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Real Property

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I. Introduction

During the survey period, many cases addressed real property issues in Georgia. Georgia courts were most active in the areas of zoning, condemnation, and landlord-tenant law. In the following pages, the authors review certain cases that signal developing trends or provide guidance in a specific area of the law.

II. Mineral Rights

An interesting mineral rights case concerned the constitutionality of Official Code of Georgia Annotated ("O.C.G.A.") section 44-5-168. The statute provides that if owners of mineral interests do not, within a period of seven years, either (1) work their mineral rights, (2) attempt to work their mineral rights, or (3) pay property taxes on their mineral rights in order to protect such rights, the fee owner may reclaim the mineral rights by adverse possession.[1] While much used over the years since its enactment, this section's constitutionality had not been upheld previously. In *Georgia Marble Co. v. Whitlock*,[2] the Georgia Supreme Court

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1. *See generally* O.C.G.A. § 44-5-168 (1991).
2. 260 Ga. 350, 392 S.E.2d 881 (1990).

rejected Georgia Marble's claim that section 44-5-168 amounts to an uncompensated taking of property.[3]

Whitlock, the fee owner, sued to gain title to Georgia Marble's mineral rights by adverse possession. Georgia Marble admitted that it had neither worked nor attempted to work its mineral rights, but claimed that it had paid taxes on the rights during the previous seven years. Even if it had not paid taxes on the mineral rights, Georgia Marble argued the statute providing for loss of its mineral rights was unconstitutional. The trial court found that Georgia Marble had neither specifically returned the particular mineral rights for property tax purposes, nor paid property taxes on them for the tax years 1980 to 1987. Therefore, Georgia Marble lost its mineral rights under section 44-5-168, which the court held to be constitutional.[4]

The supreme court upheld this decision, stating that:

> O.C.G.A. § 44-5-168 gives the owners of severed mineral interests three ways to protect their property: [T]hey may work the rights; they may attempt to work the rights; they may pay taxes on the rights. Only if the owner fails to comply with the State's requirements for seven years will the owner's mineral interests lapse and return to the owner of the fee.[5]

Therefore, there had not been an uncompensated taking of Georgia Marble's property, but rather a lapse in their compliance with the statute, which allowed a successful claim of adverse possession by the fee owner.[6] *Georgia Marble* serves as a warning that holders of mineral rights must comply with 44-5-168 to maintain those rights.

III. EASEMENTS

Two cases decided during the past year significantly affected easement law. The first of these, *Jakobsen v. Colonial Pipeline Co.*,[7] addressed the extent to which the holder of an easement may side-cut trees that are not located within the easement area.[8] Jakobsen's property was subject to four petroleum pipeline easements in favor of Colonial Pipeline Company and Plantation Pipeline Company. Federal regulations require companies operating petroleum pipelines to inspect these pipelines at least twenty-six times per year. Because Colonial and Plantation operated over 8,000

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3. *Id.* at 355, 392 S.E.2d at 885-86.
4. *Id.* at 351-52, 392 S.E.2d at 882-84.
5. *Id.* at 355, 392 S.E.2d at 885.
6. *Id.*, 392 S.E.2d at 885-86.
7. 260 Ga. 565, 397 S.E.2d 435 (1990).
8. *Id.* at 566, 397 S.E.2d at 437.

miles of pipeline, and because ground inspection of pipeline areas would be virtually impossible, the companies used aerial inspections.[9]

The trial court found that Colonial and Plantation had conducted aerial patrols over Jakobsen's property since 1949 and that the pipelines on Jakobsen's property were overgrown with " 'trees and brush . . . [so as to] obscure the right of way to the extent that . . . [Colonial's and Plantation's] aerial patrolling is ineffective in determining the surface conditions on or adjacent to the right of way.' "[10]

After acknowledging the findings of the trial court, the Georgia Supreme Court turned to the easement document for guidance in determining whether to allow Colonial to side-cut the trees that encroached on its easement area.[11] According to the easement, Colonial and Plantation had the right to " 'maintain, operate, alter, repair, remove and replace' the pipes . . . and the 'right to do whatever may be requisite for the enjoyment of the rights' " granted by the easement.[12] The court stated that an easement "impliedly includes the authority to do those things which are reasonably necessary for the enjoyment of the things granted."[13] In addition, the trial court's order did not authorize the removal of trees not within the easement area, but only authorized trimming those portions that encroached upon the easement area.[14] In essence, *Jakobsen*, over a strong dissent, stands for an easement holder's right to patrol and inspect that easement in a reasonable manner, as well as the right to make such reasonable uses and adjustments as are necessary for the practical enjoyment of the easement.

The second significant easement case, *Glass v. Carnes*,[15] was a continuation of the *Carnes v. Charlock Investments (USA), Inc.*[16] litigation stream. In *Charlock* defendant, Charlock, sued to enjoin the Gwinnett County Board of Commissioners from closing a portion of Settles Bridge Road, which traversed the Rees farm. Charlock owned property abutting the road that adjoined the north side of the Rees farm. The company intended to develop its property for residential purposes and wanted to keep the road open.[17]

As discussed in *Glass*, a county may declare a section of the county road system abandoned when it determines that this section "has for any

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9. *Id.* at 565, 397 S.E.2d at 436.
10. *Id.*
11. *Id.* at 565-66, 397 S.E.2d at 436-37.
12. *Id.*, 397 S.E.2d at 436.
13. *Id.* at 566, 397 S.E.2d at 437 (citing Brooke v. Dellinger, 193 Ga. 66, 17 S.E.2d 178 (1941)).
14. *Id.*
15. 260 Ga. 627, 398 S.E.2d 7 (1990).
16. 258 Ga. 771, 373 S.E.2d 742 (1988).
17. *Id.* at 771-72, 373 S.E.2d at 743-44.

reason ceased to be used by the public to the extent that no substantial public purpose is served by it."[18] The county must also give notice to affected property owners. Evidence showed that the public had used Settles Bridge Road since at least 1955, and it is the only road in Land Lot 285 of Gwinnett County that runs in a northerly direction to the Chattahoochee River. When a property owner dedicates a road with no express grant of fee simple title, an easement results.[19]

In *Glass* the trial court found that Gwinnett County had permanently closed and abandoned the contested portion of Settles Bridge Road, that the county could not legally reopen the road, and that the county's rights in the property had reverted to Rees.[20] Charlock maintained that the county had fee simple title to the road and was entitled to reopen it, while the Glasses maintained that they had an express appurtenant easement over the portion of the road that traversed the Rees farm.[21] The court found that there was no question of necessity because the disputed portion of the road was not the only means of ingress and egress available to Charlock or the Glasses. For these reasons, the Glasses did not have a private easement. The right of Charlock and the Glasses to use the road is no greater than the general public's right, which the county extinguished by abandoning the road.[22]

On appeal, the supreme court applied O.C.G.A. section 32-7-2(b)(1).[23] The statute provides that once a county abandons a section of the county road system, "that section of road shall no longer be part of the county road system and the rights of the public in and to the section of road as a public road shall cease."[24] The court, therefore, declared that once the county had abandoned the road, the Board of Commissioners had no authority to reopen it.[25] Concerning the easement claimed by the Glasses, the court held that when a party has a private easement over property that "through dedication later becomes a public road, vacation or abandonment of the road by a public body, i.e., the county, does not affect the rights of the holder of the private easement."[26] Therefore, the trial court erred in ruling that the Glasses did not have an express easement.[27] How-

18. O.C.G.A. § 32-7-2(b)(1) (1991).
19. 260 Ga. at 630, 398 S.E.2d at 9.
20. *Id.* at 631, 398 S.E.2d at 10.
21. *Id.* at 628-29, 398 S.E.2d at 8.
22. *Id.* at 631, 398 S.E.2d at 10.
23. *Id.*
24. O.C.G.A. § 32-7-2(b)(1) (1991).
25. 260 Ga. at 631, 398 S.E.2d at 10.
26. *Id.* at 632, 398 S.E.2d at 11; *see also* Southern Ry. v. Wages, 203 Ga. 502, 47 S.E.2d 501 (1948); Harris v. Powell, 177 Ga. 15, 169 S.E. 355 (1933).
27. 260 Ga. at 632, 398 S.E.2d at 11.

ever, the court also stated that it "does not appear that Charlock has any express or implied easement over the contested portion of the roadway."[28]

IV. Construction of Documents

The court of appeals held in *Patel v. Gingery Associates*[29] that when two agreements are independent of, and not conditional upon, each other, the breach of one is not a valid defense to default on the other.[30] In *Patel* Patel and his brother purchased all of the stock in a motel from Mr. Gingery's father in 1979, giving him a note secured by a deed to secure debt. Mr. Gingery agreed not to unreasonably withhold his consent to the future sale of the motel while the deed to secure debt remained outstanding. A year later, Mr. Gingery died and Gingery Associates (his sons) entered into a series of complex agreements to resell the motel to Patel and his brother for tax and other purposes. A number of agreements arose out of these negotiations, including a loan and security agreement, but not an agreement on the withholding of consent to sale.[31]

The Patels sought to sell the motel in 1983, but Gingery Associates refused to consent to the sale. Patel and his brother continued to make payments on the note for several years. When they stopped making payments, the Gingery sons foreclosed on the property, confirmed the sale, and sued to recover the deficiency. The Patels asserted that the Gingery sons' refusal to consent to the Patel's proposed sale of the motel violated the Patels' original agreement with Mr. Gingery.[32]

The court of appeals held that the fundamental issue was the relationship between the agreements.[33] The agreements were independent and not conditional upon each other because the agreement between the Patels and Mr. Gingery was separate from the agreement between the Patels and Gingery's sons.[34] Therefore, a breach of the original agreement by Gingery Associates would not be a defense to the Patels' later default on their note to the Gingery Associates. The court further stated that Mr. Gingery's agreement not to be "unreasonable" in the future was too uncertain, indefinite, and vague to be enforceable.[35] The authors do not agree with the court's reasoning. A reasonableness provision is not uncertain or vague, but rather is based on the widely used and accepted con-

28. *Id.* at 633, 398 S.E.2d at 12.
29. 196 Ga. App. 203, 395 S.E.2d 595 (1990).
30. *Id.* at 205, 395 S.E.2d at 597.
31. *Id.* at 204, 395 S.E.2d at 596.
32. *Id.* at 204-05, 395 S.E.2d at 596.
33. *Id.* at 205, 395 S.E.2d at 597.
34. *Id.*
35. *Id.* at 206, 395 S.E.2d at 597 (citing Farmer v. Argenta, 174 Ga. App. 682, 331 S.E.2d 60 (1985)).

cept of commercial reasonableness, which is common in all forms of contracts.

