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I. INTRODUCTION

This Article focuses on noteworthy opinions by Georgia appellate courts between June 1, 2016 and May 31, 2017 that are relevant to the practice of construction law.[1]

II. MECHANICS' AND MATERIALMEN'S LIENS

A. Period for Foreclosure

In *Lang v. Brand-Vaughan Lumber Co.*,[2] the Georgia Court of Appeals addressed whether a lien claimant could foreclose on a mechanics' and materialmen's lien more than seven years after the judgment the lien claimant obtained on the underlying judgment for the debt.[3] The court held that it could not because, under Georgia's dormant judgment statute,[4] the judgment was no longer valid.[5] Not directly addressed by the court was whether the result would have been different if the judgment had been renewed or revived per Georgia law.[6]

B. Notice of Commencement of Project

To perfect a mechanics' and materialmen's lien, a person providing labor, services, or materials for the improvement of property, and who has a right to a lien but does not have privity of contract with the

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1. For an analysis of construction law during the prior survey period, see Frank O. Brown, Jr., *Construction Law, Annual Survey of Georgia Law*, 68 MERCER L. REV. 83 (2016).
2. 339 Ga. App. 710, 792 S.E.2d 461 (2016).
3. *Id.* at 711, 792 S.E.2d at 463.
4. O.C.G.A. § 9-12-60(a) (2017).
5. *Lang*, 339 Ga. App. at 714–15, 792 S.E.2d at 465.
6. *See generally id.* at 710, 792 S.E.2d at 461.

contractor, is required by section 44-14-361.5(a)[7] of the Official Code of Georgia Annotated (O.C.G.A.) to give a written "notice to contractor" with information set forth in O.C.G.A. § 44-14-361.5(c).[8] The information must be provided within thirty days from the date that the owner, agent for owner, or contractor files a notice of commencement per O.C.G.A. § 44-14-361.5(b),[9] or thirty days following the first delivery of the labor, services, or materials to the property, whichever is later.[10] The purpose of the notice to contractor is to alert the contractor and owner that a person not in privity with the contractor has lien rights relating to the property so that care can be taken by the contractor and owner to make sure that person is paid. However, under O.C.G.A. § 44-14-361.5(d),[11] a notice to contractor is not required if the owner, agent for owner, or contractor fails to file the project notice of commencement.[12]

O.C.G.A. § 44-14-361.5(b) lists the information to be included in a project notice of commencement.[13] Several prior Georgia Court of Appeals opinions have addressed, with mixed results, whether a failure to provide all of that information, or to otherwise strictly comply with project notice of commencement requirements, is fatal to the effectiveness of that notice.[14] *Capitol Materials, Inc. v. JLB Buckhead, LLC*[15] once again dealt with that question. There, Capitol Materials, Inc., a supplier to a subcontractor, contended that it was excused from timely giving a notice to contractor because the subject project notice of commencement allegedly did not include several statutorily required items of information.[16] The Georgia Court of Appeals did not analyze compliance with each of those items, but determined that the failure of the project notice of commencement to identify or provide contact information for the owner's construction lender, as required by O.C.G.A.

7. O.C.G.A. § 44-14-361.5(a) (2017).

8. O.C.G.A. § 44-14-361.5(c) (2017).

9. O.C.G.A. § 44-14-361.5(b) (2017).

10. O.C.G.A. § 44-14-361.5(a). The notice of commencement of the project per O.C.G.A. § 44-14-361.5(b) is different from the notice of commencement of a lien action under O.C.G.A. § 44-14-361.1(a)(3). *See* O.C.G.A. § 44-14-361.5(b).

11. O.C.G.A. § 44-14-361.5(d) (2017).

12. *Id.*

13. O.C.G.A. § 44-14-361.5(b).

14. *See generally* Fid. & Deposit Co. of Maryland v. Lafarge Bldg. Materials, Inc., 312 Ga. App. 821, 720 S.E.2d 288 (2011); Se. Culvert, Inc. v. Hardin Bros., LLC, 312 Ga. App. 158, 718 S.E.2d 28 (2011); Beacon Med. Prods., LLC v. Travelers Cas. & Sur. Co., 292 Ga. App. 617, 665 S.E.2d 710 (2008); Harris Ventures, Inc. v. Mallory & Evans, Inc., 291 Ga. App. 843, 662 S.E.2d 874 (2008); Gen. Elec. Co. v. N. Point Ministries, Inc., 289 Ga. App. 382, 657 S.E.2d 297 (2008).

