Mercer Law Review

Volume 73
Number 1 *Annual Survey of Georgia Law*

Article 14

12-2021

Local Government

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I. INTRODUCTION

This Article addresses selected opinions and legislation of interest to the local government laws issued during the Survey period of this publication.[1]

II. SOVEREIGN IMMUNITY

Perhaps the most remarkable development on sovereign immunity[2] in recent years did not come from the courts but instead the voters. Attempting to address the issues raised and later decided in *Lathrop v. Deal*,[3] the General Assembly has worked tirelessly to establish a waiver of sovereign immunity for claims seeking injunctive and declaratory relief.[4] However, at least one bill failed to make it to the governor's desk[5] and two other bills were vetoed by successive governors.[6] Not giving up on their efforts, lawmakers were able to circumvent the governor during the 2020 legislative session by pushing through a constitutional amendment that put the question directly in voters' hands.[7] House

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1. For an analysis of Georgia local government laws during the prior Survey period, see Russell A. Britt et al., *Local Government Law*, 72 MERCER L. REV. 223 (2020).

2. The Georgia Constitution provides:

> [S]overeign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. GA. CONST. art. I, § 2, para. 9(e).

3. 301 Ga. 408, 801 S.E.2d 867 (2017) (holding sovereign immunity bars declaratory and injunctive relief claims against the State, including challenges to a law's constitutionality under the Georgia Constitution); *see* Christian Henry et al., *Local Government Law*, 70 MERCER L. REV. 177, 178–82 (2018) (discussing the *Lathrop* decision).

4. *Lathrop*, 301 Ga. at 408, 801 S.E.2d at 869.

5. *See* Ga. H.R. Bill 791, Reg. Sess. (2018) (unenacted).

6. *See Veto Number 2*, GOVERNOR NATHAN DEAL OFFICE OF THE GOVERNOR, https://nathandeal.georgia.gov/press-releases/2016-05-03/deal-issues-2016-veto-statements/ (last visited August 18, 2021) (vetoing House Bill 59 (2016) because "[w]hile the purported purpose of [House Bill] 59 was to legislatively address a recent judicial decision, the waiver of sovereign immunity contained therein is not sufficiently limited."); *Veto 5*, GOVERNOR BRIAN P. KEMP 2019 SESSION OF THE GEORGIA ASSEMBLY VETO MESSAGES & SIGNING STATEMENTS (2019), https://gov.georgia.gov/documents/2019-veto-statements (last visited August 18, 2021) (vetoing House Bill 311 (2019) because "considering the possible ramifications of a [sovereign immunity] wavier, it is essential that the provisions be appropriately tailored in conjunction with the executive branch to provide pathways for judicial intervention without unduly interfering with the daily operations of the state.").

7. *See* Ga. H.R. Res. 1023, Reg. Sess., 2020 Ga. House 1, 1 (proposing an amendment to the state constitution waiving sovereign immunity for declaratory judgment actions for constitutional violations).

Resolution 1023, presented on the statewide ballot on November 3, 2020, was overwhelmingly approved with over 74% of the vote.[8]

With the adopted constitutional amendment in place, sovereign immunity is now waived for actions seeking declaratory relief for actions allegedly outside the scope of the government's legal authority or in violation of the Georgia or United States Constitution.[9] Where a court awards declaratory relief under this expressed waiver, sovereign immunity is also waived for enjoining such acts and enforcing the judgment.[10] But this limited waiver does not extend to damages, attorney's fees, or costs of litigation, unless specifically authorized by a later Act of the General Assembly.[11] Notably, the scope of the constitutional waiver "shall apply to past, current, and prospective acts which occur on or after January 1, 2021."[12] It, therefore, remains to be seen how appellate courts will apply this waiver to acts described as ongoing and continuous on or after January 1, 2021, yet first arose before this trigger date.

III. OFFICIAL IMMUNITY

The Georgia Court of Appeals' holding in *Ware v. Jackson*[13] is a good reminder that establishing a negligently performed ministerial act in the context of official immunity does not necessarily establish liability alone.[14] The facts involved an inmate murdered by his cellmate while incarcerated in the Fulton County Jail.[15] After his murder, it was discovered that the inmate should have been released from the jail three months prior to his death. As a result, the inmate's estate sued the sheriff and a sheriff's office employee who worked in the records department of the jail. The Fulton County Superior Court granted summary judgment

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8. *November 3, 2020 General Election Constitutional Amendment #2*, GA. SEC'Y OF STATE, https://results.enr.clarityelections.com/GA/105369/web.264614/#/detail/800200 (last visited August 18, 2021).

9. GA. CONST. art. I, § 2, para. 5(b)(1).

10. *Id.*

11. *Id.* at (b)(4).

12. *Id.* at (b)(1).

13. 357 Ga. App. 470, 848 S.E.2d 725 (2020), *reconsideration denied* (Oct. 30, 2020).

14. The Georgia Constitution provides:

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

GA. CONST. art. I, § 2, para. 9(d).

15. *Ware*, 357 Ga. App. at 470, 848 S.E.2d at 727.

to both defendants, concluding they were entitled to official immunity.[16] Although the court of appeals affirmed the grant of official immunity to the sheriff, it reversed the finding that the records employee was entitled to such immunity.[17] However, the court of appeals nonetheless affirmed the grant of summary judgment in favor of the records employee on different grounds.[18]

First, as to the sheriff, the court of appeals found that all of the claims against him were necessarily premised on the sheriff's decision to delegate authority related to the operation and oversight of the jail to his employees.[19] Therefore, any acts or decisions made by the sheriff in this regard "would clearly call upon him to exercise personal deliberation and judgment based upon his experience and expertise."[20] Such acts, therefore, were deemed discretionary, and absent evidence of actual malice, the sheriff was entitled to official immunity.[21]

As to the records employee, however, the court of appeals found that the trial court erred in granting her summary judgment on the basis of official immunity.[22] It reasoned that once the records employee became aware of a discrepancy between a calendar and an inmate's record, "she had a ministerial duty to process the calendar in its entirety in order to ensure that every inmate's record, including [the subject inmate's], had been updated."[23] The court of appeals nonetheless found that the failure to perform this ministerial duty was not the proximate cause of the inmate's injuries.[24] It instead reasoned that the cellmate's "intervening criminal act broke the causal connection between [the records employee's] allegedly negligent conduct and [the inmate's] death."[25] Absent causation, the plaintiff could not establish a *prima facie* case for negligence, and the records employee, therefore, was still entitled to summary judgment on the negligence-based claims.[26]

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16. *Id.*

17. *Id.*

18. *Id.* at 470–71, 848 S.E.2d at 727.

19. *Id.* at 474–75, 848 S.E.2d at 730.

20. *Id.* at 475, 848 S.E.2d at 730.

