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Real Property

by Linda S. Finley*

I. INTRODUCTION

This Article surveys developments in Georgia real property law between June 1, 2018 and May 31, 2019.¹ The Article covers noteworthy cases decided during this period by the Georgia Supreme Court, the Georgia Court of Appeals, the United States District Courts, and the United States Bankruptcy Court and includes information about legislation enacted during the survey period which affects real property law.²

II. LEGISLATION

The 2019 regular session of the Georgia General Assembly adjourned *sine die* concluding its forty-day legislative session shortly after midnight on Tuesday, April 2, 2019.³ Although further legalization of marijuana and the enactment of cannabis-related legislation legalizing limited in-state cultivation, production, manufacturing, sale, and

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1. For an analysis of real property law during the prior survey period, see Linda S. Finley, *Real Property, Annual Survey of Georgia Law*, 70 MERCER L. REV. 209 (2018).

2. An additional resource for reviewing real property case law during the survey period is: Carol V. Clark, 2019 Judicial Update, 2019 Real Prop. Law Inst. (Institute of Continuing Legal Education in Georgia (2019).

3. *Legislative Update Weeks 9–10 (04.08.19)*, STATE BAR OF GEORGIA, https://www.gabar.org/committeesprogramssections/programs/leg/weekly_updates.cfm (last visited Oct. 24, 2019).

purchase of low-THC CBD oil⁴ was perhaps the most talked about legislation during the session, real property law was not ignored.

Very basic, but important to every real estate practitioner, is the statutory amendment to add section 9-15-4(f)⁵ to the Official Code of Georgia, which increases recording fees that the clerk of superior court may charge and provides for a flat fee per instrument (in most instances) rather than a per page fee. The cost for recording most real estate instruments shall be twenty-five dollars.⁶ The types of instruments where the flat fee is applicable “includ[e], but [are] not limited to, each deed, deed of trust, affidavit, release, notice, certificate, cancellation, assignment, notice of filing for Uniform Commercial Code related real estate, and assignment of a security deed of mortgage.”⁷ Likewise, liens upon real estate and personal property, hospital liens, *lis pendens*, information on utilities, cancellations, and a writ of *feri facias* will also carry a twenty-five dollar flat fee.⁸ The fee changes become effective January 1, 2020.⁹

The Georgia Landlord Tenant Law¹⁰ was amended to add a new provision¹¹ prohibiting retaliation by a landlord against a tenant who reports unsafe or unhealthy conditions of a property.¹² A violation can be established if a tenant demonstrates that he or she alerted the landlord about repair or a property condition affecting the health or safety of the tenants or the habitability of the property,¹³ that the tenant, in good faith,¹⁴ complained to a governmental body who enforces building or housing codes,¹⁵ or that the tenant attempted to establish or participated in a tenant organization formed to address property conditions.¹⁶ The landlord violates the statute if, within three months after the tenant takes action, a retaliatory eviction is filed¹⁷ or if the

4. Ga. H.R. Bill 324, Reg. Sess. (2019) (codified at O.C.G.A. § 31-2A-18, O.C.G.A. § 16-12-191).

5. O.C.G.A. § 9-15-4 (2019).

6. Ga. H.R. Bill 288, Reg. Sess. (2019) (codified at O.C.G.A. § 9-15-4, O.C.G.A. § 19-8-13).

7. *Id.* § 2(f)(1)(A)(i).

8. *Id.*

9. *Id.* § 8.

10. O.C.G.A. tit. 44 ch. 7 (2019).

11. O.C.G.A. § 44-7-24 (2019).

12. Ga. H.R. Bill 346, Reg. Sess. (2019) (codified at O.C.G.A. § 44-7-24).

13. O.C.G.A. § 44-7-24(b)(2) (2019).

14. O.C.G.A. § 44-7-24(b)(3)(B) (2019).

15. O.C.G.A. § 44-7-24(b)(3) (2019).

16. O.C.G.A. § 44-7-24(b)(4) (2019).

17. O.C.G.A. § 44-7-24(c)(1) (2019).

landlord deprives the tenant from using the premises,¹⁸ halts services to the tenant provided under the lease agreement (such as utilities),¹⁹ increases the tenant's rent, terminates the lease agreement,²⁰ or generally interferes with the rights provided the tenant under the terms of the lease.²¹ Retaliation by the landlord is a defense to an eviction action and, if successful in proving that the landlord's action was willful, wanton, or malicious, the tenant may recover a civil penalty against the landlord equal to one month's rent, plus an award of \$500 for court costs and reasonable attorney's fees, less delinquent rents, or other sums to which the landlord is entitled.²² The landlord may invoke a rebuttable defense if, within a prior twelve-month period, the property has been inspected by federal, state, or local agencies which certify that the property complies with applicable building and housing codes.²³ Furthermore, the landlord is not liable for retaliation when rent or other sums due are increased pursuant to the terms of the lease,²⁴ on account of a reduction of services for an entire residential building or complex,²⁵ or on account of the provisions regulated by a state or federal housing program.²⁶ Defenses against an alleged retaliatory eviction include proof that the tenant was delinquent in payment of the rent when the landlord gives notice to vacate or files an eviction action;²⁷ that the tenant intentionally damages the property or threatens violence against the landlord, its employees, or another tenant;²⁸ that the tenant breached the lease provisions concerning serious misconduct or criminal acts;²⁹ or if the tenant remains in the property after giving the landlord a notice of termination or intent to vacate the premises.³⁰

In other legislation affecting eviction law, O.C.G.A. § 44-7-9³¹ was amended to create a deadline for parties who have received a writ of possession to obtain execution of the writ. The statute provides that application for execution must be made within thirty days of issuance of

18. O.C.G.A. § 44-7-24(c)(2) (2019).

19. O.C.G.A. § 44-7-24(c)(3) (2019).

20. O.C.G.A. § 44-7-24(c)(4) (2019).

21. O.C.G.A. § 44-7-24(c)(5) (2019).

22. O.C.G.A. § 44-7-24(e) (2019).

23. O.C.G.A. § 44-7-24(f) (2019).

24. O.C.G.A. § 44-7-24(d)(1)(A) (2019).

25. O.C.G.A. § 44-7-24(d)(1)(B) (2019).

26. O.C.G.A. § 44-7-24(d)(1)(C) (2019).

27. O.C.G.A. § 44-7-24(d)(2)(A) (2019).

28. O.C.G.A. § 44-7-24(d)(2)(B) (2019).

29. O.C.G.A. § 44-7-24(d)(2)(C) (2019).

30. O.C.G.A. § 44-7-24(d)(2)(D) (2019).

31. O.C.G.A. § 44-7-9 (2019).

the writ of possession unless the application is accompanied by an affidavit showing good cause for the delay.³² The failure to timely apply for execution of the writ requires the applicant to reapply for a writ of possession.³³ The amendment creates a definition for “application for execution of a writ of possession” as that “request or application for a sheriff, constable, or marshal to execute a writ of possession which was issued pursuant to this article”³⁴ and restates that the writ of possession is the legal instrument issued by the court to recover possession of property in an eviction proceeding.³⁵

In an effort to protect Georgia beaches, House Bill 445³⁶ revised multiple provisions of state law relating to protection of dunes. O.C.G.A. § 12-5-232³⁷ was revised to redefine certain terms used in managing the shoreline. “Dynamic dune field” is now defined as “those elements of the sand-sharing system including the dynamic area of beach and sand dunes, varying in height and width, but does not include stable sand dunes.”³⁸ The revision changes the definition of “ocean boundary of the dynamic dune field” as “extend[ing] to the ordinary high-water mark as determined by the [D]epartment [of Natural Resources].”³⁹ The determination of the landward boundary of the dynamic dune field is made more specific and grandfathers in structures existing on July 1, 1979.⁴⁰

Giving further guidelines for construction over or near dunes is the definition of “minor activity” such as “installation of decks, patios, or porches or the alteration of native landscaping” which do not impact more than one-third of the parcel, or “construction or installation of elevated crosswalks providing access across sand dunes and shoreline stabilization activities.”⁴¹

In order to determine where construction can take place on the beach, the definition of “[o]rdinary high-water mark” was amended to mean “the upper reach of the tide along the shore established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the shore, shelving, changes in the

32. O.C.G.A. § 44-7-55(d) (2019).

33. *Id.*

34. O.C.G.A. § 44-7-49(1) (2019).

35. O.C.G.A. § 44-7-49(2) (2019).

36. Ga. H.R. Bill 445, Reg. Sess. (2019) (codified at O.C.G.A. § 12-5-232).

37. O.C.G.A. § 12-5-232 (2019).

38. O.C.G.A. § 12-5-232(8) (2019).

39. *Id.*

40. *Id.*

41. O.C.G.A. § 12-5-232(10.1) (2019).

character of soil, or the presence of litter and debris.”⁴² “Sand dunes” is now defined as the “mounds of sand within the sand-sharing system deposited along a coastline by wind, tidal, or wave action, or by beach nourishment or dune construction” and includes the areas covered by native vegetation.⁴³

The amendment also created the Shore Protection Committee within the Department of Natural Resources.⁴⁴ This committee is composed of five members including the commissioner of natural resources and four other people. Three of the four appointed members must be residents of Camden, Glynn, McIntosh, Liberty, Bryan, or Chatham county.⁴⁵ The committee is authorized to issue orders and to grant, suspend, modify, or deny permits for construction that affect the dunes.⁴⁶ The remainder of the legislation amends O.C.G.A. § 12-5-238⁴⁷ and empowers and instructs the committee regarding how it will make determinations.

III. TITLE TO REAL PROPERTY⁴⁸

*Republic Title Company, LLC v. Andrews*⁴⁹ highlights important procedural distinctions between the two types of quiet title remedies found in Georgia: conventional quiet title set out at O.C.G.A. § 23-3-40,⁵⁰ and quiet title against “all the world” set out at O.C.G.A. § 23-3-60.⁵¹ Conventional quiet title sounds in equity, and therefore venue is controlled by Article VI, § II, paragraph III of the Georgia Constitution: venue is proper in the county where at least one defendant resides.⁵² Quieting title against “all the world” is a proceeding taken directly against the property to establish title to land,

42. O.C.G.A. § 12-5-232(11) (2019).

43. O.C.G.A. § 12-5-232(15) (2019).

44. O.C.G.A. § 12-5-235(a) (2019).

45. *Id.*

46. O.C.G.A. § 12-5-235(b) (2019).

47. O.C.G.A. § 12-5-238 (2019).

48. This section was authored by Teresa L. Bailey. Teresa Bailey LLC. University of Florida (B.A., 1983); Emory University School of Law (J.D., 1986). Member, State Bar of Georgia; United States Court of Appeals for the Eleventh Circuit; United States District Courts for the Northern District of Georgia, Middle District of Georgia, and Southern District of Georgia.

