Mercer Law Review

Volume 65
Number 1 *Annual Survey of Georgia Law*

Article 7

12-2013

# Construction Law

Frank O. Brown Jr.

# Construction Law

by Frank O. Brown, Jr.*

## I. INTRODUCTION

This Article focuses on noteworthy construction law opinions by Georgia appellate courts between June 1, 2012 and May 31, 2013, and one case, *Estate of Pitts v. City of Atlanta*, decided on remand in July 2013.[1] The Article briefly discusses the Georgia False Claims Act,[2] which became effective July 1, 2012.[3]

## II. CONTRIBUTION

In *Zurich American Insurance Co. v. Heard*,[4] the owner of a hotel contended that the general contractor and architect were jointly and severally liable for damage to the hotel.[5] The general contractor and architect separately settled for $2,300,000 and $100,000, respectively. The insurers for the general contractor, as subrogees for covered claims and assignees of the general contractor on uncovered claims, then sued the architect and its subcontractor engineer for contribution and other claims.[6]

The State Court of Fulton County granted summary judgment to the defendants for several stated reasons, including that after the enactment of section 51-12-33(b) of the Official Code of Georgia Annotated

---

* Shareholder in the firm of Weissman, Nowack, Curry & Wilco, P.C., Atlanta, Georgia. General Counsel for Greater Atlanta Home Builders Association, Inc. Rhodes College (B.A., 1976); Emory University School of Law (J.D., 1979). Member, State Bar of Georgia.

1. 323 Ga. App. 70, 746 S.E.2d 698 (2013).

2. O.C.G.A. §§ 23-3-120 to -127 (Supp. 2013).

3. *Id.* For an analysis of Georgia construction law during the prior survey period, see Frank O. Brown, Jr., *Construction Law, Annual Survey of Georgia Law*, 64 MERCER L. REV. 71 (2012).

4. 321 Ga. App. 325, 740 S.E.2d 429 (2013).

5. *Id.* at 327, 740 S.E.2d at 431.

6. *Id.* at 327-28, 740 S.E.2d at 431-32.

(O.C.G.A.),[7] one settling joint tortfeasor can no longer get contribution from another joint tortfeasor.[8] The Georgia Court of Appeals reversed, holding that O.C.G.A. § 51-12-33(b) precludes contribution only when a trier of fact has apportioned damages between joint tortfeasors, not when parties have settled.[9]

## III. LIABILITY INSURANCE

In *Hoover v. Maxum Indemnity Co.*,[10] an employee of a water extraction company was injured while assisting an independent contractor with its roofing work.[11] About two years later, the employee sued his employer, and the employer notified its insurer of the suit. The insurer sent a letter to the employer denying coverage and asserting a defense to the suit based on the policy's Employer's Liability Exclusion. It also purported to reserve other defenses, including lack of timely notice of the injury itself.[12]

The Georgia Supreme Court held that the insurer could not reserve other defenses, including the notice defense, while denying coverage and asserting a defense of the insured based on the Employer's Liability Exclusion.[13] According to the court,

> A reservation of rights is a term of art in insurance vernacular and is designed to allow an insurer to provide a defense to its insured while still preserving the option of litigating and ultimately denying coverage. . . . Thus, a reservation of rights is only available to an insurer who undertakes a defense while questions remain about the validity of the coverage.[14]

"When an insurer is presented with notice of a claim and demand for a defense, the 'proper and safe course of action . . . is to enter upon a defense under a reservation of rights and then proceed to seek a declaratory judgment in its favor.'"[15]

---

7. O.C.G.A. § 51-12-33(b) (Supp. 2013).

8. *Zurich Am. Ins. Co.*, 321 Ga. App. at 329, 740 S.E.2d at 432.

9. *Id.* at 330, 740 S.E.2d at 432-33. However, see *District Owners Ass'n v. AMEC Environmental & Infrastructure, Inc.*, 322 Ga. App. 713, 747 S.E.2d 10 (2013), where the Georgia Court of Appeals affirmed the trial court order dismissing a third-party contribution/apportionment claim. *Id.*

10. 291 Ga. 402, 730 S.E.2d 413 (2012).

11. *Id.* at 403, 730 S.E.2d at 415.

