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Construction Law

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by Ward Stone, Jr.*

I. INTRODUCTION

During the Survey Period, the Georgia appellate courts handed down a number of decisions underscoring the requirement that contractors hold valid and current contractor's licenses issued by the Secretary of State's office in order to be able to enforce construction contracts.[1] Several attempts to side-step the statute,[2] carve out exceptions, or avoid the harsh consequences of violating the statute were rejected in favor of strict interpretation. As several courts noted concerning the licensing statutes:

> [I]n construing any statutory text, we must presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.[3]

During the Survey Period, Georgia courts also affirmed the eight-year outside limit under the statute of repose for bringing contract or tort claims arising out of a contract of construction,[4] examined the standards

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[1] For an analysis of construction law during the prior Survey Period, see Frank O. Brown, Jr., *Construction Law*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 57 (2019).

[2] O.C.G.A. § 43-41-17(b) (2020).

[3] Duke Builders, Inc. v. Massey, 351 Ga. App. 535, 536, 831 S.E.2d 172, 174 (2019) (quoting Deal v. Coleman, 294 Ga. 170, 172–73, 751 S.E.2d 337, 342 (2013)).

[4] *See* S. States Chem., Inc. v. Tampa Tank & Welding, Inc., 353 Ga. App. 286, 836 S.E.2d 617 (2019).

for awarding attorney's fees in Miller Act[5] fee-shifting cases,[6] examined the effectiveness of lien waivers,[7] and examined the limitations on indemnity provisions in construction contracts.[8]

II. CONSEQUENCES OF FAILING TO HAVE A CONTRACTOR'S LICENSE

A. Fleetwood v. Lucas

In *Fleetwood v. Lucas*,[9] the Georgia Court of Appeals again reaffirmed the necessity of holding a contractor's license as a prerequisite for enforcing a construction contract.[10] Lucas, an unlicensed contractor, filed suit against the Fleetwoods, et al., for the balance claimed to be due to him under contracts for improvements to a house and an office, respectively, owned by the Fleetwoods. The Fleetwoods moved for summary judgment and then a directed verdict based upon Lucas's failure to have a Georgia contractor's license as required under O.C.G.A. § 43-41-17(b). Lucas admittedly did not possess a Georgia general contractor's license when he entered into the contracts, nor did he inform the Fleetwoods that he did not possess a license.[11] The court quoted O.C.G.A. § 43-41-17(b) which provides, in relevant part:

> Any contract entered into . . . for the performance of work for which a residential contractor or general contractor license is required by this chapter and not otherwise exempted under this chapter and which is between an owner and a contractor who does not have a valid and current license required for such work in accordance with this chapter shall be unenforceable in law or in equity by the unlicensed contractor.[12]

The court noted that O.C.G.A. § 43-41-17(a)[13] provides that "no person, whether an individual or a business organization, shall have the right to engage in the business of residential contracting or general contracting without a current, valid residential contractor license or general

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[5] Miller Act of 1935, 74 P.L. No. 321, 49 Stat. 793.

[6] *See* United States ex rel. Cleveland Constr. v. Stellar Grp., Inc., 2019 U.S. Dist. LEXIS 12709*; 2019 WL 338887.

[7] *See* ALA Constr. Servs., LLC v. Controlled Access, Inc., 351 Ga. App. 841, 833 S.E.2d 570 (2019).

[8] *See* Milliken & Co. v. Georgia Power Co., 306 Ga. 6, 829 S.E.2d 111 (2019).

[9] 354 Ga. App. 320, 840 S.E.2d 720 (2020).

[10] *Id.* at 325, 840 S.E.2d at 724.

[11] *Id.* at 322, 840 S.E.2d at 721–22.

[12] *Id.* at 323, 840 S.E.2d at 722 (alterations in original) (quoting O.C.G.A. § 43-41-17(b)).

[13] O.C.G.A. § 43-41-17(a) (2020).

contractor license[.]"[14] However, Lucas claimed that the work he performed on the house did not require a license because it was "repair work,"[15] relying upon O.C.G.A. § 43-41-17(g),[16] which states:

> Nothing in this chapter shall preclude a person from offering or contracting to perform or undertaking or performing for an owner repair work, provided that the person performing the repair work discloses to the owner that such person does not hold a license under this chapter and provided, further, that such work does not affect the structural integrity of the real property.[17]

The court noted that Rule 553-8-.01 of the Georgia Compilation of Rules and Regulations[18] defines repair "to mean fixing, mending, maintenance, replacement[,] or restoring of a part or portions of real property to good condition."[19] The court examined the scope of work for the house and concluded that the services to be performed by Lucas exceeded the definition for repairs under the Rule, but concluded that nevertheless Lucas could not argue the exception applied because he failed to disclose that he did not possess a contractor's license, as required by the statute.[20]

For the office property, Lucas admitted that the scope of work contracted for would have required a contractor's license but insisted that the Fleetwoods acted as the general contractor and he was merely the servant of the Fleetwoods.[21] Therefore, Lucas argued, he was not a "contractor" subject to the statute and no license was required.[22]

The court examined the definition of a contractor under O.C.G.A. § 43-41-2(4),[23] which states:

> "Contractor," except as specifically exempted by this chapter, means a person who is qualified, or required to be qualified, under this chapter and who, for compensation, contracts to, offers to undertake or undertakes to, submits a bid or a proposal to, or personally or by others performs the construction or the management of the construction for

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[14] *Fleetwood*, 354 Ga. App. at 323, 840 S.E.2d at 722 (alteration in original) (quoting O.C.G.A. § 43-41-17(a)).

