

Real Property

by Linda S. Finley*

I. INTRODUCTION

The survey period, June 1, 2010 through May 31, 2011,¹ saw continued dire economic times for Georgia and the entire United States, which were marked with a record-breaking number of foreclosures.² Georgia courts and the Georgia General Assembly began to pay attention to the foreclosure process, the diminution of property values, and how these issues affect Georgia families.³ Although the purpose of this Article is not to specifically address these serious issues, judicial and legislative trends indicate that these issues will be around for some time.

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1. For analysis of Georgia real property during the prior survey period, see Linda S. Finley, *Real Property, Annual Survey of Georgia Law*, 62 MERCER L. REV. 283 (2010).

2. John Prior, *Foreclosures in 2011 to Break Last Year's Record: RealtyTrac*, HOUSING WIRE (Jan. 12, 2011, 11:01 PM), <http://www.housingwire.com/2011/01/12/foreclosures-reach-record-high-in-2010-realtytrac>.

3. See generally *Understand Why Foreclosures Matter*, FORECLOSURE-RESPONSE.ORG (Aug. 4, 2011, 8:21 AM), http://www.foreclosure-response.org/policy_guide/why_foreclosures_matter.html?tierid=263.

II. LEGISLATION

Even though legislation affecting real property was perhaps overshadowed by legislation regarding tax reform,⁴ immigration,⁵ and Sunday alcohol sales,⁶ legislation regarding real property was, albeit more quietly, enacted. House Bill 117⁷ amended section 48-7-128 of the Official Code of Georgia Annotated (O.C.G.A.),⁸ adding language requiring that a party identified as the seller on a settlement statement be treated as the seller for all purposes of assessing withholding or other tax.⁹ The amendment further burdens the identified seller with “executing and delivering to the buyer or transferee all forms or other documents incident to determining the appropriate amount of tax to be withheld or the appropriate amount exempt from withholding requirements.”¹⁰

Apparently in response to the fear of “robo-signing,”¹¹ the legislature enacted Senate Bill 64.¹² This bill, along with changing the fees and penalties for reinstatement of defunct corporations,¹³ amended provisions relating to the execution of those instruments, defined in O.C.G.A. § 14-5-7,¹⁴ which convey interests in real property or release security agreements.¹⁵ The amendment specifies when an executed document lacking a corporate seal may be conclusive evidence that the person signing the instrument is a proper signatory and that the signature is

4. Ga. H.R. Bill 388, Reg. Sess. (2011) (unenacted).

5. Illegal Immigration Reform and Enforcement Act, Ga. H.R. Bill 87, Reg. Sess., 2011 Ga. Laws 794 (to be codified in scattered sections of O.C.G.A. tits. 13, 16, 17, 35, 36, 42, 45, 50).

6. Ga. S. Bill 10, Reg. Sess., 2011 Ga. Laws 49 (codified at O.C.G.A. § 3-3-7 (Supp. 2011)).

7. Ga. H.R. Bill 117, Reg. Sess., 2011 Ga. Laws 674 (codified in scattered sections of O.C.G.A. tits. 31 & 49).

8. O.C.G.A. § 48-7-128 (Supp. 2011).

9. O.C.G.A. § 48-7-128(b) (Supp. 2011).

10. O.C.G.A. § 48-7-128(b)(3).

11. Robo-signing is defined as when “[a]n employee of a mortgage servicing company [] signs foreclosure documents without reviewing them. Rather than actually reviewing the individual details of each case, robo-signers assume the paperwork to be correct and sign it automatically” without personal knowledge. *Robo-Signer*, INVESTOPEDIA, www.investopedia.com/term/r/robo-signer.asp (last visited Sept. 11, 2011).

12. Ga. S. Bill 64, Reg. Sess., 2011 Ga. Laws 430 (codified in scattered sections of O.C.G.A. tit. 14).

13. *Id.* § 1.

14. O.C.G.A. § 14-5-7 (Supp. 2011).

15. *Id.*

genuine.¹⁶ Under the amendment, only the signature of the president, vice president, secretary, or assistant secretary of the corporation will be considered conclusive evidence.¹⁷ The signatures of any other officers or individuals designated by corporate officers to execute such documents are no longer conclusive evidence that such documents are properly executed.¹⁸

III. TITLE TO REAL PROPERTY

In *Brock v. Yale Mortgage Corp.*,¹⁹ the ex-husband (Brock) brought an action against his ex-wife and Yale Mortgage to quiet title in the residence that the Brocks once shared. The Brocks purchased the residence in 1987 with funds from a mortgage loan, repayment of which was secured by the residence. The couple held title to the property jointly. Over the years, the Brocks' mortgage loan went into default several times, but each time Mrs. Brock was either able to cure the default or work out a payment plan. In January 2001, the loan went into default again, and the bank threatened foreclosure. Mrs. Brock did not inform Mr. Brock of the default but worked with a mortgage broker to refinance the loan solely in her name. The mortgage broker informed Mrs. Brock that Mr. Brock had to convey his interest in the residence to her in order to complete the transaction, and Mrs. Brock obtained a blank quitclaim deed from the closing attorney for her husband to sign. At the closing, Yale Mortgage paid off the previous mortgage loan and paid additional cash to Mrs. Brock, and she presented an executed, unrecorded quitclaim deed featuring Mr. Brock's signature, which was later recorded. Yale Mortgage recorded a security deed evidencing the loan against the property. In 2004, Mr. Brock filed for divorce, having discovered that his wife had spent over \$200,000 from his checking account and had forged his signature on the quitclaim deed used at the loan closing. In the divorce decree, Mrs. Brock transferred her interest in the residence to Mr. Brock.²⁰

In January 2005, Mr. Brock commenced a quiet title action against his ex-wife and Yale Mortgage.²¹ Although Yale Mortgage did not dispute that Mrs. Brock forged the quitclaim deed, Yale Mortgage answered, asserted counterclaims and cross claims, and sought a court declaration that it held a valid security interest in an undivided one-half interest in

16. *Id.*

17. *Id.*

18. *Id.*

19. 287 Ga. 849, 700 S.E.2d 583 (2010).

20. *Id.* at 849-51, 700 S.E.2d at 584-86.

21. *Id.* at 849, 851, 700 S.E.2d at 585-86.

the property.²² In 2006, Yale Mortgage amended its claims seeking “a declaration that its security interest extended to the entire property.”²³ The trial court granted Yale Mortgage’s motion for summary judgment, finding that it held a one-half, undivided interest in the property. Upon filing its subsequent claim to the entirety of the property, Yale Mortgage moved for clarification. After reconsideration, the trial court declared that Yale Mortgage’s interest in the property extended to the entire property.²⁴

The Georgia Supreme Court affirmed the trial court’s order that Yale Mortgage’s security interest in the property extended to at least a one-half, undivided interest in the property.²⁵ The supreme court did not, however, hold that Yale Mortgage’s interest extended to the entire property.²⁶ In its opinion, the court discussed the difference between cancelling a deed and setting aside a security interest on account of forgery.²⁷ Georgia law provides that a forged deed may be cancelled,²⁸ but forgery does not invalidate a subsequent security deed.²⁹ Because a tenant in common may encumber his own interest without consent of a cotenant, if that tenant in common then conveys an interest in the entirety, the transferring deed will affect his interest, but not the interest of the nonconsenting cotenant.³⁰

Importantly, the supreme court, in *Brock*, overruled *Bonner v. Norwest Bank*,³¹ which held that lenders who had foreclosed a security interest and purchased the collateral property out of foreclosure held proper title to the property even though the deed purporting to convey the property to the borrowers was a forgery.³² Specifically, the court, in *Brock*, held that the cases relied upon in *Bonner* could not support the holding “that a bona fide purchaser for value, or a security deed holder occupying such position, obtains good title notwithstanding a forgery in the chain of

22. *Id.* at 850-51, 700 S.E.2d at 585-86.

23. *Id.* at 851, 700 S.E.2d at 586.

24. *Id.*

25. *Id.*

26. *Id.* at 851-52, 700 S.E.2d at 586.

27. *Id.* at 852, 700 S.E.2d at 586-87.

28. O.C.G.A. § 23-3-40 (1982).

29. *Brock*, 287 Ga. at 851, 700 S.E.2d at 586.

30. *Id.*

31. 275 Ga. 620, 571 S.E.2d 387 (2002).

