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Real Property

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

I. INTRODUCTION

This Article surveys case law and legislative developments in Georgia law of real property during the period from June 1, 1997 to May 31, 1998. The cases and statutes discussed in this Article were chosen for their significance to practitioners in Georgia, and not every case decided or statute passed during the survey period is mentioned. Of particular note, in one case decided during the survey period, the Georgia Court of Appeals clarified the reach of the Commercial Real Estate Broker Lien Act by defining what services will support the filing and foreclosure of a broker's lien under the statute.

II. TITLE TO LAND AND BOUNDARY LINES

In Mathis v. Hammond, Clyde Hammond filed an action to remove a cloud on his title to certain land created through his wife's execution of a warranty deed for her interest in that property. Prior to 1988, Mr. Hammond held fee simple title to the subject property. In 1988 Mr. Hammond executed a warranty deed by which he conveyed his interest in the property to himself and his new wife, May Mathis Hammond, as joint tenants with rights of survivorship. In May 1993, Ms. Hammond

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deeded her interest in that property to her children. At the time Ms. Hammond executed that deed, she was terminally ill and was residing in her daughter's home. Ms. Hammond died in September 1993 after having executed a will leaving her property to her children. Shortly after his wife's death, Mr. Hammond executed a deed to the subject property with himself as grantor in which he deeded the survivorship interests to himself. Thereafter, both Mr. Hammond and his deceased wife's children claimed an interest in the property. Mr. Hammond then filed an action to quiet title in himself. 4

The confusion concerning the effect of the deed from Ms. Hammond to her children arises from a provision contained in O.C.G.A. section 44-6-190, in which Georgia recognizes the creation of a joint tenancy with right of survivorship. 6 Section 44-6-190 states, in part, that the tenancy estate or interest “may be severed as to the interest of any owner by the recording of an instrument which results in his lifetime transfer of all or a part of his interest.” 7 As the court in Mathis noted, the enactment of that provision may have changed the common law rule regarding joint tenancies with rights of survivorship. 8 The transfer of an interest by one joint tenant would, under a literal reading of the language of section 44-6-190, result in a termination of the joint tenancy with a resulting tenancy in common between the remaining co-owners and the purchaser. 9

Apparently Mr. Hammond recognized the uncertainty created by the language of section 44-6-190. In order to avoid any question concerning the application of that statute, Mr. Hammond asserted that the deed from his ex-wife to her children should be canceled because it was procured by undue influence. 10 At the close of the evidence, Ms. Hammond's children moved for a directed verdict, claiming that Mr. Hammond had failed to produce any evidence of undue influence. The

4. Id. at 159, 486 S.E.2d at 357.
6. 268 Ga. at 160, 486 S.E.2d at 358.
7. O.C.G.A. § 44-6-190.
9. Id.
10. Id. O.C.G.A. §§ 23-2-58 to -60 permit cancellation of a deed based upon the exertion of undue influence by the grantee over the grantor. O.C.G.A. § 23-2-60 (1982 & Supp. 1998). See also Arnold v. Freeman, 181 Ga. 654, 183 S.E. 811 (1936). Mr. Hammond also asserted that the deed was contrary to a prenuptial agreement between the parties. However, based on the court's ruling concerning the allegations of undue influence, the prenuptial agreement was discussed only briefly. 268 Ga. at 160-61, 486 S.E.2d at 358-59.
trial court denied their motion.\textsuperscript{11} Also, over the objection of Ms. Hammond's children, the trial court instructed the jury on the "presumption" of undue influence.\textsuperscript{12} The trial court said that such a presumption arises when the grantee of property has a confidential relationship with the grantor and the grantor is of "weak mentality."\textsuperscript{13} Ms. Hammond's children argued that the presumption of undue influence was inapplicable because Mr. Hammond failed to produce any evidence that Ms. Hammond was of a "weak mentality."\textsuperscript{14} Judgment was entered in Mr. Hammond's favor, and Ms. Hammond's children appealed, asserting error in the denial of their motion for directed verdict and the trial court's instruction to the jury.\textsuperscript{15}

The supreme court affirmed the trial court's ruling on both issues.\textsuperscript{16} First, the court agreed that Mr. Hammond presented sufficient evidence of undue influence to submit the issue to the jury.\textsuperscript{17} Specifically, the court found that evidence existed of a confidential relationship between Ms. Hammond and her children based on Ms. Hammond's advanced age, her terminally-ill physical condition, and her residence with her daughter (and the care, shelter, and transportation Ms. Hammond received from her).\textsuperscript{18}

Second, the court rejected appellants' argument concerning the jury instruction on the presumption of undue influence.\textsuperscript{19} In doing so, the court stated that the phrase "weak mentality" in the context of the jury instruction given by the trial court "covers not only feeble-mindedness but also, in the case of an elderly grantor, the domination of the grantor by the grantee, exemplified by the grantee's provision of shelter and care."\textsuperscript{20} Therefore, the fact that Ms. Hammond was elderly and being provided shelter and care by at least one of the grantees under her deed was evidence to support the trial court's charge on the presumption of undue influence.\textsuperscript{21} For these reasons, the court affirmed the jury verdict in Mr. Hammond's favor.\textsuperscript{22}

\textsuperscript{11} 268 Ga. at 160-61, 486 S.E.2d at 358-59.
\textsuperscript{12} \textit{Id.}, 486 S.E.2d at 358.
\textsuperscript{13} \textit{Id.} at 160, 486 S.E.2d at 358.
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.} at 160-61, 486 S.E.2d at 358-59.
\textsuperscript{17} \textit{Id.} at 160, 486 S.E.2d at 358.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
The court in Mathis had an opportunity to clarify the ambiguity created by section 44-6-190. However, the manner in which Mr. Hammond presented his case permitted the court to avoid deciding that issue. As a result of the court's narrowly drawn decision, the uncertainty in Georgia law concerning transfers of a single person's interest in property under a joint tenancy with rights of survivorship remains for future clarification.

In Bell v. Owens, the court of appeals considered a dispute over title to a section of property along a border between two adjoining tracts of land in Haralson County, Georgia. Donna Owens, Jason Owens, Bryan Owens, and Dawn Godwin (the "Owens Children") filed an action against William Bell ("Bell") to establish ownership of the disputed property. Bell and the Owens Children owned adjoining parcels of land that, at one point, were part of a single tract owned by Otis Bennett. In 1949 Bennett sold approximately four acres of the subject property to C.M. Clackum. Those four acres were ultimately purchased by Mr. Bell. In 1950 Bennett sold the remaining portion of his property to the Owens Children's predecessor-in-title. The deed for the property now owned by the Owens Children described their property as "the entire parcel 'except four acres sold to C.M. Clackum.'" Shortly after Bennett's sale of the second tract, the Owens Children's predecessor-in-interest constructed a barbed wire fence ostensibly on the dividing line between the two tracts. In 1987 Bell commissioned a survey, which purported to show that his property extended beyond the fence line and onto the tract then owned by the Owens Children. After Bell cut down trees beyond the barbed wire fence, the Owens Children filed an action against him seeking to establish ownership of the disputed land and seeking to recover damages for the destruction of their fence and trees.