15. 337 Ga. App. 848, 789 S.E.2d 803 (2016).

16. *Id.* at 850, 789 S.E.2d at 805.

§ 44-14-361.5(b)(6),[17] was alone sufficient to render the project notice of commencement fatally defective.[18] Consequently, the supplier was not required to provide a notice to the contractor as a condition to the effectiveness of its lien, meaning that the trial court erred in granting summary judgment to the owner on the supplier's *in rem* claim lien against the subject property.[19]

III. MOLD

Construction lawyers often encounter mold claims. In *Barko Response Team, Inc. v. Sudduth*,[20] a homeowner sued his homeowner's insurer and a mold remediation company alleging, in part, that the company was negligent in its mold remediation services and that he was injured by mold exposure. The company moved for summary judgment, contending that there was no evidence that the alleged negligence caused the homeowner's illness. The trial court denied that motion.[21]

On appeal, the Georgia Court of Appeals noted that the Georgia Supreme Court recently explained, in *Scapa Dryer Fabrics, Inc. v. Knight*,[22] that an expert's opinion on causation in a toxic tort case, which includes a mold claim, is admissible only if the expert concludes that the plaintiff's exposure to a toxic substance made at least a "meaningful contribution" to his injuries.[23] The Georgia Court of Appeals concluded that the affidavit and letter from the plaintiff's physician expert failed to meet that standard because it did not give any opinion on the degree to which the homeowner's exposure to mold contributed to his injuries, the basis for his understanding that there were high levels of toxic mold in the home, or the factual basis for his opinion that the mold caused the homeowner's illnesses.[24] The court also concluded that the gap left by the medical testimony was not cured, as is sometimes the case, by non-expert testimony of a causal link between the alleged negligence and the plaintiff's alleged injuries.[25] Thus, the trial court erred in denying summary judgment.[26]

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17. O.C.G.A. § 44-14-361.5(b)(6) (2017).
18. *Capitol Materials*, 337 Ga. App. at 852, 789 S.E.2d at 806.
19. *Id.*
20. 339 Ga. App. 897, 795 S.E.2d 198 (2016).
21. *Id.* at 897, 795 S.E.2d at 199.
22. 299 Ga. 286, 788 S.E.2d 421 (2016).
23. *Barko*, 339 Ga. App. at 900, 795 S.E.2d at 201.
24. *Id.* at 900–01, 795 S.E.2d at 201.
25. *Id.* at 901, 795 S.E.2d at 202.
26. *Id.* at 902, 795 S.E.2d at 202.

IV. UNLICENSED CONTRACTORS

Construction lawyers need to be mindful of contractor licensing issues because they can have a profound impact on the rights of parties in a construction project. Section 43-41-17(b)[27] of the O.C.G.A. states in relevant part that:

As a matter of public policy, any contract entered into on or after July 1, 2008, for the performance of work for which a residential contractor or general contractor license is required by this chapter and not otherwise exempted under this chapter[28] and which is between an owner and a contractor who does not have a valid and current license required for such work in accordance with this chapter shall be unenforceable in law or in equity by the unlicensed contractor . . . . Notwithstanding any other provision of law to the contrary, if a contract is rendered unenforceable under this subsection, no lien or bond claim shall exist in favor of the unlicensed contractor for any labor, services, or materials provided under the contract or any amendment thereto. This subsection shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies.[29]

A key issue in *Ussery v. Goodrich Restoration, Inc.*,[30] was whether, under the facts of this case, O.C.G.A. § 43-41-17(b) authorizes a homeowner to recover funds that he paid to an unlicensed restoration company.[31] In addressing that question, the Georgia Court of Appeals first noted that there is no authority applying O.C.G.A. § 43-41-17(b) to a claim for return of funds from an unlicensed contractor.[32] The court then noted that, by its terms, O.C.G.A. § 43-41-17(b) does not expressly authorize such a claim.[33]

The court then turned to the specific facts of the case, which included that the unlicensed contractor had paid all funds received from the homeowner to subcontractors who had performed the restoration work, the unlicensed contractor had made no profit on the project, and the homeowner had not claimed any damages as a result of the work performed by the contractor and its subcontractors.[34] Based on these facts, the court held that the trial court had properly entered judgment

