COUNTIES & THE LAW

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2014 Compilation Edition

Counties & the Law, 2014 Compilation Edition includes decisions of interest to county attorneys published in the Daily Report Opinions Weekly between December 28, 2013, and January 2, 2015. It compiles into a single resource all of the individual, weekly editions of *Counties & the Law* which were posted on the Legal Resources tab of the Association County Commissioners of Georgia website at:

http://www.accg.org/content_section_legal.asp?CatId=463&ContentType=Legal_Publications

This compilation edition includes a Table of Topics as well as a Table of Cases to assist the user in quickly and efficiently locating items that may be of interest. Each of the tables is arranged alphabetically. The Table of Topics begins on page 2 and the Table of Cases begins on page 3.

A special note to our readers. As a result of changes made early in 2014 at the Fulton County Daily Report website, printouts of the Opinions Weekly have several new formatting changes. Among those is a lack of pagination. Consequently, case summaries in this Compilation Edition of Counties & the Law, as well as future editions, will no longer contain year and page citations to Fulton County Daily Reports (e.g. 14 FCDR 2015).

We are very appreciative of the positive feedback we have received over the course of 2014 as a result of the publication of *Counties & the* Law and we welcome your continued suggestions and opinions.

Please contact Jim Grubiak at jgrubiak@accg.org or Joe Scheuer at jscheuer@accg.org with your comments.

TABLE OF TOPICS

TABLE OF CASES

COUNTIES & THE LAW

ANTE LITEM NOTICE

Tuttle v. Georgia Board of Regents of the University System of Georgia

Georgia Court of Appeals
March 19, 2014; A13A2190

This case involves an alleged retaliatory termination of employment. The trial court granted summary judgment to the regents since the claim was filed after the statute of limitation period had ended and there was no evidence of retaliation. The Court of Appeals affirmed. O.C.G.A. 45-1-4 is clear as to the statute of limitations. Mere ignorance of the facts constituting a cause of action does not prevent the running of the statute of limitation. There was no evidence that the former employee exercised any attempt to discover whether his termination was in retaliation for engaging in activities protected under the whistleblower statute. Finally, complying with the ante litem notice under the Georgia Tort Claims Act, O.C.G.A. 50-21-26, does not toll the statute of limitations under O.C.G.A. 45-1-4 and the suit was brought under O.C.G.A. 45-1-4.

Warnell v. Unified Government of Athens-Clarke County

Georgia Court of Appeals
September 15, 2014; A14A1474

A county police struck another vehicle and injured the occupant. The injured party failed to present the claim to the county within the 12 month period specified by O.C.G.A. 36-11-1 and the trial court granted summary judgment to the county. On appeal, the Court of Appeals affirmed, noting that the 12 month presentation period under O.C.G.A. 36-11-1 is wholly unrelated to the limited waiver of sovereign immunity under O.C.G.A. 33-24-51 (county's purchase of liability insurance on the patrol car).

Dorn v. Georgia Department of Behavioral Health & Developmental Disabilities

Georgia Court of Appeals
November 14, 2014; A14A0910

This case presents an issue of ante litem notice in the context of a wrongful death action. A parent sued the department following the death of his son contending that the department's negligence was the proximate cause of death. The trial court dismissed for failure to comply with the ante litem notice provisions of the Georgia Tort Claims Act, O.C.G.A. 50-21-20 et seq. in that the plaintiff failed to specify the amount of loss claimed. On appeal, the Court of Appeals affirmed. The ante litem notice filed in the case did not specify a dollar amount. Instead it used phrasing to the extent that the amount of loss suffered is the monetary value of the decedent's life sufficient to appropriately penalize the state's negligence. The Tort Claims Act is a limited waiver of sovereign immunity and requires strict compliance with notice requirements that are a prerequisite to filing suit. While this does not require "hypertechnical compliance" it does require the value of the loss claimed. The Court compared this situation to the *Driscoll* case where no statement whatsoever of value was in the notice and pointed out that there is no material difference here because there was nothing in this case that gave the state any notice of the magnitude of the claim.

ANNEXATION

City of Brookhaven v. City of Chamblee

Georgia Court of Appeals
November 5, 2014; A14A0762

This case presents an issue of first impression which deserves careful scrutiny of the text of the entire opinion. The General Assembly enacted a local Act providing for the annexation of territory by a city, subject to referendum approval. Prior to the occurrence of that referendum, another city attempted to annex the same territory under O.C.G.A. 36-36-21. The Court of Appeals reviewed the entire constitutional history of annexation and concluded that while several self-help methods of annexation had been provided by general law, one specifically being O.C.G.A. 36-36-21, all of these self-help methods were subordinate to the General Assembly's authority to annex by local Act. This legislative intent is set forth clearly in O.C.G.A. 36-36-10 and states specifically that these other methods do no restrict, limit, or impair the General Assembly's power to annex by local Act. Applying a plain meaning of words standard, the Court concluded that the General Assembly did not intend to create a system for cities to "race" the legislature to annex land.

BONDS

Avery v. State of Georgia

Supreme Court of Georgia
July 3, 2014; S14A0792

This case involves a challenge to the validation of revenue bonds by the Paulding County airport authority for the widening and extension of the county airport taxiway to accommodate commercial passenger jets. Under the bond resolution, the airport authority and the county will enter an intergovernmental agreement (IGA) which obligates the airport authority to operate and maintain the taxiway and the county to pay the principal and interest on the bonds and use its taxing authority to cover any shortfall. A commercial aviation company entered into a lease with the airport authority whereby it would pay the airport authority the principal amount of the bonded indebtedness. The agreement did not relive the county of its obligation to pay principal and interest on the bonds. At the public meeting of the airport authority at which the resolution and IGA were approved, part of the meeting was closed for executive session. At a subsequent public meeting, a supplemental resolution was adopted by the authority, and, the authority ratified all of its prior actions taken at the prior meeting. The bonds were validated, but the bond validation was challenged on multiple constitutional grounds. The Supreme Court upheld the trial court validation. Citing the *Clayton County Airport Authority* case, the Court noted first that the contract between the airport authority and the county was clearly a valid IGA under Art. IX, Sec. V. Para. I(a). Next, the Court held that the bond issuance did not violate the lending clause of the constitution since the extension of credit was actually from the private company to the county. Third, the Court held that the bond issuance did not violate the gratuities clause of the constitution since the issuance of the bonds in fact created a substantial benefit to the county. Finally, the Court noted that the question of whether the executive session was improper was pretermitted by the subsequent open and public meeting when the initial bond matters as well as the supplemental bond matters were all reconsidered and approved.

CIVIL PRACTICE

Druid Hills Civic Association, Inc. v. Buckler

Georgia Court of Appeals
August 5, 2014; A14A0138; A14A0139

This case involves further issues concerning the lengthy litigation regarding the development of Clifton Ridge. *{A complete understanding of the case which started in 2004 will require the reader to consult the case text for the lengthy set of facts.}* In this iteration of the dispute, the Court of Appeals considered several items. First, the trial court's certificate of immediate review was adequate to confer jurisdiction even though it was signed not by the trial judge who had granted the motion to dismiss. The certificate itself provided some evidence that the first judge was unavailable to sign it, and, because it was signed and timely filed by a second judge from the same court, this satisfies O.C.G.A. 5-6-34(b). Second, under O.C.G.A. 9-2-61, the Association was free to renew its action within 6 months of its own voluntary dismissal of its original petition. Finally, the trial court erred when it dismissed the Association's petition for lack of standing because the developers failed to raise the matter of standing before the planning commission and therefore waived it. The Court engaged in a lengthy analysis of case law going back to 1977 to reach this conclusion.

CONDEMNATION

Emery v. Chattooga County

Georgia Court of Appeals
January 6, 2014; A13A1684

The county condemned property under O.C.G.A. 32-3-1 for an ingress and egress easement to provide access to approximately 20 county residents. The property owner filed a petition to set aside the condemnation and the trial court denied it. The Court of Appeals affirmed. Under O.C.G.A. 32-3-11, the superior court can only set aside the petition under restricted circumstances, including abuse or misuse of powers. The property owner argued that the taking here was an abuse since it was done for the benefit of a few private citizens and not for the public at large. However, the amount of usage by the general public is not controlling. If the public has the right to use the road it is sufficient. It would be different if the general public was excluded from use of the road. In addition, the fire chief had previously requested the easement after responding to a fire in the area in order to improve access by emergency responders. Consequently, there is nothing to show the county acted in bad faith or that it abused its discretion.

Department of Transportation v. McMeans

Supreme Court of Georgia
January 21, 2014; S13G0614

{The summary of the initial Georgia Court of Appeals decision may be found in *Counties & the Law 2012 Compilation Edition*, p. 9}

This case involves a condemnation of property by the DOT. The property was owned by an individual who leased it to a company that he owned. An initial answer was filed, and an amendment to the answer was later filed which alleged damages for business losses. The trial court struck this amendment. On appeal, the Court of Appeals reversed on the basis that striking the answer was premature. The Court addressed the *Bill Ledford Motors* and *Lil Champ Food Store* cases noting its own prior narrow interpretation as well as its clarification that OCGA 32-3-1 *et seq.,* does not impose a requirement that business loss damages must be specifically and separately set forth in the notice of appeal. This is especially true in a case such as this where the business suffering the loss is owned and operated by the property owner. The Supreme Court reversed the Court of Appeals and upheld the trial court. The Court stated that a cardinal precept of corporate law is that corporations are separate legal entities from their shareholders, officers, directors, and employees. In this case, McMeans owned the real property but the corporation owned the business. The lessee business owner is the proper party to assert a claim for business losses resulting from the condemnation.

Department of Transportation v. McMeans

Georgia Court of Appeals
May 27, 2014; A12A1376

The Supreme Court reversed the Court of Appeals decision in this case (see above). Thus, the Court of Appeals vacates its previous judgment and adopts the Supreme Court opinion as its own. The trial court's judgment is affirmed.

