Mercer Law Review

Volume 47
Number 1 *Annual Survey of Georgia Law*

Article 10

12-1995

# Real Property

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This Article surveys case law and legislative developments in the Georgia law of real property for the period June 1, 1994, to May 31, 1995. The authors do not endeavor in this Article to comment upon every case or statute that touches on the law relating to real property. Instead, this Article is intended to provide practitioners with a convenient guide which focuses on developments of some significance, either by virtue of clarification of the law in a confused area or by its substantial effect on the practice generally.

## I. LAND LINES AND BOUNDARIES

The appeal in *Purcell v. C. Goldstein & Sons, Inc.*,[1] arose out of a long-standing dispute between the parties concerning the correct line dividing their respective properties.[2] Goldstein & Sons, Inc. ("Goldstein") and Purcell own adjacent parcels of real property in Baldwin County.[3] The civil action, which is the subject of the current appeal,

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1. 264 Ga. 443, 448 S.E.2d 174 (1994).

2. *Id.* at 443, 448 S.E.2d at 174. Incredibly, the dispute between the parties in this case dates back to at least March 1981. *See* Purcell v. C. Goldstein & Sons, Inc., 166 Ga. App. 547, 548, 305 S.E.2d 10, 12-13 (1983) (stating that a processioning proceeding was held in the Probate Court of Baldwin County in early 1981).

3. 264 Ga. at 443, 448 S.E.2d at 174 (case tried in Baldwin County Superior Court).

began when Goldstein filed an action "seeking establishment of the correct property line, a declaration that [Purcell's] house encroached on [Goldstein's] property, and an injunction against [Purcell's] continued encroachment on [Goldstein's] property."[4] After a full trial, the jury found in favor of Goldstein with regard to the location of the property line and found that Purcell's house encroached on Goldstein's property. However, the jury also requested that Purcell be permitted to keep his house where it was. The trial court entered a judgment based on the jury's verdict, which included a statement that Purcell was permitted "to keep the house where it was as a 'permissive encroachment.'"[5]

Purcell appealed the trial court's decision, asserting two enumerations of error. First, he argued that the court improperly admitted evidence without which there would have been no support for the judgment. Specifically, Purcell argued that a plat prepared by Goldstein's surveyor was inadmissible because it failed to meet the technical requirements of the Official Code of Georgia Annotated ("O.C.G.A.") section 15-6-67.[6] The court rejected the argument and found that the requirements contained in O.C.G.A. section 15-6-67 related only to the recordation of plats and not to their admissibility as evidence in court proceedings.[7] The court found that a plat's failure to meet the requirements for recordation had no effect on the admission of the plat for purposes of illustrating "other competent testimony regarding the boundar[ies]" shown on that plat; it simply means that the plat is not "presumptive evidence" of its contents.[8]

Purcell also argued that the trial court's judgment conflicted with the intent of the jury's verdict because the "injunction as worded will not permit [Purcell] to go onto [Goldstein's] property to maintain the portion of the structure which encroaches on [Goldstein's] property." Purcell argued that an easement allowing him to maintain his house was implied in the jury's verdict.[9] The court rejected that argument and concluded that the jury did not grant Purcell an easement, but had granted him only an indulgence "notwithstanding his illegal encroachment on [Goldstein's] property."[10]

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4. *Id.*

5. *Id.*

6. *Id.* at 444, 448 S.E.2d at 175. O.C.G.A. § 15-6-67 sets forth the specifications for maps and plats that are recorded in official land records in Georgia. The size of the maps and plats, the size of the typeface on them, the requirements for captions, and the data that must be included are all contained in that Code section. O.C.G.A. § 15-6-67(b) (1994).

7. 264 Ga. at 444, 448 S.E.2d at 175.

8. *Id.*

9. *Id.* at 444-45, 448 S.E.2d at 175.

10. *Id.* at 445, 448 S.E.2d at 175.

The Supreme Court's affirmation of the trial court's verdict in *Purcell* is important because of the statement concerning the evidentiary effect of a map or plat that is not drawn in proper form for recording. The court's opinion indicates that evidence in the form of a properly drawn and recorded plat creates an evidentiary presumption that the items depicted on it are correct. Further, even a non-recordable plat is relevant evidence that may be used to support other testimony concerning the land depicted in the plat.[11]

The dispute in *Phelps v. Huff*[12] revolved around the location of a boundary line between two adjoining land lots. The boundary had been drawn in two different locations by various surveyors. The two properties at issue were originally part of a 275-acre farm owned by F.N. Carter ("Carter"). In 1954, Carter divided the farm among his seven children, with each child receiving one forty-acre Land Lot. Sarah Stubbs received Land Lot 98 ("Lot 98"), and Endicott received Land Lot 97 ("Lot 97"), which adjoined Lot 98 to the west.[13]

In 1957, at the request of Endicott and Stubbs, Robinson surveyed Lots 97 and 98. While present on the two properties to conduct his survey, Robinson showed Endicott and Stubbs iron pins which he had set indicating the corners and mid-point of the line forming the common boundary between Lots 97 and 98. Robinson testified that both Endicott and Stubbs agreed that the iron pins he set were placed along the true boundary between their two properties.[14] At various times over the next thirty years, the boundary between Lots 97 and 98 was resurveyed, and each time the boundary line was indicated as lying approximately thirty-five to forty-five feet east of the boundary drawn by Robinson, increasing the size of Lot 97 and decreasing the size of Lot 98.[15] Endicott sold the portion of Lot 97 which adjoined Lot 98 to the plaintiffs in this case; the Phelps, the Osbornes, and McElroy. Ms. Bill Huff is the daughter of Stubbs and owns the portion of Lot 98 adjacent to Lot 97.[16]

The actual dispute over the exact location of the boundary between Lots 97 and 98 began in 1988, when Huff's attorney wrote letters to the Phelpses, the Osbornes, and McElroy claiming the line drawn by Robinson was the correct boundary. Thereafter, Huff began preparations to build a fence along the boundary as marked by the line drawn by Robinson in 1957. Following a trial, the jury entered a verdict in favor

11. *See id.*
12. 214 Ga. App. 398, 448 S.E.2d 64 (1994).
13. *Id.* at 398, 448 S.E.2d at 65.
14. *Id.* at 399, 448 S.E.2d at 65.
15. *Id.* at 399-400, 448 S.E.2d at 66.
16. *Id.* at 400, 448 S.E.2d at 66.

of Huff, finding the location of the boundary line as that originally drawn by Robinson.[17]

On appeal, plaintiffs challenged several evidentiary decisions reached by the trial court and argued that a jury instruction given by the court constituted reversible error. Plaintiffs' first argument involved a letter written by Endicott in 1984 to a real estate agent in connection with Endicott's attempt to sell portions of Land Lot 97.[18] In that letter Endicott referred to the survey performed by Robinson in 1957 and stated that both she and Stubs "were present at the time of the survey and we both agreed with Robinson as to the property lines and accepted his survey as correct."[19] Both prior to trial and upon Huff's attempted introduction of the letter at trial, plaintiffs objected on the basis that the letter contained hearsay.[20] The court of appeals noted that O.C.G.A. section 24-3-13 allows the admission of "'[t]raditional evidence as to ancient boundaries and landmarks.'"[21] Therefore, the court of appeals concluded that the letter was properly admitted.[22]

Plaintiffs also objected to the admission at trial of opinion testimony from a land surveyor and real estate attorney. In response to direct questioning by Huff, Tibbets, a registered surveyor, testified that a surveyor has authority to establish a property line "'in the case of a new parcel—creating a new parcel of land.'"[23] Plaintiffs did not object to that testimony. In response to cross-examination questioning, Tibbets again testified that a "surveyor could establish for a property owner '[i]n the case of a subdivision or a property line agreement.'"[24] On redirect examination, Huff asked Tibbets if Robinson established the "common line between the adjoining landowners" based on the facts that no prior dividing line had been surveyed and that the property owners' acceptance of his survey was correct.[25] Plaintiffs finally objected to that question on the basis that it called for a legal opinion.[26]

The court of appeals noted that "'[w]here a party fails to object to certain inadmissible evidence, but later objects to substantially the same

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17. *Id.*
18. *Id.*
19. *Id.* at 399, 448 S.E.2d at 66.
20. *Id.* at 400, 448 S.E.2d at 66. In their pretrial motion, plaintiffs also argued that Endicott's letter violated former Ga. Code Ann. § 38-1603 (the "Deadman's statute"). However, that argument was not raised when the letter was introduced into evidence and was not argued on appeal. 214 Ga. App. at 400, 448 S.E.2d at 66.
21. 214 Ga. App. at 401, 448 S.E.2d at 66 (quoting O.C.G.A. § 24-3-13 (1995)).
22. *Id.* at 400, 448 S.E.2d at 67.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 401-02, 448 S.E.2d at 67.

evidence, the objection should be overruled because the failure to object the first time makes this harmless error.'"[27] Based on that principal, the court concluded that plaintiffs' failure to object to the prior questioning on the same point waived any objection they might have had with regard to the final statement by Tibbets.[28] The court also stated that Tibbets' opinion "was not a legal one but one of fact."[29] The court stated that Tibbets had testified from the viewpoint of an experienced surveyor and testified based on his knowledge and practice of the profession concerning the effect of an agreement between adjoining property owners. The court indicated that such testimony was a proper subject for expert opinion testimony.[30]

Plaintiffs also objected to testimony from Huff's attorney, Benson. Huff asked Benson a hypothetical question, asking him to state his opinion, as a lawyer, of the effect of the acquiescence of adjoining landowners in accepting a survey of the boundaries of their properties as correct.[31] The court of appeals found that "Benson's opinion 'as a lawyer' can only be interpreted as his opinion that this agreement would establish the line as a matter of law."[32] As noted by the court, that determination was the responsibility of the jury.[33] However, because the court instructed the jury that they were to determine the location of the property line under the legal theories of acquiescence or adverse possession and instructed the jury that they were to determine the credibility of the witnesses and weight of the evidence, the appellate court concluded that admission into evidence of Benson's opinion was harmless error.[34]

Finally, plaintiffs argued that the trial court should not have given Jury Charge Number 10 over their objection. The text of the jury charge at issue is as follows:

> [W]here the owners of adjoining property agree upon a line as dividing their property and they acquiesce in that line either by acts or by declarations, that line becomes the fixed boundary between the properties; whether it is the original land line makes no difference. The agreed upon line is the true line between them. Further, when an

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27. *Id.* at 402, 448 S.E.2d at 67 (quoting Steverson v. Hospital Auth., 129 Ga. App. 510, 514, 199 S.E.2d 881, 885 (1973)).
28. *Id.*
29. *Id.*, 448 S.E.2d at 68.
30. *Id.*, 448 S.E.2d at 67.
31. *Id.*, 448 S.E.2d at 68.
32. *Id.* at 403, 448 S.E.2d at 68.
33. *Id.*
34. *Id.*

> oral agreement is made and executed it is binding upon all purchasers of that land.[35]

The court of appeals found that the instruction was adjusted to the evidence and accurately stated the status of the law on the issues discussed.[36] Therefore, there was no error in giving that instruction to the jury.[37] Although the appeal in *Phelps* was decided mainly on evidentiary grounds, the holding in that case is significant for the concept embodied in the trial court's instruction to the jury.

