Mercer Law Review

Volume 73
Number 1 *Annual Survey of Georgia Law*

Article 15

12-2021

Real Property

Erica L. Burchell

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I. INTRODUCTION

This Article surveys developments in Georgia real property law between June 1, 2020 and May 31, 2021.[1] Real property law is unique in that it touches nearly every other facet of the law in some way. For instance, family law often intersects with real property law in cases of divorce. Contract law is often at the root of any real property sales or agreements—and also comes into play with issues of landlord-tenant disputes and evictions. Since real property can be, and often is, the largest asset people leave behind when they pass away, real property law certainly impacts estate law. Environmental law includes questions of land use and resource management. Real property law is highly impactful and interesting, even for those who do not practice in the area.

II. ADVERSE POSSESSION

Adverse possession occurs when a party can show possession that is exclusive, not originating in fraud, "public, continuous, exclusive, uninterrupted, [ ] peaceable" and "accompanied by a claim of right."[2] The party claiming prescriptive title—that is, the would be adverse possessor—bears the burden of proving, by the preponderance of the evidence, that the elements outlined in O.C.G.A. § 44-5-161(a) have been

*Associate, Donner Law, LLC. Mercer University (B.A., cum laude, 2008); Mercer University (M.Ed., 2011); Mercer University School of Law (J.D., magna cum laude, 2017). Member, Mercer Law Review (2015–2017). Member, State Bar of Georgia. The author wishes to give special thanks to her family for being both a constant inspiration and wellspring of love and support. The author also wishes to acknowledge the wealth of support and education provided by her teachers, professors, mentors, friends, colleagues, and employers over the course of her education and career. Indeed, it takes a village to raise a child.

1. For an analysis of last year's real property law during the Survey period, see Linda Findley, *Real Property*, *Annual Survey of Georgia Law*, 72 MERCER L. REV. 255 (2020).

2. O.C.G.A. § 44-5-161(a) (2021).

met for a twenty-year period.[3]

In *Houston v. James*,[4] a fight over twenty-eight acres of land ensued between family members following the death of the original land owner, who was the father of the three dueling siblings. In this case, two sisters, Sue James Houston and Teresa James Potts, brought an appeal of the Rabun Superior Court's order that fifteen acres willed to them by their father had been acquired through prescriptive title by their brother, Tom E. James, Jr.[5] The sisters argued that the grant of summary judgment in favor of James was inappropriate because there were material issues of fact to be decided regarding James's claim of right, whether his possession was permissive, and whether his possession of the land had been exclusive.[6] On a *de novo* review of the trial court's grant of summary judgment, the Georgia Court of Appeals held that a question of material fact existed as to the time period of James's possession under claim of right.[7]

The story goes something like this: back in the 1970's, James's father, the landowner, gave James permission to build a house and move a trailer onto the property. James contended that his father told him that he did own, or promised him that he would one day own, all twenty-eight acres the father had. James's sisters begged to differ. Houston and Potts, the sisters, argued that their father had repeatedly told them he would leave an acre to each of his children, grandchildren, and great-grandchildren upon his passing, and that James would receive ten acres. The parties produced no evidence as to their father's wishes. James asserted in his complaint that back in 1979 his father changed his wishes about James living on the property and ordered James to vacate the property.[8] According to the complaint, James refused to leave, claimed the property as his own, and occupied the property exclusively for thirty years, exercising "exclusive possession, dominion, and control of the property to the exclusion of all others."[9]

Despite the pronouncements made by James in his complaint, in documents submitted in support of a new trial, James stated that his father held title to the land up until his 2017 death and referred to his

3. *See* Houston v. James, 358 Ga. App. 510, 513, 855 S.E.2d 714, 717 (2021) (citing Dyal v. Sanders, 194 Ga. 228, 233, 21 S.E.2d 596, 600 (1942); O.C.G.A. § 44-5-163 (2021)).

4. 358 Ga. App. 510, 855 S.E.2d 714 (2021).

5. *Id.* at 510–11, 855 S.E.2d at 716.

6. *Id.* at 513, 855 S.E.2d at 717.

7. *Id.*

8. *Id.* at 511, 855 S.E.2d at 716.

