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Construction Law

by Frank O. Brown, Jr.*

I. INTRODUCTION

This Article focuses on noteworthy opinions issued by Georgia appellate courts between June 1, 2013 and May 31, 2014 that are relevant to the practice of construction law.[1] Because condominium projects often result in construction-defect litigation, this Article also briefly discusses an amendment to section 44-3-106(h) of the Official Code of Georgia Annotated (O.C.G.A.), part of the Georgia Condominium Act, which became effective July 1, 2014.

II. ARBITRATION

Archer Western Contractors, LLC v. Holder Construction Co.[2] is a Georgia appellate case arising out of the now familiar tragic death of Mack Pitts, a subcontractor's employee on the Atlanta airport's International Terminal project. The Pitts estate received a large judgment against the sub-subcontractor and its employee that exceeded the sub-subcontractor's automobile liability insurance coverage.[3]

The estate then sued the City of Atlanta, the general construction manager, and the construction manager's subcontractor, alleging that they had failed to require the sub-subcontractor to maintain at least $10 million in automobile liability insurance as required by both the general contract and the subcontract. The construction manager was a joint venture composed of Holder Construction Company, Manhattan

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1. For an analysis of Georgia construction law during the prior survey period, see Frank O. Brown, Jr., *Construction Law, Annual Survey of Georgia Law*, 65 MERCER L. REV. 67 (2013).

2. 325 Ga. App. 169, 751 S.E.2d 908 (2013).

3. *Id.* at 171, 751 S.E.2d at 911.

Construction Company, C.D. Moody Construction Company, and Hunt Construction Group. The subcontractor was also a joint venture composed of Archer Western Contractors and Capital Contracting Company.[4]

Earlier Georgia appellate cases from 2011 to 2013 that arose from the estate's claims focused on whether Pitts was a third-party beneficiary of the contract's insurance provisions, including those incorporated into a Phase 2 subcontract between the construction manager and the subcontractor.[5] On remand from the Georgia Supreme Court, the Georgia Court of Appeals ultimately determined that Pitts was a third-party beneficiary.[6]

The principal issue in the current court of appeals case was whether an arbitrator or judge should decide the res judicata effect of an unappealed part of the trial court's order, which was entered in December of 2010 before the series of appeals mentioned above.[7] The unappealed part of the order granted summary judgment to the subcontractor on the construction manager's cross-claim that the subcontractor had breached its duty under the Phase 2 subcontract to indemnify the project manager pertaining to the estate's claims.[8]

In December 2011, a year after the summary judgment order, the construction manager notified the subcontractor that it would withhold further payments to the subcontractor under the Phase 3, but not the Phase 2 subcontract until conclusion of the *Pitts* litigation. The construction manager withheld future payments because of the subcontractor's breach of its contractual duty in the Phase 2 subcontract to ensure that the sub-subcontractor carried the requisite insurance.[9]

In response to the withholding of payment, the subcontractor filed suit in state court seeking a declaration that the res judicata effect of the trial court's December 2010 summary judgment order on the construction manager's indemnity claim prevented the construction manager from withholding funds under the Phase 3 subcontract. The construction manager then notified the subcontractor of its election to arbitrate under the arbitration provision of the Phase 3 subcontract. Thereafter, the construction manager filed motions to dismiss the declaratory judgment

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4. *Id.* at 169, 751 S.E.2d at 910.
5. *Id.* at 171, 751 S.E.2d at 911; *see generally* Estate of Pitts v. City of Atlanta, 323 Ga. App. 70, 74, 746 S.E.2d 698, 701 (2013).
6. *Estate of Pitts*, 323 Ga. App. at 70, 72, 746 S.E.2d at 699, 700.
7. *Archer W. Contractors, LLC*, 325 Ga. App. at 169, 171, 751 S.E.2d at 910, 911.
8. *Id.* at 171, 751 S.E.2d at 911.
9. *Id.* at 171-72, 751 S.E.2d at 911.

suit and to compel arbitration.[10] The trial court granted those motions, reasoning that, under the Federal Arbitration Act (the FAA)[11] and related federal law, the res judicata effect of the trial court's December 2010 judgment was for an arbitrator, not a court, to decide.[12]

First, the court of appeals agreed with the trial court's conclusion that the FAA applied.[13] Relying on federal case authority that it found persuasive, the court then determined that, while gateway issues about whether an arbitration provision is valid or covers a claim are for the court to decide unless the parties have clearly agreed otherwise, res judicata is not a gateway issue and is therefore for an arbitrator to decide.[14] It analogized res judicata defenses to waiver, laches, and estoppels defenses, which are also for arbitrators to decide.[15]

