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Construction Law

by Brian J. Morrissey* and Timothy N. Toler**

I. INTRODUCTION

The decisions rendered by the Georgia Supreme Court and Georgia Court of Appeals during this one-year survey period included a small opening in lender liability, a minimalist view of the requirements of evidence as it pertains to the law of fraud, an extensive discussion of the law of damages as it applies to construction contracts, and a harsh result because of failure to comply with the requirements of the mechanic's and materialmen's lien statute. This Article addresses these significant movements in the law and some of the reaffirmations of existing law in the construction field between June 1, 1998, and May 31, 1999.

II. LENDER DUTIES AND LIABILITIES

A. Disbursement of Funds

In Construction Lender, Inc. v. Sutter,1 although it remanded the case on other grounds, the court of appeals agreed with a trial court verdict that a lender's president bound the lender by voluntarily undertaking a duty to secure approval from the lender's borrowers before disbursing loan funds to a building contractor.2 Construction Lender, Inc. ("TCL"), in its loan documents with Robert and Sandra Sutter, declined to undertake any duties with respect to the quality and performance of the

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2. Id. at 407, 491 S.E.2d at 856.
construction work. After construction began, however, problems arose with the general contractor’s work, and the borrowers asked the lender not to make any further disbursements without their approval. The lender agreed and followed this procedure for the next three draws. However, the lender paid the final draw without the borrowers’ approval, increasing the final contract price above the agreed amount of $211,500, which the lender should have disbursed. The general contractor then declared bankruptcy. At trial the borrowers presented evidence of damages, including amounts paid in excess of the contract price, draws paid without approval, and the costs of completing the house resulting from delays in completion caused by the general contractor’s abandonment of the job. These damages included removal of materialmen’s liens, the continued interest on the construction loan, and the refinancing of that loan to obtain additional construction funding.\(^3\)

The borrowers presented their case to a jury on two tort theories: (1) that the lender and its president had a duty to ensure that payments made on the loan were timely and were for work actually performed; and (2) that they negligently failed to discharge the duty voluntarily undertaken to obtain the borrowers’ approval before disbursing the final loan amounts to the general contractor. After a jury verdict in favor of the borrowers, the bank president and lender appealed the denials of their motions for directed verdict and for judgment notwithstanding the verdict.\(^4\)

The court of appeals found that “[w]here one undertakes an act which he has no duty to perform and another reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care.”\(^5\) The lender, through its president, “voluntarily undertook the duty to obtain approval from the . . . [borrowers] before disbursing the . . . [funds] and breached that duty.”\(^6\) The bank’s president, as the person who personally spoke on behalf of the lender and as an officer of the corporation, could also be personally responsible for that tort.\(^7\) In essence, the bank’s president created the duty and by his actions breached that duty both on his own and the lender’s behalf.

The court, however, found the duty was limited merely to obtaining authorization before disbursal and did not encompass ensuring that materialmen’s liens were paid or that the work was properly completed

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3. Id. at 405-07, 491 S.E.2d at 855-56.
4. Id. at 406-07, 491 S.E.2d at 856.
5. Id. at 407, 491 S.E.2d at 856 (quoting Stelts v. Epperson, 201 Ga. App. 405, 407, 411 S.E.2d 281, 282 (1991)).
6. Id.
in whole or in part. Accordingly, the court found that so long as the amounts disbursed without authority would not have been paid to the general contractor otherwise, the borrowers were entitled to recover these amounts but not additional damages. Consequential damages, including the cost of completion and the additional expenses resulting from the discharge of materialmen's liens and other personal expenses incurred by the borrower, were not a reasonably foreseeable result of the lender's breach of its voluntary duty.

With respect to the alleged duty to ensure payment for work actually performed, the court found it to be purely contractual in nature and not an independent duty arising in tort. "Mere breach of the contract's terms is insufficient to create a tort cause of action" unless one breaches "an independent duty created by statute or common law."

B. Fraud: Racketeer Influenced and Corrupt Organizations Statute

In Ali v. Fleet Finance, Inc. of Georgia, home purchasers sued a lender for fraud, negligent misrepresentation, and violations of Georgia's Racketeer Influenced and Corrupt Organizations ("RICO") statute. James Cooke made an initial purchase of a fire-damaged home from Fleet Finance under an "as is" agreement. Cooke reportedly made repairs on the home and remarketed it to Claudette and Dale Ali, also under an "as is" agreement. After taking possession, Ali discovered structural damage to beams, floors, and the roof, as well as electrical and plumbing problems allegedly a result of fire damage. Ali contended that Fleet Finance, as the mortgage holder on the property when Cooke owned it, either knew or should have known about these defects and failed to disclose them prior to the real estate closing. Fleet Finance contended it had no liability whatsoever because its sole involvement
with Ali was as a lender under the assumed existing loan. The trial court granted summary judgment to Fleet Finance.\textsuperscript{15} 

On appeal the court found no duty flowing from Fleet Finance to Ali to disclose any known defects to the purchasers, limiting the doctrine of passive concealment to residential builders and sellers only.\textsuperscript{16} Moreover, the court concluded that a creditor has “no duty to determine or advise its debtor of the status of the collateral involved in the transaction.”\textsuperscript{17} 

The court also summarily disposed of the RICO claim, finding that Fleet Finance’s involvement with Cooke in over one hundred properties did not establish a pattern of racketeering activity or the requisite unlawful predicate acts sufficient to establish a RICO claim.\textsuperscript{18} 

C. Fraud: Truth in Lending 

In \textit{Chandler v. MVM Construction, Inc.},\textsuperscript{19} the court of appeals reversed the grant of summary judgment to the lender in an action for fraud and violations of the Truth in Lending Act.\textsuperscript{20} The borrowers, William and Marie Chandler, sued MVM Construction (“MVM”) and Green Tree Financial Corporation (“Green Tree”) for fraud on a home improvement contract. The Chandlers and Green Tree signed a retail installment contract, using the borrowers’ home as security for the home improvement contract. The Chandlers were both over seventy-five years old, had extremely limited income, and were in poor health—Marie Chandler had been bedridden for years. Neither of the Chandlers graduated from high school, and William Chandler was barely literate.\textsuperscript{21} 

