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Real Property

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Real Property

by Linda S. Finley*

I. INTRODUCTION

This Article discusses case law and legislative developments in Georgia real property law from June 1, 2005 through May 31, 2006. The cases and legislation discussed here were chosen at times for their significance to real property law or to update attorneys who either regularly or from time to time practice or render opinions regarding real property, and at times simply for their unusual or thought-provoking facts.

II. LEGISLATION

The statutes regarding title to manufactured housing (mobile homes) were revisited in the 2006 legislative session.¹ Official Code of Georgia Annotated (“O.C.G.A.”) sections 8-2-180 to -183,² which concern the process of converting manufactured homes into real estate, were amended to simplify the process of securitizing manufactured housing for the purpose of mortgage loans.³ In short, the legislature devised a process that eliminates the need for the creation of certificates of title and streamlines the process to avoid the back-and-forth documentation that the original legislation required.

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1. O.C.G.A. §§ 8-2-181 to -183 (2004 & Supp. 2006).

2. *Id.*

3. Ga. S.B. 253, Reg. Sess. (2006).

Prior to the amendment, the statutes required numerous convoluted steps to obtain proper securitization.⁴ The prior statutes required that the owner of the mobile home and all holders of security interests therein execute and file a Certificate of Permanent Location ("CPL") in the real estate records of the county where the land was located and with the Commissioner of Motor Vehicle Safety ("CMVS").⁵ The purpose of the CPL was to indicate, of record, that it was the parties' intent that the mobile home was secured as part of the real property. The clerk of court was to record the CPL and provide the owner with a certified copy of that document,⁶ which was then to be delivered to the CMVS, along with a certificate of title (to the mobile home).⁷ Next, the CMVS issued confirmation to the superior court clerk that the CPL had been properly filed and that the certificate of title had been surrendered.⁸ Finally, the clerk of court was to provide a copy of the CMVS documents to the county tax assessor or other entity responsible for tax valuation.⁹

The length of time required to perform the requisite steps limited access to mortgage financing for those who wished to purchase manufactured housing because mortgage lenders want immediate and valid liens on property used to secure mortgage loans at the time of closing.¹⁰ Though the prior statutes remain in effect, enactment of the amendment simplifies the process by providing an alternative means to securitize mobile homes purchased after July 1, 2006.¹¹ The new streamlined process allows mobile homes to be converted to real property using only a certificate of origin (provided by the mobile home manufacturer) to obtain the CPL, and there is no longer a need to obtain a certificate of title from the CMVS.¹² Once the CPL is properly filed with the clerk of court, the process concludes, and "the [mobile] home shall become for all legal purposes a part of the real property on which it is located."¹³

4. See Linda S. Finley, Scott H. Michalove & James S. Trieschmann, Jr., *Real Property*, 55 MERCER L. REV. 397, 399 (2003).

5. O.C.G.A. § 8-2-181 (2004).

6. O.C.G.A. § 8-2-182(a) (2004).

7. O.C.G.A. § 8-2-182(b) (2004).

8. O.C.G.A. § 8-2-182(c) (2004).

9. O.C.G.A. § 8-2-182(d) (2004).

10. See Patrise Perkins-Hooker, *2006 Legislative Update*, in 1 REAL PROPERTY LAW INSTITUTE PROGRAM MATERIALS 1, 25 (Institute of Continuing Legal Education in Georgia 2006).

11. O.C.G.A. § 8-2-183.1 (Supp. 2006).

12. *Id.*

13. O.C.G.A. § 8-2-183.1(d) (Supp. 2006).

III. TITLE TO REAL PROPERTY

*United Bank v. West Central Georgia Bank*¹⁴ was a contest between two lenders over reverter of title under O.C.G.A. section 44-14-80(a)(2), which provides that title to property reverts to the grantor seven years from the conveyance if there is no maturity date stated in the security deed.¹⁵ West Central argued that because the maturity date was stated in the note underlying the security deed and because the note was incorporated into the security deed, the reverter statute should not apply.¹⁶ The court of appeals held that the trial court correctly found that the presence of the date along with its incorporation by reference in the note was sufficient to fulfill the statutory requirement of O.C.G.A. section 44-14-80(a)(1).¹⁷

In *Bowman v. Century Funding, Ltd.*,¹⁸ the appellate court reviewed the validity of an affidavit of descent to determine whether the sworn averments of the affidavit should have put a subsequent purchaser on notice of other potential claimants to the real property.¹⁹ The plaintiffs in *Bowman* sued the record owner of the property and the owner's lender for ejectment and fraud arising from transfer of title to real property. The plaintiffs alleged that the language contained in an affidavit of descent should have put subsequent purchasers on notice that not all heirs of a prior title holder who had potential valid claims to the property had been identified.²⁰

The recorded affidavit stated that the prior decedent had been married once; however, under the heading of "Name of each Husband and Wife," the spouse was identified as "N/A."²¹ The court of appeals held that "[a] reasonable person examining this self-contradictory entry concerning the identity of [the] spouse could thus conclude that the document failed in its stated purpose—that is, the specification of 'all the heirs at law of [the decedent].'"²² Accordingly, the court of appeals reversed the trial court's order, concluding that whether the affidavit gave the subsequent

14. 275 Ga. App. 418, 620 S.E.2d 654 (2005).

