

1-2020

Local Government Law

Russell A. Britt

Michael C. Pruett

Jennifer D. Herzog

Brittanie Browning

Jacob Stalvey O'Neal

See next page for additional authors

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [State and Local Government Law Commons](#)

Recommended Citation

Britt, Russell A.; Pruett, Michael C.; Herzog, Jennifer D.; Browning, Brittanie; O'Neal, Jacob Stalvey; and Cunningham, Pearson (2020) "Local Government Law," *Mercer Law Review*: Vol. 71 : No. 1 , Article 13. Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol71/iss1/13

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Local Government Law

Authors

Russell A. Britt, Michael C. Pruett, Jennifer D. Herzog, Brittanie Browning, Jacob Stalvey O'Neal, and Pearson Cunningham

Local Government Law

by Russell A. Britt,* Michael C. Pruett,** Jennifer D.

Herzog,*** Brittanie Browning,**** Jacob Stalvey O'Neal,*****

and Pearson Cunningham*****

I. INTRODUCTION¹

Another banner year for local governments. A gubernatorial veto preserves, for now, the Georgia Supreme Court's decision in *Lathrop v.*

*Partner, Hall Booth Smith, P.C., Atlanta, Georgia. University of Georgia (A.B., cum laude, 2003); Georgia State University College of Law (J.D., magna cum laude, 2011). Member, State Bar of Georgia (Member, Constitutional Law Section, Local Government Section, and School & College Law Section); Defense Research Institute (Member, Governmental Liability Committee; Sponsorship Chair, 2019 DRI Civil Rights and Governmental Tort Liability Conference).

**Partner, Hall Booth Smith P.C., Athens, Georgia; University of Georgia (B.B.A., magna cum laude, 1988); University of Georgia School of Law (J.D., summa cum laude, 1991). Member, State Bar of Georgia.

***Partner, Hall Booth Smith, P.C., Tifton, Georgia; Presbyterian College (B.A., summa cum laude, 2003); University of Georgia School of Law (J.D., 2006). Member, State Bar of Georgia.

****Associate, Hall Booth Smith, P.C., Atlanta, Georgia. Georgia State University (B.A., summa cum laude, 2010); Georgia State University College of Law (J.D., 2014). Member, State Bar of Georgia.

*****Associate, Hall Booth Smith, P.C., Atlanta, Georgia. Mercer University (B.A., summa cum laude, 2010); University of Virginia School of Law (J.D., 2013). Member, State Bar of Georgia.

*****Associate, Hall Booth Smith, P.C., Atlanta, Georgia. University of Georgia (B.A., 2013); Georgia State University College of Law (J.D., magna cum laude, 2018). Member, State Bar of Georgia.

1. For a survey of local government law during the prior survey period, see Christian Henry, Russell A. Britt, Michael C. Pruett, Jennifer D. Herzog, Nick Kinsley, Jacob Stalvey O'Neal & Phillip E. Friduss, *Local Government Law, Annual Survey of Georgia Law*, 70 MERCER L. REV. 177 (2018).

*Deal*² that held sovereign immunity bars declaratory and injunctive relief claims against the state, including challenges to constitutionality under the state constitution.³ In the world of tax, some clarification on appraisal methodologies feature alongside cases notable for their unique procedural postures. A Georgia Supreme Court decision⁴ fleshes out what is required for a “meaningful” hearing to be afforded under zoning procedures law. Last year’s developments in the Open Meetings⁵ and Open Records Acts⁶ continue to bear fruit, and statutory construction comes front and center to this year’s developments in Whistleblower Act⁷ case law.

II. SOVEREIGN IMMUNITY

This survey period recognizably did not include a decision on sovereign immunity⁸ with more implications than the *Lathrop v. Deal*⁹ decision discussed in last year’s article;¹⁰ however, interesting developments on the issue continue to arise. In *City of Albany v. Stanford*,¹¹ the Georgia Court of Appeals addressed whether a city is entitled to sovereign immunity from a nuisance that purportedly endangers life.¹² The facts involved the City of Albany continuing to re-issue an occupational tax certificate to a business to operate a recording studio and entertainment facility, despite knowledge of allegations that the business was operating a night club and serving alcohol without a permit. The city also had knowledge of multiple police raids on the establishment, which uncovered evidence of alcohol sales,

2. 301 Ga. 408, 801 S.E.2d 867 (2017).

3. See *infra* notes 4, 76.

4. *Hochstetter v. Pickens Cty.*, 303 Ga. 786, 815 S.E. 2d 50 (2018).

5. O.C.G.A § 50-14-1 (2019).

6. O.C.G.A § 50-18-70 (2019).

7. O.C.G.A § 45-1-4 (2019).

8. The Georgia Constitution provides:

[S]overeign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

GA. CONST. art. I, § 2, para. 9(e).

9. 301 Ga. 408, 801 S.E.2d 867 (2017) (holding that sovereign immunity bars declaratory and injunctive relief claims against the State, including challenges to a law’s constitutionality under the Georgia Constitution).

10. See Henry et al., *supra* note 1, at 178–82.

11. 347 Ga. App. 95, 815 S.E.2d 322 (2018) (physical precedent), *cert. denied*, 2019 Ga. LEXIS 294 (Ga. Apr. 29, 2019).

12. *Id.* at 98, 815 S.E.2d at 325.

weapons, and drugs. The plaintiffs, as the co-administrators of a murder victim's estate, alleged that the dangerous conditions in and around the business establishment, of which the city was aware, resulted in a nuisance and the shooting death of the murder victim.¹³

The city argued it was entitled to sovereign immunity, while the plaintiff contended that such immunity “[did] not apply because cities have always been responsible for damages caused by nuisances maintained by the city that endanger life.”¹⁴ The court of appeals, however, determined that there was no “[nuisance] ‘exception’ applicable to the facts of this case.”¹⁵ First, although a “nuisance exception” to sovereign immunity is available in cases involving a taking of property, such “exception” does not apply in this case “where the ‘damage’ is injury to a person or loss of life.”¹⁶

Second, the city did not waive its sovereign immunity under the Official Code of Georgia Annotated section 36-33-1(b),¹⁷ as the plaintiffs suggested.¹⁸ Section 36-33-1(b) “provides a narrow waiver of a municipal corporation’s sovereign immunity ‘[f]or neglect to perform or [for] improper or unskillful performance of their ministerial duties[.]’”¹⁹ In the context of this code section, “ministerial functions” for which a municipality may be liable involve “the exercise of some private franchise, or some franchise conferred upon the municipality by law which it may exercise for the private profit or convenience of the municipality or for the convenience of its citizens alone, in which the general public has no interest.”²⁰ Conversely, municipalities are entitled to assert sovereign immunity for “governmental functions,” which are “of a purely public nature, intended for the benefit of the public at large, without pretense of private gain to the municipality.”²¹ Applied to the facts of this case, and without deciding whether the issuance of an occupational tax certificate is “ministerial,” the court of appeals determined that “the decision of when and whether to revoke an occupational tax certificate is a governmental function because it is the

13. *Id.* at 95–96, 815 S.E.2d at 324.

14. *Id.* at 98, 815 S.E.2d at 325.

15. *Id.*

16. *Id.* at 98–99, 815 S.E.2d at 326.

17. The text of O.C.G.A. § 36-33-1(b) (2019) reads, in full: “Municipal corporations shall not be liable for failure to perform or for errors in performing their legislative or judicial powers. For neglect to perform or improper or unskillful performance of their ministerial duties, they shall be liable.”

18. *Stanford*, 347 Ga. App. at 99, 815 S.E.2d at 326.

19. *Id.* (quoting O.C.G.A. § 36-33-1(b)).

20. *Id.* at 100, 815 S.E.2d at 326 (quotations and citation omitted).

21. *Id.* at 99, 815 S.E.2d at 326 (quotations and citation omitted).

exercise of the city's police power, which is inherently discretionary."²² Accordingly, the court of appeals held that the city was entitled to sovereign immunity and reversed the trial court's denial of the city's motion for judgment notwithstanding the verdict.²³

The dissent, however, opined that "the majority's opinion applies an inapplicable line of precedent and thereby writes this longstanding and important [nuisance] exception to the protection of sovereign immunity out of Georgia law."²⁴ The dissent pointed to precedent holding that a municipality may be liable for damages it causes to a third party from the creation or maintenance of a nuisance—regardless of whether the municipality was performing a governmental function.²⁵ The dissent further pointed to the Georgia Supreme Court's holding in *City of Thomasville v. Shank*,²⁶ where the supreme court held that "a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property."²⁷ The dissent agreed with the majority's conclusion that cases involving the taking of property without just and adequate compensation do not apply to this case; however, cases involving a nuisance that is dangerous to life and health do apply.²⁸

The majority acknowledged the holding in *Shank*, but determined that it was later clarified in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*²⁹ by the Georgia Supreme Court.³⁰ According to the majority, the supreme court in *Sustainable Coast* held that "the 'nuisance exception' recognized in *Shank* was not an exception at all, but instead, a proper recognition that the Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases."³¹ And "such an 'exception' for cases triggering application of the eminent domain clause of the Constitution does not apply here in this case where the 'damage' is injury to a person or loss of life."³²

22. *Id.* at 100–01, 815 S.E.2d at 327.

23. *Id.* at 101, 815 S.E.3d at 327.

24. *Id.* at 104–05, 815 S.E.2d at 330 (Ellington, P.J., dissenting).

25. *Id.* at 103–04, 815 S.E.2d at 329 (Ellington, P.J., dissenting).

26. 263 Ga. 624, 437 S.E.2d 306 (1993).

27. *Stanford*, 347 Ga. App. at 104, 815 S.E.2d at 329 (Ellington, P.J., dissenting) (quoting *Shank*, 263 Ga. at 625, 437 S.E.2d at 307).

28. *Id.* at 104, 815 S.E.2d at 329 (Ellington, P.J., dissenting).

29. 294 Ga. 593, 755 S.E.2d 184 (2014).

30. *Stanford*, 347 Ga. App. at 98, 815 S.E.2d at 325–26 (majority opinion).

31. *Id.* at 98, 815 S.E.2d at 326.

32. *Id.* at 98–99, 815 S.E.2d at 326.

