

Mercer Law Review

Volume 64
Number 1 *Annual Survey of Georgia Law*

Article 6

12-2012

Construction Law

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Recommended Citation

Brown, Frank O. Jr. (2012) "Construction Law," *Mercer Law Review*: Vol. 64 : No. 1 , Article 6.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol64/iss1/6

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Construction Law

by Frank O. Brown, Jr.*

I. INTRODUCTION

This Article focuses on noteworthy construction law decisions by Georgia appellate and federal district courts in Georgia between June 1, 2011 and May 31, 2012.¹

II. MEASURE OF DAMAGES

The opinion in *Royal Capital Development, LLC v. Maryland Casualty Co.*² has already been cited by plaintiffs in construction defects suits for the proposition that both repair costs and residual diminution in value can be recovered.³ The insured sued its property insurer for both repair costs and post-repair diminution in value to a commercial building resulting from construction activity on adjacent property.⁴ The United States Court of Appeals for the Eleventh Circuit asked the Georgia Supreme Court to decide the following question of law:

For an insurance contract providing coverage for “direct physical loss or damage to” a building that allows the insurer the option of paying either “the cost of repairing the building” or “the loss of value,” if the insurer elects to [] repair the building, must it also compensate the

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1. For an analysis of Georgia construction law during the prior survey period, see Frank O. Brown, Jr., *Construction Law, Annual Survey of Georgia Law*, 63 *MERCER L. REV.* 107 (2011).

2. 291 Ga. 262, 728 S.E.2d 234 (2012).

3. *E.g.*, *Ingles Markets, Inc. v. Kempler*, 730 S.E.2d 444 (Ga. Ct. App. 2012).

4. *Royal Capital Dev.*, 291 Ga. at 263, 728 S.E.2d at 235.

insured for the diminution in value of the property resulting from stigma due to its having been physically damaged?⁵

The Georgia Supreme Court answered in the affirmative.⁶ Further framing the issue before it, the court stated,

The primary issue presented to this Court is whether our ruling in *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001), a case involving an automobile insurance policy wherein we held that a provision requiring the insurer to pay for loss to the insured's car required the insurer to also pay for any diminution in value of the repaired vehicle, is applicable.⁷

The court held that *Mabry* was not limited by the type of property insured and applies to property insurance for real property.⁸ The court reasoned that its holding was consistent with the general Georgia rule that a plaintiff is entitled to "full recovery."⁹ Elaborating, it stated that in "unusual" circumstances, real property may suffer diminished value associated with the stigma of having been damaged even after it has been repaired.¹⁰ It did not clarify which circumstances are "unusual."¹¹

III. LIABILITY INSURANCE

The opinion in *Estate of Pitts v. City of Atlanta*¹² is important to both drafters of construction contracts and litigation counsel. During an airport construction project, a subcontractor's employee was fatally struck by a truck driven by an employee of a sub-subcontractor. The estate of the subcontractor's employee got a judgment against the sub-subcontractor and its employee, which exceeded the sub-subcontractor's automobile liability insurance coverage.¹³

Then, the estate sued the City of Atlanta and the general contractors, alleging that they failed to require the sub-subcontractor to maintain \$10 million in automobile liability insurance as required by both the general contract and the subcontract. Had they required that level of

5. *Id.* at 262, 728 S.E.2d at 235; *Royal Capital Dev. v. Maryland Cas. Co.*, 659 F.3d 1050, 1051 (11th Cir. 2011).

6. *Royal Capital Dev.*, 291 Ga. at 267, 728 S.E.2d at 238.

7. *Id.* at 263, 728 S.E.2d at 235.

8. *Id.*

9. *Id.* at 265, 728 S.E.2d at 237.

10. *Id.* at 263-65, 728 S.E.2d at 236-37.