Under the Truth in Lending Act,\textsuperscript{22} a consumer has a right to rescind a transaction “until midnight of the third business day following the consummation of the transaction.”\textsuperscript{23} If the seller does not properly deliver or make the required notice or material disclosures, the consumer’s right to rescind is extended until three years after consum- 

\begin{itemize}
  \item \textsuperscript{15} 232 Ga. App. at 13, 500 S.E.2d at 915.
  \item \textsuperscript{16} \textit{Id.} at 14, 500 S.E.2d at 915 (citing Toys ‘R’ Us, Inc. v. Atlanta Econ. Dev. Corp., 195 Ga. App. 195, 198, 393 S.E.2d 44, 47 (1990)).
  \item \textsuperscript{17} \textit{Id.} (citing First Fed. Sav. Bank v. Hart, 185 Ga. App. 304, 305, 363 S.E.2d 832, 833 (1987)).
  \item \textsuperscript{18} \textit{Id.}, 500 S.E.2d at 915-16.
  \item \textsuperscript{20} \textit{Id.} at 389, 501 S.E.2d at 536.
  \item \textsuperscript{21} 232 Ga. App. at 385-86, 501 S.E.2d at 533.
  \item \textsuperscript{23} \textit{Id.} § 1635(a); see also 12 C.F.R. § 226.23(a)(3) (1998); 232 Ga. App. at 387, 501 S.E.2d at 534.
\end{itemize}
mation of the transaction. The Chandlers claimed the contract they signed did not contain a required schedule of due dates for periodic payments and did not disclose the due and payable date of the first installment. The court of appeals found sufficient factual issues to create a jury question concerning the existence of these contractual defects.

Moreover, the retail installment contract itself imposed potential liability on Green Tree. It allowed the debtor to assert against Green Tree (the holder of the consumer credit contract) any defenses available against MVM (the seller of the services or goods obtained). The Chandlers alleged deficiencies and fraud in the performance of the home improvement by MVM. The court concluded that jury questions existed as to whether the Chandlers, as a result of their infirm conditions, illiteracy, and poor eyesight, used proper diligence to ensure performance or to apprise themselves of the terms of the agreement.

III. CONTRACT FORMATION, CONSTRUCTION, AND BREACH

A. Contract Formation and Construction

In North Georgia Ready Mix Concrete Co. v. L & L Construction, Inc., the jury awarded the contractor repair costs of $100,000 in a breach of contract claim against a concrete supplier. The contractor claimed the supplier changed the agreed concrete design mix, resulting in excessive curling and spalling. On appeal the supplier argued that the trial court erroneously denied its motion for directed verdict because the contractor failed to prove any express warranty regarding mix design.

The court of appeals noted that "[a]ny description of the goods which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the description." The contractor presented evidence at trial showing that the parties orally agreed to a concrete mix of at least eighty percent natural sand and a maximum of

26. Id. at 388, 501 S.E.2d at 535.
27. Id. at 388-89, 501 S.E.2d at 535.
28. Id. at 386, 501 S.E.2d at 534.
29. Id. at 389, 501 S.E.2d at 536.
31. Id. at 69-71, 508 S.E.2d at 723-25.
32. Id. at 72, 508 S.E.2d at 726 (quoting O.C.G.A. § 11-2-313(1)(b)).
The court construed this description to be an express warranty pursuant to O.C.G.A. section 11-2-313(1)(b) and found sufficient evidence for the jury to determine that the supplier's failure to meet the contract specifications caused the concrete to curl excessively. 34

B. Breach and Remedies

1. Action on Account. In Wheat Enterprises, Inc. v. Redi-Floors, Inc., 35 the floor covering subcontractor sued the general contractor after the general contractor refused to pay all invoices received for completed work. The invoices included the work as initially bid, as well as changes and additional work. The subcontractor claimed a right of recovery based on contract, commercial account, and quantum meruit. At trial the general contractor unsuccessfully moved for a directed verdict on the claim based on commercial account. 36 The jury awarded damages to the subcontractor, although the question of whether the jury calculated damages based on contract, commercial account, or some combination of both could not be determined. 37

The court of appeals found that the subcontractor presented evidence showing the parties intended their relationship to extend beyond their contract and that the general contractor "requested, assented to, and accepted" the work, thereby supporting the claim for commercial account under O.C.G.A. section 7-4-16. 38 The trial court properly determined the debt to be liquidated because the general contractor discussed and approved the debt prior to its incursion. 39

2. Rescission of Real Estate Contract. In Simmons v. Pilken- ton, 40 a purchaser filed a claim to rescind an installment land sale contract, alleging fraud in the inducement and a mistaken belief that the property included 1.5 acres. The superior court, on de novo review of the magistrate court's ruling, rescinded the contract because the purchaser had not received what he bargained for because of the seller's acknowl-

33. Id., 508 S.E.2d at 725.
34. Id., 508 S.E.2d at 726.
36. Id. at 853-55, 501 S.E.2d at 33-34.
37. Id. at 853 n.1, 501 S.E.2d at 33 n.1.
38. Id. at 856, 501 S.E.2d at 35.
39. Id.
edged mistake concerning the advertised acreage of the property.\textsuperscript{41} The court of appeals granted the seller's petition for discretionary review.\textsuperscript{42}

To obtain rescission based on fraud in the inducement, a plaintiff must show all the elements of fraud.\textsuperscript{43} Although the seller admitted misrepresenting the acreage in advertising the property, this admission did not relieve the purchaser of his burden to prove the essential elements of justifiable reliance on the seller's misrepresentation.\textsuperscript{44} In the purchase and sale of real estate, absent a special relationship, one cannot be permitted to claim that he has been deceived by false representations when he could have learned the truth and avoided damage.\textsuperscript{45} To show justifiable reliance, plaintiffs must show that they exercised due diligence to learn the truth.\textsuperscript{46} A plat, referenced in the contract's property description, depicted the correct acreage and was purportedly attached to the contract.\textsuperscript{47} Plaintiff's failure to exercise due diligence rendered rescission based on fraud, or even mutual mistake of fact, improper.\textsuperscript{48}

In \textit{Akins v. Couch},\textsuperscript{49} home buyers sued the sellers, the sellers' real estate agent, and the agent's firm for rescission of the sales contract and for compensatory and punitive damages. The trial court decided in favor of defendants, determining that the buyers had not exercised due diligence and had waived their rescission claim by procuring a loan secured by a second security deed on the property during the pendency of the lawsuit.\textsuperscript{50}

The supreme court reversed, stating that one person seeking rescission may not abide by the contract and nonetheless bring an action for rescission.\textsuperscript{51} However, "[h]ere, the [buyers] promptly sought rescission and, although they executed a second security deed, they also retained the right to have it cancelled at any time upon payment of the debt."\textsuperscript{52}

