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Real Property

Linda S. Finley

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by Linda S. Finley*

I. INTRODUCTION

This Article surveys developments in Georgia real property law between June 1, 2019, and May 31, 2020.[1] Of course, the Survey became significantly different from previous years as a result of the COVID-19 pandemic. The Supreme Court of Georgia issued emergency rules and procedures resulting in the shutdown of many courts and most assuredly the slowdown of every court. Nevertheless, the Survey is the result of a review of appellate court decisions rendered during the survey period as well as legislation and other mandates promulgated during the period which affects real property law and practice.

II. LEGISLATION

The Georgia General Assembly convened its first session on January 13, 2020. Little did anyone know that on March 14, 2020, the Legislature would be forced to suspend its sessions and otherwise limit legislative activity for twelve weeks due to the COVID-19 pandemic. The Legislature did not reconvene until June 16, 2020, and completed its session on June 26, 2020.[2]

On March 14, 2020, Georgia Governor Brian Kemp issued an Executive Order declaring a Public Health State of Emergency in Georgia.[3] The pandemic created the necessity for virtual meetings, working remotely, and even virtual real estate closings. Prior to the

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* Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Mercer University (B.A., 1978); Mercer University School of Law (J.D., 1981). Member, State Bar of Georgia and Florida; United States District Courts for the Northern District of Georgia, Middle District of Georgia, Southern District of Georgia, Northern District of Florida and Middle District of Florida, United States Court of Appeals for the Eleventh Circuit; Supreme Court of the United States; The author wishes to give special thanks to Beatrice "Teta" Bacilieri for handling the many administrative tasks necessary to bring this survey article to print.

[1] For an analysis of real property law during the prior survey period, see Linda S. Finley, *Real Property*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 241 (2019).

[2] State Bar of Georgia (2020) Legislative Update, Day 29-40 (2020).

[3] State of Georgia Executive Order No. 03.14.20.01 (2020).

shuttering of most businesses, including law firms, Georgia law required "in person"[4] notarization.[5] Although House Bill 785[6] established a protocol for remote online notarization, the bill did not pass out of legislative committee. COVID-19 changed that. On March 31, 2020, Governor Kemp issued an Executive Order pertaining to execution of documents, suspending the requirement under Georgia law that formal witnessing of documents used in real estate transactions (including that of a notary) must be executed in person.[7] The Executive Order temporarily allows attestation of recordable instruments, that under statute must be executed in the physical presence of a notary to allow the executor to be in one location, and a witness, and the notary in another location through the use of real-time audio video communication that "allows [all] parties to communicate simultaneously with each other by sight and sound."[8] Later, as it became apparent that the pandemic was going to last longer than expected, the Governor extended the Public Health State of Emergency[9] and issued an Executive Order "Allowing Remote Notarization and Attestation," which expanded the prior order allowing attestation outside the presence of a notary and/or witness to other legal documents and sets out five requirements for proper virtual notarization.[10] Specifically, this Executive Order requires: (1) That the audio-video communication technology allows simultaneous (real-time) communication among the individual signing the document (the signer), the witness(es) and/or the notary public by sight and sound; (2) that the notary is either a Georgia licensed attorney or operating under the supervision of a Georgia attorney; (3) that the signer presents evidence of identity during the live session; (4) that the notary is physically located in the state of Georgia; and (5) that the signer transmits a copy of the signed document to the notary on the same date it was executed, and that the notary, and witness execute the document on the same day that the signer executes the document.[11]

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[4] O.C.G.A. § 44-2-1 (2020).

[5] O.C.G.A. § 45-17-1 (2020).

[6] Ga. H.R. Bill 785, Reg. Sess. (2020); Thrash, Mo, Legislative Newsletter, Mortgage Bankers Association of Georgia, June 30, 2020.

[7] State of Georgia Executive Order No. 03.31.20.01 (2020).

[8] *Id*.

[9] State of Georgia Executive Order No. 04.08.20.02 (2020).

[10] State of Georgia Executive Order No. 04.09.20.01 (2020).

[11] *Id.*, See also https://www.gabar.org/COVID-19_remote_notarization.cfm.

III. CONDEMNATION AND EMINENT DOMAIN[12]

In *Torres v. City of Jonesboro*,[13] the Georgia Court of Appeals considered whether the trial court erred in holding that the appellants (Torres) failed to prove the amount of attorney's fees they incurred in defending a condemnation action they alleged was abandoned by the City of Jonesboro (City).[14] Through two condemnation actions, the City took Torres's property. Torres fought the fact of the taking and the City voluntarily dismissed the cases.[15] Consequently, citing O.C.G.A. § 22-1-12(2),[16] Torres moved for attorney's fees and costs.[17] Torres's counsel attached affidavits and billing records; court reporter bills; and bills and affidavits of an appraiser to the motion for fees and costs. Torres's fee expert testified that the attorney's fees, appraisal fees, and costs, which totaled $51,206.15, were reasonable. During the City's cross-examination, Torres's expert testified the basis for his testimony consisted of a review of the billing statements and affidavits. When testimony concluded, the City moved to strike the expert's testimony claiming it was hearsay. The trial court agreed and denied Torres's attorney's fees motion by finding that without the expert's testimony, Torres failed to present evidence as to the amount of fees.[18]

On appeal, the court of appeals held that the City's motion to strike the expert testimony was not a proper objection to the hearsay because it was only raised after Torres had rested.[19] The court held that "[a] non-contemporaneous motion to strike is not 'a procedural tool to object to evidence, except in those limited instances where the evidence was inadmissible because it was obtained in violation of a criminal defendant's constitutional rights.'"[20] The court vacated the judgment and remanded the case back to the trial court.[21]

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[12] This section was co-authored by Ivy N. Cadle and Lauren D. Brooks. Mr. Cadle is a shareholder in the law office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Macon, Georgia and an Adjunct Professor of Law at Mercer University School of Law. Mercer University School of Law (J.D. 2007); University of Georgia (MAcc. 2002); University of Georgia (B.S. 2000); CPA, 2008. Mrs. Brooks is an associate in the law office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Tallahassee, Florida.; Levin College of Law, University of Florida (J.D. 2013), Clemson University, (B.S. 2004).

[13] 354 Ga. App. 874, 842 S.E.2d 75 (2020).

[14] *Id.* at 874–75, 842 S.E.2d at 76.

[15] *Id*. at 875, 842 S.E.2d at 76.

[16] O.C.G.A. § 22-1-12(2) (2020).

[17] *Torres*, 354 Ga. App. at 875, 842 S.E.2d at 76.

[18] *Id*. at 875–76, 842 S.E.2d at 76–77.

[19] *Id*. at 876–77, 842 S.E.2d at 77.

[20] *Id*.

[21] *Id*.

In *Department of Transportation v. Szenczi*,[22] the Georgia Court of Appeals held that an O.C.G.A. § 9-11-60(b)[23] motion attacking service of process must be filed in conjunction with a notice of appeal.[24] Appellee and Condemnee Szenczi challenged service under O.C.G.A. § 32-3-8(b)[25] and argued The Department of Transportation (DOT) should effectuate service of process on the probate court or guardian because Szenczi claimed a disability.[26]

On December 9, 2013, DOT filed a petition for condemnation of real property for 0.674 acres of property, including that of Szenczi, and paid $30,150 as its estimate of just and adequate compensation into the registry of the trial court. Per the sheriff's return of service, a deputy sheriff personally served Szenczi with the petition on December 16, 2013. Four months later, the trial court entered a judgment finding no condemnee appealed DOT's estimate of compensation within the required thirty-day period.[27]

On April 23, 2014, an attorney representing Szenczi filed a notice of appeal contesting the amount of compensation paid by DOT. On May 22, 2014, Szenczi's son, claiming to be his father's "attorney-in-fact" and represented by his father's attorney, also filed a notice of appeal.[28] Months later, on September 5, 2014, Szenczi filed a motion to set aside the final order under O.C.G.A. § 9-11-60(d),[29] arguing that DOT's negotiations with Szenczi's son made them aware Szenczi was disabled and being represented by his son.[30] Because of that knowledge, Szenczi argued that DOT should have served Szenczi and his son.[31] In its defense, DOT offered an affidavit from the deputy who served Szenczi, stating that Szenczi, "identified himself . . . and was able to communicate in an appropriately responsive manner. [Other than] being in a wheelchair, Mr. [Szenczi] did not appear to me to be laboring under any disability."[32]

After two hearings on the matter, the trial court cited the deputy's observation of Szenczi in a wheelchair and found "Szenczi was laboring under 'any disability whatsoever' [per] O.C.G.A. § 32-3-8(b) and, thus, the

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[22] 354 Ga. App. 855, 841 S.E.2d 228 (2020).