The court acknowledged that in *Bryan County v. Yates Paving & Grading Co.*,[16] the Georgia Supreme Court held that a res judicata defense should be decided by the trial court.[17] However, it distinguished *Bryan County* from the current case because *Bryan County* had been decided under the rubric of the Georgia Arbitration Code[18] rather than the FAA.[19]

In *Miller v. GGNSC Atlanta, LLC*,[20] the court of appeals addressed, as a matter of first impression, whether the FAA allows a substitute arbitrator to be named when the parties' chosen arbitration forum in a consumer contract has failed or is otherwise unavailable.[21] The court reasoned that the FAA does allow a substitution if the selection of a particular forum was merely an ancillary logistical concern, but it does not if that selection was an integral term of the agreement.[22]

In this case, the court held that the designation of the chosen arbitration provider was integral to the arbitration agreement because the agreement expressly stated that any dispute "shall" be resolved "exclusively" through arbitration conducted in accordance with the designated arbitration provider's code of procedure, which, in turn,

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10. *Id.* at 169, 171-72, 751 S.E.2d at 910, 911-12.
11. U.S.C. tit. 9 (2012).
12. *Archer W. Contractors, LLC*, 325 Ga. App. at 172, 751 S.E.2d at 912.
13. *Id.* at 172-73, 751 S.E.2d at 912.
14. *Id.* at 174-75, 751 S.E.2d at 913-14.
15. *Id.* at 175, 751 S.E.2d at 913.
16. 281 Ga. 361, 638 S.E.2d 302 (2006).
17. *Archer W. Contractors, LLC*, 325 Ga. App. at 175, 751 S.E.2d at 914.
18. O.C.G.A. §§ 9-9-1 to -18 (2007 & Supp. 2014).
19. *Archer W. Contractors, LLC*, 325 Ga. App. at 175-76, 751 S.E.2d at 914.
20. 323 Ga. App. 114, 746 S.E.2d 680 (2013).
21. *Id.* at 114, 118-19, 746 S.E.2d at 682, 685.
22. *Id.* at 119-20, 746 S.E.2d at 685-86.

specified that only the chosen arbitration provider could administer the arbitration.[23] Because the arbitration provider could no longer perform arbitrations because of a consent judgment it had entered into in response to a lawsuit by the Minnesota Attorney General alleging deceptive practices, the court determined that the arbitration provision was impossible to enforce.[24] This decision suggests that parties to contracts with arbitration provisions may wish to expressly authorize the court's appointment of an alternative arbitration forum in the event the designated arbitration forum becomes unavailable.

III. COMMON LAW ALLOCATION AND INDEMNIFICATION

Allocation, contribution, and indemnification are important principles in construction disputes. In *District Owners Ass'n v. AMEC Environmental & Infrastructure, Inc.*,[25] the plaintiff filed a premises-liability action against a property owner for injuries he sustained when he jumped off a wall that concealed a thirty-three-foot drop between the wall and the parking deck. The owner filed a third-party complaint against the designers and builders of the wall and the parking deck for common-law indemnification and common-law apportionment.[26] The trial court granted the third-party defendants' motions to dismiss and motions for summary judgment on the ground that O.C.G.A. § 51-12-33[27] barred the owner's claims. The owner appealed that decision.[28]

The court of appeals affirmed the trial court's ruling on the common-law indemnification claim.[29] The court stated that O.C.G.A. § 51-12-33 does not bar indemnity claims by one who is vicariously liable for the negligence of another.[30] However, it does bar the claims asserted by the owner, which were against third-party defendants as joint tortfeasors for any amount that the owner is ultimately found liable to the plaintiff.[31]

The court also affirmed the trial court's holding on the common-law apportionment claim, reasoning that O.C.G.A. § 51-12-33 abrogated that cause of action, including third-party claims asserting it.[32] The court

23. *Id.* at 120-21, 746 S.E.2d at 686.
24. *Id.* at 116, 125, 746 S.E.2d at 683, 689. See also *Sunbridge Retirement Care Associates, LLC v. Smith*, 326 Ga. App. 550, 757 S.E.2d 157 (2014), for a similar holding.
25. 322 Ga. App. 713, 747 S.E.2d 10 (2013).
26. *Id.* at 713, 747 S.E.2d at 11.
27. O.C.G.A. § 51-12-33 (2000 & Supp. 2014).
28. *Dist. Owners Ass'n*, 322 Ga. App. at 713, 747 S.E.2d at 11.
29. *Id.*
30. *Id.* at 715-16, 747 S.E.2d at 13.
31. *Id.* at 716-17, 747 S.E.2d at 13.
32. *Id.* at 717, 747 S.E.2d at 14.

