

6-2020

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### Recommended Citation

Elizabeth C. Selph, Casenote, *Actions Speak Louder Than Words: Hanham v. Access Management Group L.P. Reestablishes Validity for Course of Conduct Parol Contracts in Georgia*, 71 Mercer L. Rev. 1277 (2020).

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# Actions Speak Louder Than Words: *Hanham v. Access Management Group L.P.* Reestablishes Validity for Course of Conduct Parol Contracts in Georgia\*

by Elizabeth C. Selph

## I. INTRODUCTION

Many laypeople recognize and revere the value of a written contract as an instrument legally binding, but they also believe such work to be solidified in its construction, unamendable without a rewriting of the agreement. Georgia courts, however, for over a century have allowed for contracts not governed by the statute of frauds<sup>1</sup> to be amended through oral agreements or course of conduct.<sup>2</sup> This principle was reaffirmed in *Hanham v. Access Management Group L.P.*,<sup>3</sup> a 2019 Georgia Supreme Court case where the court recognized that written contracts can be amended by course of conduct in the state of Georgia.<sup>4</sup> Prior to 2019, several Georgia Court of Appeals cases, using a slightly altered definition for a breach of contract from a 2013 Georgia Court of Appeals

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\* Thank you to Jacob Selph, Tammy Brack, and Jackson Brack, whose unconditional love, support, and understanding allowed the completion of this project and any professional achievement I may accomplish. My thanks to Professor Michael Sabbath and the editors of the *Mercer Law Review*, whose advice, diligence, and insight provided immeasurable guidance. Thank you to the Selph, Brost, and Swanson family for continued love, kindness, and encouragement. Thank you as well to friends and other family for your love and support.

1. O.C.G.A. § 13-5-30 (2018).

2. *See* Eaves & Collins v. Cherokee Iron Co., 73 Ga. 459 (1884); Rogers v. Atkinson, 1 Ga. 12 (1846).

3. *Hanham v. Access Mgmt. Group L.P.*, 305 Ga. 414, 825 S.E.2d 217 (2019).

4. *Id.* at 417, 825 S.E. 2d at 220.

case,<sup>5</sup> excluded all evidence that attempted to show any agreement which modified or amended any text in the written contract.<sup>6</sup> The only action considered by the courts under this new definition for a breach of contract claim were actions that were "specified in the contract."<sup>7</sup>

Although this revised definition used for a breach of contract was only slightly altered from the original definition used previously in Georgia courts<sup>8</sup> and was seemingly only a simple and innocent rewording, the definition had profound effects on contract law in Georgia. The new definition quickly became established precedent in several Georgia cases, and courts in Georgia refuted or did not consider arguments in cases where parties attempted to argue for behavior or interactions forming a new agreement. The courts stated that any basis of action had to accrue from matters "as specified in the contract."<sup>9</sup> In 2018, the Georgia Court of Appeals used the revised definition for a breach of contract to hold that an contract could not be amended in the absence of a written modification,<sup>10</sup> ignoring the rulings of Georgia courts since 1884.<sup>11</sup>

*Hanham v. Access Management Group L.P.* showed how a simple and innocent rewording of a rule had a profound effect on contract law despite established and well-recorded precedent.<sup>12</sup> The cases preceding *Hanham v. Access Management Group L.P.* also highlight how quickly an incorrect rule can be repeated by courts and harm people's rights in

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5. See *UWork.com, Inc. v. Paragon Techs., Inc.*, 321 Ga. App. 584, 590, 740 S.E.2d 887, 893 (2013).

6. See *Access Mgmt. Group, L.P. v. Hanham*, 345 Ga. App. 130, 132, 812 S.E.2d 509, 512 (2018); *Miller v. Tate*, 346 Ga. App. 315, 317, 814 S.E.2d 430, 432 (2018); *Walker v. Oglethorpe Power Corp.*, 341 Ga. App. 647, 670, 802 S.E.2d 643, 665 (2017); *Shiho Seki v. Groupon, Inc.*, 333 Ga. App. 319, 322, 775 S.E.2d 776, 779 (2015); *Cordell & Cordell, P.C. v. Gao*, 331 Ga. App. 522, 526, 771 S.E.2d 196, 200 (2015); *Inland Atl. Old Nat. Phase I, LLC v. 6425 Old Nat., LLC*, 329 Ga. App. 671, 677, 766 S.E.2d 86, 92 (2014).

7. See *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200; *Inland Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d at 92; *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893.

8. *Cooley v. Moss*, 123 Ga. 707, 708, 51 S.E. 625, 625 (1905).

9. See *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200; *Inland Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d 86, 92; *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893.

10. *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512.

11. *Eaves & Collins*, 73 Ga. at 470.