Darling International, Inc. v. Carter

Supreme Court of Georgia
January 27, 2014; S13A1745

This case involves a title dispute over land previously the subject of condemnation by the county. The property tract was one of many taken by the county under eminent domain to build a lake. That project was ultimately abandoned. O.C.G.A. 36-9-3 was then amended which allowed counties to sell the land back to the original owners. Here, the original owner was now deceased and the statute made no provision for repurchase by the heirs of the original owner. Several conveyances of parts the tract then occurred. The statute was then amended to allow for repurchase by the heirs. The county then quitclaimed most of the original tract. The heirs filed a petition to quiet title and to eject the present owner of the remaining portion of the original tract. The heirs challenged a transfer by the county to a development authority which was not entered on its minutes as required by O.C.G.A. 36-9-2. The Supreme Court noted that while this failure may have resulted in a voidable deed to the immediate grantee (the authority), the deed of a subsequent purchaser without notice of the failure to comply with the statute was not void. Further, an additional subsequent conveyance was not a further 'taking' which was subject to O.C.G.A. 36-61-9, but was a legitimate re-purposing to another proper public use. The Court noted that at the time of the transfer, amendments O.C.G.A. 22-1-1 (the Landowners Bill of Rights and Private Property Protection Act) had not yet been enacted.

ADC Investments LLC v. Department of Transportation

Georgia Court of Appeals
February 6, 2014; A13A2420

This case involves a condemnation of property by the DOT. At the time of condemnation, a static billboard was located on the property and the city sign ordinance prohibited digital billboards. Four days immediately prior to the date of taking, an amendment to that ordinance was first read in city council. The proposed amendment would have allowed for digital billboards. ADC asserted its damages should be based upon an anticipated revenue stream of income from the digital billboard while DOT asserted that the value of the property was limited to what existed on the date of taking, *i.e.* a static billboard. The trial court granted partial summary judgment to DOT. On appeal, the Court of Appeals reversed on the basis that there were genuine issues of material fact as to the reasonable probability that the sign ordinance would be amended and the existing bill board converted to digital and that those changes would have had

an appreciable impact of the present market value of the property interest which had been the subject to the condemnation.

Liberty County v. Eller

Georgia Court of Appeals
July 14, 2014; A14A0057

This case involves questions of inverse condemnation, trespass, nuisance, sovereign immunity, and other claims in the context of damages to property from storm water runoff from a county drainage pipe. The property owner sued the county. The trial denied summary judgment to the county. On appeal, the Court of Appeals reversed. Sovereign immunity was not waived and clearly barred all of the claims except inverse condemnation claims based on nuisance or trespass. Those, however, are subject to a four-year statute of limitations under O.C.G.A. 9-3-30. Finally, no evidence showed any improper maintenance of the pipe by the county.

Dillard Land Investments LLC v. Fulton County

Supreme Court of Georgia
July 18, 2014; S13G1582

This case involves the granting of certiorari by the Supreme Court of Georgia to decide whether a condemnor may voluntarily dismiss a condemnation action without the consent of the court or the condemnee, after a special master has entered an award valuing the property at issue but before the condemnor has paid the award amount into the registry of the court or to the condemnee. The Court of Appeals held that the county could unilaterally dismiss the condemnation. The Supreme Court disagreed and reversed. The county relied upon the *Orr* case for its contention that the special master order is not final or enforceable at the time it is announced and that property is not deemed 'taken' with title vesting in the condemnor until the award is paid into the court registry or to the condemnee. The Court stated that the relevant question here is not enforceability of the value award, but rather is when a plaintiff can dismiss an action without court approval and over the objection of the opposing party. The answer is it can be so dismissed only before an actual finding, decision, or judgment on the merits of the action becomes known to the plaintiff and not when the ruling becomes enforceable by the defendant. (The Court examines a great deal of case law in reaching its conclusion and the interested reader should consult the text of this case for that detailed analysis.)

Toler v. Georgia Department of Transportation

Georgia Court of Appeals
August 5, 2014; A14A0267

The DOT condemned 1.7 acres of land. The owners appealed the condemnation and demanded a jury trial. They later asserted a claim for business losses arising out of kaolin production. Twelve years after the condemnation, a jury awarded a sum for the taking, but nothing for the business loss claim. On appeal, the Court of Appeals held that the trial court erred in denying a motion in limine to exclude evidence.

Even though this case involves the recovery of business losses and not the issue of just compensation for a taking, the same principles apply. The relevant inquiry for business loss centers on causation and the uniqueness of the property. Evidence of what the owners paid for an assignment was not relevant to that determination and the owners are entitled to a new trial on the claim. The Court made several other rulings regarding evidentiary matters that were likely to recur at the subsequent retrial of the case and the interested reader is directed to the case text to review those matters.

CONSERVATION & NATURAL RESOURCES

Georgia River Network v. Turner

Georgia Court of Appeals
August 26, 2014; A14A0215; A14A0272; A14A0273; A14A0274

{This is a long and complex case with a convoluted procedural history. Interested readers will need to consult the case text for a complete understanding of the matter.} A county board of commissioners planned to build a fishing lake and sought and was granted a stream buffer variance under O.C.G.A. 12-7-1 et seq. from the director of the environmental protection division of the Department of Natural Resources. Two different river protection groups filed a challenge to the buffer variance. An administrative law judge reversed the variance. Judicial review was sought in the superior courts of Fulton and Grady counties. Both superior courts reversed the decision of the ALJ. The river groups appealed both orders. The EPD and the county appealed the Grady county court order. The Court of Appeals reversed both trial court orders. The Court concluded that the river groups challenged an 'order or action' of the EPD, that they had standing to do so, and that the trial courts erred in determining that the buffer requirement applied only to state waters with wrested vegetation. The Court noted that although the statute was internally inconsistent, the legislative intent of the General Assembly was expressed clearly in O.C.G.A. 12-7-2, and therefore it must be read to give effect to the intent to strengthen and extend erosion and sediment control activities.

CONSTITUTION

Trop Inc. d/b/a Pink Pony v. City of Brookhaven

Supreme Court of Georgia
October 10, 2014; S14A0784; S14A0931

This case involves a dispute over a city's nude dancing (sexually-oriented business) ordinance. Following litigation between the county and Pink Pony (PP) a settlement agreement was entered into which among other things allowed PP to continue operations in exchange for paying an increased, graduated license fee. The duration of the agreement was later extended for an additional 15 years. Prior to the agreement's expiration, PP ceased to be located in the unincorporated area of the county due to the creation of a new city. The city enacted its own sexually-oriented business ordinance. PP sued alleging the ordinance was unconstitutional and that PP was exempt due to the agreement with the county. The trial court granted summary judgment to the city. On appeal, the Supreme Court upheld the trial court. Citing the *Paramount Pictures*, *City of Renton*, and *Goldrush II* cases, the Court found the ordinance to be content neutral. The Court also found that the ordinance complied with all 3 prongs of the *Paramount Pictures* case. Further, under O.C.G.A 36-30-3, the prior agreement between the county and PP cannot prevent free legislation in matters of municipal government and bind the newly created city.

CONTRACTS

Unified Government of Athens-Clarke County v. Stiles Apartments Inc.

Supreme Court of Georgia
October 10, 2014; S14A0932

This case involves a contract dispute over parking rights. Stiles Apartments (SA) entered into a contract with the City of Athens in 1954 regarding a parking area located on SA's property. A dispute arose in 2003 regarding which party had control over access to and use of the parking area. The trial court determined that the agreement never intended to create public property rights in the land owned by SA, since, at the time of the agreement, the only parking need was for SA's customers. Additionally, the trial court held that the agreement did not violate the prohibition on binding future councils under O.C.G.A. 36-30-3(a). The Supreme Court upheld the trial court by ruling that the contract was unambiguous in terms and that the only determination was the intent of the parties and that the intent was clear that no public parking right was created. Regarding the claim that the agreement bound future councils in violation of the statute, the Court analyzed under the 4 prong test of the *City of Powder Springs* case and found the agreement was in the nature of a government's proprietary functions and was not subject to the prohibition.

Effingham County v. Roach

Georgia Court of Appeals
November 26, 2014; A14A1236

{This case is very long and very detailed and does not lend itself to a summary. Interested readers should consult the text of the entire opinion.}

This case presents a multitude of issues arising from a breach of contract action, bankruptcy, the validity of water and sewer development agreements, and ante litem notice. The Court of Appeals upheld the trial court's denial of summary judgment to the county because: there was an issue of fact as to when the alleged breach of contract claim accrued and whether ante litem notice was timely filed; there was an unresolved jury issue regarding whether the claim was time-barred; there was an issue of fact regarding when the duty to mitigate damages arose and whether the mitigation steps taken were reasonable; and because the claim for litigation expenses under O.C.G.A. 13-6-11 was based solely upon the argument that the breach of contract claim failed as a matter of law.

COUNTY BOUNDARIES

Bibb County v. Monroe County

Supreme Court of Georgia
March 10, 2014; S13A1395; S13A1396

{This is a lengthy decision involving the questions of mandamus and determination of county boundaries and the interested reader should consult the actual text for pertinent detail on the 4 issues discussed below.}

The case involves a long-running boundary line dispute between two counties. In 2005, a land surveyor was appointed under O.C.G.A. 36-3-20 *et seq.* to identify the true boundary. One county accepted the survey the other did not. The Secretary of State (SoS) referred the matter to an administrative law judge (ALJ). The ALJ recommended accepting the survey. The SoS then held oral arguments and conducted a site visit. The SoS issued a final determination rejecting the survey, thus leaving the boundary line undetermined. One county sought judicial review. The trial court dismissed having concluded the SoS was not acting in a judicial capacity hence the determination of the SoS was a political determination not subject to judicial review. That county then filed a mandamus asserting the SoS had exceeded his authority in rejecting the survey and failing to establish a definite county line. The trial court agreed and ordered the SoS to record the survey and establish the line. The trial court further denied a motion by the other county to intervene. The appeals by both counties were consolidated by the Supreme Court. The Court addressed 4 issues. First, the actions of officials under O.C.G.A. 36-3-20 *et seq.* are not non-justiciable political questions and may be properly the subject of mandamus. The fact a controversy has political overtones does not place it beyond judicial review. Second, while mandamus could properly issue to compel the SoS to determine the boundary line and record the survey reflecting that line, the trial court could not dictate the result of the review process by directing the SoS to record a particular survey. Third, the cases under appeal are properly before the Court regardless of whether or not they had been filed as direct appeals of final judgments and mandamus cases or as discretionary appeals of administrative

agency decisions. Finally, the county's motion to intervene should have been granted given the county's lack of notice of the mandamus action, its prompt action seeking intervention upon discovery of that action, the important rights at stake, and the fact that neither the SoS nor the other county could have adequately protected the rights. The trail court abused its discretion.

