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Real Property

by T. Daniel Brannan*
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and
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I. INTRODUCTION

This article surveys case law and legislative developments in the Georgia law of real property from June 1, 1995 to May 31, 1996. The authors do not endeavor to chronicle every case decided in the survey period but, instead, focus on cases and other developments of general significance. This article discusses several significant cases decided during the survey period and the single meaningful alteration in Georgia statutes relating to real property.

II. TITLE TO LAND

In Gansereit v. Gansereit,1 the Georgia Court of Appeals reaffirmed the long-standing rule that Georgia courts have no "power or authority to set aside an instrument transferring title to real property in another state."2 In that case, Ernest J. Gansereit, a New Jersey resident, brought an action in the DeKalb County Superior Court against his brother, Raymond F. Gansereit, to recover eight thousand dollars allegedly due under a promissory note. Raymond filed a counterclaim

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2. Id. at 762, 463 S.E.2d at 66.
seeking to set aside a deed from the brothers’ parents to Ernest. Raymond alleged that Ernest had exercised undue influence over their parents in convincing them to sell their New Jersey residence for a fraction of its true market value. The trial court entered judgment in favor of Ernest for the amount due under the promissory note and dismissed Raymond’s counterclaim on the basis that the court had no authority to set aside the sale of the property in New Jersey; Raymond appealed.

On appeal, Raymond argued that Georgia courts have authority to set aside a New Jersey deed based on the doctrine that states must give full faith and credit to the law of other states. The court of appeals rejected that argument as being without merit. The court acknowledged that a court generally has authority to adjudicate personal rights and equities between parties with regard to realty outside the court’s jurisdiction. However, the court concluded that actions directly involving title to real property located in New Jersey must be decided in that state. Because Raymond Gansereit’s claim was not based upon in personam principles, the court found that it had no authority to grant the relief requested.

The supreme court held in Wilcox County School District v. Sutton that property may still be used for school purposes even when the school building located thereon has been demolished. The property at issue in that case was located in Rochelle, Georgia (the “City”) and had been conveyed by the City to the Wilcox County Board of Education in 1950. The deed evidencing that transfer contained a provision stating that the “property would revert to the City ‘if said property is abandoned for school purposes.’” When the Wilcox County School District announced a plan that included demolition of the school building existing on the property, a group of residents and taxpayers of Wilcox County brought suit against the school district and various school officials seeking an injunction against the demolition and a declaration that the

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3. Id.
4. Id. at 763, 463 S.E.2d at 67.
5. Id. See U.S. CONST. art. 4, § 1.
8. Id. at 763, 463 S.E.2d at 67.
9. Id. at 762-63, 463 S.E.2d at 66.
11. Id. at 722, 461 S.E.2d at 870.
12. Id. at 720, 461 S.E.2d at 869.
13. Id.
title to the property on which the building stood had reverted to the City.14

The trial court granted plaintiffs' request for an injunction and set aside the demolition contract.15 The trial court also held that a jury trial was necessary to determine whether the property had been abandoned "for school purposes" so that title to the property had reverted to the City. The school district appealed that decision.16

In deciding to grant plaintiffs' injunction, the trial court had concluded, based on a deed executed in 1900 by an individual to the City, that the property was the subject of a charitable trust. The deed stated "that the City was to hold the property in fee simple 'for the purpose of erecting and maintain thereon a public school building.'"17 The appellate court noted that the deed made no reference to a trust or to trustees and expressed no intent that a trust be established.18 Based on those facts, the court of appeals rejected the trial court's finding that the quoted language was sufficient to create a trust.19 The court of appeals held that the language of the deed merely "specified the purpose for which [the property] was being conveyed."20

The appellate court next addressed whether the property had been abandoned for school purposes. In deciding the meaning of the phrase "school purposes," the court of appeals relied on the Georgia Supreme Court's decision in Board of Education of Appling County v. Hunter.21 In Hunter, the phrase "school purposes" was held to mean "any activity that is necessary in the proper maintenance and operation of a school under our present school system."22 The court in Sutton found that the undisputed evidence before the trial court was that the property continued to be part of the campus of the consolidated county school complex.23 Under that circumstance, the appellate court held that the evidence demanded the conclusion that the property was still in use for school purposes and had not reverted to the City as a matter of law.24

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14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id. at 721, 461 S.E.2d at 870.
20. Id.
21. 190 Ga. 767, 10 S.E.2d 749 (1940).
22. 265 Ga. at 722, 461 S.E.2d at 870 (quoting Hunter, 190 Ga. at 768, 10 S.E.2d at 750).
23. Id.
24. Id.
In *Evans v. Lipscomb*, Glen Lipscomb and Herbert Childers purchased the land as tenants in common on October 8, 1949. Between 1949 and 1986, Lipscomb and Childers sold approximately fifty acres of the land. In 1986, Lipscomb and Childers executed an agreement (the "1986 Agreement") dividing the remaining land along an "old logging road" running through the property. However, Lipscomb and Childers failed to designate in their agreement which party retained which portion of the divided property. On July 21, 1987, and again on March 22, 1991, Lipscomb and Childers executed quitclaim deeds to clarify that issue. Both sets of quitclaim deeds purported to convey "50 acres, more or less." After execution of the second set of quitclaim deeds, Lipscomb commissioned a survey of his tract. The survey showed that Lipscomb had actually received only twenty-one acres upon the 1986 division of the property with Childers. Childers also commissioned a survey of his tract in 1992. The survey showed that Childers received just over fifty-one acres as a result of the 1986 agreement. On April 22, 1992, Childers conveyed the western parcel of his property to Evans.

Thereafter, Lipscomb and his son requested that Childers and Evans consent to a more equitable redivision of the property. Both Childers and Evans refused. Following Mr. Lipscomb's death, the executor of Lipscomb's estate filed an action against Evans seeking equitable reformation of the 1986 Agreement and subsequent quitclaim deeds to reflect the parties' intention to divide the remainder of the property evenly. Evans filed a motion for summary judgment, asserting that the action was barred by the expiration of the applicable statute of limitation. The trial court denied the motion, and Evans appealed.

On appeal, the executor urged that he was seeking reformation of the corrective quitclaim deed executed in 1991. On that basis, he asserted that the action was timely filed within the seven-year limitation period applicable to actions to reform written instruments transferring...
title to realty. The executor argued that, because neither the 1986 agreement nor the 1987 quitclaim deed accurately described the land the parties intended Lipscomb to receive, Lipscomb had neither legal nor colorable title to his portion of the property only as a result of that 1991 deed. The supreme court rejected that argument, finding that Lipscomb's title was perfected when he entered into possession of the intended portion of the property. Because possession occurred in July 1986, the cause of action to reform the written instrument accrued at that time.

The executor also argued that even if the cause of action to reform the 1986 Agreement accrued in 1986, it was tolled for some period of time due to mutual mistake or fraud. The appellate court also rejected that argument. As a general rule, the statute of limitation does not commence to run against an equitable action for reformation of a written instrument based on mutual mistake or fraud until the mistake or fraud has been, or by the exercise of a reasonable diligence should have been, discovered. In this case, the record contains no explanation for Lipscomb's failure to conduct a survey before or after the execution of the 1986 Agreement. The court also concluded that "a visual inspection of the property should have made [Lipscomb] aware of the disparity in the two parcels." Based on those facts, the court concluded that Lipscomb had, as a matter of law, failed to act with the due diligence required to toll the running of the statute of limitation. Because Lipscomb did not file the lawsuit until December 1994, the court concluded that the action was barred by the expiration of the statute of limitation.

Another case decided during the survey period involves an issue relevant to developers and contractors of subdivisions in Georgia. In Frazier v. Deen, residents of Lake Park "C" Addition to Section One (the "Subdivision") brought an action against the developers and the builder of certain houses in the Subdivision seeking to avoid changes in

31. Id. (citing Whittle v. Nottingham, 164 Ga. 155, 138 S.E. 62 (1927)).
32. Id. The 1986 Agreement failed to specify which portion of the Cagel Property Lipscomb was to receive, and the 1987 quitclaim deed recited that the parties received property on the opposite side of the old logging road from that actually intended. Id. at 769-70, 470 S.E.2d at 643.
33. Id. at 769-70, 470 S.E.2d at 643.
34. Id. at 770, 470 S.E.2d at 643.
35. Id., 470 S.E.2d at 643-44 (citing 54 C.J.S. Limitations of Actions § 197 (1987)).
36. Id., 470 S.E.2d at 644.
37. Id. at 770-71, 470 S.E.2d at 644.
the restrictive covenants for the Subdivision. The original restrictive covenants required "that garages and carports be entered from the side or rear of the house," but specifically provided that the developers could amend the terms. On May 26, 1994, the developers sold their last eight lots in the Subdivision to the builder defendant. Later that year, the builder requested an amendment to the protective covenants to allow front-entrance garages on three of the lots it had purchased so that larger houses could be constructed on them. The developers agreed and amended the covenants applicable to the Subdivision. Plaintiffs filed an action seeking to set aside that amendment.

Plaintiffs argued that the developers lost whatever right they had to alter or amend the protective covenants when the developers sold the last property owned by them in the Subdivision. Plaintiffs relied on the holding in *Armstrong v. Roberts* that adopted for Georgia a rule applicable in New York and Illinois providing that "a developer of a subdivision who reserved the authority to waive restrictions in covenants running with the land no longer possesses that authority after divesting himself of his interest in the subdivision." Plaintiffs argued that, because the developers in *Frazier* no longer owned any property, the rule announced in *Armstrong* applied to them.