12. *Hanham*, 305 Ga. at 417–18, 825 S.E.2d at 220–21.

a common law system.<sup>13</sup> With this 2019 decision, the Georgia Supreme Court discarded the 2013 definition of a breach of contract and once again allowed courts to consider and question the validity of a contract based on interactions which take place outside of the written agreement.<sup>14</sup>

## II. FACTUAL BACKGROUND

Under its Declaration of Covenants, the St. Marlo Homeowner's Association delegated the management of the St. Marlo neighborhood to Access Management, a third party.<sup>15</sup> Access Management, as part of the agreement, was to "[o]perate and maintain the Development according to the highest standards achievable consistent with the overall plan" but could only work within the neighborhood's common areas.<sup>16</sup> Over time, Access Management, without the consent of the St. Marlo Homeowner's Association, expanded their purview to "managing the homeowner application process for landscaping modifications," which included the residence of Marie Berthe-Narchet.<sup>17</sup>

Berthe-Narchet presented to Access Management an application to modify her backyard.<sup>18</sup> Despite the application's lack of compliance with the architectural standards manual of the St. Marlo Homeowner's Association, Access Management approved the modification, and Berthe-Narchet hired a landscaper to complete the project.<sup>19</sup> Once the project was underway, as a result of the lack of compliance, the alterations caused the property of Mary and James Hanham, neighbors of Berthe-Narchet, to be flooded.<sup>20</sup>

Mary and James Hanham brought, among several claims, a claim of breach of contract against Access Management for alleged "breach of its contractual duties under the management agreement."<sup>21</sup> The Forsyth County Superior Court found for the Hanhams on the breach of contract claim, denying Access Management's motion for directed verdict, under

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13. See *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200; *Inland Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d at 92.

14. *Hanham*, 305 Ga. at 417–18, 825 S.E.2d at 220.

15. *Id.* at 415, 825 S.E.2d at 219.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 414–15, 825 S.E.2d at 218–19.

20. *Id.* at 414, 825 S.E.2d at 218.

21. *Id.* at 415, 825 S.E.2d at 219.

the argument that Mary and James Hanham were third-party beneficiaries of the contract between the St. Marlo Homeowner's Association and Access Management.<sup>22</sup>

At the Georgia Court of Appeals, Access Management stated that the superior court mistakenly denied Access Management's motion for directed verdict on the breach of contract claim, and the court agreed, reversing.<sup>23</sup> The Georgia Court of Appeals held that the Hanhams did not present the requisite evidence to demonstrate that Access Management breached its agreement with St. Marlo Homeowner's Association, stating that "[no] breach of contract claim can be founded upon responsibilities not specified in the contract,"<sup>24</sup> relying upon five other Georgia Court of Appeals' cases.<sup>25</sup> The Georgia Supreme Court ultimately reversed the Georgia Court of Appeals' rulings, holding that a contract, at least between private parties,<sup>26</sup> can be altered or modified by later course of conduct.<sup>27</sup>

### III. LEGAL BACKGROUND

#### *A. Adoption of Parol Agreements and Course of Conduct Modifications for Written Contracts in Georgia*

*Cooley v. Moss*,<sup>28</sup> a 1905 Georgia Supreme Court case, was the first Georgia court case to outline the elements for a breach of contract in a similar manner as is written today.<sup>29</sup> Previous court cases dealt with breaches of contracts, such as *Smith v. Georgia Loan, Savings & Banking Co.*<sup>30</sup> in 1901, but courts discussed the breach only as it related to the fact pattern of the case.<sup>31</sup> In *Cooley*, the court's definition of breach of contract bodes strong similarities to the Georgia courts of today's definition; *Cooley* set the foundation for future breach of contract claims in Georgia.<sup>32</sup>

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22. *Id.* at 416, 825 S.E.2d at 219.

23. *Access Mgmt. Group L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512.

24. *Id.*

25. *Hanham*, 305 Ga. at 418, 825 S.E.2d at 221.

26. Only the written contract is enforceable in a dispute involving a state actor. Any non-written modifications are not allowed in a dispute with the state because only a written contract can waive the state's sovereign immunity to allow suit. *Georgia Dep't of Labor v. RTT Assocs., Inc.*, 299 Ga. 78, 82, 786 S.E.2d 840, 843 (2016).

27. *Hanham*, 305 Ga. at 418–19, 825 S.E.2d at 221.

28. 123 Ga. at 707, 51 S.E. at 625.

29. *Id.* at 708, 51 S.E. at 625.

30. *Smith v. Georgia Loan, Sav. & Banking Co.*, 113 Ga. 975, 39 S.E. 410 (1901).

31. *Id.* at 976–77, 39 S.E. at 410–11.

32. *Cooley*, 123 Ga. at 708, 51 S.E. at 625.

One of the earliest cases in Georgia ruling that a written contract can be modified by subsequent agreements was *Rogers v. Atkinson*,<sup>33</sup> an 1846 Georgia Supreme Court case. The court in *Rogers* stated that the court may admit "evidence of conversations [and circumstances] subsequent to the time of making the agreement . . . to show that the parties agreed afterwards to vary the contract."<sup>34</sup> While the *Rogers* decision did not state a source in its reasoning (perhaps English law), Georgia courts have since adopted the same rationale of *Rogers*, and the same rationale has been used in almost every breach of contract dispute involving a subsequent agreement in Georgia since.

