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Local Government Law

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I. SOVEREIGN IMMUNITY

Interesting developments on the application of sovereign immunity continued during this survey period.[1] In *City of College Park v. Clayton*

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[1] For a survey of local government law during the prior survey period, see Russell A. Britt, Michael C. Pruett, Jennifer D. Herzog, Brittanie Browning, Jacob Stalvey O'Neal, & Pearson Cunningham, *Local Government Law*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 189 (2019).

County,[2] the Georgia Supreme Court addressed whether sovereign immunity[3] bars suits between political subdivisions of the state, such as counties and cities, and concluded that it does not.[4] The case involved taxation of alcoholic beverages at Hartsfield-Jackson Atlanta International Airport. The airport is located primarily within Clayton County, while some of the businesses located within the airport are located in unincorporated sections of the county and other businesses are located within the incorporated limits of the City of College Park. The city sued the county, asserting that the city had not been receiving the proper amount of alcoholic beverage taxes to which it was entitled under state law and that the county improperly infringed on the city's authority to tax by instructing vendors to remit 50% of the taxes due from the sale of alcohol in those portions of the airport located within the city's limits.[5]

While involving several legal issues, the supreme court noted that the issue of whether sovereign immunity applied was the most important issue to consider.[6] Following a lengthy discussion on the continuous state constitutional reservation of the common law of sovereign immunity and the origins of the same, the supreme court recapped that the State of Georgia is the sovereign for purposes of this immunity and that the sovereign cannot be called into the courts of its own making by private persons without the sovereign's permission.[7] This understanding provided a strong indication that sovereign immunity does not apply where two political subdivisions of the state are exercising their respective home rule powers by collecting tax revenues and neither is acting on behalf of the state because, in such scenario, there is no sovereignty to protect.[8] In other words, the county is not a sovereign over the city and vice versa, and "neither entity retains superior authority over the other that would prevent it from being hailed into a court of law by the other."[9]

The supreme court, therefore, held that sovereign immunity would not apply to this lawsuit unless applicable precedent somehow altered this

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[2] 306 Ga. 301, 830 S.E.2d 179 (2019).

[3] The Georgia Constitution provides:

> [S]overeign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Ga. Const. art. I, § 2, para. 9(e).

[4] *City of College Park*, 306 Ga. at 313, 830 S.E.2d at 187.

[5] *Id.* at 301–02, 830 S.E.2d at 180–81.

[6] *Id.* at 304, 830 S.E.2d at 182.

[7] *Id.* at 310–11, 830 S.E.2d at 186.

[8] *Id.* at 311, 830 S.E.2d at 186.

[9] *Id.*

fundamental nature of sovereign immunity.[10] Nevertheless, a review of case law revealed that political subdivisions had been allowed to sue each other under common law in both England and Georgia, and no precedent was found where suits between political subdivisions of a sovereign were barred by sovereign immunity.[11] Accordingly, the supreme court held sovereign immunity did not bar the city from bringing suit against the county in this case.[12]

In *Klingensmith v. Long County*,[13] the Georgia Court of Appeals provided an important reminder on how sovereign immunity is applied differently to cities versus counties.[14] The plaintiffs sued Long County, alleging negligence and nuisance for repeated flooding of their subdivision. They argued that their negligence claim was not barred by sovereign immunity because the county somehow could be held vicariously liable for ministerial acts negligently performed by the county's employees.[15]

The court of appeals, nevertheless, reiterated that the law is clear that a "county may be liable for a county employee's negligence in performing an official function only to the extent the county has waived sovereign immunity."[16] And it is a plaintiff's burden to point to the applicable waiver.[17] Although the plaintiffs contended that a waiver of sovereign immunity exists for claims alleging the negligent performance of ministerial duties, the court of appeals correctly found that such waiver only applies to cities and does not apply to counties.[18] The court of appeals therefore held that the plaintiffs' negligence claims were barred by sovereign immunity.[19]

The holding in *Board of Commissioners of Lowndes County v. Mayor of Valdosta*, *et al.*[20] highlights an on-going legal conundrum following the

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[10] *Id.*

[11] *Id.* at 311–13, 830 S.E.2d at 186–87.

[12] *Id.* at 313, 830 S.E.2d at 188.

[13] 352 Ga. App. 21, 833 S.E.2d 608 (2019).

[14] *Id.* at 24, 833 S.E.2d at 613.

[15] *Id.* at 22–23, 833 S.E.2d at 612–13.

[16] *Id.* at 24, 833 S.E.2d at 613 (quoting *Ratliff v. McDonald*, 326 Ga. App. 306, 309, 756 S.E.2d 569, 574 (2014)).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 352 Ga. App. 391, 834 S.E.2d 890 (2019), *cert. granted* (June 1, 2020). For further detail on the factual overview of this case, see discussion under Service Delivery Strategies section, infra.

Lathrop v. Deal[21] decision. Arising from a dispute over requirements under state's Service Delivery Strategy Act,[22] the county sued the cities within the county and the Georgia Department of Community Affairs (DCA), following DCA's imposition of sanctions on the county and cities pursuant to the Act.[23] The county requested declaratory and injunctive relief, as well as mandamus relief, arguing that a prior service delivery strategy agreement between the county and the cities should remain in effect and that the county and cities should remain eligible for state-administered financial assistance, grants, loans, and permits.[24]

Asserting sovereign immunity, DCA filed a motion to dismiss the declaratory and injunctive relief claims. In response, the county filed an amended petition removing DCA as a party and adding the commissioner and board members of DCA in their official and individual capacities. The commissioner and board members then filed a motion to dismiss the amended petition, arguing that sovereign immunity barred the claims for declaratory and injunctive relief, and the trial court granted it.[25]

The Georgia Court of Appeals noted that in *Lathrop* and other decisions the Georgia Supreme Court previously held that sovereign immunity barred claims against the state for declaratory and injunctive relief.[26] However, in *Lathrop* the supreme court also "indicated that such suits against state officers in their individual capacities however may not be barred by sovereign immunity."[27] The court of appeals nevertheless pointed to other language in *Lathrop* explaining that sovereign immunity cannot be evaded by suing servants or agents of the state, "when the real claim is against the [s]tate itself and it is the party vitally interested."[28]

The court of appeals noted that the test for determining whether a suit is in reality one against the state is whether "if the relief prayed [for] in the present case is granted, it will not operate to control the action of the [s]tate or subject it to liability."[29] Applying this test, the court of appeals held that (1) the county's pleadings and briefs demonstrated that DCA was the real party in interest; (2) the relief requested would control the actions of the state by requiring the commissioner and board members to

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[21] 301 Ga. 408, 801 S.E.2d 867 (2017) (holding sovereign immunity bars declaratory and injunctive relief claims against the state, including challenges to a law's constitutionality under the Georgia Constitution).

[22] O.C.G.A. §§ 36-70-1 through 36-70-28 (2020).

[23] 352 Ga. App. at 392–93, 834 S.E.2d at 892–93.

[24] *Id.* at 393, 834 S.E.2d at 893.

[25] *Id.* at 393–94, 834 S.E.2d at 893.

[26] *Id.* at 394, 834 S.E.2d at 893.

[27] *Id.*

[28] *Id.*, 834 S.E.2d at 893–94 (quoting *Lathrop*, 301 Ga. at 414–15, 801 S.E.2d at 873).

[29] *Id.* at 395, 834 S.E.2d at 894 (quoting *Moore v. Robinson*, 206 Ga. 27, 37, 55 S.E.2d 711, 719 (1949)).

direct DCA to stop certain actions; and (3) the commissioner and board members had no statutory authority in their individual capacities under the Act to direct DCA to do anything.[30] Therefore, the court of appeals affirmed the trial court's dismissal of the declaratory and injunctive relief claims on sovereign immunity grounds.[31]

This holding counters, at least in part, the proposition made in *Lathrop* that while sovereign immunity bars such claims against the state and its officials in their official capacities, officials in their individual capacities nonetheless may be sued for prospective declaratory and injunctive relief.[32] The supreme court, however, granted certiorari on June 1, 2020.

In *Gatto v. City of Statesboro*,[33] the Georgia Court of Appeals reaffirmed the physical precedent holding in *City of Albany v. Stanford*[34] that the "nuisance exception" to sovereign immunity does not apply where the damages at issue are injury to person or loss of life.[35] Sovereign immunity therefore applied to the plaintiffs' nuisance claim against the City of Statesboro for injuries and the alleged wrongful death of their son following his altercation with a bouncer at a bar in the city.[36]

The plaintiffs further argued that the city waived its sovereign immunity through its purchase of insurance. While the city did have an insurance policy, the policy contained an endorsement providing that there was coverage under the policy where sovereign immunity otherwise would have applied.[37] The court of appeals therefore held that because the lawsuit involved a governmental function to which sovereign immunity applies, the insurance policy did not cover the plaintiffs' claims due to the plain language of the policy endorsement.[38]

The plaintiffs also tried to argue that the policy endorsement "effectively usurps the [Georgia] General Assembly's legislative waiver and allows [cities] to contract around the waiver."[39] However, the court of appeals held that the legislative waiver expressly provides for the waiver only where the policy "covers an occurrence for which the defense of sovereign immunity is available."[40] Thus, given the plain meaning of

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[30] *Id.* at 395–96, 834 S.E.2d at 895.

