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I. SOVEREIGN IMMUNITY[1]

In *Gatto v. City of Statesboro*,[2] the Supreme Court of Georgia affirmed the Georgia Court of Appeals holding that municipalities are immune from liability for nuisance claims "based on alleged conduct related to property they neither own nor control."[3] Sovereign immunity,[4] therefore, applied to the plaintiffs' nuisance claim against the City of Statesboro for injuries and the alleged wrongful death of their son following his altercation with a bouncer at a bar on private property within the city.[5]

In reaching its conclusion, the supreme court recognized that its prior ruling in *Town of Fort Oglethorpe v. Phillips*[6] "extend[ed] the nuisance doctrine to include personal injuries beyond those tied to the plaintiff's property," thereby enlarging the scope of municipalities' potential liability for nuisance.[7] It nevertheless found that "no case has expanded the realm of municipal liability to cover injuries caused by property over which the municipality does not exercise dominion or control in some manner."[8] The supreme court, therefore, held that the city "cannot be held liable for its discretionary decision not to act to abate a nuisance caused by a private party and maintained on private property."[9]

2012–2014)); Georgia Municipal Association Towns and the Law (legal columnist 2011–2018).

1. For a discussion of the prior survey period *see* Russell A. Britt et al., *Local Government Law*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 193 (2021), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss1/14/ [https://perma.cc/LB3R-LXCR].

2. 312 Ga. 164, 860 S.E.2d 713 (2021).

3. *Id.* at 164, 860 S.E.2d at 715.

4. 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). While the supreme court in this case noted that the lower courts used the term "sovereign immunity" to describe the city's immunity, it elected to use the term "municipal immunity" because the immunity analysis involved "governmental immunity afforded specifically to cities." *Gatto*, 312 Ga. at 165 n.4, 860 S.E.2d at 719. Regardless of this narrowed nomenclature, the analysis falls within the broader principle of sovereign immunity.

5. *Gatto*, 312 Ga. at 164, 860 S.E.2d at 715.

6. 224 Ga. 834, 165 S.E.2d 141 (1968).

7. *Gatto*, 312 Ga. at 170, 860 S.E.2d at 719.

8. *Id.* at 173, 860 S.E.2d at 720.

9. *Id.* at 174, 860 S.E.2d at 721.

Accordingly, the city was immune from liability as to the plaintiffs' nuisance claim.[10]

The supreme court also expressed some of its justices' "doubts about the legal foundations of *Phillips*, which also divorced municipal nuisance liability from its basis in [the Georgia] Constitution's Takings Clause."[11] While it did not address these doubts and questions to resolve this case, the dicta signals that the court may have an interest in overturning *Phillips* in the future.[12]

While *Phillips* remains binding precedent for now, the court of appeals nevertheless distinguished it in *City of Alpharetta v. Vlass*.[13] The case involved a nuisance claim against the city for injuries received in a motor vehicle collision.[14] The complaint, as amended, alleged that the plaintiff was driving a school bus when a pickup truck turned left into the path of the school bus, causing a "t-bone" collision.[15] The plaintiff argued that, because the city failed to prohibit left-hand turns at the subject intersection, "despite actual and/or constructive knowledge of the hazardous condition this created," the city permitted and maintained a nuisance.[16]

The court of appeals determined that the failure to prohibit left turns at the subject intersection "falls squarely within the line of cases in which our appellate courts have refused to further extend the expansion of *Phillips*,"[17] involving the installation and then failure to maintain a defective traffic device.[18] In contrast to *Phillips* and other similar

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10. *Id.*

11. *Id.* at 171 n.6, 860 S.E.2d at 719.

12. On the underlying issue of when municipalities are provided immunity, the supreme court also recognized inconsistency in its precedent on the types of activities that constitute governmental functions to afford immunity versus ministerial functions that do not. It found that "[s]omewhat incongruously, Georgia courts have long held that the duty to maintain streets and sidewalks free from obstructions and other dangers is a *ministerial* duty." *Id.* at 167 n.4, 860 S.E.2d at 717 (emphasis in original). This recognition may be useful to any future challenge to classifying municipal maintenance of streets and sidewalks as a ministerial function that does not afford immunity.

13. 360 Ga. App. 432, 861 S.E.2d 249 (2021).

14. *Id.* at 432, 861 S.E.2d at 250. The plaintiff also brought a negligence claim on the same facts, but that claim was dismissed by the trial court and then affirmed by the court of appeals. *Id.* at 433, 861 S.E.2d at 250. The court of appeals found that the decision whether to prohibit left turns at the intersection was a discretionary act, entitling the city to immunity on the negligence claim, and the plaintiff otherwise forfeited his right to establish a waiver of immunity by the city's purchase of insurance. *Id.* at 437, 861 S.E.2d at 253.

15. *Id.* at 432–33, 861 S.E.2d at 250.

16. *Id.* at 433, 861 S.E.2d at 250.

17. *Id.* at 436, 861 S.E.2d at 253.

18. *Phillips*, 224 Ga. at 834, 165 S.E.2d at 142.

precedent, it was not alleged in *Vlass* that the city had taken any action that created a nuisance at the intersection.[19] Rather, it was only alleged that the city permitted a nuisance to exist by failing to prohibit left turns; there were no allegations that the city previously took "any action or asserted control of the intersection such that it had created a dangerous condition."[20] Accordingly, the city could not be liable for a nuisance, and the court of appeals reversed the State Court of Fulton County's denial of the city's motion to dismiss.[21] This result is consistent with state law providing that municipalities cannot be held liable for exercising their discretion in failing to perform an act where they are not required by statute to perform such an act.[22]

The holding in *Atlantic Specialty Insurance Co. v. City of College Park*[23] resolved a long-standing dispute over whether insurance endorsements limiting coverage up to the statutory waiver cap, where sovereign immunity is found to apply, contravenes public policy.[24] The supreme court held that they do not.[25]

The facts of the case involve individuals who were killed when their vehicle was struck by a stolen vehicle being chased by city police officers.[26] At the time of the incident, the city had an insurance policy that provided coverage for negligent acts involving city motor vehicles up to $5,000,000 but also included immunity endorsements stating that the insurer had no duty to pay damages "unless the defenses of sovereign and governmental immunity are inapplicable."[27] The parties agreed that Official Annotated Code of Georgia section 36-92-2(a)(3)[28] automatically waives the city's sovereign immunity up to $700,000, regardless of whether the city has liability insurance. The plaintiffs asserted that the insurance policy limit was $5,000,000 for the three deaths involved, while the insurance company maintained that the policy limit was capped at $700,000 under the statutory scheme and terms of the city's policy.[29]

19. *Vlass*, 360 Ga. App. at 437, 861 S.E.2d at 253.

20. *Id.*

21. *Id.*

22. O.C.G.A. § 36-33-2 (2022).

23. 313 Ga. 294, 869 S.E.2d 492 (2022).

24. *Id.* at 302, 869 S.E.2d at 498.

25. *Id.* "Under current Georgia law, it is not against public policy for local government entities to decline to purchase liability insurance or to purchase liability insurance that does not cover any and all losses resulting from the use of their motor vehicles." *Id.* Accordingly, the immunity endorsements do not contravene public policy.

26. *Id.* at 294, 869 S.E.2d at 493.

27. *Id.*

28. O.C.G.A § 36-92-2(a)(3) (2022).

29. *Atl. Specialty Ins. Co.*, 313 Ga. at 294–95, 869 S.E.2d at 493.

The supreme court reversed the court of appeals in rejecting the plaintiffs' arguments.[30] It held that "it is not against public policy for local government entities to decline to purchase liability insurance or to purchase liability insurance that does not cover any and all losses resulting from the use of their motor vehicles."[31] The court further held that the insurance policy purchased by the city in this case did not apply above the $700,000 statutory waiver of immunity under a plain reading of the policy endorsements.[32] Accordingly, the city had not purchased coverage above the automatic statutory waiver of sovereign immunity, and any liability was capped at $700,000.[33] This holding enables local governments to continue purchasing insurance policies at a discounted premium by limiting coverage to incidents where immunity does not apply.

The consequences of the holding in *Lathrop v. Deal*[34] continued with the supreme court's ruling in *Riley v. Georgia Association of Club Executives*.[35] Since *Gilbert v. Richardson*,[36] the court has held that claims against government officials in their official capacities are, in reality, claims against the government itself, which implicates sovereign immunity.[37] The viability of official capacity claims was further limited in *Lathrop* where the court held that sovereign immunity bars declaratory and injunctive relief claims against the state, including challenges to a law's constitutionality under the Georgia Constitution.[38] The court, however, determined that official immunity did not bar claims against government officials in their individual capacities for injunctive and declaratory relief.[39] Individual capacity claims against government officials for declaratory and injunctive relief, therefore, became more prevalent as plaintiffs attempted to circumvent sovereign immunity.[40]

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30. *Id.* at 305, 869 S.E.2d at 500.
31. *Id.* at 302, 869 S.E.2d at 498.
32. *Id.* at 303, 869 S.E.2d at 498.
33. *Id.* at 305, 869 S.E.2d at 500.
34. 301 Ga. 408, 801 S.E.2d 867 (2017).
35. 313 Ga. 364, 870 S.E.2d 405 (2022).
36. 264 Ga. 744, 452 S.E.2d 476 (1994).
37. *Id.* at 750, 452 S.E.2d at 481; *see also* Cameron v. Lang, 274 Ga. 122, 126, 549 S.E.2d 341, 346 (2001).
38. *Lathrop*, 301 Ga. at 424, 801 S.E.2d at 879; *see* Christian Henry et al., *Local Government Law*, *Annual Survey of Georgia Law*, 70 MERCER L. REV. 177, 178–82 (2018).
39. *Lathrop*, 301 Ga. at 434–35, 801 S.E.2d at 886.
40. Britt et al., *Local Government Law*, 73 MERCER L. REV. at 194–95. However, sovereign immunity has since been waived for acts seeking declaratory relief for actions allegedly outside the scope of the government's legal authority or in violation of the Georgia Constitution or United States Constitution through passage of a constitutional amendment to the Georgia Constitution. *See* Ga. H.R. Res. 1023, Reg. Sess., 2020 Ga. House J. 171.

