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I. INTRODUCTION

Last year's survey period focused on efforts to expand the passive concealment doctrine in construction cases and the parameters of arbitration under the Georgia Arbitration Code.

Substantively, with respect to expanding doctrines of fraud as they pertain to construction projects, the courts rejected attempts to impose liability for passive concealment in commercial settings. Historically, the doctrine of passive concealment has been applied to residential building relationships, but never in a commercial transaction. Part of the impetus behind this move is the fact that in a typical construction dispute involving economic damages, statutes of limitations begin to run upon performance, rather than discovery. This antagonism to discovery of concealed defects for purposes of limitations of actions carries over to discovery of concealed frauds as well. An exception has been carved out for residential home buyers who may not be in as good a position to make the type of inspection that a commercial owner can.

In the arbitration field, there were a number of cases during the survey period construing various portions of Georgia's recently adopted arbitration code, fleshing out the respective rights of the parties as governed by that code.

II. LENDER DUTIES AND LIABILITIES

During the survey period, there were surprisingly no new developments or re-affirmations of existing doctrines concerning lender involvement in construction projects.

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III. CONTRACT FORMATION, CONSTRUCTION, AND BREACH

A. Contract Formation

1. Form Contract Terms and Conditions. In Pioneer Concrete Pumping Service v. T & B Scottdale Contractors, Inc., the plaintiff subcontractor (Pioneer) provided concrete pumping services to T & B Scottdale which performed as general contractor. During the performance of this work, one of the braces supporting Pioneer's truck gave way, killing an employee of T & B Scottdale.

Upon completion of the concrete pumping, Pioneer presented a form "job ticket" to T & B Scottdale's site supervisor. On the reverse side of the form were preprinted terms and conditions relating to responsibilities of lessees, delays, notice, waiver, and terms of payment. The terms and conditions also included a provision stating that T & B Scottdale would indemnify Pioneer "for any claim resulting from the performance of this agreement," unless the claim was the result of [Pioneer's] 'sole negligence.' No reference was made on the front side of the "job ticket" to the terms and conditions on the back. Other identical "job tickets" had been used on the project, signed by the same site supervisor and others on behalf of T & B Scottdale, without any protest concerning the terms on the back side. All of these "job tickets" were paid by T & B Scottdale.

Pioneer entered into negotiations with the decedent's family, eventually settling for a payment of $700,000. During the course of these negotiations, Pioneer notified T & B Scottdale that negotiations were occurring, but T & B Scottdale chose not to participate. Pioneer sued T & B Scottdale on a claim for indemnity, and both parties moved for summary judgment. T & B Scottdale's motion was granted, and Pioneer appealed.

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2. Id. at 596, 462 S.E.2d at 628.
3. Id.
4. Id. The signature line read: "The above Times and Quantities are Verified to be Correct: BY ________________." Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id., 462 S.E.2d at 628-29.
The court of appeals reversed, holding that the "job ticket" was sufficient to bind the signer to the terms and conditions on the reverse side.\(^1\) In so holding, the court found that the site supervisor had an obligation to read the terms and was bound by the terms he did not read.\(^13\) The court also rejected the argument that the terms and conditions printed on the reverse side of a document rendered them unenforceable.\(^14\)

Likewise, the court found that T & B Scottdale's actions in paying previous "job tickets" signed by this same site supervisor ratified the supervisor's authority in signing this particular "job ticket."\(^15\) Moreover, T & B Scottdale's project manager contacted the site supervisor after the accident, indicating that the site supervisor's signature might expose T & B Scottdale to liability.\(^16\) The project manager "then sent [Pioneer] a letter stating T & B Scottdale would withhold certain funds reflecting costs calculated to be attributable to the accident."\(^17\) At no time did the project manager disclaim the site supervisor's authority to sign the "job ticket," nor did he indicate that T & B Scottdale did not consider itself bound by the indemnity provision.\(^18\)

2. Acceptance of Dedication. On a completely different issue of contract formation, in Johnson & Harber Construction Co. v. Bing,\(^19\) a plaintiff property owner sued both the construction company that built a drainage system on adjoining property, and Henry County, which had taken steps to dedicate the system, alleging surface water runoff damage.\(^20\) Summary judgment was granted in favor of Henry County from which the construction company appealed.\(^21\) Henry County moved to dismiss the appeal.\(^22\)