11. *See id.*

12. 312 Ga. App. 599, 719 S.E.2d 7 (2011), *cert. granted.*

13. *Id.* at 599-600, 719 S.E.2d at 9-10.

insurance, the estate argued, the judgment against the sub-subcontractor would have been fully satisfied.¹⁴

The defendants responded that the estate's decedent was not a third-party beneficiary of the general contract or subcontract, and, therefore, it lacked standing to assert a breach of the minimum insurance requirement.¹⁵ On appeal, the Georgia Court of Appeals acknowledged that the estate's decedent was not named as a third-party beneficiary in either of those contracts.¹⁶ However, it held that the decedent was nevertheless an intended beneficiary.¹⁷ It drew that conclusion because the City's "Owner's Controlled Insurance Program," which was made a part of the general contract and incorporated into the subcontract, stated that its purpose was "to provide one master insurance program that provides broad coverages with high limits *that will benefit all participants involved in the project.*"¹⁸ The court reasoned that the decedent was a "participant" as that term is commonly understood.¹⁹

The opinion in *Illinois Union Insurance Co. v. NRI Construction, Inc.*²⁰ addresses two important aspects of the relationship between insurer and insured under a commercial general liability policy. One was an issue of first impression—that is, the right of the insurer to recover defense costs from the insured in the absence of a specific policy provision allowing such recovery when it has been judicially determined that the insurer had no obligation to defend.²¹ The United States District Court for the Northern District of Georgia held where the insurer has expressly notified the insured of that right in a reservation of rights letter and the insured has accepted the insurer-provided defense without objection, the insurer may recover defense costs from the insured based on either unjust enrichment or implied-in-fact contract.²²

The second issue addressed by the court was the timeliness of notice of a potential claim by the insured.²³ The insured was a general contractor. An employee or individual sub-subcontractor of the insured's subcontractor suffered injury from a ladder fall. Almost two years later,

14. *Id.* at 600, 719 S.E.2d at 10.

15. *Id.* at 603, 719 S.E.2d at 11-12.

16. *Id.* at 603, 719 S.E.2d at 12.

17. *Id.* at 603-05, 719 S.E.2d at 12-13.

18. *Id.* at 603, 719 S.E.2d at 12 (emphasis in original).

19. *Id.* at 604, 719 S.E.2d at 12.

20. 846 F. Supp. 2d 1366 (N.D. Ga. 2012).

21. *Id.* at 1373-74.

22. *Id.* at 1377.

23. *Id.* at 1369-70.

the injured individual sued the general contractor, who then first notified the insurer of the suit.²⁴

After initially defending under a reservation of rights, the insurer sought a declaration of no coverage and duty to defend, arguing that the insured failed to provide timely notice per the policy which required notice "as soon as practicable of an 'occurrence' or an offense which may result in a claim."²⁵ The insured responded that it was excused from earlier notice because it believed the injury was covered by the subcontractor's workers' compensation insurance, and it would not be liable.²⁶

The court rejected the insured's argument, reasoning that its subjective belief was not controlling, and a duty to provide notice was triggered when the insured actually knew or objectively should have known of the possibility that it might be held liable for the injury.²⁷ The court granted the insurer's motion for summary judgment on its declaratory judgment claim.²⁸

The opinion in *JNJ Foundation Specialists, Inc. v. D.R. Horton, Inc.*²⁹ may be cited by insureds for the relevance of prejudice to the insurer in late-notice cases. The plaintiff driver sued a developer and another driver that rear-ended the plaintiff for injuries allegedly resulting in part from the developer's failure to adequately mark the closure of a traffic lane in connection with sidewalk construction.³⁰ As an additional insured, the developer filed third-party claims for defense and coverage against the sidewalk subcontractor's insurer.³¹ The insurer sought summary judgment, arguing in part that the developer had failed to "[i]mmediately" forward the plaintiff's suit to the insurer as required by the policy.³² Affirming the denial of that motion, the court stated that, although the insurer was not required to show prejudice from the late forwarding, the insurer's failure to demonstrate prejudice may be considered in deciding whether the developer's delay was reasonable under the circumstances.³³

24. *Id.* at 1370.

25. *Id.* at 1369.

26. *Id.* at 1370.

27. *Id.* at 1371-72.

28. *Id.* at 1378.

29. 311 Ga. App. 269, 717 S.E.2d 219 (2011).

30. *Id.* at 269, 717 S.E.2d at 221-22.

31. *Id.* at 269, 719 S.E.2d at 222. The developer also asserted claims against other third-party defendants. *Id.*

32. *Id.* at 273, 719 S.E.2d at 224.

