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David Cook

Peter Crofton

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I. INTRODUCTION

The year 2020 brought about interesting judicial opinions in construction law addressing licensing issues, contractual, and common-law indemnity, including the anti-indemnity statute, homeowner's association rights, and the recovery of lost profits on incomplete work. It also addressed standard construction-law issues in unique contexts, such as construction liens and insurance coverage and exclusions. Though the year faced the COVID-19 pandemic, decisions addressing the unprecedented circumstances caused by the virus will likely come in future years. This Article surveys significant judicial, regulatory, and legislative developments in Georgia construction law during the period from June 1, 2020, through May 31, 2021.[1]

II. LICENSING

An often-overlooked aspect of construction law is compliance with contractor licensing. The Georgia Court of Appeals reaffirmed Georgia law concerning the invalidity of a contract with an unlicensed general contractor in *Saks Management & Associates, LLC v. Sung General Contracting, Inc.*[2] In *Saks*, an unlicensed contractor undertook the renovation of an apartment complex.[3] A series of unfortunate events

*Partner, Autry, Hall, & Cook LLP, Atlanta, Georgia. Mercer University (B.B.A., 2001); Georgia College & State University (M.S., 2002); Mercer University School of Law (J.D., 2005). Member, State Bar of Georgia.

**Partner, Smith, Gambrell & Russell, LLP, Atlanta, Georgia. Auburn University (Bach. of Computer Engineering 1986); Emory University School of Law (J.D., 1990). Member, State Bars of Georgia, Alabama, Florida, and Tennessee.

1. For an analysis of last year's construction law during the Survey period, *see* Ward Stone Jr., *Construction Law*, *Annual Survey of Georgia Law*, 72 MERCER L. REV. 59 (2020).

2. 356 Ga. App. 568, 849 S.E.2d 19 (2020).

3. *Id.*, 849 S.E.2d at 23.

befell the contractor, and the project owner terminated the contractor and sued for damages. The contractor counterclaimed for breach of contract, *quantum meruit*, and unjust enrichment.[4]

The owner moved for summary judgment on all of the contractor's counterclaims.[5] The Gwinnett County Superior Court denied the motion, and the owner appealed. The court of appeals reversed the trial court, determining that summary judgment should have been granted.[6] It looked to Georgia's licensing law, codified at section 43-41-17 of the Official Code of Georgia Annotated (O.C.G.A.),[7] to determine whether an unlicensed contractor can enforce its contract, stating,

> [a]s a matter of public policy, any contract . . . for the performance of work for which a residential contractor or general contractor license is required by this chapter . . . and which is between an owner and a contractor who does not have a valid and current license required for such work in accordance with this chapter *shall be unenforceable in law or in equity by the unlicensed contractor*.[8]

Thus, the contractor's breach of contract and its equitable claims could not survive.

There is, however, a limit on the applicability of O.C.G.A. § 43-41-17. In a case decided less than a year after *Saks*, the Georgia Court of Appeals refused to apply O.C.G.A. § 43-41-17 to a contract involving an arbitration clause.[9] In *Jhun v. Imagine Castle, LLC*, it explained that Georgia's public policy on the enforcement of arbitration clauses requires that the arbitration clause in an otherwise seemingly void contract be enforced so as to allow arbitrators to decide whether the underlying contract is void.[10] The court also cited to the Supreme Court of the United States' decision in *Buckeye Check Cashing, Inc. v. Cardenga*,[11] as requiring that arbitrators, rather than courts, decide issues of contract voidness unless there is a specific challenge to the enforceability of the arbitration clause itself.[12]

The court of appeals also addressed the liability of a natural person who holds a contractor's license and qualifies a business entity for

4. *Id.* at 570, 849 S.E.2d at 24.
5. *Id.*
6. *Id.* at 574, 849 S.E.2d at 27.
7. O.C.G.A. § 43-41-17 (2021).
8. *Saks*, 356 Ga. App. at 570–71, 849 S.E.2d at 24.
9. Jhun v. Imagine Castle, LLC, 358 Ga. App. 627, 856 S.E.2d 24 (2021).
10. *Id.* at 629–30, 856 S.E.2d at 27.
11. 546 U.S. 440 (2006).
12. *Jhun*, 358 Ga. App. at 630, 856 S.E.2d at 27.

