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Construction Law

by Brian J. Morrissey*

I. INTRODUCTION

During the survey period, the appellate courts of Georgia continued to revisit certain issues that have displayed remarkable persistence in the trial courts.

For example, there were a number of attempts to impose liability directly against lenders on construction projects for the failure to insure that payments were made to contractors in such a way as to avoid the impositions of liens; however, the appellate courts failed to depart from traditional notions that lenders are typically not responsible for such failures.

Of particular significance during this survey period was the outline by the court of appeals of a new doctrine perhaps imposing obligations upon purchasers of products to look behind claims by sellers and manufacturers concerning the performance characteristics of those products. Indeed, arguably, the court of appeals may have imposed an obligation on at least a certain class of purchasers to duplicate test results employing technical specifications rather than merely relying upon test results performed by the seller or those in privity with it.

II. LENDER DUTIES AND LIABILITIES

Disbursement of Funds. In De Coudreaux v. Mutual Federal Savings & Loan Ass'n of Atlanta,† the court of appeals addressed whether duties to guarantee or inspect a construction project's progress prior to the disbursement of loan proceeds existed. The plaintiffs entered into a Construction Loan Agreement with Mutual Federal

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Savings & Loan Association of Atlanta, Incorporated ("Lender") for the construction of a new home. The Loan Agreement provided in pertinent part:

[that] [Mutual] is authorized to disburse funds under its control in said construction loan account, together with the net proceeds of the loan, only in proportion to its inspector's report of progress or by Architect's or Superintendent's Certificate accompanied by a proper affidavit from the contractor.²

The plaintiffs contended that the Lender breached this provision of the agreement by disbursing funds to the general contractor despite knowledge of problems with the construction and further breached its fiduciary duties to the plaintiffs by failing to monitor the quality of the construction.³

The plaintiffs sued the contractor and the Lender, attempting either to rescind the construction agreement or to have the Lender pay for repair of certain defects.⁴ The Lender was granted summary judgment, and the plaintiffs appealed.⁵

The plaintiffs contended that the Lender's actions were beyond that of a conventional lender and, thus, created fiduciary and common law duties flowing from the Loan Agreement to insure that the work performed by the general contractor was workmanlike and to monitor the progress of the construction.⁶ The court reaffirmed the general rule that an inspection performed by a lender on a construction project is customarily only for the benefit of the lender, not the project owner, except when the lender's activities extend beyond that of a conventional construction lender.⁷ The exception to the general rule requires a

[clear promise of the lender to perform certain protective functions, and upon a clear and distinct participation in the activity which resulted in the damage. It is certainly not enough to make general allegations that the lender inspected the work, since such inspections are presumed to be for its own financial purposes and are not intended to insure a quality of work. The lender is not an insurer of the work of the contractor, unless clear promises appear to the contrary.⁸]
The court found that inspections performed by two loan officers of the Lender and the Lender’s inspector and their correspondence about various problems concerning the construction did not constitute activity beyond that of a conventional lender.  

The court of appeals reached a similar result in Peterson v. First Clayton Bank & Trust Co. In that case, Stovall Buildings Supplies, Incorporated filed a complaint to foreclose a materialman’s lien and to collect on an open account for materials supplied for the construction of a house owned by Robert and Gertrude Peterson. The Petersons filed a third party complaint against the construction lender, First Clayton Bank & Trust Company (“Lender”), alleging breach of contractual and fiduciary duties in disbursing loan proceeds. The Petersons contended that the Lender failed to insure that the builder paid subcontractors and suppliers. Summary judgment was granted to the Lender from which appeal was taken.

The construction contract between the Petersons and the general contractor provided that:

> the builder “[would] be required to furnish to the owner or bank representative, upon request or at times of withdrawals, a statement showing itemization of expenditures to date, items due and unpaid, and to support said statement with receipted bills, affidavits, waivers of liens, and other satisfactory evidence of payment.”

The Petersons spoke several times with a bank loan officer who had reviewed the construction contract. The loan officer acknowledged that the Lender would handle disbursements of payments to the contractor and that the Lender would regularly inspect the property to monitor progress of construction. The bank officer was aware that the Petersons lived in Florida at the time and could not regularly inspect the construction progress or handle payments to the builder. The loan

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9. Id. at 505, 455 S.E.2d at 90. For example, in Jordan v. Atlanta Neighborhood Hous. Servs., 171 Ga. App. 467, 468, 320 S.E.2d 215, 216-17 (1984), in which there was found a deviation from the normal activity of a conventional lender, the evidence established that the lender had prepared the construction documents, listed the improvements to be made to the property, solicited bids from the contractor, knew the home owner was looking to it to assure proper performance of the work and provided assurances to the home owner that deficiencies in the work would be corrected once payment was made.

11. Id. at 94, 447 S.E.2d at 64.
12. Id. at 96, 447 S.E.2d at 65.
13. Id. at 94, 447 S.E.2d at 64.
officer also indicated that she would inform the Petersons about the progress of the work.\textsuperscript{14}

The Construction Loan Agreement, executed on June 19, 1991, provided in pertinent part:

Borrower authorizes and directs Lender to pay any loan proceeds due under the terms of this agreement to [the builder]. Lender has no liability or obligation in connection with the project or the construction and completion thereof, except to advance loan proceeds as agreed in this document. Lender is not obligated to inspect any improvements, nor is it liable for the performance or default of any contractor or subcontractor or for any failure to construct, complete, protect or insure said improvements or for the payment of any costs or expenses incurred in the project. Nothing, including without limitation any disbursement or the delivery or acceptance of any document or instrument, shall be construed as a representation or warranty on Lender's part. Lender is not the agent or representative of the Borrower, and the Borrower is not the agent or representative of the Lender. This agreement does not reflect a partnership or joint venture on the part of the parties and shall only serve to represent and document the loan terms of Borrower's construction loan . . . . Lender reserves the right to require execution of any materialmen's lien affidavits, or release of materialmen's lien affidavits by any contractor or subcontractor or Borrower at any time during the term of this agreement . . . . The parties agree that the Lender may disburse the proceeds of the loan to pay any expenses or liens incurred in connection with the construction and completion of the single-family residence and payment or performance of any obligation of Borrower to Lender, and at its election, Lender may pay said proceeds to Borrower or to the contractor or to any other persons furnishing labor, supplies or services for construction of the residence or to the holder of any lien, charge or encumbrance on the premises or other property securing the loan, and the whole of such proceeds are hereby assigned, transferred and pledged to Lender for such purposes . . . .\textsuperscript{15}

The builder failed to pay suppliers and subcontractors on the construction project, and over $38,000 in liens accrued against the property. The Petersons were not able to satisfy the liens and defaulted under the terms of the Construction Loan Agreement. The property was subsequently foreclosed upon.\textsuperscript{16}

The Petersons argued on appeal that the commitments made by the loan officer modified the Construction Loan Agreement despite the

\textsuperscript{14} Id. at 95, 447 S.E.2d at 64.
\textsuperscript{15} Id. at 95-96, 447 S.E.2d at 64-65.
\textsuperscript{16} Id. at 96, 447 S.E.2d at 65.
express limitation of responsibility in that agreement. The court of
appeals determined that the promises made by the loan officer amounted
to nothing more than promises to do what the Construction Loan
Agreement had already authorized through the language of the
agreement which allowed payment of proceeds to the builder. Nothing
in these promises conferred an obligation upon the Lender to insure that
subcontractors and materials suppliers were paid prior to disbursement
of proceeds to the builder. The court found that the implied condi-
tions argued by the Petkers were not clearly within the contemplation
of the parties at the time of the making of the contract and, indeed, were
contradicted by the specific language of the Construction Loan Agree-
ment itself. Moreover, the Construction Loan Agreement did not
create duties from which tort responsibility flowed. The court found
that the Petkers' allegations of negligence were simple breaches of the
Loan Agreement, if anything, and were not breaches of duties imposed
by law under any statute or recognized common law principle. The
court found no common law duty for a lender to obtain lien waivers or
payment affidavits or to otherwise insure that suppliers were paid before
disbursing funds to a builder, unless the lender's activities extended
beyond that of a conventional construction lender and the Lender
"engages . . . in activities actually connected to construction of the
property."