## II. TITLE TO LAND

Plaintiff in *Hamil v. Stanford*,[38] Petrelia Hamil, and her husband Louie Hamil were divorced in 1977.[39] At that time, the marital home was titled in Mr. Hamil's name. The divorce decree required Mr. Hamil to make monthly mortgage payments on the house while Ms. Hamil and the couple's children were permitted to occupy the home. In the event the home was put up for sale, Ms. Hamil had a first right of refusal and was entitled to receive one-half of the profit derived the sale of the home.[40]

In 1990, Mr. Hamil sold the home to his secretary, Fay Stanford, and her husband.[41] Ms. Hamil filed suit against Mr. Hamil and against the Stanfords seeking to set aside the conveyance of the property. The Stanfords filed a counterclaim seeking damages and attorney fees based on Ms. Hamil's alleged interference with their right of enjoyment to the property.[42]

At the close of Ms. Hamil's evidence presented at trial, the Stanfords moved for entry of a directed verdict. In connection with that motion, the trial court found that the house was sold for a reasonable price, that there was no evidence that the Stanfords were aware of any restrictions on the sale of the property, and that, in any event, the Stanfords owed no duty to Ms. Hamil with regard to the property. Accordingly, the trial court concluded that the Stanfords were bona fide purchasers for value

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35. *Id.* at 404 n.3, 448 S.E.2d at 69 n.3.
36. *Id.* at 404, 448 S.E.2d at 69.
37. *Id.*
38. 264 Ga. 801, 449 S.E.2d 118 (1994).
39. *Id.* at 801, 449 S.E.2d at 119.
40. *Id.*
41. *Id.* The court's opinion noted that Mr. Hamil sold the property while Ms. Hamil was "imprisoned." *Id.*
42. *Id.* The Stanfords' claim against Ms. Hamil was based on O.C.G.A. § 51-9-1, which provides that "[t]he right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." O.C.G.A. § 51-9-1 (1982).

and granted their motion.[43] At the conclusion of the evidence, the trial court found in favor of the Stanfords on their counterclaim and in favor of Ms. Hamil against her ex-husband. Ms. Hamil appealed both the trial court's entry of directed verdict against her on her claim against the Stanfords and the order in favor of the Stanfords on their counterclaim.[44]

The supreme court stated, as a preliminary matter, that the verdict entered after a bench trial would not be disturbed if there was any evidence to support the findings.[45] Next, the court analyzed the testimony presented at trial and concluded that Mr. Hamil's and the Stanfords' testimony supported the verdict.[46] Accordingly, the court affirmed entry of a directed verdict against Ms. Hamil on her claim against the Stanfords.[47] The court did, however, reverse the judgment entered in favor of the Stanfords on their counterclaim.[48] The appellate court found that there was "no evidence [Ms. Hamil] ever interfered with the Stanfords' possessory interest in the realty."[49] In the absence of such evidence, the trial court had no basis for concluding that Ms. Hamil had violated the Stanfords' rights to enjoyment of their property.[50]

In *Smith v. Georgia Kaolin Co.*,[51] John Smith filed a petition to quiet title under O.C.G.A. sections 23-3-60 to 23-3-72 with regard to land located in Wilkinson County, Georgia.[52] The heirs of George Cobb (the "Heirs") intervened, and Georgia Kaolin Co. and Dry Branch Kaolin Co. also claimed an interest in the property. After discovery, the two kaolin companies moved for summary judgment, arguing that they were entitled to judgment as a matter of law because neither Smith nor the Heirs "had demonstrated ownership by instruments of title or prescription, while Dry Branch had been in possession of the disputed property since the petition was filed."[53] The trial court granted the kaolin

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43. 264 Ga. at 801-02, 449 S.E.2d at 119.

44. *Id.* at 801, 449 S.E.2d at 119.

45. *Id.* at 802, 449 S.E.2d at 119 (citing Safeway Ins. Co. v. Holmes, 194 Ga. App. 160, 390 S.E.2d 52 (1989)).

46. *Id.*, 449 S.E.2d at 120.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Further, because the supreme court concluded that the Stanfords were not "plaintiffs" entitled to judgment on their counterclaim, the award for attorney fees against Ms. Hamil was reversed. *Id.* at 802-03, 449 S.E.2d at 120 (citing Betallic, Inc. v. Deavours, 263 Ga. 796, 439 S.E.2d 643 (1994)).

51. 264 Ga. 755, 449 S.E.2d 85 (1994).

52. *Id.* at 755, 449 S.E.2d at 86.

53. *Id.*

companies' motions for summary judgment. Smith and the Heirs appealed.[54]

Before considering the merits of the appeal brought by Smith and the Heirs, the Georgia Supreme Court first commented on the purpose and interpretation of the Quiet Title Act of 1966[55] (the "Act").[56] The Act's stated purpose is to "'create a procedure for removing any cloud upon the title to land, . . . and for readily and conclusively establishing that certain named persons are the owners of all interest in land . . . .'"[57] The court also noted that, in addition to creating an alternative for other actions used to determine the status of title to real property, the Act relaxed the standards imposed upon plaintiffs bringing such actions.[58] Specifically, the Act eliminates the requirement that a plaintiff prove actual possession of the disputed property. However, the court concluded that in order to "withstand a motion to dismiss, a person must assert a claim of either current record title or current prescriptive title" to the disputed property.[59]

The court turned to the merits of this case and concluded that Smith demonstrated "by written instruments that disputed issues of material fact remain[ed] concerning his claim" under the Act notwithstanding his apparent failure to establish his possession of the property.[60] However, the court found that the Heirs had shown no claim of title to the disputed property.[61] Therefore, the court reversed the trial court's grant of summary judgment against Smith and affirmed the entry of judgment against the Heirs.[62] The decision in this case points out the difference in the prima facie elements between actions filed under prior law concerning the establishment of title to realty and those brought under the Act. Parties not in possession of the property at issue (like landlords) should be sure that their actions are based on the Act, thereby avoiding an elemental defect in their pleadings.

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54. *Id.*
55. O.C.G.A. § 23-3-60 (1982).
56. 264 Ga. at 755, 449 S.E.2d at 86.
57. *Id.* at 756, 449 S.E.2d at 86 (quoting O.C.G.A. § 23-3-60).
58. *Id.*
59. *Id.* (citing *In re* Rivermist Homeowners Ass'n, 244 Ga. 515, 518, 260 S.E.2d 897, 899 (1979)).
60. *Id.* at 757, 449 S.E.2d at 87.
61. *Id.*
62. *Id.*

The court in *Giddens v. Barrentine*,[63] settled a dispute between the Town of Enigma ("Enigma") and local property owners which arose out of an abandonment of a railroad right-of-way. In 1986, the Interstate Commerce Commission authorized CSX Transportation to abandon its railroad line in Berrien County. A portion of that railroad line ran through Enigma. The railroad executed a quit claim deed in favor of Enigma in 1989 which purported to grant to Enigma a portion of the railroad's right-of-way.[64]

In 1992, owners of property adjacent to the railroad's right-of-way filed suit against Enigma's Mayor and City Council members seeking a writ of ejectment, quiet title, and an injunction. The property owners based their claim on their status as successors-in-title to John Easters. In 1870, Easters had conveyed to the railroad's predecessor "'the right and title to run and build their railroad lot of land number 369.'"[65] The addendum clause in Mr. Easters' deed granted title to the railroad company "so long as they their successors and assigns shall maintain and use said road but to revert to the said party of the first party whenever the said road shall be abandoned."[66] The trial court granted summary judgment in favor of the adjacent property owners and against the town of Enigma, and Enigma appealed.[67]

The supreme court stated that the deed from Mr. Easters to the railroad's predecessor "indicates that the parties intended to establish a railroad right-of-way, either as an easement or a determinable fee."[68] Under either interpretation of the deed, the court concluded that the adjacent property owners held superior title to Enigma.[69] First, if the deed conveyed an easement, "the railroad company had no interest to convey to the town after abandoning its property in 1986."[70] On the other hand, if the deed conveyed a determinable fee, then "title to the right-of-way vested in the adjoining property owners" when the railroad abandoned the property in 1986.[71] Therefore, the court reversed the

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63. 264 Ga. 510, 448 S.E.2d 441 (1994). Another case involving the abaondonment of a railroad right-of-way was discussed in last year's survey. *See* T. Daniel Brannen, et. al., *Real Property*, 46 MERCER L. REV. 401, 422-24 (1994) (discussing Bridges v. City of Moultrie, 210 Ga. App. 697, 437 S.E.2d 368 (1993)).

64. 264 Ga. at 510-11, 448 S.E.2d at 442.

65. *Id.* at 511, 448 S.E.2d at 442.

66. *Id.* The fact pattern in *Giddens* is a fairly common one in right-of-way disputes.

67. *Id.*

68. *Id.*

69. *Id.* at 511-12, 448 S.E.2d at 443.

70. *Id.*

71. *Id.* There were actually two sets of property owners contesting Enigma's right to the property at issue—the owners of land in Land Lot 369 and the owners of land in Land

grant of summary judgment in favor of the property owners in Land Lot 370 and remanded for trial.[72] The decision in this case provides another example of the Georgia courts' literal interpretation of real property conveyance documents and serves as a warning to real estate attorneys of the importance of careful drafting.

The decision reached by the Georgia Court of Appeals in *Chicago Title Ins. Co. v. Investguard, Ltd.*,[73] resolved an issue of first impression in Georgia law relating to title to property. In 1988, Jack Jennings ("Jennings") purchased a tract of land with money borrowed from Investguard, Ltd. ("Investguard"). Jennings granted Investguard a deed to secure debt securing repayment of the loan. In connection with that transaction, Chicago Title Insurance Company ("Chicago Title") issued a title insurance policy in favor of Investguard. The policy insured against encumbrances on the property, defective title, lack of right of access, and unmarketability of title.[74]

Eventually, Jennings defaulted on his repayment obligations to Investguard, and Investguard foreclosed on the property. Later, Investguard discovered that portions of the property were located in a flood plain and that the property apparently lacked access to a public road. Thereafter, Investguard made a claim against Chicago Title under the title insurance policy. Chicago Title denied that it had any liability to Investguard under the terms of the policy and commenced an action seeking a declaration that the property had access to a public road and that the flood plain condition was not covered under the policy. Investguard counterclaimed against Chicago Title for breach of the insurance contract and for bad faith refusal to pay.[75] Chicago Title filed a motion for summary judgment. The trial court granted that motion as it related to the access issue, but denied the motion as it related to the flood plain issue. The trial court concluded that a genuine issue of fact remained concerning the marketability of the property due to its location in a flood plain. Both parties appealed.[76]

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Lot 370. The court's opinion contained no discussion with regard to the merits of the dispute between Enigma and the owners of land in Land Lot 370. However, at the end of its opinion, the court noted that "[b]oth the property owners and the town agreed that there remain issues that the trial court must resolve related to the property in Land Lot 370." *Id.* at 512, 448 S.E.2d at 443.

72. *Id.* at 512, 448 S.E.2d at 443.

73. 215 Ga. App. 121, 449 S.E.2d 681 (1994).

74. *Id.* at 121, 449 S.E.2d at 682.

75. *Id.* Investguard also brought an action against the lawyers involved in the loan transaction for legal malpractice. Jerry B. Marshall and his law firm were named by Investguard as counterclaim defendants. *Id.*

76. *Id.* at 122, 449 S.E.2d at 682.