In *Riley*, the plaintiff sued the State Revenue Commissioner in her individual capacity over the constitutionality of statutory provisions imposing an annual assessment on adult entertainment establishments.[41] During the pendency of the case, the State Revenue Commissioner left her position for another role in state government.[42] The supreme court held that because the defendant was no longer State Revenue Commissioner at the time the Superior Court of Fulton County entered its summary judgment order and final judgment, an injunction against her in her individual capacity could not give the plaintiff the relief sought.[43] Plaintiff's claims against the former State Revenue Commissioner in her individual capacity therefore were moot.[44] The holding in *Riley* reminds litigants that, where declaratory and injunctive relief is sought from a government official in his or her official capacity, the official's successor must be substituted as the defendant when the official leaves office during the pendency of the case.[45] This result also highlights one of the challenges in bringing individual capacity claims for such relief.

II. OFFICIAL IMMUNITY

While official immunity[46] remains a viable defense for government officials and employees when sued in their individual capacities for personal injury claims, the fact-intensive inquiry on whether such immunity applies continues to be a challenge for disposing of claims at the pleading stage in state court.[47] This remains challenging in light of the fact that "official immunity is not a mere defense but rather *an entitlement not to be sued* which must be addressed as a threshold matter before a lawsuit may proceed."[48]

41. *Riley*, 313 Ga. at 364, 870 S.E.2d at 406.
42. *Id.* at 364, 870 S.E.2d at 407.
43. *Id.* at 367, 870 S.E.2d at 409.
44. *Id.*
45. *Id.* at 365, 870 S.E.2d at 407.
46. 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).

47. Cosby v. Lewis, 308 Ga. App. 668, 672, 708 S.E.2d 585, 588 (2011).
48. *Id.*

A wrongful death action was brought against the City of Monroe and a city police officer who shot the decedent in *Summerour v. City of Monroe*.[49] The officer filed a motion for judgment on the pleadings contemporaneously with his answer, asserting official immunity based on the attached recording of aspects of the police encounter as captured by a second officer's body camera.[50] The officer claimed that he was entitled to official immunity because "an injurious work-related act committed by an officer, but justified by self-defense, comes within the scope of official immunity," and under state law "a person who has committed a battery may assert [self] defense in a civil suit [against] the battery."[51] The officer further contended that the recording attached to his motion established a reasonable belief a fake gun was real, among other things.[52]

The Superior Court of Walton County granted the officer's motion, but "[o]n appeal, [the plaintiff] contend[ed] that the grant of judgment on the pleadings was impermissibly based on factual determinations that the trial court derived from the recording," which the plaintiff argued was not part of the pleadings.[53] The Georgia Court of Appeals agreed, holding that the recording was not a "written instrument" that could be incorporated properly into the pleadings under O.C.G.A. § 9-11-10(c).[54] It therefore held that the "recording amounted to evidentiary material that trial court was not authorized to consider without first converting the Defendants' motion to one for summary judgment."[55]

The officer attempted to argue on appeal that an official asserting immunity also may move to dismiss for lack of subject matter jurisdiction under O.C.G.A. § 9-11-12(b)(1),[56] which allows the trial court to hear evidence and make relevant factual findings to decide the threshold issue.[57] The court of appeals however rejected the officer's argument in this case, finding that the officer only moved under O.C.G.A. § 9-11-12(c),[58] which was the provision the trial court cited in granting judgment on the pleadings.[59] This holding reiterates the importance of

49. 363 Ga. App. 519, 519, 870 S.E.2d 848, 849 (2022).

50. *Id.* at 520, 870 S.E.2d at 850.

51. *Id.* at 525, 870 S.E.2d at 853.

52. *Id.* at 526, 870 S.E.2d at 853.

53. *Id.*

54. *Id.* at 529, 870 S.E.2d at 855; *see* O.C.G.A. § 9-11-10(c) (2022).

55. *Summerour*, 363 Ga. App. at 529, 870 S.E.2d at 855.

56. O.C.G.A. § 9-11-12(b)(1) (2022).

57. *Summerour*, 363 Ga. App at 530–531, 870 S.E.2d at 856; *see* Rivera v. Washington, 298 Ga. 770, 778, 784 S.E.2d 775, 780 (2016).

58. O.C.G.A. § 9-11-12(c).

59. *Summerour*, 363 Ga App at 530–31, 870 S.E.2d at 856.

asserting immunity under O.C.G.A. § 9-11-12(b)(1) where the defendant asks the court to consider evidence outside the pleadings before the summary judgment stage.[60]

Nevertheless, asserting immunity under O.C.G.A. § 9-11-12(b)(1) does not guarantee a ruling on the threshold issue of official immunity at the pleading stage.[61] In *Parr v. Cook County School District*,[62] the plaintiffs alleged that their daughter was burned by food in the school lunchroom and sued the school district and multiple school officials.[63] The defendants moved to dismiss on immunity grounds under O.C.G.A. § 9-11-12(b)(1), in addition to O.C.G.A. § 9-11-12(b)(6)[64] and O.C.G.A. § 9-11-12(c).[65] As to the issue of official immunity, the plaintiffs did not claim that the individual defendants acted with actual malice or an intent to injure the student; they therefore sought to hold the individual defendants liable for alleged ministerial acts negligently performed.[66]

The court of appeals reversed the trial court's grant of official immunity, noting that the issue of whether a ministerial duty was negligently performed is fact specific, and "factual evidence . . . may or may not be developed during discovery."[67] The plaintiffs otherwise pled sufficient facts to withstand dismissal at the preliminary stage of the litigation and had not been afforded the ability to conduct discovery.[68] Accordingly, contrary to the purported protection from the rigors of litigation that official immunity provides, government officials sued in their individual capacities are often times subjected to discovery notwithstanding their entitlement to such immunity.

III. *ANTE LITEM* NOTICE

It was a busy year for the Georgia Court of Appeals in evaluating the *ante litem* notice requirements for claims against the state of Georgia, counties, and municipalities. Through a number of opinions, the court of appeals illuminated the importance of seeking a specific amount of damages from the governmental entity.

60. *Id.* at 530, 870 S.E.2d at 856.

61. *Id.* at 531, 870 S.E.2d at 856.

62. 359 Ga. App. 823, 860 S.E.2d 114 (2021).

63. *Id.* at 823, 860 S.E.2d at 115.

64. O.C.G.A. § 9-11-12(b)(6).

65. *Parr*, 359 Ga. App. at 823–24, 860 S.E.2d at 115.

66. *Id.* at 826, 860 S.E.2d at 117.

67. *Id.* at 827–28, 860 S.E.2d at 118 (quoting Austin v. Clark, 294 Ga. 773, 775, 755 S.E.2d 796, 798–99 (2014)).

68. *Parr*, 359 Ga. App. at 826–27, 860 S.E.2d at 117.

As a reminder, the county and municipality requirements with regard to *ante litem* notice are as follows:

> (a) No person, firm, or corporation having a claim for money damages against any municipal corporation on account of injuries to person or property shall bring any action against the municipal corporation for such injuries, without first giving notice as provided in this Code section.
>
> (b) Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having the claim shall present the claim in writing to the governing authority of the municipal corporation for adjustment, stating the time, place, and extent of the injury, as nearly as practicable, and the negligence which caused the injury. No action shall be entertained by the courts against the municipal corporation until the cause of action therein has first been presented to the governing authority for adjustment . . . .
>
> (e) The description of the extent of the injury required in subsection (b) of this Code section shall include the specific amount of monetary damages being sought from the municipal corporation. The amount of monetary damages set forth in such claim shall constitute an offer of compromise. In the event such claim is not settled by the municipal corporation and the claimant litigates such claim, the amount of monetary damage set forth in such claim shall not be binding on the claimant.[69]

Additionally,

> All claims against counties must be presented within 12 months after they accrue or become payable or the same are barred, provided that minors or other persons laboring under disabilities shall be allowed 12 months after the removal of the disability to present their claims.[70]

A quick aside before we dive into the analysis regarding cities and counties. During the Survey period, the Federal District Court for the Northern District of Georgia interpreted Georgia's *ante litem* notice statute for Georgia law claims against a county[71] and a municipality.[72] However, the same court held that the Dalton Whitfield Solid Waste Authority was neither a county nor a city and, thus, did not benefit from

69. O.C.G.A. § 36-33-5 (2022).

70. O.C.G.A. § 36-11-1 (2022).

71. Crisp v. Georgia, 2021 U.S. Dist. LEXIS 238082, *27 (N.D. Ga. Nov. 15, 2021), *aff'd* 2022 U.S. App. LEXIS 23487 (11th Cir. Ga., Aug. 23, 2022).