III. CONTRACT FORMATION, CONSTRUCTION AND BREACH

A. Contract Formation

Promoter's Liability. In Weir v. Kirby Construction Co., Kirby
Construction brought suit against Weir for the remaining contract

17. Id. at 97, 447 S.E.2d at 66. O.C.G.A. § 13-4-4 pertaining to modification of
contracts provides as follows:

Where parties, in the course of the execution of a contract, depart from its terms
and pay or receive money under such departure, before either can recover for
failure to pursue the letter of the agreement, reasonable notice must be given to
the other of intention to rely on the exact terms of the agreement. The contract
will be suspended by the departure until such notice.

19. Id.
20. Id. at 99, 447 S.E.2d at 67.
21. Id.
22. Id.
balance for renovation of a "Patti Arbuckle's Restaurant." Weir entered into the contract as President of Patti Arbuckle's Productions, Incorporated; however, a certificate of incorporation had not yet been issued by the Secretary of State.\textsuperscript{24} As no certificate of incorporation had issued as of the date of the contract, Kirby Construction brought suit against Weir as the promotor, although there was no evidence that Weir had actual knowledge that the certificate had not yet issued when he entered into the contract.\textsuperscript{25} Weir appealed from a jury verdict against him and from the denial of his motion for directed verdict.\textsuperscript{26} The court reversed the trial court's judgment due to the fact Weir did not have actual knowledge there was no corporation at the time he entered into the contract.\textsuperscript{27}

\textbf{B. Contract Construction}

\textbf{Modification Through Course of Business Dealings.} In \textit{Barnes \\& Tucker Co. v. Westinghouse Electric Corp.},\textsuperscript{28} Alco Standard Corporation sued Westinghouse Electric Corporation for negligent repair work on certain autotransformers.\textsuperscript{29} After Westinghouse moved for summary judgment on the negligence claim because of the economic loss rule, Alco added a claim for breach of implied warranty based upon Westinghouse's alleged failure to repair and rewind the autotransformers in a skillful and careful manner.\textsuperscript{30} Westinghouse amended its motion for summary judgment by filing an Order Acknowledgment which Westinghouse had sent Alco upon receipt of the transformers for repair. The Acknowledgment disclaimed any liability on the part of Westinghouse for breach of any statutory warranty, express or implied, or for any economic loss for work to be performed. On first appeal, the court of appeals reversed the grant of summary judgment finding that issues of fact with respect to

\begin{itemize}
  \item \textsuperscript{24} \textit{Id.} at 832-33, 446 S.E.2d at 186.
  \item \textsuperscript{25} \textit{Id.} at 833, 446 S.E.2d at 186.
  \item \textsuperscript{26} \textit{Id.} at 833, 446 S.E.2d at 187.
  \item \textsuperscript{27} \textit{Id.} O.C.G.A. § 14-2-23 formerly had provided that: "All persons who assume to act as a corporation before the Secretary of State has issued the certificate of incorporation . . . shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." The statute was repealed effective July 1, 1989, by enactment of O.C.G.A. § 14-2-204 which provides: "All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting." O.C.G.A. § 14-2-204 (1994).
  \item \textsuperscript{28} 216 Ga. App. 715, 455 S.E.2d 409 (1995).
  \item \textsuperscript{29} \textit{Id.} at 715, 455 S.E.2d at 410.
  \item \textsuperscript{30} \textit{Id.}
\end{itemize}
the contract claim existed concerning whether the Acknowledgment ever became a part of the contract between the parties.\textsuperscript{31}

On retrial, Barnes & Tucker Company was substituted as party plaintiff.\textsuperscript{32} On appeal, Barnes & Tucker contended that, absent any evidence that Barnes & Tucker had explicitly accepted the Order Acknowledgment as an amendment to the oral contract, the trial court erred in submitting the issue to the jury.\textsuperscript{33} The court reaffirmed the general rule concerning modification of contracts as follows:

> [e]ven if the contract provides it may not be changed except by writing, parties may subsequently by mutual consent enter into a new agreement at variance with the other. The modified agreement need not be expressed in words, in writing or signed, but the parties must manifest their intent to modify the original contract.\textsuperscript{34}

Westinghouse had introduced evidence that, through a course of business dealings over the years between the parties and circumstances under which the contract was formed, the Order Acknowledgment had been accepted by Barnes & Tucker as a part of the agreement.\textsuperscript{35}

**Implied Contracts.** In *Owens v. Landscape Perfections, Inc.*,\textsuperscript{36} the court of appeals considered whether the existence of an express oral agreement between owner and contractor precluded the contractor from recovering in quantum meruit.\textsuperscript{37} The parties had a previous contractual relationship under which Landscape Perfections performed construction services at the former home of the plaintiffs, Steve and Jean Owens. In 1989, the Owens contacted Landscape Perfections for services in preparation for the construction of a new home.\textsuperscript{38} The president of Landscape Perfections met with the Owens on several occasions, flagging trees which were to remain on the property and taking measurements in preparation for the landscaping plan. The plan was presented with a written proposal to Steve Owens, including the total cost for the services. The proposal was never signed or returned by the Owens.\textsuperscript{39} Steve Owens verbally agreed to the price contained in the proposal and informed Landscape Perfections to proceed with the project. When the

\begin{footnotes}
\item[31.] Id. at 715-16, 455 S.E.2d at 410.
\item[32.] Id. at 716, 455 S.E.2d at 410.
\item[33.] Id.
\item[34.] Id. at 717, 455 S.E.2d at 411.
\item[35.] Id.
\item[37.] Id. at 643, 451 S.E.2d at 496.
\item[38.] Id. at 642, 451 S.E.2d at 495.
\item[39.] Id., 451 S.E.2d at 495-96.
\end{footnotes}
Owens failed to pay for the services despite demand, Landscape Perfections commenced a suit in quantum meruit.\(^{(40)}\)

At trial, Landscape Perfections offered evidence concerning the reasonable value of the services.\(^{(41)}\) The court held that when one renders valuable services to another, and the latter accepts, an implied promise to pay a reasonable value is created.\(^{(42)}\) The Owens argued that "[t]here cannot be an express and implied contract for the same thing existing at the same time between the same parties."\(^{(43)}\) But the court found there to be no express oral agreement between the Owens and Landscape Perfections for the services rendered. The express oral agreement between the Owens and Landscape Perfections did not establish definite terms upon which the corporation would be paid; therefore, this term could be implied for those services rendered at a reasonable value.\(^{(44)}\)

**Incorporation of Performance Specifications.** The court of appeals in *Cobb County School District v. MAT Factory, Inc.*\(^{(45)}\) considered a number of issues relating to contract, fraud and warranty claims.\(^{(46)}\) On June 6, 1991, Cobb County School District and Leisure Lines, Incorporated entered into a contract obligating Leisure Lines to complete playground resurfacing at Blackwell Elementary School for a total cost of $24,990.\(^{(47)}\) The AIA Agreement contained an "entirety" clause enumerating the contract documents comprising all of the terms and conditions of the agreement. These included contract specifications which specified playground covering material composed of wood fiber or chips and required the bidder to meet the surface depth requirements of the Consumer Products Safety Commission Technical Guidelines under ASTM and ANSI specifications.\(^{(48)}\)

Leisure Lines contracted with MAT Factory, a California corporation, the distributor of a plastic-type product called "Safety Deck" manufactured in New Zealand by Versatile Plastic Recyclers. The Safety Deck

\(^{40}\) *Id.* at 643, 451 S.E.2d at 496.

\(^{41}\) *Id.*

\(^{42}\) *Id.; see also* O.C.G.A. § 9-2-7 (1982).


\(^{44}\) 215 Ga. App. at 643, 451 S.E.2d at 496.


\(^{46}\) *Id.* at 697, 452 S.E.2d at 142.

