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Construction Law

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I. Introduction

Nowhere is the downturn in the economy more pronounced than in the construction industry. Contractors and subcontractors are going out of business with increasing frequency. When a party to a construction project defaults on its obligations, everyone else involved in the project is affected. Material suppliers may have been left unpaid, the bank must examine its potential liability, the surety must determine its exposure, and above all else, the work must be completed. The cases and legislation during this survey period reflect this aspect of the construction industry.

The most significant event during the survey period was the enactment of new provisions in the mechanics' and materialman's lien statutory framework. Agreements to waive liens before the material or services are supplied are no longer valid. Accordingly, property owners and contractors cannot rely on blanket lien waivers to prevent liens from being placed on the property.

Also during the survey period, the Georgia Court of Appeals ruled on several lender liability issues further clarifying the potential exposure a bank has when it becomes heavily involved in a construction project. The economic downturn has also led to an increasing number of surety claims as construction projects continue to fail. The changes in the law in the last year make it absolutely imperative that the construction lawyers prepare their clients for the possible default by one of the other parties.

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Proper planning is the only way to reduce the harmful effects of bankruptcy and business failure.

II. Lender Responsibilities and Rights

During the preceding survey period, those decisions relating to lender liability questions concerned the conduct of the lender in the disbursement of loan proceeds.[1] With the downturn in the economy and the recession in the construction industry, it should not be long before Georgia's appellate courts are faced squarely with the question of when a lender assumes the duties of a developer or other player in the construction process. The focus during this survey period, however, is on lender entanglements in a development and their effect on the lender's right to foreclose under a security deed.

In *Landor Condominium Consultants, Inc. v. Bankers First Federal Savings & Loan Ass'n*,[2] plaintiff Landor Condominium and the Colony Place Company "attempted to develop a condominium project in Richmond County. Colony Place was to be the developer; and Landor was to provide management services."[3] Bankers First Federal made a construction loan to Colony Place. Colony Place defaulted on the loan and was placed into involuntary bankruptcy by Bankers First Federal.[4]

The bankruptcy court permitted Bankers First Federal to foreclose on the project. The bank acquired the property at the foreclosure sale and Landor Condominium made no attempt to stop the foreclosure. The bankruptcy trustee settled the claims, which Colony Place had against the bank.[5] "[B]oth Colony Place and Landor Condominium released the bank from all claims."[6]

Landor Condominium and Colony Place brought suit against Bankers First Federal and one of its officers for "breach of contract, wrongful foreclosure and violations of Georgia's Racketeer Influenced & Corrupt Organizations Act ("RICO")."[7] Together Colony Place and Landor Condominium contended that the bank failed to continue to finance the construction of the project resulting in wrongful foreclosure, and that the bank violated a partnership agreement between the bank and Colony Place by failing to continue the development of the project. Landor Con-

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1. Brian J. Morrissey & Matthew W. Wallace, *Construction Law*, 43 Mercer L. Rev. 141, 142-44 (1991).
2. 204 Ga. App. 212, 418 S.E.2d 772 (1992).
3. *Id.* at 212, 418 S.E.2d at 773.
4. *Id.*
5. *Id.* at 212-13, 418 S.E.2d at 773-74.
6. *Id.* at 213, 418 S.E.2d at 774.
7. *Id.* at 212, 418 S.E.2d at 773.

dominium alleged that it was a third-party beneficiary of the loan agreements between Colony Place and Bankers First Federal and that the bank tortiously interfered with Landor Condominium's management contract with Colony Place. The trial court granted summary judgment in favor of the bank and its officer as to all claims, and plaintiffs appealed.[8]

The court of appeals rejected plaintiffs' argument that a partnership agreement existed between the bank and Colony Place under the loan agreements, finding merely a relationship of lender/borrower, not partners or joint venturers, under the terms and conditions of the loan.[9] Accordingly, the bank was found merely to have agreed to loan money, but not to finance the project when the loan was in default.[10] Furthermore, the court rejected Landor Condominium's claims on substantive grounds holding that Landor Condominium could not assert a wrongful foreclosure claim because it had no interest in the property itself and could not sue on the loan agreements, because it was not a third-party beneficiary of those agreements.[11] Moreover, the court held in connection with Landor Condominium's tortious interference claim that the bank was "simply exercising its rights under the loan agreements" to foreclose and thus could not have tortiously interfered with Landor Condominium's contract with Colony Place.[12]

This case illustrates a trend by contractors and developers to recast the role of lender as a principal player in the development of a construction project. Courts now at least are reluctant to accept such a recharacterization of a lender's role, particularly in the absence of any conduct by the lender or an exercise of control or power outside of those specifically delineated in its loan agreements.

In another foreclosure context, *Brevard Federal Savings & Loan Ass'n v. Ford Mountain Investments*,[13] plaintiff Ford Mountain Investments ("Ford Mountain") attempted to enjoin foreclosure commenced by Brevard Federal Savings & Loan ("Brevard Federal") under a deed to secure debt. The original developer had borrowed money from Brevard Federal but experienced financial problems and, with Brevard Federal's consent, Ford Mountain assumed the project.[14] Ford Mountain's interest was subordinated to the promissory note and the deed to secure debt under the assumption agreement. Ford Mountain made payments on the note to

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8. *Id.*
9. *Id.* at 213, 418 S.E.2d at 774.
10. *Id.*
11. *Id.*
12. *Id.* The court of appeals also held that the releases barred the wrongful foreclosure claims and Landor Condominium's tortious interference claim. *Id.*
13. 261 Ga. 619, 409 S.E.2d 36 (1991).
14. *Id.* at 619, 409 S.E.2d at 37.

Brevard Federal although it was not liable on the original note itself. As a result, when Ford Mountain failed to continue note payments, Brevard Federal's only remedy against Ford Mountain was foreclosure.[15]

Plaintiff Ford Mountain filed a declaratory action and sought an injunction against foreclosure. An injunction was entered by agreement pending a hearing, but when Ford Mountain failed to make the next monthly payment, Brevard Federal moved to dissolve the injunction. The court denied the injunction and Brevard Federal appealed.[16] Subsequently,

> the trial court entered findings of fact and conclusions of law . . . on the merits of the declaratory judgment action, holding the contract between the parties required Brevard [Federal] to release its interest in Highland Tops based on the wholesale appraisal value of the lots. Brevard filed an amended notice of appeal.[17]

The trial court determined that by failing to release the properties, Brevard Federal excused Ford Mountain from continuing to make payments under the note. In rejecting that holding, the supreme court reiterated the long standing doctrine that " 'a borrower who has executed a deed to secure debt is not entitled to an injunction against the sale of the property under a power in the deed, unless he first pays or tenders to the creditor the amount admittedly due.' "[18] Therefore, even though an issue concerning the proper release price for the lots remained for decision, Ford Mountain could not discontinue payments on the note pending an outcome of that question. Accordingly, the supreme court ruled that the injunction should be dissolved due to Ford Mountain's failure to perform those acts required of it under the contract.[19]

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15. *Id.* Similar to many development loans, the assumption documents contained an agreement for release of residential lots sold by the developer. Under that agreement, Ford was to pay 30% of appraised value of the lots to be released. Customarily, Ford had been paying 30% of retail appraised value, but on September 27, 1990, Ford sought release of the entire tract by tendering 30% of the wholesale appraised value of 34 lots. *Id.*

16. *Id.* at 619-20, 409 S.E.2d at 37.

17. *Id.* at 620, 409 S.E.2d at 38. Ancillary to the main holding in the case, the supreme court reversed the findings of fact and conclusions of law with respect to the merits of the complaint because the consent of both parties is required before consolidation of the injunction hearing and a hearing on the merits, and because Brevard had requested a trial by jury. *Id.*, 409 S.E.2d at 38-39. *See* O.C.G.A. § 9-11-52 (1982 & Supp. 1992) and § 9-11-65(a)(2) (1982).

18. 261 Ga. at 620-21, 409 S.E.2d at 38 (quoting Wright v. Intercounty Properties, Ltd., 238 Ga. 492, 494, 233 S.E.2d 160, 161 (1977)).

19. *Id.* at 621, 409 S.E.2d at 38-39.

III. Contract Formation, Construction and Breach

A. Contract Formation

Apparent Authority and Agency. In *Hussey, Gay & Bell v. Georgia Ports Authority*,[20] Clay-Ric, Inc., a subcontractor on a warehouse extension construction project at Georgia Ports Authority's ocean terminal facility, subcontracted with the general contractor to pave the floor of the warehouse. Hussey, Gay & Bell prepared the plans and specifications for the project on behalf of Georgia Ports Authority. After initial installation, the poured floor became wet as a result of work performed on site by the general contractor and other contractors, and, therefore, failed to pass a load test performed by the architect, Hussey, Gay & Bell.[21]

The general contractor directed Clay-Ric to repave the floor, but failed to pay Clay-Ric for the repaving work, an expense in excess of $40,000. Clay-Ric brought suit against the general contractor, Hussey, Gay & Bell, and Georgia Ports Authority to recover the amounts allegedly owed for the repaving work.[22] Georgia Ports Authority moved for summary judgment, which was granted and subsequently appealed by Clay-Ric.[23]

The gravamen of Clay-Ric's complaint is that Georgia Ports Authority, "directly or through its agents, authorized the paving repair work and represented that Clay-Ric would be paid for the work."[24] In support of the motion for summary judgment, Georgia Ports Authority submitted an affidavit of its director of engineering and construction, who testified that Georgia Ports Authority never had any contract with Clay-Ric for basic contract or extra work, that Georgia Ports Authority never authorized extra work, that Georgia Ports Authority "neither authorized the paving repair work nor represented that [it] would pay Clay-Ric for the repair work, and that [Hussey, Gay & Bell] had no authority to contract with Clay-Ric on the [Georgia Ports Authority's] behalf."[25] "Clay-Ric [presented] the affidavit of its president, who stated that he was instructed by representatives of [Hussey, Gay & Bell] that the repair work was to be paid for by the [Georgia Ports Authority]."[26] Clay-Ric also submitted deposition testimony of the general contractor's representative who stated that one of Hussey, Gay & Bell's engineers committed to Clay-Ric's representative that if Clay-Ric performed the work, Hussey,

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20. Hussey, Gay & Bell v. Georgia Ports Auth., 92 F.C.D.R. 1014.
21. *Id.* at 1014.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1015.
26. *Id.*

Gay & Bell would make sure Clay-Ric was paid for it.[27] Clay-Ric presented no evidence taking issue with Georgia Ports Authority's contention that it did not authorize the repair work or represent that it would pay Clay-Ric for the repairs.[28]

Clay-Ric asserted on appeal that an issue of fact existed concerning Hussey, Gay & Bell's authority "to contract with Clay-Ric for the extra work on behalf of the [Georgia Ports Authority]."[29] In rejecting that contention, the court of appeals noted that " '[t]he bare assertion or denial of the existence of an agency relationship is a statement of fact when made by one of the purported parties to the relationship; but when made by an outsider, bare assertions or denials are mere conclusions of law.' "[30] As a result, Georgia Ports Authority's affidavit that Hussey, Gay & Bell was not its agent was a statement of fact that Clay-Ric did not overcome with its conclusory affidavits. The court held "H G & B's role as the engineer did not automatically confer upon H G & B the power to enter into contracts on behalf of GPA."[31]

