

# Mercer Law Review

---

Volume 49  
Number 1 *Annual Survey of Georgia Law*

Article 10

---

12-1997

## Real Property

T. Daniel Brannan

William J. Sheppard

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Brannan, T. Daniel and Sheppard, William J. (1997) "Real Property," *Mercer Law Review*: Vol. 49 : No. 1 , Article 10.

Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol49/iss1/10](https://digitalcommons.law.mercer.edu/jour_mlr/vol49/iss1/10)

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

# Real Property

by T. Daniel Brannan\*  
and  
William J. Sheppard\*\*

## I. INTRODUCTION

This Article surveys the case law and legislative developments in the Georgia law of real property from June 1, 1996 to May 31, 1997. The authors do not endeavor to chronicle every case decided or address each action by the Georgia Legislature during that period. Instead, they focus on those cases and statutory enactments that are likely to have some particular significance for legal practitioners in their day-to-day practice or that establish some new principle of law. During the past year, some of the more significant developments in real property law have come from the legislature, including the passage of the Georgia Electronic Signature Act.<sup>1</sup>

## II. TITLE TO LAND

During the survey period, there were several interesting cases involving disputes over title to land, including a few cases of first impression for Georgia courts. The issue in one case, *Thornton v. Carpenter*,<sup>2</sup> was whether Carpenter qualified as a bona fide purchaser for value of realty and was entitled to protection against the claims of an incompetent grantor seeking to set aside the conveyance. The property at issue was conveyed by Ms. Thornton, an incompetent, to her

---

\* Partner in the firm of Morris, Manning & Martin, L.L.P., Atlanta, Georgia. Georgia State University (A.B., 1979); Mercer University (J.D., 1982). Member, State Bar of Georgia.

\*\* Associate of the firm of Morris, Manning & Martin, L.L.P., Atlanta, Georgia. Emory University (B.A., 1986); Mercer University (J.D., 1992). Member, State Bar of Georgia.

1. 1997 Ga. Laws 1052, § 1 (codified at O.C.G.A. § 10-12-1 to -5 (Supp. 1997)).

2. 222 Ga. App. 809, 476 S.E.2d 92 (1996).

son and attorney-in-fact.<sup>3</sup> The son then sold the property to Moody, who had notice of the claim of another of Ms. Thornton's sons challenging the validity of the conveyance to the first son. Subsequently, Moody conveyed the property by quitclaim deed to Carpenter, and Carpenter later sold a portion of the subject property to Edenfield. The second son, who was appointed as Ms. Thornton's guardian, filed suit against Carpenter and Edenfield seeking to set aside the conveyances and to regain the property.<sup>4</sup>

At trial, apparently in an attempt to show that Carpenter was not a bona fide purchaser, plaintiff contended that Moody was acting as Carpenter's agent for purposes of acquiring the property formerly owned by Ms. Thornton and that, consequently, Carpenter should be charged with notice given to Moody of Ms. Thornton's incompetence. Carpenter submitted an affidavit stating that no agency relationship existed between him and Moody and that he had no knowledge of plaintiff's claims prior to acquiring title to the property. Plaintiff presented no evidence to contradict that affidavit. Plaintiff also contended that Carpenter was put on constructive notice of defects in Moody's title to the property as a result of the initial transfer of the property from Ms. Thornton to her son, who was also her attorney-in-fact. Finally, plaintiff contended that the conveyance by Moody to Carpenter by quitclaim deed should be construed to charge Carpenter with constructive notice of defects in Moody's title. The trial court granted summary judgment, and plaintiff appealed.<sup>5</sup>

The court of appeals agreed that Carpenter was in fact a bona fide purchaser.<sup>6</sup> First, the court held that an assertion of an agency relationship unsupported by specific facts and made by an outsider to the relationship, is insufficient to refute a denial of an agency relationship made by a purported party thereto.<sup>7</sup> Because Carpenter's testimony that Moody was not his agent was uncontroverted by any facts presented by plaintiff, no question of fact was presented for trial.<sup>8</sup> Second, the court rejected the second son's argument that the manner of the conveyance by Ms. Thornton imposed a burden of inquiry upon

---

3. *Id.* at 809, 476 S.E.2d at 93. After the transfer, pursuant to O.C.G.A. section 29-5-1 (1997), Ms. Thornton was judicially determined to be incapacitated as of a date prior to the transfer. 222 Ga. App. at 811, 476 S.E.2d at 94.

4. 222 Ga. App. at 809, 476 S.E.2d at 93.

5. *Id.* at 809-14, 476 S.E.2d at 93-95.

6. *Id.* at 809, 476 S.E.2d at 93.

7. *Id.* at 812, 476 S.E.2d at 94 (citing *McDaniel v. Peterborough Cablevision*, 206 Ga. App. 437, 425 S.E.2d 424 (1992)).

8. *Id.* at 813, 476 S.E.2d at 95.

persons dealing with the property.<sup>9</sup> The court reasoned that Ms. Thornton conveyed the property to the first son as her son and not as her attorney-in-fact.<sup>10</sup> Finally, the court held that Moody's conveyance to Carpenter by quitclaim deed did not alone constitute notice of any claims against Moody as grantor.<sup>11</sup>

However, the appellate court disagreed with the trial court about the effect of Carpenter's status as a bona fide purchaser. Rather than relying on Official Code of Georgia Annotated ("O.C.G.A.") section 23-1-19,<sup>12</sup> the court found that O.C.G.A. section 13-3-24(a)<sup>13</sup> was controlling.<sup>14</sup> Under section O.C.G.A. 13-3-24, the controlling question was whether Ms. Thornton was lucid at the moment she made the transfer to her first son.<sup>15</sup> Because that issue was for the jury to determine, the court reversed and remanded for trial.<sup>16</sup>

*Williams v. Brown*<sup>17</sup> concerned whether the meaning of the word "children" in deeds conveying remainder interests includes illegitimate children. Two tracts of land were involved—a twenty-five-acre tract and a one-hundred-acre tract. The deed to the twenty-five-acre tract of land stated that the land was transferred to Ralph Miller upon Milton Miller's death. Upon Ralph Miller's death, the land was to be transferred to "his children then living."<sup>18</sup> If none existed, the land reverted to Milton Miller's estate. The deed to the one-hundred-acre tract stated

---

9. *Id.*

10. *Id.* at 812, 476 S.E.2d at 95.

11. *Id.* at 813, 476 S.E.2d at 95.

12. O.C.G.A. § 23-1-19 (Supp. 1997).

13. *Id.* § 13-3-24(a) (1982).

14. 222 Ga. App. at 813, 476 S.E.2d at 95. Section 13-3-24(a) states:

The contract of an insane, a mentally ill, a mentally retarded, or a mentally incompetent person who has never been adjudicated to be insane, mentally ill, mentally retarded, or mentally incompetent to the extent that he is incapable of managing his estate as prescribed by this Code is not absolutely void but only voidable, except that a contract made by such person during a lucid interval is valid without ratification.

O.C.G.A. § 13-3-24(a).

15. 222 Ga. App. at 813, 476 S.E.2d at 95.

16. *Id.* at 813, 476 S.E.2d at 96. As an instruction for the trial court, the court of appeals discussed the degree to which plaintiff would be required to make restitution if the jury determined that Ms. Thornton was incompetent at the time of the transfer. *Id.* at 814, 476 S.E.2d at 95-96. Specifically, the court held that restitution need be made, if at all, only to the immediate grantee from Ms. Thornton. *Id.*, 476 S.E.2d at 96. Accordingly, if plaintiff prevailed, Carpenter and Edenfield would be entitled to nothing from plaintiff. Because Carpenter acquired the property from Moody through a quitclaim deed, Carpenter likely would have no recourse to recover the price he paid.

17. 267 Ga. 215, 476 S.E.2d 753 (1996).

18. *Id.* at 215-16, 476 S.E.2d at 754.

that the land was transferred to Ralph and Eloise Miller upon Milton Miller's death. Upon Ralph and Eloise Miller's death, the land was to be transferred to "their children then living."<sup>19</sup> If no children existed, the land reverted to Milton Miller's estate.<sup>20</sup>

Eloise Miller predeceased Ralph Miller. At the time of Ralph's death, he and Eloise had no children together, but Ralph had three illegitimate children. The heirs of Milton Miller claimed that those children had no interest in either of the tracts, and the trial court agreed. Ralph's children appealed.<sup>21</sup>

The question before the supreme court was whether the illegitimate children were "children" under either of the deeds. The court declared that it must ascertain the intent of the grantor.<sup>22</sup> To do so, the court looked to the law at the time the deeds were drafted.<sup>23</sup> In 1961 the law provided that "children" in instruments of conveyance meant legitimate children unless there was evidence of a specific contrary intent.<sup>24</sup> Because the court found no evidence that Milton Miller specifically intended to convey to illegitimate children, the court concluded that Miller could only have meant legitimate children.<sup>25</sup> Therefore, the court upheld the trial court ruling that the three illegitimate children were not entitled to any interest in either of the tracts of land.<sup>26</sup>

Justice Sears disagreed with the majority view that illegitimate children were not "children" under the deed to the twenty-five-acre tract.<sup>27</sup> Justice Sears maintained that Milton Miller's intent must be determined by reading the two deeds together.<sup>28</sup> One deed conveyed the property to Ralph's and Eloise's ("their") children, while the other conveyed the property to Ralph's ("his") children. Justice Sears opined that the different language in the deeds showed that the grantor specifically intended the twenty-five-acre tract of land to go to all of Ralph's children, regardless of their mother's identity, while the deed to the one-hundred-acre tract showed the grantor's intent to convey that tract only to the children of Ralph and Eloise.<sup>29</sup>

---

19. *Id.*

20. *Id.* at 216, 476 S.E.2d at 754.