The developers and the builder filed a motion for summary judgment. The trial court granted that motion, and plaintiffs appealed. The court of appeals followed the reasoning of the supreme court in *Armstrong*. It agreed that, by selling their last lot in the subdivision, the developers waived their right to amend the restrictive covenants. However, that conclusion did not end the court's analysis. Because plaintiffs were seeking injunctive relief, the court assessed the harm that would be caused from granting the injunction and balanced that harm against the harm from allowing development under the amended

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40. Id. at 153, 470 S.E.2d at 915.
41. Id.
42. 254 Ga. 15, 325 S.E.2d 769 (1985).
44. Id. There was some discussion regarding whether the developers still retained an interest in the Subdivision. The developers argued that they retained an interest based on the fact that Lake Park "C" was only one part of a larger development in which the developers still owned lots. The court rejected that argument based on the fact that the restrictive covenants at issue only applied to Lake Park "C," not to the entire development.
45. Id. at 153, 470 S.E.2d at 915.
46. Id. at 154, 470 S.E.2d at 916.
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Based on the evidence presented to the trial court, there was no indication that plaintiffs would be harmed by permitting construction under the amended protective covenants. The evidence indicated that the waiver was granted so that "larger, more expensive homes could be built on the lots affected" and that the plaintiffs' property values would actually increase. Based on those facts, the appellate court affirmed the trial court's judgment against plaintiffs on their request for injunctive relief as a matter of law.

Although the builder prevailed in *Frazier*, this case should provide a warning to other builders. In order to avoid the type of litigation involved in *Frazier*, builders considering the purchase of the few remaining lots in a planned community should carefully investigate whether those lots are appropriate for development under the applicable restrictive covenants. If the lots are not appropriate and the developer retains the right to waive or amend those restrictions, the builder should obtain that waiver or amendment prior to making its purchase.

Two other cases decided during the survey period also arose out of disputes relating to planned communities. In the first, the supreme court affirmed the rights of a homeowners' association to enforce a lien for nonpayment of association assessments. In the second, the supreme court held that a homeowners' association was not entitled to ownership of common recreational areas constructed within the subdivision.

The facts in *Timberstone Homeowner's Ass'n v. Summerlin* are relatively straightforward. J.E. Summerlin purchased a lot in the Timberstone Subdivision in 1976. A "Declaration of Covenants, Conditions, Restrictions and Easements for Timberstone" was recorded in the Fulton County land records that applied to all lots in the Timberstone Subdivision. The Declaration expressly provided for the

47. *Id.* The court in *Armstrong* stated that an injunction to enforce protective covenants "should be refused where its grant would operate oppressively on the defendant's rights." 254 Ga. at 16, 325 S.E.2d at 770-71 (quoting MARTA v. Wallace, 243 Ga. 491, 495, 254 S.E.2d 822, 825 (1979)).

48. 221 Ga. App. at 154, 470 S.E.2d at 916. The court also noted that the developers' ownership in property in the remaining portions of the overall development (but outside the Subdivision) provided an economic disincentive to any arbitrary waiver of restraints by the developers. *Id.* at n.1.

49. *Id.* at 155, 470 S.E.2d at 916. However, the court specifically reserved the issue of whether plaintiffs would be entitled to recover money damages to the extent those might be proven. *Id.* at n.2.


payment of assessments by homeowners for the maintenance of common property and facilities and for the collection of unpaid assessments by imposition of a continuing lien. After his purchase, Mr. Summerlin conveyed his interest in the lot to his wife, Evelyn, who thereafter reconveyed the lot to Mr. Summerlin.53

Beginning in 1989, the homeowners' association filed liens against the lot based on the Summerlins' failure to pay the assessments; the liens eventually totaled $2,141. Mr. Summerlin filed an action to have the liens removed. He alleged that membership in the association was voluntary and that he never used the recreational facilities at issue. Both Mr. Summerlin and the Homeowners' Association filed motions for summary judgment. The trial court granted Mr. Summerlin's motion, finding that the covenant requiring payment of assessments "did not pertain to land use [and] was not binding on Summerlin without his affirmative acceptance."54 The association appealed, and the supreme court reversed.55

The court stated the established rule that a "purchaser is charged with legal notice of the [recorded] covenant, even if it is not stated in his deed."566 Further, relying on Lowry v. Norris Lake Shores Development Corp.57 the court stated that a covenant requiring payment of a charge for common recreational facilities is binding on a purchaser with notice.58 Under those circumstances, the court concluded that the trial court erred in denying the association's motion for summary judgment.59

Hampton Ridge Homeowners Ass'n v. Marett Properties, Ltd.60 concerned a dispute regarding ownership of the swim and tennis facility constructed in the Hampton Ridge Subdivision.61 The plat recorded prior to construction of the subdivision designated one tract as a recreational area.62 Subsequently a "Declaration of Covenants and Restrictions" and a "Consent to be Bound" were filed in the land records.63 The Declaration provided that the developer was to retain
“fee title to and all rights in all property owned by the developer and designated as common property or for public use.”

During a dispute that arose concerning assessments to pay for the recreational area, Marett Properties, Ltd. (“MPL”), the successor to the original developer, failed to pay property taxes on the recreational area. As a result of that failure, the recreational area was sold by the county at a tax sale to Jean Marett, the wife of the owner of MPL’s corporate general partner.

The Homeowners Association filed an action against MPL and Marett seeking a declaration of title to the recreation area and the imposition of a constructive trust on amounts paid as assessments by the homeowners for the recreational area. After presentation of evidence, the trial court granted a directed verdict to MPL and Marett. The Homeowners Association appealed from the entry of the judgment on the directed verdict.

On appeal, the Homeowners Association based its claim on title to the disputed property on the designation of that tract as recreational area in the original subdivision plat. The general rule in Georgia is that purchasers of lots in a subdivision acquire an easement in all areas set aside for their use on the recorded plat. That easement constitutes an irrevocable property right that cannot be abrogated without express abandonment or conduct amounting to an abandonment of that right.

The supreme court concluded that the purchasers of lots in the Hampton Ridge Subdivision had expressly abandoned their right to an easement in the swim and tennis facility. That finding was based on the language of the Declaration stating that the developer retained “fee title to and all rights in” the recreational area.

The court also rejected the Homeowners Association’s arguments relating to the imposition of a constructive trust on assessments paid to MPL. “A constructive trust ‘is a remedial device created by a court of equity in order to prevent unjust enrichment.’” Essentially, the Homeowners Association sought to recover funds paid as assessments for the year in which taxes and utility bills on the recreational property were not paid. However, the trial court concluded, and the appellate

64. Id. at 656, 460 S.E.2d at 791.
65. Id. at 655, 460 S.E.2d at 790.
66. Id.
67. Id. at 656, 460 S.E.2d at 791 (citing Doughtie v. Dennison, 240 Ga. 299, 240 S.E.2d 89 (1977)).
68. Id. (citing Westbrook v. Comer, 197 Ga. 433, 29 S.E.2d 574 (1944)).
69. Id.
70. Id.
71. Id. (quoting Lee v. Lee, 260 Ga. 356, 392 S.E.2d 870 (1990)).
court agreed, that there was no evidence of any misappropriation of funds by MPL. At most, the evidence established that a dispute existed regarding the "priorities according to which the money was disbursed." That showing was insufficient as a matter of law to establish a breach of fiduciary duty or to impose a constructive trust on those funds.

### III. LANDLORD/TENANT AND DISPOSSESSORY

Four cases decided during the survey period involved significant legal issues relating to leases and the relationships between landlords and tenants. In Cardin v. Outdoor East, the court of appeals discussed the language sufficient to describe property that is the subject of a lease and whether a lease longer than one year is enforceable absent a signature by the parties to be bound. The lease in Cardin was for a period of eighteen years. Under the lease, Outdoor East was to lease property belonging to the Cardins for the purpose of erecting and maintaining an outdoor advertising billboard. The lease described the property only as "I-75." The lease was signed by the Cardins but was not signed by Outdoor East. Outdoor East filed a motion for judgment on the pleadings, asserting that the lease was unenforceable based on an inadequate description of the leased property and the absence of a writing signed by Outdoor East. The trial court granted that motion, and the Cardins appealed.

The appellate court concluded that there were facts provable under the Cardins complaint which could entitle them to relief. In Georgia, leases are enforceable, despite an insufficient description of the property, when the lessee has actually taken possession of the property. Similarly, even though the lease is for a term longer than one year, it could be taken outside the statute of frauds through part performance by the lessee. Based on the existence of those potential claims by the Cardins, the appellate court concluded that judgment could not be entered on the pleadings and reversed the trial court.