72. Parris v. 3M, 2022 U.S. Dist. LEXIS 60043, *24 (N.D. Ga. March 30, 2022).

an *ante litem* notice statute.[73] The statutes above illustrate that the *ante litem* notice requirements are different when bringing an action against a county versus a municipality. Therefore, this Article will first consider the county *ante litem* notice case followed by the cases involving municipalities.

A. County Ante Litem Notice

Notice requirements when suing a sheriff in addition to the county were addressed in *Nusz v. Paulding County, Georgia.*[74] The court of appeals held that, in such a case, the *ante litem* notice must also be presented to the sheriff and not just the county's board of commissioners.[75] The court of appeals relied on prior decisions to reach this conclusion; this was not a matter of first impression nor did it result in overturning any previous case law.[76]

B. Municipal Ante Litem Notice

In *Hall v. City of Blakely*,[77] the court of appeals determined that an *ante litem* notice "seeking a monetary amount of no less than $350,000.00 and no more than two million dollars" failed to describe the amount of damages with the required specificity.[78] The applicable statute requires "the specific amount of monetary damages" to be included in the *ante litem* notice.[79] A notice without such a specific amount identified does not substantially comply with the statute.[80] The notice must be definite enough to constitute a binding offer of settlement to the city.[81] The *ante litem* in this case did not meet that bar.[82]

The plaintiff attempted three unsuccessful *ante litem* notices in *City of Atlanta v. Burgos*.[83] The first two notices were insufficient for a number of reasons, and the City of Atlanta responded via letters stating that the notices failed to meet the requirements of O.C.G.A. § 36-33-5. The City of Atlanta's response merely stated that it had waived sovereign

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73. Johnson v. 3M, 563 F. Supp. 3d 1253, 1318 (N.D. Ga. 2021).

74. 361 Ga. App. 131, 131, 863 S.E.2d 384, 384 (2021).

75. *Id.* at 134, 863 S.E.2d at 386.

76. *Id.*; *see* Moats v. Mendez, 349 Ga. App. 811, 814–18, 824 S.E.2d 808, 811–14 (2019); Davis v. Morrison, 344 Ga. App. 527, 531–32, 810 S.E.2d 649, 652–53 (2018).

77. 361 Ga. App. 135, 863 S.E.2d 393 (2021).

78. *Id.* at 136, 863 S.E.2d at 395.

79. O.C.G.A. § 36-33-5(e).

80. *Hall*, 361 Ga. App. at 138, 863 S.E.2d at 396.

81. *Id.*

82. *Id.*

83. 361 Ga. App. 490, 492–93, 864 S.E.2d 670, 673 (2021).

immunity for vehicular accidents up to the financial limits specified therein.[84]

The court in *Burgos* made three relevant holdings.[85] First, like the court in *Hall*, the court of appeals held that all three *ante litem* notices insufficiently identified the amount of damages sought because they stated that the plaintiff was making a claim for a sum to be determined at a later date.[86] Second, the court of appeals held that any city official's attempt to waive the *ante litem* notice requirement expressly would be deemed ineffectual.[87] Last, the Clayton County State Court erred in finding that the waiver of sovereign immunity meant that the claimant did not have to comply with the *ante litem* notice requirements.[88]

In *City of Suwannee v. Padgett*,[89] the City of Suwannee argued that the plaintiffs' *ante litem* notice demanding $2 million for personal injuries and $250,000 for loss of consortium did not comply with the statute because it exceeded the city's policy limits.[90] The City of Suwannee's argument that the *ante litem* notice required a demand capable of being accepted by a city was based on several prior appellate cases, not the statute itself, and therefore the court of appeals was unconvinced.[91] The judiciary will not read into the statute language that the legislators did not include.[92] Thus, the court of appeals held in favor of the plaintiff.[93]

Wrapping up this year's local government section on *ante litem* notices is *City of Norcross v. Johnson*.[94] This is another case where the court of appeals held that the *ante litem* notice did not sufficiently include the specific amount of damages being sought.[95] The *ante litem* notice at issue demanded $1,500,000 for damages against the City of Norcross "*and any and all other employees, agencies or entities who may have been involved in causing [the plaintiff's] injuries*."[96] This notice was insufficient because it failed to identify the specific amount sought against the city; instead,

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84. *Id.*
85. *Id.* at 496, 864 S.E.2d at 675.
86. *Id.* at 492–93, 864 S.E.2d at 673.
87. *Id.* at 494, 864 S.E.2d at 674.
88. *Id.*
89. 364 Ga. App. 34, 873 S.E.2d 712 (2022).
90. *Id.* at 35, 873 S.E.2d at 715.
91. *Id.*
92. *Id.* at 36, 873 S.E.2d at 716.
93. *Id.*
94. 363 Ga. App. 78, 870 S.E.2d 564 (2022).
95. *Id.* at 79, 870 S.E.2d at 567.
96. *Id.* at 80, 870 S.E.2d at 567.

the plaintiff identified a global amount he desired to recover from a handful of potential sources.[97]

The major takeaway from this year's opinions relating to *ante litem* notices is the interpretation and requirements for stating a specific amount of damages.[98] Subsection (e) of O.C.G.A. § 36-33-5 can doom a prospective plaintiff to the benefit of a municipality.[99] Therefore, both claimants and municipalities should pay close attention to the explicit language in the *ante litem* notice statute and the corresponding cases interpreting the statute.

IV. OPEN RECORDS AND OPEN MEETINGS

The pleading requirements to state an Open Records Act[100] claim at the motion to dismiss stage, in interplay with the Secrecy Act,[101] were clarified in *Blau v. Georgia Department of Corrections*.[102] The case arose when an investigative journalist submitted an Open Records Act request to the Georgia Department of Corrections (GDOC) seeking information on the drugs used for lethal injection.[103] The GDOC responded by withholding the responsive records in their entirety, insofar as the records contained information protected by the Secrecy Act,[104] O.C.G.A. § 42-5-36(d).[105] The journalist sued, alleging that the GDOC was improperly withholding records and was required to redact the information protected by the Secrecy Act then produce the records.[106] On the GDOC's motion, the Superior Court of Fulton County dismissed the complaint.[107] The Georgia Court of Appeals reversed.[108]

The journalist's complaint alleged that the GDOC "possesse[d] documents responsive to the . . . . Requests that do not consist entirely and exclusively of 'information' covered under the Secrecy Act."[109] The court of appeals held that the Secrecy Act did not entirely foreclose the

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97. *Id.* at 81, 870 S.E.2d at 568.

98. *Id.* at 82, 870 S.E.2d at 568.

99. O.C.G.A. § 36-33-5(e) provides in relevant part "[t]he description of the extent of the injury required in subsection (b) of this Code section shall include the specific amount of monetary damages being sought from the municipal corporation."

100. O.C.G.A. §§ 50-18-70 through 50-18-77 (2022).

101. O.C.G.A. § 42-5-36(d) (2022).

102. 364 Ga. App. 1, 873 S.E.2d 464 (2022).

103. *Id.* at 1, 873 S.E.2d at 466.

104. *Id.*

105. O.C.G.A. § 42-5-36(d).

106. *Blau*, 364 Ga. App. at 1, 873 S.E.2d at 466.

107. *Id.* at 1–2, 873 S.E.2d at 466.

108. *Id.* at 2, 873 S.E.2d at 466.

109. *Id.* at 3, 873 S.E.2d at 467.

plaintiff's claims at the pleadings stage of litigation.[110] The court held that, because, on the face of the pleadings, it could not tell whether all of the records contained exclusively content protected by the Secrecy Act, dismissal was not warranted, and the journalist successfully stated a claim for violation of the Open Records Act.[111]

Next, *Cardinale v. Keane*[112] is an ongoing saga involving two issues of first impression under the Open Records Act: (1) whether a private person making an Open Records request has a cause of action to seek civil penalties for violations of the Act; and (2) whether the award of a civil penalty is a matter committed to the trial court's discretion.[113] A third central question is what is sufficient, at the motion to dismiss stage, to allege that a given defendant is a records "custodian" within the meaning of the Act.[114]

The case arose following the *pro se* plaintiff Cardinale's "numerous requests" for public records from the City of Atlanta over many years.[115] In pertinent part, Cardinale sued a private attorney who represented the city in previous litigation and a city Councilman.[116] Cardinale sought civil penalties to be awarded against the defendants for their alleged violations of the Act and asserted that both defendants were "custodians" of the records sought in his complaint. The Superior Court of Fulton County dismissed the complaint for failure to state a claim.[117]

The court of appeals agreed with Cardinale and reversed the trial court's dismissal.[118] The Open Records Act provides for civil or criminal penalties to be sought by the Attorney General and separately that a civil penalty may be imposed in "any civil action brought pursuant to [the] Act."[119] The court of appeals looked to a supreme court decision[120] recently interpreting nearly identical provisions in the Open Meetings Act, O.C.G.A. §§ 50-14-6[121] and 50-14-5(a),[122] and determined that, notwithstanding a separate provision expressly authorizing the Attorney General to bring an action for civil penalties (but not one explicitly