Subsequent oral modifications to written contracts has been codified in Georgia since *The Code of the State of Georgia*,<sup>35</sup> the first legislative code for the state, which was published in 1861.<sup>36</sup> Such a revision is called a parol agreement or a parol contract, which is defined in Black's Law Dictionary as "a contract or modification of a contract that is not in writing."<sup>37</sup> In *The Code of the State of Georgia*, parol evidence is allowed "to prove a new and distinct subsequent agreement."<sup>38</sup>

Since *Eaves & Collins v. Cherokee Iron Co.*<sup>39</sup> in 1884, parties have been able to modify a written contract through subsequent course of conduct.<sup>40</sup> In this decision, the Georgia Supreme Court ruled that,

When a contract is in writing, each party has a right to expect the other to do precisely what he promises; but if, in the course of the execution of its terms—the carrying them into practical execution in a continuous business—some of those terms are departed from and

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33. *Rogers v. Atkinson*, 1 Ga. at 12.

34. *Id.* at 22, 23.

35. Cobb's Digest § 10-2-3729 (1861).

36. Contracts, however, cannot be modified without a written amendment when the contract, as modified, is subject to the statute of frauds. O.C.G.A. § 13-5-30. Under Georgia law, the statute of frauds mandates that a contract and its amendment must be in writing and signed by the party to be responsible if the amended contract is a promise by an executor or administrator to answer for damages out of his own estate, a promise to answer for the debt of another, any marriage agreement, any contract for the sale of lands or concerning lands, any agreement that cannot be performed within one year of the contract's creation, any promise to revive a debt barred by the statute of limitations, and any commitment to lend money. *Id.* The statute of frauds has been in Georgia law since *The Code of the State of Georgia* for 1861. Cobb's Digest § 3-2-1952 (1861). The term "statute of frauds," however, was not codified in *The Code of the State of Georgia* until 1895. Ga. Code of 1895, § 8-1-3642.

37. CONTRACT, *Black's Law Dictionary* (11th ed. 2019).

38. Cobb's Digest § 10-2-3729.

39. 73 Ga. 459 (1884).

40. *Id.* at 470.

money is paid and received on that departure for some time . . . the departure is a sort of new agreement.<sup>41</sup>

This decision was later codified in the 1895 *The Code of the State of Georgia*.<sup>42</sup>

*B. Allowance of Parol Agreements and Course of Conduct Modifications Prior To Hanham v. Access Management Group L.P.*

Parol agreements and course of conduct modifications have a long history in Georgia case law prior to 2019. Since 1846 with *Rogers v. Atkinson*,<sup>43</sup> courts have repeatedly allowed parol agreements in a myriad of cases. The same can be stated with *Eaves & Collins v. Cherokee Iron Co.*, which in 1884 established the existence of course of conduct modifications into case law.<sup>44</sup> Except when a written contract disallows any course of conduct modifications,<sup>45</sup> parties are usually bound by their proven conduct as well as a written contract.

*Parker v. Brown House Co.*<sup>46</sup> is a 1903 Georgia Supreme Court case that considered both parol agreements and course of conduct modifications to a written contract.<sup>47</sup> In *Parker*, both parties agreed in a leasing contract that any desired repairs to be made to the leased building had to be submitted as a notice detailing the type of repair desired and an estimate of the cost of repair. This notice then had to be approved by both parties before repairs could begin. The parties would also pay equally for any costs of repair.<sup>48</sup>

The defendant began to ask the plaintiff to repair the leased building but did not require the plaintiff to submit a notice and never approved the repairs in writing. The plaintiff continued to do repairs at the request of the defendant, but never received the requisite notice or approval. Near the end of the lease after all the repairs were finished, the plaintiff submitted to the defendant the cost of the repairs so the defendant could pay half the cost; the defendant refused to pay because he had not received the requisite notice and approval as stipulated in the contract.<sup>49</sup>

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41. *Id.*

42. Ga. Code of 1895, § 8-1-3642.

43. 1 Ga. at 22, 23.

44. *Eaves & Collins*, 73 Ga. at 470.

45. *Caribbean Lumber Co. v. Anderson*, 205 Ga. App. 415, 417–18, 422 S.E.2d 267, 269 (1992).

46. 117 Ga. 1013, 44 S.E. 807 (1903).

47. *Parker*, 117 Ga. at 1014, 44 S.E. at 808.

48. *Id.*

49. *Id.* at 1014–15, 44 S.E. at 808.

The Georgia Supreme Court stated that "no law of this [s]tate require[d] such a stipulation to be in writing," and parties have the ability to waive certain limitations in a contract and modify an agreement by course of conduct.<sup>50</sup> The court found that while there was no express agreement in favor of the plaintiff's action, the defendant had, by his activity, waived the obligation for the plaintiff to submit a notice and obtain approval in order to be compensated for repairs.<sup>51</sup> The court found that since the defendant "request[ed] the repairs to be made, [stood] by without objection while they were being made, and accept[ed] and enjoy[ed] the benefit of them after they were made," he could not argue that the plaintiff failed to comply as specified in the contract.<sup>52</sup> Courts in Georgia have continually allowed such parol agreements and course of conduct modifications in a similar manner until a few years ago.