\(^{12}\) \textit{Id.}, 462 S.E.2d at 629.
\(^{13}\) \textit{Id.} (citing Trulove v. Woodmen of the World Life Ins. Soc'y, 204 Ga. App. 362, 365, 419 S.E.2d 324, 328 (1992)).
\(^{14}\) \textit{Id.}
\(^{15}\) \textit{Id.} at 597, 462 S.E.2d at 629 (citing Holliday Constr. Co. v. Sandy Springs Ass'n, 198 Ga. App. 20, 21, 400 S.E.2d 380, 382 (1990)).
\(^{16}\) \textit{Id.}
\(^{17}\) \textit{Id.}
\(^{18}\) \textit{Id.}
\(^{20}\) \textit{Id.} at 179, 469 S.E.2d at 698.
\(^{21}\) \textit{Id.}, 469 S.E.2d at 698-99. After the contractor filed its notice of appeal, the property owner and Henry County settled, and the property owner dismissed without prejudice. \textit{Id.}
\(^{22}\) \textit{Id.}, 469 S.E.2d at 699.
In reversing the grant of summary judgment in favor of Henry County, the court found fact issues relating to acceptance of the dedication. The evidence adduced at the trial court level consisted of a letter issued by the county requiring the contractor to establish a two-year maintenance bond on construction of all streets, curbs, gutters, and storm drainage structures in the particular subdivision in question. The letter went on to state that Henry County would accept all future maintenance of the subdivision. This expression of intent to take control by Henry County was held to establish a fact question on acceptance of the dedication.

B. Contract Construction


"In late August or early September 1990, during the initial development of the property, [the] grading subcontractor discovered debris" buried within the intended building area. Leveto agreed that he and Futch would pay $10,000 to remove the waste, but that this offer was subject to approval by Futch. No document was ever signed by Leveto or Futch, but Leveto tendered to Armstrong and Property Leasing two checks totalling $14,000, plus a release in final settlement, which tender was rejected.
An excavation company removed the debris and the facility was completed in the spring of 1991. By the fall of 1991, cracks appeared in the club level of the building and substantial movement of walls occurred on the backside of the warehouse as a result of movement in the adjacent sloped ground. The roof of the facility began to leak, a problem that Mann Construction was unsuccessful in eliminating. Fireman's Fund, the surety, denied the property owner's repeated demands to correct the structural defects.

Armstrong and Property Leasing sued Leveto, Futch, and their development company for negligence, breach of contract, and fraud. They also sued Mann Construction and Fireman's Fund for fraud, negligence, and breach of warranty. The jury returned a verdict in favor of Property Leasing against Mann Construction and Fireman's Fund in the amount of $180,000 for breach of contract in connection with the roof, but against Property Leasing for construction of a parking lot at the facility. Mann Construction was awarded $42,510 on a counterclaim made against Property Leasing for construction of a parking lot at the facility. Post-trial motions were denied and Armstrong, Property Leasing, Mann Construction, and Fireman's Fund all appealed.

In one aspect of these appeals, Armstrong and Property Leasing contended that Mann Construction had an obligation to ensure that the soil surrounding the construction site would support the constructed facility and meet minimum load-bearing requirements. The court held that while Mann Construction had an obligation to disclose errors and omissions contained in the contract documents, such an obligation did not include any failure to disclose to the project inspector the existence of a burial pit. Such duty was limited to errors found in the contract itself, and not to external conditions found at the site.

2. Conditions Precedent for Final Payment. In Grubb v. Woodglenn Properties, Inc., the court, in a case primarily concerning materialmen's liens, addressed the failure of the contractor to provide

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33. Id.
34. Id.
35. Id. at 538-39, 458 S.E.2d at 483.
36. Id. at 540, 458 S.E.2d at 483.
37. Id.
38. Id.
39. Id.
40. Id. at 540, 458 S.E.2d at 484.
41. Id.
fully executed affidavits as to liens and encumbrances as required by the construction agreement's rider, and whether that failure precluded final payment. The court held that because the contractor had signed the form provided to him by the construction lender, but did not have the opportunity to execute that document properly before a notary public, enforcement of the contract provisions requiring an affidavit would not be justified.

C. Breach and Remedies

1. Excuse for Nonperformance. For the most part, nonperformance or breach by one party to a contract excuses the failure of the other party to perform. In CRS Sirrine, Inc. v. Dravo Corp., Dravo Corporation and Weyher/Livsey Constructors, Inc., (plaintiffs) were joint-venture partners with defendant CRS Sirrine, Inc., in the construction of a power plant for the United States Navy. CRS was a design expert and had produced the technical proposal from which a bid on the part of the joint venture was prepared. Plaintiffs prepared a bid based upon these documents and were to be responsible for the actual construction of the project. Numerous problems were encountered and plaintiffs sued defendant for deficiencies in the design documents, breach of contract, and breach of fiduciary duty, claiming losses amounting to approximately $30,000,000. Under the terms of the joint venture arrangement, the designer was to be paid a fee for its work on the project and was to share in profits, but was not to bear any risk of loss.