21. *Id.*

22. *Id.*, 476 S.E.2d at 755 (citing *Banks v. Morgan*, 163 Ga. 468, 136 S.E. 434 (1927)).

23. *Id.* (citing *Thomas v. Trust Co. Bank*, 247 Ga. 693, 279 S.E.2d 440 (1981)).

24. *Id.* at 217, 476 S.E.2d at 755 (citing *Pasley v. State*, 215 Ga. 768, 113 S.E.2d 454 (1960)).

25. *Id.*

26. *Id.*

27. *Id.* at 218-19, 476 S.E.2d at 755-56 (Sears, J., dissenting). Justice Hunstein joined Justice Sears in her opinion.

28. *Id.* at 219, 476 S.E.2d at 756-57.

29. *Id.*, 476 S.E.2d at 756.

Further, Justice Sears dissented because the majority opinion was contrary to public policy and to the court's other decisions regarding children born out of wedlock.<sup>30</sup> The concept of virtual legitimization allows an illegitimate child to inherit from the father's estate upon a showing that the child is in fact the father's child and that the father wished the child to share in the estate.<sup>31</sup> This concept is consistent with principles of equal protection that prevent states from discriminating based on immutable attributes.<sup>32</sup> Imposing disabilities on an illegitimate child is contrary to the basic concept that legal burdens should bear a relationship to individual responsibility or wrongdoing.<sup>33</sup> Justice Sears stated that "nothing in our case law prevents the application of these sound principles to the transfer of land deeds," as it is "unduly harsh to make children pay the penalty for the misconduct of their parents."<sup>34</sup>

The supreme court faced another issue of first impression in *Leeds Building Products, Inc. v. Sears Mortgage Corp.*<sup>35</sup> This case concerned the effect of a recorded security deed that, although defective, appeared proper on its face. In *Leeds Building Products*, Peach Communities, Inc. ("PCI"), a residential home builder, purchased construction materials on credit from Leeds Building Products, Inc. ("Leeds"). To secure repayment of the purchase price, PCI executed security deeds to Leeds on the properties PCI was developing. However, the unofficial witness to those instruments never saw PCI's representative sign the deeds. Thereafter, the defective deeds were recorded in the land records of the county where the properties were located.<sup>36</sup>

Plaintiffs purchased or financed purchases of the homes that had been pledged to Leeds by PCI. Prior to purchasing those homes, plaintiffs performed title searches regarding the properties. However, those title searches failed to disclose the existence of Leeds' security deeds, and the debt from PCI to Leeds was not satisfied at the time plaintiffs closed on their respective transactions. Thereafter, Leeds demanded that plaintiffs satisfy the security deeds and stated its intention to foreclose the security deeds if payments were not made. Plaintiffs filed an action

---

30. *Id.* at 220, 476 S.E.2d at 757.

31. *Id.* at 218, 476 S.E.2d at 756.

32. *Id.* (citing *Parham v. Hughes*, 441 U.S. 347, 351 (1979)).

33. *Id.* (citing *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 620-21 (1973)).

34. *Id.* at 220, 476 S.E.2d at 757.

35. 267 Ga. 300, 477 S.E.2d 565 (1996).

36. *Id.* at 300, 477 S.E.2d at 567.

seeking damages for Leeds' wrongful declaration of default, wrongful attempt to foreclose, fraud, and litigation expenses.<sup>37</sup>

The parties filed cross motions for summary judgment, and the trial court granted summary judgment to Leeds. The court of appeals reversed the principal ruling by the trial court and held that although the deeds were properly recorded and facially valid, they did not provide notice of Leeds' claim because they were not properly attested or acknowledged.<sup>38</sup>

The supreme court noted that it had not previously addressed whether a recorded deed that was not facially defective provided notice to subsequent purchasers sufficient to maintain the priority of the earlier creditor under O.C.G.A. section 44-2-1.<sup>39</sup> After a brief analysis, however, the court concluded that "a security deed which has no facial defects as to attestation is entitled to be recorded, and, once filed, provides constructive notice to subsequent purchasers."<sup>40</sup> The court relied on three sources to support its finding. First, the court stated that prior decisions from Georgia appellate courts implied that a deed containing only latent defects provides constructive notice to subsequent purchasers.<sup>41</sup> Second, the court noted that a majority of other jurisdictions "have recognized that a defect in the acknowledgment of an instrument required for recordation, which is not apparent on the face of the instrument, does not prevent the recordation from providing constructive notice to subsequent bona fide purchasers."<sup>42</sup> Third, the court found this majority rule to be consistent with the purposes of Georgia's statutory recording scheme and "consistent with . . . modern commercial practice."<sup>43</sup> To clarify the status of the law, the supreme court overruled previously decided cases that implied that a latently defective attestation negated the constructive notice provided by an otherwise properly recorded deed.<sup>44</sup>

---

37. *Id.*

38. *Id.* at 301, 477 S.E.2d at 567. The court of appeals agreed with the lower court's finding that there was no evidence of fraud by Leeds. *Id.* Therefore, the case was reversed in part and affirmed in part. *Id.* at 302, 477 S.E.2d at 568.

39. *Id.*, 477 S.E.2d at 567; O.C.G.A. § 44-2-1 (1991).

40. 267 Ga. at 300, 477 S.E.2d at 566-67.

41. *Id.* (citing *Glover v. Cox*, 137 Ga. 684, 73 S.E. 1068 (1912); *Nalley Chevrolet, Inc. v. California Bank*, 100 Ga. App. 197, 110 S.E.2d 577 (1959), *overruled on other grounds* by *Whitehead v. Southern Discounts Co.*, 109 Ga. App. 126, 135 S.E.2d 496 (1964)).

42. *Id.* at 302, 477 S.E.2d at 568 (citing H.D. Warren, *Record Notice—Acknowledgment*, 59 A.L.R.2d 1316, § 25 (1958)).

43. *Id.*

44. *Id.* (overruling *White v. Magarahan*, 87 Ga. 217, 13 S.E. 509 (1891), and *Propex v. Todd*, 89 Ga. App. 308, 79 S.E.2d 346 (1953), to the extent they were inconsistent with the holding).

It should be noted that O.C.G.A. section 44-14-33, which was at issue in *Leeds Building Products*, was amended effective July 1, 1995 to include a statement that "[i]n the absence of fraud, if a mortgage is duly filed, recorded, and indexed on the appropriate county land records, such recordation shall be deemed constructive notice to subsequent bona fide purchasers."<sup>45</sup> This amendment resolves the issue that was before the court in *Leeds Building Products*, at least with regard to security deeds executed after the effective date of that amendment. However, the holding leaves open the issue of whether that amendment applies retroactively to deeds executed before July 1, 1995 that contain latent defects other than in the method of attestation.<sup>46</sup>

In *Reidling v. Holcomb*,<sup>47</sup> purchaser Greg Reidling sued realtors Larry Holcomb and Jack Waldrip for negligence and landowner Jack Hulseley for unjust enrichment. In May 1995 Reidling was shown subdivision property by a salesman allegedly working for Holcomb and Waldrip. The salesman showed Reidling an outdated subdivision plat that incorrectly identified the property as Lot 4. The property that Reidling was shown was in fact Lot 1. Subsequently, Reidling purchased property incorrectly identified in the contract but correctly identified in the warranty deed. Reidling, a builder, completed seventy-five percent of the construction on a new home on Lot 1 of the subdivision under the mistaken impression that it was the parcel he had purchased. Jack Hulseley, who owned Lot 1, discovered the house on his lot and informed Reidling that he was taking possession of the house and lot.<sup>48</sup>

The court of appeals upheld the trial court's grant of summary judgment for Hulseley, reasoning that the sole cause of Reidling's damages was his own conduct.<sup>49</sup> Reidling was thus barred from recovery. The court stated that the purpose of the recording statute is to afford constructive notice to everyone of the existence of the recordation.<sup>50</sup> The warranty deed from the grantors to Reidling incorporated by reference a recorded plat that correctly identified Reidling's parcel. Because the deed referenced the recorded plat in the legal description,

---

45. O.C.G.A. § 44-14-33 (1982 & Supp. 1997).

46. 267 Ga. at 300 n.1, 477 S.E.2d at 567 n.1. The court specifically distinguished the facts in this case from those in *Higdon v. Gates*, 238 Ga. 105, 231 S.E.2d 345 (1976). 267 Ga. at 300, 477 S.E.2d at 567. In *Higdon* the deed contained a defect obvious on its face. Therefore, the deed, even though recorded, failed to provide any constructive notice to subsequent purchasers of the affected property under Chapter 2 of Title 44. *Id.*

47. 225 Ga. App. 229, 483 S.E.2d 624 (1997).

