Mercer Law Review

Volume 75
Number 1 *Annual Survey of Georgia Law*

Article 8

12-2023

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Recommended Citation

Crofton, Peter F.; Cook, David R.; and Parker, C. Jackson (2023) "Construction Law," *Mercer Law Review*: Vol. 75: No. 1, Article 8.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol75/iss1/8

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Construction Law

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I. INTRODUCTION

This annual Survey Article focuses on noteworthy opinions by Georgia appellate courts and federal courts in Georgia relevant to the practice of construction law.[1] This Survey Article highlights key developments, including Georgia's Anti-Indemnity Act,[2] High Voltage Safety Act,[3] Lien Waiver Statute,[4] the United States Supreme Court's recent *Sackett v. EPA*[5] decision, the Southern States Chemical and Tampa Tank dispute, insurance coverage updates, discovery, forum selection clauses, and more. For construction lawyers, these developments are essential to understand in navigating the ever-evolving practice of construction law in Georgia.

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1 For an analysis of Construction Law during the prior survey period, *see* Peter M. Crofton et al., *Construction Law, Annual Survey of Georgia Law*, 74 MERCER L. REV. 67 (2022), https://digitalcommons.law.mercer.edu/jour_mlr/vol74/iss1/8/ [https://perma.cc/A34X-3Y53].

2. O.C.G.A. § 13-8-2(b) (2016).

3. O.C.G.A. §§ 46-3-30–40 (1992).

4. OCGA § 44-14-366 (2009).

5. Sackett v. EPA, 143 S. Ct. 1332 (2023).

II. GEORGIA'S ANTI-INDEMNITY ACT

Georgia's anti-indemnity statute received an unusual level of review in 2022. The statute, codified in O.C.G.A. § 13-8-2(b),[6] voids an indemnity provision that shifts to the indemnitor the risk of loss or damage resulting from the indemnitee's sole negligence in a contract relating to maintenance or construction.[7]

In *Power v. Toccoa Dreams LLC*,[8] a party who was injured at a rented vacation home sued the property owner and the rental agent for damages resulting from a fall.[9] The property owner and the rental agent sued the renter for a variety of claims, including indemnification. The renter denied liability and asserted the indemnification obligation in its rental contract was void under the anti-indemnity statute. The Superior Court of Fannin County denied the renter's motion for summary judgment, and the renter appealed.[10]

The Court of Appeals of Georgia reversed the trial court's decision, applying the two-part test established by the Supreme Court of Georgia in *Kennedy Development Company, Inc. v. Camp*.[11] The Supreme Court of Georgia established that courts should look to whether the indemnification provision "(1) relate[s] in some way to a contract for 'construction, alteration, repair, or maintenance' of certain property and (2) promise[s] to indemnify a party for damages arising from that own party's sole negligence."[12] Applying the first part of the test, the court of appeals determined that the anti-indemnity statute "has been applied to commercial and residential lease agreements bearing little or no relationship to any ostensible building construction."[13] Then the court cited the Georgia Supreme Court as having held that the anti-indemnity statute "sets forth a public policy prohibiting exculpatory clauses in residential lease agreements."[14]

Applying the second part of the test, the court of appeals determined the broad language of the indemnity obligation included the indemnitee's

6. O.C.G.A. § 13-8-2(b) (2016).

7. *Id.*

8. 367 Ga. App. 116, 885 S.E.2d 82 (2023).

9. *Id.* at 116–17, 885 S.E.2d at 83.

10. *Id.* at 117, 885 S.E.2d at 83–84.

11. *Id.* at 119–20, 885 S.E.2d at 85; Kennedy Dev. Co. v. Camp, 290 Ga. 257, 719 S.E.2d 442 (2011).

12. *Kennedy Dev. Co.*, 290 Ga. at 259, 719 S.E.2d at 444 (quoting O.C.G.A. § 13-8-2(b)).

13. *Power*, 367 Ga. App. at 120, 885 S.E.2d at 85.

14. *Id.* (citing Country Club Apts. v. Scott, 246 Ga. 443, 444, 271 S.E.2d 841, 842 (1980)).

sole negligence.[15] Also applying prior precedent, the court looked at the four corners of the agreement, not the nature of the actual claims for which indemnity was sought, in determining the scope of the clause.[16] Having determined the indemnity clause at issue satisfied both parts of the two-part test, the court held that the clause violated the anti-indemnity statute and was therefore void.[17]

The United States District Court for the Middle District of Georgia upheld a broad indemnity obligation in *Norfolk Southern Railway Company v. Langdale Forest Products Company*.[18] In *Norfolk Southern*, the parties signed an agreement that allowed Langdale to maintain a private railroad crossing. On two occasions, Norfolk Southern trains struck trucks entering or leaving Langdale's property. Norfolk Southern demanded indemnity against the costs, damages, and claims arising from the two incidents. When Langdale failed to indemnify it, Norfolk Southern filed an action seeking a declaration that it was entitled to indemnity from Langdale.[19]

In the action, Langdale contended the indemnity obligation in the crossing agreement violated Georgia's anti-indemnity statute and was therefore void.[20] The district court reviewed both Georgia decisional law on the anti-indemnity act and parsed the meaning of phrases such as "appurtenance" and "right of way."[21]

Ultimately, the court concluded that it would not extend the anti-indemnity statute to apply to the crossing agreement. The court explained that "[w]ithout precedent or a definition of appurtenance under Georgia law that clearly includes the private crossing at issue, it would be inappropriate for this Court to expand Georgia Law by finding that the private crossing agreement is barred by O.C.G.A. § 13-8-2(b)."[22]

The court also considered the requirement in the crossing agreement that Langdale maintain liability coverage of at least two million dollars.[23] Consequently, the court determined that "even if the anti-indemnification statute applied, the insurance requirement

15. *Id.* at 121, 885 S.E.2d at 86.
16. *Id.*
17. *Id.* at 121–22, 885 S.E.2d at 86–87.
18. No. 20-CV-147, 2023 U.S. Dist. LEXIS 10556 (M.D. Ga. Jan. 20, 2023).
19. *Id.* at *2–4.
20. *Id.* at *8.
21. *Id.* at *9–12.
22. *Id.* at *18 (citing O.C.G.A. § 13-8-2(b)).
23. *Id.* at *19.

provision would save the private crossing agreement from O.C.G.A. § 13-8-2(b)."[24]

The United States Court of Appeals for the Eleventh Circuit jumped on the anti-indemnity bandwagon with its decision in *Northern Illinois Gas Company v. USIC, LLC*.[25] In *Northern Illinois*, the court reversed in part and affirmed in part a district court's determination that an obligation to defend and indemnify violated the anti-indemnity statute.[26]

First, as to the defense obligation, the court wasted little time.[27] It reviewed prior Georgia cases construing the anti-indemnity statute and the contract language at issue and concluded that "USIC's duty to defend is unlimited and requires USIC to defend Nicor against all claims of damages even those based on Nicor's sole negligence. That construction violates Georgia public policy and is therefore unenforceable."[28]

However, the court upheld the indemnity obligation based on an exception to that obligation for "losses or damages caused by the sole negligence of [Nicor] . . . ."[29] The court explained that the duty to defend is a separate duty under Georgia law from the duty to indemnify.[30] As such, the severability clause in the agreement required the unenforceable duty to defend be severed from the enforceable duty to indemnify.[31]

The limits of Georgia's anti-indemnity statute have not yet been fully discovered.[32] For example, the appellate courts have not yet addressed whether a surety's broad form of a General Agreement of Indemnity is violative of the statute. Such a determination would require a surety operating in the state of Georgia to draft the indemnity obligation of the signatories more narrowly to such an indemnity agreement.