32. *Brock*, 287 Ga. at 853, 700 S.E.2d at 587 (citing *Bonner*, 275 Ga. at 621, 571 S.E.2d at 388).

title.³³ With this ruling, the supreme court also overruled *Mabra v. Deutsche Bank*,³⁴ which had followed the *Bonner* precedent.³⁵

Further, the court disagreed with Yale Mortgage's argument that Mr. Brock had ratified the loan agreement by the terms of the divorce decree because Mr. Brock was not a party to the loan agreement and, therefore, could not ratify the terms therein.³⁶ The court also held that even though Mr. Brock received a benefit from the payoff of the previous mortgage, accepting the benefits of the payoff would act to ratify the agreement only if he had full knowledge of the material facts.³⁷ The sole evidence before the court was that the refinance was done, and the prior loan satisfied, without Mr. Brock's knowledge.³⁸ The supreme court concluded that the trial court had it right the first time—that the mortgage company maintained only a one-half interest in the property.³⁹

*Rector, Wardens & Vestryman of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, Inc.*⁴⁰ was one of several cases during the survey period that analyzed ownership of church property when a local congregation splits with its national governing body.⁴¹ Christ Church was founded in colonial Georgia in 1733.⁴² Title to the property was "vested in Christ Church by act of the provincial legislature in 1758."⁴³ The legislative land grant was again confirmed by the Georgia General Assembly in 1789, establishing title to the real estate in the wards and vestrymen of the church.⁴⁴ In 2007, the Diocese of Georgia filed suit against Christ Church, its rector, and members of the vestry, seeking a declaration that all property of Christ Church was owned by the Diocese and requesting that the court permanently enjoin Christ Church from using any church funds for anything other than that permitted by the canons of the diocese.⁴⁵ The heart of the suit was "whether the church property [was] impressed with a trust in favor of

33. *Id.*

34. 277 Ga. App. 764, 627 S.E.2d 849 (2006).

35. *Brock*, 287 Ga. at 853, 700 S.E.2d at 587.

36. *Id.* at 854, 700 S.E.2d at 588.

37. *Id.* at 855, 700 S.E.2d at 588-89.

38. *Id.* at 850, 700 S.E.2d at 585.

39. *Id.* at 851, 700 S.E.2d at 586.

40. 305 Ga. App. 87, 699 S.E.2d 45 (2010), *aff'd*, No. S10G1909, 2011 WL 5830140 (Ga. Nov. 21, 2011).

41. *Id.* at 87, 699 S.E.2d at 47.

42. *Id.* at 89, 699 S.E.2d at 48.

43. *Id.*

44. *Id.* at 89, 699 S.E.2d at 49.

45. *Legal Q & A Top 10 Questions*, CHRISTCHURCHSAVANNAH, <http://www.christchurchsavannah.org/Legal/Legal-FAQ.htm> (last visited Sept. 11, 2011).

the National Episcopal Church.”⁴⁶ Both parties sought summary judgment and the trial court granted the National Episcopal Church’s motion and denied Christ Church’s motion, “finding that even though the parish own[ed] its real estate, the discipline, canons, and constitutions of the National Episcopal Church and the Diocese of Georgia established an implied and express trust over the property for the use of the National Episcopal Church.”⁴⁷

In rendering its decision, the Georgia Court of Appeals recognized that, while it is not proper for courts to intervene in doctrinal disputes within a church, civil courts are authorized to enforce the rights of the parties when a church property dispute can be resolved outside of doctrinal disputes.⁴⁸ To reach a decision, the court must consider whether the underlying church government is congregational or hierarchal.⁴⁹ Georgia law defines a congregational church as one that “is strictly independent of other ecclesiastic associations and owes no fealty or obligation to any higher church government authority.”⁵⁰ In a congregational church, the church members themselves control decisions and property.⁵¹ However, a hierarchical church is part of a larger organization of “churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head.”⁵² Where church governance is hierarchal in nature, the court is required to use “neutral principles of law” to determine property ownership, which includes “state statutes, corporate charters, relevant deeds, and the organizational constitutions and bylaws of the denomination.”⁵³

The court of appeals determined that the governance of Christ Church was hierarchal in nature and that neutral principles of law were applicable.⁵⁴ The court therefore looked to the historical land grant to Christ Church, state statutes, and governing church documents to determine whether a trust existed in favor of the National Episcopal Church.⁵⁵

The court held that the historical land grant did not establish a trust because Christ Church took title to the property long before the existence of the Diocese of Georgia and before the National Church came

46. *Christ Church*, 305 Ga. App. at 87, 699 S.E.2d at 47.

47. *Id.* at 87-88, 699 S.E.2d at 47.

48. *Id.* at 88, 699 S.E.2d at 47-48.

49. *Id.* at 88, 699 S.E.2d at 48.

50. *Id.*

51. *Id.*

52. *Id.*

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

54. *Id.* at 89, 699 S.E.2d at 48.

55. *Id.*

to Georgia.⁵⁶ However, the court determined that the current statute provided that churches are subject to the Georgia Nonprofit Corporation Code,⁵⁷ and that Christ Church and the church property were “subject to the same provisions, conditions, and limitations as any other incorporated church.”⁵⁸ Moreover, when Christ Church joined with the National Episcopal Church in 1823, Christ Church subjected itself to the statutes then in place so that “‘the mode of church government [and] rules of discipline’ of the National Episcopal Church established a trust.”⁵⁹ The court also considered the church’s governing documents, including the original charter of Christ Church and subsequent amendments.⁶⁰ Although those documents did not create an implied trust, when Christ Church became a parish of the Georgia Diocese in 1823, it, along with other joining churches, promised “‘unqualified accession’ to the National Episcopal Church’s constitution, canons, and discipline[.]” including the National Episcopal Church’s articles of association.⁶¹ The result was that Christ Church became subject to the “usual disciplines” of the national body.⁶² Further, in 1918, Christ Church, in its amended charter, confirmed its accession to the Georgia Diocese and the National Episcopal Church.⁶³ Therefore, the evidence showed that Christ Church was a full participant in the Georgia Diocese and the National Episcopal Church from 1823 until at least 2006, and by agreeing to accept admission to the national body and agreeing to be governed by the Georgia Diocese and National Episcopal Church, an implied trust was created.⁶⁴

Furthermore, Christ Church, as a member of the diocese, had acceded to the national body’s express trust in church property because the General Convention of the National Episcopal Church adopted the Trust Canon of 1979, which stated that “all parish real and personal property is held in trust for the National Episcopal Church and its dioceses.”⁶⁵ However, note that this matter may very well be a part of a future survey of Georgia real property law, since the Georgia Supreme Court

56. *Id.* at 89-90, 699 S.E.2d at 49.

57. O.C.G.A. §§ 14-5-40 to -51 (2003 & Supp. 2011).

58. *Christ Church*, 305 Ga. App. at 90-91, 699 S.E.2d at 49-50.

59. *Id.* at 91, 699 S.E.2d at 50; O.C.G.A. § 14-5-46 (2003).

60. *Christ Church*, 305 Ga. App. at 92, 699 S.E.2d at 50.

61. *Id.*

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

63. *Id.* at 93, 699 S.E.2d at 50-51.

64. *Id.* at 93-94, 699 S.E.2d at 50-51.

65. *Id.* at 95, 699 S.E.2d at 52.

after granting certiorari issued a lengthy, detailed opinion affirming the court of appeals.⁶⁶

*Kemp v. Neal*⁶⁷ is another case where the Georgia Supreme Court considered ownership of church property claimed by both the local parishioners and the national church body.⁶⁸ A dispute arose between the trustees of the Williams Chapel African Methodist Episcopal Church (Williams Chapel) and the National African Methodist Episcopal Church (the National Church) over the ownership of church property. However, unlike *Christ Church*, there was no land grant, deed of record, or other instrument conveying real property to either the local congregants or the national body, and no body of historical documents regarding the relationship between the local and National Church.⁶⁹

In 2008, Williams Chapel sought to terminate its relationship with the National Church. In response, the National Church filed a petition to quiet title, seeking a declaratory judgment and injunctive relief. After a final hearing, the trial court found that Williams Chapel had permissive use of the property, holding it in trust for the benefit of the National Church and, granting additional equitable relief, ordered that all property of Williams Chapel, including all bank, mortgage, insurance, and other accounts, be delivered to the National Church. The trustees of Williams Chapel appealed.⁷⁰

The supreme court, like the court of appeals in *Christ Church*, recognized that the First Amendment⁷¹ limits the role courts play in resolving church property disputes, noting that courts must use “neutral principals of law,” such as deeds of conveyance and the constitutions and bylaws of the denomination to resolve disputes.⁷² Accordingly, the supreme court looked to the property title records and noted that there was no deed transferring title to the property to either litigant.⁷³ The absence of a deed conveying the property limited the governance of the issues by statute, and in the absence of a deed of conveyance, the court turned to the “Book of Discipline, the governing ecclesiastical doctrine and constitution of the AME church . . . [which] provides that ‘the title(s) to all real, personal, and mixed property held . . . by the local churches, shall be held IN TRUST for the [national] African Methodist Episcopal

66. No. S10G1909, 2011 WL5830140 (Ga. Nov. 21, 2011).

67. 288 Ga. 324, 704 S.E.2d 175 (2010).