48. *Id.* at 230, 483 S.E.2d at 625.

49. *Id.* at 232, 483 S.E.2d at 627.

50. *Id.* at 230, 483 S.E.2d at 625.



it had the same effect as if the plat were attached to the deed.<sup>51</sup> The court opined that a title examination, which Reidling failed to perform, would have disclosed the mistake.<sup>52</sup> Therefore, the court held that Reidling was under constructive notice as to the true owner of the land.<sup>53</sup>

*Cobb County v. Crew*<sup>54</sup> concerned an action brought against Cobb County ("County") to establish and quiet title to three tracts of land.<sup>55</sup> The tracts were once part of a larger tract owned by Mrs. A.E. Collins, across which the Georgia Railway and Electric Company ("GREC") acquired an easement by way of condemnation in the early 1900s.<sup>56</sup> Five years after the condemnation, the property was subdivided and conveyed; the deed referred to a subdivision plat filed of record in 1908. The plat showed a street two hundred feet wide at the eastern end of the property. The County paved an 18.5-foot-wide portion of the area shown on the plat as a street.<sup>57</sup>

GREC used the easement for a trolley line until 1948 when the tracks were removed. Thereafter, a driveway was constructed connecting Tract 1 to the paved road; that driveway ran across Tracts 3 and 4. Crew, Sr. occupied Tract 1 from 1954 until 1990, first as a lessee, then as the owner of the property. The deed by which Crew, Sr. acquired title to Tract 1 described the easternmost portion of the parcel as the paved road. Crew, Sr. also used Tracts 3 and 4 continuously from the date he first occupied Tract 1. He "planted gardens which covered large portions of each tract" and "maintained and paved the driveway."<sup>58</sup>

Crew, Jr. contended that his father owned Tracts 3 and 4 by prescription. In turn, the County argued that it acquired title to Tracts 3 and 4 by dedication from Mrs. Collins. The County asserted that when the plat was recorded in 1908, the County received the entire two hundred-foot width of the dedication shown on the plat as one street. Further, the County asserted that, by paving a portion of the dedication, it accepted dedication of the entire width of the road indicated on the plat.

---

51. *Id.* at 231, 483 S.E.2d at 626.

52. *Id.*

53. *Id.* Reidling's unjust enrichment claim was dismissed because no evidence existed that Hulsey was aware of Reidling's mistake or intentionally failed to act while Reidling constructed the house. *Id.*, 483 S.E.2d at 626-27.

54. 267 Ga. 525, 481 S.E.2d 806 (1997).

55. *Id.* at 525, 481 S.E.2d at 808. After the action was filed, the parties resolved their dispute concerning one of the tracts. *Id.* at 526 n.1, 481 S.E.2d at 808 n.1.

56. *Id.* at 528 n.3, 481 S.E.2d at 810 n.3 (citing O.C.G.A. § 22-2-85 (1982)).

57. *Id.* at 526, 481 S.E.2d at 808.

58. *Id.*

After a special master concluded that the petitioners were entitled to all three tracts of land, the County appealed.<sup>59</sup>

To establish title to land through dedication, an entity must prove: (1) intent of the owner to dedicate the land to public use and (2) acceptance of the dedication by the public.<sup>60</sup> The court concluded that based on the evidence, the special master could have found that Mrs. Collins intended to dedicate two separate streets: one in the area of the paved street and another on Tract 3 with the trolley car easement separating the two streets.<sup>61</sup> That holding was based on the fact that the trolley line already existed at the time Mrs. Collins' plat was recorded. Therefore, the court concluded that it was unreasonable to conclude that Ms. Collins intended to dedicate that portion of the two hundred-foot right-of-way to public use.<sup>62</sup> Furthermore, the court found that the County's failure to exercise any control over Tract 3 for ninety years created a presumption that the public had not accepted the dedication of that tract.<sup>63</sup> Therefore, Crew, Sr. was declared the title owner of Tract 3.<sup>64</sup>

### III. LAND LINES AND BOUNDARIES

*Martin v. Patton*<sup>65</sup> includes a comprehensive discussion by the court of appeals on the law of determining boundaries. That discussion provides an excellent resource for practitioners representing parties with disputes over their property boundaries.

The land at issue in *Martin* was in Land Lots 76 and 77 of the fourth district in Spalding County. A survey of the land conducted in 1931 used courses and distances to precisely describe the perimeter of the property; however, the location of the land lot line that ran through the property was not precisely located. The survey did describe the larger parcel (in Land Lot 76) as having "83 25/100 +" acres and the smaller parcel (in Land Lot 77) as having "59 85/100 +" acres.<sup>66</sup> Later deeds transferring the larger parcel described the parcel as "eighty-three and twenty-five one hundredths (83.25) acres" in Land Lot 76, eliminating

---

59. *Id.*

60. *Id.* at 527, 481 S.E.2d at 809 (citing *Moreland v. Henson*, 256 Ga. 685, 353 S.E.2d 181 (1987)).

61. *Id.* at 526, 481 S.E.2d at 808.

62. *Id.* at 528, 481 S.E.2d at 810.

63. *Id.*

64. *Id.* As a result of the court ruling with regard to Mrs. Collins' intent to dedicate two separate streets, it followed naturally that the County failed to establish her intent to dedicate Tract 4 (which ran between the two streets). Therefore, the court affirmed the decision declaring that title to that tract was in Crew, Sr. *Id.*

65. 225 Ga. App. 157, 483 S.E.2d 614 (1997).

66. *Id.* at 157, 483 S.E.2d at 617.

the "+" and excluding the phrase "all that tract or parcel lying and being in Land Lot 76," which had preceded the statement of acreage.<sup>67</sup>

In 1955 the owner of the larger parcel hired the original surveyor of the property to survey the line between Land Lots 76 and 77 and mark it with iron stakes. Thereafter, the owner of the smaller parcel built a fence along the line marked in the 1955 survey ("Westbrook Survey"). In 1982 the owner of the smaller parcel died, and a survey ("Storey Survey") was conducted of that tract. The Storey Survey resulted in the boundary of the smaller parcel being located 129 feet west of the fence (on the larger parcel). The owner of the larger parcel then commissioned another survey. That survey identified three possible locations for the property line between the parcels: (1) along the line established in the Storey Survey (the easternmost line), (2) along the line established by the Westbrook Survey (the central line), and (3) along a line based upon the boundaries of land lots located north and south of the disputed property (the westernmost line).<sup>68</sup>

At trial the jury was given its choice of the three lines to determine the boundary between the two parcels. After the jury concluded that the Storey Survey established the correct line, the trial court entered a decree on the verdict. The owner of the larger parcel filed a motion for a new trial. That motion was denied, and this appeal followed.<sup>69</sup>

Appellant first argued that by erecting a fence on the line from the Westbrook Survey, appellee had acquiesced to that boundary line. The court rejected that argument, holding that a fence erected on one's own land does not establish an agreement to a boundary line as a matter of law even if the fence is erected on or near a boundary line. Instead, the intent of the parties controls.<sup>70</sup> The evidence regarding the purpose of the fence was disputed at trial. However, because the jury resolved that issue against appellant, that determination could not be disturbed on appeal.<sup>71</sup>

Next, appellant argued that the trial court erred as a matter of law by "not finding that the location of a land lot line takes precedence over acreage cited in deeds of coterminous landowners when both deeds cite the land lot line as the common boundary."<sup>72</sup> The court noted that in an action to quiet title, the jury's verdict is intended only to resolve disputed issues of fact. If the jury erroneously applies the law, the trial

---

67. *Id.* at 158, 483 S.E.2d at 617.

68. *Id.* at 161, 483 S.E.2d at 620.

69. *Id.* at 159, 483 S.E.2d at 618.

70. *Id.* at 160, 483 S.E.2d at 619.