[23] O.C.G.A. § 9-11-60(b) (2020).

[24] *Szenczi*, 354 Ga. App. at 858, 841 S.E.2d at 231.

[25] O.C.G.A. § 32-3-8(b) (2020).

[26] *Szenczi*, 354 Ga. App. at 855, 841 S.E.2d at 229.

[27] *Id.*

[28] *Id.* at 856, 841 S.E.2d at 229–30.

[29] O.C.G.A. § 9-11-60(d) (2020).

[30] *Szenczi*, 354 Ga. App. at 856, 841 S.E.2d at 230.

[31] *Id.*

[32] *Id.*

DOT was required to have served the probate court of the county in addition to serving Szenczi personally."[33]

On appeal, the court opined that a defense of insufficiency of process or insufficiency of service of process is waived if it is not made by motion or included in a responsive pleading, and Szenczi's notice of appeal failed to plead defective service or mention service at all.[34] The court further explained that because Szenczi failed to plead improper service in the notice of appeal and he did not file his O.C.G.A. § 9-11-60(b) motion with his untimely notice of appeal (instead, he filed the motion three months later), Szenczi waived the issue of improper service.[35] The court reversed the judgment setting aside the final order.[36]

In *Troup County v. Mako Development*,[37] the Georgia Court of Appeals addressed three key issues: (1) Did the trial court erroneously instruct the jury on consequential damages? (2) Did the trial court improperly allow the jury to hear evidence of a "runway protection zone?" (3) Did the trial court properly refuse to award attorney fees sought by Mako?[38]

Before Troup County (County) sought to expand its airport, Mako owned a 4.41-acre tract near the end of a runway. In August of 2015, the County sought to extend that runway towards Mako's property. To facilitate the runway extension, the County took an avigation easement over the entire 4.41 acre property so airplanes could fly low over Mako's property to land on the extended runway. Claiming the area protected by the avigation easement was from 725 to 740 feet, the County sought to pay $4,500. However, after the taking, the County entered Mako's property to remove twenty-two trees the County claimed encroached on the airspace protected by the avigation easement.[39]

Mako timely filed a notice of appeal of the declaration and petition of taking, invoking its right to a jury trial to determine the amount of just and adequate compensation. At trial, both parties hired expert appraisers to testify on the appropriate amount of compensation for the condemned property. The County's appraiser valued the property at $149,738 before the condemnation and $145,246 after the condemnation, attributing the $4,492 reduction in value to the direct taking of the avigation easement. The County's appraiser testified there were no consequential damages to the remainder of the property. Mako's

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[33] *Id.*

[34] *Id.* at 857, 841 S.E.2d at 231.

[35] *Id.*

[36] *Id.*

[37] 352 Ga. App. 366, 835 S.E.2d 44 (2019), *cert. denied* (June 1, 2020).

[38] *Id.* at 366, 835 S.E.2d at 46.

[39] *Id.* at 366, 835 S.E.2d 46–47.

appraiser testified the property was worth $1,102,500 before the condemnation and $705,600 afterward, for a total reduction in value of $396,900. Mako's appraiser attributed $220,500 of that loss to the direct taking of the easement and the remaining $176,400 as consequential damages to the remainder of the property.[40]

"Over the County's objection, the trial court instructed the jury to consider both direct and consequential damages."[41] Direct damages were defined by the trial court as damage "'to the property actually taken,' meaning 'the actual value of the loss.'"[42] The trial court then

> defined consequential damages as damage to, "the property the owner has left after the part the Condemnor takes or uses is subtracted," meaning "the difference between the value of the remaining property immediately before the taking and its value after the taking" or "the decrease, if any, in the fair market value of this remainder in its circumstance just prior to the time of the taking compared with its fair market value in its new circumstances just after the time of the taking."[43]

The County claimed Mako's appraiser was in error because he should have only valued the easement taken instead of valuing the easement taken and assigning a consequential damage to the property below.[44] However, the court held that the jury instruction was harmless because the facts and circumstances surrounding the verdict indicated there was no double recovery.[45]

Second, the County argued that evidence of a runway protection zone was irrelevant and improperly confused the jury.[46] In response, the court explained a jury is allowed to consider all elements reasonably affecting value and the runway protection zone, set forth in compliance with local ordinances and Federal Aviation Administration regulations, restricted the uses of certain parts of the property.[47] Specifically, no hazardous materials could be stored and no facilities where people would gather could be constructed within 1,700 feet of the end of a runway.[48] Because of the extended runway, the protection zone encroached into Mako's property after the taking.[49] Because this incursion plainly limited

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[40] *Id.* at 367–68, 835 S.E.2d 47.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 371, 835 S.E.2d at 49.

[45] *Id.* at 372, 835 S.E.2d at 49–50.

[46] *Id.*, 835 S.E.2d at 50.

[47] *Id.*

[48] *Id.* at 373, 835 S.E.2d at 50.

[49] *Id.*

potential uses of Mako's property, the court held evidence of the existence of the runway protection zone was relevant and admissible and did not unfairly confuse the jury as to what they were supposed to be evaluating.[50]

Finally, as it concerned Mako's claim for attorney's fees pursuant to O.C.G.A. § 9-15-14,[51] the court held the trial court did not abuse its discretion by refusing to award attorney's fees based on Mako's claim the County's appraisal was fundamentally flawed.[52] Instead, the court noted the four alleged flaws in the County's appraisal and reviewed the conflicting evidence the County presented to support its appraisal.[53] Explaining that "even if the County's appraisal resulted in a rather lowball amount, there was at least some factual evidence to support" the County's position on each of the points.[54] Accordingly, the court held the trial court did not abuse its discretion by denying Mako's claim for attorney's fees and affirmed the final judgment.[55]

IV. EASEMENTS, COVENANTS AND BOUNDARIES[56]

Easements and declarations of covenants can be affirmative or negative. Both are methods of granting certain rights in connection with the property while retaining title to the land. However, easements are usually affirmative, giving the holder the right to use someone else's land for a specified purpose. Alternatively, covenants are usually negative, limiting what the burdened party can do on their own land. On the other hand, boundary line disputes arise if there is some question as to the legal boundaries of the property.

Sorrow v. 380 Properties, LLC,[57] concerns creation and abandonment of easements. The evidence showed that Sorrow lived on the south side of an alley that was adjacent to property she had owned since 1990. 380 Properties (Plaintiff) purchased property on the north side of the alley in 2013. Plaintiff brought suit against Sorrow after she refused to remove a make-shift garage, rocks, trees, and shrubs that blocked the alleyway to the street. Sorrow counterclaimed alleging that Plaintiff had abandoned

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[50] *Id.* at 373, 835 S.E.2d at 50–51.

[51] O.C.G.A. § 9-15-14 (2020).

[52] *Troup County*, 352 Ga. App. at 374, 835 S.E.2d at 51.

[53] *Id.*

[54] *Id.* at 375, 835 S.E.2d at 52.

[55] *Id.* at 376, 835 S.E.2d at 52.

[56] This section was authored by Linda Finley and Tanisha Pinkins, Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Buffalo State College (B.A., 2010; B.S., 2010); Emory University School of Law (J.D., 2016). Member, State Bar of Georgia, Supreme Court of Georgia, United States District Court for the Northern District of Georgia.

[57] 354 Ga. App. 118, 840 S.E2d 470 (2020).

its easement rights to one portion of the alley and that she had obtained a prescriptive easement regarding a second portion.[58]

The trial court granted partial summary judgment to Plaintiff, finding that there was no authority for Sorrow's claim of partial abandonment and that her evidence of non-use was insufficient.[59] The court denied the parties' other cross motions for summary judgment on the Plaintiff's affirmative defense that Sorrow was not entitled to relief under an "unclean hands" theory.[60] Sorrow appealed and Plaintiff filed a cross-appeal on the denial of its own motions.[61]

On appeal, Sorrow argued that the trial court erred in concluding that Plaintiff had not partially abandoned the alleyway.[62] The appellate court found no authority for the proposition that an express easement could be partially abandoned and declined to extend case law recognizing that "a partial tract may be acquired by prescription."[63] The court once and for all held that "Georgia law does not recognize partial abandonment of an express easement."[64]

Sorrow further contended that the trial court erred in finding that she had failed to present sufficient evidence to prove Plaintiff's abandonment of the alleyway. She argued that *Tietjen v. Meldrim*[65] established a three-prong test which she met by showing that: (1) the alley had been obstructed for more than thirty years by present and previous owners; (2) that Plaintiff had not used a portion of the alley at all; and (3) use of a second portion of the alley was exclusive to her property.[66] However, the appellate court did not read *Tietjen* as establishing such a test and the law on point was that where the easement was established by grant, the doctrine of extinction by a non-use did not apply.[67] "'[M]ere nonuser without further evidence of an intent to abandon such easement will not constitute abandonment.'"[68]

Citing *Tietjen,* the appellate court held that Sorrow's burden was to prove an intent to abandon by "clear and unequivocal" evidence and further that no presumption of abandonment would arise from mere non-use for a period less than that required to acquire easement by

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[58] *Id.* at 119, 840 S.E.2d at 471.