The appellate court stated in its opinion that no Georgia court had previously addressed the issue of whether the fact that property is located in a flood plain renders title to that property unmarketable.[77] In order to decide the case, the court looked to decisions rendered in similar situations by courts in other jurisdictions. The court of appeals noted that those courts have found that "defects in the physical condition of . . . property . . . do not constitute unmarketability of title."[78] The court of appeals adopted the reasoning of other courts and stated that "[a]lthough location of part of the property in a flood plain my affect its market value, it does not affect the marketability of title to the property."[79] Accordingly, the court of appeals reversed the trial court's decision and found that Chicago Title was entitled to entry of judgment as a matter of law.[80]

The court of appeals also sided with Chicago Title on the issue of access to the property.[81] The property at issue in this case was separated from a public road by two other tracts that were formerly owned by Jennings. The deed for the first of the two tracts (the "Second Tract") described the property being conveyed by reference to a compiled plat.[82] That plat "showed two parallel lines beginning from the northern edge of the [S]econd [T]ract and extended across both that tract and the third tract into the subject property."[83] The plat also bore the designation "R/W" and contained a scale for determining dimensions depicted on the plat.[84] The deed out from Jennings with regard to the third tract "contained a reservation of a 60-foot-wide easement."[85] The court concluded that those notations, coupled with the existence and contents of the referenced plat, established access to the property as a matter of law.[86] Therefore, the court of appeals affirmed the trial court's decision granting summary judgment to Chicago Title with regard to the issue of access to the property.[87]

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77. *Id.*, 449 S.E.2d at 682-83.

78. *Id.*, 449 S.E.2d at 683 (citing Chicago Title Ins. Co. v. Kumar, 506 N.E.2d 154 (Mass. App. Ct. 1987); Title Trust Co. v. Barrows, 381 So. 2d 1088 (Fla. App. 1979); Hocking v. Title Ins. & Trust Co., 234 P.2d 625 (Cal. 1951); Sperling v. Title Guar. & Trust Co., 227 A.D. 5 (N.Y. 1929), *aff'd*, 170 N.E. 163 (N.Y. 1930)).

79. *Id.* at 123, 449 S.E.2d at 683.

80. *Id.*

81. *Id.* at 124, 449 S.E.2d at 683-84.

82. *Id.*, 449 S.E.2d at 683.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*, 449 S.E.2d at 683-84.

87. *Id.* at 125, 449 S.E.2d at 684. Marshall and his law firm had filed a motion for summary judgment at trial on the same bases as those asserted by Chicago Title and had

In *Thomas v. Garrett*,[88] an elderly woman ("Ms. Thomas") unsuccessfully attempted to have a deed she executed in favor of her niece set aside.[89] In the underlying transaction, defendants agreed to give Ms. Thomas three elements of consideration for the transfer of land—$50,300 in cash, $675 per month for the rest of her life, and the right to remain on the land in defendants' care during her life.[90] However, because the defendants planned to borrow $50,300 from a lending institution, the sales contract was drafted to reflect that element as the sole consideration for the conveyance.[91] The sale of the property took place under those terms. Ms. Thomas's right to continuing payments and to live on the property after the conveyance were reflected in a separate postclosing agreement which was formally executed by Ms. Thomas and defendants.[92]

The parties performed under the postclosing agreement for several months before Ms. Thomas moved off of the property. Thereafter, defendants continued to make payments as required under the postclosing agreement. Ms. Thomas filed an action against defendants seeking to cancel her deed to them.[93] She based her right to cancel the deed on the provisions of O.C.G.A. section 23-2-2, which allows the cancellation of deeds where there exists a "'[g]reat inadequacy of consideration, joined with great disparity of mental ability.'"[94] Ms. Thomas also sought to set aside the deed based on defendants' exercise of undue influence over her. The trial court directed the verdict against Ms. Thomas on her claim under O.C.G.A. section 23-2-2. The trial court also directed a verdict in favor of defendants on Ms. Thomas's claim that the deed should be set aside based on defendants' exertion of undue influence over her.[95]

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achieved similar results. Both Marshall and Investguard had appealed the trial court's decision, and those appeals proceeded at the same time as Chicago Title's appeal. *Id.* at 122, 449 S.E.2d at 682. The court of appeals found that its decision concerning the flood plain and access issues with regard to Chicago Title controlled the issues on appeal for Marshall and his law firm. *Id.* at 125, 449 S.E.2d at 684. Therefore, the court of appeals found that Marshall and his law firm were entitled to summary judgment against Investguard on its claims for breach of contract and malpractice. *Id.*

88. 265 Ga. 395, 456 S.E.2d 573 (1995).
89. *Id.* at 397-98, 456 S.E.2d at 575-76.
90. *Id.* at 395, 456 S.E.2d at 574.
91. *Id.* at 395-96, 456 S.E.2d at 574.
92. *Id.* at 396, 456 S.E.2d at 574.
93. *Id.* at 396-97, 456 S.E.2d at 575.
94. *Id.* at 397, 456 S.E.2d at 576 (quoting O.C.G.A. § 23-2-2 (1982)).
95. *Id.* at 395, 456 S.E.2d at 574.

The court of appeals affirmed the trial court's decision in all respects.[96] First, with regard to Ms. Thomas's claim that the deed should be cancelled based on defendants' undue influence, the court found that "there was no evidence that the deed has been executed by [Ms. Thomas] as a result of any undue influence exercised by [defendants]."[97] The court found that there was no evidence to support Ms. Thomas's argument that defendants were in a confidential relationship with her or that they had controlled her finances.[98]

Next, the court determined that Ms. Thomas had failed to establish either of the two elements required to set aside a deed under O.C.G.A. section 23-2-2. That code section permits a deed to be cancelled if there is a "'[g]reat inadequacy of consideration, joined with great disparity of mental ability.'"[99] The court stated that the evidence showed "that the fair market value of the farm greatly exceeded $50,300."[100] However, the court further noted that the cash consideration Ms. Thomas received for her conveyance of the land was not the sole consideration for the contract. Under the post-closing agreement, she also received an enforceable promise by the defendants to make $675 per month payments and care.[101] Additionally, the court noted that plaintiff executed an affidavit at the closing of defendants' purchase of the land "acknowledging that she was conveying her farm for less than its fair market value and she was doing so because of her 'natural love and affection' for [defendants]."[102] Based on those facts, the court concluded that Ms. Thomas had failed to show a great inadequacy of consideration.[103]

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96. *Id.* at 398, 456 S.E.2d at 576.

97. *Id.* at 397, 456 S.E.2d at 575.

98. *Id.*

99. *Id.*, 456 S.E.2d at 576 (quoting O.C.G.A. § 23-2-2).

100. *Id.* at 398, 456 S.E.2d at 576.

101. *Id.* In the first part of its opinion, the court addressed Ms. Thomas's argument that the postclosing agreement should not have been considered at trial. The court concluded that, notwithstanding the fact that there was no present consideration flowing from Ms. Thomas for defendants' execution of that agreement, the agreement was enforceable based on the parties' performance. In any event, Ms. Thomas could not avoid the effect of the agreement based on her own failure to provide consideration, and, as noted by the court, defendants were not seeking to avoid the agreement. *Id.* at 396-97, 456 S.E.2d at 575.

102. *Id.* at 398, 456 S.E.2d at 576. The court noted that "love and affection" may constitute valid consideration. *Id.* (citing Cannon v. Williams, 194 Ga. App. 808, 22 S.E.2d 838 (1942)). However, given the court's findings regarding the adequacy of other consideration, the issue of "love and affection" was not central to the court's decision.

103. *Id.*

The court also concluded that Ms. Thomas had failed to establish her claim regarding a disparity of mental ability between her and defendants. In that regard, the court found that while there was opinion evidence that a recent surgery and plaintiff's continuing medication could have had an effect on her mental capacity, "the actual witnesses to [plaintiff's] execution of the deed had no doubts as to her mental capacity."[104] Further, Ms. Thomas's personal physician examined her the day after the closing of the sale and found no indication of any mental incapacity. The court concluded that the evidence "was such as to demand a finding that [plaintiff] had sufficient mental capacity to execute the deed."[105]

## III. LANDLORD/TENANT AND DISPOSSESSION

There were several cases decided during the survey period in the law relating to the landlord-tenant which presented either interesting or important principles of law. First, in *Southern Trust Ins. Co. v. Center Developers, Inc.*,[106] the court of appeals clarified the law concerning the enforceability of contractual waivers of subrogation agreements contained in leases.[107] The entire argument concerning such waiver provisions related to their interplay with O.C.G.A. section 13-8-2(b). That code section provides that an agreement relating to a building (*e.g.*, a lease) that purports to indemnify or hold a party harmless against liability for damages arising out of damage to property caused by or resulting from the sole negligence of that party, its agents, or its employees is void and unenforceable as against public policy.[108]

*Southern Trust Insurance* involved appeals of decisions reached in nine different cases, all of which arose out of two fires which occurred at Loehmann's Plaza Shopping Center (the "Shopping Center") in Smyrna, Georgia. Plaintiffs in all nine cases were either tenants at the Shopping Center, owners of such tenants, or insurers of the tenants claiming under a right of subrogation. Defendants in the cases included the owner of the Shopping Center, the property management company of the Shopping Center, and the contractors responsible for maintaining the neon signs which allegedly caused the fires.[109]

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104. *Id.*
105. *Id.*
106. 217 Ga. App. 215, 456 S.E.2d 608 (1995).
107. *Id.* That issue was discussed in last year's survey. *See* T. Daniel Brannen, et. al., *Real Property*, 46 MERCER L. REV. 401, 417-20 (1994) (discussing Central Warehouse & Dev. Corp. v. Nostalgia, Inc., 210 Ga. App. 15, 435 S.E.2d 230 (1993)).
108. O.C.G.A. § 13-8-2(b) (1982 & Supp. 1995).
109. 217 Ga. App. at 215-16, 456 S.E.2d at 609.

After the close of discovery, the Shopping Center owner and its general partner moved for summary judgment on the basis of provisions contained in the various leases, in which the tenants purportedly waived any rights of parties claiming through them based on subrogation. The trial court granted those motions, and various plaintiffs appealed.[110]

The nine leases at issue in *Southern Trust Insurance* each contained one of three different waiver of subrogation clauses. Six of the leases contained the following waiver of subrogation provision:

> Each of the parties hereto waives any and all rights of recovery against the other . . . for loss of or damage to such waiving party or its property or the property of others under its control arising from any cause insured against under the standard form of fire insurance policy with all permissible extensions and endorsements covering additional perils or under any other policy of insurance carried by such waiving party in lieu thereof.[111]

Appellants in those six appeals argued that their leases did not "'bar subrogation because none of the leases required the tenants to purchase first-party property insurance.'"[112]

In making that argument, those appellants relied on the decision rendered in *Central Warehouse & Development Corp. v. Nostalgia, Inc.*[113] The court of appeals rejected that argument and found that issues raised by these six appellants were controlled adversely to them by the recent whole court opinion in *Glazer v. Crescent Wallcoverings, Inc.*[114]

In *Glazer* the court of appeals expressly disapproved language contained in *Central Warehouse & Development Corp.* which suggested

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110. *Id.* at 216, 456 S.E.2d at 609.

111. *Id.* at 217, 456 S.E.2d at 610.

112. *Id.*

113. 210 Ga. App. 15, 435 S.E.2d 230 (1993). In *Central Warehouse Development*, the court of appeals held that, absent a lease provision obligating a tenant to purchase and maintain fire insurance, an exculpatory provision purporting to relieve the landlord from liability for damages arising from its sole negligence is unenforceable. *Id.* at 17, 435 S.E.2d at 232.

114. 217 Ga. App. at 217, 456 S.E.2d at 610 (citing Glazer v. Crescent Wallcoverings, Inc., 215 Ga. App. 492, 493, 451 S.E.2d 509, 511 (1994)). The principal for which the court in *Southern Trust Insurance* cited *Glazer* was not the primary holding in that case. 215 Ga. App. 492, 451 S.E.2d 509 (1994). In *Glazer*, the tenant and landlord had agreed in a lease not to sue one another for negligence. The tenant suffered damage and sued third parties (not the landlord) for their part in causing those damages, and those third parties filed contribution actions against the landlord. The main issue before the court on appeal was whether the waiver of subrogation provision between the tenant and the landlord prevented the third parties from maintaining their contribution claims against the landlord. 215 Ga. App. at 494, 451 S.E.2d at 512.