The court also rejected Clay-Ric's argument that an implied contract existed with Georgia Ports Authority under theories of *quantum meruit* and unjust enrichment.[32] The court reiterated Georgia precedent, which holds that "a materialman or subcontractor [cannot] recover against an owner or general contractor with whom it has no contractual relationship, based on a theory of unjust enrichment or implied contract; rather, it is limited to the statutory remed[y] provided by Georgia's lien statute."[33]

B. Contract Construction

Warranties. In *McDevitt & Street Co. v. K-C Air Conditioning Service, Inc.*,[34] McDevitt & Street Co. entered into a general contract to provide a waste water riser system in an Embassy Suites Hotel. Plaintiff McDevitt & Street entered into a subcontract with defendant K-C Air Conditioning Service, Inc. ("K-C Air"), for the design, purchase, and in-

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1015 (quoting Coley Elec. Supply, Inc. v. Colonial Eggs of Alma, Inc., 165 Ga. App. 108, 299 S.E.2d 165 (1983)).
31. *Id.*
32. *Id.*
33. *Id. See* O.C.G.A. §§ 44-14-360 to -366 (1982 & Supp. 1992). *See also* PPG Indus., Inc. v. Hayes Constr. Co., 162 Ga. App. 151(1), 290 S.E.2d 347 (1982). The court also rejected Clay-Ric's argument that accepting the repair work without compensation was an unlawful taking of property by the state without just and adequate compensation as required by the Georgia Constitution. 92 F.C.D.R. at 1015.
34. 203 Ga. App. 640, 418 S.E.2d 87 (1992).

stallation of the system.[35] The subcontract agreement provided that the work be "performed by subcontractor in a good and workmanlike manner strictly in accordance with the Contract Documents . . . ."[36] The subcontract further stated the following:

> Subcontractor warrants and guarantees the Work to the full extent provided for in the Contract Documents. Without limiting the foregoing or any other liability or obligation with respect to the Work, Subcontractor shall, at its expense and by reason of its express warranty, make good any faulty, defective, or improper parts of the Work discovered within one year from the date of acceptance of the project by the Architect and Owner or within such longer period as may be provided in the Contract Documents.[37]

The general conditions contained in a American Institute of Architects ("AIA") Form A201 and incorporated into the contract made the subcontractor "bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor by these documents assumes toward the Owner and the Architect."[38] Under AIA Form A201, the general contractor further warrants to the owner that "[a]ll Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements . . . may be considered defective . . . . This warranty is not limited by the provisions of Paragraph 13.2."[39] The subcontract further required defendant to furnish a performance bond in an amount equal to the contract price.[40] Wassau Insurance posted the performance bond, which remained in duplicative effect until such time as defendant "shall well and truly perform all of the undertakings . . . and conditions and agreements of [the] subcontract within the time provided therein . . . ."[41]

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35. *Id.* at 640, 418 S.E.2d at 89.

36. *Id.*

37. *Id.*

38. *Id.*, 418 S.E.2d at 89-90. American Institute of Architects Contract A201, 1967 Edition, as amended by supplementary conditions, was incorporated into this agreement. *Id.*

39. *Id.* at 640-41, 418 S.E.2d at 90.

> Paragraph 13.2.2, relating to "correction of the work," required that if within "one year after acceptance by Owner . . . or within such longer period of time as may be prescribed by law . . . any of the Work is found to be defective or not in accordance with the contract documents, the contractor shall correct it promptly after receipt of written notice to do so" unless Owner has "given a written acceptance of such condition. This obligation shall survive termination of the contract."

Id. at 641, 418 S.E.2d at 90.

40. *Id.*

41. *Id.*

Slightly more than two years after opening, in February 1988, plaintiff, general contractor, received complaints about ten random leaks in the plumbing risers of the hotel. The leaking caused ceiling tiles to fall and raw sewage to penetrate the restaurant and meeting rooms of the hotel. Affected guest suites were out of service for three days while leak repairs were effectuated. Leaks then began occurring more frequently. Plaintiff notified its subcontractor and Wassau Insurance of its claim against the subcontractor due to the failure of the mechanical connections on the plumbing risers. After several meetings, the owner, plaintiff, and defendant, but not Wassau Insurance, agreed that a system wide failure had occurred requiring extensive repair to avoid repeated patching. An analysis of sections removed during the repairs showed an adhesive failure resulting from contaminated cement used at the joints.[42]

Plaintiff offered the subcontractor the opportunity to correct the problem, which it declined, and plaintiff paid another subcontractor $151,986.97 to effectuate the repair. The owner also had damages resulting from its inability to use the facility. Plaintiff's total losses were $338,594.57.[43]

Plaintiff brought suit against the subcontractor for negligence, breach of contract, breach of express and implied warranties, and the expenses of litigation and against Wassau Insurance for defendant's, K-C Air, failure to perform. Plaintiff sought actual damages, a twenty-five percent bad faith penalty, and attorney fees from Wassau.[44] The trial court granted defendant's motion *in limine* to exclude evidence of the default provisions of the contract that provided the following:

> Should Subcontractor at any time: fail to supply the labor, materials, equipment, supervision and other things required . . . of sufficient quality to perform the Work with the skill [and] conformity . . . required hereunder . . . or fail in the performance or observance of any of the covenants, conditions, or other terms of the subcontract, . . . each of which shall constitute a default hereunder by Subcontractor, Contractor shall, after giving Subcontractor notice of default 48 hours within which to cure, have right to exercise any one or more of [four specified] remedies.[45]

The trial court also granted a directed verdict on the damages paid to the owner for the loss of the use of the hotel.[46]

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42. *Id.* at 641-42, 418 S.E.2d at 90.

43. *Id.* at 642, 418 S.E.2d at 90-91.

44. *Id.*, 418 S.E.2d at 91. Those penalties are set forth in O.C.G.A. § 33-4-6 (1992).

45. 203 Ga. App. at 642-43, 418 S.E.2d at 91.

46. *Id.* at 643-44, 418 S.E.2d at 92. The decision deals with a host of issues unrelated to construction of the contract. For treatment of the bond related issues, see *infra* text accompanying notes 227-44.

The court of appeals reversed the trial court exclusion of the default provision under the contract.[47] Seemingly, the trial court ruling relied upon the one year warranty period. The court of appeals found that the contract obligated the subcontractor "to provide labor, material and equipment necessary to perform good quality work, free from faults and defects, and an event of default was deemed to have occurred should the contractor 'at any time' fail to do so."[48] Thus, under an indemnification provision of the subcontract, the subcontractor must indemnify the contractor as a result of the insufficiency of its performance.[49]

Cost Plus Contract. In *Maddox v. Brown*,[50] "plaintiffs John and Pamela Brown entered into a contract with defendant Frank Maddox d/b/a Frank Maddox Construction Company for the building of a house."[51] The contract called for the house to be built on a "cost plus" basis, with plaintiffs to reimburse the contractor for all costs of construction plus a fee of $5,500.[52]

After completion of the house, plaintiffs sued defendant contractor for breach of contract and fraud, based upon overpayments resulting from lack of documentation of expenses, defects in the construction of the house, and misrepresentations concerning the expected services and overcharges. The contractor counterclaimed for additional payments allegedly due. The court entered judgment in favor of plaintiffs for actual damages, punitive damages, and attorney fees and the defendant appealed.[53]

The contractor also appealed the grant of a directed verdict against his counterclaim for additional costs of construction. Under a "cost plus" contract, the defendant must prove the amount of costs incurred through bills submitted. The evidence at trial showed that plaintiffs paid the contractor in excess of the bills submitted and thus, no additional monies would be due under that particular contract.[54]

Joint Payment Agreement. It is commonplace in construction projects for payment disputes to arise between lower-tiered subcontractors and suppliers. Sometimes these lower-tiered contractors agree to have payments made by joint check to protect their claims in the proceeds without hindering progress on the job. In *Georgia Glass & Metal,*

47. 203 Ga. App. at 642-43, 418 S.E.2d at 91-92.
48. *Id.* at 643, 418 S.E.2d at 91.
49. *Id.*
50. 200 Ga. App. 492, 408 S.E.2d 719 (1991).
51. *Id.* at 492, 408 S.E.2d at 719.
52. *Id.*, 408 S.E.2d at 719-20.
53. *Id.* at 492-93, 408 S.E.2d at 720.
54. *Id.* at 493, 408 S.E.2d at 720.

Inc. v. Arco Chemical Co.,[55] Georgia Glass & Metal, Inc. ("Georgia Glass") entered into a general construction contract with Investment Syndications, Inc. to furnish material and labor for construction of a condominium project. Defendant Arco Chemical Company ("Arco") provided materials to Georgia Glass for incorporation into this work. On October 9, 1984, Georgia Glass submitted its first purchase order to Arco, showing the terms of sale. As a result of Arco's concern with the financial stability of Georgia Glass, Georgia Glass agreed with the owner making payment on the project for the use of joint checks made payable to Georgia Glass and Arco.[56] The agreement provided the following:

> It is our understanding that [Arco] is furnishing the aluminum requirements to GEORGIA GLASS & METAL, INC. for the [Phoenix Condominium] job. At the request of [Arco] and GEORGIA GLASS & METAL, INC. this will confirm that payment in the amount of $225,000 will be jointly payable to [Arco] and GEORGIA GLASS & METAL, INC. in accordance with the terms of sale which are thirty days from date of invoice.[57]

Subsequently, the owner began experiencing financial difficulties and filed for bankruptcy. "Georgia Glass filed a lawsuit against the owner and a mechanic and materialman's lien against the condominium project; both however, were stayed by the filing of the bankruptcy petition."[58]

Arco sued Georgia Glass for payment of unpaid invoices on May 26, 1988. The trial court granted a partial summary judgment in favor of Arco holding that "the joint pay agreement did not relieve Georgia Glass of its obligation to pay Arco, even when the owner had not paid Georgia Glass."[59]

On appeal, Georgia Glass argued that it construed the joint pay agreement to mean that both Georgia Glass and Arco would receive payments directly from the owner and that neither would be entitled to any monies other than from the owner.[60] Georgia Glass further argued that Arco knew of the interpretation of the agreement that Georgia Glass had "but remained silent even though Arco interpreted the agreement differently."[61]

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55. 201 Ga. App. 15, 410 S.E.2d 142 (1991).

56. *Id.* at 15-16, 410 S.E.2d at 142-43.

57. *Id.* at 16, 410 S.E.2d at 143.

58. *Id.*

59. *Id.*

60. *Id.* In essence, Georgia Glass wished to construe the joint pay agreement as a "pay when paid" agreement that would obviate Georgia Glass' contractual obligations to Arco in the event that it did not receive payments from the owner.