licensure.[13] In *Laliwala v. Harris*,[14] a business owner hired a general contractor to renovate a building.[15] The general contractor was unlicensed, so it hired a licensed contractor "to serve as the statutory qualifying agent for the Project [and] allowed [the unlicensed general contractor] to use his general contractor's license to obtain permits for the Project." Problems developed, so the owner sued the general contractor and its owner for breach of contract and various tort claims, and also asserted various tort claims against the individual license holder in his capacity as the qualifying agent for the project.[16]

The license holder moved for summary judgment based on O.C.G.A. section 43-41-9(i),[17] which provides that the license laws do not impose "civil liability against an individual qualifying agent by any owner . . . beyond the liability that would otherwise exist legally or contractually apart from and independent of the individual's status as a qualifying agent."[18] The State Court of Cobb County granted summary judgment and the court of appeals affirmed.[19]

The court of appeals' decision is notable for two reasons. First, the decision clearly states that the license law does not impose a duty of care on license-qualifying agents to third parties.[20] Second, the decision leaves several unanswered questions such as what independent duties a licensed contractor—a licensed professional under O.C.G.A. section 9-11-9.1[21]—owes to third parties, if any, and what are the legal ramifications of the unlicensed general contractor hiring a third-party company to allow use of its contractor's license, a practice often called "license renting" that is illegal in many jurisdictions.

In *Fleetwood v. Lucas,*[22] the Georgia Court of Appeals addressed the definition of "contractor" under the licensing statute, as well as the exception for repair work.[23] In this case, *Fleetwood hired Lucas to perform work on two houses.*[24] *Lucas alleged that he completed the work, but Fleetwood failed to pay the remaining balance owed.*[25] Following the

13. *Id.* at 629, 856 S.E.2d at 26–27.
14. 357 Ga. App. 365, 850 S.E.2d 804 (2020).
15. *Id.* at 365, 850 S.E.2d at 806.
16. *Id.*
17. O.C.G.A. § 43-41-9(i) (2021).
18. *Laliwala*, 357 Ga. App. at 368, 850 S.E.2d at 807 (quoting O.C.G.A. § 43-41-9(i)).
19. *Id.* at 368–69, 850 S.E.2d at 808.
20. *Id.* at 368, 850 S.E.2d at 807.
21. O.C.G.A. § 9-11-9.1 (2021).
22. 354 Ga. App. 320, 840 S.E.2d 720 (2020).
23. *Id.* at 324, 840 S.E.2d at 723.
24. *Id.* at 320, 840 S.E.2d at 721.
25. *Id.* at 322, 840 S.E.2d at 721–22.

failure to pay, Lucas sued for breach of contract in the State Court of Fulton County. Fleetwood moved for summary judgment on the grounds that Lucas had no license to perform the work. The trial court denied Fleetwood's motion, and the case proceeded to a jury. After the jury returned a verdict in favor of Lucas, Fleetwood appealed.[26]

Generally, if a person holds no residential or general contractor's license but performs work when a license is required, the contract is unenforceable.[27] However, under O.C.G.A. § 43-41-17(g), a person may perform repair work without a license if the person discloses that he or she does not have a license, and the work does not affect the structural integrity of the project.[28]

In this case, Lucas held no license, and he testified at trial that he did not inform Fleetwood that he held no license.[29] Because Lucas failed to disclose that he held no license, the contract did not qualify for the repair exception under O.C.G.A. § 43-41-17(g), rendering it unenforceable under O.C.G.A. § 43-41-17(a).[30]

Nevertheless, Lucas argued he was not a "contractor" within the meaning of the licensing statute because he bore no responsibility for any contractual risk to the Fleetwoods.[31] The definition of "contractor" includes "construction management services" when the person performing the "services is at risk contractually to the owner for the performance and cost of the construction."[32] Based on this segment of the definition, Lucas argued he was not a "contractor."[33] The court declined to accept Lucas's definition, and instead, the court liberally construed the term to further the legislative intent of protecting property owners against faulty construction.[34]

Finally, Lucas argued he was a mere servant of Fleetwood.[35] But the evidence showed he contracted with Fleetwood to perform construction services, including repairs, in exchange for compensation. As a result, he met the statutory definition of "contractor" under O.C.G.A. § 43-41-2(4).[36]

