Real Property

by Linda S. Finley*

I. INTRODUCTION

This Article looks at notable issues regarding Georgia real property law during the survey period, including legislation enacted by the Georgia General Assembly and case law decided in Georgia courts. The Author is happy to report she no longer feels compelled to begin the Survey by discussing the dire economic conditions of the state of Georgia or, indeed, the United States as a whole. At the time of the writing of this Survey, RealtyTrac, which reports national foreclosure statistics, released its mid-year 2016 foreclosure report showing that foreclosure activity affecting Georgia real property in the month of July 2016 was 15% lower than the previous month and 44% lower than the same period the previous year. Disturbing, however, was the economic statistic reporting that Georgia home sales for June 2016 were down 33% from the previous month and 25% from the same period in 2015.[1] Only time will tell exactly what these contradictory trends indicate, but, in the meantime, whether the economy is improving or declining, this Survey attempts to provide the practitioner, student, or lay person with a brief outline of what has occurred in this area of the law during the last twelve months.

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1. REALTYTRAC, *Georgia Real Estate Statistics & Foreclosure Trends Summary*, RealtyTrac.com, http://www.realtytrac.com/statsandtrends/ga (last visited Aug. 22, 2016).

II. LEGISLATION

The 2016 Regular Session of the 153rd Georgia General Assembly convened on January 11, 2016, and adjourned *sine die* on March 24, 2016.[2] During the session, foreclosure no longer appeared to be at the forefront of the bills brought to committee or considered on the floor. There was no legislation signed by the governor that directly amended the Real Property Code,[3] but legislation was enacted pertaining to other areas of the law, and that legislation directly affects the practice of real property law.

Senate Bill 290,[4] although a revision to the Insurance Code[5] rather than a change to specific real property law provisions, is germane to any attorney who handles the collection of title insurance premiums, advises clients as to title insurance, or adjusts title insurance losses. The Georgia Department of Insurance (the Insurance Department) had traditionally not required Georgia attorneys to be licensed as insurance agents even though closing attorneys, by nature of their role in closing a sale of real property, advise clients and others about title insurance and regularly collect insurance premiums during the closing. The Insurance Department issued an opinion letter in April 2000 exempting attorneys from licensing requirements based on the exclusions found in the definition for "attorney" at Official Code of Georgia Annotated (O.C.G.A.) section 33-23-1(b)(1).[6] The need for legislation arose because, in wake of the creation of regulations by the Federal Consumer Financial Protection Bureau,[7] the Insurance Department advised several mortgage lenders that Georgia did, in fact, require attorneys to be licensed under Georgia law in order to issue title policies.[8]

Senate Bill 290 was enacted to address the Insurance Department's change of position by revising O.C.G.A. § 33-23-4[9] to include Georgia attorneys in the statute's list of exempted persons. The amendment uses the definition within O.C.G.A § 33-23-1(b)(1): "An attorney at law

2. GEORGIA COURTS JOURNAL, http://journal.georgiacourts.gov/article/2016-enacted-legislation (last visited Aug. 22, 2016).

3. O.C.G.A. tit. 44 (2010).

4. Ga. S. Bill 290, Reg. Sess. (2016) (amending O.C.G.A. tit. 33 ch. 23 (2013 & Supp. 2016)).

5. O.C.G.A. tit. 33 (2013 & Supp. 2016).

6. O.C.G.A. § 33-23-1(b)(1) (2013 & Supp. 2016); William L. Phalen, III, RPLS Legislative Committee: It's A Long, Long Journey (Real Property Law Institute Materials, May 12-14).

7. *See* 12 U.S.C. § 5511 (2010).

8. Phalen, III, *supra* note 6.

9. O.C.G.A. § 33-23-4 (2013 & Supp. 2016).

admitted to practice in this state, when handling the collections of premiums or advising clients as to insurance as a function incidental to the practice of law or who adjusts losses which are incidental to the practice of his or her profession" is not included within the definition of "agent, subagent, [or] counselor."[10] The end result is that O.C.G.A. § 33-23-4(h)(2)(B)[11] expressly exempts attorneys from the requirement that they become licensed insurance agents.[12]

In a further step toward revising Georgia law to reflect the digital age and providing instruction on how digital images, traditional documents, and images of instruments are to be properly certified for recording with the clerk of court, H.R. Bill 1004[13] amended Title 15 of the Georgia Code[14] to provide standardized directions and requirements.

The amendment provides that, in order for maps, plats, or condominium plans to be recordable, the document must now conform to specific requirements. The document to be recorded must include a caption containing the following: the county, city, town, municipality, or village where the property lies; the names of all owners of the property; the type of document being recorded, such as whether the image is a subdivision or condominium plat, condominium site plan, condominium plot plan, or condominium floor plan; the name of the subdivision, if any; the name of the condominium, if the document concerns a condominium; identification of any applicable units, pods, blocks, lots, or other designation of the subdivision or condominium; the identity of the developers; all land districts and land lots reflected on the map, plat, or plan; the date of preparation or revision date; the identity, license or registration number, and contact information of the land surveyor. [15] Furthermore, the image's pages must be numbered if it contains multiple pages.[16]

The amendment also requires that each document provide a "surveyor certification box" containing the surveyor's certification of whether the map, plat, or plan has been approved by the applicable municipal, county, or other governing body, and, if no approval is required, that the applicable body has affirmed, in writing, that no approval is required, including the name and date of approval or waiver of the approval.[17] Lest

10. O.C.G.A. § 33-23-1(b)(1) (2013 & Supp. 2016).
11. O.C.G.A. § 33-23-4(h)(2)(B) (2013 & Supp. 2016).
12. *Id.*
13. Ga. H.R. Bill 1004, Reg. Sess. (2016).
14. O.C.G.A. tit. 15 (2015 & Supp. 2016).
15. O.C.G.A § 15-6-67(b)(1)(A)-(L) (Supp. 2016).
16. *Id.*
17. O.C.G.A § 15-6-67(b)(2) (Supp. 2016).

a surveyor wants to cut corners, the amendment creates a crime punishable as a misdemeanor[18] if a surveyor makes a fraudulent certification.[19] Also required is a "filing information box" of not less than three square inches, in the upper left-hand corner, which shall be reserved for the clerk to append filing information.[20] Any image of maps, plats, or plans must comply with the minimum standards purveyed in the regulations of the State Board of Registration for Professional Engineers and Land Surveyors.[21] It must be an electronic image of a single page, certified and presented to the clerk electronically in conformance with the rules of the Georgia Superior Court Clerks' Cooperative Authority.[22]

House Bill 51[23] amended O.C.G.A. § 48-4-40,[24] adding sums to be paid to redeem property after it has been foreclosed by taxing authorities for unpaid ad valorem taxes. In the past, purchasers at tax foreclosure sales and those parties redeeming the property from sale were often at odds as to how to calculate the total sum to be paid to redeem property, as the statute was silent about whether charges other than the taxes and penalties paid at the sale, taxes paid after the sale of the property, plus a statutory premium were required to effect redemption by the proper party.[25] The amendment provides for additional sums to be paid to properly redeem real property from a tax sale, and it directs payment of property owners or condominium association fees or assessments paid by the tax deed purchaser after purchase of the property at the tax sale.[26] The amendment curtails any argument about what is required to properly redeem property and protects those who purchase such properties from unexpected and unfair loss.

18. A misdemeanor is punishable in Georgia by up to 12 months imprisonment and up to a $1000 fine. *See* O.C.G.A. § 17-10-3 (2013 & Supp. 2016).

19. O.C.G.A. § 15-6-67(d) (Supp. 2016).

20. O.C.G.A. § 15-6-67(b)(3) (Supp. 2016).

21. O.C.G.A. § 15-6-67(b)(4) (Supp. 2016). *See also* GA. COMP. R. & REGS. ch. 180-1 to -13 (2016).

22. O.C.G.A. § 15-6-67(b)(4) (Supp. 2016).

23. Ga. H.R. 51, Reg. Sess. (2016).

24. O.C.G.A. § 48-4-40 (2010 & Supp. 2016).

25. The statute continues to require payment of a premium of 20% of the bid amount for the first year or fraction of the year of purchase and 10% of the bid amount for each year thereafter. *See* O.C.G.A. § 48-4-42 (2010 & Supp. 2016).

26. O.C.G.A. § 48-4-42(a) (Supp. 2016).

III. CONDEMNATION AND EMINENT DOMAIN[27]

While the Georgia appellate courts issued several decisions concerning eminent domain, the decisions largely clarified existing law concerning the right to take property, petitions to set aside the taking, and awards for attorney fees and costs of litigation. Three cases of note concern issues related to the duty to pay just and adequate compensation for a temporary taking, the right to bring a condemnation action even if a contractual dispute is pending for the same subject matter, and the right of entry.

In *Fincher Road Investments, LLLP v. City of Canton*,[28] the City of Canton (the City) filed a petition for condemnation and deposited its initial estimate of compensation in the amount of $787,400. Claiming the taking was improper for a number of reasons, Fincher Road Investments, LLLP (Fincher) filed a petition to set aside the declaration of taking. The petition was initially dismissed because Fincher failed to give the City notice of the hearing fifteen days before it commenced, as required by statute. In an earlier appeal, the Georgia Court of Appeals determined the trial court had the discretion to hear a petition to set aside, even though the rule nisi for the hearing on the merits of that petition was not served on the City a full fifteen days before the hearing.[29]

On the day the remittitur was issued for the earlier interlocutory appeal, the City filed a motion to dismiss the taking. Therein, the City claimed that Fincher's property was no longer necessary for public use. The City also filed a dismissal, relinquished all rights to the property, and asked that the clerk completely refund its deposit of just and adequate compensation. Fincher filed a motion in opposition, asserting entitlement to compensation for the loss of the property while the City's taking was effective. Fincher also sought attorney fees and costs of litigation. The trial court granted Fincher's motion for fees and costs, but denied its request for compensation related to the temporary taking. A second petition for interlocutory appeal resulted in this decision.[30]

Citing the Takings Clause of the Fifth Amendment to the United States Constitution,[31] the Georgia Court of Appeals reversed the decision

27. This section was authored by Ivy N. Cadle, shareholder in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Macon, Georgia. Adjunct Professor of Law, Mercer University, Walter F. George School of Law. University of Georgia (B.S., cum laude, 2000; M.Acc., 2002); Mercer University, Walter F. George School of Law (J.D., 2007); CPA, 2008. Member, State Bar of Georgia.

28. 334 Ga. App. 502, 779 S.E.2d 717 (2015).

29. *Id.* at 503, 779 S.E.2d at 718-19.

30. *Id.* at 503-04,779 S.E.2d at 719.

31. U.S. CONST. amend. V.

of the trial court and held that Fincher was entitled to compensation for the temporary taking of property.[32] The court of appeals cited precedent of the Supreme Court of the United States to explain that "'the government may elect to abandon its intrusion' . . . [however], even such temporary takings are not 'different in kind from permanent takings, for which the Constitution clearly requires compensation.'"[33] Because the City elected to acquire the property by filing a declaration of taking, a method of taking that immediately transfers title to the City upon the filing of the petition and deposit of compensation, the court of appeals held that Fincher was entitled to compensation for loss of the property during the time the City held title.[34]

The trial court accepted the City's argument that O.C.G.A. § 22-1-12[35] limited Fincher's recovery to attorney fees and costs of litigation, and that the recovery of attorney fees and costs barred Fincher from receiving compensation for the temporary taking.[36] When examining the trial court's decision, the court of appeals rejected the trial court's reasoning that compensation for the temporary taking, in addition to attorney fees and costs, would be a windfall for the property owner.[37] Instead, the court of appeals reasoned that the 2006 Landowner's Bill of Rights[38] expanded private property protections, and the court held the City's statutory obligation to pay attorney fees and costs of litigation in no way eliminated the City's duty to provide compensation for a taking, even a taking that is ultimately abandoned.[39] Therefore, the judgment of the trial court was affirmed in part and reversed in part.[40]

In *White v. Ringgold Telephone Co.*,[41] Ringgold Telephone Company (Ringgold Telephone) and Brian White voluntarily entered into an easement agreement. Under the terms of the easement, Ringgold Telephone could place telecommunication equipment on White's property for the consideration of providing White's residence and office with NexTV video and internet service at no charge.[42] The agreement required Ringgold Telephone to provide service until it "sells, transfers,

32. *Fincher*, 334 Ga. App. at 504-05, 779 S.E.2d at 719-20.
33. *Id.* at 505-06, 779 S.E.2d at 719-20.
34. *Id.* at 506, 779 S.E.2d at 721.
35. O.C.G.A. § 22-1-12 (Supp. 2016).
36. *Fincher*, 334 Ga. App. at 507-08, 779 S.E.2d at 722.
37. *Id.* at 508, 779 S.E.2d at 722.
38. Ga. H.R. Bill 1313, Reg. Sess., 2015 Ga. Laws 444.
39. *Fincher*, 334 Ga. App. at 508, 779 S.E.2d at 722.
40. *Id.* at 509, 779 S.E.2d at 723.
41. 334 Ga. App. 325, 779 S.E.2d 378 (2015).
42. *Id.* at 326, 779 S.E.2d at 379-80.