Concurring fully and specially, the concurrence noted, although a municipality cannot assert sovereign immunity in defending against a private nuisance claim, the court was unaware of any precedent holding a municipality liable for a private nuisance “where the alleged nuisance resulted in personal injury to a member of the public, as opposed to the owner or occupier of the property.”³³ And “given the rationale for the [nuisance] exception—that the government may not unreasonably interfere with private property rights—[the concurrence saw] no basis for extending the exception to include claims [resulting in personal injury to a member of the public].”³⁴ Moreover, to the extent the plaintiff attempted to assert a public nuisance claim, the concurrence noted that there was no precedent extending the “nuisance exception” to sovereign immunity for such a claim.³⁵ The concurrence therefore agreed that the city was entitled to sovereign immunity.³⁶

The majority opinion provided a significant victory to the city by reversing a \$10,640,000 judgment.³⁷ More importantly, the physical precedent decision³⁸ provides persuasive authority for limiting the “nuisance exception” to sovereign immunity for municipalities going forward.

In *Fulton County School District v. Jenkins*,³⁹ the Georgia Court of Appeals reaffirmed the limitation on school districts’ waiver of sovereign immunity for incidents involving a school bus.⁴⁰ The allegations in the complaint involved a bus driver failing to ensure a special needs student exited the bus at school. As a result, the student allegedly remained on the bus while parked in the school’s transportation-system parking lot for the evening, unwittingly locked inside the bus by the driver.⁴¹

The school district moved to dismiss the complaint, arguing it was entitled to sovereign immunity. The plaintiff argued that sovereign

33. *Id.* at 102, 815 S.E.2d at 328 (Gobeil, J., concurring).

34. *Id.* at 103, 815 S.E.2d at 329 (Gobeil, J., concurring).

35. *Id.* at 102–03, 815 S.E.2d at 328–29 (Gobeil, J., concurring).

36. *Id.* at 103, 815 S.E.2d at 329 (Gobeil, J., concurring).

37. *See id.* at 96, 815 S.E.2d at 324 (majority opinion).

38. *See* GA. CT. APP. R. 33.2 (a)(1) (“An opinion is physical precedent only (citable as persuasive, but not binding, authority) . . . with respect to any portion of the published opinion in which any of the panel judges concur in the judgment only, concur specially without a statement of agreement with all that is said in the majority opinion, or dissent.”).

39. 347 Ga. App. 448, 820 S.E.2d 75 (2018).

40. *Id.*

41. *Id.* at 448, 870 S.E.2d at 76.

immunity was waived by O.C.G.A. § 20-2-1090,⁴² which requires school districts to have insurance policies covering school children, and O.C.G.A. § 33-24-51(b),⁴³ which expressly provides a waiver of sovereign immunity for injuries arising from the operation and use of a government entity's motor vehicle.⁴⁴ The trial court concluded that O.C.G.A. § 20-2-1090 waived the school district's sovereign immunity for the plaintiff's claims.⁴⁵

The court of appeals reversed, noting that its earlier decision in *Rawls v. Bulloch County School District*⁴⁶ foreclosed the argument that O.C.G.A. § 20-2-1090 somehow waived a school district's sovereign immunity.⁴⁷ The court's holding relied on the fact that O.C.G.A. § 20-2-1090 does not provide express language waiving sovereign immunity or the extent of such waiver.⁴⁸

The court of appeals contrasted O.C.G.A. § 33-24-51,⁴⁹ which does provide an express waiver of sovereign immunity and the extent of the waiver.⁵⁰ However, the court of appeals held that O.C.G.A. § 33-24-51 did not apply to this case because, as in *Rawls*, there was no vehicular accident as contemplated by O.C.G.A. § 33-24-51.⁵¹ Thus, the court of appeals reversed the trial court's denial of the school district's motion to dismiss.⁵²

During the survey period, the Georgia Court of Appeals addressed on multiple occasions the requirement of a written contract in order to waive a local government's sovereign immunity for breach of contract claims. In *Browning v. Rabun County Board of Commissioners*,⁵³ the wife of a deceased county employee brought a breach of contract claim after she was denied proceeds from an optional life insurance policy.⁵⁴ The record did not contain an enrollment form signed by the deceased for the election of coverage under the optional policy.⁵⁵ And even though

42. O.C.G.A. § 20-2-1090 (2019).

43. O.C.G.A. § 33-24-51(b) (2019).

44. *Jenkins*, 347 Ga. App. at 449, 870 S.E.2d at 76.

45. *Id.*

46. 223 Ga. App. 234, 477 S.E.2d 383 (1996).

47. *Jenkins*, 347 Ga. App. at 451, 820 S.E.2d at 77–78.

48. *Id.* at 451–52, 820 S.E.2d at 78.

49. O.C.G.A. § 33-24-51 (2019).

50. *Jenkins*, 347 Ga. App. at 452–53, 820 S.E.2d at 78–79.

51. *Id.* at 453–54, 820 S.E.2d at 79.

52. *Id.* at 454, 820 S.E.2d at 79.

53. 347 Ga. App. 719, 820 S.E.2d 737 (2018), *cert. denied*, 2019 Ga. LEXIS 424 (Ga. June 3, 2019).

54. *Id.* at 719–20, 820 S.E.2d at 738–39.

55. *Id.* at 723, 820 S.E.2d at 741.

there was a summary of benefits that purported to show the deceased was enrolled in the optional policy, the court of appeals held that the summary of benefits was not a written contract between the county and the deceased because it was not signed by either party and it did not show “the assent of the parties to the contract or contain any terms other than the monthly premium.”⁵⁶ Accordingly, the court of appeals affirmed the trial court’s ruling that the claim was barred by sovereign immunity.⁵⁷

In *Cobb County School District v. Learning Center Foundation of Central Cobb, Inc.*,⁵⁸ a charter school sued the school district, alleging that the school district violated the Charter Schools Act⁵⁹ by treating the charter school less favorably than other local schools.⁶⁰ The school district moved to dismiss, contending that the claim was barred by sovereign immunity. The trial court denied the motion, finding that by entering the charter agreement, pursuant to the Charter Schools Act, the school district agreed to be bound by the provisions of the Charter Schools Act.⁶¹ The court of appeals agreed, holding that the plain language of the Charter Schools Act “does more than recite that the parties to a charter are bound by the Act.”⁶² It instead “creates the basic terms of a charter agreement by stating that the parties to a charter ‘agree to be bound’ ‘as if’ the provisions of the Act were replicated word-for-word in the charter agreement.”⁶³ Thus, the court of appeals held that the school district’s sovereign immunity was waived as to the plaintiff’s breach of contract claim.⁶⁴ However, this decision is physical precedent only,⁶⁵ with the dissent contending that sovereign immunity was not waived because it did not believe the plain language of O.C.G.A. § 20-2-2062(1)⁶⁶ incorporated the Charter Schools Act into the charter agreement—the statute merely declares “that those who enter into a charter have agreed that their charter is a contract governed by the Charter Schools Act.”⁶⁷

56. *Id.* at 722–23, 820 S.E.2d at 740.

57. *Id.*

58. 348 Ga. App. 66, 821 S.E.2d 127 (2018).

59. O.C.G.A. §§ 20-2-2060–20-2-2076 (2019).

60. *Learning Ctr. Found. of Cent. Cobb*, 348 Ga. App. at 66, 821 S.E.2d at 128.

61. *Id.* at 67, 821 S.E.2d at 128.

62. *Id.* at 69, 821 S.E.2d at 129.

63. *Id.* at 69, 821 S.E.2d at 129–30.

64. *Id.* at 69, 821 S.E.2d at 130.

65. See GA. CT. APP. R. 33.2 (a)(1); see also *supra* note 38.

66. O.C.G.A. § 20-2-2062(1) (2019).

67. *Learning Ctr. Found. of Cent. Cobb*, 348 Ga. App. at 71, 821 S.E.2d at 131 (Ellington, P.J., dissenting).

In *Shelnutt v. Mayor of Savannah*,⁶⁸ firefighters brought a breach of contract claim, alleging they were paid less than what the City of Savannah's written pay policy required. The firefighters argued that the city modified the terms of the pay policy through its course of conduct.⁶⁹ However, the court of appeals determined that, regardless of the city's conduct, the city was entitled to sovereign immunity against the breach of contract claim in the absence a written contract.⁷⁰

In *Fulton County v. City of Atlanta*,⁷¹ a case challenging the annexation of property in Fulton County, the Georgia Supreme Court noted the unique circumstances where courts may reach the merits of a case before addressing the jurisdictional issue of sovereign immunity.⁷² The supreme court held that, even if sovereign immunity would bar claims against the city and city officials in their official capacities, it would not bar the claims against the city officers in their individual capacities.⁷³ The supreme court therefore would have to address the constitutionality of the subject annexation ordinance in any event.⁷⁴ And because it determined that the subject annexation ordinance was never properly enacted, the supreme court was able to affirm the trial court's judgment in favor of the city, regardless of whether the city was entitled to sovereign immunity.⁷⁵

Finally, following the General Assembly's inability to pass legislation during the 2018 legislative session in response to *Lathrop v. Deal*,⁷⁶ it successfully passed House Bill 311⁷⁷ during the 2019 legislative session. The bill provided for a limited waiver of sovereign immunity for declaratory or injunctive relief claims to remedy an injury in fact caused by government entities or government officials in their official capacity in violation of a state statute, the Georgia Constitution, or the United States Constitution.⁷⁸ The proposed waiver also extended to declaratory and injunctive relief claims against enforcement of a state statute, on

68. 349 Ga. App. 499, 826 S.E.2d 379 (2019).

69. *Id.* at 504, 826 S.E.2d at 384.

70. *Id.* at 505, 826 S.E.2d at 384.

71. 305 Ga. 342, 825 S.E.2d 142 (2019).

72. *Id.* at 342 n.3, 825 S.E.2d at 143 n.3.

73. *Id.*

74. *Id.*

75. *Id.*

76. 301 Ga. 408, 801 S.E.2d 867 (2017) (holding sovereign immunity bars declaratory and injunctive relief claims against the State, including challenges to a law's constitutionality under the Georgia Constitution); see Ga. H.R. Bill 791, Reg. Sess. (2017) (unenacted).