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72. Id. at 656-57, 460 S.E.2d at 791-92.
73. Id. at 657, 460 S.E.2d at 791.
74. Id., 460 S.E.2d at 791-92.
76. Id. at 664-65, 468 S.E.2d at 31.
77. Id. at 665, 468 S.E.2d at 31.
78. Id.
79. Id.
80. Id. (citing Barto v. Hicks, 124 Ga. App. 472, 184 S.E.2d 188 (1971)).
81. Id. (citing O.C.G.A. § 13-5-31 (1982)).
82. Id., 468 S.E.2d at 31-32.
Powell v. Estate of Austin\textsuperscript{83} also involved a question relating to the statute of frauds. In Powell, the Estate of William B. Austin, Maurice F. Steinberg, and Birnet Johnson ("Lessor") executed an agreement with Charles Edward Bell, Benny Carnel Smith, and Bell & Smith Enterprises, Inc. ("Lessees") for the lease of property located in Augusta, Georgia suitable for operating a restaurant. The original term of the lease was five years, but Lessees had the right to renew and extend the lease for two additional five-year periods beginning on July 1, 1990. In order to exercise the renewal option, the lease required that Lessees provide Lessor written notice of their exercise of the first renewal prior to the expiration of the existing lease term.\textsuperscript{84}

During the initial term of the lease, Lessees shifted ownership of the restaurant and Bell & Smith Enterprises, Inc. ("Smith Company") among themselves. In January 1998, Smith became the sole shareholder in Smith Company while Bell became the sole owner of the restaurant located on the leased property. Bell later formed a new corporation, Bell & Son Enterprises, Inc. ("Bell Company") to operate the restaurant. Lessor were unaware of the change in ownership of Smith Company or of the restaurant.\textsuperscript{85} In March 1990, after Smith was no longer involved in the operation of the restaurant, Bell provided written notice to Lessor of Smith Company’s intent to renew the lease. Bell provided that notice in his purported capacity as president of Smith Company.\textsuperscript{86} On the basis of Bell’s notice, Lessor renewed the lease for a five-year period through June 30, 1996.\textsuperscript{87}

In August 1990, F. Carol Powell, III purchased all the stock of Bell Company and began operating the restaurant. Powell informed Lessor that he had assumed the lease. In return, Lessor informed Powell that he would “be considered the tenant and thus would be individually liable on the lease.”\textsuperscript{88} Powell was aware of the five-year renewal term purportedly exercised by Bell and made payments of rent to Lessor

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\textsuperscript{84} Id. at 446-47, 462 S.E.2d at 379.
\textsuperscript{85} Id. at 447, 462 S.E.2d at 379.
\textsuperscript{86} Id. The Court did not make clear in its opinion whether Bell actually retained the position as president of Smith Company despite the change in ownership and his creation of Bell Company. However, the use of the word “purport” in its opinion and the Court’s later finding that there was no evidence of his authority to act on behalf of Smith Company indicate that he did not retain that position. Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 447-48, 462 S.E.2d at 379.
\end{flushleft}
pursuant to the terms of the lease. Powell also received proceeds from a condemnation of a portion of the parking lot for the restaurant. Powell operated the restaurant until the summer of 1992 when he abandoned the leased premises. When that occurred, Lessors filed an action for a distress warrant against Powell. In that action, Lessors sought to recover the costs of repairs to the leased property. A jury trial was held, and a verdict was entered against Powell. At the conclusion of that trial, Powell made a motion for judgment notwithstanding the verdict and for a new trial. Powell argued that Lessors had failed to provide any evidence that a landlord-tenant relationship existed between them and Powell. He also argued that the trial court erred in admitting evidence concerning damage to the leased premises. The trial court denied Powell's motion, and Powell appealed.

In deciding whether there was any evidence to support the jury's conclusion that a landlord-tenant relationship existed between Powell and Lessors, the appellate court first considered whether the lease had properly been renewed. Because the renewal term was for longer than one year, the court concluded that both the notice to extend the lease and the authority of the agent exercising that option had to be in writing. Because the record contained no evidence that Bell had any authority to act on behalf of Smith and Smith Company at the time he purportedly exercised the option to renew, the lease was not been properly renewed. Therefore, the court concluded that Powell "was not an assignee or subtenant pursuant to a valid express contract."

That conclusion, however, did not terminate the court's inquiry. The court next considered whether Powell and Lessors had sufficiently performed under the lease, as extended, so that it had been taken outside the statute of frauds.

A parol contract sought to be enforced as within some exception to the Statute of Frauds ... must be certain and definite in all essential

89. The condemnation actually took place during the original lease term (i.e., before June 30, 1990) and before Powell "assumed" the lease from Lessees. In fact, Lessees had originally intervened in the condemnation proceeding and asserted a right to a portion of the condemnation proceeds based on their leasehold interest in the leased property. It is unclear from the court's opinion, but it may be presumed that Powell received an assignment of the right to those proceeds along with his purchase of the stock in Smith Company. *Id.* at 447-48, 462 S.E.2d at 379-80.

90. *Id.* at 448, 462 S.E.2d at 380.

91. *Id.* at 447, 462 S.E.2d at 379.


93. 218 Ga. App. at 448, 462 S.E.2d at 380.
particulars, and if part performance is relied upon to make it enforceable, the part performance must be part performance of an essential element of the contract sought to be proved, and of a character which would render it a fraud on the plaintiff if the defendant refused to comply.\textsuperscript{94}

The court found that the evidence before the jury sufficiently identified the "party to be held liable [under the lease], the monthly rental, and the duration of the lease."\textsuperscript{95} Further, the court concluded that Powell's acceptance of the condemnation proceeds constituted part performance of the lease.\textsuperscript{96} In light of those facts, the court concluded that the jury could properly have found the existence of an implied lease contract between Powell and Lessors sufficient to support an action for distress warrant.\textsuperscript{97}

The court also considered Powell's assertion that the trial court improperly admitted evidence relating to physical damages to the leasehold at the time Powell vacated it.\textsuperscript{98} Powell cited \textit{D. Jack Davis Corp. v. Karp,}\textsuperscript{99} for the proposition that a distress warrant may only be used to recover possession of the property and rent due under the lease, not to recover other damages.\textsuperscript{100} The court concluded that Powell misinterpreted \textit{D. Jack Davis Corp.} That conclusion was based on the language of section 44-7-77(a) of the Official Code of Georgia Annotated ("O.C.G.A."), which states that "[I]f, on the trial of the case, the judgment is against the tenant, the judgment shall be entered against the tenant for all rent due and for any other claim relating to the dispute."\textsuperscript{101} The court stated that the inclusion of the phrase "and for any other claim relating to the dispute" clearly indicated that the Georgia legislature "intended that a distress proceeding may be used to recover damages in addition to rent if they are somehow related to the lease."\textsuperscript{102}

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  \item \textsuperscript{94} \textit{Id.} at 448-49, 462 S.E.2d at 380 (quoting Norris v. Downtown LaGrange Dev. Auth., 151 Ga. App. 343, 259 S.E.2d 729 (1979)).
  \item \textsuperscript{95} \textit{Id.} at 449, 462 S.E.2d at 380.
  \item \textsuperscript{96} \textit{Id.} The court also noted that the "Statute of Frauds provides no defense to a promising party when the other party has acted on the promise to his detriment." \textit{Id.} By sharing the proceeds of the condemnation with Powell based on his representation that the lease had been extended, the Lessors had acted to their detriment. Therefore, Powell was estopped to assert the statute of frauds as a defense. \textit{Id.} (citing Scott v. Lumpkin, 153 Ga. App. 17, 264 S.E.2d 514 (1980)).
  \item \textsuperscript{97} \textit{Id.}, 462 S.E.2d at 381.
  \item \textsuperscript{98} \textit{Id.}
  \item \textsuperscript{99} 175 Ga. App. 482, 333 S.E.2d 685 (1985).
  \item \textsuperscript{100} 218 Ga. App. at 450, 462 S.E.2d at 381.
  \item \textsuperscript{101} O.C.G.A. § 44-7-77(a) (1991).
  \item \textsuperscript{102} 218 Ga. App. at 451, 462 S.E.2d at 381-82.
\end{itemize}
The holding in **Powell** is important because it clarifies the scope of claims that may be brought in distress warrant actions. Under that court's interpretation of O.C.G.A. section 44-7-77, lessors may seek to recover all damages relating to or arising out of a breach of a lease pursuant to the expedited procedure allowed in distress warrant cases. That result, however, presents a potential problem for lessees. In the future, lessors (who may have more financial resources to support litigation) may use the expedited distress warrant procedures to "fast track" significant litigation relating to damages arising out of leases. The difference between lessors' and lessees' ability to respond quickly in litigation may result in verdicts more favorable to lessors than might otherwise be achieved.

The court in **Pakwood Industries, Inc. v. John Galt Associates**, clarified the conditions under which it is reasonable for a lessor to withhold its consent to an assignment of a lease to a new lessee. In that case, Pakwood Industries, Inc. entered into a lease for space in Montreal Court AA. The lease provided that Pakwood "could not assign the lease or sublease the premises without prior written consent of the landlord, which consent could not be unreasonably withheld." Pakwood operated a custom woodworking business on the leased premises. John Galt Associates subsequently purchased Montreal Court AA.

After Galt purchased the property, Pakwood began negotiating a sale of its assets to System Implementation Services, Inc. ("SIS") and its owner Michael Greenberg. SIS was a manufacturing consulting company, Greenberg was its only employee. Greenberg had formed SIS in 1990. Greenberg had experience as a business consultant, but he had no significant experience in the business conducted by Pakwood.

Pursuant to the proposed purchase and sale transaction, SIS would purchase all of Pakwood's assets but would assume none of Pakwood's liabilities. In exchange, SIS was to pay Pakwood $200,000 in cash at closing plus $337,000 in promissory notes and $100,000 in an "earn out" to be paid over five years. As security for repayment of the promissory notes, SIS would execute a security agreement attaching all the assets it had obtained from Pakwood under the sale. Additionally, Greenberg

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103. O.C.G.A. § 44-7-77(a).
105. Id. at 528, 466 S.E.2d at 227.
106. Id.
107. Id., 466 S.E.2d at 227-28.
108. Id. at 529, 466 S.E.2d at 229. The court noted that Greenberg had little experience "in furniture or cabinet making or any associated industry." Id.
was to execute a personal guaranty for $437,000. Pakwood was also to arrange assignment of its lease with Galt.  

Galt agreed that it would consent to the assignment of the lease between Pakwood and SIS if Greenberg and Pakwood's owner would individually guarantee SIS's obligations under the lease. Pakwood's principal and Greenberg refused to execute such guarantees, and Galt withheld its consent to the assignment. As a result of Galt's refusal to consent, the proposed transaction between Pakwood and SIS did not close.  

Pakwood brought suit against Galt for damages based on the failed transaction and alleged that Galt had unreasonably withheld its consent to an assignment of the lease. The trial court granted Galt's motion for summary judgment, finding that there was no evidence sufficient to create a genuine issue with regard to Pakwood's claim. On Pakwood's appeal, the Georgia Court of Appeals agreed with the trial court and affirmed the grant of summary judgment to Galt.  

