § 44-14-13(c) and (d),¹¹ relating to disbursement of closing proceeds.¹² The amendment affects all loans and closings conducted after July 1, 2008 and provides that settlement agents may disburse settlement proceeds from an escrow account only after receipt of one of the following specified negotiable instruments, even if they are not “Collected funds”¹³ (literally meaning cash in hand): (1) A cashier’s check issued by a lender specifically for the loan closing and then only if the funds are immediately available and in a form in which the funds could not be dishonored or refused when presented for payment;¹⁴ (2) A check drawn on a Georgia attorney or real estate broker’s escrow account if the closing attorney reasonably believes the funds can be collected within a reasonable period;¹⁵ (3) A check issued by the federal government or the State of Georgia;¹⁶ (4) Personal check(s) not exceeding \$5000 per loan closing.¹⁷

The 2008 General Assembly also amended the statutory provisions governing materialmen’s and mechanic’s liens.¹⁸ The amendment provides that a party, mechanic, or materialman of any sort must claim a lien within ninety days after the completion of service and file it in the clerk’s office of the superior court.¹⁹ A lawsuit seeking recovery of the claim must be filed within 365 days from the date of filing the initial claim of lien.²⁰ In addition, within thirty days after commencing the suit, “the party claiming the lien shall file a notice with the clerk of the superior court of the county wherein the subject lien was filed.”²¹

III. TITLE TO REAL PROPERTY

In *Harbuck v. Houston County*,²² Harbuck owned property where an unpaved road ran alongside the frontage. When the developer of a subdivision on the adjacent property sought to complete the unpaved portion of the road to provide access to the development, Harbuck brought suit. A Special Master, in accordance with his duties, deter-

11. O.C.G.A. §§ 44-14-13(c)-(d) (2001), amended by O.C.G.A. §§ 44-14-13(c)-(d) (Supp. 2008).

12. See O.C.G.A. §§ 44-14-13(c)-(d).

13. O.C.G.A. § 44-14-13(a)(2) (2001 & Supp. 2008).

14. *Id.* § 44-14-13(c)(1).

15. *Id.* § 44-14-13(c)(2).

16. *Id.* § 44-14-13(c)(3).

17. *Id.* § 44-14-13(c)(4).

18. O.C.G.A. §§ 44-14-360 to -369 (2002 & Supp. 2008).

19. O.C.G.A. § 44-14-361.1(a)(2) (Supp. 2008).

20. O.C.G.A. § 44-14-361.1(a)(3) (Supp. 2008).

21. *Id.*

22. 284 Ga. 4, 662 S.E.2d 107 (2008).

mined that Houston County and the developer were entitled to notice of the quiet title action. Following a hearing, the Special Master found that Harbuck did not have color of title to the unpaved road and that she could not bring suit against a subdivision for adverse possession of the road. The Special Master further found that Harbuck was required to show that the road had never been dedicated, the county failed to accept dedication, or the county had abandoned the right of way. The Special Master did not issue any findings for these latter issues but left them to the trial court for disposition. After the Special Master's report was adopted by the trial court, the county and developer were granted summary judgment.²³

On appeal, Harbuck argued that it was error for the trial court rather than the Special Master to rule on the summary judgment motion.²⁴ The Georgia Supreme Court found no merit in the argument.²⁵ Although a special master has jurisdiction to “ascertain the validity of petitioner's title” . . . there is no authority divesting the trial court's overall jurisdiction of the case.²⁶

Harbuck also argued that the Special Master's determination that the county and the subdivision were entitled to notice of the quiet title action was wrong.²⁷ The court held, however, that the county was entitled to notice because of the county's interest in dedication of the streets delineated in the recorded plat of the subdivision to public use.²⁸ Likewise, the developer of the subdivision was entitled to notice because of its interest in paving the street in question to gain access to the new subdivision.²⁹

On the issues left by the Special Master to the trial court, Harbuck argued that the right of way had not been dedicated by the county because it remained unpaved.³⁰ She relied upon an unrecorded plat she received at the time of the purchase of her own property, which stated, “where dead ends occur during development temporary turn-arounds to be installed, if no future development within 14 months turn-arounds to be paved at the Developer's expense with all necessary utilities and easements to be dedicated to Houston County.”³¹ The court, however, held that the language Harbuck relied upon did not clearly retract the

23. *Id.* at 4-5, 662 S.E.2d at 108.

24. *Id.* at 5, 662 S.E.2d at 108.

25. *Id.*

26. *Id.* (internal ellipsis omitted) (quoting O.C.G.A. § 23-3-66 (1982)).

27. *Id.* at 5-6, 662 S.E.2d at 108-09.

28. *Id.*

29. *Id.* at 6, 662 S.E.2d at 109.

30. *Id.*

31. *Id.*

presumption of express dedication created by the recorded subdivision plat survey.³² The court noted that it was not necessary that all portions of a street be paved to show dedication of the entire street, including the unpaved portions.³³ The unpaved portion of the street claimed by Harbuck was simply a continuation of a street that had been expressly dedicated by the county, and the fact that the continuation of that street was unpaved was irrelevant.³⁴ Finally, the court determined that the Special Master did not have to recuse himself even though he had deeded unrelated land to the developer in another matter.³⁵

In *Murray v. Stone*,³⁶ the supreme court reviewed the now-repealed Dead Man's Statute.³⁷ Stone and Murray were adjacent landowners. Stone claimed that she purchased two tracts of land in the 1960s from her sister-in-law (Murray's mother), but she was never given a deed. Stone introduced evidence that she had exclusively occupied and maintained both tracts for more than twenty years. She also testified to a natural boundary line, which Murray never crossed. A jury found in favor of Stone on her claim for adverse possession and prescription, and Murray appealed.³⁸

At trial, the court applied the law regarding conversations with persons now deceased as was in effect during the times of the various conversations between Stone and the seller of the property. Stone was not allowed to testify about her conversations with the deceased seller prior to 1979.³⁹ However, the court allowed her to testify about a 1986 conversation that she had with the seller and Murray. Stone testified that at that time, Murray told her that \$240 remained due for the purchase of the tracts.⁴⁰ The conversation gave rise to Stone making payment for that sum, including presentation of a check with the

32. *Id.*

33. *Id.*

34. *Id.* at 7, 662 S.E.2d at 109.

35. *Id.*, 662 S.E.2d at 110.

36. 283 Ga. 6, 655 S.E.2d 821 (2008).

37. GA. CODE ANN. § 38-1603(1) (1933), *repealed by* 1979 Ga. Laws 1251.

38. *Murray*, 283 Ga. at 6, 655 S.E.2d at 822.

39. Prior to July 1, 1979, evidence of conversations with a decedent was not permitted, and such conversations were expressly excluded notwithstanding whether the testimony was admissible under other rules of evidence. That statute rendered "inadmissible in actions against a person since deceased evidence of transactions or communications with the deceased person." *Willis v. Kennedy*, 267 Ga. 165, 165, 476 S.E.2d 246, 247 (1996). Testimony regarding a transaction or occurrences on or after the date of repeal of the Dead Man's Statute (July 1, 1979) are not barred by reason of the decedent's subsequent death but are subject to other rules of competent witnesses. O.C.G.A. § 24-9-1 (1995).