21. *See id.* (holding sheriff entitled to official immunity for discretionary acts without discussing actual malice element—presumably because allegations of actual malice were not at issue in the case).

22. *Id.* at 475, 848 S.E.2d at 730–31.

23. *Id.* at 476, 848 S.E.2d at 731.

24. *Id.*

25. *Id.*

26. *See id.* at 476–79, 848 S.E.2d at 731–33.

In *Melton v. McCarthan*,[27] the Georgia Court of Appeals addressed another fact pattern involving an inmate being attacked by a cellmate, but the issue of causation was not reached.[28] In this case, the inmate yelled for assistance while holding the attacking cellmate.[29] A deputy responded to the scene, secured the cellmate, and moved him out of the cell. The deputy, however, failed to complete a report of the incident. During a subsequent shift, the deputy left for the day and a sergeant arrived to find the cellmate out of his assigned cell. Having no knowledge of the earlier altercation, the sergeant ordered the cellmate back to his assigned cell, and soon after, the cellmate attacked and injured the inmate. The inmate proceeded to file suit against both the deputy and sergeant.[30]

The Fulton County State Court denied both officials' summary judgment motions.[31] On appeal, the deputy argued that the trial court erred in finding he was not entitled to official immunity, claiming "his duty to create an incident report was not triggered because he had to use discretion to determine whether the incident threatened any person's safety or threatened the orderly control and security of the facility."[32] The court of appeals disagreed, holding that, while the policy did not define what constitutes "physical harm or an incident threatening a person's safety or the orderly control and security of the facility," the evidence showed that any fight required an incident report be created.[33] The deputy, therefore, "had a ministerial duty to create a report of the initial incident prior to the end of his shift and was not entitled to official immunity[.]"[34]

On the other hand, the court of appeals reversed the denial of official immunity for the sergeant.[35] The plaintiff argued that a policy requiring certain staff to review earlier events and advise employees of possible noteworthy events or possible hazards from prior shifts imposed an affirmative duty to investigate events from prior shifts.[36] The court of appeals rejected this argument, holding that the evidence did not support such reading of the policy and ruling that the sergeant's lack of

27. 356 Ga. App. 676, 848 S.E.2d 684 (2020).
28. *Id.* at 676–79, 848 S.E.2d at 685–87.
29. *Id.* at 676, 848 S.E.2d at 685.
30. *Id.*
31. *Id.*
32. *Id.* at 678, 848 S.E.2d at 686.
33. *Id.*
34. *Id.*
35. *Id.* at 678, 848 S.E.2d at 687.
36. *Id.* at 678–79, 848 S.E.2d at 687.

knowledge of the subject incident "preclude[d] a finding that he had a duty to inform himself or staff."[37] Without any such knowledge, there was no evidence that the sergeant breached a ministerial duty, and he was, therefore, entitled to official immunity.[38] Accordingly, the court of appeals reversed the trial court's denial of summary judgment as to the sergeant.[39]

Although official immunity is generally a threshold question of law,[40] it sometimes requires factual findings by the jury to be decided. *Patel v. Lanier County*,[41] involved a written policy of the Lanier County Sheriff's Office that arguably created a ministerial duty not to leave detainees alone in vehicles during transport.[42] The sheriff's deputy defendant did not deny the existence of the policy or that it created a ministerial duty; he instead argued that the policy did not apply to the transport of pretrial detainees like the plaintiff.[43]

The Eleventh Circuit Court of Appeals held that the text of the policy favored it applying to all detainees, but oral testimony gleaned in discovery supported the contention that the policy did not apply to pretrial detainees.[44] While the United States District Court for the Middle District of Georgia granted the deputy official immunity on summary judgment, the plaintiff argued that the testimonial evidence contradicting the text of the policy, at most, created a factual question for the jury. The court of appeals agreed. It, therefore, held, "[o]n remand . . . a jury should determine—in light of the written policy and the testimonial evidence—whether [the deputy's] conduct was governed by a 'specific, simple, absolute, and definite duty' not to leave detainees like [the plaintiff] unattended during transport."[45]

In *Hardigree v. Lofton*,[46] the Eleventh Circuit examined what constitutes "actual malice" or "intent to injure" in order to overcome an officer's otherwise entitlement to official immunity for discretionary functions under Georgia law.[47] The facts involved a police officer's entry

37. *Id.* at 679, 848 S.E.2d at 687.

38. *Id.*

39. *Id.*

40. *See* Cosby v. Lewis, 308 Ga. App. 668, 672, 708 S.E.2d 585, 588 (2011) ("[O]fficial immunity is not a mere defense but rather *an entitlement not to be sued* that must be addressed as a threshold matter before a lawsuit may proceed.")

41. 969 F.3d 1173 (11th Cir. 2020).

42. *Id.* at 1192.

43. *Id.*

44. *Id.* at 1193.

45. *Id.*

46. 992 F.3d 1216 (11th Cir. 2021).

47. *See id.* at 1233.

into the plaintiff's house and use of force on the plaintiff in connection with a criminal drug investigation.[48] It was undisputed that such police functions are discretionary, so the only question was whether the police officer acted with actual malice or intent to cause injury.[49]

In the summary judgement record, several facts supported the plaintiff's allegations of actual malice.[50] Most notably, the police officer testified that he did not have probable cause to enter the house, but he did so anyway. This finding highlights how courts sometimes rely on the lack of probable or arguable probable cause in the context of federal law claims to support a finding of actual malice related to official immunity and state law claims.[51] With a lack of probable cause to enter the house and arrest the plaintiff, and the plaintiff's version of facts supporting the police officer's excessive use of force (*inter alia*, tasing the plaintiff in the penis from a short distance and then tasing him again in the upper thigh), the court of appeals held that a jury could find that the police officer acted with actual malice.[52] The United States District Court for the Northern District of Georgia's denial of official immunity was therefore affirmed.[53]

IV. TAXATION

This year saw two cases analyzing O.C.G.A. § 48-5-380,[54] specifically the time in which a suit for a tax refund can be commenced, and a case concerning sufficiency to state a tax refund claim under the statute. Of these two cases discussed herein, the authors saw one seminal case interpreting recent legislative amendments, and one case backing the sufficiency of the plaintiff's claims for a tax refund.

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48. *Id.* at 1222–23.

49. *Id.* at 1233.

50. *Id.*

51. *See, e.g.*, Wright v. Watson, 209 F. Supp. 3d 1344, 1371 (2016) (holding that because a jury could conclude that officers did not have probable cause for a search warrant and manufactured evidence to support the warrant, the jury could also infer that officers acted with actual malice when they made the decision to seek the search warrant) (citing Bateast v. Dekalb Cty., 258 Ga. App. 131, 132, 572 S.E.2d 756, 758 (2002) (finding genuine fact dispute on official immunity because jury could infer that officers arrested the plaintiff despite knowing that she did not commit any crime)); *but see* Mays v. City of Union Point, et al, 3:19-CV-00084 (Doc. 23) (Royal, J.) (M.D. Ga. 2021) (holding that although plaintiff sufficiently alleged that officers lacked arguable probable cause to arrest plaintiff and used excessive force during the arrest, plaintiff failed to alleged sufficient facts that would suggest officers acted with actual malice).