The trial court, in a bench trial, found defendant to have breached contractual and fiduciary duties by failing to provide sufficient and accurate information to plaintiffs, design the project within budgeted quantities, and notify plaintiffs when significant increases over estimated quantities occurred. Damages were awarded in the amount of $5,518,812.

43. Id. at 902-05, 470 S.E.2d at 456-58.
44. Id. at 904, 470 S.E.2d at 457-58.
46. Id. at 301, 464 S.E.2d at 899.
47. Id.
48. Id.
49. Id. at 301-02, 464 S.E.2d at 899.
50. Id. at 302, 464 S.E.2d at 899.
51. Id.
CRS appealed. The trial court's determination was upheld, but the court of appeals remanded for the trial court to clarify its findings concerning how it arrived at the damages awarded. Defendant again appealed from the trial court's clarification of its damage calculation methodology.

On appeal, CRS contended that if its conduct caused a delay where the plaintiffs' conduct also partially caused or contributed to the delay, it would not be liable. The court found that if a party to a contract makes it impossible for the other party to perform, then nonperformance is excused. This doctrine, however, did not apply to instances where both parties contribute to the delay, unless defendant's contribution to delay was itself caused as a result of the plaintiffs' conduct.

IV. TORT LIABILITY

A. Fraud

1. Passive Concealment Doctrine. The Georgia Court of Appeals had two occasions to address the passive concealment doctrine, and in both instances held that the doctrine is limited to controversies between residential homeowners and residential builder/sellers.

In Armstrong Transfer & Storage Co. v. Mann Construction, Inc., the vendor was sued for fraudulent concealment of buried debris. The court held that the doctrine of passive concealment is limited to the sale of residential properties, not commercial property. As this case involved commercial property, the doctrine was not applicable. This view also formed the basis of the court's holding in Crotts Enterprises, Inc. v. John Payne Co.

53. 219 Ga. App. at 302, 464 S.E.2d at 899.
55. 219 Ga. App. at 304, 464 S.E.2d at 900.
56. Id. at 303, 464 S.E.2d at 900. O.C.G.A. § 13-4-23 (1982), applicable in this instance, states: "If the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance."
58. 217 Ga. App. at 540, 458 S.E.2d at 483-84.
59. Id. at 539-40, 458 S.E.2d at 483.
60. Id. at 539, 458 S.E.2d at 483.
2. Fraud By Omission or Surprise. In *Sears Mortgage Corp. v. Leeds Building Products, Inc.*,62 Sears Mortgage and others purchased or financed the purchase of certain homes from a residential builder.63 The builder had purchased materials on credit from Leeds Building Products, executing security deeds on each of the properties to serve as collateral for the construction materials.64

Upon the close of the purchase of the properties, plaintiffs had no actual knowledge of the security deeds, and as a result, the security deeds were not satisfied at that time.65 Subsequently, the builder could not satisfy its debts to Leeds Building Products, which demanded that plaintiffs satisfy the debts secured by the security deeds.66 Leeds Building Products threatened foreclosure when plaintiffs refused.67

Plaintiffs sued Leeds Building Products to enjoin it from foreclosing on the properties, and for damages resulting from fraud and wrongful foreclosure.68 Leeds Building Products was granted summary judgment, and the plaintiffs appealed. Plaintiffs also contended that they were entitled to summary judgment on their claims for fraud and wrongful foreclosure.69

On appeal, plaintiffs contended that “the trial court used an impermissibly narrow standard in assessing their fraud claim [arguing that] a showing of fraud can be made without evidence of affirmative misrepresentations.”70 While affirmative misrepresentation is not necessarily required for a showing of fraud, that element must be satisfied by evidence of suppression of a material fact or surprise.71 The court found that the relationship between Leeds Building Products and the builder was one of creditor/debtor, and did not amount to any fraud.72

63. Id. at 349, 464 S.E.2d at 908.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id. at 351, 464 S.E.2d at 909.
71. Id.
72. Id. at 352, 464 S.E.2d at 910.
B. Fraud

1. Failure to Pay Not Conversion. In *Doyle Dickerson Co. v. Durden*, a subcontractor on a construction project brought suit against the general contractor for conversion of funds. Although the general contractor had been paid in full by the project owner, it failed to remit those amounts to the subcontractor, rather expending them to pay for other expenses. The subcontractor failed to exercise its lien rights.

The subcontractor contended that the funds paid to the general contractor were "subject to a trust in favor of those who furnished labor and materials used in completing the improvements" to real property. The subcontractor further contended that the president and sole owner of the general contractor knowingly converted these trust funds due plaintiff. The defendant moved for summary judgment on the basis that no viable claim for conversion existed because the subcontractor had no title or right of possession to the funds received by the general contractor. The subcontractor appealed from the grant of defendant's motion for summary judgment.