33. *Id.* at 275-76, 719 S.E.2d at 226.

IV. FRAUD

Challenges associated with seeking rescission for fraud are apparent in *Novare Group, Inc. v. Sarif*.³⁴ The purchasers of condominium units sued the developers and brokers, asserting, among other claims, fraud, negligent misrepresentation, and violation of the Georgia Fair Business Practices Act,³⁵ based on alleged misrepresentations by the developers' brokers that views from the units would not be blocked by later development. The purchasers alleged that when these representations were made, the developers had already planned a project across the street that would block their views.³⁶

The trial court granted the defendants' motion for judgment on the pleadings as to all claims. The Georgia Court of Appeals reversed the trial court's order.³⁷ The Georgia Supreme Court held that the trial court properly granted the motion and reversed the court of appeals.³⁸

The supreme court explained that, as a general rule, a party alleging fraudulent inducement of a contract may either: "(1) affirm the contract and sue for damages from the fraud or breach; or (2) promptly rescind the contract" before suing for fraud.³⁹ Because the purchasers simultaneously filed suit and sought to rescind the contract, the court held that they did not properly rescind their purchase agreements.⁴⁰

The court also held that they lacked grounds for rescission because the alleged misrepresentations related to future promises and were directly contradicted by the purchase agreements, which "expressly state[d] that the views may change over time, oral representations of the sellers could not be relied upon," the purchasers had not relied on oral representations by the brokers, and the agreement included all terms.⁴¹

V. INDEMNIFICATION

In *Kennedy Development Co. v. Camp*,⁴² nearby property owners sued the subdivision developer for increased stormwater runoff from the subdivision.⁴³ Thereafter, the developer and the subdivision's home-

34. 290 Ga. 186, 186-87, 718 S.E.2d 304, 306-07 (2011).

35. O.C.G.A. §§ 10-1-390 to -407 (2010).

36. *Novare Grp., Inc.*, 290 Ga. at 186-87, 718 S.E.2d at 306-07.

37. *Id.* at 187, 718 S.E.2d at 307.

38. *Id.* at 191, 718 S.E.2d at 310.

39. *Id.* at 188, 718 S.E.2d at 307.

40. *Id.* at 188, 718 S.E.2d at 307-08.

41. *Id.* at 189, 718 S.E.2d at 308.

42. 290 Ga. 257, 719 S.E.2d 442 (2011).

43. *Id.* at 257, 719 S.E.2d at 443.

owners' association entered into an assignment and assumption agreement under which the association agreed to indemnify and defend the developer against "any and all" claims relating to the "construction, maintenance, repair, or operation of" the subdivision and other matters.⁴⁴ The developer then filed a third-party complaint for indemnification and defense against the association based on the indemnification provision. The association responded that the indemnification provision was invalid under section 13-8-2(b) of the Official Code of Georgia Annotated (O.G.C.A.).⁴⁵

The key question addressed by the Georgia Supreme Court was whether the indemnification provision related to "construction, alteration, repair, or maintenance," and was therefore covered by O.C.G.A. § 13-8-2(b).⁴⁶ At the time that the assignment and assumption agreement was executed, that subsection stated as follows:

A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee is against public policy and is void and unenforceable, provided that this subsection shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer.⁴⁷

The court held that the assignment and assumption agreement clearly related to "construction, alteration, repair, or maintenance," and was therefore covered by O.C.G.A. § 13-8-2(b), even though that agreement did not itself include terms of a construction project, because the agreement was a vehicle through which the association assumed existing maintenance and repair responsibilities of the developer for past construction.⁴⁸ Significantly, the court rejected the developer's argument that O.C.G.A. § 13-8-2(b) applied only to contracts for future construction and not to ones for completed construction.⁴⁹

44. *Id.* at 257-58, 719 S.E.2d at 443-44.

45. *Id.* at 258, 719 S.E.2d at 444; see O.C.G.A. § 13-8-2(b) (2010 & Supp. 2012).

46. *Kennedy Dev. Co.*, 290 Ga. at 259, 719 S.E.2d at 444; see also O.C.G.A. § 13-8-2(b).