61. *Id.* Georgia Glass relies upon O.C.G.A. § 13-2-4 (1982), which provides the following: "The intention of the parties may differ among themselves. In such case, the meaning

In rejecting Georgia Glass' argument, the court noted that a condition precedent may make the obligation to make payment to a subcontractor or supplier contingent upon payment by the owner or a higher-tiered contractor.[62] The court found Georgia Glass mistaken about the effect of the joint payment agreement.[63] Therefore, the trial court interpretation of the agreement is correct and the agreement did not discharge Georgia Glass from any obligation to make payment to Arco.[64]

Accord and Satisfaction. In *Dawson Construction Co. v. Georgia State Financing & Investment Commission*,[65] plaintiff Dawson Construction Company ("Dawson") entered into a construction contract with the Georgia State Financing and Investment Commission ("GSFIC") to renovate an old state office building. In response to a payment application in the amount of $1,065,057.16 on March 9, 1988, GSFIC issued a check to Dawson Construction in the amount of $863,599.06. Prior to the issuance of this check the president of the construction company and a representative of GSFIC met to review various claims filed by the construction company and subcontractors for damages incurred on the project. GSFIC also asserted claims against the contractor for defective and unfinished work. At this meeting the parties agreed to defer negotiation of their respective claims until a later date.[66]

The check issued on March 9, 1988, contained the following endorsement: "NEGOTIATION OF THIS CHECK CONSTITUTES PAYMENT IN FULL OF ITEMS LISTED ON THE VOUCHER."[67] An accompanying memorandum and voucher further provided: "FINAL PAYMENT EXCEPT FOR THE SUM OF $200,000.00 WITHHELD FOR INCOMPLETE WORK."[68] Article E-25(b) of the construction contract provided the following:

> Acceptance of the final payment shall operate as and shall be a release to the owner from all claims of any kind or character under the contract except for such specific amount or amounts as may have been withheld to cover the fair value of any incomplete work, which has been certified by the architect under the provision of Paragraph (d) of Article 5 of the

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placed on the contract by one party and known to be thus understood by the other party at the time shall be held as the true meaning." *Id.*

62. 201 Ga. App. at 17, 410 S.E.2d at 143. This is the quintessential "pay when paid" clause.

63. *Id.*

64. *Id.*, 410 S.E.2d at 143-44.

65. 203 Ga. App. 625, 417 S.E.2d 190 (1992).

66. *Id.* at 625-26, 417 S.E.2d at 190.

67. *Id.* at 626, 417 S.E.2d at 191.

68. *Id.*

> Form of Agreement as incomplete through no fault on the part of the contractor.[69]

On March 11, 1988, the president of the general contractor wrote GSFIC to confirm the agreement reached at the earlier meeting to defer review of the outstanding claims. The general contractor noted that, despite the conditional language on the voucher memorandum concerning withholding of $200,000, the check represented a final payment, but that the general contractor was not, by accepting the check, waiving its right to assert claims for damages.[70]

On March 15, 1988, GSFIC wrote to the general contractor indicating that the general contractor had agreed to give up one of its claims at the earlier meeting, which allowed GSFIC to compute the amount in the check. GSFIC also asserted that it denied certain subcontractor claims, but indicated that other certain claims were considered still pending and that GSFIC had pending unresolved claims against the general contractor itself. GSFIC asked for a mutual release or covenant not to sue in an attempt to settle all claims, after which GSFIC would issue a check for the remaining $200,000.[71]

After receiving this reply, the general contractor deposited the check. GSFIC claimed this constituted an accord and satisfaction of all claims, including any claim to retainage, except the specific claims of certain subcontractors specifically indicated as still pending. Despite this contention, on August 8, 1988, the general contractor wrote to GSFIC requesting one-half of the retainage. On August 18, 1988, GSFIC issued an additional check in the amount of $100,000, which contained the same conditional language as the earlier check concerning final payment. The voucher memorandum accompanying the check also contained the same language substituting $100,000 as the amount still being withheld.[72]

On October 5, 1988, the general contractor requested the remainder of the retainage and asked for a decision on its claims against GSFIC. On November 18, 1988, GSFIC indicated that the claims of the particular subcontractors still pending were denied, but indicated that GSFIC was going to make final payment as soon as all contract requirements were met. No further payments were made and the general contractor brought suit for delay damages and for the claims of its subcontractors against GSFIC. GSFIC answered the complaint and raised the defense of accord and satisfaction. GSFIC also brought a counterclaim against the general contractor for damages it suffered as a result of the incomplete and defec-

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69. *Id.*
70. *Id.*
71. *Id.* at 626-27, 417 S.E.2d at 191.
72. *Id.* at 627, 417 S.E.2d at 191.

tive work. Subsequent to the answer, GSFIC sent the general contractor a third check in the amount of $90,770.73 with the same conditional language contained in the previous checks, vouchers, and memoranda, except indicating that only $7,500 was withheld for incomplete work. The general contractor never negotiated the third check and returned it to GSFIC.[73]

GSFIC moved for summary judgment based upon its defense of accord and satisfaction, which was granted. Dawson appealed.[74]

The principal questions answered on appeal were the following: Did GSFIC and Dawson have a meeting of the minds regarding the claims that the accord and satisfaction encompassed, and did GSFIC waive any accord and satisfaction defenses by its acts or conduct.[75] The court found that Dawson in its pay request number twenty-nine did not seek final payment.[76] When Dawson received the March 9 check marked as final payment, it sought clarification from GSFIC as to the meaning of the conditional language and believed that it represented final payment under the contract only of the amount of $863,599.06. None of the checks contained any reference to waiver of any subcontractor claims, thus, creating fact questions as to the scope of accord and satisfaction.[77]

Generally, questions concerning an accord and satisfaction are for the jury.[78] The court concluded that the sequence of events surrounding the issuance of the checks, ambiguity in the language in relationship to those facts, and the issuance of three checks raised questions of fact for resolution by a jury concerning the meeting of the minds issue.[79]

The court further found that GSFIC's conduct subsequent to the tender of the March 9 check, including the tender of the additional checks and GSFIC's consideration of subcontractor claims supposedly embodied within the alleged accord and satisfaction, raised questions of fact concerning if GSFIC waived the accord and satisfaction.[80]

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73. *Id.* at 627-28, 417 S.E.2d at 191-92.

74. *Id.* at 628, 417 S.E.2d at 192.

75. *Id.* The court dismissed out of hand questions concerning whether the alleged accord and satisfaction was supported by consideration, whether there was a bona fide dispute as to the amount due Dawson, whether the conditional language used on the checks was sufficient to constitute an accord and satisfaction and whether there was sufficient evidence presented of satisfaction of the alleged accord. *Id. See* Wood Bros. Constr. Co. v. Simons-Eastern Co., 193 Ga. App. 874, 389 S.E.2d 382 (1989). *See also* O.C.G.A. §§ 13-4-102 to -103 (1982).

76. 203 Ga. App. at 630-31, 417 S.E.2d at 193-94.

77. *Id.* at 630, 417 S.E.2d at 194.

78. *Id.* at 631, 417 S.E.2d at 194.

79. *Id.* at 630-31, 417 S.E.2d at 194.

80. *Id.* at 631, 417 S.E.2d at 194.

C. *Breach and Remedies*

Measure of Damages for Defective Workmanship. In *Paul Davis Systems, Inc. v. Peth*,[81] plaintiff Peth sued Paul Davis Systems for defective repair work to a fire damaged house. Expert testimony presented by the plaintiff showed the extent of repairs necessary to correct defects in the workmanship of the defendant. The jury entered a verdict against the defendant in the amount of $40,000.[82]

Defendant contended that the evidence did not permit calculations of damages by the jury with reasonable certainty. The court, in rejecting that argument, reaffirmed the proposition that the jury is not permitted to guess as to the amount of damage, but must calculate the loss with reasonable certainty.[83] The plaintiff is not required to establish exact figures, but merely provide sufficient data to estimate the damages with reasonable certainty.[84] The measure of damages for defective workmanship is the cost of repair of the defect.[85]

IV. Tort Liability—Contractual Duties and Fraud

A. *Prima Facia Case*

In *Maddox v. Brown*,[86] plaintiffs John and Pamela Brown contracted with Frank Maddox to construct a house. The contract was a "cost plus" arrangement. After completion of the house, the plaintiffs sued Maddox for breach of contract and fraud, alleging overpayment. The jury awarded the plaintiffs' damages in the amount of $21,843.69, plus $30,000 in punitive damages and $6,560 in attorney fees. Maddox appealed.

At trial, Maddox moved for directed verdict on the claims of fraud, and on appeal raised the denial of this motion as a ground for reversal.[87] "Defendant [Maddox], however, represented that if he were hired as general contractor he would be able to pass along savings to the plaintiffs by obtaining a contractor's discount on materials," but evidence at trial showed that the contractor had not received a discount on certain items.[88] "Defendant also did not see that the correct amount of sales tax was charged

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81. 201 Ga. App. 734, 412 S.E.2d 279 (1991).
82. *Id.* at 734, 412 S.E.2d at 280.
83. *Id.* at 735-36, 412 S.E.2d at 281.
84. *Id.*
85. *Id.* at 736, 412 S.E.2d at 281.
86. 200 Ga. App. 492, 408 S.E.2d 719 (1991). For additional treatment of this decision, see *supra* text accompanying notes 50-54.
87. 200 Ga. App. at 492-93, 408 S.E.2d at 719-20.
88. *Id.* at 493-94, 408 S.E.2d at 720.

for materials billed to the plaintiffs."[89] Defendant further represented that the construction would be completed within ninety days of the closing of the construction loan, however, construction took almost twice as long to complete.[90]

At trial, defendant could not produce all the bills for material and labor that he charged to the plaintiffs. As a result, the court of appeals found that this evidence warranted submission of the question of fraud to the jury.[91] These allegations of fraud sufficiently supported a claim for punitive damages.[92]

This case illustrates the slight evidence necessary to present a fraud case to the jury arising out of a construction contract. One must wonder whether any delay in the completion of a construction project will warrant allegations of fraud premised upon the promised original date for completion. If that is so, let the contractor beware.[93]

B. *Election of Remedies*

In *American Demolition, Inc. v. Hapeville Hotel Ltd. Partnership*,[94] plaintiff American Demolition entered into a contract with Hapeville Hotel Limited Partnership to demolish the old Atlanta Airport Hilton Hotel, "to remove all asbestos and underground foundations, to backfill all holes and to recompact the soil."[95] The parties based their contract upon the American Institute of Architects' ("AIA") form contract, plus a nineteen page addendum of supplementary conditions.[96]

The contract contained two merger clauses. One of those clauses provided the following: "[t]he Contract documents form the Contract for Construction. This Contract represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral."[97]

American Demolition encountered unforeseen problems stemming from the building's foundation being more extensive than had been anticipated coupled with a wet subsurface soil condition caused by a drainage prob-

89. *Id.*
90. *Id.*
91. *Id.* at 494, 408 S.E.2d at 720-21.
92. *Id.*, 408 S.E.2d at 721.
93. For an example of a fraud case involving a false contractor's affidavit under the materialman's lien statute, see Steimer v. Northside Bldg. Supply Co., 202 Ga. App. 843, 415 S.E.2d 688 (1992). For another example of the slight circumstances sufficient to establish a case for fraud, see DCA Architects, Inc. v. American Bldg. Consultants, Inc., 203 Ga. App. 598, 417 S.E.2d 386 (1992).
94. 202 Ga. App. 107, 413 S.E.2d 749 (1991).
95. *Id.* at 107, 413 S.E.2d at 750.
96. *Id.*
97. *Id.* at 108, 413 S.E.2d at 750.

lem at the site. American Demolition did not complete the contract requirements and was not paid for some of the work. American Demolition then filed suit to recover payment of the contract balance and additional costs.[98]

Part of American Demolition's theory of recovery hinged upon a claim for fraud. The trial court granted summary judgment on this count against American Demolition, which appealed.[99] The thrust of American Demolition's argument concerning fraudulent concealment is that the defendant misrepresented and concealed site conditions, particularly the drainage problem, the extensive nature of the foundation, and the wet condition of subsurface soils. This argument is premised upon the nondisclosure of the two engineering reports, which revealed these problems, but were not disclosed to American Demolition. American Demolition contended in opposition to the motion for summary judgment that it was not aware of the reports or the unusual subsurface conditions.[100]