[31] *Id.* at 396, 834 S.E.2d at 895.

[32] *See Lathrop*, 301 Ga. at 434–35, 801 S.E.2d at 886.

[33] 353 Ga. App. 178, 834 S.E.2d 623 (2019).

[34] 347 Ga. App. 95, 99, 815 S.E.2d 322, 326 (2018) (physical precedent), *reconsideration denied* (July 17, 2018), *cert. denied* (Apr. 29, 2019).

[35] *Gatto,* 353 Ga. App. at 183, 834 S.E.2d at 628.

[36] *Id.* at 178, 183, 834 S.E.2d at 625, 628.

[37] *Id.* at 183, 834 S.E.2d at 628.

[38] *Id.* at 184, 834 S.E.2d at 628–29.

[39] *Id.*, 834 S.E.2d at 629.

[40] *Id.*, 834 S.E.2d at 629 (quoting O.C.G.A. § 36-33-1(a) (2020)).

the statute and that "the Supreme Court of Georgia [previously] has specifically analyzed insurance policies to determine whether they actually provide coverage for a plaintiff's claims," the court of appeals rejected the plaintiffs' argument.[41]

Finally, in a pair of cases decided by two different panels within nine days of each other, the Georgia Court of Appeals reaffirmed that the waivers from protection provided under the Recreational Property Act,[42] including where there is a charge for the use of recreational property, do not constitute a waiver of a county's sovereign immunity.[43]

II. OFFICIAL IMMUNITY

It was noted in the June 1, 2017 through May 31, 2018 Survey[44] that the Georgia Court of Appeals' decision in *Odum v. Harn*[45] did not heed the Georgia Supreme Court's discussion in *Barnett v. Caldwell,*[46] which admonished lower courts for summarily classifying student supervision as a discretionary function in the context of official immunity[47] without analyzing the particular facts of the case[48]—likely because *Barnett* was decided just ten days prior to *Odum*. The court of appeals got a second bite at the apple during this survey period after the supreme court granted the plaintiffs' petition for certiorari, vacated the prior *Odum* decision, and remanded the case in order for the court of appeals to reconsider its decision in light of *Barnett*.[49] The revised analysis, however, did not change the conclusion and the court of appeals again affirmed the grant of summary judgment in *Odum v. Harn*.[50]

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[41] *Id.*, 834 S.E.2d at 629.

[42] O.C.G.A. §§ 51-3-20 through 51-3-26 (2019).

[43] *See* Gwinnett County, Ga. v. Ashby, 354 Ga. App. 863, 866–67, 842 S.E.2d 70, 73–74 (April 15, 2020); Macon-Bibb County. v. Kalaski, 355 Ga. App. 24, 27–28, 842 S.E.2d 331, 334 (April 24, 2020). For further discussion on the Recreational Property Act, *see infra*.

[44] *See* Christian Henry, Russell A. *Local Government Law*, *Eleventh Circuit Survey*, 70 Mercer L. Rev. 177, 185–86 (2018).

[45] 344 Ga. App. 488, 811 S.E.2d 19 (2018).

[46] 302 Ga. 845, 809 S.E.2d 813 (2018).

[47] The Georgia Constitution provides:

> [A local government officer] may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, [his] ministerial functions and may be liable for injuries and damages if [he] act[s] with actual malice or with actual intent to cause injury in the performance of [his] official functions.

Ga. Const. art. I, § 2, para. 9(d).

[48] *See* Henry et. al., *Supra* note 44, at 185–86 (2018).

[49] *See Odum v. Harn*, 350 Ga. App. 572, 572, 829 S.E.2d 818, 818 (2019), *cert. denied* (Jan. 27, 2020).

[50] *Id.*, 829 S.E.2d at 818–19.

The facts involved a child passenger on a Bryan County School District school bus driven by the defendant. "The [bus driver] stopped the bus across the street from the child's house, activating the [bus's] red flashing lights, stop arm, and crossing gate. The child was required to cross a lane containing oncoming traffic in order to reach his [waiting] mother." The school district's training manual provided that "[s]tudents should not be allowed off the bus until all traffic has stopped" and that drivers should, "[t]each the students that [the driver's] signal for danger after they are off the bus is blowing the horn."[51] Drivers were also instructed that they should "[c]ontinuously use both direct vision and mirrors to identify any moving traffic from both the front and from behind."[52]

Further, the bus driver had recently attended a training session where these and other guidelines, including having a child pause on the bottom step of the bus before disembarking, were reviewed.[53]

The bus driver testified that "she looked for traffic as she released the child but did not see any." She also testified that while, "the child stopped before crossing the yellow line in the middle of the road, he did not look back at the her for permission to cross." The bus driver then, "sounded her horn as soon as she saw an oncoming truck." Sadly however, the truck struck the child and the child died.[54]

In analyzing whether the bus driver was entitled to official immunity, the court of appeals carefully examined the analysis in *Barnett* and found that the bus driver was exercising a discretionary function in supervising the child because it required judgment as "to whether any vehicles on the same road were stationary or moving toward the bus such that the child should or should not be released."[55]

Accordingly, having reviewed the particular facts of the case, the court of appeals correctly applied *Barnett* in finding that "the bus driver had to make multiple judgments about releasing the child."[56] And because there was no evidence that the bus driver acted with actual malice, it affirmed the trial court's grant of official immunity.[57] There will not be a third bite at the apple, as the supreme court denied certiorari on January 27, 2020, after the plaintiffs petitioned a second time.[58]

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[51] *Id.* at 573, 829 S.E.2d at 819.

[52] *Id.*

[53] *Id.* 572–73, 829 S.E.2d at 819.

[54] *Id.* at 573, 829 S.E.2d at 819.

[55] *Id.* at 574–75, 829 S.E.2d at 820.

[56] *Id.* at 575, 829 S.E.2d at 820.

[57] *Id.*

[58] *Id.* at 572, 829 S.E.2d 818.

In *Williams v. DeKalb County, et al.*,[59] the Georgia Supreme Court analyzed official immunity in the context of an alleged violation of the Open Meetings Act.[60] Specifically, the plaintiff sought penalties against county commissioners in their individual capacities for purportedly not providing proper notice under the Act before adopting a pay increase for themselves. At the motion to dismiss stage, the trial court found that official immunity protected the commissioners from liability under the Act because deciding at a meeting to consider an item not on the pre-published agenda, based on a determination that it is necessary to do so, requires the exercise of judgment and therefore is a discretionary act.[61]

However, without deciding whether the commissioners' actions were in fact discretionary, the supreme court held that even if the actions were discretionary, the plaintiff "sufficiently allege[d] that the commissioners acted with actual malice by intentionally violating the agenda requirements of the Act—a criminal act."[62] The supreme court therefore found that the commissioners were not entitled to official immunity from the penalty provisions of the Act at the pleadings stage.[63]

III. TAXATION

This year saw one case dealing with the constitutionality of the 2017 legislative amendment to O.C.G.A. § 48-5-2(3)(B)(vii)(I)[64] and (II)[65], and how Low Income Housing Tax Credits (LIHTC) should be valued when calculating ad valorem real property taxes; one case that interprets the two 2014 amendments to O.C.G.A. § 48-5-380,[66] specifically the time in which a suit for a tax refund can be commenced, and a case concerning tax executions during tax appeals. Of the three cases discussed herein, the authors saw two seminal cases interpreting recent legislative amendments, and one case backing the actions taken by the Fulton County Tax Commissioner.

In 2016 the Georgia Court of Appeals held in *Heron Lake II Apartments v. Lowndes County Board of Tax Assessors*,[67] that O.C.G.A.

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[59] 308 Ga. 265, 840 S.E.2d 423 (2020).

[60] O.C.G.A. §§ 50-14-1 through 50-14-5 (2020). For further discussion on the Open Meetings Act, *see infra*, Section IV(B).

[61] *Williams,* 308 Ga. at 265–66, 840 S.E.2d at 426.

[62] *Id.* at 279, 840 S.E.2d at 434.

[63] *Id.*, 840 S.E.2d at 434.

[64] O.C.G.A. § 48-5-2(3)(B)(vii)(I) (2020).

[65] O.C.G.A. § 48-5-2(3)(B)(vii)(II) (2020).

[66] O.C.G.A. § 48-5-380 (2020).

[67] 299 Ga. 598, 791 S.E2d 77 (2016).