15. O.C.G.A. § 44-14-80(a)(2) (2002).

16. See *United Bank*, 275 Ga. App. at 419-20, 620 S.E.2d at 655.

17. *Id.* at 418-20, 620 S.E.2d at 654-55.

18. 277 Ga. App. 540, 627 S.E.2d 73 (2006).

19. *Id.* at 540, 627 S.E.2d at 75.

20. *Id.* at 540-41, 627 S.E.2d at 75-76.

21. *Id.* at 542-43, 627 S.E.2d at 76-77.

22. *Id.* at 543, 627 S.E.2d at 77.

purchaser actual or constructive notice of the excluded heirs' claim to the property was a question of fact.²³

In *Brandenburg v. Navy Federal Credit Union*,²⁴ Navy Federal Credit Union funded a \$63,000 home equity line of credit to the borrowers, the former husband of the plaintiff, and the former husband's new wife. Prior to the closing, rather than obtaining a full title examination, the credit union obtained an "ownership report," which on its face stated that the report provided only current owner information and a legal description of the real property offered as security for the loan. If a title examination had been performed, it would have revealed a divorce decree recorded in the real estate records requiring the former wife (a title holder to the property) to convey the property by quitclaim deed to the former husband upon his payment of \$40,000.²⁵

Upon discovering that the property had been conveyed as security for a loan without her knowledge (or the transfer of her recorded title interest), the former wife filed an action against her former husband and his new spouse for fraudulent conveyance. A receiver was appointed and the property was sold with the proceeds being held by the receiver. The lender was added as a party to the action and claimed that its security interest was superior to all other claims because the lender acquired its interest as a bona fide purchaser, in good faith, and without notice of the former wife's interest in the property.²⁶ The trial court granted summary judgment to the lender.²⁷ The court of appeals reversed, holding that although the divorce decree was not recorded in the general execution docket, a proper title examination would have revealed the judgment in the deed records and would have placed the lender on notice of the judgment and property interest of the former wife.²⁸

IV. SALE OF REAL PROPERTY

In *Snipes v. Marcene P. Powell & Associates, Inc.*,²⁹ a real estate broker sued for commission.³⁰ The court of appeals focused on the meaning of the word "introduced" as used in the listing agreement that was prepared using the standard Georgia Association of Realtors

23. *Id.*

24. 276 Ga. App. 859, 625 S.E.2d 44 (2005).

25. *Id.* at 859-61, 625 S.E.2d at 44-45.

26. *Id.* at 859-60, 625 S.E.2d at 44-45.

27. *Id.* at 860, 625 S.E.2d at 45.

28. *Id.* at 860-61, 625 S.E.2d at 45.

29. 273 Ga. App. 814, 616 S.E.2d 152 (2005).

30. *Id.* at 815, 616 S.E.2d at 154.

form.³¹ Specifically, the agreement provided that the sellers would pay the broker its commission if the property was sold to “any buyer introduced to the Property by Broker within 90 days after the expiration of the Listing Period.”³² The court of appeals held that as long as the broker had “some minimal causal connection with the sale, or [was] in the chain of causation leading to the sale,” the requirements of the listing agreement were met.³³

The court looked at the “silence” in a contract rather than the contract’s specific words in *Crowell v. Williams*.³⁴ In that case, the sales contract was silent regarding remedies that would be available in the event of default by either the purchaser or the seller. The purchaser defaulted when he could not close the sale of the property, and the seller retained the deposit.³⁵ The court of appeals held that the purchaser was entitled to specify that the deposit would be forfeited in the event of default.³⁶ However, unless the contract provides otherwise, the “seller is required to return any purchase monies paid where the transaction is in effect cancelled or rescinded by the buyer’s default in failing to pay the entire purchase price and the seller reasserts possession.”³⁷ The court further stated that “the partial payment . . . gives the buyer an equitable interest in the land to the extent of his investment.”³⁸ Once the seller rescinded the contract, he could not retain both the land and the funds.³⁹ The seller was required by equity to restore the original status quo by returning the deposit to the purchaser.⁴⁰

In *Kennedy v. Droughton Trust*,⁴¹ the purchaser brought an action against the seller for specific performance for failing to close the sale of realty. The purchaser made an offer to buy property using a standard Georgia Association of Realtors contract that recited a closing date of December 10, 2003. The portion of the sales contract indicating the time limitation for the seller to accept or reject the offer was left blank. The seller executed the contract on December 11, 2003, and returned it to the purchaser without changing the already-expired closing date. Shortly

31. *Id.* at 817-18, 616 S.E.2d at 156.

32. *Id.* at 814-15, 616 S.E.2d at 154.

33. *Id.* at 818, 616 S.E.2d at 156.

34. 273 Ga. App. 676, 615 S.E.2d 797 (2005).

35. *Id.* at 676-77, 615 S.E.2d at 798-99.