[15] *Id.* at 322, 840 S.E.2d at 722.

[16] O.C.G.A. § 43-41-17(g) (2020).

[17] *Fleetwood*, 354 Ga. App. at 323, 840 S.E.2d at 723 (quoting O.C.G.A. § 43-41-17(g)).

[18] GA. COMP. R. & REGS. 553-8-.01 (2020).

[19] *Fleetwood*, 354 Ga. App. at 324, 840 S.E.2d at 723 (quoting GA. COMP. R. & REGS. 553-8-.01).

[20] *Id.*

[21] *Id.* at 325, 840 S.E.2d at 724.

[22] *Id.* at 322, 840 S.E.2d at 722.

[23] O.C.G.A. § 43-41-2(4) (2020).

> an owner of any building, bridge, or other structure, including a person who installs industrialized buildings as defined in paragraphs (3) and (4) of Code Section 8-2-111, for the construction or improvement of, addition to, or the repair, alteration, or remodeling of any such building, bridge, or structure for use by the owner or by others or for resale to others. The term "contractor" for purposes of this chapter shall include a person who contracts to, undertakes to, or submits a bid or proposal to perform, or otherwise does himself or herself perform, for an owner:
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> (A) Construction management services relative to the performance by others of such construction activities where the person performing such construction management services is at risk contractually to the owner for the performance and cost of the construction; and
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> (B) Services of a contractor as part of performance of design-build services,
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> whether as a prime contractor, joint venture partner, or as a subcontractor to a design professional acting as prime contractor as part of a design-build entity or combination.[24]

The court rejected Lucas' argument that he was not a contractor, noting that Lucas had agreed he entered into contracts with the Fleetwoods to perform services for compensation, including making repairs to the house and the office.[25] Thus, the court found that

> Lucas "for compensation, contract[ed] to . . . personally or by others perform [ ] . . . the construction or improvement of, addition to, or the repair, alteration, or remodeling of any . . . building, . . . for use by the owner or by others or for resale to others."[26]

Accordingly, "he was a contractor as defined in O.C.G.A. § 43-41-2(4) and was required to have a license under O.C.G.A. § 43-41-17(a)."[27] The court concluded Lucas was barred from bringing the action and reversed with direction that the trial court enter judgment for the Fleetwoods.[28]

B. LFR Invsestments, LLC v. Van Sant

LFR Investments, LLC v. Van Sant[29] is another example of the Georgia Court of Appeals strictly enforcing the plain meaning licensing

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[24] *Fleetwood*, 354 Ga. App. at 324–25, 840 S.E.2d at 723 (quoting O.C.G.A. § 43-41-2(4)).

[25] *Fleetwood,* 354 Ga. App. at 325, 840 S.E.2d at 724.

[26] *Id.* (alterations in original) (quoting O.C.G.A. § 43-41-2(4)).

[27] *Id.*

[28] *Id.*

[29] 355 Ga. App. 101, 842 S.E.2d 574 (2020).

statutes.[30] LFR Investments (LFR) was a single-member LLC with its sole member being Louis Reynaud. Reynaud held a valid contractor's license as a residential basic qualifying agent registered with the Georgia Department of State for the entity Peachtree Gardens Development, Inc. However, at no time was Reynaud registered as a residential basic qualifying agent for LFR. LFR entered into a contract with Van Sant to purchase a property in Forsyth. Van Sant hired LFR as general contractor to build a house on the property. However, about a year before the house was completed Van Sant terminated the contract with LFR and hired another contractor to complete the work. LFR filed suit against Van Sant for breach of contract and unjust enrichment. Van Sant filed a motion for partial summary judgement arguing that LFR did not have the right to enforce the contract because he was not properly licensed. LFR argued that, because its sole member Reynaud was properly licensed as a statutory "qualifying agent" for another entity, LFR should be considered properly licensed and able to enforce the contract.[31]

The court looked to the plain language of the statute, which provides:

> [N]o person, whether an individual or a business organization, shall have the right to engage in the business of residential contracting or general contracting without a current, valid residential contractor license or general contractor license, respectively, issued by the division under this chapter or, *in the case of a business organization, unless such business organization shall have a qualifying agent as provided in this chapter holding such a current, valid residential contractor or general contractor license on behalf of such organization issued to such qualifying agent as provided in this chapter*.[32]

The court rejected LFR's argument and found that O.C.G.A. § 43-41-9(a)[33] required the sponsoring agent to be registered for the entity that is using the license.[34] The court held that "for a business to be considered properly licensed, . . . it must have at least one qualifying agent that is properly licensed, and that qualifying agent must specifically hold a license on that business's behalf."[35] Given that Reynaud had not qualified as a registered agent on behalf of LFR, LFR was not a properly licensed entity and the contract was unenforceable by LFR.[36] The court noted: "For Reynaud to be considered a qualifying agent

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[30] *Id.* at 103, 842 S.E.2d at 577.

[31] *Id.* at 101–02, 842 S.E.2d at 576.

[32] *Id.* at 103–04, 842 S.E.2d at 577 (alteration in original) (quoting O.C.G.A. § 43-41-17(a)) (emphasis added).

[33] O.C.G.A. § 43-41-9(a) (2020).