III. GEORGIA'S HIGH VOLTAGE SAFETY ACT

The Court of Appeals of Georgia, in a matter of first impression, interpreted the meaning of the word "work" as used in Georgia's High Voltage Safety Act (HVSA)[33] in *Pferrman v. BPS of Tifton, Inc.*[34] The HVSA was passed to prevent injury and interruptions of utility service

24. *Id.* at *22–23 (citing O.C.G.A. § 13-8-2(b)).
25. No. 21-13377, 2023 U.S. App. LEXIS 9134 (11th Cir. Apr. 18, 2023).
26. *Id.* at *36–37.
27. *Id.* at *11–12.
28. *Id.* at *26.
29. *Id.* at *25–26.
30. *Id.* at *27.
31. *Id.* at *34–35.
32. O.C.G.A. § 13-8-2 (2016).
33. O.C.G.A. §§ 46-3-30–40 (1992).
34. 364 Ga. App. 624, 876 S.E.2d 6 (2022).

by placing restrictions on working within ten feet of the vicinity of high-voltage electric lines without notice.[35] In this case, the owner of a billboard hired a contractor to replace the sign. During the sign replacement, an employee of the contractor who was holding a metal rod "close to a power line," was electrocuted and injured as a result. The injured employee sued the billboard owner under the HVSA alleging the owner was strictly liable for the worker's injuries.[36]

The Superior Court of Tift County granted the billboard owner's motion for summary judgment, and the court of appeals affirmed.[37] The court of appeals began with the HVSA's prohibition on performing work within ten feet of a high-voltage line without notifying the Utility Protection Center.[38] The court rejected the worker's contention that, under the HVSA, the billboard owner's preparatory activities such as stockpiling the needed materials "miles away from the high-voltage lines at issue" constituted performing "work" under the HVSA.[39] The HVSA defines "work" as "the physical act of performing or preparing to perform any activity . . . near high-voltage lines."[40] The court explained that the HVSA's imposition of strict liability is in derogation of the common law and therefore must be strictly construed.[41] The court affirmed the trial court's grant of summary judgment to the billboard owner despite the policy behind the HVSA. "Whatever policy objectives or alleged societal good may be forwarded by reading the statute as [the worker] proposes," the court explained, "our canons of statutory construction do not permit us to read this statute in such a way."[42]

IV. BE CAREFUL WHAT YOU ASK FOR

Dekalb County asked the United States District Court for the Northern District of Georgia to quash a non-party subpoena in *Steel, LLC v. Archer Western Construction, LLC*.[43] The underlying litigation involved a subcontractor's change order claims against the general contractor relating to the expansion of a wastewater treatment facility

35. O.C.G.A. § 46-3-31 (1992).
36. *Pferrman*, 364 Ga. App. at 625, 876 S.E.2d at 8.
37. *Id.* at 626, 876 S.E.2d at 8.
38. *Id.* at 626, 876 S.E.2d at 9 (citing O.C.G.A. § 46-3-33(1) (1992)).
39. *Id.* at 627, 876 S.E.2d at 9–10.
40. *Id.* at 626, 876 S.E.2d at 9.
41. *Id.* at 628, 876 S.E.2d at 10.
42. *Id.* at 629, 876 S.E.2d at 10.
43. No. 21-CV-02109, 2022 U.S. Dist. LEXIS 236837 (N.D. Ga. Sept. 30, 2022).

for DeKalb County. The subcontractor served a subpoena to the County seeking records and testimony relating to the disputed change orders.[44]

The district court, without much explanation, determined the subpoena was overly broad and unduly burdensome, and thus should be quashed.[45] Nevertheless, the district court found another way to address the County's pivotal role in the dispute:

> The County's apparent and unexplained refusal to approve the change orders and undertake other acts that affect this lawsuit threaten to bring this litigation to an effective halt. Thus, under this Court's inherent authority to manage its docket and achieve the orderly and expeditious disposition of cases, the Court [orders] DeKalb County to file on the docket within thirty days of the date of this Order a status report informing the Court of the County's plan to release retainage and approve change orders directly affecting the parties to this action.[46]

V. GEORGIA'S LIEN WAIVER STATUTE

A. Arco Design/Build, LLC v. Savannah Green I Owner, LLC

The effects of COVID-19 are still being felt in construction disputes. In *Arco Design/Build, LLC v. Savannah Green I Owner, LLC*,[47] the Court of Appeals of Georgia interpreted the tolling provisions of the 2020 Statewide Judicial Emergency and how they applied to the Georgia lien waiver statute.[48]

Arco Design/Build, LLC (Arco) and Savannah Green 1 Owner, LLC (SGO) entered into a contract in 2018 for Arco to design and build a warehouse in Pooler, Georgia.[49] The contract required that Arco would submit periodic payment applications accompanied by a release of liens and claims in the amount in the payment application. The applicable statute requires an assumption that the amount is deemed paid in full unless an affidavit of nonpayment is filed within sixty days of the waiver.[50]

In April 2020, Arco submitted a payment application in the amount of $1,027,695.17 along with an accompanying lien waiver.[51] However, in

44. *Id.* at *2–3.
45. *Id.* at *5.
46. *Id.* at *6 (citation omitted).
47. 364 Ga. App. 380, 875 S.E.2d 385 (2022).
48. *Id.* at 380, 875 S.E.2d at 386.
49. *Id.*
50. *Id.* at 380–81, 875 S.E.2d at 386; *see* O.C.G.A. § 44-14-366(f)(2) (2021).
51. *Id.* at 381, 875 S.E.2d at 386.

September 2020, Arco filed an affidavit of nonpayment claiming it was still owed $668,912.17 under the April payment application. Subsequently, Arco recorded its lien and SGO filed suit alleging breach of contract for defective work and a declaratory judgment that the affidavit of nonpayment was untimely. Arco responded with a counterclaim for breach of contract and to foreclose on its lien against the property. Arco claimed that its affidavit of nonpayment was timely as the sixty-day period was tolled by the Statewide Judicial Emergency Order. The trial court granted partial summary judgment regarding the affidavit for nonpayment for SGO and Arco appealed.[52]

The first emergency order "grant[ed] relief from any deadlines or other time schedules or filing requirements imposed by otherwise applicable statutes, rules, regulations, or court orders, whether in civil or criminal cases or administrative matters."[53] Arco argued that the phrase "in civil or criminal cases or administrative matters" only modified "court orders" and therefore broadly included all timelines related to statutes.[54] However, the court pointed out that the original emergency order's stated purpose was to apply to "judicial proceedings" and that Arco's interpretation would "confound reason."[55]

Arco's argument continued with the determination of what constituted a "judicial proceeding."[56] The court looked to precedent where it had established that "a lien is not a pleading . . . until the lien becomes attached to the lawsuit . . . ."[57] Also, the stated purpose of a lien is not to seek relief from a court or judicial proceeding, but a lien is used to establish a debt and the court found no basis that the filing of a lien could constitute a "judicial proceeding."[58]

Arco's last argument was against the trial court's finding that the intent of the order was to apply to "litigants" and not all of Georgia law.[59] The court reinforced the position taken by the trial court that the lien is a statutory deadline and not a legal deadline imposed on "litigants."[60] Based on the court's interpretation of the emergency orders and the principle that Georgia lien laws must be construed in favor of the

52. *Id.* at 381, 875 S.E.2d at 386–87.

53. *Id.* at 383, 875 S.E.2d at 387.

54. *Id.* at 384, 875 S.E.2d at 388.

55. *Id.* at 385, 875 S.E.2d at 389.

56. *Id.*

57. *Id.* at 387, 875 S.E.2d at 390 (quoting Simmons v. Futral, 262 Ga. App. 838, 841, 586 S.E.2d 732, 734 (2003)).

58. *Id.* at 386, 875 S.E.2d at 390.

59. *Id.* at 389, 875 S.E.2d at 391.