### *C. The Legal Shift to Disallowing Parol Agreements in Georgia*

In *Board of Regents of the University System of Georgia v. Doe*,<sup>53</sup> a dispute arose between a university professor and the then-President and then-Provost of the Georgia Institute of Technology over an accused breach of an employment contract.<sup>54</sup> In the 2006 decision, the Georgia Court of Appeals quoted the factors of a breach of contract originally outlined in Georgia case law by the Georgia Supreme Court in *Cooley v. Moss* in 1905:<sup>55</sup> "A breach of contract may arise in any one of three ways, namely: by renunciation of liability under the contract; by failure to perform the engagement; or by doing something which renders performance impossible."<sup>56</sup>

In *UWork.com, Inc. v. Paragon Techs., Inc.*,<sup>57</sup> a 2013 Georgia Court of Appeals case involving breach of contract disputes between a contractor and subcontractor, the court cited to *Board of Regents of the University System of Georgia* when explaining the qualifications of a breach of contract claim.<sup>58</sup> The court in *UWork.com, Inc.* seemingly wanted to slightly rephrase the court's wording in *Board of Regents of the University System of Georgia* by writing the following in its definition

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50. *Id.* at 1015, 44 S.E. at 808.

51. *Id.* at 1016, 44 S.E. at 809.

52. *Id.*

53. 278 Ga. App. 878, 630 S.E.2d 85 (2006).

54. *Id.* at 879–80, 630 S.E.2d at 87–88.

55. 123 Ga. at 707, 51 S.E. at 625.

56. *Bd. of Regents of the Univ. Sys. of Georgia*, 278 Ga. App at 887, 630 S.E.2d at 93.

57. 321 Ga. App. 584, 740 S.E.2d 887 (2013).

58. *Id.* at 590, 740 S.E.2d at 893.



for a breach of contract: "A breach occurs if a contracting party repudiates or renounces liability under the contract; fails to perform the engagement as specified in the contract; or does some act that renders performance impossible."<sup>59</sup>

Altering "by failure to perform the engagement"<sup>60</sup> to "fails to perform the engagement as specified in the contract"<sup>61</sup> appears to be an innocuous change in wording. The court in *UWork.com, Inc.* did not alter the phrasing of the *Board of Regents of the University System of Georgia* to aid in its argument for the ruling, and the rewording was seemingly not done to limit or narrow the ruling of *Board of Regents of the University System of Georgia*. All of the requirements for a breach of contract were reworded by *UWork.com, Inc.* and not that requirement alone.<sup>62</sup>

*Hanham v. Access Management L.P.* mentioned the possibility that *UWork.com* added the "as specified in the contract" phrase because the case from which *UWork.com* pulled the rule, *Board of Regents of the University System of Georgia*, focused its analysis on a written contract created by a state actor.<sup>63</sup> In *Board of Regents of the University System of Georgia*, a party was suing a representative of the State for a breach of contract,<sup>64</sup> and waiver of sovereign immunity can only occur via a written contract.<sup>65</sup> While *UWork.com* may have added the phrase "as specified in the contract" because the issue in *Board of Regents of the University System of Georgia* was whether the contract would be waived by sovereign immunity,<sup>66</sup> the court in *Board of Regents of the University System of Georgia* explicitly stated that a state's sovereign immunity is based upon written contracts, so its focus on written contracts is given context.<sup>67</sup> The court in *Board of Regents of the University System of Georgia* never ruled that only the written contract could be considered, nor did it suggest the exclusion of any parol evidence; rather, the court only framed its discussion of reading a written contract to sovereign immunity.<sup>68</sup> The court in *Board of Regents of the University of Georgia*

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59. *Id.*

60. *Bd. of Regents of the Univ. Sys. of Georgia*, 278 Ga. App. at 887, 630 S.E.2d at 93.

61. *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893.

62. *Id.*

63. *Hanham*, 305 Ga. at 418 n. 3, 825 S.E.2d at 221 n. 3; *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893; *Bd. of Regents of the Univ. Sys. of Georgia*, 278 Ga. App. at 880–81, 630 S.E.2d at 88.

64. *Bd. of Regents of the Univ. Sys. of Georgia*, 278 Ga. App. at 880, 630 S.E.2d at 88.

65. GA. CONST. art. I, § 2, ¶ IX(c) (2019).

66. *Bd. of Regents of the Univ. Sys. of Georgia*, 278 Ga. App. at 881, 630 S.E.2d at 88.

67. *Id.*

68. *Id.* at 880–81, 630 S.E.2d at 88–89.

also held that a contract between the parties existed despite a lack of a formalized written agreement because of a party's course of conduct made in reliance to the agreement as well as promises made by both parties; to apply from this case that contracts must be in writing would be ignoring the holding of *Board of the Regents of the University of Georgia*.<sup>69</sup> For the court in *UWork.com* to assert, based on the analysis of the court in *Board of Regents of the University System of Georgia* took, that the court will never consider extraneous materials, ignores the presence of a State actor, the circumstances surrounding sovereign immunity, and what actually occurred in that case.<sup>70</sup> While such an inference could have occurred by the court in *UWork.com* as suggested by the court in *Hanham v. Access Management Group, L.P.*, this seems unlikely.<sup>71</sup>