The appellate court stated that "a lease clause providing that a lessor cannot unreasonably withhold consent to assign the lease is a covenant upon the landlord." In that context, the term "reasonable" refers to "considerations of fairness and commercial reasonableness." In other words, consent cannot be withheld for "arbitrary or capricious reasons, or merely for personal preferences."  

The undisputed facts in the record before the trial court demonstrated the following: (1) After the sale to SIS, Pakwood would have no assets and its viability as an ongoing entity was questionable; (2) SIS was a relatively new business with no rental history; (3) All of SIS's assets acquired from Pakwood would be pledged to Pakwood as security for debt; (4) SIS's owner and sole employee had no significant experience in

109. Id. at 528, 466 S.E.2d at 227-28.
110. Id., 466 S.E.2d at 228. Galt actually proposed an alternative arrangement under which it would consent to the assignment. That suggestion was also rejected. Id.
111. Id.
112. Id. at 528-29, 466 S.E.2d at 228.
113. Id. at 529, 466 S.E.2d at 228 (citing Sterns Gallery v. Corporate Property Investors, 176 Ga. App. 586, 337 S.E.2d 29 (1985)).
114. Id.
115. Id.
the business to be operated on the leased premises; (5) Pakwood had experienced financial difficulties and had failed to pay rent for the leased premises. Based on those facts, the court found "the requirement for personal guarantees [from Greenberg and Pakwood's principal] was clearly and palpably commercially reasonable and established the commercial reasonableness of Galt's decision as matter of law." The holding in Pakwood provides lessors a clear roadmap of the reasons that may support their decision to withhold consent to an assignment of a lease.

The court in Owens v. Barclays/American Mortgage Corp. considered whether a landlord may insulate itself from liability to a tenant for wrongful dispossession by employing an independent contractor to conduct that dispossession. Owens involved the dispossession of Gordon Owens from a condominium (the "Condo") which Barclays/American Mortgage Corp. ("Barclays") acquired through foreclosure. After foreclosing on the Condo, Barclays hired Capital Securing Company to inspect the property and advise Barclays whether it was occupied. Barclays also instructed Capital to inform Barclays immediately if the Condo was occupied. Pursuant to Barclay's instructions, Capital sent its employees to the property. Those employees found the condominium "open with no furniture inside." They were also informed by Owens' neighbor that Owens had moved. Based on that information, Barclays requested that Capital "secure the property for final conveyance' in accordance with the Department of Housing and Urban Development's instructions for the State of Georgia." In securing the Condo, Capital's agents "disposed of dirty clothes which were strewn about the floor and removed and stored 'everything which appeared to be salvageable.'"

Owens returned later that same day and discovered that the locks were changed. Owens contacted Barclays and Capital and informed them that he had been wrongfully dispossessed, that he was still living in the Condo, and that he had paid the current month's rent. Barclays returned the items Capital had removed, but Owens claimed that some items had been lost or damaged. Owens filed an action for wrongful dispossession against Barclays.

117. Id. at 527-30, 466 S.E.2d at 227-29.
118. Id. at 529-30, 466 S.E.2d at 229.
120. Id. at 161, 460 S.E.2d at 837.
121. Id.
122. Id. at 160-61, 460 S.E.2d at 836-37.
123. Id.
124. Id.
Barclays filed a motion for summary judgment, asserting that if Owens was wrongfully dispossessed, Capital was the liable party because Capital was an independent contractor instead of Barclays' employee. The trial court agreed with Barclays and granted its motion for summary judgment. Owens appealed.

The appellate court agreed with the trial court's finding that Capital was an independent contractor. Barclays "had no control over the method or manner in which Capital inspected, cleaned and secured the property in this case, and [Barclays] did not direct or participate in [those] activities." Therefore, Barclays generally would not be responsible under a theory of respondeat superior for the torts committed by Capital. However, the court found that this case fit within an exception to the general rule with regard to liability of an employer for the acts of its independent contractor.

Under O.C.G.A. section 44-7-50, an owner seeking to take possession of leased premises must follow certain procedures. The owner must demand possession of the property, and if the tenant refuses to deliver possession, the owner must file an affidavit for possession. If the

125. Id. at 160, 460 S.E.2d at 836.
126. Id. at 161-62, 460 S.E.2d at 837. The court's finding in this matter was based upon Owens' failure to produce any evidence showing that Barclays "controlled the time, manner and method of executing the work in which his personal property was removed from the condominium." Id. at 162, 460 S.E.2d at 837.
127. Id. at 161, 460 S.E.2d at 832 (citing McDaniel v. Peterborough Cable Vision, 206 Ga. App. 437, 425 S.E.2d 424 (1992)).
128. Id.
130. 218 Ga. App. at 162, 460 S.E.2d at 837-38 (citing O.C.G.A. § 44-7-50). Section 44-7-50 states:

(a) In all cases where a tenant holds possession of lands or tenements over and beyond the term for which they were rented or leased to the tenant or fails to pay the rent when it becomes due and in all cases where lands or tenements are held and occupied by any tenant at will or sufferance, whether under contract of rent or not, when the owner of the lands or tenements desires possession of the lands or tenements, the owner may, individually or by an agent, attorney in fact, or attorney at law demand, the possession of the property so rented, leased, held or occupied. If the tenant refuses or fails to deliver possession when so demanded, the owner or the agent, attorney in fact, or attorney at law of the owner may go before the judge of the superior court, the judge of the state court, or the clerk or deputy clerk of either court, or the judge, clerk or deputy clerk of any other court with jurisdiction over the subject matter, or a magistrate in the district where the land lies and make an affidavit under oath to the facts. The affidavit may likewise be made before a notary public subject to the same requirements for the judicial approval specified in Code Section 18-4-61, relating to garnishment affidavits.

O.C.G.A. § 44-7-50(a).
The court concluded that although the owners of property are allowed to conduct dispossessions through their agents or attorneys, "nothing in the statute . . . would allow an owner to avoid liability for a wrongful eviction by delegating [its] duties to an independent contractor." Therefore, material questions of fact remained to be decided at trial concerning Barclays' liability to Owens that precluded entry of summary judgment, and the appellate court reversed. The holding in Barclays contains an implicit warning to owners of leased property. Hiring independent contractors to take possession of property formerly leased will no longer insulate such owners from liability for wrongful dispossession. In order to avoid that liability, property owners may be required to become more involved with and exert greater control over the methods used by those independent contractors. The risk that property owners run in doing so is that their relationships to those contractors may be transformed to that of employer and employee, resulting in the potential for greater liability to the property owner. The alternative to exerting greater control over independent contractors is for owners to ensure that those contractors will indemnify and hold the property owner harmless for their wrongful acts and that the contractors have the financial ability to stand behind those indemnification obligations.

IV. SALES CONTRACTS AND BROKERS

In Hanlon v. Thornton, Ellsworth Hanlon purchased a tract of land in Clark and Oglethorpe Counties from Luther and Evelyn Smith for $150,000. Hanlon learned about the property through Steve Brannen, a real estate agent with Purvis & Associates. Hanlon intended to operate a mobile home park on the property.

In February 1990, before purchasing the property, Hanlon came to Georgia from his home in California, met with Brannen, and viewed several pieces of property. The next day, Hanlon executed a contract to purchase the property from the Smiths and then returned to California.
nia. The next month Hanlon and his wife returned to Georgia for the closing. On the morning of the closing, Hanlon inspected the property and the mobile homes located thereon and made a list of defective items. Hanlon also had the quality of the well water on the property tested and spoke to Jack Griffith of the Oglethorpe County Commission about Hanlon's plans to put a mobile home park on the site. At the closing, "Hanlon was warned that Georgia is a 'buyer beware state.'" Hanlon left the closing and returned an hour later after having a conversation with a friend. Hanlon demanded and received a price concession from the Smiths for defects he identified in the mobile homes.

After the closing, Hanlon and his wife moved into one of the mobile homes on the property. At that point, things began to go wrong. First, Hanlon had to replace a furnace, a stove, and a refrigerator in one of the mobile homes. He also had to recoat the roof of another mobile home. The well on the property "kept drying up and produced discolored water which smelled of sulfur." Hanlon spent ten thousand dollars for a new well on the property. Finally, Hanlon also learned that the property was adjacent to a landfill and that it was smaller than represented in a flyer he received before the closing.