12. *Id.* at 403-04, 730 S.E.2d at 415-16.

13. *Id.* at 405, 730 S.E.2d at 416-17.

14. *Id.* at 405, 730 S.E.2d at 416.

15. *Id.* at 405, 730 S.E.2d at 417 (quoting Richmond v. Ga. Farm Bureau Mut. Ins. Co., 140 Ga. App. 215, 217, 231 S.E.2d 245, 247 (1976)).

The court also held that the insurer's denial letter failed to effectively reserve the notice defense because it did not "unambiguously inform" the insured that the insurer "intended to pursue a defense based on untimely notice of the claim."[16] Instead, the letter merely stated that, "coverage for this matter may be barred or limited to the extent the insured has not complied with the notice provisions under the policy," and it included "boilerplate language" purporting to reserve the right to assert numerous other defenses.[17]

## IV. MECHANICS' AND MATERIALMEN'S LIENS

In the case of *182 Tenth, LLC v. Manhattan Construction Co.*,[18] a general contractor filed suit to collect a debt and to foreclose the related mechanics' and materialmen's lien.[19] The Georgia Court of Appeals held that the contractor's itemized general conditions costs for overhead or administrative costs during the construction project (such as the cost of staff, mobilization, phone and water, power, a job-site trailer, dumpster rentals, the final cleaning, and builder's risk and general-liability insurance) were not lienable because they did not actually become part of the property.[20] For the same reason, it also held that interest on these costs was not lienable.[21]

In response to this decision, the Georgia legislature amended O.C.G.A. § 44-14-361[22] to allow liens to include general conditions costs to the extent they are permitted by an express or implied contract or purchase order,[23] and to provide that mechanics' and materialmen's liens "shall include interest on the principal amount due in accordance with Code Section 7-4-2 or 7-4-16."[24]

## V. STATUTES OF LIMITATION

In *Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc.*,[25] the owner of an automobile shredding facility sued its designing

16. *Id.* at 406, 730 S.E.2d at 417.

17. *Id.* at 404, 406, 730 S.E.2d at 416-17. The court also held that the insurer waived the notice defense by not asserting it at earlier stages. *Id.* at 407, 730 S.E.2d at 418.

18. 316 Ga. App. 776, 730 S.E.2d 495 (2012).

19. *Id.* at 776, 730 S.E.2d at 497.

20. *Id.* at 780-81, 730 S.E.2d at 500.

21. *Id.* at 781, 730 S.E.2d at 500.

22. O.C.G.A. § 44-14-361 (2002 & Supp. 2013).

23. Ga. H.R. Bill 434, Reg. Sess., 2013 Ga. Laws 1102 (codified at O.C.G.A. § 44-14-36-1(c)).

24. *Id.* (codified at O.C.G.A. § 44-14-361(d)).

25. 317 Ga. App. 464, 731 S.E.2d 361 (2012).

engineering firm for breach of contract and professional malpractice.[26] The engineering firm sought summary judgment on the basis that the suit was barred by the four-year statute of limitation in O.C.G.A. § 9-3-25[27] for express oral promises.[28] The owner responded that two cover letters from the engineering firm and an enclosed draft scope of work amounted to a written contract, which, according to O.C.G.A. § 9-3-24,[29] is subject to a six-year statute of limitations.[30] The owner also noted that one of the letters included cost estimates for the first three stages of work and stated that the engineering firm would bill on an hourly basis. The Superior Court of Gwinnett County granted summary judgment to the engineering firm.[31] The Georgia Court of Appeals affirmed, noting that to be considered a written contract under O.C.G.A. § 9-3-24, all of the contract's essential terms had to be stated in, or be ascertainable from, the writings.[32] The court concluded that because the essential contract element of consideration was lacking from the cover letters and draft scope of work, the writings did not specify the hourly rate.[33]

The owner also argued that an invoice from the engineering firm, about four months after the letters and draft scope, cured that deficiency because the court could calculate the hourly rates from the invoice.[34] The court rejected the argument by noting that, while a written contract can arise from several writings, those writings have to be contemporaneous.[35]