49. 347 Ga. App. 463, 819 S.E.2d 889 (2018).

50. O.C.G.A. §§ 23-3-40–23-3-44 (2019).

51. O.C.G.A. §§ 23-3-60–23-3-73 (2019).

52. *Republic Title*, 347 Ga. App. at 465, 819 S.E.2d at 891–92.

making the case *in rem*.⁵³ As such, venue is proper where the property is situated.⁵⁴

In *Republic Title*, Andrews brought an equitable quiet-title petition, but filed suit in the county where the property was located and not where any of the respondent–defendants resided.⁵⁵ Republic Title filed a motion to dismiss the matter for improper venue, which was denied by the trial court. Thereafter, summary judgment was granted to Andrews. Republic Title appealed.⁵⁶

In its sole enumeration of error, Republic Title claimed that the trial court erred in denying its motion to dismiss because proper venue was not in the county where the property was located but was proper only in a county where a defendant could be served. The court of appeals reversed the trial court, pointing out that the two statutes governing quiet title were “entirely distinct from each other.”⁵⁷ Since Andrews characterized her petition as a “conventional quia timet,” did not frame the action as against the property itself, and since she named two individuals and specific deeds she sought removed as clouds on her title, the court held the action was properly prosecuted as a conventional quiet title, requiring it to be brought in the county where at least one of the respondents resided.⁵⁸ Accordingly, summary judgment was improper.⁵⁹

The case *Republic Title Company, LLC v. Freeport Title and Guaranty, Inc.*,⁶⁰ involved a dispute over excess funds generated from a 2017 tax sale of real property in Fulton County. Freeport, the owner of the property at the time of the tax sale, filed a money rule complaint against the sheriff to recover the excess funds, and Republic intervened claiming to be entitled to the excess funds because of its recorded security deed. Freeport amended its petition to include a claim to quiet title under O.C.G.A. § 23-3-40, to remove the Republic security deed as a cloud on Freeport’s title. Freeport claimed that title to the property had reverted to Freeport in 2014 as a matter of law.⁶¹

53. *Id.* at 465, 819 S.E.2d at 892.

54. O.C.G.A. § 23-3-62 (2019).

55. *Republic Title*, 347 Ga. App. at 463, 819 S.E.2d at 890.

56. *Id.*

57. *Id.* at 464, 819 S.E.2d at 891 (citing with approval *Patel v. Patel*, 342 Ga. App. 81, 90, 802 S.E.2d 871, 878 (2017)).

58. *Id.* at 466, 819 S.E.2d at 892.

59. *Id.* at 468–69, 819 S.E.2d at 894.

60. 829 S.E.2d 172 (Ga. Ct. App. 2019).

61. *Id.* at 173.

Under O.C.G.A § 44-14-80,⁶² title to real property conveyed as security for repayment of a debt reverts to the grantor at the expiration of seven years from the date of maturity of the debt unless the security deed recites that the parties intended to create a perpetual or indefinite security interest in the real property.⁶³ Republic's security deed contained a fixed maturity date of 2007. Accordingly, title reverted to Freeport in 2014, three years before the date of the tax sale.⁶⁴

A special master appointed in the case found that title reverted to Freeport as a matter of law, and Freeport was entitled to the excess funds. The trial court adopted the special master's report, and Republic appealed.⁶⁵

Republic made three arguments on appeal but did not enumerate as error the ruling that title to the property had reverted to Freeport. First, Republic argued that the special master exceeded the scope of the special master's jurisdiction in making a finding concerning the excess funds.⁶⁶ The court of appeals determined that, although the special master has complete jurisdiction within the scope of the pleadings "to ascertain and determine the validity, nature, or extent of petitioner's title and all other interests in the land,"⁶⁷ the trial court must independently determine the correctness of the special master's report before adopting it as the court's judgment.⁶⁸ As such, the trial court, not the special master, ordered disbursement of the funds to Freeport. Since Republic could demonstrate no harm, the court of appeals determined that it did not need to pass on whether it was appropriate for the special master to opine about the disbursement of the excess funds.⁶⁹

Republic next argued that Freeport lacked standing to petition to quiet title since Freeport was required to possess a freehold estate or an estate for years (with at least five years remaining) at the time the petition was filed. The court of appeals found that conventional quiet title requires a petitioner to allege and prove possession in itself at the time of filing of the petition.⁷⁰ The requirement to possess a freehold estate or an estate for years, while a requirement for a quiet title action

62. O.C.G.A § 44-14-80 (2019).

63. *Freeport Title*, 829 S.E.2d at 174 n.4.

64. *Id.* at 174.

65. *Id.*

66. *Id.*

67. O.C.G.A. §§ 23-3-43, 23-3-66 (2019).

68. *Freeport Title*, 829 S.E.2d at 174.

69. *Id.* at 174–75.

70. *Id.* at 175–76.

against all the world, it is not a requirement of conventional quiet title. Freeport filed its petition to quiet title within the twelve-month redemption period under O.C.G.A. § 48-4-40. Freeport's title as owner of the property was not divested, and the tax sale purchaser had no right to possession. The court of appeals held Freeport therefore had standing to pursue its quiet title claims.⁷¹

In *Bowen v. Laird*,⁷² as part of a land deal where Bowen purchased property from Laird, Bowen conveyed an 8.45-acre tract to Laird that adjoined another property Laird owned. Thereafter, Bowen conveyed 3,000 acres to The Highlands at Clear Creek, LLC (HCC) that mistakenly included the 8.45-acre tract Bowen had previously conveyed to Laird. HCC subdivided the property it acquired from Bowen. The 8.45-acre tract was subdivided into eight lots, four of which HCC sold to third parties.⁷³

In 2007, Laird noticed that his property tax bill identified the taxable property as fifty-seven acres rather than the sixty-five acres he believed he owned. Laird inquired into the matter and discovered the conveyance of the 8.45-acre tract to HCC. Laird brought the issue to Bowen's attention, and it was determined that the title examination conducted by the attorney who closed the transaction to HCC missed the deed from Bowen conveying the property to Laird. The parties attempted to work out a remedy without litigation, but ultimately Laird filed suit to quiet title against Bowen, HCC, the owners of the four lots, and their lenders. Laird also asserted a claim for attorney's fees.⁷⁴

In response to the suit, Bowen admitted that he had no claim to the disputed property, that he had erroneously included the 8.45-acre tract in the later conveyance to HCC, and that he did not own that property at the time he conveyed it to HCC. Bowen, however, disputed that Laird was entitled to attorney's fees.⁷⁵

HCC, the four lot owners, and their lenders responded to the petition and crossclaimed among the defendants. Laird filed for summary judgment on the title issue, but not on the claim for attorney's fees. The defendants opposed the motion and requested that the special master issue a report. The special master concluded that Laird held fee simple title to the 8.45-acre tract and that the conveyance by Bowen to HCC, and all subsequent conveyances were clouds on Laird's title, and should be removed. In 2010, the trial court entered a decree quieting title in

71. *Id.* at 176.

72. 348 Ga. App. 1, 821 S.E.2d 105 (2018).

73. *Id.* at 1–2, 821 S.E.2d at 107.

74. *Id.* at 2, 821 S.E.2d at 107–08.

75. *Id.* at 2, 821 S.E.2d at 108.

favor of Laird, but preserved for later resolution all other claims between the parties including the claims for attorney's fees and crossclaims between the defendants.⁷⁶

Almost seven years later, the issue of bad faith attorney's fees⁷⁷ was tried by a jury against Bowen only.⁷⁸ Although the jury found no bad faith on the part of Bowen, it nonetheless awarded Laird \$78,266 in fees for "unnecessary trouble and expense."⁷⁹ Bowen filed a motion for judgment notwithstanding the verdict (JNOV), which was denied by the trial court. Bowen appealed.⁸⁰

In reversing the trial court's denial of Bowen's motion for JNOV, the court of appeals noted that a petition to quiet title under O.C.G.A. § 23-3-60 is an action *in rem*, not against a person or entity, and the statute does not specifically authorize an award of attorney's fees.⁸¹ Since the jury found no bad faith in the transaction between Bowen and Laird, the court turned to the issue of "unnecessary trouble and expense," which the court explained as a defendant forcing a plaintiff to sue where no bona fide controversy existed.⁸²

The court held that since there were duplicate conveyances of the 8.45-acre tract, there was a bona fide controversy regarding title to that property, and Laird was required to file to quiet title.⁸³ Bowen had no claim to the property at the time suit was filed and admitted the same in his answer. The jury's verdict awarding fees against Bowen was premised on the fact that Bowen's second conveyance of the property to HCC created the problem, and that it would be fair for Bowen to pay Laird's fees.⁸⁴ The court of appeals stated, however, "the mere fact that a defendant's action has caused an issue which later requires litigation to correct does not in and of itself provide a basis for the award of attorney fees."⁸⁵ The losing party ought not to be burdened with the attorney's fees of the other party where there is a bona fide controversy unless there has been "wanton or excessive indulgence in litigation."⁸⁶

76. *Id.*

77. O.C.G.A. § 13-6-11 (2019).

78. *Bowen*, 348 Ga. App. at 3, 821 S.E.2d at 108.

79. *Id.*

80. *Id.*

81. *Id.* at 3–4, 821 S.E.2d at 108.

82. *Id.* at 4, 821 S.E.2d at 109.

83. *Id.* at 5, 821 S.E.2d at 109.

84. *Id.* at 5, 821 S.E.2d 109–10.

85. *Id.* at 5, 821 S.E.2d at 110.

86. *Id.* at 6, 821 S.E.2d at 110.

In *White v. Gens*,⁸⁷ Nicholle Gens (Gens), as Administrator of the Estate of April Gens, filed suit to quiet title against John White and others (collectively, White) claiming ownership of a residential lot in Forsyth County. White counterclaimed seeking to reform deeds in the chain of title to the property. The trial court found that Gens was equitably estopped from claiming title to the property, and granted summary judgment to White.⁸⁸ However, the trial court was reversed by the Georgia Supreme Court in 2016, which held that Gens was not equitably estopped, and the matter was remanded to the trial court to address the merits of the reformation counterclaim.⁸⁹ On cross motions for summary judgment, the trial court granted summary judgment to Gens and against White. White appealed.⁹⁰

The evidence showed that April Gens obtained a loan in 1999 encumbering 4.3 acres, including all of what was later carved out as Lot 7, and secured repayment by a security deed. April Gens later obtained a second loan for the same property by then subdivided into lots purported to be secured by a second security deed. However, the legal description of the property contained in the second security deed only described a 150-square foot access strip used for boat docking privileges which was part of Lot 7. Thereafter, April Gens filed for bankruptcy, identifying the properties described in the two security deeds as properties to be surrendered to the bank. The bankruptcy stay was lifted and the bank then foreclosed.⁹¹

After the foreclosure, the bank recorded a cancelation of only the first security deed, which had encumbered all of Lot 7, and conveyed Lot 7 to White's predecessor in title by general warranty deed. However, the legal description on the warranty deed used the erroneous description of the second security deed conveying only the access strip.⁹²

In his motion for summary judgment, White introduced the scrivener's affidavit of the attorney who closed both loans with April Gens. In it, the closing attorney contended that he prepared both security deeds, and the second security deed was intended by the bank and April Gens to convey all of Lot 7, and not just the access strip.⁹³ The

87. 348 Ga. App. 145, 820 S.E.2d 254 (2018).