71. *Id.*

72. *Id.* at 161, 483 S.E.2d at 619.

court should set aside the verdict.<sup>73</sup> The court stated that when the description in a deed refers to natural or artificial boundaries that may be definitely ascertained, any description inconsistent with that boundary must yield.<sup>74</sup> The original plat in this case clearly referred to the land lot line as the boundary. During the trial, appellee's expert admitted that both the Westbrook Survey and the 1994 Survey located the actual line between Land Lots 76 and 77. Based on that admission, the court concluded that there was "no probative evidence to support the jury's verdict" that another line was the true boundary.<sup>75</sup> Therefore, the court vacated the jury's verdict and remanded the case for a new trial.<sup>76</sup>

#### IV. EASEMENTS AND RIGHTS-OF-WAY

At issue in *Sadler v. First National Bank*<sup>77</sup> was the disputed existence and use of an easement on property belonging to Sadler that adjoined property leased by First National Bank of Baldwin County ("Bank"). A plat registered in conjunction with a 1975 transaction between Sadler and the Bank's lessor showed the property in question as an "access road."<sup>78</sup> The specified access road was sixty-one feet wide and three hundred feet long with approximately two-thirds of its length belonging to the Bank's lessor. The Bank subsequently paved a portion of the access road for parking spaces, used the road to provide access to its property, and landscaped other portions of the tract. Sadler contended that even if an easement had come into existence, the Bank had abandoned the easement. The trial court concluded that the Bank, through its lease, was entitled to an easement to use the access road but found as a matter of fact that the Bank had abandoned those parts of the access road that it did not use to access its leased tract.<sup>79</sup>

On appeal the supreme court agreed with the trial court ruling that the Bank had an easement but reversed the finding of abandonment.<sup>80</sup> "It is well established that when property is subdivided and a conveyance is made according to a recorded plat, the purchaser acquires an

---

73. *Id.*

74. *Id.* at 166, 483 S.E.2d at 623.

75. *Id.*

76. *Id.*

77. 267 Ga. 122, 475 S.E.2d 643 (1996).

78. *Id.* at 122, 475 S.E.2d at 644.

79. *Id.*

80. *Id.* at 122-23, 475 S.E.2d at 644-45.

easement in areas set aside for the purchaser's use.<sup>81</sup> The court reasoned that the deed in the 1975 transaction recited that the tract being conveyed was part of lands previously conveyed to Sadler.<sup>82</sup> Consequently, the court held that an easement was created by express grant and not by implication as held by the trial court.<sup>83</sup> The "doctrine of extinction by nonuse" does not apply when an easement is created by express grant.<sup>84</sup> Moreover, the court stated that evidence of an intent to abandon, in addition to nonuse, is required to show abandonment of an easement created by implication.<sup>85</sup> The court found that even if the access road was created by implication, the Bank plainly evidenced its intent to exert control over the entire easement through its use and maintenance of the parking facilities and landscaping.<sup>86</sup>

*Descendants of Bulloch, Bussey & Co. v. Fowler*<sup>87</sup> is another case decided during the survey period that addressed a question of first impression. That case involved competing claims to an abandoned railroad right-of-way. The original owner of the land conveyed fee simple title to Bulloch, Bussey & Co. ("Bulloch") in 1896. The land encompassed a railroad right-of-way at that time, but no mention was made of the right-of-way in the deed to Bulloch. Bulloch conveyed a portion of the property to Fowler. The deed for that transaction designated the railroad right-of-way as the boundary to Fowler's tract. A dispute arose over ownership of the right-of-way when the railroad abandoned it. Bulloch's successor-in-interest claimed title to the entire right-of-way, while Fowler claimed that he owned the land up to the centerline of the former right-of-way. The trial court ruled in favor of Bulloch, and Fowler appealed.<sup>88</sup>

On appeal the court stated that a deed identifying a road as a boundary is generally construed as conveying the grantor's interest in the road (up to the centerline) unless clearly intended otherwise.<sup>89</sup> That rule "avoids the undesirable result of having long, narrow strips of land owned by people other than the adjacent landowner."<sup>90</sup> The court

---

81. *Id.* at 122, 475 S.E.2d at 644 (citing *Walker v. Duncan*, 236 Ga. 331, 223 S.E.2d 675 (1976); *Tietjen v. Meldrin*, 169 Ga. 678, 151 S.E. 349 (1930)).

82. *Id.*

83. *Id.* (citing *Fairfield Corp. No. 1 v. Thornton*, 258 Ga. 805, 374 S.E.2d 727 (1989); *Smith v. Bruce*, 241 Ga. 133, 244 S.E.2d 559 (1978)).

84. *Id.*

85. *Id.* at 123, 475 S.E.2d at 645.

86. *Id.*

87. 267 Ga. 79, 475 S.E.2d 587 (1996).

88. *Id.* at 80, 475 S.E.2d at 589.

89. *Id.* at 81, 475 S.E.2d at 589.

90. *Id.* (citing 1 GEORGE A. PINDAR & GEORGINE S. PINDAR, *GEORGIA REAL ESTATE LAW* § 13-10 (4th ed. 1993); *Johnson v. Arnold*, 91 Ga. 659, 18 S.E. 370 (1893)).

adopted that general rule for "use in construing deeds that have as a boundary a railroad right-of-way."<sup>91</sup> Therefore, the court concluded that the deed from Bulloch to Fowler conveyed title to property extending to the centerline of the right-of-way.<sup>92</sup>

Like *Descendants of Bulloch*, the case of *Mersac, Inc. v. National Hills Condominium Ass'n*<sup>93</sup> presented an issue of first impression. Mersac developed a condominium complex called The Summit. Mersac sold the units to the individuals who comprised National Hills Condominium Association. Access to the units from the public road was by a paved road called Mersac Court. That road was part of the common elements of the condominium and therefore was not a public road. In conveying the condominium units, Mersac failed to reserve an easement across Mersac Court. Consequently, an undeveloped parcel of land owned by Mersac was landlocked.<sup>94</sup>

Mersac filed an action for declaratory relief to establish its right to use Mersac Court to reach its undeveloped, landlocked parcel.<sup>95</sup> In seeking that relief, Mersac relied on O.C.G.A. section 44-9-40,<sup>96</sup> which permits the courts to grant an easement over private land when the petitioner's property is landlocked. The trial court held that Mersac was not entitled to use Mersac Court and issued a permanent injunction to that effect. Mersac appealed.<sup>97</sup>

The supreme court affirmed.<sup>98</sup> Although O.C.G.A. section 44-9-40 permits the courts to grant an easement over private land when property is landlocked, the court may deny that relief when the request is

---

91. *Id.*

92. *Id.*

93. 267 Ga. 493, 480 S.E.2d 16 (1997).

94. *Id.* at 494, 480 S.E.2d at 17.

95. *Id.*

96. O.C.G.A. § 44-9-40 (1982). Section 44-9-40 states in pertinent part:

(a) The superior court shall have jurisdiction to grant private ways to individuals to go from and return to their property and places of business . . . .

(b) When any person or corporation of this state owns real estate or any interest therein to which the person or corporation has no means of access, ingress, and egress and when a means of ingress, egress, and access may be had over and across the lands of any private person or corporation, such person or corporation may file his or its petition in the superior court of the county having jurisdiction [seeking to have a private way granted]; . . . however, where it appears [that the land is not landlocked or appears] otherwise unreasonable, the judge of the superior court is authorized under the circumstances to find that the condemnation and declaration of necessity constitute an abuse of discretion and to enjoin the proceeding.

97. 267 Ga. at 494, 480 S.E.2d at 17.

98. *Id.* at 495, 480 S.E.2d at 17.

"otherwise unreasonable."<sup>99</sup> The court held that "necessity [for an easement] cannot be created by one's own voluntary action in giving up reasonable access."<sup>100</sup> Because Mersac had failed to reserve access to its own land, the court concluded that granting an easement would only reward Mersac's negligence and deprive National Hills of the full use of its property.<sup>101</sup> Therefore, the supreme court upheld the trial court's finding that the grant of the easement was "unreasonable."<sup>102</sup>

Mersac also argued that it was entitled to an easement based on the theories of "implied reservation" or "prescription." The court rejected both theories.<sup>103</sup> First, Georgia does not recognize the doctrine of implied reservation. Second, to acquire an easement by prescription, the claimant bears the burden of showing that he has exercised control over the property, including the making of repairs.<sup>104</sup> On appeal Mersac omitted the transcript of the evidence and hearing from the record. Therefore, the court presumed that the trial court's factual finding that Mersac did not carry the burden was supported by the evidence.<sup>105</sup>

#### V. SALES CONTRACTS AND BROKERS

In *Scheinfeld v. Murray*,<sup>106</sup> Mark Scheinfeld, a real estate developer, executed a contract for the sale of real estate with June Murray and her daughter (collectively "Murray"). Pursuant to that contract, Murray agreed to sell Scheinfeld a tract of land "less and except for a 25,000 square foot lot, inclusive of Seller's current residence, said exact lot location to be determined by Purchaser."<sup>107</sup> The parties attached a document to the contract containing an "approximation of the Purchaser's designation of lots."<sup>108</sup> After execution of the contract, Scheinfeld notified Murray that the lot design would have to be changed. Finding the amended lot design unacceptable, Murray refused to go through with the sale.<sup>109</sup>

Scheinfeld brought an action against Murray seeking specific performance. Murray filed a motion for summary judgment, which the

---

99. *Id.* Prior to the current holding, the phrase "otherwise unreasonable" had not been interpreted by the Georgia courts. *Id.*

100. *Id.* at 494, 480 S.E.2d at 17-18.