68. *Id.* at 324, 704 S.E.2d at 177.

69. *Id.*

70. *Id.* at 324-25, 704 S.E.2d at 177.

71. U.S. CONST. amend I.

72. *Kemp*, 288 Ga. at 326, 704 S.E.2d at 178-79 (internal quotation marks omitted).

73. *Id.* at 326-27, 704 S.E.2d at 179.

Church, Inc., and subject to the provisions of [the Book of Discipline].”⁷⁴

The supreme court then analyzed whether there was another theory that Williams Chapel could rely on to support its claim to the church property.⁷⁵ The supreme court held that a claim based upon adverse possession would not lie because, even though Williams Chapel had used the property for over seventy years, it did so with the permission of the National Church.⁷⁶ Permissive use of the property, even given the length of time of its use, “cannot be the foundation of a prescription until an adverse claim and actual notice to the other party.”⁷⁷ There was no evidence that Williams Chapel gave notice of an adverse claim to the property to the National Church prior to the suit, so a claim of prescriptive title also failed.⁷⁸ However, it was undisputed that Williams Chapel obtained the land upon which the church stood through a gift.⁷⁹ Obtaining the land and then building the church upon it created in equity “a good title even at law.”⁸⁰ Therefore, based on that gift of land, Williams Chapel held title to the property under the Book of Discipline because the building of the church upon the gifted land created title and having title created a trust referenced in the Book of Discipline, and Williams Chapel held title in trust for the National Church.⁸¹

Williams Chapel next contended that, even if it held the property in trust for the National Church, the trust was breached because the National Church provided no support or benefits to the local congregants.⁸² However, the supreme court reasoned that there was no neutral principle of law embodying that position, and because civil courts “may not rely on doctrinal concerns or ecclesiastical principles when deciding disputes between churches,” the court held that the argument was without merit.⁸³

Although Presiding Justice Carley concurred with the majority opinion regarding the court’s jurisdiction over the matter as an equity case, he dissented from the majority’s analysis that provisions of the Book of

74. *Id.* at 327, 704 S.E.2d at 179 (alterations in original) (footnote omitted).

75. *Id.*

76. *Id.*

77. *Id.* (internal quotation marks omitted); O.C.G.A. § 44-5-161(b) (2010).

78. *Kemp*, 288 Ga. at 327, 704 S.E.2d at 179.

79. *Id.*

80. *Id.* at 327-28, 704 S.E.2d at 179 (quoting *Sikes v. Seckinger*, 164 Ga. 96, 103, 137 S.E. 833, 837 (1927)) (internal quotation marks omitted).

81. *Id.* at 328, 704 S.E.2d at 179-80.

82. *Id.* at 329, 704 S.E.2d at 181.

83. *Id.* at 329-30, 704 S.E.2d at 181.

Discipline, which were enacted decades after the church obtained title, could act as a neutral principle of law upon which to determine title to the real estate and other property.⁸⁴ Justice Carley relied on the only deed of record, a security deed evidencing the mortgage that burdened the church property.⁸⁵ The security deed was executed by the trustees of Williams Chapel but did not expressly state that the property was held in trust for the National Church.⁸⁶ Justice Carley concluded that the lengthy relationship between Williams Chapel and the National Church, “without more, is insufficient to create an implied trust.”⁸⁷ He then examined the Discipline of the AME Church, which referred to title to property.⁸⁸ The Discipline clearly stated that all property was to be held in trust for the National Church, but Justice Carley noted that the church did not enact these trust provisions until 1972.⁸⁹ Because Williams Church obtained its title to the property decades before the adoption of the trust provision of the Discipline, Justice Carley reasoned that the majority should have considered the church constitution in place at the time the church obtained title.⁹⁰

IV. SALE OF REAL PROPERTY⁹¹

In *JR Real Estate Development, LLC v. Cheeley Investment, L.P.*,⁹² a buyer filed a lawsuit seeking specific performance, declaratory judgment, and injunctive relief related to a land sale and purchase agreement.⁹³ In *JR Real Estate*, the buyer agreed to purchase 53.937 acres of land for \$5,933,070 with \$100,000 paid as earnest money. The original closing date was July 31, 2008, but a series of extensions occurred, one of which included an additional payment of \$50,000 in earnest money. As part of a final extension of the closing date to November 14, 2008, an amendment was executed lowering the purchase price to \$5,735,000,

84. *Id.* at 330, 704 S.E.2d at 181 (Carley, P.J., concurring in part and dissenting in part).

85. *Id.* at 331, 704 S.E.2d at 182.

86. *Id.*

87. *Id.* (quoting *Coles v. Wilburn*, 241 Ga. 322, 323, 245 S.E.2d 273, 274 (1978)) (internal quotation marks omitted).

88. *Id.*

89. *Id.*

90. *Id.* at 331-32, 704 S.E.2d at 182.

91. This section was authored by Jonathan E. Green, associate at the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Atlanta, Georgia. Vanderbilt University (B.A., 1998); University of Georgia School of Law (J.D., 2001). Member, State Bar of Georgia.

92. 309 Ga. App. 250, 709 S.E.2d 577 (2011).

93. *Id.* at 253, 709 S.E.2d at 580.

providing for a payment of an additional \$750,000 in earnest money and making the sale contingent upon the rezoning of the property. The amendment provided that, if the rezoning was denied, the earnest money would be released without any further liability.⁹⁴

The rezoning application was approved, but the buyer did not close on the purchase of the real property. The purchaser filed suit for a declaratory judgment, claiming that it was entitled to a return of the \$900,000 in earnest money. The seller filed a counterclaim seeking a declaratory judgment that it was entitled to the earnest money. The specific performance claim was ultimately dismissed. After the parties filed cross-motions for summary judgment, the trial court ruled in favor of the seller, awarding the \$900,000 in earnest money as liquidated damages. The purchaser appealed.⁹⁵

The court of appeals overturned the trial court's decision.⁹⁶ In interpreting the contract, the court noted that the contract language specified that the first \$150,000 in earnest money was intended to be a reasonable estimate of liquidated damages, rather than a penalty.⁹⁷ However, in regard to the \$750,000 in additional earnest money, the court noted that the amendment only specified that this sum constituted earnest money for an additional sixty day extension on the closing.⁹⁸ Therefore, the court held that there was an issue of material fact as to whether the additional \$750,000 in earnest money was intended to be liquidated damages.⁹⁹

In *Hampton Island, LLC v. HAOP, LLC*,¹⁰⁰ the Georgia Court of Appeals examined a claim for specific performance for the purchase of real property in an unusual situation. The dispute centered on two pieces of land located on the Hampton Island Preserves in Liberty County, Georgia. The plaintiff, HAOP, LLC (HAOP) purchased the property in 2005 from South Hampton Island Preservation Properties, LLC (South Hampton). As part of the sale, South Hampton agreed to make certain improvements to the real property but failed to do so. South Hampton then joined with various other business entities to form Hampton Island, LLC (Hampton Island). HAOP sought damages from Hampton Island for the breach of contract by South Hampton. Prior to filing suit, HAOP and South Hampton entered into an agreement

94. *Id.* at 251-53, 709 S.E.2d at 579-80.

95. *Id.* at 253, 709 S.E.2d at 580.

96. *Id.* at 256, 709 S.E.2d at 582.

97. *Id.* at 254, 709 S.E.2d at 581.