The court noted that criminal statutes make it a felony for a contractor to divert monies earmarked for the payment of labor and services performed, or materials furnished, under a contractor's order for specific improvements to real property. Although cases construing the criminal statute have used the words "trust" and "trustee," the court found these references merely to describe the criminal offense. The

74. Id. at 426, 461 S.E.2d at 902.
75. Id.
76. Id.
77. Id.
78. Id. at 426-27, 461 S.E.2d at 902.
79. Id. at 427, 461 S.E.2d at 902.
80. Id., 461 S.E.2d at 903.
81. Id. at 427-28, 461 S.E.2d at 903. O.C.G.A. § 16-8-15(a) (1982) provides:
Any architect, landscape architect, engineer, contractor, subcontractor, or other person who with intent to defraud shall use the proceeds of any payment made to him on account of improving certain real property for any other purpose than to pay for labor or services performed on or materials furnished by his order for this specific improvement while any amount for which he may be or become liable for such labor, services, or materials remains unpaid, commits a felony . . . .
court further noted that this criminal statute did not give rise to a civil cause of action, nor did it establish or create a property right in the funds as the subcontractor contended. The court found that the constructive trust fund doctrine is limited under general principles of equity to instances in which persons are entitled to file liens under Georgia's materialmen's lien laws. By failing to file such a lien, the subcontractor could not assert the doctrine.

C. Negligence

1. Implied Contractual Provisions Giving Rise to Claim for Negligence. In Seely v. Loyd H. Johnson Construction Co., residential home purchasers sued the builder/seller for negligent construction or repair, breach of contract, breach of warranty, and strict liability. After moving into the residence, purchasers discovered water leaking from the bathroom wall and notified the builder/seller who sent a plumber to repair the leak. Several days later, the repair failed, and water again leaked from the hole causing personal injury to Ms. Seely. Summary judgment was granted in favor of the builder/seller for all claims of negligence from which the Seelys appealed.

The court noted that the doctrine "of caveat emptor was abandoned in cases involving latent defects in transactions between home buyers and builder/sellers of new homes." A professional builder has a legal duty to exercise a reasonable duty of care, skill, and ability, which, under similar conditions and like surrounding circumstances, others in the profession ordinarily employ. As a result, a builder/seller, having held himself out as an expert to build a fit and workmanlike residence, cannot escape liability simply by claiming that an independent contractor he hired was responsible for that work. This duty is premised upon the inference that a builder/seller directs and controls the

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83. 218 Ga. App. at 428, 461 S.E.2d at 903.
84. Id. at 427, 461 S.E.2d at 903 (citing In re American Building Consultants, 138 B.R. 1015, 1017 (Bankr. N.D. Ga. 1992)).
85. Id. at 428, 461 S.E.2d at 903.
87. Id. at 719, 470 S.E.2d at 285.
88. Id.
89. Id.
90. Id.
91. Id. at 720, 470 S.E.2d at 286.
92. Id. (citing Williams v. Runion, 173 Ga. App. 54, 57, 325 S.E.2d 441, 446 (1984)).
93. Id. at 720-21, 470 S.E.2d at 286.
work of all those employed by it to the extent that an ordinarily prudent builder would exercise such direction and control in order to ensure a fit and workmanlike structure.\(^9^4\)

2. **Negligent Construction and Fraudulent Concealment.** In *Florence v. Knight*,\(^9^5\) plaintiffs filed an action for personal injuries against Knight Development and individual partners of that company.\(^9^6\) One of the plaintiffs had fallen through the attic floor, which consisted of blown insulation. Plaintiffs alleged inadequate lighting to discern whether any solid flooring existed in that location.\(^9^7\) The defendants filed a motion for summary judgment on the grounds that the plaintiffs failed to establish a latent construction defect. Plaintiffs appealed the grant of summary judgment.\(^9^8\)

On appeal, the court of appeals found that the defect was not latent and was certainly discoverable upon reasonable inspection.\(^9^9\) A builder/seller of homes is not liable for damages resulting from negligent construction in the absence of fraudulent concealment.\(^1^0^0\)

3. **Limitation of Actions.** In *Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Hardaway Co.*,\(^1^0^1\) "the Hardaway Company sued Parsons, Brinckerhoff, Quade [and] Douglas, Inc., and DRC Consultants . . . to recover . . . economic losses incurred in [the] construction of ten approach bridges for the Eugene Talmadge Memorial Bridge in Savannah."\(^1^0^2\) Hardaway's central contention was that Parsons, Brinckerhoff negligently designed portions of the bridges, and it sought to recover for additional work and other expenses incurred when it had to abandon these designs.\(^1^0^3\) The defendant's motion for summary judgment, in which it had argued that the suit was not filed within the statute of limitations, was denied.\(^1^0^4\)

\(^{94}\) *Id.* at 721, 470 S.E.2d at 286.