52. *Hardigree*, 992 F.3d at 1233.

53. *Id.*

54. O.C.G.A. § 48-5-380 (2021).

On June 25, 2021, the Georgia Court of Appeals held in *Jones v. City of Atlanta*:[55]

> O.C.G.A. § 48-5-380 contains no 30-day limitation period for challenging the agency's decision. Indeed, under a plain reading of the statute, the only restrictions on a plaintiff who has filed a claim with the municipality are that 'no suit may be commenced until the earlier of the governing authority's denial of the request for refund or the expiration of 90 days from the date of filing the claim[,]' and '[u]nder no circumstances may a suit for refund be commenced more than five years from the date of the payment of taxes or fees at issue.' Those restrictions are met in this case. This reading comports with the overall scope of O.C.G.A. § 48-5-380, which allows a taxpayer to directly file suit, and states that an action under O.C.G.A. § 48-5-380 is not the exclusive remedy for a taxpayer.[56]

This lawsuit was regarding a class action complaint in the Superior Court of Fulton County alleging that certain fees imposed by the Department of Watershed Management (DWS) of the City of Atlanta constituted illegal taxes, and thus, under O.C.G.A. § 48-5-380,[57] the plaintiff and the class were entitled to a refund of these fees.[58] The class action took issue with two fees imposed by DWS: (1) a franchise fee and (2) a payment in lieu of taxes (PILOT).[59] The plaintiff originally filed a complaint with the commissioner of DWS on March 24, 2017, disputing application of these fees. The commissioner denied Jones's complaint, holding the fees were lawful. The plaintiff appealed the decision to the DWS appeals board, and on January 26, 2018, the appeals board denied the appeal, holding it was without jurisdiction to rule on the legality of the City's ordinances.[60] The plaintiff filed the lawsuit on June 19, 2018. The City of Atlanta moved to dismiss the plaintiff's claim for lack of jurisdiction, stating the plaintiff failed to exhaust all administrative remedies.[61] Additionally, the City of Atlanta contended that, under City of Atlanta Ordinance § 154-31 and O.C.G.A. §§ 5-4-1 and 5-4-6, the plaintiff only had thirty days to seek judicial review of the appeal board's decision, and the plaintiff failed to meet this thirty-day deadline. The trial court granted the City of Atlanta's motion to dismiss, finding it did not have subject matter jurisdiction on the plaintiff's claims. The plaintiff

55. 360 Ga. App. 152, 860 S.E.2d 833 (2021).
56. *Id.* at 156, 860 S.E.2d at 837.
57. O.C.G.A. § 48-5-380.
58. *Jones*, 360 Ga. App. at 152, 860 S.E.2d at 834.
59. *Id.* at 152, 860 S.E.2d at 835.
60. *Id.* at 152–53, 860 S.E.2d at 835.
61. *Id.* at 153, 860 S.E.2d at 835.

appealed the trial court's decision to the Supreme Court of Georgia, who transferred the case to the Georgia Court of Appeals with commentary.[62]

The Georgia Court of Appeals determined the trial court did err in its jurisdictional ruling, and further interpreted O.C.G.A. § 48-5-380.[63] The court stated O.C.G.A. § 48-5-380 provides that a taxpayer may choose from two alternative procedures to seek a tax refund: (1) it allows a taxpayer to either directly file suit or (2) first file a claim with the municipality before seeking judicial review.[64] The court noted the previous version of this statute, before it was amended in 2014, required the taxpayer to first file a claim with the municipality before filing suit; however, upon the amendment this was no longer a requirement.[65] The court bolstered its interpretation by showing in the prior version of O.C.G.A. § 48-5-380, the General Assembly did impose a limitation period for filing suit after the agency issued its decision.[66] Specifically, holding the prior version of the statute showed that "it is clear that the General Assembly knew how to create such a requirement, but chose not to do so."[67] Moreover, the court held that there was not any wording in the current nor the previous version of the statute referencing the certiorari procedure or the corresponding thirty-day limitation period.[68] As such, the court determined there was no thirty-day limitation period for challenging the agency's decision, vacated the trial court ruling, and remanded the case.[69]

The Georgia Court of Appeals on December 15, 2020, held in *Rice et al. v. Fulton County*,[70] that under O.C.G.A. § 48-5-380 the taxpayers' allegations were sufficient to state a tax refund claim.[71] In this case, the taxpayers brought a putative class action against Fulton County, City of Atlanta, City of Alpharetta, City of Johns Creek, City of Milton, City of Roswell, City of Sandy Springs, City of Chattahoochee Hills, City of College Park, City of East Point, City of Fairburn, City of Hapeville, City of Palmetto, City of Union City, and City of South Fulton, seeking a

62. *Id.* (The Supreme Court of Georgia stated the following in transferring the case to the Georgia Court of Appeals: "[i]f the Court of Appeals determines that the trial court erred in its jurisdictional ruling, it should remand the case to the trial court for the entry of a proper order on the other issues raised in [the City's] motion to dismiss.").

63. *Id.* at 153–55, 860 S.E.2d at 835–36.

64. *Id.* at 155, 860 S.E.2d at 836.

65. *Id.* at 155, 860 S.E.2d at 836–37.

66. *Id.* at 156, 860 S.E.2d at 837.

67. *Id.* at 156–57, 860 S.E.2d at 837.

68. *Id.* at 157, 860 S.E.2d at 837.

69. *Id.* at 157, 860 S.E.2d at 838.

70. 358 Ga. App. 1, 852 S.E.2d 860 (2020).