DRUG TESTING

Smith v. City of Atlanta

Georgia Court of Appeals
May 21, 2014; A14A0034

This case involves the question of due process in the context of drug testing. City firefighters were required to submit to random drug testing as part of the city substance abuse policy. A firefighter provided a urine sample which was split into 2 containers. The first sample tested positive. The firefighter was offered an opportunity to explain, but he failed to do so. He was informed the second sample would be tested at a different lab. He consented. This also tested positive. The firefighter was terminated. The termination was appealed to the civil service board and upheld and then appealed to superior court and upheld. On appeal to the Court Appeals, the Court also upheld. The basis for the appeal was that the city did not follow a written policy in conducting the testing. Citing the *Camden County* case, the Court reiterated that in order to satisfy due process, a public employee with a property interest in continued employment must be given notice and an opportunity to be heard before being deprived of that interest. While it is not disputed that the written policy was not followed, due process does not hinge upon personnel manuals. An alleged violation must result in in a procedure which itself falls short of due process standards. In this case, the firefighter was given multiple notices and opportunities to be heard.

EASEMENTS

Gwinnett County v. McManus

Supreme Court of Georgia
March 3, 2014; S13A1878

The case involves an injunction issued against the county to prohibit it from using artificial means to increase the water and sediment running off of county property onto an adjacent parcel. In the course of constructing a road project, the county built a temporary sediment pond to drain water and sediment from the project onto a drainage easement on an adjacent parcel. Heavy rains caused excess runoff which exceeded the drainage easement and caused significant damage to the rest of the adjacent parcel. The owners filed suit against the county seeking an injunction to prevent further damage. The county built a permanent retention pond, however evidence showed excess runoff continued. The trial court found the county exceeded the bounds of the easement, issued the injunction, and ordered 26 interim remedial measures. On appeal, the Supreme Court upheld the injunction. The Court noted the injunction did not prohibit all runoff, only 'increased' runoff. In other words, runoff that exceeds the boundary of the easement. In addition, the remedial measures are intended only to prevent the county from exceeding the easement.

Donald Azar, Inc. v. Muche

Georgia Court of Appeals
March 7, 2014; A13A2404

This case involves a question of abandonment of an alley (an alleged private way). The trial court adopted a special master's finding that any interest in the alley had been abandoned. The Court of Appeals affirmed. Citing *Pindar's Georgia Real Estate Law & Procedure*, the Court noted that it is well established law that an actual or implied easement may be lost by abandonment. Here, there was evidence of intent to abandon "of a clear, unequivocal and decisive character". The alley had been unused since the 1970s. The owner alleging the easement never objected to improvements which blocked the alley in 1991 and consented to additional improvements that included fencing and other encroachments which closed the alley. No objection was ever made until 2001.

ELECTIONS

Lilly v. Heard

Supreme Court of Georgia
July 3, 2014; S14A0433

This case involves a challenge to the qualifications of a person elected to a county board of education. A pre-election challenge was filed with the local board of elections pursuant to O.C.G.A. 21-2-6 challenging that a candidate did not meet the one year residency requirement. The board conducted a hearing and issued a written ruling that the candidate was a resident and was qualified. The challenger did not file an appeal with the superior court as authorized under the statute. Instead, a quo warranto action was filed. The trial court dismissed the challenge for mootness, laches, res judicata, and collateral estoppel. The

Supreme Court upheld the trial court. The Court noted that O.C.G.A. 9-12-40 prevents re-litigation of all claims which have been adjudicated or which could have been adjudicated between identical parties in identical causes of action. The election board resolved a factual dispute through procedures that are sufficiently similar to that of a court and the board's minutes demonstrate that both sides had the right to be heard and present evidence and the challenger was given a full and fair opportunity to contest residency. Consequently, the election board was acting as a "court of competent jurisdiction" for purposes of res judicata.

FRANCHISE AGREEMENTS

Advanced Disposal Services Middle Georgia, LLC v. Deep South Sanitation LLC

Supreme Court of Georgia
September 29, 2014; S14A0784; S14A0785

This case involves a dispute over an exclusive franchise granted to a solid waste collection service. The county maintained several solid waste collection centers which were operated at a substantial annual loss to the county. In response, the county adopted an ordinance authorizing an exclusive franchise for solid waste collection and executed an exclusive franchise agreement with a single collection service. Prior to the ordinance and agreement, DSS had been providing pickup service. DSS refused to discontinue service and the county sought injunctive relief. The trial court denied the request. On appeal, the Supreme Court reversed. Citing the *City of Lilburn* and *Mesteller* cases, the Court applied the rational basis standard to the constitutional due process claim noting that solid waste collection was served a legitimate and important public purpose under O.C.G.A 12-8-21 & 12-8-31.1 and the supplementary powers provision of the constitution. The means provided under the ordinance for collection and disposal was reasonably related to the public purpose and an exclusive franchise agreement offered the best opportunity to provide curbside pickup in a uniform and cost effective manner and to discourage illegal dumping.

IMMUNITY

City of Atlanta v. Mitcham

Georgia Court of Appeals
November 20, 2013; A13A0912

This is a slight revision of a case that was reported previously. See 2013 Compilation Edition, p.26. A concurring opinion was added.

City of Milledgeville v. Primus

Georgia Court of Appeals
December 19, 2013; A13A1826

This case involves the question of sovereign immunity. A city corrections officer was driving a city transport vehicle when the brake line failed. The officer was injured in the ensuing crash. The officer sued the city alleging failure to adequately inspect and maintain the brake line. The city moved for summary judgment and the trial court denied it without explanation. The Court of Appeals reversed. First, sovereign immunity applies to cities unless the General Assembly waives it by law. Second, a ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. Third, a discretionary act calls for the exercise of personal deliberation and judgment which in turn entails examining the facts, reaching conclusions, and acting upon them in a way not specifically directed. Forth, sovereign immunity is waived for ministerial acts but not for discretionary ones. Fifth, the party seeking to benefit from the waiver of immunity must bear the burden of establishing the waiver. Here, the duty to inspect a vehicle part typically that would never need replacing was discretionary. The plaintiff presented no evidence to show a there was a specific timetable for inspection and no guideline as to what an inspection of a brake line should entail. Consequently, there is no waiver to sovereign immunity.

Center for a Sustainable Coast, Inc. v. Georgia Department of Natural Resources

Supreme Court of Georgia
February 24, 2014, S13G0602

The case involves the issue of whether sovereign immunity bars injunctive relief at common law. The Supreme Court holds that it does and it specifically overrules *Intl. Bus. Machines Corp. v. Evans*, 265 Ga. 215 (1995). The Court declares the *Evans* case to be unsound because: the Constitution allows only the General Assembly to waive sovereign immunity; the Constitution does not provide for an exception to that exclusive authority; the *Evans* case mischaracterizes waiver of sovereign immunity as an exception; & the cases relied on in *Evans* either predate the incorporation of sovereign immunity into the Constitution or ignore the impact thereof. Applied to the present case, the plain language of the statute at issue, O.C.G.A. 12-5-230, provides no express or implied waiver so injunctive relief is barred either under the statute or common law. Relief lies against officers in their individual capacities, although qualified immunity may limit the availability of such relief.

Center for a Sustainable Coast, Inc. v. Georgia Department of Natural Resources

Georgia Court of Appeals
March 17, 2014; A12A1059

The case involves the issue of whether sovereign immunity bars injunctive relief at common law. The Court of Appeals conformed its opinion in accordance with the holding of the Supreme Court.

Bartow County v. Southern Development III LP

Georgia Court of Appeals
March 3, 2014; A13A2068; A13A2069

This case involves sovereign immunity in the context of excess proceeds of a tax sale. The LP conveyed a parcel to a purchaser. A warranty deed and security deed were filed in 2004. A default ensued and the LP foreclosed in 2009 but did not record the deed under power of sale until 2011. In 2009, the tax commissioner sent notices of a tax levy on that same property to all interested persons, including the LP. The tax commissioner received a signed receipt. A tax sale was held and excess proceeds resulted. In early 2010, the tax commissioner sent notice of the proceeds to parties including the LP. In mid-2010, the former owner sought and received the excess proceeds. In 2011, the LP sent an anti-litem notice to the county demanding the funds. The county answered asserting sovereign immunity and moved for summary judgment. The trial court denied the motion. On appeal, the Court of Appeals reversed. There had been no waiver of sovereign immunity under O.C.G.A. 36-1-4. In addition, sovereign immunity is not an affirmative defense that must be established by the party seeking its protection. Rather, the waiver must be established by the party seeking to benefit from the waiver. Thus the LP had the burden of proof which it failed to carry.

City of Atlanta v. Shavers

Georgia Court of Appeals
March 11, 2014; A13A1949

This case involves a question of qualified immunity arising from an alleged false imprisonment and malicious prosecution. A police officer arrested a suspect for felony larceny even after reviewing security camera video showing the suspect did not take anything. Further evidence showed a statement had been made that the officer was going make the charges "stick no matter what." The charges were ultimately dismissed and the alleged suspect sued the officer. The trial court held that qualified immunity did not protect the officer. The Court of Appeals affirmed. Public agents are immune from liability for discretionary acts unless done with malice or intent to injure. In this context, a showing of actual malice requires a deliberate intention to do wrong, and denotes express malice or malice in fact. The officer knew that the suspect did not steal prior to the arrest being made. This would allow a jury to infer reasonably that the arrest proceeded with knowledge that there was no probable cause which would establish deliberate intention to do a wrongful act.

