12-1994

Real Property

T. Daniel Brannan

Stephen M. LaMastra

William J. Sheppard

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Property Law and Real Estate Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol46/iss1/13

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Real Property

by T. Daniel Brannan*
Stephen M. LaMastra**
and
William J. Sheppard***

This Article surveys case law and legislative developments in the Georgia law of real property for the period June 1, 1993 to May 31, 1994. An overwhelming majority of cases decided by the Georgia appellate courts during the survey period reaffirmed established principles of real property law, albeit sometimes in unusual factual settings. The Georgia legislature was, however, actively creating new statutes and refining old ones. This article is intended to provide the practitioner with a convenient guide to both judicial and legislative activities during the survey period.

I. LAND LINES AND BOUNDARIES

In Hatcher v. Hatcher,1 Ernest Hatcher ("Hatcher") owned property in Laurens County and, in 1988, agreed to lease a portion of it to his nephew, J.R. Hatcher, for life.2 Hatcher asked his attorney, Dale Thompson, to draw up a document leasing the tract to J.R. for life and giving J.R. fishing rights in a pond on Hatcher's land. Hatcher refused to have a survey of the property made and, consequently, Thompson described the leased tract from a simple drawing of the property. J.R. placed a camper in the approximate center of the leased tract.3

---

* Partner in the firm of Morris, Manning, Martin, Atlanta, Georgia. Georgia State University (A.B., 1979); Mercer University (J.D., 1982). Member, State Bar of Georgia.
** Corporate Counsel & Director of Real Estate, Wolf Camera, Inc., Atlanta, Georgia. Former Associate in the firm of Alston & Bird, Atlanta, Georgia. Wake Forest University (B.A., 1987); Vanderbilt University (J.D., 1990). Member, State Bar of Georgia.
*** Associate in the firm of Morris, Manning & Martin, Atlanta, Georgia. Emory University (B.A., 1986); Mercer University (J.D., 1992). Member, State Bar of Georgia.
2. Id. at 869, 440 S.E.2d at 756.
3. Id. at 869-70, 440 S.E.2d at 756.
J.R. lived on the tract without incident for more than two years before a dispute arose. At that point, Hatcher dug a drainage ditch across the driveway on the leased tract, thereby preventing J.R. from driving onto the property. Hatcher brought an action alleging that the mobile home was not located on the leased tract.⁴

Hatcher based his argument on what he contended was an ambiguity in the description of the leased tract and argued that the lease was unenforceable for lack of an adequate description of the leased premises.⁵ The lease described the property as: "A tract of land fronting 60 yards on Hilbridge Road and extending back in equal width a depth of 130 yards in land lot 50 in the 18th land district of Laurens County."⁶ The trial court rejected Hatcher's argument that the lease did not sufficiently describe his intention regarding the quantity and location of the lease tract and found for J.R.⁷

The appellate court affirmed the trial court.⁸ The court quoted from Weisner v. Gulledge,⁹ stating that:

"Perfection in legal descriptions of tracts of land is not required. If the premises are so referred to as to indicate ... [the grantor's] intention to convey a particular tract of land, extrinsic evidence is admissible to show the precise location and boundaries of such tract. The test as to the sufficiency of the description of property contained in the deed is whether or not it discloses with sufficient certainty what the intention of the grantor was with respect to the quantity and location of land therein referred to, so that its identification is practicable. [T]he key to the intention of the grantor must be found in the document itself."¹⁰

At trial, both J.R. and Hatcher presented testimony from expert witnesses (surveyors) "that when property is described as extending back 'in equal width' it is customarily interpreted as meaning at 90 degree

---

⁴ Id. at 870, 440 S.E.2d at 756.
⁵ Id.
⁶ Id. at 869-70, 440 S.E.2d at 756.
⁷ Id. at 870, 440 S.E.2d at 756.
⁸ Id. at 871, 440 S.E.2d at 757. Originally, Hatcher filed his appeal with the Georgia Supreme Court, but the appeal was transferred to the court of appeals. Id. at 869, 440 S.E.2d at 755 (quoting Beauchamp v. Knight, 261 Ga. 608, 409 S.E.2d 208 (1991)). The court of appeals began its opinion by stating that jurisdiction was proper in that court because the equitable relief sought by Ernest was incidental to and secondary to the principal issue of the location of property lines, which is a legal issue. Id., 440 S.E.2d at 755-56.
¹⁰ Hatcher, 211 Ga. App. at 870, 440 S.E.2d at 756.
angles." Based on that testimony, the court concluded that the mobile home was within the leased tract.

II. TITLE TO LAND

In First Rebecca Baptist Church, Inc. v. Atlantic Cotton Mills, the subject was the effect of a reverter clause in a deed to a charitable group. Atlantic Cotton Mills conveyed the property at issue to Rebecca Baptist Church pursuant to a deed which contained the following reverter clause:

The said Second Parties [Rebecca Baptist Church] to have and to hold the said lot of land and its appurtenances forever, in trust for the sole use, benefit and enjoyment of Rebecca and the members thereof, the same to be used as a place for divine worship by the congregation of said church, in fee simple, but only so long as said lot is used for such church purposes, it being expressly provided that if said lot of land should ever cease to be used for such church purposes, then the title thereto, that is all the right, title and interest hereby conveyed, shall immediately revert to the First Part, its successors and assigns.

In 1979, the majority of the congregation known as Rebecca Baptist Church voted to move to Rivoli Crossing and chose as its name Rivoli Crossing Baptist Church. The minority of the congregation took the name First Rebecca Baptist Church ("FRB") and, with the permission of the majority, continued to worship at the property.

Atlantic brought this action against Rivoli and FRB, seeking a declaration that the title to the property had reverted to it pursuant to the reverter clause contained in the deed to Rebecca Baptist Church. Rivoli and FRB answered and made competing claims to the property. The trial court held that Rivoli was the original church named in the deed from Atlantic and that the reverter clause was not activated by Rivoli's move to its new location. FRB appealed.

The Georgia Supreme Court affirmed in part and reversed in part and found that Atlantic was the title owner of the property. First, the
court affirmed the finding that Rivoli was the same church that had received the original conveyance from Atlantic.\footnote{Id. at 688-89, 440 S.E.2d at 160.} According to Official Code of Georgia Annotated ("O.C.G.A.") section 14-5-43,\footnote{O.C.G.A. § 14-5-43 (1994).} the majority of the members of a church are presumed to constitute that church as an entity.\footnote{263 Ga. at 688, 440 S.E.2d at 160. O.C.G.A. section 14-5-43 states: The majority of those who adhere to its organization and doctrines represent a church. The withdrawal by one part of a congregation from the original body or the uniting of a part of a congregation with another church or denomination is a relinquishment of all rights in the church abandoned. O.C.G.A. § 14-5-43.} Because Rivoli represented the majority of the original church, that body retained all the original church's rights in the property upon the split with FRB.\footnote{Id.}

Unfortunately for FRB and Rivoli, the court reversed the part of the trial court's opinion which denied Atlantic's claim under the reverter clause.\footnote{See First Rebecca, 263 Ga. at 689, 440 S.E.2d at 160.} The court concluded that the language of the reverter clause was clear and demanded a finding in favor of Atlantic.\footnote{Id.} "[T]he property [was] to be used for the 'sole use, benefit and enjoyment of [Rivoli] and the members thereof, the same to be used as a place of divine worship by the congregation of said church,' and that title revert[ed] when the property [was] not used for 'such church purposes.'"\footnote{Id.} When the majority of the original church ceased using the Property as a place of worship, title reverted back to Atlantic.\footnote{Id.}

The supreme court next considered whether the reverter clause was unenforceable as a matter of law, an issue not decided by the trial court.\footnote{Id.} The court affirmed the established rule in Georgia that reverter clauses in deeds to charitable organizations do not constitute an
impermissible restraint on the alienation of land. Accordingly, the provision at issue was enforceable pursuant to its terms.

In *Merrell v. Beckwith*, the supreme court affirmed the judgment of the trial court setting aside the transfer of certain real property from Lillie Mae Merrell to her grandson as a fraudulent conveyance. Merrell had executed a promissory note, due on demand, in favor of Bell Dalton Beckwith in 1981. Beckwith testified at trial that she orally demanded repayment of the note and had her attorney send a demand for repayment on August 5, 1983. In response to Beckwith's requests for admission, Merrell admitted receiving the letter dated August 5, but did not recall when she received it. On August 10, 1983, Merrell conveyed her home to her grandson ("McCart"), reserving a life estate in herself.

Beckwith filed an action based on Merrell's failure to pay the Note upon demand and obtained a judgment on the note. Beckwith then filed an action seeking to set aside the transfer from Merrell to McCart as a fraudulent conveyance. Merrell made a motion for directed verdict at trial claiming that Beckwith had failed to produce evidence of Merrell's actual intent to defraud Beckwith and failed to produce evidence that McCart had knowledge of, or grounds to suspect, an intent to defraud. That motion was denied. The jury returned a verdict in favor of Beckwith, and set aside the deed from Merrell.

On appeal, Merrell argued that the trial court erred in denying of her motion for directed verdict and that the evidence did not support the jury's verdict. The appellate court rejected both arguments and affirmed. The court found that sufficient evidence existed both to

30. *Id.*, 440 S.E.2d at 160-61 (citing Rustin v. Butler, 195 Ga. 389, 391, 24 S.E.2d 318, 320 (1943)). As explained by the court, the reason for this rule is the belief that the donor of a gift for charitable purposes has the right to ensure that it continues to be used for those purposes and to ensure that it is not alienated by the donees. *Id.* at 699-90, 440 S.E.2d at 161 (quoting J.C. Vance, *Annotation, Validity and Effect of Provision or Condition Against Alienation, in Gift for Charitable Trust or to Charitable Corporation*, 100 A.L.R.2d 1208, 1209 (1965)).
31. *Id.* at 690, 440 S.E.2d at 161.
33. *Id.* at 782, 439 S.E.2d at 490.
34. *Id.* at 779, 439 S.E.2d at 488.
35. *Id.* at 779 n.1, 439 S.E.2d at 488 n.1.
36. *Id.* at 779-80, 439 S.E.2d at 488.
37. *Id.* at 780 n.3, 439 S.E.2d at 488 n.3.
38. *Id.* at 780, 439 S.E.2d at 489.
39. *Id.*
40. *Id.*
41. *Id.* at 780-81, 439 S.E.2d at 489.
require submitting the issue of Merrell's fraudulent intent to the jury and to support the jury's verdict.\footnote{42} In reaching that conclusion the court referred to evidence of four points: 1) that Merrell transferred the property to McCart, a close family member, soon after an oral and written request for payment of the Note; 2) that Merrell had no other assets at the time of the transfer; 3) that the transfer was for very little, if any, monetary consideration; and 4) that Merrell remained in possession of the property for over seven years after the transfer.\footnote{43}

The court also rejected Merrell's contention that the trial court erred in its jury instructions, by giving an erroneous instruction and by refusing to give an instruction requested by Merrell.\footnote{44} At Beckwith's request, the court instructed the jury as follows: "[t]ransactions between relatives are to be scanned with care and scrutinized closely. And slight evidence of fraud between them may be sufficient to set aside the transaction."\footnote{45} The court found that charge was an accurate statement of the law and that it was supported by the evidence.\footnote{46} The court found, however, that the charge submitted by Merrell on the legal presumption arising from her continued possession of the property was "incomplete and misleading" when it stated that "continued possession of property by the grantor may create a 'badge of fraud' only if not satisfactorily explained."\footnote{47}

For practitioners involved in cases of alleged fraudulent conveyances, this case provides several items of useful information. First, specific elements of proof are enumerated which, if proven, create a question of fact as to whether the intent to defraud existed. Second, the court has identified an acceptable jury instruction to be used in such cases.

The court in Martin v. Schindley\footnote{48} held that a co-owner of certain real property was entitled to equitable partition because her co-owner had not properly exercised his option to purchase her interest.\footnote{49} Susan Martin and Alan Schindley were divorced co-owners of the property. The settlement agreement incorporated into their divorce decree divided their equity in the property and gave Schindley an option to purchase Martin's interest in the property for $8,066.10. The option was

\begin{itemize}
\item \footnote{42} Id. at 781, 439 S.E.2d at 489.
\item \footnote{43} Id.
\item \footnote{44} Id., 439 S.E.2d at 490.
\item \footnote{45} Id. at 781-82, 439 S.E.2d at 490.
\item \footnote{46} Id. at 782, 439 S.E.2d at 490.
\item \footnote{47} Id.
\item \footnote{48} 264 Ga. 142, 442 S.E.2d 239 (1994).
\item \footnote{49} Id. at 144, 442 S.E.2d at 241.
\end{itemize}
exercisable by Schindley by notice to Martin within sixty days after May 5, 1991.50

On July 2, 1991, Schindley filed a bankruptcy petition in which he scheduled a one-half interest in the property and listed Martin as an unsecured creditor in the amount of $8,066.10. Martin was notified of the filing by the bankruptcy court. Schindley subsequently obtained a discharge in bankruptcy. Thereafter, Martin filed this action and sought equitable partition of the property. Schindley answered, claiming that his discharge in bankruptcy barred Martin's complaint. In essence, Schindley argued that, by listing Martin as an unsecured creditor for the amount of his purchase option and giving Martin notice of the listing, he had exercised his option to purchase her share in the property.51 The trial court granted Schindley's motion to dismiss and the court of appeals affirmed.52

The supreme court reversed.53 The court stated that an option contract does not grant the party having the option any legal or equitable interest in the property until the option has been exercised according to its terms.54 The court found that Schindley had not exercised his option on or before the date he filed his petition in bankruptcy and, therefore, had no interest in Martin's property interest on that date.55 The court also found that the bankruptcy court's mailing of the bankruptcy petition to Martin as a listed creditor on July 5, 1991, was not a proper exercise of the option as the notice did not come from Schindley to Martin, and was in any event untimely.56 Because Schindley had no interest in Martin's property that could be affected by his discharge in bankruptcy, Martin's claim for partition was not barred.57

In Raulerson v. Smithwick,58 the supreme court clarified the meaning of the phrase “joint lives” when used in the grant of a life estate to two persons.59 Walter Smithwick, III purchased large parcel of land from Dwight Raulerson and E.D. Raulerson. As part of the transaction, Smithwick conveyed a small portion of that property to E.D. Raulerson

50. Id. at 142-43, 442 S.E.2d at 240.
51. Schindley argued that he had become the owner of the property, while discharging his obligation to pay. See id. at 143, 442 S.E.2d at 240.
52. Id.
53. Id., 442 S.E.2d at 241.
54. Id.
55. Id.
56. Id. at 143-44, 442 S.E.2d at 241.
57. Id. at 144, 442 S.E.2d at 241.
59. Id. at 806, 440 S.E.2d at 165.
and his wife, Pauline Raulerson, by quitclaim deed. The house in which
the Raulersons had lived for many years was located on that portion of
the larger tract. The deed granting the property recited that it
quitclaimed to the Raulersons all of Smithwick's right and title in "A
LIFE ESTATE ONLY for the joint lives of [E.D. Raulerson and Pauline
Raulerson] ...".

Mr. Raulerson died and was survived by his wife, Pauline. Smithwick
then filed this action seeking possession of the small parcel and claiming
that the life estate terminated upon Mr. Raulerson's death. Both parties
filed motions for partial summary judgment, and the trial court granted
Smithwick's motion.

The appellate court reversed the trial court's ruling, finding that the
life estate did not terminate until the death of both Raulersons. Smithwick
made his argument based solely on the definition of "joint
lives" contained in Black's Law Dictionary, and the appellate court
soundly rejected that definition as controlling in Georgia. The court,
relying on O.C.G.A. section 44-6-81, held "that a life estate granted
to two or more persons for their 'joint lives' does not terminate as to the
survivor until such survivor's death, provided the deed or other
instrument does not contain specific limiting language directing an
earlier termination of the estate granted."

In Hughes v. Cobb County, the supreme court affirmed a trial
court's grant of an application to remove and relocate a cemetery. C.V.
Nalley III purchased a twelve-acre tract in Cobb County that
contained a small cemetery with approximately fifty-two grave sites.
Nalley applied for a permit to remove and relocate the grave sites and
gave notice to the descendants of the persons buried in the cemetery of
his application. The application first came before the Cobb County
Cemetery Preservation Commission, which denied the application.

