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Real Property

by T. Daniel Brannan* and
William J. Sheppard**

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, 1998, to May 31, 1999. 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 decided during the survey period present issues on which the appellate courts were sharply divided and provide lively discussions of the judges' differing viewpoints.

II. TITLE TO LAND

The supreme court in Atlanta-East, Inc. v. Laird1 resolved the issue of who held title to certain property after title became confused as a result of multiple transfers from an entity acting as trustee for different trusts.2 The property at issue in Laird was a 160-acre tract ("property") located in Gilmer County, Georgia. In 1917 McCorkle received title to an undivided one-fourth interest in the property. When he died in 1930, his one-fourth interest passed to his daughter-in-law, Margaret

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2. Id. at 668, 501 S.E.2d at 204.
McCorkle. In 1942 Ms. McCorkle transferred her interest in the property to the Charleston National Bank ("Bank") by a deed of trust. The Bank was acting as administrator of the estate of a third party ("Porter Estate"). According to Ms. McCorkle's deed of trust, the Porter Estate owned the remaining three-fourths interest in the property. In 1983, acting as the trustee of the Porter Estate, the Bank purported to transfer fee simple title to the Property to Burnt Mountain Company. Shortly thereafter, Burnt Mountain transferred fee simple title to the property to Laird.\(^3\)

Atlanta-East's claim to the property originated with a deed executed in June 1991. In that deed, the Bank, acting as trustee of the McCorkle Trust, transferred Ms. McCorkle's one-fourth interest in the property to John and Gwendolyn McCorkle. Later that year, they transferred their interest in the property to Atlanta-East. In April 1996 Atlanta-East filed an action seeking a declaration that it was the owner of an undivided one-fourth interest in the property. On cross-motions for summary judgment, the trial court ruled that Laird owned the property free and clear of any interest claimed by Atlanta-East. Atlanta-East appealed from entry of judgment based on that order.\(^4\)

In a divided opinion, the supreme court affirmed the trial court's grant of summary judgment to Laird.\(^5\) In finding that Laird held fee simple title to the property, the court concluded that the Bank's execution of the 1983 deed to Burnt Mountain was sufficient to transfer both Ms. McCorkle's one-fourth interest and the Porter Estate's three-fourths interest.\(^6\) The court relied on the terms of Ms. McCorkle's deed of trust in support of that finding.\(^7\) The deed of trust stated, in pertinent part, as follows:

\[\text{"Whereas [McCorkle] and the Estate of \ldots Porter are the owners of the property and \ldots the [Bank] is one of the administrators of the Estate of \ldots Porter, and \ldots is handling and endeavoring to sell or lease the undivided interest of said Estate in and to said real estate, and it is believed that said property can be handled, sold or leased more advantageously as a whole \ldots [McCorkle] doth grant, bargain, sell, release, and forever quitclaim unto the [Bank], all of the right, title, interest, claim or demand [she has] in all real estate situate [sic] in Gordon, Pickens, and Gilmer Counties, Georgia \ldots Said lands shall include [the Property] \ldots To have and to hold \ldots in trust \ldots\}^\]

3. Id. at 665-66, 501 S.E.2d at 202-03.
4. Id. at 666, 501 S.E.2d at 203.
5. Id. at 668, 501 S.E.2d at 204.
6. Id. at 667-68, 501 S.E.2d at 203-04.
7. Id. at 666-67, 501 S.E.2d at 203-04.
with the following powers, rights, duties, and obligations . . . (4) to make sale and conveyance of [the Property] or any part thereof."\(^8\)

Based on that language, the court concluded that Ms. McCorkle intended "to vest the Bank as trustee with absolute title to her one-fourth interest in the Property, and to authorize the Bank to sell that one-fourth interest."\(^9\)

The court found further support for its conclusion in another provision of Ms. McCorkle's deed of trust. That provision stated as follows:

"It is expressly provided that there shall be no duty or responsibility on the part of any purchaser . . . [of the Property] to make inquiry as to the nature of the trust under which it is held by the [Bank], and . . . any purchaser . . . shall be protected in dealing with [the Bank] in all respects as if the . . . Bank, as Trustee, were the sole and absolute owner of [McCorkle's] interest in said real estate in fee simple."\(^10\)

From that provision, the court concluded that Ms. McCorkle "intended to shield purchasers of her undivided one-fourth interest in the Property from claims that the Bank was without authority to sell that interest."\(^11\) Laird was the successor of Burnt Mountain, whom the court found had taken title from the Bank acting as Ms. McCorkle's trustee.\(^12\)

Because the court found that the 1983 deed from the Bank to Burnt Mountain was sufficient to pass fee simple title to the property, the court concluded that the Bank's 1991 purported transfer of an undivided one-fourth interest to Atlanta-East's predecessor was entirely ineffective.\(^13\) Therefore, the court held that Atlanta-East's claim failed and that the trial court properly entered summary judgment for Laird.\(^14\)

Justice Carley presented a well-reasoned dissent, which Justice Hustein joined, based on the capacity in which the Bank purported to execute the 1983 deed to Burnt Mountain.\(^15\) The dissent noted that a trust is a distinct legal entity, and when a trust purports to transfer title to real property, the deed "'should be executed by the trustee, as trustee.'"\(^16\) While the failure to execute a deed in that manner does not affect the validity of the deed when the trustee has no interest in the

\(^{8}\) Id., 501 S.E.2d at 203 (first and third through eighth alterations by court).