88. *Id.* at 145, 820 S.E.2d at 255.

89. *Gens v. White*, 299 Ga. 637, 791 S.E.2d 48 (2016).

90. *White*, 348 Ga. App. at 146, 820 S.E.2d at 255.

91. *Id.* at 146–47, 820 S.E.2d at 255–56.

92. *Id.* at 147, 820 S.E.2d at 256.

93. *Id.*

court of appeals held that White had carried his burden to show mutual mistake by the parties to the conveyance.⁹⁴

Gens presented no evidence to rebut the closing attorney's affidavit. In fact, her deposition testimony supported the mutuality of the error as she testified that April Gens believed she had lost all interest in Lot 7 due to the bankruptcy and foreclosure. The mutuality of the mistake was further confirmed by the facts that White's predecessor purchased Lot 7 from the bank and built a house on it, that White then purchased the property and he and his family lived on it for six and one half years, and that April Gens took no action to stop the sale of the land, construction of the house, or occupation by White.⁹⁵

In finding in favor of Gens, the trial court focused on the lack of evidence as to how or why the mistake was made in the second security deed.⁹⁶ The court of appeals reversed and held that when the undisputed evidence shows the mutuality of the mistake, the cause of the mistake is immaterial, particularly when the non-complaining party is not prejudiced by reformation.⁹⁷

Although Gens contended in the litigation that the mistake was not mutual, she presented no evidence in support of her claim. Testimony that April Gens had expressed a desire to retain Lot 7 for herself was inconsistent with her subsequent decision to encumber Lot 7 in exchange for loans from the bank and her later surrender of the property in bankruptcy.⁹⁸ The court of appeals stated that, had April Gens not defaulted on her loans and surrendered the property in her bankruptcy proceeding, she may have been able to retain Lot 7.⁹⁹ However, given her voluntary surrender of Lot 7 in the bankruptcy proceeding, the court of appeals could determine no prejudice in reforming the deeds in the chain of title.¹⁰⁰ Accordingly, it was error to grant summary judgment to Gens and to deny summary judgment to White on his reformation claims. The matter was reversed and remanded to the trial court with direction.¹⁰¹

94. *Id.*

95. *Id.* at 147–48, 820 S.E.2d at 256.

96. *Id.* at 148, 820 S.E.2d at 257.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 148–49, 820 S.E.2d at 255.

IV. SALE OF REAL PROPERTY¹⁰²

In *Groce v. M24, LLC*,¹⁰³ the Georgia Court of Appeals addressed the issue of whether a purchaser's reliance on oral misrepresentations by the seller's agent regarding boundaries of real property which differed from the description in the written contract constituted justifiable reliance for a fraud claim.¹⁰⁴ In October 2013, Valerie and Mark Groce (the Groces) met with Steve Montgomery, an agent of M24, LLC (M24), to look at a tract of undeveloped land being offered for sale by M24. M24's agent made representations to the Groces regarding the boundary lines and stated that the tract included a creek. The Groces agreed to the purchase and signed a contract with M24. The contract between the parties included a legal description of the property being purchased.¹⁰⁵ The contract also included a merger clause stating that it constituted the entire contract and there were no "other promises, conditions, understandings or other agreements" between the parties.¹⁰⁶

In January 2014, the Groces began construction of a house on what they thought was their property. In 2015, they discovered that the house was built on property owned by another party. The Groces were forced to move the structure.¹⁰⁷

The Groces filed a lawsuit against M24 alleging fraud and that they justifiably relied upon the representations of M24's agent as to the boundaries of the property. The trial court granted summary judgment to M24 on the fraud claim, holding that the Groces could not demonstrate that they justifiably relied upon M24 because they could have discovered through their own due diligence that the land on which the house was built was not part of the tract. On appeal, the Groces argued that there was a genuine issue of material fact as to the element of justifiable reliance in support of their fraud claim.¹⁰⁸

The court of appeals upheld the trial court's ruling, holding that the evidence "[was] plain and indisputable that the Groces failed as a matter of law to exercise due diligence to discover the true boundaries

102. This section was authored by Alexander F. Koskey, III, CIPP/US. Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Samford University (B.S., 2004); Cumberland School of Law, Samford University (J.D., 2007). Member, State Bars of Georgia, Florida, and Alabama; United States Court of Appeals for the Eleventh Circuit, United States District Courts for the Northern District of Georgia, Middle District of Georgia, and Middle District of Florida.

103. 346 Ga. App. 157, 816 S.E.2d 703 (2018).

104. *Id.* at 157, 816 S.E.2d at 704.

105. *Id.* at 158, 816 S.E.2d at 704–05.

106. *Id.*

107. *Id.* at 158, 816 S.E.2d at 705.

108. *Id.* at 159, 816 S.E.2d at 705.

of the property that was the subject of their transaction with M24, because the contract for deed described those boundaries.”¹⁰⁹ The court further determined that the Groces’ reliance in building the house “on a description of the property that differed from the description in their contract for deed was unjustifiable as a matter of law.”¹¹⁰ The Groces could not rely on oral representations about the boundaries of the tract due to the merger clause in the contract.¹¹¹ Therefore, the Georgia Court of Appeals affirmed the granting of summary judgment to M24 on the fraud claim.¹¹²

In *Rivers v. Revington Glen Investments, LLC*,¹¹³ the Georgia Court of Appeals reversed a judgment in favor of a purchaser who brought a breach of warranty claim against a seller, holding that the seller did not breach warranty provisions in a sales contract which represented that there were no environmental hazards on the property.¹¹⁴ In 2013, William Rivers (Rivers), on behalf of the Rivers Family Trust (the Trust), entered into a contract with Revington Glen Investments, LLC (Revington) to sell 7.5 acres of land to Revington. Rivers claimed that he had never walked the property before entering into the contract with Revington. The contract contained representations and warranties from Rivers and the Trust that they had never violated any environmental regulations and that no hazardous substances existed on the property.¹¹⁵

After Revington began developing the property, a large number of old tires were discovered buried there, which is a violation of Georgia law. Although Revington admitted that Rivers had no knowledge of and did not place the tires on the property,¹¹⁶ it filed suit against Rivers alleging breach of warranty, misrepresentation, intentional concealment, and nuisance related to the contract.¹¹⁷ The trial court found the Trust liable under the contract since the existence of the buried tires and other debris was in violation of law and constituted a breach of warranty under the agreement between the parties.¹¹⁸

109. *Id.*

110. *Id.* at 159–60, 816 S.E.2d at 706.

111. *Id.*

112. *Id.* at 160, 816 S.E.2d at 706.

113. 346 Ga. App. 440, 816 S.E.2d 406 (2018).

114. *Id.* at 440, 816 S.E.2d at 407.

115. *Id.* at 441, 816 S.E.2d at 407–08.

116. *Id.*

117. *Id.* at 440, 816 S.E.2d at 407.

118. *Id.* at 442, 816 S.E.2d at 408.

At trial and on appeal, Revington argued that the Trust made an express warranty in the contract that the property “had not been used, maintained or operated in any way which violated any . . . law” and the existence of the tires constituted a violation of the law.¹¹⁹ However, the Georgia Court of Appeals held that the trial court’s reading of the contract was incorrect.¹²⁰ Specifically, the court of appeals held that the express language of the agreement indicated only that the Trust was warranting that it had not taken any action to violate the law, and “not that it had taken steps to discover and remediate any existing hidden issues caused by previous owners.”¹²¹ The court of appeals further held that the contract provision did not include a warranty that all previous owners had complied with the law and, if Revington wanted such a warranty, one should have been in the contract.¹²² Therefore, the judgment in favor of Revington on the breach of warranty claim was reversed.¹²³

In *BPP069, LLC v. Lindfield Holdings, LLC*,¹²⁴ the court of appeals addressed the issue of whether a seller knowingly misrepresented a property’s zoning status and concealed that the city intended to demolish property and whether such representations supported a claim for fraud.¹²⁵ In July 2014, BBP069, LLC (BBP) entered into a contract to purchase two parcels from Lindfield Holdings, LLC (Lindfield). The contract entitled BBP to examine title to the parcels and provided a seven-day due diligence period where the buyer could elect to terminate the contract.¹²⁶ Prior to the purchase, the two parcels had been zoned as “Urban Rural–Historical Infill.”¹²⁷ This zoning prohibited multifamily housing, but the parcels had been granted a legal non-conforming use status. Also, prior to the purchase by BBP, the city posted notice on the parcels declaring the buildings unsafe and noticed the demolition of each building. Although the notices of demolition were public record, they did not include a legal description.¹²⁸ The sale of the parcels was completed on July 30, 2014, at which time Lindfield Holdings executed a seller’s affidavit swearing that there were “no encumbrances of record

119. *Id.*

120. *Id.*

121. *Id.* at 442–43, 816 S.E.2d at 408.

122. *Id.* at 443, 816 S.E.2d at 408.

123. *Id.* at 443, 816 S.E.2d at 409.

124. 346 Ga. App. 577, 816 S.E.2d 755 (2018).

125. *Id.* at 578, 816 S.E.2d at 756.

126. *Id.* at 579, 816 S.E.2d at 757.

127. *Id.* at 578, 816 S.E.2d at 757.