60. Id. at 805, 440 S.E.2d at 165.
61. Id. at 805-06, 440 S.E.2d at 165.
62. Id. at 806, 440 S.E.2d at 165 (citing Black's Law Dictionary 973 (4th ed. 1968)).
63. Id.
65. 263 Ga. at 806, 440 S.E.2d at 165. The supreme court revisited this same issue in
the case of Hill v. Wimpy, 264 Ga. 198, 444 S.E.2d 808 (1994). In that case, the court
stated that the holding from Raulerson v. Smithwick controlled and that the trial court's
decision finding an earlier termination of the life estate was in error. 264 Ga. at 198, 444
S.E.2d at 803-04.
67. Id. at 131, 441 S.E.2d at 409.
68. Id. at 128-29, 441 S.E.2d at 407. The Cemetery Preservation Commission is
empowered to hear and review applications for cemetery relocation and to make
recommendations to the Board of Commissioners. Id. at 129 n.1, 441 S.E.2d at 407 n.1.
The Cobb County Board of Commissioners then reviewed a modified application and granted approval. In order to support his application, Nalley was required to show the following: (1) that he was the title owner of the property containing the cemetery; (2) that the location and boundaries of the burial ground were delineated by a survey based on an archeologist’s report; (3) that he had developed a plan for notifying and had notified descendents of those interred in the burial ground; and (4) that he had a plan for disinterment and disposition of the remains. The superior court conducted a de novo review and found that the cemetery was a family/neighborhood cemetery, that Nalley had established his title ownership of the property through an opinion letter of an attorney, and that his application was otherwise complete. The court also found that “it was appropriate to move the cemetery and that relocation would preserve rather than destroy the cemetery’s cultural and historical significance to Cobb County.”

The appellate court affirmed the trial court’s finding that Nalley owned a family/neighborhood cemetery. A family/neighborhood cemetery is one that has not been dedicated to public use, but has instead been used by the landowner to the burial of “relatives or some other portion of the public (e.g., neighbors and friends) but not the community at large.” This is quite different from a “public” cemetery, which is open to burial of members of the public. At trial, Nalley presented a single witness who testified that no prior owner of the property had dedicated the cemetery to public use. The descendants, on

---

69. *Id.* at 129, 441 S.E.2d at 407.
70. *Id.* Nalley claims he amended his application to provide a different site for relocation of the cemetery to accommodate concerns expressed by the Cemetery Preservation Commission. *Id.*
71. *Id.*
73. 264 Ga. at 129, 441 S.E.2d at 407.
74. *Id.*
75. *Id.* at 129-30, 441 S.E.2d at 407.
76. *Id.* at 129, 441 S.E.2d at 407-08.
77. *Id.*, 441 S.E.2d at 407. In order for Nalley to prove his title to the property, it was essential that the court accept his argument that the cemetery was a family/neighborhood cemetery. Otherwise, the cemetery would be deemed to have been “dedicated” for public use, and Nalley’s use of the property limited so as not to interfere with the public’s interest in continued use of the property. *Id.* at 130, 441 S.E.2d at 408 (citing O.C.G.A. § 44-5-230 (1991)).
the other hand, presented several witnesses.\textsuperscript{78} Apparently, the trial court believed Nalley's witness was more convincing. The appellate court specifically found that there was evidence in the record at trial to support the judgment in favor of Nalley and refused to substitute its opinion for the opinion of the trial court with regard to the credibility of the witnesses.\textsuperscript{79}

III. EASEMENTS AND RIGHTS OF WAY

In \textit{Avery v. Colonial Pipeline Co.},\textsuperscript{80} the court of appeals held that the holder of an easement for use as a pipeline had a right to remove trees and vegetation from the right-of-way and to trim trees overhanging the easement so that it may be inspected from the air.\textsuperscript{81} Colonial Pipeline Company and Plantation Pipeline Company transport refined petroleum products via underground pipelines. The products transported by Colonial and Plantation ("defendants") are regulated by federal law.\textsuperscript{82} The plaintiffs ("Avery") are the successors-in-interest of the parties that granted easements to defendants to construct and maintain pipelines to be used in their business.\textsuperscript{83}

Defendants received notice from the federal regulatory agency charged with overseeing their pipeline operations that they were in probable violation of the requirements for maintaining the easements.\textsuperscript{84} Specifically, the easements were "overgrown with large trees and bushes which obscured [them] to the extent that aerial patrolling was ineffective in determining the surface conditions on or adjacent to the pipeline right-of-way."\textsuperscript{85} When defendants notified Avery that they intended to enter the easements and to cut trees and other vegetation, Avery filed an action seeking declaratory relief and damages. The trial court granted in part defendants' motion for summary judgment ruling that

\textsuperscript{78} \textit{Id.} at 130, 441 S.E.2d at 408.
\textsuperscript{79} \textit{Id.} From the court's comments, it seems clear the descendants argued that the side with the most witnesses should win. However, this case proves the opposite.
\textsuperscript{81} \textit{Id.} at 391, 444 S.E.2d at 365.
\textsuperscript{82} \textit{Id.} at 392, 444 S.E.2d at 366.
\textsuperscript{83} \textit{Id.} at 388, 444 S.E.2d at 363. Ignitable refined petroleum, which defendants transport in their pipelines, is classified as a hazardous liquid and regulated by the United States Department of Transportation's Office of Pipeline Safety under the Hazardous Liquid Pipeline Safety Act and the regulations promulgated thereunder. \textit{Id.} (citing 49 U.S.C. §§ 20001 \textit{et seq.;} 49 C.F.R., Part 195).
\textsuperscript{84} \textit{Id.} at 389, 444 S.E.2d at 364.
\textsuperscript{85} \textit{Id.} Federal regulations required that the Easements "be maintained so as to have 'clear visibility and to give reasonable access to maintenance crews.'" \textit{Id.} (citing 49 C.F.R. § 195.3(c)(3)(ii) (1993)).
defendants could enter onto the easements to “remove trees, vegetation, and overhang.” The trial court reserved ruling on damages.

The court of appeals affirmed the trial court's judgment with regard to defendants' right to cut vegetation in the easements. The court relied on the holding from Jakobsen v. Colonial Pipeline Co. to conclude that defendants have an implied right to clear the easements as required by the federal regulators. In Jakobsen, the supreme court found that pipeline easements “impliedly include the right to side-trim trees so that [the pipeline operator] might aerially inspect the pipelines to determine whether they are in need of maintenance, repair, or are otherwise a public hazard.” Therefore, defendants were entitled to go on the easements and the trial court's ruling to that effect was proper.

The court of appeals pointed out, however, that the defendants' right to cut vegetation in and around the easements was not without limitation, and also held that the trial court's ruling did not grant unlimited discretion to defendants. Only that removal required “to give reasonable access to maintenance crews” was authorized. The court noted that the trial court's ruling did not “authorize removal [of vegetation] regardless of need” and specifically reserved decision on the issue of any damages that may have been caused by excessive clearing. This case is yet another that severely restrains the grantee of an easement from unfettered control of the easement property. For this reason alone, Georgia real estate professionals should carefully review Avery.

The court in Smith v. Tolbert held that purchasers of real property have a duty to determine the interest of those occupying or using the

86. Id. at 388, 444 S.E.2d at 363.
87. Id.
88. Id. at 389-90, 444 S.E.2d at 364.
91. Id. at 390, 444 S.E.2d at 365 (citing Jakobsen, 260 Ga. at 566 n.2, 397 S.E.2d at 436 n.2).
92. Id.
93. Id. at 391-92, 444 S.E.2d at 365-66.
94. Id. at 392, 444 S.E.2d at 366. Although not specifically mentioned in this regard, presumably the court would also allow sufficient cutting to permit aerial observation of the pipeline easement.
95. Id.
property at the time of the sale and cannot complain if their rights under the deed from the sellers is subject to the rights of others occupying or using the property. Mark Smith and Michael Miller ("purchasers") contracted with Ben and Louise Tolbert ("sellers") for the purchase of a two story commercial building in the City of Roswell. A gravel driveway and parking area (the "Alley") were located behind the property. The description of the property on the warranty deed included the Alley and specifically noted the existence of the gravel driveway.

When the City of Roswell claimed fee simple to the Alley, the purchasers demanded that the sellers defend that action based on the covenant of warranty contained in the warranty deed. Both parties filed motions for summary judgment. The trial court granted the sellers' motion and denied the purchasers' motion. The purchasers appealed.

The appellate court affirmed the trial court with regard to both motions. The purchasers admitted that they knew of the existence of the Alley and that it was used by the public. The appellate court rejected the purchasers argument that the Alley was "vacant property," and found that the property in dispute was in fact an alley. The court also rejected the purchasers' argument that the Alley was a private way because the public openly and obviously used the Alley as a parking lot while shopping at the businesses located in the immediate vicinity. The court concluded that the purchasers' warranty claims failed "because 'the existence of a public road on land, known to the purchaser or which should have been known to the purchaser, is not such an incumbrance [sic] as would constitute a breach of the covenant of warranty.'" Additionally, the court found that the purchasers had waived any warranty claim by failing to raise the issue of the public use of the Alley when they had knowledge of that use prior to closing. This decision sends a powerful message to purchasers of real property: Investigate the property and the uses to which it is put before buying.

97. Id. at 176-77, 438 S.E.2d at 656.
98. Id. at 176, 438 S.E.2d at 656.
99. Id. at 175-76, 438 S.E.2d at 656.
100. Id.
101. Id. at 177, 438 S.E.2d at 657.
102. Id. at 176, 438 S.E.2d at 656.
103. Id.
104. Id.
106. Id. at 176-77, 438 S.E.2d at 656-57.
In several cases decided during the survey period, Georgia courts discuss the requirements for establishing an easement by prescription. The first such case is Eileen B. White & Associate v. Gunnells.\textsuperscript{107} The plaintiff in that case, Eileen B. White & Associate, owned land on which an asphalt road lay.\textsuperscript{108} That road was built, maintained, and kept open by plaintiff, but the Gunnells had been using it for more than seven years as an alternate means of access and egress to their property, which adjoined plaintiff's. Plaintiff brought an action to enjoin Gunnells from continuing to use the road. Gunnells counterclaimed, alleging a prescriptive easement and seeking to enjoin plaintiff from interfering with their use of the road.\textsuperscript{109} The trial court found for the Gunnells and declared that a prescriptive easement existed in their favor. Further, the court enjoined plaintiff from interfering with the Gunnells' use of the road.\textsuperscript{110} Plaintiff appealed.\textsuperscript{111}

The supreme court reversed, finding that Gunnells had failed to prove the elements necessary to the creation of a prescriptive easement.\textsuperscript{112} The court first set out the elements an applicant must prove in order to establish the existence of a prescriptive easement: (1) uninterrupted use of the way for seven or more years; (2) that the way does not exceed 20 feet in width and that it is the same 20 feet originally appropriated; and (3) that he has kept it open and in repair during the seven year period.\textsuperscript{113} The court found that the appellees had failed to allege and show that they had "kept the road open and in repair."\textsuperscript{114}

As the supreme court explained, the requirement that the road be maintained by the party claiming an easement by prescription is related to the requirement that the owner of property be given notice of an adverse claim made by another party.\textsuperscript{115} Simply using the road without express permission of the owner, even where the owner is aware of that use, is insufficient to establish an easement by prescription.\textsuperscript{116} The owner's acquiescence without some form of adverse use establishes, at most, a revocable license.\textsuperscript{117} By requiring that the claiming party

\begin{thebibliography}{115}
\bibitem{107} 263 Ga. 360, 434 S.E.2d 477 (1993).
\bibitem{108} \textit{Id.} at 360, 434 S.E.2d at 477.
\bibitem{109} \textit{Id.}
\bibitem{110} \textit{Id.}, 434 S.E.2d at 477-78.
\bibitem{111} \textit{Id.}, 434 S.E.2d at 478.
\bibitem{112} \textit{Id.} at 360-63, 434 S.E.2d at 477-79.
\bibitem{113} \textit{Id.} at 360, 434 S.E.2d at 478.
\bibitem{114} \textit{Id.}
\bibitem{115} \textit{Id.} at 360-61, 434 S.E.2d at 478.
\bibitem{116} \textit{Id.} at 361-62, 434 S.E.2d at 478-79.
\bibitem{117} \textit{Id.} at 362, 434 S.E.2d at 479.
\end{thebibliography}
make repairs in order to keep the road open, the court reinforced the notion that only an adverse use will suffice.\textsuperscript{118}

The Gunnells cited several cases that hold that an owner's acquiescence in the use of his property for seven years without notice of an adverse claim in the form of repairs or otherwise would grant a prescriptive easement to the user.\textsuperscript{119} The court rejected that argument and expressly overruled those cases to the extent that they so held.\textsuperscript{120}

\textit{Jackson v. Stone}\textsuperscript{121} is another case which dealt with the creation of a prescriptive easement.\textsuperscript{122} Harold and Betty Stone, Weldon Cantrell, and G.C. and Irene Lunsford (collectively referred to as the "Stones") filed an action seeking a declaration of their rights regarding a road, which adjacent property owners had been using to provide access to their own land, running across the Stones' property. Paul Jackson, Floyd Jackson, and W. C. Crider (collectively referred to as the "Jacksons") purchased property adjoining the Stones' property in 1989 and considered the road running across the Stones' property as the most convenient access to the Jacksons' property.\textsuperscript{123}

Thereafter, the Stones erected a gate across the road. The Jacksons, in the process of developing their property, took down the gate and scraped the road with a grader, which prompted the Stones to file this action.\textsuperscript{124} The Jacksons, in defending their right to use the road, made a two-part argument. First, they argued that the southern portion of the road was public which the Stones could not reappropriate. Second, they argued that they had acquired a prescriptive easement to the northern section of the road through their predecessor in title.\textsuperscript{125} The trial court rejected the Jacksons' arguments and concluded that the southern portion of the road in issue was a private road and that the Jacksons had not acquired an easement by prescription over the northern portion of the road.\textsuperscript{126}

The court of appeals agreed with the trial court that the evidence did not support a finding that the southern portion of the road was a public road.\textsuperscript{127} A dedication to public use is not complete until both the

---

\textsuperscript{118} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 466, 436 S.E.2d at 674.
\textsuperscript{123} \textit{Id.} at 465-66, 436 S.E.2d at 675.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 466-68, 436 S.E.2d at 675-76.
\textsuperscript{126} \textit{Id.} at 468, 436 S.E.2d at 676.
\textsuperscript{127} \textit{Id.} at 467, 436 S.E.2d at 675.
intention of the owner to dedicate it and the acceptance on the part of the public is shown. The court found that the evidence showed that the Stones had granted easements to the use of the road in some instances and had specifically refused to grant easements in others, thereby retaining control over who used the road. The court also noted testimony which indicated that the county's delivery of gravel to and grading of the southern portion of the road did not indicate the road's dedication to the public.

With regard to the Jacksons' claim to a prescriptive easement over the northern section of the road, the court found that Jackson failed to show the essential element of continuous use for the prescriptive period. The Jacksons depended on the use of their predecessor in title to their property to establish continuous use for seven years. However, the court found evidence that the road as then in use was not identical to that used by the Jacksons' predecessors in title. Therefore, the Jacksons were unable to establish seven years' use over the same roadway.

Additionally, the court found the evidence uncontroverted that neither the Jacksons nor their predecessors in title gave notice of their adverse use of the Stones' property either by building the road or contributing to its repair and maintenance. Accordingly, the court upheld the trial court's finding that the northern portion of the road was not subject to a prescriptive easement.

IV. COVENANTS

In Prime Bank v. Galler, the court held that, where strict enforcement of restrictive covenants results in an undue hardship on the party against whom such covenants are enforced, the court should consider whether the harm to the enforcing party may be alleviated by less drastic measures. The Gallers purchased a lot in the Amanda Woods Subdivision. All the lots in that subdivision were subject to restrictive covenants which, among other things, required the builder to

128. Id. at 466, 436 S.E.2d at 675.
129. Id. at 466-67, 436 S.E.2d at 675. These prior exercises by the Stones of control over who used the road, while not alone dispositive, was a significant factor in the court's decision. Id.
130. Id. at 467, 436 S.E.2d at 675.
131. Id. at 467-68, 436 S.E.2d at 676.
132. Id.
133. Id. at 467, 436 S.E.2d at 676.
134. Id. at 468, 436 S.E.2d at 676.
135. Id.
137. Id. at 289, 430 S.E.2d at 738.
obtain approval of all construction plans by an architectural control committee ("ACC") before beginning construction. Robert Carpenter owned the lot adjacent to the Gallers' lot, and Prime Bank loaned Carpenter the money to build a house on his lot. The plans for Carpenter's house were submitted to ACC, and were approved according to the terms of the covenants. Carpenter began construction of a house on his lot, but built that house according to a mirror image plan from that submitted to ACC. Prime Bank foreclosed on the house after Carpenter died.

The Gallers filed a lawsuit seeking to have the house on Carpenter's lot demolished because it did not fit within the design scheme of the neighborhood, and because it was based on plans not approved by ACC. Specifically, the house was built so that the blank wall from it faced the Gallers' windows. The trial court found that the house as built violated the restrictive covenants and ordered the house demolished.

The supreme court agreed with the trial court, finding that the Carpenter house violated the restrictive covenants. The court also agreed that the restrictive covenants that applied to Carpenter's lot bound Prime Bank, and that Prime Bank's construction of the Carpenter house constituted a continuing violation of the restrictive covenants. However, the supreme court disagreed with the trial court's finding that the Carpenter house should be demolished.