The court concluded that even if the original agreement were enforceable, Patel and his brother had disregarded the alleged breach of the original agreement, complied with their obligations for several years, and then asserted the breach as a defense to a subsequent action.[36] In so doing, they waived the right to assert the breach.[37]

V. Mortgages and Security Deeds

The concept of novation has become an increasingly important issue as the number of loan restructurings increases. In *Commonwealth Land Title Insurance Co. v. Miller*,[38] the court of appeals held that when a valid obligation exists between the original mortgagee and mortgagor, the mortgagor cannot avoid its obligations under the mortgage simply by transferring its interest in the secured property.[39]

In *Miller* defendants, Albert and Linda Miller, purchased a residence in 1979 by delivering a deed to secure debt and promissory note to the seller, Hazel Bartow. After their divorce, Mr. Miller deeded the property to Mrs. Miller. Subsequently, he bought the property back from her. The Millers allegedly made both transfers with the seller's oral approval. In early 1985, Mr. Miller sold the property. The purchaser began making payments on the note, but defaulted in August 1985. The original seller, Mrs. Bartow, then assigned the note to plaintiff, Commonwealth Land Title Insurance Company, which sued the Millers to recover on the note. Mr. Miller asserted that Mrs. Bartow's failure to object to the several transfers constituted a release by novation. The trial judge overruled Commonwealth's motion for directed verdict, and the jury found in favor of Mr. Miller.[40]

The court of appeals held that Mr. Miller remained obligated on the original mortgage because Mrs. Bartow's actions did not constitute a novation or release of Mr. Miller as the original debtor.[41] Revisiting its 1989 decision in *Randall v. Norton*,[42] the court held that when the original mortgagor is not released and a new mortgagor is substituted in his place, no novation has occurred and the original mortgagor remains liable on

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36. *Id.*
37. *Id.*
38. 195 Ga. App. 830, 395 S.E.2d 243 (1990).
39. *Id.* at 831-32, 395 S.E.2d at 244.
40. *Id.* at 830-31, 395 S.E.2d at 243-44.
41. *Id.* at 831, 395 S.E.2d at 244.
42. 192 Ga. App. 734, 386 S.E.2d 518 (1989).

the note.[43] Although the purchaser had begun paying on the note, the appropriate parties had not agreed to create a new contract and release the original mortgagor from his obligations under the original loan documents.[44]

In *Durden v. Hilton Head Bank & Trust Co.*,[45] a dispute arose between the holders of two deeds to secure debt that conveyed the same property. Each party held a deed to secure debt when fire destroyed the improvements on the property. The fire insurer filed an interpleader action and paid the insurance proceeds to the court. The trial court granted summary judgment in favor of the bank, finding that the Bank's deed to secure debt took priority, and, thus, entitling it to the proceeds. The evidence showed that the same attorney closed both deals involving the property. The deed to secure debt that favored Durden was not recorded until May 1987, although the note that it secured was due and payable in February 1986. In November 1986, the attorney closed a transaction in which the bank took a deed to secure debt from the same borrower on the same property. The bank promptly recorded its security deed.[46]

The court in *Durden* had to determine whether the bank had knowledge or notice, via its agent, the attorney, of the prior deed to secure debt.[47] The trial court accepted the attorney's uncontradicted testimony that he could not remember the earlier transaction because it involved the real estate, estate collateral, and other agreements as well.[48] The court applied O.C.G.A. section 44-2-1, which provides that a prior unrecorded security deed loses priority to a subsequent purchaser who files without notice of the prior deed.[49] Relying on the attorney's testimony, the court concluded that Durden's security deed lost priority to the later deed because he failed to record his deed until May 1987.[50] The court of appeals upheld the trial court's decision.[51]

Another case required the court's interpretation of mortgage documents when four separate security deeds secured the same note. In *Commercial Exchange Bank v. Johnson*,[52] the court of appeals interpreted

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43. 195 Ga. App. at 831, 395 S.E.2d at 244.

44. *See also* Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981); Hall v. Robertson, 168 Ga. App. 582, 309 S.E.2d 690 (1983).

45. 198 Ga. App. 232, 401 S.E.2d 539 (1990).

46. *Id.* at 232, 401 S.E.2d at 539.

47. *Id.* at 233, 401 S.E.2d at 540. *See generally* O.C.G.A. § 44-2-1 (1991) (with respect to knowledge and notice).

48. 198 Ga. App. at 233, 401 S.E.2d at 540.

49. O.C.G.A. § 44-2-1 (1991).

50. 198 Ga. App. at 232, 401 S.E.2d at 539.

51. *Id.* at 234, 401 S.E.2d at 540.

52. 197 Ga. App. 529, 398 S.E.2d 817 (1990).

the term "debtor" under O.C.G.A. section 44-14-161.[53] Commercial Exchange Bank held a note that was executed by Max and Betty Johnson, but secured by four separate deeds to secure debt. Each deed contained a "dragnet clause," and each conveyed a separate tract of land. Max Johnson, individually, was grantor of two of the deeds; Shiloh Venture, Inc. ("Shiloh"), of which Max Johnson was chairman of the board and primary shareholder, was grantor of another deed; and Johnsoncraft Homes, Trust ("Johnsoncraft"), of which Max and Betty Johnson were trustees, was the grantor of the final deed. After it foreclosed on all the deeds, the bank filed a complaint for confirmation of the foreclosure sales, naming as defendants only Max and Betty Johnson.[54]

The trial court denied the bank's request to confirm the sale of the tracts conveyed by Shiloh and Johnsoncraft. Because Shiloh and Johnsoncraft were debtors under section 44-14-161, and because the complaint did not name them as defendants, the foreclosure sales on their properties were not subject to confirmation.[55] Restating its ruling in *First National Bank & Trust Co. v. Kunes*,[56] the court of appeals stated that "[t]he purpose of this Code section [O.C.G.A. section 44-14-161] is to protect debtors from deficiency judgments when the forced sale of their property brings less than the fair market value."[57]

In the instant case, Shiloh and Johnsoncraft, as grantors of separate deeds to secure debt, were "debtors" under the statute until the foreclosure sale was complete.[58] However, upon completion of the foreclosure sale, Shiloh and Johnsoncraft had satisfied their obligations as guarantors and thus were no longer "debtors" within the meaning of section 44-14-161.[59] The statute limited their financial responsibility to the proceeds from the sale of the properties that they specifically conveyed; they had no stake in a deficiency judgment.[60] Therefore, the trial court should have confirmed the foreclosure sales of the tracts conveyed by Shiloh and Johnsoncraft.[61] According to the court, because Shiloh and Johnsoncraft were not then "debtors" under the statute, the statute did not require the bank to notify them of the impending confirmation of the foreclosure sales.[62] The significance of *Johnson* lies in the court's interpretation of the term "debtor" under section 44-14-161. The statute refers to the

53. *Id.* at 530, 398 S.E.2d at 819.
54. 197 Ga. App. at 529, 398 S.E.2d at 818-19.
55. *Id.* at 529-30, 398 S.E.2d at 819.
56. 128 Ga. App. 565, 197 S.E.2d 446 (1973).
57. 197 Ga. App. at 530, 398 S.E.2d at 819.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

debtor on the underlying debt: the maker, surety, or guarantor of a promissory note, for example.[63] The term "debtor" does not include a mere grantor of a security interest for indebtedness, unless the grantor is also obligated to repay the indebtedness.[64]

A final case, *American Mini-Storage, Marietta Boulevard, Ltd. v. Investguard, Ltd.*[65] is worthy of mention. The issue in *American Mini-Storage* was whether the payee of a note must accept, in full satisfaction of a debt, a quitclaim deed conveying the property held as security for the note.[66] In a one-page opinion, the court of appeals held that the payee of a note has the right to elect which remedy it shall pursue following default; the payor cannot force the payee to accept the secured property in satisfaction of the debt.[67]

VI. FORECLOSURE

In *C.K.C., Inc. v. Free*,[68] the court again interpreted O.C.G.A. section 44-14-161. The issue was whether a creditor can secure a deficiency judgment on real estate sold by foreclosure, when the court did not confirm the foreclosure sale.[69] Appellant purchased certain real property from appellees and executed two separate promissory notes in favor of appellees. One note represented a portion of the down payment; the second note represented the balance of the purchase price. When appellant defaulted under both notes, appellees notified appellant of the acceleration of the first note and of their intention to foreclose under the security deed. Appellees mentioned only the second note in the foreclosure advertisement. Appellees then bought the property themselves at the sale for an amount less than that due under the notes. In a companion case, the trial court denied their application for confirmation. The denial in that case became final because the time for appeal expired.[70]

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63. *Id.*
64. *Id.*
65. 196 Ga. App. 862, 397 S.E.2d 199 (1990).
66. *Id.* at 863, 397 S.E.2d at 200.
67. *Id.* (citations omitted).
68. 196 Ga. App. 280, 395 S.E.2d 666 (1990).
69. *Id.* at 282, 395 S.E.2d at 667.
70. *Id.* at 280-81, 395 S.E.2d at 666-67. As stated in this case,

> [a]fter the trial court denied the confirmation [of the foreclosure sale], appellees appealed to this court in a companion case which we remanded to the trial court for specification of findings of fact and conclusions of law. The confirmation was again denied, and this court has no record of any subsequent appeal. The time for such appeal having expired, the denial of confirmation by the trial court is final.

Id. at 281, 395 S.E.2d at 667.

The court of appeals held that the notice of acceleration of the smaller note given to appellant indicated that the deed to secure debt securing that note would be foreclosed.[71] Therefore, the foreclosure on that note would affect the larger note.[72] Quoting a federal district court case, the court held that " '[a] deficiency judgment is the imposition of personal liability on mortgagor for unpaid balance of mortgage debt after foreclosure has failed to yield full amount of due debt.' "[73] The instant action was merely an effort to obtain a deficiency judgment, which was barred because appellees failed to obtain a confirmation.[74] Summary judgment in favor of appellant, therefore, was appropriate.[75]

VII. DISPOSSESSION

The only significant dispossession case decided during the survey period was *Branch v. Wesav Financial Corp.*[76] The primary issue in *Branch* was whether a prospective purchaser in possession of a mobile home is subject to a dispossessory proceeding by the prospective vendor who seeks return of the mobile home.[77] Defendants entered into a contract to purchase a mobile home from plaintiff. The mobile home was delivered to defendants before plaintiff approved defendants' credit application. When the credit application was subsequently disapproved, plaintiff sought return of the mobile home and initiated a dispossessory proceeding pursuant to O.C.G.A. section 44-7-50.[78] The trial court granted plaintiff's request for a writ of possession.[79] The court of appeals held that the parties did not have a contract for the lease of real property, but rather a conditional contract for the sale of personal property (the mobile home).[80] Therefore, the trial court erred in granting the writ and the court of appeals reversed the trial court's decision.[81]

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71. *Id.* at 282-83, 395 S.E.2d at 668.

72. *Id.*

73. *Id.* at 282, 395 S.E.2d at 667 (quoting Redman Indus., Inc. v. Tower Properties, Inc., 517 F. Supp. 144, 151 (N.D. Ga. 1981)).

74. *Id.* at 283, 395 S.E.2d at 668.

75. *Id.*

76. 198 Ga. App. 347, 401 S.E.2d 569 (1991).

77. *Id.* at 347, 401 S.E.2d at 570.

78. *Id.* (citing O.C.G.A. § 44-7-50 (1991)).

79. *Id.* 401 S.E.2d at 570.

80. *Id.*

81. *Id.* The court of appeals stated that plaintiff's appropriate remedy for the return of the mobile home was an action in trover pursuant to O.C.G.A. § 44-12-150 (1982). 198 Ga. App. at 347, 401 S.E.2d at 570.

VIII. LANDLORD AND TENANT

During the survey period, Georgia courts decided the most cases of interest in the area of landlord and tenant law. In *Wells v. Citizens & Southern Trust Co.*,[82] the court of appeals upheld the trial court's grant of a motion for summary judgment in favor of the landlord based on the assumption of risk doctrine.[83] Appellant Wells sued appellee C&S Trust, as owners and managers of an apartment complex, to recover for injuries sustained when Wells fell while descending a stairway between his apartment and the parking lot. Wells claimed that the stairway was insufficiently lighted and that defendants were liable for allowing the unsafe condition to exist. Evidence was shown at trial that Wells had used the back staircase of his apartment building while aware that the lighting in the stairwell was insufficient. Evidence also showed that he had other means of egress from his apartment. He proceeded downstairs while at the same time observing that the overhead light of the stairway was not on. The trial court granted defendant's motion for summary judgment, stating that Wells assumed the risk and was therefore barred from recovery.[84]

On appeal, the court of appeals held that a landlord is under a statutory duty to keep the premises in good repair, but he does not become an insurer of the tenant's safety.[85] The court in *Wells* revisited its 1989 decision in *Hall v. Thompson*[86] and held:

> "Even though the condition of the premises may be hazardous and the landlord negligent, he may not be liable for injury where the [tenant] had equal or superior knowledge of the alleged defect. If a [tenant] knows of a defect, '[he] must use all of [his] senses in a reasonable measure amounting to ordinary care in discovering and avoiding those things that might cause hurt to [him].' "[87]

Furthermore, Wells was charged " 'with knowledge of those defects which he had actually observed or which were so transparently obvious that his failure to observe them cannot reasonably be excused.' "[88] Based on this reasoning, the court held that Wells had assumed the risk and that he did

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82. 199 Ga. App. 31, 403 S.E.2d 826 (1991).