36. *See id.* at 678, 615 S.E.2d at 799.

37. *Id.* at 677-78, 615 S.E.2d at 799.

38. *Id.* at 678, 615 S.E.2d at 799.

39. *Id.* at 679, 615 S.E.2d at 800.

40. *Id.*

41. 277 Ga. App. 837, 627 S.E.2d 887 (2006).

thereafter, the seller received a higher offer for the property. On December 16, 2003, the purchaser notified the seller of his intent to close the sale and offered dates for the closing. When no response from the seller was forthcoming, the purchaser sent a second letter with a date certain for closing to which the seller again failed to respond. The purchaser then brought suit for specific performance of the sales contract. The trial court granted summary judgment to the seller, finding that the contract had expired on December 10, 2003, and that even if the contract had not expired, the buyer had failed to tender the purchase price.⁴²

The court of appeals reversed the trial court's finding that a legal impossibility existed when the seller accepted the offer after the expiration of the date specified in the contract for closing.⁴³ The court held that the lack of a specified closing date did not render the contract too vague to be enforced and that the court may impose performance within a reasonable amount of time.⁴⁴ During the discovery portion of the case, the seller acknowledged that the seller received the purchaser's correspondence attempting to schedule the closing and that the attempts were made within a reasonable time frame.⁴⁵ The court of appeals reasoned that the trial court erred in granting summary judgment on the ground that the contract had expired.⁴⁶ Further, the court held that at least one question of fact for jury consideration existed regarding whether the purchaser was required to tender the purchase price.⁴⁷

In *Amend v. 485 Properties*,⁴⁸ the Georgia Supreme Court revisited its decision in *Killearn Partners v. Southeast Properties*.⁴⁹ In *Killearn* the Georgia Supreme Court reviewed whether the Brokerage Relationships in Real Estate Transaction Act ("BRRETA"), as amended in 2000,⁵⁰ prevented real estate professionals from seeking a common law

42. *Id.* at 837, 839-40, 627 S.E.2d at 887-89. Under the maxim of "he who seeks equity must do equity," the plaintiff was required to tender the entire purchase price into the registry of the court. *Id.* at 840, 627 S.E.2d at 889.

43. *Id.* at 840, 627 S.E.2d at 889.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 841, 627 S.E.2d at 889.

48. 280 Ga. 327, 627 S.E.2d 565 (2006) [hereinafter *Amend II*].

49. 279 Ga. 144, 611 S.E.2d 26 (2005). The decision in *Killearn* is discussed in last year's real property survey. See Linda S. Finley, *Real Property*, 57 MERCER L. REV. 331, 342-44 (2005).

50. O.C.G.A. §§ 10-6A-1 to -16 (2000 & Supp. 2006).

remedy for commission when no written brokerage agreement was executed.⁵¹ The decision in *Amend* overruled the prior case.⁵²

Amend began as a suit for commission filed in the federal court in the Northern District of Georgia and was appealed to the Eleventh Circuit Court of Appeals.⁵³ The court of appeals sent the matter to the Georgia Supreme Court on a certified question of “whether procuring cause is an element of a quantum meruit claim under Georgia law.”⁵⁴ The Georgia Supreme Court answered “yes.”⁵⁵

In *Amend II* a leasing agent for WorldCom negotiated a ten-year lease for property owned by 485 Properties. The lease provided, among other things, that 485 Properties would pay the leasing agent’s commission. WorldCom signed the lease, but 485 Properties refused to sign when WorldCom’s financial woes became public. WorldCom filed for bankruptcy protection, and the court appointed a leasing agent who successfully negotiated a lease between WorldCom and 485 Properties; however, the lease was for a smaller space. Amend then sued 485 Properties, seeking damages for unpaid commission.⁵⁶

In the original *Amend* case, the issue before the district court was “whether the broker [had] a cause of action under Georgia law against the [owner] for breach of contract based on the pre-bankruptcy fee agreement or based on quantum meruit for fruitless negotiations.”⁵⁷ The district court found there to be no breach of contract claim but reserved decision on the quantum meruit claim pending the Georgia Supreme Court decision in *Killearn*.⁵⁸ Because the law in this area appeared to be unclear to the Eleventh Circuit, the court certified the question to the Georgia Supreme Court.⁵⁹ The Georgia Supreme Court held that “procuring cause” is an element for a claim for commission under quantum meruit and expressly overruled any case, including *Killearn*, to the contrary.⁶⁰

51. *Killearn*, 279 Ga. at 144, 611 S.E.2d at 27.

52. *See Amend II*, 280 Ga. at 328 & n.2, 329-30, 627 S.E.2d at 567 & n.2, 568.

53. *Amend v. 485 Properties, LLC*, 401 F.3d 1255, 1257-58 (11th Cir. 2005) [hereinafter *Amend I*].

54. *Amend II*, 280 Ga. at 327, 627 S.E.2d at 566.

55. *Id.*

56. *Id.* at 328, 627 S.E.2d at 566.

57. *Amend I*, 401 F.3d at 1257.