[34] *LFR Invs., LLC*, 355 Ga. App. at 104, 842 S.E.2d at 577 (citing O.C.G.A. § 43-41-9(a)).

[35] *Id.*

[36] *Id.* at 105, 842 S.E.2d at 578.

on LFR's behalf, the statute therefore makes clear that Reynaud must hold a license specifically on LFR's behalf, and to obtain that license, Reynaud must have applied for such license with the Secretary of State 'expressly on behalf of' LFR."[37] The court also noted that O.C.G.A. § 43-41-9(e)(2)[38] "explicitly contemplates that 'a qualifying agent may serve in such capacity for more than one business organization[.]'"[39] To do so, however, the statute specifies that the qualifying agent must still "satisfy the criteria for serving in such capacity with regard to each such business organization[.]"[40]

C. Restor-It, Inc. v. Beck

In *Restor-It, Inc. v. Beck*,[41] Beck engaged Restor-It, Inc. (Restor-It), an unlicensed contractor, to perform remodeling work, including electrical and plumbing work. Restor-It held no general or specialty contractor's license, but nevertheless performed a portion of the work. Beck, upon discovering Restor-It's lack of any license, refused to pay. Restor-It then sued for the balance due.[42] The Georgia Court of Appeals posed the issues as "whether the trial court properly found that Restor-It performed electrical and plumbing work, whether Restor-It was exempt from the requirement that it be licensed to perform such work, and whether the contract between Restor-It and Beck [was unenforceable by Restor-It] based on Restor-It's performance of such work" without a license.[43]

The trial court found that the contract between Restor-It and Beck included plumbing and electrical work for which Restor-It did not have a valid specialty contractor's license to perform, and therefore Restor-It could not enforce the agreement.[44] Under O.C.G.A. § 43-41-2(12),[45] a "specialty contractor" is defined as

> [A] contractor whose scope of work and responsibility is of limited scope dealing with only a specific trade and directly related and ancillary work and whose performance is limited to such specialty construction work requiring special skill and requiring specialized

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[37] *Id.* at 104, 842 S.E.2d at 577.

[38] O.C.G.A. § 43-41-9(e)(2) (2020).

[39] *LFR Invs., LLC*, 355 Ga. App. at 105, 842 S.E.2d at 578 (alterations in original) (quoting O.C.G.A. § 43-41-9(e)(2)).

[40] *Id.* at 105, 842 S.E.2d at 578 (quoting O.C.G.A. § 43-41-9(e)(2)).

[41] 352 Ga. App. 613, 835 S.E.2d 398 (2019).

[42] *Id.* at 613–14, 835 S.E.2d at 400–01.

[43] *Id.* at 614, 835 S.E.2d at 401.

[44] *Id.*

[45] O.C.G.A. § 43-41-2(12) (2020).

> building trades or crafts, including, but not limited to, such activities, work, or services requiring licensure under Chapter 14 of this title.[46]

Restor-It countered with a rather circular argument, to the effect that it was a specialty contractor, and therefore was not required to have a general contractor's license, and that under the language of the statute (O.C.G.A. § 43-41-17(f)),[47] specialty contractors are exempt

> [F]rom securing a *general contractor's license* to perform work under . . . "this chapter . . . provided that such other work involved is incidental to and an integral part of the exempt work performed by the specialty contractor and does not exceed the greater of $10,000.00 or 25 percent of the total value at the time of contracting of the work to be performed."[48]

The court rejected Restor-It's argument as misstating the law, holding that the statute creates no exception to the requirement that specialty contractors be licensed, but merely authorizes holders of valid specialty licenses to perform portions of larger projects without having a general contractor's license.[49] Further,

> the statute also clearly and specifically states, "nothing in *this chapter* shall permit a specialty contractor to perform work falling within the licensing requirements of *Chapter 14* of this title where such specialty contractor is not duly licensed under such chapter to perform such work." Accordingly, a plain reading of the statute prohibits a specialty contractor from performing *any* electrical or plumbing work without a [specialty contractor's] license, as mandated by O.C.G.A. § 43-14-8(a)(1)and (b).[50]

Essentially, the court held that there is no *de minimis* exception under the statute for work requiring a specialty contractor's license.[51] "Thus, it is of no consequence whether Restor-It is a general contractor or a specialty contractor. The contract with Beck required substantial electrical and plumbing work, and neither a general contractor nor a specialty contractor can perform such work without an electrical or plumbing license."[52]

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[46] *Restore-It, Inc.*, 352 Ga. App. at 616, 835 S.E.2d at 402 (quoting O.C.G.A. § 43-41-2(12)).

[47] O.C.G.A. § 43-41-17(f) (2020).

[48] *Restore-It, Inc.*, 352 Ga. App. at 614, 619, 835 S.E.2d at 401, 404 (alterations in original) (quoting O.C.G.A. § 43-41-17(f) (emphasis added).

[49] *Id.* at 618–19, 835 S.E.2d at 403–04.

[50] *Id.* at 619, 835 S.E.2d at 404 (quoting O.C.G.A. § 43-41-17(f)) (alterations in original).

[51] *Id.* at 619, 835 S.E.2d at 404.

[52] *Id.* at 618, 835 S.E.2d at 403 (citing O.C.G.A. § 43-14-8).