Based on all the problems he discovered after closing, Hanlon filed an action against the Smiths, Brannen, Purvis & Associates, R.M. Thornton (the listing agent), and Smith-Boley-Brown (Thornton's company). In that action, Hanlon alleged fraud and sought rescission of the sales contract, compensatory and punitive damages, and attorney fees. Hanlon claimed that Brannen told him that there were no landfills in the area and that the property had been appraised at $150,000. Defendants claimed that Hanlon had failed to exercise due diligence to justify his reliance on any misrepresentations regarding the landfill and
the value of the property. The trial court granted defendants' motion for summary judgment, and Hanlon appealed.\textsuperscript{144}

The appellate court affirmed the trial court's decision finding that Hanlon failed as a matter of law to prove that he justifiably relied on any misrepresentations by defendants.\textsuperscript{146} The court based its decision on the fact that Hanlon made no independent efforts to discover the existence of landfills in the area or the true value of the property.\textsuperscript{146} The means of obtaining that knowledge were equally available to Hanlon and defendants. The court noted that Hanlon "could have had an inspector check the appliances [in the trailers and] . . . could have asked for an independent appraisal of the value of the property."\textsuperscript{147} Further, the court noted that Hanlon had not "even attempted to make an independent inquiry as to whether or not there was a landfill in the area."\textsuperscript{146} Given those facts, the court concluded that Hanlon had failed as a matter of law to establish an element essential to his claims for fraud.\textsuperscript{149}

Hanlon relied on the holdings in \textit{Dorsey v. Green}\textsuperscript{150} and \textit{Georgia-Carolina Brick & Tile Co. v. Brown}\textsuperscript{151} to support his argument that his limited investigation, coupled with Brannen's alleged misrepresentations concerning the absence of a landfill, raised a material question of fact whether his reliance was reasonable. The appellate court distinguished both cases.\textsuperscript{152} First, \textit{Dorsey} involved the actions of an executor of a will who had fiduciary obligations to the plaintiff.\textsuperscript{153} Because of that fiduciary relationship, the court in \textit{Dorsey} concluded that the plaintiff was "not bound to exhaust all means at his command to ascertain the truth before relying on the representations [of the fiduciary]."\textsuperscript{154} In this case, there was no fiduciary relationship between defendants and Hanlon; therefore, his reliance on their representations was not reasonable.\textsuperscript{155}

Similarly, the court rejected Hanlon's argument that Brannen's failure to identify the landfill in response to Hanlon's direct question supported

\begin{footnotes}
\item 144. \textit{Id.} at 501, 462 S.E.2d at 156.
\item 145. \textit{Id.} at 502, 462 S.E.2d at 157.
\item 146. \textit{Id.}, 462 S.E.2d at 156.
\item 147. \textit{Id.}, 462 S.E.2d at 157.
\item 148. \textit{Id.}
\item 149. \textit{Id.} at 502-03, 462 S.E.2d at 157.
\item 150. 202 Ga. 655, 44 S.E.2d 377 (1947).
\item 152. 218 Ga. App. at 501, 462 S.E.2d at 156.
\item 153. 202 Ga. at 659, 44 S.E.2d at 380.
\item 154. \textit{Id.}
\item 155. 218 Ga. App. at 502, 462 S.E.2d at 156.
\end{footnotes}
a claim for fraud. Unlike the situation in Georgia-Carolina Brick, the alleged defect in this case could have been discovered through an exercise of reasonable diligence and required no specialized training to discover. Absent any investigation by Hanlon there is no basis for finding defendants liable for fraud.

The Georgia Court of Appeals in *Eva Pendley Realty, Inc. v. Bagley* provided some instruction about what constitutes a "written listing agreement" within the meaning of the Georgia Commercial Real Estate Broker Lien Act. In that case, Troy Preston Bagley and Evelyn Bagley brought an action against Evan Pendley Realty, Inc., David Bagley, and Carl Kandell (the "Brokers") seeking to set aside a lien the Brokers filed pursuant to the Act.

In order for a real estate broker to have a lien under the Act, two principle conditions must be satisfied: (1) there must be "a listing agreement . . . as evidenced by a writing signed by the owner;" and (2) the broker must locate a buyer "ready, willing, and able to enter and who actually enters into a purchase or lease" of the property. The issue in this case was whether a listing agreement existed. The document on which the Brokers relied was an advertising brochure signed by the Bagleys. The brochure was entitled "property information" and included the following language: "I want $15,000 net to me per [acre] base 83 approx." The Bagleys filed a motion for summary judgment contending that the Brokers were unable to establish the existence of a written, signed

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156. Id. at 503, 482 S.E.2d at 157.
157. In *Carolina Brick*, the defect complained of was not obvious to the untrained observer. However, the person making the false representation had specialized knowledge concerning the defective product. 153 Ga. App. at 748, 266 S.E.2d at 535.
158. 218 Ga. App. at 503, 462 S.E.2d at 157. Although the court in *Hanlon* was not required to reach the issue, Hanlon's actions after the closing may have precluded him from obtaining rescission in any event. In order to rescind a contract for fraud, a plaintiff must promptly notify the defendant of its election to rescind upon discovery of the fraud. See Manning v. Wills, 193 Ga. 82, 17 S.E.2d 261 (1941) (party seeking to rescind a contract based on fraud must, upon discovering fraud, act at once and announce his purpose to rescind and adhere thereto). In this case, Hanlon made repairs to the property, including replacing appliances in one of the mobile homes and installing a new well on the property after he should have discovered the misrepresentations of which he complained. Those actions could be viewed as affirming the contract and preventing rescission at a later date.
159. 219 Ga. App. at 503, 462 S.E.2d at 157.
163. 219 Ga. App. at 203, 464 S.E.2d at 851.
164. Id.
listing agreement between them and the Brokers. The trial court granted that motion, and set aside the Brokers' lien on the property. The Brokers appealed.\textsuperscript{166}

The appellate court affirmed the trial court's grant of summary judgment.\textsuperscript{166} The court held that the advertising brochure did "not provide [the Brokers] with the right to procure a buyer and receive a commission for the sale of the Bagleys' realty."\textsuperscript{167} Therefore, the court agreed that a condition precedent to the Broker's right to a lien had not occurred. Brokers of commercial real estate in Georgia should take note of the court's decision and should attempt to ensure that an agreement providing them the right to procure a buyer \textit{and} to receive a commission is signed with regard to every transaction in which they are involved.

In \textit{Barnes v. Whatley},\textsuperscript{168} William Whatley, d/b/a Whatley Realty filed an action against James Barnes seeking to recover a real estate broker's commission arising out of a failed transaction. The transaction involved approximately sixty-six acres of land owned by The Peoples Bank and offered for sale through an oral, nonexclusive listing agreement with Whatley. Whatley advertised the property for sale and showed the property to Barnes on one occasion. Barnes then wrote a check for ten percent of the listing price and gave it to Whatley as a deposit. Whatley completed the check by denoting the payee as "Whatley Realty Trust Account" and noting on the check "[e]arnest money on 66.21 acres."\textsuperscript{169} In exchange for the check, Whatley gave Barnes a receipt that contained the notation "Binder on 66.21 acres pending title clearance and 30 days to close."\textsuperscript{170} Whatley did not deposit Barnes' check.

The next day Whatley drafted a real estate sales agreement and mailed it to the Bank. That contract expressly obligated the Bank to pay Whatley a real estate commission "when the sale is consummated."\textsuperscript{171} The instrument also stated, "[t]his instrument shall be regarded as an offer by the Purchaser or Seller, who first signs, as to the other and is open for acceptance by the other until 4:00 p.m. on the 7th day of July, 1993."\textsuperscript{172} The Bank signed the agreement and returned it to Whatley, but Barnes refused to close the transaction. After the Bank

\begin{itemize}
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} \textit{Id.} at 204, 464 S.E.2d at 851.
  \item \textsuperscript{167} \textit{Id.} at 203, 464 S.E.2d at 851.
  \item \textsuperscript{168} 221 Ga. App. 110, 470 S.E.2d 498 (1996).
  \item \textsuperscript{169} \textit{Id.} at 110, 470 S.E.2d at 499.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.} at 111, 470 S.E.2d at 499.
  \item \textsuperscript{172} \textit{Id.}, 470 S.E.2d at 499-500.
\end{itemize}
sold the property to another purchaser, Whatley sued Barnes to recover the commission that would have been due.\textsuperscript{173}

The trial court concluded that there was a complete contract between the Bank and Barnes and that, because Whatley procured a ready, willing, and able purchaser, Barnes was obligated to pay the real estate commission to Whatley upon Barnes' withdrawal from the contract.\textsuperscript{174} Barnes appealed, and the appellate court reversed.\textsuperscript{175}

First, the court of appeals found no binding and enforceable contract between the Bank and Barnes. Pursuant to O.C.G.A. section 13-5-30(4), all contracts for the sale of land "must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him."\textsuperscript{176} Because Barnes never signed the agreement, he was not obligated to abide by its terms. Further, the court concluded that the agreement executed by the Bank omitted several essential terms, including the purchase price, the terms of the sale, and a legal description of the property.\textsuperscript{177} Those omissions also rendered the contract unenforceable.\textsuperscript{178}

Despite the absence of an enforceable contract between the Bank and Barnes, Whatley argued that he was entitled to a commission under the terms of O.C.G.A. section 10-6-32, which provides that "[t]he broker's commissions are earned when, during the agency, he finds a purchaser who is ready, willing, and able to buy and who actually offers to buy on the terms stipulated by the owner."\textsuperscript{179} The court rejected Whatley's argument, finding that O.C.G.A. section 10-6-32 "contemplates a mutually binding and enforceable sales contract."\textsuperscript{180} Therefore, although the closing of a sale is not a condition precedent to a broker's right to a commission under O.C.G.A. section 10-6-32, the broker must establish the existence of a binding contract of sale.\textsuperscript{181} Under the circumstances of this case, the court concluded that Barnes had no obligation to pay a broker's commission to Whatley.\textsuperscript{182}

\textsuperscript{173} Id. at 110-11, 470 S.E.2d at 499-500.
\textsuperscript{174} Id. at 111, 470 S.E.2d at 500.
\textsuperscript{175} Id.
\textsuperscript{177} 221 Ga. App. at 111-12, 470 S.E.2d at 500.
\textsuperscript{178} Id. (citing Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698 (1951)).
\textsuperscript{179} O.C.G.A. § 10-6-32 (1994).
\textsuperscript{180} 221 Ga. App. at 112, 470 S.E.2d at 500.
\textsuperscript{181} Id.
\textsuperscript{182} Id., 470 S.E.2d at 501.
V. FORECLOSURES

Two cases were decided during the survey period that provide important instruction on the method of advertising foreclosure and of providing notice of a foreclosure sale to the debtor. In *Southeast Timberlands, Inc. v. Security National Bank*, the court held that when Timberlands defaulted under the renewal note, the Bank advertised the secured property for foreclosure and conducted a foreclosure sale. That advertisement referenced a debt of $400,000. The advertisement also referenced 'all renewal or renewals, extension or extensions of said indebtedness, either in whole or in part' and announced that the Bank had declared the entire 'balance,' not note, due and collectible. After conducting the foreclosure sale, the Bank reported the sale for confirmation. The trial court confirmed the sale over Timberlands' objection, and Timberlands appealed.