98. *Id.*

99. *Id.*

100. 306 Ga. App. 542, 702 S.E.2d 770 (2010).

whereby Hampton Island agreed to pay HAOP \$1,000,000 in exchange for title to the property and a release of all claims by HAOP. Hampton Island failed to pay the sum to repurchase the property, and HAOP sued Hampton Island for specific performance. The trial court granted summary judgment to HAOP on the claim for specific performance, and Hampton Island appealed.¹⁰¹

Hampton Island raised the following primary issues on appeal: (1) a lack of consideration for the agreement; (2) the agreement was entered as a result of duress; (3) HAOP had unclean hands and, therefore, was not entitled to specific performance; (4) impossibility of performance; and (5) that the trial court lacked equitable jurisdiction to grant specific performance.¹⁰² The court of appeals affirmed the lower court's ruling.¹⁰³

First, the court of appeals noted that the transfer of title to the property constituted adequate consideration for the agreement to pay \$1,000,000.¹⁰⁴ Second, with regard to the claim of duress, the court held that no duress existed, declining to overturn binding precedent.¹⁰⁵ Specifically, the court found that there was no evidence of wrongful actions.¹⁰⁶ Additionally, the court, citing *Cooperative Resource Center v. Southeast Rural Assistance Project*,¹⁰⁷ held that, because Hampton Island was controlled by sophisticated businessmen with access to legal counsel, there could be no duress.¹⁰⁸ Next, analyzing the "unclean hands" argument, the court of appeals noted that HAOP had attempted to induce third parties to forego doing business with Hampton Island.¹⁰⁹ However, the court held that the alleged misconduct was unrelated to the subject of the litigation and, therefore, could not bar specific performance.¹¹⁰

In *Office Depot, Inc. v. District at Howell Mill, LLC*,¹¹¹ the court of appeals examined a lawsuit brought by a tenant against a landlord for breach of an exclusive-use provision.¹¹² On December 27, 2005, the tenant, Office Depot, Inc., leased commercial space in a shopping center

101. *Id.* at 542-43, 702 S.E.2d at 771-73.

102. *Id.* at 543-48, 702 S.E.2d at 773-75.

103. *Id.* at 549, 702 S.E.2d at 776.

104. *Id.* at 544, 702 S.E.2d at 773.

105. *Id.* at 545-46, 702 S.E.2d at 774.

106. *Id.* at 545, 702 S.E.2d at 774.

107. 256 Ga. App. 719, 569 S.E.2d 545 (2002).

108. *Hampton Island*, 306 Ga. App. at 544-45, 702 S.E.2d at 773-74.

109. *Id.* at 547, 702 S.E.2d at 775.

110. *Id.*

111. 309 Ga. App. 525, 710 S.E.2d 685 (2011).

112. *Id.* at 525, 710 S.E.2d at 686.

located on Howell Mill Road in Atlanta, Georgia, from The District at Howell Mill, LLC (District). In the lease agreement, the District agreed to an exclusive-use provision whereby the District would not enter into a lease or operating agreement with any person or entity whose primary business was the sale of school supplies. Eighteen months later, the District leased space in the shopping center to The School Box, which intended to utilize the premises, in part, for the sale of school supplies. The School Box opened its store in November 2006.¹¹³ At that time, Office Depot apparently took no action concerning The School Box.¹¹⁴

In May 2007, ELPF Howell Mill, LLC agreed to purchase a majority interest in the shopping center from the District. As part of the transaction, ELPF requested an estoppel certificate from Office Depot.¹¹⁵ On April 24, 2007, Office Depot executed an estoppel certificate stating that “[t]o Tenant’s knowledge, Landlord is not in default in the performance or observance of any of its obligations under any terms or provisions of the Lease.”¹¹⁶ In December 2007, Office Depot gave notice to the District that its entering into a lease with The School Box violated the exclusive-use provision of the lease and started paying reduced rent pursuant to the lease.¹¹⁷

Office Depot then filed a declaratory judgment action seeking a declaration that the District and ELPF had breached the exclusive-use provision. The District and ELPF counterclaimed for breach of contract. The District and ELPF prevailed at summary judgment and Office Depot appealed.¹¹⁸

On appeal, the court of appeals first held that ELPF relied on the estoppel certificate in its decision to close on the purchase of a part-interest in the shopping center.¹¹⁹ Office Depot argued that the reliance was unreasonable because both ELPF and the District knew that the exclusive-use provision had been violated.¹²⁰ The court of appeals, however, observed that the testimony showed that both the District and ELPF had examined the issue prior to the completion of the sale and determined that leasing to The School Box had not violated the exclusive-use provision.¹²¹ Therefore, the court held that Office Depot

113. *Id.* at 526-27, 710 S.E.2d at 686-87.

114. *See id.* at 526-27, 710 S.E.2d at 686-87.

115. *Id.* at 527, 710 S.E.2d at 687.

116. *Id.* (alteration in original) (internal quotation marks omitted).

117. *Id.*

118. *Id.*

119. *Id.* at 528, 710 S.E.2d at 687.

120. *Id.* at 528, 710 S.E.2d at 688.

121. *Id.* at 528, 710 S.E.2d at 688.

was estopped from claiming that the exclusive-use provision was violated.¹²²

V. TAXATION OF REAL PROPERTY¹²³

As in years past, the purchase of real property at tax sales and the valuation of property for tax purposes remain hot topics. In *Brown Investment Group, LLC v. Mayor & Alderman of Savannah*,¹²⁴ the Georgia Supreme Court addressed whether a tax sale purchaser had standing to maintain an action for trespass during the redemption period.¹²⁵

On August 1, 2006, Brown Investment Group, LLC (Brown) obtained title to a parcel of real property by tax deed. A vacant building on the property was deemed unsafe by the City of Savannah and demolished on July 25, 2007, during the redemption period.¹²⁶ Brown sued “the mayor and alderman of the City for the full value of the destroyed building, alleging that the City failed to give it” proper notice prior to the demolition.¹²⁷ The trial court granted summary judgment for the city, finding that Brown “failed to bar the right to redeem the property and therefore, [had] no standing to seek damages against the [City].”¹²⁸ The court of appeals affirmed on other grounds, holding that “when the building was demolished, the absolute 12 month right of redemption under O.C.G.A. § 48-4-40(1)¹²⁹ had not expired and, as a result, Brown held neither legal title nor the right of possession and therefore lacked standing to sue the City for trespass.”¹³⁰

The Georgia Supreme Court granted certiorari to review that ruling.¹³¹ The court stated that “[t]o maintain an action for trespass or injury to realty, it is essential that the plaintiff show either that he was the true owner or was in possession at the time of the trespass.”¹³²

122. *Id.* at 529, 710 S.E.2d at 688.

123. This section was authored by Sarah-Nell H. Walsh, associate in the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Atlanta, Georgia. University of Virginia (B.A., 2001); William and Mary School of Law (J.D., 2004). Member, State Bar of Georgia.

124. 289 Ga. 67, 709 S.E.2d 214 (2011).

125. *Id.* at 68, 709 S.E.2d at 215-16.

126. *Id.* at 67-68, 709 S.E.2d at 215.

127. *Id.* at 68, 709 S.E.2d at 215.

128. *Id.* (alteration in original) (internal quotation marks omitted).

129. O.C.G.A. § 48-4-40(1) (2010).

130. *Brown Inv. Grp.*, 289 Ga. at 68, 709 S.E.2d at 215.

131. *Id.* at 68, 709 S.E.2d at 216.

132. *Id.* (quoting *Coffin v. Barbaree*, 214 Ga. 149, 151, 103 S.E.2d 557, 558 (1958)) (internal quotation marks omitted).

The court observed that, while “Brown’s defeasible fee gave it both an insurable interest in the property and sufficient interest therein to require the City to provide it with notice of the demolition,” recognition of this legal interest was not inconsistent with the legal title held by the original property owner.¹³³ Ultimately, the court held that “the tax sale purchaser during the time allowed for redemption does not have a sufficient interest to recover the full value of the destroyed improvements and thereby prevent the defendant in fi. fa. as the true owner from obtaining such a recovery.”¹³⁴

In *Nuci Phillips Memorial Foundation, Inc. v. Athens Clarke County Board of Tax Assessors*,¹³⁵ the county board of tax assessors challenged a charitable organization’s ad valorem tax exemption. The Nuci Phillips Memorial Foundation, Inc. (Foundation), operates Nuci’s Space, a facility in Athens where musicians and others may obtain help for anxiety, depression, and other mental health issues. The Foundation applied for and was granted an exemption from ad valorem taxes for the property on which its facility is located. The Athens Clarke County Board of Tax Assessors unsuccessfully challenged the exemption in the trial court.¹³⁶ The court of appeals reversed, holding that “since the Foundation rents out rehearsal space as well as space for private birthday parties and wedding receptions, then the Foundation does not use its property exclusively in furtherance of its charitable pursuits as required by O.C.G.A. § 48-5-41(d)(2)¹³⁷ in order to qualify for an exemption from ad valorem taxation.”¹³⁸

The supreme court granted certiorari to determine whether the court of appeals correctly applied O.C.G.A. § 48-5-41(d)(2).¹³⁹ The supreme court held that, in order for an institution to be granted a property tax exemption pursuant to O.C.G.A. § 48-5-41(a)(4),¹⁴⁰ it must meet four qualifications.¹⁴¹ First, the public charity must both own the property and use it in its charitable purposes.¹⁴² Second, the property must be

133. *Id.* at 69-70, 709 S.E.2d at 217.