71. *Id.* at 9, 852 S.E.2d at 867.

refund of *ad valorem* property taxes based on alleged illegal assessments of their properties under state constitutional and statutory law.[72]

Specifically, in 2018, the taxpayers filed their putative class action complaint against Fulton County seeking property tax refunds pursuant to O.C.G.A. § 48-5-380.[73] The taxpayers amended their complaint twice and added additional plaintiffs and several municipalities within Fulton County as defendants. The taxpayers

> alleged in their complaint, as amended, that by appraising their properties in 2016 and 2017 based on sales price without reappraising similarly situated residential properties that had not been sold in 2015 or 2016, the Board violated the Uniformity Clause of the Georgia Constitution, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the equalization requirement imposed by O.C.G.A. § 48-5-306(a).[74]

As such, the taxpayers alleged that they were due refunds from the defendants of the taxes illegally assessed in 2016 and 2017, in addition to pre- and post-judgment interest and attorney's fees and expenses under O.C.G.A. § 13-6-11.[75] The defendants moved to dismiss the taxpayers' amended complaint, under O.C.G.A. § 48-5-380, asserting the taxpayers failed to state a claim for a tax refund. The Fulton Superior Court granted the defendants' motions to dismiss and concluded that the facts as alleged in the amended complaint failed to state a claim for an illegal assessment of the taxpayers' properties to state a claim within the purview of the tax refund statute, O.C.G.A. § 48-5-380.[76] Further, the trial court concluded the gravamen of the taxpayers'

> allegations was that the Board, in assessing the value of their properties for the 2016 and 2017 tax years, had failed to consider other factors beyond the recent sale price, and the [trial] court ruled that such a claim could only be pursued through the tax appeal process set forth in O.C.G.A. § 48-5-311.[77]

The Georgia Court of Appeals stated: "[t]o determine whether a claim can be brought as a tax refund claim under O.C.G.A. § 48-5-380, courts must look 'not [at] the general nature of the ground asserted, but the

72. *Id.* at 1–2, 852 S.E.2d at 862.
73. *Id.* at 2–3, 852 S.E.2d at 863.
74. *Id.* at 3, 852 S.E.2d at 863.
75. *Id.*
76. *Id.* at 4, 852 S.E.2d at 864.
77. *Id.*

underlying facts supporting the asserted ground.'"[78] Therefore, the court held that a

> claim based on mere dissatisfaction with an assessment, or on an assertion that the assessors, although using correct procedures, did not take into account matters which the taxpayer believes should have been considered (e.g., different comparable sales for the purpose of establishing value), is not . . . one which asserts that an assessment is erroneous or illegal within the meaning of [O.C.G.A.] § 48-5-380.[79]

The court held a claim is cognizable

> [i]f the taxpayer alleges that the assessment is based on matters of fact in the record which are inaccurate, or that the assessment was reached by the use of illegal procedures, then the taxpayer has asserted a claim that the taxes were 'erroneously or illegally assessed and collected' under O.C.G.A. § 48-5-380.[80]

Further, the court held in this "case the amended complaint did not simply allege that the Board erred by using the recent sales price to value the" taxpayers' properties and "used different valuation methods when reassessing sold and unsold property for the 2016 and 2017 tax years."[81]

In construing the facts in favor of the taxpayers, the court held that the taxpayers

> "alleged that the Board intentionally singled out for reassessment and increased taxation only that small group of taxpayers who purchased real property in 2015 or 2016, while leaving undisturbed the assessments of other property in the same class that had not been sold, [ ] creating significant tax disparities between similarly situated taxpayers."[82]

The court reasoned that the taxpayers' allegations went beyond a claim that the Board improperly relied on sales prices for valuation or used different valuation methods when reappraising different types of property, and therefore, the taxpayers had a cognizable claim under

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78. *Id.* at 5, 852 S.E.2d at 864 (quoting Gwinnett Cnty. v. Gwinnett I P'ship, 265 Ga. 645, 647, 458 S.E.2d 632, 635 (1995)).

79. *Id.* at 1, 852 S.E.2d at 864 (quoting *Gwinnett*, 265 Ga. at 647, 458 S.E.2d at 635).

80. *Id.* at 5, 852 S.E.2d at 864–65 (quoting *Gwinnett*, 265 Ga. at 647, 458 S.E.2d at 635).

81. *Id.* at 8, 852 S.E.2d at 867.

82. *Id.*

O.C.G.A. § 48-5-380.[83] As such, the court reversed the trial court's granting of defendants' motion to dismiss.[84]

V. SERVICE DELIVERY STRATEGIES

In the last year, the Georgia Court of Appeals reviewed one case regarding service delivery strategies, *City of Sandy Springs v. City of Atlanta*.[85] This case was regarding the definition of an "affected municipality" under the Service Delivery Strategy Act (SDS Act) entitled to mandatory mediation of its claim.

The Georgia Court of Appeals on February 26, 2021, held that the City of Sandy Springs was not an affected municipality under the SDS Act entitled to mandatory mediation of its claim regarding the City of Atlanta's refusal to review its rates, determining that the City of Sandy Springs was required to submit its challenge of the reasonableness of the rate to alternative dispute resolution before bringing challenge in court.[86] The City of Sandy Springs alleged that in October 2005, a service delivery agreement designated the City of Atlanta as the direct retail water service provider for all of unincorporated Fulton County, which included the area that was later incorporated as the City of Sandy Springs in December 2005; that the City of Atlanta maintained an outside city water rate that was 21% higher than the inside water rate, and that this rate differential was arbitrary, in violation of O.C.G.A. § 36-70-24(2)(B); that the City of Atlanta's refusal to review and revise the water fees assessed to Sandy Springs customers violated the SDS Act, and that Sandy Springs was entitled to alternative dispute resolution under O.C.G.A. § 36-70-28(c); and that a judge outside the circuit initiate mandatory mediation pursuant to O.C.G.A. § 36-70-25.1(d)(1).[87] Further, the City of Sandy Springs filed a motion to transfer venue, requesting transfer to an adjoining judicial circuit superior court pursuant to O.C.G.A. § 36-70-25.1(d)(1)(A).[88]

The City of Sandy Springs argued that the Fulton County Superior Court erred by determining the City of Sandy Springs was required to be a party to the current service delivery strategy before it could utilize O.C.G.A. § 36-70-28(c):[89]

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83. *Id.* at 8–9, 852 S.E.2d at 867.
84. *Id.* at 9, 852, S.E.2d at 867.
85. 358 Ga. App. 604, 855 S.E.2d 779 (2021).
86. *Id.* at 606–07, 855 S.E.2d at 782.
87. *Id.* at 604, 855 S.E.2d at 780–81.
88. *Id.* at 604, 855 S.E.2d at 781.
89. *Id.* at 605, 855 S.E.2d at 781.

> [i]n the event that a county or an affected municipality located within the county refuses to review and revise, if necessary, a strategy in accordance with paragraphs (2) and (3) of subsection (b)[,] then any of the parties may use the alternative dispute resolution and appeal procedures set forth in [O.C.G.A. § 36–70–25.1 (d)].[90]

"As used in [O.C.G.A. § 36-70-28], the term 'affected municipality' means each municipality required to adopt a resolution approving the local government service delivery strategy pursuant to subsection (b) of Code Section 36-70-25."[91] The court held that the City of Sandy Springs was not incorporated until December 2005, and thus did not meet the definition of an affected municipality pursuant to O.C.G.A. § 36-70-28(c), "as it was not required to adopt a resolution approving the service delivery strategy because the strategy was already in place."[92]

Instead, the court found that O.C.G.A. § 36-70-24 applied to the City of Sandy Springs' claims, which directs the City of Sandy Springs that in order to engage in a dispute regarding water rates, a governing authority must conduct a public hearing, secure a rate study, and participate in some form of alternative dispute resolution.[93] Therefore, the trial court did not err in finding the City of Sandy Springs' case was premature, and the Georgia Court of Appeals affirmed the trial court's decision.[94]

VI. OPEN RECORDS AND OPEN MEETINGS

A. OPEN MEETINGS ACT

Despite many boards across the state of Georgia holding telephonic meetings under emergency exception provisions of Georgia's Open Meetings Act during the COVID-19 pandemic, or perhaps as a result of same, there are no Open Meetings Act cases to report this year.