§ 48-5-3's[68] mandate that "[a]ll real property . . . shall be liable to taxation" and classified LIHTCs as part of, "the bundle of rights, interest, and benefits connected with the ownership of real estate" in the Georgia Department of Revenue's Appraisal Manual, granted preferential treatment for ad valorem taxation purposes by creating a subclass of tangible property other than as permitted by the State Constitution, which ran afoul of the taxation uniformity provision.[69] In 2017, the General Assembly amended O.C.G.A. § 48-5-2(3).[70] This "amendment changed the second sentence of paragraph (3) to mandate the consideration of data provided by the property owner, and added a new division to (vii) to subparagraph (B)," and subdivided O.C.G.A. § 48-5-2(3)(B)(vii) with two new sections (I) and (II) which in essence state that tax assessors in establishing the value of any property subject to rent restrictions under the sales comparison approach or the income approach.[71] Further, the 2017 amendment rewrote O.C.G.A. § 48-5-2(3)(B)(vi), which provided the criterion for tax assessors to apply in determining the fair market value of Section 42 properties.[72] Finally, the amendment redesignated former O.C.G.A. § 48-5-2(3)(B)(vii) as O.C.G.A. § 48-5-2(3)(B)(viii),[73] and that provision provides that, in determining the fair market value of real property, tax assessors shall also consider "[a]ny other existing factors provided by law or by rule and regulation of the commissioner [of revenue] deemed pertinent in arriving at fair market value."[74]

After the 2017 amendment was passed, the Lowndes County Board of Tax Assessors (the Board), filed a new declaratory judgment action seeking a judgement that the 2017 amendment was unconstitutional for violating the Georgia Constitution's taxation uniformity provision. The Board asked for the trial court to interpret the 2017 amendment to allow LIHTCs to continue to be treated as regular income.[75] The trial court held that LIHTCs could be considered "actual income" under O.C.G.A. § 48-5-2(3)(B)(vii)(II)'s income approach, and if LIHTCs are not considered "actual income" then O.C.G.A. § 48-5-2(3)(B)(vii)(II) violates

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[68] O.C.G.A. § 48-5-3 (2020).

[69] *Heron Lake II Apartments,* 299 Ga. at 605–06, 610, 791 S.E. 2d at 83, 85.

[70] O.C.G.A. § 48-5-2(3) (2020).

[71] Heron Lake II Apartments, LP v. Lowndes County Board of Tax Assessors, 306 Ga. 816, 818–19, 833 S.E.2d 528, 531 (2019).

[72] *Id.* at 818, 833 S.E.2d at 531.

[73] O.C.G.A. § 48-5-2(3)(B)(viii) (2020).

[74] *Heron Lake II Apartments, LP*, 306 Ga. at 819, 833 S.E.2d at 531.

[75] *Id.*

the constitution's taxation uniformity provision.[76] On appeal, the Appellants raised three enumerations of error:

> (1) the trial court lacked jurisdiction over the Board's petition because when the Board filed suit, it had not yet assessed the Appellants' properties for the 2018 tax year; (2) the trial court erred in finding the LIHTCs were "actual income" rather than offsets against tax liability; and (3) the trial court erred in declaring O.C.G.A.§ 48-5-2(3)(B)(vii)(I) and (II) unconstitutional, given the General Assembly's power to forbid the use of improper appraisal methods.[77]

The appellate court held that the trial court had jurisdiction over the Board's petition for declaratory relief pursuant to the Declaratory Judgment Act[78] as the Board alleged the existence of a justiciable controversy in which future conduct depended on the resolution of uncertain legal relations.[79] Additionally, the court held that the trial court erred in concluding that Section 42 Tax Credits for LIHTCs constitute "actual income" under the O.C.G.A. § 48-5-2(3)(B)(vii)(II) income approach, because the credits offset Section 42 property owners and investors' tax liability, and reversed the trial court's conclusion to the contrary.[80] Lastly, the court held that O.C.G.A. § 48-5-2(3)(B)(vii)(I) and (II) do not violate the Georgia State Constitution's taxation uniformity provision as tax assessors have alternative methods of assessing the fair market value of Section 42 properties and are not arbitrary or unreasonable methods, and as such, the court reversed the judgment of the trial court.[81]

The issue in *Hojeij Branded Foods, LLC v. Clayton County*[82] was the time to bring an action for a tax refund in superior court against a county or city found in O.C.G.A. § 48-5-380, and the related waiver of sovereign immunity. In 2014, O.C.G.A. § 48-5-380 was amended and added subsection (g)[83] to the statute.[84] O.C.G.A. § 48-5-380(g) states "[u]nder no circumstances may a suit for refund be commenced more than five years from the date of the payment of taxes or fees at issue."[85] Further, O.C.G.A. § 48-5-380(b) states:

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[76] *Id.*, 833 S.E.2d at 531–32.

[77] *Id.* at 819–20, 833 S.E. 2d at 532.

[78] 28 U.S.C. § 2201 (2020).

[79] *Heron Lake II Apartments, LP,* 306 Ga. at 820–21, 833 S.E. 2d at 532.

[80] *Id.* at 823, 833 S.E. 2d at 534.

[81] *Id.* at 828, 833 S.E. 2d at 537.

[82] 355 Ga. App. 222, 843 S.E.2d 902 (2020).

[83] O.C.G.A. § 48-5-380(g) (2020).

[84] *Hojeij Branded Foods, LLC,* 355 Ga. App. at 225, 843 S.E.2d at 905.

[85] *Id.*

> [a]ny taxpayer from whom a tax or license fee was collected who alleges that such tax or license fee was collected illegally or erroneously may file a claim for refund with the governing authority of the county or municipality at any time within one year or, in the case of taxes, three years after the date of the payment of the tax or license fee to the county or municipality.[86]

Before the 2014 amendment to O.C.G.A. § 48-5-380, the statute required taxpayers to file a claim for refund within three years of the tax payment and could only file an action in superior court after the expiration of one year from the date of filing the refund claim or within one year from the date the governing authority denied the claim for refund.[87] In this case, the appellate court determined the only deadline applicable to a taxpayer who directly files suit in the trial court is subsection (g), which allows for the filing of a suit against a county or municipality for a tax refund within five years of the date the disputed taxes were paid because sovereign immunity has been expressly waived by the Georgia Legislature for the duration of time.[88]

In *B.C. Grand, LLC v. FIG, LLC et al.*[89] the court of appeals looked at the issue of purchased tax executions for delinquent ad valorem taxes on property to collect higher interest amounts and penalties than were due because the executions were based on initial tax assessments that were later reduced.[90] O.C.G.A. § 48-3-3(b)[91] states "[t]he . . . tax commissioner shall issue executions for nonpayment of taxes . . . at any time after 30 days have elapsed since giving notice as provided in subsection (c) of this Code section."[92] In the case at hand, the Fulton County Tax Commissioner so issued the 2012 tax executions.[93] Investa Services of GA, LLC "purchased the tax executions, paying the full face value" in December 2012, then in September 2013, the Fulton County Tax Commissioner entered into a consent agreement reducing the assessed value of the property for 2012 from $7.4 million to $3.8 million, and issued a refund on the tax overpayment based upon the pertinent refund statute at that time. In November 2013, Investa Services of Ga, LLC sent B.C. Grand, LLC a notice stating the 2012 tax executions were due.[94] B.C. Grand filed a class action seeking a refund of any interest and

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[86] O.C.G.A. § 48-5-380(b) (2019).

[87] *Hojeij Branded Foods, LLC,* 355 Ga. App. at 226, 843 S.E.2d at 905.

[88] *Id.*, 843 S.E.2d at 905–06.

[89] 352 Ga. App. 646, 835 S.E.2d 676 (2019).

[90] *Id.* at 646, 853 S.E.2d at 677

[91] O.C.G.A. § 48-3-3(b) (2019).

[92] *Id.*

[93] *B.C. Grand, LLC*, 352 Ga. App. at 647, 835 S.E.2d at 678.

[94] *Id.* at 647–48, 835 S.E.2d at 678–79.

penalties it claimed to have overpaid to Investa and FIG, LLC as a result of the tax assessment reduction.[95] The case was dismissed by the trial court as B.C. Grand failed to state a claim for conversion, negligence, unjust enrichment or to assert the Fulton County Tax Commissioner cancelled the tax executions or they were void as a matter of law based on the post-issuance reduction in the tax assessment.[96] The court of appeals affirmed the trial court's dismissal of the action for the aforementioned reasons.[97]

IV. OPEN RECORDS/ OPEN MEETINGS

A. Open Records

There is only one case to report on stemming from Georgia's Open Records Act[98] this year. In *Institute for Justice v. Reilly et al.*,[99] the Institute for Justice (a nonprofit public interest law firm, hereinafter TIFJ) unsuccessfully attempted to challenge the long held principle that the General Assembly is not an "agency" subject to release of records under Georgia's Open Records Act (the Act).[100] The court of appeals affirmed the trial court's dismissal of TIFJ's claims holding that the General Assembly and its offices were not subject to the Act where the statute did not explicitly cover the General Assembly; the historical practice of the state had been to exempt the General Assembly, and records from the Office of Legislative Counsel were statutorily exempt from disclosure.[101]

Pertinent facts of the case were as follows: TIFJ requested records under the Act from several Georgia legislative staff offices about a 2012 statute regulating the practice of music therapy. These offices included the Office of the Clerk of the House of Representatives, the Office of the Secretary of the Senate, the House Budget and Research Office, the Senate Budget and Evaluation Office, the Senate Research Office, and the Office of Legislative Counsel. When those requests were refused, TIFJ brought suit seeking declaratory and injunctive relief for production of the requested records.[102]

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[95] *Id.* at 648, 835 S.E.2d at 679.

[96] *Id.* at 649, 853 S.E.2d at 679–80.

[97] *Id.* at 650, 853 S.E.2d at 680.

[98] O.C.G.A. §§ 50-18-70 through 50-18-77 (2020).

[99] 351 Ga. App. 317, 830 S.E.2d 793 (2019). The complaint originally included the Secretary of State as a defendant, but after a settlement agreement between the Secretary of State and TIFJ, the claims against the Secretary of State were dismissed.