134. *Id.* at 70, 709 S.E.2d at 217.

135. 288 Ga. 380, 703 S.E.2d 648 (2010).

136. *Id.* at 380, 703 S.E.2d at 649.

137. O.C.G.A. § 48-5-41(d)(2) (2010).

138. *Nuci Phillips*, 288 Ga. at 380, 703 S.E.2d 649.

139. *Id.*

140. O.C.G.A. § 48-5-41(a)(4) (2010).

141. *Nuci Phillips*, 288 Ga. at 384-85, 703 S.E.2d at 652.

142. *Id.* at 384-85, 703 S.E.2d at 652 (quoting *Thomas v. Ne. Ga. Council, Inc., Boy Scouts of Am.*, 241 Ga. 291, 293, 244 S.E.2d 842, 844 (1978)) (“Mere latent ownership of property by an institution of public charity will not entitle it to an exemption . . .”).

used exclusively for charitable purposes that benefit the public.¹⁴³ Third, the real estate or building's primary purpose cannot be to secure income.¹⁴⁴ Fourth, the property cannot raise income distributable to shareholders or other owners of the property.¹⁴⁵ Once the institution has met these four qualifications, O.C.G.A. § 48-5-41(d)(2) allows property to "be used for the purpose of securing income so long as such income is used exclusively for the operation of that charitable institution," provided that such institution is exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code.¹⁴⁶

Because the Foundation is a 501(c)(3) charity, owns the property, devotes the property entirely to charitable purposes that benefit the public, and rents space solely to raise funds for the organization's charitable services, the supreme court reversed the court of appeals and held that the Foundation qualifies for an exemption from ad valorem taxation under O.C.G.A. § 48-5-41(d)(2).¹⁴⁷

In *City of Atlanta v. Clayton County Board of Tax Assessors*,¹⁴⁸ the City of Atlanta (City) sought review of a decision by the county board of equalization that found certain parcels of land leased to a common carrier airline were not exempt from ad valorem taxes. The City appealed the superior court's order that granted summary judgment to the Clayton County Board of Tax Assessors, holding that five parcels of property leased by the City to Delta Air Lines, Inc., at Hartsfield-Jackson Atlanta International Airport were not exempt from ad valorem taxes in 2005. The parcels contain hangars and maintenance facilities for servicing aircraft and engines, a ground support equipment building, a building to handle cargo, and two flight kitchens.¹⁴⁹ The issue in dispute was whether, pursuant to O.C.G.A. §§ 6-3-20 to -21,¹⁵⁰ the five parcels are "actively used for a public or governmental purpose."¹⁵¹ According to O.C.G.A. § 6-3-20 property is "acquired, owned, leased,

143. *Id.* at 385, 703 S.E.2d at 652 (citing *Bd. of Equalization v. York Rite Bodies of Freemasonry*, 209 Ga. App. 359, 360, 433 S.E.2d 299, 301 (1993)) ("denying exemption to a Masonic lodge because it also devoted numerous resources to pursuits that benefited only its members").

144. *Id.*; O.C.G.A. § 48-5-41(d)(1) (2010).

145. *Nuci Phillips*, 288 Ga. at 385, 703 S.E.2d at 652; *see also* O.C.G.A. § 48-5-41(c) (2010).

146. *Nuci Phillips*, 288 Ga. at 382, 703 S.E.2d at 650; O.C.G.A. § 48-5-41(d)(1); I.R.C. § 501(c)(3) (2006).

147. *Nuci Phillips*, 288 Ga. at 387, 703 S.E.2d at 653.

148. 306 Ga. App. 381, 702 S.E.2d 704 (2011).

149. *Id.* at 381, 702 S.E.2d at 704-05.

150. O.C.G.A. §§ 6-3-20 to -21 (1995).

151. *City of Atlanta v. Clayton Cnty.*, 306 Ga. App. at 382, 702 S.E.2d at 705.

controlled, or occupied for public, governmental, and municipal purposes' if it is used 'to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft.'¹⁵² The court of appeals concluded that the five parcels were exempt from ad valorem taxation pursuant to O.C.G.A. § 48-5-41(a)(1)(B)(i)¹⁵³ because they were "reasonably and uniformly used for the public convenience and welfare to facilitate the effective operation of the Airport."¹⁵⁴

In *In re Waddy*,¹⁵⁵ the United States Bankruptcy Court for the Northern District of Georgia addressed "whether the Fulton County Tax Commissioner has a valid unsecured priority tax claim for taxes assessed pre[petition against real property owned by the debtor, when stay relief as to the real property has been granted to the holder of the security deed on the property."¹⁵⁶ Under a plain reading of Title 48 of the O.C.G.A.,¹⁵⁷ the debtor remains personally liable for the taxes assessed prepetition because "ad valorem taxes are chargeable either as a personal debt of the taxpayer or as a lien"¹⁵⁸ Based on this, the bankruptcy court held that the debtor is personally liable for the real property taxes assessed against the property prior to the filing of the Chapter 13¹⁵⁹ petition.¹⁶⁰ In so holding, the bankruptcy court was unpersuaded by the debtor's equitable argument that she should not be liable for the taxes on the property due to the lender's failure to foreclose on the property since the granting of stay relief.¹⁶¹

VI. EASEMENTS, COVENANTS, AND BOUNDARIES

In *LN West Paces Ferry Associates, LLC v. McDonald*,¹⁶² the Georgia Court of Appeals considered the damages that can be awarded when crossing a neighbor's property line.¹⁶³ Najjar and McDonald were

152. *Id.*; O.C.G.A. §§ 6-3-20 to -21.

153. O.C.G.A. § 48-5-41(a)(1)(B)(i) (2010).

154. *City of Atlanta v. Clayton Cnty.*, 306 Ga. App. at 385, 702 S.E.2d at 707 (internal quotation marks omitted).

155. No. 09 64634 WLH, 2010 WL 4881677 (Bankr. N.D. Ga. Sept. 24, 2010).

156. *Id.* at *1.

157. O.C.G.A. tit. 48, chs. 1-6 (2010 & Supp. 2011).

158. *In re Waddy*, 2010 WL 4881677, at *2 (quoting *Mulligan v. Sec. Bank of Bibb Cnty.*, 280 Ga. App. 248, 249, 633 S.E.2d 629, 631 (2006)) (internal quotation marks omitted).

159. 11 U.S.C. ch. 13 (2006).

160. *In re Waddy*, 2010 WL 4881677, at *1.

161. *Id.* at *3.

162. 306 Ga. App. 641, 703 S.E.2d 85 (2010).

163. *Id.* at 643, 703 S.E.2d at 89.

neighbors. Najjar constructed a 30,000 square foot residence but discovered that the residence was not connected to a sewer line nor did it have a septic tank. Najjar determined that McDonald's property had private access to the sewer via a manhole in McDonald's yard, which was located 220 feet beyond the boundary of Najjar's property. Although Najjar left a voicemail message for McDonald requesting permission for a tie-in to the sewer, he did not submit plans showing the location of the desired easement as McDonald's attorney requested. Instead, without obtaining permission, Najjar instructed his plumbing contractor to tie into the manhole on McDonald's property. The contractor refused but ran a hookup that stopped at the property boundary. Najjar then had other laborers dig a trench and tie into the sewer line on McDonald's property. When McDonald discovered the tie-in, he brought suit, asserting claims for trespass and ejectment.¹⁶⁴ Najjar countered, asserting "the existence of and his entitlement to a sewer easement extending from his property to McDonald's manhole . . ."¹⁶⁵ Najjar also sought a declaratory judgment for breach of quiet title to the easement, tortious interference with the easement, and a permanent injunction prohibiting McDonald from extinguishing the easement. A jury found for McDonald, awarding compensatory and punitive damages and attorney fees, and Najjar appealed. On appeal, Najjar argued that the evidence did not support the jury's finding of intentional trespass sufficient to support an award of damages.¹⁶⁶ The court of appeals affirmed the verdict, holding that when Najjar trespassed onto McDonald's property, he willfully interfered with the property.¹⁶⁷ The court relied upon O.C.G.A. § 51-9-1,¹⁶⁸ which states that "[t]he right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie,"¹⁶⁹ to establish that McDonald could recover compensatory damages and, moreover, that punitive damages could "be awarded for a trespass that reflects 'an intentional disregard of the rights of another.'"¹⁷⁰

164. *Id.* at 641-42, 703 S.E.2d at 87-89.

165. *Id.* at 642, 703 S.E.2d at 89.

166. *Id.* at 641-43, 703 S.E.2d at 88-89.

167. *Id.* at 645, 703 S.E.2d at 90.