[59] *Id.* at 119, 840 S.E.2d at 472.

[60] *Id.* at 119–20, 840 S.E.2d at 472.

[61] *Id.*

[62] *Id.* at 121, 840 S.E.2d at 472.

[63] *Id.*

[64] *Id.*, 840 S.E.2d at 472–73.

[65] 169 Ga. 678, 151 S.E.2d 349 (1930).

[66] *Sorrow*, 354 Ga. App. at 121, 151 S.E.2d at 473.

[67] *Id.*

[68] *Id.* (citing Sadler v. First Nat. Bank of Baldwin County, 267 Ga. 122, 475 S.E.2d 643 (1996)).

prescription.[69] The language in *Tietjen* cited by the court repeats several times that there must be a clear intent to abandon—the evidence of non-use must be decisive and unequivocal and the intent to abandon must be of a clear, unequivocal, and decisive character.[70] Because Sorrow failed to introduce evidence that Plaintiff either expressly abandoned its easement in the alley or prove more than non-use by Plaintiff, evidence was insufficient to show an intent to abandon.[71]

Sorrow also argued that the trial court erred in denying her motion for summary judgment with respect to Plaintiff's affirmative defense that she was not entitled to equitable relief because of her "unclean hands."[72] Sorrow brought claims in equity against Plaintiff for easement abandonment, adverse possession, and prescriptive easement. The long-held maxim in bringing and defending actions in equity is that "[h]e who would have equity must do equity" and Plaintiff's affirmative defense was based on allegations that Sorrow violated zoning and permitting ordinances with the erection of the make-shift garage and showed a continuing pattern of other illegal behavior. [73] The court held that the nature of Sorrow's behavior and actions was a question of fact and therefore she was not entitled to summary judgment.[74] Likewise, Plaintiff's crossclaim for summary judgment on the unclean hands theory failed for the same reason, and the claim that Plaintiff was entitled to judgment on Sorrow's prescriptive easement claim failed because a question of fact was created when she testified that she repaired and maintained the alley.[75]

In *Patel Taherbhai, Inc. v. Broad Street Stockbridge II, LLC*,[76] the court of appeals held that proper action by which the owner of dominant land could seek to remove obstructions on an access easement was an action for damages or injunctive relief, not ejectment.[77] This decision overruled *Amah v. Whitefield Academy, Inc.*[78]

Broad Street, the owner of land benefited by an access easement, brought suit for ejectment and injunctive relief against Patel Taherbhai (Patel), the owner of the servient land. The suit claimed that Patel constructed certain encroachments on an access easement granted to

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[69] *Id.*

[70] *Id.* at 121–22, 840 S.E.2d 473.

[71] *Id.* at 122–23, 840 S.E.2d at 473–74.

[72] *Id.* at 123, 840 S.E.2d at 474.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 124, 840 S.E.2d at 474.

[76] 352 Ga. App. 113, 834 S.E.2d 117 (2019).

[77] *Id.* at 123, 834 S.E.2d at 121.

[78] 331 Ga. App. 258, 770 S.E.650 (2015).

Broad Street and that the encroachments were unsafe and diminished the value of Broad Street's property.[79]

In 2001, predecessors in interest of the parties entered into a Reciprocal Easement Agreement (REA) which granted Broad Street's predecessor "[a] perpetual, non-exclusive and unobstructed access, ingress, and egress easement over, across, upon and through those portions of [what became Patel's] property '(the Access Easement).'"[80]

In 2007, Patel purchased the property (the dominant estate) and built a Taco Bell thereon. In order to make room for a drive-through line, a four-way intersection situated on the Access Easement was altered and Patel also extended the Taco Bell parking spots into the Access Easement. Two years after the Taco Bell was constructed, Broad Street purchased its tract of land (the servient estate). Five years after its purchase, Broad Street reached out to Patel complaining about the parking lot and intersection. After the parties were unable to resolve their dispute, Broad Street filed suit claiming that Patel's "encroachment" created a safety hazard, violated the clear terms of the Access Easement, and diminished the value of Broad Street's property. Broad Street sought an injunction ordering Patel to remove the encroachments and ejectment on the ground that Patel was wrongfully attempting to exercise possession and control of Broad Street's property.[81]

Patel moved for summary judgment and to dismiss the Complaint on the grounds that there was no evidence that the modifications to the Access Easement substantially or materially interfered with Broad Street's easement, that Broad Street had enjoyed uninterrupted access to its property, and that Broad Street did not timely object to the encroachment, therefore, Broad Street was equitably estopped from then objecting to the encroachment. Patel further argued that Broad Street's complaint was time-barred because actions for trespass upon or damage to property must be brought within four years after the right to the cause of action accrues.[82] Along that same line of argument, Patel argued that Broad Street was guilty of laches and was barred from seeking equitable relief because it allowed the modification to remain in place for more than seven years before filing the complaint.[83]

The appellate court reviewed the characteristics of easements and the law of ejectment and determined it was error for the trial court to order

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[79] *Id.* at 113, 834 S.E.2d at 118.

[80] *Id.* at 114, 834 S.E.2d at 119.

[81] *Id.* at 114–15, 834 S.E.2d at 119.

[82] *Id.* at 115, 834 S.E.2d at 119–120.

[83] *Id.*, 834 S.E.2d at 120.

ejectment.[84] The trial court relied upon the earlier *Amah* case to conclude that, in cases of encroachment upon an easement, the remedy of ejectment was proper.[85] In overruling *Amah*, the appellate court held that the proper remedy for encroachment upon an easement is a suit for damages, not ejectment.[86]

Moreover, the court of appeals, relying on the early precedent of *Ezzard v. Findley Gold Mining Co.*,[87] restated "that an action for ejectment only lies for something tangible, something of which possession may be delivered by the sheriff to the plaintiff."[88] "Where a party's enjoyment of its easement is disrupted or obstructed, the remedy is an action for damages or injunction."[89] There was no evidence that Broad Street's ownership and use of the property was diminished.[90] Therefore, it was error for the trial court to order ejectment and the trial court was reversed.[91]

Turning to covenants in *Polo Golf and Country Club Homeowners Association, Inc. v. Cunard et al*,[92] the Georgia Supreme Court held that an ordinance does not violate the Contracts Clause of the U.S. Constitution[93] or the Georgia Constitution's Impairment Clause[94] if it does not preclude a homeowner's association from exercising the contractual remedies of its declaration of covenants.[95]

The Polo Golf and Country Club Homeowners Association (the HOA) brought an action against Forsyth County engineering department executives in their individual capacities (the executives), seeking declaratory and injunctive relief regarding enforcement of an addendum to the county's stormwater ordinance. The executives brought dispositive motions which the trial court granted and the HOA appealed.[96]

The issues arise from flooding of a Forsyth County subdivision (the Polo Fields) caused by failure of stormwater mechanisms including a dam. The HOA's position was that the county was responsible for repair and upkeep of the failing storm water mechanism, but the county relied

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[84] *Id.* at 116, 834 S.E.2d at 120.

[85] *Id.* at 117, 834 S.E.2d at 120.

[86] *Id.* at 118, 834 S.E.2d at 121–22.

[87] 74 Ga. 520, 58 Am. Rep. 445 (1885).

[88] *Patel*, 352 Ga. App. at 119, 834 S.E.2d at 122.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] 306 Ga. 788, 793, 833 S.E.2d 505, 509 (2019).

[93] U.S. CONST. art. 1, §10.

[94] GA CONST. of 1983, art. I, sec. 1, par. X.

[95] *Polo Golf and Country Club Home Owners Association*, 306 Ga. at 793, 833 S.E.2d at 509.