"that an intent to shift the risk to the insurer could be expressed only by a separate mandatory insurance provision."[115] The court noted that the language in the six leases at issue in *Southern Trust Insurance* was "substantially identical" to the waiver of subrogation provision at issue in *Glazer*.[116] The court also noted that the waiver provisions at issue were clearly labeled as "waiver of subrogation clauses," clearly contemplated the existence of insurance, and "'*by their terms do not apply in the absence of insurance.*'"[117] For that reason, the court of appeals concluded that the waiver of subrogation provisions at issue in this case did not violate the requirements of O.C.G.A. section 13-8-2(b) and found that the trial court properly granted summary judgment to defendants.[118]

The text of the second waiver of subrogation provision at issue in *Southern Trust Insurance* is as follows:

> Landlord and Tenant agree that in the event the Demised Premises or its contents are damaged or destroyed by fire or any other cause recoverable by insurance maintained by either, the rights of either against the other with respect to such damage or destruction are hereby waived and released.[119]

Plaintiff subject to that waiver of subrogation provision argued that it did not prevent claims for losses beyond those covered by insurance.[120] The court agreed with plaintiff in *Southern Trust Insurance* and found that the trial court's grant of summary judgment was unauthorized.[121]

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115. 217 Ga. App. at 218, 456 S.E.2d at 610.

116. *Id.* at 217, 456 S.E.2d at 610.

117. *Id.* at 218, 456 S.E.2d at 610 (emphasis in original).

118. *Id.* Judge Smith dissented to the majority opinion with regard to these six leases. *Id.* at 223-25, 456 S.E.2d at 613-15 (Smith, J., dissenting). Judge Smith noted that each of the six leases at issue had a "loss and damage" clause as well as a waiver of subrogation provision. In those provisions, the tenant agreed to hold the landlord harmless "from liability based on claims of the tenant for damage to the tenant's property, *including subrogation claims by the tenant's insurance carrier, 'unless such damage shall be caused by the willful act or gross neglect of the landlord.*'" *Id.* at 224, 456 S.E.2d at 614 (emphasis in original). That contractual language, according to Judge Smith, created a question of fact regarding whether the damages claimed were the results of "gross neglect." *Id.* Judge Smith also noted that the "loss and damage" provisions in certain leases had been amended, and that those amendments also created issues of fact for determination by the jury. *Id.* at 225, 465 S.E.2d at 615.

119. *Id.* at 219, 456 S.E.2d at 611.

120. *Id.* This plaintiff was actually the parent corporation of a tenant whose property was destroyed.

121. *Id.* at 219-20, 456 S.E.2d at 611. Although the court did not expressly state the basis for its finding, the language in the lease "recoverable by insurance maintained by either [Landlord or Tenant]" likely was central to the courts' decision. That phrase indicates that the waiver was only effective to the extent of insurance coverage. *See id.* at

The court noted that the record on appeal was insufficient for the court to determine whether the insurance maintained by defendants covered the losses to plaintiffs' property.[122]

The final two leases at issue contained the following waiver of subrogation provision:

> Landlord shall not be liable to Tenant or any other person for any damage . . . to . . . property by reason of the failure of Landlord to perform any of its covenants or agreements hereunder, nor for such damage . . . caused by reason of any defect in the Premises now or in the future existing, nor for any damage . . . caused by any present or future defect in the plumbing, wiring, or piping in any part of the Shopping Center . . . , or for any damage arising from acts or negligence of other tenants or occupants of the Shopping Center.[123]

The tenant agreed to indemnify and hold the shopping center harmless from any losses "by reason of any damage . . . to property . . . ."[124] The tenant also agreed that it would, "at its expense, provide and maintain in force during the entire lease term public liability insurance with limits of coverage not less than fifty thousand dollars for property damage loss from any one accident . . . ."[125] The trial court, reading the tenant's obligation to provide insurance in connection with the agreement to indemnify and to hold the owner of the shopping center harmless, concluded that the parties had mutually released each other and that the tenant had waived any rights of subrogation.[126]

On appeal, plaintiffs, insurance companies of tenants claiming through subrogation, argued that the trial court failed to recognize "'the distinction between coverage under a liability policy and coverage under a property insurance policy.'"[127] The court of appeals agreed. The court noted liability insurance policies and property insurance policies insure against different types of risk.[128] The court stated that the tenant's agreement to maintain "public liability insurance" was intended to protect the landlord from "the 'noncontractual legal liability' claims of invitees or other third parties."[129] The court concluded that such an

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219-20, 456 S.E.2d at 611.

122. *Id.*

123. *Id.* at 220, 456 S.E.2d at 612.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 220-21, 456 S.E.2d at 612 (discussing the different risks insured against under the two types of policies).

129. *Id.* at 221, 456 S.E.2d at 612.

agreement was "not evidence that the landlord and tenant have agreed to exculpate each other and to look solely to insurance in the event of casualty to personal property . . . ."[130] Therefore, the court of appeals held that summary judgment was improperly granted against the insurers for their claims based on fire damage and alleged consequential business losses.[131]

The lesson to be learned from the holding in *Southern Trust Insurance* is that landlords and tenants alike must carefully review any lease provision that purports to shift the risk of loss between the parties. Practitioners representing landlords would be well advised to model any lease-based waiver of subrogation provision on the provision found enforceable in this case.

In *Mullis v. Shaheen*,[132] Billy Mullis, Bruce Love, and Love Enterprises, Inc. ("Lessees") entered into a five-year commercial lease with Doris B. Shaheen.[133] The lessees operated a business from the leased property and made monthly payments as required in the lease until the business was sold. The new owner of the business did not execute a new lease with Shaheen after the sale of the business. Thereafter, the tenant defaulted on its obligation to pay rent.[134]

The landlord filed suit seeking a writ of possession for the premises, a judgment for past due rent, and a judgment for rent that became due after the landlord regained possession during the remainder of the lease term. The trial court granted summary judgment against Mullis and Love in the principal amount of $37,500 plus attorney fees and postjudgment interest.[135]

Mullis appealed, arguing that the landlord was not entitled to recover rents that became due after she obtained a writ of possession and terminated the lease. The court of appeals rejected that argument, noting that while eviction of a tenant normally extinguishes the landlord's right to recover rent, Georgia law allows parties to a contract to agree differently.[136] The court of appeals noted the long-established rule in Georgia, "'Parties to a lease agreement may contract in advance to hold the lessee liable for rent even after an eviction, deducting therefrom only the amounts recovered by the lessor from reletting the

130. *Id.* In fact, the opposite is probably true; tenants often work quite diligently to include a carefully worded casualty provision in any lease.

131. *Id.*

132. 217 Ga. App. 277, 456 S.E.2d 764 (1995).

133. *Id.* at 277, 456 S.E.2d at 765.

134. *Id.* at 277-78, 456 S.E.2d at 765.

135. *Id.* at 277, 456 S.E.2d at 765.

136. *Id.* at 278, 456 S.E.2d at 765.

premises.'"[137] The court found the lessees clearly agreed to such an arrangement in this case, and the landlord was entitled to entry of judgment as a matter of law based on the plain language of the agreement.[138]

The decision in *Market Place Shopping Center v. Basic Business Alternatives, Inc.*[139] involved the effect of a landlord's violation of a lease provision which granted a tenant the exclusive right to operate a certain type of business on a property and identifies the measure of damages a tenant may recover upon such a breach. Basic Business Alternatives, Inc. d/b/a New Garden Bake Shop and Deli ("New Garden") signed a lease with Market Place Shopping Center (the "Owner") for the operation of a bakery and a deli.[140] The lease contained a provision in which the Shopping Center agreed not to rent space to another bakery or deli without New Garden's permission. Shortly after New Garden opened for business, the Owner secured Gorin's Gyro Wrap ("Gorin's") as a tenant in the Shopping Center. Gorin's menu included "specialty deli sandwiches."[141] Gorin's opened for business in March 1992, and from that time until New Garden ceased operating in June 1992, New Garden's sales declined sharply.[142]

New Garden filed an action against the Owner for breach of the exclusivity provision contained in the lease and sought a declaration that New Garden had no further obligations under the lease. The Owner filed a counterclaim seeking possession of the premises and the balance of the rent due under the lease.[143] The trial court, sitting as the trier of fact, concluded that the Owner violated the exclusivity provision by leasing space to Gorin's and entered judgment in favor of New Garden. The trial court also awarded the Owner rents which became due under the lease prior to April 1992. The Owner appealed.[144]

The appellate court affirmed the trial court's ruling in part and reversed it in part.[145] As a preliminary matter, the appellate court agreed that, by leasing to Gorin's, the Owner violated the exclusivity

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137. *Id.* (quoting Bentley-Kessinger, Inc. v. Jones, 186 Ga. App. 466, 467-68, 367 S.E.2d 317, 318 (1988)).

138. *Id.*

139. 213 Ga. App. 722, 445 S.E.2d 824 (1994).

140. *Id.* at 722, 445 S.E.2d at 825.

141. *Id.*

142. *Id.*

143. *Id.* Although it is not clear from the court's opinion, the Owner's claim likely included claims for rents due both before New Garden closed (in June 1992) and due thereafter until the end of the lease term.

144. *Id.* at 722-23, 445 S.E.2d at 826.

145. *Id.*

provision contained in the lease. The court of appeals interpreted the term "deli" according to its "usual and common signification."[146] The court found that a deli is "'a store where ready-to-eat food products [are] sold either to be taken out or eaten on the premises, as in sandwiches.'"[147] The court of appeals also agreed that New Garden had established a sufficient connection between the Owner's breach of the lease and New Garden's inability to pay rent. Therefore, the court concluded that the Owner's leasing of space to Gorin's excused New Garden's performance under the lease.[148]

On the other hand, the court of appeals reversed the award of damages to New Garden, finding that the trial court had applied an incorrect measure of those damages.[149] The court, quoting the decision reached in *Carusos v. Briarcliff, Inc.*,[150] stated that the appropriate measure of New Garden's damages was "'the difference in value between the plaintiff's leasehold with the covenant against competition unbroken and the same leasehold with the covenant broken.'"[151] In this case, New Garden only produced evidence of its investment in preparing the leased premises for use as a bakery and deli (i.e., the cost to build-out and equip the space, and the cost of obtaining supplies), but failed to produce any evidence regarding the diminution of the value of its leasehold.[152] Absent evidence of that kind, the court of appeals concluded that New Garden was not entitled to an award of damages.[153]

## IV. SALES CONTRACTS AND BROKERS

In *Bowers v. Greene*,[154] the court of appeals held that a jury would have to decide whether a sales broker was entitled to a commission when facts exist to show the owner prevented the broker from completing the sale of real property.[155] In early 1987, James Bowers and William Humphlett (the "Brokers") learned that the United States Postal

146. *Id.*

147. *Id.* (citing O.C.G.A. § 13-2-2 (1982)). The court noted that the definition of "deli" was drawn from a dictionary but did not indicate the exact source of that definition. *Id.* at 722, 445 S.E.2d at 826 (the trial court consulted a dictionary in defining the term).

148. *Id.* at 723, 445 S.E.2d at 826 (citing O.C.G.A. § 13-4-23 (1982 & Supp. 1995)).

149. *Id.*

150. 76 Ga. App. 346, 45 S.E.2d 802 (1947).

151. 213 Ga. App. at 723, 445 S.E.2d at 826 (quoting Carusos v. Briarcliff, Inc., 76 Ga. App. 346, 351, 45 S.E.2d 802, 806 (1947)).