\textsuperscript{41} \textit{Id.} at 900-01, 497 S.E.2d at 615.
\textsuperscript{42} \textit{Id.} at 901, 497 S.E.2d at 615.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}, 497 S.E.2d at 616 (citing Fowler v. Overby, 233 Ga. App. 803, 803-04, 478 S.E.2d 919, 921 (1996)).
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.} at 902, 497 S.E.2d at 616.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} 271 Ga. 276, 518 S.E.2d 674 (1999).
\textsuperscript{50} \textit{Id.} at 277, 518 S.E.2d at 675.
\textsuperscript{51} \textit{Id.} at 278, 518 S.E.2d at 675.
\textsuperscript{52} \textit{Id.} (citing Gibson v. Alford, 161 Ga. 672, 685, 132 S.E. 442, 448 (1925)).
The issue of the buyers' intent to affirm the sales contract was a question for the jury.\textsuperscript{53} The evidence showed that the sellers failed to disclose septic system problems to the buyers despite actual knowledge of the problems.\textsuperscript{54} The sellers' real estate agent denied that any problems existed when specifically asked by the buyers' agent.\textsuperscript{55} The supreme court held that the issues of the buyers' justifiable reliance upon the alleged misrepresentation, and whether the purchasers exercised due diligence in inspecting the property, were also questions of fact for the jury.\textsuperscript{56}

3. Damages. In \textit{MARTA v. Green International, Inc.},\textsuperscript{57} the court of appeals reviewed the sufficiency of evidence supporting an award of damages for cost overruns and extra work resulting from defective plans and specifications.\textsuperscript{58} In this case, a replacement contractor and its surety brought a breach of contract action against the Metropolitan Atlanta Rapid Transit Authority ("MARTA") seeking damages on the Kensington Transit Station construction project. The trial court entered judgment on a jury verdict awarding plaintiffs $2.8 million. MARTA appealed the trial court's denial of its motion for judgment notwithstanding the verdict or for new trial, asserting that plaintiffs did not show damages proximately caused by contract defects.\textsuperscript{59}

Plaintiffs' evidence showed that MARTA's designs were severely flawed. At trial plaintiffs' expert set out three methods by which damages could be calculated.\textsuperscript{60} MARTA argued that plaintiffs used "the "total cost method" or "modified total cost method." MARTA contended both that this method is 'universally disfavored' and that [plaintiffs] failed to meet the four-part test required by courts that recognize it."\textsuperscript{61} Plaintiffs denied that they used this method in proving their damages.\textsuperscript{62}

The court of appeals noted that whether plaintiffs used this method is irrelevant to the standard of proof for causation or damages under Georgia law.\textsuperscript{63} Damages may be estimated with reasonable certainty

\textsuperscript{53} Id., 518 S.E.2d at 676.
\textsuperscript{54} Id. at 277, 518 S.E.2d at 675.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 278, 518 S.E.2d at 676.
\textsuperscript{58} Id. at 420, 509 S.E.2d at 676.
\textsuperscript{59} Id. at 419-20, 509 S.E.2d at 676.
\textsuperscript{60} Id. at 420-22, 509 S.E.2d at 676-77.
\textsuperscript{61} Id. at 422 n.1, 509 S.E.2d at 677 n.1.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
despite difficulty in fixing the exact amount. "Thus, if a plaintiff can show with reasonable certainty the total amount of damages and the degree to which those damages are attributable to defendant, that is sufficient to support an award." When a defendant clearly causes a substantial portion of the loss, a plaintiff will not be limited to an award of only those damages which are shown to result solely from the defendant's particular breaches. The trial court, therefore, was correct in denying MARTA's motion for judgment notwithstanding the verdict and for new trial.

In Dill v. Chastain, the court of appeals reviewed the evidentiary support for an award of damages on a breach of contract action brought by a residential contractor against a homeowner. The homeowner replaced the contractor during construction and refused to pay more than a portion of the total contract amount. The contractor sued for the contract balance and was awarded $13,878.87.

The homeowner appealed the trial court's denial of his motion for a directed verdict and motion for judgment notwithstanding the verdict, arguing that the contractor did not establish the amount required to finish the project. The court of appeals agreed, noting that "when a construction contract is wrongfully breached, the basic component of damages is the net profit the contractor would have received had full performance been permitted." The contractor's failure to put into evidence the amount he would have expended to complete the project was fatal to his claim. Nor was the contractor entitled to prove his damages by relying upon the project completion costs of the homeowner.


64. Id. at 422-23, 509 S.E.2d at 678.
66. Id. 67. Id.
69. Id. at 770, 507 S.E.2d at 873.
70. Id.
72. Id. at 771, 507 S.E.2d at 873.
73. Id.
74. Id., 507 S.E.2d at 873-74.
defective plans and specifications on a transit station construction project. At trial plaintiffs sought to admit into evidence copies of project drawings with seventy-six pages of a witness's narrative describing different problems on the job. The trial court sustained MARTA's objection that the exhibit constituted a "continuing witness." Plaintiffs then removed the narrative and submitted only the plans with certain sections highlighted in yellow. The trial court admitted the modified exhibit over objection on the same ground.\footnote{76}{Id. at 419-20, 424, 509 S.E.2d at 676, 679.}

On appeal the court reviewed the rationale underlying the continuing witness rule.\footnote{77}{Id. at 424, 509 S.E.2d at 679.} The jury hears written testimony when read from the witness stand in the same way it hears oral testimony when presented from the witness stand.\footnote{78}{Id.} However, allowing the jury to reference written testimony again during deliberation, while it receives oral testimony only once, places undue emphasis on the written testimony.\footnote{79}{Id.} This rule has been applied to affidavits, depositions, written dying declarations, and written confessions.\footnote{80}{Id.} However, the rule "does not apply to items of evidence such as drawings or other documents which are 'demonstrative evidence that serve only to illustrate testimony given by the witnesses.'"\footnote{81}{Id. at 424-25, 509 S.E.2d at 679 (quoting Gabbard v. State, 233 Ga. App. 122, 124, 503 S.E.2d 347, 349 (1998)).} Thus, the trial court properly allowed the project drawings to go out with the jury.\footnote{82}{Id. at 425, 509 S.E.2d at 679.}

MARTA also appealed the trial court's refusal to admit into evidence a handwritten document discovered in the contractor's files. The document was not signed, and MARTA admitted it could not find anyone who could identify the document or give information about its creation.\footnote{83}{Id. at 426, 509 S.E.2d at 680.} The court noted that O.C.G.A. section 24-3-14(b) "requires that a foundation be laid through the testimony of a witness who is familiar with the method of keeping the records and who can testify thereto and to facts which show that the entry was made in the regular course of . . . business at the time of the event or within a reasonable time thereafter."\footnote{84}{Id. (quoting Nalley Northside Chevrolet v. Herring, 215 Ga. App. 185, 186, 450 S.E.2d 452, 454 (1994)) (internal quotation marks omitted).}
Because MARTA presented no such testimony, the trial court properly excluded the handwritten document from evidence.  