9. *Id.* at 511–12, 855 S.E.2d at 716.

father as the "predecessor in title" to his sisters.[10] James even admitted that back in 1982, his father deeded him 0.96 acres of the property. Part of the deeded property included the land where James's house sits. No other property was deeded to James at that time. James paid taxes on the 0.96 acres, while his father paid the taxes on the remaining land. In depositions, both sisters testified that James asked his father for ten acres of land back in 2014, angering their father. Furthermore, the sisters contended that their father helped to build a barn located on the property and also helped to furnish cattle and seed.[11]

In 2017, the father died.[12] A 2016 will made by the father left roughly fifteen acres to the two sisters and roughly twelve acres in a life estate to James. Remember, 0.96 of an acre had already been deeded to James by his father *inter vivos*. After the death of his father, James filed an action for declaratory judgment. In the action, James sought to obtain title by adverse possession to the fifteen acres willed to his sisters by their father. Moreover, James wanted an injunction to prevent his sisters from occupying or selling the land. James's sisters counterclaimed, and requested an injunction to prevent their brother from trespassing on their land. Houston and Potts also requested attorney's fees for frivolous litigation. Subsequently, James moved for summary judgment, which the trial court granted.[13]

In their appeal, Houston and Potts contended that material issues of fact existed.[14] Namely, the sisters argued that there was a question as to (1) James's claim of right to the land, (2) whether he possessed the land by permission, and (3) whether his possession was exclusive. Without addressing the issues of permission and exclusivity, the court of appeals agreed with the sisters that a question of material fact did exist with regard to James's claim of right to the property. Accordingly, the court of appeals reversed the grant of summary judgment.[15]

The court of appeals explained that a "claim of right" is equivalent to a "claim of title" and a "claim of ownership."[16]A claim of right need not be together with a claim of title from a predecessor, but a claim of right does require a claim of title "in the sense that the possessor claims this

10. *Id*. at 512, 855 S.E.2d at 716.

11. *Id*.

12. *Id*.

13. *Id*.

14. *Id*. at 513, 855 S.E.2d at 717.

15. *Id*. at 516, 855 S.E.2d. at 718.

16. *Id*. at 513, 855 S.E.2d at 717 (citing Walker v. Sapelo Island Heritage Auth., 285 Ga. 194, 196, 674 S.E.2d 925, 927 (2009); Simmons v. Cmty. Renewal & Redemption, LLC, 286 Ga. 6, 6, 685 S.E.2d 75, 75 (2009)).

property as his own."[17] The assertion of dominion over a property gives rise to a presumption of claim of right—particularly when valuable improvements provide the basis for assertion of dominion.[18] The court of appeals cautioned, however, that the exercise of dominion alone does not dispense with the possessor's need to show claim of right when conflicting evidence as to claim of right is presented.[19]

The court went on to note that though adverse possession can arise through innocent or mistaken possession, knowledge that a piece of property belongs to someone else is fatal to any claim of adverse possession.[20] The death of the adverse possession claim occurs because of the requirement of good faith.[21] In James's case, evidence existed that James may have exercised dominion over the full twenty-eight acres of land. James's sisters even acknowledged that since the 1970's, James has farmed the land, erected buildings on the land, parked his vehicles on the land, and sold hay from the property. These factors are indicators of possession.[22] Moreover, there is evidence that the sisters and father believed James had taken the land, against his father's will, as far back as the 1980's.[23] But, the court of appeals noted that there is also evidence that James occupied the land with the knowledge that his father kept title to the full twenty-eight acres. James admitted his father had a change of heart regarding the land in 1979. Moreover, James admitted to the deeding of 0.96 acres by his father in 1982. James's father only deeded the 0.96 acres to James at the time, and nothing more. Sometime after that deed was delivered, James went to his father and requested a grant of an additional ten acres, which James's father refused.[24]

The court of appeals also cited James's reference to his father as his sister's predecessor in title and James's statement that his father retained title to the property until his father's death in 2017.[25] These facts, the court of appeals held, created a question of fact as to whether James knew the property did not belong to him.[26] These facts are critical, because where a claimant admits that another holds title, such an

17. *Houston*, 358 Ga. App. at 513, 855 S.E.2d at 717 (quoting *Simmons*, 286 Ga. at 6, 685 S.E.2d at 77).

18. *Id*. (quoting Childs v. Sammons, 272 Ga. 737, 739, 534 S.E.2d 409, 410 (2000)).

19. *Houston*, 358 Ga. App. at 513, 855 S.E.2d at 717.

20. *Id*. at 513–14, 855 S.E.2d at 717.