\(^{47}\) *Id.*

\(^{48}\) *Id.* at 697-98, 698 n.1, 452 S.E.2d at 142, 142 n.1 ("ASTM is the American Society for Testing Materials and ANSI is the American National Standards Institute").
was installed with the knowledge and consent of Cobb County School District at Blackwell Elementary School.\textsuperscript{49}

Subsequent to this installation, on July 15, 1991, the Director of Planning of the Cobb County School District sent a memo to the Director of Support Services attaching a copy of ASTM Designation F1292-91, the standard specification for impact attenuation of surface systems for playground equipment. The memo attached a copy of the June 18, 1990 test results performed on Safety Deck by Northwest Laboratories.\textsuperscript{50} The Northwest Laboratories' test report indicated that impact attenuation was measured in accordance with proposed ASTM standard F8-52. The Northwest Laboratories' test results and MAT Factory promotional literature indicating safe fall height parameters had been provided by Leisure Lines to Cobb County School District on November 9, 1990, eight months prior to the Blackwell Elementary School contract.\textsuperscript{51} The memo of the Director of Planning was forwarded to Leisure Lines requesting that Leisure Lines furnish updated test results showing compliance with ASTM Designation F1292-91. The memo explicitly indicated that without a representation that the testing had been done in accordance with the new ASTM standard, the Director of Planning would recommend no further purchases of the material.\textsuperscript{52}

The memo was forwarded by Leisure Lines to MAT Factory for response, which was provided on July 23, 1991, by the president of MAT Factory. The president of MAT Factory indicated that the tests performed under proposed standard F8-52 were in compliance with the standard specification carrying the permanent ASTM Designation F1292-91.\textsuperscript{53} Upon receipt of this letter, the Director of Planning sent a memo to the Director of Support Services referring to this representation stating that the test performed was in compliance with the ASTM specification and withdrew his opposition to making additional purchases of the product.\textsuperscript{54}

While the proposed standard F8-52 was a committee designation and was ultimately used as the standard, it was finalized into the permanent ASTM Designation F1292-91 with one major difference: temperature

\begin{footnotesize}
\begin{enumerate}
\item Id. at 698, 452 S.E.2d at 143.
\item Id.
\item Id. at 698, 700, 452 S.E.2d at 143-44.
\item Id. at 699, 452 S.E.2d at 143.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
controls were required for in-laboratory testing, but not for site testing.\textsuperscript{55}

On December 3, 1991, a letter of contract was issued by the School District to Leisure Lines to supply Safetytred playground servicing for nine elementary schools in accordance with the proposal dated October 16, 1991 for a total price of $194,415.\textsuperscript{56} There were no performance specifications included in or alluded to in this letter contract. Leisure Lines placed an order with MAT Factory on January 6, 1992 but canceled that order on January 17, purchasing instead “Gras-Gard” from Pawling Corporation of New York. Delivery of “Gras-Gard” was accepted by Cobb County School District until September 24, 1992, when Leisure Lines received a letter from Cobb County School District indicating the product was “non-conforming” and stating it was no longer wanted.\textsuperscript{57}

Prior to that notice, on September 11, 1992, Cobb County School District had Northwest Laboratories perform the same on-site tests on the Blackwell Elementary School installation as had previously been done by MAT Factory in California.\textsuperscript{58} The 1990 test results provided by MAT Factory to Leisure Lines, and subsequently to Cobb County School District, reflected a maximum “safe fall” height of 7.45 feet on the first test and 8.5 feet on the second. The test performed at Blackwell Elementary showed maximum safe fall heights of only 4 to 6 feet.\textsuperscript{59} Although the 1990 test report indicated that “[t]he [volleyball] court was in a very wet condition because it had recently been irrigated[,]”\textsuperscript{60} the promotional materials obtained from MAT Factory using the 1990 test data indicated that Safety Deck’s high test results showed a safe fall height of almost 9 feet which minimized risks of injury to children on playgrounds.\textsuperscript{61}

Cobb County School District brought suit against Leisure Lines for fraud, breach of contract and breach of warranty and against MAT Factory for fraud and breach of warranty. The trial court entered

\textsuperscript{55} Id. The court of appeals does not discuss what significance this difference could make with respect to reliability of test results performed in an uncontrolled environment or representations made incorporating those results. Indeed, there is no discussion concerning the differences between the type of controls used in a laboratory setting as opposed to site testing where differing environmental factors may affect results unbeknownst to the purchaser. See id.

\textsuperscript{56} Id. at 698 n.2, 452 S.E.2d at 143 n.2. (“Safetytred” was the name given to the product by Verstile. MAT [Factory] registered that name as well as “Safety Deck” with the patent and trademark office for marketing purposes. It is the same product.”).

\textsuperscript{57} Id. at 700, 452 S.E.2d at 144.

\textsuperscript{58} Id. There is no discussion by the court of appeals about why Cobb County School District chose to duplicate these tests on that date.

\textsuperscript{59} 215 Ga. App. at 700, 452 S.E.2d at 144.

\textsuperscript{60} Id. at 700 n.4, 452 S.E.2d at 144 n.4.

\textsuperscript{61} Id. at 700, 452 S.E.2d at 144.
summary judgment against Cobb County School District from which it appealed.62

With respect to the contract claims against Leisure Lines, the court of appeals found that the first contract relating to Blackwell Elementary School did not include any mandatory safe fall height.63 There was no discussion, however, whether the ANSI and ASTM standards relating to impact attenuation and safe fall heights, incorporated by reference into the contract in the specifications, would have imposed any mandatory safe fall height requirement on the product chosen. With respect to the second contract, the “Gras-Gard”, being a trade name for Safetytred, the same product as MAT Factory’s Safety Deck, was a suitable substitute. The contract was not breached because it contained no performance specifications whatsoever, and, upon delivery, Leisure Lines fully performed its obligations.64

**Breach of Warranties.** With respect to the warranty claims, in *Cobb County School District v. MAT Factory, Inc.*,65 the court of appeals considered express and implied warranties of merchantability under Georgia’s Commercial Code.66 The warranty of merchantability only runs to those parties in direct privity with the seller.67 With respect to the breach of warranty claim against Leisure Lines as the seller, rejection of the product in September 1992 after installation in June 1991 and delivery of the second shipment in early 1992 was not within a reasonable time after tender and delivery as a matter of law.68 It is not clear from the language of the opinion whether 8 months is unreasonable as a matter of law or simply unreasonable in light of the facts in this case, particularly in light of the court’s finding that Cobb County School District could not have justifiably relied upon the test results in representations and promotional material as the basis for fraud.69

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62. *Id.* at 697, 452 S.E.2d at 142.
63. *Id.* at 701, 452 S.E.2d at 145.
64. *Id.* at 702, 452 S.E.2d at 145.
65. *See supra* note 45.
68. 215 Ga. App. at 702-03, 452 S.E.2d at 146.
69. *See infra* notes 95-98.
C. Breach and Remedies

Limitation of Actions. During the survey period, the court of appeals had two occasions to address the meaning of the statute of repose governing construction claims. In Hanna v. McWilliams, plaintiffs Joseph and Annastasia Hanna brought suit for damages to real and personal property against Steve McWilliams d/b/a McTee & Associates and Ace Fireplace Sales, Incorporated. On June 13, 1992, plaintiffs' house caught fire. The Hannas contended the fire was caused by a latent fireplace defect. The fireplace had been installed on March 19, 1984. The fireplace was sold by Ace Fireplace to McWilliams, who was sent a final bill on April 17, 1984. McWilliams testified that the substantial completion date on the house was on or before July 31, 1984. The Hannas contended the house was substantially completed no earlier than August 14, 1984, when the Certificate of Occupancy was issued. The Hannas took possession of the house on October 5, 1984. The suit was filed on August 7, 1992 for negligent construction. Summary judgment was granted by the trial court against the Hannas because the suit was barred by the applicable statutes of limitation.

70. O.C.G.A. § 9-3-51 provides as follows:
   (a) No action to recover damages:
      (1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property;
      (2) For injury to property, real or personal, arising out of any such deficiency; or
      (3) For injury to the person or for wrongful death arising out of any such deficiency shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.
   (b) Notwithstanding subsection (a) of this Code section, in the case of such an injury to property or the person or such injury causing wrongful death, which injury occurred during the seventh or eighth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement.

O.C.G.A. § 9-3-51 (1982).