5. Limitation of Actions. In *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, the general contractor sued the project design engineer for economic losses resulting from negligent misrepresentations made by the engineer, who was not in privity with the general contractor. The supreme court was asked to determine when a cause of action accrues in this type of suit. The court of appeals held that the action accrued when the general contractor entered into the contract and at least partially relied on misrepresentations. The supreme court reversed, however, holding that the negligence action accrued only when the economic loss was certain and ascertainable, not speculative. The supreme court found that the court of appeals erred in overlooking an essential requirement that, to maintain its action, Hardaway must have suffered economic loss. Until Hardaway incurred that economic loss with certainty, and not merely as a matter of speculation, its claim did not accrue, and thus, the limitations period did not commence. Accordingly, the cause of action accrued once economic loss occurred, and Hardaway had four years before it was required to file its complaint.

Likewise, in *Travis Pruitt & Associates, P.C. v. Bowling*, the court of appeals affirmed the denial of summary judgment to defendant on the statute of limitations defense. In this case, the purchaser filed suit within four years after her property flooded, the date she claimed she first suffered injury as a result of defects in the construction. Travis Pruitt & Associates argued that the statute of limitations began to run on the date of substantial completion. The court found, “The true test to determine when a cause of action accrues is to ascertain the time

85. *Id.*  
87. *Id.* at 424, 479 S.E.2d at 728.  
88. *Id.*  
89. *Id.*  
90. *Id.*  
91. *Id.* at 425-26, 479 S.E.2d at 728-29.  
92. *Id.* at 426, 479 S.E.2d at 729.  
93. *Id.* at 426-28, 479 S.E.2d at 729-30. O.C.G.A. section 9-3-31, which provides a four-year limitation period for actions claiming injuries to personality, was applicable in this instance because the claims were for economic losses. *Id.* at 426, 479 S.E.2d at 729.  
95. *Id.* at 225, 518 S.E.2d at 454.  
96. *Id.*
when the plaintiff could first have maintained her action to a successful result.\textsuperscript{97} This finding is seemingly in conflict with the general rule that “a cause of action based on negligent design and construction accrues and the statute of limitation begins to run at the time the project is substantially completed.”\textsuperscript{98} However, the general rule is premised upon situations in which the negligence in the design gives rise immediately to ascertainable damages of some variety.\textsuperscript{99} That rationale does not apply to cases such as \emph{Bowling}, in which the negligence in the construction occurred on a neighboring property and in which the instrumentality that caused the damage may have existed for a number of years but the damages occurred within the four-year statute of limitations.\textsuperscript{100}

IV. TORT LIABILITY

A. Negligence

1. Premises Liability. In \emph{Clemmons v. Griffin},\textsuperscript{101} a repairman sued the homeowner in negligence for injuries he sustained when the air conditioning unit he was repairing exploded. The repairman claimed that the homeowner breached a duty to warn him that an individual who was not competent to rewire the air conditioning unit had done so prior to his inspection.\textsuperscript{102} “[A] homeowner has a duty to warn an invitee... of dangers or defects of which the owner knew or in the exercise of ordinary care it was the owner's duty to know.”\textsuperscript{103} However, the trial court properly granted summary judgment for the homeowner because the repairman failed to come forward with specific evidence that the homeowner had superior knowledge of the hazard.\textsuperscript{104}

2. Negligent Inspection/Limitation of Liability Clause. In \emph{Redding v. Tanner},\textsuperscript{105} appellants sued a home inspector for negligent inspection of the home they were purchasing. The inspector failed to

\textsuperscript{97} Id. at 226, 518 S.E.2d at 454 (citing U-Haul Co. & C. v. Abreu & Robeson, Inc., 247 Ga. 565, 566, 277 S.E.2d 497, 499 (1981)).

\textsuperscript{98} Id. (citing Corp. of Mercer Univ. v. National Gypsum Co., 258 Ga. 365, 366, 368 S.E.2d 732, 733 (1994)).

\textsuperscript{99} Id.

\textsuperscript{100} Id.


\textsuperscript{102} Id. at 721, 498 S.E.2d at 100.

\textsuperscript{103} Id. at 722, 498 S.E.2d at 100.

\textsuperscript{104} Id. at 723, 498 S.E.2d at 101.

note substantial cracks in the brick covering the gables. In granting summary judgment for the inspector, the trial court relied upon Brainard v. McKinney and the following waiver of liability clause contained in the written inspection report:

"This inspection and report does not cover all aspects, even of structural conditions. Neither TLC Home Inspections nor the inspector shall be liable for mistakes, omissions, or errors in judgment. This limitation of liability shall include and apply to all consequential damages, . . . and property damage of any nature. This company and the inspector assume no responsibility for the cost of repairing or replacing any unreported defects or conditions."

The court of appeals distinguished Brainard on the ground that the home purchaser in that case signed a written contract containing the waiver clause. Although Brainard held a similar clause enforceable and not void as against public policy, the written document in Redding was prepared only after the parties orally agreed to the inspection and after the inspection was completed. Furthermore, the purchasers had not signed the inspection report containing the limitation of liability clause.

The court of appeals also rejected the inspector's argument that the claim was barred under the doctrine of "avoidable consequences." The inspector argued that because the purchaser observed during the inspection that the inspector did not climb onto the roof to inspect the gables, the purchaser did not exercise ordinary care in protecting himself from the inspector's negligence. The court found that the homeowners were fully entitled to trust the inspector to perform the necessary procedures to inspect the property correctly.