110. *Id.* at 6, 873 S.E.2d at 469.
111. *Id.* at 7, 9, 873 S.E.2d at 469, 471.
112. 362 Ga. App. 644, 869 S.E.2d 613 (2022).
113. *Id.* at 646, 648, 869 S.E.2d at 616, 617.
114. *Id.* at 651, 869 S.E.2d at 619.
115. *Id.* at 644, 869 S.E.2d at 615.
116. *Id.*
117. *Id.*
118. *Id.* at 653, 869 S.E.2d at 620–21.
119. *Id.* at 648, 869 S.E.2d at 617; *see* O.C.G.A. §§ 50-18-73(a), 50-18-74(a) (2022).
120. *See* Williams v. DeKalb Cnty., 308 Ga. 265, 840 S.E.2d 423 (2020).
121. O.C.G.A. § 50-14-6 (2022).
122. O.C.G.A. § 50-14-5(a) (2022).

authorizing private citizens to do so), the statute contemplates a private person bringing such an action.[123] Relatedly, the court held that the award of civil penalties was soundly committed to the discretion of the trial courts.[124]

As to the sufficiency of an allegation that a person is a custodian of records, the defendant-appellees argued that merely asserting that they were custodians was a conclusion of law, rather than factual assertions.[125] The court of appeals again disagreed, holding that generally such allegations are treated as factual, and that Cardinale, as a *pro se* plaintiff, was entitled to less stringent pleading standards.[126] Cardinale sufficiently alleged that the attorney and city councilman were custodians of the records sought. The defendants also raised the argument that the City of Atlanta had a duly designated records custodian, who was not the city councilman, pursuant to O.C.G.A. § 50-18-71(b)(1)(B).[127] Because the Superior Court of Fulton County did not reach the issue, the court of appeals did not address the argument.[128]

The defendant-appellees have filed a petition for writ of certiorari to the supreme court.[129] The questions ultimately to be decided are: (1) whether the Open Records Act's limitation of enforcement actions to be brought against "persons . . . having custody of records" is a jurisdictional limitation, such that, if they are not, a trial court lacks subject matter jurisdiction; (2) whether an individual's status as not being the designated records custodian for an entity is jurisdictional, such that it should be factually resolved as early as possible; (3) whether anyone other than the Attorney General (including private citizens) may seek civil penalties; and (4) whether a pleading that a defendant is a custodian of records is sufficient as a factual allegation, or a mere question of law, at the motion to dismiss stage.[130] Upon the completion of this Article, the supreme court had not yet acted to grant or deny certiorari.

V. ZONING AND LAND USE

Georgia law provides that a property owner can acquire a vested right to initiate a specific use of property despite a change in zoning laws in

123. *Cardinale*, 362 Ga. App. at 647–48, 869 S.E.2d at 617; *see Williams*, 308 Ga. at 276–77, 840 S.E.2d at 433.

124. *Cardinale*, 362 Ga. App. at 649, 869 S.E.2d at 618.

125. *Id.* at 651–52, 869 S.E.2d at 619.

126. *Id.* at 652, 869 S.E.2d at 620.

127. O.C.G.A. § 50-18-71(b)(1)(B) (2022).

128. *Cardinale*, 362 Ga. App. at 652–53, 869 S.E.2d at 620.

129. *Id.* at 644, 869 S.E.2d at 613.

130. *Id.* at 647–48, 651, 869 S.E.2d at 617, 619.

certain scenarios. One instance is where the landowner relies upon official assurances that a building permit will probably issue.[131]

During this Survey period, the Supreme Court of Georgia addressed the limitations of these circumstances in *Brown v. Carson*.[132] In *Brown*, the property owner, Carson, planned to purchase and develop a property divided into 9,000-square-foot residential lots. Prior to purchase, Carson met with Forsyth County Planning Director, Brown, who told Carson that the zoning ordinance, as currently written, permitted a lot of that size. Brown made no representations about any impact future zoning changes might have, nor did he guarantee that Carson's plan would be approved. After this conversation, Carson proceeded with the purchase.[133]

Shortly after the purchase, Forsyth County imposed a moratorium on accepting applications for land disturbance permits for Carson's proposed lot size.[134] Carson applied and was denied. Carson then filed an application for determination of his vested rights with the county planning department. Carson was consistently denied through the appeal process and filed suit, temporarily prevailing in the court of appeals, which concluded that Carson bought the property and made expenditures after relying on the assurance of zoning officials that a building permit would issue.[135]

The supreme court reversed, holding that Carson did not have a vested right to develop his property on the basis of zoning officials' assurances.[136] The court reasoned that the "official assurances" provision requires a landowner to show that he relied upon the probability that a permit would issue, which in turn means the assurance itself contains an actual representation that a building permit "*will likely issue* in the future."[137] Because Brown's words were "'no more than a neutral statement of the present zoning in effect,'" his communication to Carson did not carry with it the requisite definitiveness or apparent promise to amount to such an assurance.[138]

Rockdale County v. United States Enterprises, Inc.,[139] concerned the specificity zoning ordinances must have to avoid being unconstitutionally

131. *See*, *e.g.*, WMM Properties, Inc. v. Cobb Cnty., 255 Ga. 436, 339 S.E.2d 253 (1986).

132. 313 Ga. 621, 872 S.E.2d 695 (2022).

133. *Id.* at 621–22, 872 S.E.2d at 697.

134. *Id.* at 622, 872 S.E.2d at 697.

135. *Id.*

136. *Id.* at 623, 872 S.E.2d at 697–98.

137. *Id.* at 623, 872 S.E.2d at 698.

138. *Id.* at 624, 872 S.E.2d at 698 (quoting Cohn Cmtys., Inc. v. Clayton Cnty., Ga., 257 Ga. 357, 359, 359 S.E.2d 887, 889 (1987)).

139. 312 Ga. 752, 865 S.E.2d 135 (2021).

vague and run afoul of the Due Process Clause.[140] The property owners applied to Rockdale County for a permit to build a QuikTrip gas station.[141] The county denied the application on the ground that the proposed facility was a "truck stop," which was prohibited by the county's development ordinance.[142]

The ordinance defined "truck stops," in essence, as any facility where "heavy [t]rucks" could be maintained, serviced, stored, repaired, fueled, or where such trucks could be parked overnight, which primarily serviced such trucks.[143] The owners argued in their appeal of the denial of the permit that the proposed gas station did not meet the "definition of a 'truck stop' because the facility would be used primarily for the sale of gasoline to automobiles and did not provide overnight accommodations or parking."[144] After the failed appeal, the owners petitioned the Rockdale County Superior Court, arguing that the truck stop ordinance was unconstitutionally vague under the Georgia Constitution; the superior court agreed.[145]

The supreme court, however, determined that the ordinance was not unconstitutionally vague.[146] Although some terms were not further defined in the ordinance, the court reasoned (in an extensive dictionary-definition walkthrough of the ordinance's terms) that the ordinance was "comprehensible" in the overall light of plain meaning, statutory definition, and dictionary definition, and therefore not unconstitutionally vague.[147] Thus, local government should take note of the "comprehensibility" standard for zoning ordinances to pass muster as sufficiently clear: the terms used be readily understandable by being expressly defined in the ordinance or by their plain meaning or dictionary definition.

VI. WHISTLEBLOWERS

It seems that practitioners finally recognize the potency of the Georgia Whistleblower Act (GWA), codified at O.C.G.A. § 45-1-4.[148] This year's Survey period featured a significant uptick in decisions under the GWA. At last, the Supreme Court of Georgia finally weighed in on a case

140. *Id.* at 753, 865 S.E.2d at 138.
141. *Id.* at 752, 865 S.E.2d at 137–38.
142. *Id.*
143. *Id.* at 754, 865 S.E.2d at 138–39.
144. *Id.* at 755–56, 865 S.E.2d at 140.
145. *Id.* at 757, 865 S.E.2d at 140.
146. *Id.* at 769, 865 S.E.2d at 148.
147. *Id.* at 767, 865 S.E.2d at 147.
148. O.C.G.A. § 45-1-4 (2022).

concerning the Act—a case this article covered last year while it was at the Georgia Court of Appeals. But, perhaps the most important news to report is the General Assembly's enactment of H.R. Bill 1390,[149] which provides local government employees with a cause of action for sexual harassment in the government workplace and explicitly incorporates the remedies provided for in the GWA.[150] We cover that law elsewhere in this Article.

Turning back to the GWA, the supreme court reversed the appellate court's decision in *Mimbs v. Henry County Schools*,[151] a case about the statute of limitations for a GWA claim.[152] As noted in last year's article, the appellate court's analysis was quite cryptic.[153] The court of appeals seemed to have suggested that, because the school teacher-plaintiff learned of her principal's intention to recommend that her contract not be renewed on April 24th, which was merely finalized by the school district's formal notice issued on April 27th, the teacher's claim must have accrued more than one year prior to the date of her filing the lawsuit on May 3, 2018.[154] In other words, the court of appeals did not view the principal's and school district's actions as separate events.[155] But, as the supreme court later explained, the plaintiff did not receive the April 27th letter until May 3, 2017.[156] As the school district conceded, it was not required to accept the principal's recommendation of non-renewal on April 24th. Thus, the formal April 27th termination letter was a separate, actionable act of retaliation which the plaintiff learned about on May 3, 2017—exactly one year prior to the date of her lawsuit.[157] Therefore, the claim relating to the termination itself was not actually barred.[158]

At the court of appeals, whistleblowers were met with mixed success. In *Thompson v. DeKalb County*,[159] the court quickly rejected a lawyer's allegations that his termination, from a county law department, was

149. Ga. H.R. Bill 1390, Reg. Sess., 2022 Ga. Laws 347 (amending O.C.G.A. tit. 34, ch. 5).

150. *Id.*

151. 313 Ga. 631, 872 S.E.2d 685 (2022).

