Real Property

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I. INTRODUCTION

This Article surveys case law and legislative developments in the area of real property law in Georgia during the period from June 1, 1999, to May 31, 2000. As in past surveys, the authors do not attempt to chronicle each case and statute that affects real property law. Rather, the authors selected the decisions and statutes discussed in this Article for their significance and interest to participants in the everyday practice of real estate law in this state. Several cases discussed below revisited issues from recent surveys and enlarged upon or clarified the holdings from those prior cases.

II. TITLE TO LAND

In Burt v. Skrzyniarz, the Georgia Supreme Court defined the evidentiary burden required for a party to rebut the presumption of equal shares in a cotenancy. According to the court, that presumption may only be rebutted through proof of "clear and convincing evidence" showing that the parties share their tenancy other than in equal proportions.

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2. Id. at 36-37, 526 S.E.2d at 850.
3. Id.
The two cotenants in the case, Paul Burt and Nancy Skrzyniarz, began dating in 1990. In 1997 the couple purchased a home in Dutch Island, Georgia. The sales contract for the house obligated both Burt and Skrzyniarz as purchasers of the property, and it was undisputed that they took possession of the house as tenants in common. The deed from the seller to Burt and Skrzyniarz identified both parties as the grantees of the property.4

When they separated, a dispute arose between Burt and Skrzyniarz concerning their interests in the property. Burt contended that he owned a ninety-nine percent interest in the property and that Skrzyniarz owned only one percent. Burt filed a complaint for statutory partitioning in which he sought a determination of his interest in the property. During the trial of Burt's claim, third parties involved in the purchase and sale of the property introduced evidence that Burt and Skrzyniarz were to hold title to the property jointly. Following the trial the jury rejected Burt's argument and found the couple had equal shares in the property. Burt appealed from the judgment entered on that verdict.5

Burt's argument on appeal focused on the instructions the trial court gave to the jury. In its jury charge, the trial court had instructed the jury that “unless ... the document or instrument provides otherwise, a tenancy in common is created whenever [sic] ... two or more persons are entitled to the simultaneous possession of any property. Tenants in common may have unequal shares, but they will be held to be equal unless the contrary appears.”6 Additionally, the trial court instructed the jury that “[p]arol or oral evidence of the nature of the transaction or the circumstances or the conduct of the parties is admissible to rebut the presumption of equal shares [between tenants in common], but in order to rebut the presumption, the proof must be clear and convincing.”7 It was this second instruction that Burt objected to on appeal.8

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4. Id. at 35, 526 S.E.2d at 849.
5. Id. at 36, 526 S.E.2d at 850.
6. Id. (quoting O.C.G.A. § 44-6-120 (1991)). That instruction was based on the language contained in the 1991 version of O.C.G.A. section 44-6-120.
7. Id. (internal quotations omitted).
8. Id. Burt also contended on appeal that the trial court's jury instruction regarding the presumption of equal shares was incompatible with its instruction to the jury regarding a purchase money resulting trust. As a result, Burt asserted that the trial court should not have instructed on a tenancy in common at all. Id. at 37, 526 S.E.2d at 850. A purchase money resulting trust arises when the purchase price of property is paid by one person but the vendor transfers the property to another. Under those circumstances, the transferee is deemed to hold the property in trust for the person furnishing the consideration. See BLACK'S LAW DICTIONARY 1235 (6th ed. 1990); see also O.C.G.A. § 53-12-92 (a), (b) (1997). The court stated that the concept of a purchase money constructive trust is simply an alternative theory to that of a joint tenancy and that no error arose when the
The court rejected Burt's argument and affirmed the trial court.\(^9\) In its opinion the court noted the "axiom that, under normal circumstances, tenants in common hold equal shares in jointly held property is a fundamental precept the of law, and should not be easily subjected to uncertainty or undoing."\(^10\) Using that concept as a springboard, the court noted similar contexts in which a "clear and convincing" evidentiary standard is applied.\(^11\) For example, clear and convincing evidence must be presented when one seeks to have a deed set aside or reformed or when one seeks to show that a purchaser of property who makes a conveyance to his or her spouse, parent or child did not intend to make a gift.\(^12\)

The critical issue for the court in \textit{Burt} in imposing such a high evidentiary burden in this case was the reliance placed on the "well-established presumptions attending a property owner's actions."\(^13\) The court's decision shows the need for certainty in real estate transactions and gives tremendous deference to the parties' actions in determining what the effect of a given transaction may be.

In \textit{Jones v. Bowen},\(^14\) the Georgia Court of Appeals revisited an issue discussed in the 1997 survey, namely that a deed incorporating a recorded plat by reference as to the legal description has the same effect as if the information on the recorded plat were actually reflected in the deed.\(^15\) The boundary dispute in \textit{Jones} arose from John Robert Jones' January 1999 purchase of two parcels of land from Dorothy R. Zeitower, Lillian R. Stephenson, and Christopher C. Ryals (collectively the "Sellers"). Prior to the purchase, Jones employed George William Donaldson to survey the property. The plat prepared by Donaldson, dated December 31, 1998, was recorded in the Candler County Court-house.\(^16\) The deed described the property as follows:

All those two certain parcels of land situate lying in a body together in the 1685th G.M. District of Candler County, Georgia and in the aggregate containing 945.064 acres, more or less, all as shown on a plat

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\(^9\) Id.

\(^10\) Id.

\(^11\) Id. at 36-37, 526 S.E.2d at 850.

\(^12\) Id. at 37, 526 S.E.2d at 850.

\(^13\) Id.


\(^16\) 244 Ga. App. at 300-01, 535 S.E.2d at 503.
of survey prepared for John Robert Jones by George William Donaldson, Registered Surveyor, dated December 31, 1998, and of record in Plat Book 8, Page 88, Candler County, Georgia records, to which plat and the record thereof reference is hereby made and incorporated herein . . . .

The Grantors intend to convey all of their interest in the tract of land conveyed to Grantors by Executor's and Trustee's Deed, dated February 27, 1997, and recorded in Deed Book 149, Pages 4-5, Candler County, Georgia records, which has been resurveyed by aforesaid plat. Said tract of land is described in said deed as containing 996 acres of land, more or less.17

The 1998 Plat followed the markers used in a survey plat created in 1981. However, a 1972 plat was also recorded in Candler County depicting the same property. That plat showed an additional 16.3-acre tract (the "Disputed Tract") as part of the property. Jones claims that he discovered the 1972 Plat shortly after he purchased the property. The 1998 Plat showed the Disputed Tract as part of property owned by adjoining property owners (the "Neighbors"). However, it was uncontested that the Disputed Tract had once been a part of the property owned by Sellers.18

Based on the discrepancy between the 1972 Plat and the 1998 Plat, plus the language of the deed showing the Sellers' intent to transfer all of their interest in the property, Jones filed a complaint against the Neighbors. Jones claimed in his complaint that the Disputed Parcel was transferred to him by the warranty deed from the Sellers.19 Jones sought to have the property resurveyed to confirm the boundary between his property and the Neighbors' property. Jones also sought temporary and permanent injunctions to restrain the Neighbors from further clearing the Disputed Tract, along with compensatory damages for trespass arising from clearing that had already been done. The Neighbors filed a motion to dismiss for failure to state a claim, which the trial court granted. Jones appealed.20

On appeal Jones argued that language in the deed describing the property being conveyed should be construed in accordance with the intent of his predecessors in title.21 According to Jones, the Sellers intended to convey "all of the interest they acquired in the property by

\[\text{References:}\]

17. Id. at 300, 535 S.E.2d at 503.
18. Id. at 301, 535 S.E.2d at 503.
19. Id. at 302, 535 S.E.2d at 503. Jones attached to his complaint a copy of the warranty deed from the Sellers. Id. at 301, 535 S.E.2d at 503.
20. Id. at 300, 535 S.E.2d at 502.
21. Id. at 302, 535 S.E.2d at 503.
means of the executor's and trustee's deed.\textsuperscript{22} Jones argued that the recitation in the deed concerning the number of acres being transferred showed clearly the Sellers' intent to convey the Disputed Tract to Jones.\textsuperscript{23} The court of appeals rejected Jones' argument and affirmed the trial court's decision.\textsuperscript{24} In doing so the court noted that the deed to Jones expressly incorporated the 1998 Plat as describing the property being sold and reflected all the interest of Jones' predecessors in title.\textsuperscript{25} The court relied on the absence of an express covenant in the deed regarding the precise number of acres being transferred in order to find the incorporation of the plat controlling over the general statement of acreage.\textsuperscript{26}

Jones also argued that the supreme court's decision in \textit{Wooten v. Solomon}\textsuperscript{27} required a rejection of the 1998 Plat in favor of the 1972 Plat.\textsuperscript{28} Jones asserted "that 'a previous particular description' of property is determinative of the property conveyed under a deed in the event of a conflict with the plat with which it is associated."\textsuperscript{29} The court distinguished the facts in \textit{Wooten} from the facts in \textit{Jones} and concluded that the rule in \textit{Wooten} is limited to cases when the plat reference in a deed and other descriptions of the property also contained in the deed are in conflict.\textsuperscript{30} Further, the court found that, as a result

\begin{itemize}
\item Id. The property was specifically identified as containing two parcels as follows:
- Parcel One: All that certain ... parcel of land situate ... , containing 497.731 acres, more or less, as shown and depicted as Parcel 1A on a plat prepared for John Robert Jones by George William Donaldson, Registered Surveyor and hereinabove made a part of this description by reference ... [and]
- Parcel Two: All that certain ... parcel of land situate ... containing 447.333 acres, more or less, as shown and depicted as Parcel 1B on a plat prepared for John Robert Jones by George William Donaldson, Registered Surveyor and hereinabove made a part of this description by reference ... .
\end{itemize}

\begin{itemize}
\item Id. at 301, 535 S.E.2d at 503.
\item 23. Id. at 302, 535 S.E.2d at 503.
\item 24. Id. at 303, 535 S.E.2d at 504.
\item 25. Id. at 302, 535 S.E.2d at 503.
\item 26. Id., 535 S.E.2d at 503-04. "Absent an express covenant indicating that a given number of acres are conveyed, a clause as to quantity will be rejected in favor of the actual area if that is ascertainable by metes and bounds description." \textit{Id.} (citing Martin v. Patton, 225 Ga. App. 157, 163-64, 483 S.E.2d 614, 621 (1997)). In the deed to Jones, the Sellers specifically disclaimed any representation regarding the specific acreage of the property. \textit{Id.}
\item 27. 139 Ga. 433, 77 S.E. 375 (1913).
\item 28. 244 Ga. App. at 302, 535 S.E.2d at 504.
\item 29. \textit{Id.}
\item 30. \textit{Id.} at 302-03, 535 S.E.2d at 504.
\end{itemize}
of incorporation, the property description in the 1998 plat was the same as the description contained in the deed.31