The parties in *UWork.com, Inc.* also were not claiming a parol agreement, and such an issue was never addressed by the court in *UWork.com, Inc.*<sup>72</sup> The ultimate holding in *UWork.com, Inc.* that no breach of contract had occurred<sup>73</sup> would also seemingly have occurred had the court in *UWork.com, Inc.* directly quoted from *The Board of Regents of the University System of Georgia* in its definition for breach of contract; the facts of the case in *UWork.com, Inc.* appear to fit a breach of contract under both given definitions.<sup>74</sup> The alteration made in the definition of breach of contract by *UWork.com, Inc.* appears to have been done innocently, but allowed the establishment for a new standard for parol agreements in written contracts.<sup>75</sup>

While several cases did not contest whether parol agreement evidence should be included, they legitimized the altered definition of a breach of contract established in *UWork.com, Inc.* and aided to establish the necessary precedent essential for the *Access Management Group L.P. v. Hanham*<sup>76</sup> ruling. Other cases, however, more directly laid the groundwork for parol agreements to be disallowed in written contracts

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69. *Id.* at 881, 630 S.E.2d at 89.

70. *See id.* at 880–81, 630 S.E.2d at 88–89.

71. *Hanham*, 305 Ga. at 418 n. 3, 825 S.E.2d at 221 n. 3; *Id.*

72. *UWork.com, Inc.*, 321 Ga. App. at 589–90, 740 S.E.2d at 892–93.

73. *Id.* at 594, 740 S.E.2d at 895.

74. *See id.*; *Bd. of Regents of the Univ. Sys. of Georgia*, 278 Ga. App. at 887, 630 S.E.2d at 93.

75. *See Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200; *Inland Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d at 92.

76. 345 Ga. App. 130, 812 S.E.2d 509.

in Georgia though factual similarities to *Access Management Group L.P. v. Hanham*. In *Shiho Seki v. Groupon, Inc.*,<sup>77</sup> a 2015 Georgia Court of Appeals case, the court directly quoted *UWork.com, Inc.* when establishing the elements for a breach of contract claim.<sup>78</sup> The breach of contract claim revolved around allegations of Groupon failing to pay Seki's business for vouchers as promised via a written agreement, despite evidence showing otherwise.<sup>79</sup> The court held under the *UWork.com, Inc.* qualifications that a breach of contract had not occurred.<sup>80</sup>

*Miller v. Tate*<sup>81</sup> also used the same language from *UWork.com, Inc.* in its discussion of a breach of contract issue.<sup>82</sup> In that case, a seller of a home and the prospective buyer entered into a purchase and sale agreement, but the actions of the buyer prevented the final closing from occurring.<sup>83</sup> The Georgia Court of Appeals in 2018 held that a breach of contract did occur by the buyers for their delay in closing the sale as agreed.<sup>84</sup>

In *Walker v. Oglethorpe Power Corporation*,<sup>85</sup> the court quoted from both *UWork.com, Inc.* and *Shiho Seki* when establishing the parameters for a breach of contract claim.<sup>86</sup> In this 2017 Georgia Court of Appeals case, former customers of several electric-membership corporations (EMCs) sued their respective EMCs and the larger electric cooperatives for breach of contract when their respective EMCs failed to distribute patronage capital as specified in the contract.<sup>87</sup>

The court ultimately held for the EMCs on the breach of contract claim.<sup>88</sup> The appellants were chastised for not introducing a "particular provision in the EMCs bylaws [that] expressly mandates" repayment,<sup>89</sup> as is required by the *UWork.com, Inc.* and *Shiho Seki* reading of "fails to perform the engagement as specified in the contract."<sup>90</sup> The former customers attempted to argue that such a position was apparent

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77. 333 Ga. App. 319, 775 S.E.2d 776.

78. *Id.* at 322, 775 S.E.2d at 779.

79. *Id.* at 321–22, 775 S.E.2d at 779.

80. *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779.

81. 346 Ga. App. 315, 814 S.E.2d 430.

82. *Id.* at 317, 814 S.E.2d at 432.

83. *Id.* at 318, 814 S.E.2d at 433.

84. *Id.* at 318–19, 814 S.E.2d at 433.

85. 341 Ga. App. 647, 802 S.E.2d 643.

86. *Id.* at 670, 802 S.E.2d at 664–65.

87. *Id.* at 647, 802 S.E.2d at 648–49.

88. *Id.* at 673, 802 S.E.2d at 666–67.

89. *Id.* at 671, 802 S.E.2d at 665.

90. *Id.* at 670, 802 S.E.2d at 664–65.

through the conduct exemplified by the EMCs' bylaws, but this argument was rejected because no contract provision was attached to the appellants' claim.<sup>91</sup>

*Inland Atlantic Old National Phase I, LLC v. 6245 Old National, LLC*,<sup>92</sup> a 2014 Georgia Court of Appeals case, involved two parties who entered into an agreement to develop a shopping center. As part of the agreement, 6525 Old National, LLC was obligated to supervise the construction and oversee a contractor working on the shopping center during the first phase of the project. Either party was able to rescind the contract at any point during the first phase of the project if any problems arose.<sup>93</sup>