72. Id. at 648, 446 S.E.2d at 742.
73. Id.
74. Id.
The Hannas first contended that operation of the "discovery of defects" rule should delay the accrual of a right of action until the damage to realty occurred on June 13, 1992. The "discovery" rule, however, does not extend to property damage, but only to cases of bodily injury.\(^{75}\) Moreover, the discovery rule does not apply to the eight-year statute of repose which begins to run after substantial completion of the improvement to real property.\(^{76}\)

The applicable statute of limitations governing damage to realty has been construed to mean that suit must be brought within four years after substantial completion.\(^{77}\) Thus, the claim from this damage was time-barred.\(^{78}\) With respect to the claim for damage to personalty, although the statute provides that the limitation period does not begin to run until injury is sustained,\(^{79}\) the application of the statute of repose barred the claim.\(^{80}\) The court found that the statute of repose did not establish an eight-year statute of limitation, but an outer time limit only which commenced upon substantial completion of the improvement to realty. Both of these previously existing statutes of limitation governing the claims brought continued to operate, but within this outer parameter.\(^{81}\)

The statute of repose applies regardless of when injury occurs or whether a cause of action has even accrued at all prior to the expiration of the eight-year time period. Indeed, the court reiterated that the statute of repose can commence to run against an injured property owner even before that owner acquires legal title to the realty in question.\(^{82}\) Interestingly, the construction of the statute of limitation governing damage to realty makes application of the statute of repose to claims arising out of it unnecessary in every instance.

The court went on to hold that the fireplace was an "improvement" within the meaning of the statute because it was an integral part of the


\(^{77}\) 213 Ga. App. at 649, 446 S.E.2d at 743. O.C.G.A. § 9-3-30 itself merely provides: "All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues." O.C.G.A. § 9-3-30 (1982) (emphasis added).

\(^{78}\) 213 Ga. App. at 650, 446 S.E.2d at 743.

\(^{79}\) See O.C.G.A. § 9-3-31 which provides: "Actions for injuries to personalty shall be brought within four years after the right of action accrues." O.C.G.A. § 9-3-32 (1982) (emphasis added). The operative language is identical to that contained in O.C.G.A. § 9-3-30.

\(^{80}\) 213 Ga. App. at 652, 446 S.E.2d at 745. See supra note 71.

\(^{81}\) 213 Ga. App. at 651, 446 S.E.2d at 744.

\(^{82}\) Id.
house, not a mere frill, and served as an alternate heat source of economic and aesthetic value. A component on a construction project "is an essential or integral part of the improvement to which it belongs, [when] it is itself an improvement to real property." Moreover, as the fireplace itself was an improvement to real property, the date of substantial completion was that date on which the fireplace, and not the entire house, was completed.

The court of appeals was confronted with a slightly different issue in Gwinnett Place Associates, L.P. v. Pharr Engineering, Inc. In that case, Lillian Manley and her husband filed suit against Gwinnett Place Associates, L.P., d/b/a Gwinnett Place Mall to recover damages for injuries incurred when Lillian Manley fell on a ramp located outside one of the mall restaurants. Subsequently, Gwinnett Place Associates filed a third party complaint against Pharr Engineering, the firm responsible for designing and constructing the parking lot and curbs at the mall; RTKL Associates, the architectural firm responsible for the overall design of the mall, including ramps; and Hoar Construction, the general contractor responsible for installation of the ramps. Summary judgment was granted to the third party defendants from which appeal was made.

The mall was substantially completed in February 1984, and the third party complaint was not filed until September 24, 1993, more than eight years after that date. Gwinnett Place contended that the statute of repose did not apply to an action for indemnity. The court found that because the underlying claims were dependent upon proof of damage to person or property, the indemnity claim was equally controlled by the applicable statute of repose. Gwinnett Place further contended that the exception to the eight-year statute of repose found within the language of the statute itself controlled because the original action

83. *Id.* at 652, 446 S.E.2d at 744.
84. *Id.* (quoting *Mullis v. Southern Co. Servs.*, 250 Ga 90, 94, 296 S.E.2d 579, 584 (1983)).
85. *Id.*, 446 S.E.2d at 744-45.
87. *Id.* at 53, 449 S.E.2d at 890.
88. *Id.* at 53-54, 449 S.E.2d at 890.
89. *Id.* at 54, 449 S.E.2d at 890.
90. *Id.* at 55, 449 S.E.2d at 891. *See, e.g.*, Krasaeath v. Parker, 212 Ga. App. 525, 441 S.E.2d 868 (1994) (holding a similar statute of repose applicable to a contribution claim arising out of a medical malpractice action pursuant to O.C.G.A. § 9-3-71(b)).
91. O.C.G.A. § 9-3-51(b) provides:
Notwithstanding subsection (a) of this Code section, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the seventh or eighth year after such substantial completion, an
was filed in a timely fashion even though the injury occurred in the eighth year after substantial completion. The court rejected this argument holding that the indemnity action did not relate back but stood on its own filing date and, thus, was barred by the statute of repose.

IV. TORT LIABILITY—CONTRACTUAL DUTIES AND FRAUD

A. Fraud

Lack of Justifiable Reliance. In one of the more puzzling aspects of the decision in Cobb County School District v. MAT Factory, Inc., the court of appeals held that there was no material issue of any genuine fact as a matter of law with respect to whether Cobb County School District in good faith justifiably relied upon representations made by MAT Factory and its president concerning the testing on the product. The court found that the test results were available to all parties involved in the transaction before any contract was signed and held that Cobb County School District was free to repeat the test where and when it wanted, if it so desired, pursuant to any standard it chose. Cobb County School District waited until September, 1992 before it made any such test. The court of appeals suggests no reason why the School District chose at that moment to perform a test. In finding a lack of justifiable reliance as a matter of law, the court held:

The law does not afford relief to one who suffers by not using the ordinary means of information, whether the neglect is due to indifference or credulity. When the means of knowledge are at hand and

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action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement.

O.C.G.A. § 9-3-51(b).

93. Id., 449 S.E.2d at 891-92.
94. See supra note 45.
95. 215 Ga. App. at 701, 452 S.E.2d at 145.
96. Id., 452 S.E.2d at 144-45.
97. Id. at 700, 452 S.E.2d at 144. For example, if the School District had received information after the fact concerning the falsity of information represented to it concerning the performance of the product, its decision to test the product in September, 1992 makes sense. Obviously, if the test was based on mere whimsy, the School District's position is less sympathetic.
equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's representations. Under the circumstances in the case at bar, the trial court did not err in concluding as a matter of law that plaintiffs failed to exercise proper diligence in protecting themselves from defendant's alleged fraudulent concealment.\textsuperscript{98}

What is curious about this conclusion is the fact that the cases relied upon for support of the legal proposition are land transaction cases where historically a buyer is on notice of all that he can see, whereas here the School District, a non-expert in the physical properties of this particular product, was led to believe that certain test results showed the product performed to certain qualities consistent with the School Districts' requirements as set forth in the ANSI and ASTM specifications. If the court of appeals is serious in holding that as a matter of law the School District could not have relied upon the information furnished by the manufacturer's representatives, i.e., the distributors, then it remains to be seen how far one must go in order to protect oneself from exaggerated claims derived from testing done on any product sold commercially. This uncertainty opens the door to a potentially serious attack on rights of claimants in products liability cases as well as all purchasers of products incorporated into construction projects.

\textbf{Representations made to third parties.} In Maddox \textit{v}. Southern Engineering Co.,\textsuperscript{99} the fraud claim of plaintiff Gilbert Maddox against defendant, Southern Engineering Company, Carroll County Water Authority, and Still Waters Plantation Ltd., was dismissed because it was premised upon representations made to government officials in order to secure the location for the construction of a dam and reservoir. As the representations were not made to the plaintiff, they were not actionable as a fraud against him because he was not misled in any way by any false representation allegedly made.\textsuperscript{100}

\textsuperscript{98} Id. at 701, 452 S.E.2d at 145 (quoting Miller \textit{v}. Clabby, 178 Ga. App. 821, 823, 344 S.E.2d 751 (1986)).