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26. *Id.* at 323, 840 S.E.2d at 722.
27. O.C.G.A. § 43-41-17(b) (2021).
28. O.C.G.A. § 43-41-17(g) (2021).
29. *Fleetwood*, 354 Ga. App. at 322, 840 S.E.2d at 722.
30. *Id.* at 324, 840 S.E.2d at 723.
31. *Id.*
32. *Id.* at 325, 840 S.E.2d at 723 (quoting O.C.G.A. § 43-41-2(4)(a) (2021).
33. *Id.* at 324, 840 S.E.2d at 723.
34. *Id.* at 325, 840 S.E.2d at 723.
35. *Id.*, 840 S.E.2d at 724.
36. *Id.*

III. ANTI-INDEMNITY STATUTE

Georgia's anti-indemnity statute[37] directly applies to construction contracts and, as of July 1, 2016, contracts for engineering, architectural, and land-surveying services.[38] On remand from the Georgia Supreme Court, the Georgia Court of Appeals addressed the prior version of Georgia's anti-indemnity statute.[39] With a long history, the 2020 case of *Milliken & Co. v. Georgia Power Co.*,[40] originated with a plane crash that injured and killed several passengers and crew members.[41] Their representatives sued several defendants, including a nearby plant owner, Milliken & Company (Milliken), based on claims that the location of transmission lines on Milliken's property was the contributing cause of the crash.[42] Milliken asserted a cross claim against Georgia Power Company (GPC) based on an easement it granted to GPC. The easement required GPC to indemnify Milliken for any claims arising out of GPC's construction or maintenance of the transmission lines. The easement provision at issue read as follows: "[GPC], its successors or assigns shall hold [Milliken], its successors or assigns harmless from any damages to property or persons (including death), or both, which result from [GPC's] construction, operation or maintenance of its facilities on said easement areas herein granted."[43]

On a motion for summary judgment, GPC argued that the provision did not impose an indemnity obligation on GPC or, even if it did, the provision violated the anti-indemnity statute.[44] The Fulton State Court found that the provision was a covenant not to sue, rather than an indemnity obligation.[45] The court of appeals affirmed the trial court's ruling but did so based solely on GPC's second argument—the provision violated the anti-indemnity statute.[46]

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37. O.C.G.A. §§ 13-8-2(b)–(c) (2021).

38. The statute was amended in 2016 to include certain indemnity provisions in agreements for engineering, architectural, or land surveying services. Ga. H.R. Bill 943, Reg. Sess. (2016).

39. The court construed the version of the anti-indemnity in effect in 1989, which is when the easement was made. Milliken & Co. v. Georgia Power Co., 344 Ga. App. 560, 811 S.E.2d 58 (hereinafter *Milliken I*), *rev'd*, 306 Ga. 6, 829 S.E.2d 111 (2019) (hereinafter *Milliken II*).

40. 354 Ga. App. 98, 839 S.E.2d 306 (2020) (hereinafter *Milliken III*).

41. *Id.* at 98, 839 S.E.2d at 308.

42. *Milliken I*, 344 Ga. App. at 561, 811 S.E.2d at 60.

43. *Id.*

44. *Id.* at 561–62, 811 S.E.2d at 60.

45. *Milliken II*, 306 Ga. at 7, 829 S.E.2d at 112.

46. *Id.*, 829 S.E.2d at 113 (relying on the "right for any reason" rule).

On appeal to the supreme court, Milliken attacked the court of appeals' interpretation of the anti-indemnity statute.[47] In general, "a party may contract away liability to the other party for the consequences of his own negligence without contravening public policy, except when such agreement is prohibited by statute."[48] As one such statute, the anti-indemnity statute applies when an indemnification provision (i) "relates in some way to a contract for 'construction, alteration, repair, or maintenance' of certain property" and (ii) "promises to indemnify a party for damages arising from that own party's sole negligence."[49] Since the easement required GPC to "construct, erect, install, operate, maintain, inspect, reconstruct, repair, rebuild, renew and replace" transmission poles and lines on Milliken's property, the supreme court ruled that it was within the scope of provisions governed by the anti-indemnity provision.[50]

As to whether it violated the sole-negligence prong, the Georgia Supreme Court ruled that it did not.[51] In contrast to the statutory prohibition, the easement did not require GPC to indemnify Milliken for damages resulting from Milliken's sole negligence. Instead, it required GPC to indemnify Milliken for GPC's negligence—which is not prohibited by the statute.[52]

GPC cited cases that invalidated indemnity provisions that required indemnification without regard to fault and were thus broad enough to include the indemnitee's negligence.[53] Relying on these cases, GPC cited Milliken's pleadings, which sought indemnification from GPC ostensibly without regard to fault.[54] The supreme court rejected this argument because, even though Milliken's pleadings sought such broad indemnification, the underlying indemnity provision did not.[55]

But the case did not end there. Since the court of appeals did not address the trial court's primary reasoning—that the clause was merely a covenant not to use, rather than an indemnity clause—the supreme court remanded the case.[56] On remand in *Milliken II*, the court of appeals

47. *Id.* at 8, 829 S.E.2d at 113.