47. *Id.*

48. *Kennedy Dev. Co.*, 290 Ga. at 260, 719 S.E.2d at 445; see O.C.G.A. § 13-8-2(b).

49. *Kennedy Dev. Co.*, 290 Ga. at 260 n.3, 719 S.E.2d at 445 n.3.

In *JNJ Foundation Specialists, Inc. v. D.R. Horton, Inc.*,⁵⁰ the plaintiff driver sued a developer and another driver that rear-ended the plaintiff, claiming the developer's failure to properly indicate a lane closure due to sidewalk construction partially caused the plaintiff's injuries.⁵¹ The developer filed third-party claims for indemnification and defense against its sidewalk subcontractor.⁵² The Georgia Court of Appeals considered the trial court's rulings on cross-motions for summary judgment between the developer and the third-party defendants.⁵³

The sidewalk subcontractor's subcontract required it to defend and indemnify the developer for any claims "in any way occurring, incident to, arising out of, or in connection with . . . the work performed or to be performed by contractor . . ." ⁵⁴ The court rejected the sidewalk subcontractor's argument that "arising out of," as used in indemnity provisions, required a showing that the sidewalk subcontractor's actions were the proximate cause of the plaintiff's injuries.⁵⁵ In affirming the grant of summary judgment to the developer on its claims against the sidewalk subcontractor, the court said instead that "[a]lmost any causal connection or relationship will do."⁵⁶

VI. STATUTE OF REPOSE

In *Wilhelm v. Houston County*,⁵⁷ seeking damages from a malfunctioning septic system, a homeowner sued a builder, Houston County, and the county health department for fraudulent concealment.⁵⁸ The suit was filed more than eight years after the plaintiff purchased the house.⁵⁹

The Georgia Court of Appeals affirmed the trial court's grant of summary judgment to the defendants based on the construction-related statute of repose at O.C.G.A. § 9-3-51.⁶⁰ The court noted that, although

50. 311 Ga. App. 269, 717 S.E.2d 219 (2011). For an additional discussion of this case, see *supra* notes 29-33 and accompanying text.

51. *JNJ*, 311 Ga. App. at 269, 717 S.E.2d at 221-22.

52. *Id.* at 269, 717 S.E.2d at 222.

53. *Id.*

54. *Id.* at 270, 717 S.E.2d at 222.

55. *Id.* (quoting *BBL-McCarthy, LLC v. Baldwin Paving Co.*, 285 Ga. App. 494, 498, 646 S.E.2d 682, 686 (2007)).

56. *Id.*

57. 310 Ga. App. 506, 713 S.E.2d 660 (2011).

58. *Id.* at 506-07, 713 S.E.2d at 661-62. The plaintiff also asserted a nuisance claim. *Id.*

59. *Id.* at 507-08, 713 S.E.2d at 662-63.

60. *Id.* at 510-11, 713 S.E.2d at 663, 665; see O.C.G.A. § 44-14-361.2(a) (2002).

the plaintiff asserted a fraud claim and O.C.G.A. § 9-3-96 may toll the statute of limitation for fraud, § 9-3-96 does not toll this statute of repose.⁶¹

The court also noted, however, that “a defendant may be equitably estopped from raising the defense of the statute of repose if the plaintiff reasonably relied on a fraudulent act or statement by the defendant that occurred after the plaintiff’s injury accrued” and that led plaintiff to delay filing suit until the expiration of the statute of repose.⁶² In this case, the court concluded, there was no evidence of a fraudulent act or statement after the plaintiff’s purchase of the house.⁶³

VII. MECHANICS’ AND MATERIALMEN’S LIENS

In *Fidelity & Deposit Co. of Maryland v. Lafarge Building Materials, Inc.*,⁶⁴ a supplier sued a general contractor and surety on a materialmen’s lien discharge bond for the price of materials the supplier provided to a subcontractor for a project.⁶⁵ The general contractor and surety moved for summary judgment on the ground that the supplier had not provided a Notice to Contractor in accordance with O.C.G.A. § 44-14-361.5(a) and (c).⁶⁶ In response, the supplier argued that it was excused from providing a Notice to Contractor because the general contractor’s mandatory Notice of Commencement, per O.C.G.A. § 44-14-361.5(b) and (d), was fatally deficient in that it failed to include the general contractor’s telephone number.⁶⁷

