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Construction Law

by Brian J. Morrissey

I. INTRODUCTION

As the construction industry moved through its recession, a number of issues eventually percolated their way through the appellate courts. Not surprisingly, once projects began going under, many of these cases focused on novel theories seeking to impose liability against "deep pockets."

The most significant event during the survey period was the development of a unique approach to impose liability against the government for the insolvency of sureties presented on public works projects, and the abrupt reversal of the adoption of this theory by the Georgia Supreme Court.

Also during the survey period, there were a number of attempts to impose liability against lenders on construction projects for the failure to ensure that payments were made to contractors in such a way as to avoid the imposition of liens, and on commitments to keep construction loans flowing.

II. LENDER RESPONSIBILITIES AND RIGHTS

The entanglement of the banking industry in both commercial and residential construction raised a number of issues concerning a lender's responsibilities and rights vis-a-vis the participants in a construction project. As a lender moves toward "pulling the plug" on a particular project or development, the ramifications for an owner or a contractor may be extremely serious and detrimental. Borrowers and third parties affected by a lender's actions have all sought, through various means, recourse against a lender who acts in a manner detrimental to the

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furtherance of a project. Georgia courts have always been reluctant to place a great deal of responsibility on lenders in connection with their actions concerning loans. However, the degree of involvement by a lender in a particular project or development may be the key factual feature affecting a determination of a lender's responsibilities.

A. Disbursement of Loan Proceeds

Typically, a lender has no liability beyond its contractual responsibilities to the parties with whom it contracted. This principle was followed during the survey period. In Peterson v. First Clayton Bank & Trust Co., Stovall Building Supplies, a supplier of materials used in the construction of a house, filed a complaint to foreclose a materialman's lien against the owner and to collect on an open account against the builder, Shope, in connection with the construction of a house for Robert and Gertrude Peterson, the property owners. The Petersons filed a third party claim against the construction lender, First Clayton Bank & Trust, alleging that the bank breached its contractual and fiduciary duties in disbursing loan proceeds for the construction of the house. The Petersons' main allegation against the bank was that it failed to administer and account for disbursements properly, and it failed to exercise appropriate care in assuring that the builder had been paying subcontractors and suppliers.

The construction contract between the Petersons and the builder required the builder, upon request, to furnish the owner or a bank representative with times of withdrawals. Furthermore, the builder would have to provide a statement showing an itemization of expenditures to date, items due and unpaid, and supporting documentation including receipts, as well as affidavits, waivers of liens, and other evidence of payment. After reviewing the construction contract, the bank agreed to finance construction of the house. During a series of conversations, it became clear that the bank, as part of its loan function, would handle disbursements and payments to the builder required under the construction contract. Also, the bank would regularly inspect the

3. Id. at 94, 447 S.E.2d at 64.
4. Id.
5. Id.
6. Id.
7. Id.
property to monitor progress of the construction. The Petersons, who were living in Florida at the time, could not monitor the progress of their home's construction in Georgia.

The Construction Loan Agreement between the Petersons and the bank stated:

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

8. Id.
9. Id.
10. Id. at 95, 447 S.E.2d at 64-65.
Simultaneously, the Petersons signed an agreement authorizing a bank official to handle disbursements of draws payable directly to the contractor on the construction loan. The bank proceeded to disburse funds to the builder upon request, sometimes with the participation of the Petersons, who at times reviewed disbursement requests. The builder failed to pay suppliers and subcontractors, however, and as a result, $38,000 in liens were filed against the property, which were not satisfied by the Petersons. The Petersons defaulted on the Construction Loan Agreement by failing to remove the liens, and the bank foreclosed on the property.

The bank moved for summary judgment on the Petersons' third party claim for negligence and breach of fiduciary duty. The trial court granted the bank's motion, and the Petersons appealed. The Georgia Court of Appeals found that the bank had not undertaken any responsibility to ensure that materialmen and subcontractors were paid before disbursing loan proceeds to the builder. In doing so, the court of appeals rejected the Petersons' argument that the agreement by the bank officials to make such payments was a modification to the terms of the Construction Loan Agreement. There was no modification because the bank officials did not promise anything other than what the Construction Loan Agreement provided for in the first place, that is, that the bank could disburse payments directly to the builder and would monitor construction progress. No implied contractual provision existed since an obligation to ensure that materialmen and subcontractors were paid was not necessary to effect the full purpose of the contract between the Petersons and the bank; therefore, it could not fairly be said to be within the contemplation of the parties. The Petersons expressly authorized the bank to pay loan proceeds directly to the builder, and the Construction Loan Agreement provided that the bank was not liable.

11. Id. at 96, 447 S.E.2d at 65.
12. Id.
13. Id.
14. Id.
15. Id. at 98, 447 S.E.2d at 66-67.
16. Id. at 97-98, 447 S.E.2d at 66. O.C.G.A. § 13-4-4 (1982) provides:

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

Id. § 13-4-4.
18. Id.
or obligated in connection with the project in any respect except to advance loan proceeds as agreed in the contract. Thus, no implied contract could exist simultaneously with this express understanding.

Regarding the Petersons’ claim for negligence and breach of fiduciary duty on the part of the bank, the court of appeals held that in addition to any breach of contractual obligation, there must also be a breach of a duty imposed by statute or recognized legal principle. Typically, a lender has no obligation to protect the owner on a construction project unless the lender’s activities extend beyond that of the conventional construction lender and the lender actually engages in activities connected to the construction of the property. The court of appeals found that the bank, while agreeing to assist the Petersons by making payments directly to the builder, did not agree to obtain lien waivers, payment affidavits, or otherwise ensure that suppliers were paid before disbursement of funds to the builder. Moreover, the Petersons did not surrender to the bank their own contractual obligations to ensure that all labor and material bills were paid and that the property be kept free from liens. The court of appeals concluded that the bank’s primary role was to protect its interests in the secured property and not to ensure that the borrowers’ interests were protected. While the bank had an obligation to exercise diligence and good faith in the disbursement of construction funds in a timely manner for work actually performed, nothing in this obligation compelled the bank to undertake duties owed by the builder or the Petersons.

B. Continued Availability of Credit

In Wachovia Bank of Georgia v. Mothershed, Wachovia Bank’s motion for summary judgment was granted on its claim for a deficiency judgment on three promissory notes made as construction loans to Mothershed. Mothershed counterclaimed for breach of an oral contract under which Wachovia was to make future construction

19. Id.
20. Id.
21. Id. at 99, 447 S.E.2d at 67.
24. Id.
25. Id. at 100, 447 S.E.2d at 68.
26. Id.
28. Id. at 854, 437 S.E.2d at 854.
loans. The failure of Wachovia to make these loans resulted in the collapse of Mothershed's residential construction business. An interlocutory appeal was taken from the denial of summary judgment to both Wachovia's claim against Mothershed and Mothershed's counter-claim against Wachovia.

The court of appeals reversed the denial of summary judgment finding that the promissory notes, as unconditional obligations, were sufficient in and of themselves to support a cause of action. Parol testimony could not outline conditions not referenced specifically on the face of the notes. Mothershed contended that the oral agreement to extend future construction loans required the bank to maintain an inventory of construction or "spec" loans at all times. So, when one home sold, another loan would be offered based upon an appraisal of the proposed home, a review of the plans, the rate of interest then charged on construction loans, and the necessity of renewability of the loan. Since the parties did not agree upon any specific parcels to secure the loans, no time limitations were specified, the value of the loans was indefinite, and no maturity date was specified, the court of appeals determined that there was not sufficient evidence of a contract, merely an agreement to agree in the future.