\(^{96}\) *Id.* at 799, 459 S.E.2d at 437.

\(^{97}\) *Id.*

\(^{98}\) *Id.*

\(^{99}\) *Id.* at 800, 459 S.E.2d at 437.

\(^{100}\) *Id.*, 459 S.E.2d at 438.

\(^{101}\) 221 Ga. App. 74, 470 S.E.2d 904 (1996), *cert. granted*.

\(^{102}\) *Id.* at 74, 470 S.E.2d at 904.

\(^{103}\) *Id.*

\(^{104}\) *Id.* at 74-75, 470 S.E.2d at 904.
Defendant’s application for interlocutory appeal was granted as an
issue of first impression. In reversing the trial court’s denial of
defendant’s motion for summary judgment, the court of appeals
considered when a cause of action arises where a party seeks “recovery
for economic losses incurred as a result of alleged negligent misrepresen-
tation.” Generally, a claim for negligent misrepresentation is
authorized under Georgia law.

The court reiterated that a cause of action accrues at that time when
plaintiff first could have maintained an action to a successful result.
In other words, the right of action accrues from the time there has been
a breach of duty, notwithstanding that actual damage has not yet
resulted.

The court found that a claim for negligent misrepresentation sounded
in negligence, not fraud, so the statute of limitations began to run when
there was a negligent act coupled with a proximately resulting inju-
ry. The court found the tort to be complete when the defendant
ergentially supplied false information for the guidance of the plaintiff,
and when the plaintiff sustained a pecuniary loss caused to it by its
justifiable reliance upon that information. In other words, the cause
of action accrues “when the [plaintiff] knew or should have known that
[it] had a loss caused by [its] reliance upon the defendant's informa-
tion.”

In this case, the date on which the plaintiff signed the contract with
the Department of Transportation is the time from which the statute
runs, because on that date the “causal means” test was met where
plaintiff could have first maintained its action to a successful result.
Thus, an action for damages accrued, not when plaintiff realized it had
been damaged, but when it first relied upon faulty information and
expended monies or became obligated to act under its contract.

105. Id. at 75, 470 S.E.2d at 904-05.
106. Id., 470 S.E.2d at 905.
(1983).
108. 221 Ga. App. at 77, 470 S.E.2d at 905.
109. Id.
110. Id., 470 S.E.2d at 906.
111. Id. at 78, 470 S.E.2d at 907.
112. Id.
113. Id.
114. Id. at 78-79, 470 S.E.2d at 907.
A. Service of Claim of Lien on Property Owner

In *Grubb v. Woodglenn Properties, Inc.*, the builder, Woodglenn Properties, brought suit for breach of contract involving the construction of a home, and was awarded a judgment in rem and special lien based upon its filed materialmen's lien. On appeal, the property owner contended that service requirements for claims of lien pursuant to the materialmen's lien statute were not followed, inasmuch as he did not receive a copy of the claim of lien by registered or certified mail, and further, that the claimant's lien contained an inaccurate property description. The claim of lien was served with the complaint upon the property owner's wife, which service the court found to have exceeded the statutory minimum requirement. The court also rejected the argument concerning the inaccurate property description, finding it to be correct in every respect, other than the plat book page number.

B. Inaccurate Description of Real Property

Not all errors in property descriptions will be treated as lightly. In *Mull v. Mickey's Lumber & Supply Co.*, the court of appeals was asked to address whether an error in description of the real property against which a claim of lien was made prevented enforcement of the lien. Partial summary judgment had been granted in favor of Mickey's Lumber and Supply Company, and the property owners appealed. This claim of lien was predicated upon the supplies furnished for the construction of the property owner's home for which there had never been payment. The property owners had purchased lots twenty and twenty-one in the Camelot subdivision in Walton County. The home was constructed on lot twenty-one because lot twenty

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118. 220 Ga. App. at 905, 470 S.E.2d at 458.
119. Id.
120. Id.
122. Id. at 344, 461 S.E.2d at 272.
123. Id. at 343, 461 S.E.2d at 271.
124. Id.
was deemed unfit for construction. Both lots were closed separately and
taxed independently.125 No construction whatsoever was performed on
lot twenty.126 The claim of lien indicated that the supplier had
furnished materials and labor for the improvement of property on lot
twenty, not lot twenty-one.127 The trial court found that all other
aspects of the description were accurate, and that the mere failure to
identify the appropriate lot owned by the same individuals, and
contiguous with the lot named in the claim of lien, did not render the
description legally insufficient to preclude enforcement of the lien.128