[96] *Id.* at 788–89, 833 S.E.2d at 507.

upon a 2014 version of the Georgia Stormwater Management Design Manual (the Stormwater Manual) providing that "'[w]hen a subdivision . . . whether new or existing, has legally created a property or homeowner's association, [such as the HOA here], the [homeowner's] association will be responsible for maintenance of all drainage easement and stormwater facilities.'"[97] In response, the HOA argued that the 2014 version of the Stormwater Manual was unconstitutional because it impaired the HOA's contractual obligations to its homeowners as set out in the subdivision's Declaration of Covenants which made each homeowner responsible for such repair. The trial court found in favor of the executives that the HOA's contract-based constitutional claims were not viable and also concluded that the executives were protected from suit under sovereign immunity.[98] The appellate court, however, determined that the trial court's analysis was backwards because the trial court looked first at the issue of constitutionality and then at sovereign immunity.[99] Sovereign immunity should have been the threshold analysis before the court moved on to an analysis of the constitutional issue.[100] Furthermore, the trial court's finding that suit against the executives was barred by sovereign immunity was in error as "the doctrine of sovereign immunity usually poses no bar to suits [for prospective relief] in which state officers are sued in their individual capacities for official acts that are alleged to be unconstitutional."[101] Because the HOA sued the executives from the basis of prospective relief, the suit was not barred by sovereign immunity.[102] However, how the trial court reached its decision had no effect to the outcome because, as the executives argued, the HOA had no standing to bring the suit because the executives did not take enforcement action against the HOA.[103] Without action to enforce the stormwater regulations, the HOA could not show that injury was "actual and imminent" as required for the relief it sought.[104]

The court found that the trial court's grant of judgment on the pleadings to the executives was proper based on the evidence which showed that the county ordinance did not wholly preclude the HOA from using the provisions of the declaration to affect compliance by the subdivisions' homeowners to comply with the county's stormwater

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[97] *Id.* at 790, 833 S.E.2d at 507 (emphasis omitted).

[98] *Id.*, 833 S.E.2d at 508.

[99] *Id.* at 790–91, 833 S.E.2d at 508.

[100] *Id.* at 791, 833 S.E.2d at 508.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

maintenance requirements.[105] The HOA identified only impediments to its exercise of its contractual remedies, such as the vagaries of dealing with time constraints; the bureaucracy of its administrative board; and difficult homeowners, but it did not show any actual inability to exercise its contractual remedies on account of the ordinance. [106] Accordingly, the court held that there was no violation of the protections of the U.S. Constitution's Contracts Clause.[107]

The HOA also failed to show that the ordinance impaired the HOA Declarations so as to violate the Georgia Constitution's Impairment Clause.[108] The test is whether a vested right exists and then whether that vested right has been "injuriously affected" by the law in question.[109] The HOA contended that the rights set forth in the Declaration were vested rights but it failed to fully articulate a vested right or show that the ordinance affected any alleged vested right or caused injury to the HOA.[110] The Georgia Supreme Court held that the ordinance did not prohibit the HOA from exercising all of its remedies for addressing homeowners' noncompliance with their stormwater maintenance obligations under the Declaration.[111] The trial court's decision to grant the stormwater executives' motion for judgment on the pleadings was affirmed.[112]

V. Foreclosure[113]

The Georgia courts addressed Georgia non-judicial foreclosure practices and procedures in a few notable decisions during the Survey period.

First, the Georgia Court of Appeals revisited the requirement that a foreclosure sale be judicially confirmed prior to an attempt to collect a loan deficiency. In *Wells v. Regions Bank*,[114] a borrower appealed the trial court decision granting summary judgment in favor of the lender on a breach of contract suit for money owed on a home equity line of credit

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[105] *Id.* at 792–93, 833 S.E.2d at 509.

89 *Id.* at 793, 833 S.E.2d at 509.

[107] *Id.*

[108] *Id.* at 794, 833 S.E.2d at 510.

[109] *Id.* at 793–94, 833 S.E.2d 510.

[110] *Id.* at 794, 833 S.E.2d 510.

[111] *Id.*

[112] *Id.*

[113] This section was authored by Dylan W. Howard, Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Yale University (B.A., cum laude, 1999); University of Georgia School of Law (J.D., cum laude, 2002). Member, State Bar of Georgia, Supreme Court of Georgia, Georgia Court of Appeals, United States Court of Appeals for the Eleventh Circuit, United States District Courts for the Northern District of Georgia, Middle District of Georgia and Southern Districts of Georgia.

[114] 350 Ga. App. 652, 829 S.E.2d 889 (2019).

following the foreclosure of a prior construction loan held by the same lender.[115] The court of appeals ultimately overturned the decision, finding that the borrower had raised genuine issues of material fact precluding judgment to the lender.[116] The court noted at the outset that the judicial confirmation requirement applies where there are two separate debts at issue: (1) where said debts are inextricably intertwined and (2) where both loans were secured by the same property and involved the same parties. 117 Regions argued that the confirmation requirement should not apply because the stated purpose for the line of credit was for "personal expenses."[118] Prior cases turned in part on the 'purpose' of the loans and the trial court granted summary judgment in Regions' favor on the basis of the stated 'purpose' of the loan at issue.[119] The court of appeals determined that the trial court's review was too technical stating that "[w]e are not persuaded by Regions's argument that the 'purpose' was not the same as the 'use.'"[120] Since the borrowers had actually used a portion of the proceeds of the home equity line of credit to repair and improve the home, the court held that the loans were sufficiently related to raise a genuine issue of material fact requiring a jury.[121] This decision clearly limits lenders' ability to draft their contracts in order to avoid the Georgia confirmation requirement.

In *Oconee Federal Savings and Loan Association v. Brown*,[122] the Georgia Court of Appeals addressed a host of issues raised by borrowers attempting to contest a foreclosure. First, the court definitively held that a party facing foreclosure is not entitled to a declaratory judgment because while they may have other justiciable claims, they are not in need of any direction from the trial court with respect to future conduct on their part.[123] The court also overturned the trial court's decision to deny summary judgment on the borrower's anticipatory repudiation claim.[124] The borrowers alleged that Oconee Federal anticipatorily repudiated its contractual obligations by allegedly rejecting their attempts to tender payment, by instructing them not to make payments, and by demanding that the borrowers sign away certain rights.[125] The

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[115] *Id.* at 652, 829 S.E.2d at 890.

[116] *Id.*

[117] *Id.* at 655, 829 S.E.2d at 892.

[118] *Id.* at 656, 829 S.E.2d at 893.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 657, 829 S.E.2d at 893.

[122] 351 Ga. App. 561, 831 S.E.2d 222 (2019).

[123] *Id.* at 566–67, 831 S.E.2d at 228.

[124] *Id.* at 568, 831 S.E.2d at 230.

[125] *Id.* at 569, 831 S.E.2d at 230.

trial court found genuine issues of material fact supporting this claim and the court of appeals disagreed, stating that for a breach to provide the basis for an anticipatory repudiation claim, it must be an "unqualified repudiation of the entire contract prior to the time of performance."[126] The court of appeals also overturned the trial court's decision denying summary judgment on the plaintiff's negligence claim.[127] Since the borrowers based their negligence claim on an alleged failure to comply with Freddie Mac's servicing guidelines, the court of appeals held that the guidelines neither imposed a duty on a lender for the benefit of their borrower, nor provided for a private right of action.[128]

Finally, the court of appeals took a close look at O.C.G.A. § 9-13-172.1,[129] which permits a foreclosing party to rescind the foreclosure in specific circumstances.[130] In *Najarian Capital, LLC v. Federal National Mortgage Association,*[131] the court of appeals consolidated two similar cases. In each, the appellant purchased property at foreclosure and appellee rescinded the sale within thirty days of foreclosure. Appellant sought documentation proving that the rescission statute applied. Appellant then filed suit, alleging breach of contract and seeking specific performance. The trial court granted Fannie Mae's motion to dismiss in both cases, and Najarian Capital appealed.[132] The court of appeals ultimately affirmed, holding that the statute did not require the foreclosing entity to provide either documentary proof or any type of reasonable evidence that the rescission qualified under the statute.[133] While appellant argued that this ruling would effectively prevent a purchaser from ever challenging a rescission, the court of appeals disagreed, arguing that the purchaser could have obtained information proving that the rescission was wrongful from other sources prior to filing suit.[134] This certainly makes clear for the future that foreclosure sale purchasers will have a difficult time challenging rescissions under O.C.G.A. § 9-13-172.1.

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[126] *Id.*

[127] *Id.* at 574, 831 S.E.2d at 233.

[128] *Id.*

[129] O.C.G.A. § 9-13-172.1 (2020).

[130] O.C.G.A. § 9-13-172.1(d) (2020).

[131] 354 Ga. App. 159, 840 S.E.2d 500.

[132] *Id.* at 160, 840 S.E.2d at 501.