128. *Id.*

affecting title to the parcels and that good merchantable title could be conveyed free and clear of liens and encumbrances other than taxes for the year 2014 and those not yet due and payable.”¹²⁹

In August 2014, Lindfield Holdings filed an application to change the zoning classification of the two parcels even though it had sold the parcels to BBP a week earlier. The city denied the application and demolished the buildings on the parcels. BBP received an invoice from the city for demolition costs in the amount of \$17,179.90.¹³⁰

BBP filed a suit against Lindfield Holdings and other third parties alleging breach of contract, fraud, negligent misrepresentation, and sought to rescind the contract.¹³¹ BBP specifically alleged that Lindfield Holdings misrepresented the parcels as being zoned for multifamily development and being in compliance with “local, state and federal laws.”¹³² BBP also alleged that Lindfield Holdings failed to disclose the demolition resolutions and the non-conforming use status of the parcels. The trial court granted summary judgment to Lindfield Holdings on the basis that BBP could not show justifiable reliance on the alleged misrepresentations made by Lindfield Holdings.¹³³

BBP appealed contending that issues of fact existed with respect to BBP’s ability to discover the demolition resolutions recorded in the public record and further claimed that it exercised due diligence in examining title to the two parcels—which did not disclose the demolition resolutions since they were filed against the incorrect owners.¹³⁴ The court of appeals upheld summary judgment in favor of Lindfield Holdings on the fraud claim as there was “no merit” in BBP’s claim concerning the misrepresentations of the zoning of the property since zoning is a legislative function of a county and it cannot serve as the basis for a fraud action.¹³⁵ The court of appeals further held that “the record shows that the property’s zoning classification precluded multifamily housing and that a process existed for a potential buyer to verify whether a particular piece of property had been granted a legal non-conforming use.”¹³⁶ Therefore, the court of appeals upheld the

129. *Id.* at 580, 816 S.E.2d at 758.

130. *Id.* at 580–81, 816 S.E.2d at 758.

131. *Id.* at 581, 816 S.E.2d at 758–59.

132. *Id.* at 581, 816 S.E.2d at 759.

133. *Id.*

134. *Id.* at 583, 816 S.E.2d at 760.

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

136. *Id.* at 586, 816 S.E.2d at 761.

award of summary judgment to Lindfield Holdings on the fraud claim.¹³⁷

V. EASEMENTS, COVENANTS, AND BOUNDARIES¹³⁸

In *Gilbert v. Canterbury Farms, LLC*,¹³⁹ the court of appeals held that O.C.G.A. § 44-5-60¹⁴⁰ does not limit the enforceability of restrictive covenants to a twenty-year term or preclude the renewal of restrictive covenants unless the restrictive covenant is subject to county or city zoning laws.¹⁴¹

Here, the plaintiff property owners brought an action against the defendants who intended to develop a lot. The plaintiffs claimed that the lot in question could not be cleared and used for development because such action would violate certain restrictive covenants that were bound to the property.¹⁴² The defendants countered that the restrictive covenant violated O.C.G.A. § 44-5-60, because the statute prohibits automatic renewals of restrictive covenants on lots that have fewer than fifteen subdivisions.¹⁴³

Following a bench trial, the court determined that O.C.G.A. § 44-5-60 does not bar the renewal of restrictive covenants.¹⁴⁴ However, the court refused to grant injunctive relief to prevent the defendants from further developing the plot, holding that an injunction would cause undue hardship to the defendants.¹⁴⁵

The court of appeals reversed in part, holding that O.C.G.A. § 44-5-60 does not preclude the restrictive covenant from renewing according to the contractual terms.¹⁴⁶ On the other hand, the court of appeals held that plaintiffs were entitled to injunctive relief because the evidence did not show how the defendants would be unduly burdened if they had to halt constructing their development.¹⁴⁷

137. *Id.* at 586, 816 S.E.2d at 762.

138. This section was authored by Tanisha Pinkins, Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Buffalo State College, (B.A., 2010; B.S., 2010). Emory University School of Law (J.D., 2016). Member, State Bar of Georgia.

139. 346 Ga. App. 804, 815 S.E.2d 303 (2018).

140. O.C.G.A. § 44-5-60 (2019).

141. *Gilbert*, 346 Ga. App. at 809, 815 S.E.2d at 308 (citing *Sweeney v. Landings Ass'n, Inc.*, 277 Ga. 761, 761–62, 595 S.E.2d 74, 75 (2004)).

142. *Id.* at 804, 815 S.E.2d at 305.

143. *Id.* at 808–09, 815 S.E.2d at 308.

144. *Id.* at 807, 815 S.E.2d at 307.

145. *Id.* at 814, 815 S.E.2d at 311.

146. *Id.* at 809–10, 815 S.E.2d at 308.

147. *Id.* at 813–14, 815 S.E.2d at 310–11 (noting that the defendants stipulated to the fact that they violated the restricted covenant prior to receiving approval or a court order

In *Jeschke v. Turnstone Group, LLC*,¹⁴⁸ the appeals court reviewed whether declarations of covenants are effective after foreclosure of a subdivision. In the matter, the Jeschkes (Plaintiffs) purchased a lot in a subdivision. The lot was subject to a declaration of covenants. Shortly after the Plaintiffs' purchase, the unsold lots in the subdivision were foreclosed. After foreclosure, the foreclosing bank sold the lots to REO Funding. Four years later, Plaintiffs purchased a second lot from REO Funding. In 2017 Plaintiffs were notified by Turnstone Group, LLC (a representative of REO Funding) that because the homeowners association created by the original developer had gone dormant, a new homeowners association had been created. In response, Plaintiffs brought suit against Turnstone Group seeking injunctive relief and a declaration as to whether the Plaintiffs' two lots were subject to the developer's declaration of covenants in light of the prior foreclosure. Turnstone filed for partial summary judgment on the applicability of the covenants to Plaintiffs' two lots. The trial court granted the motion and Plaintiffs appealed.¹⁴⁹

Plaintiffs' theory was that the foreclosure of the subdivision extinguished the declaration of covenants.¹⁵⁰ The court of appeals held, however, that the first lot obtained by Plaintiffs prior to the foreclosure remained bound by the declaration of covenants as a matter of law because Plaintiffs bought the first lot subject to the covenants and the foreclosure specifically set out that only the unsold lots were being foreclosed.¹⁵¹ The Plaintiffs' first lot was unaffected by the foreclosure and remained bound under the declaration of covenant under which they had purchased.¹⁵²

In support of their argument that the covenants did not apply to lots purchased after foreclosure, Plaintiffs relied upon an implied covenant theory.¹⁵³ The appellate court applied that theory in reversing the trial court, determining that whether the declaration of covenants was bound to the lots purchased after foreclosure presented a question of material fact of whether the declaration of covenant was void on any property purchased after foreclosure.¹⁵⁴

and that the defendants intended to continue to violate the covenant despite the present court proceedings).

148. 348 Ga. App. 155, 820 S.E.2d 245 (2018).

149. *Id.* at 156–57, 820 S.E.2d at 246–47.

150. *Id.* at 157, 820 S.E.2d at 247.

151. *Id.* at 157–58, 820 S.E.2d at 247.

152. *Id.*

153. *Id.* at 158, 820 S.E.2d at 248.

154. *Id.*

[W]here an owner of land subdivides it into lots for the purpose of sale, under a general plan or scheme restricting the lots to certain uses, restrictions that are embodied in such general plan or scheme may in a proper case be imposed upon the lots beyond the express restrictions contained in the deeds to the purchasers, on the theory of implied covenants. The need for such a rule is particularly compelling where third parties have relied on the applicability of the covenants. The party wishing to enforce a non-express agreement must, of course, establish the area covered by the agreement and the specific content of the restrictions alleged. This is usually accomplished by showing a common grantor's general scheme or plan for developing the property in question.¹⁵⁵

Here, Plaintiffs were successful in pointing to evidence creating material questions of fact as to whether the declaration of covenants was applicable to the lot that they acquired after the foreclosure. Specifically, plaintiffs pointed to the fact that the security deed was filed before the foreclosure and was thus superior to the declaration of covenants. Moreover, Plaintiffs showed that the declaration of covenants had not been implemented, the homeowners association was improperly formed, no dues or assessments were ever collected, and that the declaration of covenants had never been enforced. So even though Plaintiffs were clearly aware of the declaration of covenants, having previously bought a lot subject to the declaration, questions of fact remained as to whether they had knowledge that those restrictive covenants were still in effect and applicable to the additional lot they later purchased.¹⁵⁶

In *Emson Investment Properties, LLC v. JHJ Jodeco 65, LLC*,¹⁵⁷ the appeals court analyzed and set out the requirements of quasi-easements and implied easements. In *Emson*, a developer purchased land through multiple limited liability corporations set up that way in order to receive financing. Multiple loans were secured by the developer through the separate corporate entities, each of which ultimately went into default resulting in foreclosure of the loans. Emson and JHJ each purchased property in the development at or after the foreclosures.¹⁵⁸

A dispute arose about parking at the development, and Emson installed a gate to halt access to the rear of his property and the parking area. JHJ brought suit for declaratory judgment and injunctive

155. *Id.* (citing *Castle Point Homeowners Ass'n, Inc. v. Simmons*, 333 Ga. App. 501, 505–06, 773 S.E.2d 806, 809 (2015)).

156. *Id.* at 158–59, 820 S.E.2d at 248.

157. 349 Ga. App. 644, 824 S.E.2d 113 (2019).

158. *Id.* at 645–46, 824 S.E.2d at 115–16.

relief, asserting rights to quasi-easements and implied easements across Emson's property. Following a bench trial, the trial court found that JHJ had both quasi-easements and implied easement rights across Emson's property and issued declarations and a permanent injunction in favor of JHJ.¹⁵⁹

On appeal, the appellate court reversed, determining that JHJ was not entitled to quasi-easement rights for waters, sewer, and storm water services beneath Emson's property.¹⁶⁰

A quasi-easement arises when the owner of an entire tract uses one part of the tract for the benefit of another and thereafter the tract is divided so that the benefitted parcel, quasi-dominant estate, is separated from the burdened parcel, quasi-servient estate. If the quasi-dominant estate receives a benefit that is apparent, continuous, permanent in nature and is necessary and beneficial to the enjoyment of the quasi-dominant estate, then an easement is implied from the prior use.¹⁶¹

That is, a quasi-easement “requires proof that before the conveyance or transfer severing the unity of title, the common owner used part of the united parcel for the benefit of another part, and this use was apparent and obvious, continuous, and permanent.”¹⁶² To be entitled to a quasi-easement, JHJ must have proven that the development had a single common owner. The court determined that it could not construe unity of title from the chain of conveyance and concluded that there was no common owner of the entire development at the outset.¹⁶³ Therefore, JHJ had no right to a quasi-easement, and the trial court was reversed.¹⁶⁴

The appellate court next considered whether JHJ was entitled to an implied easement. In Georgia, “for an implied easement to exist, (1) the dominant estate must be landlocked, (2) the easement must be necessary, and (3) the servient and dominant estates must have previously comprised a single parcel under the same owner.”¹⁶⁵ In addition to the finding that the two properties did not arise from a single owner, the facts were undisputed that JHJ's property was not

159. *Id.* at 646, 824 S.E.2d at 116.

160. *Id.* at 647, 824 S.E.2d at 116–17.

161. *Id.* at 647, 824 S.E.2d at 117.

162. *Id.* (quoting *De Castro v. Durrell*, 295 Ga. App. 194, 198, 671 S.E.2d 244, 249 (2008)).