\(^{9}\) Id. at 667, 501 S.E.2d at 204.

\(^{10}\) Id., 501 S.E.2d at 203 (alterations by court) (footnote omitted).

\(^{11}\) Id. at 668, 501 S.E.2d at 204.

\(^{12}\) Id. at 666, 501 S.E.2d at 203.

\(^{13}\) Id. at 666, 501 S.E.2d at 203.

\(^{14}\) Id. at 668, 501 S.E.2d at 204.

\(^{15}\) Id. (Carley, J., dissenting).

\(^{16}\) Id. at 669, 501 S.E.2d at 205 (quoting GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 745, at 486 (2d ed. rev. 1982)).
subject property except that of trustee, the dissenters opined that a
different result occurs when a trustee occupies more than one position
with regard to a single tract of land.\textsuperscript{17} In this case the dissent noted
that the Bank was both the administrator of the Porter Estate and the
trustee of the McCorkle Trust.\textsuperscript{18} Because the deed from the Bank to
Burnt Mountain only referenced a transfer of title by the Bank as
representative of the Porter Estate, it was effective only to transfer the
Porter Estate's interest in the property.\textsuperscript{19} To properly convey Ms.
McCorkle's one-fourth interest, the deed to Burnt Mountain was required
to have been executed by the bank as trustee of the McCorkle Trust.\textsuperscript{20}

In \textit{Blizzard v. Moniz},\textsuperscript{21} the supreme court determined that a purchaser
of property under a tax deed must actually take possession of the
property before its title may become vested and not subject to redemption
under section 48-4-48 of the Official Code of Georgia Annotated
("O.C.G.A.").\textsuperscript{22} The property at issue in \textit{Blizzard} consisted of approximately twenty-three acres located in Troup County, Georgia. Lucy Hilderbrand, plaintiffs' mother, had owned the property for more than forty years when she conveyed it to Fogal in July 1987. Hilderbrand financed Fogal's purchase of the property, and Fogal executed a deed to secure debt in favor of Hilderbrand. In 1988 Fogal transferred partial undivided interests in the property to seven people but retained an undivided 8.54% interest for himself. The deeds transferring those partial interests were recorded shortly after Fogal executed them.\textsuperscript{23}

Fogal failed to pay the 1990 ad valorem taxes due on the property. In
1991 the Troup County Tax Commissioner issued a tax fi. fa. against
Fogal, but did not issue a fi. fa. against any of the other tenants in
common whose title was of record. The commissioner then advertised

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} ("[T]he rule is otherwise where the trustee occupies more than one representa-
tive capacity with respect to the same property.").
\item \textsuperscript{18} \textit{Id.} at 668, 501 S.E.2d at 204-05.
\item \textsuperscript{19} \textit{Id.} at 669-70, 501 S.E.2d at 205-06.
\item \textsuperscript{20} \textit{Id.} at 670, 501 S.E.2d at 205-06.
\item \textsuperscript{21} 271 Ga. 50, 518 S.E.2d 407 (1999).
\item \textsuperscript{22} \textit{Id.} at 54, 518 S.E.2d at 410-11. As discussed in the court's opinion, a purchaser of
a tax deed may also preclude redemption by giving appropriate notices under O.C.G.A.
section 48-4-45. \textit{Id.} at 53, 518 S.E.2d at 410. That statute provided that a tax debtor's
right of redemption may be foreclosed by giving notice to the debtor, the occupant of the
property, and all persons with claims of record in the county where the property is located.
\textit{Id.} at 51 n.5, 518 S.E.2d at 409 n.5. The notice must be sent by registered or certified mail
and must be published in the newspaper that publishes the sheriff's advertisements for
that county. \textit{Id.} It was undisputed that Blizzard failed to give the notice required under
section 48-4-45. \textit{Id.} at 53, 518 S.E.2d at 410.
\item \textsuperscript{23} \textit{Id.} at 50-51, 518 S.E.2d at 408.
\end{itemize}
and conducted a tax sale. Blizzard was the high bidder at the tax sale and received a tax deed to the property.\textsuperscript{24}

In 1994 Fogal defaulted on his repayment obligations to Hilderbrand under the purchase money deed to secure debt. On March 31, 1994, Fogal and his other tenants in common executed a deed in lieu of foreclosure reconveying the property to Hilderbrand. Hilderbrand died later that year, and the property passed to her daughters, who were plaintiffs in the trial court. In early 1996, plaintiffs learned of the previous tax sale to Blizzard. Thereafter, they filed an action seeking to quiet title to the property in themselves after they tendered the sum necessary to redeem the property from Blizzard. The trial court concluded that plaintiffs were entitled to redeem the property upon payment of $9252.21 to Blizzard. Blizzard appealed that ruling.\textsuperscript{25}