21. *Id*. at 514, 855 S.E.2d at 717 (citing Halpern v. Lacy Investment Corp., 259 Ga. 264, 265, 379 S.E.2d at 520, 520 (1989)).

22. *Id*. at 514, 855 S.E.2d at 717–18 (citing *Walker*,285 Ga. at 198, 674 S.E.2d at 928).

23. *Id*. at 514, 855 S.E.2d at 718.

24. *Id*.

25. *Id*. at 514–15, 855 S.E.2d at 718.

26. *Id*. at 515, 855 S.E.2d at 718.

admission is fatal to a claim of right.[27] The court of appeals, reviewing whether a grant of summary judgment was appropriate, and thus reviewing the case *de novo* and drawing inferences favorable to James's sisters, held that an issue of material fact existed. The court of appeals noted that evidence in the record could support a reasonable inference that James was nothing more than a trespasser—and that is for a jury to decide.[28] The court of appeals thus reversed the trial court's grant of summary judgment.[29]

III. EASEMENTS, COVENANTS, AND BOUNDARIES

Easements, generally speaking, grant certain rights to the holder of the easement—allowing the holder to use someone else's land for a specific purpose. Alternatively, declarations of covenants often restrict a property owner from doing certain activities on their own land. Simply stated, easements often grant rights to non-property owners as they concern another person's piece of property. By contrast, declarations of covenants take away or limit the rights of property owners as they concern their own pieces of property. Boundary disputes spring up when there is a question as to the legal borders of a certain piece, or pieces, of property.

The recently decided case of *Doxey v. Crissey*[30] begged the question of whether pedestrians could be required to hold their horses—that is, not to walk upon a bridle trail easement located on a lot owned by Carolyn Doxey in the Oakton subdivision. Doxey's property backs up to the Kennesaw Mountain National Park[31]—which includes hiking and walking trails[32]—and the bridle trail easement connects the street fronting Doxey's property with the park.[33] Residents of the subdivision where Doxey lived used the bridle trail easement area to access the park on foot. Eventually, in the early 2000s, Doxey erected a fence across the back of her lot, adding a gate that allowed access to the park. However, by 2004, the gate was "nailed shut and then removed," blocking access to

27. *Id*. (citing *Simmons*, 286 Ga. at 7, 685 S.E.2d at 77–78).

28. *Id*. (referring to Ga. Power Co. v. Irvin, 267 Ga. 760, 766, 482 S.E.2d 362, 368 (1997)).

29. *Id*. at 516, 855 S.E.2d at 718.

30. 355 Ga. App. 891, 846 S.E.2d 166 (2020).

31. *Id*. at 892, 846 S.E.2d at 168.

32. *Kennesaw Mountain National Battlefield Park Georgia*, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, https://www.nps.gov/kemo/index.htm (last visited Sept. 1, 2021).

33. *Doxey*, 355 Ga. App. at 892, 846 S.E.2d at 168.

the park from Doxey's property.[34]

In 2018, ten fellow residents of Oakton subdivision brought suit against her—seeking a permanent injunction against Doxey.[35] The plaintiffs sought to permanently enjoin Doxey from obstructing the easement. Furthermore, the plaintiffs sought to require Doxey to remove the fences blocking the easement. At a bench trial, the plaintiffs were successful. The Cobb Superior Court declared that all Oakton subdivision residents could enforce the easement—whether equestrian or pedestrian. Moreover, the trial court granted the permanent injunction against Doxey, meaning she could no longer obstruct or interfere with the residents' easement use. Clearly not horsing around, the trial court also ordered Doxey to remove the fence that blocked the easement.[36]

Doxey appealed.[37] In what was essentially a three-pronged attack, Doxey first argued that the trial court erred by considering parol evidence to ascertain the meaning of "bridle trail."[38] Second, Doxey argued that the trial court erred in their "finding that the bridle trail easement had not been abandoned by nonuse."[39] Third, Doxey argued that the restriction of her prior counsel's testimony amounted to error.[40]

Addressing Doxey's first argument, the Georgia Court of Appeals agreed with Doxey that the trial court did in fact err in considering parol evidence as to the meaning of "bridle trail."[41] The appellate court concluded that the term bridle trail is unambiguous and cannot be otherwise reasonably interpreted.[42] Accordingly, the court determined that the easement is for horseback riding and that the fact that the easement could also be suitable for other purposes did not create an ambiguity in the term bridle trail. After settling the issue of parol evidence, the appellate court remanded the case to the trial court for further proceedings—because while the term bridle trail may be unambiguous, easements can change.[43] Easements can change in frequency, manner, and intensity of use without one party's consent if the change does not unreasonably damage the servient estate or cause

34. *Id*.