101. *Id.*, 480 S.E.2d at 18.

102. *Id.*

103. *Id.*

104. *Id.* (citing O.C.G.A. § 44-9-54 (1982)).

105. *Id.*

106. 267 Ga. 622, 481 S.E.2d 194 (1997).

107. *Id.* at 622, 481 S.E.2d at 194.

108. *Id.*

109. *Id.*, 481 S.E.2d at 195.

trial court granted. The trial court determined that "the 'contract' sought to be performed was void for want of sufficient description [of the] boundaries and location of the 25,000 square foot lot."<sup>110</sup> Scheinfeld appealed.<sup>111</sup>

Specific performance of a contract for sale of land will not be decreed by a court of equity "unless there is a definite and specific statement of the terms of the contract"<sup>112</sup> and the contract identifies "the land to be sold with reasonable definiteness . . . [by describing] the particular tract or furnish[ing] a key by which it may be located with the aid of extrinsic evidence."<sup>113</sup> Scheinfeld contended on appeal that the preliminary designation of lots attached to the contract did indeed provide the information necessary to identify the parcel that Murray was to retain. However, it was undisputed at trial that the initial lot design "did not accurately reflect the actual site on which Murray's home was located."<sup>114</sup> Therefore, the supreme court concluded as a matter of law that the initial agreement was "void for want of sufficient description."<sup>115</sup>

Scheinfeld argued that the parties had agreed to a modification of their original contract. He based that argument on a series of post-contract documents exchanged between the parties.<sup>116</sup> However, the court noted that the original agreement required modifications to be in writing and signed by the parties. Because the record contained no documentation signed by Murray that established the property's boundaries, the court concluded that the parties did not modify their original contract so as to remedy the defect in the description.<sup>117</sup>

The holding in this case demonstrates the importance of accurately describing all realty to be conveyed. It should serve as a warning to parties to transactions to firm up all aspects of a sale prior to contracting. Otherwise, one of the parties to an "agreement to agree" may legally decide not to complete the transaction despite what may be considerable loss to the other party.

---

110. *Id.* at 622-23, 481 S.E.2d at 195.

111. *Id.* at 622, 481 S.E.2d at 195.

112. *Id.* at 623, 481 S.E.2d at 195 (quoting *Williams v. Manchester Bldg. Supply Co.*, 213 Ga. 99, 101, 97 S.E.2d 129, 130 (1957)).

113. *Id.* (quoting 2 GEORGE A. PINDAR & GEORGINE S. PINDAR, *GEORGIA REAL ESTATE LAW* § 18-11 (4th ed. 1993)).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 622, 481 S.E.2d at 196.



## VI. FORECLOSURES

In *Wright v. Barnett Mortgage Co.*,<sup>118</sup> Barnett Mortgage was the secured party under a promissory note and security deed executed by Wright's predecessor-in-interest. When Wright defaulted under the note, Barnett accelerated the entire balance and foreclosed on the property. Barnett sent notice of the foreclosure to Wright and the original debtor by certified mail. The notice to Wright was addressed to the property and was signed for by an unknown person. However, Wright lived at another address and had previously received mail from Barnett there.<sup>119</sup>

On the morning of the foreclosure, Wright notified Barnett that she had not received notice of the foreclosure. Barnett foreclosed anyway. Wright filed suit seeking to have the foreclosure set aside based on Barnett's failure to comply with the requirements of O.C.G.A. section 44-14-180.<sup>120</sup> Both the trial court and the court of appeals disagreed with Wright.<sup>121</sup>

The court stated that O.C.G.A. section 44-14-180 describes the manner in which a "true mortgage" on real estate may be foreclosed.<sup>122</sup> Among other things, that Code section requires that the secured party state the amount of its claim.<sup>123</sup> Wright complained that the notice of foreclosure from Barnett did not specify a reinstatement amount. The court rejected that argument, stating that O.C.G.A. section 44-14-180 likely did not apply to a foreclosure under a deed of power.<sup>124</sup> Moreover, Wright had failed to pay an amount that would have reinstated the loan. Therefore, the court concluded that even if section 44-14-180 applied, Wright could demonstrate no prejudice from the allegedly defective notice.<sup>125</sup>

Wright also argued that Barnett had failed to comply with the requirements of O.C.G.A. section 44-14-162.2.<sup>126</sup> Under that Code section, notice of foreclosure pursuant to a deed under power of sale must be given to the debtor in writing and sent "by registered or certified mail, return receipt requested, to the property address or to

---

118. 226 Ga. App. 94, 485 S.E.2d 583 (1997).

119. *Id.* at 94, 485 S.E.2d at 584.

120. O.C.G.A. § 44-14-180 (1982).

121. 226 Ga. App. at 96-97, 485 S.E.2d at 585-86.

122. *Id.* at 96, 485 S.E.2d at 585.

123. O.C.G.A. § 44-14-180(1).

124. 226 Ga. App. at 96, 485 S.E.2d at 585 (citing *Kennedy v. Gwinnett Commercial Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980)).

125. *Id.*

126. *Id.* at 97, 485 S.E.2d at 586; O.C.G.A. § 44-14-162.2(a) (1982).

such other address as the debtor may designate by written notice to the secured creditor."<sup>127</sup> Wright contended that Barnett was on notice that her address had changed because Barnett had previously delivered notices to her at her new address.<sup>128</sup> However, it was undisputed that Wright had not given written notice to Barnett as required under section 44-14-162.2. The court held, therefore, that Barnett had complied with the notice requirements of section 44-14-162.2 and that the foreclosure was proper.<sup>129</sup>

Based on the reasoning of *Zeller v. Home Federal Savings & Loan Ass'n*,<sup>130</sup> which was discussed in last year's survey,<sup>131</sup> Barnett sought sanctions against Wright for a frivolous appeal.<sup>132</sup> Although the court declined to award sanctions against Wright, the strong concurring opinion by Justice Smith indicates that another appeal on this issue will be dealt with harshly.<sup>133</sup>

The holding in *Southeast Timberlands, Inc. v. Haiseal Timber, Inc.*<sup>134</sup> pertained to an issue similar to that presented in *Baby Days, Inc. v. Bank of Adairsville*,<sup>135</sup> which was discussed in last year's survey—the interplay between foreclosure on real estate when the debtor is subject to independent obligations and the need to confirm the sale.<sup>136</sup> Southeast Timberlands purchased real estate from Haiseal Timber and executed a promissory note in Haiseal's favor for a portion of the purchase price. The promissory note was secured by a deed to secure debt, which referenced the note.<sup>137</sup> The security deed included a clause that provided that Southeast Timberlands had the right to have portions of the property released from the security deed upon paying Haiseal eighty percent of the proceeds gained from sales of timber from those tracts of secured property.<sup>138</sup>

---

127. 226 Ga. App. at 96, 485 S.E.2d at 585.

128. *Id.* at 94, 485 S.E.2d at 584.

129. *Id.* at 97, 485 S.E.2d at 586.

130. 220 Ga. App. 843, 471 S.E.2d 1 (1996).

131. T. Daniel Brannan et al., *Real Property*, 48 MERCER L. REV. 455, 480-81 (1996).

132. Barnett argued that "the similarity between the two cases is 'uncanny.'" 226 Ga. App. at 99, 485 S.E.2d at 586 (Smith, J., concurring specially)).

133. *Id.*

134. 224 Ga. App. 98, 479 S.E.2d 443 (1996).

135. 218 Ga. App. 752, 463 S.E.2d 171 (1995) (discussed in Brannan et al., *supra* note 131, at 482).

136. 224 Ga. App. at 101, 479 S.E.2d at 446-47.

137. The note was also secured by a personal guaranty from Southeast Timberlands' president, Jewett Tucker. *Id.*, 479 S.E.2d at 446. Because Tucker's liability is not material to the outcome of the case, his claims will not be discussed separately.

138. *Id.* at 99, 479 S.E.2d at 444-45.