163. *Id.* at 648, 824 S.E.2d at 117.

164. *Id.*

165. *Id.* at 648, 824 S.E.2d at 118.

landlocked. Therefore, the trial court was reversed on the second issue.¹⁶⁶

VI. TRESPASS AND NUISANCE¹⁶⁷

In *Plantation at Bay Creek Homeowners Association, Inc. v. Glasier*,¹⁶⁸ a Homeowners Association (HOA) brought suit against homeowners in the community who disputed an easement across their property providing access to a lake.¹⁶⁹ The case arose after the Glasiers purchased the property from Karen Kilbourne who purchased the property from the original developer.¹⁷⁰ During the time she owned the property, Kilbourne disputed the existence of a pedestrian easement across her property which provided access to the lake. She denied others access to her property and was known to call the police to halt pedestrian traffic. In 2007, the HOA determined that there was no lake access and erected a sign which said: “NO LAKE ACCESS/NO PARKING.”¹⁷¹

In 2012, the Glasiers purchased the property from Kilbourne. The warranty deed contained standard language that the conveyance was subject to all easements and restrictions of record but did not reference the purported easement. At the time of purchase, the “NO LAKE ACCESS/NO PARKING” sign was in place on the property. In 2014, the HOA president, Charles Lorentz, entered the Glasiers’ yard without their permission and removed the sign. Thereafter, people began using the Glasiers’ property to gain access to the lake. The Glasiers objected to the removal of the sign to an HOA member and learned that the HOA planned to install a concrete pad on the path. The Glasiers then installed their own no trespassing sign, but the HOA required removal of the sign.¹⁷²

The Glasiers contacted the original surveyor who reviewed his records and advised that there was nothing in his records to show an easement. He further advised that the label “10’ PEDESTRIAN ESMT” appearing on the subdivision plat was an error. This information was presented to the county department of planning which revised the plat and removed the label. The HOA filed suit for equitable reformation of the revised plat and sought injunctive relief to halt the Glasiers from

166. *Id.* at 648–49, 824 S.E.2d at 118.

167. This section was authored by Linda S. Finley.

168. 349 Ga. App. 203, 825 S.E.2d 542 (2019).

169. *Id.* at 203, 825 S.E.2d at 542.

170. *Id.* at 205, 825 S.E.2d at 546.

171. *Id.* at 205–06, 825 S.E.2d at 547 (capitalization in original).

172. *Id.* at 206, 825 S.E.2d at 547.

interfering with the pedestrian walkway. The Glasiers filed an eight-count counterclaim alleging quiet title, breach of quiet enjoyment, trespass, theft by taking, and intentional infliction of emotional distress, and seeking a declaratory judgment as to the revised plat, injunctive relief prohibiting any person from crossing the Glasier property without permission, and attorney's fees and costs.¹⁷³

The parties filed cross-motions for summary judgment and the matter was referred to a special master. The special master issued a report concluding that there was no easement across the Glasiers' property. The court adopted the special master's report, denied the HOA's summary judgment, granted summary judgment to the Glasiers on their counterclaims for quiet title, declaratory judgment and injunctive relief, and denied the parties' cross-motions for summary judgment as to the remaining counterclaims.¹⁷⁴

On appeal, the HOA contended that the phrase on the plat, "10' PEDESTRIAN ESMT," was sufficient to the extent that the homeowners were not entitled to a declaratory judgment or injunctive relief.¹⁷⁵ However, the court of appeals held the special master's findings that the phrase was "void for uncertainty of description," was proper.¹⁷⁶ The court noted that because there were no lines, arrows, or other markings connecting the phrase to the plat and the notation of "10'" was unclear as to whether it referenced the length or width of the purported easement that there was no means to quantify or determine the easement location.¹⁷⁷ Further, the plat did not provide a key for determining an easement location. Therefore, the trial court's order granting summary judgment to the Glasiers was proper.¹⁷⁸

The court next reviewed the Glasiers' claim for trespass.¹⁷⁹ The claim was brought on the grounds that the HOA president entered their property on behalf of the HOA and removed the "NO LAKE ACCESS" sign causing damages from the traffic which thereafter entered their property.¹⁸⁰

An owner of real property has the right to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from its use. In an action for trespass, the landowner may recover

173. *Id.*

174. *Id.* at 206–07, 825 S.E.2d at 547.

175. *Id.* at 207, 825 S.E.2d at 547.

176. *Id.* at 207, 825 S.E.2d at 548.

177. *Id.* at 207–08, 825 S.E.2d at 548.

178. *Id.* at 208, 825 S.E.2d at 548.

179. *Id.*

180. *Id.* at 208–09, 825 S.E.2d at 548.

compensatory damages upon a showing of any wrongful, continuing interference with a right to the exclusive use and benefit of a property right.¹⁸¹

The evidence was undisputed that the HOA president entered the Glasiers' property without permission and removed their sign and the HOA president testified at deposition that he removed it in his capacity as HOA president. A jury question was created as to whether the HOA was liable for its president's actions but not whether the trespass occurred.¹⁸²

Likewise, the court determined that the HOA was not entitled to summary judgment on the theft by taking claim brought by the Glasiers.¹⁸³ Georgia statute provides a civil action for theft by taking and allows the owner of the property to recover damages.¹⁸⁴ Because there was a question of fact remaining as to whether the HOA authorized its president to remove the sign erected on the property, a jury question remained and a denial of summary judgment was proper.¹⁸⁵

Next, the court reviewed the denial of the HOA's claim for summary judgment on the Glasiers' claim for breach of quiet enjoyment. Again, the court ruled no error.¹⁸⁶ The Glasiers alleged that their right of quiet enjoyment of their property had been spoiled by the actions of people wrongfully using the pedestrian easement to access the lake after being told they could do so by the HOA and the removal of the sign from the Glasier property.¹⁸⁷ The evidence was sufficient to create a question of fact and support the denial of summary judgment on the claim.¹⁸⁸

Moving to the Glasiers' claim for intentional infliction of emotional distress, the court held that the trial court erred by denying the HOA's summary judgment motion.¹⁸⁹ The court of appeals held that the wrongful behavior alleged by the Glasiers was not so extreme as to support the claim.¹⁹⁰

181. *Id.* at 209, 825 S.E.2d at 549 (citing LN West Paces Ferry Ass'ns, LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010)).

182. *Id.* at 209–10, 825 S.E.2d at 549.

183. *Id.* at 210, 825 S.E.2d at 549.

184. *Id.* at 210, 825 S.E.2d at 549–50 (citing O.C.G.A. § 51-10-6 (2019)).

185. *Id.* at 210, 825 S.E.2d at 550.

186. *Id.*

187. *Id.* at 210–11, 825 S.E.2d at 550.

188. *Id.* at 211, 825 S.E.2d at 550.

189. *Id.* at 212–13, 825 S.E.2d at 551.

190. *Id.* at 212, 825 S.E.2d at 551.

“Four elements must be present to support a claim of intentional infliction of emotional distress: (1) The conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe.”¹⁹¹

Whether the claim rises to a level of outrageousness to sustain such a claim is a question of law.¹⁹² The HOA also sought summary judgment on the Glasiers’ claim for attorney’s fees and costs of litigation. Again, the HOA’s arguments came up short and the appeals court found that the trial court did not err when it denied the HOA’s motion for summary judgment on this claim.¹⁹³ “O.C.G.A. § 13-6-11 provides for an award of attorney’s fees against a defendant who has (1) acted in bad faith, (2) been stubbornly litigious, or (3) caused plaintiff unnecessary trouble and expense.”¹⁹⁴ Whether a party is entitled to such fees is a jury question. The Glasiers’ claim for trespass would in itself support a claim for expenses of litigation and attorney’s fees.¹⁹⁵ “The legal theory is that the intentional nature of the trespass gives rise to the bad faith necessary for such recovery.”¹⁹⁶ Therefore, because summary judgment was properly denied to the HOA on the Glasiers’ claim for trespass, the denial of the HOA’s motion for summary judgment by the trial court was proper.¹⁹⁷

Finally, the court of appeals determined that the trial court’s denial of summary judgment to the HOA on the Glasiers’ punitive damages claim was proper.¹⁹⁸ Punitive damages can be awarded when there is evidence of “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.”¹⁹⁹ Here, whether the trespass of the HOA was knowing and willful or that it demonstrated conscious disregard to the rights of the Glasiers created a question of fact for jury determination.²⁰⁰

191. *Id.* (quoting *Sevcech v. Ingles Markets, Inc.*, 222 Ga. App. 221, 474 S.E.2d 4 (1996)).

192. *Id.* at 212, 825 S.E.2d at 550.

193. *Id.*

194. *Id.* at 213, 825 S.E.2d at 551.

195. *Id.* at 213, 825 S.E.2d at 552.

196. *Id.* (citing *Mize v. McGarity*, 293 Ga. App. 714, 667 S.E.2d 695 (2008)).

197. *Id.*

198. *Id.*

199. *Id.* at 213–14, 825 S.E.2d at 552 (citing *Camp Cherokee, Inc. v. Marina Lane, LLC*, 316 Ga. App. 366, 729 S.E.2d 510 (2012)).

200. *Id.* at 214, 825 S.E.2d at 552.

A reminder that the actions of a third party can be held against another is found in *Whitaker Farms, LLC v. Fitzgerald Fruit Farms, LLC*.²⁰¹ The facts were that Sean Lennon (Lennon) owned Fitzgerald Farms and farmed peaches. Carroll Farms was owned by Kay Barnes (Kay) and her son Hynes Barnes (Hynes). Lennon worked at Carroll Farms during high school and college and after receiving his master's degree in 2003, he began full-time peach farming. Around 2006, Kay and Hynes agreed to allow Lennon to grow peaches on a twenty-acre tract on their farm. The parties began with an oral handshake deal for Lennon to lease the tract for the life of the peach trees but later a lease was executed so that Lennon could obtain crop insurance. Lennon also maintained a cooled, commercial packing shed nearby which was used to store the peaches out of the Georgia sun.²⁰²

In October 2015, Kay and Hynes sold their farm to Curtis Whitaker, the owner of Whitaker Farms, including the twenty-acre orchard where Lennon farmed his peaches.²⁰³ At the closing of the sale, Carroll and Hynes both executed an owner's affidavit representing that the property sold was "subject to no leases, tenancies, adverse possession, occupancy rights, licenses, or similar claims by third parties."²⁰⁴ Hynes did not advise Whitaker that Lennon was farming a twenty-acre peach orchard or that he had farmed that land for over a decade. After the purchase, Hynes stayed on to manage the property for Whitaker Farms.²⁰⁵

Several months after the sale, Lennon prepared for harvest and came onto the land as needed during a seven-month period. Lennon testified that he never saw Whitaker in the orchard but saw Hynes drive by many times each day. At no time did Hynes inform Lennon that the property had sold. In August 2016, harvest of the peaches began. The first truck load was picked and dropped off at the Fitzgerald Farms' packing facility without incident. The workers returned for a second load, again without problem, but when they started to leave, all the gates were locked. Hynes was observed driving away from one of the locked gates. The workers called Lennon to tell him they were locked in. Lennon called Hynes asking him to unlock the gates, prompting a text message from Hynes that Lennon should talk to the new owner. Up until that time, Lennon did not know that Carroll Farms had been sold. Lennon called the sheriff's office attempting to get the locks cut, and in

201. 347 Ga. App. 381, 819 S.E.2d 666 (2018).