[133] *Id.* at 161, 840 S.E.2d at 502.

[134] *Id.* at 163, 840 S.E.2d at 503.

VI. SALE OF REAL PROPERTY[135]

In *BCM Construction Group, LLC v. Williams,*[136] the Georgia Court of Appeals addressed the issue of whether a modification to the closing date on a real estate purchase contract had to be in writing and whether a questions of fact existed to make dismissal improper.[137] On January 10, 2018, BCM Construction Group, LLC (BCM Construction) and Dianne and Johnie Williams (collectively the Williamses) entered into an agreement for BCM to purchase five parcels of land for $4,500,000. The closing of the purchase was to occur in two phases with the first phase to close by August 23, 2018. The purchase agreement contained language that, "if for any reason the closing of the purchase of Phase I has not occurred within 225 days of the date of this contract, except due to default by Seller, this contract shall expire and terminate without notice."[138] The agreement further stated that there could be no extension to the agreement "unless agreed upon in writing" by both parties and that "no modification of this Agreement shall be binding unless signed by all parties" to the agreement.[139]

On the eve of closing, BCM Construction's principal sent an email to the Williamses requesting an extension of the closing date. BCM Construction stated that the extension was sought due to a delay in obtaining zoning approval and a land disturbance permit. BCM Construction requested that the closing date be extended to seven days of receipt of the land disturbance permit. The Williamses did not respond until the following week and informed BCM Construction's agent that they would not require strict compliance with the closing date. On September 5, 2018, the Williamses notified BCM Construction that it had terminated the contract due to the failure to close by the closing date in the agreement.[140]

BCM Construction filed a lawsuit against the Williamses asserting claims for promissory estoppel, breach of contract, injunctive relief, specific performance, and a declaratory judgment that the failure to close was caused by the Williamses' failure to honor an alleged promise to

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[135] This section was authored by Alexander F. Koskey, III, CIPP/US, CIPP/E, Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Samford University (B.S. 2004); Cumberland School of Law, Samford University (J.D. 2007). Member, State Bars of Georgia, Florida, and Alabama; United States Court of Appeals for the Eleventh Circuit, United States District Courts for the Northern District of Georgia, Middle District of Georgia, and Middle District of Florida.

[136] 353 Ga. App. 811, 840 S.E.2d 51 (2020).

[137] *Id.* at 811–12, 840 S.E.2d at 53.

[138] *Id.* at 812, 840 S.E.2d at 53.

[139] *Id.*

[140] *Id.* at 812–13, 840 S.E.2d at 53–54.

extend the closing date.[141] The Williamses filed a motion for judgment on the pleadings, asserting that any extension of the closing date had to be in writing pursuant to the Statute of Frauds[142] and the express terms of the contract. BCM Construction argued that they could not have closed on the August 23, 2018, the date stated in the contract, due to a delay caused by the Williamses.[143] BCM Construction further claimed that the Williamses waived the closing date requirement by their conduct, and that BCM Construction had partially performed the contract by having the property rezoned.[144]

The trial court granted judgment on the pleadings to the Williamses on the basis that the agreement could only be modified in writing and the Williamses had exhibited no actions which would have extended the closing date. On appeal, BCM Construction argued that the Williamses conduct waived the closing date and that such waiver is enforceable despite a lack of a written modification. BCM Construction also argued that the Williamses were estopped from terminating the agreement because BCM Construction reasonably relied upon the oral promise to extend the closing date and that it was error for the trial court to grant judgment on the pleadings.[145]

The Georgia Court of Appeals reversed the trial court's judgment.[146] In its holding, the court of appeals stated that the issue was whether the Williamses waived strict compliance with the term of the agreement, not the modification of the agreement.[147] Although the Williamses disputed that they waived the closing date orally in a phone call with BCM Construction, the court of appeals cited to the limited record containing two emails between the parties, including one from the Williamses to BCM Construction after the closing date, which stated that their attorney was reviewing the documents.[148] These allegations alone, the court of appeals held, create a question of fact as to whether the Williamses waived strict compliance with the terms of the agreement.[149] The court of appeals further held that other terms of the agreement, including a specific provision that the parties could not orally waive provisions of the agreement, were indeed waivable.[150] Therefore, the

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[141] Id. at 813, 840 S.E.2d at 54.

[142] O.C.G.A. §§ 13-5-30 and 13-5-31 (2020).

[143] *BCM Construction Group, LLC*, 353 Ga. App. at 813, 840 S.E.2d at 54.

[144] *Id.* at 813–14, 840 S.E.2d at 54.

[145] *Id.* at 814, 840 S.E.2d at 54.

[146] *Id.* at 816, 840 S.E.2d at 56.

[147] *Id.* at 814, 840 S.E.2d at 55.

[148] *Id.* at 816, 840 S.E.2d at 56.

[149] *Id.*

[150] *Id.*

court of appeals concluded that there were factual questions remaining as to whether the Williamses' conduct waived strict compliance with the closing date and the case, and the trial court erred in granting judgment on the pleadings.[151]

In *Estate of Fanning v. Estate of Fanning*,[152] the court of appeals addressed the issue of whether a right of first refusal agreement was enforceable in a dispute between two family estates concerning the ability to purchase adjacent parcels of land owned by each estate.[153] In 2010, Karen Fanning and Steven Fanning were transferred adjacent parcels of real estate by their mother. In conjunction with the transfers, Karen Fanning and Steven Fanning entered into an "Agreement for Right of First Refusal" which gave either party an option to purchase the other party's parcel of land in the event the owner wants to sell the land. Under the right of first refusal agreement, the selling party was required to give the non-selling party thirty days to make an offer to purchase the property. If the non-selling party did not act within thirty days, the selling party waived his or her right to purchase the property.[154]

The Estate of Karen Fanning (Karen's Estate) filed a lawsuit against the Estate of Steven E. Fanning and Cynthia Fanning (collectively Steven's Estate) seeking a declaratory judgment from the court that the right of first refusal agreement was unenforceable or, if it was enforceable, Karen's Estate satisfied the notice requirement in the agreement and Steven's Estate forfeited its rights under the agreement. Karen's Estate filed a motion for summary judgment alleging that it marketed and listed for sale certain parcels of the property; that a third-party purchaser executed a contract to purchase the property; that Karen's Estate sent notice to Steven's Estate under the right of first refusal agreement; and Steven's Estate did not respond to the notice. Thus, any right to purchase the property had lapsed. In support of its motion, Karen's Estate attached a copy of the notice sent to counsel for Steven's Estate referencing an offer from the third party purchaser; a copy of an email from counsel for Steven's Estate acknowledging receipt of the notice; two notices sent to Steven's Estate at two different addresses; and an advertisement published in a local newspaper. Steven's Estate responded that summary judgment was not proper as Karen's Estate did not produce any evidence supporting the claim that it sent the required notice under the agreement.[155] The trial court granted summary judgment to Karen's Estate concluding that the right of refusal

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[151] *Id.*

[152] 354 Ga. App. 282, 840 S.E.2d 655 (2020).

[153] *Id.*

[154] *Id.* at 283, 840 S.E.2d at 656–57.

[155] *Id.* at 283–84, 840 S.E.2d 657.

was enforceable, but there were no genuine issues of material fact between the parties.[156]

The Georgia Court of Appeals reversed the trial court's decision and held that Karen's Estate was not entitled to summary judgment.[157] Specifically, the court of appeals held that the exhibits relied upon by Karen's estate in its motion for summary judgment were "unauthenticated documents, not accompanied by sworn affidavits or other admissible evidence."[158] Therefore, Karen's Estate did not present sufficient evidence to establish a prima facie case which would entitle it to summary judgment.[159]

In *Sexton v. Sewell*,[160] the Georgia Court of Appeals addressed whether a seller was entitled to specific performance of a real estate sales contract. In March 2017, Zachary and Carrie Sexton (the Buyers) offered to purchase a house for sale by Russell and Linda Sewell (the Sellers). The contract between the parties called for a two-week due diligence period where the Buyers could cancel the contract without penalty. The closing was scheduled for June 22, 2017.[161]

On May 13, 2017, after the expiration of the due diligence period, the Buyers notified Sellers that they were moving to North Carolina, but that they still planned to close on the property. On May 22, 2017, the Buyers notified the Sellers that they were unilaterally terminating the contract. The Sellers refused the attempted termination and informed the Buyers that they would seek specific performance of the contract if the Buyers failed to appear at the closing. The Buyers did not appear at the closing and, as a result, the Sellers filed a lawsuit seeking specific performance of the contract. The broker for the sale also asserted claims seeking its sales commission from the contract.[162]

The Sellers filed a motion for partial summary judgment and the Buyers filed a cross-motion for partial summary judgment.[163] The trial court denied the Buyers' motion and granted the Sellers' motion.[164] On appeal, the Buyers contended that the trial court erred when it ruled that the Sellers were entitled to specific performance despite the fact that they had an adequate remedy at law.[165] The Georgia Court of Appeals stated

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[156] *Id.* at 282, 840 S.E.2d at 656.