152. *Id.*

153. *Id.*

154. 217 Ga. App. 468, 458 S.E.2d 150 (1995).

155. *Id.* at 470-71, 458 S.E.2d at 152.

Service (the "Postal Service") was interested in purchasing certain property located in eastern Cobb County. The Brokers contacted the owners of the property, Darryl Greene, Paul O. Owenby and Al Hallman, Jr. (the "Owners") concerning the possibility of a sale of their property to the Postal Service. The Owners and the Brokers entered into a listing agreement on February 19, 1987 which provided in part that Brokers would offer the property for sale to the Postal Service at $130,000 per acre and that if sale were consummated the Brokers would receive a ten percent commission. The listing agreement did not contain a termination date.[156]

The initial negotiations between the Brokers and the Postal Service did not produce a contract for sale of the property. After approximately eight months, the Postal Service notified the Brokers that its purchase of the property was being put "on hold."[157] Thereafter, the Owners instructed the Brokers to cease their contact with the Postal Service and informed them that the Owners' attorney would handle all future negotiations.[158]

In December 1990, the Postal Service contacted the Owners directly, and the Owners executed an offer to sell the property to the Postal Service for $110,000 per acre. The Brokers did not help negotiate that offer and did not learn about it until Spring 1991. After learning of the offer, the Brokers contacted Mr. Greene who told them "to do whatever [they] 'could to facilitate the sale.'"[159] During a meeting with the Brokers, Mr. Greene stated that "they 'had certainly done [their] duty and . . . that the real estate fee was due . . . ,' but that they need[ed] to contact Owenby."[160] Owenby told the Brokers that no commission was due.[161]

The Postal Service purchased the property on October 11, 1991, and the Brokers were not paid a commission. The Brokers sued the Owners for breach of contract and quantum meruit. The trial court granted the Owners' motion for summary judgment on the breach of contract claim, but denied that motion with regard to the quantum meruit claim, and both parties appealed.[162]

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156. *Id.* at 468-69, 458 S.E.2d at 151.
157. *Id.* at 469, 458 S.E.2d at 151.
158. *Id.*
159. *Id.*
160. *Id.* at 469-70, 458 S.E.2d at 151.
161. *Id.* at 470, 458 S.E.2d at 151.
162. *Id.*, 458 S.E.2d at 152.

The court of appeals reversed the trial court's order granting judgment against the Brokers' contract claim.[163] The court stated that because the Brokers were not the exclusive agent of the Owners in connection with the sale of the property, the Brokers

> were entitled to recover . . . commissions . . . only upon proof that they were the procuring cause of the [sale], which can be established by showing that negotiations for the sale were set on foot through their efforts, that they performed every service required by their employment which it was possible to perform, and that the failure on their part to personally consummate the trade was due to the interference of the [Owners].[164]

Construing the evidence most strongly against the Owners, the court concluded that three issues of fact remained to be decided by the jury: (1) Whether the sale to the Postal Service was consummated without further assistance from the Brokers as a result of the Owners' interference; (2) Whether the Brokers would have ultimately consummated the sale to the Postal Service but for the Owners' interference; and (3) Whether the sale was consummated within the reasonable time implied in the listing agreement between the Owners and the Brokers.[165]

However, the court of appeals agreed with the trial court's finding on the Owners' motion for summary judgment against the Brokers' claim for quantum meruit.[166] The record before the trial court supported a finding that the Owners engaged the Brokers to sell the property, that the Brokers informed the Postal Service that the property was available, that the Brokers submitted an offer to sell the property on behalf of the Owners, that the Brokers negotiated terms with the Postal Service and continuously met with Postal Service representatives concerning the surveying, appraisal, and rezoning of the property, and that the Owners accepted those services.[167] Under those circumstances, the jury must be "'allowed to decide whether [the Brokers are] entitled to any recovery in quantum meruit.'"[168]

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163. *Id.* at 470-71, 458 S.E.2d at 152.

164. *Id.* at 470, 458 S.E.2d at 152 (quoting Realty World & Co. v. Hooper Properties, 191 Ga. App. 773, 775, 383 S.E.2d 164, 167 (1989)).

165. *Id.* at 470-71, 458 S.E.2d at 152-53.

166. *Id.* at 471-72, 458 S.E.2d at 153.

167. *Id.* at 471, 458 S.E.2d at 153.

168. *Id.* (quoting Futch v. Guthrie, 176 Ga. App. 672, 673, 337 S.E. 384, 385 (1985)).

## V. FORECLOSURES

The court in *Mobley v. Commonwealth Mortgage Assurance Co.*[169] analyzed the interplay between the private mortgage insurance policies that are often required by lenders in connection with loans secured by real estate and O.C.G.A. section 44-14-161 relating to confirmation of foreclosure sales.[170] In that case, the appellants ("Mobley") borrowed $59,000 from a lender to purchase real property. In connection with the loan, the lender required that Mobley obtain a private mortgage insurance policy which "provided that in the event of default, [the insurer] would pay the lender thirty percent of the appellants' outstanding debt at the time of default, irrespective of any amount bid at the foreclosure sale."[171] Commonwealth Mortgage Assurance Company ("Commonwealth") issued the insurance policy (the "Policy") according to those terms. The Policy required Mobley to indemnify Commonwealth for any sum that Commonwealth had to pay the lender under the insurance policy.[172]

Mobley defaulted on the loan, and the lender foreclosed and purchased the property at the foreclosure sale. Without attempting to confirm the foreclosure sale, the lender made a claim against Commonwealth under the mortgage insurance policy. Commonwealth paid the lender $19,303 under the policy and then sought to recover that sum from Mobley pursuant to the indemnity provided in the Policy. Mobley defended that action, claiming that its indemnity agreement with Commonwealth was void as against public policy in that it sought to circumvent the requirements of O.C.G.A. section 44-14-161.[173] Mobley also asserted a third-party complaint against the lender for equitable subrogation. Mobley asserted the lender was unjustly enriched by obtaining both the property and the proceeds of the mortgage insurance policy. The trial court granted Commonwealth's motion for summary judgment and denied Mobley's motion for summary judgment on their third-party claims.[174] The court of appeals affirmed that ruling in an unpublished

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169. 264 Ga. 652, 450 S.E.2d 205 (1994).

170. *Id.* at 652, 450 S.E.2d at 205. *See* O.C.G.A. § 44-14-161 (1982).

171. 264 Ga. at 652, 450 S.E.2d at 205.

172. *Id.*

173. *Id.* at 653, 450 S.E.2d at 206. O.C.G.A. § 44-14-161 provides that "no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon." O.C.G.A. § 44-14-161(a).

174. 264 Ga. at 653, 450 S.E.2d at 206.

opinion, stating that the holding in *Turner v. Commonwealth Mortgage Assurance Co.* controlled the appeal.[175] The supreme court granted a writ of certiorari in order to decide the issues involved.[176]

The supreme court agreed with the court of appeals decision and held that Commonwealth's suit against Mobley did not violate the statute requiring confirmation of foreclosure sales before a deficiency judgment may be sought.[177] The court found that Mobley's liability to Commonwealth under the policy's indemnification provision arose independently of the debt Mobley owed to the lender and therefore did not constitute a "deficiency."[178] In reaching that decision, the court noted that the confirmation statute was in derogation of common law and that its language must be strictly construed.[179] Additionally, because the court found no evidence of any relationship between the lender and Commonwealth, there was no basis for the court to conclude that the issuance of the Policy "'constituted a deliberate subterfuge of the confirmation statute.'"[180]

Judges Benham and Hunstein dissented from the majority's decision in this case.[181] In their dissent, Judges Benham and Hunstein stated that the loan transaction and the issuance of the Policy were "inextricably intertwined."[182] Because of the close relationship between the two transactions, the dissenters believed that "public policy required that such an agreement not be enforced unless their compliance with the confirmation of sale statute and that indemnification would be limited to the actual loss suffered as a result of the foreclosure."[183] The dissenters concluded that the lender's requirement of mortgage insurance was simply another method of attempting to avoid the statutorily created judicial review of actions seeking deficiency judgments, and that the "scheme is, therefore, violative of the clear public policy of this state."[184]

The decision the court reached in *Mobley* may have a significant impact on the practice relating to real estate lending and foreclosures. Lenders will likely begin increasingly to require private mortgage

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175. *Id.* (citing Turner v. Commonwealth Mortgage Assurance Co., 207 Ga. App. 428, 428 S.E.2d 398, 398 (1993)).

176. See id. at 654, 450 S.E.2d at 207.

177. *Id.* at 653, 450 S.E.2d at 206.

178. *Id.* at 654, 450 S.E.2d at 207.

179. *Id.*

180. *Id.* (quoting *Turner*, 207 Ga. App. 428, 430, 428 S.E. 398, 430).

181. *Id.* at 654-57, 450 S.E.2d at 206-08 (Benham, P.J., dissenting).

182. *Id.* at 657, 450 S.E.2d at 208.

183. *Id.*

184. *Id.*

insurance as a condition of lending and will look to those policies to satisfy any loss that they incur as a result of a foreclosure. Of course, insurers may challenge lenders' rights to recover under such policies where the foreclosure sale price is inexplicably low.

During the survey period, both the Georgia Supreme Court and the court of appeals rendered decisions in a case in which a debtor sought to set aside a foreclosure based on the lack of the statutorily required notice.[185] Those decisions are important because they clarify the relief that may be afforded debtors who fail to receive such notice and clarify several evidentiary issues that arise in many such disputes.

In *Calhoun First National Bank v. Dickens*,[186] Rebecca Dickens and her husband executed a promissory note and security deed in favor of Calhoun First National Bank (the "Bank") in connection with the Dickens' purchase of certain real property.[187] Thereafter, Mr. Dickens transferred his interest in the property to Ms. Dickens. When Ms. Dickens defaulted on her obligations under the promissory note, the Bank sent notice of default as required by O.C.G.A. section 44-14-162 to Mr. Dickens, but not to Ms. Dickens.[188] The Bank subsequently sold the property at foreclosure.

Ms. Dickens brought an action seeking an accounting and damages based on a wrongful foreclosure on the ground that she did not receive the statutorily required notice of default. At trial, Ms. Dickens made a motion for directed verdict, which the trial court denied. At the close of the trial, the jury returned a verdict for the Bank. Ms. Dickens appealed. The court of appeals reversed the trial court's judgment, finding that the foreclosure sale should have been set aside based on Ms. Dickens' lack of notice of the foreclosure and sale.[189] Additionally, the court of appeals held that Ms. Dickens was entitled to a directed verdict for damages equal to the amount by which the fair market value of the property exceeded the indebtedness at the time of the sale.[190]

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185. *See* Calhoun First Nat'l Bank v. Dickens, 264 Ga. 285, 443 S.E.2d 837 (1994); Dickens v. Calhoun First Nat'l Bank, 214 Ga. App. 490, 448 S.E.2d 237 (1994). Those two reported decisions were not the only times this case appeared before an appellate court. *See* 214 Ga. App. at 490, 443 S.E.2d at 837 (citing three previous appearances of the case before the court of appeals). The facts underlying the case are set forth in detail at 208 Ga. App. 489, 431 S.E.2d 121 (1993).

186. 264 Ga. 285, 443 S.E.2d 837 (1994).

187. 264 Ga. at 285, 443 S.E.2d at 838.