III. EASEMENTS AND RESTRICTIVE COVENANTS

The court in Lovell v. Anderson,32 also discussed a topic addressed in a prior survey.33 The dispute in Lovell concerned the use of a dirt road owned by Jeremiah Earle Field. Field's nephew, Lovell, used the road to access his two properties (the “Three-acre Tract” and the “Thirty-one-acre Tract” respectively). The Three-acre Tract was admittedly accessible from a public highway, but Lovell testified that the Thirty-one-acre Tract was only accessible from the dirt road. Prior to his death, Field granted Lovell permission to use the dirt road on Field’s property by issuing the following written statement: “Earle Lovell has permit to go on any of my land, has the right to tell anyone without written permit to leave.”34 After Field died, Wendell Anderson, Sr., the executor of Field’s estate, demanded that Lovell cease using the dirt road and any other property owned by the estate. When Lovell refused, Anderson filed suit.35

In the complaint Anderson asserted claims for injunctive relief, specific performance, trespass, private nuisance, conversion, and punitive damages. Anderson’s claims for damages derived from, among other things, Lovell’s use of the estate’s property to grow and sell Christmas trees. Lovell filed a counterclaim seeking a declaratory judgment that the 1989 statement written by Field granted Lovell an easement in gross to utilize the dirt road or, in the alternative, that it was a license that had ripened into an easement.36

Anderson moved for partial summary judgment on the main claim as to Lovell’s liability for damages and on Lovell’s counterclaim. Anderson contended that Lovell’s license to traverse the dirt road was revoked upon Field’s death. Anderson submitted the affidavit of a title expert who asserted that the records of Cherokee County, Georgia, did not reflect an easement granted to Lovell to use the dirt road. The trial court granted the executor’s motion, reserving the issue of damages for trial, and Lovell appealed.37 The court of appeals rejected Lovell’s

31. Id. at 303, 535 S.E.2d at 504.
34. 242 Ga. App. at 538, 530 S.E.2d at 234.
35. Id. at 537-38, 530 S.E.2d at 235.
36. Id.
37. Id. at 538, 530 S.E.2d at 235.
argument that questions of fact remained to be decided at trial on his two alternative theories of recovery and affirmed the trial court's decision to grant partial summary judgment.\textsuperscript{38}

In rejecting Lovell's argument concerning the license that allegedly ripened into an easement, the court relied on Official Code of Georgia Annotated ("O.C.G.A.") section 44-9-4\textsuperscript{39} and \textit{McCorkle v. Morgan}.\textsuperscript{40} In \textit{McCorkle} the Georgia Supreme Court held that a parol license can be revoked when the licensee's enjoyment of the license was not preceded by the necessary expenditure of money.\textsuperscript{41} Under the facts of \textit{Lovell}, there were two potential points at which Field could be deemed to have granted Lovell a license that could have matured into an easement: (1) when Lovell first began using the road and (2) when Field wrote the statement formally giving Lovell access.\textsuperscript{42} The court found no evidence of an expenditure of money by Lovell at either time in reliance on the license.\textsuperscript{43} The evidence in the record on summary judgment established that Lovell had used the road since he acquired the Three-acre Tract and the Thirty-one-acre Tract in approximately 1970. The first expenditure that Lovell made in connection with his use of the road occurred in 1986 or 1987, when he installed a gate. Thus, Lovell used the road for at least sixteen years before he put up the gate. Similarly, Lovell made no expenditure in reliance upon the granting of a license in 1989 when Field's statement was written. Lovell had already installed the gate on the road at least two years before Field gave him the written statement.\textsuperscript{44} In short, "it was not necessary for [Lovell] to expend any money preceding [his] use of the [road]."\textsuperscript{45} Accordingly, the court held the license never ripened into an easement.\textsuperscript{46} Therefore, it was revoked upon Field's death.\textsuperscript{47}

\begin{itemize}
  \item 38. \textit{Id.} at 538-39, 530 S.E.2d at 235-36.
  \item 39. \textit{Id.} O.C.G.A. § 44-9-4 states as follows:
    A parol license to use another's land is revocable at any time if its revocation does no harm to the person to whom it has been granted. A parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such a case, it becomes an easement running with the land. O.C.G.A. § 44-9-4 (1982).
  \item 40. 268 Ga. 730, 492 S.E.2d 891 (1997).
  \item 41. \textit{Id.} at 730, 492 S.E.2d at 892.
  \item 42. 242 Ga. App. at 537-38, 530 S.E.2d at 234-35.
  \item 43. \textit{Id.} at 539, 530 S.E.2d at 235.
  \item 44. \textit{Id.}
  \item 45. \textit{Id.} (quoting \textit{McCorkle}, 268 Ga. at 731, 492 S.E.2d at 235).
  \item 46. \textit{Id.}
  \item 47. \textit{Id.} (citing \textit{Cook v. Pridgen, Stapler & Dunn}, 45 Ga. 331, 340-41, 12 Am. Rep. 582, 584 (1872)).
\end{itemize}
The court also rejected Lovell’s argument regarding the creation of an “easement in gross.”\textsuperscript{48} The court began its analysis by setting forth the definition of an easement in gross:

An easement in gross is defined as “a right to pass over land which is \textit{not} given for the purpose of ingress or egress to and from other land . . . .” \textit{It is “a personal right and [one] not running with the land on the benefit side.” It may be created by express grant. “Since an easement is an interest in land, however, a grant of an easement should be drawn and executed with the same formalities as a deed to real estate . . . .”\textsuperscript{49}}

The court then held the permit given to Lovell by Field did not constitute a grant of an easement under Georgia law.\textsuperscript{50} The court stated that “[a]n express grant of an easement must contain language sufficient to designate with reasonable certainty the land over which it extends. It is generally sufficient to identify the whole tract of land owned by the grantor over which the easement passes.”\textsuperscript{51} Adopting the language of \textit{Central of Georgia Railroad v. Dec Ass’n}, the court held the 1989 statement “was neither a deed nor in a form that could be recorded with the Clerk of the Superior Court on the deed records . . . . [I]t had no legal description to identify the property or easement . . . .”\textsuperscript{52} At best, the agreement was merely a revocable license.\textsuperscript{53}

In \textit{Hood v. Spruill},\textsuperscript{54} the Georgia Court of Appeals affirmed the longstanding rule that when a purchaser has knowledge of a public road on land, the encumbrance does not constitute a breach of the covenant of warranty.\textsuperscript{55} Leontina and Alfred Hood purchased a tract of land on the corner of East Cobb Drive and Johnson Ferry Road in Cobb County, Georgia, in order to build a car repair shop. After the Hoods had begun construction, another business owner in the area sued them for encroaching on a roadway easement that ran across the Hoods' property. As it turned out, the Hoods' property contained a fifty-foot-wide roadway easement with a paved road known as Five Points Lane running down

\begin{footnotes}
\footnotetext{48.} \textit{Id.}, 530 S.E.2d at 236.
\footnotetext{49.} \textit{Id.} at 539-40, 530 S.E.2d at 236 (citations omitted).
\footnotetext{50.} \textit{Id.} at 540, 530 S.E.2d at 236 (citing O.C.G.A. § 44-9-1).
\footnotetext{53.} \textit{Id.}
\footnotetext{55.} \textit{Id.} at 45, 528 S.E.2d at 566.
\end{footnotes}
the middle. Five Points Lane provided public access to surrounding roads and businesses.  

Although the Hoods admitted they knew of the roadway easement before purchasing the property, they asserted claims against their seller, Spruill, based on breach of the general warranty deed given at closing, "which guaranteed title to the property against the lawful claims of all persons whomsoever." Spruill filed a motion for summary judgment, and it was granted.

The court of appeals affirmed the trial court's ruling. The court held the roadway was a public road across private land. The court stated that "[w]hile the roadway easement is described in various ways in the documents of record before this Court, use is the determinative factor in designating it as 'private' or 'public.'" The undisputed evidence showed the private drive was used as a public roadway for cars to access Johnson Ferry Road and businesses on East Cobb Drive. Additionally, public records described the roadway easement as a "non-exclusive easement appurtenant for ingress and egress for pedestrian and vehicular traffic and utility purposes over, on, and across the property." From this evidence, the court determined the easement was a public one.

After concluding the roadway was for public use, the court noted it is longstanding law that the existence of a public road on land, which is known to the purchaser, is not an encumbrance that would constitute a breach of the covenant of warranty. The court stated as follows:

To hold that a public road running through a tract of land, which was known to the purchaser at the time of his purchase thereof, is such an incumbrance on the land as would constitute a breach of a covenant of warranty against incumbrances, would produce a crop of litigation in this state that would almost be interminable.

56. Id. at 44, 528 S.E.2d at 566.
57. Id. (internal quotations omitted).
58. Id.
59. Id., 528 S.E.2d at 567.
60. Id., 528 S.E.2d at 566.
61. Id.
62. Id. at 45, 528 S.E.2d at 566.
63. Id. at 45 n.1, 528 S.E.2d at 566 n.1 (internal quotations omitted).
64. Id.
65. Id. at 45, 528 S.E.2d at 566 (citing Desvergers v. Willis, 56 Ga. 515, 516, 21 Am. Rep. 289, 290 (1876)).
66. Id., 528 S.E.2d at 566-67.
The Hoods clearly knew about the public roadway easement at the time they entered into the purchase agreement. In fact, the purchase contract itself stated that the property was "inclusive of an easement for transit across the property as shown on the exhibits and is acknowledged by purchaser." Additionally, the plat for the property specifically identified the existence of an easement 50.89 feet wide. Finally, the Hoods' broker testified that, at the closing, the title insurance representative took approximately twenty minutes to show the Hoods all the easements on the property, including the fifty-foot wide easement that "must remain open for public ingress and egress.