Diamond v. Department of Transportation

Georgia Court of Appeals
March 13, 2014; A13A1741; A13A1742

This case involves a question of sovereign immunity and duty of care arising from injuries sustained when plaintiffs drove through a construction area and plunged into a ditch. The Court of Appeals disagreed with the trial court on the sovereign immunity question. Nothing in O.C.G.A. 50-21-24 states that the waiver of immunity under one subsection works to waive immunity under all other subsections in a given case. On the duty of care issue, the Court noted that the plaintiffs point to no statute or case law that establishes a duty owed by DOT in the circumstances of this case. Whether such a duty is owed is a question of law, not of fact, and nothing establishes a basis for imposing a duty on DOT to erect signs or take other steps to inform drivers of the closure of a county-owned road.

Roberson v. McIntosh County School District

Georgia Court of Appeals
March 14, 2014; A13A2280

This case involves the question of official immunity. A school district employee who was covered under a group life insurance policy became ill and was hospitalized. The employee's spouse spoke with the district's payroll and benefit manager. The district had no specific policy or procedure specifying how the manager was to assist employees with retirement or insurance planning. The spouse presented an executed power of attorney to handle her husband's affairs. A discussion ensued regarding converting the group life insurance policy to an individual policy as part of the retirement package. The conversion did not occur correctly, and the employee died with no life insurance. The spouse sued on the basis that district negligence caused her to lose out on the insurance benefit. The trial court granted summary judgment on the basis of immunity. The Court of Appeals upheld the trial court. The Court restated the doctrine of official or qualified immunity as protecting public officials or employees for discretionary actions within the scope of their duties if done without willfulness, malice, or corruption. Liability holds only for ministerial acts negligently performed or acts performed with malice or intent to injure. Ministerial acts are simple and definite and require the mere execution of a specific duty. Discretionary acts call for personal deliberation and judgment. The Court noted it had often held that an action is ministerial only if a county creates a policy requiring certain actions under certain circumstances. Here, there was no written policy. The employee performed a discretionary duty and did so without willfulness, malice, or corruption.

Ratliff v. McDonald

Georgia Court of Appeals
March 18, 2014; A13A1906

This case involves the questions of sovereign immunity, official immunity, and premises liability. (There is a lengthy fact situation involved and the interested reader should consult the text of the case.) Some individuals suffered personal injuries while attempting to pick up someone being released from a detention center. A lawsuit followed against the sheriff and several deputies. Summary judgment was granted to the sheriff and deputies and affirmed on the basis of sovereign immunity. On an additional claim against the deputies for failure to protect from the assault, the Court of Appeals implied that it would have found them immune on the basis of official or qualified immunity if they had asserted it. Since

they did not, the Court went through a lengthy premises liability analysis and ultimately upheld the trial court's grant of summary judgment to the deputies since the plaintiff failed to establish "superior knowledge", which is the sine qua non of a premises liability claim.

Battlefield Investments, Inc. v. City of LaFayette

Georgia Court of Appeals
March 20, 2014; A13A2466

This case involves questions of sovereign immunity and negligence arising from damages sustained to property when a city sewer system backed up and overflowed. The trial court granted summary judgment to the city without indicating whether the basis was sovereign immunity or the lack of negligence. The Court of Appeals upheld with trial court. The Court did not address the sovereign immunity issue because there was no genuine issue of material fact as to negligence and it affirmed on that basis only. The evidence showed the overflow resulted from "historic flooding" and that there had been no such incidents prior to or after that flooding on the plaintiff's property and that no other property suffered an overflow. The plaintiff attempted to rely on res ipsa loquitor. However, that was not authorized here since the flood conditions were not under the exclusive control of the city and the plaintiff failed to install a valve which would have prevented the overflow. Finally, the trial court correctly denied a motion to recuse since it had not been timely filed.

Jackson v. Payne

Georgia Court of Appeals
March 26, 2014; A13A1921

This case involves questions of official immunity arising from the execution of a *fi. fa*. by deputy sheriffs. The trial court denied summary judgment to the sheriff as well as the deputies. The Court of Appeals upheld in part and reversed in part the trial court. The Court stated that official immunity did not allow a law enforcement officer to detain or take a judgment creditor into custody in executing a *fi. fa*. absent exigent circumstances or probable cause that crime had been committed. Thus, a question of fact remained as to whether the deputies acted with actual malice or outside the scope of their authority. As to the sheriff, no evidence was presented that such officer acted with malice or deliberate indifference to a known risk of harm with regard to the supervision and training of his deputies, so official immunity should have resulted in summary judgment.

Eshleman v. Key

Georgia Court of Appeals
March 28, 2014; A13A1671

This case involves questions of official immunity arising from a dog bite. A police 'suspect apprehension' canine escaped from an enclosure and bit a child. The trial court denied summary judgment to the police officer who was the canine handler. The Court of Appeals affirmed. The Court stated that the allegation

was a violation of O.C.G.A. 51-2-7 by failing to properly restrain a vicious animal. Because the dog was a police canine specially trained to apprehend criminals, there was some evidence that the animal has a propensity to do the act which caused the injury and that the defendant officer knew of it. Where the relevant facts pertaining to official immunity are in dispute, resolution of the factual issues is for the jury.

Greenway v. Northside Hospital, Inc.

Georgia Court of Appeals
May 27, 2014; A12A0705

In *Roper v. Greenway*, 294 Ga. 112 (2013), the Supreme Court reversed part of the Court of Appeals decision in *Greenway v. Northside Hospital, Inc.*, 317 Ga. App. 371 (2012). Thus, the Court of Appeals vacates that portion of its previous judgment and adopts the Supreme Court opinion as its own. The Supreme Court also directed the Court of Appeals to consider whether the deputy acted with malice or intent to injure. The Court of Appeals concluded that there was sufficient evidence for a jury to conclude an intent to harm and reversed the trial court's grant of summary judgment.

Marshall v. McIntosh County

Georgia Court of Appeals
May 30, 2014; A14A0639; A14A0640

The case involves the issues of sovereign and official immunity in the context of a wrongful death action. The plaintiff's late husband began experiencing chest pains and called 9-1-1. The operator communicated the aid request to the director of the 9-1-1 system who allegedly refused to send aid and directed EMT's not to respond. The trial court granted summary judgment to the county on the basis of sovereign immunity and to the director on the basis of official immunity. On appeal, the Court of Appeals upheld dismissal on the basis of sovereign immunity but reversed on the basis of official immunity. The Court cited the *Hendon* case and noted that O.C.G.A. 46-5-131(a) does not meet the strict criteria for a statutory waiver of sovereign immunity except in cases of wanton and willful misconduct or bad faith. Thus dismissal for sovereign immunity as to the county and to the director in the director's official capacity was correct. However, the director was also sued in an individual capacity. At such an early stage of the case it could not be determined whether the director duties were discretionary rather than ministerial and whether the claim supported actual malice. Such a determination is highly fact specific. In addition, O.C.G.A. 46-5-131(a) does provide liability for a county official in the case of wanton and willful misconduct or bad faith.

Georgia Department of Corrections v. Couch

Supreme Court of Georgia
June 16, 2014; S13G1555

The Court of Appeals decision was reported previously in Counties & the Law 2013 Compilation Edition, p. 23. The Supreme Court decision below is extremely long & detailed and the interested reader is urged to consult the entire text of the opinion.

This case involves the question of whether the GA Tort Claims Act expressly waives sovereign immunity when a settlement offer is rejected. A prisoner was injured while on a work detail at the warden's house. After filing suit, his settlement offer was rejected and he then prevailed at trial. The trial court found that the state had waived sovereign immunity with respect to the claim for attorneys' fees under O.C.G.A. 9-11-68. The Court of Appeals agreed and upheld the trial court. The Court of Appeals noted that the statute does not provide an independent cause of action, but, merely establishes circumstances in the event of the rejection of an offer of settlement under which attorney fees are to be paid. Thus the claim that the fees are barred by sovereign immunity is rejected. The Supreme Court granted certiorari. Citing *Fru-Con* and other cases, the Court held that an award of attorney fees under O.C.G.A. 9-11-68(b) does not come within the GA Tort Claims Act definition of a tort 'claim' because expended fees are not a 'loss'. Further, that subsection (b) does not create an independent tort or other cause of action. Instead, the attorney fees awarded under the offer-of-settlement statute are wholly dependent on the parties' conduct during the underlying tort action and may be sought only in connection with such an action. This leads to the conclusion that sovereign immunity is waived for such awards. However, while the General Assembly waived sovereign immunity for tort actions under the GA Tort Claims Act, this does not mean that state defendants and their lawyers are free to violate the rules of civil litigation and sabotage the just, speedy, and, inexpensive determination of such actions. Having waiver sovereign immunity under the GA Tort Claims Act, it was not necessary that a separate, explicit immunity waiver be provided for every step of the resulting litigation which might require the state to pay money or expend resources. Consequently, the Court of Appeals holding that sovereign immunity did not bar an award of attorney fees and litigation costs is affirmed, but under a different rationale. The case was remanded back to the trial court for recalculation of the attorney fee award for the reasonable value of the professional legal services actually provided during the period from the date of the rejection of the settlement offer through the entry of judgment.

Fulton County v. Colon

Georgia Court of Appeals
July 7, 2014; A12A0592; A12A0530

This case involves immunity in the context of whistleblower protection under O.C.G.A. 45-1-4. The Supreme Court had affirmed the Court of Appeals decision in this case as it relates to the express waiver of sovereign immunity created by O.C.G.A. 45-1-4, but reversed the Court of Appeals as to the interpretation of the statute provisions. Here, the Court of Appeals vacates its previous decision in this case and adopts the judgment of the Supreme Court as its own. Consequently, the judgment of the trial court denying the county's motion to dismiss for lack of subject matter jurisdiction on the basis of sovereign immunity is affirmed.