At trial Bell argued that the Owens Children had failed to produce any evidence that the barbed wire fence was actually constructed on the true boundary between the two properties, and he filed a motion for directed verdict on that basis. The trial court denied Bell's motion and permitted the case to go to the jury. The jury found that the fence was the boundary line between the two tracts and awarded the

24. Id. at 826, 497 S.E.2d at 592.
25. Id.
26. Id.
27. Id.
28. Id.
Owens Children actual and punitive damages against Bell. Bell appealed the judgment entered on that verdict.

The court of appeals concluded that the jury was authorized to find the barbed wire fence represented the actual boundary between the two tracts. In doing so, the court relied on O.C.G.A. section 44-4-6, which provides two mechanisms for determining the location of a disputed boundary line. Under that statute, an “uncertain” or “unascertained” boundary line may be established either by oral agreement, if the oral agreement is accompanied by actual possession, or by acquiescence of the parties in a mutually agreed boundary. The court stated that the evidence regarding construction of the barbed wire fence and mutual acceptance of that fence as the boundary line between the two properties for approximately thirty years was sufficient to establish the boundary line pursuant to section 44-4-6. Accordingly, the court of appeals found that the trial court properly denied Bell’s motion for directed verdict and upheld entry of judgment based on the jury verdict.

III. EASEMENTS

In McCorkle v. Morgan, the Georgia Supreme Court stated unequivocally that a “parol license can be revoked where the licensee’s enjoyment of the license was not preceded necessarily by the expenditure of money.” In this case, Clifford E. Morgan, Sr. owned a tract of commercial property located on the northeast corner of West Howard Avenue and Atlanta Avenue. Mr. Morgan conveyed one portion of his property to his daughter, defendant Barbara J. McCorkle, and the remainder to his sons, Clifford E. Morgan, Jr. and James E. Morgan, Sr. (the “Morgans”). Each tract contained a building from which the respective transferees operated a business. The tract transferred to the Morgans had no parking lot, therefore, they used the parking lot on McCorkle’s parcel for their customers. Additionally, the front door to the

29. Id.
30. Id.
31. Id. at 827, 497 S.E.2d at 593.
32. Id. (citing O.C.G.A. § 44-4-6 (1991 & Supp. 1998)).
33. O.C.G.A. § 44-4-6.
34. 230 Ga. App. at 827, 497 S.E.2d at 593.
35. Id. The court also rejected Bell’s argument that the actual damages awarded to the Owens Children were not supported by the evidence. Id. Finally, the court found that Bell failed to preserve for appeal any error relating to the punitive damages award. Id. at 827-28, 497 S.E.2d at 593-94.
37. Id. at 730, 492 S.E.2d at 891.
building on the Morgans' property was only a few feet from the boundary with McCorkle's property.\(^{38}\)

In 1995 McCorkle notified the Morgans that they should cease using the parking lot on McCorkle's property for their customers. Thereafter, McCorkle constructed a chain link fence on the dividing line between the two tracts. The fence effectively prevented customers from using the parking lot on McCorkle's property in order to conduct business on the Morgans' tract.\(^{39}\)

The Morgans filed an action against McCorkle asserting that they had been granted a license to McCorkle's property and they had incurred expenses in execution of that license. Therefore, they contended their license had ripened into an easement running with the land. The Morgans relied on O.C.G.A. section 44-9-4 to support their position.\(^{40}\) After a bench trial, the trial court rejected the Morgans' argument and entered judgment allowing McCorkle to revoke the license. The Morgans appealed.\(^{41}\)

The supreme court stated that the undisputed evidence at trial showed that the Morgans began using McCorkle's parking lot in 1977, and that they used it for six years before incurring any expenses in connection with maintaining the parking lot.\(^{42}\) Because the Morgans had not been required to "expend any money preceding their use of the parking lot," their interest in McCorkle's tract remained a parol license that was revocable at McCorkle's will.\(^{43}\) Therefore, the court affirmed the trial court's judgment in favor of McCorkle.\(^{44}\) From the court's ruling in McCorkle, it is clear that simply using a license, without expenditure of money at the outset of that use, even for a long period of time, will not convert a license into an easement.

In Givens v. Ichauway, Inc.,\(^{45}\) Ichauway, Inc. leased a parcel of land through which the Ichauwaynochaway Creek flowed. Ichauway conducted ecological research on the creek. Givens owned property upstream from Ichauway's leasehold and asserted the right to use the

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38. Id. at 730-31, 492 S.E.2d at 892.
39. Id. at 730, 492 S.E.2d at 892.
40. Id. The provision reads as follows:
   A parol license to another's land is revocable at any time if its revocation does no
   harm to the person to whom it has been granted. A parol license is not revocable
   when the licensee has acted pursuant thereto and in doing so has incurred
   expenses; in such a case, it becomes an easement running with the land.

41. 268 Ga. at 730-31, 492 S.E.2d at 892.
42. Id. at 731, 492 S.E.2d at 892.
43. Id.
44. Id.
stream (including sections within the boundary of Ichauway's leasehold). Ichauway objected to Givens' use of the creek on its leasehold and filed an action to enjoin Givens from trespassing on the creek. Givens contended that because the creek was "navigable," he had a right to float down the creek through Ichauway's leased property.\(^4\)

The general rule in Georgia is that the owner or leaseholder of property on both sides of a creek may "exclude others from the creek unless the stream is navigable or some servitude exists."\(^5\) O.C.G.A. section 44-8-5(a) states that to be navigable, a stream must be "capable of transporting boats loaded with freight in the regular course of trade either for the whole year or a part of the year. The mere rafting of timber or transporting of wood in small boats shall not make a stream navigable."\(^6\)

Givens attempted to show that the Ichauway Creek was navigable by floating a raft containing a goat, a bail of cotton, and two passengers down the creek from his property through Ichauway's leasehold. A hydroelectric dam crossed the creek on Ichauway's leasehold. However, Givens was successful in navigating the stream on his raft by disassembling the craft above the dam, transporting it and his cargo by foot around the dam, and reassembling the raft below the dam. Givens asserted that his raft was similar to watercraft in use in the 19th century. He also attempted to prove that the creek was once used for commerce. In support of that position, Givens testified to anecdotal stories from elder residents of the area.\(^7\) In rebuttal, Ichauway presented expert testimony that the creek was incapable of supporting commercial water traffic.\(^8\) At the close of discovery, Ichauway filed a motion for summary judgment asserting that the undisputed evidence established that Ichauway Creek was not "navigable" as a matter of law.\(^9\) The trial court granted that motion, and Givens appealed.\(^10\) The supreme court affirmed the trial court's entry of summary judgment.\(^11\)

\(^{46}\) Id. at 710, 493 S.E.2d at 150.


\(^{49}\) 268 Ga. at 711-12, 493 S.E.2d at 150-51.

\(^{50}\) Id. at 712, 493 S.E.2d at 151.

\(^{51}\) Id. at 712-13, 493 S.E.2d at 151.

\(^{52}\) Id. at 710, 493 S.E.2d at 150.

\(^{53}\) Id. at 715, 493 S.E.2d at 153.
The supreme court rejected Givens's argument that his navigation of the creek in his raft established navigability. The court found that there was no evidence that watercraft like the one built by Givens had ever been used in commerce on the creek. The court also refused to consider Givens's testimony regarding past uses of the creek. His testimony regarding lore from "old-timers" was deemed inadmissible hearsay and Givens was held not qualified to render any expert opinion testimony concerning commercial water transport. As a result, the court found that the only admissible evidence before the trial court was from Ichauway's expert who testified that the smallest craft normally in commercial use in the area could not be used on Ichauway Creek.