III. CONTRACT FORMATION, CONSTRUCTION, AND BREACH

A. Contract Formation

Dual Agency. In Remediation Services, Inc. v. Georgia-Pacific Corp., a dredging contractor brought an action to recover payment against Georgia-Pacific on theories of breach of contract and quantum meruit. An environmental engineer responsible for dredging projects on behalf of Georgia-Pacific was a fifty percent owner in Remediation

29. Id. at 853, 437 S.E.2d at 853.
30. Id.
31. Id.
32. Id. at 854, 437 S.E.2d 853-54.
33. Id.
34. Id. at 854-55, 437 S.E.2d at 854.
35. Id. at 855, 437 S.E.2d at 854. Prior to July 1, 1988, commitments to lend money were not required to be in writing. After that date, any commitment to lend money had to be in writing. See O.C.G.A. § 13-5-30 (1988).
37. Id. at 427, 433 S.E.2d at 632.
Services and instrumental in awarding the dredging contract, the scope of which was determined by this employee.38 By way of defense, Georgia-Pacific asserted that it was defrauded by one of its own employees, making the dredging contract void ab initio.39 The court of appeals found that dual agency did not render the contract void per se, but voidable at the option of the principal who was without knowledge of the dual agency at the time the contract was entered.40

Indefiniteness of Contract. In *Jackson v. Williams,*41 plaintiffs Jackson and Crider filed suit against Williams for breach of a contract to construct a road.42 Jackson and Crider had leased a piece of property, a portion of which was subleased to Williams for use as a quarry.43 The agreement was modified by locating the quarry on the parcel, which leasehold interest was assigned through DMH Holdings, Williams' company, to Vulcan Materials Company.44 Jackson and Crider contended Williams entered into an oral contract to construct a road which would connect the quarry to a nearby public highway. Williams performed some preliminary construction in 1989 and 1990, but stopped work and repudiated the alleged agreement.45 At trial judgment was entered in favor of Jackson and Crider for $715,000 in contractual damages and $40,000 for bad faith.46 Williams' motion for judgment notwithstanding the verdict was granted from which the plaintiffs appealed.47 The court of appeals held:

The requirement of certainty extends not only to the subject matter and purpose of the contract, but also to the parties, consideration, and even the time and place of performance where these are essential. When a contract is substantially alleged, some details might be supplied under the doctrines of reasonable time or reasonable requirements. But indefiniteness in subject matter so extreme as not

38. *Id.* at 427-28, 433 S.E.2d at 632-33.
39. *Id.* at 427, 433 S.E.2d at 632.
40. *Id.* at 430, 433 S.E.2d at 634.
42. *Id.* at 640, 434 S.E.2d at 98.
43. *Id.*
44. *Id.* at 641, 434 S.E.2d at 99.
45. *Id.*
46. *Id.* at 640, 434 S.E.2d at 98.
47. *Id.*, 434 S.E.2d at 98-99.
to present anything upon which the contract may operate in a definite manner renders the contract void . . . .48

The court of appeals found the oral contract to be indefinite and unenforceable because there were no discussions between the parties regarding the material content of the road, the precise location of the road or its dimensions, or the estimated cost of the project.49 Moreover, there were no discussions concerning the time period for construction or a completion date.50

B. Contract and Construction

**Time Is of the Essence.** In *Separk v. Caswell Builders, Inc.*,51 the purchaser of a house constructed by Caswell Builders argued that a "time of the essence" clause in the contract vitiated the contract itself once closing did not occur on the date specified in the contract.52 The court of appeals found plaintiff's contention to be without merit, absent an expiration date specifically in the contract and a clause imposing a condition of closing by the date specified.53 The time of the essence clause merely bound the parties to perform certain actions by the date specified, the failure of which would be a breach.54

**Privity.** In *Crispens Enterprise, Inc. v. Halstead*,55 Halstead contracted with Crispens Enterprise to construct a garage.56 Crispens Enterprise subcontracted the pouring of a fifteen foot high concrete retaining wall to Con-Wall Construction Company.57 The concrete wall cracked, and Crispens Enterprise was unable to repair it satisfactorily.58 Halstead sued for breach of contract and other theories.59 Partial summary judgment was granted against Crispens Enterprise

48. *Id.* at 642, 434 S.E.2d at 100 (quoting Peachtree Medical Bldg., Inc. v. Keel, 107 Ga. App. 438, 130 S.E.2d 530, 532 (1963)).
49. *Id.* at 643, 434 S.E.2d at 100.
50. *Id.*
52. *Id.* at 713, 434 S.E.2d at 502-03.
53. *Id.* at 714, 434 S.E.2d at 503.
54. *Id.*
56. *Id.* at 133, 433 S.E.2d at 354.
57. *Id.*
58. *Id.*
59. *Id.*
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with respect to its contractual liability for the negligent construction of the retaining wall. Crispens Enterprise appealed. The contract provided that Crispens Enterprise would erect a thirty foot by forty foot garage, including a retaining wall. The court of appeals found that under the express contract drafted by Crispens Enterprise, the scope of the builder's work included the construction of the retaining wall, with Halstead's understanding and permission that the actual construction of the wall would be subcontracted to Con-Wall Construction. This did not alter the relationship between Crispens Enterprise and the owner, nor did it result in a direct contract between the owner and Con-Wall Construction. Accordingly Crispens Enterprise, as the general contractor, was responsible for the proper erection of the garage pursuant to the written agreement and could be held accountable under a claim of breach of contract.

Acceptance of Work. In Emory Rent-All, Inc. v. Lisle Associates General Contractors, the parties entered into a written construction contract providing that Lisle Associates would build a new office building for Emory Rent-All for $135,730. The contract contained a retainage clause under which Emory Rent-All was to make bi-weekly payments of ninety percent of labor and materials incorporated into the job. The retainage balance was to be paid upon acceptance of the completed building, or occupancy, whichever occurred first. The contract included blueprints which provided for a concrete retaining wall reinforced with steel.

Prior to completion of the project and before acceptance, Emory Rent-All noticed that the retaining wall was defective. Lisle Associates acknowledged the defect and attempted to make a correction, but even after the repair was performed, Emory Rent-All objected to paying the retainage on the project because of "paving problems and wall problems." Subsequently, Lisle Associates executed an extended five-year

60. Id.
61. Id.
62. Id.
63. Id. at 133-34, 433 S.E.2d at 354.
64. Id. at 134, 433 S.E.2d at 354.
65. Id.
67. Id. at 516, 441 S.E.2d at 927.
68. Id.
69. Id.
70. Id.
71. Id. at 516-17, 441 S.E.2d at 927.
warranty on the wall and issued a check representing that portion of retainage pertaining to the retaining wall. In lieu of being satisfied by the condition of the wall, Emory Rent-All accepted the extension on the warranty in exchange for payment of the retainage.

During the initial one-year warranty period, Emory Rent-All notified Lisle Associates that the retaining wall had a continuing defect, which Lisle Associates refused to repair. Emory Rent-All had the wall repaired and then sued Lisle Associates under the extended warranty for the repair cost.

The trial court directed a verdict for Lisle Associates on the theory that the extended warranty had no consideration and was therefore a nudum pactum and void. Emory Rent-All appealed this decision.

The court of appeals held that "by accepting the building in less than 'contract status,' Emory provided consideration for the 'new' extended warranty in return for paying the contested retainage."

C. Breach and Remedies

Limitation of Actions. In Heffernan v. Johnson, suit was brought for negligence and fraud arising out of Johnson's installation of tile for Heffernan. The trial court granted summary judgment to the defendant on the statute of limitations defense. The four-year statute of limitations pertaining to trespass or damage to realty has been construed to measure the accrual of that right of action at the time of substantial completion of the project. The court of appeals further

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72. Id. at 517, 441 S.E.2d at 927.
73. Id.
74. Id.
75. Id.
76. Id. at 516, 441 S.E.2d at 927.
77. Id.
78. Id. at 517, 441 S.E.2d at 928. But see Owings v. Georgia R.R. Bank & Trust Co., 188 Ga. App. 265, 372 S.E.2d 825 (1988) (agreement to discount attorney fees to be recovered under the judgment was unenforceable because of lack of consideration).
80. Id. at 139-40, 433 S.E.2d at 108.
81. Id. at 140, 433 S.E.2d at 108. The applicable statute of limitations may be found in O.C.G.A. § 9-3-30: "All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues." Id. § 9-3-30. For a discussion of the applicable statute of repose which may also affect the right to bring an action, see Brian J. Morrissey & Matthew W. Wallace, Construction Law, 43 Mercer L. Rev. 141, 147-48 (1991).
held that the discovery rule and continuing tort theories are not applicable to actions involving only property damage. 83