The court also rejected Restor-It's argument that a failure to obtain a license is grounds for an injunction only and that Restor-It should still be able to enforce the contract.[53] The court applied the plain language of the statute and affirmed the trial court's finding that the failure of Restor-It to obtain the proper licenses for the electrical and plumbing work rendered the contract unenforceable by Restor-It under O.C.G.A. § 43-14-8(a)(1).[54]

Note: While undoubtedly reaching the correct result, the court went beyond the literal language of the statutes in indicating the contract was "void" as contrasted to being "unenforceable" by the unlicensed contractor. The court quoted dicta from its decision in *Brantley Land & Timber v. W & D Investments*,[55] where it was stated that

> [W]here a statute provides that persons proposing to engage in a certain business shall procure a license before being authorized to do so, and where it appears from the terms of the statute that it was enacted not merely as a revenue measure but was intended as a regulation of such business in the interest of the public, contracts made in violation of such statute are void and unenforceable.[56]

In *Brantley*, however, the contract in question was found to be enforceable, and therefore certainly not void, rendering the reference to the contract being void dicta.[57]

While the Georgia appellate courts have not reached the issue of quantifying the affirmative remedies of the other contracting party against the unlicensed contractor failing to have an appropriate contractor's license, the issue has been addressed in other states, with most courts concluding that assuming the other contracting party was not *in pari delicto* with the unlicensed contractor, their remedies remain intact. For example, in *Lewis & Queen v. N.M. Ball Sons*,[58] the California Supreme Court held, in construing a statute similar to Georgia's licensing statute, that where a contractor was barred from recovery due to failure to have a proper contractor's license, the owner could nevertheless recover damages.[59]

> It is true that when the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the

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[53] *Id.* at 622, 835 S.E.2d at 406.

[54] *Id.* at 613, 835 S.E.2d at 400; O.C.G.A. § 43-14-8.

[55] 316 Ga. App. 277, 729 S.E.2d 458 (2012).

[56] *Restore-It, Inc.*, 352 Ga. App. at 617, 835 S.E.2d at 403 (quoting *Brantley Land & Timber*, 316 Ga. App. at 278, 729 S.E.2d at 459).

[57] *Brantley*, 316 Ga. App. at 280, 729 S.E.2d at 461.

[58] 48 Cal. 2d 141, 308 P.2d 713 (1957).

[59] *Id.* at 150,154, 308 P.2d at 719,721.

> activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred. In this situation it is said that the plaintiff is not *in pari delicto*.[60]

Among the unanswered questions in Georgia, however, is the fact that whether a contractor holds a Georgia contractor's license is a matter of public record through the Secretary of State's website,[61] thereby putting such information within the public domain. That creates the opportunity for owners to engage a contractor knowing they are unlicensed and then "lying in the weeds" and refusing to pay. In such circumstances, would the other contracting party be found to be *in pari delicto* with the unlicensed contractor? Time will tell.

III. STATUTE OF REPOSE

A. Southern States Chemical, Inc. v. Tampa Tank & Welding, Inc.

Georgia's Statute of Repose[62] bars any action against a contractor improving realty after eight years following substantial completion of the work.[63] It states:

> (a) No action to recover damages:
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> (1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property;
>
> (2) For injury to property, real or personal, arising out of any such deficiency; or
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> (3) For injury to the person or for wrongful death arising out of any such deficiency shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement *more than eight years after substantial completion* of such an improvement.[64]

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[60] *Id.* at 153, 308 P.2d at 720 (citations omitted).

[61] Georgia Secretary of State, https://sos.ga.gov (last visited Sept. 21, 2020).

[62] O.C.G.A. § 9-3-51 (2020).

[63] *Id.*

[64] O.C.G.A. § 9-3-51(a)(1)–(3) (emphasis added).

O.C.G.A. § 9-3-50[65] defines substantial completion as "the date when construction was sufficiently completed, in accordance with the contract as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended."[66]

In 2000, Southern States Chemical, Inc. (Southern) contracted with Tampa Tank & Welding, Inc. (Tampa) to convert an industrial chemical containment tank designed to hold molten sulfur to hold two million gallons of liquid sulfuric acid. The renovation required that a new steel floor be welded over the existing steel floor with a layer of sand containing a cathodic corrosion control system to be sandwiched between the two floors to prevent corrosion. This system was installed by Tampa but was designed by Corrosion Control, Inc. (CCI), installed under the supervision of CCI, and tested by CCI.[67]

The tank conversion was substantially completed in January 2002. At the time of project completion, Tampa commissioned CCI to prepare a post-installation commissioning inspection report on the completed tank, in which it estimated the tank should have a useful life of between forty-three and forty-five years. On July 3, 2011 (nine and one-half years later), Southern discovered that sulfuric acid was leaking from the tank. Southern then initiated an action against Tampa to recover damages in contract and tort, claiming that Tampa breached its warranty by failing to install the system properly, negligently driving Bobcats over the sand after the cathodic corrosion control system had been installed, and failing to properly seal the floor leading to rainwater penetrating and corroding the system. Tampa vouched CCI into this action claiming that CCI failed to properly test and design the system.[68]

Tampa had included a twelve-month materials and workmanship warranty for the renovation of the tank but CCI provided no express warranty.[69]

> Southern argue[d] that the statute of repose, O.C.G.A. § 9-3-51(a), [was] not applicable because the claims against Appellees were not for a construction deficiency but for breach of express written warranties. Southern further contend[ed] the trial court erred by concluding that the statute of limitation on simple written contracts [(six years)] bar[red] its claim against Appellees, by ruling that Southern failed as a matter of law to exercise due diligence to discover Appellees' alleged

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[65] O.C.G.A. § 9-3-50 (2020).