48. *Id.* (quoting Lanier at McEver v. Planners & Eng'rs Collaborative, 284 Ga. 204, 205, 663 S.E.2d 240, 242 (2008)).

49. *Id.* at 9, 829 S.E.2d at 113.

50. *Id.* at 9–10, 829 S.E.2d at 114.

51. *Id.* at 10, 829 S.E.2d at 114.

52. *Id.*

53. *Id.* at 11, 829 S.E.2d at 115.

54. *Id.* at 12, 829 S.E.2d at 115.

55. *Id.*

56. *Id.* at 14, 829 S.E.2d at 117.

reversed the trial court's ruling and construed the clause as an indemnity clause.[57] A provision need not contain the "magic word 'indemnify.'"[58] Moreover, the easement provisions reference to personal injuries and death would be mere surplusage outside of an indemnity provision because GPC would have no standing to assert a claim for wrongful death.[59] Accordingly, GPC's motion for summary judgment should have been denied because (i) the clause was one for indemnity and (ii) it did not violate Georgia's anti-indemnity statute.[60]

IV. CONTRACTS CLAUSES

The case of *Havenbrook Homes, LLC v. Infinity Real Estate Investment, Inc.*[61] raised several issues common to construction projects and contracts.[62] A deck collapsed causing serious injuries to a renter, Ms. Williams, and her guest, both of whom sued several parties for their injuries. Before Williams began renting the property, the property owner, RHA1, hired Havenbrook Construction, LLC, which hired Infinity Real Estate Investments (Infinity) to perform construction work on the deck, and Infinity subcontracted the work to TMC Services, LLC (TMC). While the parties disputed whether TMC was instructed to install bolts to secure the deck, there was no dispute that the necessary bolts were never added. When Williams entertained guests on the deck, it separated from the building.[63]

Ms. Williams sued RHA1; its property manager Havenbrook Homes, LLC; Havenbrook Construction; Infinity; and TMC.[64] In response to the Williams' complaint, RHA1 and Havenbrook Homes asserted a counterclaim against Williams for breach of the rental agreement. In addition, Havenbrook Construction filed a crossclaim against Infinity. And RHA1 and Havenbrook Homes filed a third-party complaint against Infinity.[65]

57. *Milliken III*, 354 Ga. App. at 102, 839 S.E.2d at 310.

58. *Id.* at 101, 839 S.E.2d at 309.

59. *Id.*

60. *Id.* at 102, 839 S.E.2d at 310.

61. 356 Ga. App. 477, 847 S.E.2d 840 (2020).

62. *Id.* at 477, 847 S.E.2d at 842.

63. *Id.* at 478–79, 847 S.E.2d at 843.

64. *Id.* at 479, 847 S.E.2d at 843. Williams' guest sued only Havenbrook Homes and RHA1 for negligence.

65. *Id.*, 847 S.E.2d at 844.

A. Contractual Privity and Third-Party Beneficiary Status

With regard to RHA1's breach-of-contract claim against Infinity, the trial court granted summary judgment to Infinity because the relevant contract was between Infinity and Havenbrook Construction, not RHA1.[66] The court of appeals affirmed, reasoning that RHA1's status as property owner that was the subject of the contract did not make RHA1 a party to the contract.[67]

Moreover, the court held that RHA1 was not a third-party beneficiary of the relevant contract.[68] In so ruling, the court declined to consider parol evidence of the parties' intentions and looked solely to the face of the contract to find any intention that RHA1 was an intended beneficiary.[69] Though the Havenbrook entities argued that Infinity knew the contract required work to benefit RHA1, the contract itself exhibited no such intention.[70]

B. Common-Law Indemnity

With regard to Havenbrook Construction's common-law indemnity claim against Infinity, the court of appeals affirmed the trial court's dismissal.[71] Common-law indemnity is available only in limited circumstances, such as when liability is imputed based on another's tort.[72] Reviewing the record, the court found that the allegations against Havenbrook Construction were founded on its own negligence and not on any theory of imputed or vicarious liability.[73] It found, therefore, that dismissal of the indemnity claim was proper.[74]

C. Contractual Indemnity Against Tenant

In their counterclaim against Williams for breach of the rental agreement, RHA1 and Havenbrook Homes argued that Williams failed to obtain liability insurance and failed to indemnify them. The court of appeals affirmed the trial court's award of summary judgment to

66. *Id.* at 480, 847 S.E.2d at 844.