27. O.C.G.A. § 43-41-17(b) (2017).
28. See O.C.G.A. § 43-41-17 for exemptions.
29. O.C.G.A. § 43-41-17(b).
30. 341 Ga. App. 390, 800 S.E.2d 606 (2017).
31. *Id.* at 391, 800 S.E.2d at 608.
32. *Id.* at 392, 800 S.E.2d at 609.
33. *Id.*
34. *Id.* at 392–93, 800 S.E.2d at 609.

in favor of the contractor on the refund claim following a bench trial on that and other claims.[35]

V. APPORTIONMENT

Construction lawyers should be familiar with Georgia's apportionment statute, O.C.G.A. § 51-12-33,[36] because it may substantially impact the amount of recoverable damages. Although not a construction case, *Camelot Club Condominium Ass'n v. Afari-Opoku*[37] addresses apportionment issues that might be relevant in some construction-related disputes.

In *Camelot*, the spouse of a murdered resident of a condominium complex brought action against the complex and a security firm alleging negligence and nuisance. The jury apportioned 25% fault to the complex and 25% to the security firm. The trial court thereafter entered a judgment that imposed liability on the complex for the security firm's 25% fault.[38]

The complex appealed, arguing the trial court erred in doing so. Because the complex was vicariously liable for the security firm's actions under either O.C.G.A. § 51-2-5(4)[39] or O.C.G.A. § 51-2-5(5),[40] the plaintiff argued that the assignment of the security firm's fault to the complex was proper.[41] The former statute imposes liability on an employer for an independent contractor's performance in connection with a statutory duty, such as the duty under O.C.G.A. § 51-3-1[42] to keep premises safe.[43] The latter imposes liability on an employee who maintains control over an independent contractor.[44]

The Georgia Court of Appeals first noted that O.C.G.A. § 51-12-33 generally precludes any post-verdict reassignment of damages based on a jury's apportionment of fault.[45] Signaling that a post-verdict reassignment might sometimes be proper, the court nevertheless addressed the plaintiff's contention that a post-verdict reassignment was

35. *Id.* at 394, 800 S.E.2d at 610.
36. O.C.G.A. § 51-12-33 (2017).
37. 340 Ga. App. 618, 798 S.E.2d 241 (2017).
38. *Id.* at 618, 798 S.E.2d at 244. The security firm also remained liable for its 25%. *Id.*
39. O.C.G.A. § 51-2-5(4) (2017).
40. O.C.G.A. § 51-2-5(5) (2017).
41. *Camelot Club*, 340 Ga. App. at 624, 798 S.E.2d at 247–48.
42. O.C.G.A. § 51-3-1 (2017).
43. *Camelot Club*, 340 Ga. App. at 624, 798 S.E.2d at 248.
44. *Id.*
45. *Id.* at 626, 798 S.E.2d at 248–49.

necessary because apportionment under O.C.G.A. § 51-12-33 does not apply to vicarious liability.[46]

The court ultimately determined that it could not tell from the jury's general verdict whether it was based on vicarious liability and that the trial court therefore erred in reassigning liability to the complex.[47] The court noted that the jury might have found the complex liable for nuisance without regard to any actions by the security firm, in which case vicarious liability would not arise.[48] It also noted that the jury might also have imposed liability on the security firm based on its independent common law duty to provide security.[49] In other words, in the absence of a special verdict, special interrogatories, or pretrial clarification, an independent claim against either the employer or the independent contractor can possibly result in the inapplicability of the general rule that apportionment does not apply to vicarious liability.[50]

VI. ECONOMIC-LOSS RULE

The economic-loss rule is frequently mentioned in construction-related disputes. In *Atlantic Geoscience, Inc. v. Phoenix Development & Land*,[51] that rule was an issue in the context of the purchase and development of real property.[52] Developer Phoenix hired engineering firm Atlantic to perform a Phase I Environmental Assessment of about forty-five acres of land that Phoenix was considering buying. Atlantic's written report to Phoenix stated that a small part of the property was a soil/stone storage yard. After buying the property in partial reliance on that statement, Phoenix sold the forty-five acres to a related entity for development. Phoenix and that entity then learned that the small portion of land was actually a landfill and that the property could not be developed as planned. Ultimately, the forty-five acres was re-conveyed to Phoenix and its lender foreclosed on that acreage.[53]