It is difficult for the authors to conceive of a situation when a purchaser could more clearly be deemed to have notice of a public roadway encumbrance on her property than was true in Hood v. Spruill. The only thing surprising about the holding in this case is that the appellee apparently made no motion for entry of sanctions against the appellant based upon the assertion of a frivolous appeal.

In Bibb County v. Georgia Power Co., the Georgia Court of Appeals addressed several issues surrounding an easement that Georgia Power used for its utility poles. Of particular importance, the court decided whether Bibb County had to reimburse the utility for the relocation of those poles due to a road-widening project. In the late 1940s and early 1950s Georgia Power obtained and recorded indefinite easements conveyed by private landowners with property adjacent to an approximately twenty-foot wide road that would later become known as Northside Drive in Macon, Georgia. These indefinite easements allowed Georgia Power to place power poles and distribution lines across the properties. Once the poles were placed, the easements became definite. From 1957 to 1965, Bibb County condemned or purchased title to a portion of the same properties across which Georgia Power had easements. As a result, by 1965 Bibb County owned fee simple title to an eighty-foot right-of-way for Northside Drive. However, Bibb County did not condemn the Georgia Power easements.

In 1965 Bibb County deeded title of the eighty-foot right-of-way to the Georgia Rural Roads Authority ("the Roads Authority") for road

67. Id., 528 S.E.2d at 566.
68. Id.
69. Id.
71. Id. at 133-39, 525 S.E.2d at 138-42.
72. Id. at 139, 525 S.E.2d at 142.
73. Id. at 132, 525 S.E.2d at 137-38.
construction. During March through August 1967, Georgia Power, at its own expense, relocated its power poles to accommodate the road construction. Nineteen of those poles were moved anywhere from ten to thirteen feet. Another eighteen, not shown on some plats, also may have been moved. In 1990 the Georgia Highway Authority, successor to the Roads Authority, deeded the property back to Bibb County. The City of Macon then annexed small portions of the road. In 1995 and 1996 Bibb County requested Georgia Power relocate approximately one hundred poles to accommodate another road widening project along Northside Drive. Georgia Power agreed to move the poles but only if the county paid the expenses associated with the relocation.\footnote{74}

Bibb County and the City of Macon then filed a declaratory action to force Georgia Power to relocate the poles at its own expense. Plaintiffs also asserted claims for delay damages, trespass, breach of contract, punitive damages and attorney fees. Bibb County later added a claim for damages for violating the antigratuity clause of the Georgia Constitution. Georgia Power asserted a counterclaim seeking compensation for moving the utility poles on an inverse condemnation theory.\footnote{75}

The trial court ordered Georgia Power to relocate the poles and reserved the issue of reimbursement for later determination. On motions for partial summary judgment regarding thirty-seven of the poles, the trial court ruled in favor of Georgia Power’s recouping relocating expenses in two separate orders.\footnote{76} The County and City appealed.\footnote{77}

In arguing for summary judgment, the parties first focused on the validity of a 1941 agreement between Bibb County and Georgia Power, in which Georgia Power agreed in part to relocate poles in a county right-of-way at its expense.\footnote{78} The court noted that the paragraph from the 1941 agreement concerning relocation costs applied only to poles “placed under or prior to this agreement,” which included poles permissively constructed in county rights-of-way pursuant to an application process set forth in the agreement.\footnote{79} The poles at issue in the case, however, were placed pursuant to the private landowner agreements, not the 1941 agreement. Furthermore, when the poles were relocated in 1967, Bibb County did not own the land; thus they were not

\footnote{74}{\textit{Id.}, 525 S.E.2d at 138.}
\footnote{75}{\textit{Id.}}
\footnote{76}{\textit{Id.} One order concerned nineteen of the poles, and the other concerned eighteen poles. \textit{Id.}}
\footnote{77}{\textit{Id.}}
\footnote{78}{\textit{Id.} at 133, 525 S.E.2d at 138.}
\footnote{79}{\textit{Id.}}
placed in county rights-of-way. For those reasons, the court held that the 1941 Agreement did not apply.

With respect to reimbursement for moving the thirty-seven poles, the court of appeals reversed the trial court's grant of summary judgment in favor of Georgia Power on the grounds that factual disputes precluded judgment as a matter of law. First, a question existed as to "whether Georgia Power had an established easement at the time Bibb County asked it to relocate its poles in 1996. The written easements obtained from the private landowners prior to 1967 were indefinite easements that became definite by the actual placement of the poles." Second, a dispute existed as to whether Georgia Power had placed poles along all of the easements prior to the county obtaining the eighty-foot right-of-way from the property owners, and if so, where they were placed. Lastly, an issue existed arising from the relocation of some poles in 1967. Once established, Georgia Power's easements could not be changed without the landowner granting an additional easement or through condemnation. The court relied on *Jackson Electric Membership Corp. v. Echols* to explain this rule:

"To construe the original easement in any other manner would be to authorize the [utility] to eventually take all the [landowners'] land if the necessities of their business dictated, without requiring the payment of any additional damages or compensation to the landowners."

80. Id.
81. Id. A franchise agreement with the City also was found not to apply. Id.
82. Id.
83. Id.
84. Id. at 134, 525 S.E.2d at 139. Georgia Power did not retain records showing the placement of poles from the early time periods; the earliest documents showing any use are the county's road paving plans for Northside Drive created in 1957 and revised in 1965, which reflect only fifteen poles on the south side of the road. To counter Georgia Power's evidence (consisting of extrapolations from those plans and the vague recollections of various individuals about the location of some of the poles), the County submitted the affidavit of an expert who, based on an analysis of aerial photographs of the area from 1960, disputed the placement, number and maintenance of the poles. The County also submitted the 1957/1965 plat showing only some of the poles in place and gaps in other places (along with other expert testimony that the gaps would indicate the absence of poles). Finally, the County submitted a 1968 plat (accompanied by expert testimony) showing the poles apparently ended before reaching one of the areas in question as they were not shown to continue on property farther west. Id. at 134, 525 S.E.2d at 139.
85. Id. at 133-34, 525 S.E.2d at 139.
no matter how great the [landowners'] losses might be as a result thereof.\textsuperscript{87}

Georgia Power claimed that because it relocated at least some of the poles at issue to the south only ten to thirteen feet for the first road widening, it stayed within the thirty-foot easement width it had purchased from the landowners and, thus, was not changing or abandoning its easements but was simply relocating the poles within their allowed general area.\textsuperscript{88} The court held, however, that whether relocating a power pole several feet to one side is within the “general area” of an easement is a question for the jury.\textsuperscript{89} Additionally, the court noted that because Georgia Power allegedly maintained a fifteen-foot clearance on the north and south sides of the poles, moving a pole thirteen feet to the south necessarily would require the entire easement to move to the south to accommodate the clearance.\textsuperscript{90} The question for the court was “whether the particular movement of the poles was a change in the degree or kind of the easement, for the changed locations may be found to ‘occupy a general area beyond the outer limits of the space previously occupied.’”\textsuperscript{91}

A final issue regarding the validity of the easements was whether they legitimately followed the first relocation pursuant to a Georgia Highway Department policy.\textsuperscript{92} The policy allowed for pre-existing easements to follow the relocation of poles when the poles were relocated to accommodate road construction or widening. However, the Roads Authority, the owner of the land when Georgia Power relocated its poles in 1967, may not have followed that policy, and the evidence indicating whether it applied to the specific road project was inconclusive.\textsuperscript{93}

Georgia Power argued that despite the foregoing factual disputes, the plain language of the easements allowed for the 1967 relocation. The easements provided that Georgia Power could enter the land to make

\textsuperscript{87} 241 Ga. App. at 134, 525 S.E.2d at 139 (quoting Echols, 84 Ga. App. at 612, 66 S.E.2d at 772).

\textsuperscript{88} \textit{Id.} at 135, 525 S.E.2d at 140. There also was a dispute concerning whether the easements were even thirty-feet wide. Georgia Power claimed they were, based on its historical practice of maintaining a fifteen-foot tree clearance to the north and south of each pole, but there was no definitive evidence, and the County disputed Georgia Power’s claim with its own evidence, including aerial photographs showing no clearance. \textit{Id.}, 525 S.E.2d at 139.

\textsuperscript{89} \textit{Id.} at 135, 525 S.E.2d at 140.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Id.} (quoting Humphries v. Georgia Power Co., 224 Ga. 128, 129, 160 S.E.2d 351, 352 (1968)).

\textsuperscript{92} \textit{Id.} at 136, 525 S.E.2d at 140.

\textsuperscript{93} \textit{Id.}
repairs, renewals, alterations and extensions to the power lines.\textsuperscript{94} However, the court held these rights did not "encompass the right to move the fixed poles several feet in one direction; otherwise, by incremental adjustments, Georgia Power could eventually take over the entire property, a result not contemplated by such language."\textsuperscript{95} The court framed the issue as whether during 1967 the Roads Authority, as the landowner, and Bibb County, which was in charge of utility relocations, intended these easements should be moved from their original locations to the new locations.\textsuperscript{96} Furthermore, the court held Georgia Power might have intended to abandon the easements when it relocated them and did not seek reimbursement for the relocation.\textsuperscript{97}

Finally, Georgia Power argued that questions of fact remained regarding whether the County was estopped from denying the existence of the easements.\textsuperscript{98} The court rejected this argument for two reasons.\textsuperscript{99} First, the court relied on \textit{Richmond County v. Pierce}\textsuperscript{100} for the proposition that estoppel does not generally apply to the state or county, nor can prescription run against the state or a local government in regard to land held for the public benefit.\textsuperscript{101} Second, the court noted that "[e]stoppel requires justifiable reliance on the opposing party's representations or conduct and a change in position to one's detriment."\textsuperscript{102} The court found Georgia Power presented no evidence that it changed its position based on any action taken by Bibb County or the City of Macon.\textsuperscript{103}

After addressing all of the issues with respect to the validity of the easements, the court addressed the issue of reimbursement and concluded that even if all of the factual questions were resolved in favor of Georgia Power, it would not settle the question of who should pay the relocation costs.\textsuperscript{104} Pursuant to O.C.G.A. section 32-4-42(6), a county is authorized "to order any utility having poles in, on, along, over, or under the public roads of a county road system to relocate those poles if

\begin{itemize}
\item 94. \textit{Id.}
\item 95. \textit{Id.}, 525 S.E.2d at 140-41.
\item 96. \textit{Id.}, 525 S.E.2d at 141.
\item 98. \textit{Id.} at 137, 525 S.E.2d at 141.
\item 99. \textit{Id.}
\item 100. 234 Ga. 274, 215 S.E.2d 665 (1975).
\item 101. 241 Ga. App. at 137, 525 S.E.2d at 141.
\item 103. \textit{Id.}
\item 104. \textit{Id.}
\end{itemize}
the relocation is made necessary by the construction of any part of the county road system (outside the corporate limits of a municipality)."