Davis v. Effingham County Board of Commissioners

Georgia Court of Appeals
July 23, 2014; A14A0292

This case involves issues of nuisance, negligence and sovereign and official immunity. The plaintiffs sued the county for damages they allegedly suffered after their truck struck a pothole on a county road. The trial court ruled in favor of the county and held that no nuisance claim had been stated and that the suit against the county and the sheriff and deputy in their official capacities was barred by sovereign immunity and the negligence claim against the sheriff and deputy in their individual capacities was barred by official immunity. On appeal, the Court of Appeals affirmed. First, sovereign immunity clearly bars any action for personal injury or wrongful death against a county arising from nuisance or inverse condemnation. A single, isolated instance of a pothole does not amount to either a nuisance or inverse condemnation. Second, official (or qualified) immunity offers protection to public officials in suits in their individual capacities for discretionary action taken within the scope of official authority and done without willfulness, malice, or corruption. Here a written policy required the deputy to exercise discretion in determining if the pothole constituted a road defect. He determined that since the pothole was outside the fog line, not in the lane of travel, and hence not a road hazard. In other words, the shoulder area is not considered part of the roadway ordinarily used for vehicle traffic.

Lagroon v. Lawson

Georgia Court of Appeals
August 6, 2014; A14A0100

This case involves the issues false imprisonment, false arrest, and malicious prosecution. Two adults, Lagroon and Barnett, were inadvertently present at the home of a third adult, Rhodes, were a party took place and minors were consuming alcohol. Lagroon and Barnett were charged with contributing to the delinquency of minors. They argued that there was no probable cause but that they were arrested and prosecuted due to the friendship of the sheriff and deputies with Barnett's estranged husband and the estranged ex-husband of Rhodes. The state eventually obtained a nolle prosequi dismissing the charges. The Court of Appeals found that malicious prosecution was the exclusive remedy available to Lagroon and Barnett (and, hence affirmed summary judgment to the sheriff an deputies on false imprisonment and false arrest). However, the Court reversed the grant of summary judgment to the sheriff and deputies on the malicious prosecution claim because there were genuine issues of material fact as to whether they were entitled to official immunity, whether they honestly and reasonably believed there was probable cause, and whether they acted with malice. *{This is made clear only by reading the amazing, but convoluted, fact situation.}*

Liberty County School District v. Halliburton

Georgia Court of Appeals
August 21, 2014; A14A0333

This case involves the issues of racial discrimination and sovereign and qualified immunity. A school principal sued the county school district, the superintendent, and the members of the board of education alleging the nonrenewal of her contract was an act of racial discrimination. The Court of Appeals found that the trial court should have granted the motion to dismiss the school district, the superintendent, and the board members in their official capacities on the basis of sovereign immunity. The superintendent and the board members, in their individual capacities, however, were not entitled to a motion to dismiss on

the basis of qualified immunity. Since no discovery has yet been completed in the case, it cannot be said that the principal would not be entitled to relief under any state of provable facts in support of the claim that the individuals acted with actual malice.

City of Hapeville v. Grady Memorial Hospital Corporation

Georgia Court of Appeals
August 18, 2014; A14A0724

This case involves the issues of sovereign immunity and the failure to pay for medical services rendered to inmates in the custody of city. A hospital sued the city seeking payment for treatment of four prisoners transported by the city to the hospital. The Court of Appeals found that the trial court correctly determined that O.C.G.A. 42-5-2(a) waived sovereign immunity. Interestingly, the Court works around the seeming limitation of the *Center for a Sustainable Coast* case and states that express waiver words are not necessarily required and that an express statutory waiver can occur if a statute creates a right of action against the state which can result in a money judgment and the state would otherwise have enjoyed sovereign immunity. Otherwise, the legislative act would have no meaning. The wording of the statute in this case meets this test. Since municipal sovereign immunity is provided in O.C.G.A. 36-33-1, *et seq*., the court notes the waiver under O.C.G.A. 42-5-2 also includes municipalities because O.C.G.A. 42-5-2(b) covers inmates to whom O.C.G.A. 42-4-1, *et seq*. applies, thereby including inmates held by cities.

City of Atlanta v. McCrary

Georgia Court of Appeals
August 25, 2014; A14A0602; A14A0691

This case involves the issues of sovereign immunity and maintenance of a nuisance. Police officers on patrol noted an improper tag and turned on their lights and siren. The vehicle driver accelerated away rather than stopping. The officers determined that they did not have legal basis under the city high-speed chase policy to continue pursuit. The other speeding vehicle, however, was involved in a head-on collision and a fatality resulted. The estate of the deceased sued the city and the officers claiming negligence and that the city maintained a nuisance that endangered the public by failing to enforce its pursuit policy. The trial court granted summary judgment to the officer under sovereign immunity but declined to limit the city's waiver of sovereign immunity to the amount of the insurance policy. The Court of Appeals found that the trial court erred by not granting summary judgment to the city. Police pursuit is inherently dangerous, but to constitute a nuisance requires a showing that such acts are continuous or regularly repetitious acts which could work damage to anyone in proximity to police cars. Evidence that other collisions involving city police cars occurred is not evidence of improper training. Nuisance can only be shown by evidence of the city's specific failure or negligence which resulted in the collisions.

City of Atlanta v. Demita

Georgia Court of Appeals
September 10, 2014; A14A1216

This case involves the issues of municipal sovereign immunity and maintenance of a nuisance. A homeowner sued the city for damages to her home allegedly caused by the negligent construction or maintenance of a storm water drainage system. A jury found in favor of the homeowner. The Court of Appeals restated the general principles of statutory municipal sovereign immunity noting that cities have sovereign immunity against negligent performance of or failing to perform governmental functions. However, while cities are immune from negligence in failing to protect property owners from water incursion, they cannot, under the guise of performing a governmental function, create or maintain a nuisance or take property without just compensation. Even in the absence of a waiver to sovereign immunity, the maintenance of a continual, abatable nuisance such as repeated flooding from negligent construction or maintenance of a sewer may create liability. This liability is triggered by a continuous or repetitious act or condition which causes injury and of which the city has knowledge and which it fails to rectify. Here, there was no evidence that the city negligently constructed or maintained a sewer or drainage system. The Court was unwilling to accept the homeowner's assertion that mere maintenance of a street off of which water flows constitutes a sewer or drainage system. Consequently, the trial court erred.

Georgia Department of Corrections v. Developers Surety & Indemnity Co.

Supreme Court of Georgia
September 22, 2014; S14G0360

{This Court of Appeals decision in this case was reported in Counties & the Law 2013 Compilation Edition, page 25.}

This case involves a dispute over a construction contract between GDOC and a roofing company. The contract was for reroofing certain prison buildings. After a 2 year delay in completion, GDOC declared the contract in default and sought payment under the performance bonds. The bond company brought suit alleging breach of contract by GDOC. GDOC argued that the waiver of sovereign immunity for breach of contract did not apply since the bonding company was not a party to the contract. The trial court granted summary judgment to the bond company. On appeal, the Court of Appeals affirmed. Under the doctrine of equitable subrogation, the surety here is able to step into the shoes of the contracting party. The Court goes through a lengthy analysis which ends with an examination of Art. I, Sec. II, Para. IX(c) of the Constitution. The defense of sovereign immunity is waived as to any action ex contractu. This plain language does not limit the waiver to particular claimants. In a unanimous decision, the Supreme Court affirmed, and noted that simply, there is a waiver of the state's sovereign immunity in this case of a claim asserted by a surety on a contract with the state.

Gonzalez v. Georgia Department of Transportation

Georgia Court of Appeals
October 22, 2014; A14A1203

A car passenger was injured in a wreck allegedly caused by too much standing water on a state highway. DOT filed two motions. First, a motion to dismiss under sovereign immunity and, second, a motion for summary judgment based on lack of evidence. The trial court granted summary judgment to DOT. On appeal, the Court of Appeals reversed the trial court. The issue of whether DOT is entitled to sovereign

immunity is a threshold issue that the trial court is required to address before reaching the merits of any other argument. If DOT is entitled to sovereign immunity, then the trial court lacks subject matter jurisdiction to try the negligence claims. The case was remanded back so the trial court could make this threshold determination.

DeKalb County v. Kirkland

Georgia Court of Appeals
October 30, 2014; A14A0784

This case involves a dispute between county employees and the county regarding payment for unused compensatory time. {There is a lengthy fact situation and interested readers are directed to the full text of the opinion.) The trial court denied summary judgment to the county. On appeal, the Court of Appeals reversed the trial court. The plaintiffs, after being promoted to the rank of captain, were not entitled to use compensatory time accrued more than a year earlier and are not entitled to recover payment for their unused compensatory time. The county code is unambiguous on these points and there was no written contract that promised the plaintiffs compensation for accrued time. Additionally, plaintiffs failed to demonstrate that they were misclassified as overtime-exempt employees under the federal Fair Labor Standards Act. Consequently, sovereign immunity was not waived.

Department of Transportation v. Jarvie

Georgia Court of Appeals
December 11, 2014; A14A0887

A car passenger died in a car wreck with a construction vehicle doing work for a general contractor for the DOT. Plaintiffs allege the DOT negligently designed, constructed, and maintained the access point where the truck entered the highway. The Court of Appeals reversed the trial court's denial of summary judgment to the DOT. Although sovereign immunity is waived under the tort claims act, O.C.G.A. 50-21-24(9) provides an exception applicable to this case. The state has no liability regarding the approval of the stockpile plan for location of the rocks which the dump truck was unloading.