40. *Murray*, 283 Ga. at 7, 655 S.E.2d at 822.

notation “paid in full land-210 ft. by 80 ft. of land.”⁴¹ Murray asserted that testimony about the 1986 conversation violated the Dead Man’s Statute because the 1986 conversation with the deceased seller and Murray was nothing more than a continuation of the 1960s transaction with the now deceased seller.⁴² The Georgia Supreme Court did not find merit in the argument and affirmed the trial court on all grounds.⁴³

In *Biggers v. Crook*,⁴⁴ which involved a matter of first impression, the supreme court considered whether a deed to secure debt to real property executed by only one joint tenant is extinguished upon the death of the grantor.⁴⁵ Linda Crook and her brother William Biggers were the sole heirs of their mother’s estate and took title to her home as joint tenants with the right of survivorship. William Biggers took possession of the property and used it as his residence until the time of his death in 2002. In 1996 William Biggers married Dianne Biggers. Prior to the marriage, they entered into a prenuptial agreement which specified that the property remained the sole and separate property of William Biggers.⁴⁶

In 2002 prior to his death, Rita Craig, Dianne Biggers’s sister, recorded a security deed executed by William Biggers, which purported to convey the property as security for repayment of a loan. Linda Crook was not a party to the deed and was unaware of it until Dianne Biggers filed for a year’s support in probate court seeking an award of title to the property. Linda Crook filed an action for declaratory judgment seeking an order declaring that she was the owner of the property and that neither Dianne Biggers nor Rita Craig had an interest thereto. Dianne Biggers counterclaimed, seeking a declaration that the prenuptial agreement was void and claiming a one-half interest in the property by virtue of inheritance. Rita Craig also counterclaimed on the grounds that the recorded security deed severed the joint tenancy, entitling her to recover against the property for the unpaid debt. The trial court granted summary judgment to Linda Crook, finding the security deed to be void, and Dianne Biggers and Rita Craig appealed.⁴⁷

The supreme court considered the effect of execution of the security deed by only one tenant on the joint tenancy.⁴⁸ The court reviewed

41. *Id.*

42. *Id.*, 655 S.E.2d at 823.

43. *Id.*

44. 283 Ga. 50, 656 S.E.2d 835 (2008).

45. *See id.* at 51, 656 S.E.2d at 837.

46. *Id.*, 656 S.E.2d at 836.

47. *Id.* at 50-51, 656 S.E.2d at 836-37.

48. *Id.* at 51, 656 S.E.2d at 837.

O.C.G.A. § 44-6-190,⁴⁹ the statute that created such tenancies.⁵⁰ Specifically, the court examined how a joint tenancy created under the statute might be severed.⁵¹ Quoting the language of the code, the court noted that a joint tenancy “may be severed as to the interest of any owner by the recording of an instrument which results in his lifetime transfer of all or a part of his interest.”⁵² Citing prior Georgia caselaw, the supreme court noted that the purpose of a security deed is to provide security for repayment of a debt and therefore is a security lien of the “highest order.”⁵³

Finding no existing Georgia authority to resolve the issue, the court looked to authority from the state of California.⁵⁴ The rationale in the opinion of the California court was that a conveyance of a security interest in real property does not convey ownership of that property but conveys only the right to take action upon default of the grantor pursuant to a power of sale provision in a security instrument.⁵⁵ Hence, acting under the power of sale provision does not sever a joint tenancy.⁵⁶ Persuaded by the California authority, the supreme court held the encumbrance created by one joint tenant was not a lifetime transfer of all or part of the joint tenant-grantor’s interest such as would sever the joint tenancy with the right of survivorship.⁵⁷ Upon William Biggers’s death, his sister, as the surviving joint tenant, immediately became the sole owner of the property.⁵⁸ Because William Biggers’s interest in the property terminated at his death, the security interest held by Rita Craig was also extinguished.⁵⁹ The court did not consider the validity of the prenuptial agreement because the title to the land passed to the surviving joint tenant and the property was not part of the decedent’s estate.⁶⁰

49. O.C.G.A. § 44-6-190 (1991).

50. *Biggers*, 283 Ga. at 51, 656 S.E.2d at 837.

51. *See id.*

52. *Id.* at 51-52, 656 S.E.2d at 837 (quoting O.C.G.A. § 44-6-190).

53. *Id.* at 52, 656 S.E.2d at 837.

54. *Id.* (citing *Hamel v. Gootkin*, 202 Cal. App. 2d 27 (1962)).

55. *Id.* (citing *Hamel*, 202 Cal. App. 2d at 29).

56. *Id.*

57. *Id.* at 52, 656 S.E.2d at 838.

58. *Id.* at 52-53, 656 S.E.2d at 838.

59. *Id.* at 53, 656 S.E.2d at 838.

60. *Id.*

IV. CONDEMNATION⁶¹

In *City of Atlanta v. Sig Samuels Laundry & Dry Cleaning*,⁶² a dry cleaning business moved for an injunction against the City of Atlanta (City) to enjoin installation of a sidewalk on the City's right of way. The landowner's claim to the right of way arose from the fact that it had long utilized the area sought by the City as additional parking for its customers. The superior court declined to grant a permanent injunction, but it ordered the City to compensate the landowner for any loss in the property's market value and to provide the landowner with two additional parking spots.⁶³

On appeal, the Georgia Supreme Court overturned the trial court's order.⁶⁴ The supreme court held that the landowner's prior use of the right of way did not establish "an unqualified right to use the area for that purpose."⁶⁵ Noting that (1) the construction of the sidewalk did not impair access to the business, (2) the construction of the sidewalk would not be a nuisance, and (3) the sidewalk would only impair the unauthorized use of the right of way, the supreme court determined that the business was not entitled to compensation.⁶⁶

In *Collins & Associates v. Henry County Water & Sewage Authority*,⁶⁷ the landowner appealed the amount of compensation awarded by a jury for the taking of its land,⁶⁸ and the trial court's decision to exclude evidence of damages caused by the imposition of a Watershed Protection Ordinance and evidence concerning the potential value of the condemned land if it had been subdivided.⁶⁹ The Georgia Court of Appeals held that the trial court had properly determined that the issue for jury determination was the value of the land with the watershed protection ordinance in place and not whether the imposition of the restrictions in the ordinance had diminished the value of the property.⁷⁰ Noting that

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62. 282 Ga. 586, 652 S.E.2d 533 (2007).

63. *Id.* at 586-87, 652 S.E.2d at 534.

64. *Id.* at 587, 652 S.E.2d at 534.

65. *Id.*

66. *Id.* at 587-88, 652 S.E.2d at 534-35.

67. 290 Ga. App. 782, 661 S.E.2d 568 (2008).

68. The landowner claimed that the lower court had erred by deciding that it was entitled to compensation for only 5.46 acres rather than 9.78 acres, which the landowner contended it owned based on a boundary dispute. *Id.* at 782-84, 661 S.E.2d at 571-72.

69. *Id.*, 661 S.E.2d at 570-71.

70. *Id.* at 784, 661 S.E.2d at 571.

it was not the condemnor but another legal entity that had enacted the ordinance, the court of appeals ruled that the proper relief the property owner should have sought from the imposition of the ordinance was to file an action for inverse condemnation against the enacting authority.⁷¹ Stating that condemnation only provided compensation for value of the land at the date of taking, the court of appeals further held that the property owner's theory that subdividing the condemned property in the future would increase its value was hypothetical and thus inadmissible.⁷²

Conversely, in *Department of Transportation v. Patten Seed Co.*,⁷³ the court of appeals looked at how rezoning a property in the future would affect the current value of the property.⁷⁴ The trial court allowed the admission of evidence relating to the potential value of the property taken if the property were rezoned. The Department of Transportation (DOT) appealed the admission of evidence regarding the speculative value of the property, the exclusion of rebuttal testimony, and the charges made by the trial court to the jury.⁷⁵ Although the land was zoned as agricultural, the condemnee presented evidence that it was "highly likely" that the property would have been rezoned as commercial had the condemnee sought the rezoning.⁷⁶ The potential for rezoning was established by evidence that the adjoining property bordered other commercial property, the needed variances would have been granted, and the municipality would have provided the necessary water and sewer services.⁷⁷ The court of appeals held that the commercial zoning was reasonably probable and could have affected the land value.⁷⁸

The DOT also claimed that the trial court had erred by not giving a jury charge pursuant to *Department of Transportation v. Gunnels*⁷⁹ to outline the steps to determine just and adequate compensation.⁸⁰ The court of appeals decided that the trial court's refusal to make the *Gunnels* charge was proper because the charge proffered by the DOT had not been tailored to the facts, as issues raised in the charge, such as

71. *Id.* at 783-84, 661 S.E.2d at 571.