\textsuperscript{100} Id. at 7, 453 S.E.2d at 72. This, of course, did not require dismissal of the plaintiff's RICO claim which was based upon the statutory violation of making false statements to a government agency and not the same fraud as was dismissed.
V. MATERIALMAN'S LIENS

A. Notice Requirements

Final Delivery of Materials. In *Resurgens Plaza South Associates v. Consolidated Electric Supply, Inc.*, 101 Consolidated Electric Supply, Inc., d/b/a B & W Electric Supply provided materials to DCG Electrical Construction, the electrical contractor hired by the general contractor, Summit Commercial Contractors, Incorporated, in the performance of interior finish work in Resurgens Plaza.102 Invoices of Consolidated Electric Supply show an order was placed on October 10, 1990, for certain polished brass wall fixtures which were delivered on December 10, 1990. DCG Electrical failed to pay for the materials and Consolidated Electric filed a lien against the property on February 19, 1991. Judgment was entered against Resurgens Plaza which appealed from the denial of its motions for directed verdict and judgment not withstanding the verdict.103

Resurgens Plaza contended that the delivery on December 10, 1990 was not part of the original contract but a separate contract between DCG Electrical and a tenant, and that Consolidated Electric failed to properly allocate its charges between the two separate agreements.104 Resurgens Plaza offered the testimony of its property manager who indicated that DCG Electrical requested two extra wall sconces after the build out of the space had been completed. The lack of detail with respect to identification of the particular materials involved and that Consolidated Electric invoices showed the order had been placed in October, rather than in November or December after the space was built out, allowed the issue to proceed to a jury.105

In a strongly worded dissent, it was pointed out that the last delivery of material DCG Electrical needed to complete its contract was on October 23, 1990, more than three months before the lien was filed by Consolidated Electric. There was no evidence to suggest a continuation of the contractual relationship. Rather, the evidence suggested a new relationship created by DCG's additional work to be performed for the tenant.106 Moreover, the dissent was persuaded by the fact that a

102. Id. at 818, 452 S.E.2d at 785.
103. Id. at 818-19, 452 S.E.2d at 785-86.
104. Id. at 819, 452 S.E.2d at 786.
105. Id.
106. Id. at 820-21, 452 S.E.2d at 787.
Certificate of Occupancy had issued on October 6, 1990 and that final punchlist work was completed by the end of November, 1990. The majority opinion, however, indicates that the issuance of a Certificate of Substantial Completion, release of retainage, or other activity under the construction contract does not bar a claim of lien.

B. Requirement of Contractual Relationship

Ratification of Contract Creating Privity. In *Underground Festival, Inc. v. McAfee Engineering & Co.*, Underground Festival was the lessor of certain space in Underground Atlanta in which DBA of Atlanta, Incorporated was to open a restaurant and bar. The lease was signed on behalf of DBA by its president while the outer shell of the mall was being constructed. The lease with Underground Festival required the interior space to be designed and built by DBA pursuant to a construction allowance for improvements. The president of DBA oversaw the design, construction and start up of the company, and contracted with McAfee Engineering Company to design and install an HVAC system and grease hoods in the space. McAfee Engineering, incorrectly denominated DBA as F&K of Atlanta, Incorporated, because DBA's architect had done so on blueprints. The error was unnoticed and incorporated into the contract signed by the president of DBA. F&K of Atlanta was a nonexistent entity. After the design and installation of the equipment, when the invoice was not paid, McAfee Engineering filed a claim of lien against Underground Festival. DBA subsequently filed for bankruptcy protection naming McAfee Engineering as a creditor. The court proceeded to trial and a verdict was returned in the amount of $126,100 in favor of McAfee Engineering. Underground Festival appealed from judgment.

On appeal, Underground Festival contended McAfee Engineering was not entitled to file a lien against the property because no contract existed between it and Underground Festival or Underground Festival's tenant, DBA. A lien may attach to real property when materials are furnished at the insistence of the owner, contractor, or some other person acting for the owner or contractor. A lien requires a contractual

107. Id. at 821, 425 S.E.2d at 787.
110. Id. at 243, 447 S.E.2d at 684.
111. Id.
relationship between the materialman and one contracting with the owner in order to prevent a stranger from ordering work upon real estate and charging the owner.\textsuperscript{113} The court found that DBA had ratified the contract signed by its president with McAfee Engineering.\textsuperscript{114} The corporation's conduct implied ratification because DBA submitted McAfee's invoices to Underground Festival for payment from its construction allowance, and the officers of DBA wrote to Underground Festival acknowledging that DBA owed the debt to McAfee Engineering. Although the contract executed by the president of DBA mistakenly mentioned a different nonexistent corporation, it was clear from the evidence that the president intended to act on behalf of DBA when he entered into the contract, and, therefore, DBA had complete authority to ratify the agreement.\textsuperscript{115} The court held:

"Where a corporation knowing all of the facts accepts and uses the proceeds of an unauthorized contract executed in its behalf without authority, the corporation may be bound because of ratification . . . ."

If this is true where the contract is unauthorized and the corporation seeks to avoid responsibility, it is certainly so when the contract was in fact authorized, the corporation does not deny that it ratified the contract, but another name was mistakenly placed on the contract by the materialman.\textsuperscript{116}

C. Fulfillment of Conditions Precedent

Commencement of Action Against Contractor. In order to create and enforce a lien against an owner, a subcontractor must first commence an action against the defaulting contractor or recover the amount of its claim within twelve months.\textsuperscript{117} In Underground Festival, Underground Festival contended that McAfee Engineering failed to fulfill this condition precedent by not commencing an action against DBA prior to its lien foreclosure action. The court concluded, however, that

\begin{itemize}
  \item \textsuperscript{114} 214 Ga. App. at 244, 447 S.E.2d at 684. See O.C.G.A. § 10-6-52 (1994).
  \item \textsuperscript{115} 214 Ga. App. at 244, 447 S.E.2d at 684-85. The dissent mistakenly applied Broyles v. Kirkwood Court Apts., 97 Ga. App. 384, 103 S.E.2d 97 (1958), for the proposition that the corporation did not have authority to ratify the contract as it was not done with its authority, overlooking the fact that the president intended to bind DBA when he entered into the contract and was acting solely on its behalf. 214 Ga. App. at 248, 447 S.E.2d at 687 (McMurray, P.J., dissenting).
  \item \textsuperscript{116} 214 Ga. App. at 244-45, 447 S.E.2d at 685 (emphasis in original).
  \item \textsuperscript{117} O.C.G.A. § 44-14-361.1(a)(3) (Supp. 1995).
\end{itemize}
a subcontractor is relieved from the requirement to commence an action against the contractor in instances where the contractor is bankrupt. Moreover, a contractor is not required to refrain from commencing an action against a bankrupt creditor as it may file a claim in bankruptcy within the appropriate time period. By doing so, the contractor has "commenced an action" within the meaning of the lien statute. By filing a claim in the bankruptcy action, McAfee Engineering commenced an action within the twelve months, even though it was relieved of the responsibility to do so.

VI. SURETY BOND AND GUARANTOR ISSUES

A. Public Works Bonds

Who May Assert Claim. In 1992, the court of appeals rejected any narrow definition of "subcontractor" in considering standing to assert claims on payment bonds under Georgia's Little Miller Act (the "Act"). The court rejected the argument that the Act should be construed as limiting coverage in the same way that federal courts had under the Federal Miller Act. In Barton Malow Company v. Metro Manufacturing, Inc., the court of appeals was able to revisit this question, again broadening the scope of coverage under the Act.

Barton Malow Company was hired by DeKalb County to construct a filter plant expansion. Barton Malow posted a payment bond using Aetna Casualty & Surety Company as its surety. The contract required prefabricated carbon steel pipe and accessories for which Barton Malow contracted with Progressive Fabricators. Progressive Fabricators contracted with the plaintiff, Metro Manufacturing, to furnish some of the materials. In Metro v. Barton Malow Co., the court held that Metro Manufacturing was a subcontractor within the meaning of the Act.

118. 214 Ga. App. 245, 447 S.E.2d 685. See O.C.G.A. § 44-14-361.1(a)(4) which provides that a contractor "may enforce the lien directly against the property so improved in an action against the owner thereof, if filed within 12 months from the time the lien becomes due . . . ." O.C.G.A. § 44-14-361.1(a)(4) (Supp. 1995).
120. 214 Ga. App. 245, 447 S.E.2d 685.
122. Id. at 11, 421 S.E.2d at 87. See Clifford F. McAvoy Co. v. United States, 322 U.S. 102 (1944).
124. Id. at 56, 446 S.E.2d at 786. The term "subcontractor" under the Act is defined as one "supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the contract . . . ." O.C.G.A. § 13-10-1(b)(2) (Supp. 1995).
the items, all of which were in fact delivered to the project site. Progressive Fabricators then filed for bankruptcy without paying for these items and suit was brought for recovery under the payment bond. Summary judgment was granted to the plaintiff. The defendant contractor and its surety appealed.\textsuperscript{125}

The contractor and its surety argued the plaintiff was too remote as a mere supplier to a supplier to recover under the bond. The court of appeals, in rejecting this argument, reiterated the broad definition of "subcontractor" adopted in 1992. The Court found that the plaintiff was merely a supplier of materials to another supplier of materials. This reasoning did not distinguish it from the plaintiff in \textit{Tom Barrow Co. v. St. Paul Fire & Marine Insurance Co.}\textsuperscript{126} In \textit{Tom Barrow}, the claimant provided services, not simply materials, to another supplier of materials, but the court of appeals found this to be a meaningless distinction.\textsuperscript{127}

The net effect of this holding is, as the dissent suggests, as follows:

\begin{quote}
[U]nless the majority's holding today is somehow narrowed in scope in future cases, it would appear that "all persons supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the contract" will be "subcontractors," regardless of whether they are in privity of contract with the prime contractor. [citations omitted]. This will mean that any language in the Little Miller Act implying a contrary result is mere surplusage.\textsuperscript{128}
\end{quote}

The case probably does mean the end of any direct privity requirement in order to assert a claim under the Act.