60. *Id.* at 390, 875 S.E.2d at 392.

property owner, the court affirmed the trial court's judgment that the statute was not tolled by the Statewide Judicial Order.[61]

B. IHI E&C and International Corp. v Robinson Mechanical Contractors, Inc.

In *IHI E&C and International Corp. v. Robinson Mech. Contractors Inc.*,[62] Georgia's lien waiver statute struck again.[63] IHI E&C International Corporation (IHI) contracted with Robinson Mechanical Contractors, Inc. (Robinson) to complete work on a construction project in Elba Island, Georgia.–The purchase order contracts required that Robinson submit a lien waiver prior to payment of any invoices throughout the life of the project.[64] The Georgia lien waiver statute stated that a lien waiver executed pursuant to the statute deems the party paid regardless of actual payment unless a claim of lien or affidavit of nonpayment is filed within sixty days of the waiver.[65] Throughout the project, Robinson submitted lien waivers and invoices in the amount of $30 million and IHI failed to pay within the sixty-day time period. However, neither party objected or raised concern and IHI repeatedly paid invoices that were past the sixty-day period. IHI eventually filed suit asking the court to find that unpaid invoices in the amount of $5.2 million were extinguished by Robinson's failure to file an affidavit of nonpayment.[66]

The United States District Court for the Northern District of Georgia looked to Georgia substantive law to interpret the statute.[67] While the Supreme Court of Georgia has yet to take up this issue, the Court of Appeals of Georgia has decided two cases upholding the plain meaning of the statute as a complete bar to recovery in the absence of an affidavit of nonpayment within sixty days of the waiver.[68] In order for the district court to rule against the Georgia appellate court decisions, Robinson had to show a "persuasive indication" that the Supreme Court of Georgia

61. *Id.*

62. No. 19-cv-04137, 2022 U.S. Dist. LEXIS 179800 (N.D. Ga. Sept. 30, 2022).

63. *See generally id.* at *17; O.C.G.A. § 44-14-366.

64. *IHI E&C Int'l Corp.*, 2022 U.S. Dist. LEXIS 179800, at *3–4.

65. O.C.G.A. § 44-14-366. The statute has since been amended to allow filing of a notice of nonpayment within sixty days after the date of the waiver. Ga. S. Bill 315, Reg. Sess., 2020 Ga. Laws 576.

66. *Id.* at *3, 5.

67. *Id.* at *7.

68. *Id.* at *9–10; *see* ALA Construction Services, LLC v. Controlled Access, Inc., 351 Ga. App. 841, 833 S.E.2d 570 (2019); *Arco Design/Build, LLC*, 364 Ga. App. 380, 875 S.E.2d 385.

would reach an opposite result of the appellate courts.[69] Robinson failed its burden to show a "persuasive indication," and the court reinforced that failure to file a notice within the sixty-day statutory period extinguishes any claim on that debt.[70]

VI. WATER RUNOFF, WETLANDS, AND WOTUS

A. Sackett v. Environmental Protection Agency

In one of its recent watershed cases, the Supreme Court of the United States waded into the Clean Water Act's[71] jurisdiction over waters of the United States (WOTUS).[72] The case, *Sackett v. Environmental Protection Agency*, arose out of the Sacketts' attempt to construct a house on their property located near Priest Lake, Idaho. When the Sacketts attempted to backfill the lot with dirt and rocks, the EPA notified them that such backfilling violated the Clean Water Act. As a basis for jurisdiction, the EPA contended the property contained WOTUS because the wetlands on the property were located near a ditch that fed into a creek, which fed into Priest Lake—a navigable, intrastate lake. The District Court and the United States Court of Appeals for the Ninth Circuit agreed with the EPA. The Sacketts filed a writ of certiorari to the Supreme Court, which was granted to determine the meaning of "the waters of the United States" under the Clean Water Act, and whether the Act includes the wetlands on the Sackett's property.[73]

To determine the jurisdictional scope of the Clean Water Act, the Supreme Court reviewed the administrative and judicial history of water pollution regulation and interpretation of WOTUS in the Clean Water Act.[74] The Court then started the work of construing WOTUS by looking to the statute, which prohibits discharging pollutants into "the waters of the United States."[75] As to the term "waters," the Supreme Court affirmed the definition of "waters" as "those relatively permanent, standing or continuously flowing bodies of water 'forming geographical

69. *IHI E&C Int'l Corp.*, 2022 U.S. Dist. LEXIS 179800, at *7–8.

70. *Id.* at *16–17. Note that the effect of a statutory lien waiver has also been modified by the General Assembly. Ga. S. Bill 315, Reg. Sess., 2020 Ga. Laws 576 ("Waivers and releases provided for under this Code section shall be limited to waivers and releases of lien and labor or material bond rights and shall not be deemed to affect any other rights or remedies of the claimant.").

71. 33 U.S.C. §§ 1251–1389.

72. Sackett v. EPA, 143 S. Ct. 1332 (2023).

73. *Id.* at 1331–32.

74. *Id.* at 1332–33.

75. *Id.* at 1331; 33 U.S.C. §§ 1311(a), 1362(7), 1362(12)(A).

features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[76]

Then the Court addressed whether wetlands are included in WOTUS.[77] Though the Court did not categorically exclude wetlands, upon review of the text and history of the Clean Water Act, it concluded that wetlands must be "indistinguishably part of a body of water that itself constitutes" WOTUS.[78] To establish jurisdiction over a wetland, an agency must first identify an adjacent body of water that constitutes WOTUS.[79] Second, the wetland must have a "continuous surface connection" with the WOTUS.[80]

Based on its interpretation of the Clean Water Act, the Court held that the wetlands on the Sackett's property are not WOTUS because they are distinguishable from any body of water that constitutes WOTUS independently.[81] The Court reversed the opinion of the Ninth Circuit.[82]

B. Wise Business Forms Inc. v. Forsyth County

In *Wise Business Forms, Inc. v. Forsyth County*,[83] the Georgia Court of Appeals addressed a water run-off case against Forsyth County and the Georgia Department of Transportation arising out of the expansion of a roadway.[84] The plaintiff claimed the County and the Department's expansion increased surface and stormwater runoff flowing under its property, which created a sinkhole in its parking lot. Specifically, the plaintiff alleged that the defendants designed and installed a sophisticated stormwater drainage system but failed to provide detention facilities to mitigate increased runoff.[85]

The plaintiff asserted claims of inverse condemnation by permanent nuisance. After the Superior Court of Forsyth County granted the County's and the Department's motions to dismiss, the plaintiff appealed. Though the court of appeals agreed with the plaintiff that an

76. *Sackett*, 143 S. Ct. at 1336 (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006)).

77. *Id.* at 1338–39.

78. *Id.* at 1339.

79. *Id.* at 1341.

80. *Id.* (citing *Rapanos*, 547 U.S. at 742).

81. *Id.* at 1344.

82. *Id.*

83. 363 Ga. App. 325, 870 S.E.2d 894 (2022).

84. *Wise Bus. Forms Inc.*, 363 Ga. App. at 325, 870 S.E.2d at 895.

85. *Id.* at 326, 870 S.E.2d at 896.

expert affidavit under O.C.G.A. § 9-11-9.1[86] was not required, it affirmed the dismissal based on the statute of limitations.[87]

Since the plaintiff's claims were based on real property damage, the court held that four-year statute of limitations applied.[88] For claims of permanent nuisance, the plaintiff is permitted only one cause of action to recover all past and future harm.[89] The court explained that the statute of limitations begins to run when "some portion of the harm becomes observable,"[90] "unless some new harm that was not previously observable occurred within the four years preceding" the lawsuit.[91]

The court determined that the four-year statute of limitations began to accrue upon completion of the project.[92] As alleged in the plaintiff's complaint, the project dramatically increased the runoff that affected the property, which would have been observable immediately upon completion of the project. In response, the plaintiff responded that the sinkhole occurred twenty years later.[93] But the court of appeals held that the sinkhole did not constitute "new harm" because it was a "change[] [in] degree" of the initial harm, which was the increase in runoff under the plaintiff's property.[94]

Finally, the plaintiff argued that its claim was based on a continuing or abatable nuisance.[95] However, the court held that the plaintiff could not establish that the defendants maintained the drainage system or exercised control or acceptance to establish a duty to maintain it.[96] Moreover, the the court explained that the alleged nuisance was permanent because it "stemmed" from the road expansion, including any associated stormwater drainage system.[97] Thus, the court of appeals

86. O.C.G.A. § 9-11-9.1 (2007).

87. *Wise Bus. Forms Inc.*, 363 Ga. App. at 327, 870 S.E.2d at 896.