83. *Id.* at 32, 403 S.E.2d at 828.

84. *Id.* at 31, 403 S.E.2d at 827.

85. *Id.*

86. 193 Ga. App. 574, 388 S.E.2d 381 (1989).

87. 199 Ga. App. at 31-32, 403 S.E.2d at 827 (quoting Hall v. Thompson, 193 Ga. App. 574, 574-75, 388 S.E.2d 381, 382 (1989)).

88. *Id.* at 32, 403 S.E.2d at 827 (quoting Oliver v. Complements, Ltd., 190 Ga. App. 30, 32, 378 S.E.2d 154, 155 (1989)).

not exercise ordinary care in avoiding the dangers; therefore, summary judgment at the trial court level was appropriate.[89]

Jones v. Campbell[90] is another case addressing a tenant injury. Mr. and Mrs. Jones leased a residence from the Campbells and lived there for seven years before the incident at issue occurred in 1986. At the rear of the property was a stream that served as storm drainage for the area. The stream was also adjacent to a sewerage easement. Mr. Jones mowed the lawn twice weekly during the time that the Joneses lived there, and the banks along the stream eroded between one and two feet during the same period. Mrs. Jones notified the Campbells that erosion was occurring, and Mr. Campbell visited the property in 1985 to examine the area. After city representatives viewed the property, Mr. Campbell agreed to pay the city to repair the easement. The repair was not effected prior to the accident. In July 1986, Mr. Jones was mowing the grass when the ground gave way. He fell into the hole, and his foot was caught under the lawn mower; he lost several toes and received severe injury to his foot. Findings showed that he had not slipped on the bank, but rather that a hole had appeared in the ground several feet from the stream. Mr. Jones brought suit against the Campbells and the city. Only the Campbells remained as defendants, and the court entered summary judgment in favor of the landlords.[91]

On appeal, the court of appeals held that the primary issue was proximate cause.[92] Acknowledging that the Campbells may have been negligent in allowing the erosion to occur, the court held there was "no evidence to show that the Campbells, any more than the Joneses, should reasonably have foreseen the creation of such a hole appearing by the continuing erosion."[93] Therefore, plaintiff, in order to recover, would have to show evidence of causation linking the specific "defect" that caused the injury with the erosion.[94] The court ruled that in order to recover, the tenant is required to show that the landlord breached his duty to keep the premises in good repair and that the breach was the proximate cause of the injury sustained.[95] The court in *Jones* found no such cause-effect connection and held that summary judgment in favor of the landlord was appropriate.[96]

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89. *Id.*, 403 S.E.2d at 828.
90. 198 Ga. App. 83, 400 S.E.2d 364 (1990).
91. *Id.* at 83-84, 400 S.E.2d 364-65.
92. *Id.* at 85, 400 S.E.2d at 365-66.
93. *Id.*, 400 S.E.2d at 366.
94. *Id.*
95. *Id.* at 86, 400 S.E.2d at 366.
96. *Id.*

In *Borg-Warner Insurance Finance Corp. v. Executive Park Ventures*,[97] the issue was the enforceability of a lease clause that provided that landlord and tenant shall " 'hold each other (including its employees, customers, invitees, licensees and others) harmless from and against any and all liability, damage, injury, action or causes of action whatsoever suffered or occasioned upon the premises or arising out of the operation, conduct and use of the premises.' "[98] Executive Park Ventures brought suit alleging that one of Borg-Warner's employees or agents had negligently set the fire that partially destroyed the offices. Borg-Warner asserted that the lease provision quoted above should shield Borg-Warner from liability. The trial court found the provisions unenforceable, and Borg-Warner appealed.[99]

The court of appeals held that although parties can secure enforceable waivers of liability by clearly and unequivocally expressing these waivers, the lease provision quoted above did not clearly and unequivocally express the mutual intent of the parties to waive liability for the consequences of their respective negligent acts or omissions.[100] Thus, the provision would not constitute an enforceable bar to the instant action and, therefore, could not be upheld.[101] The court stated that such a provision which " 'purport[ed] to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee [was] against public policy and [was] void and unenforceable.' "[102] Therefore, the court affirmed the unenforceability of the lease provision.[103]

All drafters of leases should carefully review the following case involving the extension of a lease term. In *Hertz Equipment Rental Corp. v. Evans*,[104] the Georgia Supreme Court interpreted an option to purchase contained in a lease. The original lease between landlord and tenant contained a provision that the ten-year lease term could be extended by one five-year extension period and that:

> "[i]n the event that the term of this lease is renewed, as herein provided, after the expiration of the first year of said extended term, Lessee shall have the right and option to purchase the premises hereby leased. Such

97. 198 Ga. App. 70, 400 S.E.2d 340 (1990).
98. *Id.* at 70, 400 S.E.2d at 341.
99. *Id.*
100. *Id.* (citations omitted).
101. *Id.* at 70-71, 400 S.E.2d at 341.
102. *Id.* (quoting O.C.G.A. § 13-8-2(b) (Supp. 1991)).
103. *Id.* at 71, 400 S.E.2d at 341.
104. 260 Ga. 532, 397 S.E.2d 692 (1990).

> option may be exercised at any time by Lessee giving ninety days written notice thereof to Lessor."[105]

Tenant exercised the option to extend the lease for five years. In 1979 (after 15 years), the parties executed another document entitled "extension of lease." This document extended the term of lease for three more years, and it also contained a tenant option that allowed the lease to be extended for two additional three-year terms. That document provided that the original lease remained in full force and effect except as changed by the second document. At the end of the final nine years, the tenant attempted to exercise the option to purchase the property. The landlord refused to comply, and the tenant brought an action for specific performance.[106]

The landlord made a motion for summary judgment, and the trial court granted it. The supreme court affirmed the trial court's ruling, citing O.C.G.A. section 13-2-1,[107] which states that "[t]he construction of a contract is a question of law for the court."[108] The supreme court reasoned that the 1979 lease extension was a subsequent agreement that referred to and extended the term of the 1964 lease, but that the option to purchase, by its own term, "had viability only through the expiration of the lease extension provided for in the 1964 lease, i.e., the five year extension that was exercised in 1974 and which expired in 1979."[109] Further, because nothing about the option to purchase was affected by the 1979 document, it followed that the option had to have been exercised during the original five year extension term, and it was not so exercised.[110] Therefore, summary judgment in favor of the landlord dismissing tenant's claim for specific performance was appropriate.

Another case of interest raises the recurring issue of landlord reasonableness, a question that the authors discussed in last year's survey.[111] In *Vaswani v. Wohletz*,[112] the court of appeals ruled on the issue of a landlord's ability to unreasonably withhold consent to a proposed assignment by a tenant in the absence of a provision regarding reasonableness. In *Vaswani* the lease provided that the tenant would not assign the lease or sublet the premises without the prior written consent of the landlord.[113]

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105. *Id.* at 532, 397 S.E.2d at 693 (quoting the lease).
106. *Id.*
107. O.C.G.A. § 13-2-1 (1982).
108. 260 Ga. at 533, 397 S.E.2d at 694 (citing O.C.G.A. § 13-2-1 (1982)).
109. *Id.*, 397 S.E.2d at 693.
110. *Id.*
111. *See* Robert L. Foreman, Jr. et al., *Real Property*, 42 MERCER L. REV. 389, 401 (1990).
112. 196 Ga. App. 676, 396 S.E.2d 593 (1990).
113. *Id.* at 676, 396 S.E.2d at 594.

The landlord never gave written consent to an assignment of the lease by the tenant and brought this action to recover rents that he was allegedly owed by the tenant. The trial court entered judgment on a jury's verdict in favor of the landlord, and the tenant appealed.[114]

The court of appeals held, as it had in 1987 in *Nguyen v. Manley*,[115] that the decision in *Stern's Gallery of Gifts v. Corp. Property Investors*[116] did not purport to adopt in Georgia a "trend" toward requiring a showing of reasonableness in the landlord's withholding of consent, even in the absence of a lease clause requiring that such consent not be unreasonably withheld.[117] The court in *Vaswani* stated that Georgia courts have been reluctant to impose a requirement of reasonableness on consent when a lease does not so provide.[118] In accordance with these decisions, the court held that the terms of the lease could not be construed as requiring reasonableness on the part of the landlord in granting or withholding consent to assignment.[119]

Another case dealing with an emerging body of law in Georgia is *Joyce's Submarine Sandwiches, Inc. v. California Public Employees Retirement System*,[120] in which the court of appeals ruled on the issue of liquidated damages. The court cited *Southeastern Land Fund v. Real Estate World*[121] for the proposition that whether liquidated damages provisions are enforceable depends on whether three requirements are met: "First, the injury caused by the breach must be difficult or impossible of accurate estimation; second, the parties must intend to provide for damages rather than for a penalty, and third, the sum stipulated must be a reasonable pre-estimate of the probable loss."[122] Although the *Southeastern Land Fund* doctrine has been eroding in Georgia, as the authors mentioned in last year's survey,[123] the court in *Joyce's* found a portion of the doctrine instructive. The court found that under the circumstances the $50 per day liquidated damages provided for in the lease was a reasonable pre-estimate of a probable loss and therefore the trial court had correctly found that the lease provided for liquidated damages and not a pen-

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114. *Id.*

115. 185 Ga. App. 187, 363 S.E.2d 613 (1987).

116. 176 Ga. App. 586, 337 S.E.2d 29 (1985).

117. 196 Ga. App. at 676-77, 396 S.E.2d 593-94.

118. 196 Ga. App. at 677, 397 S.E.2d at 44 (citing Sun Ins. Servs., Inc. v. 260 Peachtree Street, 192 Ga. App. 482, 385 S.E.2d 127 (1989)).

119. *Id.*

120. 195 Ga. App. 748, 395 S.E.2d 257 (1990).

121. 237 Ga. 227, 227 S.E.2d 340 (1976).

122. *Id.* at 230, 227 S.E.2d at 343 (citations omitted); *see also* Fields v. Smith, 190 Ga. App. 369, 378 S.E.2d 741 (1989).

123. *See* Foreman, *supra* note 111, at 400-01.

alty.[124] Therefore, the court in *Joyce's* based its decision on one of the three elements of the *Southeastern Land Fund* decision, the element of liquidated damages as a reasonable pre-estimate of anticipated loss. The court in *Joyce's* upheld the decision of the trial court awarding past due rent and liquidated damages to the California Public Employees Retirement System.[125] *Joyce's* is noteworthy because it is another case in the line of cases that cited *Southeastern Land Fund* and that applied at least part of its test to the question of liquidated damages.[126]

CBL & Associates, Inc. v. McCrory Corp.[127] concerned a "continuous operation" clause. The United States District Court for the Middle District of Georgia held in *CBL* that a landlord's request for injunctive relief requiring a tenant to continuously operate the leased premises should not be granted because the court was unwilling and unable to "undertake the continuous and detailed supervision that would be required to enforce" the injunction.[128] In 1980 CBL leased over 9,000 square feet of space in Georgia Square Mall to McCrory's. McCrory's was the mall's fifth largest tenant, and the lease provided for an increasing minimum annual rent as well as a percentage rental when gross sales reached a certain level. McCrory's continued to suffer declining sales and decided to close its store. The lease provided that McCrory's agreed to "operate one hundred percent (100%) of the leased premises during the entire term . . . with due diligence and efficiency so as to produce all of the gross sales which may be produced by such manner of operation."[129]

The district court stated that CBL had made an unusual request: CBL sought an injunction not to drive McCrory's out of business, but rather to keep McCrory's in business.[130] The court stated that an injunction would only be granted when good cause is shown, which consisted of (1) a substantial likelihood that CBL would prevail on the merits, (2) that CBL would suffer irreparable injury unless the injunction is granted, (3) that the threatened injury to CBL outweighs the damage to McCrory's, and (4) that the injunction would not be adverse to the public interest.[131] The court found that CBL had no chance of prevailing on the merits because the contract (in this case, the lease) must be " 'definite, certain and clear, and so precise in its terms as to the thing or things to be done by the

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124. 195 Ga. App. at 750-51, 395 S.E.2d at 259-60.