Recoupment. In *Exterior Wall Systems, Inc. v. Dean,* 84 Exterior Wall Systems sued to recover sums due for labor and materials furnished in the construction of Dean's residence. 85 Defendant counter-claimed for negligent damage to the residence and breach of contract. 86 The plaintiff appealed the jury's verdict for the defendant on plaintiff's claims and in favor of plaintiff on defendant's counterclaims. 87 The court of appeals reversed the judgment against Exterior Wall Systems based upon the trial judge's erroneous instruction to the jury that defendant's nonpayment was justified if the plaintiff extracted and collected more than was actually due. 88 The court of appeals held that nonpayment was not the remedy for such a breach of contract, but recoupment was appropriate. 89

Election of Remedies. In *LeBrook, Inc. v. Jefferson,* 90 the purchasers of a new home sued the construction contractor for negligence, breach of warranty, and fraud. 91 Plaintiff Jefferson initially executed a contract with LeBrook for the purchase of a newly constructed home. The home, however, was not built according to specifications approved by the Veterans Administration; consequently, a builder's warranty and a commercial warranty were required by the lender. 92 The parties amended the contract to include a representation that the contractor would provide the requisite warranties. 93 The contractor failed to forward an application or premium to the commercial warrantor, and the property was not enrolled under the warranty program. 94 After closing, Jefferson discovered water under the home and notified the contractor, who made one attempt to make a repair that failed. 95

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85. Id. at 428, 436 S.E.2d at 543-44.
86. Id.
87. Id., 436 S.E.2d at 544.
88. Id.
89. Id. Recoupment is a claim or demand of the defendant arising out of the same transaction as that sued on by the plaintiff. See O.C.G.A. § 13-7-3 (1982).
91. Id. at 650, 437 S.E.2d at 361.
92. Id.
93. Id.
94. Id.
95. Id. at 651, 437 S.E.2d at 361.
At trial the contractor unsuccessfully moved for a directed verdict, and the jury returned a verdict for Jefferson on all counts. Jefferson elected to have a judgment entered only on the breach of warranty claim. The court of appeals found that the jury's verdict would have supported any theory of recovery asserted by the defendants.

**Difference Between Contract Price and Market Value.** In *Separk v. Caswell Builders, Inc.*, the court of appeals reiterated a long-standing rule that the proper measure of damages on the breach of contract to purchase real property is the difference between the contract price and market price of the property on the day of breach.

**Voidability at Option of Principal.** In *Remediation Services, Inc. v. Georgia-Pacific Corp.*, the court of appeals reaffirmed that contracts created by dual agency are not void per se, but are voidable at the option of the principal as the undisclosed dual agency operates as a fraud upon the principal.

**Lost Profits.** In *Excavation +, Inc. v. Candler*, *Excavation +, Inc.* ("Excavation") contracted with Asa Candler V, Asa Candler VI, and Candler/Lombard Limited Partnership to supply fill dirt for a proposed shopping center. Excavation sued the defendants for lost profits resulting from the repudiation of their construction contract. The trial court granted summary judgment for defendants finding the damages sought were speculative and conjectural.

The court of appeals held that the measure of damages for the breach was the contract price less what it would cost the contractor to perform. In other words, the measure of damages was the lost profits. The evidence adduced during discovery showed that Excavation did not know what the expected profit was on the job and, as a result, any figure

96. Id. at 650, 437 S.E.2d at 361.
97. Id.
98. Id. at 651-52, 437 S.E.2d at 362.
100. 209 Ga. App. at 714, 434 S.E.2d at 503.
102. 209 Ga. App. at 430, 433 S.E.2d at 634.
104. Id. at 351, 433 S.E.2d at 340.
105. Id.
106. Id. at 352, 433 S.E.2d at 341.
107. Id.
provided by its officers would be speculative in nature. Excavation also conceded that unexpected costs could arise in the construction business that were outside its control. As a result, many expenses used in the estimate were based upon a timely completion of the project. Excavation attempted to base its claim for damages on the price contained in the defendant's contract and the price under which Ivie & Associates, its subcontractor, had agreed to perform. As Excavation's claim was based purely on speculation as to amount, the damages were remote and speculative, and summary judgment was properly entered against Excavation.

IV. TORT LIABILITY—CONTRACTUAL DUTIES AND FRAUD

A. Negligence, Fraud, and Other Torts—Duties

Independent Contractors

Premises Liability. In Englehart v. OKI America, Inc., an employee of a subcontractor brought an action against both a general contractor and property owner for personal injuries sustained when he fell through an opening in a floor which had been covered temporarily with plywood. The trial court granted summary judgment to the property owner, and the employee appealed.

A.R. Weeks & Associates was the general contractor on the project. During construction there were openings in the floor for the installation of the heating, ventilation, and air conditioning ("HVAC") system. As a protective measure, these openings were covered with plywood. The property owner, OKI America, assigned one of its employees to visit the construction site periodically to ensure that the general contractor was conforming to the construction contract drawings and specifications. Part of the duties of OKI America's inspector was to measure the size and location of the HVAC openings. To do so, he removed plywood.

108. Id. at 353, 433 S.E.2d at 341.
109. Id. at 352-53, 433 S.E.2d at 341.
110. Id. at 353, 433 S.E.2d at 341.
111. Id. Ivie & Associates disputed any written contractual agreement for the performance of work or any agreement on price. Id.
112. Id.
114. Id. at 151, 433 S.E.2d at 332.
115. Id.
116. Id.
117. Id.
pieces, took measurements, and replaced the plywood as he had found it.118

Generally, a property owner who has surrendered full possession and control of the property to an independent contractor is not liable for any injuries sustained on the property.119 The plaintiff claimed that exceptions to this general rule controlled the actions of OKI America because they retained the right to direct or control the manner of executing the work, OKI America ratified the negligence of the general contractor when its employee placed the plywood pieces back over the HVAC openings, or OKI America had a nondelegable duty imposed by law.120 The trial court held that OKI America did not retain the right to direct and control the manner of executing the work because the construction contract provided complete control of the construction site to the general contractor.121 Moreover, the general contractor was responsible for all safety precautions at the site.122 While OKI America did retain the right to ensure that the work conformed to the contract drawing specifications, such right did not permit OKI America to exercise control over the manner in which A.R. Weeks did the work.123 The court of appeals stated, "Such a general right does not mean that

118. Id.

An employer is liable for the negligence of a contractor:
(1) When the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance;
(2) If, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed;
(3) If the wrongful act is the violation of a duty imposed by express contract upon the employer;
(4) If the wrongful act is the violation of a duty imposed by statute;
(5) If the employer retains the right to direct or control the time and manner of executing the work or interfere and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference; or
(6) If the employer ratifies the unauthorized wrong of the independent contractor.

Id. § 51-2-5.

120. 209 Ga. App. at 151-53, 433 S.E.2d at 333-34. The nondelegable duty argued by plaintiff as set forth in O.C.G.A. § 34-2-10(b) (1992) is as follows: "Every employer and every owner of a place of employment, place of public assembly, or public building, now or hereafter constructed, shall so construct, repair, and maintain such facility as to render it reasonably safe." Id. § 34-2-10(b).

121. 209 Ga. App. at 152, 433 S.E.2d at 333.

122. Id.

123. Id.
the contractor is controlled as to his methods of work. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way. The court of appeals further found that OKI America did not ratify any alleged negligence of the general contractor. The testimony of OKI America’s employee showed that he did not have Occupational Safety and Health Administration (“OSHA”) construction site training, was not responsible for checking on the safety of the work site maintained by the general contractor, and was merely there to ensure that the work conformed to the contract drawings and specifications.

Finally, the court of appeals found that OKI America did not have a nondelegable duty to maintain the workplace. A property owner can delegate the responsibility of maintaining a safe workplace by relinquishing possession and control of the property to an independent contractor.