\textbf{Notice of Claim.} In \textit{Devore & Johnson, Inc. v. Bowen & Watson, Inc.},\textsuperscript{129} Bowen & Watson was the general contractor for the construction of elementary school facilities in Habersham County. In order to obtain the contract, Bowen & Watson provided Employer's Insurance of Wausau as its surety. Cody Mechanical Company was hired by Bowen & Watson as a subcontractor, and Devore & Johnson supplied the electrical plumbing supplies to Cody Mechanical that were used in

\begin{footnotes}
\item[125] 214 Ga. App. at 56, 446 S.E.2d at 786.
\item[126] \textit{Id.} at 56-57, 446 S.E.2d at 786-87. \textit{See supra} note 121.
\item[127] 214 Ga. App. at 57, 446 S.E.2d at 787.
\item[128] \textit{Id.} at 58, 446 S.E.2d at 788. The Little Miller Act itself states: "As used in this article, the term . . . 'Subcontractor' includes but is not limited to those having privity of contract with the prime contractor." O.C.G.A. § 36-82-100(2) (1993) (emphasis added); \textit{see also} O.C.G.A. § 13-10-2(a)(5) which defines "subcontractor" as "a person other than an owner having a direct contract with the contractor." O.C.G.A. § 13-10-2(a)(5) (Supp. 1995) (emphasis added).
\end{footnotes}
connection with the project. Cody Mechanical failed to pay for the materials, and a lawsuit was filed on the payment bond. Summary judgment was granted to Bowen & Watson and its surety from which the plaintiff, Devore & Johnson, appealed.\textsuperscript{130}

On February 24, 1993, upon inquiry from Bowen & Watson concerning certain invoices that Cody Mechanical had prematurely submitted to the contractor for payment, Devore & Johnson informed Bowen & Watson that Cody Mechanical had not been current in making payments on past invoices. Bowen & Watson requested a list of unpaid invoices for other projects due from Cody Mechanical. Devore & Johnson sent a certified letter dated March 16, 1993, to Bowen & Watson advising the company of the remaining past due balances owed by Cody Mechanical on three separate projects involving Bowen & Watson.\textsuperscript{131} The letter stated:

[w]e have worked closely with Phillip Cody in an effort to bring these accounts to a current basis. We regret the necessity of informing Bowen & Watson Construction Company but obviously, the size of the account has a definite affect on our own financial structure. The situation has become progressively worse in recent months. We would like very much to meet with both you and Philip in an effort to reach a satisfactory solution.\textsuperscript{132}

Cody Mechanical subsequently filed for liquidation in bankruptcy.\textsuperscript{133}

The court held that the letter sent to Bowen & Watson, including the name of the party to whom the materials were furnished and computations of outstanding balances on several projects, constituted notice under the Georgia Little Miller Act despite the fact the letter did not specify that it was sent for the purpose of providing Bowen & Watson with notice pursuant to the statute.\textsuperscript{134} The liberal construction

\textsuperscript{130.} Id. at 63, 453 S.E.2d at 68.  
\textsuperscript{131.} Id.  
\textsuperscript{132.} Id., 453 S.E.2d at 68-69.  
\textsuperscript{133.} Id., 453 S.E.2d at 69.  
\textsuperscript{134.} Id. at 64, 453 S.E.2d at 69. O.C.G.A. § 36-82-104(b)(2) provides:

Any person having direct contractual relationship with a subcontractor, but no contractual relationship express or implied with the contractor furnishing such payment bond or security deposit on a public work where the contractor has complied with the Notice of Commencement requirements in accordance with subsection (f) of this Code section, shall have the right of action on the payment bond or security deposit, provided such person shall, within 30 days from the filing of the Notice of Commencement or 30 days following the first delivery of labor, material, machinery, or equipment, whichever is later, give to the contractor a written Notice to Contractor setting forth:

(A) The name, address, and telephone number of the person providing labor, material, machinery, or equipment;
accorded the Little Miller Act due to its remedial nature\textsuperscript{135} allowed the court to conclude that the intent of the letter was to inform the contractor that the supplier was looking to the contractor for payment of the subcontractor's bill, and, therefore, proper notice of claim had been made within the time period required of a subcontractor not in direct privity with the contractor.\textsuperscript{136}

B. Sureties

**Breach of Completion Contract.** While Amwest Surety Insurance Co. v. RA-LIN & Associates, Inc.\textsuperscript{137} involves a public works bond, the issues involved in that case pertain to general surety law. Amwest Surety Insurance Company brought suit against RA-LIN & Associates and RA-LIN's insurer, St. Paul Fire & Marine Insurance Company, alleging that RA-LIN refused to proceed with completion of a construction project for low income housing owned by the Housing Authority of the City of Granville, Georgia.\textsuperscript{138} Amwest was the surety on payment and performance bonds offered on the project to Dennis Welding Construction Company, the original contractor on the project. Dennis Welding Construction defaulted, and the Housing Authority called on Amwest Surety to complete performance.\textsuperscript{139} Amwest Surety determined to rebid the project for completion by another contractor.\textsuperscript{140}

Rebid documents were prepared by Surety and Construction Consultants, Incorporated, which had performed a survey of the project to determine the scope of what was left to be done. Five potential bidders were mailed bid packages, and on May 28, 1991, Surety and Construction Consultants held a prebid conference to discuss the bid documents with the potential bidders. Surety and Construction Consultants understood that the Housing Authority would not accept a completion

\begin{itemize}
\item[(B)] The name and address of each person at whose instance the labor, material, machinery, or equipment is being furnished;
\item[(C)] The name and the location of the public work; and
\item[(D)] A description of the labor, material, machinery, or equipment being provided and, if known, the contract price or anticipated value of the labor, material, machinery, or equipment to be provided or the amount claimed to be due, if any.
\end{itemize}


136. 216 Ga. App. at 64, 453 S.E.2d at 69.
138. Id. at 526-27, 455 S.E.2d at 107.
139. Id. at 527, 455 S.E.2d at 107.
140. Id.
contract if the Housing Authority were named as a party in the contract. A question was asked at the conference by RA-LIN concerning the identity of the other contracting party to the completion contract. Due to an ongoing lawsuit between Amwest and RA-LIN in an unrelated matter, RA-LIN preferred to contract directly with the Housing Authority and not Amwest Surety. Surety and Construction Consultants told RA-LIN that the successful bidder would contract directly with the Housing Authority. The “Invitation to Bid” contained in part the following two provisions relating to time:

The successful bidder will be notified no later than five (5) days after the bid opening and will be expected to immediately enter into the construction contract. The successful bidder will only begin operations upon receipt of a notice to proceed. The notice to proceed will set the date at which the contract time will commence . . . . All bids will be regarded as valid and in full force for 60 calendar days after receipt of bids.

The contract also contained language above the bidder’s signature language indicating that the bid would remain valid and available for acceptance sixty calendar days from the bid date. The “scope of work” terms provided that the successful bidder would be completing a contract for Amwest Surety and the Housing Authority. The proposed form of agreement contained in the bid documents indicated that the form of agreement was that which Amwest Surety and the Housing Authority anticipated entering with the successful bidder. The instructions also indicated that the successful bidder could be required to enter into a contract with either Amwest Surety or with the Housing Authority alone. But, in either case, the form of agreement itself would not be grounds for the completion contractor to refuse to enter into a contract as long as the actual completion contract used conformed to the form agreement. The suggested form agreement named Amwest Surety and the completion contractor as the only parties to it.