[66] O.C.G.A. § 9-3-50(2).

[67] Southern States Chemical, Inc. v. Tampa Tank & Welding, Inc., 353 Ga. App. 286, 287, 836 S.E.2d 617, 619–20 (2019).

[68] *Id.* at 286–88, 836 S.E.2d at 619–20.

[69] *Id.* at 290, 836 S.E.2d at 622.

> fraud [(concealment of the defect)], and by dismissing Southern's breach of contract per se claim.[70]

In this case's third appearance before the Georgia Court of Appeals, the court examined whether Southern should be considered a third-party beneficiary of the contract between Tampa and CCI, and whether the CCI Report constituted an express warranty for forty-three to forty-five years.[71] The court held that because Tampa, and not CCI, installed the system, Southern did not get a direct contractual benefit from CCI which only designed and tested the product.[72] Accordingly, Southern could not be considered a third-party beneficiary of any "warranty."[73] The court then looked to whether the statute of repose barred suit.[74] Southern argued that the statute of repose did not bar suit because the tank conversion was not an improvement to realty and that the suit was for a breach of express warranty, rather than for deficient construction.[75] The court rejected this argument and looked to *Mullis v. Southern Co. Services*[76] to find the test of whether construction services constitute improvements to real property, triggering the statute of repose.[77]

> These factors are (1) is the improvement permanent in nature; (2) does it add to the value of the realty, for the purposes for which it was intended to be used; (3) was it intended by the contracting parties that the "improvement" in question be an improvement to real property or did they intend for it to remain personalty.[78]

The court held that all the indicia of an intent that the storage tank renovations be improvements to realty were present, and found that the statute of repose did apply, barring Southern's claims.[79]

Finally, the court examined whether Southern could raise fraud as an estoppel to prevent application of the statute of repose.[80] Southern argued that the trial court erred in finding that Southern failed to exercise due diligence in not discovering the leak (having failed to perform recommended independent inspections).[81] However, the court

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[70] *Id.* at 286, 836 S.E.2d at 619.

[71] *Id.* at 290–91, 836 S.E.2d at 622.

[72] *Id.* at 291–92, 836 S.E.2d at 622–23.

[73] *Id.*

[74] *Id.* at 292, 836 S.E.2d at 623.

[75] *Id.*

[76] 250 Ga. 90, 296 S.E.2d 579 (1982).

[77] *S. States Chem., Inc.*, 353 Ga. App. at 293, 836 S.E.2d at 624.

[78] *Id.* (quoting *Mullis*, 250 Ga. at 94, 296 S.E.2d at 583).

[79] *Id.* at 294, 836 S.E.2d at 624.

[80] *Id.* at 295, 836 S.E.2d at 625.

[81] *Id.*

held that no evidence of fraud had been presented that would have prevented Southern from discovering the defect in the construction.[82] The court's

> review of the unambiguous language of O.C.G.A. § 9-3-51(a) [found] that the statute makes no distinction between claims sounding in negligence and those sounding in contract. Whether in tort or in contract, the statute broadly precludes any action to recover damages brought outside the eight-year period of repose. It is well settled that "a statute of ultimate repose frames the time period in which a right may accrue, if at all. Therefore, if an injury occurs outside this time period, the injury is not actionable."[83]

IV. MILLER ACT CLAIMS – RECOVERY OF ATTORNEY'S FEES

A. United States ex rel. Cleveland Construction, Inc. v. Stellar Group., Inc.

In *United States ex rel. Cleveland Construction, Inc. v. Stellar Group., Inc.*,[84] a Miller Act and breach of contract suit, Stellar Group, Inc. (Stellar) was contracted by the Department of Defense (DOD) to do work at Fort Benning. Stellar subcontracted to Cleveland Construction, Inc. (Cleveland) to do work on the job. After the completion of the project, Cleveland brought an action for breach of contract against Stellar and its surety, Liberty Mutual Insurance Company, claiming that Stellar failed to pay the full amount due under the contract, plus additional labor and materials, and other additional costs associated with the project owed to Cleveland. Stellar counterclaimed for change order costs, supervision costs, delay, and other conditions and damages.[85]

> The parties stipulated that they would present their claims for damages against each other through expert testimony. Through its expert, Cleveland brought the following claims against Stellar: (1) additional direct labor and material claim for $2,964,800; (2) extended general conditions claim for $395,381; (3) pending cost proposals $78,848; and (4) outstanding Subcontract balance claim for $917,512. Therefore, Cleveland sought total damages against Stellar of $4,356,541. Stellar brought the following counterclaims against Cleveland: (1) change order costs for $947,498.88; (2) added supervision costs for $1,610,106.95; (3) extended general conditions for $1,353,119.04; and (4) liquidated damages for $542,803.52.Stellar thus

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[82] *Id.*

[83] *Id.* (quoting Rosenberg v. Falling Water, Inc., 289 Ga. 57, 59, 709 S.E.2d 227, 229 (2011)); O.C.G.A. § 9-3-51(a).

[84] No. 4:16-CV-179 (CDL), 2019 U.S. Dist. LEXIS 12709, at *1 (Jan. 28, 2019).

[85] *Id.* at *1–2.