125. *Id.* at 751, 395 S.E.2d at 260.

126. *See also* Liberty Life Ins. Co. v. Thomas B. Hartley Constr. Co., 258 Ga. 808, 375 S.E.2d 222 (1989); Daniels v. Johnson, 191 Ga. App. 70, 381 S.E.2d 87 (1989).

127. 761 F. Supp. 807 (M.D. Ga. 1991).

128. *Id.* at 810.

129. *Id.* at 808.

130. *Id.*

131. *Id.* (citing Shatel Corp. v. Maota Yacht Corp., 697 F.2d 1352 (11th Cir. 1983)).

party whose performance is sought to be compelled that neither party can reasonably misunderstand it.' "[132]

The court held that it would be nearly impossible for the court to oversee McCrory's and make sure that the store remained open until the year 2000 (the lease expiration year); therefore, the court saw no choice but to deny the injunction.[133] Furthermore, the court found that CBL did not fulfill the second requirement of a successful action for an injunction in that CBL would not suffer irreparable harm if the injunction was not issued.[134] According to the court, the loss of rent was a purely economic injury, the chance for collecting percentage rent was slim (McCrory's business had been declining in recent years, and it had never paid percentage rent), and therefore a suit for rent would be an adequate remedy.[135] In addition, the court found no merit to CBL's argument that the loss of McCrory as a tenant would cause irreparable harm because McCrory's leased only 1.35% of the mall's space and was not an anchor tenant or a major draw in the mall.[136]

Another continuous operation case is *Piggly Wiggly Southern Inc. v. Heard*,[137] which dealt with the alleged breach of an implied covenant in the lease between the parties. In 1963, Piggly Wiggly entered into a lease agreement with Heard's predecessor. The lease provided for a term of fifteen years (to expire in 1979) and contained a percentage rent clause. The lease was renewed for an additional seven years and then for two additional three-year periods. In 1989, during the final extension period, Piggly Wiggly ceased operating a grocery store on the leased premises. The leased premises remained vacant, and evidence showed that the surrounding shopping center suffered as a result.[138] The trial court granted summary judgment in favor of the landlord, and the court of appeals affirmed on the basis that Piggly Wiggly had breached an express and implied covenant in the lease that obligated it to continually occupy the premises and operate a business thereupon for the duration of the lease term.[139]

The court of appeals relied on a lease provision which stated that:

> "[L]essee is leasing the leased building for use as a supermarket and the other parts of the leased property for parking and other uses incident to a supermarket business, but lessee's use of the leased building and the

132. *Id.* at 809 (quoting Martin v. Bohn, 227 Ga. 660, 662, 182 S.E.2d 428, 430 (1971)).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 810.
137. 197 Ga. App. 656, 399 S.E.2d 244 (1990), *rev'd*, 261 Ga. 503, 405 S.E.2d 478 (1991).
138. 197 Ga. App. at 656, 399 S.E.2d at 244.
139. *Id.*

> leased property shall not be limited nor restricted to such purposes, and said building and property may be used for any other lawful business . . . ."[140]

This lease provision requiring Piggly Wiggly to operate a lawful business, according to the court of appeals, implied that Piggly Wiggly would continuously operate some business on the premises; this was the intent of the landlords, who hoped to build a shopping center around Piggly Wiggly as an anchor tenant.[141] The court of appeals agreed with the reasoning of the trial court in that the term "business" did not contemplate a closed or vacant store, and therefore upheld the summary judgment in favor of the landlords.[142]

However, the supreme court reversed the decision of the appeals court in *Piggly Wiggly Southern Inc. v. Heard*,[143] just two months after *CBL* and just as the survey period closed. The supreme court held that the lease agreement between the parties did not contain an express covenant of continuous operation and that the language was plainly to the contrary.[144] Based on this reasoning, the supreme court held that the trial court and court of appeals were not authorized to construe the lease otherwise.[145] The court pointed out that the lease provided an express mitigation of such a requirement: "[L]essee's use of the leased building and leased property shall not be limited nor restricted to such purposes [use as a supermarket, etc.], and said building and property may be used for any other lawful business."[146] Because the lease contained no provision creating an implied covenant of continuous operation, the lease's provision for free assignability without consent of lessor "weighs strongly against a construction of the contract which would require the tenant to continue its business throughout the term of the lease."[147] In addition, the existence of a large minimum base rent, according to the court, weighed against an implied covenant of continuous operation. For these reasons, the supreme court reversed the decision of the court of appeals.[148] *Piggly Wiggly* was decided on grounds that the courts should not unnecessarily read additional obligations into a negotiated contract; *CBL*

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140. *Id.* at 657, 399 S.E.2d at 246 (quoting the lease).

141. *Id.* at 656, 399 S.E.2d at 244 (citing Fifth Ave. Shopping Ctr. v. Grand Union Co., 491 F. Supp. 77 (N.D. Ga. 1980)).

142. *Id.* at 658, 399 S.E.2d at 246-47.

143. 261 Ga. 503, 405 S.E.2d 478 (1991).

144. *Id.* at 504, 405 S.E.2d at 479.

145. *Id.* (citing Heyman v. Financial Properties Developers, Inc., 175 Ga. App. 146, 332 S.E.2d 893 (1985)).

146. *Id.*

147. *Id.* (citing Kroger v. Bonny Corp., 134 Ga. App. 834, 216 S.E.2d 341 (1975)).

148. *Id.*, 405 S.E.2d at 480.

was based on the court's belief that courts should not be in the business of supervising tenants.[149]

Another landlord-tenant case is *Kurc v. Herren*,[150] in which the court of appeals held that, because there is no statutory or public policy prohibition against enforcement of a lessee's agreement, his personalty shall be deemed "abandoned" to the lessor if left on the leased premises after the termination of a lease; such a provision is enforceable in Georgia.[151] The tenant in *Kurc* argued that the personalty abandonment provision in the lease did not satisfy the test for enforceability as a measure of liquidated damages. However, the court held that the provision did not need to satisfy this test because it was not a liquidated damages provision.[152] The provision does not authorize the recovery of damages in the event of a breach, but rather provides that items of personalty remaining on the premises after the lease term are abandoned and become the property of the landlord.[153] For these reasons, the court in *Kurc* held that, although there was no Georgia authority on this issue, other jurisdictions have recognized the enforceability of such a provision, and the lease provision was enforceable.[154]

A final case of note is *Crystal Blue Granite Quarries, Inc. v. McLanahan*,[155] in which there was a dispute over a "renewal" clause. McLanahan leased nearly eighty acres for quarrying purposes to Crystal Blue's predecessor-in-interest, and the lease gave the tenant the right to renew for an additional twenty-five year period "upon the same terms and conditions [as the 1960 lease]."[156] The original lease then provided that any such renewal would provide for an increase in the minimum annual guaranteed rent along with the payment of the "prevailing rate" per cubic foot of usable granite quarried and removed, or $.10 per cubic foot, whichever was greater. If the parties were unable to agree upon the "prevailing rate," the lease stipulated that binding arbitration would result.[157]

The supreme court held in *Crystal Blue* that a lease must have a "mechanism by which certain and definite" rent may be ascertained without resorting to conflict resolution (such as arbitration) to avoid execution of an entirely new lease.[158] The court also held that reference to a "re-

149. *Id.* at 505, 405 S.E.2d at 480.
150. 196 Ga. App. 331, 396 S.E.2d 62 (1990).
151. *Id.* at 332, 396 S.E.2d at 63; *see also* Hardin v. Macon Mall, 169 Ga. App. 793, 315 S.E.2d 4 (1984).
152. 196 Ga. App. at 333, 396 S.E.2d at 64.
153. *Id.*, 396 S.E.2d at 63.
154. *Id.* at 332, 396 S.E.2d at 63.
155. 261 Ga. 267, 404 S.E.2d 266 (1991).
156. *Id.* at 267, 404 S.E.2d at 266.
157. *Id.*, 404 S.E.2d at 267.
158. *Id.* at 268, 404 S.E.2d at 268.

newal" should not be controlling, but rather the terms of the lease and their intent, which made the provision in *Crystal Blue* an extension.[159] Practitioners should remain mindful of this. The supreme court held that the execution of a new lease was necessary in *Crystal Blue* to renew the lease; in the absence of such an execution, the trial court was correct in determining that no renewal had occurred.[160]

The authors believe that the result of this case was based on form rather than substance. This in turn leads the court in the wrong direction. In practice, the terms "renewal" and "extension" are frequently used interchangeably in this context, and the existence of one or the other is not deemed to turn on whether the continuation of the lessor-lessee relationship occurs by virtue of the terms of the original lease instrument, by an amendment to that instrument, or by an entirely new instrument. If the instrument in question provides either a specified rental for the continuation period or a formula or mechanism by which the parties are committed to ascertain such rental, then the terms of the continuation of the relationship are, and should be held to be, sufficiently certain to satisfy any reasonable legal standard without regard to whether the term "renewal" or the term "extension" is used and also without regard to whether or not a new instrument is signed.

IX. LIENS

In *Galbreath v. Vondenkamp*,[161] the court of appeals ruled on the statute requiring a materialman to file an action to enforce a lien within twelve months of the date on which the debt was due to be paid by the property owner. Appellee's contractor engaged subcontractor-appellant to furnish labor and materials for heating, air conditioning, and electrical wiring for appellee's residence. Appellant completed his work on November 15, 1986. When the contractor did not pay him, appellant filed his lien on December 29, 1986, and subsequently filed suit against the contractor on September 9, 1987. In June 1988, appellant received notice that the contractor had filed bankruptcy; the subcontractor then filed a proof of claim in the bankruptcy proceeding for the amount of debt owed. The subcontractor thereafter filed an action against the owners of the property to enforce the lien, but the trial court granted the property owners' motion for summary judgment on the grounds that the subcontractor had not filed his action against the owners within the statutory twelve-month period.[162]

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159. *Id.*
160. *Id.* at 267, 404 S.E.2d at 267.
161. 197 Ga. App. 284, 398 S.E.2d 278 (1990).
162. *Id.* at 284, 398 S.E.2d at 278-79.

Citing several of its earlier rulings, the court of appeals found that the subcontractor properly filed a claim of lien within the statutory twelve-month period, and then filed a proof of claim during the contractor's subsequent bankruptcy proceeding; these actions were therefore adequate to fulfill the requirements of the statute.[163] The court held that there were certain exceptions to the twelve-month statutory period[164] and that when a subcontractor obtained a judgment in a suit against the contractor, the subcontractor could then proceed to enforce that judgment in a suit against the property owner, even when the suit against the property owner is instituted beyond the twelve-month period.[165] Basing its decision on the reasoning in *Adair Manufacturing Co. v. Allied Concrete Enterprises*[166] the court in *Galbreath* remanded the case to the trial court on the basis that summary judgment was inappropriate.[167]

An additional case involving materialmen's liens is *FS Associates, Ltd. v. McMichael's Construction Co.*,[168] in which a contractor brought an action against an owner-landlord to enforce its lien for work that the contractor performed on behalf of a tenant of the landlord. FS Associates had entered into a lease agreement with a restaurant operator which provided that FS Associates would furnish the restaurant operator with a $59,400 improvement allowance. FS Associates made it clear to the restaurant operator that this was all the money that the landlord would allot, and any costs above that would be the sole responsibility of the tenant. Upon completion of the work, McMichael's Construction presented the tenant with a bill of over $200,000. FS Associates paid the tenant the $59,400 construction allowance as specified in the lease, and the tenant passed that payment on to McMichael's. When McMichael's was not paid its balance due of $129,109, McMichael's brought suit against FS Associates to enforce its lien.[169]

The lien statute permits contractors to have a lien on real estate for which they have furnished labor, services, or materials " 'if they are furnished at the instance of the owner . . . or some person acting for the owner.' "[170] The issue in *FS Associates* was whether the restaurant operator was the agent of FS Associates in contracting for the construction

163. *Id.* at 284-85, 398 S.E.2d at 279; *see also* In re Village Centers, 80 Bankr. 574 (Bankr. N.D. Ga. 1987); Melton v. Pacific S. Mortgage Trust, 241 Ga. 589, 247 S.E.2d 76 (1978).