[100] *Id.* at 317, 830 S.E.2d at 794.

[101] *Id.*

[102] *Id.* at 317–18, 830 S.E.2d at 794–95.

TIFJ maintained that "under the plain language of the Act, it applies to all state 'offices,' including the offices of the General Assembly."[103] However, stating that words are not read in isolation, the court of appeals disagreed stating that "the primary determinant of a text's meaning is its context, which includes the structure and history of the text and the broader context in which that text was enacted, including statutory and decisional law that forms the legal background of the written text."[104]

In its current form, the Act provides: "All public records shall be open for personal inspection and copying, except those which by order of a court of this state or by law are specifically exempted from disclosure."[105] As used in the Act, the term "'[a]gency' shall have the same meaning as in Code Section 50-14-1."[106] That Code section, which is part of the Open Meetings Act,[107] defines the term "agency" as meaning: "Every state department, agency, board, bureau, office, commission, public corporation, and authority."[108] Reviewing historic case law decided under older versions of Georgia's "Sunshine Law"[109] wherein the supreme court found that nearly identical language did not include the General Assembly, *Coggin v. Davey,*[110] and recognizing that in 2012 the General Assembly undertook a comprehensive revision of both the Open Records Act and Open Meetings Act but nowhere in that overhaul did the General Assembly plainly identify itself as now subject to either Act, the court agreed with the prior precedent stating, "the General Assembly, including its committees, commissions and offices, is not subject to a law unless named therein or the intent that it be included be clear and unmistakable."[111]

The late Judge Goss concurred but wrote separately to emphasize that longstanding Georgia law required the court to affirm, stating that if the General Assembly had wanted to include itself in the set of departments, agencies, or offices subject to the Act, it could have done so expressly.[112]

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[103] *Id.* at 319, 830 S.E.2d at 795.

[104] *Id.* (*quoting* City of Guyton v. Barrow, 305 Ga. 799, 805 (3), 828 S.E.2d 366 (2019)).

[105] *Id.* (citing O.C.G.A. § 50-18-71(a) (2020)).

[106] *Id.* (citing O.C.G.A. § 50-18-70(b)(1) (2020)).

[107] O.C.G.A. § 50-14-1 (2020).

[108] *Id.* (citing O.C.G.A.§ 50-14-1(a)(1)(A)).

[109] *Id.* Following its enactment in 1972, the Sunshine Law was amended several times, and by 1988, it evolved into the Open Records Act, codified at OCGA §§ 50-18-70 through 50-18-77, and the Open Meetings Act, codified at OCGA §§ 50-14-1 through 50-14-5. See D. Voyles, *Open Meetings: Revise Law*, 5 GA. ST. U. L. Rev. 475, 477–78 (1988) (outlining amendments to Georgia's Sunshine Law between 1972 and 1988).

[110] 233 Ga. 407, 410–11, 211 S.E.2d 708 (1975).

[111] *Institute for Justice,* 351 Ga. App. at 320, 830 S.E.2d at 796 (citing *Harrison Co. v. Code Revision Commission*, 244 Ga. 325, 328, 260 S.E.2d 30 (1979)).

[112] *Id.* at 322, 830 S.E.2d at 797 (Goss, J., concurring).

Chief Judge McFadden dissented, stating the question before the court was whether the language "every state office" includes legislative offices, and he believed the answer to be "self-evident" that it in fact did.[113] Supporting his opinion he recognized that in the Act itself the General Assembly directed that it be broadly construed to allow access to government records, that the historic case law relied upon by the majority applied to outdated statutory language (and the statutory language extending the Act to every state office was not enacted until 2012 which was decades after that case law), and that "the already clear and unmistakable meaning of every state office encompasses legislative offices is rendered crystalline by O.C.G.A. § 28-4-3.1"[114] or otherwise that statute would be reduced to "meaningless surplusage."[115]

TIFJ and others seeking to have the General Assembly be subject to the Act were disappointed when the supreme court declined to review this case.

Note: In accordance with Court of Appeals Rule 33.2(a),[116] this opinion is physical precedent only (citable as persuasive, but not binding, authority). Although it is outside the scope of this article, it is worth a look at Rule 33.2 with regard to binding/physical precedent as the rule changes effective August 1, 2020.[117]

B. Open Meetings

Very different aspects of the Open Meetings Act were analyzed by the court of appeals and Georgia Supreme Court this year. While the court of appeals' decision limited the Open Meetings Act and its enforceability, the Georgia Supreme Court took the opposite approach by allowing private citizens to bring claims for certain violations.

In *Sweet City Landfill, LLC v. Lyon*,[118] the Georgia Court of Appeals upheld the trial court's granting of the Elbert County, the Elbert County Board of Commissioners, and individual commissioners' (hereinafter Elbert County Appellees) motion to dismiss.[119] Sweet City Landfill, LLC (hereinafter Sweet City) alleged that it spent considerable monies pursuing a certain landfill project that was the subject of many lawsuits. In a 2018 public meeting, one of the commissioners referenced a private meeting in 2012 between the commissioners wherein they discussed

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[113] *Id.,* 830 S.E.2d at 797–98.

[114] *Id.* 322–25, 830 S.E.2d at 797–99.

[115] *Id.* at 325, 830 S.E.2d at 799.

[116] GA. CT. APP. R. 33.2(a) (2020).

[117] *Institute for Justice,* 351 Ga. App. at 322, S.E.2d at 797.

[118] 352 Ga. App. 824, 835 S.E.2d 764 (2020).

[119] *Id.* at 824, 835 S.E.2d at 768–69.

knocking out the landfill project before it got started.[120] The Appellees filed a motion to dismiss arguing that (1) the claim had been resolved in a prior lawsuit; (2) the statute of limitations for Sweet City's claim had expired; and (3) the individual defendants were entitled to immunity.[121] Although the court held in favor of the Elbert County Appellees on all three issues,[122] this summary will focus on the statute of limitations and immunity arguments as they relate to the Open Meetings Act.

Because it pled bad faith, Sweet City argued the trial court erred in granting immunity to the Elbert County Appellees.[123] The relevant portion of O.C.G.A. § 51-1-20(a)[124] provides:

> any local governmental agency, board, authority, or entity shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.[125]

Although Sweet City generally pled that the Elbert County Appellees did not act in good faith, the court held the complaint failed to set out a statement that the Elbert County Appellees adopted or took a resolution, rule, regulation ordinance, or any other official action at a closed meeting in violation of the Open Meetings Act.[126] The important takeaway is that the court found the alleged actions mentioned above did not rise to the level of bad faith.[127]

Next, Sweet City contended that O.C.G.A. § 9-3-96[128] tolls the six-month statute of limitations for an Open Meetings Act lawsuit, because the Elbert County Appellees' fraudulent 2012 actions were not revealed until 2018 (six years later).[129] O.C.G.A. § 9-3-96 generally tolls the statute of limitations until the discovery of fraud if there are allegations of fraud that deterred the plaintiff from bringing the claim.[130] However, the relevant portion of O.C.G.A. § 50-14-1(b)(2)[131] reads as follows:

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[120] *Id*. at 825, 835 S.E.2d at 769.

[121] *Id*. at 825–26, 835 S.E.2d at 769.

[122] *Id*. at 824, 835 S.E.2d at 768.

[123] *Id*. at 827, 835 S.E.2d at 770.

[124] O.C.G.A. § 51-1-20(a) (2019).

[125] *Id*.

[126] *Sweet City Landfill, LLC*, 352 Ga. App. at 827–28, 835 S.E.2d at 770.

[127] *Id*. at 828, 835 S.E.2d at 771.

[128] O.C.G.A. § 9-3-96 (2020).

[129] *Sweet City Landfill, LLC*, 352 Ga. App. at 829, 835 S.E.2d at 771.

[130] O.C.G.A. § 9-3-96.

[131] O.C.G.A. § 50-14-1(b)(2) (2020).

> Any resolution, rule, regulation, ordinance, or other formal action of an agency . . . based on an alleged violation of this provision shall be commenced within 90 days of the date such contested action was taken or, if the meeting was held in a manner not permitted by law, within 90 days from the date the party alleging the violation knew or should have known about the alleged violation so long as such date is not more than six months after the date the contested action was taken.[132]

The court held the plain meaning of O.C.G.A. § 50-14-1(b)(2) creates a six-month maximum for filing Open Meetings Act claims and "provides no indication that the time for bringing such a claim may be tolled."[133]

The *Sweet City* ruling makes it challenging for plaintiffs to bring Open Meetings Act claims. Unless the legislators revise the Act, it appears the six-month limitation period will be strictly enforced. Furthermore, the court set a high bar for alleging bad faith in such a case to overcome official immunity.