In the case of *Carrier Corp. v. Rollins, Inc.*,[36] the contract between an HVAC installer and a property owner stated that the owner had to file any suit within one year from "the date the claim arose."[37] The contract did not define that phrase. The installer moved for a directed verdict on the basis that "substantial completion" of the contract had occurred about two years before the owner filed suit.[38] On appeal from the denial of the installer's motion and other rulings, the Georgia Court

26. *Id.* at 464, 731 S.E.2d at 363.
27. O.C.G.A. § 9-3-25 (2007).
28. *Newell Recycling of Atlanta, Inc.*, 317 Ga. App. at 465, 731 S.E.2d at 363.
29. O.C.G.A. § 9-3-24 (2007).
30. *Newell Recycling of Atlanta, Inc.*, 317 Ga. App. at 464, 467, 731 S.E.2d at 363-64.
31. *Id.* at 464, 466, 731 S.E.2d at 362, 364.
32. *See id.* at 464, 731 S.E.2d at 362.
33. *Id.* at 467, 731 S.E.2d at 364.
34. *Id.*
35. *Id.* at 466-67, 731 S.E.2d at 364.
36. 316 Ga. App. 630, 730 S.E.2d 103 (2012).
37. *Id.* at 632, 730 S.E.2d at 107.
38. *Id.* at 632-33, 730 S.E.2d at 106-07.

of Appeals noted that generally a cause of action for breach of a construction contract accrues at substantial completion of the project.[39] However, it held that the suit was timely because (1) the contract did not mention substantial completion and used the term "complete operational system" to describe the project; and (2) the system was either never completed or was completed within a year from when the owner filed suit.[40]

## VI. "PAY-IF-PAID" PROVISIONS

In *Vratsinas Construction Co. v. Triad Drywall, LLC,*[41] the contract between a drywall subcontractor and the general contractor contained a pay-if-paid provision.[42] According to the subcontractor, after it expressed concerns to the general contractor about the owner's ability to pay, the general contractor told it not to worry, to continue working, and that the general contractor would pay the subcontractor from its "own pocket" if necessary. The general contractor did pay the subcontractor's next application even though the owner had not paid the general contractor. However, the general contractor refused to pay the subcontractor's next seven applications because it had not received payment from the owner. After completion of the project, the owner filed bankruptcy.[43]

The subcontractor sued the general contractor arguing that it had waived the pay-if-paid provision by committing to pay from its "own pocket" and doing so in connection with one application for payment. A jury returned a verdict for the subcontractor.[44]

On appeal, the general contractor argued that the Superior Court of Fulton County erred in denying its motions for directed verdict and judgment notwithstanding the verdict because there was insufficient evidence of waiver of the pay-if-paid provision.[45] The Georgia Court of Appeals stated that although waiver can occur by conduct, "the law will not infer the waiver of an important contract right unless 'the waiver is *clear and unmistakable.*'"[46] The court added, "[B]ecause waiver is not favored under the law, the evidence relied upon to prove a waiver 'must

39. *Id.* at 633, 730 S.E.2d at 107.
40. *Id.* at 633-34, 730 S.E.2d at 107-08.
41. 321 Ga. App. 451, 739 S.E.2d 493 (2013).
42. *Id.* at 452, 739 S.E.2d at 495.
43. *Id.* at 451-53, 739 S.E.2d at 494-95.
44. *Id.* at 453, 739 S.E.2d at 495-96.
45. *Id.* at 453, 739 S.E.2d at 496.
46. *Id.* at 453-54, 739 S.E.2d at 496 (quoting Accurate Printers, Inc. v. Stark, 295 Ga. App. 172, 177, 671 S.E.2d 228, 232 (2008)).

be so clearly indicative of an intent to relinquish a then[-]known particular right or benefit as to exclude any other reasonable explanation.'"[47] According to the court, the party asserting waiver has the burden of proving it.[48]

Applying those principles to the facts, the court held that there were insufficient facts to establish waiver.[49] In reaching that conclusion, it emphasized that the general contractor had refused to pay the subcontractor's last seven applications, and the subcontractor's account manager and co-owner were very aware of the pay-if-paid provision and were unaware of any change in the applicability of that provision.[50]