Southeast Timberlands contracted with both Thompson Hardwoods, Inc. and S.M. Baxter Timber Company, granting them the right to harvest timber on certain tracts of the secured property (the "Thompson tract" and the "Baxter tract," respectively). However, before Southeast Timberlands' contract with Thompson closed, Haiseal released its security interest in the Thompson tract. Southeast Timberlands received payment in full under its contracts with Thompson and Baxter but paid Haiseal less than eighty percent of the proceeds it received from the timber harvests on the Thompson and Baxter tracts.<sup>139</sup>

Southeast Timberlands failed to make its scheduled payments under the note and security deed. Consequently, Haiseal foreclosed upon most of the property described in the security deed. However, Haiseal inadvertently omitted the Thompson tract from the foreclosure. Although the foreclosure sale resulted in a deficiency under the note of \$350,000, Haiseal did not confirm the foreclosure price.<sup>140</sup> Thereafter, Haiseal filed a complaint against Southeast Timberlands alleging that "Southeast breached the covenant contained in the deed to secure debt to pay [eighty] percent of the timber sale proceeds to Haiseal."<sup>141</sup> Haiseal sought to recover the difference between what it had been paid for timber harvested on the Thompson and Baxter tracts and a sum equal to eighty percent of what Southeast Timberlands had received from those harvests. Southeast filed motions for summary judgment and for directed verdict arguing that Haiseal's action was one seeking to recover a "deficiency" and was precluded by Haiseal's failure to confirm the foreclosure sale. The trial court denied both motions, and Southeast Timberlands appealed.<sup>142</sup>

For reasons that will become apparent, the court analyzed Southeast Timberlands' arguments on appeal separately as they related to the Thompson and Baxter tracts. First, the court acknowledged that when the debtor has an "obligation which is independent, unsecured and separate from its obligation under the note," the creditor is not barred from suing on that remaining obligation even without confirming foreclosure of the secured property.<sup>143</sup> However, the court rejected Haiseal's argument that Southeast Timberlands' obligation to remit

---

139. *Id.*

140. *Id.* Haiseal did commence a confirmation action but dismissed its petition before obtaining a ruling from the court. *Id.*

141. *Id.* at 99-100, 479 S.E.2d at 445. The complaint also "allege[d] that [Mr.] Tucker was liable based on his personal guarantee" of the note. *Id.* at 100, 479 S.E.2d at 445.

142. *Id.* at 100, 479 S.E.2d at 445.

143. *Id.*, 479 S.E.2d at 446 (citing *Kennedy v. Trust Co. Bank*, 160 Ga. App. 733, 288 S.E.2d 87 (1981); *Baby Days, Inc. v. Bank of Adairsville*, 218 Ga. App. 752, 463 S.E.2d 171 (1995)).

proceeds from timber harvested on the secured property was independent of its obligation to pay the underlying note.<sup>144</sup> The court relied on the fact that there was only one promissory note and one deed to secure debt, and it reasoned that the provision was "inextricably intertwined" in the security deed that allowed Southeast to satisfy the debt by paying Haiseal a portion of the timber proceeds from the secured property.<sup>145</sup> Because Haiseal had not confirmed the foreclosure sale with regard to the Baxter tract, the court held Southeast Timberlands was entitled to judgment as a matter of law on Haiseal's claim to proceeds from that tract.<sup>146</sup>

With regard to the Thompson tract, Southeast Timberlands argued that it was entitled to judgment because Haiseal relinquished all its rights to timber proceeds by executing the quitclaim deed. The court agreed.<sup>147</sup> Therefore, the court was not required to determine whether the action with regard to the Thompson tract was one for a deficiency judgment even though Haiseal never foreclosed on that portion of the secured property.<sup>148</sup>

It is important to note that the opinion as it relates to the Thompson tract was endorsed only by a plurality of the court. Justices Blackburn and Smith concurred specially in the result of the main opinion.<sup>149</sup> However, they, along with the three dissenting justices, disagreed with the plurality view of Haiseal's quitclaim deed. As a result, a majority believed that Haiseal's claim to a portion of the proceeds of timber from the Thompson tract was not released by the execution of that deed.<sup>150</sup> However, Justices Blackburn and Smith concluded that Haiseal's action was for a deficiency even with regard to the proceeds from the Thompson tract and was therefore barred as a matter of law.<sup>151</sup>

The authors believe that the concurring opinion correctly analyzes the issues regarding the Thompson tract. As Justice Blackburn wrote, "Haiseal foreclosed, it failed to confirm, and it may not now sue for a deficiency whether or not it failed to foreclose on a portion of the property described in the single security deed."<sup>152</sup> Any other outcome could result in secured parties foreclosing on all but a small portion of secured property, bidding in unconscionably low sums, then suing the

---

144. *Id.* at 101, 479 S.E.2d at 446.

145. *Id.*

146. *Id.*

147. *Id.* at 101-02, 479 S.E.2d at 446-47.

148. *Id.*

149. *Id.* at 102, 479 S.E.2d at 447 (Blackburn, J., concurring specially).

150. *See id.*; 224 Ga. App. at 106, 479 S.E.2d at 450 (McMurray, P.J., dissenting).

151. 224 Ga. App. at 102-04, 479 S.E.2d at 447-48 (Blackburn, J., concurring specially).

152. *Id.*, 479 S.E.2d at 447.

debtor for deficiency based on the fact that not all the property was foreclosed. That would clearly be contrary to the purpose of the confirmation statute.<sup>153</sup>

## VII. EMINENT DOMAIN AND CONDEMNATION

*Banks v. Georgia Power Co.*<sup>154</sup> involved an appeal challenging the constitutionality of O.C.G.A. section 22-3-20,<sup>155</sup> which permits condemnation of private property by corporations that generate and distribute electric power. Georgia Power sought to condemn land owned by Banks pursuant to O.C.G.A. section 22-2-100.<sup>156</sup> Banks contended that the statute was unconstitutional because it provided no objective criteria to determine the necessity for such a condemnation.<sup>157</sup>

However, the court concluded that the power company's authority to condemn was sufficiently restricted by the language of O.C.G.A. section 23-2-20 and by court decisions so that it withstood Banks' constitutional challenge.<sup>158</sup> First, the court stated that, by enacting that Code section, the legislature delegated the power to condemn property to Georgia Power and other similar entities.<sup>159</sup> That delegation was constitutional if "the purpose and policy of the legislation are clearly provided, although the method, details, making of subordinate rules, and the determination of facts to which the policy is to apply are deferred to another."<sup>160</sup> The court found that the purpose of O.C.G.A. section 22-3-20 was sufficiently clear from the terms of the statute.<sup>161</sup>

Second, the court stated that section 23-2-20 restricts the power company's right of condemnation to property that is to be used to "carry on . . . activities necessary for constructing and operating' a plant for

---

153. See O.C.G.A. § 44-14-101 (1982).

154. 267 Ga. 602, 481 S.E.2d 200 (1997).

155. O.C.G.A. § 22-3-20 (1982). Section 22-3-20 states:

Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others in order to run power lines, maintain dams, flow backwater, or carry on other activities necessary for constructing and operating such a plant, provided that the person first pays just compensation to the owner of the land to be affected.

O.C.G.A. § 22-3-20.

156. 267 Ga. at 602, 481 S.E.2d at 200 (citing O.C.G.A. § 22-2-100 (1997)).

157. *Id.* at 603, 481 S.E.2d at 202.

158. *Id.* (citing *Nolan v. Central Ga. Power Co.*, 134 Ga. 201, 67 S.E. 656 (1910); *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 62 S.E. 52 (1908); *Jones v. North Ga. Elec. Co.*, 125 Ga. 618, 54 S.E. 85 (1906)).

159. *Id.*

160. *Id.*

161. *Id.* at 604-05, 481 S.E.2d at 202-03.

generating electricity."<sup>162</sup> The court found that the power company's rights were further restricted by the principle that property may only be condemned if it is "useful, needful, and necessary for public purposes."<sup>163</sup> The court opined that property used for "the provision of electrical power for distribution and sale to the general public" was, without doubt, put to a public purpose.<sup>164</sup>

Finally, although the court acknowledged that O.C.G.A. section 22-3-20 allows the power companies some discretion to determine what property is "necessary" to provide electric power, that "discretion is not unfettered."<sup>165</sup> Under Georgia law, all condemning authorities must act in good faith in identifying property to be condemned.<sup>166</sup> Based on all these facts, the court concluded by finding that providing electric power to the general public is a public enterprise and property used for such purposes is devoted to a public use.<sup>167</sup> Therefore, O.C.G.A. section 22-3-20 delegates only the authority reasonably necessary for a public purpose and is constitutional.<sup>168</sup>

*Woods v. Department of Transportation*<sup>169</sup> is potentially a very significant decision for the plaintiff's bar. In that case the Department of Transportation ("DOT") filed a condemnation petition and deposited seventy-six thousand dollars into the court registry as just and adequate compensation. Woods was dissatisfied with the amount and appealed to a jury pursuant to O.C.G.A. section 32-3-14.<sup>170</sup> Before trial, the DOT's appraiser increased his valuation of the property to ninety thousand dollars, but the DOT failed to tender any additional amount into the court registry. At trial the jury awarded Woods \$162,000, and a final judgment was entered. Thereafter, Woods filed a motion seeking to recover attorney fees under O.C.G.A. section 9-15-14.<sup>171</sup> The trial court denied that motion based solely on its conclusion that section 9-15-14 is not applicable in eminent domain cases. Woods appealed.<sup>172</sup>

---

162. *Id.* at 603, 481 S.E.2d at 203 (quoting O.C.G.A. § 22-3-20).

163. *Id.* at 604, 481 S.E.2d at 203 (quoting *Piedmont Cotton Mills v. Georgia R.W. & Elec. Co.*, 131 Ga. 129, 136, 62 S.E. 52, 55 (1908)).