B. Fraud and Other Torts

1. Fraud. In Smalls v. Blueprint Development, Inc., the house purchasers sued a seller and developer, asserting fraud, constructive
fraud, and negligent construction because of defendants' alleged failure to disclose that their houses were built on property designated as wetlands. The trial court granted partial summary judgment on the fraud claims, finding that plaintiffs, as a matter of law, failed to exercise due diligence by not investigating whether their homes were built on wetlands or land previously designated as wetlands.\textsuperscript{116} The court of appeals affirmed.\textsuperscript{117} The "passive concealment exception to the general rule of caveat emptor . . . is concerned with concealed defects that purchasers in the exercise of due diligence could not detect."\textsuperscript{118} Although the real estate sales contracts executed by plaintiffs contained specific terms that alerted them to the possibility that the property might be subject to wetlands regulation, plaintiffs failed to take any affirmative action to investigate the status of their property.\textsuperscript{119} Plaintiffs' failure to present evidence of the exercise of due diligence to discover the alleged fraud was fatal to their fraud claims.\textsuperscript{120}

\textbf{2. Fraud/Attorney Fees.} In \textit{Gantt v. Bennett},\textsuperscript{121} home purchasers asserted fraud and state RICO claims against several defendants regarding a defective septic system. The purchasers sued the builder-seller, the Forsyth County inspector who issued the permit on the septic system, the Forsyth County Board of Health, a land surveyor who conducted percolation tests, and the installer of the septic tank. The jury returned a verdict against the builder, the county inspector, and the Board of Health on the purchasers' fraud claims. The jury found that the land surveyor and installer were not liable to the purchasers. The trial court granted the land surveyor's motion for attorney fees against the purchasers pursuant to O.C.G.A. § 9-15-14.\textsuperscript{122} The builder, county inspector, and Board of Health appealed the trial court's denial of their motions for a directed verdict and for a new trial on the fraud claims.\textsuperscript{123} The court of appeals affirmed the trial court's ruling, finding sufficient evidence of fraud to support the jury's verdict.\textsuperscript{124} With respect to the builder, the court found sufficient evidence from which the jury could conclude that the builder knew that

\bibliography{\textsuperscript{116} Id. at 556, 497 S.E.2d at 55. \textsuperscript{117} Id., 497 S.E.2d at 56. \textsuperscript{118} Id. at 557, 497 S.E.2d at 56. \textsuperscript{119} Id. at 558, 497 S.E.2d at 56-57. \textsuperscript{120} Id., 497 S.E.2d at 57. \textsuperscript{121} 231 Ga. App. 238, 499 S.E.2d 75 (1998). \textsuperscript{122} Id. at 238-40, 499 S.E.2d at 77-78. \textsuperscript{123} Id. at 240, 242, 499 S.E.2d at 78, 80. \textsuperscript{124} Id.}
the septic system had been located in ground water and improper soils that would cause it to break down. The court noted that "fraud may not be presumed but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence." Further,

"[I]n cases of passive concealment by the seller of defective realty, we find there to be an exception to the rule of caveat emptor. Seller [has] a duty to disclose in situations where he or she has special knowledge not apparent to the buyer and is aware that the buyer is acting under a misapprehension as to facts which would be important to the buyer and would probably affect its decision."

The county inspector admitted that he had not performed the required visual inspection of the septic system prior to submitting his report and issuing the permit. The inspector issued the permit by looking at the contractor's drawing. Evidence showed that the inspector completed similar false reports on a number of other houses in the same subdivision. The fraud claims against the Board of Health were a by-product of the purchasers' claims against the inspector. The court of appeals found the evidence of fraud sufficient to create an issue of fact for the jury.

The inspector and the Board of Health also argued that the four-year statute of limitations barred the purchasers' fraud claims. The purchasers responded that the statute was tolled under O.C.G.A. section 9-3-96 because of defendants' wrongful concealment of the problem. The court of appeals agreed. Evidence showed that the amendment to the purchasers' complaint that added the county inspector as a defendant was filed within four years of the date the purchasers first received notice from the county that the septic system had never, in fact, been inspected.

The court of appeals reversed the trial court's award of attorney fees to the land surveyor on the purchasers' RICO claim. Because the trial court denied the land surveyor's motions for summary judgment and for a directed verdict on this claim, imposition of sanctions under

125. Id. at 241, 499 S.E.2d at 79.
126. Id. at 240, 499 S.E.2d at 79 (quoting O.C.G.A. § 23-2-57).
127. Id. at 240-41, 499 S.E.2d at 79 (quoting Wilhite v. Mays, 140 Ga. App. 816, 818, 232 S.E.2d 141, 143 (1976)).
128. Id. at 243, 249, 499 S.E.2d at 80, 81, 85.
129. Id. at 242, 499 S.E.2d at 80.
130. Id. at 244, 499 S.E.2d at 81.
131. Id.
132. Id.
133. Id. at 245, 499 S.E.2d at 82.
O.C.G.A. section 9-15-14 was improper. This case was not so unusual that the trial court could award attorney fees after refusing the party's motion for a directed verdict.

In a strong dissent, Judge Blackburn, joined by Chief Judge Andrews, took exception to the majority's ruling on the purchasers' fraud claims. "[I]n a fraudulent concealment action the allegedly defrauded party must prove that the alleged defrauder had actual, not merely constructive, knowledge of the fact concealed." Although expert testimony showed that defendant "should have known" the septic system would fail, this evidence was not enough, in the dissenter's opinion, to prove defendant's actual knowledge.

With respect to the evidence of fraud against the inspector, the dissent noted that testimony indicated the inspectors would examine the contractor's plans for the septic system and accept or refuse the septic system according to the contractor's drawing if time did not permit the inspectors to complete an inspection at the site. The inspectors believed this procedure was approved. Thus, the dissent found, the purchasers did not show that the inspector made a false representation with the intention and purpose of deceiving them, which is an essential element of fraud.

3. RICO. In Maddox v. Southern Engineering Co., the court of appeals reviewed the proximate cause element needed for standing to sue under the Georgia RICO Act. Plaintiff landowner sued an engineering company, a county water authority, and other defendants, alleging a RICO violation. The water authority had arranged for the engineering firm to help obtain a construction permit for a dam and reservoir upstream from plaintiff's property. Plaintiff asserted that defendants had intentionally submitted fraudulent documents to state agencies to obtain their construction permit. This violated O.C.G.A. section 16-10-20, resulting in a depreciation of property value. Plaintiff argued these offenses constituted the predicate acts needed to show a

134. Id.
135. Id. at 246, 499 S.E.2d at 82 (citing Porter v. Felker, 261 Ga. 421, 422, 405 S.E.2d 31, 33 (1991)).
136. Id. at 247-50, 499 S.E.2d at 83-85 (Blackburn, J., dissenting).
137. Id. at 248, 499 S.E.2d at 84 (quoting Lively v. Garnick, 160 Ga. App. 591, 592, 287 S.E.2d 553, 555 (1981)).
138. Id.
139. Id. at 249, 499 S.E.2d at 84.
140. Id.
141. Id., 499 S.E.2d at 84-85.
143. Id. at 802, 500 S.E.2d at 592.
pattern of racketeering activity under subsections (8) and (9) of O.C.G.A. section 16-14-3. In an earlier appeal of this case, the court of appeals ruled that these statutory violations can constitute the predicate acts for a RICO claim. Plaintiff then appealed the trial court's grant of summary judgment for defendants on the ground that plaintiff lacked standing.