In the trial court and again on appeal, Blizzard contended that plaintiffs’ right to redeem the property was time barred because O.C.G.A. section 48-4-48 provided for an absolute limitation period for redeeming property sold at a tax sale.\textsuperscript{26} Section 48-4-48(b) provided in pertinent part that “[a] title under a tax deed executed on or after July 1, 1989, shall ripen by prescription after a period of four years from the date of execution of that deed.”\textsuperscript{27} In an extremely short opinion, a unanimous court concluded that “the plain language of OCGA § 48-4-48 (1989) requires . . . adverse possession by the tax deed grantee in order for title to ripen under the statute” and thus foreclose the tax debtor’s right to redeem the property.\textsuperscript{28} The court relied on the two-word

\begin{footnotes}
\item[24] Id. at 51, 518 S.E.2d at 408-09.
\item[25] Id. at 52-53, 518 S.E.2d at 409-10. As noted by the supreme court, the trial court found that there were significant issues relating to the validity of the tax sale unrelated to the issue of redemption. Id. However, the supreme court’s discussion of the redemption issue rendered discussion of those other issues moot. Id. at 53, 518 S.E.2d at 410 (“But even accepting, for the sake of argument, the validity of the tax sale to Blizzard, the undisputed circumstances show that the plaintiffs’ right to redeem the property was not barred by either the giving of notice under OCGA. § 48-4-45 or the ripening of title by prescription under OCGA § 48-4-48 (1989).”).
\item[26] Id.
\item[27] Id. at 50 n.1, 518 S.E.2d at 408 n.1 (quoting O.C.G.A. § 48-4-48(b) (1989)). The General Assembly amended O.C.G.A. § 48-4-48(b) effective July 1, 1996, to read as follows:

A title under a tax deed executed on or after July 1, 1989, but before July 1, 1996, shall ripen by prescription after a period of four years from the execution of that deed. A title under a tax deed properly executed on or after July 1, 1996, at a valid and legal sale shall ripen by prescription after a period of four years from the recordation of that deed in the land records in the county in which said land is located.

\end{footnotes}
phrase "by prescription" to justify its conclusion.²⁹ According to the court, for title to be acquired by prescription, there must be some adverse possession.³⁰ Because it was "uncontroverted that Blizzard never occupied the property, nor committed any acts or exhibited any conduct which would amount to adverse possession of the property," the court found that Blizzard had failed to foreclose plaintiffs' right of redemption.³¹

The issue decided in Blizzard is not as simple as the court's truncated opinion makes it appear. In Moultrie v. Wright,³² decided just four years ago, the supreme court reached exactly the opposite conclusion as stated in Blizzard.³³ In Moultrie, Chatham County took title to property through execution of a tax deed based on Moultrie's failure to pay taxes. Moultrie contended that the county had never taken possession of the property and had never provided notice of foreclosure of Moultrie's right of redemption. Therefore, according to Moultrie, the county's title was subject to his right to redeem the property despite the passage of more than seven years.³⁴ The supreme court rejected that argument, stating in pertinent part as follows:

While [Moultrie] had the absolute right to redeem the property for 12 months following the sale in 1975, the evidence is uncontroverted that appellant failed to exercise that right. For the following six years, the county could not have foreclosed [Moultrie's] right to redeem the property without notice of the bar of redemption. However, the evidence is uncontroverted that the county took no action regarding the property during those six years and that appellant did not redeem the property. Upon the expiration of the seven-year period in OCGA § 48-4-48, the county's title was no longer subject to defeasance through redemption. Any failure to provide notice of a bar of redemption during those six years is not relevant to the resolution of this case.³⁵

The supreme court's decision in Moultrie was based on precedent established over forty years ago in Patterson v. Florida Realty & Finance Corp.³⁶ In Patterson, as in Moultrie, the supreme court concluded that the mere passage of time, without the necessity of adverse possession, could result in a foreclosure of a tax debtor's right to redeem property

²⁹. Id., 518 S.E.2d at 410.
³⁰. Id., 518 S.E.2d at 410-11 (citing O.C.G.A. § 44-5-160 (1991)).
³¹. Id., 518 S.E.2d at 411.
³³. See id. at 31, 464 S.E.2d at 196.
³⁴. Id. at 30-31, 464 S.E.2d at 195.
³⁵. Id. at 32, 464 S.E.2d at 196-97 (emphasis supplied) (citations omitted).
³⁶. 212 Ga. 440, 93 S.E.2d 571 (1956).
sold pursuant to a tax deed. That decision was based on the version of O.C.G.A. section 48-4-48 in effect when the supreme court decided Patterson.

While it appears that the supreme court rejected these earlier precedents in favor of what it believed was the plain meaning of the statute, the court did not expressly overrule Moultrie and Patterson. Instead, the court apparently attempted to pass off its deviation from established precedent by referring to those earlier decisions as having been "decided under prior law." However, the prior law under which those cases were decided also contained the phrase "by prescription" which the court in Blizzard apparently found so convincing. Obviously, the earlier courts did not agree with the court's reading of the plain meaning of O.C.G.A. section 48-4-48 as determined in Blizzard.