58. *Id.*

59. *See Amend II*, 280 Ga. at 327, 627 S.E.2d at 566.

60. *Id.* at 330, 627 S.E.2d at 568.

V. EASEMENTS, COVENANTS, AND BOUNDARIES

In *Sledge v. Peach County*,⁶¹ neighboring property owners disputed their boundary line, relying upon descriptions found in old deeds. The plaintiff claimed that the boundary was set by an old fence line that had been in place for over thirty years. The defendants claimed that the boundary line was the land lot line described in the plaintiff's deeds, consisting only of Land Lot 15 in Peach County, Georgia and that the disputed acreage was located in Land Lot 14. Following a bench trial, judgment was entered for the plaintiffs, and the defendants appealed.⁶²

The appellate court reviewed the statutory rules for determining disputed lines.⁶³ According to Georgia law, natural landmarks are the most reliable and conclusive evidence of disputed boundary lines;⁶⁴ ancient landmarks control courses and distances called for in a survey;⁶⁵ when lot corners are determined but not marked, a straight line will be run, but an established line, although crooked, shall not be overruled;⁶⁶ and courses and distances are used when there is no higher evidence of a disputed line.⁶⁷ Furthermore, the general reputation in the neighborhood shall be evidence of ancient landmarks if those landmarks have existed more than thirty years.⁶⁸ Finally, Georgia law provides that "[a]cquiescence for seven years by acts or declarations of adjoining landowners shall establish a dividing line."⁶⁹

Applying these statutory rules, the court held that the fence line relied upon by the plaintiff had been in existence for more than thirty years.⁷⁰ Further, the court held that the plaintiff had farmed the disputed acreage without objection by the defendants and that the parties had treated the fence as the boundary line.⁷¹ Based on the ancient landmark and the conduct of the parties, the court of appeals held that the trial court was authorized to find for the plaintiff.⁷²

61. 276 Ga. App. 780, 624 S.E.2d 288 (2005).

62. *Id.* at 780-81, 624 S.E.2d at 289-90.

63. See O.C.G.A. § 44-4-5 (1991); *Sledge*, 276 Ga. App. at 782, 624 S.E.2d at 290.

64. O.C.G.A. § 44-4-5(1).

65. *Id.* § 44-4-5(2).

66. *Id.* § 44-4-5(3).

67. *Id.* § 44-4-5(4).

68. O.C.G.A. § 44-4-6 (1991).

69. *Id.*

70. *Sledge*, 276 Ga. App. at 783, 624 S.E.2d at 291.

71. *Id.*

72. *Id.* at 784, 624 S.E.2d at 291.

In *Young v. Oak Leaf Builders, Inc.*,⁷³ the purchasers of a home sued their builder for breach of contract, breach of warranty, negligence, and fraud because the builder had constructed their home within an easement that gave the city of Lilburn, Georgia access to a detention pond located to the rear of the purchasers' property.⁷⁴ The trial court granted summary judgment to the builder but was reversed in part on appeal.⁷⁵

The evidence showed that the purchasers hired the builder to construct a new home. The purchasers obtained a construction loan from which draws would be taken to pay the builder as he completed specified steps during the building process. Upon completion of construction and approval by the lender, the loan would convert to permanent financing.⁷⁶

After the builder poured the foundation, the lender requested a foundation survey. The survey showed that the foundation encroached upon the city's easement. Neither the lender nor the builder advised the purchasers that the foundation encroached upon the easement.⁷⁷

When construction was completed, the purchasers requested that the lender convert the construction loan to permanent financing. The lender advised the purchasers of the encroachment and told them that the mortgage could not close. The purchasers demanded that the builder reimburse them for the cost of the home; however, the builder obtained an appraisal showing that the encroachment had not devalued the home and obtained a waiver from the city allowing the encroachment. The lender was satisfied with this resolution, and the purchasers closed the permanent loan.⁷⁸

Following closing, the purchasers obtained an appraisal that indicated that the encroachment significantly diminished the value of their home, and they filed suit. In their claim for breach of contract and breach of warranty, the purchasers alleged that the builder defectively built the home within the easement and therefore breached its implied duty to perform in a fit and workmanlike manner. The builder contended that because the purchasers proceeded with closing with full knowledge of the encroachment, the purchasers could not recover. The trial court granted summary judgment to the builder on the ground that the purchasers

73. 277 Ga. App. 274, 626 S.E.2d 240 (2006).

74. *Id.* at 275, 626 S.E.2d at 242.

75. *Id.* at 274, 626 S.E.2d at 241.

76. *Id.* at 275, 626 S.E.2d at 242.