77. Ga. H.R. Bill 311, Reg. Sess. (2019) (unenacted).

78. *Id.*

the basis that the statute, on its face or as applied, violates the Georgia or United States Constitution.⁷⁹ The proposed waiver would not apply, *inter alia*, to the recovery of monetary relief, attorney's fees, or expenses of litigation except as provided in O.C.G.A. § 9-15-14.⁸⁰ Stakeholders believed this attempted response to the *Lathrop* decision would be signed into law. However, the governor surprisingly vetoed the bill, stating that when "considering the possible ramifications of a [sovereign immunity] wavier, it is essential that the provisions be appropriately tailored in conjunction with the executive branch to provide pathways for judicial intervention without unduly interfering with the daily operations of the state."⁸¹ Accordingly, the seminal *Lathrop* decision again remains the controlling law on sovereign immunity's application to declaratory and injunctive relief claims for at least one more year.

III. OFFICIAL IMMUNITY

Following significant discussions and holdings by the Georgia Supreme Court on the topic of official immunity⁸² in *Lathrop v. Deal*⁸³ and *Barnett v. Caldwell*,⁸⁴ this survey period proved less eventful. Nevertheless, certain justices of the Georgia Supreme Court signaled an appetite for a significant review of the doctrine's applicability to local government employees in *Wyno v. Lowndes County*.⁸⁵

In *Wyno*, the plaintiff, whose wife was attacked and killed by a neighbor's dog, brought suit against Lowndes County and four individual Lowndes County Animal Control employees. Leading up to the attack, numerous complaints about the dogs at the neighbor's address had been filed with the animal control office. The plaintiff

79. *Id.*

80. *Id.*; O.C.G.A. § 9-15-14 (2019).

81. *Veto Statement No. 5 (2019)*, GOVERNOR BRIAN P. KEMP OFFICE OF THE GOVERNOR, <https://gov.georgia.gov/documents/2019-veto-statements> (last visited July 23, 2019).

82. The Georgia Constitution provides:

[A local government officer] may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, [his] ministerial functions and may be liable for injuries and damages if [he] act[s] with actual malice or with actual intent to cause injury in the performance of [his] official functions.

GA. CONST. art. I, § 2, para. 9(d).

83. 301 Ga. 408, 801 S.E.2d 867 (2017); *see* Henry et al., *supra* note 1, at 182–83.

84. 302 Ga. 845, 809 S.E.2d 813 (2018); *see* Henry et al., *supra* note 1, at 184–85.

85. 305 Ga. 523, 824 S.E.2d 297 (2019).

therefore alleged that the employees negligently failed to perform ministerial duties as to the allegedly dangerous dog.⁸⁶

The employees asserted immunity under former O.C.G.A. § 4-8-30,⁸⁷ a portion of the Responsible Dog Ownership Law that purports to exempt local governments and their employees from liability arising from their enforcement of, or failure to enforce, that law and local dog-control ordinances.⁸⁸ Although the plaintiff challenged the constitutionality of former O.C.G.A. § 4-8-30, the supreme court did not reach the constitutional question because it determined that the employees were protected by official immunity from the claims.⁸⁹

Specifically, the supreme court rejected the trial court's conclusion that the Lowndes County Animal Control Ordinance established ministerial duties; it instead determined that the reference duties under the ordinance were discretionary in nature.⁹⁰ "Although the ordinance directs animal control officers to make investigations and inquiries upon receiving a complaint, such [actions are] for the purpose of determining whether the [complaint] . . . describes a dog that is vicious, dangerous, or potentially dangerous, as described [by] the . . . [o]rdinance."⁹¹ The supreme court found "[t]his initial determination [to] necessarily require[] the exercise of judgment and the application of a legal standard to specific facts before determining that further action is required."⁹² Further, "even if [an employee] determines that a dog is 'dangerous' or 'potentially dangerous' [pursuant to the ordinance], the [employee] has a range of enforcement options at his or her disposal."⁹³ Thus, the supreme court held that the employees had "significant discretion with regard to the handling of each complaint."⁹⁴

The record also was devoid of any evidence that the employees harbored ill will or malice towards the plaintiff or his deceased wife or that the employees intentionally conducted their investigations of dog complaints in a manner so as to harm the plaintiff or his deceased wife.⁹⁵ The supreme court therefore held that the plaintiff did not

86. *Id.* at 524, 824 S.E.2d at 299–300.

87. O.C.G.A. § 4-8-30 (2011).

88. *Wyno*, 305 Ga. at 524–25 & n.1, 824 S.E.2d at 300 & n.1.

89. *Id.* at 523–24, 824 S.E.2d at 299.

90. *Id.* at 528–30, 824 S.E.2d at 302–03.

91. *Id.* at 530, 824 S.E.2d at 303.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 533, 824 S.E.2d at 305.

satisfy his burden of demonstrating in the record that any of the employees acted with actual malice or intended to cause the plaintiff or his deceased wife harm.⁹⁶ Absent evidence of a discretionary act taken with actual malice, the supreme court affirmed the trial court's grant of summary judgment in favor of the employees.⁹⁷

In light of the facts from this case, the decision's holding was predictable. The decision's concurrence, however, was not. It suggests that the supreme court may want to reconsider some or all of the precedents applying official immunity to county and municipal employees under Article I, Section II, Paragraph IX(d) of the Georgia Constitution,⁹⁸ as well as the interplay between that constitutional provision and the provision found under Article IX, Section II, Paragraph IX⁹⁹ of the Georgia Constitution.¹⁰⁰ Three justices joined the concurrence's author,¹⁰¹ thus signaling that a significant review of these issues may occur in the near future.

In *Ortega v. Coffey*,¹⁰² the plaintiff sued a county road superintendent, among others, following the death of her husband and injury of her minor son in a vehicle accident. The plaintiff alleged that the road superintendent failed to inspect the roadway which caused her husband's death and son's injuries.¹⁰³ The trial court granted summary judgment to the road superintendent, finding that he was entitled to official immunity.¹⁰⁴ The Georgia Court of Appeals agreed.¹⁰⁵

Despite the plaintiff testifying that she had complained to the road superintendent about the poor condition of the road, as well as presenting evidence of other complaints about the road,

there was no evidence of any policy, written or unwritten, directive or law establishing the manner in which [the road superintendent] was required to inspect, repair or maintain the roadway. Instead, the evidence demonstrated that, although [the] road superintendent . . . was responsible for maintaining the county roadways, there were no required scheduled inspections and no written policy, instruction or

96. *Id.*

97. *Id.*

98. Ga. CONST. art. I, § 2, para. 9(d).

99. This provision provides: "The General Assembly may waive the immunity of counties, municipalities, and school districts by law." Ga. CONST. art. I § 2, para. 9.

100. *Wyno*, 305 Ga. at 533–34, 824 S.E.2d at 305–06 (Nahmias, P.J., concurring).

101. *Id.* at 534, 824 S.E.2d at 306 (Nahmias, P.J., concurring).

102. 348 Ga. App. 794, 824 S.E.2d 690 (2019).

103. *Id.* at 794, 824 S.E.2d at 692–93.

104. *Id.* at 796–97, 824 S.E.2d at 694.

105. *Id.* at 797, 824 S.E.2d at 694.

directions about how the roadways should be maintained or how to respond to issues with the roadways.¹⁰⁶

The court of appeals therefore determined that the road superintendent “exercised personal deliberation and judgment to maintain the roadways and such actions were discretionary.”¹⁰⁷ And, because the plaintiff’s contention that the road superintendent acted “with reckless disregard for the safety of others” did not rise to the level of “actual malice necessary to overcome official immunity for discretionary acts,” the grant of summary judgment in favor of the road superintendent was affirmed.¹⁰⁸ This decision highlights the fact that when local governments craft policies and procedures, a “less is more” approach may provide a better opportunity to avoid the creation of ministerial duties that potentially could strip their employees’ of official immunity.

In *Llewelyn v. Bryant*,¹⁰⁹ a six-year-old student was struck and killed by a school bus after he exited the bus at the school he attended. The plaintiffs, the student’s parents, filed a negligence action against the school’s assistant principal, alleging the negligent performance of her duties in overseeing the unloading of buses contributed to the student’s death.¹¹⁰ The trial court denied the assistant principal’s motion for summary judgment, but the Georgia Court of Appeals reversed.¹¹¹

The plaintiffs argued that the school transportation handbook, which provided that school staff should be on duty to supervise the unloading of buses, created a ministerial duty that the assistant principal negligently performed.¹¹² The trial court agreed, finding that the this case was analogous to *McDowell v. Smith*.¹¹³ The court of appeals disagreed by determining that “the handbook’s requirement that ‘school staff . . . be on duty to supervise’ children as they exit buses is not simple, absolute and definite, and does not require the execution of

106. *Id.* at 798, 824 S.E.2d at 694–95.

107. *Id.* at 798, 824 S.E.2d at 695.

108. *Id.* at 799, 824 S.E.2d at 695.

109. 349 Ga. App. 274, 825 S.E.2d 614 (2019).

110. *Id.* at 274, 825 S.E.2d at 615.

111. *Id.*

112. *Id.* at 275, 825 S.E.2d at 615–16.

113. *Id.* at 276, 825 S.E.2d at 616; see *McDowell v. Smith*, 285 Ga. 592, 592–94, 678 S.E.2d 922, 923–24 (2009) (holding receptionist’s mandated actions of consulting with administrator or checking the student’s information card to verify that the person picking up child was authorized to do so were ministerial because actions were “simple, absolute and definite, and required the execution of specific tasks without any exercise of discretion.”).

specific tasks.”¹¹⁴ Similarly, the duty to “receive” the children was not simple or definite.¹¹⁵ The court of appeals held that the cited directives were instead “vague and indefinite, and necessarily require the exercise of discretion, especially in light of the long-standing rule that the ‘duty to supervise, control and monitor students is a discretionary function.’”¹¹⁶ Absent any evidence of actual malice, the court of appeals held the assistant principal was entitled to official immunity.¹¹⁷

Interestingly, the court of appeals did not cite *Barnett*, where the supreme court recently analyzed supervision of students in the context of directives found in a faculty handbook.¹¹⁸ Nonetheless, the court of appeals’ decision is consistent with the *Barnett* holding—although a policy may cause certain aspects of student supervision to be ministerial, the “determination . . . is made on a case-by-case basis, and the dispositive issue is the character of the specific actions complained of, not the general nature of the job.”¹¹⁹ And because the duty to “supervise” and “receive” students exiting buses in *Llewelyn* did not provide “simple, absolute, and definite” requirements, the plaintiff failed to demonstrate a negligently performed ministerial duty.¹²⁰

Finally, the holding in *King v. King*¹²¹ provides a seemingly obvious yet helpful reminder that a public official may only assert official immunity for actions taken in the performance of his or her official duties.¹²² There, the ex-wife of a sheriff’s officer filed suit, alleging that the sheriff’s officer retaliated against her for making a social media post about him, which led to her false arrest.¹²³ Although the sheriff’s officer prepared an “application of issuance of criminal warrant,” the record showed that such process was available to private citizens, and there was no evidence that the sheriff’s officer was acting as a law enforcement officer when he initiated the process.¹²⁴ Accordingly, the district court found that the sheriff’s officer “was not acting in the performance of his official duties when he initiated a criminal complaint against [his ex-wife] and is thus not entitled to official immunity.”¹²⁵

114. *Llewelyn*, 349 Ga. App. at 277, 825 S.E.2d at 616.