The court performed a two-part inquiry into whether the foreclosure sale conducted by the Bank was improper. As noted by the court, there are certain minimum legal requirements concerning the contents of foreclosure advertisements, and a failure to meet those minimum requirements will render the foreclosure sale defective as a matter of law. In order for a foreclosure advertisement to be valid, it must contain a full and complete description of the property to be sold, including the street address of the property, and the names of the creditor, the debtor, and any person who may be in possession of the property. An advertisement is not required to include the amount...
of the debt. Therefore, the court concluded that "a misstatement or overstatement of the debt does not render [the] advertisement legally defective." 191

However, as the court noted, a foreclosure advertisement that is not defective as a matter of law may still prevent confirmation if defects in the advertisement "chilled" the bidding, thereby causing an inadequate selling price. 192 The court stated that "errors [in the advertisement] that would not confuse the bidding intentions of any potential bidder of sufficient mental capacity to enter a binding contract for the sale of real property do not show a chilling of the sale so that a fair market value bid was not obtained." 193 Timberlands argued that by advertising a higher debt amount, the Bank made it appear that a higher bid would be needed to purchase the property. The court rejected that argument because a bidder at a foreclosure sale is not required to bid the amount of the indebtedness. 194

In the third section of its opinion, the court noted that the trial court "made no explicit findings of fact and conclusions of law regarding the legality of the advertisement, any possible effect these alleged defects had on bidding, or the fair market value of the property." 195 The trial court is required to make those findings by O.C.G.A. section 44-14-161, and the absence of explicit findings of fact and conclusions of law impeded the appellate court's review. However, the appellate court stated that the obligation to provide an appropriately detailed order for review fell to Timberlands. 196 Timberlands failed to request such an order either before or after the trial court's ruling. Therefore, the appellate court had no basis for finding that the trial court had failed to make the appropriate factual findings and legal conclusions and had no choice but to affirm. 197 Based on the holding in Timberlands any debtor opposing confirmation of a foreclosure sale would be well-advised to ensure that a detailed order is entered. Only by doing so may a debtor preserve a meaningful appeal.

192. Id.
193. Id. (quoting Williams v. South Central Farm Credit, ACA, 215 Ga. App. 740, 742, 452 S.E.2d 148, 151 (1994)).
194. Id. at 360, 469 S.E.2d at 457. In fact, a secured creditor is not required to bid in the amount of the debt at a foreclosure sale. Rather the confirmation procedure merely seeks to ensure that the purchase price at foreclosure reflects the "true market value of the property." O.C.G.A. § 44-14-161(b).
196. Id.
197. Id. at 361-62, 469 S.E.2d at 458.
In Zeller v. Home Federal Savings & Loan Ass’n, Paulette Zeller sued Home Federal Savings & Loan Association of Atlanta alleging that Home Federal had wrongfully foreclosed on her property. Zeller had executed a promissory note in favor of Home Federal together with a security deed for property she owned in Mableton, Georgia (“Mableton Property”). In August 1992, Zeller moved to Rome, Georgia (“Rome address”). Zeller failed to make the required monthly payments due to Home Federal on several occasions. Pursuant to Home Federal’s policy, it sent notices of default to the Mableton Property and, after August 1992, to the Rome address as well. The notices sent to the Mableton Property were sent via certified mail while the notices sent to the Rome Address were sent regular mail. Zeller orally informed Home Federal that she had moved, and a Home Federal representative made a written notation of Zeller’s new address in the Bank’s file. However, Zeller never provided written authorization to Home Federal to use her Rome address for delivery of notices of default.

In September 1993, Home Federal sent Zeller a foreclosure and acceleration letter by certified mail. It was undisputed that Home Federal “sent written notice pursuant to O.C.G.A. [section] 44-14-162.2 by certified mail to the [Mableton Property].” However, notice was not sent to the Rome address. Thereafter, Home Federal foreclosed on the Mableton Property.

After the foreclosure sale, Zeller filed her action for wrongful foreclosure contending that Home Federal failed to give her notice of the sale as required by law. Zeller argued that Home Federal’s actual knowledge of her Rome address triggered a duty for Home Federal to send notice of the foreclosure to her at her Rome address. Home Federal filed a motion for summary judgment based on its compliance with the requirements of O.C.G.A. section 44-14-162.2. The trial court rejected Zeller’s argument and granted Home Federal’s motion for summary judgment. Zeller appealed.

The court of appeals affirmed the trial court’s decision because O.C.G.A. section 44-14-162(a) requires that notice of foreclosure be in...
writing and "sent by registered or certified mail, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor." The court concluded that Zeller's oral communication with Home Federal, the notation made by Home Federal's employee in Zeller's file, and the receipt of payment from checks listing the Rome address did not constitute written notice within the meaning of section 44-14-162.2. The procedure Home Federal followed for giving notice of default and notice of a foreclosure and acceleration is one commonly used in the Georgia lending community. The holding in Zeller confirms that this procedure satisfies the secured lender's obligations with regard to notices of foreclosure. It also provides a model of the procedure necessary to comply with the foreclosure statute for other lenders who may not have a policy similar to that of Home Federal.

In John Alden Life Insurance Co. v. Gwinnett Plantation, Ltd., the court of appeals clarified what a foreclosing creditor must do in order to "report" the foreclosure sale. In that case, John Alden Life Insurance Company foreclosed on real property owned by Gwinnett Plantation, Ltd. ("Debtor") on May 2, 1995. On May 11, Alden filed a petition for confirmation of its foreclosure sale in the Gwinnett County Superior Court. The summons attached to the petition was stamped in the clerk of court's office assigned to Judge Weingarten. However, Alden did not deliver a copy of the petition to Judge Weingarten.

The Debtor filed a motion to dismiss the petition for confirmation; the trial court granted that motion, finding that Alden had failed to comply with O.C.G.A. section 44-14-161, which requires the foreclosing party to report the foreclosure sale to the superior court judge. Alden appealed.

208. Id. at 847, 470 S.E.2d at 482.
209. Id. at 846, 470 S.E.2d at 483.
210. O.C.G.A. § 44-14-161 (1996). That Code section states as follows:
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 debts 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.
On appeal, Alden argued "that the assignment by the clerk to Judge Weingarten was tantamount 'to reporting the sale to the judge as required by [section 44-14-161]'." The appellate court rejected that argument and strictly construed the "reporting" requirement because O.C.G.A. section 44-14-161 is in derogation of the common law. The court concluded that the judge, not the clerk of court, must be made aware of the sale. The court specifically distinguished the steps taken by Alden to report the foreclosure sale from those steps taken by the secured creditor in *Cornelia Bank v. Brown*.

In *Cornelia*, the petition for confirmation was delivered to the judge's chambers, but the judge was not present. His secretary, "acting upon authority previously given to her by the judge, affixed the judge's signature stamp to the order scheduling a hearing on the petition." That method of reporting was determined to be in technical compliance with the requirements of O.C.G.A. section 44-14-161 because the petition was presented "in the manner authorized by the judge." Therefore, the appellate court affirmed the trial court's judgment dismissing the confirmation petition based on Alden's failure to comply with the statutory requirements for confirmation.

*Baby Days, Inc. v. Bank of Adairsville* presented a factual situation of first impression in Georgia. Holmes executed a promissory note (the "Holmes' Note") dated August 9, 1990, to the Bank of Adairsville. That note was given to evidence an obligation to repay an amount loaned by the Bank to Holmes to purchase a commercial building (the "Adairsville Property"). Holmes executed a security agreement and security deed for the Adairsville Property with the Bank as grantee. That security agreement contained a "dragnet" clause that stated as follows:

SECURED OBLIGATIONS: Until terminated in writing, the security agreement secures the payment of this note and all other debts borrower may now have or in the future owe to lender, (including, but not limited to, all other notes, insurance premiums, overdrafts, letters of credit, guaranties and all extensions, renewals, refinancings and modifications of this note and of other such debts).  

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212. *Id.*
213. *Id.*
215. *Id.* (quoting *Brown*, 166 Ga. App. at 68, 303 S.E.2d at 172).
216. *Id.* (quoting *Brown*, 166 Ga. App. at 69, 303 S.E.2d at 173).
217. *Id.* at 647, 470 S.E.2d at 483.
219. *Id.* at 752, 463 S.E.2d at 172.
Baby Days, Inc., a company owned by Holmes, executed a promissory note (the "Baby Days Note") for $195,514.85 to obtain working capital from the Bank. The Baby Days Note was secured by the company's accounts receivable, equipment, inventory, and a certificate of deposit. The Baby Days Note also contained a provision stating that it "may be secured by prior or subsequent security documents notwithstanding that such security is not indicated hereon." Finally, Holmes and his wife executed guaranties of the Baby Days Note.

In February 1993, Baby Days defaulted on its repayment obligations to the Bank under the Baby Days Note. Holmes defaulted on his personal note on May 1, 1993. The Bank accelerated the Baby Days Note on June 24, 1993. Afterward, the Bank exercised a series of setoffs which still left a balance owing under the Baby Days Note. Under the Holmes' security deed, the Bank exercised its power of sale on September 7, 1993, and bid on the Adairsville Property for $135,000. The Bank did not confirm that sale.

After foreclosing on the Adairsville Property, the Bank commenced a lawsuit against Baby Days, Holmes, and his wife to collect the balance due on the Baby Days Note. In his defense, Holmes argued that the Bank's failure to confirm the foreclosure sale of the Adairsville Property barred any action against him for a deficiency judgment. Ms. Holmes also argued that the Bank's failure to confirm the foreclosure sale resulted in the release of her obligations as a co-surety under O.C.G.A. section 10-7-20. The parties filed cross-motions for summary judgment. The trial court granted the Bank's motion and denied the motions filed by Holmes and his wife. Holmes and his wife appealed.