Although equitable relief granted by a trial court should not be overturned absent an abuse of discretion, the supreme court in Gallert stated that the conveniences of the parties cannot be ignored when attempting to determine whether such an abuse has occurred. The court found evidence in the record that the Gallers' complaint could be alleviated by a less drastic measure than demolition of the house. Accordingly, the court remanded the case "for a careful consideration of

---

138. Id. at 287, 430 S.E.2d at 737.
139. Id.
140. Id. Approval of plans submitted to ACC could be obtained by default where the plans were not rejected after 45 days from the date of submission. Carpenter's plans were approved through this default method. But see infra notes 150-53 and accompanying text discussing dissenting opinion.
141. 263 Ga. at 287, 430 S.E.2d at 737.
142. Id. at 287-88, 430 S.E.2d at 737.
143. Id. at 288, 430 S.E.2d at 737-38.
144. Id., 430 S.E.2d at 738. This action involved the granting of equitable relief to the Gallers and was, therefore, properly appealed directly to the supreme court.
145. Id.
146. Id. at 288-89, 430 S.E.2d at 738-39.
147. Id. at 288, 430 S.E.2d at 738.
148. Id. at 289, 430 S.E.2d at 738.
the conveniences of the parties" with the admonition that the injunction "be crafted in a manner that is the least oppressive to [Prime Bank] while still protecting the valuable rights of the [Gallers]."

Justice Carley wrote a lengthy dissenting opinion in which he argued that the majority's decision to remand with instruction was in error, and that the trial court's decision should simply have been reversed. Justice Carley opined that the plans for Carpenter's house as built had been approved by ACC and that the house was not in violation of the restrictive covenants which applied to the lot. He based his dissenting opinion on the dual roles played in this case by both Carpenter himself and Mr. Killy Kunimoto, Carpenter's architect. Carpenter and Kunimoto were the members of the ACC. Justice Carley believed that both Carpenter and Kunimoto failed to approve or disapprove the plans for Carpenter's house within forty-five days after those plans were known to them in their capacities as members of the ACC. Their failure to object to the plans within that time resulted in ACC's approval of the plans by default. Practitioners should review the dissenting opinion in this case because it points out the problems that may arise from the common situation where developers of subdivisions wear many hats, including those of property owner and member of governing committees.

V. LANDLORD/TENANT AND DISPOSSESSION

In Central Warehouse & Development Corp. v. Nostalgia, Inc., the court of appeals held that, absent a lease provision obligating a tenant to purchase and maintain fire insurance, an exculpatory provision purporting to relieve the landlord from damages arising from its sole negligence is unenforceable. Beginning in 1985, Nostalgia, Inc. executed a series of one-year written leases for warehouse space owned by Central Warehouse & Development Corp. The last such lease covered the one-year term beginning on September 1, 1989, and ending on August 31, 1990. The lease contained a provision entitled "FIRE" which stated in pertinent part:

---

149. Id.
150. 263 Ga. at 289-92, 430 S.E.2d at 739-41 (Carley, J., dissenting).
151. Id. at 291, 430 S.E.2d at 740.
152. Id. at 291, 430 S.E.2d at 739.
153. Id. at 291-92, 430 S.E.2d at 740.
155. Id. at 17, 435 S.E.2d at 232.
156. Id. at 15, 435 S.E.2d at 231.
157. Id.
LANDLORD shall not be liable for any damages to fixtures or merchandise of Tenant caused by fire or other insurable hazards regardless of the cause thereof. Tenant shall not be liable for any damages to leased premises or any part thereof, caused by fire or other insurable hazards, regardless of the cause thereof. Landlord and Tenant hereby expressly release each other from all liability for such damage. Both Landlord and Tenant hereby agree that all insurance policies issued to either or both of them shall include a clause waiving right of subrogation against the other.¹⁵⁸

The lease also contained a provision that granted Nostalgia the option to renew the lease for one year with rent of $650 per month, with all other terms and conditions remaining the same.¹⁵⁹ The lease required Nostalgia to give Central at least three months written notice of its intention to vacate the property at the end of the lease term.¹⁶⁰

When Nostalgia's lease ended, neither party attempted to terminate their relationship, and Nostalgia remained in possession.¹⁶¹ On November 22, 1990, the leased premises were destroyed by fire. The fire started in the space adjoining Nostalgia's warehouse, but spread to Nostalgia's space and destroyed its inventory. Nostalgia brought suit against Central and the adjoining tenant alleging joint negligence, and seeking to recover damages. Both Central and Nostalgia moved for partial summary judgment on the effect of the "Fire" provision, with Nostalgia contending that the provision was unenforceable and did not preclude Nostalgia from recovering against Central in the event that the fire was caused by Central's negligence.¹⁶² The trial court assumed, but did not decide, that both parties were bound by the terms of the lease even though it had expired prior to the occurrence of the fire.¹⁶³ The trial court then found that the "Fire" provision was unenforceable and granted partial summary judgment to Nostalgia.¹⁶⁴ Central appealed.¹⁶⁵

The court of appeals relying on O.C.G.A. section 13-8-2(b),¹⁶⁶ upheld the trial court's ruling that the fire provision in the lease was unenforce-
The court first noted that parties to a contract are generally free to waive their right to recover damages resulting from the negligence of another contracting party if the intention to do so is clearly expressed. Section 13-8-2 sets forth the categories of contracts which are unenforceable under Georgia law and provides in part:

A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising of bodily injury to persons or damaged property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnity is against public policy and is void and unenforceable, provided that this subsection shall not affect the validity of any insurance contract, worker’s compensation, or agreement issued by an admitted insurer.

This statute applies to lease contracts, and the court in Nostalgia relied on the statute to support its holding that the lease provision was void and unenforceable.

In order to avoid the effect of O.C.G.A. section 13-8-2(b), Central argued that the Fire provision in the Lease did not attempt to have the parties held harmless from damages caused by their sole negligence. Central argued that “the parties’ intention was to shift the risk of any loss to an insurance carrier.” In support of its argument, Central cited Tuxedo Plumbing & Co. v. Lie-Nielsen and McAbee Construction Co. v. Georgia Craft Co., two Georgia cases interpreting contract provisions similar to that at issue in this case.

The court of appeals rejected Central’s argument and distinguished Tuxedo Plumbing and McAbee Construction from the case before it. The court found that in both of those cases, unlike this one, the lease contract required that the parties purchase insurance. However, the
lease between Nostalgia and Central did not contain such a require-
ment. The absence of such a requirement in the lease demanded a
finding that the parties did not intend to shift the risk of loss to an
insurance company. The absence of such a "mandatory insurance
provision render[ed] the release provision void as against public policy,
and consequently unenforceable." In the case of *Rucker v. Wynn,* the
court of appeals held that a landlord under a commercial lease is not required to mitigate the
damages that result from a breach by the tenant. In that case, the
landlord and tenants executed a commercial lease covering premises to
be used for the operation of a restaurant business for a term of five
years beginning on July 1, 1990. The lease contained a provision
stating that the failure to pay rent on the first of each month was a
default constituting a breach of the lease. The lease also contained
a provision stating that in the event of a default, the landlord, without
notice,

"as Tenant's agent, without terminating this lease may enter upon and
rent the premises, in whole or in part, at the best price obtainable by
reasonable effort, without advertisement and by private negotiations
and for any term Landlord deems proper, with Tenant being liable to
Landlord for the deficiency, if any, between Tenants' rent hereunder
and the price obtained by Landlord on reletting; provided, however,
that Landlord shall not be considered to be under any duty by reason
of this provision to take any action to mitigate damages by reason of
Tenants' default." On or about January 7, 1991, the tenants gave the landlord a check
for the amount of the rent due on January 1, but told the landlord their
account contained insufficient funds to pay the check. The landlord
apparently agreed to hold the check for some time to allow the tenants
to operate the business and generate funds to cover the amount of the
rent, but there was a conflict in the evidence regarding how long the
landlord agreed to wait. When the landlord deposited the check on

178. *Id.*
179. *Id.* at 16-17, 435 S.E.2d at 232.
180. *Id.* at 17, 435 S.E.2d at 232.
182. *Id.* at 70-71, 441 S.E.2d at 419. The court also stated other aspects of the law
common to disputes between landlords and tenants. *Id.* at 71-72, 441 S.E.2d at 419-20.
183. *Id.* at 69, 441 S.E.2d at 419.
184. *Id.* at 69-70, 441 S.E.2d at 419.
185. *Id.* at 70, 441 S.E.2d at 419.
186. *Id.* at 69, 441 S.E.2d at 419.
187. *Id.* at 69-70, 441 S.E.2d at 419.
January 16, 1991, it was returned for insufficient funds. Pursuant to the lease, the landlord entered the premises, retook possession, and rerented it. The tenants brought suit against the landlord for wrongful eviction, trespass, breach of implied covenant of quiet enjoyment, breach of the Lease, breach of an alleged oral contract to accept payment of rent, and conversion of personal property. The landlord counterclaimed for the amount of the past due rent under the lease, less the rent generated by the rerental.

The trial court granted summary judgment against the tenants on each of their claims, with the exception of the conversion claim, and granted summary judgment in favor of the landlord on its counterclaim, plus additional sums for attorney fees and prejudgment interest. The tenants appealed that ruling.

Because the lease concerned a commercial building, which was not for use as a dwelling place, the court stated that the landlord was entitled to rely upon the terms of the lease which avoid the statutory notice and other requirements for dispossessory proceedings. The court further found that the landlord was entitled to rely on the default provisions contained in the lease and that the landlord acted pursuant to the lease in retaking possession without notice upon default by the tenants. Accordingly, the court affirmed summary judgment with regard to the claims of wrongful eviction, trespass, breach of implied covenant of quiet enjoyment, and breach of the Lease.

The court next addressed the grant of summary judgment with regard to the tenants' claim that the landlord breached an oral agreement to accept late rent payments. The court affirmed the trial court's ruling, finding that no consideration existed to support an oral contract and that such a contract was voided by the provision in the lease stating that the lease contained the entire agreement of the parties.

The court of appeals next affirmed a commercial landlord's right to re-enter and take possession of leased premises where the landlord can

---

188. Id. at 70, 441 S.E.2d at 419.
189. Id. at 69, 441 S.E.2d at 418-19.
190. Id.
191. Id., 441 S.E.2d at 419.
192. Id. at 70, 441 S.E.2d at 419.
193. Id.
194. Id. at 70-71, 441 S.E.2d at 419.
195. Id. at 71, 441 S.E.2d at 419-20.
196. Id. The tenants apparently failed to present any testimony at trial regarding a waiver by the landlord concerning timely rent payments, only raising a waiver argument during the course of their appeal. Because the objection was not preserved in the trial court, the appellate court refused to consider that issue. Id. at 71, 441 S.E.2d at 420.
effect self-help eviction without a breach of the peace. Because no evidence existed of a breach of the peace in this case, the court found that the re-entry was proper. The appellate court also found that the landlord was entitled to rely on the lease provision stating that the Lease was not terminated and the right to claim rent was not extinguished by eviction. Relying on Peterson v. P.C. Towers, L.P., the court found that the language of the lease clearly expressed the parties' intention that "after re-entry by the landlord to take possession of the premises for re-rental, the tenants remained liable for accruing rent and were responsible to the landlord for the difference between the tenants' rent accruing under the lease and the rent obtained by reletting." Based upon the undisputed evidence in the record of the deficiency left upon re-rental, the court upheld the trial court's grant of summary judgment on the landlord's counterclaim.

In Bridges v. City of Moultrie, the court of appeals decided an appeal of a dispossessory action in which the dispossessed party argued that the plaintiff failed to establish the existence of a landlord/tenant relationship. In May 1977, Truett entered into a purchase and lease transaction with CSX Transportation, formerly Seaboard Coast Railroad Company ("CSX"). Truett purchased a station depot building in Moultrie, Georgia from CSX for use as a warehouse. The bill of sale provided that the building was to be considered severed from the realty. Contemporaneously, Truett leased the realty from CSX. At the termination of the lease, Truett was required to remove the building and all other personalty from the real property. The lease was terminable by either party upon thirty days written notice.

On November 8, 1991, the City of Moultrie acquired the realty from CSX by quitclaim deed and also took an assignment of the lease to Truett. Thereafter, the city notified Truett of its termination of the

197. Id.
198. Id.
199. Id. at 72, 441 S.E.2d at 420.
201. 212 Ga. App. at 72, 441 S.E.2d at 420.
202. Id. The court expressly reserved ruling on the issue of the landlord's duty to mitigate damages. Id. at 72 n.1, 441 S.E.2d at 420 n.1. Like the tenants' claim of waiver addressed previously, the tenant did not raise that issue at the trial court, and therefore, not preserved for decision on appeal. Id.
204. Id. at 698-99, 437 S.E.2d at 370.
205. Id. at 697-98, 437 S.E.2d at 369.
206. Id.
207. Id. at 698, 437 S.E.2d at 369.
lease, effective thirty days after notice.\textsuperscript{208} Bridges refused to surrender possession of the premises to the city.\textsuperscript{209} The city filed a dispossessory action and the court granted partial summary judgment and a writ of possession against both Truett and Bridges.\textsuperscript{210} Bridges appealed from that judgment.\textsuperscript{211}

On appeal, Bridges asserted that a factual issue existed regarding the existence of a landlord/tenant relationship between him and the City.\textsuperscript{212} Bridges argued that the purchase/lease agreement between Truett and CSX gave Truett a first right of refusal to purchase the property if CSX ceased operating a railroad on the adjoining railroad tracts.\textsuperscript{213} Alternatively, he argued that CSX had abandoned the property and had no property interest to convey to the city.\textsuperscript{214} This abandonment argument was based on a decision by the Interstate Commerce Commission approving CSX’s request to abandon the railroad line adjacent to the property.\textsuperscript{215}

The court rejected both arguments on the basis that a tenant may not raise defects in the landlord’s title to the property as a defense on a proceeding for a writ of possession.\textsuperscript{216} It is well established in Georgia that

\begin{quote}
"the law precludes [a tenant] from disputing his landlord’s title ‘while he is in actual physical occupation, while he is performing any active or passive act or taking any position whereby he expressly or impliedly recognizes his landlord’s title, or while he is taking any position that is inconsistent with the position that the landlord’s title is defective.’"\textsuperscript{217}
\end{quote}

The court found that Bridges’ occupation of the property at issue in this case necessarily arose from the purchase/lease agreement between Truett and CSX.\textsuperscript{218} Therefore, his challenge to the city’s title on any grounds must fail.\textsuperscript{219} Finding no evidence to defeat the city’s claim for

\textsuperscript{208}. \textit{Id.}

\textsuperscript{209}. \textit{Id.} Although the exact status of Bridges as the occupier of the property at issue is unclear from the court’s opinion, it appears that Bridges held possession as an assignee or successor-in-interest to Truett. \textit{Id.}

\textsuperscript{210}. \textit{Id.} at 697, 437 S.E.2d at 369.

\textsuperscript{211}. \textit{Id.} at 698 n.1, 437 S.E.2d at 369 n.1.

\textsuperscript{212}. \textit{Id.} at 698, 437 S.E.2d at 369.

\textsuperscript{213}. \textit{Id.}

\textsuperscript{214}. \textit{Id.}

\textsuperscript{215}. \textit{Id.} at 699, 437 S.E.2d at 370.

\textsuperscript{216}. \textit{Id.} at 698-99, 437 S.E.2d at 370.

\textsuperscript{217}. \textit{Id.} at 699, 437 S.E.2d at 370 (quoting O.C.G.A. § 44-7-9 (1991)).

\textsuperscript{218}. \textit{Id.}

\textsuperscript{219}. \textit{Id.}
possession, the court of appeals affirmed the trial court's decision. Although the rule relied on in Bridges has recently been under attack, the courts continually show their willingness to enforce it as in the past.

The court in Marsh v. Resolution Trust Corp., dismissed an innovative argument challenging the trial court's jurisdiction to decide a dispossessory action. In April 1989, Marsh contracted to purchase a home from Signature Homes, Inc. Signature allowed Marsh to take possession of the premises prior to closing, but the sale between Marsh and Signature never closed. In November 1990, while Marsh was still in possession of the house, the Resolution Trust Corporation ("RTC") acquired the property through a foreclosure action and recorded a deed reflecting its ownership. RTC demanded that Marsh vacate the property. When Marsh refused, RTC filed a dispossessory action alleging that Marsh was a tenant at sufferance. After hearing evidence, the trial court entered judgment in favor of RTC in its dispossessory claim and dismissed Marsh's counterclaim for the value of improvements and repairs made to the property, as well as other damages.

The court of appeals affirmed the trial court's ruling on RTC's dispossessory claim. In doing so, the court rejected Marsh's argument that RTC had failed to establish the relationship of landlord and tenant. The appellate court relied on the same rule restated in Browning discussed above.