Phoenix then sued Atlantic for professional negligence. The trial court granted summary judgment to Atlantic finding that the damages sought by Phoenix were barred by the economic-loss rule and that Phoenix had

46. *Id.*
47. *Id.* at 629, 798 S.E.2d at 250.
48. *Id.* at 628, 798 S.E.2d at 250.
49. *Id.*
50. *See generally id.* at 618, 798 S.E.2d at 241.
51. 341 Ga. App. 81, 799 S.E.2d 242 (2017).
52. *Id.* at 84, 799 S.E.2d at 245.
53. *Id.* at 83, 799 S.E.2d at 244–45.

presented no evidence that its damages were proximately caused by Atlantic's negligence.[54]

In reversing the trial court, the Georgia Court of Appeals first explained that the economic-loss rule generally provides that a contracting party who suffers purely economic loss (as opposed to damage to property or person) must seek a remedy in contract, not in tort.[55] The court then noted that Georgia law permits the recovery of certain types of economic losses where the plaintiff alleges a professional negligent misrepresentation.[56] Specifically, the court stated that Phoenix may recover those damages necessary to compensate [it] for the pecuniary loss to [it] of which the misrepresentation is a legal cause, including (a) The difference between the value of what [Phoenix] has received in the transaction and its purchase price or other value given for it; and (b) Pecuniary loss suffered otherwise as a consequence of [its] reliance upon the representation.[57]

The court concluded that most of the damages sought by Phoenix could not be recovered under this exception.[58] For example, the damages Phoenix sought under a "benefit-of-the-bargain" standard for the amounts that it hoped to achieve when it bought the forty-five acres in reliance on Atlantic's statement cannot be recovered.[59] However, under the exception, it might recover pre-development out-of-pocket expenditures made in reliance on that statement.[60]

VII. O.C.G.A. § 9-11-9.1 AFFIDAVIT

Petree v. Georgia Department of Transportation[61] is a reminder that, under O.C.G.A. § 9-11-9.1,[62] there is an important limitation on the affidavit requirement.[63] Petree sued the Georgia Department of Transportation and Macon-Bibb County alleging, in part, that the defendants had negligently planned, designed, constructed, and maintained a drainage ditch, resulting in flooding to her property. The

54. *Id.* 83–84, 799 S.E.2d at 245.

55. *Id.* at 84, 799 S.E.2d at 245.

56. *Id.* The court also noted that the affidavit required by O.C.G.A. § 9-11-9.1 applies to these claims and that they can be made against one in contractual privity with the plaintiff. 341 Ga. App. at 85, 799 S.E.2d at 246.

57. 341 Ga. App. at 85, 799 S.E.2d at 246.

58. *Id.*

59. *See id.* at 85–85, 799 S.E.2d at 246.

60. *Id.* at 85–86, 799 S.E.2d at 246.

61. 340 Ga. App. 694, 798 S.E.2d 482 (2017).

62. O.C.G.A. § 9-11-9.1 (2017).

63. *See generally Petree*, 340 Ga. App. at 694, 798 S.E.2d at 482.

defendants moved to dismiss the complaint in part because it was not supported by an expert affidavit under O.C.G.A. § 9-11-9.1. The trial court granted that motion.[64]

On appeal, Petree did not challenge the ruling as to her claims for negligent planning, design, and construction. She did, however, argue that an expert affidavit was not required to support her claim for ordinary negligent maintenance of the ditch.[65] The Georgia Court of Appeals agreed, and reversed the dismissal as to that claim.[66]

VIII. HOMEOWNER'S INSURANCE

In *Clary v. Allstate Fire & Casualty Insurance Co.*,[67] the homeowner's policy allowed Allstate to elect to either repair a fire loss or pay the homeowners for that loss. Allstate first elected to repair the damage, but after a dispute arose with the homeowners during that work, it elected to pay the loss. The homeowners filed suit contending, in part, that Allstate could not change its mind and that, among other alleged wrongs, it breached the policy by doing so. Concluding that Allstate was not precluded from changing its mind, the trial court entered summary judgment on that claim.[68] The Georgia Court of Appeals affirmed that order.[69]

IX. STORMWATER RUNOFF

Stormwater runoff claims frequently arise in connection with new construction or additions to existing buildings. In *Terry v. Catherall*,[70] the principle issue was whether, in response to the defendants' motions for summary judgment on the plaintiff homeowners' nuisance claim, the plaintiffs had presented sufficient evidence that the defendants had "caused an increase in the volume and velocity of water flowing onto the plaintiffs' property."[71] The trial court concluded that the plaintiffs had

64. *Id.* at 695–96, 798 S.E.2d at 486.