202. *Id.* at 381–82, 819 S.E.2d at 668–69.

203. *Id.* at 382, 819 S.E.2d at 669.

204. *Id.*

205. *Id.*

the meantime, Hynes called Whitaker. Whitaker testified that the phone conversation was only incidental to the locked gates. Whitaker did not contact Lennon despite Lennon's repeated calls.²⁰⁶

Lennon obtained a court order and the sheriff cut the locks. The next morning Hynes relocked the gates. Lennon filed a complaint against Hynes for temporary restraining order (TRO) and other relief, advising the court that the matter needed immediate attention so that the crop would not be lost, and asking the court to order that he be allowed to enter the property to complete the peach harvest. In response, Whitaker applied for a criminal arrest warrant against Lennon. The superior court granted the TRO, and Hynes unlocked the gates. Unfortunately, by that time the peaches were ruined.²⁰⁷

Fitzgerald Farms' complaint included a claim for trespass which "was later amended to include claims for unjust enrichment and attorney's fees."²⁰⁸ Whitaker Farms intervened in the action and filed a counterclaim. Hynes was dismissed from the action with consent of the parties and Fitzgerald Farms withdrew its claim for unjust enrichment. The trial court ruled that Fitzgerald Farms could not seek punitive damages because Whitaker did not lock the workers in the field himself, and even if he ratified Hynes's conduct, the court would not allow the jury to extrapolate from the facts a claim for punitive damages. The jury was more sympathetic and found in favor of Fitzgerald Farms in the amount of \$150,000 and awarded attorney's fees in the amount of \$400,000. The trial court denied Whitaker Farms' motion for judgment notwithstanding the verdict but reduced the attorney's fees to \$272,000.²⁰⁹

The trespass claim hinged on whether Whitaker ratified the conduct of Hynes who locked the gates.²¹⁰ "In general, an employer is not responsible for the torts of its independent contractor."²¹¹ However, an exception exists if the employer ratifies the conduct of the independent contractor.²¹² "Ratification can be either express, or implied from: (1) slight acts of confirmation by the employer; (2) silence or acquiescence of the employer; or (3) where the employer receives and holds the benefits of an unauthorized wrong."²¹³ The court of appeals held that

206. *Id.* at 382–84, 819 S.E.2d at 669–70.

207. *Id.* at 384, 819 S.E.2d at 670.

208. *Id.*

209. *Id.* at 384–85, 819 S.E.2d at 670–71.

210. *Id.* at 385, 819 S.E.2d at 671.

211. *Id.* (citing O.C.G.A. § 51-2-4 (2019)).

212. *Id.* (citing O.C.G.A. § 51-2-5 (2019)).

213. *Id.* at 386, 819 S.E.2d at 671.

Whitaker had, indeed, ratified the conduct of Hynes because Whitaker knew that Lennon had worked on and harvested the peaches at the former Carroll Farm for at least a decade and that Hynes locked the gates of the peach orchard during harvest resulting in destruction of the crop.²¹⁴ Further, Whitaker ratified the actions of Hynes when he failed to instruct Hynes to allow Lennon's workers into the orchard, when he did not stop the re-locking of the gates, when he ignored Lennon's phone calls, and when he attempted to have Lennon arrested.²¹⁵ As to Whitaker Farms' contention that there was no evidence to support attorney's fees, the court disagreed and held the fees reasonable and supported by the evidence.²¹⁶

On the cross-appeal by Fitzgerald Farms, the court of appeals reversed the trial court, holding that it was error to withdraw the punitive damages claim from consideration by the jury.²¹⁷ The actions taken by Whitaker Farms provided sufficient evidence of "conscious indifference" to allow the claim to go to the jury.²¹⁸ Specifically, "Whitaker allowed the gates to Fitzgerald Farms' orchard to remain locked while Fitzgerald Farms' peach harvest rotted, and he not only refused to unlock the gates despite Lennon's pleas to finish harvesting the peaches, but sought to have Lennon arrested."²¹⁹

VII. FORECLOSURE OF REAL PROPERTY²²⁰

The Georgia courts took a scattershot approach with their foreclosure jurisprudence this year, clarifying some important principles.

First, the Georgia Court of Appeals waded into the issues that can arise when materialman's liens and a mortgage loan come into contact. In *Fannie Mae v. Las Colinas Apartments, LLC*,²²¹ the Federal National Mortgage Association (Fannie Mae) foreclosed a security deed for a multi-family property that was also the subject of a number of materialman's liens. The multifamily loan was non-recourse, meaning

214. *Id.*

215. *Id.* at 386, 819 S.E.2d at 671–72.

216. *Id.* at 386, 819 S.E.2d at 672.

217. *Id.* at 389, 819 S.E.2d at 673.

218. *Id.*

219. *Id.* at 389, 819 S.E.2d at 673–74.

220. This section was authored by Dylan W. Howard, Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Yale University (B.A., cum laude, 1999); University of Georgia School of Law (J.D., cum laude, 2002). Member, State Bar of Georgia, Supreme Court of Georgia, United States Court of Appeals for the Eleventh Circuit, United States District Courts for the Northern District of Georgia, Middle District of Georgia, and Southern Districts of Georgia.

221. 346 Ga. App. 867, 815 S.E.2d 334 (2018).

that Fannie Mae's remedies would ordinarily be limited to recovering the property.²²² The note at issue contained language that the borrower and guarantor could be personally liable if the security deed was transferred.²²³ Following foreclosure, Fannie Mae confirmed the sale²²⁴ and filed a deficiency action against the borrower and a guarantor. Fannie Mae argued that the recorded materialman's liens constituted transfers sufficient to trigger personal liability under the note. The trial court denied Fannie Mae's argument in this regard, holding that the note was ambiguous that Fannie Mae suffered no injury as a result of the materialman's liens.²²⁵ On appeal, the Georgia Court of Appeals overturned the trial court's decision.²²⁶ It held that the loan documents were unambiguous and that the lack of damages to Fannie Mae was irrelevant, as competent parties are free to insert any provision they wish into a contract unless void by public policy.²²⁷ As a result, the court reversed the grant of summary judgment to the defendants and remanded the case to the trial court with an instruction to enter summary judgment in favor of Fannie Mae.²²⁸

In *Oconee Federal Savings and Loan Association v. Brown*,²²⁹ the Georgia Court of Appeals returned to the oft-contentious issue of whether a borrower seeking to prevent a foreclosure must tender the amount owed under the loan.²³⁰ The borrowers obtained a home equity line of credit and failed to repay it. In response, the lender sent a letter accelerating the balance of the loan and notifying borrowers that it would not accept any payment less than the total amount owed. When borrowers failed to reinstate, the lender scheduled a non-judicial foreclosure sale. Borrowers then sued, and filed a motion seeking an order directing any funds they were to pay be deposited in the registry of the trial court. The lender opposed the motion, arguing that pursuant to the note the borrowers were required to pay funds to the lender, not to the court's registry. During the course of the lawsuit, the debt matured. The trial court ultimately granted the motion, enjoining foreclosure so long as the borrowers made a specified monthly payment

222. *Id.* at 868, 815 S.E.2d at 336.

223. *Id.* at 870, 815 S.E.2d at 337.

224. See O.C.G.A. § 44-14-161 (2019) which sets out the statutory requirements for confirming a foreclosure sale.

225. *Fannie Mae*, 346 Ga. App. at 871, 815 S.E.2d at 337-38.

226. *Id.* at 871, 815 S.E.2d at 338.

227. *Id.* at 871-73, 815 S.E.2d at 338-39.

228. *Id.* at 873-74, 815 S.E.2d at 339.

229. 349 Ga. App. 54, 825 S.E.2d 456 (2019).

230. *Id.* at 54, 825 S.E.2d at 458.

into the court's registry. The lender appealed and the Georgia Court of Appeals reversed the trial court's injunction order.²³¹

First, the court held that tendering the funds to the registry of the trial court was insufficient; the funds had to be tendered to the lender.²³² Second, the court held that the case did not present sufficiently compelling circumstances justifying a departure from the tender rule, i.e., where a lender tortiously interfered with a borrower's ability to pay.²³³ Finally, the court refuted the borrower's claim that they should not be required to tender because the lender had previously refused to accept any payment less than the full amount owed.²³⁴ Noting that the lender's refusal occurred before the loan matured, that the lender had subsequently demanded payments, and that the borrowers failed to make any actual attempt to tender following the loan's maturity, the court denied this claim.²³⁵

In *Derby Properties, LLC v. Watson*,²³⁶ the Georgia Court of Appeals clarified the means by which Georgia counties can utilize foreclosure to enforce nuisance abatement liens.²³⁷ The defendant in the matter recorded a nuisance abatement lien against real property and then utilized the non-judicial tax foreclosure sale procedure to sell the property to plaintiff. The plaintiff subsequently demanded that the county return the purchase price, claiming that the county had inappropriately utilized the non-judicial tax foreclosure procedures pursuant to O.C.G.A. § 48-4-1²³⁸ rather than the judicial in rem tax foreclosure procedures pursuant to O.C.G.A. § 48-4-76.²³⁹ After the county refused the plaintiff's request, he filed a lawsuit challenging the legality of the sale. The trial court awarded summary judgment to the county, and plaintiff appealed.²⁴⁰ The court of appeals affirmed the trial court's ruling, holding that the nuisance abatement statute enabled a county tax commissioner to collect the amount of the lien using any available method.²⁴¹ Finally, the court of appeals concluded that the Georgia Legislature's intent in crafting the *in rem* tax foreclosure

231. *Id.* at 54–59, 825 S.E.2d at 458–61.

232. *Id.* at 64, 825 S.E.2d at 464.

233. *Id.*

234. *Id.* at 62, 825 S.E.2d at 462–63.

235. *Id.* at 62–63, 825 S.E.2d at 463.

236. 346 Ga. App. 631, 816 S.E.2d 766 (2018).

237. *Id.* at 632, 816 S.E.2d at 767.

238. O.C.G.A. § 48-4-1 (2019).

239. O.C.G.A. § 48-4-76 (2019).

240. *Derby*, 346 Ga. App. at 632, 816 S.E.2d at 767.