152. *Id*. at 633, 872 S.E.2d at 687.

153. *See* Britt et al., *Local Government Law*, 73 MERCER L. REV. at 215.

154. *Mimbs*, 313 Ga. at 632–33, 872 S.E.2d at 687.

155. *Id.* at 635–36, 872 S.E.2d at 689 ("Like the trial court, the Court of Appeals concluded that Mimbs suffered only one alleged adverse employment action—the nonrenewal of her contract").

156. *Id.* at 636–37, 872 S.E.2d at 689–90.

157. *Id.* at 636, 872 S.E.2d at 689.

158. *Id.* at 636–37, 872 S.E.2d at 690.

159. 363 Ga. App. 61, 870 S.E.2d 558 (2022).

pretextual for whistleblowing activity.[160] In straightforward fashion, the appellate court affirmed the Superior Court of DeKalb County's grant of summary judgment because the lawyer could not rebut the county's legitimate, non-discriminatory reason for the termination.[161]

In *Baptiste v. Mann*,[162] the court of appeals reversed the Superior Court of DeKalb County's grant of summary judgment in favor of the employer—DeKalb County Sheriff, Jeffrey Mann.[163] On appeal, the battleground was waged on the second and fourth elements of the prima facie claim: whether Baptiste engaged in protected activity (made a protected disclosure) and whether there was a causal relationship between his termination and his protected activity.[164] Baptiste argued he satisfied those elements; DeKalb County disagreed and further argued that Baptiste could not demonstrate pretext under the *McDonnel Douglas* framework.[165]

As for the protected disclosures, Mann argued that Baptiste had merely reported on, or otherwise disclosed, incidents at the DeKalb County Jail which were already widely known.[166] Mann cited the appellate court's non-precedential holding in *Forrester v. Georgia Department of Human Services*[167] in support of his argument.[168] The court in *Baptiste* bolstered *Forrester*'s non-precedential holding in dicta, but it then distinguished Baptiste's disclosures.[169] Although Baptiste's disclosures did touch on issues that were already well-known, Baptiste's disclosures also added his own concerns regarding the inadequate responses and investigations into those incidents by the DeKalb County Sheriff's Office.[170] Unfortunately, the *Baptiste* court did not take the opportunity to elaborate on the rule articulated in *Forrester*.[171] This was a missed opportunity, especially given the court's citation to *Forrester* as

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160. *Id.* at 61, 870 S.E.2d at 559–60.

161. *Id.* at 68, 870 S.E.2d at 564.

162. 360 Ga. App. 345, 861 S.E.2d 212 (2021).

163. *Id.* at 345, 861 S.E.2d at 215.

164. *Id.* at 348, 861 S.E.2d at 217.

165. *Id.* at 348–49, 861 S.E.2d at 217.

166. *Id.* at 349, 861 S.E.2d at 218.

167. 308 Ga. App. 724, 708 S.E.2d 660 (2011) (physical precedent).

168. *Baptiste*, 360 Ga. App. at 350, 861 S.E.2d at 218. *Accord Forrester*, 308 Ga. App. at 724, 708 S.E.2d at 667 (holding that if the violation or noncompliance is already well known at the time of the disclosure, then the disclosure does not constitute whistleblowing).

169. *Baptiste*, 360 Ga. App at 350, 861 S.E.2d at 218.

170. *Id.* at 351, 861 S.E.2d at 219 (" . . . although the incidents themselves may have been well documented, there does not appear to be any evidence that the Sheriff's Office's alleged lack of appropriate responses was widely known.").

171. *Id.* at 350, 861 S.E.2d at 218.

a correct statement of law, though noting its non-precedential status.[172] The rule in *Forrester* seems to beg the question: how widely known must the misconduct be?[173]

On the causal relationship element, the court in *Baptiste* rejected Mann's arguments that no causal relationship existed.[174] Mann attempted to argue that Baptiste had engaged in intervening misconduct.[175] But the court explained that this does not automatically sever an apparent connection so long as there are other indicia of causation.[176] Mann also tried to resist applying the doctrine of "first opportunity retaliation," which is where the employee argues that, despite a seemingly weak temporal relationship between the protected conduct and the adverse action, the employer actually took the adverse action at the first available opportunity.[177] The court explained that the record seemingly revealed that the adverse action was taken at the first available opportunity, or at least that a jury could so conclude.[178]

Finally, the court swiftly rejected the trial court's conclusion that pretext was not sufficiently established.[179] The court recounted the evidence—including the fact that Baptiste pointed to other employees who had engaged in similar misconduct but did not receive nearly as harsh of treatment as termination—and it held that a jury issue on pretext existed.[180]

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172. *Id.*

173. *See Thompson*, 363 Ga. App. at 69, 870 S.E.2d at 564 (declining to consider question in light of alternative basis to affirm trial court's grant of summary judgment).

174. *Baptiste*, 360 Ga. App. at 351,861 S.E.2d at 219.

175. *Id.* at 353, 861 S.E.2d at 220. *See, e.g.,* Brisk v. Shoreline Found, Inc., 654 Fed. App'x 415, 417 (11th Cir. 2016) (recognizing that intervening misconduct can sever the causal chain when the temporal proximity of the protected conduct and the adverse action are tenuous).

176. *Baptiste*, 360 Ga. App. at 353, 861 S.E.2d at 220 ("Even in those cases, however, the court considered not only whether [there was] . . . an intervening act of misconduct, but also other indicia of causation, including the strength of the temporal relationship between the protected activity and the adverse employment decision.").

177. *See, e.g.*, Ward v. United Parcel Serv., 580 Fed. App'x 735, 739 (11th Cir. 2014) ("Where there was a significant time gap between the protected activity and the adverse action, the plaintiff must offer additional evidence to demonstrate a causal connection, such as a pattern of antagonism or that the adverse action was the first opportunity for the employer to retaliate."); s*ee also* Porter v. Ca. Dep't of Corr., 419 F.3d 885, 895 (9th Cir. 2005) ("As a valid reason for the delay between her alleged protected activities and the claimed adverse actions, Porter points out that DeSantis was not in a position to retaliate until after he became the personnel Assignment Sergeant . . . This position finds support in both controlling and persuasive authorities.").

178. *Baptiste*, 360 Ga. App. at 354–55, 861 S.E.2d at 221.

179. *Id.* at 356, 861 S.E.2d at 222.

180. *Id.* at 355–56, 861 S.E.2d at 221–22.

Most of the decisions from Georgia's federal courts during the Survey period are either not published or are not worth noting. An exception is *Lamonte v. City of Hampton*.[181] There, Judge Totenberg for the United States District Court for the Northern District of Georgia issued a lengthy opinion refusing to adopt the magistrate's recommendation of summary judgment in favor of the City of Hampton.[182] On the issue of protected conduct, the court rejected the City's arguments that the plaintiff had not actually disclosed a true violation of any law, rule, or regulation; the employee merely noted that the accounting discrepancies he allegedly learned about were suspicious and perhaps illegal.[183] The court explained that the statute differentiates between different forms of protected activity—for "objecting to, or refusing to participate in," illegal activity, the employee need only have "reasonable cause to believe [it] is in violation of or noncompliance with a law, rule, or regulation."[184] The district court concluded that the employee proffered sufficient evidence demonstrating that he reasonably believed the suspicious activity was illegal.[185] On the issues of causation and pretext, the district court likewise found a dispute of fact.[186] The city argued these elements could not be satisfied because the employee was terminated by a unanimous vote of the city council, most of whom were unaware of the protected activity the employee allegedly engaged in.[187] The district court rejected the argument, appearing to rely (at least somewhat) on a "cat's paw" theory.[188] Whether a cat's paw theory really is appropriate in circumstances like this will have to await a future case raising the issue more squarely.[189]

In sum, litigation under the GWA continues to grow. There is now a wealth of decisions from the court of appeals and federal courts exercising supplemental jurisdiction. Yet, the supreme court has still (somehow) avoided a thorough decision on the merits of a GWA claim. Thus, many of the questions and issues this Article has flagged over the years have still not been conclusively resolved.

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181. 576 F. Supp. 3d 1314 (N.D. Ga. 2021).

182. *Id.* at 1331.

183. *Id.* at 1320–21.

184. *Id.* at 1318 (quoting O.C.G.A.§ 45-1-4(d)(3)).

185. *Lamonte*, 567 F. Supp. 3d at 1320.

186. *Id.* at 1327, 1330.

187. *Id.* at 1323–24.

188. *Id.* at 1327.

189. *Cf.* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) ("The 'cat's paw' theory has no application to legislative bodies.").

VII. LEGISLATIVE UPDATE

2022 was the second session of the 156th General Assembly of Georgia. This Article will not address every piece of legislation adopted or failed but is intended to illuminate laws that will impact local governments both in the short-term and long-term and address the landscape for local governments moving forward from the 2022 session.