164. 197 Ga. App. at 284, 398 S.E.2d at 278; *see also* Adair Mortgage Co. v. Allied Concrete Enter., 144 Ga. App. 354, 241 S.E.2d 267 (1977); O.C.G.A. § 44-14-361.1 (1982).

165. 197 Ga. App. at 285, 398 S.E.2d at 280.

166. 144 Ga. App. 354, 241 S.E.2d 267 (1977).

167. 197 Ga. App. at 284, 398 S.E.2d at 278.

168. 197 Ga. App. 705, 399 S.E.2d 479 (1990).

169. *Id.* at 705-06, 399 S.E.2d at 480.

170. *Id.* at 706, 399 S.E.2d at 480 (quoting O.C.G.A. § 44-14-361 (1982 & Supp. 1991)).

work performed by McMichael's.[171] The court of appeals held that the contract between FS Associates and its tenant was clear regarding the amount allotted for tenant improvements.[172] The court further found that FS Associates was in no way a party to the contract with McMichael's; the landlord's approval of the tenant's improvements in advance was merely consent and did not subject the landlord's property to a contractor's lien.[173] Finally, the court found that whatever the tenant chose to spend in addition to the improvement allowance granted by the landlord was beyond the legal responsibility of that landlord.[174] Based on these findings, the court of appeals held that FS Associates had no responsibility for the $129,109 owed to McMichael's Construction and granted summary judgment in favor of the landlord on the contractor's claim of a lien.[175]

A final case worthy of note is *CC&B Industries, Inc. v. Stroud*,[176] in which CC&B, plaintiff subcontractor, brought an action to foreclose its lien on real property owned by defendant Stroud. The trial court found in favor of Stroud. The court of appeals reversed the decision of the trial court basing its decision on its interpretation of O.C.G.A. section 44-14-361.2.[177] This section of the statute "provides for the dissolution of [a] lien upon the securing of the contractor's sworn written statement that the agreed price or reasonable value of the labor, services, or materials have been [fully] paid."[178] The court in *Stroud* noted the statute contemplates the giving of one single affidavit upon completion of the project, rather than periodic affidavits stating that the agreed price or reasonable value of parts of the labor, services, and materials have been paid, as Stroud contended.[179] Finding that the owner had produced no affidavit that would satisfy the statute, the court held that there was no dissolution of the contractor's lien pursuant to section 44-14-361.2.[180] The court found no reason to deny the subcontractor his day in court[181] because the

171. *Id.*

172. *Id.*

173. *Id.* (citing Nunley Contracting Co. v. Four Taylors, 192 Ga. App. 253, 384 S.E.2d 216 (1989), for the proposition that the landlord's consent for tenant improvements does not mean that the landlord has approved the contract between the tenant and the contractor so as to make landlord's property subject to a contractor's lien).

174. *Id.* at 707, 399 S.E.2d at 481.

175. *Id.*

176. 198 Ga. App. 658, 402 S.E.2d 527 (1991).

177. *Id.* at 658, 402 S.E.2d at 528; O.C.G.A. § 44-14-361.2 (Supp. 1991).

178. 198 Ga. App. at 658, 402 S.E.2d at 528 (citing O.C.G.A. § 44-14-361.2 (Supp. 1991)).

179. *Id.* (citing Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499, 83 S.E.2d 210 (1914); Star Mfg. v. Edenfield, 191 Ga. App. 665, 382 S.E.2d 706 (1989); Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782 (1969)).

180. *Id.*

181. *Id.*

subcontractor commenced his action to recover within twelve months of the time the amount payable to the subcontractor became due.

An amendment to the lien statute is noted in the legislative section found toward the end of this survey.[182]

X. Sales Contracts

An interesting case concerning a dispute over purchase price is *Clark v. Grissom*,[183] in which a purchaser brought suit for specific performance of a sales contract. Grissom and Clark entered into a contract for the purchase of real estate. The contract contained a clause stating that "[t]he purchase price of said property shall be: Two Hundred Thousand Dollars, ($200,000.00) to be paid in cash at closing or assume Mutual Federal Savings and Loan Association 1st Mortgage of $68,100.00 and Grissom's 2nd mortgage of $56,100.00."[184] The contract further provided that the purchasers had paid $15,000 to their attorney to be deposited in an escrow account that was "to be applied as part payment of the purchase price of said property."[185] Grissom attempted to purchase the property by assuming both mortgages (an assumption of $124,200 in mortgages) without further cash payment.[186]

The Supreme Court of Georgia held that the contract was clear in stating that the purchase price was $200,000, and the provision involving assumption of mortgages was merely a means by which Grissom could reduce the cash portion of the purchase price, not a means by which Grissom could pay a lesser purchase price for the same property.[187] The purchase price was that stated in the contract, and Grissom was not entitled to specific performance upon assumption of the mortgages without further payment.[188]

Another case of note is *Daniel v. Douglas County*,[189] which concerned a lease with an alleged option to purchase. Daniel agreed to lease his property to Douglas County for a public park. Daniel contended that the instrument constituted a lease with an option to purchase and that the option was not exercised as required by the instrument. The lease provided for five payments to be paid over a period of five years, from 1980 through 1984. At the conclusion of those payments, Douglas County had

182. *See infra* text accompanying notes 351-56.
183. 261 Ga. 37, 401 S.E.2d 536 (1991).
184. *Id.* at 37, 401 S.E.2d at 537.
185. *Id.*
186. *Id.*
187. *Id.* at 38, 401 S.E.2d at 537.
188. *Id.*
189. 261 Ga. 103, 401 S.E.2d 508 (1991).

an option to purchase the property for $10. Upon making the final payment (bringing total payments to $59,022), Douglas County failed to pay Daniels the $10 required to exercise its option consistent with the contract.[190]

The supreme court held that the contract was ambiguous and that application of the rules of construction resulted in uncertainty as to the true intention of the parties.[191] The court ultimately held that the purchase price had been paid in full, and the trial court's grant of specific performance was proper because to deny the county relief on the basis of the failure to pay $10 would be contrary to public policy.[192] Therefore, the court justified its ruling by stating that the ambiguous contract was an installment sales contract rather than a lease with an option to purchase, and, because Douglas County had made its payments over five years, it had complied with the terms of the installment sales contract and purchased the property.[193]

One final case is significant in that it deals with implied and constructive contracts for real property as well as with a developer's nightmare—that he has constructed a house on property not owned by him or his customer. In *Smith Development, Inc. v. Flood*,[194] the court of appeals held that a builder's conduct in constructing a house on property without the property owner's knowledge or consent, coupled with the builder's insistence on continuing to build after being notified by the owner to halt construction, prevented the builder from recovering on the basis of unjust enrichment.[195] Smith Development began constructing a home on land owned by Flood and Boling while it was offered for sale to the builder's customers, the Dyers. The parties never reached an agreement for the sale of the land and never executed a written contract. Flood informed Smith of this fact on several occasions. Nevertheless, Smith proceeded with construction of a house for the Dyers on the property. Flood made repeated efforts to halt Smith's construction on the property, but Smith continued construction and subsequently completed the house in November 1988. The deadline for acceptance by the Dyers of Flood and Boling's offer to sell the property passed without acceptance in February 1989, and Flood subsequently rented the premises to others under a lease-purchase agreement in April 1989. The purchase option was never exercised, but Flood received approximately $6,000 in rent.[196] The court

190. *Id.* at 103-04, 401 S.E.2d at 509.
191. *Id.* at 104, 401 S.E.2d at 509.
192. *Id.* at 104-05, 401 S.E.2d at 510.
193. *Id.*
194. 198 Ga. App. 817, 403 S.E.2d 249 (1991).
195. *Id.* at 819, 403 S.E.2d at 251.
196. *Id.* at 817-18, 403 S.E.2d at 250-51.

found that the conduct of Smith was incompatible with the clean hands doctrine, and, therefore, Smith was unable to recover on the basis of unjust enrichment.[197]

On appeal, the court held that " 'when one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof.' "[198] Such an action is normally grounded upon the theory of *quantum meruit*.[199] However, the court in *Smith* held that while Flood continued to negotiate as to the sale of the lot, she never asked for, nor consented to, the construction being done by Smith.[200] The court held that there can be no recovery for services rendered voluntarily[201] because Georgia law will not imply a promise to pay for services contrary to the intention of the parties. Based on this reasoning, the court in *Smith* found that no obligation was incurred on the part of Flood and Boling, and therefore, the trial court was correct in entering judgment in their favor.[202]

XI. Vendors and Purchasers

When a parcel of real property is in violation of local zoning ordinances and a vendor gives a general warranty of title to a purchaser, a majority of jurisdictions hold that such a violation is a breach of the warranty of merchantability of title because it exposes the purchaser to litigation. In Georgia the court of appeals adopted this majority rule in a case that the supreme court subsequently reversed.[203] In *Decatur v. Barnett*,[204] the court of appeals addressed the question of whether a conveyance of real property that is in violation of a municipal ordinance (in this case zoning) constitutes a breach of warranty of title. The court held that because such a conveyance by the vendor exposes a purchaser to civil and even criminal penalties, it constitutes a breach of a general warranty of title.[205] The Decaturs brought this action against Barnett, the immediate grantor of real property in Fayette County, and others in the chain of title, alleging that the grantor breached the warranty of title given by him because the one acre lot purchased was in violation of a Fayette County zoning

197. *Id.* at 819, 403 S.E.2d at 251 (citing Murawski v. Roland Well Drilling, 188 Ga. App. 760, 374 S.E.2d 207 (1988)).

198. *Id.* (quoting O.C.G.A. § 9-2-7 (1982)).

199. *Id.*

200. *Id.* at 819-20, 403 S.E.2d at 251-52.

201. *Id.* at 820-21, 403 S.E.2d at 252 (citing Addison v. Southern Ry., 108 Ga. App. 314, 132 S.E.2d 833 (1963)).

202. *Id.* at 821, 403 S.E.2d at 253.

203. *See* Barnett v. Decatur, 261 Ga. 205, 403 S.E.2d 46 (1991).

204. 197 Ga. App. 459, 398 S.E.2d 706 (1990), *rev'd*, 261 Ga. 205, 403 S.E.2d 46 (1991).

205. 197 Ga. App. at 460, 398 S.E.2d at 708.

ordinance. This ordinance imposed a minimum lot size of five acres of land within the applicable zoning classification. The trial court denied partial summary judgment to plaintiffs as to breach of warranty of title.[206] The court of appeals reversed.[207]

The supreme court reversed the decision of the court of appeals.[208] The supreme court stated that "we decline to extend the traditional scope of a general warranty of title in such a manner to include zoning matters."[209] More importantly, the supreme court in *Barnett* declined to extend to Georgia the majority rule stated in *Decatur*.[210]

Another case worth noting is *Barnette v. Peace*,[211] a fraud case. The Peaces purchased an unfinished house from Barnette and over the next six years paid their mortgage and expended time and money to finish the house. When the Peaces attempted to refinance their mortgage in 1988, the bank refused to make the loan because a survey revealed that the porch of the house encroached upon a Department of Transportation right of way by several feet. The Peaces alleged that the boundary line was not as it had been represented to them by Barnette and, therefore, Barnette had fraudulently induced the Peaces to purchase the property. An expert at trial stated that setting a value for the house was difficult because a prospective buyer would not be able to get financing due to the encroachment, and nearly all buyers needed financing in order to purchase a home. It was determined at trial that the Peaces could move the house back and outside of the easement at a cost of $27,550.[212]

Barnette argued on appeal that any evidence of improvements was irrelevant and immaterial to the issue of damages in a fraud case.[213] Citing a case over 100 years old, the court of appeals ruled that where "by the fraud of a vendor, the vendee has been led into expenses, he may recover compensation in damages for the actual injury he has sustained."[214] The court stated that "[t]he Peaces have thus been deprived of the 'fruits' of their labor and expenditures, the value of those improvements as realized by a sale or through a home equity loan."[215] The court of appeals upheld the verdict of the trial court and found that the Peaces were entitled to the damages claimed.[216]