B. THE OPEN RECORDS ACT

There is one lone case to report this year with regard to Georgia's Open Records Act (the Act).[95] While the providers at Phoebe Putney Health System (Phoebe) in Albany, Georgia were battling one of the earliest and most severe outbreaks of COVID-19 in the State of Georgia, this case continued to advance through the appellate process where the Georgia

90. *Id.* (quoting O.C.G.A. § 36-70-28(c)).
91. *Id.* (quoting O.C.G.A. § 36-70-28(a)).
92. *Id.*
93. *Id.* at 606, 855 S.E.2d at 782.
94. *Id.* at 606–07, 855 S.E.2d at 782.
95. O.C.G.A. §§ 50-18-70 to 50-18-77.

Supreme Court ultimately ruled that Georgia's anti-strategic lawsuits against public participation (SLAPP) statute could not be invoked to strike a counterclaim for attorney's fees brought under the Act in response to a suit to enforce a request under the Act.[96]

Georgia's anti-SLAPP statute was enacted "to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech."[97] The General Assembly of Georgia also declared "that the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process."[98]

In the case at hand, the plaintiff, Geer, filed a request with Phoebe under the Act seeking the release of certain board meeting minutes.[99] Phoebe denied the request, asserting that it was not subject to the Act. Geer filed suit to compel the release of the records. Along with its answer, Phoebe also filed a counterclaim for attorney's fees under O.C.G.A. § 50-18-73(b). In response, Geer filed a motion to strike Phoebe's counterclaim for attorney's fees under Georgia's anti-SLAPP statute, "asserting that the counterclaim was nothing more than an effort to chill his rights to petition the government and to free speech."[100] The court of appeals affirmed the trial court's judgment, concluding that the anti-SLAPP statute does not apply in this context because the anti-SLAPP statute "does not preclude a party defending a lawsuit from preserving its right to seek attorney fees and expenses if the lawsuit later is determined to lack substantial justification."[101] A petition for certiorari to the Georgia Supreme Court was granted for the purpose of answering one singular question: whether the court of appeals erred in holding that the anti-SLAPP statute does not apply to Phoebe's counterclaim for attorney's fees under the Act.[102] The Georgia Supreme Court affirmed the trial court's decision relying on a somewhat different rationale.[103]

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96. Geer v. Phoebe Putney Health System, Inc., 310 Ga. 279, 288, 849 S.E.2d 660, 666 (2020).

97. O.C.G.A § 9-11-11.1(a).

98. *Id.*

99. *Geer*, 310 Ga. at 279–80, 849 S.E.2d at 661.

100. *Id.* at 280, 849 S.E.2d at 661.

101. *Id.* at 280–81, 849 S.E.2d at 662 (quoting Geer v. Phoebe Putney Health System, Inc., 350 Ga. App. 127, 128, 828 S.E.2d 108, 110 (2019)).

102. *Id.* at 281, 849 S.E.2d at 662.

103. *Id.*

Among the purposes of the Act is fostering confidence in government through openness to the public.[104] The court notes that, "[t]o that end, the Act provides broadly for access to 'public records' prepared, maintained, or received by any 'agency' covered by the Act."[105] As Phoebe conceded, because requests under the Act, "by their very nature, pertain to public entities and records regarding matters of public interest or concern, issues regarding the protection of requestors' constitutional rights to free speech and petition may arise any time a request for records is denied."[106] The court stated that, "[s]uch rights may also be threatened when a party sues to enforce a records request under the [Act] and the party defending the suit files a counterclaim or initiates separate litigation intended solely to harass the party requesting records under the Act."[107] A SLAPP action is a meritless "lawsuit intended to silence and intimidate critics or opponents by overwhelming them with the cost of a legal defense until they abandon that criticism or opposition."[108]

Geer asserted that Phoebe's counterclaim should be stricken pursuant to the anti-SLAPP statute.[109] The Supreme Court held that Geer missed a key aspect of a claim for attorney's fees brought under O.C.G.A. § 50-18-73(b) that distinguishes it from other types of claims that might be stricken pursuant to the anti-SLAPP statute: a trial court must evaluate a claim for attorney's fees under the Act "on the basis of the record as a whole which is made in the proceeding for which fees and other expenses are sought."[110] The court noted that, "[t]his is in contrast to a claim such as defamation which directly targets speech or another protected activity that has already occurred at the time the suit is brought."[111]

The court explains that, "[t]he parties are ordinarily permitted to conduct discovery under the anti-SLAPP statute only to the extent the non-moving party is a public figure and wishes to pursue discovery relating to the issue of actual malice."[112] However, "the text of O.C.G.A. § 50-18-73(b) makes clear that the merits of a claim for attorney fees brought under the [Act] cannot be reached without an evaluation of the

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104. *Id.* (citing City of Atlanta v. Corey Entertainment, Inc., 278 Ga. 474, 476, 604 S.E.2d 140, 142 (2004)).

105. *Id.* (citing O.C.G.A. § 50-18-70(b)(1)–(2)).

106. *Id.* at 282, 849 S.E.2d at 662.

107. *Id.*

108. *Id.* at 282, 849 S.E.2d at 663 (quoting Rogers v. Dupree, 340 Ga. App. 811, 814, 799 S.E.2d 1, 5 (2017)).

109. *Id.* at 285, 849 S.E.2d at 664.

110. *Id.* at 285, 849 S.E.2d at 665 (quoting O.C.G.A § 50-18-73(b)).

111. *Id.* at 285–86, 849 S.E.2d at 665.