Marsh also argued, however, that the trial court was without authority to enter a writ of possession in favor of RTC. Marsh pointed to the fact that the trial court judge who issued the writ was a magistrate and not properly appointed to hear the dispossessory action. The appellate court disagreed with both of Marsh's arguments and affirmed the trial court's authority to enter the writ.

220. Id.
222. Id. at 217-18, 439 S.E.2d at 76-77.
223. Id. at 216, 439 S.E.2d at 76.
224. Id.
225. Id.
226. Id. at 218, 439 S.E.2d at 77.
227. Id. at 216-17, 439 S.E.2d at 76.
228. Id. at 217, 439 S.E.2d at 76 (quoting Hyman v. Leathers, 168 Ga. App. 112, 114, 308 S.E.2d 388, 390 (1983)).
229. Id.
230. Id., 439 S.E.2d at 76-77.
231. Id. at 217-18, 439 S.E.2d at 76-77.
Where a judge needs assistance from another judge in the same county, "the chief judge of any court within such county . . . may make a written request for assistance to the chief judge of any other court within such county." The county records contained an order signed by the chief magistrate of the county in which Marsh's case was pending which designated the magistrate who entered the writ. The record also showed that the designation was made pursuant to a request from the state court of that same county. Given that, the court found the designation was properly performed under O.C.G.A. section 15-1-9.1.

The court next rejected Marsh's argument that the failure to file the designation "in the court minutes until the day after her trial" made the writ improper. The statute controlling designation of judges by request does not set a specific time within which the order of designation must be filed. Absent such a requirement, the court found that the presumption that a trial judge "faithfully and lawfully performed the duties devolving upon [her] by law" controlled and upheld the propriety of the designation in this case.

VI. Sales Contracts and Brokers

The supreme court in Newborn v. Clay reaffirmed the established rule that a document purporting to transfer realty must adequately describe the property to be transferred. James Newborn and Carolyn Clay, during their marriage to one another, purchased a four-acre tract of land as tenants in common. Subsequently, Newborn and Clay separated and were divorced pursuant to a final decree which incorporated their written settlement agreement. Although the settlement agreement did not specifically address the disposition of the property, it did contain a general provision which stated: "[T]he parties hereby acknowledge that all marital property was divided at the time of

232. Id. at 217, 439 S.E.2d at 76 (quoting O.C.G.A. § 15-1-9.1(b)(2) (1994)).
233. Id.
234. Id., 439 S.E.2d at 77.
235. Id.
238. Id. at 217-18, 439 S.E.2d at 77. The court found the designation substantially complied with the requirements of O.C.G.A. § 15-1-9.1, and the absence of a timely objection by Marsh made such substantial compliance sufficient. 210 Ga. App. at 218, 439 S.E.2d at 77.
240. Id. at 623-24, 436 S.E.2d at 655.
241. Id. at 622, 436 S.E.2d at 654.
separation; therefore, each party hereby waives any and all rights or
claims to any property in the possession of the opposite party. 242
Undisputed was that Newborn was in sole possession of the real
property at issue when the final decree was entered and remained in
possession of that property through the time this action was com-
menced. 243

In June 1990, Clay conveyed her interest in the property by warranty
deed to Barry Price. Price thereafter claimed an interest in the property
and demanded rent from Newborn. In response, Newborn filed this
action against both Price and Clay alleging that he had acquired Clay's
interest in the property pursuant to the divorce decree. 244 At the close
of discovery, Price and Clay filed motions for summary judgment. In
opposing those motions, Newborn contended that the divorce decree was
ambiguous and that the court should consider the intent of the parties
to determine the disposition of the property. 245 The trial court granted
both defendants' motions for summary judgment, and Newborn
appealed. 246

The supreme court rejected Newborn's contentions and concluded that
the divorce decree unambiguously failed to describe and dispose of the
property. 247 Relying on White v. Lee 248 and Cale v. Cale, 249 the
court stated that "parties to a divorce decree must specifically describe
and dispose of [the real] property in which both parties have an interest
or the decree will not divest either party of their interest in the prop-
erty." 250 Because the divorce decree did not describe the property, the
decree did not affect the title and it remained in the name of the owners
as before the decree was entered. 251 Therefore, the court concluded
that Clay retained her undivided one-half interest in the property after
her divorce from Newborn and was free to convey that interest to
Price. 252

In a case involving the proposed development of a Publix-anchored
shopping center in Cobb County, the court of appeals held that promises
to contribute real property to a joint venture must be in writing in order

242. Id. at 622-23, 436 S.E.2d at 654.
243. Id. at 623 n.1, 436 S.E.2d at 654 n.1.
244. Id. at 623, 436 S.E.2d at 654.
245. Id., 436 S.E.2d at 654-55.
246. Id.
247. Id.
250. 263 Ga. at 623, 436 S.E.2d at 655.
251. Id. at 623-24, 436 S.E.2d at 655.
252. Id.
to be enforceable against the conveying party. Asa G. Candler V, Asa G. Candler VI, Richard B. Candler, and William R. Candler ("appellants") were in the business of locating and developing sites for shopping centers with Publix Supermarkets as the major tenant. After a number of meetings with Ray Sheppard, appellants entered into an oral joint venture agreement with him which required Sheppard to contribute a particular parcel of commercial realty to the joint venture and appellants to contribute their expertise, service, and relationship with Publix in the development of that realty. The parties signed a letter of intent that same day. Subsequently, appellants discovered that the land was owned by Clara Joy Sheppard ("appellee") rather than her husband. However, based on Sheppard's representations, appellants understood the property was owned in appellee's name for tax purposes only, and that Ray Sheppard had full authority "to manage, control and dispose of" the property.

After entering into the agreement with Sheppard, appellants hired an architect to prepare a site plan and conducted engineering studies in anticipation of developing the property. However, when a written joint venture agreement was submitted to appellee, she refused to consummate the transaction. Appellants brought this action against Sheppard and appellee for fraud and breach of an oral agreement to form a joint venture. They sought damages and the imposition of an equitable lien on the property. The trial court granted appellee's motion for summary judgment and declared her real property free from any claim of lien, and appellants appealed.

The court of appeals affirmed the trial court's decision relying principally upon the Statute of Frauds. The court noted that partnership or joint venture agreements generally are not required to be written. However, because this action involved the enforcement of a contract to convey land, the court concluded that the Statute of Frauds applied. The court held that any partnership agreement which

254. Id. at 664, 434 S.E.2d at 101-02.
255. Id., 434 S.E.2d at 102.
256. Id. at 664-65, 434 S.E.2d at 102.
257. Id. at 664, 434 S.E.2d at 101.
258. Id. at 665-66, 434 S.E.2d at 102-03.
259. Id. at 665, 434 S.E.2d at 102.
260. Id. at 665-66, 434 S.E.2d at 102-03.
purports to permit a partner to act on behalf of others in contracts for the sale of land must be written. 261

Appellants argued that Sheppard's promise to transfer the property to the joint venture was binding on appellee on the theory that Sheppard was appellee's agent for purposes of negotiating the joint venture agreement. 262 However, it was undisputed that Sheppard had no written authorization to act as agent for appellee in connection with the transaction. 263 The court rejected appellants' argument that Sheppard's agreement to transfer the property was binding on appellee, and affirmed the decision of the trial court. 264 The lesson practitioners should draw from this decision is the basic one to put any real property transaction, no matter how simple, in writing and in legal form.

Two cases decided during the survey period dealt with the issue of fraud in the real estate transactions. In both cases, the decisive issue was the purchaser's reasonableness in relying on the alleged representations made by the sellers. 265 In the first case, Delia Copeland purchased a house from Home Savings of America, F.A. in October 1989. 266 Prior to her purchase, Copeland visited the property five to ten times and had several other persons inspect the property on her behalf. 267 Copeland's inspections revealed several water-related conditions, including the presence of a creek adjacent to the property. She inquired of the real estate agent if there had been any flooding on the property, but was informed that there had not. Copeland made no further attempts to investigate whether the property was in a flood hazard area. 268

During heavy rains approximately one and one-half years after Copeland purchased the property, the property flooded. Copeland then learned from the DeKalb County land records and her insurance agent that the property was located in a flood hazard area. 269 When the

262. Id. at 665, 434 S.E.2d at 102.
263. Id. at 666, 434 S.E.2d at 103.
264. Id. at 665-66, 434 S.E.2d at 102-03. The court also noted that the husband/wife relationship between appellee and Sheppard did not obviate the need for written authorization before Sheppard's promises to transfer property became binding on appellee. Id. at 666, 434 S.E.2d at 103.
267. Id. Copeland's brother, roommate, plumber, and structural inspector viewed the property at her request prior to her purchase. Id.
268. Id. at 173-74, 433 S.E.2d at 328-29.
269. Id. at 174, 433 S.E.2d at 328.
seller refused Copeland's offer to rescind the sale, Copeland sued the
seller, the real estate broker and agent, and the surveying company and
surveyor based on fraudulent misrepresentation. The seller filed a
motion for summary judgment, which the trial court granted.270

The court of appeals agreed with the trial court's finding that
Copeland failed, as a matter of law, to establish justifiable reliance on
any representation made by the defendants, and affirmed the trial
court's ruling.271 The court concluded that the risk of flood hazard was
patent, given the presence of a creek adjacent to the property, and that
the defect Copeland complained of was equally open to all parties' in
spection.272 Copeland's failure to make any inquiry precluded her
from reasonably relying upon any representations by the defendants to
the contrary.273 Once again, Georgia courts impose a burden on
purchasers to thoroughly investigate any and all potential defects in real
property before purchasing.

In Ben Farmer Realty Co. v. Woodard,274 the court of appeals denied
recovery to a purchaser claiming fraud because the purchaser had not
taken reasonable precautions to protect herself from the alleged
fraud.275 In this case, Ms. Woodard contracted to buy a vacant home
in an obviously dilapidated condition. The house was not livable in the
condition as sold, and Woodard purchased the house knowing she would
have to undertake substantial repairs.276 The sales contract prepared
by Woodard's agent contained a stipulation stating that the house was
being sold "as is and no termite certificate will be issued."277 Woodard
inspected the house prior to her purchase and observed an access hole
in the ceiling leading to the attic, but failed to inspect the attic.278

After purchasing the property, Woodard discovered fire damage to the
ceiling joists in the attic. Woodard testified that she could see the fire
damage from the floor of the house through the access hole in the ceiling
when her contractor pointed his flashlight straight up. The cost of
repairing the damage was estimated at $13,892.93.279

Woodard sued the seller of the house and the real estate agents for the
seller, Ben Farmer Realty Co. and Rubin, claiming they fraudulently

270. Id. at 173, 433 S.E.2d at 328.
271. Id. at 174-75, 433 S.E.2d at 329.
272. Id. at 175, 433 S.E.2d at 329.
273. Id.
275. Id. at 77, 441 S.E.2d at 424-25.
276. Id., 441 S.E.2d at 424.
277. Id. at 76, 441 S.E.2d at 423.
278. Id.
279. Id. at 76-77, 441 S.E.2d at 424.
induced her to enter into the sales contract by concealing or failing to reveal the fire damage in the attic of the home. Woodard sought to recover the cost to repair the fire damage in the attic. The court granted summary judgment for defendants on Woodard's tort claim for fraud based on Woodard's failure to restore or offer to restore the property to the seller, but denied summary judgment on Woodard's breach of contract claims. Both parties appealed.

The court of appeals concluded, as an initial matter, that Woodard's complaint and the trial record clearly showed that Woodard sought to confirm the sales contract and sue for damages resulting from the defendants' alleged fraud. The court held that Woodard, "having elected to affirm the contract, the defrauded party [was] bound by its terms and [was] subject to any defenses which may be asserted . . . based on the terms of the contract." The court noted that Woodard, in order to prevail on her claim of passive concealment, must establish that the seller or its agent (1) was aware of the defective condition in the property which could not be discovered by the exercise of due diligence; (2) was aware that the purchaser was ignorant of the defect; and (3) did not disclose that defect. The court found no evidence in the record to support the conclusion that Rubin or Ben Farmer Realty knew of the fire damage. Further, the court found that Woodard failed as a matter of law to exercise due diligence in attempting to discover the defect which she claimed was concealed. The court noted that although Woodard was on notice to exercise a heightened degree of diligence in inspecting this dilapidated property, she failed to inspect the attic and thereby failed to identify damage which she admitted was easily visible.

280. Id. at 74, 441 S.E.2d at 422. Woodard based her claim on the passive concealment species of fraud. Id. at 75, 441 S.E.2d at 423. Wilhite v. Mays, changed the traditional rule of caveat emptor and placed upon sellers of residential realty a duty to disclose defects known to the seller of which the purchaser is unaware if those defects would affect the decision of the purchaser to complete the transaction. Id. at 76, 441 S.E.2d at 423 (citing Mulkey v. Waggoner, 177 Ga. App. 165, 166 S.E.2d 755 (1985)).

281. Id. at 74, 441 S.E.2d at 422.

282. Id.

283. Id.

284. Id. at 75, 441 S.E.2d at 423.

285. Id.

286. Id. at 76, 441 S.E.2d at 423 (citing U-Haul Co. v. Dillard Paper Co., 169 Ga. App. 312 S.E.2d 618, 620 (1983)).

287. Id. at 77, 441 S.E.2d at 424.

288. Id.

289. Id.
The court of appeals also found that Woodard was unable to rely on an alleged representation that the “property was in reasonably sound structural condition and in a good state of repair” because the contract upon which she sued specifically disclaimed any representations regarding the structural condition of the property. Based on its findings, the appellate court reversed the partial denial of summary judgment to Rubin and Ben Farmer on the breach of contract and warranty claims and affirmed the grant of summary judgment on Woodard's tort claims.

In McCoy v. H. N. R. Investment Group, L.P., the court of appeals relied on Georgia’s rule upholding parties' freedom to contract in deciding that a real estate broker was entitled to a commission on the sale of realty. The McCoys entered into an exclusive listing agreement with Harry Norman Realtors, predecessor-in-interest to H. N. R. Investment Group, L.P. (“HNR”), which gave HNR the exclusive right to lease the McCoys’ property for a minimum of ninety days and until terminated by thirty days prior written notice. The agreement also provided that if the McCoys sold the property to a tenant obtained by HNR “during or after the lessee’s term,” the McCoys would pay HNR a seven percent commission on the sales price.

HNR obtained a tenant for the property. When the initial term of the lease expired, the McCoys agreed with the tenant to extend the lease on a month-to-month basis. Thereafter, without further assistance from HNR, the McCoys negotiated a contract and sold the property to the tenant. HNR then brought this action, seeking to collect a commission on the sales price in accordance with its contract with the McCoys. The McCoys and HNR filed cross-motions for summary judgment. The trial court granted the motion filed by HNR and denied the McCoys' motion.

On appeal, the McCoys argued first that HNR was not entitled to a commission on the sale of the property because HNR had performed no

\[290.\] Id.
\[291.\] Id. at 78, 441 S.E.2d at 424. The court of appeals noted that the trial court's decision to grant summary judgment on Woodard's tort claim was based on her failure to tender rescission upon discovery for the alleged fraud. Because Woodard sought to affirm the contract, such a tender was unnecessary. The trial court's decision was right for the wrong reason, and was therefore affirmed. Id. (citing Newsom v. Department of Human Resources, 199 Ga. App. 419, 423, 405 S.E.2d 61, 64 (1991)).
\[293.\] Id. at 646-47, 437 S.E.2d at 357.
\[294.\] Id. at 645, 437 S.E.2d at 356.
\[295.\] Id., 437 S.E.2d at 355.
\[296.\] Id.
acts leading to the sale. Alternatively, the McCoys argued that a jury question existed as to whether HNR's efforts were "reasonably related in time to the actual sale." The appellate court rejected both arguments and found as a matter of law that HNR was entitled to commission on the sale.

Addressing the McCoys' arguments in reverse order, the court first concluded that the commission agreement created an agency that was terminable at will by either party upon thirty days written notice. The court found no evidence of written notice of termination in the record and, therefore, concluded that the agency between HNR and the McCoys was in existence at the time the sale was closed. Next, the court found the agreement provided as a matter of law that HNR was entitled to its commission despite the fact that it played no part in arranging the sale of the property. The court noted that, as a general rule, a real estate broker earns commissions "when, during the agency, he finds a purchaser who is ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner." In this case, the court concluded that the agreement changed the general rule and obligated the McCoys to pay a commission to HNR if the property was sold to a tenant procured by HNR during the term of the agency relationship. HNR earned a sales commission because a tenant procured by HNR eventually bought the McCoys' property before the termination of the agency relationship between HNR and the McCoys. Although the decision reached in this case appears relatively straightforward, it is nonetheless significant in its protection of the role of real estate brokers in Georgia. That protection follows a trend established in recent years.