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206. *Id.* at 459-60, 398 S.E.2d at 707.
207. *Id.* at 460, 398 S.E.2d at 707.
208. Barnett v. Decatur, 261 Ga. 205, 403 S.E.2d 46 (1991).
209. *Id.* at 205, 403 S.E.2d at 47.
210. *Id.*
211. 196 Ga. App. 440, 395 S.E.2d 916 (1990).
212. *Id.* at 440, 395 S.E.2d at 916-17.
213. *Id.*, 395 S.E.2d at 917.
214. *Id.* at 441, 395 S.E.2d at 917 (citing James v. Elliot, 44 Ga. 237 (1871)).
215. *Id.* at 442, 395 S.E.2d at 918.
216. *Id.*

XII. Real Estate Brokers

The court of appeals decided an interesting brokerage issue in *Piedmont Engineering Construction Corp. v. Balcor Partners-84 II, Inc.*[217] The court ruled on the issue of alleged illegally obtained real estate brokerage commissions and property management fees. This case raised claims of illegality based on the allegation that defendants were not licensed in Georgia as real estate brokers at all times pertinent, and, therefore, plaintiff Piedmont Engineering sought to recover nearly $2 million in brokerage commission and property management fees.[218]

Balcor commonly entered into negotiations with local builders and developers with regard to construction of real estate projects that would ultimately be acquired by Balcor-created limited partnerships. Balcor frequently acted as general partner for such a purchase. Piedmont and Balcor entered into a series of agreements for the construction and purchase of Park Lake Apartments, and Balcor created a partnership to purchase the apartments. Part of the purchase agreement was labeled "brokerage commissions" and stated Piedmont had agreed to pay Balcor commissions of over $600,000. In addition, Piedmont and Balcor entered into a similar series of agreements for the construction of Park Colony Apartments, in which an "acquisition fee" of over $960,000 was to be paid to Balcor. Finally, the parties executed a "management and cash flow guaranty agreement" whereby Piedmont would pay management fees totalling over $200,000 to Balcor over a three-year period. The Park Lake claims were barred by the four-year statute of limitations.[219]

The court of appeals held the undisputed evidence showed that Balcor did not function as a broker in the Park Colony transaction, but rather collected an "acquisition fee," which is quite different from a brokerage commission.[220] The court found Balcor performed no activities in connection with Park Colony that could be called brokerage activities, and, therefore, the court affirmed the grant of summary judgment in favor of Balcor.[221] Furthermore, the evidence established that the facts required judgment as a matter of law for Balcor on the remaining claims of illegal brokerage commissions paid to Balcor.[222] The court found that Colony Investors, the owner of Park Colony Apartments, executed a submanagement agreement with Balcor making Balcor the "sole and exclusive agent" of Park Colony Apartments "to maintain, operate, manage, super-

217. 196 Ga. App. 486, 396 S.E.2d 279 (1990).
218. *Id.* at 486-87, 396 S.E.2d at 280.
219. *Id.* at 487-89, 396 S.E.2d at 280-82.
220. *Id.* at 490-91, 396 S.E.2d at 282-83.
221. *Id.* at 492-93, 396 S.E.2d at 284.
222. *Id.*

vise, and lease the Property."[223] Balcor was responsible for day to day management, and its fees were based on this responsibility. Because of this fact, according to the court, Balcor was excepted from the brokerage licensing requirement of O.C.G.A. section 43-40-29.[224]

XIII. Trespass on Realty

Houston v. Deal[225] is a trespass case concerning a boundary dispute. Plaintiff, Houston, sued defendant, Deal, for trespassing and willful tortious damage to Houston's property. The suit was based on Houston's claim that Deal cut down trees upon Houston's property and destroyed a fence erected by Houston around that property. Houston sold five acres of his property to Deal in 1980, and the deed described the property sold as "containing five acres, and being bounded as follows: North by 30 foot strip of land reserved for road purposes; West by other lands of W. L. Houston; South by other lands of W. L. Houston; and East by a 30 foot strip of land reserved for road purposes."[226] The thirty foot strip of land reserved for road purposes on the east side remained woodland, and the thirty foot strip of land reserved for road purposes, which bounded the north land line of Deal's property, was deeded to Pierce County for public access to the Alapaha River. In 1988 Houston and Deal agreed to share the expense of erecting a fence between Deal's property and the strip of land on the east side of Deal's property. Later, Deal's wife informed Houston that Deal would not help pay for the fence. Shortly thereafter Deal entered the strip of land and cut down several pine trees that fell upon the fence and destroyed it.[227]

When Houston brought suit, Deal counterclaimed, alleging ownership of an easement over the thirty foot strip of property. It is important to note that in 1984 Houston deeded the property east of the thirty foot strip on Deal's east boundary to Houston's grandson, DeWayne Johnson, referring to the property conveyed as that to the east of the "30 foot strip of land reserved for road purposes."[228]

Acknowledging that the Georgia Supreme Court's decision in *Rolleston v. Sea Island Properties*[229] was controlling, the court of appeals in *Houston* held that the grantor (in this case Houston) in describing "a road as a boundary," did not leave the language in the deed at all uncertain but

223. *Id.* at 491-92, 396 S.E.2d at 283.
224. *Id.*, 396 S.E.2d at 284. *See* O.C.G.A. § 43-40-29 (1991).
225. 198 Ga. App. 335, 401 S.E.2d 562 (1991).
226. *Id.* at 335, 401 S.E.2d at 562.
227. *Id.* at 335-36, 401 S.E.2d at 562-63.
228. *Id.*
229. 254 Ga. 183, 327 S.E.2d 489, *cert. denied*, 474 U.S. 823 (1985).

rather stated that the boundary was "reserved."[230] The court further stated that Houston might have reserved the strip "for any purpose under the sun, including to graze his cows or to dig a useless trench, or for his own use as a private road to his properties to the south."[231] Furthermore, the court found that Deal had other means of access to his property.[232] "The real or proposed existence of a private road on a boundary does not *ipso facto* render it subject to the use of all who live near or by . . . ."[233] Therefore, the court found in favor of Houston, holding that he "reserved" the strip for himself for road purposes even though he never made it into a road.[234] There was no indication that Deal ever claimed a right to use this strip as a road, and the court of appeals reversed the summary judgment in favor of Deal.[235]

XIV. ZONING

It is interesting to note the large number of zoning cases the supreme court has voluntarily accepted under the *Trend* doctrine, in which the supreme court held it would review only those zoning decisions involving a constitutional issue to which it granted an application for review.[236] A case involving interpretation of the Zoning Procedures Act[237] is *Walton County v. Scenic Hills Estate, Inc.*,[238] in which the Georgia Supreme Court held that, absent other express authorization by the general assembly, the review of zoning decisions is a de novo proceeding in the superior court.[239] Scenic Hills sought rezoning of some ninety-two acres of land in Walton County and, after its application for rezoning was denied by the Walton County Board of Commissioners, filed a notice of appeal to superior court.[240] The supreme court found that, according to the Georgia Constitution, the superior courts only have appellate jurisdiction where it is provided by law.[241] Because the right to appeal to the superior court is fixed by statute, and the general assembly has not provided for zoning

230. 198 Ga. App. at 336-37, 401 S.E.2d at 563.
231. *Id.* at 337, 401 S.E.2d at 563.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*, 401 S.E.2d at 564.
236. Trend Dev. Corp. v. Douglas County, 259 Ga. 425, 425, 383 S.E.2d 123, 123 (1989).
237. *See* O.C.G.A. §§ 36-66-1 to -5 (1987).
238. 261 Ga. 94, 401 S.E.2d 513 (1991).
239. *Id.* at 94, 401 S.E.2d at 514 (citing Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981); City of Savannah v. Ravers, 253 Ga. 675, 324 S.E.2d 173 (1985)).
240. *Id.*, 401 S.E.2d at 513.
241. *Id.* at 95, 401 S.E.2d at 514 (citing GA. CONST. art. VI, § 4, para. 1).

appeals to the superior court, the local zoning authority may not grant a right of direct appeal.[242]

In *Inner Visions, Ltd. v. City of Smyrna*,[243] the supreme court held that when property is zoned for a specific use and the owner properly applies for authorization to use the property for such use, the property owner is entitled to have its application considered under the terms of the ordinance as it existed at the time the owner filed the application.[244] Although the property owners sought to use their property in compliance with the local zoning ordinance, the building located on their property did not comply with the city's building code.[245] Nonetheless, the supreme court held that "[i]f the condition of the building did not comply with the city's building code, the owners would have been entitled to the issuance of a license contingent upon compliance" with the code.[246]

Another broad zoning decision by the supreme court is found in *Tilley Properties, Inc. v. Bartow County*,[247] in which the court reaffirmed an earlier ruling that a "county has the duty and obligation to work with property owners to allow them the highest and best use of their property."[248] In *Tilley Properties* Bartow County's zoning ordinance was found to be in violation of Georgia's zoning statute, and the supreme court held that the trial court erred in failing to declare the ordinance void because of noncompliance with the statute.[249] Therefore, because the ordinance was void, there was no valid restriction on the property, and Tilley Properties had the right under Georgia law to use its property in any manner it chose.[250]

Another Georgia Supreme Court case involving zoning regulations was *Emory University v. Levitas*,[251] which concerned the grant of a variance to Emory University by the DeKalb County Board of Commissioners. Emory sought to build an eighteen story hotel and conference center on a six acre parcel zoned for a maximum building height of five stories. Emory requested that the DeKalb County Board of Commissioners grant the variance, which would effect a reduction in the area necessary for the complex and prevent the complex from encroaching into a bordering

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242. *Id.* (citing Georgia Power Co. v. Friar, 47 Ga. App. 675, 171 S.E. 210 (1933), *aff'd*, 179 Ga. 470, 175 S.E. 807 (1934)).

243. 260 Ga. 902, 400 S.E.2d 915 (1991).

244. *Id.* at 902-03, 400 S.E.2d at 916.

245. *Id.* at 902, 400 S.E.2d at 915.

246. *Id.* at 903, 400 S.E.2d at 916.

247. 261 Ga. 153, 401 S.E.2d 527 (1991).

248. *Id.* at 155, 401 S.E.2d at 529 (citing DeKalb County v. Flynn, 243 Ga. 679, 256 S.E.2d 362 (1979)).

249. *Id.* at 154-55, 401 S.E.2d at 528 (citing O.C.G.A. § 36-66-5(c) (1987)).

250. *Id.* at 155, 401 S.E.2d at 529.

251. 260 Ga. 894, 401 S.E.2d 691 (1991).

twenty-two acre rare first-growth forest, also owned by Emory; the Board granted the requested variance.[252] Variances are to be granted, according to the DeKalb County Code, " 'where by reason of exceptional topographic conditions or other extraordinary or exceptional conditions of a piece of property, the strict application of the development requirements of this chapter would result in practical difficulties to, or undue hardship upon, the owner of the property . . . .' "[253] Emory argued that the conference center was necessary and that the existence of the first-growth forest required that the complex be eighteen stories and on a smaller lot.[254]

The Georgia Supreme Court upheld the decision of the Board of Commissioners, holding the standard is that if the decision of the Board of Commissioners is supported by any evidence and the Board did not abuse its discretion under DeKalb County guidelines in granting the variance, then the appellate court must affirm the Commission's decision.[255] The court concluded that there "is some evidence to support the conclusion that strict compliance with the five story development requirement would work an unnecessary hardship on Emory by . . . requiring it to destroy a significant portion of the first-growth rain forest."[256] Therefore, the Board of Commissioners did not abuse its discretion in granting the variance.[257]

Another case of note is *The Ansley House, Inc. v. City of Atlanta*,[258] in which the supreme court determined whether discontinuance of a permissible nonconforming use, which was the result of the renovation required to obtain a business license, resulted in the destruction of such nonconforming use.[259] The trial court in *Ansley House* found that such destruction took place. The subject property had been continuously operated as a rooming house since the 1920s. This use had been permitted within a zoning classification that did not allow it only because the use of the property as a rooming house predated the adoption of Atlanta's zoning ordinance. Therefore, the house had been permitted to operate as a legal nonconforming use. The former owner's business license was revoked in June 1987 for housing, building, and electrical code violations, but in May 1987 plaintiff met with city officials to determine how to continue to operate the property as a rooming house. Based on written and oral assurances from the city officials, plaintiff purchased the property in Septem-

252. *Id.* at 894-95, 401 S.E.2d at 692-93.