Georgia's civil RICO statute provides, "Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages." Looking to federal authority, the court noted that "the language 'by reason of' imposes a proximate causation requirement on the plaintiff." Moreover, a plaintiff must show that the injury flowed directly from the alleged predicate offense and was not merely an eventual consequence of the act. Merely showing that the plaintiff would not have been injured "but for" the defendant's act is insufficient. The trial court's grant of summary judgment was proper because plaintiff could not show that the state agencies relied on the misrepresentations or that the depreciation of plaintiff's property value was a direct result of those misrepresentations.

C. Workers' Compensation—General Contractor's Tort Immunity

The supreme court reviewed two challenges to a general contractor's tort immunity under workers' compensation laws. In Warden v. Hoar Construction Co., the deceased employee's wife sued the general contractor for the wrongful death of her husband. Appellant's husband, an employee of a subcontractor, died from injuries sustained after he fell from a roof while building a church. Appellant received workers' compensation benefits from the subcontractor. The trial court granted summary judgment because of the general contractor's immunity from tort liability as a recognized statutory employer.
On appeal the supreme court was asked to overturn its holding in *Wright Associates v. Rieder*, in which the court held that, pursuant to O.C.G.A. section 34-9-11, a subcontractor's injured employee could not sue in tort against the general contractor for the general contractor's nonpayment of workers' compensation benefits. The supreme court declined, noting that "[t]he General Assembly has amended the exclusive remedy provision twice since 1981, but has chosen not to overturn the tort immunity granted general contractors in *Rieder*." Because the legislature is presumed to know how the courts have interpreted a statute, its failure to amend the statute allows the court to posit that the legislature desired no change in the law.

However, in *Flint Electric Membership Corp. v. Ed Smith Construction Co.*, the supreme court denied immunity to a general contractor for a third party's claim for indemnity under a separate statute. The contractor's employee was injured when a crane made contact with Flint Electric's high voltage line. After receiving workers' compensation benefits from the contractor, the employee and his wife sued Flint Electric for personal injury and loss of consortium.

Flint Electric sued for indemnification from the contractor under the High-voltage Safety Act, which states that anyone who operates near high-voltage lines and fails to follow the safety provisions in the statute is strictly liable when injury results and must indemnify the owner of the power line against ensuing claims. The supreme court rejected the contractor's claim of tort immunity, holding that Flint Electric's statutory indemnity action was "comparable to the contractual indemnity actions the courts have recognized as exceptions to the [Workers' Compensation Act's] exclusivity provision."

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155. 269 Ga. at 716, 507 S.E.2d at 429-30.
156. *Id.* at 716-17, 507 S.E.2d at 430.
157. *Id.* at 716-18, 507 S.E.2d at 430-31.
159. *Id.* at 466, 511 S.E.2d at 162.
160. *Id.* at 464, 511 S.E.2d at 161.
162. 270 Ga. at 464, 511 S.E.2d at 161.
163. *Id.* at 465, 511 S.E.2d at 162.
V. MATERIALMEN'S LIENS

A. Notice Requirement for Commencement of Action Against Owner

In Northside Wood Flooring, Inc. v. Borst,\textsuperscript{164} which was two cases consolidated for appeal, suppliers of home construction materials filed materialmen's liens, commenced actions against the general contractors, and sued the property owners subsequent to the filing of bankruptcy by the contractors. The facts were similar in each action. Each supplier provided materials for the construction of a home directly to the general contractor; each filed a lien against the property and commenced an action against the general contractor in timely fashion; the general contractor in each instance filed bankruptcy, and no judgment was obtained; and the suppliers did not commence an action against the owner of the property within twelve months after the claim became due, nor did they file notice of the suit against the owner.\textsuperscript{165} In each case, the trial court granted summary judgment against the lien claimant.\textsuperscript{166}

The court of appeals reviewed the statutory framework.\textsuperscript{167} O.C.G.A. section 44-14-361.1(a)(3) provides that "a materialman must commence an action to recover the amount of the claim within 12 months of the time the claim becomes due and he must, within 14 days of filing the action, file a notice of the suit."\textsuperscript{168} O.C.G.A. section 44-14-361.1(a)(4) further provides that,

where a contractor is adjudicated bankrupt or, if after an action is filed, no final judgment can be obtained against the contractor because of his adjudication in bankruptcy, the materialman need not file an action or obtain judgment against the contractor before enforcing a lien against the improved property . . . [T]he materialman may enforce the lien directly against the property by filing an action against the owner within 12 months from the time the lien becomes due. It also states that the lien claimant, within 14 days after filing the action, must file a notice of the action . . . .\textsuperscript{169}

The suppliers both argued that because they filed notices of suits against the general contractor when they commenced their actions, the

\begin{itemize}
  \item \textsuperscript{165} \textit{Id.} at 569-70, 502 S.E.2d at 508-09.
  \item \textsuperscript{166} \textit{Id.} at 570, 502 S.E.2d at 509.
  \item \textsuperscript{167} \textit{Id.} at 570-72, 502 S.E.2d at 509-10.
  \item \textsuperscript{168} \textit{Id.} O.C.G.A. section 44-14-361.1(a)(3) makes no reference to obtaining judgment against the contractor or subcontractor with whom the lien claimant is in privity.
  \item \textsuperscript{169} 232 Ga. App. at 570-71, 502 S.E.2d at 509.
\end{itemize}
provisions of O.C.G.A. section 44-14-361.1(a)(4) did not apply. The court of appeals found that while the suppliers properly brought their actions against the general contractors under subsection (a)(3), they clearly brought their actions against the property owners under subsection (a)(4). Consequently, the failure to strictly follow the provisions of (a)(4) precluded recovery and enforcement of their liens.

Interestingly, this strict adherence to the provisions of subsection (a)(4) appears at variance with the supreme court's decision in Melton v. Pacific Southern Mortgage Trust. In that case, a proof of claim timely filed in the bankruptcy action of the general contractor was held to obviate the requirement of filing suit against the property owner within the twelve-month period. Thus, the action that was later commenced against the property owner was still deemed timely.