35. *Id*. at 892, 846 S.E.2d at 169.

36. *Id*.

37. *Id*.

38. *Id*. at 892, 846 S.E.2d at 169.

39. *Id*. at 894, 846 S.E.2d at 170.

40. *Id*. For purposes of this writing, Doxey's first and second arguments are particularly relevant.

41. *Id*. at 892, 846 S.E.2d at 169.

42. *Id*. at 893, 846 S.E.2d at 169.

43. *Id*. at 893–94, 846 S.E.2d at 169.

unreasonable interference with its enjoyment.[44] The appellate court acknowledged that the easement's transition from a horseback riding trail to a walking and running trail coincides with a change in frequency, manner, and intensity of use that would be permissible without Doxey's consent if no unreasonable damage was done to Doxey's property and if the change did not result in an unreasonable interference of Doxey's enjoyment of her property.[45] No consideration of a change in use's impact was made by the trial court at trial.[46] Accordingly, the appellate court remanded the decision to the lower court for further proceedings on the issue of a change in easement.[47]

Doxey's second argument hinged on the idea that the trial court erred in finding that the bridle trail easement had not been abandoned by nonuse.[48] The appellate court disagreed. Generally speaking, after a sufficient period of time, easements can be forfeited by nonuse or lost due to abandonment—in other words, you use it or you lose it.[49] However, a special rule applies to easements obtained by grant. To dispense with an easement by grant, there must be a clear showing of intent to abandon. Trial evidence showed that Oakton residents used Doxey's property for pedestrian access to the park, and that such access continued until Doxey blocked such access. Accordingly, the appellate court upheld the trial court's finding that the easement was not abandoned.[50]

After the case went back down to the trial court, the court determined that the easement had changed in frequency, manner, and use, and was not doing unreasonable harm to Doxey or interfering unreasonably with her enjoyment of her land.[51] Doxey again appealed, contending that the trial court erred in "failing to conduct 'further evidentiary proceedings'" on the questions the court of appeals posed to the trial court for consideration on remand.[52] The appellate court agreed with Doxey, reasoning that since the trial court failed to take any action that constituted a proceeding before issuing its order, the judgment must be vacated. The court of appeals issued its opinion on June 10, 2021, thus falling just outside of the Survey period.[53]

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44. *Id*. at 894, 846 S.E.2d at 169.
45. *Id*. at 893–94, 846 S.E.2d at 169.
46. *Id*. at 894, 846 S.E.2d at 169.
47. *Id*.
48. *Id*. at 894, 846 S.E.2d at 170.
49. *Id*. (citing O.C.G.A. § 44-9-6 (2021)).
50. *Id*.
51. Doxey v. Crissey et al., 359 Ga. App. 695, 698–99, 859 S.E.2d 849, 851–52 (2021).
52. *Id*. at 699, 859 S.E.2d at 852.
53. *Id*. at 695, 859 S.E.2d at 849. While pertinent to mention in short, Doxey's second appeal and any future decisions in this case should be discussed in forthcoming articles.

In a separate case, the Georgia Court of Appeals reviewed a maintenance agreement contained within a shopping center easement.[54] In *Alterman Properties LLC v. Sunshine Plaza Associates LTD*, the court of appeals examined the common area expense responsibilities of the 2021 shopping center owners and tenants based on a 1961 easement drafted by the 2021 parties' predecessors in interest.[55] Sunshine Plaza Associates LTD—the owner of the Atlanta shopping center—brought a breach of contract action against Alterman Properties LLC (APL)—the owner of a grocery store located in the shopping center—seeking payment for common maintenance expenses listed within an easement for the shopping center property. The trial court issued a partial grant of summary judgment in favor of Sunshine Plaza Associates LTD. APL appealed, contending that the trial court erred in three ways. APL argued that the trial court erred in determining, as a matter of law, that (1) APL was responsible to pay twenty-five percent of the maintenance expenses, (2) that Sunshine Plaza proved its damages, and (3) that an affidavit from APL's manager failed to create material issues of fact.[56] The court of appeals reviewed the evidence leading to the grant of summary judgment on a *de novo* standard and in the light most favorable to the nonmoving party.[57]