115. *Id.*

116. *Id.* (quoting *McDowell*, 285 Ga. at 594, 678 S.E.2d at 924).

117. *See id.* at 276–77, 825 S.E.2d at 616–17.

118. 302 Ga. at 849, 809 S.E.2d at 817.

119. *Id.* at 848, 809 S.E.2d at 816.

120. *Id.*

121. 342 F. Supp. 3d 1364 (M.D. Ga. 2018).

122. *Id.* at 1381.

123. *Id.* at 1368.

124. *Id.* at 1373.

125. *Id.* at 1381.

This case also highlights a fundamental difference between how a public official may be held liable under state versus federal law. While the sheriff's officer could not maintain official immunity against the state law claims, he avoided liability under 42 U.S.C. § 1983¹²⁶ for the federal law claims because the district court found that he was not "acting under the color of state law" when he filed the criminal complaint—a prerequisite to liability under § 1983.¹²⁷

IV. TAXATION

This year saw three cases dealing with details of appraisal methodology, three other cases notable for their unusual procedural postures, and one case concerning the distinction between taxes and fees. We begin with the methodology.

In *White Horse Partners LLLP v. Monroe County Board of Tax Assessors*,¹²⁸ the plaintiff taxpayer challenged the assessor's expert's methodology in appraising its 250-acre timber tract. The expert was a member of a third-party appraisal firm which performed a revaluation of rural properties for the county, and which in this case had resulted in a more than doubling in the valuation of the subject tract. In accordance with standard industry practice, the expert testified that he first used extracted timber values and then used comparable sales to arrive at a value of the land itself. To determine timber values, he testified that he made personal visits to timber properties, had cruises performed on some (but apparently not all) such properties, talked with two local foresters involved in timber transactions within the county, and reviewed timber values submitted by property owners.¹²⁹ The court of appeals upheld the admission of the expert's testimony against the owner's assertion that his estimates were speculative, determining that at most it was partially speculative, which goes merely to weight rather than admissibility.¹³⁰

In *DeKalb County Board of Tax Assessors v. Astor Atl, LLC*,¹³¹ the court of appeals affirmed summary judgment in favor of the taxpayer, who asserted that the Board of Tax Assessors illegally failed to limit the appraised value of his property to its purchase price.¹³² The limitation is

126. 42 U.S.C. § 1983 (2019).

127. See *King*, 342 F. Supp. 3d at 1374.

128. 348 Ga. App. 603, 824 S.E.2d 57 (2019).

129. *Id.* at 604–06, 824 S.E.2d at 58–60.

130. *Id.* at 607, 824 S.E.2d at 60.

131. 349 Ga. App. 867, 826 S.E.2d 685 (2019).

132. *Id.*

found in O.C.G.A. § 48-5-2(3),¹³³ which states, “[n]otwithstanding any other provision of this chapter to the contrary, the transaction amount of the most recent arm’s length, bona fide sale in any year shall be the maximum allowable fair market value for the next taxable year.”¹³⁴ The taxpayer had purchased the tracts in question at foreclosure sales, which the Board argued were not “arm’s length, bona fide sales.”¹³⁵ The Board also pointed to O.C.G.A. § 48-5-1,¹³⁶ which states the general rule of returning properties “at the value which would be realized from the cash sale, but not the forced sale, of the property.”¹³⁷ The court, however, noted that definition of “arm’s length, bona fide sale” as contained in OCGA § 48-5-2(1)¹³⁸ specifically includes “a distress sale, short sale, bank sale, or sale at public auction.”¹³⁹ The court also noted the “notwithstanding” language in O.C.G.A. § 48-5-2(3)¹⁴⁰ and the caveat “except as otherwise provided in this chapter” in O.C.G.A. § 48-5-1, and found that the limitation to purchase price did apply to a “bank foreclosure sale pursuant to a deed under power.”¹⁴¹ In so holding, however, the court did note that a tax sale could be distinguished, thus affirming the holding but refuting the dicta in *Ballard v. Newton County Board of Tax Assessors*.¹⁴²

Valuation of condominiums at the Tony Sea Island resort was at issue in *Glynn County Board of Assessors v. SIA Propco I, LLC*.¹⁴³ The superior court had ruled in favor of the taxpayer on its summary judgment argument that the purchase prices included Sea Island Club membership rights and that the value of such rights should be excluded from tax valuation; the court of appeals, however, reversed.¹⁴⁴ The court of appeals had in fact already addressed the issue of membership rights with regard to similar Sea Island properties in *Morton v. Glynn County*

133. O.C.G.A. § 48-5-2(3) (2019).

134. *DeKalb Cty. Bd. of Tax Assessors*, 349 Ga. App. at 868, 826 S.E.2d at 687 (citing O.C.G.A. § 48-5-2(3)).

135. *Id.* at 867–68, 826 S.E.2d at 686–87.

136. O.C.G.A. § 48-5-1 (2019).

137. *Id.*

138. O.C.G.A. § 48-5-2(1) (2019).

139. *DeKalb Cty. Bd. of Tax Assessors*, 349 Ga. App. at 868, 826 S.E.2d 687 (citing O.C.G.A. § 48-5-2(1)).

140. O.C.G.A. § 48-5-2(3).

141. *DeKalb Cty. Bd. of Tax Assessors*, 349 Ga. App. at 868–69, 826 S.E.2d at 687.

142. *Id.* at 870, 826 S.E.2d at 688; *Ballard v. Newton County*, 332 Ga. App. 521, 773 S.E.2d 780 (2015).

143. 830 S.E.2d 403 (Ga. Ct. App. 2019).

144. *Id.*

Board of Tax Assessors,¹⁴⁵ holding there that the value of such rights should not be excluded from value.¹⁴⁶ The taxpayer here, and the superior court, attempted to distinguish that case based on an inconsistency between testimony of a witness and the ownership documents concerning certain aspects of the membership rights; the court of appeals, however, held that any such inconsistency should have been construed against the taxpayer for purposes of summary judgment.¹⁴⁷

Turning to the procedural quagmires, this year saw a return to the court of appeals in the running disputes between MMT Holdings, LLC and the City of Dublin School District. In a case discussed here last year, *City of Dublin School District v. MMT Holdings, LLC*,¹⁴⁸ the court held that the School District was immune from the taxpayer's refund claim based on its allegation that certain school taxes had not been properly approved by the voters.¹⁴⁹ Thereafter, the School District sought an order from the trial court directing the City of Dublin to disburse the tax collections to it. The trial court denied that request because the refund action remained pending against the City and the merits of MMT's allegation had not been resolved, and the School District appealed.¹⁵⁰ This time around, in *City of Dublin School District v. MMT Holdings, LLC*,¹⁵¹ the court ruled against the School District, finding the trial court's order was not a final order, the School District lacked standing, and the School District failed to obtain a certificate of immediate review.¹⁵²

This year, in *Henry County School District v. Home Depot U.S.A., Inc.*,¹⁵³ the school district was unhappy with its county's decision not to continue a fight over a taxpayer's claimed freeport exemption, but it found no relief. The taxpayer, Home Depot, claimed a freeport exemption on certain inventory, which the Board of Tax Assessors denied. The Board of Equalization upheld the denial, but the superior court reversed and ruled in favor of Home Depot.¹⁵⁴ The Board of Tax Assessors chose not to appeal that ruling, which apparently did not sit

145. 294 Ga. App. 901, 670 S.E.2d 528 (2008).

146. *Id.* at 905, 670 S.E.2d at 531.

147. *SIA Propco I, LLC*, 830 S.E.2d at 404–06.

148. 346 Ga. App. 546, 816 S.E.2d 494 (2018).

149. *Id.*

150. *Id.*

151. 830 S.E.2d 487 (Ga. Ct. App. 2019).

152. *Id.* at 491.

153. 348 Ga. App. 723, 824 S.E.2d 622 (2019).

154. *Id.* at 723–24, 825 S.E.2d at 622–23.

well with the school district, so two months later the school district filed a motion to intervene.¹⁵⁵ The trial court denied that motion and the court of appeals affirmed.¹⁵⁶ In affirming, the court noted not only that the motion to intervene was untimely but also that “only taxpayers or the tax assessor may appeal decisions of the board of equalization to the superior court,” and further that the circumstances here did not reach the level of the “strong showing” required for post-judgment intervention.¹⁵⁷

In *Love v. Fulton County Board of Tax Assessors*,¹⁵⁸ a group of citizens sued over the issue of whether the interest of Atlanta Falcons Stadium Co., LLC (Stadium Company) in the Mercedes-Benz Stadium (the New Stadium) was a leasehold subject to ad valorem property taxation. For their procedural mechanism into court, the citizens sought mandamus against the Board of Tax Assessors as well as injunctive relief, all on the premise that the Board had failed to perform its duties¹⁵⁹ under O.C.G.A. § 48-5-299(a),¹⁶⁰ which provides in relevant part:

It shall be the duty of the county board of tax assessors to investigate diligently and to inquire into the property owned in the county for the purpose of ascertaining what real and personal property is subject to taxation in the county and to require the proper return of the property for taxation.¹⁶¹

The trial court granted the Board’s motion to dismiss, and the court of appeals affirmed the trial court’s finding that the citizens had failed to show a “clear legal right to relief.”¹⁶² In so holding, the court of appeals noted the evidence that the Board conducted at least some inquiry on the issue and stated, “[g]iven that the Tax Board is afforded discretion in how to conduct an investigation, mandamus relief would be appropriate only if the Board failed entirely to conduct an investigation and reach a decision regarding the tax status of the Stadium Company’s interest in the New Stadium.”¹⁶³ However, the

155. *Id.* at 724, 824 S.E.2d at 623.