88. *Id.* at 328, 870 S.E.2d at 897; *see* Liberty Cnty. v. Eller, 327 Ga. App. 770, 772, 761 S.E.2d 164, 167–68 (2014).

89. *Wise Bus. Forms Inc.*, 363 Ga. App. at 328, 870 S.E.2d at 897 (citing Oglethorpe Power Corp. v. Forrister, 289 Ga. 331, 333, 711 S.E.2d 641, 643 (2011)).

90. *Id.* (citing *Oglethorpe Power Corp.*, 289 Ga. at 333, 711 S.E.2d at 643).

91. *Id.* (citing Floyd Cnty. v. Scott, 320 Ga. App. 549, 552 n.9, 740 S.E.2d 277, 280 (2013)).

92. *Id.* at 328, 870 S.E.2d at 897.

93. *Id.*

94. *Id.* at 328–29, 870 S.E.2d at 897.

95. *Id.* at 329, 870 S.E.2d at 898.

96. *Id.*

97. *Id.* at 330, 870 S.E.2d at 898.

affirmed the dismissal of the plaintiff's claims.[98] The case is presently before the supreme court, which granted certiorari on February 7, 2023.[99]

1. Arbitration

The Supreme Court of the United States decided two arbitration-related cases worth mentioning. The first case was *Badgerow v. Walters*,[100] in which the Court held that the method by which a federal court determines whether it has jurisdiction over a request to confirm or deny under 9 U.S.C. § 9[101] and § 10[102] is different from the "look through" method in 9 U.S.C. § 4[103] which is used to determine jurisdiction over a request to compel arbitration.[104] The Court previously held the Federal Arbitration Act[105] (FAA) does not create federal court jurisdiction, and hence to bring an action in federal court under the FAA there must be an independent jurisdictional basis.[106] In *Vaden v. Discover Bank*[107] the Court interpreted the text of 9 U.S.C. § 4 as requiring a district court to look to the "underlying substantive controversy" for an independent jurisdictional basis to decide a motion to compel arbitration.[108] However, based on the different wording in 9 U.S.C. § 9 and § 10, the Court ruled jurisdiction over an application to confirm or deny an award is determined solely by looking at the application itself to determine whether diversity or federal question jurisdiction is present.[109] Perhaps importantly, in this era of ideological polarization on the Court, Justice Kagan wrote the majority opinion, which was joined by seven other justices, with only Justice Breyer dissenting.[110]

The second arbitration matter decided by the Supreme Court was *Coinbase, Inc. v. Bielski*.[111] In *Coinbase*, a fractured majority determined that a district court is required to stay further proceedings when an

98. *Id.* at 331, 870 S.E.2d at 899.

99. *Wise Bus. Forms Inc. v. Forsyth Cnty.*, 363 Ga. App. 325, 870 S.E.2d 894 (2022), cert. granted, No. S22C084, 2023 Ga. LEXIS 30 (2023).

100. 142 S. Ct. 1310 (2022).

101. 9 U.S.C. § 9 (1947).

102. 9 U.S.C. § 10 (2002).

103. 9 U.S.C. § 4 (1954).

104. *Badgerow*, 142 S. Ct. at 1318.

105. 9 U.S.C. §§ 1–16 (1947).

106. *Badgerow*, 142 S. Ct. at 1314 (citing Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581–82 (2008)).

107. 556 U.S. 49 (2009).

108. *Id.* at 62.

109. *Badgerow*, 142 S. Ct. at 1317.

110. *Id.* at 1313.

111. 143 S. Ct. 1915 (2023).

interlocutory appeal is taken under 9 U.S.C. § 16[112] of the denial of a motion to compel arbitration.[113] The majority reasoned that under prior precedent, an interlocutory appeal "divests the district court of its control over those aspects of the case involved in the appeal."[114] The Court explained that "when a party appeals the denial of a motion to compel arbitration, whether 'the litigation may go forward in the district court is precisely what the court of appeals must decide.'"[115] Consequently, the Court held that a district court "must stay its proceedings while the interlocutory appeal on arbitrability is ongoing."[116]

The decision in *Coinbase* featured an opinion written by Justice Kavanaugh and joined by Chief Justice Roberts, Justice Alito, Justice Gorsuch, and Justice Barrett.[117] Justice Jackson wrote a dissenting opinion that was joined in full by Justices Sotomayor and Kagan, and joined in part by Justice Thomas.[118] In Section I of her dissent, the part not joined by Justice Thomas, Justice Jackson scolded the majority for departing from the text of 9 U.S.C. § 16.[119] Thus, the majority opinions in *Badgerow* and *Coinbase* leave room for further discussion of when and how the Court should apply textualist analysis to the FAA.[120]

In *Steel, LLC v. Superior Rigging and Erecting Co.*,[121] a case out of the United States District Court for the Northern District of Georgia, Superior argued that it was not bound by an unsigned contract that required arbitration.[122] Steel subcontracted with Superior to provide steel erection services on the Savannah International Trade & Convention Center Expansion. The parties negotiated the terms of the contract, and Superior performed the required work pursuant to the agreement. However, Superior never signed the final agreement.[123]

The court held that Superior unequivocally assented to the terms of the contract over email.[124] Further, Superior performed work under the

112. 9 U.S.C. § 16 (1990).

113. *Coinbase, Inc.*, 143 S. Ct. at 1918.

114. *Id.* at 1919 (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)).

115. *Id.* at 1920 (quoting Bradford-Scott Data Corp. v. Physician Computer Network, 128 F.3d 504, 506 (7th Cir. 1997)).

116. *Id.*

117. *Id.* at 1918.

118. *Id.* at 1923 (Jackson, J., dissenting).

119. *Id.* at 1925 (Jackson, J., dissenting).

120. *Badgerow*, 142 S. Ct. 1310; *Coinbase, Inc.*, 143 S. Ct. 1915.

121. No. 22-CV-2848, 2022 U.S. Dist. LEXIS 234144 (N.D. Ga. Dec. 29, 2022).

122. *Id.* at *2.

123. *Id.* at *7–10.

124. *Id.* at *7.

agreement and accepted progress payments from Steel.[125] Superior accepted its benefits under the contract and expressly accepted the terms of the contract by its performance.[126] Considering the circumstances surrounding the negotiation of the contract and the subsequent performance of the work, the court enforced the unsigned contract and mandated the parties to arbitrate the dispute pursuant to the agreement.[127]

VII. GEORGIA'S JARNDYCE V. JARNDYCE

There is rarely a year when some court has not ruled upon some aspect of the seemingly-endless disputes between Southern States Chemical and Tampa Tank. So much so that even the General Assembly became involved when it amended Georgia's statute of repose.[128] As of this writing, the most recent decision is the Supreme Court of Georgia's affirmation of a trial court's dismissal with prejudice of all remaining claims by Southern States Chemical.[129]

The genesis of the dispute is the installation of a chemical storage tank in 2002, and leakage from and defects in that tank discovered in 2011. In its opinion, the supreme court recounted the lengthy and somewhat tortured history of the case on its way toward framing the issues arising from the trial court's dismissal with prejudice of the remaining claim in April 2022.[130]

On appeal, the court affirmed the Superior Court of Fulton County's dismissal of the claims with prejudice citing that the claims were barred by the applicable statute of repose.[131] In 2012, the trial court granted summary judgment in favor of Tampa Tank partially on the grounds that the claims were barred by the eight-year statute of repose. Eight years later, the litigation was still ongoing and during the pending petition for writ of certiorari, the General Assembly passed an amendment to O.C.G.A. § 9-3-51 to add language limiting the applicability of the statute in regard to breach of express contractual warranties. Reaching the supreme court again, Southern States argued that the amended statute of repose applied to its breach of express warranty claim, while Tampa

125. *Id.* at *10–11.