## VII. SOVEREIGN IMMUNITY

In *Douglas Asphalt Co. v. Georgia Department of Transportation*,[51] the Georgia Department of Transportation (GDOT) contracted with Applied Technical Services, Inc. (ATS) to test samples of asphalt laid by Douglas Asphalt Company (Douglas).[52] After the test results indicated issues, and GDOT had declared Douglas in default on more than one hundred projects and removed it from GDOT's bidders list, Douglas sued ATS alleging that ATS had used an improper testing procedure. As part of the consideration for settlement of that suit, ATS assigned its rights against GDOT to Douglas.[53]

In the subject case, Douglas, as assignee of ATS, sued GDOT for contract-based indemnification and contribution. GDOT asserted sovereign immunity as a defense. The State Court of Glynn County granted GDOT's motion to dismiss on that ground.[54] The Georgia Court of Appeals affirmed on the indemnification claim because it determined there was no agreement to indemnify in the documents that Douglas contended constituted the ATS/GDOT contract.[55] The court also affirmed the trial court's dismissal of the contribution claim, noting that contribution is only applicable between joint tortfeasors, and determining that Douglas's claim sounded in contract, not tort.[56] It reached that conclusion because GDOT's duties to ATS relating to the

47. *Id.* at 454, 739 S.E.2d at 496 (quoting D.I. Corbett Elec., Inc. v. Venture Constr. Co., 140 Ga. App. 586, 588, 231 S.E.2d 536, 538 (1976)).
48. *Id.*
49. *Id.*
50. *Id.* at 455-56, 739 S.E.2d at 497.
51. 319 Ga. App. 47, 735 S.E.2d 86 (2012).
52. *Id.* at 47, 735 S.E.2d at 88.
53. *Id.* at 47-48, 735 S.E.2d at 88-89.
54. *Id.* at 47, 735 S.E.2d at 88.
55. *Id.* at 50, 735 S.E.2d at 90.
56. *Id.* at 50-51, 735 S.E.2d at 90-91.

testing procedures could only have arisen from a contract and not from any duty imposed by law.[57]

## VIII. THIRD-PARTY BENEFICIARIES

The history of *Archer Western Contractors, Ltd. v. Estate of Pitts*[58] is a cautionary tale to both drafters of construction contracts and litigation counsel charged with trying to anticipate appellate court rulings.[59] During an airport construction project, a truck driven by an employee of a sub-subcontractor fatally struck Pitts, a subcontractor's employee.[60] Pitts's estate received a large judgment against the sub-subcontractor and its employee, which exceeded the sub-subcontractor's automobile liability insurance coverage. The estate then sued the City of Atlanta, the general contractor, and the subcontractor, alleging that they had failed to require the sub-subcontractor to maintain $10 million in automobile liability insurance as required by both the general contract and the subcontract. Had they required that level of insurance, the estate argued, the judgment against the sub-subcontractor would have been fully satisfied. The defendants responded that Pitts was not a third-party beneficiary of the general contract or subcontract and, therefore lacked standing to assert a breach of the minimum insurance requirement.[61]

The Georgia Court of Appeals acknowledged that neither contract named Pitts as a third-party beneficiary, but it held that Pitts was nevertheless an intended beneficiary.[62] The court drew that conclusion principally because of the following language in an insurance addendum to the general contract, which the subcontracts also incorporated: [The purpose of the Owner's Controlled Insurance Program is] "to provide one master insurance program that provides broad coverages with high limits *that will benefit all participants involved in the project.*"[63] The court noted that the contracts did not define "participant," but concluded,

---

57. *Id.* at 51, 735 S.E.2d at 91. *See also* Douglas Asphalt Co. v. Linnenkohl, 320 Ga. App. 427, 430-31, 741 S.E.2d 169, 171 (2013), where the Georgia Court of Appeals held that sovereign immunity protected the GDOT commissioner from fraud claims by Douglas relating to the testing procedures.

58. 292 Ga. 219, 735 S.E.2d 772 (2012), *remanded to sub nom.* Estate of Pitts v. City of Atlanta, 323 Ga. App. 70, 746 S.E.2d 698 (2013).

59. *See generally Archer W. Contractors*, 292 Ga. at 219, 735 S.E.2d at 772.