A right to claim of lien is in derogation of the common law and the
statute creating the right to such lien is strictly construed.129 The
court found that the legal description of the real property failed the test
for sufficiency of such a property description in a legal document.130
A description, in order to be valid, must identify the land or provide a
"key" to the description which may be found by extrinsic evidence.131
The court found that the information provided, even when aided by
extrinsic evidence, "fail[ed] to lead definitely to the identification of lot
number 21 as the property subject to the lien."132 This unilateral
mistake on the part of the lien claimant rendered the lien unenforce-
able.133

C. Liens Exceeding Total Contract Price

In Gaster Lumber Co. v. Browning,134 a supplier brought suit against
property owners to foreclose on a materialmen's lien.135 The property
owners entered into a construction contract with Gregory and Associates
for the construction of a residence in the amount of $243,830. Building
materials were purchased on account by the general contractor for use
at the project. Gaster Lumber filed a claim of lien after it failed to
receive payment for supplies it had furnished.136 The general contrac-
tor was terminated for abandoning the project and the property owners
assumed the role of general contractor, expending additional sums of

125. Id.
126. Id.
127. Id. at 344, 461 S.E.2d at 272.
128. Id.
129. Id. at 345, 461 S.E.2d at 272.
130. Id. at 345-46, 461 S.E.2d at 273.
131. Id. at 345, 461 S.E.2d at 273.
132. Id. at 346, 461 S.E.2d at 273.
133. Id.
135. Id. at 435, 465 S.E.2d at 525.
136. Id.
money to complete the project, all of which were expended after the filing of the lien.\textsuperscript{137} When this occurred, $20,393.71 was still owed to this particular supplier.\textsuperscript{138}

Initially, the trial court ruled in favor of the supplier and entered judgment in the amount of $36,714.70, consisting of the principal balance of the lien, finance charges, prejudgment interest, and attorney fees. However, upon determining that the aggregate of liens exceeded the total contract price, the trial court reversed itself on a motion for new trial and entered judgment in favor of the property owners.\textsuperscript{139}

In reversing the trial court's determination, the court of appeals noted the lien statute requirement that the owner show that sums paid to the contractor were properly appropriated to material and labor costs.\textsuperscript{140} As a matter of law, payments made subsequent to the date of the filing of the lien were not properly appropriated sums, and could not be considered in determining the total contract expenditure by the property owner.\textsuperscript{141}

The court further found that prejudgment interest was an appropriate element of the damage, but distinct and separate, and was not to be included in determining whether the aggregate amount of liens exceeded total contract price contemplated under the lien statute.\textsuperscript{142} The court also noted that, while the lien statute did not expressly provide for attorney fees, if the statutory requirements for the award of attorney fees in general were satisfied, fees could be awarded on a lien claim.\textsuperscript{143}

VI. SURETY BOND AND GUARANTOR ISSUES

A. Discharge of Surety

In Armstrong Transfer & Storage Co. v. Mann Construction, Inc.,\textsuperscript{144} the court of appeals was also faced with a question concerning the

\begin{itemize}
  \item[137.] \textit{Id.}
  \item[138.] \textit{Id.}
  \item[139.] \textit{Id.} O.C.G.A. § 44-14-361.1(e) (1982) provides: "In no event shall the aggregate amount of lien set up by Code Section 44-14-361 exceed the contract price of the improvements made or services performed."
  \item[140.] 219 Ga. App. at 437, 465 S.E.2d at 525.
  \item[141.] \textit{Id.}, 465 S.E.2d at 526.
  \item[142.] \textit{Id.} at 438, 465 S.E.2d at 526.
  \item[143.] \textit{Id.} O.C.G.A. § 13-6-11 (1982) generally allows attorney fees as part of the expenses of litigation awarded under circumstances of bad faith, stubborn litigiousness, and unnecessary delay and expense.
\end{itemize}
On appeal, Fireman's Fund contended that the trial court erred in directing a verdict against it on its affirmative defenses of fraud and discharge. The surety contended that the initial draft of the construction contract, upon which it relied in making its decision to issue the performance bond, was materially different from the final contract actually entered between its principal and the project owner. Fireman's Fund argued this increased its risk, thus entitling it to a discharge of its obligation under the bond.

Typically, a surety may be discharged from its obligation under a bond if its risk is increased by an act of the insured. Fireman's Fund argued that by listing an individual as a joint general contractor, rather than as a special agent for Mann Construction, its risk was increased. However, the evidence adduced at trial showed that Mann Construction did not consider the superintendent to be a joint general contractor, but merely its agent responsible for day-to-day decision making on the project. Moreover, the omission of this term in the initial draft contract seen by Fireman's Fund did not amount to a material misrepresentation concerning its risk, because Fireman's Fund could not reasonably have relied upon an unsigned document as a true representation of the contractual relationship it was insuring.