The 1961 easement at issue in this case directed that for ten years the shopping center owners would pay the costs of "maintaining lighting, paving, policing, cleaning[,] and necessary marking of parking areas."[58] After the ten-year period was up—in what would be 1971—the retail owners would then share responsibility from time to time for the common maintenance expenses. The amount each retail owner owed was determined by their relative square footage owned within the shopping center as a whole—as measured by a plat attached to the easement.[59]

In 2013, APL leased its property to a grocery store business.[60] The lease provided that the grocery store owner would be responsible for APL's portion of common area expenses. Sunshine Plaza typically issued common area expense bills not to owners, but directly to tenants. Five years later, in 2018, Sunshine Plaza sued APL for breach of contract, alleging that APL had not paid its share of common maintenance

54. Alterman Prop's. LLC v. Sunshine Plaza Assoc's Ltd., 358 Ga. App. 698, 698, 856 S.E.2d 91, 92 (2021).

55. *Id*. at 699, 856 S.E.2d at 92–93.

56. *Id*. at 700–02, 856 S.E.2d at 93–95.

57. *Id*. at 699, 856 S.E.2d at 92 n.1.

58. *Id*. at 699, 856 S.E.2d at 92–93.

59. *Id*. at 699, 856 S.E.2d at 93.

60. *Id*.

expenses since 2014. Sunshine Plaza sought roughly $41,000.00 as of April 2018—the twenty-five percent share APL purportedly owed—along with attorney fees. APL answered the suit and filed a third-party complaint against the grocery store owner tenant. After discovery, Sunshine Plaza presented a motion for summary judgment, which the trial court granted in part. The trial court awarded Sunshine Plaza roughly $60,000.00 in damages for the breach of contract claim, and found issues of material fact remaining on the issue of attorney fees. APL appealed.[61]

On appeal, APL first argued that the trial court erred in finding that the type of expenses sought by Sunshine Plaza qualified as common expenses laid out in the easement and that the easement required APL to pay a twenty-five percent share of those expenses.[62] Identifying this claim of error as a question of contract construction, the court of appeals reviewed *de novo*, and agreed in part with APL. In contract construction, the court must attempt to ascertain the intent of the parties. To identify the intent of the parties, the court first examines the language within the contract itself. Absent ambiguity, the court will use the contract itself to find the intent of the parties.[63]

Sunshine Plaza itemized the costs it sought from APL—and the list of itemized costs included charges for parking lot light electricity, a pylon sign, landscaping, and security.[64] On appeal, APL argued that the easement language did not cover costs for pylon signage, landscaping or security.[65] The court of appeals dispensed immediately with APL's contention regarding "security"—noting that the easement contained the word "policing," which is synonymous with security.[66] Next, the court of appeals addressed that electricity for the pylon sign was covered by the "lighting" expenses called for in the easement.[67] The court of appeals turned next to the word "landscaping," which was not explicitly addressed in the easement.[68] Reviewing a grant of summary judgment *de novo*, the court of appeals held that some of the landscaping expenses Sunshine Plaza sought may include work not covered by the easement's "paving" or "cleaning" categories.[69] Therefore, the court of appeals held

61. *Id*. at 700, 856 S.E.2d at 93.
62. *Id*.
63. *Id*.
64. *Id*. at 700, 856 S.E.2d at 93–94.
65. *Id*. at 701, 856 S.E.2d at 94.
66. *Id*. at 701, 856 S.E.2d at 94.
67. *Id*.
68. *Id*.
69. *Id*.

that the trial court erred in granting summary judgment to Sunshine Plaza with regard to the landscaping expenses.[70]

APL contended next that the trial court erred in ruling as a matter of law that APL owed twenty-five percent of any shared maintenance common expenses.[71] To support its contention, APL submitted an affidavit from its manager that included a document showing APL's actual ownership percentage within the shopping center to be roughly fifteen percent of the whole. The court of appeals tossed that contention—pointing APL to the language within the easement itself.[72] The easement directed that the sums owed were to be determined by the square footage owned and that the square footage was shown on an attached plat.[73] Because the easement language dealt directly with the issue of determining percentages, the court of appeals held that APL's exhibit failed to create an issue of material fact regarding the calculation of APL's shared expenses.[74]