60. Estate of Pitts v. City of Atlanta, 312 Ga. App. 599, 599-600, 719 S.E.2d 7, 9 (2011), *vacated and remanded by sub nom. Archer W. Contractors*, 292 Ga. at 219, 735 S.E.2d at 772.

61. *Estate of Pitts*, 312 Ga. App. at 600, 719 S.E.2d at 10.

62. *Id.* at 602-03, 719 S.E.2d at 11-12.

63. *Id.* at 603, 719 S.E.2d at 12.

based on what it characterized as the common meaning, that "participant" unambiguously referred to all persons involved in constructing the project.[64]

The Georgia Supreme Court accepted certiorari.[65] The court's four-to-three majority opinion began by observing that, though the contract addendum required the city to procure certain insurance policies and the general contractor and subcontractors to procure other policies, including the automobile insurance at issue, that addendum was "somewhat confusingly, entitled 'Owner's Controlled Insurance Program' and [was] referenced in the contract as 'OCIP.'"[66] The supreme court referred to the addendum as the "OCIP addendum."[67]

The majority stated that the court of appeals analysis had been incomplete in two respects.[68] First, in determining the meaning of "all participants," it failed to consider fully the context in which that term appeared in the OCIP addendum.[69] More specifically, they opined that the court of appeals should have more carefully examined whether "OCIP," in the purpose statement mentioned above, referred only to the coverages provided by the city or to all coverages addressed in the OCIP addendum.[70] According to the majority, the second incompleteness in the court of appeals analysis was that it seemed to assume the plaintiff was a beneficiary of all insurance-related contract terms, rather than analyzing and specifying whether the plaintiff was a beneficiary of terms relating directly or indirectly to the automobile coverage.[71]

The supreme court vacated the court of appeals decision and remanded the case for consideration of these deficiencies, as well as unaddressed parol evidence and alleged judicial admissions that could bear on them.[72] The dissenters aggressively criticized the majority opinion as misguided and noted that the decision to remand was effectively directing the court of appeals to "wander in the wilderness."[73] While not expressly reversing the court of appeals opinion relating to breach of contract claims against the city, the supreme court effectively did so, stating that "[t]o the extent that the Court of Appeals concluded," which it had, that the city breached a duty to ensure that the sub-subcontrac-

64. *Id.* at 603-04, 719 S.E.2d at 12.
65. *Archer W. Contractors*, 292 Ga. at 220, 735 S.E.2d at 774.
66. *Id.* at 221-22, 735 S.E.2d at 775-76.
67. *Id.* at 222, 735 S.E.2d at 776.
68. *Id.* at 224, 735 S.E.2d at 777.
69. *Id.*
70. *Id.* at 225-26, 735 S.E.2d at 777-78.
71. *Id.* at 227-28, 735 S.E.2d at 779-80.
72. *Id.* at 230, 735 S.E.2d at 780-81.
73. *Id.* at 237, 735 S.E.2d at 785 (Hines, J., dissenting).

tor carried at least $10 million in automobile liability insurance, "it erred."[74]

On remand, the court of appeals again addressed the meaning of "all participants."[75] It characterized the supreme court's majority opinion as having determined that this term was ambiguous and as having directed the court of appeals to determine whether that ambiguity could be resolved as a matter of law.[76] The court of appeals quoted key provisions of the OCIP addendum that were not fully quoted in earlier opinions and were helpful in understanding the OCIP addendum.[77] It then considered various arguments and evidence relating to the meaning of "all participants," and, after applying rules of contract construction, once again concluded that "all participants" included Pitts as a matter of law.[78]

The court of appeals next identified, per the supreme court's direction, the specific provisions of the contract, including the OCIP addendum, to which the deceased employee was a third-party beneficiary.[79] Interpreted, those provisions required the general contractor and subcontractors to require their subcontractors to have the insurance coverages specified on the OCIP addendum.[80] Because the automobile insurance was specified on the OCIP addendum and "all participants" included Pitts, the court concluded that the employee was an intended third-party beneficiary.[81]

Although the general contract and OCIP addendum do not consistently use "OCIP,"[82] the court's conclusion, certainly as a matter of law, seems questionable for at least two reasons. First, the "all participants" language is not in the section of the OCIP addendum that addresses automobile coverage that was to be provided by the contractors but is in

---

74. *Id.* at 229, 735 S.E.2d at 780 (majority opinion).