B. Contractual Relationship—Authorization to Perform Work

In McDaniel v. Hensons', Inc., a contractor sued a timber company and a landowner in an attempt to recover for cleaning up a landfill at the timber company's direction. The landowner appealed an adverse jury verdict. The landowner had agreed to provide the timber company with $50,000 in "seed money" to clean up the property that contained organic materials. Hensons’ entered into an agreement with the timber company to perform the clearing effort, which the landowner estimated could cost up to $300,000. The timber company required Hensons’ to complete lien releases that indicated the timber company was the owner's agent. Despite the fact that the landowner had informed the timber company that Hensons’ had expended the $50,000 and that the landowner did not intend to fund any further operations, Hensons' continued to work with the landowner's knowledge. The timber company failed to pay Hensons' for work performed after thirty-five to forty percent of the project had been completed. Hensons' filed a lien against the property and commenced an action against the landowner and the timber company. Defendants disputed whether the timber company was an agent or an independent contractor.

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170.  Id. at 571, 502 S.E.2d at 509.
171.  Id. The court also stated, "[C]ompliance with one section of the lien statute does not eliminate the need to comply with another section." Id., 502 S.E.2d at 510.
172.  Id.
174.  Id. at 593, 247 S.E.2d at 79.
175.  Id.
177.  Id. at 214, 493 S.E.2d at 530.
The evidence showed that the landowner allowed the timber company to supervise work on the property, erect a construction trailer, require lien waivers, and secure a building permit, and the landowner made payments to the timber company on invoices submitted by the timber company for work under its supervision. The court of appeals found that even if the timber company had acted without authority, the landowner ratified the unapproved act by requiring and obtaining the lien releases after it had paid the timber company for work performed by Hensons. "Ratification may occur by the principal's partial payment on an allegedly unauthorized agreement." With the landowner's approval or ratified acceptance, the lien was enforceable as an improvement to the landowner's property.

C. Extinguishment of Lien—Sale to Bona Fide Purchaser

In Shockley Plumbing Co. v. NationsBank, N.A. (South), plaintiff, Shockley Plumbing, appealed the grant of summary judgment to defendant, NationsBank, concerning the attempted enforcement of a materialmen's lien against NationsBank. In affirming the grant of summary judgment, the court of appeals found that a bona fide sale to a purchaser who had given valuable consideration and who lacked knowledge or notice of the lien extinguished the lien right against the bona fide purchaser. Despite the fact that NationsBank was the construction lender on the project, it did not have actual or constructive knowledge of any attempt by the landowner to defraud its creditors, including the lien claimant. Accordingly, the lien was extinguished as to the bona fide purchaser, NationsBank.

178. Id. at 215, 493 S.E.2d at 531.
179. Id.
180. Id. (citing Pioneer Concrete Pumping Serv. v. T & B Scottsdale Contractors, 218 Ga. App. 596, 597, 462 S.E.2d 627, 629 (1995)). When an agent exceeds his authority, "the principal may not ratify in part and repudiate in part; he shall adopt either the whole or none." O.C.G.A. § 10-6-51 (1994).
183. Id. at 60-61, 493 S.E.2d at 228.
184. Id. at 62-63, 493 S.E.2d at 229.
185. Id. at 62, 493 S.E.2d at 229.
186. Id.
187. Id.
VI. SURETY BOND AND GUARANTOR ISSUES

A. Public Works Bonds—Failure of Public Body to Obtain Bonds

In *DeKalb County v. J & A Pipeline Co.*,188 the supreme court examined, adversely to the interests of the subcontractor, the duty imposed upon a public body when presented with performance and payment bonds.189 To meet the statutory requirement, the public body was to review the payment bond to determine whether it was “taken in the manner and form required in this Code section.”190 The supreme court determined that a payment bond was “taken ‘in the manner’ required” when it was “presented to, approved by and filed with the appropriate county official . . . [and] when it purports, on its face,” to secure the obligation of the general contractor to make payment “for the use and protection of subcontractors and materialmen.”191

Following the supreme court's decision in *J & A Pipeline Co.*, the legislature amended the controlling statutes, imposing an additional duty on governmental entities in the approval process to examine the form and “the solvency of the surety by the officer of the state, county, municipal corporation, or public board or body who negotiates the contract on behalf of the public entity. Said approval shall be obtained prior to the bid’s being accepted.”192

As a result of this amendment, the court of appeals held in *Hall County School District v. C. Robert Beals & Associates*193 that a public body that fails to discharge its obligations, including examining the solvency of the surety, exposes itself to a direct action by the materialmen and subcontractors affected.194 In this case, subcontractors

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190. 263 Ga. at 646, 437 S.E.2d at 330 (quoting O.C.G.A. § 36-82-102) (emphasis added by court).
191. Id. at 649, 437 S.E.2d at 331.
192. O.C.G.A. § 13-10-1(f) (Supp. 1999). The full text of the amended statute provides as follows:

> Any bid bond, performance bond, or payment bond required by this Code section shall be approved as to form and as to the solvency of the surety by the officer of the state, county, municipal corporation, or public board or body who negotiates the contract on behalf of the public entity. Said approval shall be obtained prior to the bid's being accepted.

Id. (emphasis added).
194. Id. at 496, 498 S.E.2d at 76.
working on a school construction project sued the school board for payment under a direct action provision of public construction law. The Hall County Board of Education hired Currahee Construction Company, the general contractor, to construct an elementary school. The school board required the general contractor to provide it with performance and payment bonds for $2,590,400.195

During execution of the contract, the school board discovered that the general contractor's bonds were invalid, and the school board subsequently terminated the contract. Several unpaid subcontractors, who could not make payment claims under the invalid bonds, sued the school board for amounts owed them for labor and materials. In connection with cross motions for summary judgment, the trial court ruled that questions of fact remained concerning the following issues: whether the subcontractors could hold the school board liable for the invalidity of bonds that were allegedly valid and in the form required by statute; whether the school board was entitled to sovereign immunity; and whether the subcontractors could maintain an equitable lien claim against the school board. Cross appeals ensued.196

After the school board accepted Currahee's bid, American Specialty Insurance Company ostensibly issued performance and payment bonds although the school board neither verified whether the bonds were valid nor determined whether American Specialty was solvent. As the project approached completion, the school board learned that American Specialty had not issued the bonds; therefore, the bonds were worthless. A subsequent investigation showed that American Specialty was no longer authorized to issue insurance in Georgia because the Insurance Commissioner had uncovered their unsound financial conditions. The school board demanded that the general contractor provide valid bonds within seven days. The general contractor failed to comply, and the school board cancelled its contract. Ninety-eight percent of the project had been completed at that time.197

The court found that the school board could have discovered the evidence concerning the financial unsoundness of the surety from the Insurance Commissioner's office or from the surety itself.198 Because the school board admittedly did not conduct any investigation, the ambiguity concerning whether the school board would have learned, during an appropriate investigation, that the bonds were invalid allowed a jury to infer that, had the school board conducted a proper investiga-

195. Id. at 492, 498 S.E.2d at 73.
196. Id. at 492-93, 498 S.E.2d at 73.
197. Id. at 493-94, 498 S.E.2d at 74.
198. Id. at 496, 498 S.E.2d at 76.
tion, it could have discovered the information. Furthermore, funds held by the school board that belonged to the general contractor and had not yet been paid were subject to an "equitable lien."  