Contractual Responsibility of General Contractor Not Relieved by Negligence of Independent Contractor. While a property owner may insulate itself from the negligence of an independent contractor, the general contractor retaining a subcontractor is not absolved from contractual responsibilities as a result of the negligence of the independent subcontractor. In Crispens Enterprise, Inc. v. Halstead, the general contractor correctly asserted that because negligence was committed by a subcontractor functioning as an independent contractor, it could not be vicariously responsible for those acts. However, this negligence did not relieve the general contractor of responsibility to the owner for the failure of the construction to meet the plans and specifications.

124. Id.
125. Id. at 152-53, 433 S.E.2d at 333-34.
126. Id., 433 S.E.2d at 334.
127. Id. at 153, 433 S.E.2d at 334.
128. Id.
131. Id., 433 S.E.2d at 355. O.C.G.A. § 51-2-5 (1982) provides: “An employer is liable for the negligence of a contractor: ... (3) If the wrongful act is the violation of a duty imposed by express contract upon the employer ...” Id. § 51-2-5(3).
Negligence

Nuisance. In City of Lawrenceville v. Macko,\textsuperscript{132} William and Patricia Macko sued for damages and injunctive relief on the theories of negligence and nuisance against the City of Lawrenceville and Gaines Brown, a residential home builder and seller of the Mackos' home, for the periodic flooding of their home.\textsuperscript{133} The trial court entered judgment against the defendants, and they appealed.\textsuperscript{134}

Brown applied for a building permit from the city to begin construction on the Mackos' home in March 1987. Brown obtained a site plan and topographical survey on the lot as required under the subdivision plat.\textsuperscript{135} The subdivision plat provided that the city disclaimed responsibility for overflow or erosion of natural or artificial rains beyond the right-of-way.\textsuperscript{136} While the city began an inspection of the construction site, it did not evaluate the drainage systems of the home or the elevation of the home on the property.\textsuperscript{137} In July 1989, the Mackos, who had purchased the home, experienced major flooding in the drive-under garage, which resulted in damage to the home and personal property.\textsuperscript{138}

Under the Mackos' negligence theory, the city demanded judgment in its favor.\textsuperscript{139} The city argued liability could not attach to a duty owed by the government that ran to the public generally and not to any particular member of the public unless there existed a special relationship between the government and the individual that would give rise to a particular duty owed to that individual.\textsuperscript{140} This "public duty" doctrine previously had not been applied to municipalities in actions involving negligent inspection of homes or negligent issuance of building permits.\textsuperscript{141} The court of appeals found that the city did not make

\textsuperscript{132} 211 Ga. App. 312, 439 S.E.2d 95 (1993).
\textsuperscript{133} Id. at 312, 439 S.E.2d at 97.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 312-13, 439 S.E.2d at 97. Section 101.2.3 of the Lawrenceville City Building Code provided that "[t]he inspection or permitting of any building or plan by any jurisdiction, under the requirements of this Code shall not be construed in any court as a warranty of the physical condition of such building or the adequacy of such plan." 211 Ga. App. at 313, 439 S.E.2d at 97 (quoting Lawrenceville, Ga., City Building Code § 101.2.3).
\textsuperscript{138} 211 Ga. App. at 313, 439 S.E.2d at 98.
\textsuperscript{139} Id. at 315, 439 S.E.2d at 99.
\textsuperscript{140} Id.
\textsuperscript{141} Id. The court, however, went on to examine other jurisdictions in which the doctrine had been applied in that context. Id. See Rich v. City of Mobile, 410 So.2d 385 (Ala. 1982); Trianon Park Condo. Ass'n v. City of Hialeah, 468 So.2d 912 (Fla. 1985);
specific assurances or promises to the Mackos prior to the inspection and approval of the home.\textsuperscript{142} Since the Mackos failed to establish the city owed them a duty of care specifically based upon a special relationship, the court of appeals determined that the trial court erred by failing to grant a directed verdict to the city.\textsuperscript{143}

To hold a municipality liable for nuisance, there must be a continuous and regularly repetitious act or condition which causes injury, and the municipality must have knowledge or be charged with notice of the dangerous condition or repetitive acts causing injury.\textsuperscript{144} A municipality's liability cannot arise solely from its approval of construction projects which increase surface water runoff.\textsuperscript{145} Furthermore, mere negligence, no matter how egregious the results, will not give rise to liability against the municipality for nuisance.\textsuperscript{146} There was no evidence that the maintenance of the drainage system by the city caused the flooding of the home.\textsuperscript{147} Moreover, the evidence, viewed most favorably to the Mackos, showed mere negligence on the part of the city, which was insufficient to support a cause for nuisance.\textsuperscript{148}

\textit{Piercing Corporate Entity.} Brown v. Rentz\textsuperscript{149} offers a method wherein the corporate entity can be circumvented from having a serious effect on individuals in closely-held construction companies.\textsuperscript{150} In Brown home buyers brought suit against Rentz Builders, Inc., Lonnie S. Rentz, and Linda Rentz for the negligent construction of the residence and negligent misrepresentation in the sale of the residence.\textsuperscript{151} Lonnie Rentz was a shareholder, director, and officer in Rentz Builders, Inc. Linda Rentz was not a shareholder, but was the corporate secretary. She was also a real estate agent for Royer Realty, and her listings included homes built by Rentz Builders.\textsuperscript{152}

Subsequent to purchase, the Browns discovered roof leaks and basement flooding. Although Rentz Builders attempted to make repairs,
the repairs were not satisfactory to the Browns.\textsuperscript{153} The Browns alleged that the problems were caused by defective construction and that the Rentzes knowingly and falsely represented to them that the house was properly constructed and of good quality.\textsuperscript{154} In the meantime, Rentz Builders had no assets, and Lonnie Rentz was building homes under a different corporate name.\textsuperscript{155}

The trial court granted the individual defendants' motion for summary judgment.\textsuperscript{156} The Browns appealed on the grounds that the Rentzes had disregarded the corporate form and their respective activities with regard to the construction and sale of the house; therefore, they asserted that the corporate veil should have been pierced.\textsuperscript{157}

Despite the fact that the court did not specifically pierce the corporate entity, and even though Lonnie Rentz did not build the house in his individual capacity, the court of appeals overruled the trial court's grant of summary judgment against Lonnie Rentz.\textsuperscript{158} Clearly, an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable for that tort.\textsuperscript{159} Furthermore, an officer of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable, unless he specifically directed the particular act to be done or participated or cooperated in its commission.\textsuperscript{160} The evidence of record showed that the vast majority of work was performed by subcontractors. Lonnie Rentz oversaw the subcontract work, and according to the court, did "small stuff"—"trim work," "a little of the paint work," responded personally when the Browns called, and personally performed some repair work that was claimed to be defective.\textsuperscript{161} Based on this evidence, the court concluded that a jury could find the corporation negligent in constructing the house and could find that Lonnie Rentz was personally liable for that negligent construction.\textsuperscript{162} He could be liable personally because he specifically directed the manner in which the house was constructed or he participated or cooperated in its negligent construction.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id. at 275-76, 441 S.E.2d at 877.
\item \textsuperscript{158} Id. at 276, 441 S.E.2d at 878.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. at 276-77, 441 S.E.2d at 878. See Cherry v. Ward, 204 Ga. App. 833, 420 S.E.2d 763 (1992).
\item \textsuperscript{161} 212 Ga. App. at 277, 441 S.E.2d at 878.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\end{itemize}
The ramifications of such a holding can best be understood in the context of a small construction company which normally subcontracts out all or most of the work. Typically, the owner of the construction company is an officer and will act as the project superintendent. Under the holding in *Brown*, the active involvement of the owner of the business in the supervision of work subcontracted to independent contractors will afford an easy vehicle for circumvention of the corporate entity in virtually every construction project.