The court concluded that the statute did not exempt poles located in the county right-of-way and also located on pre-existing easements not condemned by the county. The court stated that to exercise its power, the County should follow O.C.G.A. sections 32-6-171 and 32-6-173, providing that relocation "expenses are to be paid by the utility." However, the court found the problem with this interpretation is that if Georgia Power had located the poles on the land prior to the county condemning the right-of-way, the statute would be unconstitutional as a taking of private property for public purposes without just and adequate compensation. This holding is based on the theory that an easement is a property right, of which its owner cannot be deprived without just and adequate compensation. Accordingly, the court noted that:

[construed in this context, the statutory scheme provides that the county may require a utility, at the utility's expense, to relocate its equipment, even if the county's right-of-way was obtained after the utility had obtained an easement for the equipment. But in turn the utility may seek just and adequate compensation for the loss of the use of its old easement, which loss would include the costs necessary to relocate to the new easement.]

Thus, because of all the factual issues, the court reversed Georgia Power's grant of summary judgment on the issue of recoupment of relocation expenses with respect to its thirty-seven poles and affirmed the denial of the County's and City's motion for summary judgment on the same. Additionally, the court upheld the trial court's grant of summary judgment to Georgia Power on the gratuity clause claim.

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105. Id.
106. Id.
107. Id.
108. Id.
109. Id. at 138, 519 S.E.2d 141. Section 32-6-173 of the O.C.G.A. provides for this circumstance by stating that nothing in the article is to be construed as to deprive a utility of its property interest because of relocation. O.C.G.A. § 32-6-173 (1996).
111. Id., 525 S.E.2d at 141-42.
112. Id. at 138-39, 525 S.E.2d at 142. The court noted the trial court's ruling on the trespass, delay damages, punitive damages, and attorney fees claims were not challenged on appeal and thus were not addressed. Id.
In *Canterbury Forest Ass'n v. Collins*, the Georgia Court of Appeals resolved the issue of whether restrictive covenants affecting a subdivision that were set to expire by law may be renewed by compliance with recently enacted renewal statutes. On June 15, 1975, the Canterbury Forest Association ("the Association"), a subdivision homeowners association, adopted bylaws and restrictive covenants for the twenty-six lots located in the subdivision. In August 1992 Randy Collins purchased a lot in the subdivision. The deed for that lot included a provision conveying the property "subject to all valid and enforceable restrictive covenants and easements of record." On March 16, 1995, Collins and the twenty-five other Association members signed an "Amendment to the Property Owners Agreement and Covenants" ("the Amended Covenants"). The Amended Covenants reflected the members' agreement to extend the subdivision covenants, set to expire by law, for an additional twenty years.

In September 1998 Collins built a 1400-square-foot metal structure on his property in alleged violation of the Amended Covenants. The Association demanded that Collins remove the building, but he refused. The Association then filed suit. The trial court determined as a matter of law that the original covenants had expired and that the Amended Covenants were not effective to restrict Collins' use of his lot. Accordingly, the trial court granted Collins' motion for summary judgment.

On appeal the Association first contended that the trial court erred in finding the covenants had expired twenty years after their adoption and were not automatically renewed. As discussed by the court, O.C.G.A. section 44-5-60 generally limits the time that restrictive covenants are effective to twenty years. Between 1991 and 1993, O.C.G.A. section 44-5-60(d) permitted owners of land subject to restrictive covenants to renew them for an additional twenty years upon

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114. Id. at 428, 532 S.E.2d at 739.
115. Id. at 425, 532 S.E.2d at 738.
116. Id. (internal quotations omitted).
117. Id. at 426, 532 S.E.2d at 738.
118. Id.
119. Id.
120. Id.
121. Id. "[C]ovenants restricting lands to certain uses shall not run for more than 20 years." O.C.G.A. § 44-5-60(b) (1991 & Supp. 2000).
compliance with certain conditions.\textsuperscript{122} Effective July 1, 1993, the renewal provision was amended and now reads as follows:

[C]ovenants restricting lands to certain uses affecting planned subdivisions containing no fewer than 15 individual plots shall \textit{automatically be renewed} beyond the [twenty year expiration period] unless terminated by [fifty-one percent of the plot owners within two years prior to the expiration of the covenant.] Each such renewal shall be for an additional 20 year period, and there shall be no limit on the number of times such covenants shall be renewed.\textsuperscript{123}

In rejecting the Association's argument and affirming the trial court's decision that the original covenants had expired, the court of appeals first concluded that the 1993 amendment to O.C.G.A. section 44-5-60(d) did not apply to the covenants at issue.\textsuperscript{124} The court relied upon the holding in \textit{Appalachee Enterprises v. Walker}\textsuperscript{125} in determining that the 1993 amendment did not apply retroactively to covenants created before the amendment was effective.\textsuperscript{126}

The court further rejected the Association's argument that the covenants were renewed under the statute in effect between 1991 and 1993.\textsuperscript{127} The version of O.C.G.A. section 44-5-60(d) that was in effect in 1991 did not apply to the covenants for the same reason that the 1993 amendment did not apply—amendments to the statute affecting rights in realty cannot be applied retroactively.\textsuperscript{128} Furthermore, even if the court found that the 1991 version of the statute did apply, it would not have assisted plaintiff in this action. It was undisputed that the Association had failed to comply strictly with the conditions necessary to renew the covenants under that version of the statute.\textsuperscript{129} The court specifically held that substantial compliance with the statute was insufficient, stating as follows: "Since restrictions on private property are generally not favored in Georgia, they 'will not be enlarged or extended

\begin{itemize}
\item \textsuperscript{122} 243 Ga. App. at 426, 532 S.E.2d at 738. "In order to renew the covenants, the statute required that the landowners approve renewal by a two-thirds vote prior to the expiration dates of the covenants; that an attorney conduct a title search to confirm the record owners; and that several specific documents be prepared and filed in the county records." \textit{Id.} (citing O.C.G.A. § 44-5-60(b) (1991)).
\item \textsuperscript{123} \textit{Id.} (quoting O.C.G.A. § 44-5-60(d)) (emphasis added).
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} 266 Ga. 35, 463 S.E.2d 896 (1995).
\item \textsuperscript{126} 243 Ga. App. at 427, 532 S.E.2d at 738.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.}, 532 S.E.2d at 739.
\end{itemize}
by construction, and any doubt will be construed in favor of the grantee."  

Notwithstanding its conclusion that the covenants had expired by law, the court still reversed the trial court's grant of summary judgment to Collins. The court held that pursuant to his March 1995 agreement with the other landowners, Collins must abide by the Amended Covenants under the theory of promissory estoppel. The court noted that, even though the Association had failed to execute a proper renewal of the existing covenants, the individual landowners continued to comply with them and continued to enforce them in accordance with the Amended Covenants. In reliance on the existence of the Amended Covenants, the other homeowners in the subdivision took no action to enact new covenants or otherwise protect their property interests. This forbearance, combined with their continued compliance with the Amended Covenants, persuaded the court to conclude that Collins and the other signatories were bound by them until June 2015. The court noted, however, that although the covenants were binding on Collins and the other signatories personally, they would not run with the land and did not bind subsequent purchasers of the subdivision lots.

The holding in this case is significant for the owners of homes in older subdivisions and their counsel. As stated by the court, the current statutory provision permitting the automatic renewal of restrictive covenants does not apply to covenants in place prior to July 1, 1993. If the homeowners in those subdivisions desire to renew their covenants, they must use alternative means.

IV. PURCHASE CONTRACTS AND BROKERS

In Gateway Family Worship Centers, Inc. v. H.O.P.E. Foundation Ministries, the Georgia Court of Appeals resolved an interesting issue concerning the definiteness with which property must be described

130. Id. (quoting England v. Atkinson, 196 Ga. 181, 184, 26 S.E.2d 431, 433 (1943)).
131. Id. at 428, 532 S.E.2d at 739.
132. Id. at 427-28, 532 S.E.2d at 739 (citing O.C.G.A. § 13-3-44 (a) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").)
133. Id. at 428, 532 S.E.2d at 739.
134. Id.
135. Id.
136. Id. at 428 n.2, 532 S.E.2d at 739 n.2.
in a sales contract before that contract may be enforced.\textsuperscript{138} The pastor of Gateway Family Worship Centers, Inc. ("Gateway") entered into a contract with the pastor of H.O.P.E. Foundation Ministries, Inc. ("HOPE") to sell certain improved real property. A dispute arose between Gateway and HOPE concerning the amount of land to be conveyed. Gateway refused to close on its purchase of the property, and HOPE sued for breach. In that action, HOPE sought to recover its $4,000 earnest money deposit on the property. Gateway counterclaimed, seeking to recover the earnest money deposit along with reimbursement of fees it paid to obtain a survey of the property.\textsuperscript{139}