112. *Id.* at 286, 849 S.E.2d at 665 (citing O.C.G.A. § 9-11-11.1(b)(2)).

merits of the underlying dispute over the plaintiff's claim for records." In this case, the trial court could not evaluate Phoebe's allegation that Geer had pursued the litigation without substantial justification without reference to "the record as a whole which is made in the proceeding for which fees and other expenses are sought."[113]

Whether styled as a "counterclaim" and brought during the pendency of the litigation or as a request for fees filed at its conclusion, what is clear after this case is that the anti-SLAPP statute cannot operate to strike a defendant's statutory request for attorney's fees under the Act.[114]

VII. ZONING AND LAND USE

In *City of Douglasville v. Boyd*,[115] what began as an appeal of a zoning decision by writ of certiorari to the Douglas Superior Court ended with a discourse on the canons of statutory construction.[116] The City denied an application for the property owner to truck raw materials for a portable rock crushing plant over a lot zoned light industrial, which was necessary to access another lot zoned heavy industrial where the activity would take place; this it did on grounds that this was an impermissible use of the light industrial zone.[117] The applicant appealed to the superior court, which reversed the City's decision, finding summarily that the City in its denial acted "arbitrarily and capriciously."[118] The court of appeals reversed again, back in the City's favor, holding that, under the "any evidence standard," and noting that other cases hold that an accessory use not related to the uses appropriate to the zone violates local zoning ordinances, the City's denial should have remained undisturbed.[119] The applicant moved for reconsideration, arguing that on application of the canon *expressio unius est exclusio alterius*, since the City's ordinances prohibited off-site parking on property, but failed to do so regarding accessory driveway access, such access must be permitted.[120] The court of appeals denied reconsideration, reasserting that this canon must be applied depending on context, and that the entirely separate provision of the zoning code addressing parking did not justify the applicant's reading into another provision's permission for such use.[121]

113. *Id.*
114. *Id.* at 288, 849 S.E.2d at 666 (*see Geer*, 350 Ga. App. at 128, 828 S.E.2d at 110).
115. 356 Ga. App. 274, 844 S.E.2d 846 (2020).
116. *Id.* at 275, 279–80, 844 S.E.2d at 848, 851.
117. *Id.* at 274–75, 844 S.E.2d at 848.
118. *Id.* at 275, 844 S.E.2d at 848.
119. *Id.* at 274, 276, 844 S.E.2d at 847–48, 849.
120. *Id.* at 279, 844 S.E.2d at 850–51.
121. *Id*. at 279, 844 S.E.2d at 851.

In *Saik v. Brown*,[122] two sets of neighbors shared an access driveway, which became a point of contention when the Forsyth County planning department approved the Browns' plan for a subdivision which would require use of that driveway.[123] In relevant part, the Saiks' amended complaint sought equitable partition wherein the Saiks sought to consolidate ownership of the driveway in themselves; but the Forsyth Superior Court granted summary judgment to the Browns on grounds that the Saiks failed to exhaust their pre-suit administrative remedies (namely, an appeal of the subdivision approval to the County's Zoning Board of Appeals as provided for by the local development code).[124] The trial court also found that partition would be inappropriate because partition would not fully protect the interest of the parties, as provided for in O.C.G.A. § 44-6-170.[125] On appeal, the Saiks contended that summary judgment was improper because the code did not provide for public notice and so deprived them of due process, by virtue of which they did not know the deadline to appeal.[126] The court of appeals disagreed and affirmed, with the Saiks having failed to raise a constitutionality argument below.[127] Further, the court also held that, even though the Saiks pled a claim for equitable partition, the relief sought (their exclusive ownership of the driveway) was actually provided for only by statutory partition.[128] It upheld the trial court's finding that, because there would be continued easement rights to use the driveway even if the Saiks exclusively owned it, partition would not end the dispute.[129] Hence, the trial court's denial of the Saiks' petition on grounds that it was "manifest that the interest of each party would not be fully protected" by partition was not error.[130]

In *City of Rincon v. Ernest Communities, LLC*,[131] the court of appeals reaffirmed that zoning decisions, where they are taken following a hearing, presentation of evidence, and deliberation, are quasi-judicial acts which must be appealed by petition for writ of certiorari and which preclude mandamus relief.[132] In relevant part, Ernest's initial master

122. 355 Ga. App. 849, 846 S.E.2d 132 (2020).
123. *Id.* at 850, 846 S.E.2d at 134.
124. *Id.* at 851, 846 S.E.2d at 134–35.
125. *Id.* at 856, 846 S.E.2d at 138.
126. *Id.* at 853, 846 S.E.2d at 136.
127. *Id.* at 853–54, 846 S.E.2d at 136.
128. *Id.* at 855, 846 S.E.2d at 137.
129. *Id.* at 857, 846 S.E.2d at 138.
130. *Id.* at 856–57, 846 S.E.2d at 138.
131. 356 Ga. App. 84, 846 S.E.2d 250 (2020).
132. *Id.* at 93, 846 S.E.2d at 258.

plan was approved by the City, but it then made revisions which were not approved prior to Ernest's application for the land development permit and approval of site plans.[133] The City Council heard the application at a meeting, and respective counsel for the City and Ernest presented their arguments and evidence. The City Council then voted unanimously to deny Ernest's application because the master plan, with changes, had not been approved. Ernest filed suit in Effingham County Superior Court and sought mandamus to allow unrestricted use of the property and to compel the issuance of building permits.[134] The court of appeals held that, because the City's denial of Ernest's application met all three elements required of a quasi-judicial act—namely, entitlement to notice and a hearing with presentation of evidence, a decisional process involving ascertainment of facts and application of legal standards to those facts, and a binding, particular, and immediate decision that is conclusive of the rights of the parties—Ernest was required to challenge the decision by petition for writ of certiorari, and mandamus was not available.[135]

In *Clay v. Douglasville-Douglas County Water and Sewer Authority*,[136] in relevant part, the property owner claimed that the County Water and Sewer Authority's (WSA's) denial of a variance for his proposed increase in impervious surface area on his small parcel amounted to an inverse condemnation.[137] The WSA moved to dismiss, which the Douglas Superior Court granted on grounds that the WSA applied existing state and federal regulations in the use of regulatory or police powers, and so this did not amount to a "taking."[138] After determining that the WSA's decision was an adjudicative one, and therefore the trial court's dismissal constituted a judgment reviewing the decision of a state or local agency requiring an application for discretionary appeal pursuant to O.C.G.A. § 5-6-35(a)(1), the court of appeals concluded that it lacked jurisdiction because Clay failed to file such an application.[139] In so doing, the court of appeals extensively discussed, and ultimately disapproved, the holding in *Brownlow v. City of Calhoun*,[140] to the extent that it found an exception to the application for the discretionary appeal requirement extending to

133. *Id.* at 85, 846 S.E.2d at 253.
134. *Id.* at 90, 846 S.E.2d at 256.
135. *Id.* at 93, 846 S.E.2d at 258.
136. 357 Ga. App. 434, 848 S.E.2d 733 (2020).
137. *Id.* at 435, 848 S.E.2d at 735.
138. *Id.* at 435–36, 848 S.E.2d at 736.
139. *Id.* at 436–38, 848 S.E.2d at 736–38.
140. 198 Ga. App. 710, 402 S.E.2d 788 (1991).

inverse condemnations as well as classic condemnations.[141] Thus, in *Clay*, the court of appeals has now articulated in no uncertain terms that a trial court's decision on an inverse condemnation claim cannot be directly appealed, but instead requires an application for discretionary appeal.[142]