The court of appeals upheld the trial court's grant of summary judgment, because American Demolition failed to rescind the contract, and by failing to do so, the merger clause in the contract barred the fraud claim.[101] The court held the following:

> In an action for fraud, "[i]f the defrauded party has not rescinded but has elected to affirm the contract, he is relegated to a recovery in contract and the merger clause will prevent his recovery. This result obtains because where the allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he relied upon the other parties' misrepresentation and his action for fraud must fail."[102]

American Demolition, having made no effort to rescind the contract, was bound by its remedies and had elected to sue under the contract.[103]

The court of appeals further rejected American Demolition's argument that it was prevented from exercising an independent judgment in making the contract, because of the concealment, which concerned the very subject matter of the contract.[104] The court of appeals found the transaction to be at arm's length, thus, giving rise to no special or confidential relationship requiring a duty to disclose.[105]

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98. *Id.*, 413 S.E.2d at 751.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 108-09, 413 S.E.2d at 751 (citing Mitchell v. Head, 195 Ga. App. 427, 394 S.E.2d 114 (1990)).
103. *Id.*
104. *Id.* at 109, 413 S.E.2d at 752.
105. *Id.*

C. *Premises Liability*

In *King v. Midas Realty Corp.*,[106] the court of appeals clarified the potential tort liabilities of a general contractor.[107] Midas Realty hired D & M Contractors, Inc. ("D & M") to build a muffler shop on Midas' property. During construction, an eighteen foot brick wall collapsed on three employees, killing two and injuring the third. Midas Realty successfully sought summary judgment on the grounds that Midas had surrendered possession of the site, including site safety functions.[108]

Plaintiffs appealed contending that the terms of the contract between D & M and Midas, which required that all work be performed to Midas' satisfaction, were sufficient to hold Midas liable for the tort.[109] The court quickly dealt with the issue stating that the " 'evidence is clear that the premises were "surrendered" to [D & M], that [D & M's] status as an independent contractor was not "interfered" with by [appellee], that the duty of providing for the safety of workers was accordingly upon [D & M], and that no such duty was owed by [appellee].' "[110] The impact of this decision is to clarify the responsibilities of landowners when they employ contractors on their premises. In order to ensure proper liability protection, the property owner should completely surrender possession and control of the property to the contractor.

V. ARBITRATION

During the last two survey periods, the authors have detailed the continued conflict in the Georgia courts regarding the enforceability and applicability of arbitration clauses in construction contracts.[111] Unlike previous years, there has been little significant activity in the arbitration field.

Nonetheless, several decisions are of interest to the practitioner. In *National Parents' Resource Institute for Drug Education, Inc. v. Peachtree Hotel Co.*,[112] the court of appeals held that a party may "participat[e] fully in the defense of the action without ever requesting or demanding arbitration, moving for dismissal, moving for a stay, or moving to compel

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106. King v. Midas Realty Corp., 92 F.C.D.R. 1024.

107. *Id.* at 1024.

108. *Id.*

109. *Id.*

110. *Id.* at 1024-25 (quoting Bryant v. Village Centers, 167 Ga. App. 220, 222, 305 S.E.2d 907 (1983)).

111. *See* Morrissey & Wallace, *supra* note 1, at 156-61.

112. 201 Ga. App. 637, 411 S.E.2d 884 (1991). *See also* Tillman Group, Inc. v. Keith, 201 Ga. App. 680, 411 S.E.2d 794 (1991) (failure to bring motion for arbitration in magistrates court waived right).

arbitration, or taking any action to present the arbitration issue to the trial court for a ruling."[113] Accordingly, the trial court concluded that the party "not only waived its contractual right to seek arbitration, but also waived this issue in the trial court."[114] The court's message is clear—any objections to legal process on the basis of an arbitration clause should be raised early and often.[115]

Also, two decisions in neighbor states are worthy of note. First, the Alabama Supreme Court has held that arbitration cannot be compelled when the dispute was not submitted to the architect involved first.[116] In *Ex Parte Williams*,[117] the owner of an office building discovered substantial defects in a newly completed office building. When the contractor failed to correct the problem, the owner filed suit. The contractor moved to compel arbitration.[118] On appeal, the Alabama Supreme Court noted that the contract required that all disputes be first submitted to the architect prior to arbitration.[119] The contractor's failure to submit the dispute to the architect invalidated the arbitration clause.[120]

In Florida, the court of appeals held that when a bond agreement incorporates a construction contract, the surety could rely on the arbitration clause.[121] This decision indicates that courts are becoming increasingly willing to allow arbitration agreements to control. The persuasiveness of these decisions for the Georgia courts is impossible to determine.

VI. Mechanic's and Materialman's Liens

A. *Lien Waivers and Liberalization*

Of all the developments in the field of construction law during the survey period, few are as significant as the changes made by the General Assembly with regard to the enforceability of mechanic's and materialman's liens. Notwithstanding the dramatic changes made by the Georgia courts, the most significant change to occur in the mechanic's and materi-

113. 201 Ga. App. at 638, 411 S.E.2d at 886.

114. *Id.* (citing City of Buford v. Thomas, 179 Ga. App. 769, 772, 347 S.E.2d 713 (1986)).

115. Also of interest is a decision in the Northern District of Georgia holding that an arbitrator's refusal to postpone arbitration pending resolution of administrative proceedings was not unreasonable. *See* Ceco Concrete Constr., Div. of Robertson-Ceco Corp. v. J.T. Schrimsher Constr. Co., 792 F. Supp. 109 (N.D. Ga. 1992).

116. *Ex Parte* Williams, 591 So. 2d 71 (Ala. 1991).

117. 591 So. 2d 71 (Ala. 1991).

118. *Id.* at 71.

119. *Id.* at 72.

120. *Id.* at 73.

121. Henderson Inv. Corp. v. International Fidelity Ins. Co., 575 So. 2d 770 (Fla. Dist. Ct. App. 1991).

alman's liens statutory framework has been the institution as of January 1, 1992 of Official Code of Georgia Annotated ("O.C.G.A.") section 44-14-366.[122] O.C.G.A. section 44-14-366 makes several significant changes in the ability or right of individuals to waive claims of lien. O.C.G.A. section 44-14-366(a) states the following:

> [a] right to claim a lien or to claim upon a bond may not be waived in advance of furnishing of labor, services or materials. Any purported waiver or release of lien or bond claim or of this code section executed or made in advance of furnishing of labor, services, or materials is null, void, and unenforceable.[123]

This section will dramatically affect construction planning, because no longer may a contractor or property owner rely upon a blanket lien waiver in the original contract. Instead, each contractor or subcontractor must be dealt with on an individual basis in order to avoid having a lien placed on the property subsequent to the completion of the contract. This modification will greatly increase the protection afforded potential lien claimants and minimize the ability of construction contractors and property owners to protect themselves by a blanket assertion of a waiver in the initial con-

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122. O.C.G.A. § 44-14-366 (Supp. 1992). Several other aspects of the materialman's lien statutory framework have been modified. The two most significant changes involved the ability to recover rental values and the notice requirements of O.C.G.A. § 44-14-361.1 (Supp. 1992). First, O.C.G.A. § 44-14-360 (Supp. 1992) has been changed to allow the lien claimant the reasonable rental value or the actual rental cost, whichever is greater. *Id.* Before, the lien claimant was entitled only to pursue the claim for the reasonable rental value of the equipment. This change prevents a lien claimant from absorbing a loss merely because he had to pursue a lien claim rather than being paid outright by the contractor. O.C.G.A. § 44-14-361.1 has been modified in two ways. First, a party is now required at the time of filing for record of this claim of a lien a certified copy must be sent to the owner of the property or the contractor involved. O.C.G.A. § 44-14-361.1(a)(2) (1992). Also, O.C.G.A. § 44-14-361.1(a)(3) has been modified to state that after the commencement of an action, lien notice must be filed with the Clerk of the Superior Court within 14 days. *Id.* Previously, the statutory language had required the lien notice to be filed at the time of the filing of such action. Accordingly, lien claimants now are allowed a 14 day window within which to get the papers filed. Accordingly, the contractor or lien claimant is now left with a more black and white determination of when notice of a lien may be filed. No longer is it left to the vagaries of the court using a reasonable standard. *See* American Hosp. Supply Corp. v. Starline Mfg. Corp., 171 Ga. App. 790, 320 S.E.2d 857 (1984).

123. O.C.G.A. § 44-14-366(a) (1992). The changes made by the code section are significant. Now the law prevents a lien claimant from being unfairly deprived of the materials and labor furnished, because he was forced at the time he accepted the bid for the contracting job to waive all potential claims against either the general contractor or the property owner. This has been standard practice in the industry for some years to require a waiver of lien notice in the contract in order to avoid attachments to the contractor or the owner's property. DAVID F. HINKEL, GEORGIA CONSTRUCTION MECHANICS' & MATERIALMEN'S LIENS § 14-3(c) (1981 & Supp. 1991).

tract or subcontract.[124] Notably, this modification is in keeping with the sympathies of many jurors when confronted with a question of a possible lien waiver.[125]

Further, O.C.G.A. section 44-14-366 codifies the common law by invalidating all oral waivers of a mechanic's lien.[126] Also, the section puts in place new requirements that must be met before an estoppel is valid.[127] For a waiver or estoppel to be effective, the following conditions must be met under the new section: (1) a written waiver and release similar to the one provided for in the new section must be executed; and (2) the claimant must be paid for the claim.[128] The section goes on to state that a lien claim is paid in full upon:

> the earliest of: (A) Actual receipt of funds; (B) Execution by the claimant of a separate written acknowledgment of payment in full; or (C) Thirty [30] days after the date of execution of the waiver and release, unless prior expiration of said [thirty] 30 day period the claimant files a claim of lien or files in the county in which the property is located an Affidavit of Non payment . . . .[129]

Additionally, the section states that "[n]othing in this Code section shall shorten the time within which to file a claim of lien."[130]

The effect of this provision is to require that a lien claimant is paid in full for the services and materials rendered. Again, similar to previous modifications of the statutory scheme, this change will improve the ability of lien claimants to obtain payment for their materials and services. Construction contractors and property owners now must be extremely careful in releasing liens to insure that liens cannot be filed against their property.

Generally, because materialman's liens statutes are in derogation of the common law and often require innocent parties to pay the debt secured by the lien, Georgia courts have strictly construed the provisions of the Georgia Code against lien claimants.[131] As noted in last year's survey,

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124. The pursuit of these blanket waivers has been an industry practice utilized with significant results against unsophisticated contractors or subcontractors. The effect of this code provision will be to level the playing field. For a discussion of lien waivers in construction planning, see Hinkel, *supra* note 123, § 14-3(c).

125. *See, e.g.*, Schwan's Sales Enter., Inc. v. Martin Mechanical Contractors, Inc., 202 Ga. App. 510, 414 S.E.2d 727 (1992).

126. O.C.G.A. § 44-14-366 (Supp. 1992).

127. *Id.* § 44-14-366(b).

128. *Id. See* O.C.G.A. §§ 44-14-366(c) to -366(d) for copies of the necessary forms for the filing of these waivers. *Id.* §§ 44-14-366(c) to -366(d).

129. *Id.* § 44-14-366(f)(2).

130. *Id.* § 44-14-366(f)(4).

131. *See, e.g.*, Star Mfg. Co. v. Edenfield, 191 Ga. App. 665, 382 S.E.2d 706 (1989); Brockett Rd. Apartments v. Georgia Pac. Corp., 138 Ga. App. 198, 225 S.E.2d 771 (1976).