Only two bids were submitted on the project and on June 4, 1991, it was determined that RA-LIN’s bid was the lowest. RA-LIN’s bid was accepted by Amwest Surety and on June 7, 1991, a draft completion agreement was provided to RA-LIN which RA-LIN did not execute and did not return. RA-LIN advised Surety and Safety Consultants that RA-LIN was not willing to enter into a contract directly with Amwest Surety.

141. Id. at 528, 455 S.E.2d at 107.
142. Id., 455 S.E.2d at 108.
143. Id.
144. Id.
but would deal directly with the Housing Authority. Summary judgment was entered in favor of RA-LIN because no contract resulted due to the conduct of Amwest Surety. Amwest Surety appealed.

Amwest Surety contended that it had sixty days within which to accept the bid because the contract provided that the bid remain open for that period of time; however, the bid instructions also indicated that Amwest Surety had to accept the bid within five days of opening. Amwest Surety did not accept within the requisite time period.

Accordingly, RA-LIN’s bid was revocable before acceptance as no consideration was offered to keep it open the entire sixty day period. The trial court found the invitation to bidders ambiguous in this regard and construed it strictly against the drafter, Amwest Surety.

Amwest Surety also contended that a binding contract was formed within five days when its agent transmitted a proposed completion contract to RA-LIN, but the court of appeals concluded no contract was entered between the parties by that date and the transmission did not bind RA-LIN. As the parties did not have a meeting of the minds concerning the essential elements to the contract, including who the signatory would be, no contract was formed or enforceable.

VII. ARBITRATION

A. Compelling Arbitration and Staying Judicial Proceedings


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145. Id. at 528-29, 455 S.E.2d at 108.
146. Id. at 529, 455 S.E.2d at 108-09.
147. Id. at 529-31, 455 S.E.2d at 108-10.
148. Id. at 530, 455 S.E.2d at 109.
149. Id. at 531, 455 S.E.2d at 110.
150. Id. at 530, 455 S.E.2d at 109.
151. Id.
tion, H. J. Russell Construction filed a motion to dismiss the action, and Pace Construction Company filed a motion to dismiss or in the alternative for summary judgment. The motion to stay judicial proceedings was granted and all other motions denied, from which appeals were taken.\footnote{153}

The court overruled \textit{Bartlett v. Dimension Designs},\footnote{154} which had stated that an order directing arbitration was directly appealable.\footnote{155} The court held that an appeal could only be brought under the rules governing interlocutory appeals and, because those procedures were not followed, the appeals were properly dismissed for lack of jurisdiction.\footnote{156}

Even so, it is not required that an interlocutory appeal be made, as the court of appeals held in \textit{Bishop Contracting Co., v. Center Bros., Inc.}\footnote{157} In that case, the general contractor's attempt to stay proceedings and enforce an arbitration clause was denied. Subsequent to the entry of judgment in favor of a subcontractor for the collection of extra work orders, the general contractor appealed.\footnote{158} While the Georgia Supreme Court has determined that motions pertaining to pending arbitration may have significant consequences and has recommended that trial courts certify such orders for immediate appeal under interlocutory procedures, this decision did not require that an aggrieved party make an interlocutory appeal or risk waiving the issue.\footnote{159}

\textbf{Claims Barred by Res Judicata.} In \textit{Centex-Rodgers Construction Co. v. City of Roswell},\footnote{160} Centex-Rodgers contracted with the City of Roswell for the construction of a municipal complex. McCann Steel Company was a subcontractor for structural steel work. Centex-Rodgers sued McCann for delay damages caused by problems with the structural steel, and McCann counterclaimed for delay damages and additional costs related to defective plans prepared by the City of Roswell's architects.\footnote{161}

McCann Steel Company moved to enforce the arbitration clause. The trial court ordered Centex-Rodgers to file a demand for arbitration for the use and benefit of McCann Steel Company against the City of

\footnotesize{\textit{Id.} at 438-39, 450 S.E.2d at 828.}\footnote{153}

\footnotesize{\textit{Id.} at 805-06, 445 S.E.2d at 782.}\footnote{159}

\footnotesize{\textit{Id.} at 438-39, 450 S.E.2d at 829.}\footnote{154}


\footnotesize{215 Ga. App. at 439, 450 S.E.2d at 829. See O.C.G.A. § 5-6-34(a)(4) (1995).}\footnote{156}

\footnotesize{215 Ga. App. at 439-40, 450 S.E.2d at 829.}\footnote{156}

\footnotesize{213 Ga. App. 804, 445 S.E.2d 780 (1994).}\footnote{157}

\footnotesize{\textit{Id.} at 804, 445 S.E.2d at 781.}\footnote{158}

\footnotesize{\textit{Id.} at 805-06, 445 S.E.2d at 782.}\footnote{159}

\footnotesize{\textit{Id.} at 30, 449 S.E.2d at 631 (1994).}\footnote{160}

\footnotesize{\textit{Id.} at 30, 449 S.E.2d at 632.}\footnote{161}
Roswell and to assist McCann Steel in good faith in its presentation of the pass-through claim. Centex-Rodgers filed a demand for arbitration against the City of Roswell as instructed.\(^\text{162}\)

One year before, Centex-Rodgers had filed a demand for arbitration against the City of Roswell, including claims on its own behalf as well as those on behalf of other subcontractors, but excluding McCann Steel Company. The earlier demand did not include any claim by Centex-Rodgers for delay damages against the City of Roswell. On December 6, 1991, the arbitration panel awarded damages to Centex-Rodgers and three of its subcontractors, which the City of Roswell paid.\(^\text{163}\)

After Centex-Rodgers filed its second demand for arbitration for the use and benefit of McCann Steel Company as instructed by the court, in February, 1992 the City of Roswell filed an action seeking to enjoin that arbitration. On September 24, 1992, the trial court granted Centex-Rodgers' motion to compel arbitration and required that all remaining issues be arbitrated, including the City of Roswell's claim of waiver. Centex-Rodgers did not file any claims in the pending arbitration on its own behalf.\(^\text{164}\)

The arbitrator determined that Centex-Rodgers' right to arbitrate had not been waived and that the pass-through claim of McCann Steel for extra work and delay could proceed. On September 21, 1993, the arbitrator entered a consent order adopting a settlement agreement entered between McCann Steel and the City of Roswell which provided that the City of Roswell would pay McCann Steel eighty-thousand dollars and that the City of Roswell would issue to Centex-Rodgers, for the use and benefit of McCann Steel, a time extension of 150 days.\(^\text{165}\)

The City of Roswell and McCann Steel filed motions in their respective superior court actions to confirm the arbitrator's award. Subsequently, Centex-Rodgers filed motions to compel further arbitration, contending that the settlement agreement created a new cause of action for Centex-Rodgers because of the City's admission of its liability for delay. The trial court determined that Centex-Rodgers' claims were barred by the doctrine of res judicata from which appeal was taken.\(^\text{166}\)

The court held that all of the facts constituting Centex-Rodgers' cause of action for delay against the City of Roswell or McCann Steel Company existed, at the latest, by the completion of the construction of the complex. Centex-Rodgers sought to use the settlement agreement

\(^{162}\) Id. at 30-31, 449 S.E.2d at 632.
\(^{163}\) Id. at 31, 449 S.E.2d at 632.
\(^{164}\) Id.
\(^{165}\) Id., 449 S.E.2d at 632-33.
\(^{166}\) Id., 449 S.E.2d at 633.
between the City of Roswell and McCann Steel to establish the City of Roswell's liability for those delay damages;\textsuperscript{167} however, an admission of liability does not in and of itself create a cause of action but is merely evidence in the existing cause of action.\textsuperscript{168} By not filing its delay claim against the City of Roswell pursuant to the trial court's order of September 24, 1992, Centex-Rogers was precluded from bringing it in a subsequent arbitration.\textsuperscript{169} Moreover, the settlement agreement between the City of Roswell and McCann Steel, to which Centex-Rogers was a pass-through party, affected Centex-Rogers' rights as a participant, even though it chose not to present its own claims against McCann Steel in that arbitration.\textsuperscript{170} Accordingly, the court of appeals affirmed that all claims of Centex-Rogers were barred by the doctrine of res judicata.\textsuperscript{171}