72. *Id.* at 784, 661 S.E.2d at 572.

73. 290 Ga. App. 532, 660 S.E.2d 30 (2008).

74. *Id.* at 532, 660 S.E.2d at 31-32.

75. *Id.*, 660 S.E.2d at 32.

76. *Id.* at 533, 660 S.E.2d at 32.

77. *Id.* at 533-34, 660 S.E.2d at 32-33.

78. *Id.* at 534, 660 S.E.2d at 33.

79. 175 Ga. App. 632, 334 S.E.2d 197 (1985).

80. *Patten Seed*, 290 Ga. App. at 534, 660 S.E.2d at 33.

consequential damages, had been resolved and would have confused the jury.⁸¹

The DOT also challenged the trial court's issuance of the following charge proffered by the condemnee:

When assessing the value of the land taken as part of the entire tract, it is not proper merely to compute the percentage value on the basis of an artificial unit value for the entire tract unless the actualities of the case accord with such approach, as the value taken is not dependent upon the size of the whole; that is, the value of the part taken is not automatically measured by the size of the parcel from which it's taken, although the value of the part taken may be derived in part by the nature of the land around it because the setting affects the highest and best use of the property taken.⁸²

The charge was proper because it was legally correct and authorized by expert testimony that valued the tract at the same price per acre as a larger tract.⁸³

V. SALE OF REAL PROPERTY

As the economy of the United States faces a downturn, there are more cases being reported regarding contracts for the sale or listing of property. The parties to these transactions may find that the difficult real estate market makes litigation worthwhile on these deals gone bad. In *Roberts v. Coldwell Banker Kinard Realty*,⁸⁴ the Georgia Court of Appeals reviewed a realtor's listing agreement to determine when a potential purchaser is "introduced" to the property being sold.⁸⁵

Mr. and Mrs. Roberts were in the midst of a divorce when they entered into an "Exclusive Seller Listing Agreement" with Coldwell Banker to sell their home.⁸⁶ The contract was executed on March 31, 2005 and provided that if the property sold prior to June 30, 2005, the contract expiration date, "Coldwell Banker would be entitled to a six percent commission."⁸⁷ The listing agreement also provided that if the property sold within 180 days after the expiration of that listing agreement, Coldwell Banker would be entitled to the commission so long

81. *Id.* at 535, 660 S.E.2d at 34.

82. *Id.* at 536, 660 S.E.2d at 34.

83. *Id.* at 537, 660 S.E.2d at 35.

84. 286 Ga. App. 7, 648 S.E.2d 442 (2007).

85. *Id.* at 8, 648 S.E.2d at 443.

86. *Id.*

87. *Id.*

as the buyer was “introduced to the property by the Broker” prior to the expiration of the listing agreement.⁸⁸

Prior to the date on which the listing agreement was executed, Michelle Denton saw a “For Sale By Owner” sign in the Roberts’ yard, and her husband contacted Mr. Roberts to discuss the property. In April 2005 Mr. Denton contacted Mrs. Roberts to arrange a viewing of the home and learned that the property was then listed by Coldwell Banker. The Dentons contacted another broker, Trinity Real Estate, LLP, who took them to view the home.⁸⁹

After the listing agreement expired, Mr. Roberts contacted Mr. Denton to determine whether the Dentons remained interested in the property. Ultimately, the Dentons purchased the property. Coldwell Banker sued to recover its commission, claiming the Dentons were introduced to the property by its licensee, Trinity. The trial court granted summary judgment to Coldwell Banker.⁹⁰

On appeal, the court considered whether Trinity was a “licensee” of Coldwell Banker who “introduced” the Dentons to the property.⁹¹ The court noted that in the past, the use of the term “introduced” was found “to obligate sellers to pay commissions . . . where the broker [initially] told the buyer about the property, provided the buyer with information about the property, or showed the buyer the property.”⁹² Applying this standard, the court held that Coldwell Banker did not introduce the buyers to the property.⁹³ Rather, the evidence reflected that the Dentons first learned of the property by viewing the owners’ “For Sale” sign, and they obtained initial information about the property from Mr. Roberts prior to the listing.⁹⁴ Further, Coldwell Banker was not entitled to a commission on the basis that Trinity had introduced the property to the Dentons because even if Trinity had done so, there was no evidence that Trinity was a licensee of Coldwell Banker.⁹⁵ Coldwell Banker’s broad interpretation of the listing agreement was that it was entitled to a commission if the property sold within six months of the listing expiration as long as the purchaser had been introduced to the property (by anyone) during the term of the listing agreement.⁹⁶ Had

88. *Id.*

89. *Id.*

90. *Id.*, 648 S.E.2d at 443-44.

91. *See id.*, 648 S.E.2d at 444.

92. *Id.* at 9, 648 S.E.2d at 444 (alteration and ellipsis in original) (quoting *Snipes v. Marcene P. Powell & Assocs.*, 273 Ga. App. 814, 817, 616 S.E.2d 152, 156 (2005)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 10, 648 S.E.2d at 445.

that result been the intention of the parties, however, the agreement would not have included the limitation “by Broker,” following the words ‘introduced to the property.’⁹⁷

In *Harrison v. Eberhardt*,⁹⁸ the court of appeals reviewed arbitration clauses in real estate sales contracts.⁹⁹ Eberhardt contracted with Harrison for the sale of property. By special stipulation to the sales contract, Eberhardt agreed to install a new well and a new septic tank compliant with county code. Soon after closing, the well water became contaminated with septic leakage, and Harrison learned that the property was unsuitable for a septic tank.¹⁰⁰

Harrison brought suit against Eberhardt, the realty company, and its agent alleging that she had been assured of a workable well and septic system and that she had been fraudulently induced to purchase the property. The trial court granted Eberhardt’s motion to compel arbitration based upon a provision of the home buyer’s warranty containing a binding arbitration provision. The arbitrator found that Eberhardt was not responsible under the warranty for problems with the well water and septic system. After arbitration, Harrison objected to the trial court’s confirmation of the arbitration award, arguing that jury issues remained regarding her right to rescind, the lack of drinkable water, and other damages. The trial court confirmed the arbitration award, and Harrison appealed.¹⁰¹

On appeal, Harrison argued that the arbitration provision was not enforceable because it was not initialed by the parties.¹⁰² The court of appeals acknowledged that although O.C.G.A. § 9-9-2(c)(8)¹⁰³ requires parties to place their initials upon arbitration provisions, the statute did not apply to home warranties.¹⁰⁴ Further, the warranty agreement containing the arbitration clause was governed not by the Georgia statute, but by the Federal Arbitration Act (FAA).¹⁰⁵ Harrison then argued that the FAA did not apply to the transaction because no interstate commerce was involved.¹⁰⁶ The court ruled that the choice of law provision made it clear that the FAA controlled, and Georgia law,

97. *Id.*

98. 287 Ga. App. 561, 651 S.E.2d 826 (2007).

99. *See id.* at 561, 651 S.E.2d at 827.

100. *Id.*

101. *Id.* at 561-62, 651 S.E.2d at 827.

102. *Id.* at 562, 651 S.E.2d at 828.

103. O.C.G.A. § 9-9-2(c)(8) (2007).

104. *Harrison*, 287 Ga. App. at 563, 651 S.E.2d at 828.

105. *Id.*; U.S.C. tit. 9 (2006).