assigns, disposes of, ceases operation of or stops Ringgold's NexTV service television product and/or internet service."[43] In 2012, service was interrupted, and White filed a complaint seeking damages for breach of contract and a declaratory judgment that would cancel the easement and require removal of the equipment. While the parties engaged in discovery, Ringgold Telephone filed a petition for condemnation on the parcel in question.[44]

White moved to dismiss the condemnation on the grounds that Ringgold Telephone's contractual right to secure the property precluded the filing of a condemnation petition. The trial court denied White's motion to dismiss and appointed a special master. Proceedings before the special master revealed that White and Ringgold Telephone negotiated a voluntary sale of the property, but White could not convey the property with clear title. The special master returned a judgment condemning the property upon payment of $3,974.69 into the court's registry. The trial court adopted the finding of the special master, and this appeal followed.[45]

On appeal, White argued the trial court erred in three ways when it denied the motion to dismiss Ringgold Telephone's petition to condemn: (1) because Ringgold Telephone failed to establish its inability to secure the property by contract as contemplated by O.C.G.A. § 22-1-6;[46] (2) because Ringgold Telephone's contractual rights to the property were being litigated in a separate action; and (3) because Ringgold Telephone failed to show the taking was necessary.[47] The court of appeals held White's first argument failed because a condemnor must only make an effort to secure the property by agreement.[48] Evidence at the hearing showed Ringgold Telephone attempted to secure the property, but the parties could not agree on terms, namely the state of title to be transferred.[49] Accordingly, it was held that Ringgold Telephone fulfilled its statutory duty under O.C.G.A. § 22-1-6 to attempt to acquire the property by agreement.[50] The court addressed the second argument concerning the contractual dispute with well-settled Georgia law that condemnation actions are separate from suits for damages and that suits

43. *Id.* at 326, 779 S.E.2d at 380.
44. *Id.* at 326-27, 779 S.E.2d at 380.
45. *Id.* at 327-28, 779 S.E.2d at 379-80.
46. O.C.G.A. § 22-1-6 (1982).
47. *White*, 334 Ga. App. at 328, 779 S.E.2d at 381.
48. *Id.* at 328-29, 779 S.E.2d at 381.
49. *Id.* at 329, 779 S.E.2d at 381.
50. *Id.*

for damages are no reason to delay condemnation actions.[51] The court explained that this treatment was logical, because the relevant evidence in a condemnation case is strictly limited, and separate suits for different kinds of damages are not uncommon.[52] In rejecting White's third argument, the court cited uncontroverted evidence that Ringgold Telephone was currently occupying the land taken, that the land taken was on an elevation not susceptible to flooding, and that the land was necessary for the provision of safe, reliable telephone service.[53] Accordingly, the judgment of the trial court was affirmed.[54]

In *Jones v. Sabal Trail Transmission, LLC*,[55] Sabal Trail Transmission, LLC (Sabal) was hired to construct and operate a natural gas pipeline that stretched from Alabama to Florida. In order to complete the survey of the proposed pipeline route, Sabal asked property owner Sandra Jones for permission to enter and survey her land, which Jones refused. As a result, Sabal filed an action for interlocutory injunctive relief and a declaratory judgment authorizing entry over Jones' property.[56] In its pleadings, Sabal cited O.C.G.A. § 22-3-88,[57] which allows those engaged in constructing or operating natural gas pipelines to exercise the power of eminent domain.[58] The trial court entered judgment in favor of Sabal, and Jones appealed.[59]

On appeal, Jones raised several issues. First, Jones contended that the trial court erred in consolidating the hearings for the interlocutory injunction and the declaratory judgment because the notice of hearing only mentioned the interlocutory injunction.[60] Because both the interlocutory injunction and the declaratory judgment were mentioned without objection by both parties at the hearing, the court of appeals found Jones had waived any arguments concerning the defective notice of hearing.[61] Jones also claimed the Natural Gas Act[62] does not authorize entry, and the federal statute preempts state law in this area.[63] After

51. *Id.*
52. *Id.* at 329, 779 S.E.2d at 381-82.
53. *Id.* at 330, 779 S.E.2d at 382.
54. *Id.* at 331, 779 S.E.2d at 382.
55. 336 Ga. App. 513, 784 S.E.2d 865 (2016).
56. *Id.* at 513, 784 S.E.2d at 866-67.
57. O.C.G.A. § 22-3-88 (Supp. 2016).
58. *Jones*, 336 Ga. App. at 513-14, 784 S.E.2d at 867.
59. *Id.* at 514, 784 S.E.2d at 867.
60. *Id.*
61. *Id.* at 515, 784 S.E.2d at 867-68.
62. 15 U.S.C. § 717 (2005).
63. *Jones*, 336 Ga. App. at 516, 784 S.E.2d at 868.

holding that Jones waived this argument because it was not brought forth in the court below, the court of appeals adopted analysis from a similar unreported case, which held that natural gas regulation is not an entirely preempted field and that the preemption claim in the instant case involves a choice of federal law, rather than a choice of forum.[64] As such, Jones' failure to raise the claim below resulted in a waiver.[65] Jones also argued that Sabal could not properly obtain a right of entry under O.C.G.A. § 22-3-88 because Sabal had not obtained a certificate of public convenience and necessity from the Federal Energy and Regulatory Commission (FERC).[66] After looking at the legislative history of the Georgia statute, the court held the plain terms of O.C.G.A. § 22-3-88 do not condition the grant of eminent domain on the possession of any certificate or permit.[67] As an example of what the legislature did not do, the court pointed to O.C.G.A. § 22-3-82(c),[68] which affords a petroleum pipeline company the right of reasonable access for surveying after it obtains a certificate of convenience and necessity.[69] Based on the above cited authorities, the court affirmed the decision of the trial court.[70]

IV. EASEMENTS, COVENANTS AND BOUNDARIES[71]

It is a well-established principal of law that easements and declarations of covenants are viewed as contracts, and courts apply the usual rules of contract construction in interpreting both types of documents. On the other hand, actions to establish boundary lines between properties require a factual determination.

In *Albenberg v. Szalay*,[72] the Georgia Court of Appeals upheld an express easement for ingress and egress to a landlocked property,[73] but it determined the easement could not be "varied or expanded on the basis of an implied easement or a utilities easement."[74] Here, landlocked

64. *Id.*

65. *Id.* at 517, 784 S.E.2d at 868.

66. *Id.* at 517, 784 S.E.2d at 869.

67. *Id.*

68. O.C.G.A. § 22-3-82(c) (2015).

69. *Jones*, 336 Ga. App. at 517, 784 S.E.2d at 869.

70. *Id.* at 518, 784 S.E.2d at 869.

71. This section was authored by Sarah-Nell H. Walsh, shareholder in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. University of Virginia (B.A., 2001); William and Mary School of Law (J.D., 2004); and Sarah Carrier, University of Georgia (B.B.A., 2013); Georgetown University Law Center (J.D. Candidate, 2017).

72. 332 Ga. App. 665, 774 S.E.2d 730 (2015).

73. *Id.* at 665, 774 S.E.2d at 732.

74. *Id.*

Albenberg filed suit against adjoining property owners to allow the construction of a road across their property. The parties had a common predecessor in title, whose warranty deed to Albenberg described a permanent, twenty-foot easement for accessing the property. The deed also allowed improvements to the easement as long as they were "solely for the purpose of making, maintaining, repairing, modifying or replacing a road for ingress and egress."[75]

Albenberg argued this deed language reflected the easement grantor's intention to provide vehicular access to her property and that the trial court had subsequently erred in limiting her to the deed's defined "twenty feet in width."[76] The court of appeals held the "unambiguous" deed language referenced only the creation and maintenance of the twenty-foot easement itself, not the implied creation of a road as Albenberg sought.[77] The court of appeals held that "where the parties have established the actual location and dimensions of an easement, that determination is the controlling factor under Georgia law,"[78] and that "an easement with a fixed location cannot be substantially changed or relocated without the express or implied consent" of both the servient and dominant owners.[79]

Additionally, the court upheld summary judgment against Albenberg on her claims for easement by implication, prescription, and utility.[80] The court ruled that implied easements can only arise where "necessary" to the landowner's enjoyment of her land because there is "no other suitable outlet."[81] Albenberg provided no evidence she could not use her express easement "without unreasonable difficulty."[82] Thus, creating a road was not sufficiently necessary. Also, Albenberg's claim for easement by prescription[83] was denied based on her own admission that she had not used the easement tract since 1994.[84] Regarding her claim for easement by utility, the court held Albenberg could not acquire an implied easement by utility because utility companies have eminent domain

75. *Id.* at 666, 774 S.E.2d at 732.

76. *Id.* at 667-68, 774 S.E.2d 733-34.

77. *Id.* at 667, 774 S.E.2d at 733.

78. *Id.* at 667-68, 774 S.E.2d at 733 (quoting Sloan v. Sarah Rhodes, LLC, 274 Ga. 879, 880, 560 S.E.2d 653 (2002)).

79. *Id.*

80. *Id.* at 668-70, 774 S.E.2d at 734-35.

81. *Id.* at 667-68, 774 S.E.2d at 733.

82. *Id.* at 669, 774 S.E.2d at 733.

83. O.C.G.A. § 44-9-1 (2010) ("The right of private way over another's land may arise . . . from prescription by seven years' uninterrupted use through improved lands or by 20 years' use through wild lands . . . .").

84. *Albenberg*, 332 Ga. App. at 670, 774 S.E.2d at 735.

power, which would have allowed them to acquire any necessary easements.[85]

In *Land USA, LLC v. Georgia Power Co.*,[86] the Georgia Supreme Court reversed and remanded the trial court's determination that Georgia Power had a valid easement, where the easement had been granted by a foreclosed landowner post-tax sale.[87] Relying on state barment statutes, the court held that the easement was extinguished when the statutory redemption period terminated.[88] While the easement grantor retained possession in the property for one year after the tax sale, the grantor did not have "sufficient interest therein" to grant a perpetual easement.[89] The trial court previously upheld Georgia Power's express easement to land within twenty-five feet of their electric line.[90] In holding the opposite, the supreme court relied on O.C.G.A § 44-9-7[91] to indicate implied extinguishment once the foreclosed owner lost the right to redeem their property.[92] The statute states that easements recorded prior to tax fi. fa. recordation are not extinguished.[93] Thus, the court determined this "implicitly provides that any easement not so recorded is extinguished if the property is not redeemed."[94] In this case, because the facts were undisputed that the tax deed was recorded before Georgia Power recorded their express easement, the easement was extinguished once the tax deed buyer's "defeasible fee interest" ripened into fee simple title.[95]

Turning to covenants, the Georgia Court of Appeals, in *Castle Point Homeowners Ass'n v. Simmons*,[96] held there was a genuine issue of fact as to whether a homeowner was bound by homeowner's association (HOA) restrictions under the theory of implied covenants.[97] Upon homeowner Simmons' noncompliance with restrictive covenants, the HOA brought suit to enjoin violations and require removal of non-conforming features. These violations included Simmons' failure to install a sidewalk on her property's street side. The HOA pointed out

85. *Id.*
86. 297 Ga. 237, 773 S.E.2d 236 (2015).
87. *Id.* at 237-38, 773 S.E.2d at 238.
88. *Id.* at 241, 773 S.E.2d at 240.
89. *Id.* at 240, 773 S.E.2d at 239.
90. *Id.* at 238-39, 773 S.E.2d at 238.
91. O.C.G.A § 44-9-7 (1982).
92. *Land USA, LLC*, 297 Ga. at 241, 773 S.E.2d at 240.
93. *Id.*
94. *Id.*
95. *Id.* at 242, 773 S.E.2d at 240-41.
96. 333 Ga. App. 501, 773 S.E.2d 806 (2015).
97. *Id.* at 506-07, 773 S.E.2d at 810.

that nine homes with sidewalks had already been constructed when Simmons purchased her property in the fourteen-lot subdivision. Nevertheless, the trial court granted Simmons summary judgment because the covenants were recorded after her security deed was recorded.[98] The court of appeals reversed, finding that, although the covenants were not in Simmons' chain of title, restrictions may go "beyond the express restrictions contained in the deeds to the purchasers" when the land at issue was subdivided under a "general plan or scheme."[99]

The court found "several facts" which could demonstrate the existence of an implied covenant.[100] For example, Simmons' security deed referenced a "Final Subdivision Plat for Castle Point Phase 1."[101] Thus, the HOA showed Simmons had constructive notice of the common grantor's general scheme.[102] Additionally, Simmons joined the HOA and paid annual dues upon purchase of her property.[103] She also referenced the Castle Point development when she obtained a loan on the property.[104] These facts supported an implied covenant such that the court reversed summary judgment.[105]

In *Marks v. Flowers Crossing Community Ass'n*,[106] the homeowners appealed a jury verdict in favor of Flowers Crossing Community Association Inc. (the Association).[107] On appeal, the Georgia Court of Appeals vacated a judgment in favor of the Association based on restrictive covenant violations, past due assessments, attorney's fees, and injunctive relief.[108] The court held a new trial was necessary because certain covenant violations were time-barred.[109] O.C.G.A. § 9-3-29[110] states that the statute of limitations for a breach of restrictive covenants is generally two years after the right accrues and four years for past-due