Moving on to another case during the subject time period involving the Open Meetings Act. In *Williams v. Dekalb County*, a resident sued Dekalb County, Dekalb County's chief executive officer, and Dekalb County's members of the board of commissioners, alleging, amongst other things, that the board of commissioners (Dekalb Appellees) violated the Open Meetings Act by not giving proper notice of their intent to adopt an ordinance that increased their own salaries. According to the complaint, the Dekalb Appellees properly provided notice to the legal organ of its intent to raise the salary of the governing authority. However, the agenda published for the meeting made no reference to the proposed salary ordinance. During the meeting, the commissioners voted to add the proposed salary ordinance as a "walk-on" resolution and approved the increase in salary for commissioners and the chief executive officer.[134] The trial court granted the Dekalb Appellees' motion to dismiss and Williams appealed.[135]

Although the court previously held that a private citizen does not have standing to enforce the criminal penalty provision of the Open Meetings Act, the Georgia Supreme Court held that a private citizen has the authority to enforce the civil penalty provision.[136] O.C.G.A. § 50-14-5[137] authorizes the Attorney General to enforce the provision "[i]n addition to any action that may be brought by any person, firm, corporation, or other

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[132] *Id.*

[133] *Sweet City Landfill, LLC*, 352 Ga. App. at 829, 835 S.E2d at 771.

[134] *Williams,* 308 Ga. at 267–68, 840 S.E.2d at 427.

[135] *Id.* at 268–69, 840 S.E.2d at 427–28.

[136] *Id.* at 276–77, 840 S.E.2d at 433.

[137] O.C.G.A. § 50-14-5 (2020).

entity."[138] Thus, the Open Meetings Act clearly envisions a private citizen bringing a civil penalty claim.

The court next held that the complaint sufficiently alleged a violation of the Open Meetings Act.[139] Although the Open Meetings Act requires a county, prior to any meeting, to make available the agenda of all matters expected to come before the board, "[f]ailure to include on the agenda an item which becomes necessary to address during the course of a meeting shall not preclude considering and acting upon such item."[140] The complaint clearly alleges the salary ordinance was intentionally omitted from the agenda and that nothing occurred after the item was omitted from the agenda that made it necessary to take the matter up at that particular meeting.[141] Therefore, an Open Meetings Act violation was sufficiently alleged to survive the motion to dismiss stage.[142]

Next, the court held the commissioners were not entitled to official immunity at the motion to dismiss stage from the penalty provisions of the Open Meetings Act.[143] The court ruled the complaint sufficiently alleged the commissioners acted with actual malice by intentionally violating the agenda requirements of the Open Meetings Act.[144]

Lastly, the court briefly explained the Open Meetings Act claims were not barred by legislative immunity.[145] Quite simply, because the Open Meetings Act establishes civil and criminal penalties for violations, the "Act plainly abrogates legislative immunity for local officials."[146]

Unlike *Sweet City*, this case made it easier for a plaintiff to bring an Open Meetings Act claim. Time will tell if the confirmation that private citizens may bring claims for civil penalties under the Open Meetings Act will result in an increased number of such cases.

V. ZONING AND LAND USE

In *Clayton County v. New Image Towing and Recovery, Inc.*,[147] what began as a case about the standard of review on appeal of zoning decisions ended with a treatise on statutory construction. Here, the

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[138] O.C.G.A. § 50-14-5(a) (2020).

[139] *Williams*, 308 Ga. at 277, 840 S.E.2d at 434.

[140] O.C.G.A. 50-14-1(e)(1).

[141] *Williams*, 308 Ga. at 277, 840 S.E.2d at 433.

[142] *Id.* at 280, 840 S.E.2d at 435.

[143] *Id.* at 279, 840 S.E.2d 434.

[144] *Id.* For official immunity analysis, "actual malice" means a deliberate intention to do wrong. Wyno v. Lowndes County, 305 Ga. 523, 531, 824 S.E.2d 297, 304 (2019). Stated differently, the defendant must have intended to cause the harm suffered by the plaintiff. Murphy v. Bajjani, 282 Ga. 197, 203–04, 647 S.E.2d 54, 56 (2007).

[145] *Id.*, 840 S.E.2d at 435.

[146] *Id.*

[147] 351 Ga. App. 340, 830 S.E.2d 805 (2019) (physical precedent only).

Clayton County Planning and Zoning Administrator required a business license applicant to submit a site plan to run a towing and wrecking business to show how it would comply with parking and development requirements under the applicable zoning ordinances. The applicant refused to do this and the County's review committee suspended the application.[148] The Board of Zoning Appeals (BZA) held a hearing and upheld the Administrator's decision, finding that the ordinance required submission of a site plan if the site was going to be "altered" in any way, over the applicant's argument that to "alter" the site referred to physical alterations only.[149] On petition for certiorari to the superior court, the superior court reversed, strictly construing the ordinance in favor of the property owner and applying a *de novo* review of the BZA's decision on grounds that the same constituted a matter of law, not a factual finding.[150]

The court of appeals reversed, first reiterating that, while the standard of review of a County zoning board's factual findings remains "substantial evidence/any evidence," issues of law are reviewed *de novo*.[151] Although the court of appeals agreed the trial court's *de novo* review was the correct standard because the BZA's decision turned on interpretation of the ordinance, it reversed nonetheless, holding that the trial court erred by imposing too narrow an interpretation of the term "alter" contrary to the ordinance's plain meaning and context.[152]

In *Riverdale Land Group, LLC v. Clayton County*,[153] the court of appeals distinguished legislative zoning decisions from quasi-judicial ones, reaffirming that while suit may be brought to seek mandamus relief for the former, for the latter, the sole avenue for remedy lies in petition for certiorari to the superior court, and mandamus is not available.[154] The property owner, Riverdale Land Group (RLG), applied for a conditional use permit to build a gas station, which the Clayton County (County) Board of Commissioners denied. RLG filed suit, raising constitutional challenges to the County's zoning ordinances and requested mandamus relief in the form of an order requiring the County to approve its application. On the County's Motion, the trial court dismissed, concluding that the decision to deny the application must be

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[148] *Id* at 341, 830 S.E.2d at 807.

[149] *Id.* at 342, 830 S.E.2d at 808.

[150] *Id.*

[151] *Id.* at 343, 830 S.E.2d at 808–09.

[152] *Id.* at 343–44, 830 S.E.2d at 809.

[153] 354 Ga. App. 1, 840 S.E.2d 132 (2020).

[154] *Id.* at 3, 840 S.E.2d at 134.

reviewed by petition for certiorari because the decision-making process was judicial in nature.[155]

The court of appeals affirmed, holding that (1) the Board decision was quasi-judicial in nature because it required the Board to make specific factual findings about the property under certain criteria imposed by the applicable ordinance and to hold a hearing on evidence of the same,[156] and therefore (2) mandamus was not available as relief.[157] The court of appeals also addressed RLG's argument that a zoning board's ruling on a conditional use permit application is legislative, rather than judicial in nature.[158] RLG argued that Georgia's Zoning Procedures Law (ZPL)[159] defines a "zoning decision" as a final "legislative action."[160] The court of appeals disagreed, holding that, because the Georgia Supreme Court instructs that "substance matters more than form" in determining whether a zoning decision is administrative/legislative[161] or quasi-judicial, the decision here remained quasi-judicial despite the ZPL's language.[162]

In *Davis v. Rockdale Art Farm, Inc.*,[163], the Rockdale County Board of Commissioners approved a special use permit for development of a residential creative arts learning center. Property owners some three-tenths of a mile away filed a petition for certiorari, alleging various harms including noise, lighting, and increased traffic. The County and applicant, as respondents, moved to dismiss on grounds that the petitioners lacked standing to challenge the permit's approval; the petitioners argued that the respondents waived the right to contest standing by failing to raise lack of standing before the Board. The Superior Court dismissed the petition, finding that, under the Rockdale ordinance, an objection to standing at the hearing would be premature and useless, since the applicant could not assess the opposition's standing in advance of the presentation at the hearing. It also concluded that the petitioners had alleged only "generalized impacts and had failed to claim any unique damage that would not equally affect all landowners in the vicinity."[164]

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[155] *Id.* at 1–2, 840 S.E.2d at 133.

[156] *Id.* at 5–6, 840 S.E.2d at 136.

[157] *Id.* at 7, 840 S.E.2d at 136.

[158] *Id.* at 8, 840 S.E.2d at 137.

[159] O.C.G.A. §§ 36-66-1 through 36-66-6 (2019).

[160] *Riverdale Land Group, LLC,* 354 Ga. App. at 8, 840 S.E.2d at 137.

[161] *Id.* at 8, 840 S.E.2d at 137. The court of appeals noted that an amendment to a zoning ordinance would constitute such a legislative decision, to which a constitutional challenge and the remedy of mandamus could be appropriate.

[162] *Id.*

[163] 354 Ga. App. 82, 840 S.E.2d 160 (2019).

[164] *Id.* at 82–84, 840 S.E.2d at 161–62.