241. *Id.* at 633–34, 816 S.E.2d at 768.

statute was to provide an alternative to the non-judicial tax foreclosure procedures, rather than to replace them entirely.²⁴² As a result, the Georgia Court of Appeals affirmed the trial court's decision upholding the sale.²⁴³

VIII. CONDEMNATION AND EMINENT DOMAIN²⁴⁴

In *Bryde v. City of Atlanta*,²⁴⁵ the Georgia Court of Appeals considered whether the award of compensation in a condemnation action was solely governed by the condemnation statute or if civil practice act rules apply.²⁴⁶ On March 6, 2018, the City of Atlanta (City) brought condemnation proceedings against property owned by Virginia and Walton Bryde to complete a bridge on Powers Ferry Road. The petition and declaration of taking were personally served on March 27, 2018 according to the requirements of O.C.G.A. § 32-3-8.²⁴⁷ The Brydes filed an answer with a notice of appeal on May 4, 2018, under O.C.G.A. § 32-3-14²⁴⁸ seeking a jury trial on the issue of compensation. The City moved to dismiss the notice of appeal as untimely under O.C.G.A. § 32-3-14, and the trial court entered final judgment for the Brydes at the original compensation amount. The Brydes appealed and argued that their notice of appeal was timely under O.C.G.A. § 9-11-4(h) of the Civil Procedure Act,²⁴⁹ and that even if the notice of appeal was untimely, the trial court erred in dismissing their answer.²⁵⁰

O.C.G.A. § 9-11-4(h) requires the person serving the process to provide proof of "service with the court in the county in which the action is pending within five business days of the service date."²⁵¹ If the proof of service is not filed within five business days, the time for the party served to answer the process will not run until such proof of service is filed. The return of service affidavits showed that Walton Bryde was personally served at his residence and Virginia Bryde's service was

242. *Id.*

243. *Id.* at 635, 816 S.E.2d at 769.

244. This section was authored by Ivy N. Cadle, Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.; Adjunct Professor of Law, Mercer University School of Law. University of Georgia (B.S., 2000; M.Acc., 2002; CPA, 2008); Mercer University School of Law (J.D., 2007). Member, State and Federal Bars of Georgia; United States Court of Appeals for the Eleventh Circuit; Supreme Court of the United States.

245. 350 Ga. App. 129, 828 S.E.2d 122 (2019).

246. *Id.*

247. O.C.G.A. § 32-3-8 (2019).

248. O.C.G.A. § 32-3-14 (2019).

249. O.C.G.A. § 9-11-4(h) (2019).

250. *Bryde*, 350 Ga. App. at 129–30, 828 S.E.2d at 123–24.

251. *Id.* at 129, 828 S.E.2d at 123–24.

effected by leaving copies with Walton Bryde on March 27, 2018. Both affidavits were filed with the court clerk on April 5, 2018, which was more than five business days from the date of service. The Brydes filed their notice of appeal and answer on May 4, 2018, which was within thirty days of the date the City's return of service affidavits were filed.²⁵² The City argued that the Brydes' notice of appeal was untimely under O.C.G.A. § 32-3-14, which requires the declaration to be filed no "later than 30 days following the date of service as provided for in Code Sections 32-3-8 and 32-3-9."²⁵³ The City argued that the Brydes had thirty days from March 27, 2018 to file their notice of appeal, and thus, the May 4, 2018 notice of appeal was filed after the expiration of the thirty-day deadline. The City also contended that Rule 4(h)'s permission to file the notice of appeal more than thirty days following personal service conflicts with O.C.G.A. § 32-3-14.²⁵⁴

The court held that the Civil Procedure Act's grant of time extensions are permitted under specific circumstances which do not include periods of time fixed by other statutes.²⁵⁵ The court found that O.C.G.A. § 32-3-14 clearly states that an owner can file a notice of appeal "not later than 30 days following the date of service."²⁵⁶ Consequently, Rule 4(h) conflicts with the statutory provision in O.C.G.A. § 32-3-14, and therefore, the Brydes' notice of appeal was untimely.²⁵⁷

In *Hayman v. Paulding County*,²⁵⁸ the Georgia Court of Appeals considered whether Paulding County (County) created a continuing nuisance, trespass, and inverse condemnation by failing to maintain and repair its storm sewer drainage systems.²⁵⁹ In 1987, Elana Mor built a home in Paulding County where a creek west of the property flowed into culverts that ran under a road south of the property. A small drainage ditch ran along the road and emptied water into the creek. Around 2005 or 2006, the County cleared debris from the culverts and there was no evidence that the County cleaned out the culverts again. In 2003, Bill and Wendy Hayman moved into the Mor home, and within six months, they had water intrusion in the bedroom and kitchen. During heavy rains, water flowed over the drainage and onto the property. The plaintiffs called the County over a dozen times and

252. *Id.* at 129–30, 828 S.E.2d at 124.

253. *Id.* at 130, 828 S.E.2d at 124 (emphasis omitted).

254. *Id.*

255. *Id.* at 131, 828 S.E.2d at 125.

256. *Id.* (emphasis omitted).

257. *Id.* at 131–32, 828 S.E.2d at 125.

258. 349 Ga. App. 77, 825 S.E.2d 482 (2019).

259. *Id.* at 79, 825 S.E.2d at 484.

complained about the storm sewer runoff and flooding, but nothing changed. The Haymans attempted to clear the culverts and seal the walls, but the flooding continued. In September 2009, heavy rains caused substantial flooding (over two feet) into the plaintiffs' home. Bill Hayman performed excavation, installation of French drains, and installation of forty to fifty truckloads of dirt to raise the yard ground level, cleaned the ditch, and connected the driveway ditch to a gravel ditch to reduce the flooding.²⁶⁰

On December 11, 2012, plaintiffs filed suit against the County for creation of a continuing nuisance, trespass, and inverse condemnation by failing to maintain and repair its storm drainage systems. On May 3, 2016, the trial court granted the County's motion for summary judgment.²⁶¹ Plaintiffs appealed, and the court of appeals vacated and remanded the case.²⁶² On remand, the trial court again found that the plaintiffs could not attribute the flooding to a specific cause other than the rain.²⁶³

The court of appeals agreed that the trial court erred in granting summary judgment for inverse condemnation.²⁶⁴ Counties in Georgia are "not . . . generally liable for creating nuisances," but "may be liable for damages if it creates a condition on private property, such as a nuisance, that amounts to inverse condemnation or a taking without compensation."²⁶⁵ The court described a nuisance as "anything that causes hurt, inconvenience, or damage to another[,] and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance."²⁶⁶ However, the court cautioned that "a single isolated occurrence is not an actionable nuisance."²⁶⁷

The appeals court held that the maintenance of the sewer line with an obstruction was continuous because there was evidence that the County "knew or should have known after the first overflow that the obstruction was in its line."²⁶⁸ Also, based on testimony of plaintiffs' experts, the culverts should have been able to handle the storms if they were maintained properly.²⁶⁹

260. *Id.* at 78–79, 825 S.E.2d at 483–84.

261. *Id.* at 79, 825 S.E.2d at 484.

262. *Id.*

263. *Id.*

264. *Id.* at 80, 825 S.E.2d at 485.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 81, 825 S.E.2d at 485.

269. *Id.* at 81–82, 825 S.E.2d at 486.

IX. TAXATION OF REAL PROPERTY²⁷⁰

The procedural requirements to properly bar the equity right of redemption continue to be an issue for practitioners. In *Dukes v. Munoz*,²⁷¹ the court of appeals reviewed the requirements for service of an action to cut off redemption.²⁷² The facts on appeal showed that Dukes owned real property in Fulton County, Georgia, and failed to pay the ad valorem taxes resulting in foreclosure of the property by the sheriff. Munoz, Martinez, and Higgins (Purchasers) were the high bidders at the foreclosure sale in January 2014. In January 2015,²⁷³ Purchasers began the process to foreclose the equity right of redemption and sent Dukes notice of an impending barment of his property rights. Notice was sent to Dukes via certified mail/return receipt using the address of the property foreclosed, Purchasers having obtained that information from the 2014 county tax bill. The letter was returned to Purchasers as undeliverable.²⁷⁴

Purchasers filed a petition to quiet title to the property. Their attorney engaged a private investigator to locate Dukes to effect service of the suit.²⁷⁵ The investigator reported back that using “normal investigative methods and procedures,” he was unable to locate Dukes.²⁷⁶ Based on that information, Purchasers moved to serve Dukes by publication. A special master appointed by the trial court found that service by publication was justified and the court issued an order allowing such service. At the subsequent evidentiary hearing, the special master found that Purchasers had perfected service of Dukes by publication and had therefore properly barred Dukes’s right of redemption.²⁷⁷

Shortly after the special master’s findings were reported to the court, Dukes filed an objection on the grounds that he had not been properly served with barment notice or with the quiet title action. Pursuant to the statute, Dukes tendered the redemption sum into the court’s registry. In support of his motion, Dukes submitted evidence from a private investigator he had retained who concluded that Dukes could

270. This section was authored by Linda S. Finley.

271. 346 Ga. App. 319, 816 S.E.2d 164 (2018).

272. *Id.* at 319, 816 S.E.2d at 165.

273. O.C.G.A. § 48-4-45 (2019) sets out that after expiration of twelve months from the date of the tax foreclosure sale, a purchaser may proceed with an action to bar the right to redeem.

274. *Dukes*, 346 Ga. App. at 320, 816 S.E.2d at 166.

275. *Id.*

276. *Id.*

277. *Id.*

have been located in any number of ways through a Google internet search. Those search results revealed biographical and employment information about Dukes, multiple email addresses, postal addresses, and telephone numbers. Further investigation also revealed multiple social media accounts. The investigator also found a current mailing address for Dukes using the website for the county tax assessor and in subscription databases in the Georgia Secretary of State's occupational licensing division, in voter registration data, and in the property records of Dougherty County where the Google search indicated Dukes resided.²⁷⁸ Based on all the ways that Dukes could be located, the investigator concluded that "a minimal effort to locate a means for contacting Winfred Dukes would have been successful."²⁷⁹ Nevertheless, the trial court adopted the special master's report and denied Dukes's motion.²⁸⁰

The court of appeals reversed the trial court, reviewing statutes which govern quiet title actions.²⁸¹ First, the statute requires personal service upon "known persons whose residence is ascertainable."²⁸² The trial court may order service by publication "where the respondent . . . resides outside [the state of Georgia] or whose residence is unknown."²⁸³ Because service by publication is "notoriously unreliable," service by publication should be ordered only if the respondent's address cannot be determined after the plaintiff has exercised reasonable diligence to locate that respondent.²⁸⁴ The court then reviewed the requirements to prove "reasonable diligence" finding that plaintiffs must "pursu[e] every reasonable available channel of information to locate the defendant."²⁸⁵ Based on the investigation performed by Dukes's investigator, the court of appeals concluded that the Purchasers "failed to pursue obvious and fruitful channels of information that would have allowed them to ascertain Dukes' current address with minimal effort."²⁸⁶ Therefore, service of Dukes by publication was improper.²⁸⁷

When an owner or interest holder of property desires to exercise its equity right of redemption, Georgia law provides that the interest

278. *Id.* at 320–21, 816 S.E.2d at 166.