98. *Id.* at 503-06, 773 S.E.2d at 808-09.
99. *Id.* at 505, 773 S.E.2d at 809.
100. *Id.* at 506, 773 S.E.2d at 809.
101. *Id.* at 506, 773 S.E.2d at 809-810.
102. *Id.* at 506, 773 S.E.2d at 810.
103. *Id.*
104. *Id.*
105. *Id.* at 506-07, 773 S.E.2d at 810.
106. 333 Ga. App. 476, 773 S.E.2d 814 (2015).
107. *Id.* at 476, 773 S.E.2d at 816.
108. *Id.* at 476-79, 773 S.E.2d at 816-17.
109. *Id.* at 482-83, 773 S.E.2d at 820.
110. O.C.G.A. § 9-3-29 (2007).

assessments.[111] The right of action for a covenant breach accrues "immediately upon the violation."[112]

The Association claimed the homeowners' violations were "chronically repeated and continuing" to create a new cause of action each time.[113] The court denied this argument, stating "the continuing violation rule applies only where there are *separate and distinct repetitive acts* giving rise to the cause of action."[114] Here, the actions at issue were the homeowners' failure to paint a new garage door and failure to maintain window screens.[115] The court determined these were fixtures and thus could not "arise out of wholly different facts."[116] Therefore, pursuant to O.C.G.A. § 9-3-29, the right of action began accruing immediately upon violation.[117] Regarding the Association's remaining claims, the court held the new trial was needed because it could not be determined which amount of the jury award was based on time-barred claims.[118] The amount for past-due assessments was also remanded, as the court found the Association's evidence to be confusing enough to have misled the jury because it also may have included time-barred amounts.[119]

In *McLeod v. Clements*,[120] the Georgia Supreme Court granted certiorari to address the question of whether covenants running with the land bind subsequent owners "with or without notice."[121] In this case, landowner McLeod brought suit against Clements, the purchaser of an adjoining property, for failure to provide him free well water pursuant to a previous landowner's agreement. McLeod relied on a 1971 written agreement that ensured those living on his property would receive free water for the duration of their lives, which was a covenant running with the land. The property changed hands many times, and another agreement was formed in 1996. This agreement stated water would be provided to those living on McLeod's property, so long as a monthly electricity and well maintenance fee was provided. Clements affirmed he was aware of the latter agreement, but not the 1971 agreement.[122]

111. *Marks*, 333 Ga. App. at 479-80, 773 S.E.2d at 818.
112. *Id.*
113. *Id.* at 480-81, 773 S.E.2d at 818.
114. *Id.* at 481, 773 S.E.2d at 818.
115. *Id.*
116. *Id.* at 480, 773 S.E.2d at 818.
117. *Id.* at 481-82, 773 S.E.2d at 819.
118. *Id.* at 482, 773 S.E.2d at 820.
119. *Id.* at 484, 773 S.E.2d at 820.
120. 297 Ga. 371, 774 S.E.2d 102 (2015).
121. *Id.* at 371, 774 S.E.2d at 102-03.
122. *Id.* at 371-72, 774 S.E.2d at 103-04.

The court of appeals looked only at the 1971 free water agreement and determined it was a covenant running with the land, but could not be enforced against Clements because he was a bona fide purchaser who took title without notice of the agreement.[123] Because the covenant was recorded outside Clements' chain of title, he had no actual or constructive notice of the 1971 agreement.[124] Previous Georgia case law stated that covenants running with the land could bind subsequent purchasers "with or without notice."[125] In this case, the supreme court clarified this phrase to mean that the covenants would only bind purchasers "with actual notice or constructive notice, but not with no notice at all."[126]

In *Smith v. Mitchell County*,[127] landowners appealed the trial court's decision that Mitchell County's boundary line was correct because Mitchell County had acquired title to the disputed property by adverse possession.[128] The dispute arose because each of the adjacent property owners had land surveys identifying different boundary line locations.[129] The trial court submitted the matter to a special master pursuant to O.C.G.A. § 23-3-63.[130] The court ultimately adopted the special master's finding that Mitchell County's boundary determination was correct.[131] The special master found Mitchell County had acquired quiet title to the disputed lot based on their "public, continuous, exclusive, uninterrupted, and peaceable" use of the property for over seven years, as prescribed by O.C.G.A. § 44-5-160.[132] On appeal, the landowners challenged the trial court's decision on the grounds that there had been no evidentiary hearing, the evidence used was lacking, and a jury trial should have been granted.[133] The court of appeals affirmed the trial court's final decree on all three issues.[134] First, the court held the special master had "complete jurisdiction" over the matter, including the authority to set a hearing request deadline.[135] The landowners failed to meet this deadline and thus

123. *Id.* at 373, 774 S.E.2d at 104.

124. *Id.*

125. *Id.*

126. *Id.* at 374, 774 S.E.2d at 104.

127. 334 Ga. App. 374, 779 S.E.2d 410 (2015).

128. *Id.* at 378, 779 S.E.2d at 414.

129. *Id.* at 375, 779 S.E.2d at 412.

130. *Id.* at 376, 779 S.E.2d at 412. "The Quiet Title Act requires a trial court to appoint a special master (O.C.G.A. § 23-3-63), and requires the special master to make a report of the special master's findings to the trial court." *Id.*

131. *Id.*

132. *Id.* at 379, 779 S.E.2d at 414-15.

133. *Id.* at 374-75, 779 S.E.2d at 411.

134. *Id.*

135. *Id.* at 377, 779 S.E.2d at 413.

waived their right.[136] Next, the court denied the landowners' argument that there was insufficient evidence that Mitchell County possessed the disputed lot.[137] The court ruled that they need not even address discrepancies in the surveys, because the special master correctly concluded Mitchell County had acquired the land by prescription.[138]

V. FORECLOSURE[139]

The Georgia courts addressed some long-standing questions regarding foreclosure procedure during the survey period. First, the Georgia Supreme Court declared that in certain circumstances, a lender can pursue a guarantor for a deficiency judgment even where the lender failed to satisfy the Georgia confirmation requirements necessary for seeking a deficiency against a borrower.[140] In *PNC Bank, N.A. v. Smith*,[141] a mortgage lender sought to enforce personal guaranties following an unconfirmed foreclosure sale where the text of the guaranties included: (1) a pledge to remain liable on the indebtedness irrespective of the borrower's own liability; and (2) an express waiver of their legal and equitable defenses aside from payment of the indebtedness.[142] Under these specific circumstances, the court held that although the specific procedures set forth in O.C.G.A. § 44-14-161[143] for confirmation of foreclosure sales constitute a condition precedent to the seeking of a deficiency judgment against guarantors, express waivers like those included in the guaranties at issue were sufficient to waive the condition precedent for guarantors.[144]

In his concurrence, Justice Nahmias noted that the conclusion reached by the court that borrowers and guarantors were both debtors within the meaning of the statute would likely also mean a waiver of the confirmation statute protections by the borrower would be legally effective as well.[145] While this issue remains an open one, Justice Nahmias suggested that the Georgia legislature resolve it by banning or

136. *Id.*

137. *Id.* at 378, 779 S.E.2d at 413-14.

138. *Id.* at 379-80, 779 S.E.2d at 415.

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140. *See* O.C.G.A. § 44-14-161 (2010).

141. 298 Ga. 818, 785 S.E.2d 505 (2016).

142. *Id.* at 819, 785 S.E.2d at 506.

143. O.C.G.A. § 44-14-161.

144. *PNC Bank*, 298 Ga. at 819, 785 S.E.2d at 507.

145. *Id.* at 824, 785 S.E.2d at 510 (Nahmias, J., concurring).

regulating such waivers before they become commonplace in Georgia security deeds.[146]

Next, the Supreme Court of Georgia turned its attention back to an issue that appeared to have been resolved by an earlier decision,[147] that is, namely whether a borrower has standing to challenge an assignment of the security deed. In *Ames v. JP Morgan Chase Bank, N.A.*,[148] the supreme court affirmed prior decisions holding that the borrowers in the case lacked standing to sue.[149] The court further clarified, however, that a borrower may be a third-party beneficiary of certain parts of the assignment—"namely, the parts that transfer any rights and protections given to the debtor under the security deed," but this conclusion did not provide the borrower with the right to dispute the assignment itself.[150] "[T]he debtor can vindicate all of the rights it had (and continues to have) under the deed that has been transferred by suing the assignee that claims to have taken ownership of the deed and its corresponding obligations."[151] In short, an assignment does not provide a borrower with any new rights not provided by the underlying security deed.[152] Responding to an argument by the borrower that the assignment was executed after a power of attorney granted by the Federal Deposit Insurance Corporation (FDIC) to the transferor expired (and thus the foreclosing servicer was stepping on the toes of the FDIC who allegedly retained authority over the loan including the authority to modify it), the court determined that the only proper remedy was for the borrower to raise the issue with the FDIC so that the FDIC could intercede if it felt its rights had been violated.[153]

> In a situation where, for example, the entity attempting to foreclose has no legitimate claim to the security deed, such as where the alleged assignment was fraudulent, calling the foreclosure to the attention of the true deed holder would be expected to lead to remedial action by the true holder.[154]

Finally, the court noted that a debtor could have standing to challenge the validity of an assignment indirectly if the invalid assignment violated

146. *Id.* at 825, 785 S.E.2d at 510 (Nahmias, J., concurring).
147. Montgomery v. Bank of Am., 321 Ga. App. 343, 740 S.E.2d 434 (2013).
148. 298 Ga. 732, 783 S.E.2d 614 (2016).
149. *Id.* at 735, 783 S.E.2d at 617.
150. *Id.* at 739, 783 S.E.2d at 620.
151. *Id.*
152. *Id.*
153. *Id.* at 739-40, 783 S.E.2d at 620-21.
154. *Id.* at 740, 783 S.E.2d at 621.

a protection provided to the borrower by statute and thereby injured the borrower.[155] The court held that the borrower in the case at bar had not stated such a claim because the lender had no statutory obligation to identify the current security deed holder in the foreclosure notice.[156] Since the lender had satisfied the terms of O.C.G.A. § 44-14-162.2(a),[157] there was no statutory violation and the borrower simply lacked any authority to challenge the assignment on any ground.[158]

Along similar lines, the borrower in *Stoudemire v. HSBC Bank USA*[159] argued the rule that only parties can challenge an assignment should not apply to facially void assignments.[160] The Georgia Court of Appeals acknowledged case law stating that a void contract "is one that has no effect whatsoever and is incapable of being ratified" and distinguished void contracts from voidable contracts that are merely unenforceable at the election of the injured party.[161] The court ultimately refrained from deciding the issue; however, as it concluded that the borrower's challenges to the assignment (including challenges to the validity of the notary seal and the attestation of the assignment, as well as a challenge to the authority of the corporate representatives who executed the assignment) were not errors that would render the assignment facially void.[162] The ability of a borrower to challenge a facially void assignment therefore remains an open question that will likely be addressed by the Georgia appellate courts in the near future.

In *Wells Fargo Bank, N.A. v. Molina-Salas*,[163] the Georgia Court of Appeals addressed a wrongful foreclosure claim by a borrower based on an error in two of the four weekly published foreclosure advertisements.[164] Due to what the court termed a typographical error, the legal description of the collateral being foreclosed contained a reference to an incorrect land district. A foreclosure notice containing the error was published twice before being corrected.[165] The borrower alleged the foreclosure was wrongful because of the error itself and

155. *Id.*

156. *Id.* at 741, 783 S.E.2d at 621.

157. O.C.G.A. § 44-14-162.2 (2010 & Supp. 2016).

158. *Ames*, 298 Ga. at 741-42, 783 S.E.2d at 621-22.

159. 333 Ga. App. 374, 776 S.E.2d 483 (2015).

160. *Id.* at 375, 776 S.E.2d at 485.

161. *Id.*

162. *Id.* at 376, 776 S.E.2d at 484.

163. 332 Ga. App. 641, 774 S.E.2d 712 (2015).

164. A Georgia statute requires that a foreclosure notice be published for four consecutive weeks immediately prior to the foreclosure sale date. *See* O.C.G.A § 44-14-162 (2010 & 2016 Supp.).