A. Superior and State Court Appellate Practice Act

The Superior and State Court Appellate Practice Act[190] was enacted to create uniform appellate procedures in superior and state courts.[191] This Act grants appellate jurisdiction to superior and state courts for a final judgment of a lower judicatory except for: juvenile courts; certain specific courts across the state; a civil case in Article 6 probate court; an order appointing a temporary administrator; and any other court from which an appeal directly to the Georgia Court of Appeals or the Supreme Court of Georgia is authorized.[192] Understand that this Act does not give state courts appellate jurisdiction over superior courts, nor does it give superior courts appellate jurisdiction over state courts.[193]

The Superior and State Court Appellate Practice Act gives any party, including a local governing body, a right of appeal from a final administrative order of an enforcement board of the superior court of the county where the property is located; the form of the appeal is a "petition for review" and not a "writ of certiorari."[194] One concern of the General Assembly was that appeals from a lower judicatory to a superior or state court often resulted in dismissal on complex procedural grounds and not on the merits of the case.[195] The Act also provides for damages for frivolous appeals and recovery costs in some situations.[196]

B. Apportionment of Damages

In all cases filed after May 13, 2022, apportionment of damages is available in single-defendant lawsuits.[197] Also, evidence of fault of nonparties is allowed.[198]

190. Ga. H.R. Bill 916, Reg. Sess., 2022 Ga. Laws 767 (effective July 1, 2023).
191. *Id.*
192. *Id.* § 1-1.
193. *Id.*
194. *Id.*
195. *Id.*; O.C.G.A. § 5-3-2 (2022).
196. Ga. H.R. Bill 916, 2022 Ga. Laws 767 § 1-1.
197. Ga. H.R. Bill 961, Reg. Sess. 2022 Ga. Laws 802 (codified at O.C.G.A. § 51-12-33 (2022)).
198. *Id.* § 1.

C. Electronic Filing of Real Estate Records

Effective July 1, 2023, all clerks of the superior court must provide for electronic filing of real estate records and provide at least one computer terminal to the public for electric filing, including recordation and registration of deeds and other instruments.[199] Also, the presence of an incorrect tax parcel identification number, or no number at all, on a recorded instrument does not render the instrument void.[200]

D. Opioid Settlement

The Attorney General entering into a statewide opioid settlement agreement will bar any and all past, present, or future claims on behalf of any government entity seeking to recover against any business or person related to an entity within the settlement.[201] Local governments may receive money under the settlement agreement.[202]

E. The Georgia Safe Workplaces Act

The Georgia Safe Workplaces Act creates a cause of action against local governments for retaliation for reporting sexual harassment or retaliation because the employee opposed the sexual harassment.[203] These actions would be filed in accordance with the Georgia Whistleblower Act.[204] This significant development of a new cause of action against local governments is discussed further below.

F. Service on Attorney General to Defend Acts

Effective March 4, 2022, the Attorney General must be served with a copy of any action seeking a declaratory judgment or deeming any Act of the General Assembly unconstitutional.[205] The Attorney General is entitled to defend the Act being deemed unconstitutional.[206]

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199. Ga. H.R. Bill 974, Reg. Sess., 2022 Ga. Laws 280.
200. *Id.* § 1.
201. Ga. S. Bill 500, Reg. Sess., 2022 Ga. Laws 178 (codified at O.C.G.A. § 10-13B-3).
202. *Id.* § 1.
203. Ga. H.R. Bill 1390, 2022 Ga. Laws 347.
204. *Id.* § 1; *see* O.C.G.A. § 45-1-4.
205. Ga. H.R. Bill 1361, Reg. Sess., 2022 Ga. Laws 13.
206. *Id.* § 1.

G. Law Enforcement/Public Safety

1. Election Law Violations

The Georgia Bureau of Investigation now has original jurisdiction to investigate allegations of election law violations which would put the outcome of the election in doubt if true.[207]

2. 911 Operators

Certified Communications Officers (9-1-1 Operators) may participate in the Peace Officers' Annuity and Benefit Fund.[208] Certified Communications Officers must now receive training in delivery of high-quality telephone cardiopulmonary resuscitations (T-CPR).[209]

3. P.O.S.T. Certified Officers Performing Private Security

Peace Officers Standards and Training Council (P.O.S.T.) certified law enforcement officers performing private security no longer have to obtain a separate license to act as private security guards or watchmen.[210]

4. Emergency Strobe Light Requirements

Emergency low-speed vehicles are no longer subject to permitting requirements related to the use of amber strobe lights.[211] The Commissioner of the Department of Public Safety may issue a permit for five years for all emergency vehicles to operate flashing or revolving emergency lights of an appropriate color.[212]

5. Peace Officers

The Community Service Board is to establish a correspondent program to offer assistance for consultation to peace officers responding to emergency calls involving individuals with behavioral health crises, contingent upon the appropriation of funds by the General Assembly or the availability of other funds.[213] Peace officers and behavioral health officers are now immune from both criminal and civil liability for

207. Ga. S. Bill 441, Reg. Sess., 2022 Ga. Laws 121 § 11.
208. Ga. S. Bill 84, Reg. Sess., 2022 Ga. Laws 109 § 6.
209. Ga. S. Bill 505, Reg. Sess., 2022 Ga. Laws 413 § 1.
210. Ga. H.R. Bill 1441, Reg. Sess., 2022 Ga. Laws 111 § 1.
211. Ga. H.R. Bill 1011, Reg. Sess., 2022 Ga. Laws 282 § 2.
212. *Id.*
213. Ga. S. Bill 403, Reg. Sess., 2022 Ga. Laws 722.

damages occurring during the transport of a patient to a physician or facility.[214]

6. The Georgia Mental Health Parity Act

The Georgia Mental Health Parity Act[215] establishes a grant program to provide funds to units of local government for transportation costs to and from emergency receiving, evaluating, and treatment facilities, subject to appropriations.[216] Law enforcement may transport people to emergency receiving facilities if the person has committed an offense or if the officer has probable cause to believe they are a mentally ill person requiring involuntary treatment.[217]

7. LESS Crime Act

The Law Enforcement Strategic Support Act (LESS Crime Act)[218] allows for the creation of a foundation which has non-profit status[219] and is tax-exempt.[220] The foundation must have one law enforcement agency as its sole beneficiary.[221] This Act also establishes tax credits for contributions to a law enforcement foundation.[222]

8. Firearms

a. Georgia Constitutional Carry Act of 2021

The Georgia Constitutional Carry Act of 2021[223] defines a lawful weapons carrier and exempts a person from having to obtain a weapons carry license.[224] A lawful weapons carrier is a person who is licensed[225] or is a person who is not prohibited by law from possessing a weapon or long gun.[226] The Act revises provisions regarding the use or possession of a firearm in a park, historic site, or recreational area.[227] The Act also

214. *Id.* § 3.
215. Ga. H.R. Bill 1013, Reg. Sess., 2022 Ga. Laws 26.
216. *Id.* § 3-7.
217. *Id.* § 3-3.
218. Ga. S. Bill 361, Reg. Sess., 2022 Ga. Laws 716.
219. *See* I.R.C. § 501(c)(3).
220. O.C.G.A. § 48-7-25(a)(1) (2022).
221. Ga. S. Bill 361, 2022 Ga. Laws 716 § 2.
222. *Id.*
223. Ga. S. Bill 319, Reg. Sess., 2022 Ga. Laws 74.
224. *Id.* §4.
225. O.C.G.A. § 16-11-129(a)(1) (2022).
226. Ga. S. Bill 319, 2022 Ga. Laws 74 § 4.
227. *Id.* § 3.

revises provisions regarding the carrying of firearms at courthouses, government buildings, parking lots, and schools by service members of the armed forces.[228]

b. Weapon License Reciprocity

The General Assembly also revised the provisions regarding weapons carry license reciprocity for non-Georgia residents and authorized a nonresident to carry a weapon in Georgia if licensed to carry a weapon in any other state.[229]

9. Finances

a. Suspension of Public Officials Affects Compensation

Public officials who are suspended from office as a result of being indicted on felonies will no longer receive compensation while suspended.[230] If reinstated to the office, the public official will be entitled to receive any compensation withheld due to the suspension.[231] Reinstatement may occur after the expiration of the public official's term for compensation only.[232]

b. Single County TSPLOST

A Single County Transportation Special Purpose Local Option Sales Tax (TSPLOST) may now be collected for the full amount of time and does not have to end once the estimated amount is collected.[233] To collect for the maximum time, an intergovernmental agreement must be in place between the county and cities regarding the expenditure of the proceeds.[234] This will apply to new TSPLOST referendums beginning in November 2022.[235]

c. Hazardous Waste Management Fees

The sunset date for certain hazardous waste management fees is extended from July 1, 2022 to July 1, 2027.[236]

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228. *Id.* § 9.
229. Ga. H.R. Bill 218, Reg. Sess., 2022 Ga. Laws 86 § 1.
230. Ga. S. Bill 337, Reg. Sess., 2022 Ga. Laws 756 § 1.
231. *Id.*
232. *Id.*
233. Ga. H.R. Bill 934, Reg. Sess., 2022 Ga. Laws 256 § 3.
234. *Id.*
235. *Id.* § 4.
236. Ga. H.R. Bill 893, Reg. Sess., 2022 Ga. Laws 250.

d. Exemption for Timber

If the November 2022 referendum passes, there will be a state-wide exemption from all ad valorem taxes for timber equipment and timber products used to produce or harvest timber.[237]