[157] *Id.*

[158] *Id.* at 285, 840 S.E.2d at 658.

[159] *Id.*

[160] 351 Ga. App. 273, 830 S.E.2d 605 (2019).

[161] *Id.* at 273, 830 S.E.2d at 607.

[162] *Id.* at 274, 830 S.E.2d at 607–08.

[163] *Id.*, 830 S.E2d at 608.

[164] *Id.* at 275, 830 S.E.2d at 608.

[165] *Id.*

that "the threshold question in the instant case is whether the Sellers met their burden of showing that they did not have an adequate remedy at law available to them [which] would have compensated them for the Buyers' breach of the Contract."[166]

The court of appeals held that the Sellers failed to meet that burden.[167] In its holding, the court of appeals noted multiple reasons why the Sellers were not entitled to specific performance.[168] First, the Sellers could have accepted the Buyers' tender of $40,000 in earnest money when they first learned that the Buyers wanted to terminate the contract, retained that money, and remarketed the property to another buyer.[169] Second, between the time the Buyers notified the Sellers of termination and the closing date, the Buyers offered the Sellers $80,000 to terminate the contract.[170] The Sellers did not respond to this offer and, as the court of appeals noted, there was nothing indicating that the offer would not have been an adequate remedy of law.[171] Third, the Sellers could have immediately sued the Buyers for damages and the Sellers' argument that monetary damages would never constitute an adequate remedy at law lacked merit.[172] Finally, the court of appeals noted that the Sellers did not make any changes to the property to make it "unique" about the Buyers that would support an order requiring specific performance.[173] Therefore, the court of appeals concluded that the Sellers failed to meet their burden of showing that they lacked an adequate remedy at law and reversed the trial court's granting of summary judgment to the Sellers for specific performance.[174] The issues have not concluded, however, as certiorari was granted by the Georgia Supreme Court on February 10, 2020.[175]

VI. TITLE TO REAL PROPERTY[176]

The analysis of whether Georgia law allows a private organization that leases its property from a government entity to prohibit visitors from carrying firearms on its premises continues in *GeorgiaCarry.Org, Inc. v.*

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[166] *Id.* at 276, 830 S.E.2d at 609.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at 277, 830 S.E.2d at 610.

[171] *Id.*

[172] *Id.* at 277–78, 830 S.E.2d at 610.

[173] *Id.* at 279–80, 830 S.E.2d at 611.

[174] *Id.* at 281, 830 S.E.2d at 613.

[175] *Sewell v. Sexton*, 2020 Ga. Lexis 114*

[176] This section was authored by Linda S. Finley.

Atlanta Botanical Garden, Inc. (GeorgiaCarry III)[177] The case has an extended appellate history, having earlier been before the Georgia Supreme Court[178] and the Georgia Court of Appeals.[179] During the Survey period, the matter came back before the supreme court to review the court of appeals' affirmation of a trial court order holding that Atlanta Botanical Garden, Inc. (the Garden) could deny entrance to armed guests.[180]

The City of Atlanta (the City) owns the property which it leased to the Garden. Phillip Evans (Evans), a member of GeorgiaCarry.Org, Inc. (GeorgiaCarry), a gun rights organization, visited the Garden carrying a handgun in a holster on his waistband. Evans was stopped by an employee of the Garden and was advised that weapons were prohibited and he was escorted off the property.[181] Evans and GeorgiaCarry filed suit seeking interlocutory relief based on O.C.G.A. § 16-11-127(c)[182] and declaratory judgment that the Garden, as a lessee of the city, was covered by the statute.[183] The trial court dismissed the suit, and on appeal the Georgia Supreme Court affirmed in part and reversed in part and returned the matter to the trial court.[184]

On remand, the trial court granted summary judgment to the Garden on the basis that the Garden's property was private property and, therefore, it could prohibit guns.[185] Evans and GeorgiaCarry contended that since the property was owned by the City of Atlanta, the Gardens should be considered public for the purposes of the statute.[186] In its review of the trial court order, the court of appeals found that when the City conveyed the leasehold interest to the Garden, the Garden's leasehold estate "is severed from the fee," and thereafter classified as

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[177] 306 Ga. 829, 834 S.E.2d 27 (2019).

[178] Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc. (GeorgiaCarry I), 299 Ga. 26, 785 S.E.2d 874 (2016).

[179] Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc. (GeorgiaCarry II), 345 Ga. App. 160, 812 S.E. 527 (2018); *see also*, Finley, Linda S., Survey of Georgia Real Property Law, 70 Mercer L. Rev.209, 215 (2018) for further discussion regarding the Court of Appeals decision.

[180] *GeorgiaCarry II*, 345 Ga. App. at 163–64; 834 S.E.2d at 530.

[181] *GeorgiaCarry III*, 306 Ga. at 831, 834 S.E.2d at 30.

[182] O.C.G.A. § 16-11-127(c) (2020). This statute authorizes those with gun licenses to carry weapons at any location not excluded in the statute. O.C.G.A. § 16-11-127(b) (2020) identifies the prohibited places as government buildings, courthouses, jails and prisons, places of worship (except where allowed by the governing body of the church), state mental health facilities, nuclear power plants and polling places.

[183] *GeorgiaCarry I*, 299 Ga. at 26, 785 S.E.2d at 874

[184] *Id.*

[185] *GeorgiaCarry II*, 345 Ga. App. at 160, 812 S.E.2d at 528.

[186] *Id.* at 162, 812 S.E.2d at 529.

private property so that the Garden could make its decision to ban firearms.[187]

The supreme court narrowed its review of the case to "whether O.C.G.A. § 16-11-127(c) permits a private organization that leases property owned by a municipality to prohibit the carrying of firearms on the leased premises."[188] The court analyzed whether the Garden property was public or private.[189] "[P]roperty may be considered 'private' only if the holder of the present estate in the property is a private person or entity."[190] Because the City is a public entity, "if it is the holder of the present estate, then the leased premises is not private property within the meaning of the statute because property owned by a municipality is not 'private property'" and the Garden had no right to exclude firearms on the leased premises. [191] But, if the terms of the lease with the City provided that, "the Garden holds the present estate in the property, then the property is 'private property,'" and the Garden as a private property owner can exclude its visitors from carrying firearms on the premises.[192]

A lease can create one of two types of rights in the property in favor of the tenant. If the lease limits tenants use to possess and enjoy the use of the property, "no estate passes out of the landlord and the tenant has only a usufruct."[193] "A usufruct has been referred to as merely a license in real property, which is defined as authority to do a particular act or series of acts on land of another without possessing any estate or interest therein."[194] A lease which provides a fixed term may also create an estate for years. "An estate for years is one which is limited in its duration to a period which is fixed or which may be made fixed and certain."[195] An estate for years allows the lessee the right to use the leased property in any manner lessee chooses as long as the property or the party which is entitled to the remainder or reversion interest is not injured by such use.[196] As such, the tenant of an estate for years is treated as the owner of the property during the life of the estate.[197]

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[187] *Id.* (citing Delta Airlines, Inc. v. Coleman, 219 Ga. 12, 16(1), 131 S.E.2d 768 (1963)).

[188] 306 Ga. at 829, 834 S.E.2d at 29.

[189] *Id.* at 830, 834 S.E.2d at 29.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] O.C.G.A. § 44-7-1 (a) (2019).

[194] 306 Ga. at 838, 834 S.E.2d at 34; citing Jekyll Dev. Assoc., L.P. v. Glynn County Bd. of Tax Assessors, 240 Ga. App. 273, 523 S.E.2d 370 (1999).

[195] O.C.G.A. § 44-6-100 (2019).

[196] O.C.G.A. § 44-6-103 (2019).

[197] 306 Ga. at 838, 834 S.E.2d at 35.

> A usufruct is not considered an estate in real property under Georgia law . . . [and] during the term of a usufruct, the landlord continues to hold the present estate in the property. By contrast, if the lease terms create an estate for years, the present estate in the property passes from the landlord/grantor to the tenant/grantee for the duration of the lease, and the tenant/grantee is treated by our law as the owner of the property for that period of time.[198]

The court's analysis comes down to one thing: what were the terms of the lease? Because the lease was not made a part of the record on appeal and a determination based on the second theory would require a review of the lease terms, the supreme court held that summary judgment in the trial court was improper and reversed and remanded the case to the court of appeals.[199] We will surely see more of this case in the future.