On appeal by the petitioners, the court of appeals affirmed, holding that a challenge to standing can be waived if not raised before an administrative body, but only "if that body was acting in a quasi-judicial capacity."[165] Because the Rockdale ordinance vested wide discretion in the Board to grant special use exceptions, the court found this decision to be legislative rather than quasi-judicial, and therefore, the respondents were not required to raise the issue before the Board.[166] In addition, the court reiterated the two-prong "substantial-interest-aggrieved citizen" test for standing to challenge a zoning decision: (1) a person must have a substantial interest in that decision, and (2) that "interest must be in danger of suffering some special damage or injury not common to all property owners similarly situated."[167] Since the petitioners' claims of injury were too vaguely enumerated and they could not show that "other nearby properties would not also be affected," they failed to establish standing and dismissal was appropriate. [168]

In *Milani v. Irwin*,[169] following a procedurally complex route, the court of appeals reaffirmed that reduction in aesthetic quality of property gives nearby landowners standing to challenge permit decisions and held that a County cannot make ad hoc compromise conditions that expressly conflict with existing zoning ordinances.[170] Following Dekalb County's Zoning Board's grant of a permit to Milani to build a residence in a subdivision conditioned on preserving trees in the County's seventy-five foot stream buffer, Milani began construction, cutting the forbidden trees in violation of both the permit and County ordinance. The Planning Director requested Milani submit a tree planting plan to restore the buffer within fifteen days; but Milani did not do so until a month later, after the County issued Milani a citation. Milani then applied for another permit to restore the buffer and construct a seawall. The Director initially denied the application but later deemed it acceptable. The Director also told Milani that he needed no permit to construct the seawall because it was exempt from the permit requirement due to its low height, but conditioned that on the sea wall not eliminating the County buffer. Petitioners—non-adjacent neighbors in the subdivision—appealed the Director's decision to the Board of Commissioners, which the Board affirmed. The petitioners then filed a petition for certiorari in

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[165] *Id.* at 85, 840 S.E.2d at 163.

[166] *Id.* at 86, 840 S.E.2d at 164.

[167] *Id.* at 88, 840 S.E.2d at 165 (citing The Stuttering Foundation v. Glynn County, 301 Ga. 492, 494, 801 S.E.2d 793, 797 (2017)).

[168] *Id.*

[169] 354 Ga. App. 218, 840 S.E.2d 700 (2020).

[170] *Id.* at 218, 840 S.E.2d at 702.

superior court, challenging both the sufficiency of the replanting plan and the decision that Milani did not need a permit for the sea wall. Meanwhile, Milani filed a separate action against the petitioners and the Board seeking mandamus and declaratory relief, arguing that the petitioners' appeal was untimely under the County Code (the Code), that the petitioners lacked standing, and that the Board lacked authority to impose the condition on the sea wall. Milani also intervened in the petition and moved to dismiss on grounds that the petitioners' appeal to the Board was untimely and they did not have standing. The superior court sustained the petition, finding that the Board erred in approving the tree planting plan in violation of the Code's requirements. It also dismissed Milani's action, concluding that the County's conditioning construction on the seawall on not eliminating the County buffer was lawful.[171]

On Milani's appeal, the court of appeals first held that the Director's initial denial of Milani's second application was provisional and tentative, and therefore, the petitioners were not bound to file an appeal within fifteen days as mandated by County ordinance.[172] Next, the court held that the petitioners were, in fact, aggrieved persons with standing to appeal to the Board under the County Ordinance, because, although their properties were not adjacent to Milani's, they suffered the visual intrusion of Milani having cut the trees on his lot; and for the same reasons, the petitioners had standing to file a petition for writ of certiorari.[173] Milani also argued that the petition should have been dismissed because the Board failed to follow the requirements of O.C.G.A. § 5-4-7[174] and file its answer within thirty days of service of the writ.[175] The court disagreed, because the trial court had discretion to extend the time for the Board to file an answer.[176] Finally, the court affirmed the superior court's decision to sustain the petition because, although the Board approved Milani's replanting plan, that plan itself violated the Code's technical specifications requiring replacement of trees of the size Milani removed from the buffer.[177]

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[171] *Id.* at 219–21, 840 S.E.2d at 702–04.

[172] *Id.* at 221–22, 840 S.E.2d at 704.

[173] *Id.* at 223, 840 S.E.2d at 705.

[174] O.C.G.A. § 5-4-7 (2020).

[175] *Milani,* 354 Ga. App. at 223–24, 840 S.E.2d at 705.

[176] *Id.* at 224, 840 S.E.2d at 706.

[177] *Id.* at 224–25, 840 S.E.2d at 706.

VI. WHISTLEBLOWERS

For cases arising under the Georgia Whistleblower Act (GWA),[178] this year's survey period was largely uneventful. There were no decisions from Georgia's appellate courts nearly as important as last year's en banc decision in *Franklin v. Pitts*,[179] redefining the standard for analyzing the adverse employment action element.[180] And the handful of federal decisions addressing GWA claims were unremarkable.[181] Nonetheless, the City of Pendergrass's appeal from a jury verdict awarding more than $1,000,000 to the whistleblowers who prevailed at trial does warrant some discussion.[182]

Recall that public employees must demonstrate four elements to establish a prima facie case under the GWA: (1) they were employed by a "public employer"; (2) they engaged in whistleblower activity; (3) they suffered an adverse employment action; and (4) there is a causal connection between the whistleblowing activity and the adverse employment action.[183] In *City of Pendergrass v. Rintoul*,[184] the City argued that the trial court erred in failing to direct a verdict in its favor because the plaintiffs had not demonstrated the first element: that the City was a "public employer" as that term is defined in the GWA.[185] To appreciate the City's argument here, a brief review of the legislative history of the GWA is, perhaps, necessary.[186]

Originally enacted in 1993, the GWA did not extend coverage to every public employer in the state. By its own terms, the statute limited its reach to only the state's executive branch, exempting the office of the

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[178] O.C.G.A. § 45-1-4 (2019).

[179] 349 Ga. App. 544, 826 S.E.2d 427 (2019).

[180] *Id.*, 826 S.E.2d at 430; *see* Russell A. Britt, et al., *Local Government Law*, 71 MERCER L. REV. at 217–18 (discussing this case); *cf.* Ward-Poag v. Fulton Cty., 351 Ga. App. 325, 830 S.E.2d 799 (2019) (reversing trial court's grant of summary judgment of GWA claim on judicial estoppel grounds).

[181] *Cf.* Bruno v. Greene Cty. School, 801 F. App'x 681, 683 n.1 (11th Cir. 2020) (noting that plaintiff-appellant abandoned GWA claim on appeal); Anderson v. Sumter County School Dist., No. 1:19-CV-42 (LAG), 2020 U.S. Dist. LEXIS 96714 (M.D. Ga. Mar. 16, 2020) (denying motion for judgment on the pleadings on GWA claim); Cox v. Fulton County School District, No. 1:19-cv-04520-JPB-RGV, 2020 U.S. Dist. LEXIS 100680 (N.D. Ga. May 22, 2020) (Vinyard, J.) (non-final report and recommendation) (granting in part and denying in part motion to dismiss GWA claim), adopted in full at Cox v. Fulton County Sch. Dist., No. 1:19-CV-04520-JPB, 2020 U.S. Dist. LEXIS 100679 (N.D. Ga. Jun. 8, 2020) (Boulee, J.).

[182] *See* City of Pendergrass v. Rintoul, 354 Ga. App. 618, 841 S.E.2d 399 (2020).

[183] *See, e.g.*, *Franklin*, 349 Ga. App. at 547, 826 S.E2d at 431 (discussing elements).

[184] 354 Ga. App. 618, 841 S.E.2d 399 (2020).

[185] *Id.* at 620. 841 S.E.2d at 402–03.

[186] Seth Eisenberg, *Public Officers and Employees*, 24 GA. ST. U. L. REV 309 (2007).

Governor, the judicial branch, and the legislative branch.[187] Although it was amended in 2005 to extend coverage to all three branches of state government,[188] the 2005 amendment still did not enlarge the GWA to reach local governments, which the Supreme Court of Georgia had already concluded in 2000 did not come within the meaning of "any other department, board, bureau, commission, authority, or other agency of the state."[189] Nonetheless, in 2007, the Georgia General Assembly amended the GWA again, this time aiming to reach local governments—or at least, to some extent.[190] The GWA now defines "public employer" as:

> the executive, judicial, or legislative branch of the state; any other department, board, bureau, commission, authority, or other agency of the state which employs or appoints a public employee or public employees; or any local or regional governmental entity that receives any funds from the State of Georgia or any state agency.[191]

The last clause in the definition was the key to the City of Pendergrass's arguments. A local or regional governmental entity is now covered by the GWA, but only to the extent it "receives any funds from the State of Georgia or any state agency."[192]

In *City of Pendergrass*, the City argued the plaintiffs had not proven that the City received state funds.[193] Rejecting the City's arguments, the court of appeals affirmed the trial court's denial of its requests for directed verdict.[194] The plaintiffs had "identified three sources of funds that the City had received from the State of Georgia."[195] These funds included: "LOST receipts; a check for $68 that the city's municipal court received from the Georgia Department of Drivers Services ('DDS'); and services and grant money provided to the City's library by the Georgia Library Public Information Network for Electronic Services ('PINES'); and Piedmont Regional Library System ('PLRS')."[196] And because there

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[187] O.C.G.A. § 45-1-4(a)(2) (1993); *see North Georgia Regional Educational Service Agency v. Weaver*, 272 Ga. 289, 290, 527 S.E.2d 864, 865 (2000) (discussing pre-2005 amendments); *cf.* Eisenberg, *supra* note 186, at 311.

[188] 2005 Ga. Laws 899, § 1.

[189] *North Georgia Regional Educational Service Agency*, 272 Ga. at 290–91, 527 S.E.2d at 865 (holding regional education agency not within meaning of "public employer" definition).

[190] 2007 Ga. Laws 298, § 1; *cf.* Eisenberg, *supra* note 186, at 319–20 (discussing the 2007 amendment).

[191] O.C.G.A. § 45-1-4(a)(4) (2020).