The Georgia Court of Appeals reasoned that, while it is clear from O.C.G.A. § 44-14-361.5(d) that if no Notice of Commencement had been filed the supplier would have been excused from providing a Notice to Contractor, it is not clear from O.C.G.A. § 44-14-361.5 whether the same result follows where, as here, a Notice of Commencement was filed, but it contained less than all of the required information.⁶⁸

The court stated that, generally, exact compliance with statutory language is not necessary, but instead only substantial compliance addressing all essential requirements of a statute is required.⁶⁹ It

61. *Wilhelm*, 310 Ga. App. at 509, 713 S.E.2d at 663; O.C.G.A. § 9-3-96 (2007).

62. *Wilhelm*, 310 Ga. App. at 509, 713 S.E.2d at 663 (citing *Esener v. Kinsey*, 240 Ga. App. 21, 22-24, 522 S.E.2d 522, 524 (1999)) (emphasis omitted).

63. *Id.* at 510, 713 S.E.2d at 663.

64. 312 Ga. App. 821, 720 S.E.2d 288 (2011).

65. *Id.* at 821, 720 S.E.2d at 289.

66. *Id.* at 821-22, 720 S.E.2d at 289; O.C.G.A. § 44-14-361.5 (2002 & Supp. 2012).

67. *Fidelity*, 312 Ga. App. at 822, 720 S.E.2d at 289-90.

68. *Id.* at 823-25, 720 S.E.2d at 290-91.

69. *Id.* at 823, 720 S.E.2d at 290.

noted that in *General Electric Co. v. North Point Ministries, Inc.*,⁷⁰ the court held that the name of the true owner of property and the legal description of that property were essential requirements of a Notice of Commencement, while in *Rey Coliman Contractors, Inc. v. PCL Construction Services, Inc.*,⁷¹ it concluded that the failure to timely file the Notice of Commencement and to post it at the worksite were not essential requirements.⁷² Guided by those cases, and given that lien statutes must be construed in favor of the property owner and against the lien claimant, the court held that the absence of a telephone number was not an essential requirement because it presented merely a potential inconvenience to a supplier trying to file a lien.⁷³

In *Dan J. Sheehan Co. v. Fairlawn on Jones Homeowners' Ass'n*,⁷⁴ a contractor performed stucco repair work on some parts of a condominium complex. After discovering interior water and termite damage that destroyed wooden support beams and studs in some units, the contractor performed additional repair work that was not initially contemplated. The contractor sent a bill to the condominium association, which did not pay it. According to the court of appeals opinion, the contractor then filed liens against the association's property⁷⁵ and some individual units.⁷⁶ Thereafter, the contractor filed the subject lawsuit against the association and certain unit owners.⁷⁷

The contractor moved for partial summary judgment on its suit on account and breach of contract claims against the association. The trial court denied that motion because there were issues of fact about whether there was a contract and whether the parties had assented to its terms.⁷⁸

The contractor moved for partial summary judgment on its foreclosure of lien claim against the association and defendant unit owners. The unit owners filed a cross-motion for partial summary judgment on that claim and the contractor's claim for unjust enrichment. The trial court

70. 289 Ga. App. 382, 657 S.E.2d 297 (2008).

71. 296 Ga. App. 892, 676 S.E.2d 298 (2009).

72. *Fidelity*, 312 Ga. App. at 825, 720 S.E.2d at 291.

73. *Id.* at 825, 720 S.E.2d at 291-92.

74. 312 Ga. App. 787, 720 S.E.2d 259 (2011).

75. The reference to association's property is confusing because generally condominium associations do not own property. The common elements of condominiums are owned in undivided shares by the unit owners. See generally O.C.G.A. § 44-3-95 (2010) for rules relating to mechanics' and materialmen's liens against common elements and units of condominium projects.

76. *Dan J. Sheehan Co.*, 312 Ga. App. at 787-88, 720 S.E.2d at 261.

77. *Id.* at 788, 720 S.E.2d at 261.