77. *Id.*

78. *Id.*

were aware of the encroachment and chose to go forward with the closing.⁷⁹

The court of appeals reversed the trial court's order, holding that whether the purchasers waived the right to make a claim was a question of fact to be determined by a jury.⁸⁰ The court reasoned that although closing of the permanent loan proceeded, the purchasers had informed the builder that they believed the construction was negligent, and the purchasers were led to believe that failure to close the permanent financing loan would result in default and possible foreclosure.⁸¹

Additionally, because the contract provided a one-year post-closing warranty on workmanship that required the builder to correct any work rejected by the purchaser within one year of closing, the court of appeals held that a jury could reasonably conclude that the purchasers did not intend to waive their right to demand a workmanlike performance.⁸² The court also reversed the grant of the builder's motion for summary judgment on the purchasers' claim for negligent construction.⁸³ The court affirmed the grant of summary judgment on the fraud claim because the evidence demonstrated that the purchasers closed the permanent loan and paid the builder the final installment because the purchasers feared default on the construction loan and not based upon their reliance on any action or statements of the builder.⁸⁴

In *Brockway v. Harkleroad*,⁸⁵ the court of appeals held that unanimous consent to amend restrictive covenants is not required when (1) the amendment is accomplished in compliance with the provisions of a recorded declaration, (2) the amendment is agreed upon by a sufficient majority of the lot owners, and (3) the amendment is applied uniformly to all lots in the subdivision.⁸⁶ In *Brockway* a subdivision consisting of 112 residential lots was established in 1989. By 2000 only eighteen homes had been built. The homeowners' association established by the original declaration had not been formed. The common facilities—including a pool and clubhouse—had been closed, and the developer had abandoned the project. All but three of the lots had been purchased by a group of investors who wanted to develop the property for commercial use. However, to hasten the commercial development,

79. *Id.* at 275-76, 626 S.E.2d at 242-43.

80. *Id.* at 278, 626 S.E.2d at 243.

81. *Id.* at 277, 626 S.E.2d at 243.

82. *Id.* at 277-78, 626 S.E.2d at 243-44.

83. *Id.* at 278, 626 S.E.2d at 244.

84. *See id.* at 278-79, 626 S.E.2d at 244.

85. 273 Ga. App. 339, 615 S.E.2d 182 (2005).

86. *Id.* at 339, 615 S.E.2d at 183.

the investors needed to shorten the time of effectiveness of the restrictive covenants.⁸⁷

The investors filed an action for declaratory judgment seeking a ruling that the amendment to the covenants they filed terminated the original covenants and removed the restriction against commercial development as of the termination date.⁸⁸ Summary judgment was granted to the investors and was affirmed on appeal because the amendment complied with the covenant's requirements for amendments and because the amendments would apply uniformly to all lots.⁸⁹

In *Mitchell v. Cambridge Property Owners Ass'n*,⁹⁰ Bernard Mitchell owned a home in the Cambridge Subdivision that was subject to the decisions of a homeowners' association and certain restrictive covenants. Mitchell resurfaced his driveway without seeking approval of the homeowners' association's Architectural Control Committee.⁹¹ The committee decided the driveway was resurfaced "in a manner that the Committee found unsuitable for aesthetic reasons."⁹² The homeowners' association sought an injunction to compel Mitchell to return the driveway to its original state. The trial court granted the injunction. Mitchell appealed, contending that the language of the subdivision covenants did not require approval for the resurfacing of the driveway and that the trial court's interpretation of the covenants rendered them so indefinite as to become void.⁹³

In pertinent part, the restrictive covenant read, "[n]o building, storage house, cabana, fence, wall, swimming pool, or other structure shall be commenced" without approval of the homeowners' association.⁹⁴ Mitchell argued that the driveway was not a structure within the meaning of the restrictive covenant.⁹⁵ The court of appeals acknowledged that the language of the covenant did not expressly state whether it applied to construction of a driveway; however, the court looked to *Black's Law Dictionary* for the definition of "structure" as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposely joined together" and determined that a

87. *Id.* at 339-40, 615 S.E.2d at 183-84.

88. *Id.*

89. *Id.* at 340, 341-42, 615 S.E.2d at 184, 185.

90. 276 Ga. App. 326, 623 S.E.2d 511 (2005).

91. *Id.* at 326, 623 S.E.2d at 512-13.

92. *Id.*, 623 S.E.2d at 513.

93. *Id.* at 326, 328, 623 S.E.2d at 513, 514.

94. *Id.* at 326, 623 S.E.2d at 512 (brackets in original).

95. *Id.*, 623 S.E.2d at 513.

driveway met the definition.⁹⁶ Accordingly, the driveway was covered by the restrictions.⁹⁷

As to Mitchell's contention that the trial court's broad interpretation rendered the covenants vague and unenforceable, the court relied on *Waugh v. Waugh*,⁹⁸ which stated, "[I]t is only when the indefiniteness of [a contract's] subject matter is "so extreme as not to present anything upon which the contract may operate in a definite manner" that the contract is rendered void."⁹⁹ That was not the case here, and the appellate court upheld the trial court's decision.¹⁰⁰

VI. TRESPASS AND NUISANCE

The Georgia Court of Appeals reversed the trial court's grant of judgment notwithstanding a jury verdict ("j.n.o.v.") in *Sprayberry Crossing Partnership v. Phenix Supply Co.*¹⁰¹ There, Sprayberry, the owner of a shopping center, brought suit for damages under the Georgia Hazardous Site Response Act¹⁰² and for trespass and nuisance against Phenix, a company that supplied dry cleaning chemicals to Sprayberry's tenant.¹⁰³