75. *Estate of Pitts*, 323 Ga. App. at 71, 746 S.E.2d at 698.

76. *Id.* at 71-72, 746 S.E.2d at 700.

77. *Id.* at 76-77, 746 S.E.2d at 703-04.

78. *Id.* at 80, 746 S.E.2d at 708. Significantly, the court of appeals stated also, "We do not ignore the possibility that, in the construction industry, the term 'participants' has a specialized meaning relating to a preexisting OCIP . . . . But the construction companies have neither argued in their appellate briefs nor pointed to any parol evidence of such an industry meaning." *Id.* at 80, 746 S.E.2d at 705. Because "participant" probably has a specialized meaning with reference to OCIP policies, these arguments may have helped the contractors.

79. *Id.* at 84-85, 746 S.E.2d at 708.

80. *Id.* at 86, 746 S.E.2d at 708.

81. *Id.* at 85-86, 746 S.E.2d at 709.

82. Arguably, the "[n]otwithstanding anything to the contrary" language at the beginning of the summary part of the OCIP addendum rendered moot some of the inconsistency in the use of "OCIP" in the general contract. *See id.* at 76, 746 S.E.2d at 703.

a separate section addressing other specific coverages that the city was to have provided as part of the OCIP program.[83] Notwithstanding the separate coverages and separate responsible parties addressed in those separate sections, the court of appeals chose to incorporate the "all participants" language into the section of the OCIP addendum that addresses automobile coverage.[84] It did that based on its seemingly erroneous construction of the OCIP addendum as addressing only "one master insurance program" rather than one master insurance program to have been supplemented by the city and other insurance policies, including automobile coverage, provided by the contractors.[85]

Second, the automobile coverage required to be provided by the contractors was coverage "from claims" covered by automobile insurance.[86] The contractor and subcontractor argued that Pitts could not be a third-party beneficiary of that coverage because the coverage was described with reference to the claims from which the insured would be protected, rather than the claims for which a tort claimant could recover.[87] The court of appeals acknowledged the general rule that "tort claimants are not treated as third[-]party beneficiaries of insurance policies,"[88] but nevertheless concluded that the "all participants" language from "the summary provision of the OCIP addendum expressly describes the beneficiaries in a broad manner that encompasses such tort claimants."[89] It will not be surprising if the supreme court grants certiorari to review this court of appeals decision.

## IX. GEORGIA FALSE CLAIMS ACT

The Georgia False Claims Act (the "Act")[90] became effective July 1, 2012.[91] Those dealing with either the state of Georgia or local governments, or contractors dealing with those entities, need to be aware of its terms. Under the Act, any person that

> [k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval [to a state or local government or to a contractor dealing with these entities, or] [k]nowingly makes, uses, or causes to be made or used a false record or statement material to a

83. *Id.* at 81-82, 746 S.E.2d at 703-04.
84. *Id.* at 85-86, 746 S.E.2d at 709.
85. *Id.* at 86, 746 S.E.2d at 709.
86. *Id.* at 77-78, 746 S.E.2d at 704.
87. *Id.* at 81-82, 746 S.E.2d at 709.
88. *Id.*
89. *Id.* at 86, 746 S.E.2d at 709.
90. O.C.G.A. §§ 23-3-120 to -127.
91. *Id.*

> false or fraudulent claim[, is] liable to the State of Georgia for a civil penalty of not less than $5,500.00 and not more than $11,000.00 for each false or fraudulent claim, plus [, as a general rule] three times the amount of damages [that] the state or local government sustains because of the act of such person.[92]

A "claim" is defined to include "any request or demand, whether under a contract or otherwise, for money or property."[93] Under the Act, "knowingly" includes not only actual knowledge of information, but also deliberate ignorance of and "reckless disregard of the truth or falsity of the information."[94]

92. O.C.G.A. § 23-3-121(a).
93. O.C.G.A. § 23-3-120(1).
94. O.C.G.A. § 23-3-120(2).

***