also called into doubt the continued viability of its reasoning in *Murray v. Patel*[33]–which allowed third-party claims for common-law contribution–in light of the Georgia Supreme Court's *Couch v. Red Roof Inns, Inc.*[34] decision.[35]

IV. GENERAL LIABILITY COVERAGE

In *Taylor Morrison Services, Inc. v. HDI-Gerling America Insurance Co.*,[36] the Georgia Supreme Court provided three answers to two certified questions from the Eleventh Circuit Court of Appeals relating to a standard commercial general liability policy.[37] The first was that the term "occurrence"–the event necessary to trigger coverage under a policy–does not require damage to the property or work of someone other than the insured.[38] The court quickly noted that this does not necessarily mean that coverage will exist because the policy contains many exclusions, including "business risk" exclusions.[39] The second was that in most circumstances, a claim for fraud, as defined by Georgia law, is incompatible with the notion of "accident"–a defined element of an "occurrence"–and will not, therefore, involve an "occurrence" or coverage.[40] The third was that in many cases an "occurrence" might be found in the context of a breach of warranty claim, but actual coverage for breach of warranty claims will generally be limited to cases involving breach of a warranty of non-defective property, because liability for breach of the warranty of defective property would not involve "damages *because of* property damage to the nondefective property."[41]

V. CONTRACT TERMINATION

Hope Electric Enterprises, Inc. v. Schindler Elevator Corp.[42] arose from a general contractor's termination of a subcontract due to the subcontractor's alleged safety violations. The subcontract provided, in part, that if the subcontractor "repeatedly" failed to perform in accordance with the subcontract, the general contractor could, following a ten-day cure period, terminate the subcontract. After the general

33. 304 Ga. App. 253, 696 S.E.2d 97 (2010).
34. 291 Ga. 359, 729 S.E.2d 378 (2012).
35. *Dist. Owners Ass'n*, 322 Ga. App. at 718, 747 S.E.2d at 14.
36. 293 Ga. 456, 746 S.E.2d 587 (2013).
37. *Id.* at 456, 746 S.E.2d at 588.
38. *Id.* at 460, 746 S.E.2d at 591.
39. *Id.* at 460-62, 746 S.E.2d at 591-92.
40. *Id.* at 466, 746 S.E.2d at 594-95.
41. *Id.* at 466-67, 746 S.E.2d at 595 (internal quotation marks omitted).
42. 324 Ga. App. 859, 752 S.E.2d 5 (2013).

contractor terminated the subcontract for alleged repeated violations, the subcontractor sued. The trial court granted summary judgment to the general contractor and the subcontractor appealed.[43]

The Georgia Court of Appeals reasoned that the term "repeatedly," as used in the subcontract, was an indistinct and uncertain term because the subcontract provided no reference point to determine what constituted a "repeated" failure to perform, how many failures justified a termination, or that considerations beyond the mere number of violations, such as temporal proximity and total period of the subcontractor's work, were relevant to that determination.[44] Therefore, the court determined that "repeatedly" was ambiguous.[45] Consequently, the court concluded, a jury should determine whether the subcontractor had "repeatedly" violated the subcontract, and, as a result, the trial court erred in granting summary judgment to the general contractor.[46]

VI. SURETY RIGHTS AND SOVEREIGN IMMUNITY

In *Georgia Department of Corrections v. Developers Surety & Indemnity Co.*,[47] the court of appeals addressed an issue of first impression.[48] The Georgia Department of Corrections (the Department) declared a roofing contractor in default and invoked the payment and performance bonds that Developers Surety and Indemnity Company had provided on behalf of the contractor. The surety then filed suit against the Department, alleging that the Department had breached the roofing contract and requesting a declaratory judgment that the surety had no obligations under the bonds. The Department responded that the surety's claim was barred by sovereign immunity. The trial court rejected that argument and granted summary judgment to the surety, and the Department appealed.[49]

The court of appeals affirmed the decision, noting that an action for breach of contract is one of the exceptions to sovereign immunity.[50] The court reasoned that the surety was subrogated to the contract rights of the roofer once the bonds were invoked and that the surety therefore stepped into the shoes of the roofer for those contract rights.[51] In short,

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43. *Id.* at 859-61, 752 S.E.2d at 6-7.
44. *Id.* at 862, 752 S.E.2d at 8.
45. *Id.*
46. *Id.* at 860, 862, 752 S.E.2d at 7, 8.
47. 324 Ga. App. 371, 750 S.E.2d 697 (2013) *cert. granted.*
48. *Id.* at 375, 750 S.E.2d at 700.
49. *Id.* at 371-72, 750 S.E.2d at 698.
50. *Id.* at 372, 374, 750 S.E.2d at 698, 700.
51. *Id.* at 374-75, 376, 750 S.E.2d at 700, 701.