106. *Harrison*, 287 Ga. App. at 563, 651 S.E.2d at 828.

which required the parties to initial the arbitration provision, was preempted.¹⁰⁷

Because she was bringing her claim under the sales and purchase agreement, Harrison contended the warranty's arbitration provision did not apply.¹⁰⁸ The court, however, held that the arbitration provision expressly covered the claim of fraud "including without limitation, any claim of breach of contract, negligent or intentional misrepresentation or nondisclosure in the inducement, execution or performance of any contract, including this arbitration agreement, and breach of any alleged duty of good faith and fair dealing."¹⁰⁹ Harrison next argued that an arbitration provision in a home buyer's warranty did not apply to instances of fraud and deception, but the court distinguished the cases cited by Harrison because Harrison had signed an agreement acknowledging and consenting to arbitration.¹¹⁰

VI. EASEMENTS, COVENANTS, AND BOUNDARIES¹¹¹

In *Godley Park Homeowners Ass'n v. Bowen*,¹¹² the Georgia Court of Appeals approved a restrictive covenant prohibiting the placement of a "For Sale" sign on the property owned by appellee Mary Gwyn Bowen (Bowen).¹¹³ The restrictive covenant at issue gave appellant Godley Park Homeowners Association, Inc. (Godley Park) sole authority to erect such signs and explicitly barred any property owner from doing so.¹¹⁴

Bowen first argued that because her real estate agent erected the sign, the restrictive covenant was not violated.¹¹⁵ The court dismissed this argument, noting that because the real estate agent was acting on Bowen's behalf, the agent was subject to the same limitations, including the covenant, that applied to Bowen herself.¹¹⁶

Bowen then argued that the restrictive covenant constituted a restraint on trade and was therefore unenforceable. Bowen based this argument on precedent pertaining to restrictive covenants in the

107. *Id.*

108. *Id.* at 564, 651 S.E.2d at 829.

109. *Id.* (emphasis omitted).

110. *Id.* at 565, 651 S.E.2d at 829.

111. This section was authored by Wade H. Walker, Jr., Georgia Institute of Technology (B.S.E.E., 1995); Emory University, Goizueta Business School (M.B.A., 2003); Georgia State University College of Law (J.D. candidate, May 2009).

112. 286 Ga. App. 21, 649 S.E.2d 308 (2007).

113. *Id.* at 21, 649 S.E.2d at 309.

114. *Id.* at 22, 649 S.E.2d at 310.

115. *Id.*

116. *Id.*

employment context.¹¹⁷ Contracts relating to real property, the court concluded, are not subject to the same limitations.¹¹⁸ “In Georgia, it is clear that two parties may contract away or extend their rights as they please regarding the use of real property so long as public policy is not violated.”¹¹⁹ Because the covenant precluding “For Sale” signs did not directly prohibit the sale of Bowen’s property, the court concluded that it did not violate Georgia public policy and was thus enforceable.¹²⁰

In *Meinhardt v. Christianson*,¹²¹ the court of appeals considered whether granting a license to use another’s property and the “subsequent procurement of an irrevocable easement” constitute a sale of the property so as to trigger a third party’s right of first refusal.¹²² Meinhardt brought suit against owners of adjoining properties who prevented him from using an easement across their property. The central dispute involved an oral contract between Meinhardt and Christianson in which Christianson conveyed Meinhardt an easement on Christianson’s property in exchange for Meinhardt’s transfer of an equally sized portion of land, the construction of a fence, and \$1000. Christianson’s property was conveyed to her upon divorce from Tillman, with Tillman retaining a right of first refusal in the event that Christianson’s property or any portion thereon was offered for sale.¹²³ Upon learning of the oral contract between Meinhardt and Christianson, Tillman asserted his right of first refusal and demanded that Meinhardt stop using the easement conveyed by Christianson. Meinhardt subsequently filed a motion for interlocutory injunction to prevent the defendants from interfering with his use of the property.¹²⁴

Meinhardt alleged that he had partially performed his obligations under the oral contract granting him the easement on Christianson’s land, but the trial court denied his motion for interlocutory injunction in light of Tillman’s right of first refusal.¹²⁵ On appeal, Meinhardt

117. *Id.* at 23, 649 S.E.2d at 310.

118. *Id.*

119. *Id.*

120. *Id.* at 23-24, 649 S.E.2d at 311.

121. 289 Ga. App. 238, 656 S.E.2d 568 (2008).

122. *Id.* at 243, 656 S.E.2d at 574.

123. *Id.* at 238-39, 656 S.E.2d at 571. Relying on *Hinson v. Roberts*, 256 Ga. 396, 349 S.E.2d 454 (1986), the court stated that the “right of first refusal applies to attempts to sell any part of the property.” *Meinhardt*, 289 Ga. App. at 242, 656 S.E.2d at 573. Therefore, Christianson’s oral agreement to sell an easement on the property in and of itself does not trump a claim for right of first refusal. *Id.*

124. *Meinhardt*, 289 Ga. App. at 239, 656 S.E.2d at 571.

125. *Id.* at 239-40, 656 S.E.2d at 571-72.

argued that “he acquired a parol license to use the property, which became an irrevocable easement once he made improvements.”¹²⁶ Under O.C.G.A. § 44-9-4,¹²⁷

[a] parol license to use another’s land is revocable at any time if its revocation does no harm to the person to whom it has been granted. A parol license is not revocable when the licensee has acted pursuant thereto and in doing so has *incurred expense*; in such case, it becomes an easement running with the land.¹²⁸

The court held that Meinhardt’s parol license became an easement running with the land after he “paid Christianson \$1,000, began using the property, and incurred additional expense in maintaining and improving it.”¹²⁹ The court further stated that Tillman’s right of first refusal did not prohibit Christianson from conveying an easement on the property she owned.¹³⁰ In other words, “Christianson’s grant of a license to Meinhardt, and his subsequent procurement of an irrevocable easement, was not the legal equivalent of an attempted sale of the property so as to trigger Tillman’s right of first refusal.”¹³¹ The trial court, therefore, erred when it denied Meinhardt’s motion for interlocutory injunction.¹³²

In *Dover v. Higgins*,¹³³ the court of appeals reviewed a jury verdict establishing the boundary between property owned by Ernest Higgins and Meri Chris Pepper and property owned by Raymond Dover.¹³⁴ The jury was given a verdict form allowing them to (1) find that a plat submitted by Higgins and Pepper correctly established the boundary line; or (2) find that a plat submitted by Dover accurately established the boundary line; or (3) determine an entirely different boundary line. The jury verdict found that the Higgins-Pepper plat accurately depicted the boundary. Dover moved for a new trial or a judgment not withstanding the verdict, which was denied, and Dover appealed.¹³⁵

126. *Id.* at 242, 656 S.E.2d at 573.

127. O.C.G.A. § 44-9-4 (2001).

128. *Id.* (emphasis added). This statute is an exception to the Statute of Frauds, O.C.G.A. § 13-5-30 (1982 & Supp. 2008), under which an oral agreement conveying an interest in land is unenforceable. *Id.* § 13-5-30(4).

129. *Meinhardt*, 289 Ga. App. at 243, 656 S.E.2d at 574.

130. *Id.*

131. *Id.*

132. *Id.*

133. 287 Ga. App. 861, 652 S.E.2d 829 (2007).

134. *See id.* at 861-67, 652 S.E.2d at 830-34.

135. *Id.* at 862, 652 S.E.2d at 831.