156. *Id.* at 723, 824 S.E.2d at 622.

157. *Id.* at 724–26, 824 S.E.2d 623–24.

158. 348 Ga. App. 309, 821 S.E.2d 575 (2018).

159. *Id.* at 309, 821 S.E.2d at 578.

160. O.C.G.A. § 48-5-299(a) (2019).

161. *Love*, 348 Ga. App. at 317–18, 821 S.E.2d at 583–84 (citing O.C.G.A. § 48-5-299(a)).

162. *Id.* at 316–18, 821 S.E.2d at 582–84.

163. *Id.* at 318, 821 S.E.2d at 584.

court of appeals reinstated and remanded the citizens' claims for injunctive relief by holding that official immunity does not bar such claims.¹⁶⁴ The citizens' claims concerning the constitutionality of O.C.G.A. § 10-9-10,¹⁶⁵ which creates a tax exemption for the World Congress Center, were also reinstated.¹⁶⁶

Finally, the Georgia Supreme Court issued a significant ruling concerning 9-1-1 Service Act¹⁶⁷ charges in *Bellsouth Telecommunications, LLC v. Cobb County*.¹⁶⁸ That act imposes a surcharge on telephone service, which supports Georgia's 9-1-1 emergency system and provides that telephone service providers shall collect the charge and remit it to local governments.¹⁶⁹ Cobb County sued Bellsouth, alleging it had failed to collect the charge in its full amount from all its customers, and Bellsouth contended (among other defenses) that the charge was a tax rather than a fee and the county had no cause of action in tort to collect a tax.¹⁷⁰ The Georgia Supreme Court agreed with Bellsouth by holding that the charge was indeed a tax on individual telephone customers and that, without express statutory authority, a county cannot collect a tax through the judicial system.¹⁷¹ And, although the Act does provide for collection from individual customers (O.C.G.A. § 9-11-34(b)),¹⁷² it does not authorize suit against telephone companies, which act only as "intermediaries" for collection.¹⁷³

V. OPEN RECORDS/OPEN MEETINGS

A. Open Records

Two cases discussed in last year's edition of the Local Government Review, wherein the court of appeals was 0–2, have continued their course through the court system. We will update our review of those cases and then briefly turn attention to a new district court case involving a request to stay civil litigation based upon an exception in the Open Records Act involving criminal records, and a case wherein

164. *Id.* at 320–21, 821 S.E.2d at 585.

165. O.C.G.A. § 10-9-10 (2019).

166. *Love*, 348 Ga. App. at 321, 821 S.E.2d at 585–86.

167. O.C.G.A. § 46-5-134 (2019).

168. 305 Ga. 144, 824 S.E.2d 233 (2019).

169. O.C.G.A. § 46-5-134.

170. *Bellsouth*, 305 Ga. at 144, 824 S.E.2d at 234.

171. *Id.* at 151–55, 824 S.E.2d at 239–42.

172. O.C.G.A. § 9-11-34(b) (2019).

173. *Bellsouth*, 305 Ga. at 152–54, 824 S.E.2d at 240–41.

the court of appeals considered the application of the provision to collect attorney's fees under an action brought pursuant to the Open Records Act.

As you may recall, we previously reviewed *Campaign for Accountability v. Consumer Credit Research Foundation*,¹⁷⁴ wherein Consumer Credit Research Foundation (CCR) entered into an agreement with the Kennesaw State University Research and Service Foundation (KSU), and in accordance a KSU professor conducted statistical research and published a paper relating to “payday” loans. The Campaign for Accountability (CFA) sent a request to KSU under the Georgia Open Records Act for copies of certain correspondence relating to the research. KSU did not oppose the release and notified CCR that it planned to release the redacted correspondence. CCR objected and filed an action for declaratory and injunctive relief to prevent the release.¹⁷⁵ The supreme court reversed the court of appeals by adopting a narrower reading of *Bowers v. Shelton*,¹⁷⁶ concluding that the holding in that case referred only to records within certain specific exemptions from the Act's general disclosure requirement, and O.C.G.A. § 50-18-72(a)¹⁷⁷ of the Act did not bar a state agency from publicly releasing records, unless the specific exemption listed in the statute that covers the records at issue expressly prohibits disclosure.¹⁷⁸ The court held that, because the specific exemptions for materials related to academic research do not expressly prohibit disclosure, the records at issue were not subject to prohibition against disclosure.¹⁷⁹ The court noted that it did not disapprove the holding in *Bowers* that parties with an interest in nondisclosure may pursue a lawsuit to seek compliance with the Act.¹⁸⁰ Further, the court stated that nothing prevented agencies from promising by contract not to disclose information that the Act does not require them to disclose.¹⁸¹ Accordingly, the court of

174. *Consumer Credit Research Found. v. Bd. of Regents of the Univ. Sys. of Ga.*, 341 Ga. App. 323, 800 S.E. 2d 24 (2017), *rev'd sub nom.*, *Campaign for Accountability v. Consumer Credit Research Found.*, 303 Ga. 828, 815 S.E.2d 841 (2018); *see also* Henry et al., *supra* note 1, at 194–95.

175. *Consumer Credit Research Foundation*, 341 Ga. App. at 323–24, 800 S.E.2d at 25.

176. 265 Ga. 247, 453 S.E.2d 741 (1995).

177. O.C.G.A. § 50-18-72(a) (2019).

178. *Campaign for Accountability*, 303 Ga. at 830–36, 815 S.E.2d at 844–48.

179. *Id.* at 830–31, 815 S.E.2d at 844–45.

180. *Id.* at 836, 815 S.E.2d at 848.

181. *Id.* at 837, 815 S.E.2d at 849.

appeals vacated its prior judgment and adopted the decision of the supreme court.¹⁸²

We also previously looked at *Smith v. Northside Hospital, Inc.*,¹⁸³ wherein the Supreme Court of Georgia analyzed whether documents created by an organization on behalf of a government agency were subject to the Open Records Act.¹⁸⁴ The Fulton County Hospital Authority (Authority) was created in 1966, and it opened Northside Hospital, which it owned and operated for approximately twenty-five years. Looking to improve the hospital's operations, the Authority restructured in the 1990s through a long-term lease of the hospital and related assets for operation by a private, charitable, non-profit corporation. Attorney E. Kendrick Smith brought this action to compel Northside Hospital, Inc., and its parent company, Northside Health Services, Inc. (collectively, Northside), to produce specific documents related to the acquisitions of four privately owned physician groups. Northside responded to the request, asserting that it was a private, nonprofit hospital that was not subject to the Open Records Act and, even assuming it was subject to the Act, the requested documents were exempt from production under a variety of exemptions.¹⁸⁵ The supreme court granted certiorari to consider whether the documents in question were "public records" within the meaning of the Act.¹⁸⁶ The parties agreed that the Authority was an "agency" as defined by the Act and Northside was not; the only question was whether the documents sought were "prepared, maintained or received by" Northside "in the performance of a service or function for or on behalf of" the Authority.¹⁸⁷

The supreme court reversed the opinion of the court of appeals with Justice Nels Peterson writing: "The corporation's operation of the hospital and other leased facilities is a service it performs on behalf of the [county's] agency, and so records related to that operation are public records."¹⁸⁸ The case was remanded and the trial court was directed to apply the correct standard and determine how closely related the

182. *Consumer Credit Research Found. v. Bd. of Regents of the Univ. Sys. of Ga.*, 347 Ga. App. 188, 189, 818 S.E.2d 260, 260 (2018).

183. *Smith v. Northside Hosp., Inc.*, 336 Ga. App. 843, 783 S.E.2d 480 (2016), *rev'd*, 302 Ga. 517, 807 S.E.2d 909 (2017), *modified on remand*, 347 Ga. App. 700, 820 S.E.2d 758 (2018); *see also* Henry et al., *supra* note 1, at 195–96.

184. *Smith II*, 302 Ga. at 517–18, 807 S.E.2d at 912.

185. *Id.* at 518–20, 807 S.E.2d at 912–13.

186. *Id.* at 518, 807 S.E.2d at 912.

187. *Id.* at 521, 807 S.E.2d at 914.

188. *Id.* at 517, 807 S.E.2d at 912.

acquisitions were to the operation of the hospital's facilities.¹⁸⁹ Justice Melton concurred to emphasize that he felt it "defies credulity that Northside could be completely separate from and do nothing 'on behalf of' the Authority when it was the Authority itself that 'created' Northside for the purpose of carrying out virtually all of its public duties."¹⁹⁰

In an October 2018 holding, the court of appeals affirmed in part, reversed in part, and remanded.¹⁹¹ Before remand, the court of appeals had one additional issue to address, that being Northside's cross-appeal wherein Northside argued that the trial court abused its discretion by entering a protective order which prohibited it from seeking information during discovery regarding the identity and motives of individuals or entities on whose behalf Smith allegedly initiated the action, which, as the result of the supreme court's reversal, was no longer a moot issue.¹⁹² Northside conceded the identity and purpose of Smith's client had no bearing on whether he had standing, but argued simply that it was entitled in discovery to know the identity to determine "whether the client is a competitor of Northside seeking to pursue the case to gain economic value and for competitive purposes."¹⁹³ Given the broad discretion that a trial court has over discovery matters, Georgia's strong public policy in favor of open government, the minimal probative value of the identity and motives of Smith's client, and relying upon the reasoning in *Atchison v. Hospital Authority of St. Mary's*,¹⁹⁴ the court of appeals found Northside's argument unconvincing and affirmed the trial court's grant of Smith's motion for protective order.¹⁹⁵ The case was then remanded for further proceedings consistent with the supreme court's decision.¹⁹⁶

We now turn our attention to a new case, *Hammonds v. Gray Transportation, Inc.*,¹⁹⁷ which arose out of a catastrophic automobile accident resulting in the severe injury and ultimate death of Betty Jean Nipper. Defendants Gray Transportation and Elias filed a Motion asking the court to stay the proceedings until the state resolved its criminal charges against Defendant Elias, arguing that O.C.G.A.

189. *Id.* at 531, 807 S.E.2d at 921.

190. *Id.* at 532, 807 S.E.2d 921 (Melton, P.J., concurring).