On appeal, Holmes argued that he had only one debt to the Bank even though his debt arose out of several contracts. He based his argument on the existence of the dragnet clauses. He further argued that a single piece of property secured that consolidated obligation to the Bank. The Bank, on the other hand, argued that there were two separate debts.

\[\text{226. Id.}\]
and that it had foreclosed on the Adairsville Property pursuant to the
default under the Holmes personal loan, not pursuant to Holmes' guaranty of the Baby Days Note.\textsuperscript{227}

Agreeing with the Bank, the appellate court noted the following: the
two loans were not to the same debtor; the debtors executed the loan
instruments at different times; each loan was for a separate and distinct
purpose; and the corporate debt was secured by property not serving as
collateral for Holmes' personal debt.\textsuperscript{228} Based on those factors, the
court concluded that the Bank's action against Holmes was "not to
recover a deficiency judgment on the debt for which foreclosure was had,
but to recover on a separate, subsequent and different note."\textsuperscript{229} The
court reached that decision although "the dragnet clause pertaining to
the Holmes' personal loan documents conceivably could be construed as
indirectly subjecting the foreclosed real property (that served as direct
collateral to Holmes' personal loan) to constitute additional collateral,
through the medium of the Holmes' guaranty documents, for the
corporate loan."\textsuperscript{230}

Based on the decision about Holmes' claims, the appellate court
rejected Ms. Holmes' contention that she had been released as a co-
Surety.\textsuperscript{231} Additionally, the court of appeals noted that Ms. Holmes
had waived her rights under O.C.G.A. section 10-7-20 in the express
language of her guarantee document.\textsuperscript{232} In her guaranty, she author-
ized the Bank to make any settlements or compromises "as it may deem
proper with respect to any of the indebtedness, liabilities and obligations
covered by this guaranty, including the taking or releasing of security
and surrendering of documents."\textsuperscript{233}

Although the Bank of Adairsville prevailed in that case, the holding
from Baby Days should be a warning to secured lenders. Where a single
debtor or group of related debtors has executed a series of promissory
notes, some of which are secured by realty, the lender must carefully
consider whether confirmation of a foreclosure sale is a necessary pre-
condition to pursuit of an action on other notes. The four factors cited
by the court in Baby Days must be the focus of any such consideration.

\begin{itemize}
\item \textsuperscript{227} \textit{Id.} at 754, 463 S.E.2d at 173.
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{Id.} (quoting Vaughn \& Co. v. Saul, 143 Ga. App. 74, 77, 237 S.E.2d 622, 626
(1977)).
\item \textsuperscript{230} \textit{Id.} at 754-55, 463 S.E.2d at 174.
\item \textsuperscript{231} \textit{Id.} at 755, 463 S.E.2d at 174.
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{233} \textit{Id.}
\end{itemize}
VI. IMMINENT DOMAIN AND CONDEMNATION

Department of Transportation v. Sharpe\(^1\)\(^2\) is the second appearance of this case before the court of appeals. The first appeal followed entry of a jury verdict and involved questions relating to the trial court's instructions to the jury.\(^3\) The jury's verdict was reversed, and the case was remanded for a new trial. This appeal follows the second trial.\(^4\)

The case arises out of the condemnation of property owned by R.G. and Dabney Sharpe, individually and as administrators of the estate of C.W. Sharpe. The Sharpes were the owners of 19.289 acres of wooded land that contained significant limestone deposits. However, the Sharpes had not mined the limestone. The Department of Transportation ("DOT") condemned that property. During the trial, to establish the value of the property, the DOT presented testimony from its appraiser that the property was worth $23,750.\(^5\) The Sharpes, on the other hand, presented testimony that their interest in the property was worth between $616,000 and $666,000. According to the Sharpes' appraiser, that value was broken down into two components—one for the surface acreage ($16,000) and the second for the present value of the mineral deposits upon extraction ($600,000 to $650,000). At the close of the evidence, the DOT moved to strike portions of the testimony from the Sharpes' expert.\(^6\) The trial court denied that motion, and the jury entered a verdict in favor of the Sharpes for $850,000. The DOT appealed.\(^7\)

The court of appeals agreed with the DOT that the testimony from the Sharpes' appraiser concerning the value of the condemned property was improperly admitted.\(^8\) The court stated that land containing deposits of valuable minerals "may be of greater market value than land without such deposits, but the land and the deposits constitute one subject matter and there cannot be a recovery for the land as such, and also for

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\(^3\) Id. at 466, 465 S.E.2d at 695-696.

\(^4\) Id. at 466, 465 S.E.2d at 696.

\(^5\) Id. at 467, 465 S.E.2d at 697.

\(^6\) Id. at 466, 465 S.E.2d at 696.

\(^7\) Id. at 466, 465 S.E.2d at 696.
the deposits."\textsuperscript{241} The court concluded that "testimony could be offered as to the enhanced value of the land based upon the presence of the limestone deposits; however condemnees cannot value their land and the mineral deposits separately."\textsuperscript{242} In reaching that decision, the court relied upon the decisions reached in Williams v. Mayor of Carrollton,\textsuperscript{243} and Southern Railroad v. Miller.\textsuperscript{244} Based on the presentation of improper evidence, the appellate court again reversed the trial court's judgment.\textsuperscript{245}

The court in Sharpe has made a definitive statement of what expert testimony may not properly say about the value of land containing valuable mineral deposits. However, the court left unanswered the question of what testimony is proper. In order to present testimony that concerns the value of land containing unextracted mineral deposits and that comports with the court's holding in Sharpe, condemnees may be required to produce testimony from persons possessing knowledge of the amount a mining company would pay for the property. It seems clear, however, that when no mining activities are being conducted, the condemnees of such property would be precluded from introducing testimony concerning the value of the property based solely on the stream of income that could be generated from a mining lease.

The court in Fulton County v. Funk\textsuperscript{246} again considered an appeal involving application of the so-called "undivided fee rule." Fulton County and the Metropolitan Atlanta Rapid Transit Authority (MARTA) condemned property owned by Dr. Sidney Funk and leased to his professional corporation.\textsuperscript{247} At the conclusion of the evidence during the trial relating to the amount of compensation Dr. Funk and his professional corporation were to receive, the trial court charged the jury "that the amount of just and adequate compensation should 'equal to the whole—the value of the whole property, just and adequate compensation for the whole property.'"\textsuperscript{248} The condemnees appealed from the jury verdict; the court of appeals reversed, citing White v. Fulton County.\textsuperscript{249}

\begin{itemize}
  \item 241. Id.
  \item 242. Id. at 469, 465 S.E.2d at 697.
  \item 244. 94 Ga. App. 701, 96 S.E.2d 297 (1956).
  \item 245. 219 Ga. App. at 469, 465 S.E.2d at 698. See supra note 234.
  \item 246. 266 Ga. 64, 463 S.E.2d 883 (1996).
  \item 247. Id. at 64, 463 S.E.2d at 884.
  \item 248. Id.
  \item 249. 264 Ga. 393, 444 S.E.2d 734 (1994). The decision reached in White was discussed in this survey last year. See T. Daniel Brannan, et al., Real Property, 46 MERCER L. REV. 269, 298-300 (1995).
\end{itemize}
The supreme court granted certiorari to consider the holding of the court of appeals and reinstated the verdict entered in the trial court.\textsuperscript{250} The issue considered in \textit{Funk} is whether, absent a showing of uniqueness in the property, the compensation to be paid for a property is limited to the value of the fee interest in the property. That issue was created by the holding in \textit{Bowers v. Fulton County},\textsuperscript{251} in which the Georgia Supreme Court held “that a condemnee could seek business losses as a separate element of just and adequate compensation, in addition to the value of the real property interests taken or damaged.”\textsuperscript{252} The court in \textit{Funk} stated that where no business losses are recovered, “the fair market value of the real property taken does, in fact, constitute just and adequate compensation . . . [and] the condemnor need only pay the value of the land that was taken, which is then to be divided among the claimants based upon their respective interests.”\textsuperscript{253} Because a leasehold generally only has value to the lessee if he is paying below-market rent, any value that the lessee's interest in the property has necessarily reduces the value of the fee owner's interest in that same property.\textsuperscript{254} Therefore, the court concluded as follows:

\begin{quote}
[T]he fair market value of the property that was taken is generally the maximum amount that the condemnees can recover for their lost interests in the real property. This is true because, when the value of the real property that was taken is being determined, any “value” in the leasehold generally results in a corresponding loss in the “value” of the fee. The only exception is when the condemnees successfully assert that the property that was taken has unique value.\textsuperscript{255}
\end{quote}

The court also stated that its decision in \textit{Funk} did not alter the conclusion reached in \textit{White} because “the issue of uniqueness and business losses had been injected into that case.”\textsuperscript{256} In a dissenting opinion joined by Justices Sears and Thompson, Justice Hunstein took exception to the majority decision in \textit{Funk}.\textsuperscript{257} The dissent pointed out “real world” considerations that the majority failed to consider. First, Justice Hunstein stated the following:

\begin{itemize}
\item \textsuperscript{250} 266 Ga. at 67, 463 S.E.2d at 886.
\item \textsuperscript{251} 221 Ga. 731, 146 S.E.2d 884 (1966).
\item \textsuperscript{252} 266 Ga. at 64, 146 S.E.2d at 884.
\item \textsuperscript{253} Id. at 65, 463 S.E.2d at 885.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id. at 66, 463 S.E.2d at 885 (emphasis added) (citation omitted).
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Fulton County v. Funk, 266 Ga. 64, 67-69, 463 S.E.2d 886 (1995) (Hunstein, J., dissenting).
\end{itemize}
Only in an ideal world could the undivided fee rule operate constitutionally, an ideal world where the appraisal of property interests could be so precisely calculated that condemnees' loss would indeed equal precisely condemnor's gain. But the real world produces opinions, instead of absolutes, and as long as valuation testimony conflicts and a jury is entitled to believe or disregard all or any part of any witnesses' testimony, the reality is that there will be jury verdicts in which the total monetary amount awarded to justly and adequately compensate the individual interests in a condemned property may exceed the monetary amount attributed by witnesses at trial as representing the value of the unencumbered fee as a whole.