Furthermore, a recent amendment to O.C.G.A. section 48-4-48(b) calls into question the court's assertion that "by prescription" in the context of this statute requires possession by the tax deed grantee. A 1996 amendment to O.C.G.A. section 48-4-48(b) altered the statute to provide that indefeasible title will vest in the grantee under a tax deed executed after July 1, 1996, "by prescription after a period of four years from the recordation of that deed." Given that the supreme court decided Moultrie only a few months before the legislature passed this amendment, the logical justification for the amendment was to provide additional protection to tax debtors and their rights to redeem property. The legislature obviously contemplated the giving of notice of tax deeds to tax debtors through recordation before the right to redeem could be foreclosed. However, the legislature included the phrase "by prescription" in the newest provision. If, as the court in Blizzard suggests, that phrase requires possession of the property by the tax deed grantee, the recording requirement would add little, if any, protection to tax debtors not already provided by the statute. The appellate courts will probably revisit the issue addressed in Blizzard in the near future.

III. EASEMENTS

In Yaali, Ltd. v. Barnes & Noble, Inc., the supreme court discussed the difference between easements appurtenant and easements in gross in deciding that no easement existed for Yaali across adjoining land.

37. Id. at 442, 93 S.E.2d at 574.
38. See id. at 441-42, 93 S.E.2d at 573.
39. 271 Ga. at 54, 518 S.E.2d at 410.
40. See 266 Ga. at 31, 464 S.E.2d at 196; 212 Ga. at 441, 93 S.E.2d at 573.
41. O.C.G.A. § 48-4-48(b) (emphasis supplied).
owned by Barnes & Noble. The case involved two adjoining tracts of land located near the intersection of Cobb Parkway and Jones Road in Cobb County, Georgia. The tract owned by Yaali ("Yaali Tract") fronted on and had direct access only to Cobb Parkway. The tract owned by Barnes & Noble ("Barnes & Noble Tract") fronted on and had direct access to both Cobb Parkway and Jones Road. In June 1978 Citizens Jewelers, Barnes & Noble's predecessor in the Barnes & Noble Tract, conveyed to Scales Corporation an easement for ingress and egress across the Barnes & Noble Tract to the Yaali Tract. However, at the time of the conveyance, Scales no longer owned the Yaali Tract, having previously conveyed the property to Series V, Ltd. Apparently realizing the defect in its conveyance of title to the "easement" across the Barnes & Noble Tract, Scales issued a corrective warranty deed to Series V after receiving the deed from Citizens Jewelers.

After Barnes & Noble and Yaali took title to their respective parcels, Yaali contended that Barnes & Noble began interfering with its right to use the easement across the Barnes & Noble Tract. Yaali then brought an action to enjoin Barnes & Noble from continuing its interference. The trial court granted summary judgment in favor of Barnes & Noble, declaring that the purported easement did not exist. Yaali appealed, and the supreme court affirmed the trial court's decision.

The court’s decision in Yaali required a detailed discussion of the difference between easements appurtenant and easements in gross. "An easement is appurtenant when the easement is created to benefit the possessor of the land in his use of the land." An easement appurtenant requires "unity of title," which exists when the grantee owns the property receiving benefit of the easement or, in other words, the dominant estate. "An easement in gross does not require unity of title and is independent of any ownership of land." Whether an easement is appurtenant or in gross "depends upon the terms of the grant, the

43. Id. at 695-96, 506 S.E.2d at 117-18.
44. Id. at 695, 506 S.E.2d at 117.
45. Id.
46. Id.
47. Id. at 697, 506 S.E.2d at 119 (citing RESTATEMENT OF PROPERTY § 453 (1944)).
48. Id. at 695-96, 506 S.E.2d at 117-18 (citing Olsen v. Noble, 209 Ga. 899, 905, 76 S.E.2d 775, 780 (1953); 4 RICHARD R. POWELL ET AL., POWELL ON REAL PROPERTY § 34.02[2][d] at 34-17 to -18 (1998)).
49. Id. at 697, 506 S.E.2d at 119 (citing Stovall v. Coggins Granite Co., 116 Ga. 376, 380, 42 S.E. 723, 725 (1902); 4 POWELL ET AL., supra note 48, § 34.02[2][d], at 34-20).
nature of the right, the surrounding circumstances, and the parties’ intent.\textsuperscript{50}

It was undisputed that there was no unity of title at the time Barnes & Noble’s predecessor conveyed the easement at issue to Yaali’s predecessor. Accordingly, if the court determined the easement to be appurtenant, Yaali’s claim had to fail. Yaali attempted to avoid that result, assuming an appurtenant easement, by arguing that Barnes & Noble was estopped to deny the existence of the easement. That argument was based on the recitals concerning the easement contained in the chain of title to both the Yaali Tract and the Barnes & Noble Tract. Yaali relied in part on O.C.G.A. section 24-4-24 as support for its estoppel argument.\textsuperscript{61} However, as the court found, the evidentiary rule regarding recitals in deeds cannot overcome legal defects in the documents to create title when none would otherwise exist.\textsuperscript{52} Similarly, the court held that the doctrine of estoppel by deed “cannot be used to transfer title or cure flaws in the legal requirements for the creation of a property interest.”\textsuperscript{53} Therefore, to the extent that the easement Yaali sought to enforce was appurtenant, the trial court did not err in granting summary judgment to Barnes & Noble.\textsuperscript{64}

Yaali argued alternatively that the easement was actually in gross and therefore not subject to the unity of title requirement.\textsuperscript{55} The supreme court also rejected that argument, finding that there was no evidence in the record to support the conclusion that the easement was intended to exist independent of Scales’s interest in the Yaali Tract.\textsuperscript{56} Two provisions of the original document creating the easement played a central role in the court’s decision. In describing the conveyance, the deed to Scales recited “a conveyance of ‘a non-exclusive easement over and across ... the property of the undersigned ...’ which easement extends ... to the western boundary of property now owned by The

\textsuperscript{50} Id. (citing Stovall, 116 Ga. at 378-79, 42 S.E. at 724; 4 Powell \textit{et al.}, supra note 48, \S 34.02(1)(d), at 34-18).