The deed for the real property belonging to Higgins and Pepper contained a legal description, which specifically identified a grist mill.¹³⁶ Dover first contended that the jury verdict was flawed because the boundary line determined by the jury did not involve the grist mill.¹³⁷ The court of appeals noted that the law states that “ancient landmarks are the best evidence for determining boundary lines[,] aside from natural landmarks.”¹³⁸ However, the court of appeals noted that the monuments must be located and be in their original places for them to establish a boundary.¹³⁹ The court saw no reason to overturn the jury verdict.¹⁴⁰ In its decision, the court held that the deed only indicated that the grist mill was a part of the property conveyed, and the deed did not utilize the grist mill as a conveyance.¹⁴¹ Moreover, the court noted that the jury was free to disregard the reference to the grist mill in setting the border because the grist mill had been removed and the evidence did not show its actual location.¹⁴²

Dover also claimed that the trial court erred by permitting the jury to utilize the special verdict form.¹⁴³ The court of appeals found no merit in the claim of error because Dover’s attorney had agreed to the use of the jury form.¹⁴⁴

VII. TRESPASS AND NUISANCE

In *Stanfield v. Waste Management of Georgia, Inc.*,¹⁴⁵ the Stanfields brought a nuisance and trespass action against Waste Management of Georgia, Inc. (WMG), seeking money damages and an injunction. The

136. *Id.* at 863, 652 S.E.2d at 831. Specifically, the legal description was as follows:

This tract of land and grist mill containing twelve acres more or less commencing at a stooping pine tree on the original line running northward a poplar on the branch, thence down the branch to the creek; thence to a rock corner on the public road; thence a straight line to the creek; thence down the creek to the mouth of the branch at the creek; thence [a] straight line to a rock corner below the mill; thence a straight line to the commencing corner all being in the 11th District part of Lot No. 5.

Id. (alteration in original).

137. *Id.* at 864, 652 S.E.2d at 832.

138. *Id.* (citing O.C.G.A. § 44-4-5 (1991)).

139. *Id.* at 865, 652 S.E.2d at 832.

140. *Id.*, 652 S.E.2d at 832-33.

141. *Id.*, 652 S.E.2d at 832.

142. *Id.*

143. *Id.*

144. *Id.* at 866, 652 S.E.2d at 833. Higgins and Pepper also sought sanctions for a frivolous appeal, but the court denied sanctions because the appeal was not unreasonable. *Id.* at 867, 652 S.E.2d at 833-34.

145. 287 Ga. App. 810, 652 S.E.2d 815 (2007).

Stanfields purchased their home in 1987. The land immediately behind their property was zoned for general industrial use, and in 1995 WMG built its transfer station on the adjacent property. The transfer station processed solid waste, cardboard, and construction waste. The Stanfields claimed that the station emitted a bad odor and created rodent and insect problems. Mrs. Stanfield also claimed that the odor caused her to have breathing complications.¹⁴⁶

At trial, evidence showed that the odor from the station was not hazardous and that further, Mrs. Stanfield was a smoker with a history of smoking-related disease in her family. WMG also presented evidence that the rodents and insects could have been caused by reasons other than the location of the station. The Stanfields failed to submit evidence supporting their claim for damages to the realty, and the trial court granted a directed verdict on that claim. Once the claim for damages to the realty was terminated, the court refused the Stanfields' request for jury charges on trespass and directed a verdict to WMG on that claim.¹⁴⁷

The Stanfields appealed on the grounds that the trial court erred when it refused to charge the jury on the trespass claim, when it admitted written reports from a police officer who was not present to testify, and when it granted a directed verdict. In its cross appeal, WMG claimed that the trial court erred when it did not confirm the final judgment entered to the jury's verdict.¹⁴⁸ The record from the trial court showed that the Stanfields alleged that "the transfer station constituted a 'nuisance and trespass,' or more specifically a 'continuing nuisance,'" which denied the Stanfields "the rightful use and enjoyment of their property."¹⁴⁹ The Georgia Court of Appeals examined the law of damages, holding the law was clear that "a plaintiff may not recover for both discomfort and diminution of value."¹⁵⁰ Further, once the jury found that the Stanfields were not entitled to either nominal or general damages for the nuisance claim, any error arising from the trial court's grant of directed verdict on the trespass claim was harmless.¹⁵¹ The court of appeals disposed of the Stanfields' remaining issue by holding the trial court did not err in admitting written police reports in the absence of the officer because the reports were cumulative testimo-

146. *Id.* at 810-11, 652 S.E.2d at 817.

147. *Id.* at 811, 652 S.E.2d at 817.

148. *Id.* at 812-13, 652 S.E.2d at 817-18.

149. *Id.* at 812, 652 S.E.2d at 817.

150. *Id.*, 652 S.E.2d at 818.

151. *Id.*

ny.¹⁵² In review of WMG's cross-appeal on the form of the verdict, the court affirmed the trial court.¹⁵³

In *Evans v. Knott*,¹⁵⁴ Evans and Knott owned adjoining properties. Knott built a motocross track on his property, which was opened to the public. After Evans complained, the Knotts closed the tract to the public but continued to allow access to the track to a few people. Evans brought a nuisance action to enjoin Knott from operating the track. A jury found that the public operating of the track was a nuisance but the private use was not. The trial court issued a permanent injunction restricting the use of the track. Knott appealed, arguing that the permanent injunction was at odds with the jury's findings, and the Georgia Supreme Court reversed the trial court's order. On remand, the trial court entered an order denying all injunctive relief, and Evans appealed.¹⁵⁵

Evans argued that without a permanent injunction, the track could be opened to the public for use at any time without limitation.¹⁵⁶ The supreme court held that although there was some support for Evans's argument, it was undisputed that Knott closed the track to the public before the suit was filed and did not intend to reopen the track to the public.¹⁵⁷ Although it was possible that the track could be opened to the public in the future, Evans failed to establish that possibility to a reasonable degree of certainty, and the trial court was not required to issue an injunction "where [the] nuisance [had been] abated prior to trial and there is no danger of recurrence."¹⁵⁸

In *Moses v. Traton Corp.*,¹⁵⁹ Moses purchased a home from Traton, the subdivision developer. A recorded plat of the subdivision established the property boundaries of each owner of the subdivision and showed the public rights of way. A construction truck of Traton or its agent drove over the curb in front of Moses's property and damaged the grass and soil. The damaged area was located entirely on the county right of way and not a part of Moses's lot.¹⁶⁰

When Traton failed to repair the damage to Moses's satisfaction, Moses filed a trespass action against Traton and its employee.

152. *Id.* at 813, 652 S.E.2d at 818.

153. *Id.*

154. 282 Ga. 584, 652 S.E.2d 535 (2007).

155. *Id.* at 584-85, 652 S.E.2d at 536.

156. *Id.*

157. *Id.*

158. *Id.* at 585-86, 652 S.E.2d at 537 (citing *Farley v. Gate City Gaslight Co.*, 105 Ga. 323, 338, 31 S.E. 193, 199 (1898)).

159. 286 Ga. App. 843, 650 S.E.2d 353 (2007).

160. *Id.* at 843-44, 650 S.E.2d at 354.

Summary judgment was granted to Traton on the ground that Moses lacked standing to maintain an action for trespass to land of which he was not the owner.¹⁶¹

Moses appealed, relying on O.C.G.A. § 51-9-2,¹⁶² which states that “[t]he bare right to possession of lands shall authorize their recovery by the owner of such right, as well as damages for the withholding of such right.”¹⁶³ Moses argued that he possessed the property because he attended to the landscaping and requested others not to invade that property.¹⁶⁴ The court of appeals was not persuaded and held that since the property was a public right of way, Moses could not demonstrate that he held the land “to the exclusion of others.”¹⁶⁵

Moses next argued that under O.C.G.A. § 44-5-167,¹⁶⁶ he was deemed to be in possession of the public right of way because it was contiguous to his property as delineated in the recorded deed.¹⁶⁷ According to O.C.G.A. § 44-5-167, “[p]ossession under a duly recorded deed will be construed to extend to all the contiguous property embraced in the deed.”¹⁶⁸ The court of appeals held that since Moses’s deed did not embrace the property outside of his lot, the property at issue was not within the lot described in the deed, and the statute did not provide him with standing to sue.¹⁶⁹

Moses also contended that he had standing to prevent unlawful interference with the right of way pursuant to O.C.G.A. § 51-9-10.¹⁷⁰ The court noted that

OCGA § 51-9-10 protects the rights of users of rights of way from interference with their use. Moreover, “[o]wners of property which abuts a public road have the right to the use and enjoyment of such road in common with all other members of the public, as well as other rights such as ingress and egress.”¹⁷¹

161. *Id.* at 844, 650 S.E.2d at 354-55.