B. Professional Malpractice

**Third Party Practice.** In *Hussey, Gay, Bell & DeYoung International, Inc. v. Clay-Ric, Inc.*, 164 Clay-Ric brought a third party claim against Hussey, Gay, Bell & DeYoung International, Inc. ("Hussey Gay") for professional negligence as a result of a claim brought by the plaintiff, Charles Yow, against Clay-Ric for personal injuries resulting from certain modifications to a storm drain on the work site.165 Clay-Ric contended that Hussey Gay failed to exercise the requisite standard of care for engineers by not replacing a cover on the storm drain where Yow was injured after modifications were made, or by not issuing a change order requiring the construction and installation of a new cover.166 Hussey Gay brought an interlocutory appeal on the denial of its motion for summary judgment.167

Yow had previously stipulated that he would not assert a professional negligence claim against Hussey Gay.168 Because of this stipulation, the court of appeals concluded that Hussey Gay, not being liable to Yow, could not be a joint tortfeasor with Clay-Ric from which contribution could be sought in a third-party claim.169

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166. 212 Ga. App. at 53, 441 S.E.2d at 275.
167. *Id.*
168. *Id.*
169. *Id.* The court in dictum indicated Clay-Ric may have an independent professional malpractice claim against Hussey Gay unrelated to Yow's injuries, but Clay-Ric's real damages are excluded by this decision because in reality they flow from Yow's injuries. *Id.* at 53-54, 441 S.E.2d at 275.
C. Remedies

**Economic Loss Rule.** In *Advanced Drainage Systems, Inc. v. Lowman*, Advanced Drainage Systems, Inc. brought suit on an account against Lloyd Lowman, d/b/a Lowman Septic. Lowman counterclaimed. The trial court granted a directed verdict for plaintiff on its claim against Lowman, and the jury returned a verdict for Lowman on the counterclaim against Advanced Drainage in the amount of $130,000. Advanced Drainage appealed.

Advanced Drainage manufactured gravelless leach bed tubing designed to be used as part of a waste water treatment system to move effluents from septic tanks into the soil. Prior to this system, gravel systems were used exclusively in Pierce County, where Lowman engaged in business. When Lowman began installing the Advanced Drainage system, a significant number of those systems failed. Lowman contended that the Advanced Drainage system was not suitable for use in a Georgia coastal plain area, contrary to representations he had received. Lowman contended that repairs to the systems were to be paid for by Advanced Drainage but, after several were repaired, Advanced Drainage did not reimburse Lowman.

On Lowman's claim for damaged reputation, the court of appeals stated that generally damages for such an injury are not recoverable in an action premised on mere negligence where the plaintiff suffered no physical injury, unless the plaintiff proves the defendant acted willfully or wantonly. The court of appeals found that the record did not support a finding of wanton and willful conduct by Advanced Drainage and thus the claim for damage to reputation should not have been presented to the jury. Lowman contended, however, that the "economic loss" rule should not act to bar the remaining tort claims brought by him against Advanced Drainage because he suffered personal

171. Id. at 731, 437 S.E.2d at 605.
172. Id.
173. Id.
174. Id.
175. Id. at 732, 437 S.E.2d at 605.
176. Id.
177. Id.
178. Id., 437 S.E.2d at 605-06.
179. Id., 437 S.E.2d at 606.
180. Id.
181. Id. at 733, 437 S.E.2d at 606.
injury in the form of reputation damage.\textsuperscript{182} Because the court of appeals decided that the reputation claim should not have been presented to the jury, the economic loss rule controlled the case as there was an absence of personal injury.\textsuperscript{183} The economic loss rule provides that absent personal injury or damage to property other than to the allegedly defective product itself, an action in negligence does not lie, and a claim may be brought only as a contract warranty action.\textsuperscript{184} Two exceptions exist to this rule: (1) the “accident” exception, which requires a sudden and calamitous event, which not only causes damage to the product, but also poses an unreasonable risk of injury to persons or other property; and (2) the “misrepresentation” exception, which imposes a duty of reasonable care on parties to provide accurate information to others whom they know will rely upon the information in circumstances where the party providing the information is aware of how the information will be used.\textsuperscript{185} Neither of these exceptions were controlling in this case, and Lowman’s claims were barred by the economic loss rule.\textsuperscript{186}

V. MATERIALMEN’S LIENS

A. Requirement of Contractual Relationship

In \textit{Benning Construction Co. v. Dykes Paving & Construction Co.},\textsuperscript{187} the Georgia Supreme Court considered the requirement of a contractual relationship establishing a right to perfect a lien on property.\textsuperscript{188} Benning Construction was a general contractor which had entered into an agreement with Shaheen & Co. to construct an office and warehouse facility.\textsuperscript{189} Benning subcontracted with Scarboro Paving to perform the paving, curb, and gutter work associated with the project.\textsuperscript{190} The subcontract specifically prohibited assignment without the general contractor’s written consent.\textsuperscript{191} Despite that prohibition and unbe-

\begin{itemize}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.}, 437 S.E.2d at 606-07.
\item \textsuperscript{184} \textit{Id.}, 437 S.E.2d at 607.
\item \textsuperscript{185} \textit{Id.} at 734, 437 S.E.2d at 607.
\item \textsuperscript{186} \textit{Id.} at 733-34, 437 S.E.2d at 607.
\item \textsuperscript{187} 263 Ga. 16, 426 S.E.2d 564 (1993).
\item \textsuperscript{188} \textit{Id.} at 17-18, 426 S.E.2d at 566.
\item \textsuperscript{189} \textit{Id.} at 16-17, 426 S.E.2d at 565.
\item \textsuperscript{190} \textit{Id.} at 17, 426 S.E.2d at 565.
\item \textsuperscript{191} \textit{Id.}
\end{itemize}
knownst to the general contractor, Scarboro entered into a contract with Lanier Paving Co. to install the asphalt.\footnote{192}

Lanier had obtained the materials necessary to perform the paving from Dykes Paving & Construction Co.\footnote{193} The owner, Shaheen & Co., rejected the parking lot alleging that it failed to meet contractual specifications and demanded that it be replaced or resurfaced.\footnote{194} Scarboro refused to comply, and Benning Construction paid another subcontractor to resurface the parking lot.\footnote{195} Moreover, Dykes Paving demanded payment from the general contractor for materials Lanier had used to pave the original parking lot after Lanier failed to pay them. When Benning Construction refused to pay, Dykes notified Shaheen & Co., as owners, of its intent to obtain a lien on the project and filed a materialmen's lien for the cost of materials supplied to Lanier.\footnote{196} The lien was bonded by the general contractor.\footnote{197}

Subsequently, Lanier declared bankruptcy and a default judgment was entered against Scarboro in favor of Benning Construction.\footnote{198} Dykes then brought this action to foreclose its lien.\footnote{199} A jury found in favor of Dykes and returned a verdict against Benning and St. Paul, the surety on the bond, in the amount of the cost of materials supplied to Lanier. The court of appeals affirmed this verdict.\footnote{200}

The supreme court reversed on the ground that Dykes was not a subcontractor within the meaning of the materialmen's lien statute.\footnote{201} A lien will attach to real estate for labor, services, or materials furnished "if they are furnished at instance of the owner, contractor, or some

\begin{footnotes}
\item[192] \textit{Id.} Evidence of record indicated that the general contractor's superintendent observed Lanier participating in the paving work. The superintendent never informed the project manager or the general contractor's president of this fact, however, and they were unaware of Lanier's participation until the asphalt had been completely installed. Moreover, the project superintendent was not a party to the contract and did not have the authority to approve an assignment of Scarboro's subcontract to Lanier. Only the project manager and the president of the general contractor had the authority to waive the anti-assignment clause. Scarboro never asked either for a waiver. \textit{Id.}
\item[193] \textit{Id. at 17, 426 S.E.2d at 565.}
\item[194] \textit{Id.}
\item[195] \textit{Id.}
\item[196] \textit{Id.}
\item[197] \textit{Id.}
\item[198] \textit{Id., 426 S.E.2d at 565-66.}
\item[199] \textit{Id., 426 S.E.2d at 566.}
\item[200] \textit{Id. See Benning Constr. Co. v. Dykes Paving & Constr. Co., 204 Ga. App. 73, 418 S.E.2d 620 (1992).}
\item[201] 263 Ga. at 18-19, 426 S.E.2d at 566. "Subcontractor" means, but is not limited to, subcontractors having privity of contract with the contractor." O.C.G.A. § 44-14-360(9) (Supp. 1994).
\end{footnotes}
person acting for the owner or contractor." The supreme court concluded that the term "subcontractor" would be construed to mean "one who, pursuant to a contract with the prime contractor or in a direct chain of contracts leading to the prime contractor, performed the services or procured another to perform services in furtherance of the goals of the prime contractor." Because the contract between Scarboro and Lanier was not authorized by the general contractor and was in fact in violation of the anti-assignment clause contained in the contract between the general contractor and Scarboro, the assigned contract between Scarboro and Lanier was not in the direct chain of contracts leading to the prime contractor. Therefore, the materials provided by Dykes to Lanier were not furnished at the instance of the owner, contractor, or some person acting for the owner or contractor as required by the statute. Consequently, absent proof of a contractual relationship, either directly or through a chain of contracts between the owner of the property and the person to whom the materials are furnished, a lien created under the materialmen's lien statute will not attach.