The court in *Dawson County Board of Commissioners v. Dawson Forest Holdings, LLC*,[143] raised the question of whether local officials' future enforcement of allegedly unconstitutional zoning classifications is an action to which legislative immunity does not apply and for which a claimant may be entitled to prospective relief, and the court of appeals answered in the affirmative.[144] In relevant part, the LLC sued county officials in their official and individual capacities seeking an injunction against enforcement of a classification which allegedly made it impossible for the LLC to feasibly use or develop its properties—which, if true, would render the classification unconstitutional.[145] The Dawson County Superior Court denied the County defendants' motion to dismiss the LLC's individual capacity claims against them seeking to enjoin enforcement, finding that they were not barred by legislative immunity.[146] On appeal, the court of appeals affirmed, holding that while the official capacity claims were barred by sovereign immunity, the individual capacity claims were not barred by legislative immunity, because rather than seeking redress for a vote or other act by a decisionmaker,[147] the complaint was simply seeking to prevent enforcement.[148] The court went on to note that, were legislative immunity to extend to zoning enforcement (as distinct from the making of zoning decisions or voting to adopt ordinances), property owners would have no recourse whatsoever to challenge the unconstitutionality of zoning decisions or classifications.[149]

Carson v. Brown[150] provides a cautionary tale in local officials making assurances about zoning implications on which property owners later rely in their acquisition and development decisions. Here, the Forsyth County planning director confirmed at a March 2016 meeting that the

141. *Clay*, 357 Ga. App. at 439–40, 848 S.E.2d at 738.
142. *Id.* at 440, 848 S.E.2d at 739.
143. 357 Ga. App. 451, 850 S.E.2d 870 (2020).
144. *Id.* at 452–53, 850 S.E.2d at 872.
145. *Id.* at 453–54, 850 S.E.2d at 873.
146. *Id.* at 454, 850 S.E.2d at 873.
147. To which legislative immunity would apply.
148. *Id.* at 454–57, 850 S.E.2d at 874–876.
149. *Id.* at 459, 850 S.E.2d at 876.
150. 358 Ga. App. 619, 856 S.E.2d 5 (2021).

property in question was zoned for development of 9,000 square-foot lots.[151] Relying on that representation, the developer acquired the property for that purpose.[152] Later that year, before the developer could apply for a land disturbance permit, the Board of Commissioners adopted a moratorium on approving applications for land disturbance permits for lots of that size. The planning department and Zoning Board of Appeals denied the developer's application and that he had vested rights to that development, and the developer sought certiorari in superior court. The court of appeals agreed with the developer, reiterating that "[a] landowner acquires vested rights by making a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials."[153] This, notwithstanding the absence of representations about future zoning changes.[154]

The Forsyth County Superior Court in *Forsyth County v. Mommies Properties LLC*,[155] reasserted the deference due to the local zoning authority's decisions, including in the weighing of evidence through their deliberations.[156] The Forsyth County Zoning Board of Appeals (ZBA) affirmed a landowner's appeal of a stop work order issued for failing to get a land disturbance permit, among other failures.[157] The ZBA's hearing featured testimony and presentation of evidence, to which (including supposed hearsay) the landowner failed to object.[158] On petition for certiorari, the superior court reversed the ZBA, finding in pertinent part that the evidence heard by the ZBA included hearsay, without which the ZBA's decision was not supported by the "any evidence" rule.[159] The court of appeals reversed again back in favor of the ZBA, admonishing the superior court that exclusion of all hearsay evidence is not warranted by Georgia's new evidence code and that, at the ZBA hearing, the landowner had every opportunity to make objections and conduct cross-examinations, and so the ZBA's decisions should have remained undisturbed.[160]

151. *Id.* at 619, 856 S.E.2d at 6–7.
152. *Id.* at 619, 856 S.E.2d at 7.
153. *Id.* at 622, 856 S.E.2d at 9 (citations and quotations omitted).
154. *Id.* at 623, 856 S.E.2d at 9.
155. 359 Ga. App. 175, 855 S.E.2d 126 (2021).
156. *Id.* at 176–77, 855 S.E.2d at 129.
157. *Id.* at 175–176, 855 S.E.2d at 129.
158. *Id.* at 185, 855 S.E.2d at 135.
159. *Id.* at 184, 855 S.E.2d at 134.
160. *Id.* at 186, 188, 195, 855 S.E.2d at 135, 141,

The court in *Thomas County v. WH Group 2, LLC*,[161] clarified that even the decision of an official or agent of a zoning authority, short of the authority itself, can constitute a "decision" that is appealable to superior court and requires an application for discretionary review.[162] The property owner, WH Group, submitted a copy of development plans to the County's Director of Planning and Zoning, but the Director refused to submit the plans to the Board of Commissioners for approval.[163] WH Group filed a petition to superior court, asking for a writ of mandamus requiring the County to process the plans.[164] The Thomas County Superior Court granted that relief, and the County appealed. On appeal, the court of appeals determined that the Director's refusal constituted an adjudicative "decision" of the local agency (the County), and so, pursuant to O.C.G.A. § 5-6-35(a)(1), the County was required to file an application for discretionary review from the superior court's review of that decision.[165] Because the County failed to do so, the appeal was dismissed.[166]

In *D. Rose, Inc. v. City of Atlanta*,[167] the owner claimed that the City's sixty-foot setback rule amounted to an inverse condemnation because it deprived him of all economic use of the land—specifically, that he was unable to build a single-family home—and that it did so for a public purpose.[168] On appeal, the court of appeals found in the City's favor, ruling that an inverse condemnation based on zoning requires that the zoning by itself result in the deprivation of all economic use of the property.[169] In the owner's case, the remainder of the property could not be developed because of independent reasons—a floodplain, sewer easements, and sewer lines—not imposed by the setback requirement. Accordingly, the setback requirement by itself did not amount to a taking.[170]

161. 359 Ga. App. 201, 857 S.E.2d 94 (2021).
162. *Id.* at 202, 204, 857 S.E.2d at 96–97.
163. *Id.* at 201, 857 S.E.2d at 96.
164. *Id.* at 202, 857 S.E.2d at 96.
165. *Id.* at 202, 204, 857 S.E.2d at 96–97.
166. *Id.* at 204, 857 S.E.2d at 97.
167. 359 Ga. App. 533, 859 S.E.2d 514 (2021).
168. *Id.* at 534–35, 859 S.E.2d at 515.
169. *Id.* at 537, 859 S.E.2d at 517.
170. *Id.* at 538, 859 S.E.2d at 517.