65. *Id.* at 700, 798 S.E.2d at 489.

66. *Id.* at 701, 798 S.E.2d at 489–90.

67. 340 Ga. App. 351, 795 S.E.2d 757 (2017).

68. *Id.* at 351–54, 795 S.E.2d at 759–61.

69. *Id.* at 355, 795 S.E.2d at 762. On another point, it is noteworthy that the court also stated that, "even when an insurer restores damaged real property to its pre-loss *condition*, it may *also* be liable to pay for any post-repair diminution in *value*." *Id.* at 355, 795 S.E.2d at 761–62. The court cited *Royal Capital Development LLC v. Maryland Casualty Co.*, 291 Ga. 262, 265, 728 S.E.2d 234, 237 (2012), in support of that statement. *Clary*, 340 Ga. App. at 355, 795 S.E.2d at 761–62.

70. 337 Ga. App. 902, 789 S.E.2d 218 (2016).

71. *Id.* at 904, 789 S.E.2d at 221.

not because, even though their expert had provided calculations that the defendants had greatly increased the impervious surfaces of their properties, he had not conducted any tests to measure the velocity of water runoff from the defendants' property, the volume of water flowing onto the plaintiffs' property, or the slope of the defendants' property. Thus, the trial court concluded that the plaintiffs' expert had speculated that the increase in impervious surface had caused an increase in water flow onto the plaintiffs' property.[72]

The Georgia Court of Appeals disagreed, and reversed and remanded the case to the trial court.[73] It noted that the defendants had not challenged the admissibility of the plaintiffs' expert testimony but, rather, had asserted that it was insufficient to create a genuine issue on causation.[74] The court concluded that the plaintiffs' expert testimony that the greatly increased impervious surfaces on the defendants' property had increased the volume and velocity of water flowing onto the plaintiffs' property and was sufficient to defeat the motions for summary judgment.[75]

X. ARBITRATION

Many, if not most, construction contracts have arbitration provisions. In a case of first impression, the Georgia Court of Appeals, in *Suntrust Bank v. Lilliston*,[76] addressed whether in the context of a renewal action by the plaintiff debtor against Suntrust, the latter could compel arbitration per the parties' agreement even though Suntrust had not demanded arbitration in the original action, but had litigated the case for over twenty-one months during which time it engaged in discovery and filed a motion for summary judgment.[77] The trial court denied Suntrust's motion to compel arbitration, and concluded that it had waived the right to demand arbitration.[78]

On appeal, Suntrust argued that the trial court erred because, under established Georgia appellate authority, a defendant in a renewal action can raise a defense not raised in the original action.[79] The Georgia Court

72. *Id.*

73. *Id.* at 906, 789 S.E.2d at 222.

74. *Id.* at 905, 789 S.E.2d at 222.

75. *Id.* at 906, 789 S.E.2d at 221–22.

76. 338 Ga. App. 738, 791 S.E.2d 614 (2016).

77. *Id.* at 741, 791 S.E.2d at 617.

78. *Id.* at 739, 791 S.E.2d at 616.

79. *Id.* at 741, 791 S.E.2d at 617; *see also* Adams v. Gluckman, 183 Ga. App. 666, 359 S.E.2d 710 (1987); Fine v. Higgins Foundry & Supply Co., 201 Ga. App. 275, 410 S.E.2d 821 (1991); Hornsby v. Hancock, 165 Ga. App. 543, 301 S.E.2d 900 (1983).

of Appeals affirmed the trial court's denial of Suntrust's motion to compel arbitration, and reasoned that Suntrust was not precluded from raising arbitration in the renewal action simply because it had failed to do so in the original action. Instead, Suntrust was precluded from doing so because, according to the trial court's findings, Suntrust had acted inconsistently with its arbitration right in the original action and, in so doing, had prejudiced the plaintiff. The court of appeals reasoned that it could not overturn the trial court's findings because they were not clearly erroneous.[80]

80. *Suntrust Bank*, 338 Ga. App. at 741–42, 791 S.E.2d at 617–18.