188. *Id.*

189. *Id.*

190. *Id.*

The supreme court granted the Bank's petition for writ of certiorari in order to review the issue of the relief to which Ms. Dickens was entitled.[191] The supreme court stated that O.C.G.A. section 23-2-114 allowed a debtor to either seek to set aside a wrongful foreclosure or sue for damages in tort, but not both.[192] Because Ms. Dickens chose in this case to pursue an action for tort damages, the supreme court found that the court of appeals' decision setting aside the foreclosure sale itself was improper.[193]

The supreme court also reversed the court of appeals' finding that Ms. Dickens was entitled to a directed verdict on her damages claim.[194] The supreme court conceded that Ms. Dickens had established two of the four elements necessary for her to prevail on her tort claim—i.e., the existence of a duty and the breach of that duty.[195] However, the court concluded that Ms. Dickens failed to establish that the evidence demanded entry of judgment as a matter of law based on damage that proximately resulted from the Bank's failure to provide her notice of the foreclosure sale.[196] Based on those findings, the supreme court reversed the court of appeals and remanded the case for consideration of the enumerations of error previously not considered.[197]

On remand, the court of appeals addressed two evidentiary issues which are relevant to this survey.[198] First, during the trial of the case, Ms. Dickens attempted to admit into evidence two appraisals of the condemned property made by a now-deceased appraiser, but the trial court excluded those appraisals as inadmissible hearsay.[199] In an interesting ruling, the court of appeals affirmed the trial court's decision on that issue, concluding that the appraisals did not fall within the "business records" exception to the hearsay rule because they contained the opinion of the appraiser.[200] Second, Ms. Dickens attempted to introduce testimony by a neighboring land owner concerning the value of her property. The court of appeals acknowledged that property owners generally did not have to be qualified as an expert to state their

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191. *Id.*
192. *Id.* at 285-86, 443 S.E.2d at 838.
193. *Id.* at 286, 443 S.E.2d at 838.
194. *Id.*
195. *Id.*, 443 S.E.2d at 839.
196. *Id.*
197. *Id.* at 286-87, 443 S.E.2d at 839. The court of appeals had determined that the remaining enumerations of error were rendered moot by its reversal of the trial court. The Supreme Court directed the court of appeals to address those issues on remand. *Id.* at 287, 443 S.E.2d at 839.
198. 214 Ga. App. 490, 491-92, 448 S.E.2d 237, 238-39 (1994).
199. *Id.* at 491, 448 S.E.2d at 238.
200. *Id.*

opinion as to the value of their own property.[201] However, in this case, the court of appeals stated that Ms. Dickens had failed to establish any basis for the neighbor's opinion concerning the value of her property.[202] Absent such a showing, the court concluded there was no basis for the neighbor's testimony, and therefore such testimony was inadmissible.[203]

In *Breeze v. Columbus Bank & Trust Co.*,[204] the court of appeals held that the provision in the federal bankruptcy code which stays the running of limitations periods generally also tolls the time within which a foreclosing creditor is required to report a foreclosure sale for confirmation.[205] Thomas R. Breeze ("Breeze") was a debtor under a bankruptcy proceeding. Pursuant to an agreement between Breeze and Columbus Bank & Trust Co. ("CB&T"), CB&T was granted relief from the automatic stay to conduct a foreclosure of real property in which it held a security interest. After proper notice and advertisement, a foreclosure sale was conducted on May 3, 1993, but CB&T did not immediately report the foreclosure sale to the appropriate superior court for confirmation.[206] On August 20, 1993, Breeze dismissed his bankruptcy. Thereafter, by letter dated August 31, 1993, CB&T advised the superior court of the foreclosure sale and applied for confirmation. The trial court confirmed the sale on March 3, 1994, and Breeze appealed.[207]

The appellate court found that whether the foreclosure was not reported for confirmation within thirty days of the actual sale as required by O.C.G.A. section 44-14-161 was "not significant" under the circumstances of this case.[208] Under 11 U.S.C. § 108(c), periods of limitation relating to claims against debtors in bankruptcy are tolled during the pendency of the bankruptcy and for thirty days thereafter.[209] The court of appeals stated that the agreement permitting the

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201. *Id.*, 448 S.E.2d at 239.
202. *Id.*
203. *Id.*
204. 214 Ga. App. 534, 448 S.E.2d 276 (1994).
205. *Id.* at 535, 448 S.E.2d at 277.
206. *Id.* at 534-35, 448 S.E.2d at 277.
207. *Id.* at 534, 448 S.E.2d at 277.
208. *Id.* at 535, 448 S.E.2d at 277.
209. *Id.* (citing 11 U.S.C. § 108(c)). The Bankruptcy Code provides in pertient part that

> if applicable non-bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of . . . 30 days after notice of the termination or expiration of the stay under section 362, 722, 1201, or 1301

foreclosure sale did not also relieve CB&T from the automatic stay for purposes of confirming the sale.[210] Therefore, the court concluded that the time for reporting the sale to the superior court for confirmation had been suspended and did not begin to run until thirty days after Breeze's bankruptcy petition was dismissed.[211] As a result, the court concluded that the foreclosure sale was properly and timely reported in accordance with O.C.G.A. section 44-14-161.[212]

In *Coleman Road Associates v. Culpepper*,[213] Coleman Road Associates ("Coleman"), through its general partner, Carl Callum ("Callum"), executed a promissory note and deed to secure debt in favor of Dorothy Tanner Culpepper ("Culpepper") in connection with Coleman's purchase of real property.[214] Coleman defaulted on the note and Culpepper foreclosed on the property. At the foreclosure sale, Culpepper bid in an amount sufficient to fully satisfy Coleman's debt under the promissory note, plus all related expenses. Thereafter, Culpepper filed an action against Coleman and Callum alleging that Coleman had breached the obligations contained in the security deed to (i) keep the property in good condition, (ii) pay taxes on the property, and (iii) keep the property insured. Coleman and Callum moved for summary judgment. The trial court denied that motion, and Coleman and Callum appealed.[215]

The court of appeals found the trial court had erred by failing to grant Coleman and Callum's motion for summary judgment.[216] As the court discussed, a security deed only conveys title to the grantee for the purpose of securing repayment of a debt, and "'upon satisfaction of the obligation which it is given to secure, [the security deed] is automatically extinguished in effect.'"[217] By bidding an amount at the foreclosure sale which fully satisfied Coleman's debt to her, Culpepper satisfied the note to her. As a result, the deed securing the note's repayment was extinguished. Therefore, the court concluded that Culpepper was

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of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c).

210. 214 Ga. App. at 535, 448 S.E.2d at 277.

211. *Id.*

212. *Id.*

213. 214 Ga. App. 475, 448 S.E.2d 83 (1994).

214. *Id.* at 475, 448 S.E.2d at 84.

215. *Id.* at 475-76, 448 S.E.2d at 84-85. Coleman's and Callum's appeal was made upon application for an interlocutory review of the trial court's decision. *Id.* at 475, 448 S.E.2d at 84.

216. *Id.* at 476, 448 S.E.2d at 85.

217. *Id.* at 475, 448 S.E.2d at 84 (quoting Sapp v. ABC Credit & Co., 243 Ga. 151, 154, 253 S.E.2d 82, 85 (1979)).

prohibited from filing an action based on the terms of the extinguished security deed and reversed the trial court's decision.[218]

## VI. EMINENT DOMAIN AND CONDEMNATION

The court in *Georgia Neurosurgical Clinic, P.C. Profit Sharing Plan v. Rockdale County*,[219] held that valuations by an expert witness of other properties similar to the property being condemned may be a proper subject for cross examination of that witness.[220] In the case, in connection with a reservoir project, Rockdale County (the "County") filed a condemnation petition to acquire title to nearly one hundred acres of property and to a buffer easement in nearly nine acres of property within a single tract owned by Georgia Neurosurgical Clinic P.C. Profit Sharing Plan (the "Plan").[221] A special master entered an award of $309,030 in favor of the Plan, but the Plan appealed that award. After a trial in which the jury awarded $292,211, the Plan appealed, asserting that the trial court had erroneously excluded certain evidence from consideration.[222]

Among other things, the Plan argued that the trial court erred in refusing to allow questioning of the County's expert appraiser concerning his appraisals of other similar property, as well as questions concerning general trends which could have affected the value of the condemned property.[223] During the trial, the Plan sought to cross examine the County's appraiser concerning the value of other property which adjoined the condemned property and which the County also sought to acquire.[224] That adjacent property contained wetlands which the County purchased in order to mitigate the loss of wetlands expected to be destroyed by the reservoir project. There was evidence in the record that the County's appraiser assigned a per-acre value for the adjacent property that "was approximately twice as high as the value placed on the subject acreage by the jury."[225] On the other hand, the County's appraiser had testified with regard to the property being condemned

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218. *Id.* at 476, 448 S.E.2d at 85. Coleman and Callum also argued that Culpepper's lawsuit was "an attempt to obtain a deficiency judgment that is barred by her failure to have the foreclosure sale confirmed." *Id.* The court of appeals did not address that issue since it found on the grounds discussed above that Culpepper's claim was improper. *Id.*

219. 216 Ga. App. 32, 453 S.E.2d 88 (1994).

220. *Id.* at 34, 453 S.E.2d at 91.

221. *Id.* at 32, 453 S.E.2d at 89.

222. *Id.*

223. *Id.*, 453 S.E.2d at 89-90.

224. *Id.*, 453 S.E.2d at 89.

225. *Id.*

that the presence of wetlands on the subject tract "was a significant factor detrimental to its value."[226]

The County argued that the testimony the Plan sought to elicit by questioning the appraiser was inadmissible. It has long been recognized in Georgia that "sales of land to condemning authorities are inadmissible as evidence in condemnation proceedings on the issue of the value of the land sought to be condemned."[227] That general rule is based on the belief that such sales do not represent a true value of the property as "neither party is necessarily free from compulsion."[228] The court of appeals concluded that the holding from *Jordan* was not applicable in this case because the testimony did not relate to the sales price of the adjoining property; rather, the testimony related to the County's appraiser's valuation of property similar to that being condemned.[229] That testimony would be relevant to the value of the condemned property in that it could demonstrate that the appraiser had employed inconsistent appraisal methods or had arrived at inconsistent opinions regarding the value of similar property.[230]

During the trial, the Plan also sought to question the County's appraiser concerning his knowledge of recently enacted federal legislation requiring the replacement of destroyed wetlands and whether that legislation had any effect on the value of the condemned property in this case.[231] Essentially, the property owner argued that the federal requirements enhanced, rather than lessened, the value of the condemned property because that property contained wetlands which would need to be replaced. The court concluded that the Plan's proposed questioning related to the central issue in the case, namely the value of the condemned property.[232] Therefore, the trial court should have allowed the questions.[233]

The current appeal in *White v. Fulton County*[234] is the second appearance of this case before the Georgia Supreme Court.[235] The case arises out of the condemnation of land for the College Park MARTA Rail

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226. *Id.*

227. *Id.* (citing Jordan v. Department of Transp., 178 Ga. App. 133, 134, 342 S.E.2d 482, 483 (1986)).

228. *Id.* at 33, 453 S.E.2d at 89.

229. *Id.*

230. *Id.*

231. *Id.*, 453 S.E.2d at 90.

232. *Id.*

233. *Id.* There were several other evidentiary questions raised by the Plan on appeal. However, those issues are relatively minor and do not warrant discussion here. *See id.*, 453 S.E.2d at 90-91.

234. 264 Ga. 393, 444 S.E.2d 734 (1994).

235. *Id.* *See* Fulton County v. Dangerfield, 260 Ga. 665, 398 S.E.2d 14 (1990).