165. *Wells Fargo Bank, N.A.*, 332 Ga. App. at 642, 774 S.E.2d at 714.

because the lender failed to send her an amended copy of the advertisement.[166] The trial court denied the lender's motion for summary judgment on these issues, and the court of appeals accepted the issue on an application for interlocutory appeal and then overturned the trial court's decision.[167] The court of appeals first concluded that a foreclosure is defective as a matter of law based on an error in the advertisement, only if the advertisement fails to include the information required by the statute (including but not limited to the legal description of the property).[168] Because the advertisement at issue "contained an otherwise accurate description of the property, its correct physical address, its recording data by plat book and page number, and the recording data of the security deed," the court held that voiding the foreclosure based on the typographical error would "substitute shadow over substance."[169] This, the court said, it would not do.[170] Next, the court determined that while a foreclosure not defective as a matter of law can be the subject of a wrongful foreclosure suit where the alleged error caused a chilling of the bid, the plaintiff in the case at bar failed to demonstrate any evidence of bid chilling.[171] Finally, the court held that the error in the published foreclosure notice could not support a claim that the lender failed to provide the plaintiff with adequate notice of the sale.[172] This argument failed both because (1) the mailed notice contained the information required by statute even if one piece of the information was incorrect, and (2) the plaintiff had shown no injury caused to her by the failure to provide her with a copy of the corrected advertisement.[173] For these reasons, the court of appeals reversed the trial court's order and granted the lender summary judgment on the borrower's wrongful foreclosure claim.[174]

166. *Id.* at 641-42, 774 S.E.2d at 714.
167. *Id.*
168. *Id.* at 643, 774 S.E.2d at 715.
169. *Id.* at 644, 774 S.E.2d at 715-16.
170. *Id.* at 644, 774 S.E.2d at 716.
171. *Id.* at 645, 774 S.E.2d at 716.
172. *Id.* at 646, 774 S.E.2d at 716.
173. *Id.* at 646, 774 S.E.2d at 717.
174. *Id.*

VI. SALE OF REAL PROPERTY[175]

In *On Line, Inc. v. Wrightsboro Walk, LLC*,[176] the Georgia Court of Appeals reversed an order granting summary judgment in favor of the plaintiff where there were material issues as to whether misrepresentations made by the plaintiff and the defendant's inability to assume an existing loan allowed termination of the agreement without penalty to the defendant.[177] The plaintiff agreed to sell commercial real property to the defendant for $3.6 million. The purchase and sale agreement (the Agreement) provided the defendant with a 30-day inspection period (the Inspection Period) that was to begin on the day the defendant received multiple documents from the plaintiff. These documents included the title insurance policy for the property, all surveys in the plaintiff's possession, environmental reports for the property, and income and expense reports. Additionally, as part of the purchase price, the defendant was required to make attempts to assume an existing $2 million loan from the plaintiff. If the loan could not be assumed by the defendant, the Agreement would terminate. The defendant had the right to terminate the agreement at any time during the Inspection Period.[178]

On August 23, 2013, the plaintiff uploaded numerous documents to an online storage website and sent an e-mail to the defendant's representative with access to the documents.[179] On August 26, 2013, the seller sent an e-mail to a real estate agent for the defendant containing a "Receipt of Documents" (the Receipt), which was not sent with the original documents.[180] The Receipt itemized the documents uploaded online and contained a separate boxed notation stating the documents were sent on August 23, 2013, and therefore, the Inspection Period "shall end September 23, 2013."[181] The defendant initialed the Receipt, dated it August 27, 2013, and returned it to the plaintiff via e-mail acknowledging the Inspection Period ended on September 23, 2013. During the Inspection Period, the defendant discovered that although the plaintiff stated the property was built in 2006, many of the HVAC

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176. 332 Ga. App. 777, 775 S.E.2d 161 (2015).

177. *Id.* at 777, 775 S.E.2d at 162.

178. *Id.* at 777-78 n.3, 775 S.E.2d at 162-63 n.3.

179. *Id.* at 779, 775 S.E.2d at 163.

180. *Id.*

181. *Id.*

systems servicing the property were from 1989. On September 24, 2013, after the inspection period had expired but while the defendant was still reviewing the documents produced by the plaintiff, the defendant sent notice to the plaintiff terminating the Agreement.[182]

The plaintiff filed a lawsuit against the defendant alleging breach of the Agreement. The trial court granted summary judgment in favor of the plaintiff finding that there were no genuine issues of material fact as to when the Inspection Period began or whether the defendant had received all necessary documents from the plaintiff. The trial court did not address the issue of the defendant's inability to obtain financing or assume the loan from the plaintiff. The defendant appealed contending that the plaintiff made material misrepresentations to the defendant and the defendant could not assume the loan, both of which allowed the defendant to terminate the Agreement.[183]

The court of appeals began its analysis as to whether the defendant's inability to assume the existing loan on the property created an issue of material fact.[184] The defendant contended the plaintiff made material misrepresentations as to income and expense reports during the due diligence period, which prohibited the defendant from providing necessary documentation to assume the loan.[185] The court of appeals agreed that there were issues of material fact as to whether the plaintiff made material misrepresentations to the seller, and whether the inability to assume the loan would have allowed the defendant to terminate the Agreement.[186]

The court also addressed the issue of whether the Inspection Period began on August 23, 2013.[187] The defendant contended the Inspection Period did not begin on August 23, 2013, as the plaintiff had not yet produced all documents required under the Agreement.[188] The court disagreed and held that the execution of the Receipt by both the plaintiff and the defendant effectively constituted a modification of the Agreement as the defendant was under no obligation to sign the Receipt or agree with the statements made in the Receipt.[189] Furthermore, the court held that the defendant could have changed the date on the Receipt to reflect when the uploaded documents were received by the defendant or that the

182. *Id.* at 779-80, 775 S.E.2d at 163.
183. *Id.* at 780, 775 S.E.2d at 163-64.
184. *Id.*
185. *Id.* at 781, 775 S.E.2d at 164.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*

defendant had failed to receive all of the required documents.[190] Instead, the defendant's acknowledgement of all terms in the Receipt and return to the plaintiff constituted a written modification of the Agreement.[191] Accordingly, the court of appeals upheld the trial court's finding that the defendant's termination of the agreement did not occur during the Inspection Period.[192]

In *RZI Properties, LLC v. Southern REO Associates, LLC*,[193] the court of appeals addressed the issue of whether a broker failed to exercise reasonable care in disclosing to a buyer the final deadline for submission of proof of funds under a purchase agreement. The plaintiff, RZI Properties, LLC, retained a brokerage firm, Southern REO Associates, LLC, to broker the purchase of real property on behalf of the plaintiff. The seller of the property was SunTrust Mortgage.[194]

On January 4, 2012, after the plaintiff submitted an offer to purchase the property, the defendant forwarded an e-mail from the seller to the plaintiff outlining the terms of the agreement, which required the plaintiff to provide "updated proof of funds within the last 30 days."[195] The defendant also added a message to the plaintiff stating, "we have accepted contract for $5,000. Please read below and let me know. Thanks!"[196] On January 6, 2012, the plaintiff sent proof of funds to the defendant that was over thirty days old. The defendant forwarded the proof of funds to the seller. The seller's broker e-mailed the defendant and notified her the contract was rejected because the proof of funds was over thirty days old and agreed to extend the deadline until January 13, 2012. The plaintiff said proof of funds would be provided on January 17, 2012. On January 17, 2012, the seller's broker told the defendant the agreement would be terminated if proof of funds were not provided by the end of the day. The proof of funds was provided to the seller on January 18, 2012, and on January 19, 2012, the seller informed the defendant it had accepted another offer to purchase the property.[197]

The plaintiff filed a lawsuit against the defendant alleging the defendant was negligent in failing to advise the plaintiff of the deadline to submit updated proof of funds. The trial court granted summary

190. *Id.* at 781-82, 775 S.E.2d at 164.
191. *Id.* at 782, 775 S.E.2d at 164.
192. *Id.* at 782, 775 S.E.2d at 164-65.
193. 336 Ga. App. 336, 782 S.E.2d 731 (2016).
194. *Id.* at 337, 782 S.E.2d at 731.
195. *Id.* at 337, 782 S.E.2d at 732.
196. *Id.*
197. *Id.* at 337-39, 782 S.E.2d at 732-33.

judgment in favor of the defendant.[198] In its analysis, the court of appeals focused on the term "ministerial acts," which is defined under O.C.G.A. § 10-6A-3(12)[199] as "those acts described in O.C.G.A.§ 10-6A-14 and such other acts which do not require the exercise of the broker's or the broker's affiliated licensee's professional judgment or skill."[200] The court noted that although it was not specifically enumerated as a "ministerial act," the failure of the seller to "timely communicate vital information concerning the status of its offer to purchase the property, is an act that did not require the exercise of [the defendant's] professional judgment or skill."[201]

The court concluded there was no evidence that the defendant informed the plaintiff of the seller's agreement to extend the deadline to submit updated proof of funds.[202] Therefore, there was an issue of material fact as to whether the defendant exercised reasonable care in performing a "ministerial duty" of informing the seller of new deadlines.[203] In light of the above analysis, the court determined that the trial court erred in granting summary judgment to the defendant.[204]

VII. TAXATION OF REAL PROPERTY[205]

In *DLT List, LLC v. M7ven Supportive Housing & Development Group*,[206] the Georgia Court of Appeals overturned two pivotal tax cases, *Wester v. United Capital Financial of Atlanta*[207] and *United Capital Financial of Atlanta v. American Investment Associates*,[208] to the extent that these cases held that a creditor that redeems property from a tax sale has a first priority claim to excess funds held by the tax commissioner.[209] The issues appealed by DLT arose from an equitable interpleader action filed by the Carroll County Tax Commissioner (the

198. *Id.* at 336, 782 S.E.2d at 731.

199. O.C.G.A. § 10-6A-3(12) (2009).

200. *RZI Props. LLC*, 336 Ga. App. at 340, 782 S.E.2d at 733.

201. *Id.* at 341, 782 S.E.2d at 734.

202. *Id.*

203. *Id.* at 342, 784 S.E.2d at 734.

204. *Id.* at 342, 784 S.E.2d at 734-35.

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206. 335 Ga. App. 318, 779 S.E.2d 436 (2015).

207. 282 Ga. App. 392, 638 S.E.2d 779 (2006).

208. 302 Ga. App. 400, 691 S.E.2d 272 (2010).

209. *DLT List*, *LLC*, 335 Ga. App. at 320, 779 S.E.2d at 438.

Tax Commissioner) following the tax sale of real property for unpaid ad valorem taxes. The interpleader was filed to disburse funds from the tax sale in excess of those due for taxes and penalties totaling $105,188.91. The trial court awarded the excess funds to M7VEN Supportive Housing and Development Group (M7), finding that M7 was the only interested holder able to make a claim on the funds at the time of the sale. Design Acquisition, LLC (Design) and DLT List, LLC (DLT) appealed the trial court order, arguing the court erred in (1) failing to provide them with notice and a hearing; (2) awarding M7 the funds; and (3) determining that the Tax Commissioner was not authorized to file an interpleader action.[210] The Georgia Court of Appeals affirmed the trial court's ruling.[211]

The undisputed facts were that on June 3, 2014, a tax sale was conducted on two properties due to the owner's (M7) failure to pay property taxes. DLT purchased each property for $55,000. On June 6, 2014, the Tax Commissioner notified M7, DLT, and other interested parties about the excess funds generated from the tax sale. On July 14, 2014, M7 filed a claim for the excess funds with the Tax Commissioner. On July 28, 2015, DLT filed its tax deeds for each property in the real estate records. Design (a lienholder against M7) redeemed the properties from DLT for $66,000 each. Later, in October 2014, Design filed a declaratory judgment action claiming entitlement to the excess funds based on its status as redeemer.[212]

The Tax Commissioner filed an interpleader action in November 2014, to which only M7 answered. In January 2015, DLT filed a motion to dismiss or consolidate the interpleader action with Design's declaratory judgment action. Design later filed a consent motion to intervene in the interpleader action. The parties were allowed to brief the issue of rights to the excess funds. The trial court found that M7 was entitled to the excess funds because M7 was the only claimant to respond or have an interest in the properties at the time the Tax Commissioner issued the excess funds notice in June 2014.[213]

Design appealed, relying primarily on the appellate court's decisions in *Wester* and *United Capital,* that as the redeemer of the properties, it had first priority to the excess funds.[214] The Georgia Court of Appeals determined that *Wester* and *United Capital* were wrongly decided;

210. *Id.* at 318-19, 779 S.E.2d at 437.

211. *Id.* at 319, 779 S.E.2d at 437.

212. *Id.* at 319, 779 S.E.2d at 437-38.

213. *Id.* at 319-20, 779 S.E.3d at 437-38.

214. *Id.* at 320, 779 S.E.2d at 438.

therefore, it affirmed the lower court's decision.[215] The court explained that pursuant to O.C.G.A. § 48-4-1,[216] the county may conduct a sale of property if the owner neglects to pay county taxes.[217] If the delinquent property owner or any other party holding an interest in or lien on the property fails to redeem the property by paying the tax sale purchaser the purchase price plus any taxes paid and interest, the tax sale purchaser becomes the fee simple owner after one year.[218] If the delinquent property owner or lienholders do redeem the property, the property is quitclaimed back to the property owner and any lienholders at the time of the tax sale that have not been fully paid (through excess funds or any other method) retain their pre-sale liens on the property.[219] Under this scenario, the redeeming creditor receives a priority lien for the redemption price of the property.[220] When a tax sale generates excess funds, they are to be distributed according to O.C.G.A. § 48-4-5,[221] which explains in pertinent part that "[t]he notice shall state that the excess funds are available for distribution to the owner or owners as their interests appear in the order of priority in which their interests exist."[222]

In this case, at the time of the tax sale, M7 was the owner and there were no recorded liens on the property.[223] M7 was the only party to make a claim for the excess proceeds.[224] Further, Design only presented a claim for the amount of the redemption price of the properties, but not for its tax lien.[225] The court of appeals determined that Design's reliance on *Wester* and *United Capital* was misplaced.[226] It determined that *Wester* incorrectly expanded the holding of *National Tax Funding v. Harpagon Co.*[227] to mean that the redeeming creditor could both redeem the property and receive the excess funds from the tax sale to pay for the priority lien created by the redemption.[228] Instead, *National Tax Funding* held that

215. *Id.*
216. O.C.G.A. § 48-4-1 (2010).
217. *DLT List, LLC*, 335 Ga. App. at 321, 779 S.E.2d at 438.
218. *Id.* at 321, 779 S.E.2d at 439.
219. *Id.*
220. *Id.*
221. O.C.G.A. § 48-4-5 (2010).
222. *DLT List, LLC*, 335 Ga. App. at 321-22, 779 S.E.2d at 439 (quoting O.C.G.A. § 48-4-5 (2006)).
223. *Id.* at 322, 779 S.E.2d at 440.
224. *Id.* at 322-23, 779 S.E.2d at 440.
225. *Id.*
226. *Id.* at 323, 779 S.E.2d at 440.
227. 277 Ga. 41, 586 S.E.2d 235 (2003).
228. *DLT List, LLC*, 335 Ga. App. at 323, 779 S.E.2d at 440.