191. *Smith III*, 347 Ga. App. at 700, 820 S.E.2d at 760.

192. *Id.* at 700–01, 820 S.E.2d at 760.

193. *Id.* at 705, 820 S.E.2d at 764.

194. 245 Ga. 494, 265 S.E.2d 801 (1980).

195. *Smith III*, 347 Ga. App at 705–10, 820 S.E.2d at 764–66.

196. *Id.* at 710, 820 S.E.2d at 766.

197. 371 F. Supp. 3d 1340 (M.D. Ga. 2019).

§ 50-18-72(a)(4)¹⁹⁸ prevents the disclosure of Georgia's investigative reports of the subject accident while the charges against Defendant Elias are pending and that Elias would not be able to respond to the plaintiffs' written discovery or otherwise testify in his own defense without waiving his Fifth Amendment rights in the underlying criminal charges.¹⁹⁹ The United States District Court for the Middle District of Georgia found that a stay was not appropriate.²⁰⁰ After reviewing various instructive cases from non-binding sources, the district court found²⁰¹ the decision in *Golden Quality Ice Cream Company v. Deerfield Specialty Papers*²⁰² particularly helpful, wherein the court considered the following factors in deciding whether to stay a civil case during the pendency of a parallel criminal case:

(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.²⁰³

Recognizing the court's discretion in matters such as these, and applying the above factors to this case, the court gave great weight to the plaintiff's desire to resolve this dispute expeditiously and stated it would not "allow this case to linger to avoid such speculative harms" and denied the motion to stay.²⁰⁴

In *Geer v. Phoebe Putney Health System, Inc.*,²⁰⁵ the court of appeals considered the application of the provision to collect attorney's fees under an action brought pursuant to the Open Records Act.²⁰⁶ The violation of Georgia's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute²⁰⁷ was the underlying claim.²⁰⁸ Geer requested

198. O.C.G.A. § 50-18-72(a)(4) (2019).

199. *Hammonds*, 371 F. Supp. 3d at 1344–45.

200. *Id.* at 1345–46.

201. *Id.*

202. 87 F.R.D. 53, 55–56 (E.D. Pa. 1980).

203. *Id.* at 56.

204. *Hammonds*, 371 F. Supp. 3d at 1346–47.

205. 350 Ga. App. 127, 828 S.E.2d 108 (2019).

206. *Id.* at 127, 828 S.E.2d at 109.

207. O.C.G.A. § 9-11-11.1 (2019).

208. *Geer*, 350 Ga. App. at 127, 828 S.E.2d at 109.

copies of Putney's board meeting minutes and filed suit to get the court to compel disclosure under the Open Records Act.²⁰⁹

In responding to the complaint, Putney made a counterclaim for "attorney[s] fees under O.C.G.A. § 50-18-73(b),²¹⁰ which allows for an award of attorney[s] fees in any action brought under the Georgia Open Records Act 'in which the court determines that either party acted without substantial justification either in not complying with this chapter or in instituting the litigation.'"²¹¹ Geer responded by making a motion to strike the counterclaim alleging it violated the anti-SLAPP statute because it "was an effort to chill his right to petition the government and his right of free speech."²¹² The trial court denied that motion and Geer appealed.²¹³

The court of appeals "has not yet addressed whether the anti-SLAPP statute applies to claims for attorney[s] fees under OCGA § 50-18-73(b). Nevertheless, we conclude that this case is completely controlled by our decision in *Paulding County v. Morrison*."²¹⁴ In *Paulding County*, the court held that the statute did not preclude the right to seek attorney's fees.²¹⁵ Therefore, the court of appeals held that the anti-SLAPP statute did not apply to the counterclaim and affirmed the lower court's decision to deny Geer's motion to strike.²¹⁶

B. Open Meetings

In the last edition of the Local Government Review, we addressed a court of appeals decision, *Martin v. City of College Park*.²¹⁷ In *Martin*, a city employee, Chawanda Martin, was terminated and sued alleging that the termination violated the Open Meetings Act because the City Council made the interim appointment without a public vote; thus, the officials lacked authority to terminate her city employment.²¹⁸

209. *Id.*

210. O.C.G.A. § 50-18-73(b) (2019).

211. *Geer*, 350 Ga. App. at 127, 828 S.E.2d at 109.

212. *Id.*

213. *Id.*

214. *Id.* at 128, 828 S.E.2d at 109 (citing *Paulding Cty. Bd. of Comm'rs v. Morrison*, 316 Ga. App. 806, 810–11, 728 S.E.2d 921, 924–25 (2012)).

215. 316 Ga. App. at 811, 728 S.E.2d at 925.

216. *Geer*, 350 Ga. App. at 128, 828 S.E.2d at 110.

217. *Martin v. City of Coll. Park*, 342 Ga. App. 289, 289, 802 S.E.2d 292, 293 (2017), *cert. granted*, 2018 Ga. LEXIS 31 (Ga. Jan. 16, 2018), *rev'd in part sub nom.*, *City of Coll. Park v. Martin*, 304 Ga. 488, 818 S.E.2d 620 (2018), and *vacated sub nom.*, *Martin v. City of Coll. Park*, 349 Ga. App. 852, 826 S.E.2d 685 (2019); *see also* Henry et al., *supra* note 1, at 198–99.

218. *Martin*, 342 Ga. App. at 290–91, 802 S.E.2d at 293–94.

Martin argued that the appointments for interim positions needed to be conducted in an open vote under the Open Meetings Act. Since that appeal, the City of College Park and the other defendants appealed to the Supreme Court of Georgia,²¹⁹ which conducted a *de novo* review.²²⁰ However, the court disagreed based on the plain language meaning of the statute.²²¹ The court, applying *Deal v. Coleman*,²²² reasoned that the statute must be viewed “in its most natural and reasonable way, as an ordinary speaker of the English language would.”²²³

Focusing on exemptions to the Open Meetings Act, O.C.G.A. § 50-14-3(b)(2),²²⁴ allows for executive session for appointments and employment. Specifically, the court noted that “[t]he vote on any matter covered by this paragraph shall be taken in public and minutes of the meeting as provided in this chapter shall be made available.”²²⁵

The phrase ‘the vote . . . shall be taken in public’ employs the use of a definite article (‘the’) and is therefore referential, presupposing a required action. Simply put, the language does not mandate a vote on a relevant employment decision, it simply references such vote and requires that any such vote be taken in public.²²⁶

In reversing the decision, the supreme court held that the lower court misapplied the Open Meetings Act; specifically, the court of appeals “determined, without discussion, that the public vote language in subsection (b) (2) requires the city council to have voted on [the] interim appointment as city manager (and presumably any future interim appointments).”²²⁷

The supreme court held that the Open Meetings Act did not require a vote by city council on interim appointment of a city manager.²²⁸ However, the City’s charter needed to be reviewed to determine a vote was necessary.²²⁹ “We conclude that the Court of Appeals should have first determined whether the charter for the City of College Park

219. *City of Coll. Park*, 304 Ga. at 489, 818 S.E.2d at 621.

220. *Id.*

221. *Id.* at 489–90, 818 S.E.2d at 621–22.

222. 294 Ga. 170, 751 S.E.2d 337 (2013).

223. *City of Coll. Park*, 304 Ga. at 489, 818 S.E.2d at 621 (quoting *Deal*, 294 Ga. at 172–73, 751 S.E.2d at 341).

224. O.C.G.A. § 50-14-3(b)(2) (2019).

225. *City of Coll. Park*, 304 Ga. at 490, 818 S.E.2d at 622 (emphasis omitted) (quoting O.C.G.A. § 50-14-3(b)(2)).

226. *Id.* (emphasis omitted).

227. *Id.* (emphasis omitted).

228. *Id.*

229. *Id.* at 490–91, 818 S.E.2d at 622.

actually requires a vote to effectuate such an interim appointment before considering the applicability of the public-vote requirement of the Open Meetings Act.”²³⁰

The supreme court reversed the court of appeals, in part, to determine the charter requirements for voting on interim appointments.²³¹ Neither the lower court nor the parties discussed the “key issue” of whether a vote is required when appointing an interim city manager per the city charter.²³² Since it was a factual determination, the supreme court remanded for the lower court to review and determine the requirements of the City’s charter.²³³

In *Rosser v. Clyatt*,²³⁴ the court of appeals applied the statutory interpretation of the supreme court in *Martin* in the reasoning in the interpretation of the SLAPP statute.²³⁵ “[C]onsistent with the design of the Open Meetings Act, the plain language of (b)(2) requires that when a vote on a relevant employment matter is taken, it must be taken in public.”²³⁶

The Georgia appellate courts made brief mention of the Acts within the context of other cases. The Georgia Supreme Court held that the Georgia Ports Authority is an agency subject to the Open Records and Meetings Acts.²³⁷

VI. ZONING AND LAND USE²³⁸

In *Hoechstetter v. Pickens County*,²³⁹ the Supreme Court of Georgia addressed the sufficiency of information required to be presented to a County Board of Commissioners under Georgia’s Zoning Procedures

230. *Id.* at 489, 818 S.E.2d at 621.

231. *Id.* at 491, 818 S.E.2d at 622.

232. *Id.* at 490–91, 818 S.E.2d at 622.

233. *Id.* at 491, 818 S.E.2d at 622.

234. 348 Ga. App. 40, 821 S.E.2d 140 (2018), *cert. denied*, 2019 Ga. LEXIS 210 (Ga. Apr. 1, 2019).

235. *Id.* at 53, 821 S.E.2d at 152.

236. *Id.*

237. *Ga. Ports Auth. v. Lawyer*, 304 Ga. 667, 679, 821 S.E.2d 22, 31 (2018) (“The Ports Authority appears to come within the scope of the Open Meetings Act, see OCGA § 50-14-1(a)(1)(A), the Open Records Act, see OCGA § 50-18-70(b)(1), and the Georgia Records Act, see OCGA § 50-18-91(1). In addition, Georgia law considers the Ports Authority an ‘arm of the State’ against which punitive damages cannot be awarded.”).

238. This section provides a brief overview of selected decisions. For further analysis of developments in zoning case law this year, please see the article by Newton Galloway and Steven Jones, appearing in this issue.

239. 303 Ga. 786, 815 S.E.2d 50 (2018).