JUDICIAL SALARIES

Heiskell v. Roberts

Supreme Court of Georgia
October 6, 2014; S14A0779

This case involves a dispute under Article VI, Section VII, Paragraph V of the 1983 Constitution regarding judicial salaries. A state court judge retired from office after 26 years of service. The vacancy was filled via gubernatorial appointment. The former judge was making over $172,000.00 per year. Prior to taking office in 2011, the newly appointed judge agreed to a salary of $100,000.00. That state court judge was defeated at the 2012 nonpartisan general election. The state court judge filed a mandamus against the sole commissioner of Walker County seeking to recover the difference between his salary and the salary the former judge had been receiving alleging that Art. VI, Sec. VII, Para. V did not permit the county to decrease the salary. The trial court granted the mandamus claim. On appeal, the Supreme Court reversed. The view of the trial court was that the appointee was serving the remainder of the unexpired term of the former judge. Under the Constitution of 1983 appointees to fill vacancies on appellate, superior, and state courts follow a different "scheme". Paragraph III of Art. VI, Sec. VII requires that vacancies be filled by appointment of the Governor, but, Paragraph IV then says that an appointee "shall serve until a successor is duly elected and qualified and until January 1 of the year following the next general election which is more than six months after such person's appointment." The Supreme Court stated that the effect of these provisions "is to create an entirely new and shortened initial term of office for the appointed judge." Citing the *Palmour* and *City of Villa Rica* cases, the Court further distinguishes appellate, superior, and state court appointees from other public offices and from other judicial appointees noting that they do not serve out the "unexpired term" of their predecessors. The clear intent of the Constitution is further found in amendments to O.C.G.A. 15-10-20(e) which refer specifically to Paragraphs III and IV and do not contain any language regarding 'unexpired terms'. Consequently, the appointed state court judge in this case was not serving the remainder of his predecessor's unexpired term but was serving his own 15 month term of office and there was no violation of Paragraph V because he received a lower salary. *{The case also deals with questions regarding judicial immunity and attorney's fees and the interested reader is directed to the full text of the case for those matters.}*

LAW ENFORCEMENT

Mecure v. City of Atlanta

Georgia Court of Appeals
July 22, 2014; A14A0501

A police officer was suspended for violating city police department work rules prohibiting choke holds not taught or approved by the department. That decision was appealed to the civil service board and then to superior court and upheld in both instances. On appeal, the Court of Appeals affirmed. The Court noted the well-established principle that administrative board decisions will be upheld if there is any evidence to support the ruling. Here, the suspect was handcuffed and not resisting the officer. Further, the officer admitted he used a choked hold learned during military service and not one taught or approved by the department. Finally, O.C.G.A. 17-4-20(d), which prohibits the adoption of rules which prohibit an officer from using necessary force to apprehend a suspected felon, was inapplicable. First, the officer had already apprehended the suspected felon. Second, the rule only prohibits certain chokeholds but allowed those approved or taught by the department.

Graham v. City of Duluth

Georgia Court of Appeals
July 23, 2014; A14A0152

This case involves the issues of whether a city was liable on the basis of respondeat superior, negligent hiring and retention, or vicarious liability. *{A complete understanding of the case will require the reader to consult the case text for the lengthy set of facts.}* An off duty police officer who was intoxicated attacked and injured the plaintiff as well as another officer. The trail court granted summary judgment to the city. On appeal, the Court of Appeals reversed in part. On the issue of respondeat superior, the Court cited the *Clark* and *Palladino* cases as the basis for the two necessary elements to hold the city liable. First, the servant must be in furtherance of the master's business, and second, the servant must be acting in the scope of that business. Here, summary judgment was appropriate as the officer was not only intoxicated but was engaged in criminal conduct that was antithetic to his law enforcement duties. On the issue of negligent hiring and retention, a jury question exists as to whether the city exercised ordinary care due a prior incident that would have become known if the city had contacted a prior employer or examined the personnel file. On the issue of vicarious liability, a jury question exists as the officer's propensity to get extremely intoxicated, brandish his service weapon before innocent bystanders, and become belligerent and irrational when questioned or contradicted. This would make the officer unsuitable to be placed in a position where he would be issued weapons, including pepper spray, which he used in his attack on the plaintiff. In these circumstances, a jury must decide if the attack on the plaintiff was "wholly unrelated" to his employment as a police officer. He told the plaintiff he was an officer, he put on his vest and radio, showed her his badge, and instructed her to summon help, then became enraged when she did as he instructed and attacked her with his department issued pepper spray before shooting a fellow officer.

LOCAL GOVERNMENT ATTORNEYS' FEES

City of Stockbridge v. Stuart

Georgia Court of Appeals
November 3, 2014; A14A0873

This case involves a dispute between a mayor and the city council regarding the hiring and termination of a city administrator under a contract. The trial court granted attorney fees to the mayor because the mayor was acting in his official capacity and was required to hire outside counsel to assert a legal position which the city attorney could not assert of his behalf. On appeal, the Court of Appeals affirmed. The Court examined closely the powers and duties of the officials as set forth in the city charter, and, following the *Bosworth* case, held that the trial judge did not abuse discretion in awarding the fees. *{This case bears careful reading by county attorneys for its excellent analysis of hiring and firing under a contract as*

well as duty of representation in the case of conflicts between a commission chair and the remainder of the board.}

MANDAMUS

Burke County v. Askin

Supreme Court of Georgia
March 3, 2014; S13A1316

This case is round 2 of a lengthy dispute which involves a writ of mandamus regarding the obligation to maintain roads dedicated to the county. In *Burke County I*, 291 Ga. 697 (2012), the roads in question were dedicated by deed to the county and the county adopted a resolution to 'cut or build roads' in the subdivision. At some point, some roads were constructed as unpaved roads; however, the facts did not establish who constructed the roads. A subsequent purchaser of property attempted to get the county to repair and maintain the roads and sought and was granted mandamus by the trial court for some of the roads. The county appealed contending that the trial court had granted mandamus by failing to apply the correct standard, *i.e.* that the decision not to construct the entire road was arbitrary, capricious, and unreasonable, or a gross abuse of discretion. The Supreme Court remanded the case with instructions to consider the ruling under the proper standard. The trial court again issued a mandamus requiring the county to complete a particular road. On appeal, the Supreme Court upheld the mandamus. First, the decision of whether to open the unfinished section of one of the roads was a discretionary act to which mandamus applies. Second, the trial court did not manifestly abuse its discretion in granting mandamus. The only evidence given by the county actually supports the trial court's conclusion that the decision to not finish the particular road had an adverse effect upon the owners' ability to access their property. This is in contrast to the county's decision to not construct some other dedicated roads inside a subdivision as they were not necessary for access.

NEGLIGENCE

Askew v. Rogers

Georgia Court of Appeals
March 6, 2014; A13A1757

This case involves a dog bite and injuries sustained in attempting to flee the dog. Partial summary judgment was granted to the injured party on the issue of negligence when the trial court found that the

dog was carelessly managed under O.C.G.A. 51-2-7. On appeal, the Court of Appeals reversed and remanded the case back for trial. While the animal was unrestrained in violation of a county ordinance (leash law), there was an issue of material fact as to whether the owner was careless in their management at the time of the incident. The dog had been placed in a cage prior to the incident and it was unclear how it got out.

ORDINANCES

Sweeney v. Lowe

Georgia Court of Appeals
March 3, 2014; A13A2291

{This is a very short decision that does not involve directly a county. It stands for the proposition that one must always pay attention to details.}

The case involves a dog bite. The trial court granted summary judgment to the dog owner on the basis that the plaintiff failed to properly plead and prove the county ordinance which the plaintiff asserted the dog owner had violated. The Court of Appeals affirmed. The Court noted that it is well established law that in order for a court to consider a city or county ordinance, it must be alleged and proved by either producing the original or a certified copy (of which the court may take judicial notice). Here, the record does not contain either the original or a certified copy. Further, the plaintiff's summary judgment brief does not refer to any county ordinance let alone the one referred to in the defendant's brief (a city ordinance was referred to by the plaintiff). This is not even a case where the ordinance relied upon was set forth verbatim in the complaint or an uncertified copy was attached to pleadings. It is a case where the parties do not even agree upon which local ordinance is relevant. Since the record does not contain "proper proof" of the ordinance, the Court cannot consider the ordinance.

POWERS OF A MAYOR OR COUNTY COMMISSION CHAIR

Kautz v. Powell

Georgia Court of Appeals
March 19, 2014; A13A1963

This very short case has very broad ramifications regarding the exercise of hiring and firing powers. A city charter expressly authorized the mayor to hire the city attorney. (The provision did not state an employment duration or that the appointee was to 'serve at the pleasure of'). The charter was silent on who could exercise termination powers. The Court of Appeals (in a 4-3 decision) affirmed the trial court holding that since there was no express termination authority in the charter, but, that the charter did state that the city council was vested with all powers of government not otherwise provided for, then the city council, and *not the mayor*, had the power to fire the city attorney. The power to terminate could not be implied. The Court stated that it "was neither necessary nor allowable for a court to construe the unambiguous provisions of the charter as implicitly giving the mayor" the authority to fire. A strongly worded dissent, citing the *United Healthcare of Georgia*, *Bailey*, *Wright,* and *Clark* cases noted that long standing Georgia law held that a governmental official or agency that was granted the power to hire an officer for an indefinite term necessarily possessed the power to remove that officer. The dissent noted further that statutory construction "must square with common sense and reasoning, and a statute should not be interpreted in a manner that would lead to an absurd result."

PREJUDGMENT INTEREST

Gwinnett County v. Old Peachtree Partners, LLC

Georgia Court of Appeals
November 6, 2014; A14A1173

The conclusion to protracted litigation on a land dispute between the parties involving condemnation was attempted through a settlement agreement. The trial court initially found the agreement unenforceable, but the Court of Appeals reversed and held the county was bound by the agreement. On remand, the trial court awarded prejudgment interest and ruled the LLC was entitled to a trial on a claim for incidental damages. On appeal, the Court of Appeals upheld the trial court. The Court followed a lengthy analysis of O.C.G.A. 7-4-15 and relevant case law to reach its conclusion and the interested reader is directed to the text of the entire opinion.