Sprayberry contended that Phenix had contaminated the shopping center's soil and groundwater. The evidence showed that Phenix was the sole supplier of dry cleaning chemicals to the dry cleaner located on the property. During Phenix's monthly deliveries to the dry cleaner, Phenix's trucks would routinely leak chemicals into the parking lot of the shopping center as well as spill chemicals inside the dry cleaner. The spillage resulted in the property being listed on the Georgia Hazardous Site Inventory because the center's soil and groundwater had been contaminated by multiple small spills of dry cleaning chemicals.¹⁰⁴

Following a trial, the jury returned a verdict in favor of Sprayberry. Phenix contended that Sprayberry had failed to show that Phenix's actions (rather than the actions and contamination by the dry cleaning

96. *Id.* at 327, 623 S.E.2d at 513 (quoting BLACK'S LAW DICTIONARY 1464 (8th ed. 2004)) (brackets in original).

97. *Id.*

98. 265 Ga. App. 799, 595 S.E.2d 647 (2004).

99. *Mitchell*, 276 Ga. App. at 328, 623 S.E.2d at 514 (quoting *Waugh*, 265 Ga. App. at 801, 595 S.E.2d at 650) (brackets in original).

100. *Id.*

101. 274 Ga. App. 364, 364, 617 S.E.2d 622, 623 (2005).

102. O.C.G.A. §§ 12-8-90 to -97 (2006).

103. *Sprayberry*, 274 Ga. App. at 365, 617 S.E.2d at 624.

104. *Id.* at 364-65, 617 S.E.2d at 623-24.

establishment itself) were the proximate cause of the contamination and filed a motion for j.n.o.v., which was granted by the court.¹⁰⁵

While primarily considering the procedural aspects of the j.n.o.v. motion, the court of appeals also considered from whom a property owner may seek remedy in the event of contamination: "A property owner may bring an action for nuisance and trespass against one who contaminates his property with a hazardous substance."¹⁰⁶ The court reasoned that there was sufficient evidence to support the jury verdict and that while the dry cleaning tenant may have contributed to the contamination, Phenix's spillage on numerous occasions could also have contributed to the contamination of the shopping center.¹⁰⁷ The court reasoned, "Proximate cause is not necessarily 'the last act or cause, or the nearest act to the injury, but such act [that has] actively aided in producing the injury as a direct and existing cause.'"¹⁰⁸

In *Cernonok v. Kane*,¹⁰⁹ the Georgia Supreme Court reviewed how an alley abandoned by a municipality should be treated by adjoining neighbors.¹¹⁰ The Cernonoks and Kane were neighbors in Atlanta, Georgia. An alley abandoned by the City of Atlanta ran between their two properties. The Cernonoks acquired their property in June 1999 but did not immediately record deeds of conveyance. Kane obtained title to his property in December 1999 and immediately recorded his deed.¹¹¹ Almost a year after Kane acquired his property, the Cernonoks "began recording four deeds purporting to grant them title to the portion of the [a]lley abutting Kane's property."¹¹² The Cernonoks also blocked the alley, and as a result, Kane filed an action seeking to quiet title and seeking damages for continuing trespass.¹¹³ The matter was heard by a Special Master "who determined that the disputed portion of the [a]lley belonged to Kane by operation of his deed recorded prior to the Cernonoks' [sic] deeds."¹¹⁴ The trial court adopted the Special Master's finding from which the Cernonoks appealed.¹¹⁵

105. *Id.*

106. *Id.* at 365, 617 S.E.2d at 624.

107. *Id.*

108. *Id.* (quoting *Milton Bradley Co. of Ga. v. Cooper*, 79 Ga. App. 302, 308, 53 S.E.2d 761, 765 (1949)) (brackets in original).

109. 280 Ga. 272, 627 S.E.2d 14 (2006).

110. *Id.* at 272, 627 S.E.2d at 15.

111. *Id.* at 272-73, 627 S.E.2d at 15.

112. *Id.* at 273, 627 S.E.2d at 15.

113. *Id.*

114. *Id.*

115. *Id.*

On appeal, the court first considered how a street or alley abandoned by a municipality is treated, concluding that “the property reverted to the adjoining lots, with each lot expanding out to the centerline of the portion of the [a]lley abutting it.”¹¹⁶ From that point, the court considered the Cernonokses’ argument that Kane should have been on notice of their possession and use of the alley.¹¹⁷ The court held that because the Cernonoks did not live on the property and the ingress and egress to the alley was open to all until a time after Kane acquired his property, Kane was not on notice of the Cernonokses’ claim to the disputed property.¹¹⁸ “Possession . . . has the effect of notice only if it is actual, open, visible, exclusive, and unambiguous.”¹¹⁹ Because there was some evidence that supported the Special Master’s findings that Kane had no notice, the appellate court upheld the trial court’s ruling.¹²⁰