Station and, like many recent, significant condemnation cases, involved claims by both the owner and lessee of the condemned property.[236] The Dangerfields were the owners of the property prior to condemnation, and White was a lessee of that property. In the earlier appeal, Fulton County had appealed a jury award to White and the Dangerfields and was successful in having the jury award overturned. When the case was called for retrial, White moved to dismiss the claims against him, arguing that the issues concerning the value of his leasehold interest in the property had been resolved by the jury in the first trial and that the supreme court's reversal of the jury award had no effect on the judgment for White. The trial court granted White's motion and Fulton County appealed.[237]

The court of appeals stated in its opinion that "'the jury's task was to determine first the value of the whole property, and then the proportionate amounts of that whole value to be awarded to the separate interests.'"[238] In essence, the court of appeals held the total award that may be made to an owner and lessee of condemned property cannot exceed the fair market value of that property. The court of appeals relied on the holding in *Department of Transportation v. Olshan*,[239] a Georgia Supreme Court decision, as authority for its holding.[240] Based on the holding in *Olshan*, the court of appeals concluded that the erroneous admission of testimony concerning the value of the Dangerfields' ownership interest in the subject property necessarily affected the jury verdict with regard to the value of White's leasehold interest.[241] Therefore, the court of appeals reversed the trial court and remanded the case with regard to White for trial along with the retrial of the Dangerfields' claim.[242]

The supreme court disagreed with the court of appeals' ruling, stating that "the aggregate value of White's leasehold and Dangerfields' ownership interest is not limited to the fair market value of the subject property."[243] The Georgia rule on this issue "is that where there are separate estates to be condemned, each owner is entitled to the full

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236. 264 Ga. at 393, 444 S.E.2d at 734.

237. *Id.*

238. *Id.*, 444 S.E.2d at 734-35 (quoting Fulton County v. Dangerfield, 209 Ga. App. 298, 300, 433 S.E.2d 335, 336 (1993)).

239. 237 Ga. 213, 227 S.E.2d 349 (1976)

240. *Id.* at 394, 444 S.E.2d at 735 (citing Department of Transp. v. Olshan, 237 Ga. 213, 217, 227 S.E.2d 349, 352 (1976)).

241. *Id.*

242. *Id.* at 395, 444 S.E.2d at 735. *See* 209 Ga. App. 298, 300, 433 S.E.2d 335, 336 (1993), *cert. granted.*

243. 264 Ga. at 395, 444 S.E.2d at 735.

value of his respective interest, even though the aggregate amount thus attained may exceed the value of the property appraised as a unit."[244] The court noted that the contrary principle, followed by the court of appeals "is referred to as the 'undivided fee rule,' and is adhered to in some jurisdictions."[245] The supreme court distinguished *Olshan* on its facts from those presented in *White* because *Olshan* did not involve the condemnation of a leasehold interest in addition to the fee interest.[246] Further, to the extent cases previously decided by the court of appeals had relied upon *Olshan* and applied the "undivided fee" rule, the court expressly overruled those cases.[247] The supreme court reversed the court of appeals judgment and remanded the case to that court for consideration of whether the error in the first appeal affected the judgment entered in White.[248]

The appeal in *Department of Transportation v. Sharpe*,[249] arose out of the condemnation by the Department of Transportation ("DOT") of 19.289 acres of land located in Houston County which contained approximately eight million tons of limestone deposits.[250] The evidence presented at the jury trial showed that Sharpe was not mining the limestone at the time of the condemnation and had refused to sell the mining rights to a cement company operating on the tract located next to the property being condemned. The jury returned a verdict in favor of Sharpe and awarded $650,000 as the value of the property, including the limestone deposits. The DOT appealed asserting the court had erred by giving an incorrect jury instruction and by failing to declare a mistrial after hearsay evidence concerning the value of the property was introduced.[251]

The court of appeals in *Sharpe* reversed the trial court's decision on the basis of the trial court's jury instruction relating to the "peculiar value of [the] property."[252] The jury charge at issue was as follows:

> You are entitled to consider the peculiar value of property to the owner under certain conditions, but before you consider the peculiar value of

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244. *Id.* at 393-94, 444 S.E.2d at 734 (quoting 1 GEORGE S. PINDAR, GEORGIA REAL ESTATE LAW & PROCEDURE § 2-44 (4th ed. 1993)).

245. *Id.* at 394 n.1, 444 S.E.2d at 735 n.1 (citation omitted).

246. *Id.*

247. *Id.* at 394, 444 S.E.2d at 735 (overruling Department of Transp. v. McClaughlin, 163 Ga. App. 1, 2, 292 S.E.2d 435, 437 (1982) and Department of Transp. v. Franco's Pizza, 200 Ga. App. 723, 725, 409 S.E.2d 281, 283 (1991)).

248. *Id.* at 395, 444 S.E.2d at 735.

249. 213 Ga. App. 549, 445 S.E.2d 343 (1994).

250. *Id.* at 549, 445 S.E.2d at 344.

251. *Id.* at 550-51, 445 S.E.2d at 344-45.

252. *Id.* at 550, 445 S.E.2d at 344.

> the property to the owner, you must find that the relationship of the owner to it is peculiar, that is—that its advantages to the owner are more or less exclusive, and would not be likely to apply to another owner.[253]

Generally, the measure of damages in a condemnation case is the "fair market value" of the condemned property.[254] However, "when the evidence shows that the property has some unique and special value to the condemnee other than, or over and above, fair market value, and that fair market value will not afford just and adequate compensation to the condemnee, other criteria than fair market value may be considered."[255]

Before a jury may consider an alleged "peculiar value" of condemned property in Georgia, the owner of the property must be devoting it to a use which relates to that peculiar value at the time of the condemnation.[256] The court of appeals found no evidence in the record to support a conclusion that Sharpe had any special relationship to the land "or that adequate compensation could not be determined by fair market value."[257] Specifically, the court found no evidence that the land was being used at the time of condemnation for any peculiar purpose.[258] The court concluded, even though the jury charge on peculiar value contained an accurate statement of the law, no evidence existed supporting that charge. Therefore, giving that charge was "presumptively harmful" to the DOT and required reversal of the jury's verdict.[259]

The DOT also argued that the trial court erred in allowing Glen Sharpe to testify that he thought the condemned land and limestone deposits were worth over eight million dollars. Prior to trial, the trial court had granted the DOT's motion in limine and declared that Sharpe was not an expert witness entitled to state his opinion of value based on hearsay evidence.[260] Notwithstanding that ruling, Mr. Sharpe did testify regarding his opinion of the value of the land. The DOT moved for a mistrial, but that motion was denied. Instead, the court gave a

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253. *Id.*

254. *Id.*

255. *Id.* (quoting Macon-Bibb County Water & Auth. v. Reynolds, 165 Ga. App. 348, 352, 299 S.E.2d 594, 597 (1983)).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 551, 445 S.E.2d at 345.

260. *Id.* Mr. Sharpe was expected to testify concerning a conversation he had with an official of a cement company in which that official stated his company was paying one dollar per ton for limestone. *Id.*

curative instruction to the jury.[261] The court of appeals held that the trial court had not abused its discretion in choosing to give a curative instruction as opposed to granting a mistrial and agreed that curative instruction "adequately addressed any harm attributable to Sharpe's testimony."[262] However, based on its finding with regard to the erroneous jury instruction, the court of appeals reversed the jury verdict entered in favor of Sharpe.[263]

The holding in *Sharpe* is instructive of two things: 1) The court approved a jury instruction on "peculiar value;" and 2) The court indicated clearly the circumstances under which such an instruction is proper.[264] Practitioners seeking to argue that their clients' property has peculiar value should take heed of the result in this case where a court erroneously instructed on the law relating to that issue.

In *Back v. City of Warner Robbins*,[265] the City of Warner Robbins (the "City") filed declarations of taking to condemn property for a roadway construction project.[266] The City utilized the procedure set forth in O.C.G.A. section 32-3-4 to condemn the property.[267] After a trial, the court entered judgment in favor of the City granting the declaration of taking. On appeal, the condemnees raised two main issues: (1) that the City was not entitled to utilize the procedure set forth in O.C.G.A. section 32-3-4 because the title to the condemned property was not in dispute; and (2) that the City abused its discretion in failing to consider alternative roadway plans which would have been less burdensome for taxpayers as well as for the owners of the condemned property.[268]

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261. *Id.*

262. *Id.* at 552, 445 S.E.2d at 345.

263. *Id.*

264. *Id.*

265. 217 Ga. App. 326, 457 S.E.2d 582 (1995).

266. *Id.* at 326, 457 S.E.2d at 583.

267. *Id.* at 327, 457 S.E.2d at 583. Actions to condemn property brought under § 32-3-4 must comply with very specific procedures. *See* O.C.G.A. §§ 32-3-5, -6, and -7 (1982) (stating specific contents to be included in condemnation petition, filing of declaration of taking, and requiring deposit into court of estimated sum of money due as just and adequate compensation for taking).

268. 217 Ga. App. at 327, 457 S.E.2d at 583. In dicta, the court of appeals mentioned that the condemnees argued on appeal that the taking was improper "because it will primarily benefit private businesses in and around a shopping mall." *Id.* at 328, 457 S.E.2d at 584. The condemnees made that argument despite having not explicitly identified that as a basis for appeal. Nonetheless, the court of appeals found that there was "no evidence of improper intent" by the condemning authority to benefit one or a few private individuals through the condemnation, rather than to benefit the general public. *Id.* The court expressly stated that the evidence showed the real purpose of the project was to relieve traffic congestion and to reduce the number of accidents in the area of the

In a short opinion, the court of appeals rejected both arguments.[269] First, with regard to the first argument, the court noted that O.C.G.A. section 32-3-4(a) permits a municipality to condemn private property using the procedures in that code section if the municipality "'*shall for any reason conclude that it is desirable to have a judicial ascertainment of any question connected with the matter.*'"[270] Based on that statutory language, the court in *Back* concluded that municipalities may utilize O.C.G.A. section 32-3-4 even where the title to the property is not in question.[271] With regard to the second argument, the court found testimony in the trial record to support the trial court's conclusion that the City had, in fact, considered less burdensome alternatives.[272] While the court noted that the City's mayor and City Council members could not remember the exact alternatives considered, there was testimony in the record from the City's engineers and planners "that the project was a result of many years of planning and that numerous alternatives were considered."[273]

*Evans v. State*,[274] involved a forfeiture of real property ordered pursuant to O.C.G.A. section 16-13-49.[275] In *Evans*, the owners of real property ("defendants") that was subject to forfeiture raised the defense that such a forfeiture constituted an "excessive fine" prohibited by the Georgia and United States Constitutions.[276] Police officers in a helicopter had sighted marijuana growing on defendants' property and notified officers on the ground of the location of the contraband.[277] The officers on the ground approached the defendants' house and saw Danny Gaddis begin running through the woods toward the reported location of the marijuana. The police entered the defendants' property and followed Gaddis. When they located him, he was "pulling marijuana

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condemned property. *Id.*

269. *Id.* at 327-28, 457 S.E.2d at 583-84.

270. *Id.* at 327, 457 S.E.2d at 583 (quoting O.C.G.A. § 32-3-4(a) (1982) (emphasis in original)).

271. *Id.*

272. *Id.*

273. *Id.*

274. 214 Ga. App. 844, 449 S.E.2d 302 (1994).

275. *Id.* at 845, 449 S.E.2d at 303. Section 16-13-49 provides for the forfeiture of any real or personal property "which is, directly or indirectly, used or intended for use in any manner to facilitate a violation" of the Georgia Controlled Substances Act. O.C.G.A. § 16-13-49(d)(2) (1992 & Supp. 1995). For a case discussing the application of that Code section to a forfeiture of personal property, see Thorpe v. Georgia, 264 Ga. 712 (1994).