168. O.C.G.A. § 51-9-1 (2000).

169. *McDonald*, 306 Ga. App. at 643, 703 S.E.2d at 89 (internal quotation marks omitted); O.C.G.A. § 51-9-1.

170. *McDonald*, 306 Ga. App. at 643, 703 S.E.2d at 89 (quoting *Tyler v. Lincoln*, 272 Ga. 118, 120, 527 S.E.2d 180, 182-83 (2000)).

Najjar also “argue[d] that he was an innocent, as opposed to wilful, trespasser.”¹⁷¹ The court of appeals, therefore, reviewed the innocent trespasser doctrine, which “protects individuals who enter the land of another under the mistaken belief that it is permissible to do so.”¹⁷² The trial record reflected that the jury was charged by the court on the innocent trespasser doctrine, but the jury chose to reject that defense.¹⁷³ The court of appeals found that the jury was entitled to find willful trespass based upon the evidence “that Najjar directed the construction of the sewer [line] across McDonald’s property knowing that he had neither a written easement nor permission from McDonald to do so.”¹⁷⁴ Upon establishing willful trespass, the jury was then entitled to award both compensatory damages and punitive damages.¹⁷⁵ Further, pursuant to O.C.G.A. § 13-6-11,¹⁷⁶ the intentional tort of trespass authorized an award of attorney fees.¹⁷⁷

Turning from trespass under the ground to property rights in the sky, the court in *Weinstock v. Novare Group, Inc.*¹⁷⁸ considered the rights and remedies of high-rise condominium dwellers faced with finding their city views blocked by new construction.¹⁷⁹ Weinstock bought a condominium from Novare at “Twelve,” a high-rise, mixed-use building in Atlanta’s Atlantic Station.¹⁸⁰ Part of the inducement to buy condominiums at Twelve was the advertisement by Novare that the building had “spectacular city views.”¹⁸¹ Weinstock contended that Novare advertised the views while intending to block them by later constructing an adjacent forty-six-story tower. He sued Novare alleging, among other things, breach of implied easement right, negligent misrepresentation,

171. *Id.*

172. *Id.* at 644, 703 S.E.2d at 89 (quoting *Bullard v. Bouler*, 272 Ga. App. 397, 399, 612 S.E.2d 513, 516 (2005)) (internal quotation marks omitted).

173. *Id.* at 644, 703 S.E.2d at 90.

174. *Id.* at 645, 703 S.E.2d at 90.

175. *Id.*; see also O.C.G.A. § 51-9-3 (2000) (authorizing damages against a trespasser); O.C.G.A. § 51-12-5.1(b) (2000 & Supp. 2011) (authorizing punitive damages upon a finding of willful misconduct).

176. O.C.G.A. § 13-6-11 (2010).

177. *McDonald*, 306 Ga. App. at 645, 703 S.E.2d at 90.

178. 309 Ga. App. 351, 710 S.E.2d 150 (2011).

179. *Id.* at 351, 710 S.E.2d at 152. Other purchasers and residents of Twelve Atlantic Station brought similar but separate suits. See *Novare Gp., Inc. v. Sarif*, S11G0478, 2011 WL 5830488 (Ga. Nov. 21, 2011). In *Novare*, the Georgia Supreme Court reversed the decision of the court of appeals and noted that there was no inconsistency with the court of appeals rulings in *Weinstock* and *Novare* because *Weinstock* was decided on a fully developed record, while *Novare* was decided on the pleadings. *Id.* at *1 & n.3.

180. *Id.*

181. *Id.*

and fraud in the inducement. The trial court granted summary judgment to Novare on all claims.¹⁸²

While the court of appeals extensively discussed Weinstock's tort and contract allegations, for the purposes of this real property survey, it is the court's discussion of the allegations of breach of implied easement rights that is relevant. Weinstock's claims rested upon the theory that his implied easement rights, set out in O.C.G.A. § 44-9-2,¹⁸³ were breached by the subsequent construction of the neighboring high-rise.¹⁸⁴ Specifically, Weinstock pointed to the fact that Novare destroyed the "spectacular city views" it had advertised to the purchasers of condominium units in Twelve by constructing the nearby high-rise.¹⁸⁵ The key to the court's decision as to the implied easement was that the new construction was nearby, but not adjoining Twelve, as it was undisputed that Twelve and the new construction were separated by 17th Street.¹⁸⁶ Therefore, Weinstock was not entitled to an easement to light and air since the rights contemplated in O.C.G.A. § 44-9-2 arise only when "a person sells a house and the light necessary for the reasonable enjoyment thereof is derived from and across adjoining land *belonging to such person*."¹⁸⁷ The court of appeals therefore held that "an implied easement under O.C.G.A. § 44-9-2 could not arise. . . ."¹⁸⁸ Citing *Savannah Jaycees Foundation, Inc. v. Gottlieb*,¹⁸⁹ the court also held that claims to the general right of free passage of light and air would not lie because the record failed to show a "malevolent purpose" by Novare in blocking the passage of light and air.¹⁹⁰

Typically cases involving subdivision covenants involve a homeowners association or other governing group enforcing restrictions. However, in *Waller v. Golden*,¹⁹¹ the Georgia Supreme Court reviewed the opposite—a homeowners association that ignored the provisions of its own restrictive covenant.¹⁹² The Golden's resided in the Eagles Landing Country Club community, which is governed by a restrictive covenant that limits the construction of swimming pools. The Golden's submitted

182. *Id.*

183. O.C.G.A. § 44-9-2 (2002).

184. *Weinstock*, 309 Ga. App. at 358, 710 S.E.2d at 157.

185. *Id.* at 351, 358, 708 S.E.2d at 152, 157.

186. *Id.*

187. *Id.* (internal quotation marks omitted); O.C.G.A. § 44-9-2.

188. *Weinstock*, 309 Ga. App. at 358-59, 710 S.E.2d at 157.

189. 273 Ga. App. 374, 615 S.E.2d 226 (2005).

190. *Weinstock*, 309 Ga. App. at 359, 710 S.E.2d at 157 (quoting *Gottlieb*, 273 Ga. App. at 379, 615 S.E.2d at 231).

191. 288 Ga. 595, 706 S.E.2d 403 (2011).

192. *Id.* at 595, 706 S.E.2d at 404-05.

a proposal to the community's Architectural Review Board to build a pool adjacent to their home. Neither the Goldens nor the Architectural Review Board were aware of the restriction in the covenants, and the building plans were approved on August 7, 2009. Relying upon the approval, the Goldens entered into a contract to build the pool, made partial payment for the construction, and construction commenced. When the neighbors realized a pool was under construction, they objected to the Goldens and then to the homeowners association (HOA). The HOA met to address the issue, and although the pool was not in compliance with the community restrictions, the HOA allowed the construction to continue, fearing a lawsuit if the Goldens were forced to stop construction. Additionally, to minimize any negative effect on the community aesthetic, the HOA decided to pay the Goldens up to \$4,000 for the purchase and planting of mature shrubbery to shield the pool from view. To the dismay of the neighbors, the pool construction continued, and the neighbors met and consulted an attorney. On August 31, 2009, the Wallers sent the Goldens a letter demanding that the construction stop. The Wallers then filed suit on September 3, 2009, seeking an injunction against further construction, removal of the pool, attorney fees, damages for injury to property values, and a return of the funds the HOA had provided.¹⁹³ By the time the suit was filed, the Goldens had already paid their contractor \$19,864 of the total \$39,500 construction fee.¹⁹⁴ The construction continued, and the Goldens spent another \$8,022 towards completion.¹⁹⁵

On September 18, 2009, the trial court granted a temporary injunction on further construction. On December 17, 2009, the trial court entered a final judgment denying the Wallers' claims on the basis of the doctrine of laches. Following the decision, the Wallers did not seek supersedeas, and the Goldens recommenced construction, completing the pool on January 15, 2010. The Wallers appealed, contending that the trial court erred in determining that their action for injunction was barred.¹⁹⁶

The first hurdle the Wallers faced was the appellate review standard for laches: "[T]he question of laches is addressed to the sound discretion of the trial court, and on appeal the exercise of that discretion will not be disturbed unless it is so clearly wrong as to amount to an abuse of discretion."¹⁹⁷ The Wallers contended that their verbal objection to the

193. *Id.* at 595-96, 706 S.E.2d at 404-05.

194. *See id.*

195. *Id.* at 596, 706 S.E.2d at 405.

196. *Id.* at 596-97, 706 S.E.2d at 405-06.