> sought total damages from Cleveland of $4,453,528.39, less the retained Subcontract balance of $917,511.71. . . . The jury awarded $2,481,060 to Cleveland, but concluded Liberty was not jointly liable for any of this amount. The jury also awarded $1,300,000 to Stellar. Based on the parties' setoff stipulation, the clerk entered judgment in favor of Cleveland in the amount of $1,181,060. The parties stipulated that any issues presented by motions for attorneys' fees would be decided by the Court.[86]

In determining entitlement to an award for attorney's fees, the court was required to construe the applicable contract provision, which provided for an award of attorney's fees, only in favor of Stellar.[87] The attorney's fee provision of the contract stated: "Upon any default, [Cleveland] shall pay to [Stellar] its attorney['s] fees and court costs incurred in enforcing this Subcontract or seeking any remedies hereunder."[88] The issue presented was whether Stellar could recover all of its attorney's fees, despite having prevailed on only some of its claims.[89] The court ruled Stellar could recover attorney's fees that Stellar could demonstrate arose from its "successful enforcement of the Subcontract and/or successful pursuit of remedies for a default."[90] The court allowed Stellar to amend its motion to better track those fees.[91]

Cleveland also moved for an award of attorney's fees under the court's "inherent power" to award attorney's fees based upon Stellar's bad faith.[92] Although affirming its power to do so, the court declined to award such fees because there had not been a sufficient showing of Stellar's bad faith.[93]

B. United States ex rel. Dixie Communications Systems v. Travelers Casualty & Surety Co. of America

In *United States ex rel. Dixie Communications Systems v. Travelers Casualty & Surety Co. of America*,[94] Dixie Communications Systems, Inc., (Dixie) was a second-tier subcontractor on a federal project involving the construction and renovation of the Dwight D. Eisenhower Army Medical Center's Fisher Army Dental Laboratory (the Project). J&J Maintenance, Inc. (J&J) was the general contractor for the Project. J&J

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[86] *Id.* at *2–3.

[87] *Id.* at *4.

[88] *Id.* (alterations in original).

[89] *Id.*

[90] *Id.* at *7.

[91] *Id.* at *7–8.

[92] *Id.* at *8.

[93] *Id.* at *9.

[94] No. CV 118-210, 2019 U.S. Dist. LEXIS 162223 (Sep. 23, 2019).

subcontracted with the first-tier subcontractor, ICON, to perform work on the Project. ICON then subcontracted with plaintiff to install alarm systems. Travelers Casualty and Surety Company of America's (Travelers) supplied the Miller Act Project bond for the Project to J&J. After J&J, ICON, and Travelers each refused payment to Dixie, Dixie filed suit in the U.S. District Court for the Southern District of Georgia asserting four claims against J&J, Icon, and Travelers: (1) breach of contract; (2) quantum meruit; (3) a Miller Act bond claim; and (4) bad faith refusal to settle. Dixie failed to give notice of its bond claim to J&J within ninety days of completing its work and failed to allege giving notice to the general contractor in its Complaint. ICON filed bankruptcy and did not participate in the suit.[95]

J&J and Travelers moved to dismiss all counts of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)[96] due to Dixie's failure to give timely notice to J&J of its claims.[97] Dixie replied not with an amended complaint but rather filed a response to which it attached documentation seeking to convert the defendants' motion to dismiss into a motion for summary judgment.[98] The court addressed in detail the rules for allowing consideration of extrinsic documentation in response to a motion to dismiss.[99] Although the court allowed some of the documentation to be considered in connection with the motions to dismiss because it supported the basic allegations of the complaint, the court held that the extrinsic evidence did not support converting the motion to dismiss into a motion for summary judgment.[100] "The Court is limited at the motion to dismiss stage to the facts as pleaded in the [c]omplaint and attaching an affidavit to a response to a motion to dismiss is not a procedure for modifying the [c]omplaint."[101] Because no genuine issue of fact was properly raised concerning notice to the general contractor, the court granted J&J and Traveler's motion to dismiss Dixie's Miller Act Claim.[102]

> A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor within [ninety] days from the date on which the person did or performed the last of the labor

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[95] *Id.* at *1–3.

[96] FED. R. CIV. P. 12(b)(6) (2020).

[97] *Dixie Communication Systems*, 2019 U.S. Dist. LEXIS 162223, at *3.

[98] *Id.* at *3–4.

[99] *Id.* at *4.

[100] *Id.* at *10.

[101] *Id.* at *9.

[102] *Id.* at *19–20.

> or furnished or supplied the last of the material for which the claim is made.[103]

The court dismissed Dixie's claim of breach of contract citing the lack of any contract between Dixie and the general contractor, J&J, but denied the defendants' motion to dismiss Dixie's quantum meruit claim.[104] The court acknowledged that "[u]nder Georgia law, a . . . subcontractor may not recover against a . . . general contractor with whom it has no contractual relationship, based on the theory of unjust enrichment or implied contract; rather, it is limited to the statutory remedies provided by Georgia's lien statute . . . ."[105] However, the court acknowledged that "a lien cannot attach to [federal] Government property[,]" and absent the availability of an equitable remedy, Dixie would be left without any remedy.[106] Accordingly, while a "right to pursue a lien on [a] project precludes a quantum meruit claim, [because] state liens are unavailable as a matter of law on a federal public works project, the lien statute no longer stands in the way of a quantum meruit claim against the primary contractor."[107] Accordingly, the court allowed the quantum meruit claim to stand.[108] Finally, the court also dismissed the bad faith refusal to settle count against Traveler's because the dismissal of the Miller Act Claim eliminated any liability of Traveler's to Dixie.[109]