APL argued second that Sunshine Plaza failed to prove damages.[75] The court of appeals did not agree. APL argued that to sufficiently prove damages, Sunshine Plaza needed to produce the actual invoices it received from vendors.[76] However, the court of appeals reasoned that an affidavit from Philip Sunshine, which was based on personal knowledge, verified the expense summary that Sunshine Plaza provided. Accordingly, the court of appeals held that the trial court did not err in granting summary judgment to Sunshine Plaza on the issue of amounts sought from APL.[77]

APL argued third that an affidavit and exhibit from Richard Alterman created factual questions regarding percentages of ownership and that the trial court erred when it excluded them as hearsay.[78] Again, the court of appeals pointed to the language contained within the easement itself that outlined the method for calculating percentages. Since the easement was clear on this issue, no ambiguity existed that would give rise to the need to look outside the easement.[79]

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70. *Id*.
71. *Id*.
72. *Id*. at 701–02, 856 S.E.2d at 94.
73. *Id*. at 702, 856 S.E.2d at 94.
74. *Id*.
75. *Id*.
76. *Id*. at 702, 856 S.E.2d at 95.
77. *Id*.
78. *Id*.
79. *Id*. at 703, 856 S.E.2d at 95.

In brief, the court of appeals held that the evidence presented by Sunshine Plaza in support of its motion for summary judgment was sufficient to support a finding of liability on the part of APL as a matter of law, with the exception of the landscaping expenses.[80]

IV. HEIR PROPERTY

In *Morton v. Pitts*, [81] the Georgia Court of Appeals examined a recent action for partition brought forth under the Georgia Uniform Partition of Heirs Property Act (the UPHPA)[82]. In a case of pure statutory interpretation—and of the question of mandatory or permissive language—the court of appeals held that the Early Superior Court erred in following the UPHPA when the trial court failed to order an appraisal of the property being partitioned.[83] The court of appeals reasoned that when the UPHPA procedures include the word "shall," the procedures are mandatory, and that the trial court erred by declining to follow them.[84]

Georgia's UPHPA applies to partition actions for qualifying heirs property.[85] In *Morton*, the trial court found, and all parties agreed, that the subject property was qualified heirs property.[86] Georgia's UPHPA safeguards due process protections for heirs in the partition action and also creates an avenue for a court-supervised "commercially reasonable" sale.[87] One of the requirements under the UPHPA is that the property being partitioned be appraised.[88] There are two exceptions to the appraisal requirement: (1) if there is unanimous agreement among the co-tenants as to the value of the property;[89] and (2) if the court determines the cost of the appraisal exceeds any potential evidentiary value of the appraisal, then the court holds an evidentiary hearing, sets the fair market value, and notifies the parties of the value.[90]

When Morton brought her action for partition, she requested the trial court order an appraisal.[91] Morton continued requesting an appraisal

80. *Id*.
81. 357 Ga. App. 513, 851 S.E.2d 141 (2020).
82. *Id*. at 513, 851 S.E.2d at 142; *see* O.C.G.A. §§ 44-6-180 to 44-6-189.1 (2021).
83. *Morton*, 357 Ga. App. at 513, 851 S.E.2d 142.
84. *Id*. at 513–14, 851 S.E.2d at 142.
85. *Id.* at 513, 851 S.E.2d at 142.
86. *Id*.
87. *Id*. (quoting Faison v. Faison, 344 Ga. App. 600, 602, 811 S.E.2d 431, 433 (2018)).
88. *Id.* at 514, 851 S.E.2d at 142–43 (citing O.C.G.A. § 44-6-184(a) (2021)).
89. *Id.* at 514, 851 S.E.2d at 143 (citing O.C.G.A. § 44-6-184(b)).
90. *Id.* (citing O.C.G.A. § 44-6-184(c)).
91. *Id.* at 513, 851 S.E.2d at 142.

throughout the trial court's proceedings. The other parties to the action sought to use an appraisal ordered by Morton in 2018, which valued the property at $2,185,000.00. Morton objected, citing the appraisal's age, arguing that the 2018 appraisal would not accurately determine the property's current fair market value. Nevertheless, the trial court persisted, using the 2018 appraisal to set the fair market value at $2,185,000.00. Morton appealed.[92]