VII. FORECLOSURES

In a procedurally interesting case from the Superior Court of Rockdale County, the court of appeals held that a foreclosing creditor is required to establish that the price received at the foreclosure sale is the true market value of the property on the date of the foreclosure sale being

297. Id., 437 S.E.2d at 356.
298. Id. at 646-47, 437 S.E.2d at 357.
299. Id. at 646, 437 S.E.2d at 356.
300. Id., 437 S.E.2d at 357.
301. Id. at 647, 437 S.E.2d at 357.
302. Id. at 646, 437 S.E.2d at 357.
303. Id. at 647, 437 S.E.2d at 357.
304. Id., 437 S.E.2d at 358.
confirmed, notwithstanding previous sales which have been set aside. Sandra Frady owned four townhomes in Rockdale County, which were subject to deeds to secure debt made in favor of Nationwide Lending Group, Inc. Chun and Michelle Kong acquired Ms. Frady's interest in the townhomes. When the Kongs failed to make payments as required under the terms of the secured promissory notes, Shearson Lehman Hutton Mortgage Corp., as assignee of Nationwide's interest, declared the notes in default.

After proper notice and advertisement, Shearson conducted a nonjudicial foreclosure sale for each of the properties and, as the sole bidder, purchased the properties for $41,500 each. Shearson then reported the foreclosure sales to the superior court and petitioned the court for confirmation. The Kongs opposed confirmation, arguing that the foreclosure sales failed to produce the true market value of the properties. At the conclusion of the hearing on Shearson's application for confirmation, the trial court orally set aside the original sales and ordered resale of each property. Shearson, as the sole bidder for and purchaser of each unit, then sought confirmation of the subsequent resales. At the hearing on Shearson's second application, the court confirmed that each property was purchased for its true market value on the date of the resale.

The Kongs appealed, arguing that Shearson should have been required to show the true market value of the property on the date of the initial foreclosure sales. Otherwise, they argued, they would be unfairly held accountable for any decline in the value of the properties between the dates of the two sales. The appellate court rejected that argument, finding that O.C.G.A. section 44-14-161(b) mandated that a nonjudicial foreclosure sale required the price received at a nonjudicial foreclosure sale equal the true market value of the property "at the time of the sale sought to be confirmed." In other words, the court found that a foreclosing creditor is not required to show what the property may

306. Id. at 94, 438 S.E.2d at 132.
307. Id., 438 S.E.2d at 132-33.
308. Id., 438 S.E.2d at 133.
309. Id.
310. Id.
311. Id.
312. Id. at 94-95, 438 S.E.2d at 133.
313. Id. at 95, 438 S.E.2d at 133.
314. O.C.G.A. § 44-14-161(b) (1982).
315. 211 Ga. App. at 95, 438 S.E.2d at 133.
have been worth at any other time besides the time of the foreclosure sale.\textsuperscript{316} The court noted that a seller of foreclosed property "is not the insurer of its market value at the time of a judicially ordered re-sale."\textsuperscript{317} This somewhat harsh ruling contains a lesson for practitioners representing debtors in foreclosure. Debtors must be advised carefully on opposing confirmation of a sale in a falling real estate market because the debtor bears the risk of any decrease in market value before a second sale.

The case of \textit{Willard v. Stewart Title Guaranty Co.}\textsuperscript{318} presented a novel method of enforcing a promissory note and may have a significant impact on the practitioners of both general property law and the law of partnerships. In that case, the supreme court implied that a partner may be liable to a creditor on a promissory note even though the note was signed only by his partner individually.\textsuperscript{319}

The factual circumstances involved in \textit{Coburn} are complex and require careful explanation. Coburn executed a promissory note and security deed (the "Coburn Note" and "Coburn Security Deed" respectively) in favor of Great Western Mortgage Company ("GWM"), in connection with Coburn's purchase of a house and lot. Coburn subsequently sold the property to SYFTKOG, Inc. which "flipped" the property to Northern. Northern financed his purchase through Fulton Federal Savings & Loan and executed a note and security deed (the "Northern Note" and "Northern Security Deed" respectively) in favor of Fulton Federal. Stewart Title Guaranty Company issued a policy of title insurance assuring, among other things, the priority of Fulton Federal's security interest in the property.\textsuperscript{320}

The proceeds from the Fulton Federal loan should have been used to retire the Coburn Note, but the check from the closing attorney was dishonored and the note remained unpaid. Upon default under the Coburn Note, GWM began foreclosure proceedings against the property. Fulton Federal learned of the foreclosure, notified Stewart Title, and

\textsuperscript{316} Id.
\textsuperscript{317} Id., 438 S.E.2d at 134. If, as the Kongs apparently believed, the properties sold were worth more at the time of the first foreclosure sale than at the second, then the court's decision imposing the decrease in value on the Kongs may appear inequitable. However, as the court pointed out, the first sale was not confirmed at the Kongs' request. Further, the Kongs did not appeal the trial court's decision ordering the properties resold after the first foreclosure sales were set aside. The court obviously thought the Kongs had taken a chance that the second sales would net a larger amount and refused to honor their complaints when their gamble did not pay off. \textit{Id.} at 96, 438 S.E.2d at 134.
\textsuperscript{318} 264 Ga. 555, 448 S.E.2d 696 (1994).
\textsuperscript{319} \textit{Id.} at 556, 448 S.E.2d at 697.
demanded indemnity under the title insurance policy. Stewart Title purchased GWM's interest in the Coburn Note and Security Deed and quitclaimed its interest to Fulton Federal, thereby assuring Fulton Federal a first priority security interest in the property. Stewart Title filed a declaratory judgment action in federal court.²³¹

When the Northern Note became in default, Fulton Federal foreclosed on the property. Pursuant to an agreement it reached with Stewart Title, Fulton Federal paid the proceeds of that sale into the registry of the federal court. Also pursuant to that agreement, Stewart Title attempted to collect on the unpaid Coburn Note. Stewart Title filed this action in the State Court of Fulton County against Coburn and Willard.²³²

The evidence showed that Willard and Coburn had formed a corporation ("OBU") for conducting a home construction business. OBU obtained a construction loan, guaranteed by Coburn and Willard, and built a house on the property, but was unable to sell the property before the loan came due. In order to pay off the construction loan, Coburn executed the Coburn Note with GWM. Although Willard did not sign the Coburn Note, he was substantially involved in arranging that financing.²³³ Willard "filled out the loan application, paid the loan application fee, obtained and paid for an appraisal of the property, reviewed the closing documents and attended the closing."²³⁴ OBU reimbursed Coburn for the down payment he made in connection with his purchase of the property and paid the only two payments made on the Coburn Note. Further, after Coburn sold the property, Willard shared in the proceeds.²³⁵

Coburn, Willard, and Stewart Title each filed motions for summary judgment.²³⁶ The trial court granted Coburn's and Willard's motions and denied Stewart Title's.²³⁷ Stewart Title appealed the judgment of the trial court with regard to each motion.²³⁸

The court of appeals reversed the trial court's grant of summary judgment to Coburn, and found that the trial court had erroneously applied O.C.G.A. section 44-14-161 to preclude Stewart Title's claims against Coburn.²³⁹ That Code section prevents a creditor from filing

³²¹ Id.
³²² Id. at 357-58, 439 S.E.2d at 70.
³²³ Id. at 359, 439 S.E.2d at 71.
³²⁴ Id.
³²⁵ Id.
³²⁶ Id. at 358, 439 S.E.2d at 70.
³²⁷ Id.
³²⁸ Id.
³²⁹ Id.
a lawsuit to recover any deficiency remaining on a debt after that creditor has conducted a nonjudicial foreclosure. The trial court had held that Fulton Federal and Stewart Title had entered into a “cooperative enterprise” to circumvent the requirement of confirmation by having Fulton Federal foreclose on the property, but having Stewart Title sue on the Coburn Note. The appellate court stated that the trial court’s ruling had disregarded the fact that there were two notes and that Fulton Federal had foreclosed on the Northern Security Deed. The court agreed with Stewart Title that the present action was not prevented by Section 44-14-161 as Stewart Title’s claim was based on the Coburn Note, not the Northern Note. However, the court affirmed the trial court’s refusal to grant summary judgment in favor of Stewart Title.

The court also reversed the trial court’s decision granting summary judgment to Willard. Stewart Title argued that Willard was liable on the Coburn Note as a partner with Coburn in the development of the property for sale. The court found that there was “evidence that Coburn was acting on behalf of a partnership including Willard, with Willard’s actual knowledge and consent, in obtaining the loan from Great Western . . . .” Therefore, notwithstanding the fact that Willard did not sign the Coburn Note, the court found that there was a question of fact whether he was liable as a partner for the debt evidenced thereby.

330. O.C.G.A. § 44-14-161 (1982). The statute provides in pertinent part:

When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages, or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon.

Id. § 44-14-161(a).

331. 211 Ga. App. at 358, 439 S.E.2d at 70.

332. Id.

333. Id. The court could not consider the action brought by Stewart Title a deficiency action because there had been no foreclosure of property owned by Coburn. Id. at 359, 439 S.E.2d at 71.

334. Id. at 359, 439 S.E.2d at 71.

335. Id. at 360, 439 S.E.2d at 72.

336. Id., 439 S.E.2d at 71.

337. Id.

338. Id., 439 S.E.2d at 72.
Willard appealed that decision, and the supreme court reversed. Unlike the court of appeals, the supreme court found "no evidence at all that Willard ever authorized Coburn to create a partnership liability in executing the [Coburn Note]." Based on that absolute lack of evidence, the court concluded that the trial court properly granted summary judgment to Willard.

In *Druid Associates, Ltd. v. National Income Realty Trust*, the court of appeals held that a nonrecourse loan prevents a claim by the foreclosing creditor for a deficiency based upon legal subrogation. In *Druid Associates*, National Income Realty Trust ("NIRT") sold the property to Druid Associates, Ltd., taking back a promissory note and deed to secure debt. The note was without recourse and stated in part:

"It is understood that the Maker hereof shall have no personal liability hereunder of (sic) for a deficiency judgment upon foreclosure under the Deed to Secure Debt, and that in the event of default, the sole and exclusive remedy of the Holder is to look to the property through foreclosure pursuant to the Deed to Secure Debt . . . . There shall be no recourse hereunder to borrower, or its general or limited partners."

When Druid failed to make payments required by the note, NIRT foreclosed on the property. NIRT then filed this action seeking to recover a delinquent $42,746 water bill against, among others, Druid and its general partner, Harry M. Epstein. The trial court granted summary judgment in favor of NIRT, and Druid and Epstein appealed.

Initially, the court of appeals noted that two different theories of subrogation exist—"legal" subrogation and "conventional" subrogation. Conventional subrogation arises from a contract between the parties, whereas legal subrogation arises as a matter of equity, without any agreement between the parties. Because the note precluded a

---

339. 264 Ga. at 556, 448 S.E.2d at 697.
340. Id.
341. Id. The supreme court did not hold, however, that a partner who does not sign a promissory note can never be liable for the debt. To establish such liability, the plaintiff will apparently be required to produce some evidence that the debt was authorized as a partnership liability. See id.
343. Id. at 685, 436 S.E.2d at 722.
344. Id.
345. Id. at 684, 436 S.E.2d at 721.
346. Id.
347. Id. at 685, 436 S.E.2d at 722.
348. Id.
claim of conventional subrogation, NIRT based its claim on legal subrogation and requested the court to exercise its equity powers. The court of appeals reversed the trial court's decision holding that a nonrecourse loan defeats a post-foreclosure claim for legal subrogation. The court found that the language of the promissory note executed by Druid clearly and unambiguously established that recovery of the property through foreclosure was the sole remedy available to NIRT in the event of default. Based on that contractual provision, the court found that NIRT was not entitled to legal subrogation.

The court in Hernandez v. Resolution Trust Corp. also wrestled with a question involving confirmation of a nonjudicial foreclosure. Southern Federal Savings Association conducted a foreclosure sale pursuant to a power of sale contained in a security deed from Julio A. Hernandez. Southern’s successor-in-interest, Resolution Trust Corporation (“RTC”) presented the sale to Magistrate Court Judge Ann Bayneum, sitting as a presiding judge for the Superior Court of Fulton County. At the confirmation hearing, Hernandez objected to confirmation on the grounds that the sale had not been properly reported because it was not reported to the judge to whom the case was assigned, Judge Elizabeth Long. Judge Long denied Hernandez’s objections and confirmed the sale.

The court rejected Hernandez’s argument on appeal stating that the “statutory language is plain and the clear import . . . is that the report must be made to a judge of the superior court of the county in which the land is located.” Clearly, the RTC’s report to the presiding judge was sufficient to satisfy the requirements of the statute.

349. Id.
350. Id.
351. Id.
352. Id. The court found that NIRT was not entitled to subrogation on another ground. Legal subrogation is effective only to the extent that the party claiming subrogation has actually paid the debt. The court found that NIRT had failed to produce any evidence it had paid the delinquent water bill. Id. at 686, 436 S.E.2d at 723.
354. Id. at 538, 436 S.E.2d at 535.
355. Id.
356. Id. Hernandez also argued that Judge Bayneum was not a superior court judge. Like the court in March v. Resolution Trust Corp., 211 Ga. App. 216, the court found that Judge Bayneum was properly appointed to serve as a judge of the superior court. 210 Ga. App. at 539, 436 S.E.2d at 536.
357. 210 Ga. App. at 538, 436 S.E.2d at 535.
358. Id. The court found that RTC had satisfied the statutory preconditions to obtaining a deficiency judgment notwithstanding the requirement that the statute was to be strictly construed against confirmation. Id.
The Georgia Supreme Court in Wallace v. President Street, L.P.\(^{359}\) held that twelve months must elapse before the purchaser of property at a tax sale may give valid notice of final foreclosure of the debtor’s right to redeem that property.\(^{360}\) On June 5, 1990, Wallace purchased property owned by President Street, L.P. at a tax sale for $13,720.65. Wallace then gave notice of the foreclosure of President Street’s right to redeem by: (1) service on President Street’s alleged registered agent; (2) mailing notice to First Union National Bank of Florida (which held a security deed covering the foreclosed property); (3) tacking notice on the door of the office on the property; and (4) publication of a foreclosure notice in the local legal newspaper.\(^{361}\) The notice provided that the right to redeem the property would be forever foreclosed on June 6, 1991, twelve months and one day after the tax sale.\(^{362}\)

On May 15, 1991, President Street tendered the amount paid at the tax sale to Wallace and sought to redeem the property. Wallace rejected that tender as inadequate because it failed to include the additional ten percent of the purchase price and costs of service and publication required when tender is made after service of the notice.\(^{363}\) Wallace filed a petition to quiet title, and President Street filed a motion for summary judgment.\(^{364}\) President Street’s motion was based on several grounds, but the trial court granted summary judgment based only on its conclusion that Wallace’s attempt to bar redemption of the property was premature and that President Street’s tender was timely and adequate.\(^{365}\)

Wallace contended on appeal that the trial court erred by concluding that notice of redemption required by O.C.G.A. section 48-4-45 may not be sent until after the expiration of twelve months from the date of the tax sale.\(^{366}\) The statute at issue states in part: “After 12 months from the date of a tax sale, the purchaser . . . may . . . forever bar the right to redeem the property from the sale by causing a notice . . . of the foreclosure, as provided in this article [to be served on various persons by means specified].”\(^{367}\) The supreme court, relying on the plain meaning of the statute, concluded that the phrase “after 12 months”

---

360. Id. at 240, 430 S.E.2d at 2.
361. Id. at 239, 430 S.E.2d at 1.
362. Id., 430 S.E.2d at 1-2.
363. Id.
364. Id., 430 S.E.2d at 2.
365. Id. at 240, 430 S.E.2d at 2.
366. Id.
367. Id. at 239 n.2, 430 S.E.2d at 1 (quoting O.C.G.A. § 48-4-45 (1991)) (emphasis supplied).
modifies and limits both the right to bar the redemption and the giving of the notice to implement the right to bar. The court concluded that twelve months must have elapsed before the right to redeem property shall be foreclosed and before the notice of the foreclosure of the right to redeem shall be served. The court further stated that the policy in this state is to favor the rights of property owners to redeem property based on the belief that the enforcement and collection of taxes through of sale of property is a harsh procedure. Therefore, Wallace's notice was ineffective, and President Street's tender of the amount paid by Shearson at foreclosure was sufficient to preserve its right to redeem the property.

In two cases during the survey period, the owners of property encumbered by deeds to secure debt attempted preemptive strikes to stave off foreclosure. In the first such case, the supreme court held that the total amount of interest paid over the life of the loan should be used to determine if the interest rate charged violates Georgia's usury laws. Fleet Finance, Inc. of Georgia was the holder of promissory notes and security deeds from Jones and two other plaintiffs (collectively "plaintiffs"). When Fleet threatened foreclosure, the plaintiffs filed an action contending that Fleet was charging usurious interest rates under O.C.G.A. section 7-4-18 and should, therefore, be required to forfeit all interest contracted for under the notes.