The court also rejected Givens's argument that a public right of common passage existed with regard to the creek regardless of its navigability. In making that argument, Givens relied on a Georgia Supreme Court opinion from 1849. In Young v. Harrison, the court stated as follows:

Rivers are of three kinds: 1st. Such as are wholly and absolutely private property. 2d. Such as are private property subject to the servitude of the public interest, by a passage upon them. The distinguishing test between the two is, whether they are susceptible or not of use for a common passage. 3rd. Rivers where the tide ebbs and flows, which are called arms of the sea. Givens apparently argued that, because Ichauway Creek was neither "wholly and absolutely private" nor an "arm of the sea," there must exist a public right of passage on it.

In rejecting that argument, the court noted that, after entry of the decision in Young, the Georgia Legislature adopted the Code of 1863, which contained the definition of a "navigable stream which is currently embodied in Section 44-8-5(a)." Because the "Code of 1863 was intended to codify then existing law," the court found that the definition of the types of streams contained in Young was subsumed within the

54. Id. at 713, 493 S.E.2d at 151.
55. Id. at 712, 493 S.E.2d at 151.
56. Id.
57. Id.
58. Id.
59. Id. at 713, 493 S.E.2d at 151-52.
60. Id. (quoting Young v. Harrison, 6 Ga. 130 (1849)).
61. 6 Ga. 130 (1849).
62. Id. at 140-41.
63. 268 Ga. at 713, 493 S.E.2d at 151-52.
64. Id., 493 S.E.2d at 152.
definition contained in the Code. As a result, the court concluded that "no servitude of public passage is imposed upon a stream unless it is navigable under the Code." The court rejected Givens's appeal and affirmed the trial court's entry of summary judgment.

Two justices published a strong dissent to the majority's opinion. They began their opinion with the following statement:

This case is not about the ownership of the creek bed or the rights of property owners adjacent to the creek. The issue in this case is whether the public has a statutory or common law right to passage on the Ichauwaynochaway Creek because it is, or was, capable of navigation. The majority opinion misconstrues the statutory definition of navigable stream under state law and ignores the public's right to use interstate waterways under the commerce clause of the United States Constitution.

After making that statement, the dissenters pointed out what they contended were two significant flaws with the majority's opinion. First, the dissenters noted that summary judgment had never before been granted in a case concerning navigability of a stream. According to the dissenters, that issue was peculiarly one that should be resolved after full development of facts afforded by a trial. Second, and perhaps more importantly, the dissenters opined that the majority erred in failing to consider whether Ichauway Creek was navigable under federal law. The dissent stated that the issue of navigability is a federal question because the waters of Ichauway Creek flow into the Flint River and eventually into the Apalachicola River. Because the creek could be followed all the way to the Gulf of Mexico, it necessarily was part of the interstate waterway and is subject to applicable federal law. Rather than affirming the trial court the dissenters would have remanded in order for the trial court to decide questions of fact regarding navigability of the Ichauway Creek under both Georgia law and federal law.

65. Id.
66. Id.
67. Id. at 715, 493 S.E.2d at 153.
68. Id. at 715-20, 493 S.E.2d 153-57 (Fletcher, P.J., dissenting).
69. Id. at 715, 493 S.E.2d at 153.
70. Id.
71. Id.
72. Id.
73. Id. at 720, 493 S.E.2d at 156.
74. Id.
75. Id.
76. Id., 493 S.E.2d at 157.
IV. CONDEMNATION AND EMINENT DOMAIN

In *Hulsey v. Department of Transportation*, the court considered for the first time when the "date of taking" occurred in the context of an inverse condemnation. The *Hulsey* case arose out of construction of a four-lane highway by the Department of Transportation ("DOT") in Polk County, Georgia. In October 1990 the DOT contracted with Wright Brothers Construction Company to build a 2.3 mile portion of the highway. The construction commenced in early 1991. The highway was built through very hilly terrain and across valleys that contained streams flowing into a nearby ten acre lake. Hulsey and the other plaintiffs owned the lake.

Plaintiffs filed an action against the DOT for inverse condemnation, seeking to recover compensation for damage to their property that they alleged resulted from the DOT's construction of the highway. Plaintiffs complained that rainwater runoff from the construction site deposited silt into and damaged their lake. They testified that prior to construction of the highway the lake was usually clear. However, once construction of the highway commenced, the lake became "muddy" each time it rained. Plaintiffs also presented the testimony of an engineer who opined that the siltation in the lake resulted from the DOT's construction of the highway. In late 1995 the DOT completed construction of the highway and erected permanent structures to prevent silt from sliding into plaintiffs' lake. However, according to plaintiffs' expert, by October 1995 the DOT's activities had resulted in approximately 20,000 cubic yards of silt being deposited in plaintiffs' lake.

Plaintiffs also presented expert testimony from an appraiser regarding the value of their property as of January 24, 1991 and again as of October 1, 1995. Based on those two appraisals, plaintiffs' expert concluded that the siltation of the lake resulted in a depreciation in the value of plaintiffs' property of forty-five percent to fifty percent. At the close of plaintiffs' testimony, the trial court directed a verdict against plaintiffs on the basis that they had failed to establish a date of the

78. Id. at 763, 498 S.E.2d at 122.
79. Id., 498 S.E.2d at 124. Included in the case were two plaintiffs who owned a parcel of land adjacent to the subject lake. However, because they did not own a portion of the lake, their claims were dismissed by the trial court. Although they were parties to the appeal, their claims were dismissed summarily by the appellate court and do not warrant discussion. Id. at 763-65, 498 S.E.2d at 124-25.
80. Id. at 763-64, 498 S.E.2d at 124-25.
81. Id. at 764, 498 S.E.2d at 125.
82. Id.
alleged taking by the DOT. 

Plaintiffs appealed from that directed verdict.

As the appellate court noted, the “date of taking” in direct condemnation cases is “the date on which compensation is tendered or paid to the landowner.” However, in inverse condemnation actions, the public entity generally disputes that a taking has occurred and does not voluntarily offer to pay compensation to the plaintiff. As a result, there is no clearly identifiable date for measuring a plaintiff’s damages in such cases. The court also found that there was no prior Georgia authority establishing the “means for determining the ‘date of taking’ in inverse condemnation cases.”

Because of the lack of Georgia authority, the court looked to cases decided in other jurisdictions. The court found those courts had held that the date on which the impact on the affected property “stabilized” was the date of taking. The date of stabilization is determined by the “point in time when the damaging activity has reached a level which substantially interferes with the owner’s use and enjoyment of his property.” The court adopted that same reasoning for Georgia.

The court stated that by using the date on which the damage has “stabilized,” the parties may avoid piecemeal litigation by permitting the landowner to “evaluate the full extent of the damage to his or her property and the amount of compensation necessary to redress the damage” before commencing litigation.

Using the date of stabilization as the date of taking in *Hulsey*, the court held that sufficient evidence did exist for plaintiffs’ case to be presented to the jury. The court concluded that the DOT’s construc-
tion was substantially complete in the latter part of 1995 and that the DOT took steps at that time to prevent further damage to plaintiffs' lake by constructing permanent siltation stops. From that, the jury could have concluded the damage to plaintiffs' property had stabilized in late 1995. Accordingly, the evidence of the appraisal of plaintiffs' property as of October 1, 1995 provided "some evidence" of the damages on the date of taking.