253. *Id.* at 895, 401 S.E.2d at 693 (quoting DeKalb County, Ga., Code Art. II § 11-2323(3)).

254. *Id.*

255. *Id.* at 898, 401 S.E.2d at 695.

256. *Id.* at 899-900, 401 S.E.2d at 696.

257. *Id.* at 900, 401 S.E.2d at 696.

258. 260 Ga. 540, 397 S.E.2d 419 (1990).

259. *Id.* at 540, 397 S.E.2d at 419.

ber 1987 and carried out a major renovation (costing in excess of $1.6 million). When the building was approved for use as a boarding house in June 1988, the Ansley Park Civic Association filed an appeal challenging the ruling.[260]

In August 1988 the Board of Zoning Adjustment voted to revoke the legal nonconforming use status. The property owner appealed this decision, and the superior court upheld the zoning board's decision, stating that the nonconforming use had terminated because the property owner had been prohibited from using the property for a period of a year.[261] On appeal, the supreme court held that plaintiff's "acts of obtaining the building permit, beginning renovations to satisfy building code requirements, applying for a business license, and obtaining a temporary certificate of occupancy, provide clear and convincing evidence of an intent not to abandon the nonconforming use."[262] According to the court, this intent tolled the running of the forfeiture period and entitled plaintiff to the benefit of the nonconforming use.[263]

In *Fulton County v. Wallace*,[264] the supreme court followed its ruling in a 1989 case, *Cobb County v. Wilson*.[265] In the present case, Wallace had purchased thirty-two acres of property in North Fulton County. A nine acre parcel of this property was subject to the Rivermont Community Unit Plan zoning designation and had originally been intended to be part of the Rivermont residential community. The remaining twenty-three acres of Wallace's property was zoned for commercial use. In 1988 Wallace sought to have the entire thirty-two acre parcel rezoned to C-1 classification in order to develop a commercial shopping center. The Fulton County Board of Commissioners denied the request. The superior court entered an order declaring the zoning unconstitutional. The court further ordered the county to rezone the property in a constitutional manner. Finally, the court ordered damages to be paid to Wallace for inverse condemnation of the nine acres.[266]

Fulton County applied to the supreme court for discretionary appeal and asked whether inverse condemnation was appropriate for the finding of unconstitutional zoning.[267] Following *Wilson*, the supreme court held that "[w]hen zoning boards are considering the rezoning of 'fringe areas' such as the nine-acre tract involved in this appeal, the necessities of the

260. *Id.* at 540-41, 397 S.E.2d at 419-20.
261. *Id.* at 541-42, 397 S.E.2d at 420.
262. *Id.* at 543, 397 S.E.2d at 421.
263. *Id.*
264. 260 Ga. 358, 393 S.E.2d 241 (1990).
265. 259 Ga. 685, 386 S.E.2d 128 (1989).
266. 260 Ga. at 358-60, 393 S.E.2d at 242.
267. *Id.* at 358, 393 S.E.2d at 241.

case and the safeguard of the public interest are heightened."[268] Furthermore, the court held that the Fulton County Board of Commissioners had not exceeded its police power in regulating land use for zoning, and, therefore, there was no condemnation requiring just compensation.[269] Finally, the court held that:

> when considering changes in 'fringe areas' or property that was part of a C.U.P. [Community Unit Plan] the balance favors even broader discretion in the local zoning authority, therefore, their efforts to reach a compromise while remaining under the trial court's jurisdiction will be not be viewed as [an] abuse of the board's police power.[270]

The supreme court reversed the trial court's grant of damages for inverse condemnation.[271]

In *City of Atlanta v. Cates*,[272] the supreme court held that a change in a rezoning application does not create a new cause of action from a cause of action previously adjudicated.[273] Therefore, when an application to rezone fails, the doctrine of res judicata "applies to bar a second suit when the two actions have identity of parties, identity of the cause of action and the previous adjudication by a court of competent jurisdiction."[274] The court in *Cates* held that, to overcome a motion for summary judgment on res judicata grounds, the party seeking to relitigate the constitutionality of a property zoning classification "must demonstrate a change in circumstances affecting the use of the land."[275] The court held that the affidavits filed in the case created a genuine issue of fact as to the conditions surrounding the property, and, therefore, a former classification might no longer be constitutional.[276] Res judicata did not apply as a matter of law, according to the court in *Cates*, and the motion to deny summary judgment in favor of the city was correct.[277]

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268. *Id.* at 360, 393 S.E.2d at 243.

269. *Id.* at 361, 393 S.E.2d at 243-44.

270. *Id.*, 393 S.E.2d at 243.

271. *Id.*, 393 S.E.2d at 244.

272. 260 Ga. 772, 399 S.E.2d 474 (1991).

273. *Id.* at 772, 399 S.E.2d at 475.

274. *Id.* (citing Trend Dev. Corp. v. Douglass County, 259 Ga. 425, 383 S.E.2d 123 (1989)).

275. *Id.*

276. *Id.*

277. *Id.*

XV. Eminent Domain and Condemnation

In *Gomez v. Metropolitan Atlanta Rapid Transit Authority*,[278] an inverse condemnation action, the Gomez brothers brought suit against the Metropolitan Atlanta Rapid Transit Authority ("MARTA") as a result of tracks placed near the Gomez's property. The Gomez's were the owners of four parcels of property. A duplex is located on each parcel, and the rear of each parcel abuts a railroad right of way. In 1985 MARTA's north line was constructed within the railroad right of way, configuration of the tracks was changed, and new tracks were added. These changes resulted in the MARTA tracks and two railroad tracks being fifty feet closer to the Gomez property. Mark Gomez lived in one of the duplex units, and the Gomez's rented out the others. The Gomez's maintained that the extreme vibrations resulting from use of the tracks significantly altered the quality of life for themselves and for their tenants. As a result, some tenants vacated the apartments.[279] The Gomez's brought an inverse condemnation action, and the trial court ordered a directed verdict in favor of MARTA holding that "property owners have no right, as a matter of law, to just and adequate compensation for noise and vibration damages resulting from increased use of preexisting railroad right-of-way."[280] Upon review, the court of appeals held that the trial court erred because plaintiffs did not need to show a physical invasion that was damaging to their property.[281] Instead they only needed to show an " 'unlawful interference with [their] right to enjoy [their] possession.' "[282] Drawing a parallel to *Duffield v. DeKalb County*,[283] the court of appeals held that the "increased" use of the right of way in the instant case by closer and higher railroad tracks interfered with the right of use and enjoyment of the Gomez's property.[284] Such use did not exist in the original taking, nor was it contemplated. On the other hand, the situation had so drastically changed as to materially effect the use and enjoyment of the Gomez's property. Therefore, the directed verdict was not authorized.[285]

In *Cann v. Metropolitan Atlanta Rapid Transit Authority*,[286] the court of appeals ruled on the measure of damages for the loss of leased property. MARTA had initiated condemnation proceedings against property

278. 197 Ga. App. 834, 399 S.E.2d 536 (1990).
279. *Id.* at 834, 399 S.E.2d at 537.
280. *Id.*
281. *Id.* at 835, 399 S.E.2d at 538.
282. *Id.* (quoting Duffield v. DeKalb County, 242 Ga. 432, 434, 249 S.E.2d 235, 237 (1978)).
283. 242 Ga. 432, 249 S.E.2d 235 (1978).
284. 197 Ga. App. at 835, 399 S.E.2d at 538.
285. *Id.*
286. 196 Ga. App. 495, 396 S.E.2d 515 (1990).

leased by Cann in 1981. MARTA made a motion to exclude certain evidence during the jury trial. Cann's lease terminated in 1982, about nine months after the date of taking. The lease, however, provided a renewal option for four additional five-year terms (totalling twenty years).[287] The renewal was to be under the same terms and conditions in effect during the original term, except that the rent for the renewal term was to be "as may be agreed upon by the parties hereto, but in no event less than the annual rent during the last year of the preceding term."[288] MARTA maintained that Cann had only a nine-month tenancy remaining, but Cann argued that it had a leasehold interest of over twenty years.[289]

The court found that Cann had only a nine-month tenancy because the lease was not certain as to the rent to be paid for the renewed terms.[290] This uncertainty rendered those portions of the lease unenforceable.[291] Therefore, the court of appeals upheld the trial court's decision that the renewal provision had not been exercised and that Cann could not be compensated based on the renewal provision.[292] Furthermore, the court of appeals held that the construction of a high-rise commercial building, which Cann stated as the intended use of the property, was a remote and speculative possibility; therefore, damages could not be awarded based on such speculation.[293]

In another interesting case, *Moss v. Hall County Board of Commissioners*,[294] the court of appeals held that evidence of specific variances under the local zoning ordinance are not to be excluded as remote and speculative.[295] Hall County condemned a portion of real property for the development of a public road. A jury trial resulted in a verdict awarding Moss $12,900, which Moss appealed.[296] Moss maintained that under strict application of the local set-back requirements, his remaining property suffered "a reduction of permissible building area that was disproportionately greater than the taking and that this reduction of building area adversely affected the value of the remainder."[297] The court of appeals held that every act or circumstance serving to shed light on the issue at hand is relevant and admissible; therefore, when relevancy of evidence is

287. *Id.* at 495, 396 S.E.2d at 516.
288. *Id.* at 495-96, 396 S.E.2d at 517 (emphasis omitted).
289. *Id.* at 496, 396 S.E.2d at 517.
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at 496-97, 396 S.E.2d at 517.
294. 197 Ga. App. 76, 397 S.E.2d 493 (1990).
295. *Id.* at 76, 397 S.E.2d at 493.
296. *Id.*
297. *Id.*

doubtful, it should be admitted and weighed by the jury.[298] Evidence that might show a possible exception to zoning regulations, if such an exception is possible, is relevant because an exception to zoning restrictions might appreciatively influence the market value of the remaining property.[299]

Another significant condemnation case during the survey period was *Circle K General, Inc. v. Department Of Transportation*,[300] which concerned the conversion of Peachtree Industrial Boulevard into a "controlled access road."[301] The Department Of Transportation ("DOT") condemned .008 of an acre of land and two easements from Circle K as part of the conversion of Peachtree Industrial to a "controlled access road" pursuant to which Peachtree Industrial would become a raised roadway with one way service roads on either side at the ground level. Circle K had operated a gas station and grocery store on the corner of Winters Chapel and Peachtree Industrial and previously had unlimited access from Peachtree Industrial and Winters Chapel to its property. At the condemnation hearing, Circle K sought consequential damages, alleging an impairment of access to its property.[302] The trial court ruled that Circle K was " 'entitled to recover for any damages from the change in access which would be unique to itself and not of the same kind as the general public meaning the other property owners along Peachtree Industrial Boulevard whose access was also changed.' "[303] The DOT made a motion in limine to limit evidence presented by Circle K on the issue of damages.[304]

On appeal, Circle K asserted that the trial court's grant of DOT's motion in limine was in error and that Circle K was entitled "to present evidence to show that its access [had] been substantially restricted."[305] The court of appeals held that *Department Of Transportation v. Whitehead*[306] was controlling and that Circle K may present evidence showing the unique hardship and substantial impairment imposed upon it.[307] The court also distinguished *Metropolitan Atlanta Rapid Transit Authority*

298. *Id.* at 77, 397 S.E.2d at 494.

299. *Id.* (citing Atlanta Warehouses v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977)).

300. 196 Ga. App. 616, 396 S.E.2d 522 (1990).

301. *Id.* at 616, 396 S.E.2d at 523.

302. *Id.*

303. *Id.* at 617, 396 S.E.2d at 523 (quoting the trial court). The trial court found that MARTA v. Fountain, 256 Ga. 732, 352 S.E.2d 781 (1987) controlled. 196 Ga. App. at 617, 396 S.E.2d at 523.