Furthermore, Justice Hunstein wrote that

>[as a] practical matter it should be noted that because the jury generally decides whether condemned property is unique, the distinction the majority attempts to draw between unique and non-unique property will fail in application and its opinion will result in the giving of the undivided fee rule charge in all condemnation cases.

The effect of the majority's holding in Funk on the valuation of unique properties in condemnation cases is uncertain. However, practitioners should watch this area carefully in the coming years.

In *Department of Transportation v. 2.953 Acres of Land*, the Georgia Court of Appeals considered whether evidence of consequential damages and cost to cure was properly admitted in a case involving a partial taking of commercial property. In that case, the DOT condemned 2.953 acres ("Condemned Tract") of a 32.2-acre tract ("Property") on which the condemnee operated a wholesale grocery distributorship. The condemnee's business operation included storage facilities with a refrigerated loading dock, office space, a truck maintenance facility, its own water supply, and a retention pond. The business also had access to rail service and a state-maintained highway. At the time of the taking, the Condemned Tract was undeveloped, but the condemnee presented testimony at trial that the Condemned Tract was the designated area for its planned expansion.

\[258. \text{Id. at 68, 463 S.E.2d at 887.}\]
\[259. \text{Id. at 69, 463 S.E.2d at 887.}\]
\[261. \text{Id. at 45, 463 S.E.2d at 913. The Property was actually divided into three tracts—20.475 acres south of a power line right-of-way, 3.668 acres within the right-of-way, and 8.134 acres north of the right-of-way. The Condemned Tract was taken from the 8.134-acre tract and fronted on a county road and Georgia Highway 301. Id.}\]
\[262. \text{Id. at 45-46, 463 S.E.2d at 914.}\]
The condemnee also presented an appraiser's testimony that the Property had a value of $6.2 million and that the Condemned Tract had a total value of $132,930 ($45,000 per acre). The DOT's appraiser testified that the Property was worth $5.3 million and that the Condemned Tract had a value of $103,400 ($35,000 per acre). Additionally, the condemnee presented testimony relating to consequential damages to the remainder of the Property. That evidence was as follows: (1) At the time of the taking, the condemnee's business was already operating at twenty to twenty-five percent over capacity; (2) The condemnee's business must continue to expand or close; (3) The taking of the Condemned Tract left an irregular-shaped tract of land that significantly affected the condemnee's ability to expand its facilities; and (4) After the taking of the Condemned Tract, the Property was no longer best suited for use as a wholesale grocery distributorship. Instead, the highest and best use was as a general warehouse facility. Based on that evidence, the condemnee's appraiser testified that the condemnee suffered consequential damages of $4,593,256 to the remainder of the Property. The condemnee also presented testimony that it paid $200,000 to acquire an adjoining tract containing eight acres to accommodate its planned expansion. The only damages the condemnee requested was for the taking and for the purchase price of the adjoining tract. The jury awarded the condemnee $185,000, and the DOT appealed.

On appeal, the DOT made two basic arguments. First, the DOT contended that the trial court erred in allowing the evidence of the cost the condemnee incurred in purchasing the adjoining tract. In

263. Id. The condemnee also presented the testimony of its chairman that the Condemned tract had a value of $180,000. The Court's opinion indicated that the condemnee's chairman testified as an expert. Id. at 46, 463 S.E.2d at 914.

264. Id. The configuration of the Property after the taking meant that the condemnee would be able to build only a 73,000-square-foot warehouse rather than a warehouse having 225,000 square feet. Id.

265. Id. The DOT's appraiser also testified that the highest and best use for the Property was as a wholesale grocery distribution facility. The DOT's appraiser admitted that use as a general warehouse would result in two million dollars consequential damages to the remainder of the Property. Id.

266. Id. Apparently, the condemnee recognized that it would have some difficulty recovering both the diminution in value of the remainder of the Property (consequential damages) and the cost to purchase the adjoining tract (cost to cure). Those damages arguably are duplicative and cannot both be recovered. See Davis v. Davidson, 175 Ga. App. 451, 333 S.E.2d 648 (1985) (double recovery for same injury is not permissible).

267. 219 Ga. App. at 46, 463 S.E.2d at 914.

268. Id. at 47-50, 463 S.E.2d at 914. In the trial court, the DOT made a motion for directed verdict on the issues of consequential damages and cost to cure. That motion was
considering that argument, the court first set forth the proper method for establishing consequential damages. The court stated that the amount of consequential damages is the reduction, if any, in the market value of the remaining property "in its circumstance just prior to the time of the taking compared with its market value in its new circumstance just after the time of the taking." Furthermore, the court stated that the cost to cure is admissible in partial taking cases as a factor in determining consequential damages. The court concluded, therefore, that evidence relating to the cost to purchase the adjoining tract in order to prevent the consequential damage to the remainder of the Property (that otherwise would have resulted from the change in the highest and best use) was admissible.

Second, the DOT argued that the holdings in Colonial Pipeline Co. v. Williams and Department of Transportation v. Benton prevented the condemnee's introduction of evidence regarding planned expansion onto the Condemned Tract because only present uses of condemned property are relevant to the value of the land taken. The court also rejected that argument. The court noted that, unlike this case, the cases relied upon by the DOT did "not involve condemnees who claim that their land could not be purchased for the same purpose for which it is being used presently." Therefore, the court concluded that "the jury in this case was certainly allowed to consider evidence of the fact that the market value as of the date of taking was affected because the property was no longer suitable for its present use."

VII. LEGISLATIVE DEVELOPMENTS

The single significant legislative development in Georgia real property law during the survey period relates to the escheat of an intestate

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denied. Therefore, the appellate court considered whether there was any evidence to support the verdict. Id. at 48, 463 S.E.2d at 915.

269. Id. at 47, 463 S.E.2d at 915 (quoting Department of Transp. v. Metts, 208 Ga. App. 401, 403, 430 S.E.2d 622, 624 (1993)).

270. Id.

271. Id., 463 S.E.2d at 914. The court relied on Department of Transp. v. Old Nat'l Inn, 179 Ga. App. 158, 345 S.E.2d 853 (1986) (holding that the availability of adjacent land to replace the land taken was relevant in determining the amount of consequential damages to the remainder).


274. 219 Ga. App. at 48, 463 S.E.2d at 915.

275. Id.

276. Id.

277. Id. at 48, 463 S.E.2d at 915-16.
decedent's property to the state. Escheat is the transfer of property from the estate of an intestate decedent to the state of Georgia based on an absence of other legal heirs.\(^{278}\) Currently, the provisions relating to the escheat of property are codified in O.C.G.A. Title 44, Chapter 5, Article 8.\(^{279}\) However, House Bill No. 1030, which provided a complete revision of Chapters 1-11 of Title 55 (Wills, Estates, and Trusts), repealed and recodified the escheat statute.\(^{280}\)

The statute relating to escheat of property remains essentially the same under the newly enacted statute. Under both the old and new statute, if no person claims to be an heir of an intestate decedent within a stated period of time, the administrator of the estate is required to notify the probate court of the absence of heirs.\(^{281}\) Once that notification takes place, notice of the impending escheat of the property must be given by publication.\(^{282}\) If no heirs appear following the publication, the property is paid over or distributed to the board of education in the county where the estate is being administered.\(^{283}\)

However, there are differences between the old and new statute. First, the time frame established for the escheat of property is shorter under the new statute—four years as opposed to five.\(^{284}\) Second, the new statute eliminates the possibility that, after escheat occurs, an heir could appear and reclaim the property from the county school board.\(^{285}\)

\section*{VIII. Conclusion}

Several cases decided during the survey period create questions concerning the way that real property law will develop in the future. Of particular interest is the issue concerning the measure of damages in condemnation cases and the application of the "undivided fee rule." The authors expect that the owners of property being condemned by public

\begin{footnotesize}
\begin{enumerate}
\item \footnote{O.C.G.A. § 44-5-190 (1991).}
\item \footnote{See id. §§ 44-5-190 to -199.}
\item \footnote{1996 Ga. Laws 504, § 9 (codified at O.C.G.A. §§ 53-2-50 to -51 (Supp. 1996)). The changes effected by the repeal and recodification of the escheat statute will take effect as of January 1, 1998. The estates of all intestate decedents until that date shall be governed under the old law. \textit{Id}.}
\item \footnote{O.C.G.A. § 44-5-191 (existing statute); \textit{Id}. § 55-2-51 (new statute).}
\item \footnote{\textit{Id}. § 44-5-91. \textit{See also id}. § 53-11-4 (Supp. 1996) (describing the method of publication).}
\item \footnote{\textit{Id}. § 44-5-192.}
\item \footnote{\textit{Id}. § 44-5-191(a); \textit{Id}. § 55-2-51(a).}
\item \footnote{Compare \textit{id}. § 44-5-194 (allowing three years from the school board's receipt of escheated property for heir to reclaim), with \textit{id}. § 52-2-51 (stating that escheat proceedings are conclusive against heirs without provision for reclaiming property).}
\end{enumerate}
\end{footnotesize}
entities will devise some creative arguments in order to show the unique value of their properties and the various interests in them in order to avoid the limitation seemingly imposed on recovery in condemnation cases by the decision in *Fulton County v. Funk.*"