VII. TAXATION OF REAL PROPERTY[200]

Valuation of real property for taxing purposes is a repeated hot topic for taxpayers as tax assessments have a habit of increasing each year. In *Dekalb County Board of Tax Assessors v. CWS Brookhaven, LLC*,[201] the court of appeals consolidated two cases where the Dekalb County Board of Tax Assessors (the Board) challenged the trial court's grant of taxpayers' motions for summary judgment.[202] Specifically, each of the matters appealed involved apartment complexes in which the assessed values were greatly increased from previous years. CWS SGARR Brookhaven, LLC (CWS) owned an apartment complex consisting of 57 "Class B" units located in "neighborhood 7051" of Dekalb County. In 2016, the value of the property was assessed at $57,903,500. CWS appealed that assessment to the County Board of Equalization (BOE) which set the value of that property to $57,903,500. CWS did not appeal and paid its taxes on the assessed value. In 2017, the Board conducted an analysis of all the "Class B" apartment complexes that sold in 2016 and determined that it had greatly undervalued the CWS property. As part of its reevaluation process, the Board retained a commercial property appraiser to conduct an on-site inspection of the property and render an opinion of value. The result was that assessed value of the property increased to $69,753,371. CWS was unsuccessful in its appeal to the BOE and then appealed that decision to the superior court.[203]

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[198] *Id.* at 838–39, 834 S.E.2d at 35.

[199] *Id.* at 842, 834 S.E.2d at 37.

[200] This section was authored by Linda S. Finley.

[201] 352 Ga. App. 848, 836 S.E.2d 729 (2019).

[202] *Id.* at 848, 836 S.E.2d at 730.

[203] *Id.* at 849–50, 836 S.E.2d at 730–31.

Likewise, Aztec owned a "Class B" property known as the Hidden Colony Apartments, which in 2015 had been assessed a value of $8,503,560. Similar to CWS, the Aztec property was subjected to an on-site inspection and appraisal and a reanalysis of the value of the property. The assessed value was determined to be $22,339,565, a whopping 166% increase over the 2015 valuation. Aztec appealed to the BOE which decreased the value to $20,339,480. Aztec also appealed to the superior court.[204]

In each case, the taxpayers moved for summary judgment contending that the two year freeze to assessment increases, provided by O.C.G.A. § 48-5-299(c),[205] precluded the Board from increasing the assessed value set by a BOE appeal.[206] The BOE argued that the code section permitted reevaluation because an analysis of similar properties determined that the properties were significantly undervalued. The trial court granted the taxpayers' motions for summary judgment ruling that changes in comparable sales were not a "material factor" as contemplated by O.C.G.A. § 48-5-299(c)(4)[207] and therefore could not be used as a stated basis for increasing the valuations.[208]

The Board contended that the trial court erred because "the plain language of O.C.G.A. § 48-5-299(c)(4) indicates that evidence of significantly increased sales prices of like properties can, as a matter of law, constitute a material factor authorizing a reassessment within two years of a judicial determination of valuation."[209] That is, because the statute is clear and the language of the statute does not exclude "market conditions" as a material factor affecting the fair market value of the property, there should not be a limitation in the definition of factors.[210]

In affirming the trial court in each case, the appellate court stood by the long-time axiom of statute interpretation to "'presume that the [Georgia] General Assembly meant what it said and said what it meant'"[211] as well as previous interpretations of the purpose O.C.G.A. § 48-5-299(c) to "'limit the circumstances in which a board of tax assessors could raise the value of real property for the two consecutive years following an appeal wherein the board of equalization or the

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[204] *Id.* at 850, 836 S.E.2d at 731.

[205] O.C.G.A. § 48-5-299(c) (2020).

[206] *Dekalb County*, 352 Ga. App at 850, 836 S.E.2d at 731.

[207] O.C.G.A. § 48-5-299(c)(4)

[208] *Dekalb County*, 352 Ga. App at 850, 836 S.E.2d at 731.

[209] *Id.* at 850–51, 836 S.E.2d at 731.

[210] *Id.*

[211] *Id.*(citing Deal v. Coleman, 294 Ga. 170, 751 S.E.2d 337 (2013)).

superior court determined the value of such property.'"[212] Using this precedent, the court applied the rule of "ejusdem generis," which prescribes that

> when a statute of exception thereto enumerates by name or description several particular things and then concludes with a general term of enlargement—such as "other factors"—the term of enlargement "is to be construed as being . . . of the same kind of class with things specifically named unless, of course, there is something to show that a wider sense was intended."[213]

That is, that absent a showing that the reassessment falls within an exception set out in O.C.G.A. § 48-5-299, it cannot be increased for the next two successive years. [214] The court's analysis led to its application of rules of statutory interpretations and reading O.C.G.A. § 48-5-299(c)(4) to determine that the "other material factors" contemplated by the statute must meet two requirements: (1) the factors must be such that they could be revealed by an on-site inspection; and (2) the factors much be specific to the particular piece of property at issue.[215] A change in market conditions or a rise in property values in a particular neighborhood is not discernable from an on-site inspection and neither is such a factor specific to a particular piece of property.[216] Accordingly, the appellate court held that the factors set out by the county were insufficient to support its position.[217]

The second contention of the Board was that the court's interpretations of O.C.G.A. § 48-5-299(c)(4) would force the Board to violate constitutional and statutory law regarding geographic uniformity of assessments.[218] The appellate court held that the Board's arguments were without merit and that the reassessment procedures of the BOE to arrive at fair market value of a specific property satisfied the constitutionally-mandated duty to maintain a uniform tax digest and to

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[212] *Id.* (citing Mundell v. Chatham County Bd. of Tax Assessors, 280 Ga. App. 389. 634 S.E.2d 180 (2006)).

[213] *Id.* at 852, 836 S.E.2d at 732 (citing Montgomery County v. Hamilton, 337 Ga. App. 500, 788 S.E.2d 89 (2016)).

[214] The exceptions include (failure to attend the appeal hearing or provide the BOE with written evidence supporting the taxpayer's opinion of value; (2) filing a return at a different valuation during the successive two years; (3) filing an appeal pursuant to O.C.G.A. § 48-5-311 (2020) during the two successive tax years; and (4) as relevant to the appeal. *Id.* at 852, 836 S.E.2d at 732.

[215] *Id.* at 853, 836 S.E.2d at 732 (citing Center for a Sustainable Coast v. Coastal Marshlands Protections Comm., 248 Ga. 736, 670 S.E.2d 429 (2008)).

[216] *Id.* at 855, 836 S.E.2d at 733.

[217] *Id.*, 836 S.E.2d at 733–34.

[218] *Id.*, 836 S.E.2d at 734.

protect taxpayers from uncertainty within the two years following appeal.[219]

VIII. TRESPASS AND NUISANCE[220]

Floyd v. Chapman[221] concerned a dispute over a gravel driveway constructed by the Floyds over land owned by Chapman.[222] The Floyds were gifted their land from Mr. Floyd's stepmother (the stepmother). The Floyd's built a house on the land and, although the land contained road frontage, they avoided constructing a new path to connect their home to the road by using an old logging road which ran across their property as well as property retained by the stepmother. The Floyd's improved the path and hauled gravel onto it and installed an access gate on the driveway. The stepmother also granted the Floyds an easement so utilities could be installed to the Floyd home, but the Floyds did not seek an easement for their driveway believing they had the legal right to use the land.[223]

In 2014, the stepmother told the Floyds that she intended to sell the remainder of the property she held, and Mr. Floyd told her that the driveway crossed her property and asked for an easement. The stepmother failed to take any action and in 2017 she sold the remainder of the land to Chapman "subject to all easements for roads and utilities in use or of record."[224] After being unable to work out an agreement for use of the driveway, the Floyds filed suit seeking a private right of way over Chapman's property. Chapman counterclaimed for trespass and sought an injunction to prevent the Floyds from using the driveway for travel or for the underground utility lines.[225] After a bench trial, the court found that the Floyds had not established a prescriptive right of way because they failed to show evidence of use for a period of twenty years. The court further found that the Floyds had trespassed on Chapman's land and ordered the Floyds to remove the access gate and underground utility lines.[226]

In upholding the trial court's order, the court of appeals reviewed law concerning prescriptive title and related theories.[227] The key to obtaining title by prescription is whether there is uninterrupted use for a period of

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[219] *Id.* at 856, 836 S.E.2d at 734.