67. *Id.* at 481, 847 S.E.2d at 845 (citing Jai Ganesh Lodging, Inc. v. David M. Smith, Inc., 328 Ga. App. 713, 718–19, 760 S.E.2d 718, 723 (2014)).

68. *Id.* at 481-82, 847 S.E.2d 845 (quoting Perry Golf Course Dev., LLC v. Housing Auth. of City of Atlanta, 294 Ga. App 387, 388, 670 S.E.2d 171 (2008)).

69. *Id.* at 482, 847 S.E.2d at 845–46.

70. *Id.*, 847 S.E.2d at 846.

71. *Id.* at 483, 847 S.E.2d at 846.

72. *Id.* at 484, 847 S.E.2d at 847 (citing Hines v. Holland, 334 Ga. App. 292, 296, 779 S.E.2d 63, 67 (2015)).

73. *Id.* at 483, 847 S.E.2d at 846.

74. *Id.* at 484, 847 S.E.2d at 847.

Williams, finding the indemnity provision violated Georgia's anti-indemnity statute in O.C.G.A. § 13-8-2(b).[75]

The defendants argued that the anti-indemnity statute was inapplicable when "the issue [was] not their sole negligence in light of the claims that Infinity was also negligent."[76] The court rejected that argument, instead looking to the sweeping language of the indemnity clause itself to find that it was overbroad.[77] The clause required Williams to indemnify them against all liability "without limitation" resulting from "any damage or injury happening in or about" the property. Therefore, the counterclaims for breach of the rental agreement were properly dismissed.[78]

Finally, the court of appeals rejected the argument that the indemnity clause was spared from the anti-indemnity statute because the rental agreement required Williams to procure liability insurance.[79] Even though Williams was required to obtain liability insurance, under the terms of the rental agreement, such insurance did not limit Williams' liability.[80] Thus, the indemnification provision remained in violation of the anti-indemnity statute.[81]

V. CONSTRUCTION LIENS

In its 2020 Regular Session, the Georgia General Assembly passed S.B. 315,[82] which changed the form and effect of lien waivers and form and deadline for affidavits of nonpayment. Since the Act has an effective date of January 1, 2021, any opinions interpreting the changes will occur in the future.[83]

In *Massey v. Duke*,[84] the Georgia Supreme Court decided two important issues relating to Georgia's mechanics lien law. In *Massey*, a homeowner hired a contractor to repair fire damage to a home.[85] The

75. *Id.*

76. *Id.* at 485, 847 S.E.2d at 848.

77. *Id.* at 486, 847 S.E.2d at 848.

78. *Id.*

79. *Id.*

80. *Id.* ("The limits of said insurance shall not, however, limit the liability of [Williams] hereunder.").

81. *Id.*

82. Ga. S. Bill 315, Reg. Sess. (2020).

83. The Act is a response to the Georgia Court of Appeals opinion in ALA Constr. Servs., LLC v. Controlled Access, Inc., 351 Ga. App. 841, 833 S.E.2d 570 (2019) (holding lienor's failure to file an affidavit of nonpayment not only waived its lien and bond rights but also waived its contractual right to payment).

84. 310 Ga. 152, 849 S.E.2d 186 (2020).

85. *Id.* at 153, 849 S.E.2d at 188.

contractor performed some of the work and then had a parting of ways with the owner that resulted in a mechanic's lien. The lien included amounts for unpaid work performed and anticipated profit on the contracted work not performed. The trial court granted summary judgment in favor of the owner, determining that anticipated profit was non-lienable and therefore that the entire lien was void. The court of appeals affirmed the determination that anticipated profit is non-lienable; however, it reversed the determination that the lien was entirely void because it included non-lienable amounts.[86]

The supreme court ultimately affirmed the court of appeals' decision.[87] The supreme court looked to Georgia's mechanics lien statute and determined that a "lien is limited to amounts actually due to the claimant based on the work completed at the time the lien is filed, not amounts that the claimant was expecting to receive for future work under the contract."[88] The supreme court determined that the court of appeals correctly applied prior case law by voiding the overstated portion of a mechanic's lien but not the lien in its entirety.[89]