[192] *City of Pendergrass*, 354 Ga. App. at 622, 841 S.E.2d at 403.

[193] *Id.* at 622, 841 S.E.2d at 403.

[194] *Id.* at 618, 841 S.E.2d at 401.

[195] *Id.* at 623, 841 S.E.2d at 404.

[196] *Id.*

were conflicts in the evidence as to this issue, the question was appropriately left for the jury to resolve.[197]

Although the *City of Pendergrass* decision does at least confirm a plaintiff must demonstrate that the local government entity receives state funds to be sued under the GWA, the decision's treatment of the issue leaves many questions unanswered. For example, did the General Assembly's inclusion of local and regional governments—subject to the qualification that they receive state funds—import some sort of logical or temporal nexus between the state funds and the whistleblower's claim against the local entity? In other words, if neither the public employee's disclosure of the alleged, "violation of or noncompliance with a law, rule, or regulation"[198] or the alleged violation itself has anything to do with the state funds received, does the GWA still provide a remedy? Moreover, would a local government's receipt of state funds in one fiscal year obviate a whistleblower's need to make any showing on this for a claim arising in a subsequent fiscal year in which the local government did not receive state funds?

The *City of Pendergrass* Court did not grapple with the General Assembly's curious qualification that a local or regional governmental entity can be sued under the GWA so long as it "receives any funds from the State of Georgia or any state agency."[199] Finding that there was some evidence that the City received state funds, the Court affirmed.[200] Future cases will be necessary to tease out these unexplored notions.

VII. SERVICE DELIVERY STRATEGIES

In the last year two cases regarding service delivery strategies have been reviewed by the court of appeals. One was regarding the transfer of service delivery interests, and the other regarded relief available to a county for imposed sanctions for their failure to comply with the Service Delivery Strategy Act (SDS Act)[201] requirements.

In *City of Norcross v. Gwinnett County, Georgia*,[202] the City of Norcross (the City) and Gwinnett County (the County) had a dispute "over which local governmental entity was responsible for repairing and maintaining a drainage system located on commercial property that was initially located within the boundaries of the unincorporated County but was later annexed by the City."[203] In 1981, the parties that owned the properties

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[197] *Id.* at 624, 841 S.E.2d at 404.

[198] *See* O.C.G.A. § 45-1-4(d)(2) (2020).

[199] *City of Pendergrass*, 354 Ga. App. at 622, 841 S.E.2d at 403.

[200] *Id.* at 623, 841 S.E.2d at 404.

[201] O.C.G.A. §§ 36-70-2o through 36-70-28 (2019).

[202] 355 Ga. App. 662, 843 S.E. 2d 31 (2020).

[203] *Id.*, 843 S.E. 2d at 32.

where the drainage system is located dedicated the system to the County in a "Dedication of Drainage System and Detention Pond" that was executed by those parties and the County (the Dedication).[204] In 2005, the General Assembly amended the Charter of the City to expand the City limits to encompass portions of the commercial property where the drainage system was located.[205] In 2012, in accordance with the SDS Act, the City and the County agreed to a service delivery strategy governing local services, which in part noted that the County and City agreed to provide "stormwater services" within their respective boundaries, but did not contain any conveyance or assignment of the City or the County's easements or property interests in the drainage system in the commercial property.[206] In February of 2018, two large sinkholes formed in the parking lot of the commercial property due to a damaged pipe that was part of the drainage system, and a dispute arose between the City and County regarding who was responsible for the repair and maintenance.[207] The trial court found that the "City became responsible for the drainage system when it annexed the commercial property," and that *Fulton County v. City of Sandy Springs*[208] did not apply since the commercial property in this case, "was conveyed to the County by way of public dedication instead of an easement."[209]

The City appealed the trial court's ruling, asserting that *Fulton County* controls the outcome and should have resulted in the County being responsible for the maintenance and repair of the commercial property.[210] The court of appeals reversed the trial court, holding that *Fulton County* is controlling in this case because the County, "like Fulton County, was expressly granted easements over private property for the purposes of using, maintaining, repairing, and operating a drainage system, and the conveyance instrument explicitly stated that the County would maintain the system."[211] The court of appeals held that the County did not argue that the easement in this case was abandoned and failed to come forward with any evidence to show the easements had been terminated or legally transferred to the City, and therefore, the County still retained responsibility for maintaining the drainage system following the annexation by the City.[212]

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[204] *Id.* at 663, 843 S.E. 2d at 33.

[205] *Id.*

[206] *Id.* at 665, 843 S.E. 2d at 34.

[207] *Id.*

[208] 295 Ga. 16, 757 S.E. 2d 123 (2014).

[209] *City of Norcross,* 355 Ga. App. at 666–67, 843 S.E. 2d at 35.

[210] *Id.* at 667, 843 S.E. 2d at 35.

[211] *Id.* at 669, 843 S.E. 2d at 36–37.

[212] *Id.* at 672, 843 S.E. 2d at 39.

In *Board of Commissioners of Lowndes County v. Mayor and Council of the City of Valdosta, et al.*, the court of appeals reviewed the issue of whether a county board of commissioners could bring an action against Department of Community Affairs (DCA) officials in their official and individual capacities for injunctive, declaratory, and mandamus relief after the DCA imposed sanctions on county and cities for their alleged failure to comply with SDS Act requirements.[213] Lowndes County and the cities within Lowndes County (the Cities) operated under a service delivery strategy agreement implemented in 2008.[214] The SDS Act states that:

> [e]ach county and affected municipality shall review, and revise if necessary, the approved strategy: (1) [i]n conjunction with updates of the comprehensive plan as required by Article 1 of this chapter; (2) [w]henever necessary to change service delivery or revenue distribution arrangements; [or] (3) [w]henever necessary due to changes in revenue distribution arrangements.[215]

In 2016, the chairman of the Board of Commissioners of Lowndes County sent a letter to the mayors of the Cities giving notice of a meeting to review the service delivery strategy from 2008, and after the meeting, a new draft of a 2016 service delivery strategy agreement was prepared and circulated to the Cities. The Cities and Lowndes County were instructed to notify the DCA if the review of the new strategy was completed and that no revisions were necessary or to file a revised service delivery strategy with DCA in October of 2016. DCA did not receive a notification or revised service delivery strategy and imposed sanctions that the County and the Cities would be ineligible for state-administered financial assistance, grants, loans, or permits until DCA could verify that Lowndes County and the Cities have complied with the SDS Act.[216]

The Board of Commissioners of Lowndes County filed suit against DCA and the Cities requesting declaratory and injunctive relief, and mandamus relief against the DCA and the Cities. The Board argued that the 2008 Strategy Agreement remained in effect and the County and Cities were still eligible for state-administered financial assistance, grants, loans, and permits.[217] The court of appeals found that sovereign immunity was not waived as to the Board's declaratory and injunctive relief sought, and therefore was barred from suit.[218] Further, the court of

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[213] 352 Ga. App. 391, 391, 834 S.E. 2d 890, 891 (2019).

[214] *Id.* at 392, 834 S.E. 2d at 892.

[215] O.C.G.A. § 36-70-28(b)(1)–(3) (2020).

[216] *Board of Commissioners of Lowndes Cnty,* 352 at 392–93, 834 S.E. 2d at 892–93.

[217] *Id.* at 393, 834 S.E.2d at 893.

[218] *Id.* at 396, 834 S.E.2d at 895.

appeals held that the Board did not have a clear legal right to the relief sought as to the mandamus relief.[219] The court of appeals affirmed the trial court's dismissal of the Board of Commissioners of Lowndes County's case.[220]

VIII. RECREATIONAL PROPERTY ACT

Five times in the survey period, our courts took Georgia's Recreational Property Act ("RPA" or the "Act"),[221] out for an appellate spin. First enacted in 1965, the RPA has the legislatively created stated purpose "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting owners' liability toward persons entering thereon for recreational purposes."[222] Generally, unless such an owner of land acts with malice, the RPA insulates it from liability if no admission fee is charged to the person so entering.[223]

In recent past, we have seen opinions significantly defining the RPA landscape and this round did not disappoint. The courts' opinions included revisiting whether the RPA waives counties' entitlement to sovereign immunity;[224] examining the definition of "owner of land," within the meaning of the Act;[225] and crafting a new, substantial analytical framework for determining when RPA immunity is available in mixed-use recreational/commercial cases, requiring a determination of the true scope and nature of the landowner's invitation to use its property.[226] We turn to this last thought first.

A. The New Analytical Framework for Mixed-Use Recreational Properties

1. Mercer University v. Stofer

Reversing and remanding the court of appeals' earlier opinion in *Mercer University v. Stofer*,[227] the Georgia Supreme Court's decision of the same name significantly alters the legal landscape for determining

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[219] *Id.* at 397, 834 S.E.2d at 895.

[220] *Id.* at 399, 834 S.E.2d at 896.

[221] O.C.G.A. §§ 51-3-20 through 51-3-26 (2020).

[222] O.C.G.A. § 51-3-20 (2020). The word "landowner" and "owner of land" are used interchangeably throughout this article and refer to the "owner of land" connotation as set forth in the statute.

[223] O.C.G.A. §§ 51-3-22 and 51-22-23 (2020).