Serious issues with the development of the project and the ability of the contractor began at the outset of the project and ran throughout the first phase. Both parties did nothing as a response throughout most of the contract.<sup>94</sup> Near the end of the agreement, Inland Atlantic Old National Phase I, LLC warned 6525 Old National, LLC of its lack of compliance, but then gave 6525 Old National, LLC final payment for the work completed.<sup>95</sup>

*Inland Atlantic Old National Phase I, LLC* directly quoted the revised definition of a breach of contract as used in *UWork.com, Inc.* to determine the culpability of 6525 Old National, LLC.<sup>96</sup> While the court recognized the possibility of the contract being ambiguous, it did not discuss the use of parol evidence or a consideration that the terms of the agreement were altered during the course of conduct.<sup>97</sup> The court stated that, due to a clause in the contract where inaction of a party cannot be construed as a waiver, no breach of contract occurred in this case.<sup>98</sup>

A similar issue arose in *Cordell & Cordell, P.C. v. Gao*,<sup>99</sup> a Georgia Court of Appeals case decided in 2015. In *Cordell & Cordell, P.C.*, Gao sued a law firm when he was alerted to a possible breach of fiduciary duty when the firm was working on his case.<sup>100</sup> Gao told the firm "to

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91. *Id.* at 671, 802 S.E.2d at 665.

92. 329 Ga. App. 671, 766 S.E.2d 86.

93. *Id.* at 672–73, 766 S.E.2d at 89–90.

94. *Id.* at 673, 766 S.E.2d at 90.

95. *Id.* at 678, 766 S.E.2d at 93.

96. *Id.* at 677, 766 S.E.2d at 92.

97. *Id.* at 678, 766 S.E.2d at 93.

98. *Id.*

99. 331 Ga. App. 522, 771 S.E.2d 196.

100. *Id.* at 522, 771 S.E.2d at 197.

handle [the] matter in the most economical manner possible."<sup>101</sup> Gao was possibly aware of the firm not working in his best financial interest, but he still paid the firm for its work.<sup>102</sup>

The court in that case used the elements of breach of contract from *UWork.com, Inc.*, this time quoting from *Inland Atlantic Old National Phase I, LLC*,<sup>103</sup> in order to reach a denial for the directed verdict of a breach of contract claim.<sup>104</sup> Rather than considering possible course of conduct modifications or other information to suggest an alteration to the contract, the court only considered information from the contract in respect to the rule written in *Inland Atlantic Old National Phase I, LLC*.<sup>105</sup>

The quickly-established precedent of a new definition for a breach of contract came directly into focus with *Access Management Group, L.P. v. Hanham*, the first case to question the new wording of the Georgia Court of Appeals. Rather than the new rule only possibly interfering with certain evidence being considered to impact a court's holding, *Access Management Group, L.P. v. Hanham* became the first case to directly challenge the rule established in *UWork.com, Inc.* for the admittance of parol agreements.<sup>106</sup>

A 2018 Georgia Court of Appeals case, *Access Management Group, L.P. v. Hanham*, stated that Access Management and St. Marlo Homeowner's Association agreed by course of conduct to modify the responsibilities outlined in the management agreement.<sup>107</sup> The case quoted from *Cordell & Cordell, P.C.* a rule established in many previous cases that "a breach of contract, however, only occurs where 'a contracting party. . . fails to perform the engagement as specified in the contract.'"<sup>108</sup> The court then used this logic to refute any considerations that are not written in the contract, thus ruling against the claims of the Hanhams.<sup>109</sup> "Neither this, nor any, breach of contract claim can be founded upon responsibilities not specified in the contract."<sup>110</sup>

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101. *Id.* at 522, 771 S.E.2d at 198.

102. *Id.* at 522, 771 S.E.2d at 198.

103. *Id.* at 526, 771 S.E.2d at 200.

104. *Id.* at 522, 771 S.E.2d at 197.

105. *Id.* at 526, 771 S.E.2d at 200.

106. *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

## IV. COURT'S RATIONALE

In *Hanham v. Access Management Group L.P.*, the primary issue was whether a breach of contract had occurred when parties to a contract by subsequent course of conduct agreed to a term not written in the contract.<sup>111</sup> Justice Harold D. Melton wrote for the Georgia Supreme Court that a contract may be modified through an agreement subsequent to the contract's formation, and the parties' course of conduct, not just written or oral modifications, can modify the contract.<sup>112</sup> This holding disapproved the ruling of other cases for the Georgia Court of Appeals, where terms and conditions not expressly outlined in the contract were held never to be a part of the agreement between the parties.<sup>113</sup>

The Georgia Supreme Court stated in *Hanham v. Access Management Group L.P.* that a written contract can be modified by later course of conduct, as long as the parties have sufficient consideration, all the parties assent to the modification, and the modification is not disallowed by contract laws concerning the statute of frauds, contract laws about state actors, any other laws, or a provision within the original contract forbidding a modification to the contract.<sup>114</sup> The court declared that since both Access Management and St. Marlo agreed by course of conduct to widen the scope of the responsibilities of Access Management in a manner that was not illegal, they modified the terms of the management agreement and can be held liable for breach of contract.<sup>115</sup>

As the basis in its holding, the Georgia Supreme Court relied upon its previous decision in *American Century Mortgage Investors v. Bankamerica Realty Investors*<sup>116</sup> and *Vasche v. Habersham Marina*,<sup>117</sup> a Georgia Court of Appeals decision.<sup>118</sup> In those cases, breach of parol agreements were the central issue of the plaintiffs' claims, and the courts ruled that agreements made subsequent to a written contract

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111. *Hanham*, 305 Ga. at 416–17, 825 S.E.2d at 220.