126. *Id.* at *8–9.

127. *Id.* at *16.

128. O.C.G.A. § 9-3-51 (2020).

129. Southern States Chem., Inc. v. Tampa Tank & Welding, 316 Ga. 701, 701, 888 S.E.2d 553, 557 (2023).

130. *Id.* at 701–06, 888 S.E.2d at 557–61.

131. *Id.* at 701, 888 S.E.2d at 557.

Tank argued that application of the amended statute would violate due process.[132]

The court addressed Tampa Tank's due process claim in a two-part analysis.[133] First, the court established that the law was expressly intended to apply retroactively to all causes of action that have accrued on or after January 1, 1968.[134] Next, the court looked to whether Tampa Tank had a vested right in the original statute.[135] The court found that Tampa Tank did have a vested right created by the reliance of the statute to assert a claim.[136] Further, the court joined a majority of state courts in holding that the statute of repose is substantive in lieu of procedural.[137] This conclusion barred the application of the amended statute to the case at hand as a violation of substantive due process.[138]

Southern States continued the decade-long fight arguing that even if the amended statute may not be applied retroactively, the application of the original statute to the breach of warranty claim was improper.[139] Southern States asserted that the statute applied only to claims that rely on proof of negligence as an element of the cause of action.[140] The court focused on the plain meaning of the statute that stated "[n]o action to recover damages . . . [f]or any deficiency in . . . construction . . . to real property" and rebutted all of Southern State's claims that the statute was not intended to apply to contract claims.[141] There was no dispute that the storage tank was substantially completed in 2002, or that Southern States filed its initial complaint in 2012.[142] Therefore, the court affirmed the trial court's dismissal with prejudice ending the decade long controversy.[143]

132. *Id.* at 703–06, 888 S.E.2d at 558–61.
133. *Id.* at 707, 888 S.E.2d at 560.
134. *Id.* at 708, 888 S.E.2d at 561.
135. *Id.*
136. *Id.* at 712, 888 S.E.2d at 564.
137. *Id.* at 712, 888 S.E.2d at 563–64.
138. *Id.* at 712, 888 S.E.2d at 564.
139. *Id.* at 712–13, 888 S.E.2d at 564.
140. *Id.*
141. *Id.* at 713, 888 S.E.2d at 564 (citing O.C.G.A. § 9-3-51 (1968)).
142. *Id.* at 715, 888 S.E.2d at 566.
143. *Id.* at 715–16, 888 S.E.2d at 566.

VIII. INSURANCE COVERAGE

A. Employers Mutual Cas. Co. v. Tiger Creek Dev. Inc.

In *Employers Mutual Casualty Company v. Tiger Creek Development, Inc.*,[144] the United States District Court for the Middle District of Georgia held that, "an occurrence, as defined by [an] insurance policy, can include the unintended physical damage caused by intentional development activity."[145] Before the court in this case was a declaratory judgment action brought by the insurance company to determine if the erosion and pollution caused by Tiger Creek's development was covered under the insurance policy. Tiger Creek was performing work on the property next to the Pease's property and pond. During the removal of trees and vegetation, Pease noticed that her pond had sand deposits and her land was being eroded. Pease sent a cease-and-desist letter to Tiger Creek, and Tiger Creek informed its insurance provider of the possible claim. The policy covering the project provided coverage for any property damage caused by a covered occurrence.[146] The policy also defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[147]

At issue in this case was determining what was considered an "accident."[148] While both parties cited conflicting federal district court decisions, the court relied on the Georgia Supreme Court's decision in *American Empire Surplus Lines Insurance Company v. Hathaway Development Company, Inc.*,[149] that dealt with identical language.[150] In *Hathaway*, the Georgia Supreme Court found that the negligent installation of pipes that caused damage to neighboring property was an "accident."[151] This led the United States District Court for the Middle District of Georgia to conclude that, even though Tiger Creek intentionally cleared the trees and vegetation, there was no intent to cause damage to the neighboring property, and such event constituted an "accident."[152]

144. No. 21-CV-65, 2022 LEXIS 94149 (M.D. Ga. May 25, 2022).
145. *Id.* at *7.
146. *Id.* at *2–4.
147. *Id.* at *4.
148. *Id.* at *5.
149. 288 Ga. 749, 707 S.E.2d 369 (2011).
150. *Emp'rs Mut. Cas. Co.*, 2022 LEXIS 94149, at *7–8.
151. *Hathaway Dev. Co.*, 288 Ga. at 752, 707 S.E.2d at 371–72.
152. *Emp'rs Mut. Cas. Co.*, 2022 LEXIS 94149, at *8.

B. Alfa Ins. Corp. v. Gilbert

In *Alfa Insurance Corporation v. Gilbert*,[153] Alfa Insurance moved for default judgment in the Middle District of Georgia in an insurance coverage dispute for construction in Monroe County.[154] The coverage dispute arose from a lawsuit regarding erosion and pollution from the defendants' construction activities. Alfa issued a homeowner's policy and an umbrella policy to the defendant, Gilbert. However, in the policies, the property at issue was not listed and therefore Alfa challenged the claims by Gilbert in the underlying lawsuit. Further, not only was the property not listed in the insurance policies, but the policies expressly excluded coverage for business operations.[155]

The court established that insurance companies may utilize the Declaratory Judgment Act[156] when determining liabilities.[157] In considering the motion, the court looked to the pleadings to determine if there is a sufficient basis for entering a default judgment.[158] Ultimately, since the defendants were properly served, the defendants did not timely answer, and the pleading provided for a valid legal claim, the court granted the motion and entered the default judgment.[159]

IX. DISCOVERY

A *pro se* plaintiff won in the Court of Appeals of Georgia in *Blackwell v. Dreamworks Restoration Contractors, Inc*.[160] after her witnesses were excluded from testifying for a lack of disclosure.[161] The case originated from a raccoon infestation that caused Blackwell to contract with Dreamworks to replace her roof. After the installation of the new roof, Blackwell noticed the presence of mold on the bottom side of the roof sheathing. Blackwell refused to pay Dreamworks, and Dreamworks filed a lien for $18,238.42 for the material and labor provided to Blackwell and then filed suit for breach of contract two months later.[162]

Following the bench trial, the State Court of Deklab County entered judgment in favor of Dreamworks. On appeal Blackwell contended that

153. No. 21-CV-358, 2022 U.S. Dist. LEXIS 22008 (M.D. Ga. Feb. 8, 2022).

154. *Id.* at *1.

155. *Id.* at *1–2.

156. 28 U.S.C. §§ 2201–02 (2020).

157. *Id.* at *2–3 (citing State Farm Mut. Auto. Ins. Co. v. Bates, 542 F. Supp. 807, 817 (N.D. Ga. 1982)).

158. *Id.* at *3–4.

159. *Id.* at *4.

160. 366 Ga. App. 497, 883 S.E.2d 436 (2023).

161. *Id.* at 500, 883 S.E.2d at 439.