197. *Id.* at 597, 706 S.E.2d at 406 (alteration in original) (quoting *McClure v. Davidson*, 258 Ga. 706, 708, 373 S.E.2d 617, 620 (1988)) (internal quotation marks omitted).

pool was sufficient to show that they did not unreasonably delay asserting their rights, but “[a] mere objection or protest, or a mere threat to take legal proceedings, is not sufficient to exclude the consequences of laches or acquiescence.”¹⁹⁸

On appeal, the Wallers relied on *Hech v. Summit Oaks Owners Ass’n*¹⁹⁹ and *King v. Baker*,²⁰⁰ each of which were distinguishable because those cases involved activity that proceeded without permission from the respective governing bodies.²⁰¹ The supreme court noted that, in this case, the Goldens received permission from the Architectural Review Board to build the pool and were reassured by the HOA to continue the construction after the HOA heard the neighbors concerns.²⁰² Finally, the supreme court held that the trial court was correct in denying the Wallers’ claims against the HOA Board members.²⁰³ In reviewing the HOA’s actions, the proper consideration was “whether the exercise of [the association’s] authority was procedurally fair and reasonable, and whether the substantive decision was made in good faith, and is reasonable and not arbitrary and capricious.”²⁰⁴ Finding that the HOA acted in good faith, the supreme court affirmed the trial court’s order.²⁰⁵

VII. TRESPASS AND NUISANCE²⁰⁶

In *Landings Ass’n v. Williams*,²⁰⁷ the Georgia Court of Appeals, among other things, clarified the scope of private nuisance in Georgia, indicating that a person who suffers hurt, inconvenience, or damage on another’s property cannot, as a matter of law, prevail on a private nuisance claim against the property owner.²⁰⁸ In *Williams*, the estate and heirs (estate) of a fatally injured alligator-attack victim brought an action against the organizations that owned the property on which the

198. *Id.* at 598, 706 S.E.2d at 406 (alteration in original) (quoting *Holt v. Parsons*, 118 Ga. 895, 899, 45 S.E. 690, 692 (1903)) (internal quotation marks omitted).

199. 275 Ga. App. 265, 620 S.E.2d 490 (2005).

200. 214 Ga. App. 229, 447 S.E.2d 129 (1994).

201. *Waller*, 288 Ga. at 598, 706 S.E.2d at 406.

202. *Id.*

203. *Id.* at 599, 706 S.E.2d at 407.

204. *Id.*

205. *Id.*

206. This section was authored by Jennifer L. Ervin, associate in the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., in Atlanta, Georgia. Clark Atlanta University (B.A., 2005); Northwestern University School of Law (J.D., 2010). Member, State Bar of Georgia.

207. 309 Ga. App. 321, 711 S.E.2d 294 (2011).

208. *Id.* at 330, 711 S.E.2d at 301.

attack occurred, alleging premises liability and nuisance. The trial court denied the property owners' motions for summary judgment on the estate's nuisance claim, and the owners sought an interlocutory appeal of the trial court's decision. On appeal, one of the owners argued that there was no evidence from which a jury could find that it maintained a nuisance.²⁰⁹ The court of appeals agreed, holding that summary judgment for the owners was proper because the estate did not allege in its complaint that "anything generated by the owners' activities on [the owners'] property invaded *the [estate's] property* and thereby infringed on [the estate's] right of peaceful enjoyment."²¹⁰ The court reasoned that, as an initial matter, Georgia nuisance law is "grounded in the fundamental premise that everyone has the right to use his or her property as he or she sees fit, provided that in so doing the owner or occupier does not unreasonably invade the corresponding right of others to use their own property as they see fit."²¹¹ The court also noted that

a private nuisance may exist when an owner or occupier's activity on its real property generates an unreasonable amount or type of smoke, noxious odors, water, noise, or something else that invades the real property of another, causing damage to the property, injury to a person on the property, or other harm.²¹²

Relying on this reasoning, the court of appeals reversed the trial court's decision to deny the owners' motion for summary judgment and held that the property's owners did not create a private nuisance.²¹³

In *Alexander v. Hulsey Environmental Services, Inc.*,²¹⁴ the Georgia Court of Appeals clarified the scope of a Georgia statute that was passed to protect certain existing agricultural facilities from nuisance lawsuits brought by newly adjacent landowners.²¹⁵ In *Alexander*, landowners owning property adjacent to a waste disposal facility brought a nuisance claim against the facility and the facility's CEO, site manager, and a customer of the waste disposal facility (facility defendants). The facility defendants moved for summary judgment on the landowners' claim, and after a hearing, the trial court denied summary judgment to the facility but granted summary judgment to the remaining facility defendants. The landowners appealed, and the facility cross appealed.²¹⁶ On

209. *Id.* at 324-25, 711 S.E.2d at 295-97.

210. *Id.* at 330, 711 S.E.2d at 301.

211. *Id.* at 329, 711 S.E.2d at 301.

212. *Id.* at 329-30, 711 S.E.2d at 301.

213. *Id.* at 330, 711 S.E.2d at 301.

214. 306 Ga. App. 459, 702 S.E.2d 435 (2010).

215. *Id.* at 462-63, 702 S.E.2d at 439; *see also* O.C.G.A. § 41-1-7 (1997 & Supp. 2011).

216. *Alexander*, 306 Ga. App. at 459, 702 S.E.2d at 437.

appeal, the facility argued that the landowners' nuisance action was barred by O.C.G.A. § 41-1-7,²¹⁷ which protects only "certain existing agricultural facilities"²¹⁸ In asserting this argument, the facility suggested that it was an "agricultural facility" as defined under the statute.²¹⁹ However, the court of appeals refused to adopt this suggestion, concluding that a waste disposal facility was not covered under the statute.²²⁰ Ultimately, the court held that O.C.G.A. § 41-1-7 "does not extend to protect the commercial receipt, storage and treatment of septage and grease"—activities in which the waste disposal facility engaged.²²¹ The appellate court affirmed the trial court's decision and denied summary judgment to the facility.²²²

In a dispute over a property line, the Georgia Court of Appeals, in *Wright v. VIF/Valentine Farms Building One, LLC*,²²³ discussed the extent to which trespass liability can be based on prior ownership.²²⁴ In *Wright*, a landowner brought an action for trespass against the prior owners of property adjacent to the landowner's property, the alleged trespassers who developed the adjacent property, and the subsequent purchaser/occupant of the adjacent property.²²⁵ The landowner filed a second complaint alleging that the prior owners were liable for trespasses even though they had sold the property before the trespasses occurred.²²⁶ The prior owners moved for summary judgment, which the trial court granted. The landowner appealed, contending that summary judgment was in error because there were disputed material facts and the trial court failed to follow controlling precedent.²²⁷

On appeal, the landowners relied on *Whitaker Acres, Inc. v. Schrenk*,²²⁸ arguing that the prior owners were subject to liability.²²⁹ In that case, the Georgia Supreme Court held that the selling of property one does not own to others who then trespass on that land is a basis for

217. O.C.G.A. § 41-1-7 (1997 & Supp. 2011).

218. *Alexander*, 306 Ga. App. at 462, 702 S.E.2d at 439 (quoting *Herrin v. Opatut*, 248 Ga. 140, 140-41, 281 S.E.2d 575, 577 (1981)) (internal quotation marks omitted).

219. *Id.* at 462-63, 702 S.E.2d at 439.

220. *Id.* at 463, 702 S.E.2d at 439; see O.C.G.A. § 41-1-7.

221. *Alexander*, 306 Ga. App. at 463, 702 S.E.2d at 439.

222. *Id.*

223. 308 Ga. App. 436, 708 S.E.2d 41 (2011).

224. *Id.* at 436, 708 S.E.2d at 42.

225. *Id.*

226. *Id.* at 438, 702 S.E.2d at 44.

227. *Id.*

228. 170 Ga. App. 238, 316 S.E.2d 537 (1984).

229. *Wright*, 308 Ga. App. at 438, 708 S.E.2d at 44.

liability.²³⁰ Based on the court's decision in *Schrenk*, the court of appeals reversed the trial court, holding that there were genuine issues of fact as to whether the prior owners knew or should have known of the boundary line disputes.²³¹ Ultimately, the court found that it is possible for a grantor, by that status alone, to be *ipso facto* liable in tort for trespasses of his grantee.²³²

In another action for trespass, *Richardson v. Georgia Power Co.*,²³³ the Georgia Court of Appeals held a landowner liable for trespassing on his own property, which was encumbered by an easement owned by a utility company.²³⁴ After the landowner had begun building a garage on a section of his property encumbered by the easement, the utility company sued for injunctive relief and attorney fees for bad faith and stubborn litigiousness. The trial court granted the injunction ordering the landowner to remove the garage from the easement. The trial court denied summary judgment, however, on the utility company's request for attorney fees.²³⁵ The landowner appealed, and the appellate court affirmed the decision.²³⁶

On appeal, the landowner argued that the trial court erred in finding that he trespassed by constructing a building on his own property "because an owner cannot trespass on his own property."²³⁷ The appellate court agreed with the landowner's argument to the extent that he owned the property and had a right to enter it and enjoy it; however, the appellate court added that this right was subject to terms of the easement.²³⁸ Indeed, as used in the context of this case, "a 'trespass' upon an easement means use of the property in violation of the easement terms."²³⁹ This case is important because it illustrates that even a landowner can trespass on his own property when that property is subject to another's property right.