Plaintiffs who seek to recover damages based on inverse condemnation should consider carefully how the holding in Hulsey affects their cases. The date that damages have "stabilized" will likely be an issue of fact to which no firm rule may apply. It is clearly an issue that plaintiffs should discuss with their expert witnesses and which should be taken into consideration when assessing the date for appraisal of the affected property.

The dispute in Department of Transportation v. Bridges arose out of closure by the DOT of Chumley Circle at its intersection with Canton Road in Cobb County. Bridges owned a tract of land zoned for commercial use that abutted Chumley Circle near its intersection with Canton Road. The DOT's closing of Chumley Circle did not result in a physical taking of any part of Bridges's property and did not diminish Bridges's access to Chumley Circle. However, it did lengthen the route that Bridges had to follow to reach Canton Road from his property, and required that Bridges travel through residential streets to reach Canton Road. Bridges filed an action against the DOT to recover the diminution in the value of his property that he claimed would result from the change in his access to Canton Road.

The DOT moved for summary judgment against Bridges, contending that Bridges suffered no compensable taking and could not recover damages as a matter of law. The trial court denied that motion and the DOT appealed. The Georgia Court of Appeals affirmed the trial court. The DOT petitioned the Georgia Supreme Court for a writ of certiorari to consider whether the court of appeals decision conflicted with two prior court of appeals decisions.

94. Id.
95. Id.
97. Id. at 258, 486 S.E.2d at 593-94.
99. Id. at 19, 473 S.E.2d at 765.
100. Id.
The supreme court concluded that Bridges was not entitled to recover the damages he alleged and reversed the decisions of the lower courts.\(^{102}\) The court stated that the rights of property owners "fall into two categories: general rights, which [the landowner has] in common with the public, and special rights, which [the landowner holds] by virtue of . . . ownership of [the] property."\(^{103}\) However, only a public taking or damaging of the landowner's "special rights" is compensable.\(^{104}\) The court stated that Bridges's access to the public road abutting his property (i.e., Chumley Circle) had not been changed by the DOT's action, and that Bridges only complained of the inconvenience he now faced in reaching Canton Road.\(^{105}\) The court concluded that the inconvenience did not affect a special right because the public in general shared that inconvenience.\(^{106}\) The fact that Bridges might suffer more inconvenience than the remainder of the general public did not create a cause of action for him against the DOT.\(^{107}\)

The supreme court expressly rejected an argument that had convinced a majority of the court of appeals that questions of fact remained concerning Bridges's possible recovery.\(^{108}\) Bridges argued that his property was "unique" because of its convenient access to Canton Road prior to the closure of the Chumley Circle intersection. He contended that he was entitled to be compensated for the loss of that unique aspect of his property.\(^{109}\) However, as the supreme court noted, the fact that a property, which is taken is "unique" does not create a cause of action itself; rather the "uniqueness" merely provides for an enhancement of the damages that a property owner may recover.\(^{110}\) The supreme court reversed the court of appeals, resulting in entry of judgment for the DOT in the trial court as a matter of law.\(^{111}\)

In *Department of Transportation v. Woods*,\(^{112}\) the supreme court reversed a court of appeals decision that was discussed in last year's

\[\begin{align*}
102. & \quad \text{Id. at 259, 486 S.E.2d at 594.} \\
103. & \quad \text{Id. at 258, 486 S.E.2d at 594 (quoting Smith, 219 Ga. at 72, 131 S.E.2d at 529).} \\
104. & \quad \text{Id.} \\
105. & \quad \text{Id.} \\
106. & \quad \text{Id.} \\
107. & \quad \text{Id.} \\
108. & \quad \text{Id.} \\
109. & \quad \text{Id.} \\
110. & \quad \text{Id.} \\
111. & \quad \text{Id. at 260, 486 S.E.2d at 594. Another case was decided by the Georgia Court of Appeals during the survey period that involved nearly an identical issue to that decided in Bridges. See Eastside Properties v. DOT, 231 Ga. App. 217, 498 S.E.2d 769 (1998) (regarding what constitutes a "taking" through a change in traffic patterns or street access).} \\
112. & \quad 269 Ga. 53, 494 S.E.2d 507 (1998).}
\]
In this case, the DOT filed a condemnation petition against property owned by Woods and deposited $76,000 into the court's registry as "just and adequate" compensation. That assessment of the fair market value of Woods's property was based on an affidavit from the DOT's appraiser. During the course of discovery in the underlying case, the DOT's appraiser increased to $90,000 his estimate of the condemned property's fair market value. However, the DOT did not increase the amount of its deposit in the court's registry. At the conclusion of a four-day jury trial, the jury awarded $162,000 as compensation for the taking of his property. Thereafter, Woods filed a motion seeking to recover his attorney fees under O.C.G.A. section 9-15-14. The trial court denied that motion, finding that section 9-15-14 did not apply in condemnation cases.

Woods appealed that decision and the court of appeals reversed. The court concluded that the reference in section 9-15-14 to an award of attorney fees "in any civil case" rendered that statute applicable in condemnation cases. Based on the facts of the case, the court remanded Woods's motion for consideration by the trial court.

The supreme court granted the DOT's petition for a writ of certiorari and reversed the lower court's decision. Importantly, the supreme court agreed with the court of appeals that attorney fees could be awarded in condemnation cases under section 9-15-14. In upholding that portion of the lower court's ruling, the supreme court followed much the same reasoning.

The court agreed that the reference in section 9-15-14 to "any civil action" in the context of Georgia's Takings Clause clearly was intended to apply in condemnation cases.

The supreme court disagreed, however, with the court of appeals decision to remand the case to the trial court. The court found, instead, that no evidence existed to support an award of attorney fees as

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114. 269 Ga. at 53, 494 S.E.2d at 508.

115. Id. at 53-54, 494 S.E.2d at 508.


117. 225 Ga. App. at 30-31, 482 S.E.2d at 397.

118. Id. at 31, 494 S.E.2d at 398.

119. 269 Ga. at 56, 494 S.E.2d at 510.

120. Id. at 54-55, 494 S.E.2d at 508-09.

121. Id.

122. Id.

123. Id. at 56, 494 S.E.2d at 509-10.
a matter of law. First, the supreme court determined that Woods was not entitled to an award of attorney fees under the mandatory language of section 9-15-14(a). Because the DOT's initial deposit into the court's registry was based on the opinion of a qualified appraiser, the supreme court concluded that the DOT's position was not "void of 'any justiciable . . . fact, [such] that it could not be reasonably believed that a court would accept [it]."

The supreme court also concluded that no evidence existed to support an award of attorney fees under the discretionary provision of section 9-15-14(b). The court concluded that the evidence before the trial court demonstrated that the DOT's position "neither lacked 'substantial justification,' nor evidenced 'improper conduct.'" Again, the court found significant the fact that the DOT's initial deposit of funds into the trial court's registry was based on the opinion of a qualified appraiser. Additionally, the supreme court noted that Woods's claim regarding the fair market value of his property was more than double the amount the jury awarded him. The court concluded that Woods's argument that the DOT's estimate was interposed for purposes of harassment and delay was discredited. In short, the supreme court found no evidence of improper conduct by the DOT.