276. 214 Ga. App. at 846, 449 S.E.2d at 303 (citing U.S. CONST. amend. VII and GA. CONST. art. I, § 1, para. xvii).

277. *Id.* at 845, 449 S.E.2d at 303.

plants from the ground with both hands."[278] Thereafter, the police seized twenty-four marijuana plants growing on the land surrounding the house and ten plants growing inside the house.[279] The total weight of the plants the police seized was approximately one-half pound.[280] Based on that evidence, the trial court determined that the defendants' property "was used to facilitate a violation of the [Act] in the manufacturing of marijuana" and ordered a forfeiture of the property to the State of Georgia.[281]

On appeal, the appellants argued, among other things, that the forfeiture of the entire property on the basis of discovery of only 8.8 ounces of marijuana constituted cruel and unusual punishment and an excessive fine, prohibited by the Eighth Amendment to the United States Constitution and by Article I, Section 1, Paragraph VII of the Georgia Constitution. Because no Georgia court had previously addressed the issue, the court of appeals looked to decisions interpreting the federal criminal forfeiture statute for guidance.[282] The court found that case law instructive despite differences between the Georgia forfeiture statute and its federal counterpart.[283]

In a concurring opinion to the decision in *Austin v. United States*,[284] Justice Antonin Scalia "suggested that inquiry [regarding whether a forfeiture constitutes an excessive fine] focus on 'determining what property has been "tainted" by unlawful use' rather than the value of the forfeited property."[285] The Georgia Court of Appeals agreed with Justice Scalia finding that "'[t]he question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.'"[286] The court concluded the facts of this case supported a finding that the forfeiture of the entire property did not violate the prohibition against excessive fines under the Georgia Constitution or the United States Constitution.[287]

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278. *Id.*

279. *Id.* at 847, 449 S.E.2d at 304.

280. *Id.*

281. *Id.*at 845-47, 449 S.E.2d at 303-04.

282. *Id.* at 846-47, 449 S.E.2d at 304 (citing Austin v. United States, 113 S. Ct. 2801, 2810 (1993)).

283. *Id.* at 847 n.1, 449 S.E.2d at 304 n.1.

284. 113 S. Ct. 2801 (1993).

285. *Id.* at 847, 449 S.E.2d at 304 (quoting *Austin*, 113 S. Ct. at 2811 (Scalia, J., concurring)).

286. *Id.* (emphasis supplied).

287. *Id.* While the court did not expressly state the basis for its conclusion, it seems apparent that the presence of marijuana both outside and inside of the house located on the property was a factor in the decision to uphold confiscation of the entire tract. Those are the main facts which would indicate that the entire property had been "tainted" by the

## VII. TRESPASS

The court's decision in *Garner v. Blair*[288] explains the burden of proof in cases where a plaintiff seeks to recover damages based on a neighboring property owner's failure to provide lateral support. In *Garner*, Teresa Blair ("Blair") brought an action against Monroe Garner ("Garner") for damage Blair asserted resulted from Garner's excavation of dirt from an embankment located on the boundary line between their adjoining properties.[289] Garner admitted in response to Blair's interrogatories that he had removed dirt from the embankment at issue. Blair moved for summary judgment and submitted an unrebutted affidavit from an engineer who testified that the excavation of that dirt caused erosion on Blair's property.[290] The trial court granted Blair's motion for partial summary judgment on the issue of Garner's liability, and the case proceeded to trial solely on the issues of damages and attorney fees. Following a trial, the jury returned a verdict in favor of Blair for $22,500 in damages and $5,000 in attorney fees. Garner filed a motion for new trial, but that motion was denied and this appeal followed.[291]

The court of appeals affirmed the grant of summary judgment on the issue of liability.[292] In light of the unrebutted testimony of Blair's expert witness and the evidentiary admissions made by Garner during discovery, the court had no alternative but to find Garner liable under O.C.G.A. section 44-9-3.[293] However, the court agreed with Garner that the trial court had erred in failing to enter judgment as a matter of law against Blair on the issue of damages.[294] Under Georgia law, "the measure of damages for injury to real property is the difference in the value of the property before and after the injury."[295] The court found that there was no evidence in the record on which the jury could have

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defendants' illegal activities.

288. 214 Ga. App. 357, 448 S.E.2d 24 (1994).

289. *Id.* at 357, 448 S.E.2d at 25.

290. *Id.* Not only was Blair's expert's affidavit unrebutted, it appears that Garner failed to respond at all to Blair's motion for summary judgment. *Id.*

291. *Id.*

292. *Id.* at 358, 448 S.E.2d at 25.

293. *Id.* at 357-58, 448 S.E.2d at 25-26. Section 44-9-3 provides that "[o]wners of adjoining lands owe to each other the lateral support of the soil of each to that of the other in its natural state." O.C.G.A. § 44-9-3(a) (1982).

294. 214 Ga. App. at 358, 448 S.E.2d at 25.

295. *Id.* (citing Southeast Consultants v. O'Pry, 199 Ga. App. 125, 126, 404 S.E.2d 299, 301 (1991)).

based its determination of the damages awarded to Blair.[296] Blair failed to produce any evidence of the value of the property prior to the injury, testifying only as to the price of the property at the time she purchased it. The court of appeals found that testimony to be insufficient to establish the value of the property immediately prior to the injury.[297]

## VIII. LEGISLATIVE DEVELOPMENTS

There were several minor and one significant legislative changes made in the law of real property in Georgia during the survey period. Among the minor changes were the enactment of a notice requirement for purchasers of property where adjacent property is used for farming or forestry purposes,[298] the enactment of a notice that landlords must provide prospective residential tenants if the leased property has previously been flooded,[299] and the enactment of a requirement that the contractor (not the owner or the owner's agent) file the Notice of Commencement required in connection with the Mechanics' and Meterialmen's Lien Act.[300]

The general provisions of Title 44 were amended this year to create a notice provision in connection with the "purchase, lease, or other acquisition of real property or any interest in real property located in any county which has been zoned for agricultural use or identified on an approved county land use plan as agricultural or silvicultural use."[301] If an owner knows that the property being sold or leased is located "within, partially within, or adjacent to" land zoned for agricultural or forestry uses, the owner must provide the prospective purchaser or lessee a notice that the use of land for agricultural or forestry purposes may create some conditions which may cause neighboring landowners "discomfort and inconvenience" even where the activities being conducted on the property are in "conformance with existing laws and regulations and accepted customs and standards."[302] It may be speculated that the passage of this statute was prompted by claims of nuisance being brought against owners of agricultural or forestry land and was an attempt to short circuit such claims. However, the practical effect of this

296. *Id.*
297. *Id.*
298. *See* O.C.G.A. § 44-1-17 (Supp. 1995).
299. *See id.* § 44-7-20.
300. *See id.* § 44-14-361.5(b).
301. *Id.* § 44-1-17(a).
302. *Id.* Interestingly, O.C.G.A. § 44-1-17 also imposes an obligation on the prospective purchaser or lessee to perform some investigation to determine whether the subject property is within, partially within, or adjacent to agricultural or forestry land. *Id.*

Code section may be fairly limited because the statute, by its terms, does not affect the validity of deeds delivered and recorded in transactions where notice was not given and creates no cause of action against violators.[303]

Chapter 7 of Title 44, relating to Landlord/Tenant relationships, was amended to require that the owner of real property leased for residential occupancy provide notice to prospective tenants if "flooding" has caused damage to the leased property or its contents three or more times during the five preceding years.[304] "Flooding" is defined as "the inundation of a portion of the living space covered by the lease which was caused by an increased water level in an established water source such as a river, stream, or drainage ditch."[305] Unlike the change to section 44-1-17 discussed above, this amendment has some teeth. A landlord who fails to comply with the notice requirements relating to flooding is liable in tort for damage which may be caused by subsequent flooding of the leased premises.[306]

The most significant legislative development in the law of real property during the survey period was the amendment of the Georgia Land Sales Act (the "State Act").[307] Under the prior version of the State Act, unless they were involved in sales exempt from the Act, subdivision developers were required to file with the Georgia Real Estate Commission (the "Commission") a registration statement containing certain disclosures relating to the land being developed and sold.[308] The Commission issued a "certification of compliance" to developers complying with the provisions of the State Act. If a subdivision development was registered under the State Act, the United States Department of Housing and Urban Development ("HUD") deemed that the plan met the requirements of the Federal Interstate Land Sales Full Disclosure Act (the "Federal Act") and HUD issued a certificate of compliance with the Federal Act.[309]

In the 1995 amendments to the State Act, the Georgia legislature eliminated the possibility that subdivision developers could file their

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303. *Id.* § 44-1-17(b), (d).

304. *Id.* § 44-7-20.

305. *Id.*

306. *Id.*

307. *Id.* §§ 44-3-1 to -233 (1992 & Supp. 1995). The Georgia Land Sales Act is the state law counterpart to the federal Interstate Land Full Disclosure Act. *See* 15 U.S.C. §§ 1701 to 1720 (1988).

308. *See* O.C.G.A. § 44-3-3, -4 (1991 & Supp. 1995). Section 44-3-4 sets forth the categories of transactions that were exempt from the requirements of the Georgia Land Sales Act. *Id.* § 44-3-4.

309. 15 U.S.C. § 1708.

registration statements with the Commission.[310] Under the amended law, subdivision developers who are not involved in exempt transactions are only required to provide prospective purchasers with a "property report" which contains disclosures about the developer and the subdivision.[311] In effect, the legislature has eliminated the registration of subdivisions in Georgia. While that amendment at first glance seems beneficial to subdivision developers (i.e., savings in time and money through reduction in regulation), it does create some problems. First, if the transaction is one that was required to be registered in Georgia under the old version of the State Act, it will most likely be a transaction that must be registered under the Federal Act.[312] Therefore, the elimination of the state registration requirement will likely not save subdivision developers any significant trouble or money through the "reduced" regulation.

The second and most significant problem created by the amendment is one that affects subdivisions that were previously registered under the State Act, but which will become "de-registered" under the amendment. Compliance with the registration requirements under both the State and Federal Acts is (or was) usually not just a one-time procedure. Most large subdivisions are developed in stages, and the individual stages often would have to be registered separately, or the initial registration of the subdivision updated, to reflect the additional subdivided lots being offered for sale. Now that the Commission will no longer be accepting updates to previously filed registration statements, those updates will have to be filed directly with HUD. However, the practical problem is that HUD does not have the original statements and any updates the subdivision developer has filed previously. Additionally, the elimination of registration under the State Act will result in the revocation of HUD certificates of compliance. According to the notice published by HUD, those certificates expired November 14, 1995.[313] In order to obtain a

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310. *See* O.C.G.A. § 44-3-3(a) (1991 & Supp. 1995). Prior to the most recent amendment, the subsection (a) of the Georgia Land Sales Act stated as follows: "It shall be unlawful for any person to offer for sale or to sell any subdivided land to any person in this state unless such land is subject to *an effective registration statement* under this article or such land is exempt under Code Section 44-3-4." O.C.G.A. § 44-3-3(a).

311. The amended section 44-3-3 states as follows:

> It shall be unlawful for any person to offer to sell or to sell any subdivided land to any person in this state unless such offering complies with this article or is exempt under Code Section 44-3-4. Any person offering to sell any subdivided land *shall provide each prospective purchaser a property report* containing the following . . . .

O.C.G.A. § 44-3-3(a)(1).

312. *Compare* 15 U.S.C. § 1704 with O.C.G.A. § 44-3-4.

313. *See* 60 Fed. Reg. 42,436 (1995).

HUD certificate of compliance thereafter, developers of subdivisions will be forced to essentially recreate their earlier filings with the Commission and to go through the entire registration process all over again, duplicating the expenses involved in that process.