78. *Id.*

denied the contractor's motion and granted the unit owners' motion. The contractor appealed these rulings.⁷⁹

The court of appeals began its analysis by stating that to prevail on its lien foreclosure claim against the unit owners, the contractor had to prove either that it had a contract with them or that the unit owners had consented to a contract under which improvements were made.⁸⁰ Affirming the trial court, the court stated that "there [was] no finding that a contract existed" between the contractor and the association and "no showing that the unit owners had consented to" such a contract (assuming it existed), as opposed to merely consenting to the work that the contractor performed on their property.⁸¹

In *Georgia Primary Bank v. Atlanta Paving, Inc.*,⁸² a subcontractor provided labor and materials to a general contractor for use on the owner's property. Thereafter, a bank closed on a loan to the owner. The loan funds were to be used to fund additional construction and to pay off another loan.⁸³

After the loan closing, but before the bank recorded its security deed, the subcontractor recorded its mechanics' and materialmen's lien. The subcontractor obtained a consent judgment against the general contractor for the debt and then filed the subject lien foreclosure action. The bank intervened, claiming its security deed had priority over the subcontractor's lien. The trial court granted summary judgment in favor of the subcontractor, and the bank appealed.⁸⁴

On appeal, the court first held that the lien was superior to the security deed because it had been recorded first.⁸⁵ Then, it addressed the bank's contention that a contractor's affidavit signed by the general contractor at the loan closing dissolved the lien under O.C.G.A. § 44-14-361.2(a).⁸⁶ The court held that the affidavit was invalid as a dissolution affidavit because it merely stated that potential lien claimants had been "or will be" paid with amounts mentioned in the affidavit that would be received by the general contractor.⁸⁷ It did not state, as required by O.C.G.A. § 44-14-361.2(a), that "the agreed price or

79. *Id.* at 789, 720 S.E.2d at 261.

80. *Id.* at 789-90, 720 S.E.2d at 262.

81. *Id.* at 790, 720 S.E.2d at 262.

82. 309 Ga. App. 851, 711 S.E.2d 409 (2011).

83. *Id.* at 851, 711 S.E.2d at 409-10.

84. *Id.* at 851-53, 711 S.E.2d at 410.

85. *Id.* at 854, 711 S.E.2d at 411.

86. *Id.* at 854-55, 711 S.E.2d at 411-12.

87. *Id.* at 855, 711 S.E.2d at 412.

reasonable value of the labor, services, or materials *has been paid* or waived in writing by the lien claimant.⁸⁸

VIII. ARBITRATION

In *Riddick v. Williams & Bowling Developers, LLC*,⁸⁹ homeowners sued a builder entity and its principals for construction issues. The trial court compelled arbitration. The arbitrator issued an award on April 7, 2007, in favor of the homeowners and against the builder entity. No damages were awarded against the principals. On April 21, 2008, slightly more than a year after the award, the trial court directed the parties to seek clarification about whether the arbitrator had considered the homeowners' claims against the principals. The arbitrator responded that it had considered and rejected those claims. That response, dated May 28, 2008, was apparently not received by the parties until May 6, 2009.⁹⁰

On January 7, 2010, which was thirty-three months after the award, the homeowners filed a motion to confirm the arbitrator's award. The trial court denied the motion as untimely. The homeowners appealed.⁹¹ The Georgia Court of Appeals affirmed the trial court, citing O.C.G.A. § 9-9-12, which states, in relevant part, that "[t]he [trial] court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified *by the court*"⁹² According to the court, the timely filing of an application for confirmation is a prerequisite to confirmation.⁹³

88. *Id.* at 855, 711 S.E.2d at 411-12; *see also* O.C.G.A. § 44-14-361.2.

89. 311 Ga. App. 666, 716 S.E.2d 776 (2011).

90. *Id.* at 666, 716 S.E.2d at 776-77.

91. *Id.* at 666, 716 S.E.2d at 777.

92. *Id.* at 667, 716 S.E.2d at 777 (alteration in original); *see also* O.C.G.A. § 9-9-12 (2007).

93. *Riddick*, 311 Ga. App. at 667, 716 S.E.2d at 777.