162. O.C.G.A. § 51-9-2 (2000).

163. *Moses*, 286 Ga. App. at 844, 650 S.E.2d at 355 (alteration in original) (quoting O.C.G.A. § 51-9-2).

164. *Id.*

165. *Id.*

166. O.C.G.A. § 44-5-167 (Supp. 2008).

167. *Moses*, 286 Ga. App. at 845, 650 S.E.2d at 355.

168. *Id.* at 844-45, 650 S.E.2d at 355 (alteration in original) (quoting O.C.G.A. § 44-5-167).

169. *Id.* at 845, 650 S.E.2d at 355.

170. *Id.*; O.C.G.A. § 51-9-10 (2000).

171. *Id.* (alteration in original) (quoting *Holland v. Shackelford*, 220 Ga. 104, 111, 137 S.E.2d 298, 303-04 (1968)).

Because there was no evidence of interference with Moses's right of ingress or egress, his reliance upon the statute was misplaced.¹⁷² Had Traton installed impairment to Moses's right to ingress or egress, the court explained, a different result might have been reached.¹⁷³

Finally, Moses argued that the covenant recorded with his deed, which required owners to maintain their lots, gave him standing.¹⁷⁴ The court of appeals disagreed, holding such covenants do not create a possessory interest in the land.¹⁷⁵

VIII. FORECLOSURE OF REAL PROPERTY¹⁷⁶

In *Royston v. Bank of America, N.A.*,¹⁷⁷ the Georgia Court of Appeals addressed the issues of foreclosure notice and excess proceeds in the context of a complex scenario in which appellant David Royston (Royston) purchased property at a foreclosure sale held by Wachovia Bank, N.A. (Wachovia).¹⁷⁸ Wachovia sold the property subject to a senior security deed held by Bank of America. The property was also the subject of a third priority security interest, which was extinguished in the sale.¹⁷⁹

Three days after Royston received the deed under power evidencing his purchase of the property, Bank of America foreclosed its interest. Bank of America published notice of its sale but did not send written notice to Royston. The same law firm conducted both the sale in which Royston purchased the property and the subsequent Bank of America foreclosure sale.¹⁸⁰

Following foreclosure, Royston filed suit against both Wachovia and Bank of America, claiming damages for improper notice and seeking the excess proceeds from both sales. The trial court granted summary judgment to both lenders on all counts, and Royston appealed.¹⁸¹

172. *Id.*, 650 S.E.2d at 356.

173. *Id.* at 846, 650 S.E.2d at 356.

174. *Id.*

175. *Id.*

176. This section was authored by Dylan W. Howard, associate in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Yale University (B.A., 1999); University of Georgia (J.D., cum laude, 2002). Member, State Bar of Georgia.

177. 290 Ga. App. 556, 660 S.E.2d 412 (2008).

178. *See id.* at 556-64, 660 S.E.2d at 415-20.

179. *Id.* at 557, 660 S.E.2d at 415.

180. *Id.* at 557-58, 660 S.E.2d at 415-16.

181. *Id.*, 660 S.E.2d at 416.

Roylston first sought relief against Bank of America under the Georgia Residential Mortgage Act (GRMA),¹⁸² which prohibits mortgage lenders from engaging in bad faith conduct in connection with the “making of, purchase of, transfer of, or sale of any mortgage loan.”¹⁸³ The court affirmed the denial of this claim, concluding that because title to property is transferred in a foreclosure sale but the mortgage loan itself is extinguished rather than sold, the GRMA standards do not apply to a lender conducting a foreclosure sale.¹⁸⁴

The court reached a different result on Roylston’s claim against Bank of America for improper notice, however.¹⁸⁵ The court overturned the trial court’s denial of this claim for two reasons.¹⁸⁶ First, the court noted that Roylston acquired his interest in the property more than a month in advance of the sale (prior to the fifteen-day notice deadline in effect at the time).¹⁸⁷ Second, the court ruled that a genuine issue of material fact existed as to whether Bank of America had knowledge of Roylston’s ownership of the property.¹⁸⁸

Because the same law firm handled both foreclosures during the same timeframe, the court stated that a finder of fact would be authorized to conclude that one or more of the attorneys handling the Bank of America foreclosure were aware of Roylston’s interest in the property.¹⁸⁹ In turn, this conclusion would allow the finder of fact to impute that knowledge to Bank of America.¹⁹⁰ There was thus a genuine issue of material fact regarding Bank of America’s culpability for failing to provide Roylston with notice per the foreclosure statute.¹⁹¹

Roylston’s claims against Wachovia were less successful. He alleged that Wachovia’s failure to notify him of the third-priority junior interest constituted improper notice and entitled him to damages.¹⁹² The court concluded that because the interest was extinguished by the foreclosure, no harm was done.¹⁹³

182. O.C.G.A. §§ 7-1-1000 to -1021 (2004).

183. *Roylston*, 290 Ga. App. at 558, 660 S.E.2d at 416 (quoting O.C.G.A. § 7-1-1013(6) (2004)).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 560, 660 S.E.2d at 417.

188. *Id.*

189. *Id.* at 560-61, 660 S.E.2d at 417-18.

190. *Id.* at 561, 660 S.E.2d at 418.

191. *Id.*

192. *Id.* at 564, 660 S.E.2d at 420.

193. *Id.* at 563, 660 S.E.2d at 419.

Finally, Roylston claimed that he was entitled to the excess funds from both foreclosure sales.¹⁹⁴ The court concluded that the Georgia statute governing the disposition of excess proceeds provides for such proceeds to be paid to a junior lien holder or to the mortgagors but not to the bidder or the property owner.¹⁹⁵ As a result, the court not only approved the trial court's denial of this claim, but it also concluded that Roylston's claim for excess funds lacked substantial justification and thus entitled both Wachovia and Bank of America to attorney fee awards.¹⁹⁶

The court of appeals again addressed the disposition of excess proceeds in *Hawkins v. National City Mortgage Co.*¹⁹⁷ There, Walter and Carol Hawkins (the Hawkins) obtained two mortgage loans on their residence from National City Mortgage (NCM). The Hawkins subsequently defaulted on both loans. NCM foreclosed on the first mortgage and filed a separate lawsuit seeking a money judgment on the second mortgage. The trial court granted summary judgment in NCM's favor, and the Hawkins appealed. On appeal, the Hawkins made two arguments. First, NCM should have applied the surplus from the foreclosure sale to the second loan. Second, the Hawkins argued that the foreclosure under the first note extinguished the debt obligation of the second.¹⁹⁸ The court of appeals rejected both arguments.¹⁹⁹ The court held that because the two mortgage loans were separate and distinct debts, NCM's suit on the second note was not affected by its foreclosure on the first.²⁰⁰ The court also concluded that the foreclosure of the first mortgage extinguished NCM's security interest under the second, but not the underlying debt obligation.²⁰¹ Thus, NCM was entitled to file a separate lawsuit on the second mortgage loan, and its recovery thereunder was not limited to the deficiency remaining from its foreclosure of the first.²⁰²

In *DeGolyer v. Green Tree Servicing, LLC*,²⁰³ the plaintiffs Troy and Carliss DeGolyer (the DeGolyers) purchased a 6.94 acre tract of land (Tract A) with a loan from Appalachian Community Bank (ACB). Several years later, a company owned by the DeGolyers purchased a

194. *Id.*

195. *Id.* (citing O.C.G.A. § 44-14-190 (2002)).

196. *Id.* at 564, 660 S.E.2d at 419.