Although the supreme court's decision in Woods affirmed that section 9-15-14 does apply in condemnation cases, the impact of that ruling may be limited by the ultimate outcome in the case. It appears that as long

124. Id.
125. Id. at 55-56, 494 S.E.2d at 509. Subsection (a) of the statute states that attorney fees:

   shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justifiable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position.

126. 269 Ga. at 55, 494 S.E.2d at 509 (quoting O.C.G.A. § 9-15-14(a)).
127. Id. at 56, 494 S.E.2d at 509-10. Subsection (b) of the statute states that a court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct . . . .

128. Id. at 56, 494 S.E.2d at 510.
129. Id., 494 S.E.2d at 509.
130. Id., 494 S.E.2d at 510.
131. Id.
132. Id.
as the DOT's initial offer of compensation to the owners of property taken for public use is based on the opinion of a qualified expert, the fact that the jury ultimately awards a substantially larger figure likely will never support a claim for attorney fees. Therefore, the court's decision creates a "safe harbor" for the DOT and other condemning authorities to govern their procedures in the future.

V. PURCHASE CONTRACTS AND BROKERS

In Simmons v. Pilkenton, defendant advertised for sale a tract of land as containing 1.5 acres. Plaintiff contracted to purchase the property for three thousand dollars and executed a promissory note in favor of defendant for the purchase price. The description of the property in the contract executed between the parties referenced a recorded plat. After making improvements to the property and placing a trailer on it, plaintiff was advised that the property was smaller than the advertised 1.5 acres and, under an applicable county ordinance, was not large enough for a trailer. Thereafter, plaintiff filed an action against the seller for fraud, seeking, among other things, to rescind the contract. The seller counterclaimed and asserted a claim based on a default under the promissory note.

At the conclusion of the trial, judgment was entered in favor of plaintiff. Defendant was ordered to return plaintiff's purchase money with interest at the legal rate and to pay plaintiff the value of improvements made to the property. The court also denied defendant's counterclaim for recovery under the promissory note. Defendant appealed and the trial court's decision was reversed on appeal.

The court of appeals concluded that plaintiff failed to establish an essential element of his fraud claim, namely reasonable reliance. The court stated that the plat referenced in the property description attached to the contract identified the property as containing "approximately .80 acres, which clearly was less than the 1.5 acres" advertised

134. Id. at 900-02, 497 S.E.2d at 615-16. The case arose in an unusual procedural context. Initially, plaintiff filed his action to rescind the sales contract in the magistrate court in Webster County. Plaintiff prevailed before the magistrate court and defendant appealed for a de novo trial in the superior court. At the time defendant asserted his appeal, he also filed his counterclaim on the promissory note. Id. at 900, 497 S.E.2d at 615.
135. Id.
136. Id.
137. Id.
138. Id. at 901, 494 S.E.2d at 615.
139. Id.
by defendant.\textsuperscript{140} The court opined that had plaintiff reviewed the contract in anything other than a cursory manner he would have discovered the reference to the recorded plat and "could have avoided all of his woes by simply demanding to see the plat before executing the contract."\textsuperscript{141} Because plaintiff failed to exercise that minimal degree of diligence to protect himself, the court concluded that he was unable to establish a valid claim for fraud in the inducement.\textsuperscript{142} This decision underscores the need for purchasers of property to perform sufficient due diligence to protect themselves from defects that could have been discovered from recorded land records.

The court of appeals in Padgett v. City of Moultrie\textsuperscript{143} resolved an issue of first impression concerning what activities and services may support a broker's lien under the Georgia Commercial Real Estate Broker Lien Act (the "Act").\textsuperscript{144} Padgett had entered into an agreement to facilitate the purchase of property in downtown Moultrie by Cambridge Health Care Services. The services Padgett provided included the following: "[T]he negotiation and arrangement of the purchase of the hotel property, obtaining financing from both Empire [Financial Service] and from the City [of Moultrie], site analysis, market feasibility studies, assisting the architect and contractor in renovation of the property, and managing the property after closing."\textsuperscript{145} In exchange for those services, Cambridge agreed to pay Padgett $100,000. Additionally, Padgett was to receive from Cambridge a real estate commission equal to five percent of the purchase price of the property. At the closing, there were insufficient funds available to pay all of Padgett's real estate commission and the $100,000 fee. Cambridge paid the commission, and part of the $100,000 fee was paid at closing, and the parties executed a written "commission agreement" covering the balance of $55,420. When Cambridge failed to pay that sum, Padgett filed a lien against the property and later commenced an action seeking to foreclose on that lien.\textsuperscript{146}

Padgett named the City of Moultrie and Empire as defendants in her action on the basis that they held security deeds on the property that was subject to Padgett's lien.\textsuperscript{147} Empire and the City filed motions for

\begin{itemize}
\item \textsuperscript{140} Id. at 902, 494 S.E.2d at 616.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} 229 Ga. App. 500, 494 S.E.2d 299 (1997).
\item \textsuperscript{144} Id. at 500, 494 S.E.2d at 300.
\item \textsuperscript{145} Id. at 501, 494 S.E.2d at 300.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id. at 500, 494 S.E.2d at 300.
\end{itemize}
summary judgment asserting that Padgett did not have a valid broker's lien. They argued that the services Padgett performed on behalf of Cambridge were not "licensed services" under the Act and did not support filing of the lien by Padgett. Padgett filed a cross-motion for summary judgment arguing that her lien was valid and enforceable as a matter of law. The trial court denied Padgett's motion and granted summary judgment in favor of the City and Empire. Padgett appealed both decisions, and the court of appeals reversed.

In reaching its decision, the court first attempted to define what services and activities would support a lien under the Act. The court noted that the reference to services in the statute was not limited to "licensed services." In fact, the court stated that the term only appeared in subsection (a)(2) of the lien statute. The court pointed out that "a lien [arises] not only for compensation 'arising out of a listing agreement' but also 'any other agreement for the management, sale, or lease of or otherwise conveying any interest in the commercial real estate.'" The court concluded, therefore, that "the General Assembly did not intend to limit a commercial real estate broker's lien strictly to licensed services."

The court then considered whether the services Padgett provided to Cambridge in this case were properly secured by a lien against the subject property. First, the court stated that the three subsections contained in O.C.G.A. section 44-14-602(a) must be read disjunctively. As a result, Padgett was required to show only that her lien fell within the ambit of one of the three subsections. The court concluded that the written agreement between Padgett and Cambridge satisfied the provisions of section 44-14-602(a)(3) and that Padgett provided services resulting in the procuring of a ready, willing, and able buyer under section 44-14-602(a)(2). Further, the court concluded that

148. Id.
149. Id. at 501, 494 S.E.2d at 300-01.
150. Id. at 500, 494 S.E.2d at 300.
151. Id.
152. Id. at 501, 494 S.E.2d at 300.
153. Id. at 502, 494 S.E.2d at 301.
154. Id. at 503, 494 S.E.2d at 301.
155. Id.
157. Id. at 504, 494 S.E.2d at 302.
158. Id.
159. Id.
160. Id.
161. Id.
there was no dispute regarding the amount of Padgett’s lien.\textsuperscript{162} Specifically, the testimony from Cambridge’s chief executive officer established the amount of the agreed upon compensation.\textsuperscript{163} Based on its findings, the court of appeals reversed the trial court, resulting in the entry of summary judgment in favor of Padgett and against the City and Empire.\textsuperscript{164}

The holding in \textit{Padgett} is significant for real estate brokers and salespersons in that it clarifies the bases on which they will be entitled to assert liens under the Act. It is now clear that real estate brokers may secure payment of services that are ancillary to their involvement in the sale or lease of properties as brokers through the assertion of a lien. The holding in \textit{Padgett} should also serve as a warning to purchasers of commercial real estate. Some investigation must be made regarding potential agreements between the seller and their broker beyond a simple inquiry into the existence of listing agreements for the property.