B. Filing of Fraudulent Liens

In *Hicks v. McLain's Building Materials, Inc.*, purchasers of a new home brought an action for the filing of fraudulent materialmen's liens and fraudulent misrepresentation against McLain's Building Materials, a supplier for the project. After a lien had been filed, the amount was paid by the purchasers, but the lien was not canceled. The trial court granted McLain's Building Materials' motion for summary judgment, and the purchasers appealed.

The court of appeals found there to be no tort in Georgia for the filing of fraudulent liens. Georgia does recognize an action for defamation concerning title to land which requires proof of special damages as a result of the alleged defamation. General allegations that defama-

202. 263 Ga. at 18, 426 S.E.2d at 566 (quoting O.C.G.A. § 44-14-361(b) (Supp. 1994)).
204. Id.
205. Id.
206. Id. at 18-19, 426 S.E.2d at 566.
208. Id. at 191, 433 S.E.2d at 115.
209. Id. at 191-92, 433 S.E.2d at 115.
210. Id. at 192, 433 S.E.2d at 115.
211. Id.
212. Id., 433 S.E.2d at 115-16.
tion hindered obtaining credit were not sufficient to establish the requisite special damage.\textsuperscript{213}

The purchasers also asserted a direct claim under the materialmen's lien statute.\textsuperscript{214} As the supplier had filed a claim of lien rather than a preliminary notice, there was no statutory right to damages or attorney fees as the statute provided merely for unenforceability of the lien.\textsuperscript{215}

\textsuperscript{213} Id., 433 S.E.2d at 116.

\textsuperscript{214} Id. O.C.G.A. § 44-14-361.3 (Supp. 1994) provides as follows:
(a) Prior to filing a claim of lien, a person having a lien under paragraphs (1) through (8) of subsection (a) of Code Section 44-14-361 may at such person's option file a preliminary notice of lien rights. The preliminary notice of lien rights in order to be effective shall:
(1) Be filed with the clerk of superior court of the county in which the real estate is located within 30 days after the date a party delivered any materials or provided any labor or services for which a lien may be claimed;
(2) State the name, address, and telephone number of the potential lien claimant;
(3) State the name and address of the contractor or other person at whose insistence the labor, services, or materials were furnished;
(4) State the name of the owner of the real estate and include a description sufficient to identify the real estate against which the lien is or may be claimed; and
(5) Include a general description of the labor, services, or materials furnished or to be furnished.
(b) A party filing a preliminary notice of lien rights except a contractor shall, within seven days of filing the notice, send by registered or certified mail a copy of the notice to the contractor on the property named in the notice or to the owner of the property. The lien claimant may rely on the building permit issued on the property for the name of the contractor.
(c) The clerk of each superior court shall maintain within the records of that office a record separate from all other real estate records in which preliminary notices specified in subsection (a) of this Code section and affidavits specified in subsection (c) of Code Section 44-14-361.4 shall be filed. Each such notice and affidavit shall be indexed under the name of the owner as contained in the preliminary notice. The clerk shall collect a filing fee of $5.00 for the filing of such preliminary notice.
(d) A person having a lien under paragraphs (1) through (8) of subsection (a) of Code Section 44-14-361 may enforce the lien without filing a preliminary notice of lien.

\textsuperscript{215} 209 Ga. App. at 192-93, 433 S.E.2d at 116.
VI. SURETY, BOND, AND GUARANTOR ISSUES

A. Public Works Bonds

The area of public works bonds saw the most interesting developments during the past year. In a series of cases stemming from certain construction projects in DeKalb County in which the surety was insolvent, the court of appeals held as an initial approach that the county should have known of the potential insolvency due to irregular affidavits submitted to it concerning the financial condition of the surety. This approach was later rejected by the supreme court in a decision that narrowed the obligation of a public body to inquire into the financial well being of a surety offered to it on a public project.

The Court of Appeals Finds DeKalb County Responsible. The initial premise from which this series of cases originated is J & A Pipeline Co. v. DeKalb County, in which it was held that a county may be liable on a payment bond if the surety is insolvent, if the county fails to inquire adequately into the solvency and sufficiency of the surety, and the circumstances surrounding the transaction make this failure to engage in further inquiry unreasonable. This principle was followed in the first half of this survey period.

In Atlanta Mechanical, Inc. v. DeKalb County, Atlanta Mechanical brought suit against DeKalb County on a public works project. DeKalb County had entered into a public works contract with CRJ Corporation to construct a records facility. CRJ Corporation tendered a payment bond to the county showing Contractors Surety & Fidelity Company ("CSFC") as surety, but because CSFC was not authorized at the time to do business in Georgia, it was required to file a bond with an affidavit stating that the surety was the fee simple

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219. Id. at 125, 430 S.E.2d at 16.


221. Id. at 307, 434 S.E.2d at 494.

222. Id., 434 S.E.2d at 495.
owner of real estate equal in value to the amount of the bond.\textsuperscript{223} The county admitted that it did not investigate the solvency or sufficiency of the surety prior to accepting the bond, and subsequent investigation revealed that the affidavit was false in that the surety did not own any of the scheduled real estate.\textsuperscript{224}

Atlanta Mechanical contended that the county knew in mid-July 1990, two weeks before accepting the bond, that the surety was the subject of an ongoing investigation by the Georgia Insurance Commissioner.\textsuperscript{225} Indeed, the county had forwarded to the commissioner at that time copies of payment and performance bonds which it had previously accepted from the surety on other projects.\textsuperscript{226} The Insurance Commissioner ratified a cease and desist order against the surety on October 23, 1990, prohibiting the surety from continuing to act as an insurance agent in Georgia.\textsuperscript{227} The trial court granted the county's motion for summary judgment, and this appeal followed.\textsuperscript{228}

The court of appeals followed \textit{J & A Pipeline Co.}\textsuperscript{229} In holding that the county had a duty to require a payment bond, the court of appeals found the county liable for breach of that statutory duty, resulting in a

\textsuperscript{223} \textit{Id.}; O.C.G.A. § 36-82-102 (1993) provides:

The bonds or security deposits required under Code Section 36-82-101 shall be approved and filed with the treasurer or the person performing the duties usually performed by a treasurer of the obligee named therein unless the contract is for the erection, improvement, or repair of buildings for a state institution, in which case it shall be approved and filed with the board or officer having the financial management of such institution. If the surety named in the bonds is other than a surety company authorized by law to do business in this state, such bonds shall not be approved and filed unless such surety makes and files an affidavit with such bonds, stating under oath that he is the fee simple owner of real estate equal in value to the amount of the bonds over and above any and all liens, encumbrances, and exemption rights allowed by law. If the payment bond or security deposit required in paragraph (2) of subsection (b) of Code Section 13-10-1, together with affidavit when necessary, is not taken in the manner and form required in this Code section, the corporation or body for which work is done under the contract shall be liable to all subcontractors and to all persons furnishing the labor, skill, tools, machinery, or materials to the contractor or subcontractor thereunder for any loss resulting to them from such failure. No agreement, modification, or change in the contract, change in the work covered by the contract, or extension of time for the completion of the contract shall release the sureties of such payment bond.

\textit{Id.} § 36-2-102.