In connection with its loans to plaintiffs and others, Fleet charged front-end interest fees ranging from twenty-two percent to twenty-seven percent of the principal amount of the loans. The borrowers did not pay those fees in cash at closing. Instead, Fleet deducted the fees from the face amount of the loan, thus reducing the net amount of the loan proceeds actually paid to the borrowers. The borrowers then agreed to

368. Id. at 240, 430 S.E.2d at 2.
369. Id.
370. Id. at 240-41, 430 S.E.2d at 2 (citing 3A Sutherland Statutory Construction § 66.08 (4th ed.)). The court's reference to the rules of statutory construction in favor of property owners is, at best, obitur dictum. There is simply no reason for the court to have relied on the rules of statutory construction in deciding this case given its holding that the statute itself is clear and unambiguous. It is interesting however, to note the contrast between the presumptions in tax foreclosure sales (against creditor) and other foreclosure sales (against debtor). See Kong, 211 Ga. App. 93, 438 S.E.2d 132 (1993).
371. 263 Ga. at 228, 430 S.E.2d at 352.
373. 263 Ga. at 228, 430 S.E.2d at 353.
374. Id.
376. 263 Ga. at 228, 430 S.E.2d at 353.
pay for the up front fees in small, fixed amounts over the life of the loan. Despite that provision for repayment over the life of the loans, the contracts themselves stated that the front-end charges were fully earned at closing and were nonrefundable. In addition to those fees, Fleet charged yearly interest rates on the outstanding balance ranging from 18.9% to 19.9%.

Plaintiffs argued that the issue of whether a loan is usurious should be determined by deciding if the interest received in any one month exceeds the statutory limit. They further argued that the up-front charges constituted interest received by Fleet during the first month of the loan and resulted in usurious interest for that month. Accordingly, the plaintiffs argued, the entire note was usurious and Fleet should forfeit all interest due thereunder.

The trial court agreed with the plaintiffs, and held that, under O.C.G.A. section 7-4-18, interest had to be calculated for each individual month of the loan and that if the interest in any one month exceeded five percent, the entire loan was usurious. Based on that finding, the trial court enjoined Fleet from proceeding with any foreclosure, granted a motion for a certification of a class, and denied Fleet's motion to dismiss.

The supreme court reluctantly reversed the trial court's denial of Fleet's motion to dismiss. On appeal, Fleet contended that O.C.G.A. section 7-4-18 must be interpreted to require the consideration of the total interest paid over the entire period of the loan in determining if a loan was usurious. In other words, the total interest paid (or which would be paid) over the entire life of the loan should be divided by the number of months in the entire period over which the loan was scheduled to be repaid. Only if that amount exceeds five percent, would the loan be termed usurious. Fleet drew its method for calculating

377. Id. at 229, 430 S.E.2d at 354.
378. Id.
379. Id. at 229-30, 430 S.E.2d at 354-55.
380. Id. at 228, 230, 430 S.E.2d at 354-55.
381. Id., 430 S.E.2d at 354.
382. Id. at 229, 430 S.E.2d at 354. The court's characterization of "Fleet's interest-charging practices" as "exorbitant, unethical and perhaps even immoral" evidences the court's reluctance to hold in favor of Fleet. Id. However, the court stated that the burden of changing the law to prohibit Fleet's lending practices fell on the Georgia Legislature. Id.
383. Id. at 229-30, 430 S.E.2d at 354.
usurious interest from the method set out in Norris v. Sigler Daisy Corp.\textsuperscript{84}

The supreme court found that section 7-4-18 was subject to multiple reasonable interpretations, and that Fleet was entitled to the construction most favorable to its position, because the court was interpreting a criminal statute.\textsuperscript{85} The rule that a person alleged to have violated a criminal statute is entitled to the most favorable interpretation applies even where the statute is being applied in a civil context, as was the case here.\textsuperscript{86} Construing the statute in favor of Fleet, the court found that the phrase "per month" contained in Section 7-4-18 means "by the month" and does not necessarily mean "in any one month."\textsuperscript{87} The court also found that the phrase "any rate of interest greater than five percent per month" could "be read to require the lender to charge more than 5% for each and every month of the loan, instead of for any one month of the loan, in order for the loan to be usurious."\textsuperscript{88}

The court then stated that the meaning of section 7-4-1 supports Fleet’s interpretation of section 7-4-18.\textsuperscript{89} Moreover, because the front-end points and fees induced Fleet to make the loan for the entire loan and not for any one month or year, because the borrower has the use of the amount loaned for the entire loan period, and because the usury penalty applies to the interest for the entire contract, it was reasonable to test the loan for usury based on the interest charged for the entire loan period.\textsuperscript{90} The court also found support for Fleet’s argument and its decision in the opinions expressed by courts in other states.\textsuperscript{91}

Justice Benham wrote a dissenting opinion in which he stated that the court’s holding constituted “a regrettably bold step backwards in spite

\textsuperscript{84} Id. at 230, 430 S.E.2d at 354 (citing Norris v. Sigler Daisy Corp., 260 Ga. 271, 392 S.E.2d 343 (1990)). Although the court found that Norris was not binding in this case, the court did ultimately adopt that method of calculating usury for purposes of O.C.G.A. § 7-4-18. 263 Ga. at 229 n.1, 233, 430 S.E.2d at 354 n.1, 357.

\textsuperscript{85} 263 Ga. at 233, 430 S.E.2d at 357.

\textsuperscript{86} Id. at 231, 430 S.E.2d at 355 (citing FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954); Bingham, Ltd. v. United States, 724 F.2d 921, 925 (11th Cir. 1984)).

\textsuperscript{87} Id. at 231-32, 430 S.E.2d at 356.

\textsuperscript{88} Id. at 232, 430 S.E.2d at 356.

\textsuperscript{89} Id.

\textsuperscript{90} Id. Notwithstanding the statement that the holding from Norris was not binding and did not demand a finding in favor of Fleet in this case, the court relied heavily on the reasoning from Norris in reaching decision. Id. at 232, 430 S.E.2d at 356.

\textsuperscript{91} Id. at 232-33, 430 S.E.2d at 356. The court cited cases decided by the courts of Texas, Maryland, Nevada, and California and a case from the United States Court of Appeals for the District of Columbia Circuit. Id.
of legislation, precedent, common sense and public policy to the contrary." He also opined that "chaos will follow in the wake of [the court's] decision . . . and Georgia will become a safe haven for those desirous of taking unfair advantage of unsuspecting borrowers." Justice Benham disagreed with the majority's finding that the Georgia usury statute was ambiguous and, therefore, argued that the court should refrain from engaging in judicial construction of the law. Justice Benham also found precedent in the Georgia case law which he contended demanded a result contrary to the finding that the phrase "per month" did not refer to individual months. Justice Benham closed his dissent by chastising the majority for its statement that the court was constrained in its holding and that the legislature must act to prevent other lenders from pursuing a course similar to Fleet's. "To that statement [he said] the legislature has already done its job. If further legislative action is now needed, it is because this court has created confusion where none previously existed."

In Brinson v. McMillan, the supreme court reviewed a trial court's ruling on a suit to enjoin foreclosure. Charles McMillan, Jr. died intestate in 1988, leaving certain tracts of land to his heirs. A title examination conducted after his death revealed an uncanceled security deed dated September 9, 1977, from McMillan to Junie B. McMillan, now Junie B. Brinson. The security deed stated that it secured "one note, or any note given in renewal of, for $46,000, dated May 27, 1976 bearing interest at 8 percent per annum from date, due upon demand," and "any other present or future indebtedness of [McMillan] to [Brinson]." When Brinson refused to execute a cancellation of that security deed, McMillan's heirs (the "Heirs") filed this action seeking to enjoin Brinson from foreclosing on the security deed and seeking cancellation of the security deed. The trial court granted summary judgment to the heirs, and Brinson appealed.

392. 263 Ga. at 234, 430 S.E.2d at 358 (Benham, J., dissenting).
393. Id.
394. Id. at 235, 430 S.E.2d at 358.
396. Id. at 238, 430 S.E.2d at 360.
398. Id. at 802-03, 440 S.E.2d at 23.
399. Id. at 802, 440 S.E.2d at 23.
400. Id.
401. Id.
The heirs' first argument on appeal was that the security deed was ineffective because McMillan never executed a $46,000 promissory note to Brinson. Brinson had admitted in her deposition that McMillan never executed a May 27 promissory note or any other promissory note payable to her. However, in both her affidavit in opposition to the motion for summary judgment and her deposition, Brinson testified that on May 27, 1976 and September 9, 1977, McMillan was indebted to her in the amount of $46,000. Brinson further testified that McMillan never repaid any portion of that debt and that his estate now owed $46,000 plus interest. Based on those factual assertions, the supreme court found that summary judgment was improperly granted because a genuine issue of fact regarding the validity of the security deed was raised by Brinson's testimony.

The heirs also argued that Brinson's rights under the security deed were barred by laches because an action to collect on the debt was barred by the applicable statute of limitations. The court rejected that contention and found that Brinson was not prevented from exercising her rights under the security deed even if her action on the underlying indebtedness was barred. The supreme court also rejected the appellee's argument that there was no evidence presenting a question of fact regarding delivery.

VIII. EMINENT DOMAIN AND CONDEMNATION

In Styers v. Atlanta Gas Light Co., Atlanta Gas Light Co. ("AGL") sought condemnation of a fifty-foot wide easement across land owned by Walter Styers for a gas pipeline. The special master appointed to determine the market value of the easement awarded Styers $17,630. The special master also found that certain stipulations were agreed upon by AGL and Styers, including one which required AGL to give forty-eight hours advance notice before using the easement in nonemergency situations. Styers appealed the special master's award which proceeded to a jury trial on the issue of the value of the easement taken. The jury returned a verdict ruling that $70,000 was just and adequate

402. Id. at 802-03, 440 S.E.2d at 23.
403. Id. at 803, 440 S.E.2d at 23.
404. Id.
405. Id.
406. Id.
407. Id.
409. Id. at 857, 439 S.E.2d at 641.
410. Id.
compensation for the property taken, and judgment was entered for Styers in that amount.\textsuperscript{411}

This action began when Styers filed a complaint in the state court seeking damages for trespasses alleged to have been committed by AGL on Styers' land. AGL filed a counterclaim seeking damages against Styers for alleged interference with AGL's easement. AGL filed a separate action in superior court seeking an injunction to prevent Styers from interfering with AGL's easement in the future. The two actions were consolidated in the superior court, and the trial court granted AGL's motion for summary judgment on Styers' trespass claims and issued an injunction forbidding Styers from interfering with the utility's easement. The court also found that AGL was required to comply with the notice stipulation found by the special master on the condemnation case and both parties appealed.\textsuperscript{412}

The majority of the appellate court's opinion dealt with AGL's appeal of the forty-eight hour notice requirement.\textsuperscript{413} In affirming the trial court, the court focused on the terms of the Special Master Act\textsuperscript{414} and the different procedures to be followed for perfecting an appeal for "value" versus "non-value" issues as determined by a special master.\textsuperscript{415}

In addition to their primary duty of determining value in condemnation cases, special masters are also authorized to rule on \textquote{any other matters material to [the condemners' or condemnees'] respective rights.}\textsuperscript{416} Either party may seek review of the master's finding as to the value of the property or interest taken by filing an appeal for a jury trial.\textsuperscript{417} However, review of the non-value issues as determined by a special master may only be obtained by filing exceptions with "the superior court prior to that court's entry of judgment on the special master's award."\textsuperscript{418} Exceptions must be filed within ten days from entry of the award, and failure to file any such exceptions "results in a waiver of the right to further litigate non-value issues."\textsuperscript{419}

\textsuperscript{411} Id.
\textsuperscript{412} Id. at 856-57, 434 S.E.2d at 641.
\textsuperscript{413} Id. at 857-60, 439 S.E.2d at 641-43. In fact, the court dealt summarily with Styers' appeals, stating in very succinct fashion that "the trial court's grant of summary judgment to AGL . . . and the issuance of the injunction . . . were supported by the appropriate quantum of evidence." Id. at 860, 439 S.E.2d at 643.
\textsuperscript{414} O.C.G.A. § 22-2-102 (1982).
\textsuperscript{415} Id. at 857-60, 439 S.E.2d at 641-43.
\textsuperscript{416} Id. at 857, 439 S.E.2d at 641 (quoting O.C.G.A. § 22-2-102 1982)).
\textsuperscript{418} 263 Ga. at 857, 439 S.E.2d at 641.
\textsuperscript{419} Id. at 858, 439 S.E.2d at 641.
In this case, neither party filed exceptions to the special master's finding on the non-value issues, including the validity of the forty-eight hour notice provision. AGL's failure to file exceptions created a notice provision enforceable by Stryes. The court further found that any other holding would hinder the condemnor's work on condemned property pending the outcome of a jury trial on value, and that such a holding would be directly contrary to the stated purpose of the Special Master Act.

The court conceded that the language contained in previous appellate decisions "facially support[ed] AGL's contention that non-value issues can be the subject of an 'appeal." However, the court specifically rejected AGL's arguments based on those earlier opinions and reaffirmed "that the timely filing of exceptions to non-value issues passed on by the special master is the [only] means by which judicial review of those issues may be had." The holding of the court in Stryes should clarify any ambiguity regarding the method by which appeals may be perfected in condemnation cases.

Stafford v. Bryan County Board of Education also involved the procedures for appealing awards made in condemnation cases. The Bryan County Board of Education filed a condemnation action in the superior court against Stafford and other owners of the property to be condemned. A special master was appointed and a hearing held after which the special master entered an award. Stafford filed an exception to that award and an appeal of the award to the superior court. Stafford next filed on amended award, but the superior court made the first award the judgment of the court. Stafford then filed exceptions to the amended award and a notice of appeal of the valuation issue to the superior court and obtained a certificate of immediate review allowing an appeal of the trial court's entry of an award based on the special master's first findings.

---

420. Id. at 857, 439 S.E.2d at 641.
421. Id. at 858, 439 S.E.2d at 641.
422. 263 Ga. at 858, 439 S.E.2d at 642. The Special Master Act was passed to provide a "simpler," more effective method of condemnation. Id.
423. Id. at 859, 439 S.E.2d at 642.
424. Id. at 860, 439 S.E.2d at 642.
426. Id. at 6-7, 440 S.E.2d at 775.
427. Id. at 71, 440 S.E.2d at 775.
428. Id.
429. Id.
The court of appeals found that Stafford's appeal was not appropriate in light of the proceedings. His filing of an appeal to a jury on the issue of value rendered the special master's award not a final judgment subject to review. The court stated, however, that Stafford would be entitled to appeal directly all issues regarding the condemnation once the jury award of just and adequate compensation was no longer at issue in the trial court.

The issues relevant to this survey that the court in City of Dalton v. Smith decided dealt with (1) the exclusion of evidence of an easement granted by the City of Dalton to the condemnees; (2) the use of evidence of loss of privacy as an element of consequential damages; (3) the use of non-expert opinion testimony regarding the value of the property condemned; and (4) the issue of damages to the remainder of property where only part is condemned. In Smith, the City of Dalton filed a petition to condemn land, and a special master was appointed. The special master awarded the condemnees $182,000 as the fair market value of the condemned property and the condemnees appealed to the superior court. A jury returned a verdict in the amount of $271,126, and the city appealed.

On appeal, the city argued in part, that the court erred in excluding from evidence a document purporting to grant the condemnees an easement across the condemned property to the remainder of their property. This document was executed more than a year after the date the property was actually taken. Because the only question for decision in this case was the value of the property at the time of the actual taking, the appellate court of appeals agreed that the document was irrelevant and therefore properly excluded from evidence.

The city also argued that the court erred in refusing to give a requested jury charge that the loss of privacy by a condemnee was not a proper element of damages. The court rejected that argument, finding first that the city had waived its objection and second that the

430. Id.
431. Id.
433. Id. at 858-61, 437 S.E.2d at 829-31. The remainder of the City’s enumerations of error concerned the trial court’s refusal to give certain jury instructions and were dealt with, in large part, by the City’s failure to preserve the issue for appeal. Id.
434. Id. at 858, 437 S.E.2d at 829.
435. Id.
436. Id. at 859, 437 S.E.2d at 829.
437. Id.
438. Id. at 860, 437 S.E.2d at 830.
requested charge was not an accurate statement of the law. The court stated that "loss of privacy is 'an element to be considered in determining whether there were consequential damages to the remainder'" of the condemned property.

The court also rejected the city's argument that the trial court erred in allowing two non-expert witnesses to testify regarding their opinion of the value of the property taken. Both of the witnesses testified they were familiar with the property taken and that their experience in the construction industry gave them knowledge of land values in the vicinity. The court found that the trial court had not abused its discretion by allowing those witnesses' testimony because they had "an opportunity for forming a correct opinion."

Finally, the court of appeals upheld the trial court's decision to submit to the jury the question of whether the value of the remainder of the condemnees' property was impaired by the city's failure to guarantee access. "Whether a property owner has reasonable access to the property under the circumstances and whether the existing access was substantially interfered with are questions of fact to be decided by the jury."