\section*{VI. FORECLOSURES}

The issue in \textit{Quattlebaum v. Ameribank, N.A.}\textsuperscript{165} arose out of Ameribank’s attempts to confirm a foreclosure sale of property securing a loan. Robert Quattlebaum had personally guaranteed the loan. Ameribank foreclosed on the property securing the loan and sought to confirm that sale in order to pursue a deficiency against Quattlebaum.\textsuperscript{166} An order was entered by the trial court confirming the foreclosure sale on September 12, 1994.\textsuperscript{167} However, the trial court later set aside a portion of that order, which stated that Quattlebaum was personally served with notice of the confirmation hearing and was, therefore, subject to an action for deficiency by Ameribank.\textsuperscript{168}

A second hearing was scheduled for May 20, 1996 for the purpose of confirming the foreclosure sale as it related to Quattlebaum. Ameri-

\begin{itemize}
  \item \textsuperscript{162} \textit{Id.}
  \item \textsuperscript{163} \textit{Id.} at 501, 504, 494 S.E.2d at 300, 302.
  \item \textsuperscript{164} \textit{Id.} at 506, 494 S.E.2d at 304. Also at issue before the court of appeals was the relative priority of Padgett’s lien in relation to the liens held by Empire and the City. While Padgett’s lien was recorded after, and normally would be primed by Empire’s security deed for the property, the court concluded that Padgett’s broker’s lien was first in priority. \textit{Id.} at 505-06, 494 S.E.2d at 303-04. That resulted from Empire’s agreement to subordinate its lien to a security deed in favor of the City, which was filed after Padgett’s broker’s lien. \textit{Id.}
  \item \textsuperscript{165} 227 Ga. App. 517, 489 S.E.2d 319 (1997).
  \item \textsuperscript{166} \textit{Id.} at 517, 489 S.E.2d at 320.
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.}
\end{itemize}
bank's lawyers served a document entitled "Notice of Hearing" on Quattlebaum, informing him of the date of the hearing and attaching a copy of the confirmation application. Neither the Notice of Hearing nor the confirmation petition named Quattlebaum as a party. The notice ended with the following language: "You are invited, but not required, to attend the hearing."\textsuperscript{169}

Quattlebaum appeared at the confirmation hearing with counsel and asserted objections to the hearing taking place. Quattlebaum argued that the notice he received of the hearing did not comply with the requirements of the Georgia confirmation statute.\textsuperscript{170} The trial court rejected each of Quattlebaum's objections and confirmed the foreclosure sale, finding that the price bid at the sale "was within the range shown by [the] evidence as the true market value."\textsuperscript{171}

Quattlebaum appealed and the appellate court reversed the trial court's decision.\textsuperscript{172} In so ruling, the court of appeals found two deficiencies in the notice to Quattlebaum.\textsuperscript{173} First, Quattlebaum was not named as a party in the confirmation petition.\textsuperscript{174} Relying on the holding from \textit{First National Bank v. Kunes}\textsuperscript{175} and a strict construction of the confirmation statute, the court found that the failure to name Quattlebaum as a party rendered the notice defective.\textsuperscript{176} Second, the court found the form of the notice defective.\textsuperscript{177} As explained in a concurring opinion, O.C.G.A. section 44-14-161(c) contemplates that "the court shall direct that a notice of the hearing shall be given to the

\textsuperscript{169} \textit{Id.} The court's judgment confirming the foreclosure sale as it related to the principal debtor was affirmed on appeal by the Georgia Court of Appeals. \textit{See} Ameribank, N.A. \textit{v. Quattlebaum}, 220 Ga. App. 345, 469 S.E.2d 462 (1995).

\textsuperscript{170} 227 Ga. App. at 517-18, 489 S.E.2d at 321-22. Quattlebaum also raised an objection on the basis that the trial court had no authority to hold the second confirmation hearing and that the two year delay between the foreclosure sale and the second confirmation hearing unfairly prevented him from opposing the confirmation. The court rejected both arguments. \textit{Id.}, 489 S.E.2d at 321. The appellate court stated that the trial court was "required to disregard its prior confirmation order and consider anew the issue of whether the incumbent property sold fairly." \textit{Id.} at 518, 489 S.E.2d at 321. The court also stated that evidentiary concerns created by the time lag between a foreclosure sale and the confirmation hearing were "unavoidable" and were to be taken into consideration by the trial court in deciding whether or not to confirm the sale. \textit{Id.}

\textsuperscript{171} \textit{Id.} at 517, 489 S.E.2d at 321.

\textsuperscript{172} \textit{Id.} at 519, 489 S.E.2d at 322.

\textsuperscript{173} \textit{Id.} at 518, 489 S.E.2d at 321.

\textsuperscript{174} \textit{Id.}


\textsuperscript{176} 227 Ga. App. at 518, 489 S.E.2d at 321.

\textsuperscript{177} \textit{Id.}
debtor."\textsuperscript{178} In order to comply with the statute, notice must be in the form of a rule nisi or some other form as directed by the court.\textsuperscript{179} The court found that requirement to be consistent with the court's authority to supervise confirmation hearings.\textsuperscript{180} Such a procedure permits the court to ensure that "the notice is adequate and proper at the outset" and permits the debtor an opportunity to prepare for the issues involved in a confirmation hearing.\textsuperscript{181} The notice in this case was not a rule nisi; it came solely from Ameribank's counsel without any direction from the court.\textsuperscript{182} Therefore, the court found the notice insufficient as a matter of law.\textsuperscript{183} Interestingly, that decision was reached despite the fact that Quattlebaum had received actual notice, appeared at the confirmation hearing with counsel, and presented an expert witness that contradicted the testimony presented by Ameribank.\textsuperscript{184} The court concluded that, in confirmation hearings, there was no provision for "harmless error."\textsuperscript{185}

The court in \textit{Oakvale Road Associates, Ltd. v. Mortgage Recovery Fund-Atlanta Pools, L.P.}\textsuperscript{186} considered an issue that has been discussed in the surveys for the last two years. Specifically, the court considered whether failure to confirm a foreclosure sale of real estate given to secure one debt precluded recovery of a deficiency following sale of real property given by the same creditor to secure a separate debt to the same creditor.\textsuperscript{187} In this case, Oakvale Road Associates, Ltd. ("Oakvale") executed a promissory note to Southern Federal Savings & Loan Association in the face amount of $480,000. As security for the loan, Oakvale executed security deeds for three contiguous tracts of land—the Oakvale Heights Subdivision, the Broad Oak Court Subdivision, and the "Undeveloped Land." Eleven months later, Oakvale

\begin{footnotes}
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178. \textit{Id.} at 519, 489 S.E.2d at 322 (quoting O.C.G.A. § 44-14-161(c) (1982 & Supp. 1998) (emphasis added)).

179. \textit{Id.} The court did not rule that the only notice that would comply with the Georgia confirmation statute is a rule nisi and specifically left the issue that some other form of notice might comply. However, it is clear that a rule nisi always will comply with statutory requirements for notice. \textit{Id.} at 519 n.2, 489 S.E.2d at 322 n.2 (Beasley, J., concurring specially).