B. Procedure Under the Arbitration Code

Discovery Not Permitted in Confirmation Proceeding. In Fuller Enterprises, Inc. v. Hardin Construction Group, Inc.,\textsuperscript{172} Fuller Enterprises appealed from the trial court's ruling denying its motion for protective order in an arbitration confirmation proceeding against Hardin Construction Group. Fuller had been awarded damages in an arbitration proceeding and had filed an application for confirmation of the award in the superior court. Hardin Construction filed an answer with affirmative defenses and served discovery requests upon Fuller Enterprises.\textsuperscript{173}

The court of appeals reasoned by way of analogy that an arbitration confirmation proceeding is similar to a foreclosure confirmation proceeding.\textsuperscript{174} The supreme court had previously held that foreclosure confirmations were not civil suits within the ordinary meaning of that term under the Civil Practice Act.\textsuperscript{175} The court of appeals noted that the arbitration code provided that an application for confirmation of an award would be made by motion and would be heard in the manner provided by law and the rules of court concerning the making of motions,

\textsuperscript{167} Id. at 32, 449 S.E.2d at 633.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{173} Id. at 549, 451 S.E.2d at 483.
\textsuperscript{174} Id. at 550, 451 S.E.2d at 484.
even though the motion would be filed and served in the same manner as a complaint in a civil action. The court further held that while an arbitration award confirmation proceeding is a special statutory proceeding, it is not a civil suit in the ordinary meaning of that term but in the nature of a summary proceeding. Allowing discovery prior to a trial court's consideration of a motion in the summary proceeding would serve only to delay a prompt disposal of the confirmation as the code envisioned.

Defective Notice Not Prejudicial. In Goodrich v. Southland Homes Corp., Goodrich appealed from a trial court's confirmation of an arbitration award against her in an action initiated by Southland Homes Corporation. Goodrich contended in part that the trial court's confirmation of the award was improper because the demand for arbitration had failed to notify Goodrich of a right to seek a stay of arbitration as required by O.C.G.A. section 9-9-6(c)(3). An award may be vacated if the court finds that the rights of a party were prejudiced by the failure of any other party to follow the procedures of the arbitration code, unless the party continues with the proceeding without notice of the failure and without objection. While Goodrich had notice of the arbitration proceeding, she participated in the proceeding without objection, and therefore, no harm resulted to her

176. 215 Ga. App. at 550, 451 S.E.2d at 484. See O.C.G.A. § 9-9-4(a)(2) which provides: “All applications shall be by motion and shall be heard in the manner provided by law and rule of court for the making or hearing of motions, provided that the motion shall be filed in the same manner as a complaint in a civil action.” O.C.G.A. 9-9-4(a)(2) (Supp. 1995).
177. 215 Ga. App. at 550, 451 S.E.2d at 484.
178. Id. at 550, 451 S.E.2d at 484.
180. Id. at 790-92, 449 S.E.2d at 155-56. O.C.G.A. § 9-9-6(c)(3) provides as follows: A party may serve upon another party a demand for arbitration. This demand shall specify: ... (3) That the party served with a demand shall be precluded from denying the validity of the agreement or compliance therewith or from asserting limitation of time as a bar in court unless he makes application to the court within 30 days for an order to stay arbitration . . . . O.C.G.A. § 9-9-6(c)(3) (Supp. 1995).
181. 214 Ga. App. at 792, 449 S.E.2d at 156. O.C.G.A. § 9-9-13(b)(4) provides as follows: (b) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by: . . . (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection. O.C.G.A. § 9-9-13(b)(4) (Supp. 1995).
from her failure to make an application for an order to stay arbitration, and, without prejudice, confirmation of the award was proper.\textsuperscript{182}

C. Scope of Arbitrator’s Authority

**Disputes Outside the Scope of Construction Contract.** In *Goodrich*, Goodrich also contended that the scope of the agreement to arbitrate limited the scope of the arbitrator’s powers to construction disputes alone under the construction agreement.\textsuperscript{183} The arbitration code limits the powers of arbitrators to those disputes which the parties have agreed in writing to arbitrate.\textsuperscript{184} The arbitrator then was without authority to arbitrate any issue relating to the conveyance of property, but could arbitrate those disputes arising out of the construction contract.\textsuperscript{185}

\textsuperscript{182} 214 Ga. App. at 792, 449 S.E.2d at 156.
\textsuperscript{183} Id. at 790-91, 449 S.E.2d at 155.
\textsuperscript{184} Id. See O.C.G.A. § 9-9-2(c) which states:
\begin{enumerate}
\item This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply:
\item Agreements coming within the purview of Article 2 of this chapter, relating to arbitration of medical malpractice claims;
\item Any collective bargaining agreements between employers and labor unions representing employees of such employers;
\item Any contract of insurance, as defined in paragraph (1) of Code Section 33-1-2;
\item Any other subject matters currently covered by an arbitration statute;
\item Any loan agreement or consumer financing agreement in which the amount of indebtedness is $25,000.00 or less at the time of execution;
\item Any contract for the purchase of consumer goods, as defined in Title 11, the “Uniform Commercial Code,” under subsection (1) of Code Section 11-2-105 and subsection (1) of Code Section 11-9-109;
\item Any contract involving consumer acts or practices or involving consumer transactions as such terms are defined in paragraphs (2) and (3) of subsection (a) of Code Section 10-1-392, relating to definitions in the “Fair Business Practices Act of 1975”;
\item Any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement. This exception shall not restrict agreements between or among real estate brokers or agents;
\item Any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement;
\item Any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort.
\end{enumerate}
\textsuperscript{185} O.C.G.A. § 9-9-2(c) (Supp. 1995).
Avoiding Contractual Terms. In *Amerispec Franchise v. Cross*, Amerispec Franchise sought to vacate an arbitration award under the arbitration code. Amerispec Franchise contracted to perform a home inspection on behalf of the Crosses. The agreement contained an arbitration clause and a limit of liability clause which provided as follows: "[O]ur liability to you is limited to the fee paid for our inspection services and you release us from any additional liability."

The arbitrator awarded the Crosses $25,888 plus interest to accrue after thirty days at eight percent annually. The superior court vacated the award and ordered a rehearing, but only on the issue of the rate of interest established by the arbitrator. Amerispec Franchise argued on appeal that the arbitrator either erred in his interpretation of the agreement or in allowing the Crosses to rescind the inspection agreement and sue for fraud in the inducement. The superior court found that the award reflected that the limitation of liability clause was deemed void by the arbitrator and concluded the arbitrator did not overstep his authority in doing so.

Both parties indicated that the arbitrator most likely applied O.C.G.A. section 13-8-2(b) to their agreement rendering the limitation of liability clause void. The court of appeals found that the arbitrator’s determination on this question was not so clearly erroneous that it implicated "the very integrity of the arbitrator in the exercise of his authority." An arbitrator’s decision must be upheld unless it is completely irrational or constitutes a manifest disregard of the law. The application of the exculpatory clause of limitation found in O.C.G.A. section 13-8-2(b) had not been previously addressed in a reported decision at the time the arbitrator made the award; therefore, by voiding the limitation of

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187. *Id.* at 669, 452 S.E.2d at 189. Even though it was Amerispec Franchise which sought to vacate the award, and the award was in fact vacated, Amerispec Franchise was still the appellant before the court of appeals due to the limited nature of the vacation of the award.
188. *Id.*
189. *Id.*
190. *Id.* at 669-70, 452 S.E.2d at 189-90.
191. *Id.* at 670, 454 S.E.2d at 190. O.C.G.A. § 13-8-2(b) provides in pertinent part that certain exculpatory clauses in agreements are unenforceable “relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances.” O.C.G.A. § 13-8-2(b) (1982 & Supp. 1995).
193. *Id.* (quoting Bartlett v. Dimension Designs, 195 Ga. App. 845, 848, 395 S.E.2d 64 (1990)).
liability clause, the arbitrator had not necessarily overstepped his authority.¹⁹⁴

VIII. CONCLUSION

The survey period showed a broadening of the rights of bond claimants under Georgia’s Little Miller Act and the imposition of obligations upon purchasers of construction-related products to go behind test results offered as proof of performance characteristics of those products. Both changes could have far-reaching ramifications to construction claimants, and it will be interesting to see whether the appellate courts devise any limitations upon the rights and obligations that seemingly have been created.

¹⁹⁴ Id.