In *Cook Sales, Inc. v. Concrete Enterprises, LLC*,[90] the Georgia Court of Appeals decided an issue relating to a 2009 change in the lien law. Before 2009, O.C.G.A. § 44-14-361.1(a) required a lienor to file a notice of commencement of the lien action within fourteen days of filing such an action.[91] In 2009, that code section was revised to require filing the notice of commencement to within thirty days after "commencement of a lien action."[92]

In *Cook Sales*, a lienor-subcontractor timely filed suit against the general contractor, but process was not served on the defendant-general contractor for more than three months.[93] The subcontractor filed its notice of commencement of the action against the general contractor four days after obtaining service. After obtaining a default judgment against the general contractor, the subcontractor filed a foreclosure suit against the property owner, who moved for summary judgment based on the subcontractor's failure to file its notice of commencement of action within

86. *Id.* at 154, 849 S.E.2d at 188.
87. *Id.*
88. *Id.* at 154–55, 849 S.E.2d at 189.
89. *Id.* at 155, 849 S.E.2d at 189.
90. 356 Ga. App. 899, 849 S.E.2d 734 (2020).
91. *Id.* at 901–02, 849 S.E.2d at 736.
92. *Id.* at 902, 849 S.E.2d at 736.
93. *Id.* at 902, 849 S.E.2d at 736–37.

thirty days after filing that lawsuit. The trial court denied the motion to dismiss but granted a certificate of immediate review.[94]

The court of appeals ultimately reversed the trial court, explaining that the change in statutory language in 2009 from "filing" to "commencement" did not change the underlying requirement that lien claimants file the notice of commencement of action within the prescribed time of the filing of the action.[95]

The Georgia Court of Appeals in *Optum Construction Group, LLC v. City Electric Supply Company*,[96] addressed another mechanic lien issue. In that case, the general contractor subcontracted with "Palmetto Power Services Palmetto Power Unlimited, [I]nc." (Palmetto Unlimited). However, Palmetto Power Services, LLC (Palmetto Services) contracted with a material supplier for the project and then failed to fully pay for the materials. The supplier filed a lien, which the general contractor bonded off the property.[97]

After reducing its claims against Palmetto Services to judgment, the supplier sued the general contractor and its surety to collect on the lien discharge bond.[98] Those defendants sought summary judgment invalidating the lien on the grounds that Palmetto Services was outside the chain of contracts with the owner. The Gwinnett County State Court denied the general contractor's motion and granted judgment to suppliers. The general contractor appealed, and the court of appeals affirmed in part and reversed in part.[99]

The court of appeals determined there was a disputed issue of fact whether the general contractor had a contractual relationship through a chain of contracts with Palmetto Services.[100] The court noted that the entity identified in the subcontract, Palmetto Unlimited, never existed under the name listed in the subcontract, and thus the record was "not clear as to identity of the subcontractor."[101] Consequently, the court reversed the grant of summary judgment against the general contractor and its surety, while affirming the denial of the general contractor's motion for summary judgment.[102]

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94. *Id.* at 899, 849 S.E.2d at 735.
95. *Id.* at 903, 849 S.E.2d at 737.
96. 356 Ga. App. 797, 849 S.E.2d 238 (2020).
97. *Id.* at 797–98, 849 S.E.2d at 238–39.
98. *Id.* at 798, 849 S.E.2d at 239.
99. *Id.*at 797–98, 849 S.E.2d at 239.
100. *Id.* at 800, 849 S.E.2d at 240.
101. *Id.*
102. *Id.* at 800–01, 849 S.E.2d at 241.

VI. INSURANCE COVERAGE

The U.S. District Court for the Northern District of Georgia in *Phoenix Ins. Co. v. Robinson Constr. Co.*,[103] determined it had subject-matter jurisdiction over an insurer's requests for declaratory judgment concerning the insurer's duty to defend, but not its duty to indemnify. In *Phoenix Ins. Co.*, the insured subcontractor was sued for various breaches including defective work.[104] The subcontractor made demand on its commercial general liability insurance policies (CGL policies) and its commercial excess liability policies (umbrella policies) to defend and indemnify the subcontractor in a lawsuit filed by the general contractor.[105] The insurers filed a declaratory judgment action seeking to avoid providing any coverage under the policies.[106]