Georgia courts tend to place the materialman's lien under a magnifying glass to examine whether or not the filing of the lien complied with the statutory requirements found in O.C.G.A. section 44-14-361.1(a).[132] This trend to microscopically examine each lien claim may be changing as the court of appeals becomes more comfortable with the purpose and principles behind mechanic's and materialman's liens. While the courts will still not tolerate untimely filings of liens, they have softened in their approach in dealing with technical irregularities in the lien. Whereas in the past Georgia courts have almost exclusively looked at the form and not the function of the lien, the courts now have begun a trend of looking at the purpose and function of a lien.

For example, in *Summit-Top Development, Inc. v. Williamson Construction, Inc.*,[133] the court of appeals upheld a partial verdict in favor of a materialman who had originally filed an inaccurate initial lien.[134] Summit-Top Development, Inc. ("Summit-Top"), the developers of a housing subdivision, hired Williamson Construction, Inc. ("Williamson") for grading, clearing, and installing a sewer system beginning in March 1988. Summit-Top paid monthly bills for this work until it refused to pay an invoice for the blasting and removal of a large mass of rock. A second invoice on September 24, 1988 likewise remained unpaid. The parties attempted and failed at an informal resolution.[135]

Following a heated exchange, a Summit-Top principal ordered that Williamson remove its equipment from the worksite. The principal further demonstrated to Williamson that Summit-Top could not pay Williamson for the supplies and services. Williamson pulled out without completing the contract.[136]

After ceasing work, Williamson filed a claim of lien against the corporate property for $394,460.70, the total of the unpaid bills. Subsequently, Williamson instituted suit on the lien. During litigation, it became apparent that the lien amount included charges for work which Williamson had not performed. Accordingly, Williamson filed a release of lien removing $47,421.62 from the lien. The case proceeded to a jury trial and a verdict was returned for the lien amount, attorney fees, and prejudgment interest.[137]

See also Bryan J. Morrissey & Kyle Woods, *Construction Law*, 42 MERCER L. REV. 25, 39 (1990).

132. Morrissey & Wallace, *supra* note 1, at 162; O.C.G.A. § 44-14-361.1 (Supp. 1992).

133. 203 Ga. App. 460, 416 S.E.2d 889 (1992).

134. *Id.* at 461-62, 416 S.E.2d at 890-91.

135. *Id.* at 460-61, 416 S.E.2d at 890.

136. *Id.* at 462-63, 416 S.E.2d at 891.

137. *Id.* at 461, 416 S.E.2d at 890.

Summit-Top appealed the verdict claiming that the trial court had erred in denying its motion for a directed verdict.[138] Summit-Top enumerated two errors in the trial court's refusal of a directed verdict. First, the claim of lien by virtue of its incorrect filing was void and unenforceable.[139] Second, since Williamson abandoned its contract, it could not "demonstrate substantial compliance with the contract in order to enforce its lien pursuant to O.C.G.A. Section 44-14-361.1(a)(1)."[140]

The first enumeration of error attempted to rely on the principle that statutes in derogation of the common law should be strictly construed.[141] With regard to materialman's liens, this principle has been codified at O.C.G.A. section 44-14-361.1(a), which states that: "[t]o make good the liens specified . . ., they must be created and declared in accordance with the following provisions, and on failure of any of them, the liens shall not be effective or enforceable . . . ."[142] Summit-Top attempted to stretch the boundaries of this doctrine by arguing that Williamson's filing of an inaccurate lien amount invalidated the entire claim of the lien.[143] Specifically, Summit-Top claimed that Williamson:

> deliberately included erroneous charges in the lien and could not establish at trial how the amount discharged from the lien was determined; therefore . . . [Williamson] can not rely on an exception to the lien statutes which allows easily separable nonlienable items to be omitted from a lien and still preserve the lien.[144]

The court of appeals summarily dismissed this argument because Williamson had prepared the invoices supporting the lien according to Summit-Top's instructions.[145] Thus, the trial court properly denied Summit-Top's motion for a directed verdict.[146]

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138. *Id.* Summit-Top also attempted unsuccessfully to appeal the verdict of personal liability against the shareholders of Summit-Top. The court upheld the verdict against the individuals concluding that the principals "are involved in a pattern of practice wherein the corporate entity is a mere instrumentality to evade contractual responsibility in that [Williamson] is now a victim of that course of conduct." *Id.* at 464, 416 S.E.2d at 892. Therefore, the verdict against the individual was upheld. *Id.*

139. *Id.* at 461-62, 416 S.E.2d at 890.

140. *Id.* at 462, 416 S.E.2d at 891.

141. *See supra* text accompanying notes 131-32.

142. O.C.G.A. § 44-14-361.1(a) (Supp. 1992). Normally, this principle is used to invalidate liens which are not filed in strict conformance with the statutory scheme. *See, e.g.*, Atlanta Jewish Community Ctr., Inc. v. Tom Barrow Co., 130 Ga. App. 608, 203 S.E.2d 921 (1974).

143. 203 Ga. App. at 461-62, 416 S.E.2d at 890.

144. *Id.* at 461, 416 S.E.2d at 890 (citing Sears Roebuck & Co. v. Superior Rigging Co., 120 Ga. App. 412(4), 170 S.E.2d 721 (1969)).

145. *Id.* at 462, 416 S.E.2d at 891.

146. *Id.*

Summit-Top's second enumeration of error was also shot down by the court of appeals.[147] Summit-Top contended that by abandoning the work, Williamson had failed to substantially comply with the contract.[148] Substantial compliance with the contract is usually a prerequisite to creating a valid materialman's lien.[149] This requirement is waived if the contractor prevents completion of the contract.[150] In the instant case, Summit-Top relied upon the court of appeals holding in *MacLeod v. Belvedale, Inc.*,[151] which stated the following: "abandonment of the work before compliance with the contract, upon a mere apprehension that he will not be paid at the time for payment, is unauthorized and defeats the contractor's claim of lien."[152] The court summarily dismissed this contention citing two incidents, in which Summit-Top had told Williamson to leave the property and informed Williamson that it would not be paid.[153] The court stated that "[t]he foregoing evidence supports a finding that [Williamson] was prevented from completing the job by appellants' actions; therefore, [Williamson's] cessation of work was not an abandonment of the contract."[154] As is apparent in the decision in *Summit-Top*, the court of appeals has not strictly construed the lien requirements, but has reasonably construed the lien requirements. This tinkering with the statutory scheme has the net effect of furthering the remedial purpose of the materialman's lien statutes and providing for a greater degree of protection to the lien claimant.

This liberalizing trend was again featured in *Abacus, Inc. v. Hebron Baptist Church, Inc.*[155] The court of appeals in *Abacus* liberally interpreted the reasonable notice provisions contained in O.C.G.A. section 44-14-361.1, by validating a materialman's lien that was filed after the twelve month period for commencing an action.[156] Abacus brought an action to foreclose a materialman's lien against the church's property. Abacus delivered the materials to the contractor to improve the church's property and the bill became due on August 22, 1988. Abacus filed its claim of lien on November 10, 1988. On August 15, 1989, within the twelve month period, Abacus brought suit against the contractor to perfect the lien. Fol-

147. *Id.* at 462-63, 416 S.E.2d at 891.

148. *Id.* at 462, 416 S.E.2d at 891.

149. *See, e.g.*, Jones v. Ely, 95 Ga. App. 4, 96 S.E.2d 536 (1957). The principle has been codified at O.C.G.A. § 44-14-361.1(a)(1) (Supp. 1992).

150. *See, e.g.*, Marathon Oil Co. v. Hollis, 167 Ga. App. 48, 305 S.E.2d 864 (1983).

151. 115 Ga. App. 444, 154 S.E.2d 756 (1967).

152. *Id.* at 445, 154 S.E.2d at 759.

153. 203 Ga. App. at 462-63, 416 S.E.2d at 891-92.

154. *Id.* at 463, 416 S.E.2d at 891.

155. 201 Ga. App. 376, 411 S.E.2d 113 (1991).

156. *Id.* at 377, 411 S.E.2d at 114-15.

lowing that, on August 30, 1989, Abacus filed a notice of suit in Gwinnett County, where the property was located.[157]

The trial court granted judgment on the pleadings because the notice of the suit was not timely filed under O.C.G.A. section 44-14-361.1.[158] The trial court reasoned that "the present notice was untimely filed under the statute because it was filed eight days after the [twelve] month period for filing suit had expired . . . ."[159] In considering the problem, the court of appeals looked at the 1989 statute, but took cognizance and legislative intent from the 1991 amendment discussed above.[160]

Note that this liberalizing trend does not extend so far as to change the basis of the statutory scheme with regard to filing. The filing of an imperfect notice or late notice of a lien is still a defense to any potential lien claims. For example, in *Consolidated Systems, Inc. v. AMISUB Inc.*,[161] the supreme court on reconsideration again reiterated the holding that "the filing of an imperfect notice does render the lien unenforceable . . . ."[162]

B. Parties Subject to Lien

In two interesting and significant decisions under the Georgia materialman's lien statutes during the survey period, the court of appeals drafted opinions that attempted to explain which parties are subject to a lien claim. The net effect of these decisions is to broaden the applicability of the materialman's lien statutes. This further increases the likelihood that a material supplier will have a legal remedy against the property owner or lessor if he is not paid for the materials supplied. The court of appeals in *Benning Construction Co. v. Dykes Paving & Construction Co.*,[163] affirmed a judgment in favor of the lien claimant against the construction company and its surety.[164] General contractor Benning entered into an agreement with an owner for construction of an office and warehouse facility. Benning in turn subcontracted with Scarboro Paving to furnish materials and labor, to install paving, and to complete the gutter and curb work. The subcontract prohibited assignment or transfer of the work

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157. *Id.* at 376, 411 S.E.2d at 114.

158. *Id.*

159. *Id.* (*Compare with* American Hosp. Supply Corp. v. Starline Mfg. Corp., 171 Ga. App. 790, 320 S.E.2d 857 (1984)).

160. *Id.* at 377, 411 S.E.2d at 115. *See supra* text accompanying notes 127-32.

161. 261 Ga. 590, 408 S.E.2d 109 (1991).

162. *Id.* at 591, 408 S.E.2d at 110. *See also* Duncan Wholesale v. Palmer, 92 F.C.D.R. 545. Another "liberal" trend case is Bowers v. Howell, 203 Ga. App. 636, 417 S.E.2d 392 (1992).

163. 204 Ga. App. 73, 418 S.E.2d 620 (1992).