10. Human Resources

a. The Protecting Georgia Businesses and Workers Act

The Protecting Georgia Businesses and Workers Act[238] relates to wages and employment benefits by local government entities.[239] This Act prohibits local government entities from regulating hours, scheduling, or output of other employers' employees.[240] A local government may set and regulate hours, scheduling, and output for its own employees.[241] A local government is not prohibited from regulating or limiting the hours a business may operate.[242]

11. Miscellaneous

a. Boards of Education

The General Assembly codified requirements that meetings of local boards of education shall be open to the public.[243] Except as otherwise provided by law, public notice must be given, and boards of education must annually adopt rules of conduct.[244] Additionally, this law provides for procedures for members of the public to be removed from a meeting and allows recordings of meetings.[245] The law is not to limit application or enforcement of the Open Meetings Act.[246]

b. The Criminal Records Responsibility Act

The Criminal Records Responsibility Act[247] reestablishes the Criminal Case Data Exchange Board as an advisory board to the Council of

237. *See* Ga. H.R. Bill 997, Reg. Sess. (2022).
238. Ga. S. Bill 331, Reg. Sess., 2022 Ga. Laws 569.
239. *Id.*
240. *Id.* § 2.
241. *Id.*
242. *Id.*
243. Ga. S. Bill 588, Reg. Sess., 2022 Ga. Laws 148.
244. *Id.*
245. *Id.*
246. O.C.G.A. § 50-14-1 (2022).
247. Ga. S. Bill 441, Reg. Sess., 2022 Ga. Laws 121.

Superior Court Clerks of Georgia.[248] The Act requires annual reports by the Council of Superior Court Clerks of Georgia detailing activities and progress of groups within the Criminal Case Data Exchange Board.[249]

c. Food Truck Permits

Mobile food service establishments which have active permits in an origin county may operate in other counties without obtaining additional permits.[250]

d. Personal Delivery Device

The General Assembly defined a personal delivery device as a new type of motor vehicle.[251] A personal delivery device is a powered vehicle that uses an automated driving system to transport goods.[252] A personal delivery device may operate on a sidewalk, crosswalk, or public highway in Georgia.[253] The Act also allows local governments to regulate these devices through ordinances.[254]

e. State Health Data

After July 1, 2022, the Department of Community Health must post a statistical report on its website which contains data related to the state health plans administered by the department.[255] This report must include county-level data on primary care provided per 1,000 people as well as which counties fall below benchmarks and data on hospital utilization and costs.[256] This report must be updated at least twice a year.[257]

f. Design-Build Contracting

Senate Bill 586 authorizes the use of design-build contracting methods by counties and provides the procedures, conditions, and limitations of time for such contracting methods.[258] A design-build procedure is a

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248. *Id.*
249. *Id.* § 4.
250. Ga. H.R. Bill 1443, Reg. Sess., 2022 Ga. Laws 574.
251. Ga. H.R. Bill 1009, Reg. Sess., 2022 Ga. Laws 543 § 1.
252. *Id.*
253. *Id.* § 2.
254. *Id.*
255. Ga. H.R. Bill 1276, Reg. Sess., 2022 Ga. Laws 771 § 1.
256. *Id.*
257. *Id.*
258. Ga. S. Bill 586, Reg. Sess., 2022 Ga. Laws 678.

method under which a "county [may] contract[] with another party that will both design and build the structures, facilities, systems, and other items specified in the contract."[259] This can be used for transportation-related undertakings that include buildings, bridges and approaches, rail corridors, technology developments, and access to roads.[260] A county must adopt by resolution the procedures for administering design-build contracts.[261] This Bill also contains an exception for contract limitations.[262]

g. The Georgia Utility Underground Facility Protection Act

The Georgia Utility Underground Facility Protection Act[263] requires that local governing authorities with underground electric or electrically powered traffic control devices and traffic management systems become members of the Georgia Utility Protection Center and locate those devices by January 1, 2024.[264]

12. Zoning/Planning

a. Annexation

Cities are now required to file a report identifying annexed properties and digital shapefiles of annexed properties with the Legislative and Congressional Reapportionment Office of the General Assembly.[265] Cities must also submit digital shapefiles to the Department of Community Affairs.[266] The General Assembly revised the provisions related to dispute resolution and arbitration process regarding annexation.[267] Counties now have forty-five days to object to annexation.[268] The county and city would split the costs of arbitration evenly unless the county lodged a non-valid objection.[269]

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259. *Id.* § 2.
260. *Id.*
261. *Id.*
262. *Id.*
263. Ga. H.R. Bill 1372, Reg. Sess., 2022 Ga. Laws 325.
264. *Id.* § 1.
265. Ga. H.R. Bill 1385, Reg. Sess., 2022 Ga. Laws 344.
266. *Id.*
267. Ga. H.R. Bill 1461, Reg. Sess., 2022 Ga. Laws 367.
268. *Id.* § 3.
269. *Id.* § 1.

b. Zoning Procedure Act

Under the Zoning Procedure Act,[270] local government bodies delegating quasi-judicial zoning matters to a body (such as a zoning board) must now provide by ordinance or resolution for public hearings before such bodies and adopt standards for such body's exercise of quasi-judicial powers.[271] The Act also defines the appeal process and standards of review.[272] Local governments must designate the quasi-judicial officer, board, or agency upon whom service must be effectuated.[273]

c. Maternity Supportive Housing Residences

The General Assembly created a classification for "[m]aternity supportive housing residence[s]."[274] These are homes for up to six pregnant women, eighteen years of age or older, and their minor children.[275] Local governments are prohibited from imposing restrictions on such housing that would not apply to a single family living in the residence.[276]

13. Sexual Harassment

New legislation has passed governing retaliation by local governments against local government employees that oppose and report sexual harassment. Earlier this year, the Georgia House of Representatives and the Georgia Senate unanimously passed House Bill 1390.[277] Codified as O.C.G.A. § 34-5A-1,[278] this new law creates a cause of action for local government employees against a local government if that local government takes a work-related adverse action against the employee for opposing sexual harassment, filing a complaint related to sexual harassment, participating or planning to participate in an action or

270. Ga. H.R. Bill 1405, Reg. Sess., 2022 Ga. Laws 825.

271. *Id.* § 1.

272. *Id.*

273. *Id.*

274. Ga. S. Bill 116, Reg. Sess., 2022 Ga. Laws 375 § 2.

275. *Id.*

276. *Id.* at § 3.

277. Ga. H.R. Bill 1390, Reg. Sess., 2022 Ga. Laws 347 (codified at O.C.G.A. § 34-5A-1). *See* Asia Simone Burns, *Senate Passes Bill To Protect Local Government Harassment Whistleblowers From Retaliation,* ATLANTA JOURNAL CONSTITUTION (Apr. 5, 2022), https://www.ajc.com/politics/georgia-state-legislature/senate-passes-bill-to-protect-local-government-harassment-whistleblowers-from-retaliation/WLEEXFBB5ZFGHCHKOHV4SJU25Y/ [https://perma.cc/YV2Y-ZHNF].

278. O.C.G.A. § 34-5A-1 (2022).

proceeding related to sexual harassment, or conducting certain other activity demonstrating opposition to sexual harassment.[279] The new statute defines "sexual harassment" as:

> sexual advances, requests for sexual favors, sexual or sex-based conduct, or any other unwelcome and offensive conduct of a sexual nature where:
> (A) Submission to the conduct involved is made, implicitly or explicitly, a term or condition of work;
> (B) Submission to or rejection of the conduct is used as the basis for a personnel decision affecting the individual's work; or
> (C) Such conduct creates an intimidating, hostile, or offensive work environment, provided that an intimidating, hostile, or offensive work environment is not created when the conduct does not rise above the level of what a reasonable person would consider merely tactless, inconsiderate, overfamiliar, or otherwise impolite, particularly with regard to the totality of the circumstances.[280]

Specifically, the statute creates a cause of action for any individual working as an employee or in a similar capacity for any county, municipality, or consolidated government for retaliation against the local government if that local government entity has discharged, suspended, demoted, or taken any other adverse action against the individual in the terms or conditions of the work relationship because the individual has:

1) Opposed sexual harassment;
2) Made a report or a charge, or filed any complaint related to sexual harassment;
3) Instituted or caused to be instituted, assisted, or participated in any manner in any investigation, proceeding, hearing, or action related to sexual harassment; or
4) Provided information, testified, or is known by the county, municipality, or consolidated government to be planning to testify in any manner in any such investigation, proceeding, hearing, or action related to sexual harassment.[281]

The procedure for bringing a civil action under this statute is the same as that set forth in O.C.G.A. § 45-1-4(e)(1).[282] This allows any individual subject to such retaliation to bring a civil action in superior court "within

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279. O.C.G.A § 34-5A-2, codified as "Sexual Harassment in Government Workplaces"; Georgia House Daily Report, 2022 Reg. Sess. No. 28.