112. *Id.* at 417, 825 S.E.2d at 220.

113. *See Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200; *Inland Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d at 92; *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893.

114. *Hanham*, 305 Ga. at 417, 825 S.E.2d at 220. *See generally* O.C.G.A. § 13-5-30.

115. *Hanham*, 305 Ga. at 418, 825 S.E.2d at 221.

116. 246 Ga. 39, 268 S.E.2d 609 (1980).

117. 209 Ga. App. 263, 433 S.E.2d 671 (1993).

118. *Hanham*, 305 Ga. at 417, 825 S.E.2d at 220.

can modify the contract.<sup>119</sup> The court in *Hanham v. Access Management Group L.P.* also referenced *Albany Federal Savings & Loan Association v. Henderson*,<sup>120</sup> a 1945 Georgia Supreme Court decision, as the basis for its ruling that modifications to a contract can occur via the parties' mutual course of conduct.<sup>121</sup>

The Georgia Supreme Court criticized the approach applied by the Georgia Court of Appeals to reach its conclusion.<sup>122</sup> Instead of applying its recognition "that Access Management and St. Marlo 'mutually agreed by course of conduct' to modify" the contract,<sup>123</sup> the Georgia Court of Appeals utilized the rule established in *UWork.com, Inc.* to hold that a course of conduct parole agreement did not meet the parameters to qualify for a breach of contract.<sup>124</sup> The Georgia Supreme Court criticized the Georgia Court of Appeals for relying in error upon other decisions made by the Court of Appeals rather than holdings by the Georgia Supreme Court.<sup>125</sup>

The court also mentioned *Cordell & Cordell, P.C.* and *Inland Atlantic Old National Phase I, LLC* to note how courts incorrectly could ignore course of conduct modifications simply because the information was not in a written contract.<sup>126</sup> The Georgia Supreme Court finally highlighted the first case in which breach of contract was established in the State of Georgia, *Cooley v. Moss*.<sup>127</sup>

As a side note focusing not on the error of the rule but rather its adaptation by the Georgia Court of Appeals, the court in *Access Management Group, L.P. v. Hanham* claimed that a breach of contract "only occurs" in the three scenarios outlined in the remainder of the rule.<sup>128</sup> The "only occurs" language present within the case seems to be an inclusion by the court and is found nowhere else in the provided case law.<sup>129</sup> Such language is not present within *Cordell & Cordell, P.C.*,<sup>130</sup>

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119. *Am. Century Mortg. Inv.*, 246 Ga. at 40, 268 S.E.2d at 611; *Vasche*, 209 Ga. App. at 265, 433 S.E.2d at 673–74.

120. 200 Ga. 79, 36 S.E.2d 330 (1945).

121. *Hanham*, 305 Ga. at 417, 825 S.E.2d at 220.

122. *Id.* at 417–18, 825 S.E.2d at 220–21.

123. *Id.* at 417, 825 S.E.2d at 220 (quoting *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512 (2018)).

124. *Id.* at 417–18, 825 S.E.2d at 220.

125. *Id.*

126. *Id.*

127. *Id.* at 418, 825 S.E.2d at 221.

128. *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512.

129. See *Cooley*, 123 Ga. at 708, 51 S.E. at 625; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200; *Inland*

the case from which *Access Management Group, L.P. v. Hanham* pulled the quote, nor *UWork.com, Inc.*,<sup>131</sup> where the quote originated, or any other breach of contract claim case using the elements provided by *UWork.com, Inc.*<sup>132</sup> The Georgia Court of Appeals' arbitrary inclusion of "only occurs"<sup>133</sup> provided another example of how a simple rewording by the court, perhaps to increase dramatic flair or to attract the attention of the reader, could lead to adverse results by accidental limitation of a breach of contract claim.<sup>134</sup>

## V. IMPLICATIONS

The strongest benefit visible by the decision in *Hanham v. Access Management Group* is the reestablishment and solidification of parol agreements and course of conduct modifications in the state of Georgia. Through this decision, parties are no longer confined to the words of a document that may not have had exact replication to the nature of the

*Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d at 92 (2014); *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893.

130. *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200.

131. *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893.

132. *See Cooley*, 123 Ga. at 708, 51 S.E. at 625; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Inland Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d at 92.

133. *Access Mgmt. Group, L.P.*, 345 Ga. App. at 132, 812 S.E.2d at 512.