because sovereign immunity would not bar a suit by the roofer against the Department, it would not bar the surety's suit.[52]

VII. PROOF OF CODE VIOLATIONS

Champion Windows of Chattanooga, LLC v. Edwards[53] arose from a homeowner's counterclaims against the builder of her home. At trial, the homeowner's expert testified that various alleged defects did not meet "code requirements." The trial court ruled in the homeowner's favor.[54] The court of appeals held that the homeowner had failed to prove code violations because she was required to either introduce the applicable codes or offer expert testimony that specific code sections had been violated.[55]

VIII. THIRD-PARTY BENEFICIARIES

Estate of Pitts v. City of Atlanta[56] was addressed in last year's Construction Law article.[57] The *Pitts* litigation addressed the rights of an unnamed, but allegedly intended, third-party beneficiary under a general contract and subcontract, and was closely monitored by construction law members of the Georgia Bar.[58] Thus, it merits noting that the Georgia Supreme Court denied certiorari from this latest decision.[59]

IX. FIDUCIARY DUTIES

In a very significant decision for condominium construction-defect litigation, *Thunderbolt Harbour Phase II Condominium Ass'n v. Ryan*,[60] the court of appeals addressed the breach of fiduciary duty claims of a condominium association against its sole officer and director, who appeared to have been appointed to those positions by the developer-general contractor of the condominium project. The association contended that the defendant failed to adequately inspect and repair construction defects, maintain adequate insurance, and maintain the

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52. *See id.*
53. 326 Ga. App. 232, 756 S.E.2d 314 (2014).
54. *Id.* at 232-33, 240-41, 756 S.E.2d at 316, 320-21.
55. *Id.* at 241, 756 S.E.2d at 321.
56. 323 Ga. App. 70, 746 S.E.2d 698 (2013), *cert. denied.*
57. Brown, *supra* note 1, at 73-76.
58. *See generally id.*
59. Archer W. Constr. Ltd. v. Estate of Pitts, No. S13C1718, 2014 Ga. LEXIS 163 (Feb. 24, 2014); Holder Constr. Co. v. Estate of Pitts, No. S13C1732, 2014 Ga. LEXIS 161 (Feb. 24, 2014).
60. 326 Ga. App. 580, 757 S.E.2d 189 (2014).

condominium project.[61] The trial court granted summary judgment to the defendant on the basis that "Georgia law did not recognize a fiduciary duty to turn over common areas of [the condominium] in good repair."[62] The association appealed.[63]

The court of appeals reversed, holding that a jury issue existed on whether the defendant had a fiduciary duty to the association to properly maintain the condominium project.[64] In reaching that decision, the court noted that officers and directors owe the corporation a fiduciary or quasi-fiduciary duty, which requires that they act with the utmost good faith toward the corporation and its stockholders.[65] The court also noted that in the management of corporate property, officers and directors "are charged with serving the interests of the corporation as well as the stockholders."[66] In addition, the court stated that an agent has a fiduciary relationship with its principal and that a jury could determine that the defendant was an agent of the association.[67]

X. ATTORNEY FEES

In *Benchmark Builders, Inc. v. Schultz*,[68] the Georgia Supreme Court addressed a provision in a home construction contract providing for recovery of attorney fees for the prevailing party.[69] At trial, the jury ruled against the plaintiff-builder on its claim for specific performance of the construction contract and its claim in the alternative for damages for breach of the contract. Alleging that the house was not constructed per the contract, the homeowners counterclaimed for the return of their earnest money, for the value of light fixtures they had purchased and installed in the house, and for attorney fees resulting from the breach. The jury returned a verdict for the homeowners on their claims, but did not award monetary damages to the homeowners on either of the first two claims. Nevertheless, the jury awarded the homeowners $16,555 on the claim for attorney fees. The builder appealed.[70] The court of

61. *Id.* at 580, 581, 757 S.E.2d at 190.
62. *Id.* at 580, 757 S.E.2d at 190.
63. *Id.*
64. *Id.* at 582, 757 S.E.2d at 191.
65. *Id.*
66. *Id.* (quoting Enchanted Valley RV Park Resort, Ltd. v. Weese, 241 Ga. App. 415, 423, 526 S.E.2d 124, 131 (1999)).
67. *Id.*
68. 294 Ga. 12, 751 S.E.2d 45 (2013).
69. *Id.* at 13, 751 S.E.2d at 46.
70. *Id.* at 12-13, 751 S.E.2d at 45-46.