VII. ARBITRATION

A. Compelling Arbitration and Staying Judicial Proceedings

1. Expression of Intent to Arbitrate. In Pinnacle Construction Co. v. Osborne, the purchasers of a home sued Pinnacle Construction Company for defects in their house, alleging breach of contract, breach of warranty, fraud, and unfair and deceptive trade practices. Pinnacle Construction moved to compel arbitration. This motion was denied and an interlocutory appeal was taken. Sales agreements for

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145. Id. at 538, 458 S.E.2d at 481. For more details of the factual background of this case, see supra notes 26-41, 57-60.
146. 217 Ga. App. at 542, 458 S.E.2d at 485.
147. Id.
148. Id.
149. Id.
150. Id.
151. Id. at 542-43, 458 S.E.2d at 485.
153. Id. at 366, 460 S.E.2d at 881.
154. Id.
the purchase or financing of residential real estate are exempt from application of the Georgia Arbitration Code.\textsuperscript{155} The court of appeals stated that the legislature is deemed to know that new houses were sold by sales agreements containing provisions for the construction of the house itself at the time it enacted this provision.\textsuperscript{156} Such a sales agreement involving construction of a new home includes the implicit promise that the house will be built in accordance with the specifications named in the sales contract, and that a suit for defects could be maintained under that contract.\textsuperscript{157}

The parties to a sales agreement must initial the provision governing arbitration in order to constitute an expression of their intent to be bound by the provision.\textsuperscript{158} The court reasoned that new home buyers should not be afforded less protection than purchasers of resold homes.\textsuperscript{159}

2. Preemption. In \textit{North Augusta Associates Ltd. Partnership v. 1815 Exchange, Inc.},\textsuperscript{160} the court of appeals addressed whether parties to a contract must comply with the arbitration provisions, including whether a determination of arbitrability was for the trial court or the arbitrators.\textsuperscript{161} North Augusta Associates entered into an agreement with the contractor, Barge-Wagner, for construction of a project located in North Augusta, South Carolina.\textsuperscript{162} Barge-Wagner subsequently changed its name to 1815 Exchange.\textsuperscript{163} The general contract included an arbitration provision which recited conditions to occur prior to the submission of any claim to arbitration. These conditions concerned

\begin{itemize}
\item 155. \textit{Id.} at 367, 460 S.E.2d at 881. O.C.G.A. § 9-9-2(c)(8) (1982) provides:
\begin{itemize}
\item (c) This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply:
\end{itemize}
\begin{itemize}
\item \ldots \(8\) Any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialled by all signatories at the time of the execution of the agreement. This exception shall not restrict agreements between or among real estate brokers or agents \ldots
\end{itemize}

\item 156. 218 Ga. App. at 367, 460 S.E.2d at 881.
\item 162. \textit{Id.}, 469 S.E.2d at 761.
\end{itemize}
duties to be performed by the architect who would render a final decision, subject to later arbitration.\textsuperscript{164}

In November 1994, 1815 Exchange filed a demand for arbitration against North Augusta and its general partners, claiming damages of approximately $1.5 million.\textsuperscript{165} The defendants filed a Verified Petition for Declaratory Judgment and a Motion for Stay of Arbitration in Cobb County Superior Court.\textsuperscript{166} They contended that 1815 Exchange failed to comply with the provisions of the agreement relating to the timing of submission of written claims, and failed to comply with the conditions precedent for demanding arbitration.\textsuperscript{167} The petition and motion for stay were denied following the hearing.\textsuperscript{168} The trial court found that the Federal Arbitration Act\textsuperscript{169} preempted the Georgia Arbitration Code, and that under said Act the arbitrators, not the trial court, were to decide arbitrability.\textsuperscript{170}

The court found that while substantive portions of the Federal Arbitration Act may apply to the case, that Act did not preempt the entire field of arbitration, and that state procedural mechanisms consistent with the goals of the Federal Arbitration Act were applicable.\textsuperscript{171} The Federal Arbitration Act controls an agreement involving interstate commerce.\textsuperscript{172} Choice of law provisions in documents, however, govern the application of a state's arbitration code.\textsuperscript{173} Even if the Federal Arbitration Act would permit the arbitration to proceed, whereas the state code would result in a stay of that arbitration, the state's arbitration procedures will control.\textsuperscript{174} State law applies, so long as that law does not conflict with the Federal Arbitration Act.\textsuperscript{175}