*Forsyth County v. Greer* involved a claim of inverse condemnation arising out of delays in the issuance of county building and occupancy permits. The Greers, while developing a subdivision in Forsyth County, encountered delays in obtaining permits and approvals for the development. The Greers brought suit against the county, seeking damages for the several months of delay and claiming that county agents "took actions resulting in a 'temporary regulatory taking' of property in violation of the Constitution of the United States and of the State of Georgia." The County moved for dismissal based on

---

439. *Id.*
441. *Id.* at 861, 437 S.E.2d at 830.
442. *Id.*
443. *Id.* (quoting O.C.G.A. § 24-9-66 (1982)).
444. *Id.*, 437 S.E.2d at 831.
447. *Id.* at 444-45, 439 S.E.2d at 680.
448. *Id.* at 445, 439 S.E.2d at 680.
449. *Id.* The Greers originally filed a lawsuit on the same basis which was dismissed by a consent decree which allowed the Greers to file an inverse condemnation proceeding up to August 27, 1990. *Id.* at 444-45, 439 S.E.2d at 680. Claims of a violation of the United States Constitution and 42 U.S.C. 1983 were abandoned by the Greers in the trial
sovereign immunity and the Greers' failure to allege that property was taken for a public purpose.\textsuperscript{440} The trial court denied that motion and granted a certificate of immediate review.\textsuperscript{441}

The appellate court reversed.\textsuperscript{442} The Greers' complaint alleged that the acts causing the delay were (1) done by county employees without the approval of the County Board of Commissioners; (2) did not occur as part of a comprehensive land use plan; (3) were done with improper motive and bad faith; and (4) were willful and wanton. However, the Greers failed to allege that the actions were taken for a public purpose.\textsuperscript{443} Based on that omission, the court agreed with the county that no inverse condemnation was pleaded.\textsuperscript{444} The court stated that "no basis has been asserted upon which the [County] itself, as opposed to its officers, could be held liable for monetary damages on the basis of [the seizure]" as there had been no waiver of the County's sovereign immunity defense.\textsuperscript{445}

The holding in \textit{Department of Transportation v. Lawrence}\textsuperscript{446} addressed an award of consequential damages in connection with the condemnation of part of the condemnees' property.\textsuperscript{447} The Department of Transportation (the "DOT") sought to condemn 0.101 acres of land belonging to the Lawrences in order to change the slope of an embankment and increase visibility at an intersection. The Lawrences brought an action seeking just and adequate compensation for the property taken and consequential damages to the remainder.\textsuperscript{448} After a trial, the jury returned a verdict for the Lawrences for $19,400, and the DOT appealed.\textsuperscript{449}

On appeal, the DOT argued that the trial court erred in charging the jury as follows:

\begin{flushright}
\textsuperscript{450} 211 Ga. App. at 445, 439 S.E.2d at 680-81.
\textsuperscript{451} Id. at 445, 439 S.E.2d at 681.
\textsuperscript{452} Id. at 447, 439 S.E.2d at 682.
\textsuperscript{453} Id. at 446, 439 S.E.2d at 681.
\textsuperscript{454} Id.
\textsuperscript{455} Id. (quoting Kelleher v. Georgia, 187 Ga. App. 64, 65, 369 S.E.2d 341 (1988)).
\textsuperscript{456} 212 Ga. App. 72, 441 S.E.2d 81 (1994).
\textsuperscript{457} Id. at 73, 441 S.E.2d at 81.
\textsuperscript{458} Id.
\textsuperscript{459} Id.
\end{flushright}
In determining whether or not to award consequential damages, you may consider all the factors affecting the value of the taking—of value of the property after taking and applying it to highway construction, including, but not limited to, traffic noises, loss of privacy, if such has been shown to you by the evidence, such as will render it useless for the purposes for which it was constructed.\textsuperscript{460}

The DOT argued that the inclusion of the phrase “will render it useless” required the jury to assume that proximity damages rendered the house useless as a dwelling place.\textsuperscript{461} The court of appeals disagreed, finding that the jury charge viewed as a whole was a correct statement of the law and was not misleading to the jury.\textsuperscript{462} The charge itself did not instruct the jury to conclude that the Lawrences' house was rendered useless. Rather, the court of appeals found that the trial court had clearly left to the jury the issue of whether proximity damages were proper.\textsuperscript{463}

In \textit{Thompson v. Georgia Department of Transportation},\textsuperscript{464} the court of appeals held that losses resulting from an anticipated condemnation are not compensable.\textsuperscript{465} Thompson owned property which adjoined public streets that the Georgia Department of Transportation (the "DOT") proposed to improve. After word of the DOT's proposed improvements became public,\textsuperscript{466} a purchaser of Thompson's property and business withdrew its offer to buy. Thompson then brought this action seeking damages for inverse condemnation and violation of civil rights under Title 42, section 1983 of the United States Code ("section" 1983).\textsuperscript{467} The trial court granted the DOT's motion for summary judgment on each theory of liability, and Thompson appealed.\textsuperscript{468}

The court of appeals affirmed the trial court.\textsuperscript{469} First, the court found that Thompson was not entitled to damages resulting from an anticipated condemnation, regardless of whether the claim was based on a direct or inverse condemnation theory.\textsuperscript{470} Second, the court conclud-

\textsuperscript{460} Id.
\textsuperscript{461} Id.
\textsuperscript{462} Id.
\textsuperscript{463} Id.
\textsuperscript{465} Id. at 354, 433 S.E.2d at 621.
\textsuperscript{466} The proposed improvements were only in the planning stages and no official notice of condemnation was ever filed. Id.
\textsuperscript{467} Id.
\textsuperscript{468} Id. at 354, 433 S.E.2d at 624.
\textsuperscript{469} Id. at 355, 433 S.E.2d at 624.
\textsuperscript{470} Id. at 354, 433 S.E.2d at 624.
ed that the claim against the DOT based on section 1983 was barred by the Eleventh Amendment.\(^{471}\) The court concluded that Georgia conferred upon the DOT the state's eminent domain powers in connection with public roads and transportation, and that any claim against the DOT for its exercise of that power was improper.\(^{472}\)

_Bridges v. Department of Transportation\(^{473}\) involved a condemnation alleged to have occurred as a result of an incorrect survey line on Highway 441.\(^{474}\) Bridges owned property fronting the Highway in Jackson County. The Department of Transportation (the "DOT") began a road widening project which would have adversely affected Bridges' property. Initially, the DOT had planned to condemn part of Bridges' property, but when the parties could not agree regarding compensation for that taking, the DOT revised its plans so that Bridges' property would not be condemned. Bridges then filed this lawsuit alleging that the DOT had incorrectly surveyed the road right-of-way, substantially extending the road onto his property and depriving him of access, even after the revision of the plans.\(^{475}\)

Before the DOT began and after it completed its work, Bridges had two driveways accessing his property. There was some evidence that, during the work, one or the other of those driveways was closed, but never were both closed at the same time. The DOT filed a motion for summary judgment. In support of that motion, the DOT submitted several affidavits from project engineers and surveyors which described the method by which the DOT surveyed the road. Bridges opposed the DOT's motion and submitted an engineer's affidavit which concluded that the DOT's survey was inaccurate by three to five feet along the frontage of Bridges' property.\(^{476}\) However, that affidavit contained no factual basis for the conclusion.\(^{477}\) The trial court granted summary judgment to the DOT, and Bridges appealed.\(^{478}\)

The court of appeals affirmed the finding that the DOT had established an absence of material facts for trial.\(^{479}\) The court found that the DOT, by presenting factual testimony regarding the way it surveyed the right-of-way and evidence that the center line of the Highway had not been moved since at least 1962, established that its survey was

\(^{471}\) _Id._ 433 S.E.2d at 625.

\(^{472}\) _Id._


\(^{474}\) _Id._ at 33, 432 S.E.2d at 634.

\(^{475}\) _Id._, 432 S.E.2d at 634-35.

\(^{476}\) _Id._ at 33-34, 432 S.E.2d at 635.

\(^{477}\) _Id._

\(^{478}\) _Id._ at 33, 432 S.E.2d at 635.

\(^{479}\) _Id._ at 34, 432 S.E.2d at 635.
correct.\textsuperscript{480} Therefore, the DOT had discharged its burden on summary judgment "by pointing out by reference to the affidavits . . . that there is an absence of evidence to support the non-moving party's case."\textsuperscript{481} In the face of that evidence, Bridges could not simply rely on his pleadings, but was required to point to specific evidence giving rise to a triable issue of fact. His failure to do so required summary judgment be granted to the DOT.\textsuperscript{482}

The court also affirmed a grant of summary judgment with regard to Bridges' complaint of temporary inconvenience by having one or the other of his driveways closed during construction.\textsuperscript{483} In essence, the court restated the well-settled rule that damages for such temporary inconveniences are not recoverable as just and adequate compensation for condemned realty.\textsuperscript{484}

\section*{IX. TRESPASS}

In \textit{Groves v. City of Atlanta},\textsuperscript{485} the primary issue addressed on appeal was the extent of a public works contractor's liability for damages alleged as a result of its trespass on private property.\textsuperscript{486} In \textit{Groves}, the City of Atlanta hired John D. Stephens, Inc. to clear certain properties which were designated as borrow sites for fill soil being used in the construction of a new concourse at Hartsfield International Airport. The city hired Atlanta Airport Engineers ("AAE") to provide professional services in connection with the preparation of the borrow sites.\textsuperscript{487}

The city sent letters to some, but not all of the private owners of the land within the proposed borrow site offering to purchase the property. However, the city never purchased the four sites at issue in this case. Pursuant to instructions it received from AAE, Stephens began clearing the site. The owners of the sites not owned by the city brought an action against the city, Stephens, and others seeking injunctive relief and damages from the trespass.\textsuperscript{488} The trial court granted Stephens motion for summary judgment and granted a partial summary judgment

\begin{itemize}
\item \textsuperscript{480} Id.
\item \textsuperscript{481} Id. (quoting Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474, 476 (1991)).
\item \textsuperscript{482} Id.
\item \textsuperscript{483} Id. at 34-35, 432 S.E.2d at 635-36.
\item \textsuperscript{484} Id. at 34, 432 S.E.2d at 635. Bridges raised one other issue on appeal regarding the DOT's alleged closure of one driveway into this property. However, the court concluded that Bridges had not preserved that issue for appeal because it was not raised as an issue in the pretrial order entered in the case. Id. at 35, 432 S.E.2d at 636.
\item \textsuperscript{485} 213 Ga. App. 455, 444 S.E.2d 809 (1994).
\item \textsuperscript{486} Id. at 456-58, 444 S.E.2d at 810-12.
\item \textsuperscript{487} Id. at 455-56, 444 S.E.2d at 810.
\item \textsuperscript{488} Id.
\end{itemize}
for the city, and dismissed the property owners' claim for punitive damages. In sum, the court found little merit in any argument set forth by the adversely affected property owners.

The property owners contended on appeal that the trial court erred in finding that no question of fact existed to establish that Stephens performed its work for the city despite knowing that the city did not own the land. The court rejected the property owners' argument, stating that "the evidence show[ed] that as soon as the possibility of a trespass was raised, Stephens sought guidance from its superior, AAE, the city's agent, and was instructed to proceed because the city owned the property." The court based its finding on the uncontroverted testimony of Cantwell, Stephens project superintendent, and Hayes, AAE's chief resident engineer. Cantwell testified that the contract documents showed the city was the owner of the property. He also testified that when a man notified him that the city might not own the property, he referred that person to AAE and requested that he obtain clarification there. Thereafter, Cantwell discussed the situation with Hayes and was assured that the property had belonged to the city for many years. Given that testimony, the court applied the general rule that a public works contractor is not liable for damage to private property resulting from his work absent negligence or willful tort by the contractor. Hayes' testimony that Stephens had followed the plans and specifications for the project demanded the conclusion that the city, if anyone, was liable for the damages claimed by the property owners.

The court also affirmed the grant of summary judgment on the issue of punitive damages against the city. The court relied on a recent decision by the supreme court finding that an award of punitive

---

489. *Id.* Plaintiffs only appealed the grant of summary judgment to Stephens and the dismissal of their claim against the City for punitive damages. *Id.* at 456, 444 S.E.2d at 811.

490. *Id.*

491. *Id.* at 458, 444 S.E.2d at 812.

492. *Id.* at 456-57, 444 S.E.2d at 811.

493. *Id.*

494. *Id.* at 457, 444 S.E.2d at 811 (citing C.W. Matthews & Co. v. Wells, 147 Ga. App. 457, 458-59, 249 S.E.2d 281, 282 (1978) and Abercrombie v. Ledbetter-Johnson Co., 116 Ga. App. 376, 157 S.E.2d 493 (1967)). The court noted the exception to that rule for cases involving inherently dangerous activity, but found that the exception did not apply in this instance. *Id.*, 444 S.E.2d at 811-12.

495. *Id.* at 457-58, 444 S.E.2d at 812.

496. *Id.* at 458, 444 S.E.2d at 812.
damages against a governmental entity is against public policy and is impermissible as a matter of law.\(^4\)

In contrast to the holding in Groves, the court of appeals held in Rossee Oil Co. v. BellSouth Telecommunications, Inc.\(^4\) that punitive damages may be awarded against a public service company for intentional torts.\(^4\) BellSouth Telecommunications, Inc. entered onto property owned by Rossee Oil Co. and buried a telephone cable in the ground. BellSouth did so after being told by a Department of Transportation ("DOT") representative that there were no conflicts at that location and that BellSouth could install its telephone line there. In fact, BellSouth had no express authorization to install its telephone line on Rossee's property, and there was conflicting evidence regarding implied authorization for BellSouth to install its phone lines.\(^5\)

Rossee brought an action against BellSouth for willful trespass and sought compensatory damages, punitive damages, attorney fees, and expenses of litigation.\(^6\) BellSouth filed a motion for summary judgment arguing that Rossee was not entitled to recover punitive damages and attorney fees. BellSouth argued that Rossee was only entitled to damages of the type that would be authorized in a condemnation proceeding.\(^7\) BellSouth also asserted that insufficient evidence existed to prove by clear and convincing evidence that BellSouth's conduct in this case "showed willful misconduct, malice, fraud, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to consequences."\(^8\) The trial court accepted BellSouth's arguments and granted its motion for summary judgment.\(^9\) Rossee appealed.\(^10\)

The court of appeals cited Oglethorpe Power Corp. v. Sheriff,\(^11\) for the proposition that punitive damages are available in an action against a public utility corporation based on intentional conversion and trespass

\(^{497}\) Id. (citing MARTA v. Boswell, 261 Ga. 427, 405 S.E.2d 869 (1991)).
\(^{499}\) Id. at 236, 441 S.E.2d at 465-66.
\(^{500}\) Id. at 235, 441 S.E.2d at 465. BellSouth presented evidence that Rossee's president knew that BellSouth was installing cable on Rossee's property at the time the cable was being buried. To contradict this evidence, Rossee presented its president's affidavit that he had no knowledge of BellSouth's activities until at least eight days after burial of the cable was complete. Id. at 236 n.1, 441 S.E.2d at 465 n.1.
\(^{501}\) Id. at 236, 441 S.E.2d at 465.
\(^{502}\) Id. at 235, 441 S.E.2d at 465.
\(^{503}\) Id.
\(^{504}\) Id. at 236, 441 S.E.2d at 465.
\(^{505}\) Id.
to realty.\textsuperscript{507} The court also noted that there is no case authority precluding those damages where there exists clear and convincing evidence establishing one or more of the criteria for awarding punitive damages.\textsuperscript{508} The court found BellSouth’s reliance upon the statement by the DOT representative that BellSouth could bury its cable on Rossee’s property without further investigation “does not negate a genuine issues of material fact regarding BellSouth’s entire want of care in securing actual authority for placement of [the] cable over Rossee’s property.”\textsuperscript{509} For that reason, the court reversed the trial court’s grant of summary judgment against Rossee’s claim for punitive damages.\textsuperscript{510}

The court also reversed the trial court’s grant of summary judgment against Rossee’s claim for attorney fees and expenses of litigation.\textsuperscript{511} The court found that an award of damages for an intentional tort, like trespass or conversion, “generally will support a claim for expenses under O.C.G.A. [section] 13-6-11” on the theory that intentional tortious conduct is evidence of bad faith by the tortfeasor.\textsuperscript{512}

\textit{Maxwell v. City of Chamblee}\textsuperscript{513} involved claims of trespass and nuisance brought against a municipality based on its unlawful granting of variances for nonconforming uses on the property adjoining that of the plaintiff.\textsuperscript{514} Maxwell claimed that the City of Chamblee, and the city’s mayor and city council unlawfully granted variances for nonconforming uses to Bergen-Hudson Construction, Inc. (“B-H”). Maxwell sought to recover damages which he alleged resulted from that nonconforming use. In addition to denying the material allegations of the complaint, the city asserted two defenses: the statute of limitations and Maxwell’s failure to give notice to the city.\textsuperscript{515} The trial court concluded that Maxwell’s allegations of continuing trespass and nuisance were not time barred since Maxwell was entitled to recover damages accruing within the four years prior to filing of the lawsuit. Accordingly, the trial court denied summary judgment based on the statute of limitations. However, the trial court granted summary judgment to the city based on Maxwell’s