> [F]ollowing a tax sale, the holder of a . . . lien has two options – it may either file a claim to collect against any proceeds from the sale, *or* it may assert its rights following the tax sale via a statutory claim for redemption, in which case it obtains a first priority lien on the property, which it may then enforce by levy and sale.[229]

Therefore, the court of appeals overturned *Wester* and *United Capital* to the extent they held the redeeming creditor has a first priority claim on the excess tax funds for the amount paid to redeem the property.[230] The court determined that Design was entitled to make a claim against the excess funds for the amount of the tax lien, with the remainder of the funds going to M7.[231] The court further explained that the redemption price is not recoverable from the excess funds, but is the priority lien against the property.[232]

The court determined Design's claim did not receive due process without merit, as its lawyer participated in the telephonic hearing at the lower level and was given an opportunity to brief the issue after the hearing.[233] Finally, it found Design's argument that the trial court erred by finding that the Tax Commissioner did not have discretion to file the interpleader action without merit as well.[234] It opined that the trial court never made that finding, but instead found that at the point in which the Tax Commissioner filed the action, it was not necessary because she should have paid M7 the claim.[235]

In *Ballard v. Newton County Board of Tax Assessors*,[236] the Georgia Court of Appeals addressed whether a tax sale qualifies as an "arm's length, bona fide sale" under O.C.G.A. § 48-5-2,[237] and concluded by agreeing with the trial court that it does not qualify.[238] In 2012, W.D. Ballard and Nancy Mock purchased twenty-two parcels of land in Newton County at tax sales (the Property). In April 2013, the county tax assessors' office sent Ballard and Mock the 2013 property assessments. The assessors did not set the 2013 value at the 2012 tax sale purchase price. Ballard and Mock appealed the property tax assessment; however, the Georgia Board of Tax Assessors (the Board) concluded the value

229. *Id.* at 323, 779 S.E.2d at 440.
230. *Id.*
231. *Id.*
232. *Id.* at 323-24, 779 S.E.2d at 441.
233. *Id.* at 324, 779 S.E.2d at 441.
234. *Id.*
235. *Id.*
236. 332 Ga. App. 521, 773 S.E.2d 780 (2015).
237. O.C.G.A. § 48-5-2 (2010 & 2016 Supp).
238. *Ballard*, 332 Ga. App. at 521, 773 S.E.2d at 781.

represented "fair market value and uniformity."[239] Ballard and Mock appealed to the Newton County Board of Equalization, which agreed with the tax assessor's valuation. They then appealed to the superior court, claiming the one-year purchase price cap established under O.C.G.A. § 48-5-2(3) should apply to the assessed value of the property. The trial court granted summary judgment to the Board.[240]

In essence, the trial court found that because (1) the tax sale purchaser does not receive fee simple title to the property and does not to enjoy the right of possession; (2) the property owner retains the right to redeem the property and divest the tax sale purchaser of any rights; and (3) the owner of the property sold at a tax sale is not a participant in the sale, there is no arm's length, bona fide sale under O.C.G.A. § 48-5-2(.1).[241] Therefore, properties purchased at tax sales do not qualify for the one-year purchase price freeze under O.C.G.A. § 48-5-2(3).[242]

O.C.G.A. § 48-5-2(3) provides in part: "Notwithstanding any other provision of this chapter to the contrary, the transaction amount of the most recent arm's length, bona fide sale in any year shall be the maximum allowable fair market value for the next taxable year."[243] This amounts to a freeze on the ad valorem tax value of property for one year.[244] For purposes of the code section,

> '[A]rm's length, bona fide sale' means a transaction which has occurred in good faith without fraud or deceit carried out by unrelated or unaffiliated parties, as by a willing buyer and a willing seller, each acting in his or her own self-interest, including but not limited to a distress sale, short sale, bank sale, or sale at public auction.[245]

Ballard and Mock claimed even though O.C.G.A. § 48-5-2 (.1) does not specifically identify a tax sale as an example of an arm's length, bona fide sale, their tax sale purchase was entitled to the one-year purchase price freeze set forth in O.C.G.A. § 48-5-2 (3) because it was an arm's length sale at public auction between unrelated parties, a willing buyer and a willing seller, each acting in their own self-interest.[246] However, the Georgia Court of Appeals looked to the legislative intent behind the

239. *Id.*
240. *Id.* at 522, 773 S.E.2d at 781.
241. *Id.*
242. *Id.* at 522, 773 S.E.2d at 781-82.
243. *Id.* at 522, 773 S.E.2d at 782.
244. *Id.*
245. *Id.* (quoting O.C.G.A. § 48-5-2(.1)).
246. *Id.* at 522-23, 773 S.E.2d at 782.

Georgia Tax Code as a whole to reach its determination.[247] After analyzing the legislative intent, the court determined that the legislative intent was to place value on property that it would receive under a customary sale of property, not an atypical transaction, such as a tax sale.[248] Additionally, the court found persuasive that a tax sale only conveys a defeasible title subject to the right of the owner rather than conveying fee simple title.[249] Therefore, the Georgia Court of Appeals agreed with the trial court that because "fair market value of property" is not defined as the amount a buyer would pay and a seller willing to accept for a defeasible interest in property, a tax sale does not qualify as an arm's length, bona fide sale such that the one year freeze of O.C.G.A. § 48-5-2(3) applies.[250] The court determined that the issue of proper assessment of the fair market value remained pending in the lower court.[251]

In *Columbus Board of Tax Assessors v. The Medical Center Hospital Authority*,[252] the Georgia Court of Appeals affirmed the trial court's finding that eight parcels of land owned by the hospital authority were exempt from ad valorem taxation under O.C.G.A. § 31-7-72(e)(1).[253] The Columbus, Georgia Board of Tax Assessors (the Tax Board) appealed the trial court's grant of summary judgment to The Medical Center Hospital Authority (the Hospital Authority). The trial court found that the eight parcels owned by the Hospital Authority were exempt from ad valorem property taxes for the years 2009 through 2012. The Tax Board argued the trial court erred in concluding that the parcels were "public property" exempt from taxation regardless of how the property was being used.[254]

The Hospital Authority submitted a "Request for Non-Taxability" for eight properties for the years 2009 through 2012 to the Tax Board.[255] The requests were subsequently denied. The Hospital Authority appealed the denial of non-taxability to the Muscogee County Board of Equalization, which granted the request as to one parcel and denied it as to the other seven parcels. The Tax Board appealed the single grant of non-taxability to the superior court, while the Hospital Authority appealed the denial

247. *Id.* at 523, 773 S.E.2d at 782.

248. *Id.*

249. *Id.* at 523-24, 773 S.E.2d at 782.

250. *Id.* at 525, 773 S.E.2d at 783.

251. *Id.*

252. 336 Ga. App. 746, 783 S.E.2d 182 (2016).

253. O.C.G.A. § 31-7-72 (2010); *Columbus Bd.*, 336 Ga. App. at 746-47, 783 S.E.2d at 183-84.

254. *Columbus Bd.*, 336 Ga. App. at 747, 783 S.E.2d at 183.

255. *Id.*

of the other seven parcels to the superior court, which consolidated all of the actions.[256] Following a hearing, the superior court granted the Hospital Authority's motion for summary judgment, holding that "all eight of the parcels of real property . . . whose taxability for ad valorem property tax purposes was properly before this court, are determined to be exempt from ad valorem property taxation."[257] The Tax Board argued the trial court erred by holding that all of the parcels at issue were "'public property' exempt from ad valorem property taxation, regardless of how these parcels are used by the Authority, its lessee Doctors Hospital, and a private, for-profit sublessee."[258] The Board also argued the trial court erred in holding that the medical office building occupied by a for-profit clinic was tax-exempt.[259]

The first question addressed by the court of appeals was whether all real property owned by a hospital authority is automatically exempt from ad valorem taxes "regardless of the factual circumstances surrounding how these parcels are used."[260] The second question was whether a medical office building leased to a for-profit clinic, which is located on the same parcel of property occupied by a nonprofit hospital, was subject to ad valorem taxes.[261] The court relied on statutes and prior case law to evaluate the questions.[262] It found that in 1964, the Georgia legislature amended the Hospital Authorities Law to afford hospital authority-run hospitals the same tax relief granted to government-run hospitals.[263] In 1970, the Supreme Court of Georgia held in *Hospital Authority of Albany v. Stewart*[264] that real property owned by a hospital authority that produces income used to further the authority's mission is exempt from ad valorem taxes.[265] In *Stewart*, the supreme court's decision evaluated the relevance of a hospital's use of property in determining its tax exempt status.[266] The supreme court determined in *Stewart* that while the property was not part of the hospital, its income was "devoted to public purposes (hospital operations) in the furtherance of the legitimate

256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 748, 783 S.E.2d at 184.
261. *Id.*
262. *Id.*
263. *Id.* at 749, 783 S.E.2d at 184.
264. 226 Ga. 530, 175 S.E.2d 857 (1970).
265. *Columbus Bd.*, 336 Ga. App. at 749, 783 S.E.2d at 185.
266. *Id.*

functions of the hospital authority"; therefore, it was exempt from ad valorem taxes.[267]

In *Columbus Board*, only one of the eight properties generated any income during the tax years in question.[268] Therefore, a determination needed to be made whether the income produced was devoted to hospital operations in furtherance of the hospital authority.[269] As to the other seven non-income producing properties, a determination had to be made whether this "use" was devoted to public purposes in furtherance of the Hospital Authority's legitimate functions.[270]

In support of its motion for summary judgment, the Hospital Authority submitted an affidavit explaining how each parcel was used. The Hospital Authority argued all of the parcels supported and complemented the provision and the receipt of medical services. Use of the parcels ranged from a hospital and medical offices to a multi-level parking garage for visitor and employee use. The Tax Board argued tax exemptions should be strictly construed, and the Hospital Authority failed to demonstrate the parcels were being used to further its legitimate functions, namely undeveloped land next to the hospital and parking lots.[271]

The Georgia Court of Appeals determined the evidence established that all of the parcels were being used to further the legitimate function of the Hospital Authority and that none of the properties were used for a purpose "wholly unrelated" to the Hospital Authority's function.[272] It noted that the parking lots furthered the function of the hospital by providing free parking to patients, visitors, and employees, and that the walking trails were available to patients, visitors, and employees.[273] Therefore, the court found no error in the trial's court's judgment.[274] The Tax Board also argued the trial court should not have granted summary judgment to the Hospital Authority on the taxability of the parcel on which both Doctors Hospital and the Columbus Clinic were located.[275]

"While O.C.G.A. § 31-7-72(e)(1) grants the property tax exemption to hospital authorities as described earlier, O.C.G.A. § 31-7-72(e)(2) provides that the property tax exemption does not apply to any real

267. *Id.* at 750, 783 S.E.2d at 185.
268. *Id.*
269. *Id.* at 750-51, 783 S.E.2d at 185.
270. *Id.* at 751, 783 S.E.2d at 185-86.
271. *Id.* at 751-52, 783 S.E.2d at 186.
272. *Id.* at 752, 783 S.E.2d at 186.
273. *Id.* at 752, 783 S.E.2d at 187.
274. *Id.*
275. *Id.*

property in which 50 percent or more of the floor space is leased to a for-profit entity."[276] One of the parcels owned by the Hospital Authority contained a hospital and a for-profit company.[277] The Tax Board argued:

> [I]f the Hospital Authority had complied with its request to divide the parcel containing both the hospital and the clinic when it bought the property, then the portion on which the clinic was located would clearly have been taxable, because 100 percent of the floor space was occupied by a for-profit company.[278]

However, the court determined that "under the plain terms of the statute, the exemption was not lost, because less than 50 percent of the floor space on that parcel of land was leased to a for-profit company."[279] Accordingly, the trial court did not err in finding the parcel exempt from ad valorem property taxes.[280]

VIII. TITLE TO REAL PROPERTY[281]

In *Atlanta Development Authority v. Clark Atlanta University, Inc.*,[282] the Atlanta Development Authority (the Authority) sought a determination of Clark Atlanta University's (the University) reversionary rights to three adjoining parcels of real property (the Property) the University had donated to Morris Brown College (the College) in 1940.[283] Although the Georgia Supreme Court allowed the interlocutory review, it ultimately affirmed the trial court's denial of the motion to dismiss.[284] In its ruling, the supreme court focused on the granting clause contained in the one page deed (the Deed) conveying the Property to the College.[285] The granting clause stated the conveyance was subject to the condition that the College use the Property for educational purposes, and if the College ceased to use the Property for educational purposes, title to the Property reverted to the University.[286]

276. *Id.*

277. *Id.* at 752-53, 783 S.E.2d at 187.