In its decision, the court separated the duty to defend coverage from the liability coverage issues.[107] The court first determined that the duty-to-defend issue was ripe for determination because the insured subcontractor had made demand upon the insurers to defend it, and the insurers had denied that demand.[108] However, the court further determined that it did not have subject-matter jurisdiction over this claim for declaratory relief because the subcontractor's liability to the general contractor had not yet been determined.[109] Until the subcontractor's liability was established, and on what grounds, the issue of the insurers' duty to indemnify the subcontractor was not yet ripe.[110]

In another declaratory judgment action involving insurance coverage, the U.S. District Court for the Northern District of Georgia addressed an insurer's argument for exclusion based on the "All Construction" provision of the policy.[111] In *Kinsale Ins. Co. v. JazAtlanta 438, LLC*, the insured, JazAtlanta 438, LLC, obtained a commercial general liability policy from Kinsale Insurance Company.[112] The policy contained a

103. No. 20CV414LMM, 2020 U.S. Dist. LEXIS 182389, at *1 (N.D. Ga. Aug. 21, 2020).

104. *Id.* at *2.

105. *Id.* at *2–3.

106. *Id.* at *1–2.

107. *Id.* at *6.

108. *Id.* at *7–8.

109. *Id.* at *11–12.

110. *Id.* at *12.

111. Kinsale Ins. Co. v. JazAtlanta 438, LLC, No. 19CV02044SDG, 2020 U.S. Dist. LEXIS 159063, at *1 (N.D. Ga. Sept. 1, 2020).

112. *Id.* at *1.

provision entitled "Exclusion—All Construction" that excluded coverage, broadly, for claims arising out of construction and related activities.[113]

Defendant McConnell suffered injuries after completing carpentry work on the insured's property.[114] Upon completing work for the day, he attempted to leave the property, but a gate blocked his exit. He attempted to open the gate, but it fell and crushed McConnell's foot and ankle. As a result, he sued the insured. The insurer asked the Northern District of Georgia to declare that it had no duty to defend or indemnify the insured concerning McConnell's lawsuit. The insurer and insured filed cross motions for summary judgment.[115]

Applying standard rules of contract construction, the court looked specifically to the policy's "All Construction" exclusion. [116] The undisputed facts showed that McConnell was performing construction activities on the property.[117] "[B]ut for his carpentry work, [he] would not have been on the [p]roperty, would not have attempted to lift the gate, and his alleged injuries would not have occurred."[118] Accordingly, the court denied the insured's motion for summary judgment and granted the insurer's motion for summary judgment.[119]

VII. HOMEOWNER'S ASSOCIATIONS

In *Howell v. Lochwolde Homeowners Association, Inc.*,[120] the Georgia Court of Appeals decided a restrictive-deed case. A homeowner was constructing accessory structures on his property, including a "free-standing, 26-foot high, fully insulated 'tree-house' with a shingled roof and a separate lookout tower and zip line platform."[121] The homeowners' association (HOA) denied the homeowner's construction plans and fined the homeowner for violating covenants in the property deed when he continued with construction.[122]

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113. *Id.* at *1–2 "This insurance does not apply to any claim or 'suit' for 'bodily injury' . . . arising directly or indirectly out of, related to, or, in any way involving any construction, development, reconstruction, rebuilding, restoration, renovation, remodeling, repair, upgrading, improvement, or refurbishing of any building or structure of any description."

114. *Id.* at *2–3.

115. *Id.*

116. *Id.* at *7–8 (citing Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 269 Ga. 326, 327, 498 S.E.2d 492, 494 (1998)).

117. *Id.* at *8.

118. *Id.* at *11.

119. *Id.* at *14.

120. 355 Ga. App 678, 845 S.E.2d 410 (2020).

121. *Id.* at 679, 845 S.E.2d at 412.

122. *Id.* at 679, 845 S.E.2d at 412–13.

Howell ultimately wound up before the court of appeals after the trial court upheld the HOA's authority to require removal of the structures, but denied its authority to fine the homeowner.[123] The court of appeals reversed and remanded based on a peculiar fact—the HOA had been administratively dissolved for over fifteen years for failing to pay required renewal fees.[124] While the finer points of the court of appeals' decision are less about construction than association law, the case is instructive to investigate corporate formalities if a property developer is challenged by an HOA or other property association.