HOPE filed a motion for summary judgment on its claim to the earnest money and on Gateway's counterclaim for reimbursement of the survey fees.\textsuperscript{140} The evidence before the trial court demonstrated that the sales contract between Gateway and HOPE described the property as "4190 Cedar Ridge Trail located in Land Lot 192 of District 15 of DeKalb County in the City of Stone Mountain."\textsuperscript{141} The contract further contained a provision arguably incorporating by reference the description of the property recorded by the Clerk of the Superior Court of DeKalb County. However, the deed of record in DeKalb County stated the property was located in Land Lots 191 and 192, rather than just in Land Lot 192 as indicated in the contract. Because of this discrepancy, the trial court found the property description inadequate as a matter of law. Accordingly, the trial court concluded that HOPE was entitled to recover its earnest money deposit but left the issue of the survey fee reimbursement for the jury. Gateway appealed the trial court's grant of summary judgment.\textsuperscript{142}

The court of appeals agreed with the trial court's determination that the property description at issue was so indefinite that the contract could not be enforced but disagreed with the trial court's basis for that decision.\textsuperscript{143} The court explained that a property description must be adequate within itself, or at least provide a key that will "open the door to extrinsic evidence which [will] lead[] unerringly to the land in question."\textsuperscript{144} The court of appeals found a property description is

\begin{thebibliography}{144}
\bibitem{138} Id. at 288, 535 S.E.2d at 287.
\bibitem{139} Id. at 286-87, 535 S.E.2d at 287.
\bibitem{140} Id. at 287, 535 S.E.2d at 287.
\bibitem{141} Id., 535 S.E.2d at 288. The trial court also granted HOPE's motion to disqualify Gateway's lawyer as he was a material witness in the case. Id., 535 S.E.2d at 287. That issue is not pertinent here and will not be discussed in detail.
\bibitem{142} Id., 535 S.E.2d at 288.
\bibitem{143} Id. at 286, 535 S.E.2d at 288.
\bibitem{144} Id. at 287, 535 S.E.2d at 288 (citing Kenerly v. Yancey, 144 Ga. App. 295, 297, 241 S.E.2d 28, 29 (1977)).
\end{thebibliography}
inadequate if it contains nothing more than an address "within the four corners of the contract." The contract in this case stated that "the metes and bounds of the property[,] . . . as well as the acreage, were to be determined by a survey to be conducted . . . after the contract was executed." The court held that a post-contract survey can be used to determine the exact acreage to be conveyed without rendering the contract unenforceable, but use of a post-contract survey to provide the only description of the property itself is insufficient for an enforceable property sales contract. The extrinsic evidence or "key" referenced in the contract must exist at the time the contract is created. Because the property description in the contract was insufficient on the date of the contract, HOPE was not obligated to comply with any provision of the sales contract. Thus, the trial court accurately granted summary judgment in favor of HOPE for the return of the earnest money. The court of appeals also affirmed the trial court's finding that the issue of who should pay the survey cost was a question for the jury.

This case confirms the importance of a clear and unambiguous description of the property subject to a contract for sale. It also firmly establishes the inability of parties to render their contract enforceable by agreeing that a proper description will be generated after the contract is executed. The property description must be complete and proper at the time the parties execute it in order for either party to enforce it against the other.

In Johnson v. Oriental Weavers Rug Manufacturing Co., the Georgia Court of Appeals determined whether an unlicensed real estate broker is entitled to a commission when the sales contract expressly provides for a commission to be paid to the broker. Robert O. Johnson, manager of real property owned by Smith Foster, brokered the sale of part of Foster's property to Oriental Weavers Rug Manufacturing Company, Inc. ("Oriental"). Johnson brought suit against Oriental and Foster when they refused to pay the five percent brokerage commission expressly due to him according to the terms of the contract.

145. *Id.* at 288, 535 S.E.2d at 288.
146. *Id.*
147. *Id.* (citing Royal v. Bland Properties, 175 Ga. App. 250, 251, 333 S.E.2d 145, 146 (1985)).
148. *Id.*
149. *Id.*, 535 S.E.2d at 288-89 (citing Royal, 175 Ga. App. at 251, 333 S.E.2d at 146).
150. *Id.* at 289, 535 S.E.2d at 289.
152. *Id.* at 15-16, 525 S.E.2d at 738.
153. *Id.* at 15, 525 S.E.2d at 738.
The general rule is that a "person doing business in Georgia without the requisite real estate license has no standing to sue for commissions allegedly earned." The court of appeals applied this rule in finding the contract provision regarding Johnson's commission unenforceable, even though this outcome provides a benefit to the contract parties at the expense of Johnson, who had already performed the services for which he was to be paid. Because the rule is based on public policy, the court held it could not be circumvented even if it were shown that Foster and Oriental deceitfully intended not to pay Johnson all along. The rule is one of standing to sue; thus, it applies before the court ever reaches the merits of the case.

The court then analyzed whether O.C.G.A. section 43-40-29(a)(8) provided a way for Johnson to gain standing to sue the buyer and the seller. That Code section provides that the rule requiring real estate brokers to be licensed does not apply to "[a]ny person employed on a full-time basis by the owner of property for the purpose of providing property management services or community association management services, selling, buying, leasing, managing, auctioning, or otherwise dealing with such property." The court relied on a Georgia Supreme Court case holding that this statute was not intended to provide a broad means of circumventing the rule that only licensed brokers have standing to sue for nonpayment of commissions. Because Johnson had the expectation of receiving a fee for brokerage services, rather than services incidental to the normal fulfillment of his job, he is disqualified for the brokerage commission because he is not a licensed broker.

The result in Oriental Weavers Rug Manufacturing Co. should have been obvious. Public policy prohibits unlicensed brokers from receiving brokerage fees—even when the fee was provided for in the sales contract.

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154. Id. (citing O.C.G.A. § 43-40-24(a) (1999)).
155. Id.
157. Id.
158. Id. at 15-16, 525 S.E.2d at 738-39.
159. O.C.G.A. § 43-40-29(a)(8) (1999). The point of the statute is that the persons who qualify are not deemed to be acting as "brokers." Rather, they are full-time employees of the owner of the property and are compensated accordingly.
160. 241 Ga. App. at 16, 525 S.E.2d at 738 (citing Bechenko v. Fulton Fed. Sav. & Loan Ass'n of Atlanta, Inc., 244 Ga. 733, 734-35, 261 S.E.2d 643, 644-45 (1979)). The court in Bechenko held that "O.C.G.A. § 43-40-29(a) does not apply to any full time employee who receives or intends to receive a fee, commission or other valuable consideration for brokerage services." Id. (citing Bechenko, 244 Ga. at 734, 261 S.E.2d at 644-45).
161. Id. at 16, 525 S.E.2d at 739.
Unless the plaintiff can bring himself within the narrow exception to that general rule created by O.C.G.A. section 43-40-29(a)(8), no unlicensed broker may bring suit to recover real estate commissions allegedly owed to him.

V. FORECLOSURES

In Atlanta Dwellings, Inc. v. Wright, the Georgia Supreme Court examined whether it is proper for a trial court to grant an interlocutory injunction halting a foreclosure when the lender’s conduct under a forbearance agreement may constitute waiver of strict performance of the underlying security deed. Private Mortgage Funding Corporation (“Private Mortgage”) held a promissory note from Wright, the repayment of which was secured by Wright’s interest in the Azalea Gardens and an assignment of the rents and leases from that property. Wright defaulted on the loan, and Private Mortgage obtained a judgment against her. Wright then entered into a forbearance agreement with Private Mortgage. The agreement allowed Wright to payoff her other defaulted loans with Private Mortgage and leave the Azalea Gardens loan outstanding with a short payoff on several conditions.

Private Mortgage assigned all its rights under the original court judgment, the forbearance agreement, and the Azalea Gardens loan to Atlanta Dwellings, Inc. (“ADI”). After taking the assignment, ADI sent a notice of default to Wright claiming that she breached the loan and the forbearance agreement by failing to pay real property ad valorem taxes from 1992 through 1997. ADI also claimed Wright was in breach because she failed to obtain the lender’s consent when she transferred the property to Azalea Gardens, Inc. in 1993. After Wright failed to cure the alleged default, ADI filed a complaint against her. ADI sought to have the court grant the following relief:“(1) [A]llow a non-judicial foreclosure of the property; (2) issue an order restraining Wright from disposing of rents, issues, and profits in connection with the Azalea Gardens property; and (3) declare that ADI’s interest in the rents, issues and profits of the property was perfected.”

Wright obtained a temporary restraining order from the trial court staying the foreclosure. Following an evidentiary hearing, the trial court also granted Wright’s request for interlocutory injunction. Based on the evidence presented at the hearing, the court concluded that questions of

163. Id. at 232-33, 527 S.E.2d at 855.
164. Id. at 231-32, 527 S.E.2d at 855.
165. Id. at 232, 527 S.E.2d at 855.
166. Id.
fact existed for the jury to resolve regarding whether Wright had defaulted on the forbearance agreement.\textsuperscript{167}

ADI appealed the trial court's grant of interlocutory injunction to Wright. ADI also sent Wright a second demand note on the forbearance agreement, asserting that Wright had defaulted by failing to pay 1998 ad valorem taxes due on the Azalea Gardens. The trial court again issued an injunction preventing foreclosure following the alleged default until a jury could resolve the questions of fact and ADI's appeal.\textsuperscript{168}

On appeal the supreme court stated that "[i]f there is any question as to the construction of a deed to secure debt either by virtue of its original terms or a course of conduct which waives strict performance, a question for the jury is presented."\textsuperscript{169} The court found it was not unreasonable for the trial court to find questions concerning the construction of the forbearance agreement.\textsuperscript{170} If Wright proved that the language of the forbearance agreement forgave the past defaults or that the lender failed to call the loan for these defaults for an extended period of time, strict performance of the security deed could be deemed waived.\textsuperscript{171} Therefore, the lender would not be entitled to foreclose because of those alleged defaults. Because questions of fact existed for the jury to resolve, the supreme court affirmed the trial court's grant of interlocutory injunction.\textsuperscript{172}

In reaching its decision, the court noted a lower court's order that stated the "mere existence" of questions of fact or unresolved issues warrant the grant of an injunction to maintain the status quo between the parties.\textsuperscript{173} That standard favors borrowers and may delay creditors in their attempts to pursue self-help remedies for which they bargained in their loan arrangements. As a result, creditors must be particularly diligent to ensure that their actions in dealing with debtors may not be construed as waiver of strict compliance with the terms of any work-out arrangement.