appeals affirmed,[71] and the supreme court granted certiorari to determine whether the "prevailing party" language of the subject contract permitted an award of attorney fees to the homeowners, even though they had not recovered other money damages or relief.[72]

The attorney fee provision of the subject contract stated,

> If any action at law or in equity . . . is brought to enforce or interpret the provisions of this agreement, the prevailing party shall be entitled to recover reasonable attorney's fees from the other party, which fees may be set by the court in the trial or appeal of such action or may be enforced in a separate action brought for that purpose and *which fees shall be in addition to any other relief which may be awarded.*[73]

Because of the italicized language, the supreme court stated that the court of appeals had correctly determined that the contract provided for a separate and distinct claim for attorney fees, which was not ancillary to the recovery of other damages or relief, but in addition to it.[74] Therefore, the homeowners were the prevailing parties entitled to the awarded attorney fees even though the jury had awarded them no damages.[75]

The supreme court contrasted the contract language in this case with the contract language addressed in *Magnetic Resonance Plus, Inc. v. Imaging Systems International.*[76] In *Magnetic Resonance Plus, Inc.*, the contract simply provided, "In the event any proceeding or lawsuit is brought by [Magnetic Resonance or its customer] in connection with the Agreement, the prevailing party in such proceeding shall be entitled to receive its . . . reasonable attorney's fees."[77] Based on that language, the supreme court had ruled that attorney fees could not be recovered absent other relief to the plaintiff.[78]

XI. CONDOMINIUM ASSOCIATION'S RIGHT TO PURSUE CLAIMS

In the past, condominium developers have often drafted condominium declarations to bar construction-defect actions by the condominium

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71. Benchmark Builders, Inc. v. Schultz, 315 Ga. App. 64, 66, 726 S.E.2d 556, 558 (2012).
72. *Benchmark Builders, Inc.*, 294 Ga. at 13, 751 S.E.2d at 46.
73. *Id.* (alteration in original).
74. *Id.* at 13-14, 15, 751 S.E.2d at 46, 47.
75. *Id.* at 13-14, 751 S.E.2d at 46.
76. *Id.* at 14-15, 751 S.E.2d at 46-47; *see also* Magnetic Resonance Plus, Inc. v. Imaging Systems Int'l, 273 Ga. 525, 543 S.E.2d 32 (2001).
77. *Magnetic Resonance Plus, Inc.*, 273 Ga. at 525, 543 S.E.2d at 33 (second alteration in original).
78. *Id.* at 529, 543 S.E.2d at 36.

association and have vested those claims in the unit owners. They have done this for several reasons. One is that the unit owners are the actual owners of the common elements in a condominium project.[79] Thus, it makes some sense for them to have the claims. Two, the developers do not want to be potentially subject to suit by both the unit owners, as owners, and the association, as the entity responsible for maintenance of the common elements. Three, developers wanted to make it more difficult for associations to pursue construction-defect claims.[80]

Courts have upheld these declaration provisions against construction actions by associations despite O.C.G.A. § 44-3-106(h),[81] which since 1990 has expressly stated,

> The association shall have the capacity, power, and standing to institute, intervene in, prosecute, represent in, or defend, in its own name, litigation, administrative or other proceedings of any kind concerning claims or other matters relating to any portions of the units or common elements which the association has the responsibility to administer, repair, or maintain.[82]

To prevent condominium developers from continuing to include these restrictions on association rights to pursue construction-defect and other legal actions, the Georgia General Assembly amended O.C.G.A. § 44-3-106(h) in 2014[83] by adding the following language at the end:

> [A]nd such capacity, power, and standing shall not be waived, abridged, modified, or removed by any provision of any contract or document, including the condominium instruments, that were recorded, entered into, or established prior to the expiration of the period of the declarant's right to control the association as set forth in subsection (a) of Code Section 44-3-101.[84]

This amendment will likely increase the number of condominium construction-defect claims following the next cycle of condominium development.

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79. *See generally* Phoenix on Peachtree Condo. Ass'n v. Phoenix on Peachtree, LLC, 294 Ga. App. 447, 669 S.E.2d 229 (2008).

80. *See generally id.*

81. O.C.G.A. § 44-3-106(h) (2010 & Supp. 2014).

82. *Id.; see generally Phoenix on Peachtree Condo. Ass'n*, 294 Ga. App. 447, 669 S.E.2d 229.

83. Ga. H.R. Bill 820, Reg. Sess. (2014).

84. O.C.G.A. § 44-3-106(h); *see also* O.C.G.A. § 44-3-101(a) (2010 & Supp. 2014).