[224] Gwinnett County v. Ashby, 354 Ga. App. 863, 842 S.E.2d 70 (2020); Macon-Bibb County v. Kalaski, Ga. App. 355 Ga. App. 24, 842 S.E.2d 331 (2020).

[225] Chatham Area Transit Auth. v. Brantley, 353 Ga. App. 197, 834 S.E.2d 593 (2019).

[226] Mercer University v. Stofer, 306 Ga. 191, 830 S.E.2d 169 (2019); Mercer University v. Stofer, 354 Ga. App. 458, 841 S.E.2d 224 (2020).

[227] 345 Ga. App. 116, 812 S.E.2d 146 (2018).

when immunity is available to landowners when the use of the property includes some aspects of recreational use mixed with some commercial use. At issue, the opinion presents, is the question of "the meaning of the phrase 'invites or permits without charge any person to use the property for recreational purposes.'"[228] The answer, a test:

> [T]he key teachings of our cases can be distilled into a test that is more connected to the statutory text: the true scope and nature of the landowner's invitation to use . . . two related considerations: (1) the nature of the *activity* that constitutes the use of the property in which people have been invited to engage, and (2) the nature of the *property* that people have been invited to use. In other words, the first asks whether the activity in which the public was invited to engage was of a kind that qualifies as recreational under the Act, and the second asks whether at the relevant time the property was of a sort that is used primarily for recreational purposes or primarily for commercial activity.[229]

In crafting this test, the court backpedaled on certain prior mixed-use case language first introduced in *Atlanta Committee for the Olympic Games v. Hawthorne*,[230] an action emanating from the Olympic bombing.[231] The first casualty was *Hawthorne's* having focused on the landowner's subjective intent in allowing people onto its land.[232] In crafting its new test and putting an end to all subjective inquiry into landowner intent, the court disapproved its prior pronouncement that a jury is free to consider, "any relevant evidence that may be adduced that [a landowner's] purpose in allowing the public free of charge on the locus delicti was to derive, *directly or indirectly*, a financial benefit for pecuniary gain from business interests thereon."[233]

Similarly, the second casualty emanates from this same language, where the court disapproved of an inquiry into whether the landowner is set "to derive, *directly or indirectly*, a financial benefit for pecuniary gain from business interests thereon."[234] The court reasoned that indirect

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[228] *Mercer University,* 306 Ga. at 195, 830 S.E.2d at 173.

[229] *Id.* 306 Ga. at 196, 830 S.E.2d at 173–74. This wrongful death action involved a woman who fell during a free concert event put on by an alliance created to improve an inner-city neighborhood. The concert was held at a city-owned park, but Mercer had a permit for the event on behalf of the alliance. There were food and beverage vendors present, and sponsorships were available. In a grant proposal, Mercer mentioned the alliance could see "additional revenue streams." *Id.* 306 Ga. at 171, 830 S.E.2d at 192.

[230] 278 Ga. 116, 598 S.E. 2d 471 (2004).

[231] *Mercer University,* 306 Ga. at 195–96, 830 S.E.2d at 173.

[232] *Id.* at 196, 830 S.E.2d at 173 (citing *Hawthorne*, 278 Ga. at 117, 598 S.E.2d 474).

[233] *Id.* at 198, 830 S.E.2d at 175.

[234] *Id.*

benefits have, "less connection to the text of the statute" than does the subjective intent of the landowner.[235]

The court also entertained the issue of whether the question of entitlement to immunity under the Act was a question of law for the trial court, or one of fact requiring jury resolution.[236] Predictably, and non-climatically, the court held "[t]he definition and limitation of a defense is a question of law for the court; the existence or non-existence of facts on which the defense is predicated is a question for the jury."[237] This blasé, rote language begets the question of why the court would grant certiorari in the first place. In this regard, the court itself posited, "Whether a defendant is entitled to immunity under the Act will sometimes present a question of fact for a jury, especially in mixed-use cases."[238] Adding to the mystery of why the question of law versus question of fact was even asked, the court's holding nowhere directly answers this quoted query, notably reading silent on the "especially in mixed-use cases" fragment of the inquiry. The closest the opinion comes to answering was its passive suggestion that a "jury trial may often be required to resolve the question of immunity under the Act."[239]

The supreme court remanded the case back to the court of appeals to determine whether Mercer was entitled to summary judgment.[240] The earlier court of appeals opinion had relied heavily on *Hawthorne's* emphasis on subjectivity and the possibility of direct/indirect benefits flowing to the University, and the supreme court takes the time to again point this out in closing its opinion.[241]

2. Mercer University v. Stofer[242]

Given the new analytical parameters, the court of appeals predictably applied the facts set forth in Footnote 229, *supra*, to the supreme court's enunciated test, and found there existed no genuine issue for trial and that Mercer was indeed entitled to summary judgment.[243]

B. Testing the Definition of "Owner of Land"–Chatham Area Transit

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[235] *Id.* at 200–01, 830 S.E.2d at 176.

[236] *Id.* at 202–03, 830 S.E.2d at 178 .

[237] *Id.* at 202, 830 S.E.2d at 177.

[238] *Id.*

[239] *Id.*, 830 S.E.2d at 178.

[240] *Id.* at 203–04, 830 S.E.2d at 178.

[241] *Id.*, 803 S.E.2d at 178.

[242] 354 Ga. App. 458, 821 S.E.2d 244 (2020).

[243] 354 Ga. App. at 462–63, 821 S.E.2d at 228.

Authority v. Brantley

Numerous persons were injured when a ramp connected to a floating dock holding passengers collapsed. The ramp and dock were owned by the City of Savannah, and along with others, were utilized by the Chatham County Area Transit Authority (CAT). CAT provided ferry service across the Savannah river, and the dock in question was where its passengers embarked and disembarked. The dock was utilized by the public in several ways, including short term mooring of boats.[244]

Dozens of people sued both the City and CAT. Both Defendants moved for summary judgment on all cases and all motions were denied.[245] The cases were consolidated for purposes of appeal, where the court of appeals reversed all denials of the City's summary judgment motions but affirmed the denial to CAT.[246] The City's summary judgment motions were based on basic sovereign immunity and the RPA, but the court of appeals decision did not reach the RPA question as to the City, instead granting it sovereign immunity.[247]

The trial court denied CAT's dispositive motion on the theory there existed a question of fact as to whether the purpose of the dock was recreational in nature.[248] The court of appeals, however, turned to the issue of whether CAT could be considered an "owner" of property under the RPA, such that it would be entitled to Act's immunity. The answer? No.[249]

In connection with its purpose of encouraging owners to open their properties for recreational purposes, the RPA defines an owner as a "possessor of a fee interest, a tenant, a lessee, an occupant, or a person in control of the premises."[250] Not being the actual owner, tenant, or lessee of the dock, CAT argued it was entitled to RPA immunity because (1) it occupied the dock several times the day of the accident and (2) it was in control of the dock at the time because the ferry was docked and CAT had to control the area to insure safe passage to/from the ferry.[251] The court made short shrift of these arguments because, on the record, there was no evidence the ferry was actually docked at the time and no evidence there was a CAT employee on site when it collapsed.[252] Nor could CAT

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[244] *Chatham Area Transit Authority,* 353 Ga. App. at 198, 834 S.E.2d at 596. CAT's use of the dock was only temporary, during a time in which its regular dock was under repair.

[245] *Id.* at 198–99, 834 S.E.2d at 597.

[246] *Id.* at 199, 834 S.E.2d at 597.

[247] *Id.* at 205, 834 S.E.2d at 601.

[248] *Id.* at 206, 834 S.E.2d at 601.

[249] *Id.* at 208, 834 S.E.2d at 602–03.

[250] O.C.G.A. § 51-3-21(3) (2019).

[251] *Chatham Area Transit Authority,* 353 Ga. App. at 206, 834 S.E.2d at 601–02.

[252] *Id.*

argue it had an, "exclusive right to occupy the dock on the day of the collapse."[253]

The court additionally noted that CAT was just like anyone else who wanted to moor or dock their boats at the dock because CAT neither maintained nor provided any upkeep on the dock.[254] The court also rejected a definition of the word "occupant" based on the notion CAT was "occupying" the spot at the time.[255]

C. The RPA does not Create a Waiver of Sovereign Immunity for Counties

Two decisions, same holding. In both *Macon-Bibb County v. Kalaski,* and *Gwinnett County v. Ashby,* the court of appeals confirmed existing law holding that because the RPA does not specify that its application is designed to waive a county's sovereign immunity, that there is no such waiver.[256] In this regard, the court of appeals in *Kalaski* rejected the argument that because a fisherman may have paid a fee to fish off a dock that sovereign immunity was somehow lost.[257] The court of appeals reached the same conclusion in *Ashby,* where an injured parent had paid admission fee to a football game on county-owned property.[258]

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[253] *Id.*

[254] *Id.* at 207, 834 S.E.2d at 602.

[255] *Id.* at 207–08, 834 S.E.2d at 602.

[256] *Kalaski,* 355 Ga. App. at 28, 842 S.E.2d at 334*; Ashby,* 354 Ga. App. at 866–67, 842 S.E.2d at 73–74.

[257]*Kalaski,* 355 Ga. App at 26, 842 S.E.2d at 333.

[258] *Ashby,* 354 Ga. App at 866, 842 S.E.2d at 73.