V. NEGLIGENT CONSTRUCTION/INDEMNITY

A. Milliken & Co. v. Georgia Power Co.

In *Milliken & Co. v. Georgia Power Co.*,[110] on February 20, 2013, a small jet crashed into a Georgia Power transmission pole that was located on the property of Milliken & Company near the Thomson-McDuffie Regional Airport in Thomson, Georgia. The airplane was attempting a "go-around," after an aborted landing attempt. When the airplane was about sixty-three feet above ground level, the left wing struck the utility pole, which was seventy-two feet high and about 1,835 feet from the runway threshold, severing the outboard portion of the wing. The airplane continued another 925 feet before crashing in a

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[103] *Id.* at *7 (quoting 40 U.S.C. § 3133(b)(2)).

[104] *Id.* at *15, *17.

[105] *Id.* at *15 (alterations in original) (quoting Hussey v. Georgia Ports Authority, 240 Ga. App. 504, 506, 420 S.E.2d 50, 53 (1992).

[106] *Id.* at *16–17 (alteration in original) (quoting J.W. Bateson Co. v. United States, 434 U.S. 586, 589 (1978)).

[107] *Id.* at *17.

[108] *Id.*

[109] *Id.* at *20.

[110] 306 Ga. 6, 829 S.E.2d 111 (2019).

wooded area. The two pilots were injured, and the five passengers died. The families of the passengers filed suit against Georgia Power and Milliken alleging that a transmission pole located on Milliken's property was negligently erected and maintained within the airport's protected airspace. Georgia Power constructed the transmission pole on Milliken's property for the purpose of providing electricity to Milliken's manufacturing plant expansion, located adjacent to the airport, and the pole was constructed pursuant to a 1989 easement between Georgia Power and Milliken. The complaint included claims for negligent construction and maintenance, both torts.[111]

Milliken filed cross-claims against Georgia Power claiming that under the grant of easement, Georgia Power was contractually obligated to indemnify Milliken

> "[F]or all sums that [p]laintiffs may recover from Milliken" under Paragraph 12 of the 1989 Easement, which provides: [Georgia Power] Company, its successors[,] or assigns shall hold [Milliken], its successors[,] or assigns harmless from any damages to property or persons (including death), or both, which result from [Georgia Power] Company's construction, operation or maintenance of its facilities on said easement areas herein granted.[112]

Georgia Power moved for summary judgment, contending the conveyance of the easement granted a covenant not to sue rather than an indemnity agreement. The trial court agreed because the clause failed to include the term "indemnify."[113]

On appeal, the Georgia Court of Appeals held that the provision did amount to an indemnity obligation, but the indemnity agreement was void as against public policy under former O.C.G.A. § 13-8-2(b)[114] because the provision made Georgia Power liable to indemnify Milliken for damages caused by Milliken's sole negligence.[115] Former O.C.G.A. § 13-8-2(b) provided:

> A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement *relative* to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by

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[111] *Id.* at 6–7, 829 S.E.2d at 112.

[112] *Id.* at 7, 829 S.E.2d at 112 (alterations in original).

[113] *Id.*

[114] O.C.G.A. § 13-8-2(b) (2006).

[115] *Milliken & Co.*, 306 Ga. at 7, 829 S.E.2d at 113.

> or resulting from the *sole negligence of the promisee, his agents or employees, or indemnitee is against public policy and is void and unenforceable* . . . .[116]

However, the Georgia Supreme Court reversed this holding, ruling that the indemnity provision was not void under O.C.G.A. § 13-8-2(b) because although it did, "(1) relate[] in some way to a contract for 'construction, alteration, repair, or maintenance' of certain property[,]"[117] it did not require indemnity against "liability for damages arising out of bodily injury to persons or damage to property caused by or *resulting from the sole negligence of the promisee, his agents or employees, or indemnitee*"[118] because the clause requires that Georgia Power Company indemnify "Milliken for damages resulting from *Georgia Power's* acts or omissions, whereas the statute would prohibit an agreement that provides indemnity for damages resulting from *Milliken's* sole negligence[,]"[119] and therefore the provision did not violate the statute and was not void as against public policy.[120]

Note that O.C.G.A. § 13-8-2(b) was amended in 2018 and now provides:

> A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, *purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence* of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable.[121]

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[116] *Id.* at 8–9, 829 S.E.2d at 113 (emphasis in original) (quoting O.C.G.A. § 13-8-2(b) (2006)).

[117] *Id.* at 9, 829 S.E.2d at 113 (quoting Kennedy Dev. Co. v. Camp, 290 Ga. 257, 259, 719 S.E.2d 442, 444 (2011)).

[118] *Id.* 306 Ga. at 10, 829 S.E.2d at 114 (emphasis in original) (quoting O.C.G.A. § 13-8-2(b) (2006)).

[119] *Id.*

[120] *Id.* at 12, 829 S.E.2d at 116.

[121] O.C.G.A. § 13-8-2(b) (2020) (emphasis added).