\textsuperscript{51} Id. at 696, 506 S.E.2d at 118. That statute states that “[e]stoppels include presumptions in favor of: ... (5) [r]ecitals in deeds, ... , as against a grantor, ... and his privies in estate, blood, and in law.” O.C.G.A. \S 24-4-24(b)(5) (1995).

\textsuperscript{52} 269 Ga. at 696, 506 S.E.2d at 118. Yaali cited Nodvin v. Plantation Pipe Line Co., 204 Ga. App. 606, 420 S.E.2d 322 (1992), as support for its position regarding the effect of estoppel on Barnes & Noble’s defense. The court concluded that, to the extent that Nodvin supported Yaali’s argument, it was wrongly decided and should be overruled. 269 Ga. at 696, 506 S.E.2d at 118.

\textsuperscript{53} Id. at 697, 506 S.E.2d at 118 (citing Harper v. Harper, 241 Ga. 19, 21, 243 S.E.2d 74, 76-77 (1978)).

\textsuperscript{54} Id., 506 S.E.2d at 119.

\textsuperscript{55} Id.

\textsuperscript{56} Id. at 698, 506 S.E.2d at 119.
Scales Corporation." The court found that the reference to the two tracts as owned by the parties to the deed were "badges of an appurtenant easement." Additionally, the deed to Scales stated that it conveyed the easement "for the sole purpose of ingress and egress to... the said property of The Scales Corporation." The court stated that easements for ingress and egress are typically interpreted as appurtenant. Faced with those indications of intent from the deed creating the easement, Yaali failed to provide any evidence of the intent of Citizens Jewelers and Scales at the time they allegedly created the easement. In the absence of such evidence, the court concluded that the easement must be interpreted as appurtenant.

In his dissent, Justice Carley agreed with the majority's holding concerning the effect of estoppel to vest title to the easement in Yaali. However, he disagreed with the majority's conclusion regarding the interpretation of the easement as appurtenant rather than in gross. Justice Carley focused his opinion on the circumstances surrounding the execution of the deed from Citizens Jewelers to Scales in concluding that the trial court improperly entered judgment as a matter of law against Yaali. The circumstance that Justice Carley found most compelling was the fact that the two tracts were already developed for commercial use at the time Citizens Jewelers deeded the easement to Scales. He stated that "[t]he right of ingress and egress to commercial property is, in effect, similar to the typical easement in gross granted to a railroad, utility line, or pipeline to pass over or through property of the grantor so as to facilitate the commercial purposes of the grantee." Justice Carley opined that on the state of the record in the trial court, Barnes & Noble had not yet come forward with evidence showing Citizens Jewelers' deed was intended to create either an easement appurtenant or nothing. Under that circumstance, Justice Carley concluded that Barnes & Noble had not carried its burden on summary judgment and, therefore, that the burden had not shifted to Yaali to come forward with

57. Id. at 697-98, 506 S.E.2d at 119.
58. Id. at 698, 506 S.E.2d at 119.
59. Id.
60. Id. (citing Stovall, 116 Ga. at 379-80, 42 S.E. at 724-25).
61. Id.
62. Id. (Carley, J., dissenting).
63. Id., 506 S.E.2d at 119-20.
64. Id. at 699-700, 506 S.E.2d at 120-21.
65. Id. at 699, 506 S.E.2d at 120.
66. Id.
67. Id. at 700, 506 S.E.2d at 120-21.
its own evidence. As a result, Justice Carley concluded that the trial court should not have granted summary judgment to Barnes & Noble.

IV. CONDEMNATION AND EMINENT DOMAIN

The court of appeals in BIK Associates v. Troup County revisited an issue discussed in last year's survey—namely, whether altering access to a public street from private property constitutes a taking for which recovery lies. The property at issue consisted of two parcels adjoining Highway 29 in Troup County, Georgia. In connection with rerouting a portion of the roadway, Troup County proposed to condemn 726.98 square feet from one parcel and to condemn a permanent slope and temporary construction easement across the other parcel. After completion of the proposed road work, BIK's property would have access to the road, but the driveways would be substantially longer and would be constructed with substantially steeper inclines. During the trial on the value of the property interests taken from BIK, the trial court entered an order prohibiting BIK from introducing evidence concerning alleged consequential damages to its property as a result of the changes in access. At the conclusion of the trial, the jury awarded BIK $30,000.