279. *Id.* at 321, 816 S.E.2d at 166.

280. *Id.*

281. *Id.* at 323, 816 S.E.2d at 168.

282. *Id.* at 321, 816 S.E.2d at 167 (citing O.C.G.A. § 23-3-65(b) (2019)).

283. *Id.*

284. *Id.*

285. *Id.* at 322, 816 S.E.2d at 167 (citing *Reynolds v. Reynolds*, 296 Ga. 461, 769 S.E.2d 511 (2015)).

286. *Id.* at 323, 816 S.E.2d at 168.

287. *Id.*

holder pay the purchaser of the property the purchase price, all taxes paid on the property after the sale, any special assessments, and a penalty of 20% of the purchase price the first year and 10% each year thereafter.²⁸⁸ At times, the purchaser does not want to accept the redemption sum or the property owner balks at the calculated redemption sum. As *Northlake Manor Condominium Association, Inc. v. Harvest Assets, LLC*,²⁸⁹ illustrates, disputes can arise based on this calculation.

In December 2013, Harvest Assets purchased a condominium unit located in the Northlake Manor Condominium, which was sold by the sheriff of DeKalb County for unpaid taxes. The Northlake Manor Condominium Association (Association) claimed a lien on the unit for unpaid condominium assessments and sought to exercise its right to redeem the property from the sale. The Association requested that Harvest Assets provide the proper sum for redemption and also demanded that Harvest Assets pay condominium assessments which had accrued since the date of the tax sale.²⁹⁰ Harvest Assets paid the Association \$5,000 to “cover the association fees currently due” plus “future dues as they come due.”²⁹¹ Harvest Assets then added the \$5,000 assessment sum it had paid to the amount it demanded from the Association to redeem the property, seeking \$15,120. The Association objected to the amount and tendered a sum which did not include the \$5,000 payment for delinquent assessments. Harvest Assets rejected the lower payment and the Association filed suit to require it to accept tender and deliver the Association a deed of redemption. Subsequently, the Association filed an amended complaint that sought an award of all unpaid assessments that had accrued during the litigation, plus late fees, interest, and attorney’s fees. The Association also sought injunctive relief to prevent Harvest Assets from foreclosing its equity right to redeem the property. Cross-motions for summary judgment were filed by the parties, and while these motions were pending, the parties entered into a consent order whereby Harvest Assets agreed to forbear from proceeding with a barment action until further order of the court or the matter was otherwise resolved. The Association agreed that during this period it would take no action to collect the assessments and other sums it claimed due. The trial court ruled that the amount tendered by the Association to redeem the property was proper and that Harvest Assets could not include the sum it had paid the Association as

288. O.C.G.A. § 48-4-42 (2019).

289. 345 Ga. App. 575, 812 S.E.2d 658 (2019).

290. *Id.* at 576–77, 812 S.E.2d at 660.

291. *Id.* at 577, 812 S.E.2d at 660.

part of the redemption amount.²⁹² Harvest Assets appealed and the court of appeals reversed the trial court's finding that the \$5,000 paid was a "special assessment."²⁹³ The provisions of O.C.G.A. § 48-4-42 "include condominium association assessments paid by a tax sale purchaser, and that a tax sale purchaser is entitled to repayment of those assessments as part of the redemption price."²⁹⁴ The court of appeals, however, concluded that the \$5,000 added to the redemption sum was inflated because it improperly included attorney's fees and interest which should not have been included in the redemption demand.²⁹⁵ The matter was then remanded to the trial court.²⁹⁶

Subsequently, the Association decided it would not seek to redeem the property from the tax sale and would only pursue its claims for the unpaid assessments that had continued to accrue during the litigation. It dismissed that portion of its complaint which sought to redeem the property. Harvest Assets amended its answer to add a counterclaim for declaratory relief seeking judgment that payment of the accrued assessments was inequitable. The Association moved for summary judgment on its claim seeking to collect the accrued assessments above the \$5,000 already paid. It also sought an award of interest, late charges on the unpaid assessments, and its attorney's fees. Harvest Assets opposed the motion on the grounds that the terms of the earlier consent order would not allow such collection. The trial court denied the Association's motion and granted Harvest Assets' motion for a declaratory judgment. Although the trial court's order was based upon the language of the consent order, because the Association no longer sought to redeem the property, the court could set aside the Order so that Harvest Assets could complete the barment process and the Association could seek payment of the assessment from the date of the entry of the Consent Order forward. The Association appealed on the grounds that the trial court erred in denying the Association's claim for all the assessments that had accrued during the litigation.²⁹⁷

In once again reversing the trial court, the court of appeals held that

292. *Id.* at 577–78, 812 S.E.2d at 660–61. In support of its position that it was entitled to add the \$5,000 assessment amount to the redemption demand, Harvest Assets relied upon O.C.G.A. § 48-4-42 that the amount tendered to the condominium association was a "special assessment." *Id.* at 578, 812 S.E.2d at 661.

293. *Id.*

294. *Id.* (citing *Harvest Assets, LLC v. Northlake Manor Condo. Ass'n*, 340 Ga. App. 237, 796 S.E.2d 319 (2017)).

295. *Id.* at 578, 812 S.E.2d at 661.

296. *Id.*

297. *Id.* at 578–80, 812 S.E.2d at 661–62.

[a] consent order is essentially a binding agreement of the parties that is sanctioned by a court, and it is subject to the rules governing the interpretation and enforcement of contracts. Accordingly, a consent order can be construed according to the general rules of contract construction. Furthermore, where the language of a contract is plain and unambiguous, no construction is required or permissible and the terms of the contract must be given an interpretation of ordinary significance.²⁹⁸

The court held that the language of the consent order did not bar the collection of the assessments.²⁹⁹ Instead the order provided that the association would “take no action outside the confines of [the] case to collect or otherwise enforce its claim to [the] assessments.”³⁰⁰

Additionally, the appellate court held that Association was entitled to payment of the assessments on the basis of equity.³⁰¹ The court of appeals followed existing case law which held “that a tax deed purchaser of property is obligated to pay homeowners association assessments that accrue after the sale, even during the period before the purchaser can foreclose on the right of redemption.”³⁰² The defeasible fee title that Harvest Assets received at the purchase of the property triggered automatic membership in the condominium association, and made it liable to the accruing assessments, even those that accrued during the redemption period.³⁰³

In *DeKalb County Board of Tax Assessors v. Astor ATL, LLC*,³⁰⁴ the court of appeals addressed the issue of whether the purchase price at a foreclosure sale pursuant to a deed under power qualifies as an arm’s length bona fide sale for purposes of determining the assessed value of taxable real property.³⁰⁵ In 2015 Astor ATL, LLC (Astor) purchased three properties in DeKalb County at separate foreclosure sales. Astor paid \$92,000 for property on Hill Creek Cove, \$86,000 for property on Royal Springs Court, and \$103,566 for property on Smithfield Trail. In 2016 the DeKalb County Board of Tax Assessors assessed each of the properties in excess of Astor’s purchase price. The Hill Creek Cove property was assessed at \$112,800, Royal Springs Court was assessed

298. *Id.* at 580–81, 812 S.E.2d at 662–63.

299. *Id.* at 581, 812 S.E.2d at 663.

300. *Id.*

301. *Id.*

302. *Id.* at 582, 812 S.E.2d at 663 (citing *Canady v. Cumberland Harbour Prop. Owners Ass’n*, 340 Ga. App. 439, 797 S.E.2d 674 (2017)).

303. *Id.*

304. 349 Ga. App. 867, 826 S.E.2d 685 (2019).

305. *Id.* at 869, 826 S.E.2d at 687.

at \$109,900, and Smithfield Trail was assessed at \$128,400. Astor appealed the tax assessment to the DeKalb County Board of Equalization which upheld each assessment. Astor appealed to the trial court.³⁰⁶

In the trial court, Astor moved for summary judgment on the grounds that the foreclosures were arm's length bona fide sales and therefore the assessed value was limited to the 2015 purchase price pursuant to statute O.C.G.A. § 48-5-2.³⁰⁷ The trial court granted Astor's motion for summary judgment limiting the assessed value of the properties to the 2015 foreclosure sales prices.³⁰⁸

DeKalb County appealed on the grounds that the purchase of the three properties were not arm's length transactions because the sellers (the parties whose interests were being foreclosed) were not willing participants to the sales and were not participating in the sales.³⁰⁹

After first examining the statutes governing assessment, the court of appeals held that the foreclosure sales were bona fide arm's length transactions.³¹⁰ DeKalb County relied upon the language of O.C.G.A. § 48-5-2, which provides that, for an assessment to be stayed, the purchase must be in good faith and carried out by a willing buyer and a willing seller each acting in his or her own self-interest, "including but not limited to a distress sale, short sale, bank sale, or sale at a public auction."³¹¹ However, that provision cannot be read standing alone. The court of appeals examined three statutory provisions: O.C.G.A. § 48-5-1,³¹² which excludes forced sales from setting the valuation of a property; O.C.G.A. § 48-5-2(3),³¹³ which freezes the assessed value to the price paid at a recent arm's length bona fide sale; and O.C.G.A. § 48-5-2(1),³¹⁴ which defines the terms "arm's length, bona fide sale." Then, the court considered the language of O.C.G.A. § 48-5-2 which provides "[n]otwithstanding any other provision of this chapter to the contrary."³¹⁵ Examined together using the rules of statutory

306. *Id.* at 867, 826 S.E.2d at 686.

307. O.C.G.A. § 48-5-2 (2019).

308. *Astor*, 349 Ga. App. at 867–68, 826 S.E.2d at 686–87.

309. *Id.* at 868, 826 S.E.2d at 687.

310. *Id.* at 871, 826 S.E.2d at 688.

311. *Id.*

312. O.C.G.A. § 48-5-1 (2019).

313. O.C.G.A. § 48-5-2(3) (2019).

314. O.C.G.A. § 48-5-2(1) (2019).

315. *Astor*, 349 Ga. App. at 869, 826 S.E.2d at 688.

construction, the court concluded that a foreclosure sale is an arm's length, bona fide sale.³¹⁶

316. *Id.* at 868–70, 826 S.E.2d at 687–88 (emphasis omitted).