230. *Id.* at 439, 702 S.E.2d at 44 (citing *Whitaker*, 170 Ga. App. at 239, 316 S.E.2d at 538).

231. *Id.* at 439-40, 702 S.E.2d at 44-45.

232. *See id.* at 441, 702 S.E.2d at 45.

233. 308 Ga. App. 341, 708 S.E.2d 10 (2011).

234. *Id.* at 344, 708 S.E.2d at 13.

235. *Id.* at 341, 708 S.E.2d at 11.

236. *Id.*

237. *Id.* at 343, 708 S.E.2d at 12.

238. *Id.*

239. *Id.*

VIII. FORECLOSURE OF REAL PROPERTY²⁴⁰

With the slump in real estate market values and the increasing frequency of foreclosures involving mortgages with substantial deficiencies, confirmation of foreclosure, pursuant to O.C.G.A. § 44-14-161,²⁴¹ has become an increasingly popular topic for the Georgia appellate courts.

In *Titshaw v. Northeast Georgia Bank*,²⁴² a foreclosure sale was conducted by Freedom Bank, which then reported the sales to a superior court judge and applied for confirmation. Subsequently, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver for Freedom Bank and the note and guaranties at issue in the confirmation were transferred to Northeast Georgia Bank. As a result, Northeast Georgia Bank pursued and obtained confirmation. The borrower and guarantors appealed the confirmation order, arguing, in part, that Northeast Georgia Bank was not the proper party.²⁴³ The confirmation statute specifies that the “person instituting the foreclosure proceedings shall” pursue confirmation.²⁴⁴ While the confirmation statute is in derogation of common law, the Georgia Court of Appeals opted not to strictly apply the cited provision because of the following reasoning:

While the confirmation statute unquestionably provides for debtor relief by establishing a “procedure which . . . *limits* the creditor’s common-law right to seek a deficiency judgment,” we find nothing to support a conclusion that the General Assembly intended further to *extinguish* that common-law right merely because the underlying note was assigned to another creditor after the foreclosure sale.²⁴⁵

The appellants in *Titshaw* found more success with their second argument. While the foreclosing lender presented evidence that the fair market value of the property was \$595,000, it neglected to provide evidence of the amount the property brought at the foreclosure sale. In fact, the report of the sale to the superior court judge prior to filing the

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241. O.C.G.A. § 44-14-161 (2002).

242. 304 Ga. App. 712, 697 S.E.2d 837 (2010).

243. *Id.* at 712, 697 S.E.2d at 838-39.

244. *Id.* at 713, 697 S.E.2d at 839 (internal quotation marks omitted); O.C.G.A. § 44-14-161(a).

245. *Titshaw*, 304 Ga. App. at 715, 697 S.E.2d at 840-41 (quoting *Vlass v. Sec. Pac. Nat’l Bank*, 263 Ga. 296, 298, 430 S.E.2d 732, 735 (1993)).

confirmation contained a typographical error indicating that the property sold for \$550,000.²⁴⁶ Even though the trial judge indicated in the confirmation order that the recitation in the report to the lower sales price was a typographical error and that the rest of the pleadings indicated that the sale price was the higher amount, the court of appeals held that neither the pleadings nor the evidence produced at the confirmation hearing showed that the property sold for at least \$595,000.²⁴⁷ Based on this apparent oversight, the court of appeals reversed the confirmation order.²⁴⁸

In *Mundy Mill Development, LLC v. ACR Property Services, LP*,²⁴⁹ the appellant sought to challenge the conclusion reached by the foreclosing lender's appraiser that the property at issue was worth \$3,680,000. The appraiser based this conclusion, in part, on the fact that the borrower had accepted an offer to sell the property in the same amount.²⁵⁰ The appellant argued that the accepted offer was a "quick sale" offer and that "quick sale prices are 'not reflective of true market value.'"²⁵¹ The appellant relied on prior precedent where the Georgia Court of Appeals specifically held that confirming a foreclosure sale based solely on evidence of the quick sale value "does not reflect the price that would be obtained in a sale under the usual market conditions."²⁵² The court of appeals concluded that this precedent did not require reversal of the confirmation order in the instant case because the lender's appraiser based his conclusion on a number of factors including, but not limited to, the quick sale value.²⁵³ The court noted that "[o]n appellate review, the test is not whether this court would have accepted appellant's expert appraisals as the most reliable and accurate, but whether the record contains any evidence to support the findings of the trial court that the property brought its true market value at the foreclosure sale."²⁵⁴ Applying this standard, the court of appeals affirmed the confirmation order.²⁵⁵

246. *Id.* at 717-18, 697 S.E.2d at 842.

247. *Id.*

248. *Id.* at 718, 697 S.E.2d at 842.

249. 306 Ga. App. 730, 703 S.E.2d 137 (2010).

250. *Id.* at 732-33, 703 S.E.2d at 138-39.

251. *Id.* at 733, 703 S.E.2d at 149.

252. *Id.* (quoting *Gutherie v. Ford Equip. Leasing Co.*, 206 Ga. App. 258, 261, 424 S.E.2d 889, 892 (2010)).

253. *Id.*

254. *Id.* at 734, 703 S.E.2d at 139-40 (quoting *Blue Marlin Dev., LLC v. Branch Banking & Trust Co.*, 302 Ga. App. 120, 122, 690 S.E.2d 252, 254 (2010)).

255. *Id.* at 734, 703 S.E.2d at 140.

*Balboa Life & Casualty, LLC v. Home Builders Finance, Inc.*²⁵⁶ involved property that was foreclosed upon following substantial fire damage.²⁵⁷ The court of appeals concluded that a lender may be entitled to foreclose on the property for the full amount owed on the underlying mortgage and to collect insurance proceeds arising from the fire.²⁵⁸ According to the court, the general rule is that, because “insurance proceeds are an alternative source of payment on the mortgage debt, the mortgagee’s right to insurance proceeds is extinguished to the extent the debt is paid by other sources, including foreclosure”²⁵⁹ Analyzing prior precedent, the court reasoned that while full payment of the amount owed would preclude a lender from seeking a deficiency judgment, it would not preclude a lender from obtaining insurance proceeds, so long as the value of the property was less than the outstanding mortgage debt.²⁶⁰ In *Balboa*, the court concluded that the foreclosure sale price established the fair market value, and since the difference between the mortgage debt and the fair market value was greater than the amount of the insurance proceeds, the court refused to overrule the trial court’s determination that the lender was entitled to the insurance proceeds.²⁶¹

The Georgia Supreme Court, in *MPP Investments, Inc. v. Cherokee Bank, N.A.*,²⁶² addressed when, under O.C.G.A. § 44-14-80,²⁶³ a lender’s interest in real property reverts to the grantor.²⁶⁴ While the statute provides an exception where a foreclosure is conducted under specified circumstances, the trial court affirmed the special master’s conclusion that the foreclosure relied upon by the appellant lender was invalid as a result of the lender’s failure to provide a sixty-day notice required by the security deed.²⁶⁵

Both the foreclosing lender and the high bidder at the foreclosure sale appealed. First, appellants argued that the foreclosure notice issue was waived because it was not raised at a preliminary hearing or included in the pretrial order.²⁶⁶ The supreme court rejected both of these arguments, reasoning that the foreclosure sale had occurred after the

256. 304 Ga. App. 478, 697 S.E.2d 240 (2010).

257. *Id.* at 478, 697 S.E.2d at 241-42.

258. *Id.* at 479, 697 S.E.2d at 242.

259. *Id.*

260. *Id.* at 480, 697 S.E.2d at 243.

261. *Id.* at 480-81, 697 S.E.2d at 243.

262. 288 Ga. 558, 707 S.E.2d 485 (2011).

263. O.C.G.A. § 44-14-80 (2002).

264. *MPP Investments*, 288 Ga. at 559, 707 S.E.2d at 487.

265. *Id.* at 560, 707 S.E.2d at 487.

266. *Id.* at 560, 707 S.E.2d at 487-88.