180. \textit{Id.} at 520, 489 S.E.2d at 322.

181. \textit{Id.}

182. \textit{Id.} at 519, 489 S.E.2d at 322.

183. \textit{Id.} at 520-21, 489 S.E.2d at 323.

184. \textit{Id.} at 521, 489 S.E.2d at 323.

185. \textit{Id.}


\end{footnotes}
borrowed another $195,000 from Southern Federal for the development of individual lots in Broad Oak Court. A separate note was executed for that amount. In connection with that transaction, Southern Federal released its prior security interest in the Broad Oak Court property. However, Oakvale executed a second security deed to Southern Federal for the Broad Oak Court property and granted Southern Federal a second priority security interest in the Undeveloped Land. Southern Federal later transferred both notes and security deeds to Mortgage Recovery.\textsuperscript{188}

When Oakvale defaulted on both notes, Mortgage Recovery declared the full amount of the indebtedness due and sent Oakvale notices of acceleration of the debts. Mortgage Recovery also gave notice of its intent to foreclose on the property securing the debts. Mortgage Recovery subsequently foreclosed on the first security deed by selling Oakvale Heights and the Undeveloped Land for the amount due on the note. Mortgage Recovery did not attempt to confirm the sale of those properties. Mortgage Recovery also sold the Broad Oak Court property at foreclosure to recover under the second note. Unlike the sale of the Oakvale Heights property and the Undeveloped Land, the sale of the Broad Oak property resulted in a deficiency on the second note of $72,691.61. Mortgage Recovery sought to confirm the second sale and thereby preserve its right to pursue the deficiency against Oakvale.\textsuperscript{189}

On application by Mortgage Recovery, a judgment was entered confirming the second foreclosure sale.\textsuperscript{190} Oakvale appealed. On appeal, Oakvale argued that Mortgage Recovery's failure to confirm the foreclosure sale under the first security deed precluded recovery of a deficiency following the second.\textsuperscript{191} The court of appeals agreed with Oakvale and reversed the trial court's judgment.\textsuperscript{192} The court stated that debts are generally considered "inextricably intertwined" when they "are incurred for the same purpose, secured by the same property, held by the same creditor and owed by the same debtor."\textsuperscript{193} In this case, the court found that

\textsuperscript{188} 231 Ga. App. at 415, 499 S.E.2d at 405.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 415-16, 499 S.E.2d at 405-06.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 419, 499 S.E.2d at 408.
\textsuperscript{194} Id. at 416, 499 S.E.2d at 406 (citing Tufts v. Levin, 213 Ga. App. 35, 443 S.E.2d 681 (1994)).
although Oakvale's two notes were executed almost a year apart and for different purposes, they remained "inextricably intertwined" for purposes of confirmation of a foreclosure sale and an action for a deficiency. The court based its decision on the fact that the Undeveloped Land served as security for both notes. The court specifically rejected Mortgage Recovery's argument that the security for both notes was required to be "wholly identical" property in order to preclude Mortgage Recovery's attempts to recover a deficiency under the second note. The court held that Mortgage Recovery's position "would disserve the purpose of the confirmation statute, which is to assure fairness to the debtor and avert a windfall to the creditor." Accordingly, the court of appeals ruled as a matter of law that Mortgage Recovery was precluded from obtaining a deficiency against Oakvale under the second note.

VII. LANDLORD AND TENANT

In Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P., the Georgia Supreme Court had its first opportunity to apply a recently announced approach in Sturbridge Partners, Ltd. v. Walker to determine whether a landlord is liable to a tenant injured in a criminal attack. Plaintiff-appellant was raped and robbed in the parking garage beneath her apartment building. Prior to the attack on plaintiff, other crimes against property had occurred in the parking garage. Those crimes included the theft of bicycles and thefts from automobiles. The owner and manager of the apartments, Prudential-Bache and A.G. Spanos Development, Inc., respectively, had notice of those prior criminal acts. Plaintiff filed an action against the owner and manager alleging that they negligently failed to maintain the safety of the premises.

Defendants denied liability and asserted that the prior property crimes were insufficient to put them on notice of the potential for crimes resulting in personal injury. The trial court granted defendants'
motion for summary judgment and the court of appeals affirmed.\textsuperscript{205} In reaching its decision, the court of appeals "relied solely on the principle that prior property crimes could not create a factual issue regarding whether a property owner knew or should have known that a crime against a person, sexual or otherwise, might be committed on its premises."\textsuperscript{206} The supreme court granted certiorari to determine whether the court of appeals decision comported with the recently stated principle from \textit{Sturbridge Partners}.\textsuperscript{207}

The court began its analysis with a statement concerning the general obligation of landlords to protect tenants from "foreseeable" criminal attacks.\textsuperscript{208} However, the court noted that in \textit{Sturbridge Partners} it rejected a "restrictive and inflexible approach" for determining which criminal acts were foreseeable.\textsuperscript{209} In that case, the court stated: "In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of prior criminal activities and their likeness, proximity or other relationship to the crime in question."\textsuperscript{210} The court noted that in order to create a reasonable foreseeability of future criminal activity, the prior incidents are not required to be identical to the act in question.\textsuperscript{211} However, the prior criminal acts must "be sufficient to attract the [landlord's] attention to the dangerous condition which resulted in the litigated [incident]."\textsuperscript{212} In \textit{Sturbridge Partners} the court concluded that the question of reasonable foreseeability was generally a jury question.\textsuperscript{213}

After analyzing the facts presented in the current case under the holding in \textit{Sturbridge Partners}, the court concluded that the trial court's grant of summary judgment was proper.\textsuperscript{214} The court held that the prior property thefts did not suggest that personal injury would occur if further thefts took place.\textsuperscript{215} The court placed great emphasis on the fact that all the crimes occurred in a common area of the apartment building where "there is only the potential for a tenant to confront a

\textsuperscript{205} Id.
\textsuperscript{206} Id. at 604-05, 492 S.E.2d at 866 (citing Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 222 Ga. App. 169, 171-72, 474 S.E.2d 31, 34 (1996)).
\textsuperscript{207} Id. at 604, 492 S.E.2d at 866.
\textsuperscript{208} Id. at 605, 492 S.E.2d at 866.
\textsuperscript{209} Id.
\textsuperscript{210} \textit{Sturbridge Partners}, 267 Ga. at 786, 482 S.E.2d at 341.
\textsuperscript{211} 268 Ga. at 605, 492 S.E.2d at 867.
\textsuperscript{212} Id. (citing \textit{Sturbridge Partners}, 267 Ga. at 786, 482 S.E.2d at 339).
\textsuperscript{213} 267 Ga. at 787, 482 S.E.2d at 341.
\textsuperscript{214} 268 Ga. at 606, 492 S.E.2d at 867.
\textsuperscript{215} Id.
thief in an isolated situation" and "there is always the possibility that
the isolation could be brief."\textsuperscript{216} In contrast, the crimes against property in \textit{Sturbridge Partners} occurred in individual apartment units where the victims were more likely to be isolated with the criminal.\textsuperscript{217} Accordingly, the court concluded that the prior crimes against property in this case were "insufficient to create a factual issue regarding whether [the owner] could reasonably anticipate that a violent sexual assault might occur on the premises."\textsuperscript{218}