In \textit{Machen v. Wolande Management Group, Inc.},\textsuperscript{174} the Georgia Supreme Court analyzed what steps a party must take to redeem

\begin{itemize}
\item \textsuperscript{167} \textit{Id.} at 232-33, 527 S.E.2d at 855.
\item \textsuperscript{168} \textit{Id.} at 233, 527 S.E.2d at 855-56.
\item \textsuperscript{169} \textit{Id.}, 527 S.E.2d at 856 (quoting Benton v. Patel, 257 Ga. 669, 672, 362 S.E.2d 217, 220 (1987)).
\item \textsuperscript{170} \textit{Id.} at 234, 527 S.E.2d at 856.
\item \textsuperscript{171} \textit{Id.} at 233-34, 527 S.E.2d at 856 (citing West v. Koufman, 259 Ga. 505, 506, 384 S.E.2d 664, 666 (1989)).
\item \textsuperscript{172} \textit{Id.} at 234, 527 S.E.2d at 856.
\item \textsuperscript{173} \textit{Id.} at 232-33, 527 S.E.2d at 855.
\item \textsuperscript{174} 271 Ga. 163, 517 S.E.2d 58 (1999).
\end{itemize}
The court held that “the right to redeem property sold under a tax execution is conditioned upon 'the payment of the redemption price or the amount required for redemption.'" Specifically, the court held that filing a lawsuit within the time provided for redemption is insufficient to comply with the applicable four-year limitation period.

The property at issue in Machen was located on Church Street in Decatur, Georgia. Southeastern Mortgage and Investment Company, Inc. owned the property until it was sold in July 1994 to satisfy past due taxes. At the time of the tax sale, First Federal Savings & Loan Association of Americus (“First Federal”) held the first security deed on the property, and John W. Henderson, Sr. held the second security deed. In January 1996 Wolande Management Group, Inc. (“Wolande”) acquired the property from the grantee of the tax deed. Wolande then filed a quiet title action to foreclose the right of redemption. In December 1997 First Federal's successor in interest quitclaimed its interest in the property. Thereafter, Wolande dismissed its quiet title action.

In April 1998, within four years after the tax sale, the heirs of John W. Henderson, Sr. (the “Hendersons”), as his successors in interest to the property, brought suit seeking a declaration that they had a right to redeem the property and that the security deed they held was now in first priority. Wolande brought a counterclaim seeking a declaration that the Hendersons did not have a right to redeem the property. In August 1998 the court held a bench trial on the Hendersons' action for declaratory relief. At the conclusion of that trial, the court ruled that the Hendersons were barred from exercising their prior right of redemption because the four-year statutory period had expired.

The supreme court affirmed the decision of the trial court. As the appellate court noted, redemption is a “self-help remedy.” In order to take advantage of that remedy, the person seeking to redeem property must tender the amount owed before the statutory period expires. If the owner does not wish to pay the sum directly to the creditor, the owner

175. Id. at 164-65, 517 S.E.2d at 59-60.
176. Id. at 165, 517 S.E.2d at 60 (quoting O.C.G.A. § 48-4-40 (1999)).
177. Id. at 164, 517 S.E.2d at 59 (citing O.C.G.A. § 48-4-48(b) (1999). This same Code section was at issue in a case discussed in last year's survey. See T. Daniel Brannan & William J. Sheppard, Real Property, 51 MERCER L. REV. 441, 444 (1999) (discussing Blizzard v. Moniz, 271 Ga. 50, 518 S.E.2d 407 (1999)). However, the issue this year is slightly different.
178. 271 Ga. at 163-64, 517 S.E.2d at 59.
179. Id. at 164, 517 S.E.2d at 59.
180. Id. at 166, 517 S.E.2d at 60-61.
181. Id. at 164, 517 S.E.2d at 59.
can pay the sums into the registry of court until any dispute regarding
the redemption of the property is resolved.\footnote{182}{Id. at 169, 517 S.E.2d at 60.} As the court stated,
paying the sums due before the expiration of the statute of limitations
is the only procedure to redeem property sold at tax sale or foreclosure,
unless the creditor has waived tender of the amount.\footnote{183}{Id.} The court
found tender of the amount could not have been waived because an
attempt to tender the amount is necessary before the lender can possibly
waive it.\footnote{184}{Id.}

This case reveals that an owner wishing to redeem property sold at
tax sale or foreclosure must make some sort of attempt to pay the
amount owed. Otherwise, filing a suit for the court to determine the
owner’s right to redeem will not act to toll the statute of limitations
period.

VI. EMINENT DOMAIN

In\footnote{185}{271 Ga. 349, 519 S.E.2d 217 (1999).} City of Marietta v. Edwards,\footnote{186}{Id. at 351, 519 S.E.2d at 219.} the Georgia Supreme Court
reversed a ruling of the Georgia Court of Appeals regarding whether the
City of Marietta (“the City”) had lost its ability to condemn property
because of a bad faith exercise of its right to do so.\footnote{187}{Id. at 349, 519 S.E.2d at 217.} In July 1993 the
City solicited bids for the sale of a piece of property. In September 1993
the City accepted Julian and Nancy Edwards’ bid. In October counsel
for the City asked the Edwardses to consider selling a portion of the
property back to the City for use as a right-of-way. The Edwardses then
contacted Tom Boland, the City’s agent and facilitator of the sale, to ask
whether the City would condemn the right-of-way if the Edwardses
decided not to sell the land back. The parties disagreed about whether
and to what extent Boland assured the Edwardses that the City would
not exercise its power of eminent domain.\footnote{188}{Id. at 350, 519 S.E.2d at 218.} However, Julian Edward-

\footnote{189}{Id. at 349, 519 S.E.2d at 217.}
The special master recommended dismissal of the petition on the ground that the City had exercised its condemnation powers in “bad faith, arbitrarily, capriciously, and beyond powers conferred by law.” The superior court, on cross motions for summary judgment, granted the City’s motion. The court of appeals affirmed the lower court’s ruling regarding the neighbor’s property, but reversed the ruling concerning the Edwards’ property. The supreme court granted certiorari and held the court of appeals erred in holding that a genuine issue of material fact remained pertaining to the City’s bad faith exercise of its power of eminent domain.

The supreme court held that, even construing Boland’s statement regarding the City’s condemnation intentions in the light most favorable to the Edwardses, the statement was equivocal and not a guarantee of the City’s action. Boland’s statement indicated only that the City probably would not exercise its legal right of condemnation. The court further found that Boland’s statements would not serve as proof of the City’s bad faith in the condemnation. According to the court, “there is a distinction between the City’s sale of its own property and the exercise of its power to condemn the property of its citizens.” Boland’s statement in his capacity as the City’s agent for the sale of the property had nothing to do with the subsequent condemning of the Edwardses’ property, and thus, the court held it could not be used as evidence to show bad faith in the condemnation. Finally, the court stated that the Edwardses sought “to estop the City from the exercise of its right of eminent domain by asserting Boland’s unauthorized statements as evidence of the City’s bad faith.” It is well-settled that “the City cannot be estopped by ‘the acts of any officer done in the exercise of an unconferred power.’”

The supreme court also rejected the court of appeals conclusion that the city intentionally misled the Edwardses to induce them to consummate the purchase. The evidence showed the Edwardses’ bid was accepted several weeks before Boland’s alleged statement. Thus, the

190. Id.
191. Id., 519 S.E.2d at 217-18.
192. Id. at 349, 351, 519 S.E.2d at 218-19.
193. Id. at 350, 519 S.E.2d at 218.
194. Id.
195. Id.
196. Id.
197. Id. (citing O.C.G.A. § 24-3-33 (1995)).
198. Id.
199. Id. (quoting O.C.G.A. § 45-6-5 (1990)).
200. Id. at 350-51, 519 S.E.2d at 218.
Edwardses had entered into a legal, nonfraudulent contract with the City to purchase the property even before the conversation with Boland.\textsuperscript{201} Once they did so, they were bound to fulfill the contract even if it was "unwise or disadvantageous to them."\textsuperscript{202} Moreover, once "the City realized that it should have retained a portion of the property for an expanded right-of-way, it could have condemned a portion of [the Edwardses'] contract rights prior to consummation of the contract."\textsuperscript{203} Therefore, the Edwardses could not use the excuse that the City had decided to condemn part of the property that the Edwardses were obligated to buy as grounds to refuse to consummate the sale. Because the City did not make the alleged misrepresentation until after the contract was formed, and because the Edwardses already were obligated to buy, no evidence showed fraudulent misrepresentation on the part of the City. Ultimately, while the Edwardses may have shown that the City's condemnation plans were uncertain, there was not a showing of bad faith.\textsuperscript{204}

Furthermore, the court held the improvements made to the property after the sale but prior to the condemnation did not affect the City's right to condemn the right-of-way and did not suggest bad faith.\textsuperscript{205} The court noted that the City would have to pay just and adequate compensation for the right-of-way it sought based on the value of the newly-renovated property on the date of the taking.\textsuperscript{206} Therefore, the court held that "the fact that the City condemned the right-of-way after the renovation did not constitute evidence of bad faith."\textsuperscript{207} Finally, the court noted no evidence of bad faith existed in the stated purpose for the condemnation.\textsuperscript{208}

In its reasoning, the court in City of Marietta looked to previous cases and stated the following: (1) "This court has been reluctant to find bad faith on the part of the condemnor in its determination of public purpose in the exercise of the right of eminent domain."\textsuperscript{209} and (2) "[t]his court