Law (ZPL), O.C.G.A. §§ 36-66-1 through 36-66-6,²⁴⁰ in order to meet the notice and hearing requirement²⁴¹ that a public hearing constitute a “meaningful opportunity to be heard.”²⁴² In the procedure at issue, the Pickens County Planning Commission held a hearing where neighbors voiced opposition to a conditional use permit application, and then sent a one-page memorandum recommending approval—with no details of the hearing included—to the Board of Commissioners, which then approved the application some two months later.²⁴³ The neighbors argued they were denied a meaningful opportunity to be heard on the application because the Board of Commissioners’ decision, some two months after the Planning Commission hearing, was too attenuated and did not have any actual information about their objections to consider, since no such information was in the memorandum.²⁴⁴ After the superior court and court of appeals held for defendants by holding that the one hearing before the Planning Commission was sufficient, the Georgia Supreme Court reversed, holding that, since the Board of Commissioners had no information about the nature of the plaintiffs’ objections, the plaintiffs had been denied a “meaningful” opportunity to be heard, the guarantee at the heart of the ZPL’s notice and hearing requirements.²⁴⁵

In *BPP069, LLC v. Lindfield Holdings, LLC*,²⁴⁶ the court of appeals reiterated the principle that a seller’s alleged misrepresentation of the zoning of a property cannot be the basis of a fraud action.²⁴⁷ The buyers of the property brought an action for fraud, alleging that the seller misrepresented the property as being zoned for multi-family development under a nonconforming use, whereas in reality it had lost its nonconforming use status, and the City of Newnan had passed demolition resolutions concerning the property.²⁴⁸ The court of appeals

240. O.C.G.A. §§ 36-66-1–36-66-6 (2019).

241. *Hoechstetter*, 303 Ga. at 786–87, 815 S.E. 2d at 51–52.

242. *City of Roswell v. Outdoor Sys., Inc.*, 274 Ga. 130, 131, 549 S.E.2d 90, 91–92 (2001).

243. *Hoechstetter*, 303 Ga. at 786–87, 815 S.E.2d at 51.

244. *Id.* at 787–88, 815 S.E.2d at 51–52.

245. *Id.* at 787–88, 815 S.E.2d at 52. The court went on to note that

[i]f an adequate record of the hearing before the Planning Commission had been made and transmitted to the Board—such that the final zoning decision of the Board could be said to have been meaningfully informed by what happened at the hearing—the hearing before the Planning Commission perhaps might satisfy the requirements of the ZPL.

Id. at 788, 815 S.E.2d at 52.

246. 346 Ga. App. 577, 816 S.E.2d 755 (2018).

247. *Id.* at 585, 816 S.E.2d 761.

248. *Id.* at 581, 816 S.E.2d 758–59.

affirmed summary judgment for the defendant-sellers, holding that, since zoning is a legislative function of a County, a property's zoning status is a matter of law, and therefore, nondisclosure or misrepresentation of zoning status cannot serve as a basis for a fraud action, notwithstanding any misrepresentation or concealment by a seller.²⁴⁹

In *Carson v. Brown*,²⁵⁰ the court of appeals provided further guidance on what does and does not constitute a zoning “decision” which must be appealed by application for discretionary appeal.²⁵¹ The plaintiff purchased a property zoned for development into residential lots at 9,000-square-foot minimum size. The County subsequently issued a moratorium on development of lots smaller than 14,750 square feet, and the plaintiff, undaunted, submitted a land disturbance permit application to develop the smaller lots. The County's planner technician wrote to the plaintiff, releasing back his plan due to the moratorium, and the County Attorney subsequently wrote that the application would not be processed and the technician's letter constituted a rejection of the same. The plaintiff filed a petition for writ of mandamus against the technician and others, seeking an order directing that the application be processed.²⁵² The trial court denied the petition, and the plaintiff filed an application for discretionary appeal to the Georgia Supreme Court, which transferred the application to the court of appeals.²⁵³ The court of appeals granted the application, but did so after concluding that he had a right to a direct appeal under O.C.G.A. § 5-6-35(a)(7),²⁵⁴ which provides for direct appeals from denials of mandamus.²⁵⁵ On appeal, the defendants argued that the plaintiff was required to file an application for discretionary appeal under O.C.G.A. § 5-6-35(a)(1)²⁵⁶ on grounds that he was appealing the trial court's review of a local administrative agency's decision—namely, the release of the plaintiff's application back to him.²⁵⁷ The court held that this release did not constitute a zoning “decision” which would trigger the requirement of application for discretionary appeal, since the County never accepted

249. *Id.* at 585–86, 816 S.E.2d 761–62.

250. 348 Ga. App. 689, 824 S.E.2d 605 (2018).

251. *Id.* at 696, 824 S.E.2d at 612.

252. *Id.* at 693, 824 S.E.2d at 610.

253. *Id.* at 690, 824 S.E.2d at 608.

254. O.C.G.A. § 5-6-35(a)(7) (2019).

255. *Carson*, 348 Ga. App. at 690, 824 S.E.2d at 608.

256. O.C.G.A. § 5-6-35(a)(1) (2019).

257. *Carson*, 348 Ga. App. at 690–91, 824 S.E.2d at 608.

the application in the first place due to the moratorium, and therefore never reached the application's merits.²⁵⁸

Finally, in *Macon-Bibb County Planning and Zoning Commission v. Epic Midstream, LLC*,²⁵⁹ a decision which the court of appeals expressly designated as physical precedent only,²⁶⁰ the court reiterated the longstanding precept that the "substantial evidence" required by O.C.G.A. § 5-4-12(b)²⁶¹ to support a zoning decision means "any evidence."²⁶² There, the Macon-Bibb Planning and Zoning Commission (Commission) denied a fuel-handling company's application for a conditional use permit to build and operate a rail spur and ethanol facility after nearby residents voiced concerns about noise and fuel leaks, citing uncertainty of what ground pollution currently existed or would be augmented following a past incident involving contamination from a fuel pipeline.²⁶³ The Commission denied the company's motion for rehearing, and the company petitioned the superior court for certiorari; the superior court reversed the decision, with the Commission's appeal following.²⁶⁴ The court of appeals reversed back in the Commission's favor, determining that the specific issues raised concerning noise, contamination, and hazardous materials pertinent to the tract in question constituted evidence supporting the Commission's decision, and therefore there was "substantial evidence" to support that decision.²⁶⁵

VII. WHISTLEBLOWERS

Despite a previous uptick in reported activity for claims under the Georgia Whistleblower Act (GWA),²⁶⁶ that trend did not carry itself over into this survey period. Other than a handful of unreported, unremarkable federal court decisions,²⁶⁷ there is only one reported

258. *Id.* at 697, 824 S.E.2d at 612–13.

259. 349 Ga. App. 568, 826 S.E.2d 403 (2019).

260. *Id.* at 576, 826 S.E.2d at 409.

261. O.C.G.A. § 5-4-12(b) (2019).

262. *Epic Midstream, LLC*, 349 Ga. App. at 572, 826 S.E.2d at 407.

263. *Id.* at 568–71, 826 S.E.2d at 404–06.

264. *Id.* at 571–72, 826 S.E.2d at 406–07.

265. *Id.* at 575–76, 826 S.E.2d at 409.

266. Henry et al., *supra* note 1, at 206; O.C.G.A. § 45-1-4 (2019).

267. *See, e.g.*, *Chambers v. Cherokee Cty.*, 743 F. App'x 960 (11th Cir. 2018) (affirming trial court's refusal to exercise supplemental jurisdiction over whistleblower claim since federal law claims were all dismissed); *Powell v. Muscogee Cty. Sch. Dist.*, No. 4:17-cv-185 (CDL), 2019 U.S. Dist. LEXIS 4150, at *7–8 (M.D. Ga. Jan. 9, 2019) (denying Muscogee County School District's motion for summary judgment on whistleblower's claim because genuine issue of material fact existed on whether school district had legitimate

decision worth mentioning. Make no mistake though, the en banc decision of the Georgia Court of Appeals in *Franklin v. Pitts*²⁶⁸ (hereinafter *Franklin II*) warrants considerable attention by those practicing local government law. For in overturning precedent and in articulating a new standard to analyze future claims of retaliation under the GWA, the subtle splits in reasoning that arose among the court, including from some of the court's newest members, may also reveal subtle insights into the various jurisprudential philosophies on the court.

The facts and circumstances underlying the claims of whistleblower retaliation in *Franklin v. Pitts* were familiar to the Georgia Court of Appeals. As Judge Trent Brown's majority opinion quickly pointed out, an earlier iteration of the case had previously been before the court in which the court had reversed the trial court's grant of summary judgement to Fulton County based upon its statute of limitations defense.²⁶⁹ Nonetheless, the central issue before the court in *Franklin II* was whether Dedrain Franklin had actually alleged, as a matter of law, that she was retaliated against under the GWA.²⁷⁰ And to decide that question, the en banc court reckoned that it had to overturn its decision in *Freeman v. Smith*.²⁷¹

Recall that prohibited retaliation under the GWA includes "the discharge, suspension, demotion . . . or any other adverse employment action taken by a public employer against a public employee in the terms and conditions of employment."²⁷² In *Franklin II*, Dedrain Franklin contended that the following actions taken by Fulton County constituted retaliation under the GWA: (a) delaying her request to attend a training session, (b) changing her job duties, (c) denying her

nonretaliatory reason for denying whistleblower's promotion); *Jordan v. City of Waycross*, No. 5:17-cv-33, 2018 U.S. Dist. LEXIS 145543, at *10 (S.D. Ga. Aug. 27, 2018) (denying defendants' motion for summary judgement on whistleblower's claim because plaintiff/whistleblower came within protection of the statute).

268. 349 Ga. 544, 826 S.E.2d 427 (2019).

269. *Franklin II*, 349 Ga. at 544–46, 826 S.E.2d at 430–31; see *Franklin v. Eaves* (*Franklin I*), 337 Ga. App. 292, 294–300, 787 S.E.2d 265, 268–72 (2016). The court also reviewed and affirmed the trial court's decision to open the County's default in *Franklin I*. 337 Ga. App. at 292–94, 787 S.E.2d at 267–68.

270. *Id.* at 547–57, 826 S.E.2d at 432–38.