\textsuperscript{507} Rossee Oil Co., 212 Ga. App. at 236, 441 S.E.2d at 465.
\textsuperscript{508} Id.
\textsuperscript{509} Id.
\textsuperscript{510} Id.
\textsuperscript{511} Id.
\textsuperscript{512} Id., 441 S.E.2d at 466 (quoting Wisenbaker v. Warren, 196 Ga. App. 651, 396 S.E.2d 528, 531 (1990)).
\textsuperscript{513} 212 Ga. App. 135, 441 S.E.2d 257 (1994), cert. granted.
\textsuperscript{514} Id. at 135, 441 S.E.2d at 257.
\textsuperscript{515} Id.
failure to give the ante litem notice required in Georgia for claims against municipalities.\(^{516}\) The court of appeals reversed the trial court's ruling in part.\(^{517}\) The court agreed that material questions of fact existed regarding Maxwell's claims for continuing trespass and continuing nuisance.\(^{518}\) Despite the fact that there was no evidence that the plaintiff had provided written notice of his claim against the city, as required by O.C.G.A. section 36-33-5,\(^{519}\) the court concluded that summary adjudication was impro priely granted to the city.\(^{520}\)

A continuing trespass or nuisance gives rise to a cause of action every day that it continues, and the party harmed by the trespass is entitled to recover all damages that accrue during the four years prior to filing the lawsuit.\(^{521}\) Accordingly, the court concluded that "summary judgment was proper 'only [as to] those trespasses or nuisances which occurred more than four years prior to the filing of the complaint.'"\(^{522}\) Maxwell was not precluded from giving notice to the City, in accord with O.C.G.A. section 36-33-5, of damages that continued to occur on his property as a result of the nonconforming uses on the neighboring property, and he was not precluded from recovering for those damages.\(^{523}\)

516. Id.
517. Id. at 137, 441 S.E.2d at 259.
518. Id. at 136, 441 S.E.2d at 258.
519. Id., 441 S.E.2d at 259. O.C.G.A. § 36-33-5 states in pertinent part:
(a) No person, firm, or corporation having a claim for money damages against any municipal corporation on account of injuries to person or property shall bring any action against the municipal corporation for such injuries, without first giving notice as provided in subsection (b) of the Code section.
(b) Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having such claim shall present the claim in writing to the governing authority of the municipal corporation for adjustment, stating the time, place, and extent of the injury, as nearly as practicable, and the negligence which caused the injury. No action shall be entertained by the courts against the municipal corporation until the cause of action therein has first been presented to the governing authority for adjustment.
520. 212 Ga. App. at 137, 441 S.E.2d at 259. The court specifically found that oral notice of the claim to the governing body was insufficient to satisfy the statutory precondition to maintaining an action against a municipality. Id.
521. Id. at 136, 441 S.E.2d at 258-59.
522. Id., 441 S.E.2d at 259.
523. Id.
The court remanded the case to the trial court "for entry of judgment consistent with [the] opinion." However, it is unclear from the court's opinion exactly what is to happen upon remand. The court implied that the filing of the complaint was written notice to the city. If that is the case, then Maxwell will be deemed to have preserved his claim for all damages that occurred as a result of the city's trespass from a point six months before the complaint was filed. What is more likely to happen is that the trial court will dismiss Maxwell's claims pursuant to O.C.G.A. section 9-11-12(b)(6) with leave to refile. Maxwell would then be able to give notice to the city pursuant to O.C.G.A. section 36-33-5 and pursue an action for all damages accruing since a date six months before the giving of that notice.

X. MISCELLANEOUS CASES

In Dwyer v. Anand, Vijay Anand executed a commercial lease with Atlanta Rainbow, Inc. for the lease of a commercial building from February 1, 1990 through January 31, 1995. The monthly rent was $3,300, and Lawrence Dwyer executed a personal guaranty of Rainbow's obligations under the lease. When a dispute arose over a water leak in the property, Rainbow ceased paying the rent. On September 5, 1991, Anand filed an action against Rainbow and Dwyer seeking to recover the past due rent for August 1991. Anand never amended his pleadings to claim rents which became due during the pendency of the action.

At trial, Rainbow and Dwyer objected to testimony regarding rents that had come due since the filing of the complaint. The trial court overruled those objections. Following a bench trial, the trial court entered a judgment for Anand for unpaid rents totaling $38,300 and Rainbow and Dwyer appealed.

Because Anand failed to amend his pleadings to include a prayer for recovery of rents other than that due in August 1991, the court of appeals reversed the trial court. The court stated that a landlord,
In order to recover rents that become due after commencement of an action seeking rents that are already past due, ... must amend his original complaint under O.C.G.A. § 9-11-15(a), supplement his pleadings under O.C.G.A. § 9-11-15(d), or try the additional issues with the express or implied consent of the other party in accordance with O.C.G.A. § 9-11-15(b). Anand did not contend that he amended or supplemented his pleadings. The court found that Rainbow's and Dwyer's objection to consideration of Anand's claims for additional rent at the beginning of and throughout the trial established that this issue was not tried by consent of the parties.

In Hicks v. McLain's Building Materials, Inc., the court of appeals held that, absent special damages, no cause of action exists against a materialman who improperly files a lien against real property. Ms. Hicks and her husband were building a new home using Gerel Bartlett as their builder. Hicks instructed that all deliveries of materials to the building site were to be on a "C.O.D." basis. However, it was undisputed that some deliveries were not paid for at the time of delivery. Plaintiff dismissed Bartlett in November 1990.

Thereafter, a dispute arose between Hicks and McLain's Building Materials regarding payment of two invoices for materials alleged to have been delivered and incorporated into the house. The first invoice was for $2,520.93 for standard building supplies. The second invoice was for $19,858.60 which McLain contended represented the cost of a special order of non-standard doors and windows. McLain filed two separate materialmen's liens against Hicks' property, but failed to notify her of the liens. Subsequently, Hicks paid the bill for $2,520.93, but McLain failed to cancel the lien.

When Hicks discovered the liens during a title search, she filed this action against McLain. McLain released the liens before answering the complaint, but Hicks refused to dismiss her claims. The first two counts of Hicks' complaint were styled "Filing of Fraudulent Materialmen's Liens," one for each lien filed by McLain. The final count was for

533. Id. at 419, 436 S.E.2d at 533.
534. Id. at 420, 436 S.E.2d at 534.
536. Id. at 192-93, 191 S.E.2d at 116.
537. Id. at 191, 191 S.E.2d at 115.
538. Id. at 191-92, 191 S.E.2d at 116.
The court of appeals first concluded that no cause of action exists in Georgia for the filing of fraudulent liens, and that the trial court properly treated those counts as claims for defamation of title. The court then considered Hicks' argument that the attorney fees she incurred as a result of the liens satisfied the requirement of special damages and established that a cause of action existed. The court rejected that argument, affirming the trial court's grant of summary judgment, and stated that "the costs of litigation and attorney fees cannot constitute the required special damage, as such costs and fees will be present in any suit and treating them as special damage would render the special damage requirement meaningless." Hicks argued that she was entitled to rely on O.C.G.A. section 44-14-362 of the Materialman's Lien Statute to support her claim for damages as a result of the $2,520.93 lien. That code section provides that a person who files a preliminary notice of lien pursuant to O.C.G.A. section 44-14-361.3 must "cause the notice [of preliminary lien rights] to be canceled of record within ten days after final payment" or be liable to the owner for all actual damages, costs, and reasonable attorneys' fees. However, the court found that McLain had filed the lien pursuant to O.C.G.A. section 44-14-361.1 and that section 44-14-362 did not apply.

Hicks' also attempted to rely on the Materialman's Lien Statute to support her claim for additional damages as a result of the improper notice of the $19,858.60 lien. She argued that she could recover damages because of McLain's failure to notify her of the filing of the lien. The court rejected that argument, finding that the statute did not create an action for damages from its violation. The only penalty for failure to provide notice as required is that the lien is unenforceable.

539. Id. at 191, 191 S.E.2d at 115.
540. Id. at 192, 191 S.E.2d at 115.
541. Id., 191 S.E.2d at 116.
542. Id.
543. Id.
548. Id.
549. Id. at 193, 433 S.E.2d at 116.
550. Id.
The court also upheld the trial court's grant of summary judgment to McLain on Hicks' fraudulent misrepresentation claim. The court found that Hicks' failure to present evidence regarding McLain's knowledge of the false statements at the time of the misrepresentation or McLain's intent to deceive rendered Hicks' claim without merit. In fact, the court characterized plaintiff's allegation of fraud as "fanciful and without merit." In *South River Farms v. Beardon*, the court of appeals explained the meaning of the term "involved" and clarified when a lis pendens is proper because real property is "involved" in a lawsuit. James and Janice Beardon filed a pleading entitled "Notice of Intent to Sue" in Webster County against South River Farms, Ed Simmons, and others alleging that they had harassed the Beardons and prevented them from peaceful enjoyment of their property. In conjunction with that pleading, the Beardons filed several lis pendens for parcels of property owned by South River. In response, South River brought an action against the Beardons to cancel the lis pendens and prayed for damages for slander of title. The trial court granted the Beardons' motion to dismiss South River's complaint for failure to state a claim, and South River appealed.

The court of appeals reversed the trial court, concluding that the trial court erred in dismissing South River's complaint. O.C.G.A. section 44-14-610 permits a notice of lis pendens to be recorded only regarding suits in which real property is "involved." The word "involved" refers to cases where the realty is "actually and directly brought into litigation by the pleadings in a pending suit and as to which some relief is sought respecting that particular property." Because the Beardons' suit asserted no claim of interest or ownership in South River's property, but rather sought to include the property only as security to pay the judgment they hoped to win, the court concluded that the lis pendens were improperly filed.

The court then rejected the Beardons' arguments that they were protected from liability for the filing of the lis pendens under the

---

551. *Id.*
552. *Id.*
554. *Id.* at 157-58, 435 S.E.2d at 517-18.
555. *Id.* at 157, 435 S.E.2d at 517.
556. *Id.*
557. *Id.*
559. 209 Ga. App. at 157, 433 S.E.2d at 518.
560. *Id.* at 157-58, 433 S.E.2d at 518.
privilege granted allegations contained in pleadings and that South River had failed to provide any proof of damages.\textsuperscript{561}

The court first concluded that the privilege afforded properly filed pleadings did not apply in this case because the lis pendens were improperly filed.\textsuperscript{562} With regard to proof of damages, the court concluded that evidence in the record of a lost contract for the sale of one parcel of land subject to the lis pendens and evidence that South River was forced to obtain a quitclaim deed from the Beardons established sufficient factual circumstances to support South River's claim for damages.\textsuperscript{563} This case serves a warning against the random filing of lis pendens because of the perception of real property's great value in payment of judgments.

XI. LEGISLATIVE DEVELOPMENTS

There were several legislative enactments of importance to real estate practitioners during the survey. The first is related to a topic presented in last year's survey.\textsuperscript{564} Last year, Georgia took its first step toward a central recording system for the filing of instruments reflecting security interests in personal property.\textsuperscript{565} Article 9 has been amended again this year to provide for the central filing of "fixture filings" to perfect security interests in personalty that is attached to reality.\textsuperscript{566} The legislature has also extended the date on which the central filing system is scheduled to be fully operational. The central filing index was originally scheduled to be in use by July 1, 1994, but to accommodate problems experienced by the implementing body—the "Georgia Superior Court Clerks' Cooperative Authority"—that time has been extended to January 1, 1995.\textsuperscript{567}

One legislative development which will immediately affect most real estate lawyers is an amendment to Chapter 2 of Title 44 relating to the

\textsuperscript{561} Id. at 158, 433 S.E.2d at 518.
\textsuperscript{562} Id.
\textsuperscript{563} Id.
\textsuperscript{565} See O.C.G.A. § 11-9-401(1) (1994) ("The proper place to file in order to perfect a security interest is with the clerk of the superior court of any county of the state.") (emphasis supplied).
\textsuperscript{566} O.C.G.A. § 11-9-313(b).
\textsuperscript{567} See O.C.G.A. § 11-9-407(5) (1994) ("Information maintained in the central index for inclusion on search reports shall consist of all currently effective original financing statements filed on or after January 1, 1995, as well as any currently effective statement of assignment, continuation, release, or amendment relating thereto." Id.).
requirements for recordation of deeds and other instruments of title. O.C.G.A. section 44-2-14 has been amended to state:

No affidavit prepared under Code Section 44-2-20 and no instrument by which the title to real property or any interest therein is conveyed, created, assigned, encumbered, disposed of, or otherwise affected shall be entitled to recordation unless the name and mailing address of the natural person to whom the affidavit or instrument is to be returned is legibly printed, typewritten, or stamped upon such affidavit or instrument at the top of the first page thereof. This simple procedural change presents a significant trap for the unwary. The absence of a name of a natural person and that person's address from the instrument to be recorded could result in delay in perfected title or other interests in realty as the clerks of the various courts are likely to return the documents without recordation. The long delays encountered in some counties may lead the party submitting the incomplete document to wait weeks before inquiring if the document has been recorded and the interest in the property perfected. In that time, parties with competing interests may have recorded their own complete instrument and take priority over the imperfect instrument.

Another legislative development clarifies the effect of a bona fide purchaser's possession of property which would otherwise be subject to a judgment lien. O.C.G.A. section 9-12-93 has been amended and now reads:

When any person has bona fide and for a valuable consideration purchased real or personal property and has been in possession of the real property for four years or of the personal property for two years, such property shall be discharged from the lien of any judgment against the person from whom it was purchased or against any predecessor in title of real or personal property. Nothing contained herein shall be construed to otherwise affect the validity or enforceability of such judgment, except to discharge such property from any such lien of judgment. The addition of the phrase “or against any predecessor in title of real or personal property . . .” clarifies that the exception to imposition of a judgment lien extends to bona fide purchasers remote from the judgment debtor.

569. Id. § 44-2-14(b) (1994).
570. Id.
571. Id.
572. Id.
In addition, the legislature has amended the procedure for appealing a judgment entered in a dispossessory action between a landlord and a tenant. Previously, appeals from the trial court in dispossessory actions were timely filed if made within thirty days from the date of entry of the trial court's judgment. That time period has now been shortened to ten days. As a result, a tenant must make a much quicker decision whether to appeal an adverse decision.

Moreover, the court may now order an appealing tenant to pay into the registry of the court "all sums found by the trial court to be due for rent" and "all future rent as it becomes due until the issue has been finally determined on appeal." Those requirements give landlords more protection for their interest in rents due from defaulting tenants. They also increase the financial burden imposed on tenants involved in dispossessories and will likely lead to a decrease in the number of appeals by tenants from adverse trial court decisions.

There were two significant amendments during the survey period to Chapter 3 of Title 44 dealing with specialized land transactions. The first was the addition of an Article 6 to the chapter known as the Georgia Property Owners' Association Act. The Property Owners' Association Act establishes, among other things, the method for creating homeowners' associations, and defines the powers of those associations after creation. The Act also permits such associations to assess fees against the property owners in the association and provides an enforcement mechanism to force payment of those fees. Failure to pay assessments as they come due may result in a loss of privilege to use common areas maintained by the association. Further, all unpaid assessments become liens, in favor of the association, against the property owned by the nonpaying property owner.

An amendment providing for an enforcement mechanism was also made to the Georgia Condominium Act. A condominium association may now withhold utility service to condominium units where the owner

---

573. See O.C.G.A. § 44-7-56 (1994).
574. Id. The statute now reads "Any judgment by the trial court shall be appealable pursuant to Chapters 2, 3, 6, and 7 of Title 5, provided that any such appeal shall be filed within ten days of the date such judgment was entered . . . ." Id. (emphasis supplied).
575. Id.
577. Id. § 44-3-222.
578. Id. § 44-3-222.
580. Id. § 44-3-223.
581. Id. § 44-3-232.
582. Id. §§ 44-3-70 to -116 (1994).
or other occupant thereof fails to pay assessments as required by the association agreement. The right of the association is limited to times when it has obtained a judgment or judgments in its favor in excess of $750.

Finally, the Georgia Legislature has passed an amendment to Title 12 of the Official Code of Georgia which directly affect real property. O.C.G.A. section 12-13-12 was amended and now provides that:

"The state shall have a lien on the real property on which the underground storage tanks which caused the discharge are located, even if owned by a person other than the owner or operator [of the tanks], provided the owner or operator is in privity with the real property owner."

That amendment extends the state's lien rights to persons who may have no connection with a discharge of a regulated substance from an underground storage tank and provides an extra measure of leverage for the state to collect funds owed to the Underground Storage Tank Trust Fund.

583. Id. § 44-3-76 (Supp. 1994).
584. Id.
585. Id. § 12-13-12(a).
586. Id.
587. Id.