\textsuperscript{201. Id. at 350, 519 S.E.2d at 218.}
\textsuperscript{202. Id.}
\textsuperscript{203. Id.}
\textsuperscript{204. Id. at 350-51, 519 S.E.2d at 218. The court noted that "'bad faith' in this context . . . is comparable to 'conscious wrongdoing motivated by improper interest or ill will.'" Id. at 351, 519 S.E.2d at 218 (quoting Craven v. Georgia Power Co., 248 Ga. 79, 80, 281 S.E.2d 568, 569 (1981)) (citations omitted).}
\textsuperscript{205. Id. at 351, 519 S.E.2d at 218-19.}
\textsuperscript{206. Id., 519 S.E.2d at 218.}
\textsuperscript{207. Id.}
\textsuperscript{208. Id., 519 S.E.2d at 219.}
\textsuperscript{209. Id. (quoting Concept Capital Corp. v. DeKalb County, 255 Ga. 452, 453, 339 S.E.2d 583, 585 (1986)).}
has found bad faith in the determination of public purpose only when the stated purpose was a subterfuge.\textsuperscript{210} The court continued, noting that "[i]ndeed, the import of the [the second holding above] . . . 'is that a condemning authority may not utilize the power of eminent domain to restrict a legitimate activity in which the state has an interest.'\textsuperscript{211} Accordingly, like the Edwardses, persons who seek to avoid condemnation of their property, or a portion of that property, will be hard-pressed to prove bad faith by the condemning authority as a basis for doing so. In \textit{Department of Transportation v. Rasmussen,}\textsuperscript{212} the Georgia Court of Appeals addressed the issue of consequential damages in an eminent domain action.\textsuperscript{213} On March 13, 1997, the Georgia Department of Transportation ("DOT") condemned 0.216 acres of a 0.990 acre tract of land owned by Lloyd Rasmussen in order to widen Highway 124 at Rock Chapel Road in DeKalb County. The DOT also condemned a permanent easement encompassing 0.0689 acres of the tract. The condemned parcel included a building that, at the time of the taking, was used as an automotive repair shop but had once housed a service station. Several underground storage tanks existed on the property and were located on a portion of the land retained by Rasmussen.\textsuperscript{214} Testimony at trial revealed that various state and federal regulations required the tanks either be removed or closed by December 23, 1998.\textsuperscript{215} Additionally, testimony showed that "the property not taken could not be restored to the value it had at the time of the taking absent being made ready for commercial development and the property could not be redeveloped without removing the tanks."\textsuperscript{216} The DOT offered Rasmussen $28,136 as compensation for the taking, and Rasmussen appealed. A jury awarded him $52,520, including $46,020 for the market value of the property taken and $6,500 in consequential damages based on evidence of the cost to remove the tanks.\textsuperscript{217} On appeal the DOT challenged the trial court's evidentiary admission of consequential damages arguing that "the removal of the storage tanks was not a consequence of the taking."\textsuperscript{218}

\begin{itemize}
\item \textsuperscript{210} \textit{Id.} (citing Carrol County v. City of Bremen, 256 Ga. 281, 282, 347 S.E.2d 598, 599 (1986); Earth Management v. Heard County, 248 Ga. 442, 448, 283 S.E.2d 455, 461 (1981)).
\item \textsuperscript{211} \textit{Id.} (quoting \textit{Concept Capital Corp.}, 255 Ga. at 454, 339 S.E.2d at 585).
\item \textsuperscript{212} 244 Ga. App. 245, 534 S.E.2d 573 (2000).
\item \textsuperscript{213} \textit{Id.} at 245, 534 S.E.2d at 574.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.} "Closure" in this context means that the tanks must either be removed or filled with inert material.
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.}
\end{itemize}
The court of appeals affirmed the trial court's admission of the evidence. First, the court gave credence to Rasmussen's expert who had testified at trial that Rasmussen "would not have incurred the cost of removing the tanks absent the taking." He testified that the building housing the automotive repair shop "could have remained in place for an indefinite number of years, . . . [and] that had the building remained in place, the tanks could have been" closed properly by filling them with an inert material, such as sand. The expert further testified that the demolition of the building due to the taking required Rasmussen to remove the tanks on the remaining parcel at a cost of approximately $10,000 in order to restore its value as commercial property ready for development. Relying on Simon v. Department of Transportation, the court first noted:

In a condemnation proceeding involving a partial taking, two elements of damage are to be considered. The first is the market value of the property actually taken. The second is the consequential damage that will "'naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned.'"

The court held that based on Georgia law and the evidence presented by the expert, the cost to remove the storage tanks proximately arose from the taking.

The DOT also argued the trial court abused its discretion in permitting evidence that the DOT placed its right-of-way line in such a way that the taking deliberately excluded the land containing the storage tanks. Thus, the DOT claimed, this error "allowed counsel for Rasmussen to inject the issue of bad faith without following the procedure outlined in O.C.G.A. section 32-3-11(c)." The court rejected the DOT's argument, concluding that the evidence was relevant to show that the tanks remained on Rasmussen's parcel. The court stated as follows:

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219. Id. at 246, 534 S.E.2d at 575.
220. Id. at 245, 534 S.E.2d at 574.
221. Id.
222. Id. at 245-46, 534 S.E.2d at 574.
223. 245 Ga. 478, 265 S.E.2d 777 (1980).
224. 244 Ga. App. at 246, 534 S.E.2d at 574 (quoting Simon, 245 Ga. at 478, 265 S.E.2d at 778).
225. Id.
226. Id., 534 S.E.2d at 574-75.
227. Id., 534 S.E.2d at 575.
228. Id.
It is well-settled that "(u)nless the potential for prejudice in the admission of evidence substantially outweighs its probative value, the Georgia rule favors the admission of any relevant evidence, no matter how slight its probative value. Evidence of doubtful relevancy or competency should be admitted and its weight left to the jurors."\(^{229}\)

This case demonstrated one situation in which consequential damages are available in a condemnation action. Because there are a great many present and former gasoline stations located on or near right-of-ways, the factual scenario present in *Rasmussen* is likely to recur in the future and the holding will provide instruction to the owners of land subjected to condemnation.

**VII. LANDLORD AND TENANT**

As in the previous two survey periods, the issue of a landlord's liability for injuries sustained by a tenant as a result of criminal activity on the leased property was an issue in a case pending before the appellate courts.\(^{230}\) In *FPI Atlanta, L.P. v. Seaton*,\(^{231}\) the Georgia Court of Appeals held landlords have a nondelagable duty to protect the leased premises from "foreseeable third party criminal conduct" even when the tenants are tricked into voluntarily allowing the criminal to enter the property.\(^{232}\) The court also found that the security providers contractually obligated to protect the landlord's leased property may, under certain circumstances, become liable to the tenants on the theory that the tenants are third-party beneficiaries of the contract with the landlord.\(^{233}\)

Plaintiffs in *Seaton*, tenants of the Timber Trace Apartments, sued defendants Fogelman Properties, Inc. and Avron B. Fogelman, general partners of the landlord/limited partnership that owned and operated the 989-unit complex. Plaintiffs sought to recover damages based upon injuries they suffered during a robbery on the premises. Plaintiffs also sued Corporate Security Services ("CSS"), the company providing

\(^{229}\) Id. (quoting Norman v. State, 197 Ga. App. 333, 336, 398 S.E.2d 395, 398 (1990)).


\(^{232}\) Id. at 882, 524 S.E.2d at 528.

\(^{233}\) Id. at 888, 524 S.E.2d at 532.
security guards at the apartment, and James Boone, the particular security guard on duty that night.\footnote{234}

Within the five years preceding the incident that was the subject of plaintiffs' claims, there were fifty-nine burglaries, five armed robberies, one robbery, one kidnapping, two murders, four aggravated assaults, one simple battery, and one criminal trespass at the property. Despite this history of crime, the landlord provided security only in the form of off-duty and unarmed DeKalb officers. Those officers were contractually authorized only to investigate possible disturbances or suspicious behavior and call the police when necessary. The apartment complex was not equipped with fences, gates or controlled access. Although the management had considered installation of these sorts of devices, they were not installed at the time of the incident in question.\footnote{235}

On the night plaintiffs were injured, two patrolmen were on duty and noticed the robbers' car but did not find anything suspicious about it at the time. The criminals tricked plaintiff Seals into letting them enter the apartment. There, they tied her up and put her in the closet. The criminals waited for plaintiff Seaton to arrive. When Seaton arrived, they took him at gunpoint to his place of work where the criminals stole $10,000.\footnote{236}

All of the parties moved for summary judgment before the trial court. The trial court denied the Fogelman defendants' summary judgment motion on the issue of negligence but granted it on the issue of nuisance. The court found that a jury issue existed concerning whether plaintiff Seals assumed the risk of the injuries she suffered and whether Seaton had released his claims against defendants. Because plaintiffs' tort claims remained pending, the court denied the Fogelman defendants' motion for summary judgment on the issue of punitive damages. The court entered judgment for defendants CCS and Boone as a matter of law. The court refused to enter summary judgment for plaintiffs.\footnote{237}

On appeal the court first determined that a jury question existed concerning whether the Fogelman defendants breached a legal duty to plaintiffs.\footnote{238} Under Georgia law a landlord is only liable for criminal conduct occurring on the premises if that conduct is reasonably foreseeable because similar criminal conduct has already occurred on or

\footnotesize{\textsuperscript{234} Id. at 880-81, 524 S.E.2d at 526-27.\
\textsuperscript{235} Id. at 880, 883, 524 S.E.2d at 527-28.\
\textsuperscript{236} Id. at 881-82, 524 S.E.2d at 527.\
\textsuperscript{237} Id. at 882, 524 S.E.2d at 527-28.\
\textsuperscript{238} Id., 524 S.E.2d at 528.}
near the premises. The test is whether "a reasonable person would take ordinary precautions to protect his or her ... tenants against the risk posed by that type of activity." The court noted that while the crime in question does not have to be identical to previous crimes, "the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question" must be examined to determine liability of the landlord.

The issue of reasonable foreseeability is generally a jury question when the facts indicate foreseeability. Therefore, because of the extensive past crime in the area, the court found the trial court properly denied summary judgment to the Fogelman defendants even though it was undisputed that an identical crime had never occurred on the premises. The court also held that the issue of causation between the alleged breach of duty and the damages incurred by plaintiffs presented an issue of fact. The court held that when an independent criminal act of a third party was a reasonably foreseeable consequence of the landlord's negligence, that negligence is a concurrent proximate cause of the criminal conduct.

The court held plaintiff Seal's claim was not barred by assumption of the risk grounds because defendants failed to show that Seal had actual specific knowledge of the danger involved when she let the criminals into the apartment. The court also held the trial court did not err in denying the Fogelman defendants' partial summary judgment motion as to punitive damages. The court made this conclusion because under Georgia law punitive damages are available in tort cases when the plaintiff shows the defendant had an "entire want of care which would raise the presumption of conscious indifference to consequences."