278. *Id.*

279. *Id.* at 753, 783 S.E.2d at 187.

280. *Id.*

281. This section is written by Teresa L. Bailey, of counsel in the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. University of Florida (B.A., 1983); Emory University School of Law (J.D., 1986); Member, State Bar of Georgia.

282. 298 Ga. 575, 784 S.E.2d 353 (2016).

283. *Id.* at 575, 784 S.E.2d at 355.

284. *Id.*

285. *Id.* at 576, 784 S.E.2d at 355.

286. *Id.*

In 2012, the College filed for Chapter 11 bankruptcy protection in an attempt to avoid foreclosure. In 2014, the College sought the bankruptcy court's approval of the sale of a portion of the College's campus that included the Property to the Authority. The bankruptcy court granted permission for the sale to proceed, but specifically held that the College could only sell whatever interest in the Property it had under the Deed. The bankruptcy court further held that the Authority took title to the Property subject to any interest the University may have had under the Deed. After the sale, the University filed the present suit (the Complaint) seeking declaratory judgment that (1) the Deed conveyed either a fee simple determinable estate or fee simple estate subject to a limitation, that the University had a valid automatic reversionary interest in the Property under the Deed, and that the reversionary interest was triggered when the College stopped using the Property for educational purposes when it sold its interest to the Authority; or (2) with respect to any of the Property the College was still using for educational purposes, the moment the College ceased to use such portions of the Property for educational purposes, title to the Property immediately and automatically reverted back to the University. In response to the Complaint, the Authority filed a motion to dismiss challenging the validity, scope, and application of the restriction and reverter.[287]

In affirming the trial court, the supreme court determined that the restriction fell within the "charitable purposes" exemption to the general rule against restraints on alienation.[288] Citing with approval the case *First Rebecca Baptist Church, Inc. v. Atlanta Cotton Mills*,[289] the supreme court explained the purpose of the exemption:

> The reasoning is that inasmuch as a donor may make a gift for charitable purposes which is perpetual in duration, as a corollary of this right and in order to effectuate the primary purpose of the gift, the donor may impose a condition that the gifted property is not to be alienated, but is to continue in the hands of the donee in perpetuity. [Citation omitted.] Public policy favors giving the donor's distinct charitable interest greater weight than general prohibitions against the remoteness of vesting and restrictions on alienation.[290]

The supreme court found that there was no question the University intended to donate the Property to what it deemed was a charitable organization for educational purposes, which the court found to be

287. *Id.* at 577, 784 S.E.2d at 356.

288. *Id.*

289. 263 Ga. 688, 440 S.E.2d 159 (1993).

290. *Atlanta Dev. Auth.*, 298 Ga. at 578, 784 S.E.2d at 356-57.

"proper matters of charity."[291] The court further found that the estate created by the Deed was a fee simple determinable estate since the Deed provided for an automatic reversion of the estate to the grantor upon the discontinuation of the limited use for which the grantor made the conveyance.[292] Once the Property was no longer used by the College for educational purposes, title automatically returned to the University.[293]

The supreme court did not accept the Authority's argument that the sale of the Property generated funds to the College to use for educational purposes, and that use of the funds for educational purposes satisfied the use restriction in the Deed.[294] The court noted that the Deed set forth specific areas of study which qualified for acceptable use, and that the restriction was also limited to the College's use and not use by a successor entity.[295]

In *Bagwell v. Trammel*,[296] the Georgia Supreme examined issues regarding equitable partition. Thomas Bagwell (Bagwell) filed suit against Bobby and Oretta Trammel (the Trammels) for breach of a joint venture contract. The evidence demonstrated that Bagwell and the Trammels had entered into a joint venture agreement (the Agreement) establishing an entity known as Etowah Ventures in 2000. Under the Agreement, Bagwell agreed to cancel promissory notes in the amount of $1,875,000 either owed or guaranteed by the Trammels (Notes), in exchange for a one-half undivided interest in 103 acres of unimproved land (the Property) owned by the Trammels. It was intended that the Property would be owned by the Trammels and Bagwell as joint tenants in common, but titled in the name of the Trammels in trust for the benefit of Etowah Ventures. Under the Agreement, upon the sale of the Property, Bagwell would be paid the original principal amount of the cancelled Notes plus interest first, and any additional profits would be split equally between the Trammels and Bagwell.[297]

By 2002, none of the Property had been sold, and the Trammels needed additional funds. So, Bagwell and the Trammels entered into an amendment to the Agreement (the Amendment) in which Bagwell advanced $600,000 to the Trammels in exchange for a 70/30 split in any profits from the sale. In August 2004, 73.6 acres of the Property were sold and the proceeds were distributed pursuant to the Amendment. On

291. *Id.* at 578, 784 S.E.2d at 357.
292. *Id.* at 580, 784 S.E.2d at 358-59.
293. *Id.* at 581, 784 S.E.2d at 358-59.
294. *Id.* at 582, 784 S.E.2d at 359.
295. *Id.* at 581-82, 784 S.E.2d at 358.
296. 297 Ga. 873, 778 S.E.2d 173 (2015).
297. *Id.* at 873-74, 778 S.E.2d at 174.

September 1, 2004, the Trammels conveyed by warranty deed the remaining twenty-nine acres of the Property to their sons. Bagwell discovered the transfer and immediately filed an affidavit disputing the validity of the transfer. The parties negotiated without success for six years to resolve the dispute, and Bagwell filed suit seeking declaratory judgment, cancellation of the warranty deed to the Trammels' sons, imposition of a constructive trust, dissolution of the joint venture, and seeking an accounting.[298]

In 2013, after the suit had been filed, the sons quit-claimed their interest in the remaining Property back to the Trammels. Bagwell subsequently amended the suit by dropping the moot claims and adding claims for equitable dissolution and accounting of Etowah Ventures, equitable partitioning, and specific performance. After a bench trial, the trial court granted Bagwell's request for equitable partitioning and accounting, granted the request to equitably dissolve Etowah Ventures, and appointed a receiver to sell the remaining Property and distribute the profits. The trial court further held that upon such a sale, the Trammels (collectively) and Bagwell each would be entitled to the 50/50 split of the profits under the Agreement and not the 70/30 split contained in the Amendment. In making this ruling, the trial court specifically held that it was not bound to follow the formula set forth in the Amendment in the exercise of its equitable powers. Bagwell appealed.[299]

In affirming the trial court, a divided supreme court determined that not only was the trial court authorized to consider all of the circumstances beyond what was contained in the Agreement and Amendment in adjusting the accounts and claims of the parties, but that the trial court had the duty to do so in the exercise of its equitable powers.[300] The supreme court found no abuse of discretion because in making the award, the trial court properly considered Bagwell's decision to seek equitable partition and early dissolution of the joint venture, which forced a sale of the remaining Property at a time the Trammels believed would bring a substantially reduced price.[301]

In *Kim v. First Intercontinental Bank ("Kim II")*,[302] the Georgia Court of Appeals examined issues of deed reformation and equitable subrogation and ultimately held that a bank's interest in a reformed security deed is not limited to the amount to which it is subrogated.[303]

298. *Id.* at 874, 778 S.E.2d at 174-75.
299. *Id.* at 874-75, 778 S.E.2d at 175.
300. *Id.* at 877, 778 S.E.2d at 177.
301. *Id.* at 878-79, 778 S.E.2d at 177-78.
302. 335 Ga. App. 763, 782 S.E.2d 840 (2016).
303. *Id.* at 765, 782 S.E.2d at 841.

The facts demonstrated that Yong Ho Han (Han) purchased a shopping center in 1999 and granted two security deeds to SunTrust totaling $576,900, which were recorded by SunTrust. In 2006, Han conveyed by warranty deed a half interest in the property to Chan Kim (Kim), and on the same day, they conveyed their interests in the property by warranty deed to H&K Deans Bridge Properties LLC (H&K). The warranty deeds to Kim and H&K were not recorded at the time of the conveyance.[304]

After the conveyances to Kim and H&K, Han refinanced the SunTrust debt with a loan from First Intercontinental Bank (the Bank) in the amount of $620,000. The security deed with the Bank, however, contained an incorrect legal description of the property. The Bank had no notice of the prior conveyances to Kim and H&K since the warranty deeds were not of record. In 2008, Kim and H&K recorded their warranty deeds, and in 2009, H&K conveyed the property back to Han and Kim. The Bank sued Han and Kim seeking reformation of the security deed to correct the legal description of the property and a declaration that the Bank held a first priority lien against the property under the doctrine of equitable subrogation to the extent its funds were used to pay off SunTrust. The trial court both reformed the security deed and granted priority to the security deed by virtue of equitable subrogation. Kim appealed.[305] The court of appeals rejected Kim's challenge to the reformation ruling and upheld the conclusion that equitable subrogation applied. The court of appeals, however, remanded the case to the trial court to determine the proper subrogation amount. [306]

On remand, the trial court determined the Bank was equitably subrogated to a first priority lien in the amount the Bank paid to satisfy SunTrust, $403,610.82. The trial court further found that the entire property was encumbered by the Bank's security deed, which secured repayment of an amount that exceeded the subrogated interest. Kim appealed this ruling asserting that the Bank's claim should be limited to the amount paid to SunTrust, and that the Bank should be required to release its lien upon payment of $403,610.82.[307]

In affirming the trial court, the court of appeals pointed out that it had affirmed the trial court's ruling reforming the security deed in *Kim I*, and the determination that Kim's interest is subject to, *or subordinate to*, a reformed security deed.[308] Since the legal description was corrected, the

304. *Id.* at 763-64, 782 S.E.2d at 841-42.

305. *Id.* at 764, 782 S.E.2d at 841.

306. *Id. See also* Kim v. First Intercontinental Bank (*Kim I*), 326 Ga. App. 424, 756 S.E.2d 655 (2014).

307. *Kim II*, 335 Ga. App. at 764, 782 S.E.2d at 841.

308. *Id.*

reformed deed related back to the date of the original conveyance, 2006, and the deed so reformed took priority over subsequently filed interests, including Kim's 2008 warranty deed and 2009 reconveyance.[309] The court explained that the reformed deed and the subrogated first priority lien represent different interests: one based upon contract, and one arising in equity.[310] As such, Kim's claim that the Bank was limited to the payoff to SunTrust was without merit.[311]

In *Cronan v. JP Morgan Chase Bank, N.A.*,[312] Michael Cronan (Cronan) appealed the dismissal of his counterclaim to quiet title brought against JP Morgan Chase Bank, N.A. (Chase). The underlying facts showed Cronan had obtained a loan for $417,000 from Chase and executed a security deed. The legal description of the security deed described property Cronan also owned that happened to be located on the same street as the property the parties had intended to be the security for the loan. Cronan went into default, and Chase foreclosed on the property described in the security deed but not the intended property.[313]

After the foreclosure, Chase conveyed the property to Fannie Mae who instituted eviction proceedings for the intended property, which Fannie Mae identified on the dispossessory warrant as being also known as the property described in the security deed. The magistrate in the dispossessory proceeding found that Fannie Mae only owned the property as described in its vesting deed and granted a writ of possession for only that property. Two years later, Chase's counsel recorded an Affidavit of Title providing notice of Chase's intent to file suit to correct the legal description error of the underlying security deed, and a law suit was filed thereafter. Cronan answered and counterclaimed for libel and abusive collection, sought dismissal of the complaint, and moved for the recovery of attorney fees. Chase voluntarily dismissed the complaint without prejudice, but filed another Affidavit of Title to provide notice of the erroneous legal description. Chase also moved to dismiss Cronan's counterclaim. In response, Cronan amended his answer and counterclaim to include a claim for quiet title. The trial court denied Cronan's motions and dismissed the counterclaims, and Cronan appealed.[314]

309. *Id.* at 765, 782 S.E.2d at 842.

310. *Id.* at 765-66, 782 S.E.2d at 842.

311. *Id.*

312. 336 Ga. App. 201, 784 S.E.2d 57 (2016).

313. *Id.* at 201, 784 S.E.2d at 59.

314. *Id.* at 201-02, 784 S.E.2d at 59.