On appeal BIK asserted that the trial court erred in preventing it from proving consequential damages that allegedly resulted from the alterations in access to BIK's property. Like the court in Department of Transportation v. Bridges last year, the court in this case stated the general principle concerning damages for changes in access to property as follows: "Inconveniences shared by the public in general, such as changes in traffic pattern, circuity of travel, and similar traffic conditions, are not compensable; thus, a 'greater difficulty in ingress and egress which is occasioned by a change in traffic patterns is not an

68. Id.
69. Id.
73. Id. at 735, 513 S.E.2d at 284. BIK asserted several other arguments on appeal, all of which related to the trial court's exclusion of evidence concerning alleged consequential damages to BIK's property interest. Those arguments do not raise issues justifying comment in this Article. See id. at 736-37, 513 S.E.2d at 285-87.
74. 268 Ga. 258, 486 S.E.2d 593 (1997). For a discussion of Bridges, see Brannan & Sheppard, supra note 71.
appropriate item of damages in" a condemnation proceeding. The court concluded that BIK had no right to compensation based on the changes in access to its property because it had "the same access to the highway as [it] did before the [road work]." BIK’s damages were not "special, but [were] of the same kind . . . as that of the general public." As a result, the trial court properly denied BIK an opportunity to put on evidence of consequential damages allegedly resulting from the change in access from its property, and the court of appeals affirmed the jury verdict and judgment entered by the trial court.

V. PURCHASE CONTRACTS AND BROKERS

OTI Shelf, Inc. v. Schair & Associates, Inc. involved the question of whether a real estate broker under an exclusive listing agreement is entitled to recover commission on a sale that takes place without his involvement. The property at issue in Schair was one building ("100 Building") in a three-building office complex. OTI Shelf, formerly known as Outdoor Telecommunications, Inc. ("OTI"), entered into a listing agreement with Schair & Associates ("Schair") in August 1990. Under that listing agreement, Schair was employed as OTI’s "sole and exclusive agent to sell the [100 Building]" during the period from August 1990 to February 1991. The listing agreement identified two situations under which Schair would be entitled to commission in connection with the sale of the 100 Building. First, Schair would be paid a commission equal to five percent of the gross sales price if, "during the term of the agreement, the property was sold or a contract for the sale was entered into by [the] owner and a purchaser." Second, Schair would receive a five percent commission if "within 60 days after expiration of the agreement, the property was sold, or a sale contract was entered with any person or persons to whom the property was actually exhibited by [Schair] during [the] term of the contract."
The undisputed evidence demonstrated that, before OTI executed the listing agreement with Schair, Orlando Wilson, as president of OTI, had begun marketing the 100 Building and had received a letter of intent from prospective purchasers identified by him through those efforts. In November 1990, during the term of the listing agreement, OTI sold the 100 Building to an entity formed by the prospective purchasers that Wilson had identified. Schair had no involvement in the negotiation of the sale from OTI to that purchaser. After the sale closed, Schair claimed that it was entitled to a commission on the sale. Schair filed an action against Wilson and OTI to recover the commission provided in the listing agreement.85

Schair and OTI filed cross-motions for summary judgment concerning the meaning of the listing agreement as it related to Schair's right to commission on the sale of the 100 Building. The trial court denied OTI's motion and granted partial summary judgment to Schair concerning the meaning of the contract. OTI appealed.86

The court's analysis of the issues presented on appeal began with O.C.G.A. section 10-6-32.87 That statute provides as follows:

The fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser who is ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner.88

The court noted that the first sentence of O.C.G.A. section 10-6-32 has been interpreted so that the execution of an exclusive listing agreement alone does not render an owner liable for commission when the owner procures a buyer for the listed property through its own efforts, independent of the broker.89 However, the parties are free to contract otherwise, and when they do so, an owner may owe a commission to a broker who plays no part in the sale.90

In Schair the court concluded that the listing agreement between OTI and Schair required the payment of a commission notwithstanding the

85. Id.
86. Id. at 13, 517 S.E.2d at 544. The trial court expressly reserved other issues pending the outcome of OTI's appeal on the construction of the listing agreement. Id.
87. Id.
90. Id. at 14, 517 S.E.2d at 544.
fact that OTI and Wilson alone had procured the purchaser and arranged the sale.\textsuperscript{91} The court concluded that the clear and unambiguous terms of the listing agreement placed an unqualified obligation on OTI to pay a commission to Schair if a sale of the property took place during the term of the listing agreement, "even if the sale [was] accomplished without the broker's involvement."\textsuperscript{92} Accordingly, the court held that the trial court properly granted summary judgment to Schair concerning the meaning of the contract as it related to Schair's right to a commission.\textsuperscript{93}

The holding in \textit{Schair} points out the necessity for careful drafting of listing agreements between owners and brokers. If an owner wishes to preserve its right to market property through its own efforts and to complete a sale without incurring liability for a commission to the broker, the owner must ensure that the listing agreement so provides.