304. 196 Ga. App. at 617, 396 S.E.2d at 523.

305. *Id.*, 396 S.E.2d at 524.

306. 253 Ga. App. 150, 317 S.E.2d 542 (1984).

307. 196 Ga. App. at 617, 396 S.E.2d at 524.

v. Fountain,[308] finding that in *Fountain* the owner sought damages for what amounted to merely a change in traffic pattern, rather than substantial impairment of access.[309] Holding that a mere change in traffic patterns does not require compensation, the court stated that Circle K had a right of access to its property, that it had a right to be paid for the substantial impairment of that right, and that the damages suffered by Circle K were special.[310]

Perhaps the most publicly debated condemnation case during the survey period (and perhaps any other survey period!) was *Department of Transportation v. City of Atlanta*,[311] which raised a constitutional challenge to the State Commission on the Condemnation of Public Property (the "Commission"). O.C.G.A. sections 50-16-180 to -183 granted the Commission the power to approve the acquisition of public property through eminent domain,[312] which in this case was for the building of the Presidential Parkway. The DOT sought to condemn portions of public parks owned by the City of Atlanta pursuant to a grant of permission by the Commission. At issue was whether the statute granting to the Commission its power violated the 1983 Georgia Constitution section on separation of powers. Also at issue was whether the statute violated procedural or substantive due process. The trial court held that both the Commission and the statute were unconstitutional on the foregoing grounds.[313] Upon appeal, the supreme court reversed the decision of the trial court on the constitutional issues.[314]

The supreme court addressed the separation of powers issue and held that as long as delegations of legislative power are made with sufficient guidelines, the separation of powers doctrine in the Georgia Constitution is not violated.[315] Finding that the courts have approved numerous delegations of legislative authority over the years, the court held that the executive official or commission in this case was not making a legislative decision, but rather "[was] acting administratively pursuant to the direction of the legislature."[316] Furthermore, the court held that determining the necessity of condemning a piece of property is a legislative decision, and private property owners are not entitled to notice of the Commis-

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308. 256 Ga. 732, 352 S.E.2d 781 (1987).

309. 196 Ga. App. at 617, 396 S.E.2d at 524.

310. *Id.* at 618, 396 S.E.2d at 524 (citing Department of Transp. v. Whitehead, 253 Ga. App. 150, 317 S.E.2d 542 (1984)); *see also* State Highway Dep't v. Irvin, 100 Ga. App. 624, 112 S.E.2d 216 (1959).

311. 260 Ga. 699, 398 S.E.2d 567 (1990).

312. O.C.G.A. §§ 50-16-180 to -183 (1990).

313. 260 Ga. at 699-700, 398 S.E.2d at 569.

314. *Id.* at 700, 398 S.E.2d at 569.

315. *Id.* at 703, 398 S.E.2d at 571.

316. *Id.*

sion's deliberations under the doctrine of procedural due process.[317] The court held that the doctrine of substantive due process protects owners from the "arbitrary and capricious exercise of the power of eminent domain."[318] However, because the court found that the statute provided sufficient guidelines by which the Commission had acted, the taking decisions made pursuant to the statute were not necessarily arbitrary and capricious.[319] For these reasons, the supreme court upheld the constitutionality of sections 50-16-180 to -183 and the Commission that it created.[320]

A final case that warrants mention is *Cobb County v. Webb Development, Inc.*[321] In *Webb Development* the supreme court held that a condemnation for sewer lines, which were to serve private residential lots, was not an improper condemnation for a private purpose.[322] Cobb County argued that the trial court erred by ordering Cobb County to condemn private land for sewer lines, which the County claimed was a private purpose.[323] However, the supreme court affirmed the trial court's decision, holding that condemnation for public sewer lines is not a private purpose.[324]

XVI. Transfer Tax

A note should be made of Attorney General Opinion U90-25,[325] in which Georgia's Attorney General has issued an unofficial opinion that information disclosed on real estate transfer tax forms is not confidential. In addition, information taken from these forms that is ultimately placed in the tax assessors' property records is not confidential. The opinion points out that O.C.G.A. section 48-6-4(c)[326] no longer contains a requirement that the contents of the transfer tax form be kept confidential. On the other hand, O.C.G.A. section 48-5-314(a)(i)[327] provides that "[a]ll records of the County Board of Tax Assessor's which consist of materials other than the return obtained from or furnished by an ad valorem taxpayer shall be confidential,"[328] and therefore there is a conflict between

317. *Id.* at 704, 398 S.E.2d at 572.
318. *Id.*
319. *Id.* at 704-05, 398 S.E.2d at 572.
320. *Id.* at 700, 398 S.E.2d at 569.
321. 260 Ga. 605, 398 S.E.2d 3 (1990).
322. *Id.* at 605-06, 398 S.E.2d at 4.
323. *Id.* at 609, 398 S.E.2d at 6.
324. *Id.*
325. 1990 Op. Ga. Att'y Gen. No. U90-25.
326. O.C.G.A. § 48-6-4 (1991).
327. *Id.* § 48-5-314(a)(i).
328. *Id.*

the statute provisions. In the attorney general's opinion, however, information disclosed on real estate transfer tax forms is not confidential; therefore, information taken from these nonconfidential forms is also not confidential, but subject to the open records law.[329]

A final tax development of significance was Act 592 (House Bill 283), which related to ad valorem taxation of property.[330] Act 592 first provided that "current use value" of bona fide conservation use property means the amount that a knowledgeable buyer would pay for the property with the intent of continuing its existing use in an arm's length transaction.[331] In addition, Act 592 defined "current use value" of residential transitional property as the amount a knowledgeable buyer would pay in an arm's length transaction for the property with the intent of continuing the existing use.[332] The tax assessor shall consider the current use of the property, the annual productivity, and sales data of comparable real property in order to determine the current use value of such residential transitional property.[333] The Act further amended the statute by providing for the assessment of tangible property,[334] by providing for the preferential assessment of certain agricultural property,[335] by providing a definition of "bona fide conservation use property,"[336] by providing for a one-time ad valorem taxation of timber upon harvest or sale,[337] by modifying the rules with respect to publication by the counties of ad valorem tax rate and changing definitions with respect to ad valorem taxes,[338] by modifying the rules and regulations concerning appraisal and assessment of real property,[339] and by repealing O.C.G.A. section 48-5-33 which relates to the inclusion of standing timber as part of real property.[340] The provisions of Act 592 shall become effective on January 1, 1992.[341]

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329. 1990 Op. Ga. Att'y Gen. No. U90-25 at 3.

330. 1991 Ga. Laws 1903 (codified at O.C.G.A. § 48-5-2 (1991)).

331. 1991 Ga. Laws 1903 (amending O.C.G.A. § 48-5-2 (1982)).

332. *Id.*

333. *Id.*

334. *See* O.C.G.A. § 48-5-7.3 (1991).

335. *See id.*

336. *See id.* § 48-5-7.3 to -7.5.

337. *Id.* § 48-5-7.5.

338. *See id.* § 48-5-32.

339. *Id.* § 48-5-269.

340. 1991 Ga. Laws 1903.

341. *Id.*

XVII. LEGISLATION

Several legislative amendments during the survey period are worthy of mention. Act 304 (House Bill No. 97)[342] amends O.C.G.A. section 44-14-3 and provides that the grantee of a debt or similar security interest shall furnish, within sixty days of the date of full payment (changing the period from forty-five to sixty days), a legally sufficient satisfaction or shall authorize and direct the clerk or clerks of the superior court of the county or counties in which the instrument is recorded to cancel the instrument of record. In the event that an attorney remits the final payment of the instrument, the statute authorizes the grantee to direct the clerk of court to transmit the cancellation or satisfaction document to such attorney.[343] In addition, a change to the existing statute renders the grantee liable to the grantor for the sum of $500 as liquidated damages for violation of the statute, an increase over the old penalty of $200.[344] Finally, the statute was amended to provide that such satisfaction or cancellation shall be furnished to the grantor "at the grantor's last known address as shown on the records of the grantee."[345]

Another legislative enactment of note was the amendment to O.C.G.A. section 44-5-60, which changed the statute with respect to covenants running with the land.[346] The statute formerly provided that covenants restricting lands to certain uses shall not run for more than twenty years in municipalities or counties that have adopted comprehensive zoning laws.[347] The amendment provides that, notwithstanding the limitation, "covenants restricting lands to certain uses affecting planned subdivisions containing no fewer than 15 individual lots may be continued beyond 20 years as provided in this subsection."[348] Each such continuation shall be for a period of ten years, according to the new statute, and there is no limit on the number of times that such covenants may be so continued.[349] The amendment further provides that the change in covenants imposing greater restriction on use or development of land will be enforced only when agreed to in writing by the owner of the affected property.[350]

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342. 1991 Ga. Laws 413 (codified at O.C.G.A. § 44-14-3 (Supp. 1991)).

343. O.C.G.A. § 44-14-3(b)(2) (Supp. 1991).

344. *Id.* § 44-14-3(c).

345. *Id.* § 44-14-3(b)(1).

346. *Id.* § 44-5-60 (1991).

347. *Id.* § 44-5-60 (1982).

348. *Id.* § 44-5-60(d)(1) (1991).

349. *Id.*

350. *Id.* § 44-5-60(d)(4). The amendments were made by Act 264, Senate Bill 133. 1991 Ga. Laws 334.

Act 393 (House Bill 528)[351] and Act 328 (House Bill 223)[352] amended the mechanic's and materialmen's lien statute.[353] Act 393 revised O.C.G.A. sections 44-14-360 and 44-14-361 by providing that suppliers furnishing rented "tools, appliances, machinery, or equipment used in making improvements to the real estate" are entitled to a lien to the extent of the reasonable value or the contracted rental price, whichever is greater, of such tools, appliances, machinery or equipment."[354] Act 393 further revises the statute to provide that suppliers furnishing such rental tools, appliances, machinery or equipment shall have a special lien on the "real estate, factories, railroads or other property for which they furnish [their] labor, services or materials."[355] Furthermore, Act 393 created O.C.G.A. section 44-14-366, which contains the appropriate forms to be used with respect to such liens.[356]

Finally, Act 338[357] amended O.C.G.A. section 44-14-361.1 by providing that, at the time of filing for record of a claim of lien, a lien claimant shall "send a copy of the claim of lien by registered or certified mail to the owner of the property or the contractor, as the agent of the owner."[358] In addition, the amended statute provides that a party filing an action to foreclose a lien must file a notice with the clerk of the superior court of the county in which the subject lien was filed within fourteen days after filing such lien action.[359]

Another statutory development that warrants brief mention is Act 405 (House Bill 563),[360] which amended O.C.G.A. section 48-6-2. Act 405 exempted from the Real Estate Transfer Tax any "deed of assent or distribution" or "any other instrument transferring real estate to or from a fiduciary; provided, however, that the exemption provided under this paragraph shall apply only if it transfers without valuable consideration."[361]

XVIII. CONCLUSION

Although there was little activity in some areas of the law, Georgia courts were particularly active during the past year with respect to zoning, condemnation-eminent domain, and landlord-tenant law. The au-

351. 1991 Ga. Laws 915 (codified at O.C.G.A. § 44-14-360 (Supp. 1991)).
352. 1991 Ga. Laws 915 (codified at O.C.G.A. § 44-14-361 (Supp. 1991)).
353. O.C.G.A. §§ 44-14-360 to -361 (1982 & Supp. 1991).
354. *Id.*
355. *Id.* § 44-14-361(a).
356. *Id.* § 44-14-366.
357. 1991 Ga. Laws 639 (codified at O.C.G.A. § 44-14-361.1 (Supp. 1991)).
358. O.C.G.A. § 44-14-361.1(a)(2) (Supp. 1991).
359. *Id.* § 44-14-361.1(a)(3).
360. 1991 Ga. Laws 965 (codified at O.C.G.A. § 48-6-4 (1991)).
361. O.C.G.A. § 48-6-2(a)(a) (1991).

thors have attempted to discuss those cases and trends that will most likely have an impact on the practice of real estate law in Georgia and hope that the reader finds these cases and trends both instructive and interesting.