162. *Id.* at 497–98, 883 S.E.2d at 437–38.

the trial court abused its discretion by excluding two of her witnesses for failure to identify them during discovery. When served with interrogatories, Blackwell did not list any witnesses and failed to supplement her responses once she was aware of what witnesses she would call.[163] While the Court of Appeals of Georgia agreed that the trial court enjoys a broad discretion to control discovery and the imposition of sanctions, the court held that the appropriate remedy for the failure to disclose is the postponement of trial or a mistrial.[164]

X. FORUM SELECTION CLAUSE—MANDATORY OR PERMISSIVE

When negotiating a contract, a forum-selection clause needs to include specific language for federal courts to deem the clause mandatory instead of permissive.[165] In *Greenberry Industries., LLC v. ESI, Inc.*,[166] the United States District Court for the Northern District of Georgia showed just how specific the mandatory language must be.[167] This breach of contract claim included a forum-selection clause that stated:

> Venue—ESI and Subcontractor acknowledge that this Agreement was negotiated in Cobb County, Georgia and shall be deemed to have been executed in Cobb County, Georgia at the offices of ESI. Subcontractor further acknowledges that by negotiating and executing this Agreement in Cobb County, Georgia, *it is subjecting itself to and is consenting to the jurisdiction and venue of the courts of Cobb County, Georgia for the purposes of resolving any dispute that arises hereunder*. Subcontractor hereby waives any defenses or objections to the venue and jurisdiction of the state courts of Cobb County, Georgia. If this consent to the jurisdiction and venue of the state courts of Cobb County is ruled unenforceable, the parties agree to submit any dispute to binding arbitration under the rules and procedures of the American Arbitration Association office in Atlanta, Georgia.[168]

The defendant argued that the language emphasized above made this forum-selection clause mandatory and that the courts of Cobb County, Georgia, were the exclusive venues for the breach of contract.[169] While the court did not indicate any "magic words" that should be included, the court did distinguish the forum selection at hand from an Eleventh

163. *Id.* at 498–99, 883 S.E.2d at 438.

164. *Id.* at 500, 883 S.E.2d at 439.

165. Greenberry Indus., LLC v. ESI, Inc., No. 22-CV-206, 2022 U.S. Dist. LEXIS 111004, *5 (N.D. Ga. June 22, 2022).

166. 2022 U.S. Dist. LEXIS 111004.

167. *Id.*

168. *Id.* at *4 (emphasis added).

169. *Id.* at *6.

Circuit case that used the language: "Venue shall be in Broward County, Florida" and emphasized the use of "shall."[170] The court went on to concede that the forum-selection clause did prevent the plaintiff from challenging the jurisdiction and venue in Cobb County, but the language in no way prevented the plaintiff from filing suit in another jurisdiction or venue.[171] While the use of "shall" may not be a magic word, it is clear that to make a forum-selection clause mandatory, there must be language that limits the plaintiff's discretion to file in other courts.[172]

XI. MOTION FOR JUDGMENT ON THE PLEADINGS: PLAUSIBILITY IS TOUGH TO OVERCOME

A. Greenberry Industrial, LLC v. ESI, Inc. of Tennessee

In *Greenberry Industrial, LLC v. ESI, Inc.*,[173] Greenberry Industrial, LLC (GBI) entered into a contract with ESI, Inc. of Tennessee (ESI) to provide services to support a boiler replacement project in Port Hudson, Louisiana.[174] Throughout the course of construction, the parties executed six change orders, and GBI asserted that it performed additional work that it was never compensated for. GBI also claimed that it is entitled to an "Early Completion Bonus" for completing the work by July 2, 2021. In response to GBI's claims, ESI counterclaimed for liquidated damages for failure to complete the work by the date established by change order, breach of contract for frivolous change orders, and damages in defense of a prior lien claim. ESI subsequently moved for partial judgment on the pleadings.[175]

The court first addressed ESI's argument that the terms of the contract expressly barred GBI's recovery of indirect or consequential damages.[176] The contract expressly stated:

> Limitation of Liability—Notwithstanding any other provision to the contrary in this Subcontract . . . neither party shall be liable to the other for any indirect, incidental, consequential, special, exemplary or punitive damages arising from or related to this Subcontract Agreement, its performance, enforcement, breach or termination, such

170. *Id.* at *5–6 (quoting Glob. Satellite Commc'n Co. v. Starmill U.K. Ltd., 378 F.3d 1296, 1271 (11th Cir. 2004)).

171. *Id.* at *6.

172. *Id.* at *5–6.

173. No. 22-CV-206, 2022 U.S. Dist. LEXIS 222875 (N.D. Ga. Dec. 12, 2022).

174. *Id.* at *1–2.

175. *Id.* at *2–3.

176. *Id.* at *6.

> as, but not limited to, loss of revenue, anticipated profits, or loss of business . . . .[177]

ESI's contention stems from GBI's claim for damages for "alleged inefficiency and productivity losses."[178] The court relied on the fact that ESI had repeatedly approved change orders for "indirect overhead costs" and overtime rates in determining that the language could not, as a matter of law, preclude indirect or consequential damages.[179]

Next, the court addressed ESI's argument that GBI waived any right it may have had to recover for additional work when it accepted Change Order 1 and subsequently failed to object to Change Orders 3, 4, and 5.[180] The contention comes from language that ESI included in the change order that the change would not affect the project completion date and that the change order included additional GBI overhead costs.[181] ESI also claimed that GBI's failure to respond to the change orders rendered them effectively accepted.[182] The court rejected ESI's unilateral acceptance argument and noted that it is well-settled law that an offer must be accepted unequivocally in Georgia.[183]

After its first two arguments failed, ESI argued that GBI was not entitled to any schedule extensions or additional overhead as GBI failed to timely notify ESI of the delays.[184] This argument failed because ESI did not provide any factual basis in the pleadings to suggest that GBI was required to provide timely notice or that it violated this requirement while GBI's pleadings included a factual basis that could be construed to entitle GBI to damages.[185] Further, ESI claimed that GBI's failure to complete the project by the specified completion date barred GBI's recovery of the "Early Completion Bonus."[186] Again, the court found that ESI provided no factual basis from the contract that would bar an extension of the completion date or an early completion date.[187]

ESI's final argument was that GBI was not entitled to any schedule extensions based on weather delays because the contract only allowed for

177. *Id.* (emphasis added).
178. *Id.*
179. *Id.* at *10.
180. *Id.*
181. *Id.* at *11.
182. *Id.*
183. *Id.* at *13.
184. *Id.* at *14–15.
185. *Id.* at *15–16.
186. *Id.* at *16.
187. *Id.* at *16–17.

delays that met the contract's definition of force majeure.[188] On a ruling for the motion for judgment on the pleadings, the court found that the lack of specificity of the amount of rain was not necessary and that GBI's pleading that it was entitled to a deadline extension due to weather delays was sufficient under the plausible pleading standard.[189]

Ultimately, the court turned to ESI's counterclaims and determined that ESI was not entitled to judgment on the pleadings on liquidated damages or damages ESI incurred paying other parties because the pleadings plausibly established that GBI could be entitled to relief and extensions.[190]

Following the denial of ESI's motion for partial judgment on the pleadings, ESI paid GBI in the amount of $1,376,635.70 to be applied against the principal owed to GBI in August and $90,925.46 for withheld retainage in September.[191] GBI then took its shot with a motion for partial summary judgment to recover prejudgment interest on the two payments.[192] GBI based its argument on the contract requirement that ESI was to pay GBI's invoices within 30 days of their receipt and the failure to pay resulted in accruing of prejudgment interest.[193] ESI countered this claim with its argument that it justifiably withheld payments for breach of contract.[194] Yet again, the court denied the motion as premature as the determination of breach was still pending before the court and genuine issues of fact had yet to be determined.[195]

XII. CONSTRUING AMBIGUITIES IN FAVOR OF THE SURETY

A bond issued to secure Robinson Mechanical Contractors Inc.'s (Robinson) performance on a construction project in Elba Island, Georgia, became the center of a dispute between Fidelity and Deposit Company of Maryland (Fidelity) and IHI E&C International Corporation (IHI).[196] Fidelity moved for partial summary judgment and for the court to declare that the bond only covered Robinson's performance on the construction contract and that the bond did not cover two previous purchase orders.