197. 286 Ga. App. 716, 649 S.E.2d 769 (2007).

198. *Id.* at 716, 649 S.E.2d at 770.

199. *Id.*

200. *Id.* at 717, 649 S.E.2d at 771.

201. *Id.*

202. *Id.*

203. 291 Ga. App. 444, 662 S.E.2d 141 (2008).

neighboring 22.5 acre tract of land (Tract B) and obtained a second loan from ACB to fund improvements on the tract. The DeGolyers then divided the 22.5 acre tract into two parcels, separating out the five acre tract on which their residence was located (Tract C). They next obtained a loan secured by Tract C, which was subsequently transferred to the defendant, Green Tree Servicing, LLC (Green Tree). Proceeds from this loan were used to satisfy the ACB loan on Tract B, while the initial ACB loan on Tract A remained due and owing.²⁰⁴

The DeGolyers defaulted in payment of the Green Tree loan secured by Tract C. When Green Tree initiated foreclosure proceedings, it discovered that the security deed had never been recorded. Green Tree's title company corrected this error but failed to attach the legal description to the recorded deed.²⁰⁵

Without the legal description, Green Tree foreclosed on Tract A, which was not collateral for the loan and in fact was still encumbered by the initial ACB loan. Green Tree was informed of this error both by the DeGolyers and by an employee of ACB, but it failed to halt the sale. After the foreclosure, Green Tree filed suit seeking a cancellation of the erroneous deed under power and a reformation correcting the security deed. In turn, the DeGolyers filed a counterclaim for wrongful foreclosure.²⁰⁶

The court of appeals upheld the trial court's order directing a verdict in favor of Green Tree on its cancellation claim.²⁰⁷ The court described the situation as one of mutual mistake because all parties intended for the five acre Tract C to be the subject of the security deed.²⁰⁸ Because the DeGolyers could show no prejudice resulting from cancellation of the deed under power, cancellation was appropriate.²⁰⁹

In response to the wrongful foreclosure claim, Green Tree tried a novel, yet unsuccessful approach. Green Tree argued that because it never had valid power to sell Tract A, it could not have exercised that power unfairly under O.C.G.A. § 23-2-114.²¹⁰ The court disagreed with this analysis and held that "[a] claim for wrongful exercise of a power of sale . . . can arise when the creditor has no legal right to foreclose."²¹¹

204. *Id.* at 445, 662 S.E.2d at 144-45.

205. *Id.*, 662 S.E.2d at 145.

206. *Id.* at 446, 662 S.E.2d at 145.

207. *Id.* at 447, 662 S.E.2d at 146.

208. *Id.*

209. *Id.*

210. *Id.* at 448-49, 662 S.E.2d at 147; O.C.G.A. § 23-2-114 (2004).

211. *DeGolyer*, 291 Ga. App. at 449, 662 S.E.2d at 147 (quoting *Brown v. Freedman*, 222 Ga. App. 213, 214, 424 S.E.2d 73, 75 (1996)).

Finally, the court also overturned the trial court's finding that the DeGolyers were not entitled to mental anguish damages as a matter of law.²¹² While a claim for intentional infliction of emotional distress carries a high burden of proof, the court held that there were genuine issues of material fact regarding Green Tree's recklessness (there was evidence that Green Tree was notified that it was foreclosing on the wrong property) and the outrageousness of Green Tree's conduct.²¹³ In its ruling, the court cited precedent supporting the conclusion that evidence of wrongful foreclosure can support a claim for mental anguish damages.²¹⁴

In *Matrix Financial Services, Inc. v. Dean*,²¹⁵ the appellant, Matrix Financial Services, Inc. (Matrix), sought to enforce a settlement agreement between it and the appellee, Willie Grady Dean (Dean). Dean had obtained and defaulted on a mortgage that Matrix obtained from a lender that had in turn obtained its interest from South Georgia Equity Corporation (SGE).²¹⁶

Matrix foreclosed the property and initiated a dispossessory proceeding. The parties then entered into a settlement agreement reinstating the loan. Dean subsequently defaulted on the settlement agreement and brought a lawsuit seeking a rescission of the foreclosure sale. Matrix countersued for enforcement of the settlement agreement.²¹⁷

Dean's challenge relied on a ruling by a federal bankruptcy court in a prior case in which SGE had sold individual loans to multiple investors; in that case, a question of fact existed regarding whether lenders who purchased loans from SGE took such loans in good faith.²¹⁸ The court of appeals also noted an abnormality in the title history of the loan at issue.²¹⁹

The court ultimately concluded that this evidence raised an issue of material fact on whether Matrix foreclosed "in good faith and with clean hands."²²⁰ If it did not, then Matrix had no right to foreclose and the

212. *Id.*

213. *Id.* at 449-50, 662 S.E.2d at 148.

214. *Id.* at 450, 662 S.E.2d at 148 (citing *Blanton v. Dury*, 247 Ga. App. 175, 543 S.E.2d 448 (2000); *Clark v. West*, 196 Ga. App. 456, 395 S.E.2d 884 (1990)).

215. 288 Ga. App. 666, 655 S.E.2d 290 (2007).

216. *Id.* at 666, 655 S.E.2d at 292.

217. *Id.* at 666-67, 655 S.E.2d at 292.

218. *Id.* at 667-68, 655 S.E.2d at 293 (citing *In re SGE Mgmt. Funding Corp.*, 278 B.R. 653, 664 (Bankr. M.D. Ga. 2001)).

219. *Id.* at 668, 665 S.E.2d at 293.

220. *Id.*

settlement agreement arising from the foreclosure was unenforceable due to lack of consideration.²²¹

The court discussed the general rule that compromise of a doubtful claim is sufficient consideration to support a settlement but concluded that at a bare minimum the doubtful claim must be asserted in good faith.²²² If Matrix foreclosed on the property without regard to whether it had a legal right to do so, then it acted in bad faith and essentially procured the settlement agreement by fraud.²²³ As a result, the court upheld the trial court's decision denying Matrix's motion to enforce the settlement agreement and remanded the case for further proceedings.²²⁴

IX. TAXATION OF REAL PROPERTY

In *DRST Holding, Ltd. v. Agio Corp.*,²²⁵ the Georgia Supreme Court considered claims based upon competing tax deeds, each of which was issued by the county sheriff.²²⁶ In May 2004 Agio purchased property at a tax sale conducted by the sheriff of DeKalb County. The county conducted the sale to satisfy some, but not all, of the outstanding tax fi. fas. issued against the property. The proceeds of the sale were sufficient to satisfy all of the outstanding fi. fas. The County Sheriff conducted a second sale in December 2004, and Lihua Xiao purchased the property. Xiao later transferred his interest to DRST. Both DRST and Agio completed the statutory proceeding to bar the equity right to redeem the property except as against each other. Agio brought a quiet title action against DRST. A Special Master found that the second sale of the property was void, and the trial court adopted the Special Master's report, from which DRST appealed.²²⁷

The supreme court considered whether it was permissible for a county to conduct a tax sale to satisfy only a portion of outstanding tax fi. fas. and then to sell the property again at a later date to satisfy any remaining fi. fas.²²⁸ The supreme court looked to precedent to consider the options available to a purchaser of tax deeds.²²⁹ “[F]ollowing a tax sale, the holder of a competing tax lien has two options—it may either

221. *Id.* at 668-69, 665 S.E.2d at 294.

222. *Id.* at 668, 665 S.E.2d at 294.

223. *Id.* at 668-69, 665 S.E.2d at 293-94.

224. *Id.* at 670-71, 665 S.E.2d at 295.

225. 282 Ga. 903, 655 S.E.2d 586 (2008).

226. *See id.* at 903-06, 655 S.E.2d at 587.

227. *Id.* at 903-04, 655 S.E.2d at 587-89.

228. *Id.* at 904, 655 S.E.2d at 587.