VI. LIENS AND LIEN WAIVERS

A. Duke Builders, Inc. v. Massey

In *Duke Builders, Inc. v. Massey*, [122] Duke Builders, Inc. (Duke Builders) was contracted by the Masseys to work with the Masseys' insurance company and rebuild a house after a fire substantially destroyed the dwelling. Duke began construction but did not complete the job. When the Masseys refused to pay, Duke filed a materialman's lien against the property for the cost of the work completed plus lost profits for the work that was not completed.[123] The trial court found that O.C.G.A. § 44-14-361(a)–(b)[124] allows a lien for only the amount of completed work, and since the filed lien was in excess of that amount, the lien was void in its entirety.[125]

On appeal, the Georgia Court of Appeals reversed, holding that even though § 44-14-361(a)–(b) limited the amount of the lien to the value of the work completed, O.C.G.A. § 44-14-361.1(a)[126] does not require that the lien be filed in an exact amount.[127] Therefore, the court was allowed to "blue pencil" the lien to reflect the value of only the completed work.[128]

On March 26, 2020, the Georgia Supreme Court granted certiorari and indicated it would hear the case during its June 2020 arguments.[129]

B. ALA Construction Services, LLC v. Controlled Access, Inc.

Georgia Code Title 44 Property § 44-14-366[130] regulates lien waivers in connection with construction projects within the state. It prescribes forms that must be substantially complied with and, once filed, are binding whether payment has been received or not unless a certificate of non-payment is filed within sixty days (old version).[131]

In *ALA Construction Services, LLC v. Controlled Access, Inc.*,[132] ALA Construction Services, LLC (ALA) hired Controlled Access, Inc. (CA) to do work at Sugar Hill Overlook Townhomes. CA signed an interim waiver and release upon payment form in accordance with O.C.G.A. § 44-14-366, which released any and all liens that CA would have against the subject

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[122] 351 Ga. App. 535, 831 S.E.2d 172 (2019).

[123] *Id.* at 535–36, 831 S.E.2d at 174.

[124] O.C.G.A. § 44-14-361 (2020).

[125] *Duke Builders, Inc.*, 351 Ga. App. at 536, 831 S.E.2d at 174.

[126] O.C.G.A. § 44-14-361.1(a) (2020).

[127] *Duke Builders, Inc.*, 351 Ga. App. at 539, 831 S.E.2d at 176.

[128] *Id.* at 538–39, 831 S.E.2d at 176.

[129] Massey v. Duke Brothers, Inc., No. S20C0018, 2020 Ga. LEXIS 269 (Mar. 26, 2020).

[130] O.C.G.A. § 44-14-366 (2020).

[131] O.C.G.A. § 44-14-366(f)(1)(C).

[132] 351 Ga. App. 841, 833 S.E.2d 570 (2019).

property. However, ALA failed to pay CA the remaining balance for the work performed. CA failed to file an affidavit of non-payment or a claim of lien within the prescribed period of sixty days from the execution of the waiver.[133] The court held that the plain language of O.C.G.A. § 44-14-366 stated that if an affidavit of non-payment or a claim of lien are not filed within sixty days, the contract should be treated as paid in full.[134] The court held that this meant that all remedies of CA for recovery of the balance due, including breach of contract, were extinguished since the contract was treated as if it was paid in full.[135]

This decision would be reversed by SB 315,[136] 2020, which has passed both the House and the Senate and is awaiting the Governor's signature.

This new bill amends the wording in O.C.G.A. § 44-14-366 to extinguish only lien rights and not other remedies that may be available to the contractors such as damages for breach of contract.[137] It also amends the time frame from sixty days to ninety days and requires that an affidavit of non-payment be filed within ninety days rather than either an affidavit of non-payment or a claim of lien.[138]

VIII. ADMINISTRATIVE PROCEDURE

A. Georgia Interfaith Power & Light, Inc. v. Georgia Power Co.

On March 29, 2017, Westinghouse Electric Company, LLC, Georgia Power's lead contractor on Units 3 and 4 for the Vogtle Nuclear Plant, filed Chapter 11 bankruptcy, and subsequently rejected its contract with Georgia Power. Following the contractor's bankruptcy, Georgia Power submitted its 17th semi-annual construction monitoring report to the Public Service Commission (PSC). In the report Georgia Power requested approval of additional costs for replacing the contractor and assumed the burden to prove that any amount over $5.68 billion was prudent. The PSC signed off on the expenditures for the 17th semi-annual construction monitoring report. Georgia Watch filed a petition for consumers to recover some of the costs of the construction (through reduced rates for electricity) and appealed the PSC's decision to approve the 17th semi-annual construction monitoring report. Georgia Power intervened on the case and moved for dismissal contending that the PSC's approval of the report was final.[139] The court held that all the administrative

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[133] *ALA Construction Services, LLC*, 351 Ga. App. at 841, 833 S.E.2d 570 at 570–71.

[134] *Id.* at 844, 833 S.E.2d at 572.

[135] *Id.*

[136] S.B. 315, 155th Gen. Assemb., Reg. Sess. (Ga. 2020).

[137] *Id.*

[138] *Id.*

[139] 352 Ga. App. 670, 670–72, 835 S.E.2d 656, 658–59 (2019).

options must first be exhausted before appealing the decision of an administrative body.[140] In this case the petitioners did not appeal through the administrative process.[141] However, the Georgia Court of Appeals remanded the case to determine if the administrative process would have provided a remedy or if the administrative process would have been ineffective and judicial review would be required.[142]

[140] *Id.* at 672–73, 835 S.E.2d at 659.

[141] *Id.* at 672, 835 S.E.2d at 659.

[142] *Id.* at 675, 835 S.E.2d at 660–61.