VII. FORECLOSURE OF REAL PROPERTY

In *Aames Funding Corp. v. Henderson*,¹²¹ following foreclosure of secured real property, the lender filed an action for reformation to correct the legal description contained in its security deed. The lender averred that it was the intent of the parties that repayment of the mortgage loan be secured by four lots. Only one of the four lots was referenced in the security deed. The lot described in the security deed contained only a corner of the house (which the lender intended to act as security for its loan), the patio, and a shed. Subsequent to the original mortgage loan, the borrowers obtained a loan from a relative who took back a security deed properly describing the property, and the deed was then recorded in the real estate records. Only after foreclosure of the property did the lender discover the error and seek reformation of the deed, alleging mutual mistake. The trial court granted summary judgment to the borrowers.¹²²

The court of appeals reversed the trial court’s grant of summary judgment, determining that the parties had made a mutual mistake at the origination of the loan that was relievable in equity.¹²³ The court reasoned that the evidence was not in dispute that the parties intended

116. *Id.* at 272, 627 S.E.2d at 15.

117. *Id.* at 274, 627 S.E.2d at 15-16.

118. *Id.*, 627 S.E.2d at 16.

119. *Id.* (citing *McDonald v. Dabney*, 161 Ga. 711, 716, 132 S.E. 547, 554 (1926)).

120. *Id.*

121. 275 Ga. App. 323, 620 S.E.2d 503 (2005).

122. *Id.* at 323-25, 620 S.E.2d at 504-05.

123. *Id.* at 323, 325, 620 S.E.2d at 504, 505.

for the entire property to serve as security for repayment of the mortgage note.¹²⁴ The court further held that reformation of the security deed relates back to the date of the execution of the deed, which in this case established priority over the subsequent security interest given by the borrower to a relative.¹²⁵

VIII. TAXATION OF REAL PROPERTY

In *Community Renewal & Redemption, LLC v. Nix*,¹²⁶ the Georgia Supreme Court reviewed the ripening of title to real property obtained by tax deed.¹²⁷ In that case, certain real property was sold in December 1993 to DeKalb County to satisfy unpaid property taxes. In February 1999 DeKalb County conveyed the property to Nix.¹²⁸ In January 2003 the defaulting taxpayer quitclaimed her interest in the property to Community Renewal and Redemption, LLC ("Community"), and pursuant to O.C.G.A. section 48-4-42,¹²⁹ Community then attempted to tender what it deemed was the correct sum to bar the equity right of redemption to Nix.¹³⁰ Nix refused the tender, and Community filed suit to force redemption of the property. The trial court granted summary judgment to Nix, finding that title had vested in DeKalb County prior to the sale of the property to Nix.¹³¹

The Georgia Supreme Court, relying on *Moultrie v. Wright*,¹³² held that the trial court erred and reversed the trial court's order.¹³³ *Moultrie* held that expiration of a statutorily designated period without an effort to redeem by the defaulting taxpayer placed the purchaser's title beyond defeasance through redemption.¹³⁴ The statute upon which the decision in *Moultrie* relied, O.C.G.A. section 48-4-48,¹³⁵ was amended to remove the provision by which a tax sale purchaser's title is perfected merely by the passage of time and nothing else.¹³⁶ The removal of that language clarified that for all tax deeds executed after

124. *See id.* at 325, 620 S.E.2d at 505.

125. *Id.* at 326, 620 S.E.2d at 506.

126. 279 Ga. 840, 621 S.E.2d 722 (2005).

127. *Id.* at 840, 621 S.E.2d at 722-23.

128. *Id.*

129. O.C.G.A. § 48-4-42 (1999).

130. *Community Renewal*, 279 Ga. at 840, 621 S.E.2d at 722-23.

131. *Id.*

132. 266 Ga. 30, 464 S.E.2d 194 (1995).

133. *Community Renewal*, 279 Ga. at 841-42, 621 S.E.2d at 723.

134. *Moultrie*, 266 Ga. at 32, 464 S.E.2d at 197-98.

135. O.C.G.A. § 48-4-48 (1999).

136. *Community Renewal*, 279 Ga. at 841, 621 S.E.2d at 723.

July 1, 1989, the ripening of title must occur by the longer, prescriptive time period.¹³⁷

In late 2005 the court of appeals decided *E-Lane Pine Hills, LLC v. Ferdinand*,¹³⁸ which considered whether Georgia's tax collectors could sell and assign tax executions to third parties.¹³⁹ *E-Lane* involved an Atlanta developer's lawsuit attacking the Fulton County Tax Commissioner's practice of selling to third parties the tax executions (writs of *feri facias*, or "fi. fa.") created by unpaid property taxes.¹⁴⁰ The decision invalidated all tax fi. fas. sold to third parties after May 21, 2002.¹⁴¹

E-Lane Pine Hills, LLC ("E-Lane") owned property that was part of a four-acre tract in Fulton County. Although the tract was not buildable, the Fulton County Tax Assessor determined its value to be \$130,000 and issued a tax bill based upon that value. E-Lane claimed that it had not received notice of the assessed value and therefore was denied the opportunity to appeal the assessment. Thereafter, E-Lane filed a return declaring that the tract had a value of \$10,000. The tax commissioner issued a fi. fa., and E-Lane filed suit to enjoin the tax commissioner from conveying the tax execution to a third party. The trial court denied the request for interlocutory injunction.¹⁴²