271. *Id.* at 552, 826 S.E.2d at 435 (overruling *Freeman v. Smith*, 324 Ga. App. 426, 750 S.E.2d 739 (2013), "only to the extent that it applied the standard for adverse employment action in Title VII retaliation cases to a Georgia Whistleblower Act case"). Indeed, whether it was actually necessary to overrule *Freeman* triggered special concurrences from Presiding Judge Doyle and Judge Goss. *Id.* at 560–61, 826 S.E.2d at 440 (Doyle, P.J., concurring); *id.* at 561–63, 826 S.E.2d at 441–42 (Goss, J., concurring).

272. O.C.G.A. § 45-1-4(a)(5) (2019).

requests for leave, and (d) requesting that she document any leave she were to take.²⁷³ Although none of this constituted a discharge, suspension, or demotion, under the plain language of the GWA, Franklin nonetheless contended that she was retaliated against because the Act also defined retaliation to encompass “any other adverse employment action . . . in the terms and conditions of employment.”²⁷⁴ And in *Freeman*, the court appeared to interpret this phrase to mean any “materially adverse” action which would have the effect of “dissuad[ing] a reasonable employee” from engaging in the statutorily-protected disclosure—a standard that Franklin argued included the above-listed actions.²⁷⁵ But the *Franklin II* majority not only disagreed with premise of Franklin’s argument, it also disagreed with her interpretation of the type of conduct that was encompassed by the phrase “other adverse employment action.”²⁷⁶

Tracing the reasoning in *Freeman*, the majority in *Franklin II* observed that the decision appeared to have erroneously relied on the United States Supreme Court’s decision in *Burlington Northern & Santa Fe Railway Company v. White*,²⁷⁷ in which the Supreme Court had announced the “materially adverse” standard governing claims of retaliation under Title VII.²⁷⁸ This was a mistake, the majority in *Franklin II* determined, for one glaringly obvious reason: the statutory text of the GWA did not closely align with the statutory text of Title VII’s anti-retaliation provision.²⁷⁹ Instead, the statutory text of the GWA aligned more closely with Title VII’s substantive discrimination provision.²⁸⁰ Thus, to the extent *Freeman* “applied the standard for

273. *Franklin II*, 349 Ga. at 548, 826 S.E.2d at 432. The court assumed without deciding that Franklin’s allegations that she was denied promotions on two occasions satisfied the adverse employment action element under the GWA. *Id.* Ultimately, the court agreed with the lower court that Franklin could not rebut the County’s legitimate, nonretaliatory reasons for denying her these promotions. *Id.* at 557–59, 826 S.E.2d at 438–39. And with respect to Franklin’s allegations that she was denied a third opportunity to transfer to a new position, the court concluded that Franklin presented no evidence supporting this allegation, and thus, it did not consider it. *Id.* at 548 n.3, 826 S.E.2d at 432 n.3.

274. *See id.* at 545–46, 826 S.E.2d at 430–31.

275. *Id.* at 549, 826 S.E.2d at 433.

276. *Id.*

277. 548 U.S. 53 (2006).

278. *Franklin II*, 349 Ga. at 547–52, 826 S.E.2d at 432–35.

279. *Id.* at 552, 826 S.E.2d at 435.

280. *Id.* Of course, Presiding Judge Doyle also pointed out that the statutory text of the GWA likewise did not closely align with the statutory text of Title VII’s substantive provision either. *Id.* at 561, 826 S.E.2d at 440 (Doyle, P.J., concurring).

adverse employment action in Title VII retaliation cases to a Georgia Whistleblower Act case,” it was overruled.²⁸¹

The majority in *Franklin II* then turned to the text of the GWA to determine what standard governed the analysis of whether a challenged action constitutes an “adverse employment action.”²⁸² Employing the canons *noscitur a sociis* and *ejusdem generis*, the majority in *Franklin II* concluded that the “phrase ‘other adverse employment action’ should be interpreted to mean an employment action analogous to or of a similar kind or class as ‘discharge, suspension, or demotion.’”²⁸³ And finally, after briefly surveying federal court decisions that interpreted “the meaning of adverse employment action in substantive discrimination cases [under Title VII],” the majority in *Franklin II* reasoned that Franklin’s complained of conduct did not, as a matter of law, meet a “threshold level of substantiality . . . viewed objectively from the perspective of a reasonable person in the circumstances.”²⁸⁴

Thus, it appears the court in *Franklin II* heralded in a new standard under the GWA for judging the type of conduct that constitutes an “adverse employment action.” Although the majority in *Franklin II* admitted that an “adverse employment action need not be an ultimate employment decision, such as termination, failure to hire or demotion,” the majority reiterated that the conduct must meet a “threshold level of substantiality” when viewed objectively.²⁸⁵ This standard differed in kind, not just in degree, from the standard the court in *Freeman* purported to announce.²⁸⁶ “Analysis of whether the challenged action would have dissuaded a reasonable worker from making or supporting a charge of discrimination is different from an analysis of whether an employee suffered a serious and material change in the terms, conditions, or privileges of employment.”²⁸⁷

Presiding Judge Doyle and Judge Goss took issue with the majority in *Franklin II* in two important respects. First, both agreed that *Freeman* did not require overruling.²⁸⁸ To them, *Freeman* did not purport to announce that it was adopting the *Burlington* standard. If

281. *Id.* at 552, 826 S.E.2d at 435 (majority opinion).

282. *Id.* at 553, 826 S.E.2d at 435.

283. *Id.* at 561, 826 S.E.2d at 441 (citations omitted).

284. *Id.* at 555, 826 S.E.2d at 437 (citations and quotations omitted).

285. *Id.* (quoting *Grimsley v. Marshalls of MA, Inc.*, 284 F. App’x 604, 608 (11th Cir. 2008)).

286. *Id.* at 551, 826 S.E.2d at 434.

287. *Id.*

288. *See id.* at 560, 826 S.E.2d at 440 (Doyle, P.J., concurring in judgement only with respect to Division I); *id.* at 561, 826 S.E.2d at 441 (Goss, J., concurring).

anything, the decision in *Freeman* merely applied it “without formally adopting” it.²⁸⁹ The majority in *Franklin II* addressed this concern in a footnote. In the majority’s view, “application versus adoption is a distinction without a difference . . . [and] application of a more narrow standard in this case, without overruling *Freeman*, would cause confusion for the bench and bar as to which standard should be applied going forward.”²⁹⁰

It is disappointing that none of the opinions engaged in a more thorough discussion of this point, given that this divergence caused a clear split of opinions. If in *Freeman*, the court’s application of the *Burlington* standard was truly just dicta, as the Doyle and Goss concurrences suggested, it would appear that the majority opinion in *Franklin II* took a rather functional approach to precedent despite that it otherwise applied a more formalistic approach (with its heavy reliance on textualism) elsewhere in the reasoning. For the Doyle and Goss concurrences (and the judges joining them) what the court had actually said in *Freeman* should matter, too. *Franklin II* provided the court with a clear opportunity to expound on the importance of reading its own opinions closely to recognize the often-elusive distinction between dicta and holding. Unfortunately, none of the judges on the court seized the opportunity.

The second disagreement between the majority opinion and the concurrences appeared to turn on the standard the majority in *Franklin II* announced for interpreting the phrase “adverse employment action” moving forward. And subtle differences in jurisprudential philosophy seemed to animate this disagreement.²⁹¹ Statutory text was front and center in Judge Brown’s majority opinion with several citations to Scalia and Garner’s Reading Law treatise.²⁹² Interestingly enough though, Judge Goss’s special concurrence seemed motivated by something entirely different: legislative intent. Goss’s brief special concurrence does not offer much more insight into why he believed the “General Assembly had . . . intended” a broader meaning of “other adverse employment action,” aside from the few examples the

289. *Id.* at 560, 826 S.E.2d at 440 (Doyle, P.J., concurring).

290. *Id.* at 552 n.6, 826 S.E.2d at 435 n.6 (majority opinion).

291. *See id.* at 560, 826 S.E.2d at 440 (Doyle, P.J., concurring) (“I do not agree . . . that the standard the majority proposes to adopt is appropriate based on the plain language of our statute.”); *id.* at 562, 826 S.E.2d at 441 (Goss, J., concurring) (“Nothing in the text of O.C.G.A. § 45-1-5(a)(5) suggests that an employer’s ‘any other adverse employment action’ against the whistleblower must be as serious as a discharge, suspension, or demotion. If the General Assembly had so intended, it could easily have done so . . .”).

292. Despite concurring specially, Presiding Judge Doyle, nonetheless, also seemed motivated by hints of textualism.

concurrence gives. Nor does it articulate a broader theory of reliance on legislative intent or some other interpretive lens when interpreting statutes. But it may, perhaps, highlight a divergence in jurisprudential philosophy among some members of the court when it comes to interpreting statutes enacted by the General Assembly.²⁹³

Nonetheless, the following is clear from the court's opinion in *Franklin II*. First, for whistleblowers seeking to recover for retaliatory conduct that does not rise to the level of a "termination, suspension, or demotion," the conduct must be a serious and substantial change in the terms and conditions of employment to constitute an "adverse employment action."²⁹⁴ Second, federal decisions interpreting the standard for adverse employment action under Title VII's discrimination provision, rather than the retaliation provision, remain persuasive.²⁹⁵ And finally, reliance on a statute's text remains a strong leg on which to stand.

293. Compare *Ga. Insurers Insolvency Pool v. DuBose*, 349 Ga. App. 238, 240–47, 246 n.6, 825 S.E.2d 606, 609–13, 613 n.6 (2019) (interpreting the Georgia Insurer's Insolvency Pool Act with a view towards legislative intent and noting "there is no language in the Pool Act that demonstrates *an* intent that an insured be fully and completely compensated under the policy of an insolvent insurer, as suggested by [the Plaintiff].") (opinion authored by Goss, J.), with *UHS of Anchor, L.P. v. Ga. Dep't of Cmty. Health*, 830 S.E.2d 413, 429 n.98 (Ga. Ct. App. 2019):

To the extent the parties rely upon legislative history . . . we reject their reliance on same. . . . Indeed, as Georgians, and Americans, we are governed by laws, not by the intentions of legislators. . . . And as judges, we should only be concerned with what laws actually say, not with what the people who drafted the laws intended.

(opinion authored by Dillard, C.J.) (citations, quotations, and emphasis omitted).

294. See *Franklin II*, 349 Ga. at 555–56, 826 S.E.2d 437–38.

295. See *id.* at 555–56, 826 S.E.2d at 437.