164. *Id.* at 74-75, 418 S.E.2d at 621-22.

without consent of the primary contractor. Nonetheless, Scarboro contracted with Lanier Paving Company to install the asphalt without the contractor's knowledge. Lanier in turn ordered the asphalt material for the project from Dykes Paving, defendant, and entered into a joint payment agreement involving plaintiff, Scarboro, and Lanier. Plaintiff in the action timely delivered the asphalt, which was installed by Lanier. Both Scarboro and Benning were on site and knew that Lanier had supplied the labor and equipment on the project. The property owner rejected the installation of the parking lot and demanded that it be corrected. When Scarboro refused to correct the installation, Benning, the primary contractor, paid another subcontractor to resurface the area. Plaintiff supplied the asphalt material to the second contractor.[165]

Plaintiff never received payment for the material delivered to Lanier and attempted to obtain payment for the asphalt from Benning. Benning initially refused stating that the asphalt had not been supplied by plaintiff and that it did not comport with the contract requirements. In response, plaintiff provided the primary contractor with proof that the asphalt had been delivered and engineering test results, which showed that the asphalt complied with the grade requirements specified in the contract. Nonetheless, the primary contractor continued to refuse payment. Plaintiff timely notified the owner and filed the materialman's lien for $10,747.72, the cost of the asphalt. Shortly, thereafter, Lanier declared bankruptcy.[166]

Following the breakdown of negotiations between the parties, a suit was filed and tried. During the trial, the primary contractor made a motion for a directed verdict because "plaintiff was merely a supplier of materials to a supplier and was not entitled to a claim of lien as a matter of law because it neither supplied to a contractually authorized subcontractor nor had a contractual relationship with the owner."[167] The defendant timely appealed the refusal to grant a directed verdict.[168] In considering the problem, the court of appeals examined the statutory definition of subcontractor as defined by O.C.G.A. section 44-14-361(a)(2), which "provides that all materialmen furnishing material to subcontractor shall have a special lien on the real estate for which they furnish labor, services or material."[169] The court went on to note that "[b]y statutory definition, the 'subcontractor' means, but is not limited

165. *Id.* at 74, 418 S.E.2d at 620-21.

166. *Id.*, 418 S.E.2d at 621.

167. *Id.*

168. *Id.*

169. O.C.G.A. § 44-14-361(a)(2) (Supp. 1992). *See* 204 Ga. App. at 74-75, 418 S.E.2d at 621.

to, subcontractors having privity of contract with the contractor."[170] The court stated the following:

> Although Lanier was a second tier subcontractor having no privity of contract with Benning, it nevertheless was a "subcontractor" within the definition of the lien statute. As the supplier of material "used in making improvements to the real estate" for the benefit of the owner or a subcontractor, plaintiff was authorized by law to attach a lien on the property to the extent of the "reasonable value" of that material.[171]

The court went on to note that "[e]ven if Scarboro breached its contract with Benning by subcontracting with Lanier without Benning's consent, this would not destroy the privity of contract or prevent or defeat the statutory lien."[172] The court of appeals acknowledged the interest of the subcontractor who had supplied the materials, and interpreted the statute in such a way to insure that the supplier of materials is paid for any money they are out. This is in keeping with the general trend to liberalize the mechanic's and materialman's lien statutory framework in favor of the supplier of materials.[173]

This liberalizing trend that runs throughout the survey period does not extend to all cases involving privity. In a fascinating opinion, the court of appeals affirmed a summary judgment dismissal of a claim, because the lien claimant did not have sufficient privity of contract with the sublessee of the property.[174] In *D & N Electric, Inc. v. Underground Festival, Inc.*,[175] the court upheld a summary judgment dismissal against a lien claimant, because the lien claimant did not have privity of contract with the person who ordered the construction work done.[176] Defendant, Underground Festival, owned a fifty year lease on property from which it sublet a portion to the B. Gallery Group, Inc. ("BGGI"). This sublease provided that prior to the commencement of the lease term, BGGI would have certain improvements made on the property and that in consideration for these improvements, BGGI would receive an allowance from defendant toward the costs of the improvement work. Payment of this allowance was to be made within sixty calendar days after the execution of lien waivers from those individuals that made improvements on BGGI's lease-

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170. 204 Ga. App. at 74-75, 418 S.E.2d at 621. *See* O.C.G.A. § 44-14-360(9).

171. 204 Ga. App. at 74-75, 418 S.E.2d at 621. In reaching this decision, the court relied heavily on the opinion in Tonn & Blank v. D.M. Asphalt, 187 Ga. App. 272, 370 S.E.2d 30 (1988).

172. 204 Ga. App. at 75, 418 S.E.2d at 621.

173. *See supra* text accompanying notes 122-62.

174. D & N Elec., Inc. v. Underground Festival, Inc., 202 Ga. App. 435, 414 S.E.2d 891 (1991).

175. 202 Ga. App. 435, 414 S.E.2d 891 (1991).

176. *Id.* at 438-39, 414 S.E.2d at 893-94.

hold. D & N Electric performed certain work in connection with these improvements on the property and was not paid. Subsequently, it filed its claim of lien and instituted foreclosure action.[177]

Following discovery, the trial court granted summary judgment in favor of Underground Festival and the lien claimant appealed.[178] In ruling, the court of appeals dealt with several issues.[179] The first was the nature of the interest held by Underground Festival in the property. The court quickly noted that "[n]either the existence nor the status of owner of the reversionary interest in the property is relevant to the resolution of the instant appeal."[180] The court concluded that since Underground Festival held a fifty year lease in the property and it was sublessor to BGGI, Underground Festival was a "true owner" against whose interest a materialman's lien could attach.[181] The court noted that a " 'lien [authorized by O.C.G.A. section 44-14-361] may attach to the interest of a lessee [-sublessor] who has an estate for years in the demised premises, subject to the conditions of the lease.' "[182]

Next, the court determined that the relationship between the sublessor and the sublessee was sufficient to allow a materialman's lien to be filed against Underground Festival.[183] The court quickly dispensed with the privity problem stating the following:

> [s]ince the evidence of record would authorize a finding that [Underground Festival] had consented to such of BGGI's contracts as related to the contemplated improvements of the property, the lack of any immediate contract between [Underground Festival] and those with whom BGGI had contracted in connection with those improvements would not be a viable basis for the grant of summary judgment in favor of [Underground Festival].[184]

After resolving each of these issues in favor of the lien claimant, the court of appeals, the judicial equivalent of a *deus ex machina*, reversed itself and held in favor of Underground Festival.[185] The rationale for this holding stems from a failure of privity of contract between the lien claim-

177. *Id.* at 435-36, 414 S.E.2d at 891-92.

178. *Id.* at 436, 414 S.E.2d at 892.

179. *Id.* at 436-39, 414 S.E.2d at 892-94.

180. *Id.* at 436, 414 S.E.2d at 892.

181. *Id.* (citing Bennett Ironworks v. Underground Atlanta, 130 Ga. App. 653(1), 204 S.E.2d 331 (1974)).

182. *Id.* (quoting James G. Wilson Mfg. Co. v. Chamberlain-Johnson-Dubose Co., 140 Ga. 593, 79 S.E. 465 (1913)).

183. *Id.* at 436-37, 414 S.E.2d at 892-93.

184. *Id.* at 437, 414 S.E.2d at 893.

185. *Id.* at 438-39, 414 S.E.2d at 893-94.

ant and BGGI.[186] The court found that "unless there was contractual privity between [D & N Electric] and BGGI, [D & N Electric] can have no enforceable lien against appellee's interest in the property."[187] The court stated the following:

> "There need be no contract between the materialman and the true owner, but there must be a contract for material with a person who has contracted with the true owner for the erection of the improvements. A contract is necessary to fix the liability of the owner and establish a privity between him and the materialman. A stranger may not order work done upon real estate and thus charge the true owner . . . ."[188]

This privity problem represented the fatal flaw in the lien claimant's action. As the court noted, D & N Electric did not "base its claim upon a contract with BGGI. Instead, [D & N Electric] asserts that its contract was with an individual named Phillip Brock 'd/b/a B. Gallery.' "[189] Further, D & N Electric presented no evidence about any connection between Brock and BGGI. The court of appeals, however, was willing to assume that Mr. Brock was a corporate officer and had the authority to bind B. Gallery.[190] The court noted that even if the assumption was made, the lien claimant failed to comply with O.C.G.A. section 44-14-361.1(a)(3) because it failed to file suit against him individually.[191] The court therefore concluded:

> [i]f Brock, in his corporate capacity, was otherwise authorized to contract on behalf of BGGI for the improvements on the property so as to charge [Underground Festival] the costs thereof [D & N Electric's] failure to bring suit against BGGI in compliance with O.C.G.A. [section] 44-14-361.1(a)(3) nevertheless mandates the grant of summary judgment in favor of appellee.[192]

Accordingly, the liberal trend that has been discussed in this section of the survey did not extend to a situation in which a corporate veil needed to be pierced to reach a result in favor of the lien claimant. When a party files its initial claim for a lien, it must be certain as to exactly against whom the lien needs to be filed. The corporate identity needs to be correctly determined in order to avoid compromising the lien claim.

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186. *Id.* at 438, 414 S.E.2d at 894.

187. *Id.*

188. *Id.* at 438-39, 414 S.E.2d at 894 (quoting Marshall v. Peacock, 205 Ga. 891, 893, 55 S.E.2d 354, 357 (1949)).

189. *Id.* at 439, 414 S.E.2d at 894.

190. *Id.*

191. *Id.* Accordingly, the time to file the lien against the individual had elapsed.

192. *Id.*

C. Claims and Attorney Fees

In several unusual cases, the court of appeals changed or clarified aspects of the materialman's lien statutory framework. In two cases, the court of appeals clarified what represented a jury question in a lien foreclosure action. The court in *Schwann's Sales Enterprises, Inc. v. Martin Mechanical Contractors, Inc.*,[193] held that a jury question existed as to when a furnishing of labor or materials occurred in order to determine whether the lien was timely filed.[194] In *Schwann* the lien claim would only be timely filed if the jury found that a single call by the defendant to the subcontractor for help on installing a gas pump constituted a furnishing of goods and services under the contract, and therefore allowed the claim of lien to be timely filed. The claimant sent an electrician to the property where he found an employee of the gas company working on the gas pump. He assisted in getting the gas pump operational again.[195] The court noted that the "evidence is not conclusive regarding whether the electrician's response to defendant's request for help to make the gas pump operational should be considered work necessary for completion of subcontractor's contract with Mid-Mo [a general contractor]."[196] The court believed this created a jury issue.[197] The court went on to note that there was sufficient evidence to support the jury's verdict in favor of there being a valid and enforceable lien and upheld their verdict.[198]

The court of appeals also found a jury question as to the amount of the lien in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Allied Ready Mix, Inc.*[199] The court in *Allied Ready Mix* reversed a summary judgment in favor of the lien claimant, because there was a question of fact as to whether the owner was entitled to credit for amounts he had allegedly paid to the primary contractor.[200] In a brief opinion, the court of appeals noted that the affidavit filed by the contractor stating that he had paid directly to the suppliers and materialman an amount equal to that paid by the owner to the contractor represented a question of fact as to the exact value of the ma-

193. 202 Ga. App. 510, 414 S.E.2d 727 (1992).

194. *Id.* at 511, 414 S.E.2d at 728.

195. *Id.* at 510, 414 S.E.2d at 727.

196. *Id.*, 414 S.E.2d at 727-28.

197. *Id.* at 511, 414 S.E.2d at 728.

198. *Id.* This case contrasts with the case of Womack Indus. v. B & A Equip. Co., 199 Ga. App. 660, 405 S.E.2d 880 (1991). For discussion of Womack Indus. v. B & A Equip., see Morrisey & Wallace, *supra* note 1, at 163-64.

199. 201 Ga. App. 873, 412 S.E.2d 622 (1991).