134. *Hanham v. Access Management Group, L.P.* is not the first time in recent Georgia history that the Georgia Court of Appeals has neglected long-established Georgia Supreme Court precedent and accidentally created an altered rule that was quickly promulgated through many Georgia Court of Appeals cases. In *State v. Harper*, 303 Ga. 144, 810 S.E.2d 484 (2018), the Georgia Supreme Court noticed that an incorrect standard for trespass had been used by the Georgia Court of Appeals. *Id.* at 144–46, 810 S.E.2d at 485–86. Rather than continue the long-established standard by the Georgia Supreme Court that only explicit notice to alert forbidden entry as necessary to constitute a trespass, *See Murphey v. State*, 115 Ga. 201, 202, 41 S.E. 685, 686 (1902), the Georgia Court of Appeals in 1997 altered the rule and stated that express notice, rather than explicit notice, was required, *Wood v. State*, 227 Ga. App. 677, 678, 490 S.E.2d 179, 180–81 (1997), based on the wording of a 1973 Georgia Court of Appeals case that mentioned the defendant's express notice. *Scott v. State*, 130 Ga. App. 75, 78, 202 S.E.2d 201, 204 (1973). Many Georgia Court of Appeals cases began to then promulgate this express notice standard established in 1997 when a 2008 Georgia Court of Appeals case adopted an express notice standard in its case on trespass. *Osborne v. State*, 290 Ga. App. 188, 189 (2008). *See Harper v. State*, 338 Ga. App. 535, 538 (2016); *Sheehan v. State*, 314 Ga. App. 325, 326 (2012). While the Georgia Supreme Court readopted the explicit notice standard in 2018, *State v. Harper* evidences along with *Hanham v. Access Management, L.P.* a possible history of the Georgia Court of Appeals neglecting or incorrectly applying standards of the Georgia Supreme Court despite clear precedent. *State v. Harper*, 303 Ga. at 144–46, 810 S.E.2d at 485–86.



parties' interactions and can seek justice for violations of an arrangement that originated outside of an established written agreement. Evidence of behavior and actions by the parties can be used to show the possibility of a new contract's formation, to the benefit of the party who relied upon the conduct exhibited by the other party.<sup>135</sup>

*Hanham v. Access Management Group L.P.* is also a cautious reminder to writers about the law and interpreters of the law alike how instrumental precise wording is to the correct functioning of government. While the rewording seemingly meant only to reintroduce the elements of a breach of contract in a new manner and not to limit or alter the definition, such an alteration affected several Georgia Court of Appeals cases and possibly interfered and denied parties from rights which they deserved. By either not considering or directly denying parties the possibility of an outside agreement beyond the written contract, the court hindered themselves from working in the best interest of the parties for the pursuit of fairness and equality.

The chain of events which led to the decision of *Access Management Group L.P. v. Hanham* is interesting not only to analyze the necessity of precise wording, but also as a commentary upon the common law system. The history leading to *Access Management Group L.P. v. Hanham* shows how quickly the erroneous rewording of established rules can promulgate and become precedent in courtrooms throughout the state.<sup>136</sup> Without an examination by courts of the origins of certain rules quoted or cited in previous decisions, courts introduce the possibility of reaffirming an incorrect rule that either denies rights to a current party or will harm a party in future cases. Without another mechanism in place that could stem these types of results, litigants who get their cases resolved in the Georgia Court of Appeals and are not able to appeal to the Georgia Supreme Court seem to risk being subject to departures in precedent by the Georgia Court of Appeals.<sup>137</sup> While *UWork.com* filed a motion for reconsideration that was denied, *Walker, Shiho Seki*, and *Cordell & Cordell, P.C.* never filed an appeal to the

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135. *Hanham*, 305 Ga. at 417, 825 S.E.2d at 220.

136. See *Cooley*, 123 Ga. at 708, 51 S.E. at 625; *Miller*, 346 Ga. App. at 317, 814 S.E.2d at 432; *Walker*, 341 Ga. App. at 670, 802 S.E.2d at 665; *Shiho Seki*, 333 Ga. App. at 322, 775 S.E.2d at 779; *Cordell & Cordell, P.C.*, 331 Ga. App. at 526, 771 S.E.2d at 200; *Inland Atl. Old Nat. Phase I, LLC*, 329 Ga. App. at 677, 766 S.E.2d at 92; *UWork.com, Inc.*, 321 Ga. App. at 590, 740 S.E.2d at 893.

137. For reasons that a litigant might be unable to appeal a ruling, see Donna Bader, *10 Good Reasons Not To Appeal*, PLAINTIFF MAGAZINE, <https://www.plaintiffmagazine.com/recent-issues/item/10-good-reasons-not-to-appeal> (last visited Oct. 4, 2019).

Georgia Supreme Court.<sup>138</sup> By reiterating an error of previous courts on a rule of law as good law without ensuring its accuracy, future cases risk the possibility of adopting incorrect law for years and harming many people until someone has the insight to catch the error. *Hanham v. Access Management Group L.P.* serves as a reminder to those who use case law to argue for their clients or for those who apply case law in binding decisions that they must ensure the accuracy of the information presented in previous courts rather than unwavering acceptance of that information, in order to best serve the client's interest or in the best interest of correctly preserving the law.

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138. *Walker*, 341 Ga. App. 647, 802 S.E.2d 643; *Shiho Seki*, 333 Ga. App. 319, 775 S.E.2d 776; *Cordell & Cordell, P.C.*, 331 Ga. App. 522, 771 S.E.2d 196; *UWork.com, Inc.*, 321 Ga. App. 584, 740 S.E.2d 887.