Justice Hunstein wrote a dissenting opinion that was strongly critical of the majority.\textsuperscript{219} She suggested that the majority opinion only gave "lip service to holding in \textit{Sturbridge [Partners]}," and then proceeded "to usurp the jury's role by resolving contested factual conflicts" in order to achieve a desired result—"a return to 'restrictive and inflexible' standard of the 'substantially similar' prior criminal act" that was rejected in \textit{Sturbridge Partners}.\textsuperscript{220} Justice Hunstein acknowledged that plaintiff might have a relatively weak case.\textsuperscript{221} However, she opined that the "mere recognition of the weakness of appellant's case does not entitle the majority to play factfinder and enter summary adjudication for appellees in a case where the evidence does not, with plain and palpable facts, establish the absence of evidence to support the nonmoving party's case."\textsuperscript{222} Justice Hunstein stated that she would reverse the trial court's entry of judgment as a matter of law and remand so that the jury could resolve factual disputes regarding the foreseeability of the crimes against plaintiff in this case.\textsuperscript{223}

The authors tend to agree with Justice Hunstein's analysis of the \textit{Prudential-Bache} case. If the holding from \textit{Sturbridge Partners} means anything, it is that the question of foreseeability of a tenant's injuries from the criminal acts of third parties is generally a jury question. Only in the most patent cases, when the plaintiff fails to present any evidence that would suggest the crime at issue was foreseeable, would summary adjudication in favor of the property owner be appropriate. As a result of the court's decision in \textit{Prudential-Bache}, the issue of foreseeability in these situations will likely result in substantial litigation and numerous appeals in the coming years. Practitioners from both the plaintiffs and

\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.} at 607, 492 S.E.2d at 868 (Hunstein, J., dissenting).
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.} at 608, 492 S.E.2d at 868.
defense bar should closely follow the development of this area and assess for themselves the ultimate effect of the supreme court's decision in *Sturbridge Partners*.

VIII. LEGISLATIVE DEVELOPMENTS

The Georgia Legislature passed two significant acts affecting the law of real property in Georgia during its 1998 session. The first act made several revisions to the practice and procedure in dispossessory proceedings. First, the legislature amended O.C.G.A. section 44-7-52, which granted tenants an absolute defense in a dispossessory proceeding through the tender of the rent allegedly owed plus the cost of a dispossessory warrant. The amendment added subsections (b) and (c) to the existing statute. Those subsections state as follows:

(b) If the court finds that the tenant is entitled to prevail on the defense provided in subsection (a) of this Code section and the landlord refused the tender as provided under subsection (a) of this Code section, the court shall issue an order requiring the tenant to pay to the landlord all rents which are owed by the tenant and the costs of the dispossessory warrant within three days of said order. Upon failure of the tenant to pay such sum, a writ of possession shall issue. Such payment shall not count as tender pursuant to subsection (a) of this Code section.

(c) For a tenant who is not a tenant under a residential rental agreement as defined in Code Section 44-7-30, tender and acceptance of less than all rents allegedly owed plus the cost of the dispossessory warrant shall not be a bar nor a defense to an action brought under Code Section 44-7-50 but shall, upon proof of same, be considered by the trial court when awarding damages.

The new subsection (b) defines a very short time frame within which tenants are required to pay all rents that they are adjudged to owe. If a tenant fails to pay those amounts within the time allowed, the landlord will gain possession of the property. The new subsection (c) clarifies what occurs when a commercial tenant tenders less than the full amount owed. If the tenant is adjudged to have tendered less than all that was owed, the landlord shall be entitled to a writ of possession.


226. O.C.G.A. § 44-7-52(b) (Supp. 1998).

227. *Id.*
The sums tendered in such cases will only serve to reduce the amount of the money judgment entered against the tenant.\textsuperscript{228}

Second, the legislature clarified what happens to funds paid into the registry of a court under section 44-7-52 during the pendency of an appeal from a judgment. Under the prior law, section 44-7-54 required that any sums in dispute remain in the registry of the trial court until the final resolution of an appeal. Under the new law, all sums that the trial court finds are owed to the landlord, even if subject to dispute in the appeal, will be paid to the landlord unless the tenant shows good cause for not doing so during the pendency of the appeal.\textsuperscript{229}

Third, the legislature changed the time period for filing an appeal from a verdict in a dispossessory action. Under the prior law, parties dissatisfied with the trial court's verdict in a dispossessory action had ten days within which to file a notice of appeal. Under the new statute, that time period is shortened to seven days.\textsuperscript{230}

The other significant legislative development involved the creation of a mechanism by which owners of property may have mechanics' and materialmen's liens voided. Under the Georgia Mechanics' and Materialmen's Lien Act, the claimant must file the lien within three months following the time when the amount claimed became due, and must commence an action to establish the amount of the lien within twelve months from the date the amount claimed became due.\textsuperscript{231} Additionally, the claimant must file a Notice of Commencement of the action in the land records of the county where the property subject to the lien is located within fourteen days following commencement of that action.\textsuperscript{232} The new statute states that if no such notice has been filed within fourteen months after the date the amount claimed in the lien became due, the owner of the property may have the lien voided.\textsuperscript{233} There are specific notice provisions and procedures that must be followed in order for the owner to successfully void a lien under this new statute.\textsuperscript{234} However, when those notice requirements have been satisfied, the clerk of the superior court is required to mark on the

\textsuperscript{228.} Id. § 44-7-52(c).
\textsuperscript{229.} Compare O.C.G.A. § 44-7-54(c) (1991) with O.C.G.A. § 44-7-54(c) (Supp. 1998).
\textsuperscript{230.} Compare O.C.G.A. § 44-7-56 (1991) with O.C.G.A. § 44-7-56 (Supp. 1998). Based on the shortened time frame for filing a notice of appeal, the legislature also provided that a writ of possession and execution writ for any money judgment must be effective at the expiration of seven days after the date such judgment was entered. See O.C.G.A. § 44-7-55(a) (Supp. 1998).
\textsuperscript{231.} O.C.G.A. § 44-14-361.1(a)(2), (3) (Supp. 1998).
\textsuperscript{232.} Id. § 44-14-361.1(a)(3).
\textsuperscript{233.} Id. § 44-14-367 (Supp. 1998).
\textsuperscript{234.} Id.
recorded lien the following language: "This lien is void of record pursuant to Code Section 44-14-367 of the Official Code of Georgia Annotated."\textsuperscript{235} At the same time, the legislature made a minor change to the statute concerning mechanics' and materialmen's liens. The statute required that a Notice of Commencement be executed under oath by the lien claimant or the lien claimant's attorney.\textsuperscript{236} The legislature specifically amended the statute to allow for a correction of a Notice of Commencement in the event that the lien claimant or its counsel failed to execute the notice under oath. If that occurs, the notice may be amended "without leave of court at any time before entry of the pretrial order and thereafter by leave of court."\textsuperscript{237} Although it is not clear from the language of the statute, the authors believe that the amendment to the Notice of Commencement must be made during the pendency of any action seeking to establish the amount of the claimant's lien, not during an action against the property owner to foreclose the lien if two separate actions are filed.

\textsuperscript{235} Id. § 44-14-367(a).
\textsuperscript{236} Id. § 44-14-361(b) (1982).
\textsuperscript{237} Id. § 44-14-361.1(a)(3).