229. *Id.*

file a claim to collect against any proceeds from the sale, or it may assert its rights following the tax sale via a statutory claim for redemption.’²³⁰

The court held that once the county sold the property to Agio to satisfy only some of the fi. fas., the county itself became “a competing tax lienholder as to the remaining unsatisfied fi. fas.”²³¹ Neither of the options available to a tax lienholder included the right to conduct a second sale.²³² The county could have redeemed the property from Agio and conducted a tax sale for the remaining fi. fas., which would have then satisfied all outstanding fi. fas.²³³ Alternatively, the county could have used the excess proceeds from the first sale to satisfy the remaining fi. fas. it held.²³⁴ Because the second sale was not a legal option for the county, it was conducted in error, was subject to being set aside, and created a cloud on the title for DRST.²³⁵

At the time of the second tax sale, the right of redemption had not yet foreclosed and Agio held a defeasible title subject to the remaining unsatisfied fi. fas.²³⁶ The redemption option was possible until Agio exercised its foreclosure option in May 2005.²³⁷ Agio’s defeasible fee, however, was not subject to defeasance by the county’s unauthorized second sale.²³⁸ After the second sale, DRST stood in the same position as the county and became a competing lienholder for the property.²³⁹ Because DRST did not take any action to redeem the property after Agio initiated proceedings to foreclose the equity right of redemption, title vested in Agio.²⁴⁰ The court noted that DRST might be entitled to a refund of its purchase price but specifically did not rule on that issue because it was not before the court.²⁴¹

In *Oconee Board of Tax Assessors v. Thomas*,²⁴² the supreme court considered an issue regarding the appeal of assessment for breach of a conservation use covenant for land.²⁴³ Thomas and her then-husband

230. *Id.* (quoting *Nat’l Tax Funding v. Harpagon Co.*, 277 Ga. 41, 44, 586 S.E.2d 235, 239 (2003)); *See also* Linda S. Finley, *Real Property*, 56 MERCER L. REV. 395, 410-13 (2004).

231. *Agio*, 282 Ga. at 904, 655 S.E.2d at 587.

232. *Id.*

233. *Id.*

234. *Id.* at 905, 655 S.E.2d at 588.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 906, 655 S.E.2d at 588.

240. *Id.*, 655 S.E.2d at 589.

241. *Id.*

242. 282 Ga. 422, 651 S.E.2d 45 (2007).

243. *See id.* at 422, 651 S.E.2d at 46.

were granted a conservation use covenant for land they jointly owned during their marriage. They later divorced, and Thomas became the sole owner of the property. Because of the change in ownership, Thomas was required to reapply for the conservation use covenant. When she did not do so, the Oconee County Board of Tax Assessors (the BOA) sent Thomas notice on two separate occasions that it would assess a penalty for breach of the conservation use covenant if she did not apply for continuation of the covenant. She did not do so, and the BOA assessed a penalty. Thomas attempted to appeal the assessment to the county board of equalization, but she was thwarted by the BOA. She then sought mandamus in the superior court, where she was entitled to appeal the assessed penalty, and the BOA appealed.²⁴⁴

BOA's opposition to Thomas's attempted appeal was rooted in its definition and use of the word "assessment" under O.C.G.A. § 48-5-311(e)(1)(A).²⁴⁵ That statute "permits taxpayers to 'appeal from an assessment by the county board of tax assessors to the county board of equalization . . . as to matters of taxability, uniformity of assessment, and value, and, for residents, as to denials of homestead exemptions.'"²⁴⁶ BOA argued that the statute did not apply because the penalty for the breach of a conservation covenant was not an assessment within the meaning of the statute.²⁴⁷ The supreme court noted two flaws with the BOA's argument: a misidentification of what Thomas was appealing, and a misunderstanding of the use of the word "assessment" in the statute and a resulting misunderstanding that the statute would apply in support of Thomas's attempts to appeal.²⁴⁸

BOA characterized Thomas's appeal as an action seeking a review of her alleged breach of the conservation covenant.²⁴⁹ However, the assessment levied against her triggered the appeal.²⁵⁰ BOA argued that its assessments did not fall within the statute because the meaning of the word "assessment," as used in the statute, was limited to the determination of value.²⁵¹ The court consulted *Black's Law Dictionary*, holding that use of the word "assessment" is not limited to valuation but that it also concerns the imposition of a penalty, such as a tax or

244. *Id.*

245. O.C.G.A. § 48-5-311(e)(1)(A) (Supp. 2008).

246. *Thomas*, 282 Ga. at 422, 651 S.E.2d at 46 (ellipsis in original) (quoting O.C.G.A. § 48-5-311(e)(1)(A)).

247. *Id.* at 423, 651 S.E.2d at 46.

248. *Id.* at 422, 651 S.E.2d at 46.

249. *Id.* at 423, 651 S.E.2d at 46.

250. *Id.* at 422, 651 S.E.2d at 46.

251. *Id.* at 423, 655 S.E.2d at 46.

fine.²⁵² Therefore, with the BOA imposing a penalty upon Thomas, the provisions of O.C.G.A. § 48-5-311(e)(1)(A) applied.²⁵³

BOA next argued that its assessment was not appealable because the county board of equalization has jurisdiction for appeal of the denial of an application for conservation use covenant.²⁵⁴ BOA relied upon O.C.G.A. § 48-5-7.4(j)(1),²⁵⁵ but the court held that the provision was not applicable because it covered only the application of conservation use covenants and could not cover the entire subject of appeals.²⁵⁶ The court held that the assessment of a penalty for a breach of a conservation use covenant is an assessment covered in the right to appeal.²⁵⁷

Finally, the BOA argued that Thomas's appeal was untimely and that Thomas failed to exhaust her statutory remedies prior to appeal.²⁵⁸ The assessment sent to Thomas provided no information regarding her appeal rights as required by statute.²⁵⁹ BOA could not ignore the requirements for providing information regarding appeal and then seek to bar the appealing party for untimely compliance.²⁶⁰ Exhausting statutory remedies was not possible because Thomas had to file a petition for mandamus to force BOA to permit her to follow the statutory administrative process.²⁶¹ The lower court's ruling was affirmed with three special concurrences.²⁶²

The special concurrence, authored by Justice Melton and joined by Justices Carley and Hines, makes no distinction between the right of Thomas to appeal both the declaration of breach and the concomitant assessment of the mandatory penalty, which may be made to the board of equalization.²⁶³ The remedy most appropriate is the appeals process of O.C.G.A. § 48-5-311,²⁶⁴ not the refund process of O.C.G.A. § 48-2-35.²⁶⁵ Thomas appealed the ability of the BOA to impose any penalty

252. *Id.*

253. *Id.*

254. *Id.*

255. O.C.G.A. § 48-5-7.4(j)(1) (Supp. 2008).

256. *Thomas*, 282 Ga. at 423, 651 S.E.2d at 47.

257. *Id.*

258. *Id.* at 424, 651 S.E.2d at 47.

259. *Id.*; O.C.G.A. § 48-5-306(b)(2) (2001).

260. *Thomas*, 282 Ga. at 424-25, 651 S.E.2d at 47.

261. *Id.* at 425, 651 S.E.2d at 47.

262. *Id.*, 651 S.E.2d at 48.

263. *Id.* at 426-27, 651 S.E.2d at 47-48 (Melton, J., concurring specially).

264. O.C.G.A. § 48-5-311 (1999 & Supp. 2008).

265. *Thomas*, 282 Ga. at 427, 651 S.E.2d at 49 (Melton, J., concurring specially); O.C.G.A. § 48-2-35 (Supp. 2008).

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at all under the circumstances, which included the appeal of whether the conservation use covenant had been breached.²⁶⁶

266. *Thomas*, 282 Ga. at 427, 651 S.E.2d at 49 (Melton, J., concurring specially).