PROBATION

Sentinel Offender Services v. Glover

Supreme Court of Georgia
November 26, 2014; (See case for listing of the 32 appeals and cross appeals)

{This case is very long and very detailed and does not lend itself to a summary. Interested readers should consult the text of the entire opinion.}

Sentinel Offender Services LLC v. Glover

Supreme Court of Georgia
December 22, 2014; (See case for listing of the 32 appeals and cross appeals)

{This case is 13 pages long and does not lend itself to a summary. Interested readers should consult the text of the entire opinion. This rendition contains slight revisions to the previously published opinion}

These cases present a multitude of constitutional and statutory issues arising from the use of private probation companies by Georgia courts to provide misdemeanor probation supervision services. Some of the challenges include: O.C.G.A. 42-8-110 (g)(1), the private probation statute, is unconstitutional; O.C.G.A. 42-8-30.1 precludes tolling of misdemeanor probation sentences and restricts imposition of conditions; private companies cannot provide probation services; and collection of supervision fees is unlawful. The Supreme Court remanded back to the trial courts with instructions to address justifiability questions including standing, ripeness, and mootness. The Court agreed with the trial court that most of the alleged injuries were not a consequence of privatized probation services per se, but rather result from wrongful acts allegedly committed by employees of the private company. The Court did not rule on the issue of the constitutionality of the private probation statute as applied because the trial court did not distinctly rule itself upon the issue. The Court agreed that the statute did not unconstitutionally condone imprisonment for debt. The Court also agreed that the private probation statute does not allow for the tolling of misdemeanor probation sentences. The Court reversed the trial court on the matter of electronic monitoring and held that it is not a prohibited condition in misdemeanor cases. The Court made several holdings regarding the validity and invalidity of the probation services contracts and the issues of fees.

ROADS

Burke County v. Askin

Georgia Court of Appeals
March 28, 2014; A13A1909

This case involves a dispute over road abandonment. The county adopted a resolution abandoning its interest in 5 roads pursuant to O.C.G.A. 32-7-2. The trial court ruled that 3 of the roads should not be abandoned. The Court of Appeals reversed. The superior court cannot substitute its judgment for that of

the board of commissioners as to the weight of the evidence on factual findings in the abandonment determination. Economic factors are proper considerations, even to the extent of relieving the public from the charge of maintaining a road that is no longer useful. The county did not abuse its discretion and had a rational basis for its determination that the roads served no substantial public purpose.

City of Atlanta v. Kovalcik

Georgia Court of Appeals
December 2, 2014; A14A0768

A car passenger died in a nighttime car wreck at a newly configured intersection in rainy conditions where 8 of 10 street lights were out. The Court of Appeals upheld the trial court's denial of summary judgment to the city. Generally, the mere absence of ordinary street lights will not constitute negligence and render a city liable if a city has performed its duty to keep streets safe and free form defect. This case, however, presents peculiar factual circumstances. The intersection was redesigned with an unusual left turn configuration. Eight of ten street lights were out. Many other drivers had damaged the curb area at that same location. Visibility was poor. The city played a role in designing and constructing and knew or should have known that the lighting was not yet operational. Under these circumstances, the absence of lighting could be considered as evidence on the issue of maintaining safe conditions.

STORMWATER MANAGEMENT

Polo Golf & Country Homeowners' Association, Inc. v. Rymer

Supreme Court of Georgia
January 21, 2014; S13A1635; S13A1636

This case involves a question of responsibility for repair of stormwater facilities. The fact situation requires one to patiently follow the bouncing ball: 1) the stormwater facilities (SWF) are beneath lots in a residential subdivision built in the 1980's; 2) the SWF were not expressly dedicated to the county; 3) the county disclaimed ownership of any SWF that do not lie under county streets; 4) the subdivision has a mandatory homeowners' association (HOA); 5) the HOA does not own the SWF; 6) HOA covenants require each homeowner to repair structures on their property including SWF; 7) the county enacted a stormwater ordinance in 1996; 8) the ordinance was amended in 2004 to require an HOA to take responsibility for SWF on their property. It is within this context the story unfolds. The owners of a home in the subdivision suffered damages due to recurrent flooding of their property. They demanded that the HOA and the county take action to fix the SWF. The HOA notified the owners that it had given notice to the county that neither the owner nor the HOA should be held responsible for the repairs. Later, the HOA notified the owners that it would be selecting a contractor and it would be paying for the repairs. Repairs however, never ensued. Subsequent flooding occurred, and the owners brought suit against the HOA and

the county. At this point, SWF pipes failed completely and flooding and sinkholes occurred in the subdivision. The county sought to have the HOA repair the damage under the ordinance. The HOA sought a declaratory judgment that the ordinance impaired contracts. The trial court granted summary judgment to the county and found the ordinance enforceable against the HOA. On appeal, the Supreme Court began its analysis by looking at the covenants. When the HOA was first notified of the matter, it took the position that neither it, nor, the owners were responsible and it asserted the county was responsible. Further, the HOA promised to repair its expense. The owner's reliance upon these assertions and promises was reasonable. Hence the trial court was correct in denying summary judgment to the HOA. The Court continued by analyzing the ordinance. By its own terms, the ordinance does not apply to the HOA in this case because it states that it applies only to new developments and redevelopments and not to pre-existing developments like the HOA. Hence, the trial court was wrong to deny summary judgment to the HOA and to grant it to the county.

SUPPLEMENTARY POWERS

Fulton County v. City of Sandy Springs

Supreme Court of Georgia
March 28, 2014; S14A0114

(This case summary is much longer than normal. The opinion is a noteworthy reminder that what seems self-evident, often isn't.)

This case involves an issue of the supplementary powers provision of the Constitution in the context of an easement. During 1976, homeowners in the unincorporated area of the county threatened litigation with the county over drainage problems. As part of negotiations, the county agreed to construct 2 detention ponds and was granted 2 easements. These granted the right to construct and maintain the ponds as part of the public drainage system and the right of ingress and egress over the property. In 2005, this area ceased to be unincorporated and was included entirely within the corporate limits of a newly created city. Shortly thereafter, drainage problems began to occur. The homeowners sued the county and the trial court found the county still owned the easements and had a duty to repair the ponds in perpetuity.

The Court of Appeals affirmed in part. First, the Court rejected the county argument that the Supplementary Powers Provision prohibited it from providing storm water and sewage collection services inside the boundaries of a city in the absence of an intergovernmental contract. The Court's reasoning, with no citation of authority, was merely that the county was not being required to provide an ongoing storm water and sewage collection system. The Court cited the *Tinsley Mill Village* case for the proposition that the county had a duty to repair as long as it held the easements. Once the county transferred the easements or prospectively abandoned them, then the duty would cease (thus the duty did not extend in perpetuity).

The vigorous dissent by Justice Benham takes the majority opinion apart piece by piece. First, the county is directly prohibited from maintaining the pond facilities within the clear meaning of the Supplementary Powers Provision. Second, the county is likewise expressly prohibited from performing sewage and drainage services within any city under a 1951 local constitutional amendment. Third, the factual findings show that no lawsuit was ever filed initially against the county by these homeowners. The county's actions were a voluntary undertaking and were not part of any enforceable agreement or settlement. Fourth, the majority opinion places the county squarely within a "Catch 22". It requires the county to retain responsibility for the easements and maintain the structures only until the easements are transferred or abandoned. This ignores the reality that the city disclaims the duty to repair and maintain the facilities. The county cannot unilaterally transfer the easements to the city since the city does not want them. Further, the county cannot ever prospectively abandon the easements if it has a duty to repair and maintain them. Fifth, the county is being required to maintain facilities and provide services that it is prohibited by law from providing. Sixth, the argument that the creation of the city did not terminate the easements, is correct, but it is not the issue under this case. Under the *Irvin* and *Owens Hardware* cases, an easement is to be construed pursuant to its plain language. These easements DO NOT require the county to construct or maintain ANY FACILITY AT ALL. They are permissive ONLY and do not require the grantee to use them. Seventh, the *Tinsley Mill Village* case has been misread. The county has not sued the landowner of the property to make repairs to its easements. Here the county is not using the easements, and, cannot constitutionally be required to use them. Eighth, no distinction has been made between potential liability for damages created by maintaining a nuisance on an easement and the duty to maintain services that a count cannot legally provide. Finally, the solution here is for the city to do one of several things. It could: acquire its own easements; accept assignment of the county easements; or, enter into an intergovernmental contract with the county.

TAXATION

Southern LNG Inc. v. MacGinnitie

Supreme Court of Georgia
March 3, 2014; S13A1486

This case is round 2 of a lengthy dispute over ad valorem taxes of an alleged utility. In *Southern I*, 290 Ga. 204 (2011), Southern sought status as a public utility so that tax returns would be filed with the state revenue commissioner. Initial dismissal on sovereign immunity grounds was reversed. On remand, summary judgment was granted to the state revenue commissioner on a mandamus claim on the ground that Southern had an adequate alternative remedy in the form of a tax appeal under O.C.G.A. 48-5-311 and that its claim that it is a public utility whose property should be returned to the state revenue commissioner instead of the country should be raised there. On appeal, the Supreme Court reversed. The Court noted that "the trial court's analysis was incomplete." Under the *Roach* case, to preclude mandamus, an alternative legal remedy must be 'equally convenient, complete, and beneficial to the petitioner'. In this litigation, the record contains little detail on the tax appeals. However, it is undisputed

that the state revenue commissioner is not a party to those actions. As a nonparty, the state revenue commissioner would not normally be bound by a ruling. Thus the current tax appeal appears not to provide Southern with an adequate alternative remedy. However, it is further unclear: 1) whether the state revenue commissioner could be made a party or otherwise be legally bound by the tax appeals; 2) whose burden it would be to do so; and 3) if there are procedural barriers or other features of the tax appeal process that would prevent Southern from obtaining a binding ruling. Since the parties have not briefed these issues and since the trial court did not address them, the case is remanded again for further proceedings.