The opinion in *E-Lane* sets forth an exhaustive review of the legislative history of the law regarding the sale of any execution for taxes.¹⁴³ Since 1872, the Georgia Legislature has authorized the sale to third parties of any execution for taxes, allowing the third parties to then enforce the execution.¹⁴⁴ The 1872 statute's provisions concerning tax executions became O.C.G.A. section 48-3-19,¹⁴⁵ and the provisions concerning other executions issued without the judgment of a court became O.C.G.A. section 9-13-36.¹⁴⁶ In 2002 the Georgia General Assembly repealed O.C.G.A. section 48-3-19, effective May 21, 2002,¹⁴⁷ which according to *E-Lane*, was due to abuses stemming from the practice of selling tax executions to private entities, particularly the sale

137. *Id.*

138. 277 Ga. App. 566, 627 S.E.2d 44 (2005).

139. *Id.* at 566, 627 S.E.2d at 45.

140. *Id.*

141. *See id.* at 570, 627 S.E.2d at 48.

142. *Id.* at 566-67, 627 S.E.2d at 45-46.

143. *See id.* at 567-70, 627 S.E.2d at 46-48.

144. *See id.* at 567-68, 627 S.E.2d at 46.

145. O.C.G.A. § 48-3-19 (1999 & Supp. 2006).

146. *E-Lane*, 277 Ga. App. at 568, 627 S.E.2d at 47; O.C.G.A. § 9-13-36 (2006).

147. *See* 2002 Ga. Laws 1481-83, §§ 1, 5.

of large blocks of the executions to third parties.¹⁴⁸ The General Assembly did not, however, repeal or in any way change O.C.G.A. section 9-13-36, and the tax assessor relied on this statute as the authority under which it continued the practice of selling property tax fi. fa. to third parties.¹⁴⁹

In reaching its decision, the court of appeals held that the 2002 legislature must have intended to restrict the operation of O.C.G.A. section 9-13-36 as it related to sales of property tax executions.¹⁵⁰ So holding, the court of appeals vacated the trial court's order denying the interlocutory injunction and remanded the case for further proceedings consistent with its order.¹⁵¹ When asked on motion for reconsideration to apply the decision prospectively, the court refused.¹⁵²

However, in attempting to resolve the practical problems that the court of appeals decision created, the legislature enacted O.C.G.A. section 48-3-19¹⁵³ and amended O.C.G.A. section 9-13-36.¹⁵⁴ The legislation only affects tax executions transferred on or after July 1, 2006, the effective date of the legislation.¹⁵⁵ The statutes do not address the real property title issues created by the decision in *E-Lane* with respect to the 2002, 2003, and 2004 tax executions that had been transferred by the Tax Commissioner prior to the decision.¹⁵⁶

In *Croft v. Fairfield Plantation Property Owners Ass'n*,¹⁵⁷ the court of appeals considered the issue of whether a defeasible fee interest in property rendered the holder liable for real estate taxes and homeowners' association dues.¹⁵⁸ Croft purchased real property held for unpaid taxes at a tax sale.¹⁵⁹ Pursuant to the Georgia statute allowing redemption of property from tax sales upon payment of statutory penalties,¹⁶⁰ Croft was vested with a defeasible fee simple interest in the property.¹⁶¹ Because the interest was defeasible, Croft argued that he was not responsible for payment of the real property taxes on the

148. *E-Lane*, 277 Ga. App. at 567, 627 S.E.2d at 46.

149. *Id.*

150. *Id.* at 570, 627 S.E.2d at 48.

151. *Id.* at 570-71, 627 S.E.2d at 48.

152. *Id.* at 572, 627 S.E.2d at 49.

153. O.C.G.A. § 48-3-19 (Supp. 2006).

154. O.C.G.A. § 9-13-36 (2002 & Supp. 2006).

155. Ga. S.B. 585, § 8, Reg. Sess. (2006).

156. See O.C.G.A. § 48-3-19; O.C.G.A. § 9-13-36.

157. 276 Ga. App. 311, 623 S.E.2d 531 (2005).

158. See *id.* at 311, 623 S.E.2d at 532.

159. *Id.* at 312, 623 S.E.2d at 532.

160. See O.C.G.A. § 48-4-40 (1999).

161. *Croft*, 276 Ga. App. at 313, 623 S.E.2d at 533.

property or the homeowners' association fees.¹⁶² The court of appeals confirmed that a purchaser at a tax sale holds only a defeasible fee interest in the property purchased, but the court held that the defeasible interest itself is sufficient to render a tax sale purchaser responsible for real estate taxes and homeowners' association dues.¹⁶³ Accordingly, the judgment of the trial court was affirmed.¹⁶⁴

162. *Id.*

163. *Id.* at 313-14, 623 S.E.2d at 533.

164. *Id.* at 314, 623 S.E.2d at 534.