280. O.C.G.A. § 34-5A-1.

281. O.C.G.A. § 34-5A-2(a).

282. O.C.G.A. § 34-5A-2(b). The Georgia Whistleblower Act is codified at O.C.G.A. § 45-1-4. *See* Franklin v. Pitts, 349 Ga. App. 544, 544, 826 S.E.2d 427, 430 (2019).

one year after discovering the retaliation or within three years after the retaliation, whichever is earlier."[283] Remedies for violations of O.C.G.A. § 34-5A-2 are the same as those provided by O.C.G.A. §§ 45-1-4(e)(2) and 45-1-4(f).[284] Thus, an individual bringing a cause of action under this statute can seek:

> (A) An injunction restraining continued violation of this Code section;
> (B) Reinstatement of the employee to the same position held before the retaliation or to an equivalent position;
> (C) Reinstatement of full fringe benefits and seniority rights;
> (D) Compensation for lost wages, benefits, and other remuneration; and
> (E) Any other compensatory damages allowable at law.[285]

If the individual prevails, they may be awarded "reasonable attorney's fees, court costs, and expenses."[286]

Additionally, O.C.G.A. § 34-5A-2 explicitly does not "prohibit the county, municipality, or consolidated government from taking appropriate corrective or remedial action against any individual who it determines has engaged in or facilitated sexual harassment."[287] Since this law has only been in effect since July 1, 2022, there is no case law analyzing it yet. However, it should be monitored closely to see how it is interpreted with and in relation to Title VII claims and Equal Employment Opportunity Commission, as well as other whistleblower and sexual harassment claims.

14. Georgia Recreational Property Act

After several years of somewhat heavy appellate and legislative activity on the subject, this Survey period saw little action pertaining to Georgia's Recreational Property Act (RPA).[288] First enacted in 1965, RPA has the express legislative purpose "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners' liability toward persons entering thereon for recreational purposes."[289] Generally, unless such an owner of land acts

283. O.C.G.A. § 45-1-4(e)(1).
284. O.C.G.A. § 34-5A-2(b).
285. O.C.G.A. § 45-1-4(e)(2).
286. O.C.G.A. § 45-1-4(f).
287. O.C.G.A. § 34-5A-2(c) (2022).
288. O.C.G.A. §§ 51-3-20 through 51-3-26 (2022).
289. O.C.G.A. § 51-3-20.

with malice, RPA insulates such owners from liability if no admission fee is charged to persons so entering.[290]

Continuing an appellate trend of protecting such landowners, *Schock v. Holy Trinity Catholic Church*,[291] the period's lone wolf appellate decision, well covers three of the Act's key aspects that must be satisfied before a landowner can claim the protections thereof: 1) That no charge or fee be assessed those persons entering the property;[292] 2) that the subject property be "available to the public";[293] and 3) that the land be made available for a "recreational purpose."[294]

Mark Schock sued Holy Trinity Catholic Church (Holy Trinity) and the local Knights of Columbus "for injuries he allegedly sustained when he slipped and fell at a Lenten dinner hosted by the Knights of Columbus and held on the Church's property."[295] Holy Trinity was open to both its members and the general public. Consistent with its purpose, the Knights of Columbus collected and donated funds to various programs and charities in its community.[296]

Holy Trinity provided the Knights of Columbus with the use of a hall located on its property in order for the Knights of Columbus to host a series of Lenten dinners.[297] Holy Trinity did not pay for or provide the food served at the Lenten dinners; it did not supply the employees to work at the dinners; nor did it receive any donations from the Knights of Columbus for providing a venue to host the dinners.[298]

The Knights of Columbus hosted the Lenten dinners as a charitable service to the community, and the evidence submitted showed the dinners' purpose was "'for all individuals in the community to spend time together enjoying a meal.'"[299] The dinners were open to the public, and both admission and the food were free of charge to all. While the Knights

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290. O.C.G.A. §§ 51-3-22 and 51-22-23 (2022).

291. 361 Ga. App. 195, 863 S.E.2d 536 (2021).

292. O.C.G.A. § 51-3-25(2) (excluding liability protection for injury suffered in any case where the owner of land charges the person or persons who enter or go on land for recreational use thereof).

293. O.C.G.A. § 51-3-20.

294. *Id.*; *see* O.C.G.A. § 51-3-21(4) ("'Recreational purpose' includes, but is not limited to, any of the following or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, aviation activities, nature study, water skiing, winter sports, and viewing or enjoying historical, archeological, scenic, or scientific sites.").

295. *Schock*, 361 Ga. App. at 195, 863 S.E.2d at 537.

296. *Id.* at 196, 863 S.E.2d at 538.

297. *Id.* at 195, 863 S.E.2d at 538.

298. *Id.* at 195–96, 863 S.E.2d at 538.

299. *Id.* at 196, 863 S.E.2d at 538.

of Columbus accepted donations, it did not require that attendees make a donation or pay an entrance fee to attend the Lenten dinners. Moreover, no items were sold at the Lenten dinners by either the Knights of Columbus or Holy Trinity.[300]

Mark Schock attended one of the dinners with his mother, and while she temporarily sat in her car talking on the phone, Schock went ahead, entered the hall, and made himself a plate.[301] Either on his way to a table, or on his way back up for seconds, he slipped and fell on "a substance."[302] He had not made a donation, and although his mother intended to, the events of the day prevented her from doing so.[303]

Schock sued and lost on summary judgment.[304] On appeal, Schock promulgated the three separate, substantive RPA issues mentioned above and summarily declared the Lenten Dinner "'was not a recreational activity open to the public, and free of charge to the public.'"[305] The court of appeals addressed these issues one at a time.

a. Free of Charge

Recognizing that no fee or admission was charged, Schock instead pointed to a donation basket that was strategically placed right at the front of the food line, claiming that was "a clear sign" to attendees (1) that "the collection of monies was expected in order to partake in the food," and (2) that both Holy Trinity and the Knights of Columbus received a financial benefit therefrom.[306] The court disagreed and noted that the undisputed record evidence was that patrons who did not wish to, or could not, pay still received their meals.[307]

Tying off loose ends, the court also noted that even if the placement of the basket somehow caused attendees to feel compelled to donate, Schock himself did not.[308] Under the law at that time of injury, even if other attendees' donations could be seen as an "admission fee," the fact Schock

300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 197, 863 S.E.2d at 539.
307. *Id.*
308. *Id.* at 198, 863 S.E.2d at 539.

had not paid meant that the protections of the RPA were fully in place and protected Holy Trinity and the Knights of Columbus from liability.[309]

b. Open to the Public

The court turned next to Schock's contention that the dinner was not open to the public without limitation, that the Dinner's "religious origins . . . intrinsically [serve] to limit those who attend to members of the [Church] or Knights of Columbus, other Catholics, and those not of the Church who are invited by members."[310] This contention was furthered by Schock's assertion that the religious significance of the event dissuaded non-Catholics.[311] The court summarily dismissed these rather well-thought-out arguments, pointing to an absence of record evidence to support them, and again noting the purpose of the Dinner was for "all individuals in the community to spend time together enjoying a meal."[312]

The court rejected Schock's attempts to differentiate his case from *Word of Faith Ministries v. Hurt*,[313] a prior case that held RPA immunized from liability "a church sponsoring a free 'Hallelujah Fun Night,' intended as an alternative to traditional Halloween activities."[314] Schock alleged that the dietary and other restrictions imposed by Lent and imposed at the Dinner created a narrower benefit than the fall festival at issue in *Word of Faith Ministries.*[315] Passing on the direct logic of that argument, the court of appeals reasoned that Schock failed to introduce any evidence that either defendant limited access to either the premise or the dinner, and hence was not open to the public within the meaning of the Act.[316]

c. Recreational Purpose

Schock's final argument was that the purpose of the dinner was "to raise money to benefit the Knights of Columbus" and not that of a

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309. *Id*. The Court noted the RPA was amended to allow for liability in instances where *any* person pays an admission fee, not just the particular plaintiff. *See* O.C.G.A. § 51-3-25(2).

310. *Schock*, 361 Ga. App. at 198, 863 S.E.2d at 539.

311. *Id*. at 198, 863 S.E.2d at 539–40.

312. *Id.* at 198, 862 S.E.2d at 540.

313. 323 Ga. App. 296, 746 S.E.2d 777 (2013).

314. *Schock*, 361 Ga. App. at 198–99, 863 S.E.2d at 540; *Word of Faith*, 323 Ga. App. at 297, 756 S.E.2d at 778.

315. *Schock*, 361 Ga. App. at 199, 863 S.E.2d at 540.

316. *Id*.

recreational purpose.[317] The court summarily rejected the argument, noting that it had previously held that a free festival event on church property serves a "recreational purpose" to which RPA applies.[318] It also rejected the contention that evidence donations were solicited and obtained was material to the questions posed, holding that recent supreme court precedent held "[i]t is improper to consider . . . subjective motivations in determining . . . entitle[ment] to immunity under the Act"; it cited the relevant question as being whether "the landowner actually invited people onto the property (directly or indirectly) to do something 'recreational,' or whether people have instead been allowed onto the property to engage in commercial activity."[319] Answering that question, the court concluded the undisputed record evidence showed the dinner was to allow individuals in the community to gather together to enjoy a meal and that Schock had been invited to use the property for a recreational purpose.[320]

317. *Id.*

318. *Id.*

319. *Id*. at 199–200; 863 S.E.2d at 540–41 (quoting Mercer Univ. v. Stofer, 354 Ga. App. 458, 461, 841 S.E.2d 224, 227 (2020) and Mercer Univ. v. Stofer, 306 Ga. 191, 199, 830 S.E.2d 169, 175 (2019)).

320. *Schock*, 361 Ga. App. at 200, 863 S.E.2d at 541.