

COUNTIES & THE LAW

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2012 Compilation Edition

Counties & the Law, 2012 Compilation Edition includes decisions of interest to county attorneys published in the Daily Report Opinions Weekly between January 2, 2012, and December 28, 2012. 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:

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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.

We are very appreciative of the positive feedback we have received over the course of 2012 as a result of the re-launch 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.

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COUNTIES & THE LAW

ADMINISTRATIVE LAW

Upper Chattahoochee Riverkeeper Inc. v. Forsyth County

Georgia Court of Appeals

November 14, 2012; A12A0979; 12 FCDR 3653

This case involves a petition filed with an administrative law judge (ALJ) disputing the issuance by EPD of a permit to the county authorizing two county facilities to discharge treated wastewater into the river. The ALJ dismissed most claims on a summary determination but did hold the permit issuance violated state law. The superior court reversed the ALJ and remanded. On appeal to the Supreme Court, the Court first upheld the superior court's construction of the agency rules. Such rules must be interpreted as whole and read in context. Here, the issue is whether the granting of the permit violated the rule. Given the rule's plain meaning as well as deference to the agency's interpretation of its own rule, the superior court correctly ruled that the ALJ erroneously interpreted the rule. The superior court was incorrect however, in upholding an agency rule that had not been promulgated pursuant to the mandates of OCGA 50-13-4. The Court also ruled that the *Hughey* case was no longer applicable since the portion of the rule on which that case had been based has been removed subsequently. Finally, the Court ruled that the ALJ had exceeded her authority in ordering the director of EPD to revise the permit limits.

ANNEXATION

Worley v. Peachtree City

Georgia Court of Appeals

January 20, 2012, A10A0330, 12 FCDR 265

In light of its decision in *Scarborough Group v. Worley*, 211 Ga. LEXIS 935 (2011) the Supreme Court of Georgia reversed the decision of the Georgia Court of Appeals in *Worley v. Peachtree City*, 305 Ga. App. 118, 699 SE2d,94 (2010) and remanded the case for vacation of judgment and dismissal of the appeal. This is in fact so ordered by the Court of Appeals. The case dealt with an alleged illegal annexation which caused an unincorporated island which was prohibited by OCGA 36-36-4(a). An initially deficient annexation which created an unincorporated island was cured by a subsequent annexation conducted prior to the trial court's ruling.

ANTE LITEM NOTICE

Coweta County v. Cooper

Georgia Court of Appeals

October 16, 2012; A12A1111; 12 FCDR 3262

This case involves the issue of proper compliance with the ante litem notice statute, O.C.G.A. 36-11-1. Plaintiff and her minor child were allegedly injured when their car was struck by a county vehicle on February 2, 2009. A lawsuit was not filed until January 1, 2011 (well beyond the 12 month period under the statute to provide written notice to the county). The trial court ruled that substantial compliance had

been met because the plaintiff had called the county commissioners' office and been told to send a written letter to the county attorney. In fact, the address given was that of a private law firm used by the county as outside legal counsel. A certified letter of notice was accepted at the law firm on March 4, 2009 (within the notice period). On appeal, the Court of Appeals ruled that substantial compliance had not been met. Neither the firm, nor its partners or employees were in house county legal counsel or a county employee or official. Further, they were not authorized by the county to accept such notice. Consequently, the 12 month notice period had not been met as to the adult plaintiff. This however, did not act as a bar to that plaintiff's claim against the driver of the county vehicle for personal liability. In addition, under the statute, the 12 month period was tolled for the minor child of the plaintiff.

BONDS

Sherman v. Development Authority of Fulton County

Georgia Court of Appeals

February 21, 2012, A11A1595, 12 FCDR 631(revised 12 FCDR 2605)

Plaintiff intervened in a bond validation proceeding in superior court to validate revenue bonds to be issued by the authority under the Development Authorities Law. The trial court rejected plaintiff's claims and entered judgment validating the bonds. The Court of Appeals vacated the judgment because the trial court failed to set forth findings of fact and conclusions of law with respect to the various grounds pursued by plaintiff in opposing the validation as was required by OCGA 9-11-52(c). Alternatively, the trial court could dismiss the action on remand if it determines that reentry of the judgment with the required findings of fact and conclusions of law would serve no purpose. Apparently, the appellate brief showed that no bonds had been issued, no bonds were going to be issued, and that development of the proposed facility was never commenced.

Sherman v. Development Authority of Fulton County

Georgia Court of Appeals

July 5, 2012; A12A0587; 12 FCDR 2360

This case involves the validation of revenue bonds in superior court. The development authority (DAFC) sought to develop a warehouse facility and lease it to a company. Revenue bonds were issued to finance the project. A memorandum of agreement was signed by DAFC, the company, and the board of tax assessors which set a valuation methodology for ad valorem taxes during the lease period. The revenue bonds were contested in a superior court validation proceeding but were validated. On appeal to the Court of Appeals, the validation was vacated and the case remanded back to superior court. First, the Court rejected the argument that the validation proceedings lacked personal jurisdiction due to a defect in acknowledgement of service. This was deemed waived because no objection had been raised at trial. Second, the Court rejected the argument that the trial court was unauthorized to rule on the validity of the memorandum of agreement since the Revenue Bond Law (O.C.G.A. 36-82-61) limited proceedings only to bond validity. In this case the bonds were in fact issued under the Development Authorities Law (O.C.G.A. 36-62-1 *et seq.*) which authorized the trial court to determine all questions of law and fact relating to the case. Third, the Court rejected the argument that the trial court was unauthorized to rule on the memorandum because the board of assessors had signed the memo but was not a party to the litigation and was required to have been a party under O.C.G.A. 9-11-19. No showing had been made that the board of assessors was in fact an indispensable party. However, the Court agreed that the trial court had failed to respond adequately to the request for a detailed order under O.C.G.A. 9-11-52. The trial court's order did not set forth the facts or process by which it reached certain conclusions, but rather it merely contained a

dry recitation that certain legal requirements had been met. Consequently, the case was remanded so the trial court could enter an appropriate order setting forth requisite findings of fact and conclusions of law to allow meaningful appellate review.