[220] This section is authored by Linda S. Finley.

[221] 353 Ga. App. 434, 838 S.E.2d 99 (2020).

[222] *Id.* at 434, 838 S.E.2d at 101–02.

[223] *Id.* at 435, 838 S.E.2d at 102.

[224] *Id.*

[225] *Id.* at 435–36, 838 S.E.2d at 102–03.

[226] *Id.* at 436, 838 S.E.2d at 103.

[227] *Id.*

seven years through improved land or by twenty years through wild lands.[228] The trial court found that Chapman's property consisted of wild land and not improved land.[229] The Floyds having built their road in 2006 could not show a twenty year period to obtain prescriptive title.[230]

The appeals court next examined whether the Floyds had obtained a private way over Chapman's land.[231] To establish a private way a party must show:

> (1) that they, or a predecessor in title, had been in uninterrupted use of the alleged private way for the period of time required by OCGA § 44-9-1; (2) that the private way is no more than twenty feet wide, and that it is the same twenty feet originally appropriated; and (3) that they have kept the private way in repair during the period of uninterrupted use . . . . [a] claim of prescriptive title requires proof that the possession did not originate in fraud and was (1) public; (2) continuous; (3) exclusive; (4) uninterrupted; (5) peaceable; and (6) accompanied by a claim of right. The use must also be adverse rather than permissive.[232]

After confirming the trial court's order to remove the gate was proper because the Floyds had no prescriptive easement for the driveway and had therefore trespassed onto Chapman's land, the court of appeals went on to review the trial court's findings concerning the utility lines and reversed the trial court's decision on that issue.[233] The easement that the stepmother granted to the utility company was broad in scope and the language in the deed to Chapman specifically stated that Chapman took the land "subject to all easements for roads and utilities in use or of record."[234] The court therefore held that a valid easement existed as to the powerlines and that the lines were not a trespass upon Chapman's property and could remain in place.[235]

In *Rouse v. City of Atlanta,*[236] the appellate court analyzed whether the City of Atlanta (City) committed trespass against a property owner by virtue of an unknown deeply buried sewer line on the homeowner's property and whether the property was "dedicated" to the City.[237]

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[228] *Id.* (citing O.C.G.A. § 44-9-1 (2020)).

[229] *Id.* at 437, 838 S.E.2d at 104.

[230] *Id.*

[231] *Id.* at 436–37, 838 S.E.2d at 103.

[232] *Id.*

[233] *Id.* at 439, 838 S.E.2d at 105.

[234] *Id.* at 435, 838 S.E.2d at 102.

[235] *Id.* at 439, 838 S.E.2d at 105.

[236] 353 Ga. App. 542, 839 S.E.2d 8 (2020).

[237] *Id.* at 542, 839 S.E.2d at 10.

The facts were that, in 2012, Rouse purchased a home in Atlanta which was built in 2004. Rouse did not know of the sewer line, which traversed the property, and there was no instrument of record which showed an easement for the line, nor was there any outward appearance that a sewer line existed. In 2017, Rouse contracted to sell the property for $380,000. During the closing process the sewer line was discovered between seventeen and thirty feet below the surface of the property. The sale fell through and the evidence displayed that the existence of the sewer line lowered the value of the property to $10,000.[238]

Rouse filed an action against the City for trespass, nuisance, and taking and inverse condemnation. He also sought an award of special damages and attorney's fees. Rouse filed a motion for summary judgment in the trial court on the grounds that the City had no recorded easement to permit the sewage pipe to traverse his property; the facts of the case did not give rise to a prescriptive easement or dedication; and alternatively he should be awarded compensation for the taking of his property. The City also filed its motion for summary judgment on the grounds that the City had continuously maintained and repaired the pipe since 1896, therefore the portion of Rouse's land traversed by the sewage pipe was impliedly dedicated to the City.[239] The trial court granted the City's motion and denied Rouse's motion.[240]

The court of appeals held that the trial court erred in granting the City's motion for summary judgment because the evidence was inadequate to prove that the land in question was dedicated to the City, stating that "[d]edication is the setting aside of land by the owner for a public use."[241] Land can be dedicated for public use either expressly or by the actions of the owner.[242] After the land is dedicated and used by the public, the owner cannot afterwards reappropriate the land to his private use.[243] The City's burden of proof was to show either express or implied dedication of the land by Rouse, or Rouse's acquiescence of its use by the public.[244]

The record showed that the sewage pipe was constructed in the late 1800s and was being actively used by the City as part of its sewer system. The record was unclear whether the property owner at the time of the construction constructed the pipe for his own use or gave the City

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[238] *Id.* at 543, 839 S.E.2d at 11.

[239] *Id.*

[240] *Id.*

[241] *Id.* at 543–44, 839 S.E.2d at 11 (citing *Lowry v. Rosenfeld*, 213 Ga. 60, 96 S.E.2d 581 (1957)).

[242] *Id.* at 544, 839 S.E.2d at 11

[243] *Id.* (citing O.C.G.A. § 44-5-230 (2020)).

[244] *Id.*, 839 S.E.2d at 11–12.

permission to construct it, and there is no recorded easement in the county land records. The City conceded that it was unknown whether the 1800s property owner constructed the sewer pipe or whether he allowed the pipe to be constructed on the property. Further, the only evidence to support the allegations in the City's claims that it had continuously maintained and repaired the pipe since 1896 was the record of a single inspection in 2011.[245] Accordingly, although the City proved that it was actively using the sewer pipe, the court concluded that the City could not prove dedication of the property because it could not meet its burden to show facts that clearly indicated that an owner meant to abandon his personal dominion over the property and to dedicate it to public use.[246] That is, evidence of a sole inspection during the 100-year plus life of the sewage pipe was insufficient to prove dedication and the trial court was reversed.[247]

The court of appeals next turned to Rouse's arguments that the trial court erred in denying his motion for summary judgment on his claims for trespass, nuisance, inverse condemnation, and attorney's fees.[248] Trespass is any wrongful interference with an owner's right to exclusive use and the benefit of the property and is a voluntary and intentional act. Key to this matter is, to maintain an action for trespass, a party must show either that he is the true owner with legal title or that he was in possession at the time of the trespass.[249] Here, a question of fact remained as to whether property had been dedicated to the City's use. If so, then there was no trespass. Because a question of fact remained, the trial court did not err in denying Rouse's motion on this claim.[250]

In examining Rouse's claim for nuisance, the court of appeals concluded that a municipality can be liable for nuisance when it, among other things, maintains a sewer system which damages or inconveniences the property.[251]

> To state a claim for nuisance against a municipality, a plaintiff must establish that (1) the city's conduct was egregious enough to exceed mere negligence, (2) the resulting continuous or repetitious dangerous condition was of some duration, and (3) the city failed to correct the

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[245] *Id.* at 544–45, 839 S.E.2d at 12.

[246] *Id.* at 545, 839 S.E.2d at 12.

[247] *Id.* at 545–46, 839 S.E.2d at 12–13.

[248] *Id.* at 546, 839 S.E.2d at 12.

[249] *Id.*, 839 S.E.2d at 13.

[250] *Id.* at 546–47, 839 S.E.2d at 13.

[251] *Id.* at 547, 839 S.E.2d at 13.

> danger within a reasonable time after acquiring knowledge of the defect or dangerous condition.[252]

Because the City used the sewer pipe for sewage and rainwater, whether the City owned, constructed, maintained, or installed the pipe and attempted to repair created a question of fact as to whether the City exercised dominion and control over the pipe. Therefore, it was proper for Rouse's motion for summary judgment to be denied.[253]

Next, turning to Rouse's claim for inverse condemnation, the court looked at the elements of proof.

> An inverse condemnation claim arises when the governmental entity creates a condition on private property that amounts to a taking without compensation . . . . [A] property owner does not have to show a physical invasion of the property, but only an unlawful interference with the owner's right to enjoy the land.[254]

That is, an inverse condemnation occurs where a municipality takes some action for public purpose which causes a nuisance or trespass resulting in the diminished use and functionality of a private owner's land.[255] However, even though the City admitted it actively used the sewer pipe on Rouse's property, and therefore had taken affirmative action that caused a nuisance, trespass, or diminished the use of Rouse's property, the fact issue of whether the property was dedicated to the City remained, precluding summary judgment.[256] Finally, the court denied that Rouse was entitled to attorney's fees because the questions of fact identified by the court remained.[257]

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[252] *Id.*

[253] *Id.* at 547–48, 839 S.E.2d at 14.

[254] *Id.* at 548, 839 S.E.2d at 14.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 549, 839 S.E.2d at 15.