200. *Id.* at 874-75, 412 S.E.2d at 623-24.

terialman's lien making summary judgment improper.[201] The court of appeals noted the following:

> [e]ven if this evidence may not have been sufficient to authorize the grant of summary judgment *in favor of the Owner*, construing it most favorably for the Owner as the non-moving party, it was certainly sufficient to demonstrate the existence of a genuine issue of material fact so as to preclude the grant of summary judgment *in favor of the Materialman*.[202]

In a fascinating case, the court of appeals clarified the role a materialman's lien would play between property owners and contractors.[203] Fuji Vegetable Oil, Inc. ("Fuji") engaged Chiyoda International ("Chiyoda") as a general contractor for construction of a vegetable oil refining plant on property owned by Georgia Ports Authority. Chiyoda hired Grady Sturgess Builder, Inc. ("Sturgess") as a subcontractor on the project. Sturgess defaulted on its contract and even though it had been paid by Chiyoda, it did not pay the materialmen and other lien claimants with claims in excess of $540,000. In the contract between Fuji and Chiyoda, Chiyoda agreed to pay and satisfy all claims for labor and materials for any worked performed under the contract.[204]

Fuji called upon Chiyoda to discharge the liens, but Chiyoda refused, claiming that Fuji had a "non-lienable possessory interest." Accordingly, a dispute existed as to whether Georgia Ports Authority's property was a lienable estate, and that Chiyoda was not under any contractual obligation to satisfy the liens. Chiyoda filed a declaratory judgment action. Following discovery, Chiyoda successfully moved for summary judgment on the theory that the claims were invalid. Hoffman Electric and twenty-one other material suppliers appealed the court's judgment to the court of appeals.[205]

In a surprising opinion, the court of appeals declined to address the issue of whether Georgia Ports Authority's property was a lienable estate, because the nature of the obligation between Chiyoda and Fuji was contractual.[206] The dispute was not necessarily a question to be decided by the materialman's lien statutory framework.[207] The court noted that Chiyoda's assertion that "Fuji's estate is not lienable would not, even if true, relieve the appellee of its liability under the terms of its agreement

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201. *Id.*
202. *Id.* at 875, 412 S.E.2d at 623-24.
203. Hoffman Elec. Co. v. Chiyoda Int'l Corp., 203 Ga. App. 731, 417 S.E.2d 371 (1992).
204. *Id.* at 731-32, 417 S.E.2d at 371-72.
205. *Id.* at 732, 417 S.E.2d at 372.
206. *Id.* at 732-33, 417 S.E.2d at 372.
207. *Id.*

with Fuji both to remove liens and discharge the underlying claims on which they are predicated."[208]

Accordingly, the court of appeals found that the Chiyoda question regarding the use of the usufruct in the nonlienable interest held by Fuji was not addressed with regard to the materialman's liens statute.[209] Proper drafting of the contract by the representatives of Fuji successfully prevented the assertion of a defense by Chiyoda and led to greater certainty in the contracting process.

Finally, two remedial aspects of the materialman's lien statutory framework were clarified by the court of appeals during the survey. The court in *Turner Construction Co. v. Electrical Distributors, Inc.*,[210] held that a supplier of materials was entitled to prejudgment interest at the statutory rate.[211] Electrical Distributors, Inc. ("EDI"), a supplier to a subcontractor on a large commercial construction project, successfully brought suit on a lien bond against Turner Construction Company ("Turner").[212] On remittitur, the trial court entered a judgment for EDI in the principal amount of $117,538.58 and interest calculated at eighteen percent per annum from the date the obligation became due. Turner and the surety appealed the award of prejudgment interest.[213] The only issue on appeal was Turner's contention that since the lien statutes do not expressly provide for an order of prejudgment interest, the trial court's ruling was invalid.[214] The court of appeals relied on the supreme court's decision in *Horkan v. Great American Indemnity Co.*,[215] which awarded the prejudgment interest at the liquidated damage rate of seven percent.[216] The court felt bound by the Horkan decision and thus awarded a grant of prejudgment interest in favor of the lien claimant.[217]

Turner also contended that the statutory limit for interest would be the seven percent in the statute, not the eighteen percent that was in the bill of sale issued by EDI. The court held that the statutory authorization to charge interest on commercial accounts does not apply in the instant case, because the materials supplied by EDI went to a subcontractor, not to Turner itself.[218] Accordingly, the court of appeals summarily threw out

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208. *Id.* at 732, 417 S.E.2d at 372.
209. *Id.* at 732-33, 417 S.E.2d at 372.
210. 202 Ga. App. 726, 415 S.E.2d 325 (1992).
211. *Id.* at 726-27, 415 S.E.2d at 326.
212. *Id.* at 726, 415 S.E.2d at 326. *See* Electrical Distribs. v. Turner Constr. Co., 196 Ga. App. 359, 395 S.E.2d 879 (1990).
213. 202 Ga. App. at 726, 415 S.E.2d at 326.
214. *Id.* at 726-27, 415 S.E.2d at 326.
215. 211 Ga. 690, 88 S.E.2d 13 (1955).
216. *Id.* at 691, 88 S.E.2d at 14.
217. 202 Ga. App. at 726-27, 415 S.E.2d at 326.
218. *Id.* at 727, 415 S.E.2d at 326.

the eighteen percent interest levied against Turner.[219] The court noted that Turner's "liability does not arise out of their failure to pay any amounts they owed to [EDI] on a commercial account and O.C.G.A. [section] 7-4-16 thus is not applicable."[220] The court of appeals affirmed the decision to grant interest but reduced the liquidated damages amount to seven percent.[221] Prejudgment interest should be requested on all material lien claims in order to maximize recovery on behalf of the lien claimants. In most cases, however, the lien claimant will be limited to the statutory prejudgment interest amount and cannot modify that amount by contract or agreement.

The court of appeals also clarified that attorney fees are not available for lien claimants. The court in *Benning Construction Co. v. Dykes Paving & Construction Co.*,[222] stated that attorney fees were not recoverable in lien claim actions.[223] The court noted that " 'attorney fees are recoverable only when authorized by some statutory provision or by contract.' "[224] Absent a specific provision in the materialman's statute allowing the reward of attorney fees, a lien claimant cannot make a claim for attorney fees unless he is in direct contractual privity with the person with whom he supplied the materials and the contract supports such a claim. In *Benning* the court dismissed the attorney fees portion of the claim noting that the failure to establish a contractual relationship between plaintiff and defendant is fatal to any and all claims for attorney fees made by the lien claimant.[225]

During the survey period, the court of appeals and the General Assembly made significant changes in the statutory scheme allowing for the filing and recovery of materialman's lien. While there has been a certain and identifiable trend to provide a greater chance for the recovery by lien claimants of the cost they have expended in providing materials, the lien statute still requires exacting and specific attention to the timely filing requirement contained in O.C.G.A. section 44-14-361.1. Contractors should pay specific attention to the new provision, which makes the waiving of lien claims prior to the supply of the material invalid. This liberalization of the lien claim rules furthers the policies in the materialman's lien statutes and will in all likelihood continue as the Georgia courts be-

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219. *Id.*, 415 S.E.2d at 327.

220. *Id.*

221. *Id.*

222. 204 Ga. App. 73, 418 S.E.2d 620 (1992). *See supra* text accompanying notes 163-73. For a discussion of subcontracting and lien claims, *see supra* text accompanying notes 163-92.

223. 204 Ga. App. at 76, 418 S.E.2d at 622.

224. *Id.* (citing Glynn County Fed. Credit Union v. Peagler, 256 Ga. 342, 348 S.E.2d 628 (1986)).

225. *Id.*

come increasingly familiar with the function of materialman's liens over the form.

VII. Surety, Bond, and Guarantor Issues

A. *Public Works Bonds*

Failure of Public Works Owner to Require Bond. Generally speaking, a public owner is required by law to require from the entities with whom it contracts to perform a construction payment and performance bonds.[226] For example, in *City of Atlanta v. United Electric Co.*,[227] the City of Atlanta and the Downtown Development Authority of the City of Atlanta (collectively "the City") appealed the grant of summary judgment to plaintiff United Electric Company, which had asserted a claim against them for the failure to require a payment bond of the gen-

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226. For public work contracts exceeding $40,000, O.C.G.A. § 13-10-1(b) (Supp. 1992) provides as follows:

> No contract with this state, a county, a municipal corporation, or any public board or body thereof, for the doing of any public work shall be valid for any purpose, unless the contractor shall give:
>
> (1) A performance bond with good and sufficient surety or sureties payable to, in favor of, and for the protection of the state, county, municipal corporation, or public board or body thereof for which the work is to be done. The performance bond shall be in the amount of at least the total amount payable by the terms of the contract. This bond shall not be required when a bond is required under Code Section 36-10-4;
>
> (2)(A) A payment bond with good and sufficient surety or sureties, payable to the state, county, municipal corporation, or public board or body thereof for which the work is to be done, and for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the contract. The payment bond shall be in the amount of at least the total amount payable by the terms of the contract.

Id. In lieu of a payment bond, the contracting entity may post a cashier's check, certified check or cash for that amount with the public owner. O.C.G.A. § 13-10-1(b)(2)(B) (Supp. 1992). Furthermore, "No contract with this state or with a county, municipal corporation, or any other public board or body thereof for the doing of any public work shall be valid for any purpose unless the contractor shall comply with Code Section 13-10-1." O.C.G.A. § 36-82-101 (1987). O.C.G.A. § 36-82-102 (1987) provides in pertinent part:

> . . . If the payment bond or security deposit required in paragraph (2)(b) of Code Section 13-10-1, together with affidavit when necessary, is not taken in the manner and form required in this Code section, the corporation or body for which the work is done under the contract shall be liable to all subcontractors and to all persons furnishing labor, skills, tools, machinery, or materials to the contractor or subcontractor thereunder for any loss resulting to them from such failure . . . .

Id. A "subcontractor" includes "but is not limited to those having privity of contract with the prime contractor." O.C.G.A. § 36-82-100 (1987).

227. 202 Ga. App. 239, 414 S.E.2d 251 (1991).

eral contractor performing work in Underground Atlanta. The City contended that Underground Atlanta was not a public works project as contemplated under the statute and therefore no payment bond was required.[228]

Defendants were participants in the Underground Atlanta project and had entered into an agreement with Underground Festival, Inc., to construct and operate the project. Underground Festival, Inc., separately contracted for the construction of the exterior shell of the project and payment and performance bonds were required for that aspect of the project. Furthermore, Underground Festival, Inc., had agreed to complete the commercial facilities within the project itself, and in one such facility, the tenant, using a tenant allowance provided by Underground Festival Project, Inc., contracted with a general contractor to construct the interior of the facility. The contractor subcontracted with plaintiff United Electric Company to provide materials and services on the project. The general contractor on this particular aspect of the construction was not required by Underground Festival, Inc., to provide payment and performance bonds. The general contractor failed to pay United Electric Company for its work on the project and eventually declared bankruptcy.[229]

The court of appeals found that the project was constructed by the Downtown Development Authority under the Downtown Development Act.[230] The "totality of the agreements" between the City and Underground Festival, Inc., showed that the project itself was contemplated as a public works project.[231] In failing to require a payment and performance bond in accordance with the law, United Electric Company, Inc., acquired a "direct right of action to recover any resulting loss."[232]

Timely Notice. In *Southern Steel Co. v. United Pacific Insurance Co.*,[233] Southern Steel Company sued United Pacific Insurance Company, a surety, on a payment bond placed by the general contractor, Noonan Kellos, Inc., for construction of the Cobb County jail. The general contractor had hired Roanoke Iron and Bridgeworks, Inc., as a subcontractor to supply and install the detention equipment in the jail. The subcontractor in turn hired Southern Steel to supply various locking devices and other hardware. The last of the materials shipped by Southern Steel to

228. *Id.* at 239, 414 S.E.2d at 252.

229. *Id.* at 239-40, 414 S.E.2d at 252.