The court of appeals found that the counterclaim did in fact meet the pleading requirements of the quiet title statute.[315] The court found that the complaint set forth the Affidavits of Title filed by Chase cast a cloud on title to the property that was not described in the underlying security deed which Cronan claimed to own free and clear of any lien by Chase.[316] Accordingly, the court of appeals found that the trial court committed error by dismissing the counterclaim.[317] The court of appeals, however, affirmed the trial court's denial of attorney fees in favor of Cronan since the quiet title counterclaim was not independent from the claims for reformation of the security deed contained in the complaint.[318] The court of appeals also affirmed the trial court's refusal to allow Cronan to depose the attorney who executed the Affidavits of Title since the allegations of the Affidavits described the relationship of the parties or other objective facts affecting title.[319]

In *Johnson v. Bank of America, N.A.*,[320] Bobby Johnson (Johnson), the plaintiff, filed a petition to quiet title to remove a security deed in favor of Pine States Mortgage Corporation (Pine States) and the assignments of the security deed to Bank of America N.A. (BoA) and Bank of New York Mellon (BONY) as clouds on his title. Johnson alleged in his complaint that Pine States was a dissolved mortgage lender that had relinquished its rights to the security deed in 2007, and the assignments of the security deed to BoA and BONY, in 2011 and 2012, could not have conveyed any interest. BoA was served and filed an answer and motion to dismiss the complaint on the basis that Johnson lacked standing to challenge the assignments. The trial court granted the motion to dismiss, and Johnson appealed.[321]

In reversing the trial court, the court of appeals determined that Johnson had met the pleading requirements to bring a quiet title action by alleging he held title to the property by way of a warranty deed by (1) including a legal description of the property at issue in his complaint; (2) attaching a plat of survey to the complaint, he identified the interests adverse to his and the instruments upon which the adverse claims were based; and (3) alleging that Pine States had relinquished any interest it had under the security deed and that the later assignments of the

315. *Id.* at 204, 784 S.E.2d at 60.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at 205, 784 S.E.2d at 61.
320. 333 Ga. App. 539, 773 S.E.2d 810 (2015).
321. *Id.* at 539-40, 773 S.E.2d at 811-12.

security deed had no legal effect.[322] The court found that regardless of the merits of Johnson's claim, Johnson had in fact stated a claim under the Quiet Title Act and his complaint should not have been dismissed.[323]

The court of appeals rejected BoA's position that Johnson lacked standing to challenge the assignments because he was not a party to the assignments.[324] The court found that the plaintiff in a quiet title case does not need to be a party to the instrument the plaintiff considers to be a cloud in order to bring the action to remove the cloud.[325] The court stated, "[T]he fact that Johnson was not a party to the assignments that he challenges does not destroy his standing to assert that those assignments are clouds upon his title."[326]

Looking at yet more quiet title issues in *TDGA, LLC v. CBIRA, LLC*,[327] the Georgia Supreme Court determined that sovereign immunity bars quiet title actions brought under the conventional quiet title statutes,[328] but sovereign immunity does not bar quiet title actions brought in rem against all the world.[329] The undisputed facts were TDGA, LLC (TDGA) acquired the property at issue from a party who had purchased the property at a tax sale, foreclosed the equity of redemption, and filed a conventional quiet title action against all parties with a recorded interest in the property, including the Georgia Department of Revenue and the Georgia Department of Labor (the Departments), each of which held recorded liens against the property. The Departments filed a joint motion to dismiss claiming the suit was barred due to sovereign immunity. The trial court granted the motion to dismiss, and TDGA appealed.[330]

In affirming the trial court, the Georgia Supreme Court conducted a constitutional analysis of sovereign immunity and concluded that the state and its agencies are immune from suit unless the legislature specifically states otherwise.[331] Since there is no explicit waiver of sovereign immunity in the statutes governing foreclosure of the right of redemption and conventional quiet title actions, the state and its

322. *Id.* at 541-42, 773 S.E.2d at 813.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. 298 Ga. 510, 783 S.E.2d 107 (2016).
328. *See* O.C.G.A. § 23-3-40 (1982).
329. *TDGA*, 298 Ga. at 510, 783 S.E.2d at 107; O.C.G.A. § 23-3-60 (1982).
330. *TDGA*, 298 Ga. at 510-11, 783 S.E.2d at 107-08.
331. *Id.* at 511-12, 783 S.E.2d at 108.

agencies are immune from suit under O.C.G.A. § 23-3-40.[332] The court, however, distinguished between conventional quiet title and quieting title in rem.[333] An action brought in rem is not an action against the state or any other person or entity. It is an action against the underlying property, and any person claiming an interest in that property, including the state, must affirmatively assert that claim in the quiet title action.[334]

In the case *Harris v. West Central Georgia Bank*,[335] Andy Harris (Harris) filed suit against West Central Georgia Bank (the Bank) to stop the foreclosure of property in which Harris claimed he had a superior security interest. The property at issue was owned by Phillip Adcock (Adcock), who had given Harris a security deed to the property in 2007 as security for repayment of a promissory note in the amount of $150,000. However, no promissory note to Harris existed and no money had actually changed hands. The security deed came about in connection with a limited liability company (the LLC) that had been formed by Harris, Adcock, and a third party, who purchased forty-five lots in a subdivision using a $1,350,000 loan from AgSouth Farm Credit ACA (AgSouth). AgSouth required additional collateral for the loan, and Harris was the only member of the LLC with the wherewithal to provide the additional collateral. The security deed given by Adcock to Harris was an attempt by Harris to balance liability for the loan with AgSouth. Thereafter, Harris' security deed in Adcock's property was cancelled of record by an instrument Harris claimed was forged. Adcock obtained other loans security by the same property, but ultimately failed to pay the loan to the Bank who commenced foreclosure against the property. Harris filed suit to enjoin the foreclosure and to have the cancellation of his security deed set aside. The Bank counterclaimed to quiet title. The trial court dismissed Harris' complaint and granted the Bank's counterclaim to quiet title at the conclusion of a bench trial. The trial court found that it was unnecessary to determine if the cancellation of the security deed was a forgery because the security deed itself was invalid for lack of a valid debt actually secured by the instrument.[336]

Harris appealed asserting three enumerations of error: (1) Harris was given the security deed by Adcock to secure Adcock's obligations under the operating agreement of the LLC; (2) the security deed was not invalid because the consideration it identified was a mistake; and (3) the Bank lacked standing to attack the security deed between Harris and Adcock

332. *Id.* at 512, 783 S.E.2d at 108.

333. *Id.*

334. *Id.* at 512, 783 S.E.2d at 109.

335. 335 Ga. App. 114, 779 S.E.2d 441 (2015).

336. *Id.* at 114-15, 779 S.E.2d at 442-43.

since the Bank was not a party to the agreement.[337] The court scrutinized the LLC's operating agreement and found that there was no obligation of any of the members to contribute more than initial minimal capital investment, and that there was no provision creating an obligation for each member to pay one-third of the cost of any property purchased by the LLC.[338] As such, Adcock was not contractually liable to Harris under the operating agreement for $150,000 of the down payment to the Bank for the loan.[339]

Regarding the mistaken consideration argument, the court found that had the parties intended performance of obligations under the operating agreement to constitute consideration for the security deed, Harris and Adcock could have drafted the security deed to reflect that intent.[340] Adcock did not agree the intent of the security deed was to secure performance under the operating agreement. As such, the court of appeals found that the mistake was not a mutual mistake, and equity could not intervene to reform the security deed.[341] Lastly, the court addressed Harris' lack of standing argument: since the Bank was not a party to the security deed between Harris and Adcock, the Bank could not attack it.[342] The court found that the applicable statute provides that quiet title will be sustained where *any* instrument casts a cloud on title.[343] Here, the Bank asserted the invalid security deed was a cloud on its title. The fact the Bank was not a party to the instrument for the purposes of its quiet title counterclaim was of no consequence.[344]

In the case *Caraway v. Spillers*,[345] the Caraways received a deed from Wendy Caraway's grandmother, Nettie Spillers, for two acres of property in 1998. The Caraways immediately took possession of the two acres, placed a manufactured home on it, and lived there as their residence until 2011. The Caraways, however, did not record their deed. In 2003, Nettie Spillers deeded the same two acres to Matt Spillers (Spillers), Wendy Caraway's uncle, and Spillers immediately recorded his deed. The Caraways recorded their deed to the property one month after Spillers recorded his deed. In 2011, Spillers filed suit to cancel Caraways' deed, and the Caraways filed a response claiming, among other things,

337. *Id.* at 115, 779 S.E.2d at 443.
338. *Id.* at 116, 779 S.E.2d at 443.
339. *Id.*
340. *Id.* at 117, 779 S.E.2d at 444.
341. *Id.*
342. *Id.*
343. *Id. See also* O.G.G.A. § 23-3-40.
344. *Harris*, 335 Ga. App. at 117, 779 S.E.2d at 444.
345. 332 Ga. App. 588, 774 S.E.2d 162 (2015).

that they had acquired title to the property by adverse possession. The trial court granted summary judgment to Spillers based strictly on the date of recording of the two deeds, and found that since Spillers was first in time, his deed was valid and the Caraways' was not. The Caraways appealed. [346]

The court of appeals held that an occupant's possession is analogous to constructive notice.[347] Anyone who purchases or contracts for a deed to real property is required to inquire into the right of any person in possession of the property, and such possession is notice of whatever title or right the occupant claims to have in the property.[348] Accordingly, the court reversed and remanded the case because an issue of fact remained as to whether the Caraways' possession of the property put Spillers on notice of their title.[349]

IX. TRESPASS AND NUISANCE[350]

Trespass and nuisance are related doctrines that protect interests in the exclusive possession and use and enjoyment of land. Accordingly, the courts are routinely clarifying these interests. During this Survey period, the courts particularly took note of issues relating to damages.

In *Oglethorpe Power Corp. v. Estate of Forrister*,[351] the Georgia Court of Appeals considered whether discomfort and annoyance were elements of nuisance damages and whether those damages could be asserted by a limited liability company.[352] In *Oglethorpe*, neighboring property owners brought suit against a power plant owner, Smarr EMC (Smarr), and operator, Oglethorpe Power Corporation (Oglethorpe), complaining of noises and vibrations coming from the plant. The *Oglethorpe* litigation has a long history in the courts and was first appealed by Oglethorpe and Smarr after the trial court entered summary judgment in favor of the property owners. Thereafter, the Georgia Court of Appeals affirmed, and Oglethorpe and Smarr petitioned for a writ of certiorari to the Supreme Court of Georgia which affirmed in part, reversed in part, and remanded. On remand, the trial court entered judgment on a jury verdict in favor of

346. *Id.* at 588-89, 774 S.E.2d at 162-63.

347. *Id.* at 589, 774 S.E.2d at 163.

348. *Id.*

349. *Id.* at 589-90, 774 S.E.2d at 163.

350. This section was authored by Sabrina Lynn Atkins, associate in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. Georgia College & State University (B.A., with honors, 2010); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2013).

351. 332 Ga. App. 693, 774 S.E.2d 755 (2015).

352. *Id.* at 707-08, 774 S.E.2d at 766-67.

the property owners; Oglethorpe and Smarr appealed, and the property owners cross appealed. [353]

First, Oglethorpe and Smarr, relying on *City of Warner Robins v. Holt*,[354] argued discomfort and annoyance equate to emotional distress, not nuisance damages.[355] However, the court of appeals disagreed.[356] Relying on the Restatement (Second) of Torts and O.C.G.A. § 41-1-4,[357] the court of appeals stated that "[a] private nuisance may injure either a person or property, or both, and for that injury a right of action accrues to the person who is injured or whose property is damaged."[358] The court went on to find that issues of "'discomfort and annoyance' in the context of nuisance is not a species of emotional distress, but a distinct element of nuisance damages . . . ."[359]

Next, the court considered whether the discomfort and annoyance damages could be asserted by a limited liability company.[360] Relying on the United States Supreme Court's holding in *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*,[361] the court held in the affirmative.[362] In *Baltimore*, the Supreme Court found that a church, a religious corporation created under the General Incorporation Act, could bring a claim for annoyance and discomfort damages against a railroad company after it built an engine yard and machine shop next to the church building.[363] After noting that *Baltimore* had been relied on by numerous Georgia courts, the court of appeals concluded "that a limited liability company may have a cause of action for 'discomfort and annoyance' affecting the use of its property for the purposes intended by its members and those they permit to join them."[364]

Finally, the court took up the question of whether a limited liability company was an "occupant" of its property for the purposes of damages. [365] While Oglethorpe and Smarr contended "occupant" was equivalent to "resident" and therefore the appellant could not recover, the court of

353. *Id.* at 694-96, 774 S.E.2d at 758-59.
354. 220 Ga. App. 794, 470 S.E.2d 238 (1996).
355. *Oglethorpe*, 332 Ga. App. at 707-08, 774 S.E.2d at 766.
356. *Id.*
357. O.C.G.A. § 41-1-4 (2014).
358. *Oglethorpe*, 332 Ga. App. at 708, 774 S.E.2d at 767 (quoting O.C.G.A. § 41-1-4).
359. *Id.*
360. *Id.* at 710-11, 774 S.E.2d at 768.
361. 108 U.S. 317, 329-30 (1883).
362. *Oglethorpe*, 332 Ga. App. at 711, 774 S.E.2d at 768.
363. *Id.* at 711, 774 S.E.2d at 768 (discussing *Baltimore*, 108 U.S. 317, 329-30).
364. *Id.* at 712, 774 S.E.2d at 769.
365. *Id.*

appeals disagreed.[366] The court of appeals noted "residence is not necessary for occupancy."[367] Notably, the holding in *McIntyre v. Scarbrough*[368] by the Georgia Supreme Court rejects Oglethorpe and Smarr's position and holds:

> 'Occupy' is more expansively defined in Black's Law Dictionary . . . as 'to hold possession of; to hold or keep for use; to possess.' Because one may occupy a residence by holding it or keeping it for use, the court erred in imposing a requirement that permanent physical presence was necessary to fulfill the occupancy requirement of the warranty deed.[369]

Moreover, the court of appeals noted that in *Baltimore*, church members and their guests did not reside at the property, but rather used the property for church and Sunday school; this did not affect the corporation's claim for nuisance damages.[370] Accordingly, the court of appeals held "that the trial court erred in removing the issue of damages for 'discomfort and annoyance' from consideration [of] the jury."[371]

In *Toyo Tire North America Manufacturing, Inc. v. Davis*,[372] Duron and Lynn Davis (the Davis's) filed an action against Toyo Tire North America Manufacturing (Toyo Tire) alleging trespass, continuing trespass, and nuisance resulting from Toyo Tire's operation of a tire manufacturing plant which is located in close proximity to the Davis' home. Toyo Tire filed a motion for summary judgment which was ultimately denied by the trial court. Thereafter, the trial court granted Toyo Tire's motion for immediate review. Toyo Tire began operating its facility near the Davis' home in 2006. Thereafter, the Davis' hired counsel who sent a letter to Toyo Tire requesting that Toyo Tire purchase the Davis' home in order to avoid litigation. Due to Toyo Tire's continued operations and refusal to purchase the Davis' home, the Davis's filed their complaint in 2013 alleging they were subject to constant noise including truck traffic and alarms, black dust, foul odors, and unsightliness.[373]

366. *Id.*

367. *Id.*

368. 266 Ga. 824, 471 S.E.2d 199 (1996).