Newton Timber Co. LLLP v. Monroe County Board of Tax Assessors

Supreme Court of Georgia
March 10, 2014; S13A1566

This case involves dual issues of mandamus and ad valorem tax appeals in superior court. Commencing in 2008, the LLLP filed annual tax appeals regarding thousands of acres in the county. For several of the years no filing fees were paid. In addition, in 2011, the LLLP sought CUVA treatment for 18 different parcels, but handwrote 2008 at the top of each application. One year later, the LLLP filed a mandamus action seeking to compel the BoA to approve or deny the CUVA applications and to compel them to certify the appeals to superior court. Following much procedural maneuvering, the trial court concluded that the LLLP was required to pay an amount required under O.C.G.A.9-15-4 (a) for each tax appeal (107 appeals had been filed but filing fees had been paid on only 27) as the consolidation feature of O.C.G.A 48-5-311 (e)(6) did not apply. The Supreme Court upheld the trial court and found that the BoA could not properly comply with the certification of the tax appeals to the superior court since the taxpayer had not paid the required filing fees. Further, the LLLP filed the CUVA applications in 2011 and they were granted going forward. Any attempt by the LLLP to make those applications effective for 2008 was clearly untimely on its part. Since the applications were approved going forward, there was no question of a denial or a refusal to act by the BoA.

SPH Glynn LLC v. Glynn County Board of Tax Assessors

Georgia Court of Appeals
March 13, 2014; A13A1752; A13A1753

This case involves a property tax appeal during the time the tax increase moratorium was in effect under O.C.G.A. 48-5B-1. Partial summary judgment was granted to the taxpayer on the issue of capped value under the statute but attorneys' fees were denied. On appeal, the Court of Appeals agreed on the issue of capped values and disagreed on the issue of attorneys' fees. Even though the cap issue was not raised during the administrative proceedings but first made an issue in superior court, it was allowable under a de novo review since the matter involved the determination as to value. The Court also held that the cap should apply even though a new parcel had been created out of a larger parcel since the legislative intent to provide a moratorium was clear. Finally, since the capped value was over 4 times lower than the value set by the board, attorneys' fees should have been allowed under O.C.G.A. 48-5-311(g)(4)(B).

Hansen v. DeKalb County Board of Tax Assessors

Supreme Court of Georgia
July 3, 2014; S14A0187

This case involves a dispute between a taxpayer and the county board of tax assessors (BOA). The taxpayers filed, pursuant to O.C.G.A 48-5-306 (d), a so-called Request for Information with the BOA seeking detailed information regarding 2012 appraisal and assessment. The BOA responded with information. The taxpayer was dissatisfied and requested more specific information. The BOA again provided information. This also did not satisfy the taxpayer who then requested in writing a meeting at which the taxpayer intended to record the proceedings. The BOA declined the meeting. The taxpayer then filed a complaint styled as a "Petition for Mandamus and/or Order and Judgment under O.C.G.A. 50-18-71" seeking an order to compel the BOA to comply. The trial court dismissed the petition finding it to be not cognizable under the Open Records Act or mandamus. The Supreme Court upheld the trial court. The Court noted that the Open Records Act does not apply to information sought under O.C.G.A. 48-5-306. In addition, mandamus is only authorized where the litigant seeks to compel a public official to perform an act or fulfill a duty required by law. Here, the BOA provided various documents as it was requested to do. That is all that was required under O.C.G.A. 48-5-306. That statute does not allow a dissatisfied taxpayer to demand supplemental responses in a recorded meeting. The Court stated that such demands "stray far beyond what the statute requires." Even further, the taxpayer failed to avail himself of the administrative remedy available under O.C.G.A. 48-5-311 prior to resorting to the courts.

Slivka v. Nelson

Georgia Court of Appeals
August 20, 2014; A14A0710

This case is noteworthy as it distinguishes between the ad valorem appeal process under O.C.G.A. 48-5-311 and the refund process under O.C.G.A. 48-5-380.

A property owner placed land under a conservation use covenant. In 2007, the owner conveyed the property to a limited liability investment corporation. The county notified the former owner and the LLC of the covenant breach. The former owner sent a letter to the county disputing the breach, but the LLC paid the penalty in full. In 2009, the former owner reacquired the property by foreclosing on the security deed on the property and in 2010 was approved for a conservation use covenant. In 2011, the county sent a delinquent tax notice to the owner for unpaid taxes for 2008-2010. The owner paid the overdue amount under protest. The owner sought a refund under O.C.G.A. 48-5-380. The trial court granted summary judgment to the county. On appeal, the Court of Appeals upheld the trial court. The Court began its analysis by distinguishing between a tax appeal under O.C.G.A. 48-5-311 and a refund procedure under O.C.G.A. 48-5-380 and noted that they are distinct remedies that serve different purposes. A tax appeal provides the most expeditious resolution of a taxpayer's dissatisfaction with an assessment, preferably before taxes are paid. In contrast, a refund action is a procedure to protect a taxpayer from later-discovered defects which result in taxes being erroneously or illegally assessed and collected. A refund procedure is available only to correct errors of fact or law that caused erroneous or illegal taxation and cannot be used to address a claim based upon mere dissatisfaction with an assessment or an assertion that assessors did not take into account matters which the taxpayer believes should have been considered. In this case, the taxpayer does not assert that the assessment was based upon inaccurate facts in the record. Instead, the taxpayer asserts the county did not take into consideration certain matters in

determining whether an initial covenant breach had occurred, specifically whether the use had changed. The arguments fail to establish an "erroneous or illegal" tax assessment. Hence, a refund action was not cognizable.

Fulton County Board of Tax Assessors v. Toro Properties VI LLC

Georgia Court of Appeals
September 18, 2014; A14A1048; A14A1063

This case involves the issues of litigation fees, court costs, and public policy in the matter of an ad valorem tax appeal. In the context of a tax appeal on 2 commercial parcels, the trial court entered a final order and judgment setting value on each parcel. Subsequently (and in the next term of court) the LLC moved for, and the trial court granted, litigation costs and attorney fees under O.C.G.A. 48-5-311(g)(4)(B). On appeal, the Court of Appeals upheld the trial court. The Court noted that the county's argument that the orders constituted final judgments which terminated the proceedings in superior court was contradictory to the plain words of the statute. The express wording clearly mandates the issuance of such an award following the court's final determination of value. Additionally, the fact that the fee awards were rendered after the expiration of the term of court in which the valuation orders were issued does not frustrate judicial economy or violate public policy as the statute contains no time limitation regarding when the taxpayer must move or a court must award litigation costs and attorney fees.

TORTS

Strauss v. City of Lilburn

Georgia Court of Appeals
November 11, 2014; A14A1043

This case presents an issue of a slip and fall on a city-owned sidewalk. The trial court found the injured party had equal knowledge of the hazard and granted summary judgment to the city. On appeal, the Court of Appeals reversed. Summary judgment is not appropriate where there is an issue of material fact with respect to the knowledge of the hazard. There is no dispute the city had actual or constructive knowledge of the concrete riser. Whether the injured party exercised ordinary care for her own safety and whether she had greater or equal knowledge of the hazard posed by the riser are jury questions.

WORKERS' COMPENSATION

Chambers v. Monroe County Board of Commissioners

Georgia Court of Appeals
August 25, 2014; A14A0265

After returning from a call, a firefighter was sitting at a desk, got up at the request of a supervisor who needed the desk, and heard her knee pop. She required knee surgery and will likely need a knee replacement. An administrative law judge found the injury compensable on the basis she was in the workplace and following a supervisor's orders when injured. The employer (the county) appealed and the Appellate Division vacated the ALJ award concluding that there was no causal connection between her employment and the injury. The superior court affirmed the Appellate Division noting the deference it was required to give to the Appellate Division findings. On appeal, the Court of Appeals reversed. The courts may not substitute their judgment for that of the workers compensation board on whether an injury arose out of the claimants' employment. To hold otherwise would work a dramatic alteration of the 'any evidence' rule. Here the claimant carried the burden of causal connection before the board and the board's finding must be affirmed if there is any evidence to support it. In this case, there was such evidence to support the board's determination. Consequently, the courts may not disturb that determination.

Barzey v. City of Cuthbert

Supreme Court of Georgia
September 29, 2014; S14A0620

This case involves a challenge to the Workers Compensation Act, O.C.G.A. 34-9-1, *et seq.*, which precludes a non-dependent parent from recovering benefits for the death of a child (who, in this case, happened to be a city employee). The Supreme Court upheld the trial court by ruling that the limitation on recovery of non-dependent heirs does not violate due process or equal protection.

ZONING

Noble Parking, Inc. v. Centergy One Associates, LLC

Georgia Court of Appeals
March 21, 2014; A13A2254

This case involves a dispute over the operation of a surface park-for-hire parking lot. The trial court ruled that although Noble (the lot's operator) had a legal nonconforming (and grandfathered) use, the use was superseded by a permitted use and, that in any event, Noble's claims to the contrary were barred by failure to exhaust administrative remedies. The Court of Appeals reversed. While cases such as *Powell* and *Mortgage Alliance* stand for the proposition that administrative remedies must be exhausted first, they do not hold that a defendant is barred from defending an action brought initially by a third party. The dispute in this case began as an action between 2 neighboring private parties. Noble intervened in that action, but did not seek a 'declaration in a court of equity' and did not 'circumvent the review process' by instituting a collateral attack on the city's nonconforming use decision. Further, the Court declined to hold that a vested right in a legal nonconforming use can be superseded by a use that takes place outside of the express terms required for that use.

Newton County v. East GA Land & Development Co. LLC

Supreme Court of Georgia
October 23, 2014; S14A1049

An LLC sued the county for a writ of mandamus contending that a zoning ordinance was invalid. The trial court granted summary judgment to the LLC. On appeal, the Supreme Court affirmed. The zoning ordinance refers to and purports to incorporate by reference a set of maps. However, the maps were not in existence at the time the ordinance was adopted. The maps are an integral part of the ordinance and without them the ordinance is too indefinite and vague to satisfy due process. The Court reiterated the standard 4 prong test for incorporating a document or map by reference: 1) the document must be identified with certainty; 2) it must be a public record; 3) it must be accessible by the public; and 4) the adopting resolution must give notice of public accessibility. A map not in existence cannot be a public record and is not accessible by the public. The Court reiterated its previous rejection of the proposition that incorporation by reference can apply prospectively to a currently nonexistent document.