\textsuperscript{224} 209 Ga. App. at 308, 434 S.E.2d at 495.
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.} at 307, 434 S.E.2d at 494-495.
\textsuperscript{229} See supra note 216.
direct right of action to the subcontractor or supplier. The court of appeals held that the county had notice of the possible inadequacy of the surety due to irregularities in the affidavit in the description of real estate. The court of appeals rejected the county's argument that an amendment to the bond statute requiring an investigation of the solvency of the surety indicates that no duty existed on the part of the county prior to that amendment. The court of appeals concluded

231. 209 Ga. App. at 309, 434 S.E.2d at 496.
232. Id. at 310, 434 S.E.2d at 496-97; O.C.G.A. § 13-10-1 (Supp. 1994), provided in part the basis for establishing liability on the part of the county, provided prior to amendment as follows:

(a) (1) If the state, a county, a municipal corporation, or any public board or body thereof requires a bid bond for any particular public work, no bid for a contract with the state, county, municipal corporation, or any public board or body thereof for the doing of such public work shall be valid for any purpose, unless the contractor shall give a bid bond with good and sufficient surety or sureties approved by the governing authority for the faithful acceptance of the contract payable to, in favor of, and for the protection of the state, county, municipal corporation, or public board or body thereof for which the contract is to be awarded. The bid bond shall be in the amount of not less than 5 percent of the total amount payable by the terms of the contract. No bid shall be read aloud or considered if a proper bid bond or other security authorized in paragraph (2) of this subsection has not been submitted. The provisions of this subsection shall not apply to any bid for a contract which is required by law to be accompanied by a proposal guaranty and shall not apply to bids for contracts with any public agency or body which receives funding from the United States Department of Transportation and which is primarily engaged in the business of public transportation.

(2) In lieu of the bid bond provided for in paragraph (1) of this subsection, the state, a county, a municipal corporation, or any public board or body may accept a cashier's check, certified check, or cash in the amount of not less than 5 percent of the total amount payable by the terms of the contract payable to and for the protection of the state, county, municipal corporation, or public board or body thereof for which the contract is to be awarded.

(b) No contract with this state, a county, a municipal corporation, or any public board or body thereof, for the doing of any public work shall be valid for any purpose, unless the contractor shall give:

(1) a performance bond with good and sufficient surety or sureties payable to, in favor of, and for the protection of the state, county, municipal corporation, or public board of body thereof for which the work is to be done. The performance bond shall be in the amount of at least the total amount payable by the terms of the contract. This bond shall not be required when a bond is required under Code Section 36-10-4;

(2)(A) A payment bond with good and sufficient surety or sureties, payable to the state, county, municipal corporation, or public board or body thereof for which the work is to be done, and for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution
that the amendment merely clarified the implicit understanding that a surety was not good and sufficient unless it was solvent.\textsuperscript{233} The court of appeals again upheld this principle in \textit{Mayer Electric Supply Co. v. DeKalb County}.\textsuperscript{234}

\textbf{The Supreme Court Reverses.} In the meantime, the case starting this controversy surrounding a county's duty to inquire into the solvency of a proffered surety found its way to the supreme court. In \textit{DeKalb County v. J & A Pipeline Co.},\textsuperscript{235} the supreme court reversed the court of appeals' principle of a county's duty to inquire.\textsuperscript{236} The supreme court differed in its interpretation of the statutory basis on which the court of appeals had relied, holding that the controlling statute merely provided that the contract with a county for doing public work would not be valid unless the contractor provided good and sufficient surety.\textsuperscript{237}

case text
Likewise, the statute giving rise to a direct claim against a county made itself contingent upon compliance with the initial statute. However, the statute giving rise to the direct action merely provides that if the payment bond, taken together with the affidavit if necessary, was not taken in the manner and form required in the code, then liability could attach. The supreme court concluded that, when read together, these statutes do not impose a duty on the county to require a payment bond and provide for liability if the county breaches that duty. The statute merely creates a duty on the part of the general contractor to give a bond with good and sufficient surety, the breach of which duty rendered the general contract invalid. The county itself merely had the duty to take the affidavit and bond in the specified manner and form.

Since the bond requirement is in lieu of a right to file a materialmen’s lien on a public works project, there is a common purpose for both the bond and the lien law, and the bond requirements were to be construed in pari materia with the lien law to determine the extent of the county’s duty and liability therefrom. From this analysis the supreme court determined that a county has discharged its obligation under the law if it is presented with a payment bond or surety’s affidavit which, on their face, comport with the statutory requirements without any requirement to make further inquiry or investigation. The bond or affidavit is taken “in the manner” required when either is presented to, approved by, and filed with the appropriate county official. The payment bond

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238. 263 Ga. at 646-47, 435 S.E.2d at 330. O.C.G.A. § 36-82-101 (1993) provides in part: "No contract . . . with a county . . . for the doing of any public work shall be valid for any purpose unless the contractor shall comply with Code Section 13-10-1." Id. § 36-82-101.

239. 263 Ga. at 646-47, 437 S.E.2d at 330. See O.C.G.A. § 36-82-102 (1992) which provides in pertinent part:

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

Id. § 36-82-102.

240. 263 Ga. at 647, 437 S.E.2d at 330.
241. Id.
242. Id.
243. Id. at 648, 437 S.E.2d at 331.
244. Id. at 649, 437 S.E.2d at 331.
245. Id.
is taken "in the form" required when, on its face, it purports to be submitted on behalf of the general contractor who is obligated to make such submission by law.\textsuperscript{248} Furthermore, the affidavit is taken in the form required when it purports, on its face, to be a statement under oath that the surety is the fee simple owner of certain real estate equal in value to the amount of the bond.\textsuperscript{247} Therefore, if the county takes a payment bond from the general contractor or an affidavit from the surety which does, on its face, comport with the statutory requirements, the subcontractors and materialmen's direct action remedy will be defeated notwithstanding the subsequent inefficacy of the bond or the subsequent discovery of the falsity of the affidavit.\textsuperscript{248}

\subsection*{B. Sureties}

\textbf{Claim Against Surety as Transitory Action.} In \textit{Harry S. Peterson Co. v. National Union Fire Insurance Co.,}\textsuperscript{249} subcontractor, Harry S. Peterson Company, sued National Union Fire Insurance Company on a surety bond.\textsuperscript{250} The bond had been issued on behalf of Harvey Construction Company in connection with a Virginia construction contract. The bond itself was signed in Maryland and the subcontract was entered in Michigan. Peterson Company, a Michigan corporation, signed the subcontract in Maryland. No documents were signed or work performed in Georgia.\textsuperscript{251} The payment bond provided the following:

\begin{quote}
[n]o claim or action shall be commenced hereunder by any claimant . . . other than in a state court of competent jurisdiction in and for the country [sic] or other political subdivision of the state in which the Project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated and not elsewhere.\textsuperscript{252}
\end{quote}

\textsuperscript{246.} \textit{Id.}
\textsuperscript{247.} \textit{Id.}, 437 S.E.2d at 331-32.
\textsuperscript{248.} \textit{Id.} at 649-50, 437 S.E.2d at 332. The court was also persuaded by the amendment to O.C.G.A. § 13-10-1(f) that a duty to investigate solvency did not exist prior to the date of the amendment. 263 Ga. at 650, 437 S.E.2d at 332. The court made no indication as to the effect of its ruling on the amendment, since the question was not before it. \textit{Id.} at 651, 437 S.E.2d at 332.
\textsuperscript{250.} \textit{Id.} at 585, 434 S.E.2d at 779.
\textsuperscript{251.} \textit{Id.}
\textsuperscript{252.} \textit{Id.} at 585-86, 434 S.E.2d at 779.
National Union moved to dismiss the action for lack of subject matter jurisdiction and improper venue.\(^{253}\)

National Union did substantial business in Georgia but was not a "resident" of Georgia for jurisdictional purposes.\(^{254}\) The trial court dismissed the case, and Peterson Company appealed.\(^{255}\) The court of appeals found that the subcontractor's claim was a transitory action for jurisdictional and venue purposes.\(^{256}\) A transitory action:

comprehends in general those actions which at common law might be tried wherever personal service could be obtained upon the defendant. But if the cause of action is one that in its nature can arise in one place only, the action is local and suit can be brought only where the cause of action arose. In other words, an action is transitory where the transaction on which it is founded might have taken place anywhere; and it is local where the transaction is necessarily local, that is, could have happened only in a particular place.\(^{257}\)

The court of appeals concluded that the subcontractor's claim against the surety was transitory and not local.\(^{258}\) Notwithstanding this conclusion, the court of appeals upheld the venue selection provisions of the contract, overruling Georgia case law to the contrary.\(^{259}\)

**Release of Principal.** In *Hardaway Co. v. Amwest Surety Insurance Co.*,\(^{260}\) the court addressed a question certified from the United States Court of Appeals for the Eleventh Circuit.\(^{261}\) The certified question was as follows:

Whether a creditor's agreement to release a principal debtor, which contains an express reservation of rights against the surety, is a release of the surety's liability to the creditor on the surety bond or a mere covenant by the creditor not to sue the principal debtor when the

\(^{253}\) *Id.* at 585, 434 S.E.2d at 779.