164. *Id.*

165. *Id.*

166. *Id.* (citing *Miles v. Brown*, 223 Ga. 557, 156 S.E.2d 898 (1967)).

167. *Id.*

168. *Id.* at 605, 481 S.E.2d at 203.

169. 225 Ga. App. 29, 482 S.E.2d 396 (1997), *cert. granted*, 1997 Ga. LEXIS 544.

170. *See* O.C.G.A. § 32-3-14 (1996).

171. O.C.G.A. § 9-15-14 (1993 & Supp. 1997).

172. 225 Ga. App. at 29, 482 S.E.2d at 396. In fact, the court granted Woods' application for discretionary appeal. *Id.*

After a lengthy analysis, the court of appeals reversed the trial court decision.<sup>173</sup> The court began its analysis by acknowledging the historical rule that the phrase "just and adequate compensation" as contained in the Georgia Constitution did not include the condemnee's attorney fees and expenses of litigation.<sup>174</sup> However, the court opined that a provision added to the Georgia Constitution in 1983 somewhat altered the general rule.<sup>175</sup> Article I, section 3, paragraph 1(d) states: "The General Assembly may provide by law for the payment by the condemnor of reasonable expenses, including Attorneys' fees, incurred by the condemnee in determining just and adequate compensation."<sup>176</sup> O.C.G.A. section 9-15-14, enacted in 1986, provides that under certain circumstances a trial court is authorized to award attorney fees in "any civil action."<sup>177</sup> The court in *Woods* reasoned that the plain and clear language of O.C.G.A. section 9-15-14 established the intent of the General Assembly that the statute should apply to condemnation proceedings because "a condemnation proceeding is a 'civil action.'"<sup>178</sup> Therefore, the court concluded that the trial court erred by refusing to award Woods' fees and expenses without considering whether the DOT "unnecessarily expanded the proceedings by improper conduct" (that is, offering less than one-half what the jury awarded).<sup>179</sup>

As stated at the outset of this discussion, the holding in *Woods* may significantly affect the practice of attorneys representing condemnees. If the DOT (and presumably other condemning authorities) face liability for the condemnee's attorney fees in addition to a high value award, the DOT will have an incentive to make more reasonable offers of payment before litigation commences. However, the supreme court has granted the DOT's petition for certiorari in this case.<sup>180</sup> It remains to be seen whether the supreme court will agree with the court of appeals and whether *Woods* will remain the law in Georgia.

In *Butler v. Gwinnett County*,<sup>181</sup> Gwinnett County ("County") condemned portions of the plaintiffs' property for use as an access lane on the Ronald Reagan Parkway. The County and plaintiffs entered

---

173. *Id.* at 31, 482 S.E.2d at 398.

174. *Id.* at 29-30, 482 S.E.2d at 396-97 (citing *DeKalb County v. Trustees, Decatur Lodge*, 242 Ga. 707, 251 S.E.2d 243 (1978)).

175. *Id.* at 31, 482 S.E.2d at 397.

176. GA. CONST. art. I, § 3, para. 1(d). Note the addition of this subparagraph was made after the decision in *Trustees, Decatur Lodge*.

177. 225 Ga. App. at 30, 482 S.E.2d at 397 (citing O.C.G.A. § 9-15-14).

178. *Id.*

179. *Id.* at 31, 482 S.E.2d at 397-98.

180. *Department of Transp. v. Woods*, 1997 Ga. LEXIS 544.

181. 223 Ga. App. 703, 479 S.E.2d 11 (1996).

consent decrees pursuant to which the County paid plaintiffs more than the value of their condemned property as appraised by the County. Two years later, after the road work was completed, plaintiffs filed an action against the County based primarily on damages allegedly arising from the construction of the access lane.<sup>182</sup> Plaintiffs alleged in that action that the construction of the access lane had damaged their remaining property. The County moved for summary judgment on the basis of the previous consent orders resolving the condemnation action two years prior. That motion was granted, and plaintiffs appealed.<sup>183</sup>

On appeal plaintiff Butler sought to avoid preclusion due to the prior condemnation proceedings by characterizing the new claim as negligent construction of the access lane that had damaged the remaining property through "noise, pollution, erosion, and other problems."<sup>184</sup> The court acknowledged that even though a condemnation proceeding is conclusive as to all damages resulting from proper construction "whether foreseen or not,"<sup>185</sup> damages caused by negligent or improper construction on condemned property "are recoverable in a suit separate from the condemnation proceeding."<sup>186</sup> However, based on the testimony of plaintiffs' expert witness, the court concluded that the damages sought by the suit were not caused by negligent construction.<sup>187</sup>

In order to avoid the effect of their own expert's testimony, plaintiffs argued that a jury could find negligent or improper construction as a result of negligent design. However, plaintiffs cited no authority to support that argument.<sup>188</sup> The court noted that plaintiffs' argument, if accepted, would permit "unending inverse condemnation and damage claims from property owners who decide, after construction, that the improvement's design impacts them in a way they did not anticipate."<sup>189</sup> The court reasoned that regardless of whether plaintiffs anticipated the consequential damages that allegedly resulted from the

---

182. *Id.* at 703, 479 S.E.2d at 12. Plaintiffs' claims were couched as "negligent construction, nuisance, inverse condemnation, trespass, negligent misrepresentation, fraudulent inducement, and breach of contract." *Id.*

183. *Id.*

184. *Id.* at 704, 479 S.E.2d at 12-13.

185. *Id.*, 479 S.E.2d at 13 (quoting *Fulton County v. Woodside*, 223 Ga. 316, 319, 155 S.E.2d 404, 408 (1967)).

186. *Id.* (citing *Georgia Power Co. v. Jones*, 122 Ga. App. 614, 178 S.E.2d 265 (1970)).

187. *Id.* Plaintiffs' expert testified in pertinent part as follows: "I'm not complaining or I'm not really talking about negligence in construction because as far as I know the construction was done exactly as it was planned and designed, so I'm not talking about the construction by the contractor . . . ." *Id.*

188. *Id.*

189. *Id.* at 705, 479 S.E.2d at 13.



road work, the damages had to be recovered, if at all, in the condemnation proceedings.<sup>190</sup> Plaintiffs' nuisance and trespass claims also failed because they simply restated a claim for compensation for the prior taking. The compensation plaintiffs received in the prior condemnation proceeding precluded the bringing of such an action. Based on these findings, the court of appeals affirmed the trial court's grant of summary judgment.<sup>191</sup>

#### VIII. MISCELLANEOUS CASES

In *Kruzel v. Leeds Building Products, Inc.*,<sup>192</sup> Leslie Kruzel allegedly entered into an oral contract with Civil Structures, Inc. ("CSI") for the construction of a house on property she owned. Ms. Kruzel's father was the president and CEO of CSI. Kruzel claimed to have obtained financing for the cost of construction from Wildwood Properties, a company also controlled by her father. Kruzel executed a security deed in favor of Wildwood.<sup>193</sup>

Leeds Building Products, Inc. ("Leeds") and other materialmen filed claims of lien against the property. Leeds brought an action seeking, among other things, cancellation of the security deed to Wildwood and appointment of a receiver. After a hearing, the trial court appointed a receiver to complete construction of the house and then to liquidate the property. Kruzel appealed that order.<sup>194</sup>

The supreme court stated that a receiver may be appointed "to take and hold 'any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested.'"<sup>195</sup> The evidence before the trial court showed that the house was unoccupied and had been vandalized, that no repairs had been made to the house, and that the house was threatened with further damage.<sup>196</sup> Furthermore, the record indicated a very strong possibility of fraudulent collusion between Ms. Kruzel and the contractor intended to defeat the materialmen's liens.<sup>197</sup> Based on those facts, the court concluded that the trial court did not abuse its discretion by appointing a receiver.<sup>198</sup>

---

190. *Id.* at 704, 479 S.E.2d at 13.

191. *Id.* at 705-06, 479 S.E.2d at 13-14.

192. 266 Ga. 765, 470 S.E.2d 882 (1996).

193. *Id.* at 765, 470 S.E.2d at 883.

194. *Id.* at 766, 470 S.E.2d at 883.

195. *Id.* (quoting O.C.G.A. § 9-8-3 (1982)).