230. O.C.G.A. §§ 36-42-1 to -16 (1987 & Supp. 1992).

231. 202 Ga. App. at 240, 414 S.E.2d at 252-53. *See* O.C.G.A. § 36-42-3(6) (Supp. 1992).

232. 202 Ga. App. at 240, 414 S.E.2d at 253.

233. 935 F.2d 1201 (11th Cir. 1991). The United States District Court through the exercise of diversity jurisdiction was considering a question concerning notice under Georgia's Little Miller Act. O.C.G.A. §§ 36-82-100 to -105 (1987 & Supp. 1992).

the project pursuant to Roanoke Iron's purchase orders occurred on July 15, 1986.[234]

In September 1986, Roanoke Iron filed bankruptcy. Southern Steel then notified the general contractor that, "because of the substantial amount Roanoke Iron owed Southern Steel for materials already delivered to the jail, . . . no additional materials would be provided unless paid for in advance or at delivery."[235]

On November 17, 1986, Southern Steel wrote to the general contractor informing it that Southern Steel had a number of items previously ordered by Roanoke Iron for which it had not yet been paid. Southern Steel informed the general contractor that, unless the general contractor requested and paid for them, the items would be returned to inventory. These materials were then shipped at the general contractor's request to the site on December 15, 1986. The general contractor also ordered and paid for other materials requested from Southern Steel after August 1986.[236]

Southern Steel also provided materials at no charge including screws, keys, an allen wrench, strike plates, and ten reworked electric locks. The locks were repaired because they had burned out on the job site. These materials were shipped to the site in late November and mid-December 1986.[237]

On February 6, 1987, Southern Steel sent to United Pacific Insurance Co., the surety, written notice of its claims against the payment bond for the unpaid balance of invoices to Roanoke Iron. Suit was subsequently filed by Southern Steel. United Pacific moved for summary judgment on the ground that Southern Steel failed to comply with the timely notice provisions under Georgia's Little Miller Act.[238] The district court granted

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234. 935 F.2d at 1202.

235. *Id.*

236. *Id.*

237. *Id.* at 1202-03.

238. *Id.* at 1203. O.C.G.A. § 36-82-104(b) (Supp. 1992) provides as follows:

> Every person entitled to the protection of the payment bond . . . who has not been paid in full for labor or material furnished in the prosecution of the work . . . shall have the right to bring an action on such payment bond . . . for the amount, or the balance thereof, unpaid at the time of the commencement of such action and to prosecute such action to final execution and judgment for the sum or sums due him; provided, however, that any person having a direct contractual relationship with a subcontractor, but no contractual relationship express or implied with the contractor furnishing such payment bond or security deposit, shall have the right of action upon the payment bond or security deposit upon giving written notice to the contractor within 90 days from the day on which such person did perform the last of the material or machinery or equipment for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied.

summary judgment to the surety, because the no-charge items provided in November and December 1986 were corrective performance and therefore not an event from which measurement for notice purposes could be calculated. The district court found that the last date of original contract performance required summary judgment.[239]

Before the United States Circuit Court of Appeals for the Eleventh Circuit, Southern Steel argued that most of the no-charge items related back to and completed earlier shipments of materials supplied pursuant to purchase orders from Roanoke Iron, thus, constituting the last material furnished for which claim was made. Southern Steel also argued that the corrective work was performed not through any fault of its own, but was necessary to fulfill responsibilities under the original contract so that the delivery of those items were within the original contract performance. Accordingly, the delivery of the corrective work would be the last date of the delivery of materials from which notice should be measured.[240]

The court rejected Southern Steel's first argument based upon a stipulation between the parties which indicated that July 15, 1986, was the last date of shipment and satisfaction of purchase orders presented by Roanoke Iron.[241] The court went on to consider Southern Steel's second argument noting that under the Federal Miller Act, repairs do not normally toll the notice requirement, but that "each circumstance must be judged on its own facts."[242] The court then focused on the following factors: " 'the value of the materials shipped, the original contract specifications, the unexpected nature of the work, and the importance of the materials to the operation of the system in which they are used.' "[243] Applying this analysis to the facts, the court found that an issue of fact existed as to whether the reworking of the locks was done as part of the original con-

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Id.

239. 935 F.2d at 1203.

240. *Id.* at 1204.

241. *Id.* Of course, materials ordered directly by the general contractor and paid for by it do not come into play since the claim against the surety is predicated upon the failure of Roanoke Iron to make payment under certain invoices directed to the subcontractor. Thus, for purposes of this argument the July 15, 1986 date stipulated by the parties would be controlling.

242. *Id.* The court noted that Georgia's Little Miller Act was guided in its interpretation by federal law interpreting the Federal Miller Act. Amcon, Inc. v. Southern Pipe & Supply Co., 134 Ga. App. 655, 656, 215 S.E.2d 712, 713 (1975); Porter-Lite Corp. v. Warren Scott Contracting Co., 126 Ga. App. 436, 438-39, 191 S.E.2d 95, 97 (1972). Federal case law construing the Federal Miller Act notes that a sweeping general rule concerning repairs is not available and requires a factually intensive analysis. Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 173 (5th Cir. 1973).

243. 935 F.2d at 1204-05 (quoting United States *ex rel.* Georgia Elec. Supply Co. v. United States Fidelity & Guar. Co., 656 F.2d 993, 996 (5th Cir. Unit B Sept. 1981)).

tract rather than merely as repairs.[244] The court determined that the locks were required under the original contract specifications, that the reworking was necessary through no fault of the supplier, but through the fault of others, making the repairs unexpected, and that working locks were important to the operation of the jail.[245] Accordingly, the summary judgment was reversed.[246]

B. Sureties

Notice to Proceed Against Principal. The supreme court in *Johnson Controls, Inc. v. Safeco Insurance Co.*,[247] answered a question certified from the United States Court of Appeals for the Eleventh Circuit pertaining to a creditor's obligation to proceed against a principal after notice from the surety as failure to do so.[248] "The [plaintiff], Johnson Controls, Inc. ("JCI"), had entered into a subcontract with Ocean Electric Corporation ("Ocean Electric") for work at the Trident Submarine Training Facility in Kings Bay, Georgia."[249] Safeco Insurance Company ("Safeco") had posted a surety bond guaranteeing Ocean Electric's performance.[250] "Following a performance dispute between JCI and Ocean, JCI notified Ocean Electric Corporation that it was in default [and] JCI submitted a claim to the [surety]."[251] The surety responded by letter dated November 4, 1986, as follows:

> Johnson Controls [JCI] has asserted and continues to assert various claims against both Ocean and SAFECO in regard to the construction project located at Kings Bay, Georgia.
>
> You are notified that Johnson Controls [JCI] should proceed to collect any debt it believes it has owing to it from Ocean immediately. Johnson [JCI] should proceed to institute adversary proceedings against Ocean Electric immediately . . . .[252]

Johnson Controls instead elected to complete the job by hiring another subcontractor, although the project was terminated by the Navy on December 16, 1986, before completion. Ocean Electric subsequently declared

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244. *Id.* at 1205.
245. *Id.* at 1205-06.
246. *Id.* at 1206.
247. 261 Ga. 364, 404 S.E.2d 556 (1991).
248. *Id.* at 364-65, 404 S.E.2d at 556-57.
249. *Id.* at 365, 404 S.E.2d at 557.
250. *Id.*
251. *Id.*
252. *Id.*

bankruptcy and on November 23, 1987, JCI filed suit against Safeco as surety to recover $117,000 in excess costs incurred after the default.[253]

The United States District Court granted summary judgment in favor of the surety on its argument that JCI failed to file suit within three months after its letter of November 4, 1986.[254] The question for the Georgia Supreme Court was whether the selection by JCI of an available contractual remedy, which contemplated deferral of the time of payment by Ocean Electric, ameliorated the requirement to file suit within three months after notice by the surety of its obligation to do so.[255] The supreme court found that the time for measuring the accrual of the cause of action against Ocean Electric would be at the time of breach of contract, that is, when JCI declared Ocean Electric to be in default of the agreement.[256]

This ruling creates pitfalls for the unwary contractor or subcontractor, who may feel a false sense of security in following a remedy available to it under an agreement it may have with another entity. By following that remedy, it may cut off other rights it has under payment and performance bonds unless those rights are pursued diligently and simultaneously.

Length of Time of Sureties Liability. Previously in *McDevitt & Street Co. v. K-C Air Conditioning Service, Inc.*,[257] the construction of the contract as it applied between a contractor and subcontractor was discussed. Also before the court of appeals in this case were questions concerning the length of time for which the surety would be responsible under its bond obligations and the types of damages that may apply against a surety when in bad faith the surety refuses to honor its obliga-

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253. *Id.*

254. *Id.* at 365-66, 404 S.E.2d at 557. O.C.G.A. § 10-7-24 (1989) provides:

> Any surety, guarantor, or endorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor, his agent, or any person having possession or control of the obligation, to proceed to collect the debt from the principal . . . and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice . . . the endorser, guarantor, or surety giving the notice . . . shall be discharged. No notice which does not state the county in which the principal resides shall be considered a compliance with the requirements of this Code section.

Id.

255. 261 Ga. at 365, 404 S.E.2d at 557. Implicit in this statement of the issue before the supreme court is the fact that JCI could bring in another subcontractor to complete the work and then charge Ocean the difference between what it would have cost under the original contract and what it in fact cost JCI to bring in the completing subcontractor.

256. *Id.* at 366, 404 S.E.2d at 557.

257. 203 Ga. App. 640, 418 S.E.2d 87 (1992). For further treatment of this case in connection with the construction of contracts, see *supra* text accompanying notes 34-49.

tions.[258] The performance bond posted by Wassau Insurance, the surety on the project, indicated that the surety's undertakings remained in force and effect until the subcontractor had finished all of its obligations under the subcontract during the life of any guaranty required under that contract. The trial court had construed the bond to relieve the surety of its liability under the bond at the conclusion of the one year warranty. The contract obligated the subcontractor to correct defective work discovered within one year from the date of acceptance or within such longer period as may have been provided within the contract documents.[259] As previously discussed, that period was extended to include any period of time as may be prescribed by law and incorporated implicitly in the statute of limitations applicable to breaches of contract.[260] O.C.G.A. section 9-3-24 provides for a six year statute of limitations.[261] As a result, the surety was also obligated under its bond for this same period of time.[262]

VIII. CONCLUSION

The economics of the construction industry demand that the construction lawyer plan for business failure at every turn. Accordingly, construction lawyers must be intimately familiar with the changes in the materialman's and mechanic's lien statutory framework. Also, there is a definite, albeit slow, trend to expand the liability for construction failures to lenders and sureties, further emphasizing the need for proper advanced planning to protect clients from business failures.

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258. 203 Ga. App. at 642-44, 418 S.E.2d at 91-92.

259. *Id.* at 643-45, 418 S.E.2d at 91-93.

260. *Id.* at 645, 418 S.E.2d at 92.

261. O.C.G.A. § 9-3-24 (1982).

262. 203 Ga. App. at 645, 418 S.E.2d at 93. The court also found that a jury question existed on whether the surety acted in bad faith in refusing to honor its obligations under the provisions of O.C.G.A. § 10-7-30. That statute is virtually identical with O.C.G.A. § 33-4-6 applying to insurance generally and applies a 25% penalty and all reasonable attorney fees against a surety who refuses a demand for payment in bad faith. 203 Ga. App. at 645-46, 418 S.E.2d at 93-94.