\section*{VI. Foreclosures}

In \textit{Lawson v. Habersham Bank},\textsuperscript{94} the court of appeals affirmed the trial court's decision permitting the sequential sale of two parcels of land for the satisfaction of a single debtor's debt without the necessity of confirming the earlier sale.\textsuperscript{95} Howard and Jenny Lawson ("Lawsons") originally obtained a loan to acquire a poultry farm located in Habersham County, Georgia. Habersham Bank loaned the Lawsons $287,217.65 and took a deed to secure debt on the farm as security for repayment of the loan. The Lawsons later negotiated to borrow additional sums from Habersham Bank to make needed improvements to the farm. The bank issued the Lawsons a line of credit for $35,000 that was secured by a deed to secure debt on their home, which was located in Stephens County. In October 1995, shortly before the line of credit became due and payable, the Lawsons executed a third note ("Consolidation Note") that consolidated the first two debts into a single note in the initial principal sum of $332,420.86. The Lawsons pledged their farm and home as security for repayment of the Consolidation Note.\textsuperscript{96}

In the fall of 1996, the Lawsons defaulted on their obligations under the Consolidation Note. Thereafter, Habersham Bank commenced foreclosure proceedings against the farm and the house. The Lawsons

\begin{itemize}
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id., 517 S.E.2d at 545.
\item \textsuperscript{94} 233 Ga. App. 88, 503 S.E.2d 341 (1998).
\item \textsuperscript{95} Id. at 92, 503 S.E.2d at 344.
\item \textsuperscript{96} Id. at 89, 503 S.E.2d at 342.
\end{itemize}
sought to enjoin foreclosure on their home by filing an action in the Superior Court of Habersham County, but they did not seek similar relief with regard to the farm. The trial court issued an injunction temporarily halting the foreclosure of the Lawsons' home, but Habersham Bank foreclosed on their farm. The bank did not confirm that foreclosure sale. During the later hearing on the Lawsons' attempt to prevent foreclosure on their home, the Lawsons contended that Habersham Bank's foreclosure efforts constituted an effort to collect a deficiency that was barred by the bank's failure to confirm the foreclosure of the farm. The trial court rejected that argument, finding that the bank was not attempting to recover a deficiency, and the Lawsons appealed.

The appellate court began its analysis by stating the definition of an action for deficiency as follows: "A deficiency judgment is the 'imposition of personal liability on a mortgagor for unpaid balance of mortgage debt after foreclosure has failed to yield [the] full amount of due debt.'" The court noted a distinction between seeking to impose personal liability on a debtor after foreclosure and simply foreclosing on separate parcels of real estate pledged as security for multiple debts. The court explained that "the [confirmation act] does not inhibit sale, under a power contained in a security deed, of property other than property previously sold by [Habersham Bank], which failed to bring the amount of the debt." Notwithstanding the execution of the Consolidation Note, the court concluded that two separate debts remained (i.e., the original purchase money debt on the farm and the line of credit for improvements) and that the farm and the house remained as security

97. Id. at 89-90, 503 S.E.2d at 342. The confirmation statute provides as follows: When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages, or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon.

O.C.G.A. § 44-14-161(a) (1982).

98. 233 Ga. App. at 90, 503 S.E.2d at 342-43.


100. Id. at 91, 503 S.E.2d at 343.

101. Id. (quoting Salter v. Bank of Commerce, 189 Ga. 328, 332, 6 S.E.2d 290, 293 (1939) (alterations by court)).
under the two earlier notes. The court concluded that, based on the Lawsons' default on the second debt (the line of credit), Habersham Bank was entitled to foreclose on the security (the house) without confirming the foreclosure sale on the farm.

It is clear from the court's opinion that it would have reached a different conclusion had there been a single debt secured by multiple properties. Therefore, it was essential that the court found the Consolidation Note did not act to extinguish the two earlier notes. That conclusion follows the general rule in Georgia that the execution of a renewal or consolidation note does not extinguish the earlier debt absent an express agreement between the parties to the contrary. This case reinforces the necessity for lenders to consider carefully the terms upon which they may renew or consolidate promissory notes when multiple tracts of real property provide security for the different debts.

VII. LANDLORD AND TENANT

The issue of a landlord's liability for injuries sustained by a tenant as a result of criminal activity on the leased property was again an issue during this survey period. In Jackson v. Post Properties, Inc., the court of appeals reversed the trial court's grant of summary judgment in favor of defendant landlord in an action filed by an injured tenant. An unknown assailant raped Kim Jackson after entering her ground-level apartment at the Post Brook Apartments ("Apartments") through a window. She had recently moved from an upper-level apartment to the ground-floor unit where the attack took place. While living at the Apartments, Jackson was previously the victim of an unsolved burglary and was aware that another rape had occurred at the Apartments. Therefore, Jackson and Post possessed "equal knowledge of the risk of

102. Id. at 92, 503 S.E.2d at 344 ("[H]ere, there were two separate parcels of real property that were provided as consideration for two separate obligations, the first being the purchase money for the farm and the second the line of credit for improvements on the farm . . . ").

103. Id. at 91-92, 503 S.E.2d at 343-44.

104. Id. at 92, 503 S.E.2d at 344.


107. Id. at 704, 513 S.E.2d at 263.

108. Id. at 701, 513 S.E.2d at 261. Another attack at these same apartments was the subject of a case that previously came before the court of appeals. In that case, the landlord successfully defended a claim based on the rape of a different tenant. Post Properties, Inc. v. Doe 230 Ga. App. 34, 40, 495 S.E.2d 573, 578-79 (1997). The court in Jackson held that its earlier decision constituted physical precedent only and was not binding in the present case. 236 Ga. App. at 704, 513 S.E.2d at 263. Further, the court found that factual issues distinguished the two cases. Id.
third-party criminal attack, including rape" at the time of the incident that formed the basis of her claims. To prevail Jackson was required to demonstrate that Post was negligent in maintaining the Apartments and that she was unable, through the use of ordinary care, to avoid injury because of Post's negligence.