B. Sureties—Construction of Obligation Strictly in Sureties’ Favor

In *R.J. Griffin & Co. v. Continental Insurance Co.*, the contractor sued under a construction performance bond after the subcontractor refused to return an overpayment. The court of appeals faced the issue of whether a subcontractor’s performance bond, issued in favor of the general contractor, covers the subcontractor’s refusal to return the general contractor’s overpayment. The court held that under the plain language of the subcontract and the bond, as well as a waiver and release executed by the surety, the wrongful retention of funds was a breach of the subcontract and therefore fell within the terms of the bond.

Contrary to the general rule governing construction of insurance policies, the construction of a surety’s obligation is construed strictly in the surety’s favor. Despite this fact, when the language is clear and unambiguous, construction in the surety’s favor is not permissible unless it is consistent with the language. The court concluded that “the obligation to ‘perform fully’ includes the obligation to cure all breaches of the subcontract, not just the physical completion of the work.” The trial court concluded that the subcontractor wrongfully retained funds paid to it by the general contractor and had an obligation to return them, and the surety did not appeal this finding. The subcontractor’s breach of a written, direct obligation to the general contractor permitted the general contractor to seek reimbursement from the surety, which had expressly undertaken the obligation to “perform fully . . . in accordance with the undertakings, covenants, terms, conditions and agreements” for the subcontractor.

199. Id.
200. Id. at 498, 498 S.E.2d at 77-78.
202. Id. at 822, 497 S.E.2d at 586.
203. Id. at 825, 497 S.E.2d at 588.
204. Id.
205. Id. at 823, 497 S.E.2d at 587.
206. Id.
207. Id.
208. Id. at 824, 497 S.E.2d at 588.
209. Id. at 825, 497 S.E.2d at 588.
VII. Arbitration

A. Arbitrator’s Authority

In Atlanta Gas Light Co. v. Trinity Christian Methodist Episcopal Church, property owners brought a class action suit against a gas manufacturing plant operator for property damage. In this case, the court of appeals reiterated the limited statutory grounds for vacating an arbitration award. The court found that even though the arbitrator may have imperfectly made his determinations or applied state law, these grounds were insufficient for overturning the arbitration award. Likewise, in Haddon v. Shaheen & Co., an award of attorney fees, in the absence of any provision in the contract allowing this type of award, did not constitute a corruption in the procurement of the award so as to require its vacation. “Corruption,” as a ground for vacating an arbitration award, requires “corrupt or dishonest proceedings.”

B. Statute of Limitations

In Hardin Construction Group, Inc. v. Fuller Enterprises, Inc., the court of appeals addressed whether the renewal statute applied to the one-year statute of limitations for filing confirmation actions concerning arbitration awards. A federal district court dismissed a timely filed action to confirm the arbitration award for lack of diversity jurisdiction.


211. Id. at 617, 500 S.E.2d at 375.
212. Id. at 618, 500 S.E.2d at 376. Arbitration awards may be vacated only for the following reasons:
(1) Corruption, fraud, or misconduct in procuring the award;
(2) Partiality of an arbitrator appointed as a neutral;
(3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or
(4) A failure to follow the procedures of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.

213. 231 Ga. App. at 619-20, 500 S.E.2d at 377-78.
215. Id. at 596, 598, 499 S.E.2d at 695.
216. Id. at 597, 499 S.E.2d at 695.
218. Id. at 718, 505 S.E.2d at 757.
because the amount in controversy was less than $50,000. On appeal the Eleventh Circuit affirmed the dismissal. Two weeks later, Fuller petitioned the Fulton Superior Court to confirm the arbitration award. The court dismissed the action because of petitioner's failure to comply substantially with the requirements of the Nonresident Contractors Act.\textsuperscript{219} The appellate court affirmed the dismissal.\textsuperscript{220}

Following substantial compliance with the Nonresident Contractors Act and within six months of the affirmance of the dismissal on appeal, Fuller refiled the confirmation proceeding in Fulton Superior Court. Hardin sought dismissal of the action because of, among other reasons, the expiration of the statute of limitations.\textsuperscript{221} Hardin contended that the application was barred because it was filed two years and seven months after Fuller received the award.\textsuperscript{222} The court found that the limitation period was tolled during the pendency of the appeal in the Eleventh Circuit and that Fuller timely filed the first application in Fulton Superior Court.\textsuperscript{223} Fuller further asserted that its second filing was not barred by the statute of limitations because it was eligible for the benefit of the renewal statute.\textsuperscript{224} The court agreed and found that the renewal statute applies generally to arbitration confirmation proceedings as it would to "any case."\textsuperscript{225}

\begin{enumerate}
\item Id.
\item Id.
\item Id. "The court shall confirm an award upon application of a party made within one year after its delivery to him . . . ." O.C.G.A. § 9-9-12 (Supp. 1999).
\item 233 Ga. App. at 720, 505 S.E.2d at 758.
\item Id., 505 S.E.2d at 758-59.
\item Id., 505 S.E.2d at 759. The renewal statute provides:
\begin{enumerate}
\item When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of the state or any federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissall, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-41; provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.
\item This Code section shall not apply to contracts for the sale of goods covered by Article 2 of Title 11.
\item The provisions of subsection (a) of this Code section granting a privilege of renewal shall apply if an action is discontinued or dismissed without prejudice for lack of subject matter jurisdiction in either a court of this state or a federal court in this state.
\end{enumerate}
\item O.C.G.A. § 9-2-61 (Supp. 1999).
\item 233 Ga. App. at 720-21, 505 S.E.2d at 759.
\end{enumerate}
VIII. CONCLUSION

Current economic times probably do not favor additional developments in the lender liability area. Nonetheless, the small opening afforded to borrowers whose lenders have not strictly complied with their contractual and tort obligations may allow more significant developments as to lenders in the future, during an economic downturn. Further, case law has more fully developed the law of damages in the construction field in this state, and this trend should continue to fill gaps in Georgia law. Finally, the courts have reaffirmed strict compliance with the requirements of the mechanic's and materialmen's lien statutes, and it may now be time to revisit the supreme court's decision in *Melton* to relax some of those requirements.