The court of appeals agreed with Morton, deciding that the trial court erred in failing to order an appraisal.[93] The court of appeals reasoned that because neither of the appraisal exceptions applied in this case, the trial court had no choice but to order an appraisal of the property.[94] The trial court was bound by the UPHPA's mandatory language, which demanded an appraisal be ordered and be considered in assessing the property's fair market value.[95] Consequently, the court of appeals vacated the order of the trial court and remanded the case back to the trial court for additional proceedings.[96]

V. MATERIALMEN'S LIEN

In *Massey et al. v. Duke Builders, Inc.*[97] the Georgia Supreme Court addressed the questions of whether materialmen's liens may include anticipated profits and if not, whether a lien filed against a property owner that includes anticipated profits is therefore void in its entirety.[98] In short, the supreme court held while anticipated profits may not be included in a materialmen's lien, their inclusion alone does not render the entire materialmen's lien void.[99]

In 2013, a fire destroyed the home of John and Stephanie Massey.[100] The Masseys hired a contractor to build them a new home. The Masseys paid the contractor, Duke Builders, Inc., on a project-by-project basis as the work was completed. When the contractor was paid, the payment included materials, labor, and a contractor's fee to Duke Builders, the last of which varied according to the project. The Masseys and Duke Builders had some disagreements, and in April of 2015, the Masseys hired a new contractor. Just a month later, in May of 2015, Duke Builders

92. *Id*.
93. *Id*. at 515, 851 S.E.2d at 143.
94. *Id*. at 514–15, 851 S.E.2d at 143.
95. *Id*. at 515, 851 S.E.2d at 143.
96. *Id*.
97. 310 Ga. 152, 849 S.E.2d 186 (2020).
98. *Id*. at 153, 849 S.E.2d at 187.
99. *Id*. at 153, 849 S.E.2d at 187–88.
100. *Id*. at 153, 849 S.E.2d at 188.

filed a nearly $200,000.00 materialmen's lien against the Massey's property. The lien included roughly $146,000.00 towards work already completed—including labor, materials, and profits. A little over $50,000.00 of the lien was for profits Duke Builders anticipated earning based on the estimated completion of the home.[101]

In November of 2015, the Masseys filed suit against Duke Builders for breach of contract and other things.[102] Duke Builders answered and filed counterclaims. In March of 2018, the Masseys renewed a previously denied motion for summary judgment, arguing that the lien filed by Duke Builders should not have included anticipated profits. The trial court ruled in favor of the Masseys, holding the lien amount illegal and indeed declaring the entire lien void. The trial court ordered the lien be marked cancelled.[103]

Duke Builders appealed the trial court's order for cancellation of its lien.[104] On appeal, the court of appeals affirmed the trial court's ruling with regard to the inclusion of anticipated profits—namely, that it was not allowed—a win for the Masseys. However, in a win for Duke Builders, Inc., the court of appeals reversed the trial court's holding that the lien was void in its entirety.[105] The supreme court affirmed the court of appeals on both issues.[106]

The supreme court agreed with the court of appeals that anticipated profits may not be included in a materialmen's lien.[107] The court reasoned that under O.C.G.A. § 44-14-361(c),[108] only amounts due and owing can be included in the lien amount.[109] So, while a materialmen's lien can include overhead costs, profit, labor, and material costs for work already completed,[110] it may not include expected earnings for future work not completed at the time of the lien.[111]

Turning to the issue of whether improper inclusion of anticipated profits rendered the entire lien void, the supreme court again affirmed the court of appeals.[112] The supreme court cited precedent dating as far

101. *Id*.
102. *Id.*
103. *Id*.
104. *Id*. at 154, 849 S.E.2d at 188.
105. *Id*.
106. *Id*.
107. *Id*. at 154–55, 849 S.E.2d at 189.
108. O.C.G.A. § 44-14-361(c) (2021).
109. *Massey*, 310 Ga. at 154–55, 849 S.E.2d at 189.
110. *Id*. at 155, 849 S.E.2d at 189 (citing O.C.G.A. § 44-14-361(c)).
111. *Id.* (citing O.C.G.A. § 44-14-361.1).
112. *Id*.

back as 1917[113] to support the notion that a claim will not be defeated simply because the claim exceeds the claimant's right. Instead, the valid part of the claim will be upheld, and the invalid portion fails.[114]

113. *Id*. (citing Pace v. Shields-Geise Lumber Co., 147 Ga. 36, 92 S.E.2d 755 (1917)).
114. *Id*.