188. *Id.* at *17–18.

189. *Id.* at *19.

190. *Id.* at *21–23.

191. Greenberry Industrial, LLC v. ESI, Inc. Of Tennessee, No. 22-CV-206, 2023 U.S. Dist. LEXIS 32598, at *3 (N.D. Ga. Feb. 28, 2023).

192. *Id.*

193. *Id.* at *5.

194. *Id.*

195. *Id.* at *6.

196. IHI E&C Int'l Corp. v. Robinson Mech. Contractors Inc., No. 19-cv-04137, 2022 U.S. Dist. LEXIS 180174, at *3–4 (N.D. Ga. Sept. 30, 2022).

On the first purchase order, IHI required an irrevocable letter of credit but no bond. On the second purchase order, IHI required neither an irrevocable letter of credit nor a bond. The third agreement was the construction contract and IHI required Robinson to obtain payment and performance bonds, and Robinson obtained a performance bond from Fidelity in the amount of the construction contract.[197] Included in the performance bond was the language "[t]he surety shall not be liable to [IHI] or others for obligations of [Robinson] that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations."[198] IHI argued that the work performed pursuant to the purchase orders was incorporated into the main construction contract and covered by the performance bond.[199] Fidelity argued that there was no incorporation of the purchase orders, and the bond only covered the construction contract.[200]

Applying Georgia law, the court looked first to interpret the indemnity provision in the construction contract that IHI relied on for its claim.[201] The clause stated:

> [Robinson] shall, TO THE FULLEST EXTENT PERMITTED BY LAW, unconditionally indemnify, hold harmless, protect and defend [IHI] . . . from and against any damages, claims, demands, suits by any person or persons, losses, liabilities and expenses (including but not limited to, reasonable attorneys' fees, other litigation or arbitration costs and punitive damages, if allowed by applicable law), arising out of or resulting from Subcontractor's actions and/or omissions in the performance of the Work, *the performance of other activities or services of any kind undertaken by [Robinson] or occurring in connection therewith* (including [Robinson's] failure to comply with the terms of [the Construction Contract]), whether occurring on or off the Project site.[202]

The two parties disagreed on the interpretation of this clause and therefore it was determined to be ambiguous.[203] To decipher the ambiguity created by the indemnity clause, the court: (1) interpreted the disputed language in the context of the whole contract and the circumstances at the time of creation of the contract; (2) construed the

197. *Id.* at *4–5.
198. *Id.* at *6.
199. *Id.* at *8.
200. *Id.*
201. *Id.* at *11.
202. *Id.* at *12 (emphasis added).
203. *Id.* at *12–15.

ambiguity against the drafter; (3) construed the suretyship obligation narrowly; and (4) construed the performance bond in accordance with industry practice.[204]

Since the indemnity clause was included in the construction contract and the contract was incorporated into the performance bond, the court analyzed the language in both and the circumstances surrounding the execution of them.[205] First, the construction contract made no mention of the purchase order work, and the parties even used a change order to remove some of the scope of work in the purchase order and added it to the construction contract.[206] The court gave this weight as the parties could have simply incorporated the entire purchase order scope of work into the main construction contract if the parties intended for them to be integrated.[207] Another factor the court considered was the fact that the purchase orders required the fabrication of materials to be completed entirely offsite while the construction contract required the installation of work at the job site.[208] Lastly, the court noted that if the indemnity clause could be construed to cover work that was outside of the four corners of the contract it would "lead to an absurd result."[209]

The court then construed the ambiguity against the drafter of the agreement, IHI.[210] The court concluded that Fidelity's interpretation was the most reasonable in light of the parties' intent at the time of contracting.[211]

Further, the court explained that surety contracts may not be extended by implication or interpretation and the surety contract will be construed in favor of the surety under Georgia law.[212] The performance bond included language that Fidelity was not liable for any scope of work that was "unrelated" to the construction contract.[213] Construing this in favor of Fidelity, the court determined that Fidelity was obligated only for the work and damages under the construction contract and not the unincorporated purchase orders.[214]

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204. *Id.* at *16.
205. *Id.* at *17.
206. *Id.* at *17–18.
207. *Id.* at *18.
208. *Id.* at *18–19.
209. *Id.* at *20.
210. *Id.* at *23.
211. *Id.* at *23–24.
212. *Id.* at *24 (citing Arnold v. Indcon, L.P., 219 Ga. App. 813, 813, 466 S.E.2d 684, 685 (1996)).
213. *Id.* at *24.
214. *Id.* at *25.

Moreover, the court stated that the performance bond must also have the same penal sum as the bonded contract price in accordance with industry practice.[215] Here, the court explained, the sum of the performance bond was set at the exact same amount as the construction contract and Robinson's president testified during trial that this was in accordance with his experience of thirty-four years in the industry.[216]

All of the factors the court considered in interpreting the ambiguity created between the two parties fell in favor of Fidelity, and therefore, the court found that the performance bond did not cover the unincorporated purchase orders.[217] In sum, in Georgia the law significantly favors the surety in any ambiguity of what the bond may cover.

XIII. LIS PENDENS

During the survey period, the Court of Appeals of Georgia held that a notice of lis pendens was valid for erosion damages after the properties were completed, properly sodded, and inspected by the city.[218] Almont Homes developed 109 home sites that were adjacent to the Phillips's property.[219] Over the course of the construction of the homes, "between 396 and 570 cubic yards of silt was deposited into the [Phillips's] stream."[220] The Phillips filed a number of claims alleging that Almont Homes was in violation of laws related to erosion control and also filed a notice of lis pendens as to all 109 homes. However, the trial court canceled the notice of lis pendens on the basis that the suit did not "involve" the properties that had been completed, sodded, and were no longer causing silt to damage the Phillips's property.[221]

Under Georgia law, a notice of lis pendens is appropriate when property is the subject of a lawsuit.[222] This allows potential buyers to be aware that the property is "involved" in pending litigation.[223] In this case, all of the property was determined to be "involved" in pending litigation as even the completed homes caused silt deposits in the past and the overall change in the landscape of the developed property continued to

215. *Id.* at *26.

216. *Id.*

217. *Id.* at *27.

218. Phillips v. Almont Homes NE, Inc., 365 Ga. App. 65, 66, 68, 877 S.E.2d 644, 646–47 (2022).

219. *Id.* at 65–66, 877 S.E.2d at 645.

220. *Id.* at 65, 877 S.E.2d at 645.

221. *Id.* at 66–67, 877 S.E.2d at 645–46.

222. *Id.* at 67, 877 S.E.2d at 646; O.C.G.A. § 44-14-610 (1982).