\(^{254}\) *Id.* at 586, 434 S.E.2d at 779.

\(^{255}\) *Id.* at 585, 434 S.E.2d at 779.

\(^{256}\) *Id.* at 587, 434 S.E.2d at 780.

\(^{257}\) *Id.* (quoting 77 AM. JUR. 2D, Venue § 2 (1975)).

\(^{258}\) *Id.*

\(^{259}\) *Id.* at 590, 434 S.E.2d at 782. The court stated, "Therefore, I believe the language in Cartridge referring to 'broad considerations of public policy against limiting venue by contract' should be disapproved." *Id.* See *Cartridge Rental Network v. Video Entertainment, Inc.*, 132 Ga. App. 748, 209 S.E.2d 132 (1974).


\(^{261}\) *Id.* at 698, 436 S.E.2d at 643. See *Hardaway Co. v. Amwest Sur. Ins. Co.*, 986 F.2d 1395 (11th Cir. 1993).
surety has not consented to the creditor's release of the principal debtor. When B & F continued to experience financial difficulty on the job, Hardaway demanded that Amwest fulfill the subcontract, which Amwest did. B & F then sued Hardaway for payment of additional costs. In a settlement of that suit, Hardaway agreed to release B & F for claims regarding default under the subcontract, but specifically reserved its warranty claims against B & F and specifically provided that it retained its rights against Amwest. B & F released all its claims against Hardaway. Hardaway sued Amwest for damages for B & F's default. Amwest contended that the release terminated Hardaway's rights against Amwest as a surety. The United States District Court for the Southern District of Georgia granted summary judgment to Amwest on this theory. Upon review, the United States Court of Appeals for the Eleventh Circuit declined to rule and requested that the Georgia Supreme Court answer the certified question.

"[T]he release of a principal debtor, without the consent of the surety, releases the surety, unless the right to go against the surety is reserved in the instrument of release, or it appears from the whole transaction that the surety should remain bound." Some Georgia case law, however, had misinterpreted the general rule and had made holding the surety obligated contingent on the existence not only of a reservation of rights against the surety, but also on knowledge and consent of the surety that discharge of the principal is taking place. The supreme court corrected this aberration in Georgia law holding that "either the

262. 263 Ga. at 698, 436 S.E.2d at 643-44.
263. Id., 436 S.E.2d at 643.
264. Id.
265. Id.
266. Id.
267. Id.
268. Id.
269. Id.
270. Id. at 698-99, 436 S.E.2d at 643; 986 F.2d 1395, 1396 (11th Cir. 1993).
consent of the surety or the reservation of rights by the creditor will suffice to
insure the survival of the surety's obligation after the release of the principal
debtor."

Thus, the mere absence of the surety's consent to the release would not release
the surety, so long as the creditor had reserved in the instrument of release the
right to proceed against the surety.

Arbitration. In Abe Engineering, Inc. v. Travelers Indemnity Co., Travelers
Indemnity Company issued payment and performance bonds on a school
construction project on behalf of Williams Construction Company, the
general contractor. Williams Construction contracted with Abe Engineering to
perform certain work on the project. A dispute arose between Abe Engineering
and Williams Construction which was submitted to arbitration. Travelers
Indemnity was aware of, but did not participate in, the arbitration proceedings.
After the arbitrators issued an award for Abe Engineering, Abe Engineering
filed a pro se application in the Muscogee County Superior Court to modify
the order to include Travelers Indemnity as surety and to enter judgment
against both parties. Service was attempted on Travelers Indemnity by
mailing a copy of the motion by certified mail to Continental Guaranty &
Credit Corporation, an adjusting company which handles various claims for
Travelers Indemnity. Travelers Indemnity moved to dismiss alleging insufficient
service of process. The trial court dismissed the suit on that basis.

Applications under the Georgia Arbitration Code are to be made by
motion in the same manner as a complaint in a civil action is filed.

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273. 263 Ga. at 698, 436 S.E.2d at 644.
274. Id.
276. Id., 436 S.E.2d at 755.
277. Id.
278. Id.
279. Id.
280. Id. See Brian J. Morrissey & R. Kyle Woods, Construction Law, 42 MERCER L.
282. Id.
283. Id. O.C.G.A. § 9-9-4(a)(2) (Supp. 1994) provides: "All applications shall be by
motion and shall be heard in the manner provided by law and rule of court for the making
or hearing of motions, provided that the motion shall be filed in the same manner as a
complaint in a civil action." Id. § 9-9-4(a)(2). Furthermore, O.C.G.A. § 9-9-4(c)(2) (Supp.
1994) provides that: "[T]he initial application to the court shall be served on the other
parties in the same manner as a complaint under Chapter 11 of this title." Id. § 9-9-4(c)(2).
Furthermore, O.C.G.A. § 9-11-4(d)(1) (1993) provides that in certain circumstances service
The court of appeals concluded that Abe was required to serve its motion to modify the arbitration award in accordance with the Georgia Civil Practice Act, and that Act did not permit service on a defendant corporation directly by certified or registered mail.

VII. MISCELLANEOUS

A. Taxation

Tangential to strict construction law are tax laws that apply in certain circumstances to construction companies or projects. In C.W. Matthews Contracting Co. v. Collins, C.W. Matthews Contracting Co., a construction paving contractor, brought suit against the Georgia Department of Revenue for local sales taxes paid from November 1988 through November 1991 in the approximate amount of $350,000. The taxes in question were local sales taxes produced by local option, Metropolitan Atlanta Rapid Transit Authority, and special county sales taxes. The trial court granted the Department’s motion for summary judgment, ruling that the exemption from local taxes for state contractors set forth in Georgia law did not apply to local sales and use taxes.

The court of appeals appeared genuinely interested in the question, but found that it was without jurisdiction due to a procedural error in

on a nonresident corporation may be made by certified mail through the office of the Secretary of State. Id. § 9-11-4(d)(1).

287. Id. at 1, 435 S.E.2d at 222.
288. Id., 435 S.E.2d at 221-22.
289. See O.C.G.A. § 50-17-29(e) (1994) which provides:
No city, county, municipality, or other political subdivision of this state shall impose any tax, assessment, levy, license fee, or other fee upon any contractors or subcontractors as a condition to or result of the performance of a contract, work, or services by such contractors or subcontractors in connection with any project being constructed, repaired, remodeled, enlarged, serviced, or destroyed for, or on behalf of, the state or any of its agencies, boards, bureaus, commissions, and authorities; nor shall any city, county, municipality, or other political subdivision of this state include the contract price or value of such contract, work, or services performed on such projects in computing the amount of any tax, assessment, levy, license fee, or other fee authorized to be imposed on any contractors or subcontractors.

Id. § 50-17-29(e).
290. 210 Ga. App. at 1, 435 S.E.2d at 222.
the filing of the appeal. Thus, it remains an open question whether local sales taxes are properly collected from contractors on projects with the state. From the language of the opinion, it would appear that the court of appeals would lend a sympathetic ear to such a claim if properly brought before it.

VIII. CONCLUSION

So far, the Georgia appellate courts have resisted great changes to theories of liability, novel or otherwise, that may have been adopted in other jurisdictions. Even so, the pressure to change will remain for an industry in a state of flux as the sources of revenue for projects in good times and bad times become targets for those whose efforts and contracts do not turn out as planned.

291. Id. at 1-2, 435 S.E.2d at 222.