The court held that arbitration could not proceed unless the conditions precedent agreed to by the parties in the contract were met. Failure to uphold those conditions would circumvent the intent of the parties as expressed at the time they entered into the agreement.\textsuperscript{176} Unless the

\begin{enumerate}
\item[164.] Id.
\item[165.] Id. at 791, 469 S.E.2d at 761.
\item[166.] Id.
\item[167.] Id.
\item[168.] Id.
\item[170.] 220 Ga. App. at 791, 469 S.E.2d at 761.
\item[171.] Id.
\item[174.] 220 Ga. App. at 791, 469 S.E.2d at 761.
\item[175.] Id. at 791-92, 469 S.E.2d at 762.
\item[176.] Id. at 792, 469 S.E.2d at 762.
\end{enumerate}
parties specifically agree to defer questions for arbitrability to the arbitrators, under Georgia law, a court will decide questions of arbitrability. "An agreement to arbitrate arbitrability must be shown by clear, unmistakable evidence."\(^{177}\)

**B. Procedure Under the Arbitration Code**

1. **Discovery Permitted in Confirmation Proceeding.** In a reversal of a case discussed in last year's annual survey,\(^{178}\) the Georgia Supreme Court determined that discovery is permitted in confirmation proceedings. In *Hardin Construction Group, Inc. v. Fuller Enterprises, Inc.*,\(^{179}\) the court considered whether any type of discovery would be permitted in a confirmation proceeding. In the previous year, the Georgia Court of Appeals held it was not.\(^{180}\) In that case, the trial court denied a motion for protective order. The court of appeals determined that discovery should not be permitted, reversing the trial court.\(^{181}\)

The Georgia Supreme Court noted that confirmation proceedings under the Georgia Arbitration Code are not civil actions.\(^{182}\) Such a procedure is initiated by motion and requires that applications made under the Code be heard and decided according to the rules provided for the hearings of motions.\(^{183}\) "Nevertheless, even though [a] confirmation proceeding is not a civil action, the Civil Practice Act chapter governing discovery applies."\(^{184}\) The court concluded, however, that in order not to frustrate the purpose of an arbitration proceeding, unlimited discovery in an arbitration confirmation proceeding would not be permitted, but limited discovery relating solely to affirmative defenses to confirmation would be allowed.\(^{185}\)

\(^{177}\) Id. at 793, 469 S.E.2d at 762-63 (citing First Options v. Manual Kaplan, 115 S. Ct. 1920 (1995)).


\(^{181}\) 265 Ga. at 770, 462 S.E.2d at 130.

\(^{182}\) Id. at 771, 462 S.E.2d at 131.

\(^{183}\) Id. See O.C.G.A. § 9-9-4(a)(2) (1982).

\(^{184}\) 265 Ga. at 771, 462 S.E.2d at 131. O.C.G.A. § 9-11-81 (1982) provides: "This chapter shall apply to all special statutory proceedings, except to the extent that specific rules of practice and procedure ... are expressly prescribed by law; but, in any event, the provisions of [the Civil Practice Act] governing ... discovery ... shall apply to all such proceedings."

\(^{185}\) 265 Ga. at 772, 462 S.E.2d at 131.
C. Scope of Arbitrator's Authority

1. Review of Arbitrator's Actual Findings Not Permitted. In *Hundley v. Greene*, the Georgia Court of Appeals held that a claim that an arbitrator's actual findings were not supported by evidence was tantamount to challenging whether the arbitrator acted outside the scope of his authority. The Georgia Supreme Court reversed this decision in *Greene v. Hundley*. In doing so, the court noted that arbitrating parties agree to waive certain rights in favor of a quick resolution of their disputes when they agree to arbitrate. The Georgia Arbitration Code does not require that an arbitrator enter findings of fact in support of an award, nor does the Code require an arbitrator to explain the reasoning behind an award. So long as the award is derived from the context of a contract, the remedy fashioned is within the inherent power of an arbitrator. If the parties agreed that the arbitrator would resolve all existing disputes between them, there is nothing in the record to support a finding that the arbitrator exceeded his authority, as his findings are protected.

The Georgia Supreme Court found that "the arbitration code provided the exclusive means by which contractual agreements to arbitrate would be enforced." This Code expressly provides that awards must be confirmed unless vacated or modified in accordance with the Code itself. As a result, unless a statutory ground for vacating an award is found in the Code, an award must be confirmed.

VIII. Conclusion

The survey period showed the focus on alternative dispute resolution by strengthening in some areas, and curtailing in others, arbitration rights governed under Georgia's Arbitration Code. Moreover, doctrines designed to protect consumers in a consumer-oriented market were held

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188. 266 Ga. 592, 468 S.E.2d 350 (1996).
189. Id. at 595, 468 S.E.2d at 352.
190. Id.
191. Id., 468 S.E.2d at 353.
192. Id. at 596, 468 S.E.2d at 353.
193. Id. at 595-96, 468 S.E.2d at 353.
194. Id. at 596, 468 S.E.2d at 353.
195. Id.
not to reach into the commercial market where the parties are on more equal footing.