196. *Id.*

197. *Id.*

198. *Id.* at 767, 470 S.E.2d at 884. The court also found that Ms. Kruzel's "offer" did not preclude the trial court's finding. Under the Georgia Mechanics' and Materialmen's

However, the court of appeals did reverse the portion of the trial court ruling granting the receiver authority to liquidate the property.<sup>199</sup> A trial court may only authorize an appointed receiver to liquidate assets in the case of "some emergency which creates an immediate necessity" therefor.<sup>200</sup> From the record on appeal, the appellate court concluded that the trial court had not made a finding of an emergency sufficient to support liquidation of the property before trial.<sup>201</sup>

#### IX. LEGISLATIVE DEVELOPMENTS

There were several significant legislative enactments during the past year, most of which relate to security interests in real estate. First, O.C.G.A. section 44-14-1 was amended to permit the use of open-ended security clauses by the assignees and transferees of security interests in home equity credit lines.<sup>202</sup> Advances made by the assignee or transferee after the assignment or transfer retain the priority of the advances made by the original creditor if those later advances "were authorized by the original parties to the home equity line of credit agreement or contract."<sup>203</sup>

Second, O.C.G.A. section 44-14-361.1 was amended to clarify the procedure for foreclosing a mechanic's or materialman's lien filed against realty by a subcontractor or materialman.<sup>204</sup> Generally, a subcontractor or materialman who holds a lien and is not in direct contractual privity with the owner is required to commence an action against the

---

Lien Act, Ms. Kruzel had the unilateral right to post a bond throughout the action but had failed to do so. *Id.* (citing O.C.G.A. § 44-14-364 (1991 & Supp. 1997)). Under those circumstances, "a mere offer to give a bond was not an adequate substitute for the appointment of a receiver." *Id.* at 766, 470 S.E.2d at 884.

199. *Id.*

200. *Id.* (quoting *Coker v. Norman*, 162 Ga. 238, 238, 133 S.E. 243, 244 (1926)).

201. *Id.*

202. 1997 Ga. Laws 712, § 1 (codified at O.C.G.A. 44-14-1(b), (c) (Supp. 1997)).

203. O.C.G.A. § 44-14-1(c) (Supp. 1997). There is an ambiguity created by quoted language relating to the timing of the "authorization" and the mechanism by which it may be given. However, it could be argued that the original lender may give its authorization for additional advances simply by establishing the original maximum credit limit on a revolving credit line. With home equity credit lines of that type, the debtor is able to take advances up to a fixed amount (that is, the total that may be borrowed is "pre-authorized" by the creditor). Therefore, as the debtor pays down the amount due on his or her equity credit line, additional advances taken within that credit limit after transfer or assignment to a new creditor should be deemed "authorized" by the original creditor. Of course, the debtor should also be deemed to have "authorized" those additional advances.

204. 1997 Ga. Laws 829, § 1 (codified at O.C.G.A. § 44-14-361.1(a)(4) (Supp. 1997)). As explained, this amendment will have little effect on general contractors and others in direct privity of contract with the owner of the construction project.

general contractor within twelve months from the date he last performed work on the property.<sup>205</sup> The commencement of this action is generally a condition precedent to the lienholder's right to file an action to foreclose the lien. Previously, there were two exceptions to that general rule—when the general contractor (1) dies or leaves the state; or (2) declares bankruptcy. In those instances the subcontractor or materialman was permitted to file an action directly against the owner without first suing the general contractor.<sup>206</sup>

The recent amendment created another exception to the general rule requiring an action against the general contractor. The lienholder may now foreclose its lien without suing the general contractor when the lienholder's contract for the work contains a so-called "pay-when-paid" clause.<sup>207</sup> Pay-when-paid clauses condition the general contractor's obligation to pay its subcontractors and materialmen on receipt by the general contractor of payment for the work from the owner.<sup>208</sup>

Third, the legislature created a mechanism by which the owners of real property may have nonconforming liens removed from the land records.<sup>209</sup> A nonconforming lien is defined as any lien not provided for in Chapter 14 of Title 44, not specifically established by statute, or not included in a written declaration or covenant.<sup>210</sup> To have a nonconforming lien removed from the land records, the affected landowner or the landowner's attorney may file an *ex parte* petition and obtain a court order directing the superior court clerk to record the order and cancel the nonconforming lien.<sup>211</sup> A copy of the nonconforming lien is required to be attached to the petition.<sup>212</sup>

Two significant statutory amendments that affect real property are not codified in Title 44. The first is found in the Georgia Hazardous Sites Response Act ("HSRA").<sup>213</sup> O.C.G.A. section 12-8-96 was amended to create a lien on property for which funds from the hazardous waste trust fund ("Fund") are expended.<sup>214</sup> The lien created by O.C.G.A. section 12-8-96(e) benefits the State of Georgia as the holder of the Fund. The

---

205. O.C.G.A. § 44-14-361.1(a)(3) (Supp. 1997).

206. *Id.* § 44-14-361.1(a)(4) (1996).

207. *Id.* § 44-14-361.1(a)(4).

208. See *D.I. Corbett Elec., Inc. v. Venture Constr. Co.*, 140 Ga. App. 586, 231 S.E.2d 536, 537 (1976) (subcontract provided final payment to subcontractor was to be made "within 30 days after completion of the work included in this subcontract, written acceptance of same by the Architect and Owner, . . . and full payment therefor by the owner").

209. 1997 Ga. Laws 970, § 2 (codified at O.C.G.A. § 44-14-320(b), (c) (Supp. 1997)).

210. O.C.G.A. § 44-14-320(b).

211. *Id.* § 44-14-320(c).

212. *Id.*

213. 1997 Ga. Laws 1050, § 1 (codified at O.C.G.A. § 12-8-96(e) (Supp. 1997)).

214. O.C.G.A. § 12-8-96(e).

State's claim is perfected by the filing of a claim of lien identifying the property affected and stating the type of corrective action taken, the authority pursuant to which the corrective action is taken, the date the corrective action began, the cost of the corrective action to date, and the estimated total cost of the claim.<sup>215</sup> After the claim of lien is filed, the State must send copies of the lien to the owner of the property and all persons believed to be liable for the cost of the corrective action.<sup>216</sup> Significantly for secured lenders and other lienholders, liens created and perfected pursuant to O.C.G.A. section 12-8-96(e) do not take priority over prior recorded liens and security interests. However, foreclosure of this type of lien does not divest the State's lien, which remains against the property.<sup>217</sup>

The legislature created an important exception to O.C.G.A. section 12-8-96(e) liens. No lien may be asserted

where the present owner of the real property . . . did not cause or contribute to a release which resulted in the expenditure of hazardous waste trust funds upon the property, unless that owner knew or in the exercise of reasonable diligence should have known that the release was occurring during his or her period of ownership or that the release had occurred prior to his or her acquisition of ownership.<sup>218</sup>

That exception was clearly intended to provide a safe haven for those real estate owners who qualify as "innocent landowners" and so avoid liability for corrective action costs under HSRA.<sup>219</sup> However, the language of O.C.G.A. section 12-8-96(e) does not track precisely the text of the Code sections creating the innocent landowners defense to HSRA liability.<sup>220</sup> Whether those differences in the language of the statute will have any meaningful effect on the application of the liens remains to be decided.

---

215. *Id.*

216. *Id.* When section 12-8-96(e) liens are foreclosed, the funds generated, after paying off prior liens and security interests in the property, are to be deposited in the Fund. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* § 12-8-96.1(c)(3) (1996). O.C.G.A. § 12-8-96.1(c)(3) excepts from liability for response costs persons who can show

by a preponderance of the evidence that the release of a hazardous waste . . . was caused solely by [a]n act or omission of a third party . . . if [that] person establishes by a preponderance of the evidence that [h]e had no relationship with the third party nor exercised any control over activities of the third party and [h]e took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

220. Compare O.C.G.A. § 12-8-96(e) with § 12-8-96.1(c)(3)(A), (B).

The final legislative action during the survey period that is likely to have significant impact on real property law is the enactment of the Georgia Electronic Records and Signatures Act ("Electronic Signatures Act").<sup>221</sup> Under the Electronic Signatures Act, parties to a transaction may agree "to be bound by an electronic record executed or adopted with an electronic signature."<sup>222</sup> If the parties agree, the contract or documents they execute will be deemed to satisfy "[a]ny rule of law which requires a signature" and "[a]ny rule of law which requires a record of that type to be in writing."<sup>223</sup> Therefore, documents subject to the statute of frauds, including documents transferring title to land, may now be executed by electronic signature.<sup>224</sup> Certainly, it will take some time for the full impact of the Electronic Signatures Act to be realized. However, the authors fully expect that practitioners will soon start seeing its impact in their daily practices.

#### X. CONCLUSION

As discussed above, the courts addressed numerous issues of first impression during the survey period. In fact, the authors do not recall a period in recent years when so many cases created new legal principles. The holdings from these cases are likely to be carried forward and applied in new situations in the coming years. It will be interesting to see how far they ultimately reach and what impact they will have on related areas of law.

---

221. 1997 Ga. Laws 1052, § 1 (codified at O.C.G.A. §§ 10-12-1 to -5 (Supp. 1997)).

222. O.C.G.A. § 10-12-4.

223. *Id.*

224. *Id.* The Electronic Signatures Act defines an electronic signature as "an electronic or digital method executed or adapted by a party with the intent to be bound by or to authenticate a record." *Id.* § 10-12-3(1). To be effective, the signature must be "unique to the person using it, . . . capable of verification, . . . under the sole control of the person using it, and . . . linked to the data in such a manner that if the data are changed the electronic signature is invalidated." *Id.*