VIII. LOST PROFITS DAMAGES

In *Mitchell & Associates, Inc. v. Global Systems Integration, Inc.*,[125] the Georgia Court of Appeals affirmed the grant of summary judgment awarding lost profits despite contract language waiving consequential damages. The lost profits were those the contractor would have earned under its prime contract had the subcontractor properly performed its sub-contractual obligations.[126]

The court of appeals began its analysis with the premise that "'[a] party who has been injured by a breach of contract can recover profits that would have resulted from performance' of that contract."[127] The court then determined that the lost profits were direct, not consequential, damages because those lost profits "[could] be traced solely to [the subcontractor's] breach of the Agreement and were the immediate fruit of that contract."[128] Finally, the court of appeals affirmed the Cherokee County Superior Court's award of these lost-profit damages because theses damages were not barred by the contractual waiver of consequential damages.[129]

IX. SAFETY-STATUTORY EMPLOYEE

In *Brack v. CPPI of Georgia, Inc.*,[130] the Georgia Court of Appeals addressed an all-too-common fact pattern for a construction site—injury of a subcontractor's employee.[131] The subcontractor's employee sued the

123. *Id.* at 679–80, 845 S.E.2d at 413.

124. *Id.* at 678, 682, 845 S.E.2d at 412, 414.

125. 356 Ga. App. 200, 844 S.E.2d 551 (2020).

126. *Id.* at 203, 844 S.E.2d at 554.

127. *Id.* (quoting Comtrol, Inc. v. H-K Corp., 134 Ga. App. 349, 352, 214 S.E.2d 588, 591 (1975)).

128. *Id.*

129. *Id.*

130. 357 Ga. App. 744, 849 S.E.2d 521 (2020).

131. *Id.* at 745, 849 S.E.2d at 522.

general contractor, seeking to recover outside of the statutory workman's compensation system.[132] The trial court granted summary judgment determining that the sale-of-goods exception to the workman's compensation system did not apply.[133]

The *Brack* decision may seem somewhat routine, but it foreshadows an issue likely to become more important in the future. The use of modular building systems continues to increase, with the modules often produced in a factory, shipped to the project site, and assembled by a small crew of trained technicians. This type of modular construction is more likely to be a sale-of-goods transaction than that in *Brack* because the value of the manufactured components substantially outweighs that of the installation services. The sale-of-goods aspect of modular construction has many implications beyond workman's compensation.

In *Richey v. Kroger Company*, [134] the Georgia Court of Appeals addressed a very different workplace safety case. In *Richey*, Kroger hired a contractor to perform work on its property.[135] One of the contractor's employees observed a person entering a worker's car while parked in Kroger's parking lot. The worker ran to his vehicle and knocked on the window, only to be shot and killed by the intruder. The worker's widow sued Kroger for failing to maintain a safe and secure parking lot, despite a "long history" of crimes committed in the parking lot and nearby.[136]

The trial court granted summary judgment to Kroger, finding that the worker acted unreasonably by leaving the safety of the worksite and placing himself in danger by engaging the individual who had broken into the truck.[137] The court of appeals reversed the grant of summary judgment, determining the record did not show that no reasonable person would have acted as did the worker, and thus the reasonableness of the worker's conduct was a question for the jury.[138]

X. AMENDMENT TO STATUTE OF REPOSE

In response to the 2019 opinion of *Southern States Chemical, Inc. v. Tampa Tank & Welding, Inc.*,[139] the Georgia General Assembly enacted S.B. 451[140], which excludes breach-of-contract claims from Georgia's

132. *Id.* at 849 S.E.2d at 522–23.
133. *Id.* at 747, 849 S.E.2d at 523.
134. 355 Ga. App. 551, 845 S.E.2d 351 (2020).
135. *Id.*, 845 S.E.2d at 352.
136. *Id.* at 552, 845 S.E.2d at 353.
137. *Id.*
138. *Id.* at 555, 845 S.E.2d at 355.
139. 353 Ga. App. 286, 836 S.E.2d 617 (2019).
140. Ga. S.B. 451, Reg. Sess. (2020).

eight-year statute of repose for construction-related claims.[141] In *Southern States Chemical*, the Georgia Court of Appeals held that the statute of repose applied to claims for breach of an express warranty that extended beyond the eight-year period.[142] To avoid the loss of such long-term warranties, the legislature added O.C.G.A. § 9-3-51(c), which excludes from the statute of repose "actions for breach of contract, including, but not limited to, actions for breach of express contractual warranties."[143]

141. O.C.G.A. § 9-3-51 (2021).

142. 353 Ga. App. at 295, 836 S.E.2d at 625.

143. O.C.G.A. § 9-3-51(c) (2021).