369. *Oglethorpe*, 332 Ga. App. at 712-13, 774 S.E.2d at 769-70 (quoting *McIntyre*, 266 Ga. at 825, 471 S.E.2d 199).

370. *Id.* at 713-14, 774 S.E.2d at 770.

371. *Id.* at 714, 774 S.E.2d at 770.

372. 333 Ga. App. 211, 775 S.E.2d 796 (2015).

373. *Id.* at 211-12, 775 S.E.2d at 797-98.

On appeal, Toyo Tire argued that the Davis' claims are barred by the four-year statute of limitations.[374] However, based on the Georgia Supreme Court's ruling in *Cox v. Cambridge Square Towne Houses, Inc.*,[375] the court of appeals disagreed.[376] In *Cox*, the supreme court held that if the nuisance is a continuing one, "the statute does not run from the time of the first harm except as to the harm then caused."[377] The court of appeals held that because there was evidence Toyo Tire continued to grow throughout the years and expand its business, the permanence of the alleged trespasses entitled the Davis's to elect to recover for all damages or past invasions occurring no more than four years before they filed their complaint.[378]

Next, Toyo Tire contended that the Davis's failed to show that the alleged trespass and nuisance proximately caused the value of their property to decrease.[379] While Toyo Tire did not dispute the Davis's appraisal expert's valuation of the property, it did contend that the appraiser failed to testify that the diminution in value was caused by Toyo Tire.[380] However, the court of appeals held that because the appraisal expert considered characteristics relating to the Toyo Tire facility, giving rise to the nuisance and trespass claim, his opinion was not entirely speculative.[381] Accordingly, the court of appeals affirmed the trial court's denial of summary judgment.[382]

Finally, and similar to the court of appeals' holding in *Oglethorpe*, the court of appeals held that contrary to Toyo Tire's argument, the Davis's could recover both diminution in value as well as discomfort and annoyance damages under their nuisance claim.[383]

In *Ridley v. Turner*,[384] the Turners sued Ridley claiming trespass and nuisance relating to erosion from grading and construction on the Ridley property, which in turn caused sediment deposits in Turners' pond. The jury ultimately awarded the Turners $80,000 and $10,000 for their trespass and nuisance claim, respectively.[385] The main argument made on appeal by Ridley concerned whether the proper measure of damages

374. *Id.*
375. 239 Ga. 127, 236 S.E.2d 73 (1977).
376. *Toyo Tire*, 333 Ga. App. at 212, 236 S.E.2d at 798.
377. *Id.* at 213, 775 S.E.2d at 799.
378. *Id.* at 214, 775 S.E.2d at 799.
379. *Id.* at 216, 775 S.E.2d at 800.
380. *Id.*
381. *Id.* at 217, 775 S.E.2d at 801.
382. *Id.*
383. *Id.* at 218-19, 775 S.E.2d at 802.
384. 335 Ga. App. 108, 778 S.E.2d 844 (2016).
385. *Id.* at 108-09, 778 S.E.2d at 845.

was the difference in the market value of the property before and after the damage occurred from the sedimentation.[386] Ridley argued the trial court erred when it instructed the jury that "under Georgia law, cost of repair and diminution of value are alternative, although sometimes interchangeable, measures of damages in trespass cases. The plaintiffs may choose to present their case using either or both methods of measuring damages depending on the particular circumstances."[387]

The court of appeals noted that in the instant case, the Turners elected to focus on the cost of repair as the measure of damages, which when based on Georgia law, was appropriate so long as the amount of damages did not exceed the value of the property.[388] Thus, because the damages awarded to Turner, totaling $90,000, did not exceed the value of the property, the court of appeals affirmed the trial court's instruction.[389]

X. ZONING[390]

Turning lastly to zoning law, in *Burton v. Glynn County*,[391] the Supreme Court of Georgia upheld the trial court's determination that property owners had operated their property in violation of the zoning ordinance.[392] The trial court's decision was affirmed because the frequency of the events and the systematic manner in which the property has been marketed and utilized for large-scale gatherings supported the conclusion that the property's use as an event venue was beyond that expected or customary for a one-family dwelling.[393] In 2008, Burton (the Burtons), owners of an oceanfront property on St. Simons Island, began to offer the property as a short-term vacation rental, and over time, the Burtons' home became a popular venue for weddings and large gatherings. By 2010, neighbors began to file complaints with the homeowners association and local law enforcement in regards to excessive noise, parking issues, and traffic.[394]

386. *Id.* at 111, 778 S.E.2d at 846.

387. *Id.*

388. *Id.* at 111, 778 S.E.2d at 846-47.

389. *Id.* at 112, 778 S.E.2d at 847.

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391. 297 Ga. 544, 776 S.E.2d 179 (2015).

392. *Id.*

393. *Id.* at 544-45, 547, 776 S.E.2d at 181-83.

394. *Id.* at 544-45, 776 S.E.2d at 181.

In response to these complaints, Glynn County conducted an investigation where they determined the Burtons were operating the property as a commercial event venue.[395] As a result, the county issued a cease and desist letter contending the Burtons' operation of the property in this manner was not a permitted use in an R-6 district,[396] and requested the Burtons immediately discontinue such use.[397] In response, the Burtons filed a lawsuit against the county seeking declaratory and injunctive relief as well as an order to stop the county's efforts to enforce its zoning ordinance to prohibit the use of their property as an event venue. In their complaint, the Burtons claimed enforcing the zoning ordinance against them would violate their constitutional rights to due process and equal protection. The county filed a counterclaim seeking a declaratory judgment confirming its interpretation of the zoning ordinance.[398]

Following an evidentiary hearing, the trial court issued an order where they concluded

> The Burtons' permissible accessory use of their property to host a wedding or social event has become the primary use of their property, and the magnitude, frequency, and cumulative impact thereof has moved beyond that expected or customary for a one-family dwelling. Because this use falls outside the normal scope of residential property use, it is thus [a violation] of Section 701 of the Glynn County Zoning Ordinance.[399]

The trial court also denied the Burtons' equal protection claims, finding they had presented no evidence of other residential properties in Glynn County that were operated in the same manner as the Burtons' property that were treated differently by the county. Both parties appealed.[400]

Citing to *Expedia, Inc. v. City of Columbus*,[401] the Georgia Supreme Court held that review of the construction of a zoning ordinance is a

395. *Id.* at 545, 776 S.E.2d at 181.

396. *Id.* The Glynn County Zoning Ordinance, § 701.1 states five permitted uses Government owned or operated use, facility or land (1) One-family dwelling (2) Government owned or operated use, facility or land (3) Non-commercial horticultural or agriculture, but not including the keeping of poultry or animals (4) Accessory use in compliance with the provisions of Section 609 (5) Customary home occupation established under the regulations of Section 608. *Id.*

397. *Burton*, 297 Ga. at 545, 776 S.E.2d at 180.

398. *Id.* at 545, 776 S.E.2d at 181.

399. *Id.* at 546, 776 S.E.2d at 182.

400. *Id.* at 545, 776 S.E.2d at 181-82.

401. 285 Ga. 684, 681 S.E.2d 122 (2009).

matter of law subject to a de novo review.[402] The court states "the cardinal rule is to ascertain and give effect to the intention of the lawmaking body."[403] To accomplish that intent, the supreme court looked at the language of the ordinance itself, which stated the ordinance is "designed to encourage the formation and continuance of a stable, healthy environment for one-family dwellings. . . ."[404] To promote the desired "low-to-medium density residential" development in R-6 districts, the ordinance expressly aims "to discourage any encroachment by commercial, industrial, high density residential, or other uses capable of adversely affecting the single-family residential character of the district."[405] As such, the supreme court found that the clear intent of the ordinance is to restrict the use of properties situated in R-6 zoning districts primarily to residential use by single families and other uses that are customarily incidental thereto.[406]

Given this intent, the court concluded, as the trial court did, that the Burtons' use of their property violated the Glynn County Zoning Ordinance, stating that the frequency of the events and the apparently systematic manner in which the property has been marketed and utilized for large-scale gatherings supported the conclusion that the property's use as an event venue had, as the trial court found, "moved beyond that expected or customary for a one-family dwelling."[407] The supreme court went on to affirm the trial court's determination that the Burtons failed to produce any evidence that would support their equal protection claim, acknowledging the witness the Burtons produced at the trial level who stated other homes in the area held similar events, but whom could not state there were properties that held these events with the frequency that the Burtons did.[408]

The remaining issue the trial court did not address was the Burtons' due process challenge. While citing *105 Floyd Road, Inc. v. Crisp County*,[409] the court stated that "[t]o satisfy due process, an ordinance must 'be specific enough to give fair warning of the prohibited conduct.'"[410] The Burtons argued the zoning ordinance failed to define at

402. *Burton*, 297 Ga. at 546, 776 S.E.2d at 182.

403. *Id.* (quoting Ervin Co. v. Brown, 228 Ga. 14, 15, 183 S.E.2d 743, 744 (1971)).

404. *Id.*

405. *Id.* (quoting Glynn County Zoning Ordinance § 701.1).

406. *Id.* at 547, 776 S.E.2d at 182-83.

407. *Id.*

408. *Id.* at 548, 776 S.E.2d at 183.

409. 279 Ga. 345, 613 S.E.2d 632 (2005).

410. *Burton*, 297 Ga. at 548, 776 S.E.2d at 183 (quoting *105 Floyd Road*, 279 Ga. at 348, 613 S.E.2d at 634).

what volume hosting events would move the use from permissible as an accessory use of a one family dwelling to an impermissible primary use. In regards to this issue, the court concluded that the ordinance at issue here is sufficiently specific for "persons of common intelligence" to recognize that the Burtons' use of the property did not qualify as a permissible use in an R-6 district, and therefore their due process challenge fails.[411]

In *Bulloch County Board of Commissioners v. Williams*,[412] the Bulloch County Board of Commissioners (the Board) appealed the superior court order reversing the Board's denial of a conditional use permit for a personal care home.[413] The county then appealed the superior court decision arguing the superior court erred by failing to apply the "any evidence" standard of review to a local government body's zoning decision.[414] The appellate court held that

> When reviewing a local governing body's zoning decision, the superior court applies the any evidence standard of review. In the appellate courts, the standard of review is whether there is any evidence supporting the decision of the local governing body, not whether there is any evidence supporting the decision of the superior court.[415]

To accomplish this, the court reviewed the records of the Board which showed that Williams (Ms. Williams) applied for a conditional use permit to operate a personal care home.[416] In response, the Bulloch County Planning and Zoning Department completed a multi-point written assessment and subsequently recommended an approval of the application.[417]

When the Bulloch County Planning and Zoning Department recommendation went in front of the Board, an attorney representing eleven adjacent landowners stated several reasons supported a denial of the application, including: (1) the personal care home could only be reached by traveling down an unpaved "washboard dirt road, especially during inclement weather"; (2) "the driveway is narrow and hard to find"; (3) the distance from the home to the nearest hospitals was over 18 miles; and (4) an adjacent property owner was concerned about liability if a personal care home resident were to fall in a pond located within 150 feet

411. *Id.*
412. 332 Ga. App. 815, 773 S.E.2d 37 (2015).
413. *Id.* at 815, 773 S.E.2d at 38.
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*

of the proposed personal care home.[418] The Board, agreeing with the concerns raised by the adjacent landowners, denied the application,[419] to which Ms. Williams appealed de novo to the superior court.[420]

The Georgia Court of Appeals points out that the Bulloch County Code states that the board of commissioners is not bound by the recommendation of the planning and zoning commission, and that the power to approve a conditional use and enact an amendment rests with the board of commissioners.[421] As such, the appellate court held that the information before the Board regarding the washboard dirt road and the greater distance from the nearest hospital in comparison to other approved personal care homes adequately supported the Board's decision to deny the application for a conditional use permit and reversed the superior court's order directing the Board of Commissioners to grant the application.[422]

418. *Id.* at 816, 773 S.E.2d at 39.

419. *Id.*

420. *Id.*

421. *Id.* at 817, 773 S.E.2d at 39. S*ee also* Bulloch County Code, Appendix C, § 410(f)(1)(5).

422. *Williams,* 332 Ga. App. at 817, 773 S.E.2d at 40.