VIII. WHISTLEBLOWERS

Last year's Survey period featured a lull in decisions arising under the Georgia Whistleblower Act (GWA).[171] This year's Survey period featured slightly more decisions, both at the state and federal level, and headlines of a jury verdict awarding $350,000 to a firefighter in May 2021 certainly caught the attention of practitioners around the state.[172]

As for Georgia appellate decisions, the Supreme Court of Georgia still has not provided practitioners with much insight on the nature of a claim under the GWA.[173] Indeed, one of the lawyers involved in the trial resulting in the $350,000 verdict for the firefighter-whistleblower commented that the lack of pattern jury instructions, verdict form examples, and dearth of authority on other trial and evidentiary issues left both sides with little guidance at trial.[174]

Nevertheless, the Georgia Court of Appeals did publish three decisions during the Survey period—two of which are worth noting.[175] In *Maine v. Department of Corrections*, the court reminded all just how important the causal relationship element is.[176] The case of *Maine* involved a corrections officer who was ordered by his superiors to provide an inmate (a confidential informant) with a cell phone relating to a confidential operation being run by the Department of Corrections.[177] Viewing the evidence on the grant of a judgment notwithstanding the verdict (JNOV), the court affirmed the JNOV holding that the evidence at trial "did not link" the plaintiff's termination to the whistleblowing activity on which the plaintiff based the claim.[178] The plaintiff argued that his objections and concerns about participating in the operation were voiced to the warden of the prison, but the court noted that the plaintiff was not

171. *See* Russell A. Britt, et al., *Local Government Law*, 72 MERCER L. REV. 1, 244–45 (2020).

172. Cedra Mayfield, *Showing Teeth of Whistleblower Act, Georgia Jury Awards $350K Verdict to Firefighter*, DAILY REPORT (May 20, 2021 at 7:08 p.m.), https://www.law.com/dailyreportonline/2021/05/20/showing-teeth-of-whistleblower-act-georgia-jury-awards-350k-verdict-to-firefighter/#:~:text=you%20for%20sharing!-,Your%20article%20was%20successfully%20shared%20with%20the%20contacts%20you%20provided,allegations%20against%20his%20city%20employer.

173. The Supreme Court did decide Fulton County v. Ward-Poag, 310 Ga. 289, 849 S.E.2d 465 (2020), during the survey period; however, while mentioning a GWA claim, that case was largely about Georgia's law on judicial estoppel.

174. Mayfield, *supra* note 187.

175. The decision in Campbell v. Cirrus Educ., Inc., 355 Ga. App. 637, 845 S.E.2d 384 (2020), turned exclusively on unrelated procedural matters.

176. 355 Ga. App. 707, 845 S.E.2d 736 (2020).

177. *Id.* at 708, 845 S.E.2d at 738.

178. *Id.* at 713, 845 S.E.2d at 742.

terminated for another four years, long after the warden to whom the plaintiff "blew the whistle" had departed.[179] There was simply no evidence presented linking the plaintiff's whistleblowing activity with the decision to terminate him. No evidence linked the then former warden to the decision, and the plaintiff failed to show that anyone involved in the decision was aware of the whistleblowing activity.[180]

The case of *Mimbs v. Henry County Schools*,[181] involved a statute of limitations issue.[182] Recall, O.C.G.A. § 45-1-4(e)(1) mandates that the whistleblower must file the action either "within one year after discovering the retaliation or within three years after the retaliation, *whichever is earlier*."[183] In *Mimbs*, the plaintiff, a fifth grade teacher, alleged that she was retaliated against for refusing to alter students' grades.[184] After voicing concerns, the principal of her school met with the plaintiff on April 24, 2017, and informed her that the school would not be renewing her contract.[185] The principal gave the plaintiff the option of resigning rather than facing a non-renewal of her contract.[186] But the plaintiff refused to resign, and on April 27, 2017, the Henry County superintendent issued notice of the plaintiff's contract non-renewal. Mimbs filed suit on May 3, 2018, exactly one year from the date that her counsel received the superintendent's April 27th notice. As the court explained, however, this meant she filed suit just a few days too late. The principal had made a definitive decision of not renewing her contract, and the plaintiff learned of this at least as early as the April 24, 2017 meeting. Then on April 27, 2017, the plaintiff learned that the alleged retaliation had actually materialized when the superintendent issued the written notice of non-renewal.[187] Thus, the plaintiff had discovered the alleged retaliation more than one year from the date she filed suit. Interestingly though, the court was quite cryptic as to whether the April 24 or April 27 date controlled.[188]

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179. *Id.* at 712, 845 S.E.2d at 741.

180. *Id.*

181. 359 Ga. App. 299, 857 S.E.2d 286 (2021).

182. *Id.* at 299, 857 S.E.2d at 287.

183. O.C.G.A. § 45-1-4(e)(1) (emphasis added).

184. *Mimbs*, 359 Ga. App at 299, 857 S.E.2d at 287.

185. *Id.* at 300–01, 857 S.E.2d at 288.

186. *Id.* at 301, 857 S.E.2d at 288.

187. *Id.*

188. The court perhaps sidestepped the issue since the plaintiff did not file suit until more than one year after the April 27 date. In a footnote, the court distinguished Albers v. Ga. Bd. of Regents, 330 Ga. App. 58, 766 S.E.2d 520 (2014), noting that in *Albers* testimony existed showing that the termination had not actually been finalized. *Mimbs*, 359 Ga. App. at 303, 857 S.E.2d at 289 n.1.

The Eleventh Circuit's *per curiam* decision in *West v. City of Albany*,[189] is perhaps the most illuminating decision in the Survey period. Though an unpublished federal court decision, the decision nonetheless sheds light on an issue that has not been fully explored. *West* involved an aspect of the second *prima facie* element of a GWA claim: that the whistleblower (a) disclose or otherwise object to (b) a violation of or noncompliance with a law, rule, or regulation.[190] Do internal policies or procedures count as a law, rule, or regulation? The court in *West* answered no.[191] Similar to the alleged violations of internal protocols in *Coward v. MCG Health, Inc.*,[192] the plaintiff in *West* disclosed alleged violations of lax cash-control protocols within the City of Albany.[193] So *West* reiterates that it is not enough for the plaintiff to point to conduct that does not necessarily amount to illegal activity.[194] Indeed, *West* addresses that which the Georgia Court of Appeals pretermitted in *Maine*.[195]

189. 830 F. App'x 588, 597–98 (11th Cir. 2020) (per curiam).

190. *Id.* at 592.

191. *Id.* at 598.

192. 342 Ga. App. 316, 802 S.E.2d 396 (2017). The *Coward* case is only physical precedent in Georgia, and thus, its holding is only persuasive.

193. *West*, 830 F. App'x at 598.

194. *Id.*

195. *See Maine*, 355 Ga. App. at 710–11, 845 S.E.2d at 739 (assuming without deciding that the failure to adhere to the department policy of requiring written authorization constituted a violation of a law, rule, or regulation).