Jackson asserted several instances of Post's negligence. First, she claimed that Post was negligent because the window through which the assailant entered was flimsy. Second, Jackson contended that Post was negligent in providing security at the apartments. Finally, she contended that Post negligently maintained the lighting and landscaping in such a way as to contribute to her injury. The appellate court concluded that material issues of fact existed on each of those three claims.

The principal issue of fact discussed by the court involved the window through which the assailant entered Jackson's apartment. The window was manufactured with a built-in spoon lock. Additionally, Post provided all ground-floor residents with thumbscrew locks for their windows and instructed residents on the use of such locks. Jackson contended that the rapist gained entry to her apartment despite her proper use of both locks. Post relied upon a provision in Jackson's lease that required her to report any defects in locks to Post in writing. Jackson had not complained about the locks on her windows. Further, Post asserted that Jackson had improperly used the thumbscrew locks.

The court of appeals rejected both of Post's arguments. First, the court found that Post was on notice of the potential defect in the spoon locks, even in the absence of a written complaint by Jackson, because other tenants had complained about them. Relying on its decision

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110. Id.
111. Id. at 703, 704, 513 S.E.2d at 262, 263.
112. Id. at 704, 513 S.E.2d at 263.
113. Id. at 702-03, 513 S.E.2d at 262-63. The court dealt perfunctorily with Jackson's assertion regarding the negligent security issue. The court stated only that no security guard was on duty the night Jackson was attacked and that "[a] jury must determine whether this omission was unreasonable in light of the known risk of harm." Id. at 704, 513 S.E.2d at 263. The court did not discuss Jackson's claim that Post negligently maintained the lighting and landscaping, simply noting that no "plain and palpable facts exist on which reasonable minds could not differ" and that summary judgment was therefore improper on that issue. Id. (quoting Bishop v. Mangal Bhai Enters., 194 Ga. App. 874, 875, 392 S.E.2d 535, 537 (1990)).
114. Id. at 703, 513 S.E.2d at 262.
115. Id. at 703-04, 513 S.E.2d at 262-63.
116. Id. at 703, 513 S.E.2d at 262.
in *Demarest v. Moore,*\(^{117}\) the court concluded that a jury must determine whether Jackson's rape was the result of the type of windows installed by Post when the Apartments were constructed.\(^{118}\) The issue of whether Jackson properly secured the thumbscrew lock on the night she was attacked presented a classic example of a factual issue sufficient to require a trial; the jury was required to decide whether the locks were properly secured.\(^{119}\) Thus, the court reversed the trial court's grant of summary judgment for Post.\(^{120}\)

**VIII. LEGISLATIVE DEVELOPMENTS**

The single noteworthy action by the Georgia General Assembly during the survey period that affects real property law came in the form of an amendment to the Georgia Electronic Records and Signatures Act ("Act").\(^{121}\) By amending the Act, the legislature clarified that an enforceable contract for the sale of real property may be created by an exchange of electronic correspondence, including e-mail and facsimile transmissions. A signature now may be interpreted to mean the author's identifier appended to an e-mail.\(^{122}\) Further, the Act now expressly states that a signed electronic record satisfies the statute of

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118. 236 Ga. App. at 703, 513 S.E.2d at 262-63.
119. *Id.* Post apparently gave two different instructions regarding placement of the thumbscrew locks. Jackson admitted in her deposition that Post informed her that the locks should be placed at the bottom of the window. However, Post's Executive Vice President of Services acknowledged that Post sent a memorandum to its tenants stating that thumbscrew locks should be placed approximately six inches from the bottom of the window. The evidence supported the conclusion that, on the night of the attack, Jackson placed her locks six to eight inches above the bottom of the window frame, in compliance with one instruction given by Post. *Id.*, 513 S.E.2d at 262. It is arguable whether Jackson could, under those circumstances, be found not to have exercised due care. From Jackson's perspective, the worst that can be said is that a question of fact as to whether she failed to exercise due care for her own safety remains for the jury to determine. *Id.* at 702-03, 513 S.E.2d at 262.

Post also asserted that Jackson was negligent in moving from an upper-level apartment to a ground-floor unit. The court rejected that argument stating that the "argument is untenable. By its very nature, it suggests that Post admits that its apartments were defectively designed for even *having* first floor apartments and that any tenant who lives on the first floor assumes all risk of criminal attack." *Id.* at 704, 513 S.E.2d at 263. The court concluded that whether moving to a ground-floor apartment demonstrates a lack of due care is a jury question. *Id.*

120. *Id.*
122. O.C.G.A. § 10-12-3(7) (Supp. 1999) ("Signature" means any symbol or method that a person causes to be attached to or logically associated with a record with the intent to sign such record.").
With this clarification regarding the enforceability of electronic signatures, electronic execution of real estate contracts and related documents will likely become more prevalent in Georgia.

123. Id. § 10-12-4(c) ("When a rule of law requires a writing, an electronic record satisfies that rule of law."); id. § 10-12-4(d) ("When a rule of law requires a signature, an electronic signature satisfies that rule of law.").