223. *Phillips*, 365 Ga. App. at 67, 877 S.E.2d at 646.

cause silt to be deposited into the Phillips's stream.[224] The Court of Appeals of Georgia held that the complaint clearly prayed for relief from the activities on all properties owned by Almont Homes and the notice of lis pendens was appropriate against them.[225]

XIV. CHANGE ORDER AS AN ACCORD & SATISFACTION

A genuine issue of material fact prevented the United States District Court for the Southern District of Georgia in *United States v. Federal Insurance Company*[226] from addressing whether a change order was considered an accord and satisfaction under Georgia law.[227] It appears that if there was evidence of mutual assent, the court would have found that the change order was a proper accord and satisfaction.[228]

In Georgia, accord and satisfaction is valid "where the parties to an agreement, by subsequent agreement, have satisfied the former agreement, and the latter agreement has been executed."[229] These agreements have been found to be binding when there is a meeting of the minds, and the existence of an accord and satisfaction is a question for the jury.[230]

In this case, the parties were in dispute over "Change Order 10," which was accidentally signed by the painting subcontractor purporting to accept $2,840,383.00 to resolve any disputes regarding the unanticipated presence of lead.[231] However, the plaintiff argued that there was never a meeting of the minds as the signature was executed mistakenly due to administrative errors.[232] In considering extrinsic evidence, the court concluded that there was a genuine dispute as to whether there was a meeting of the minds and denied the motion for summary judgment.[233] However, it appears that regardless of the mistake, the existence of a change order being a valid accord and satisfaction is a question for the jury.[234]

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224. *Id.* at 68, 877 S.E.2d at 647.
225. *Id.* at 70, 877 S.E.2d at 649.
226. No. CV-216-113, 2022 U.S. Dist. LEXIS 84562 (S.D. Ga. May 9, 2022).
227. *Id.* at *17 (quoting O.C.G.A. § 13-4-101 (1933)).
228. *Id.*
229. *Id.* (quoting O.C.G.A. § 13-4-101).
230. *Id.*
231. *Id.* at *19.
232. *Id.* at *18–19.
233. *Id.* at *19–20.
234. *Id.* at *17.

XV. DAMAGES IN A NUISANCE CLAIM

During the construction of a solar farm, the defendants in *H&L Farms LLC v. Silicon Ranch Corp.*,[235] allowed for the erosion of their job site and sediment was deposited in a neighboring fishing lake.[236] Most notably in the opinion, the court explored the various damages the plaintiffs alleged they suffered as a result of the nuisance caused by the inadequate erosion control.[237]

First, the plaintiffs asked for punitive damages.[238] Under Georgia law, punitive damages are reserved for a continuing nuisance, repetitive trespass, or for "failure to adequately ameliorate the runoff of water and silt onto another's property."[239] In *Tyler v. Lincoln*,[240] the court awarded punitive damages in a similar claim when there was evidence that the erosion control was not adequate, the drainage system was designed to increase runoff to the plaintiff's land, and the developers were aware of the nuisance and failed to mitigate.[241] Here, however, the issue was before the court on summary judgment and too many of the surrounding facts were disputed to determine if the court would apply the rule in *Tyler*.[242]

The plaintiffs also requested damages for the diminution of value due to the nuisance.[243] The court denied the defendant's motion for summary judgment as the plaintiff could testify to the diminution in value of his property due to the loss of rental revenue for the cabin on the property.[244] The evidence showed that while the site was beginning to stabilize, it would be a question of fact for the jury to decide whether the site would ever be completely stabilized under the defendant's erosion control plan.[245] The court found that diminution of value can only be properly awarded when there is a permanent nuisance.[246]

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235. No. 21-CV-134, 2023 U.S. Dist. LEXIS 7897 (M.D. Ga. Jan. 17, 2023).

236. *Id.* at *3–4.

237. *Id.* at *14–17.

238. *Id.* at *12.

239. *Id.* at *12 (quoting Tyler v. Lincoln, 272 Ga. 118, 120, 527 S.E.2d 180, 183 (2000)).

240. 272 Ga. 118, 527 S.E.2d 180 (2000).

241. *Id.* at 121, 527 S.E.2d at 183.

242. *H&L Farms LLC*, 2023 U.S. Dist. LEXIS 7897, at *12–14; *Tyler*, 272 Ga. at 120, 527 S.E.2d at 182.

243. *H&L Farms LLC*, 2023 U.S. Dist. LEXIS 7897, at *14–15.

244. *Id.* at *15–16.

245. *Id.* at *15.

246. *Id.* at *14–15 (citing City of Gainesville v. Waters, 258 Ga. App. 555, 557, 574 S.E.2d 638, 642 (2002)).

The plaintiffs also sought emotional distress damages for their nuisance claim.[247] The court sided with the defendants on their motion for summary judgment, stating that the plaintiffs may not recover emotional distress damages on a nuisance claim; however, the court stated that they could recover for "discomfort and annoyance" damages.[248] The court found that a jury could reasonably find in favor of the plaintiffs in showing that the lake was intended for fishing and recreation as opposed to its original use as an irrigation lake and be awarded "discomfort and annoyance" damages at trial.[249] The plaintiffs here ran the gambit of remedies in their nuisance claim, and the court illustrated which claims could be viable at trial.[250]

XV. SUBCONTRACTOR OR INDEPENDENT CONTRACTOR?

In *York v. Moore*,[251] York began renovating a residence in Lakemont, Georgia for Moore.[252] The parties did not execute any written contract for the renovation work. After work proceeded, Jeff Gosnell Painting (JGP) was hired to complete the painting and staining scopes of work for the home. A fire erupted in the home and the cause of the fire was determined to be a drop cloth and oily rags presumably from JGP's work on the home.[253]

Moore sued York as the general contractor alleging liability for JGP as a subcontractor.[254] York moved for summary judgment relying on two exceptions for the general rule of liability for a contractor's negligence.[255] In Georgia, "'employers are not responsible for torts committed by independent contractors.'"[256] Georgia has also codified a list of exceptions to non-liability "for the negligence of a[n] [independent] contractor . . . if there is a duty imposed by express contract . . . or the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control."[257] The record indicated that, while there was likely an enforceable contract for work that York was to

247. *H&L Farms LLC*, 2023 U.S. Dist. LEXIS 7897, at *16.

248. *Id.* at *16–17.

249. *Id.* at *17.

250. *Id.* at *21–23.

251. 367 Ga. App. 152, 885 S.E.2d 193 (2023).

252. *Id.* at 152, 885 S.E.2d at 194.

253. *Id.* at 152–53, 885 S.E.2d at 194.

254. *Id.* at 153, 885 S.E.2d at 194.

255. *Id.*

256. *Id.* at 154, 885 S.E.2d at 195 (quoting Watkins v. First South Utility Constr., 284 Ga. App. 547, 549, 644 S.E.2d 449, 451 (2007)); *see also* O.C.G.A. § 51-2-4 (1933).

257. O.C.G.A. § 51-2-5(3), (5) (1933).

perform on the house, there was no indication of an express contract that imposed liability on York for JGP's negligence.[258] The court found that York was entitled to judgment as a matter of law.[259]

XVI. DUTY TO INDEMNIFY NOT RIPE

Under Georgia law, the duty to indemnify may not be considered until the court issues a ruling on the duty to defend or final disposition in an underlying action.[260] This action stemmed from an insurance policy issued by Auto-Owners Insurance Company (Auto-Owners) to the HOA of Tabby Place. In the underlying action, property owners downstream of the Tabby Place suburb suffered property damage due to the alleged malfunction of the Tabby Place stormwater infrastructure. After receiving notice of the underlying lawsuit, Auto-Owners sent the HOA a reservation of rights and stated that it would not provide a defense to the HOA until the pending coverage issues were resolved. Ultimately, Auto-Owners filed a declaratory judgment action seeking a declaration that Auto-Owners had no duty to defend or to indemnify the HOA in the underlying lawsuit.[261] The court agreed with the defendant's argument that the declaratory judgment was not ripe as the underlying action had not resolved the liabilities of the parties in the underlying suit.[262]

XVII. CONCLUSION

In the ever-evolving area of construction law in Georgia, the developments explored in this Survey Article underscore the need for practitioners to remain vigilant and informed. Georgia's construction landscape is shaped by legislation and court decisions, impacting contractual obligations, safety standards, dispute resolution, and more. Staying abreast of these developments remains crucial for those practicing within this dynamic industry.

258. *York*, 367 Ga. App. at 155, 885 S.E.2d at 195.

259. *Id.* at 156, 885 S.E.2d at 196.

260. Auto-Owners Ins. Co. v. Tabby Place Homeowners Ass'n., 637 F. Supp. 3d 1342, 1360 (S.D. Ga. Sep. 28, 2022).

261. *Id.* at 1345–47.

262. *Id.* at 1360.