Finally, the court held the trial court erred when it granted summary judgment to CCS and Boone. The court found that normally an independent contractor, such as the security providers here, will not be held liable for the landlord's "personal and nondelegable duty ... to

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239. Id. (citing O.C.G.A. § 51-3-1 (1981); Lau's Corp. v. Haskins, 261 Ga. 491, 492-93, 405 S.E.2d 474, 476 (1991)).
240. Id.
241. Id.
242. Id. at 884, 524 S.E.2d at 529.
243. Id.
244. Id.
245. Id.
246. Id. at 884-85, 524 S.E.2d at 529.
247. Id. at 885, 524 S.E.2d at 530.
248. Id. at 885-86, 524 S.E.2d at 530 (quoting O.C.G.A. § 51-12-5.1(b) (Supp. 2000)).
249. Id. at 886, 524 S.E.2d at 530.
keep the premises and approaches safe.”\textsuperscript{250} However, employing the rules of contract construction, the court examined the contract between the Fogelman defendants and the security defendants and found the “contract clearly indicates that parties not expressly named in the contract are to be affected by the contract as third-party beneficiaries.”\textsuperscript{251} The court based this ruling on finding that “the contract expressly excluded and limited liability only as to property but did not expressly exclude or limit liability for personal injury.”\textsuperscript{252} The court found that whether the security providers breached their primary contractual duties to the tenants by failing to investigate or report any conduct to the police remained an issue for the jury.\textsuperscript{253}

In a special concurrence, Presiding Judge Pope agreed with the findings of the majority regarding “duty, breach, proximate cause, and punitive damages for the [Fogelman defendants].”\textsuperscript{254} However, Judge Pope did not agree with the majority that questions of fact existed on the issue of the tenants’ status as third-party beneficiaries of the security contract.\textsuperscript{255} Judge Pope refused to find the security company’s failure to disclaim liability for personal injuries to tenants while disclaiming liability for property damage was sufficient to create third-party liability.\textsuperscript{256} However, Judge Pope did conclude that a cause of action against the security providers might have arisen if they reasonably led the tenants to believe that guards were providing security for the tenants and if the security guards were negligent.\textsuperscript{257}

In \textit{Wadkins v. Smallwood},\textsuperscript{258} the Georgia Court of Appeals held that under Georgia statutory law a landlord’s failure to maintain a smoke detector in good condition cannot be introduced in a trial on the landlord’s negligence.\textsuperscript{259} Plaintiff, Katina Wadkins, sued the owners of her apartment, Michael and Josie Smallwood, because she was injured and her child was killed in an apartment fire when the landlords had not maintained the hard-wired smoke detector or installed an additional battery-operated smoke detector. At trial the jury found for the Smallwoods. Wadkins appealed.\textsuperscript{260}

\textsuperscript{250} \textit{Id.} (citing Feggans v. Kroger Co., 223 Ga. App. 47, 50, 476 S.E.2d 822, 825 (1996)).
\textsuperscript{251} \textit{Id.} at 887, 524 S.E.2d at 531.
\textsuperscript{252} \textit{Id.} at 888, 524 S.E.2d at 532.
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{Id.} at 889, 524 S.E.2d at 532 (Pope, J., concurring specially).
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.} at 890, 524 S.E.2d at 533.
\textsuperscript{257} \textit{Id.}
\textsuperscript{259} \textit{Id.} at 136, 530 S.E.2d at 502.
\textsuperscript{260} \textit{Id.}
The apartment duplex at issue in this case is federally assisted Section VIII housing for low-income families. As part of the agreement the landlords entered into for ten years, the Columbus Housing Authority ("CHA") hired a contractor to renovate the apartments, and the CHA periodically inspected the apartments to recommend needed repairs to the landlords. At the time of the incident, applicable federal regulations required that at least one battery-operated smoke detector be located on each level of the Section VIII housing unit after October of 1992. Further, the City of Columbus building code required the installation of smoke detectors in compliance with manufacturer suggestion. Also, Georgia law required the installation of battery-operated smoke detectors in apartments after 1994.

The landlords were never informed of any malfunction with the hard-wired smoke detector, and they never installed a battery-operated smoke detector because they were ignorant of the Georgia law. The trial court would not allow Wadkins to introduce evidence of the landlord's failure to maintain a battery-operated smoke detector because the trial court's interpretation of O.C.G.A. section 25-2-40 only allowed Wadkins to introduce evidence that the Smallwoods were required to install a battery-operated smoke detector. In an opinion written by Chief Judge Johnson, the court of appeals agreed with the trial court's interpretation of the statute because O.C.G.A. section 25-2-40(g) states that failure to maintain a smoke detector cannot be used as evidence of negligence in a civil case.

Wadkins argued on appeal that the exclusion in O.C.G.A. section 25-2-40(g) is applicable to tenants but not landlords. The court found this argument to be without merit because neither the actual language of section 25-2-40(g) nor any of the related statutes limits its applicability to tenants. The court further held the exclusion in section 25-2-40(g) overrides landlords' general statutory and common law duties because of the rule of statutory construction that the more specific

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261. Id. at 135, 530 S.E.2d at 501.
262. Id.
263. Id. at 136, 530 S.E.2d at 502 (citing O.C.G.A. § 25-2-40 (Supp. 2000)).
264. Id. The statute states:
   Failure to maintain a smoke detector in good working order in a dwelling . . . in violation of this Code section shall not be considered evidence of negligence, shall not be considered by the court on any question of liability of any person . . . and shall not diminish any recovery for damages arising out of the ownership, maintenance, or occupancy of such dwelling.
   O.C.G.A. § 25-2-40(g).
266. Id., 530 S.E.2d at 502-03.
statutes govern over the more general statutes.\textsuperscript{267} Thus, the court found the trial court did not err in prohibiting the introduction of evidence that the Smallwoods failed to maintain a battery-operated smoke detector.\textsuperscript{268}

At trial Wadkins moved for directed verdict because the Smallwoods did not install a battery-operated smoke detector and did not maintain the hard-wire smoke detector.\textsuperscript{269} The trial court denied Wadkins’ motion and the appellate court affirmed the trial court’s ruling.\textsuperscript{270} The appellate court reasoned that there was enough evidence before the trial court to pose a jury question on whether the lack of operable smoke detectors proximately caused Wadkins’ injuries and the child’s death.\textsuperscript{271} Evidence before the trial court included testimony by a fire investigator that it was possible that operable smoke detectors would not have prevented the injuries complained of in the action.\textsuperscript{272}

The remainder of the court’s opinion deals with Wadkins’ appeal regarding the trial court’s refusal to charge the jury with the instructions she presented.\textsuperscript{273} The court concluded that the trial court’s general charge to the jury was a more accurate and nonargumentative statement of the law and explanation of the verdict.\textsuperscript{274} Judges McMurray and Phipps concurred with Chief Judge Johnson’s opinion.\textsuperscript{275}

This case points out that, though a landlord may have general duties to keep the leased premises safe, the specific statutory exclusion from liability on this duty provided in O.C.G.A. section 25-2-40(g) governs over the general. Thus, a landlord must keep a battery-operated smoke detector in good repair on the premises, but the landlord’s failure to do so cannot be used against the landlord to prove negligence.

\section*{VIII. LEGISLATIVE DEVELOPMENTS}

The Georgia General Assembly passed only one noteworthy statute related to real property during the 1999 Legislative Session. Senate Bill 343 amends O.C.G.A. section 22-3-60 by replacing the entire Code section.\textsuperscript{276} The bill also adds sections 22-3-63 and 22-3-140.\textsuperscript{277} Prior

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\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Id. at 138, 530 S.E.2d at 503.
\textsuperscript{270} Id. at 139, 530 S.E.2d at 503.
\textsuperscript{271} Id. at 138-39, 530 S.E.2d at 503.
\textsuperscript{272} Id. at 138, 530 S.E.2d at 503.
\textsuperscript{273} Id. at 139-42, 530 S.E.2d at 504-06.
\textsuperscript{274} Id. at 139, 530 S.E.2d at 503-04.
\textsuperscript{275} Id. at 142, 530 S.E.2d at 504.
\textsuperscript{276} O.C.G.A. section 22-3-60 now reads as follows:
to its amendment, section 22-3-60 allowed nongovernmental entities constructing or operating a waterworks, water distribution system, a sewerage collection system or a sewage treatment and disposal system to condemn property or property interests if it was necessary to carry out the business of the nongovernmental entity. As a result of Senate Bill 343, section 22-3-60 now provides that nongovernmental entities can only condemn property or property interests if consent by resolution or ordinance is first obtained from the governing authority of the political subdivision in which the nongovernmental entity is operating. The new section 22-3-63 limits the ability of nongovernmental entities to condemn land for use in connection with the operation of waterworks and sewerage systems. Under that Code section, the power of condemnation may only be exercised by nongovernmental agencies operating large sewerage systems (1,000 or more) and customers, and then only in counties in which the system was in operation on May 1, 2000, and adjacent counties. Under the new section 22-3-140, governmental agencies operating a waterworks and sewerage systems are permitted to use, in addition to the methods of condemnation contained in Title 22, the “declaration of taking method” of condemnation as provided in Title 32. The enactment of that statute should make it easier for public

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277. O.C.G.A. section 22-3-63 provides an exception to the consent requirement of section 22-3-60 for applicable nongovernmental entities in operation before the enactment of the bill. O.C.G.A. section 22-3-140 provides the power of eminent domain for governmental entities “owning or operating a sewage collection, treatment, or disposal system, a water or waste-water system, a gas or gas line system, an electrical or electrical line system, or a drain or storm-water system.”


279. Id. § 22-3-60 (Supp. 2000) (adding the proviso “provided, however, that prior to condemning property in any political subdivision, any such entity shall first obtain the consent of the governing authority of such political subdivision, which consent may be granted by resolution or ordinance”).

280. Id. § 22-3-63.

281. Id. § 22-3-140.
waterworks and sewerage systems to obtain easements over private property in order to expand their systems.