CIVIL PRACTICE

Ellis v. Caldwell

Supreme Court of Georgia

January 9, 2012, S11A1748, 12 FCDR 68

A captain with the county fire and rescue department was terminated for violating county code requirements pertaining to county fire and rescue employees. The captain filed a timely appeal to the adverse action. To mitigate loss of salary, the captain opted to begin receiving retirement benefits prior to the date of the administrative appeal hearing. The hearing officer held that the county did not correctly apply the facts to the cited violations and reversed the termination. The county merit system council upheld the reinstatement since the termination was based upon factual errors. The county refused to reinstate the captain who then filed a mandamus action to compel reinstatement and seeking back pay, benefits, and attorney fees and litigation costs. The trial court granted mandamus as well as back pay and found further that the county had been stubbornly litigious under O.C.G.A. 9-15-14 and awarded attorney fees and costs. The Supreme Court upheld the trial court ruling because the captain had a clear legal right to reinstatement which was violated by the county steadfastly refusing to abide by the rulings of the hearing officer and merit system council. The trial court's order failed to specify which provision of O.C.G.A. 9-15-14 its award of attorney fees and costs was the basis of its ruling. The Supreme Court found that the conduct fell within the waiver provision of subsection (b) of the Code section since the record indicated undisputedly that the county affirmatively waived its right to a hearing on the issue of attorney fees by submitting a post-trial court hearing brief which failed to object to the fees.

Paulding County Board of Commissioners v. Morrison

Georgia Court of Appeals

July 12, 2012; A12A0035, A12A0036, A12A0372, & A12A0373; 12 FCDR 2382

This case involves the issue of counterclaims and the anti-SLAPP statute. In prolonged litigation over zoning, the county filed verified answers which asserted no independent counterclaims but each of which contained a 'wherefore' clause praying for costs, expenses, and reasonable attorneys' fees. The trial court held that these clauses invoked O.C.G.A. 9-11-11.1 and that the board failed to properly verify its answers in compliance with the anti-SLAPP statute. The Court of Appeals reversed and held that a mere prayer for relief requesting attorneys' fees does not in and of itself constitute a claim triggering the anti-SLAPP statute and that a party defending a lawsuit has the right to seek attorneys' fees if a lawsuit is determined to lack substantial justification.

CONDEMNATION

Robinson v. Gwinnett County

Supreme Court of Georgia

February 6, 2012, S11A1533, 12 FCDR 343

The county condemned a portion of tract of real property. The plaintiffs held a right of first refusal to purchase the tract from the owner of the tract and alleged they had a right to compensation due to the

condemnation. The trial court held that a right of first refusal was not a compensable interest under Art. I, Sec. III, Para.I of the Constitution. The Supreme Court upheld that decision stating that a mere option to purchase land does not confer upon the holder of the option any legal or equitable interest in the land which is the subject of the option until the option is exercised. Consequently, since the option holders in this case had not exercised their option to purchase the land, they did not hold a legally compensable interest in the property as a result of the condemnation.

Fincher Road Investments, LLLP v. City of Canton

Georgia Court of Appeals

March 16, 2012; A11A1613 & A11A1787; 12 FCDR 1161

This case involves issues regarding condemnation and strict construction of CS 32-3-11. The city, as well as the Cobb Co. Marietta Water Authority, condemned land owned by the LLLP for construction of a reservoir. The LLLP filed a petition to set aside the taking, but the trial court ruled that since a rule nisi was filed 5 days prior to the hearing, that the 15 day notice required by CS 32-3-11(c) had not been met. The petition was dismissed for failure to comply strictly with the statute. The Court Of Appeals disagreed and reversed holding that the subsection (c) was discretionary rather than mandatory and, that under the plain words of the statute, it the presiding judge, rather than the LLLP, who was required to schedule the hearing. The trial judge had the discretion to hold the hearing outside the 60 day time period of the statute. The case was remanded for the trial court to determine, in its discretion, whether to afford the LLLP an opportunity for a hearing on the merits of the set aside petition.

Gwinnett County v. Ascot Investment Company

Georgia Court of Appeals

March 16, 2012; A11A2112; 12 FCDR 1162

This case involves issues regarding condemnation, appropriate damages, and juror qualification. The county condemned land owned by the company for construction of public roadway projects. The company won at trial and received a jury award of over \$3 million in damages. The Court Of Appeals followed its prior decisions in the Ogburn Hardware, Five Forks, & other cases and upheld the award of consequential damages to the remaining property of the company since the evidence showed that the proposed future use of the property was neither hypothetical nor speculative and no abuse of judicial discretion had been shown. The court also followed the Walls case and held that a trial judge was in the best position to determine if a juror had sufficient comprehension of English during voir dire and that only a showing of manifest abuse of discretion could overcome that determination.

Adkins v. Cobb County

Supreme Court of Georgia

September 10, 2012; S12A0848; 12 FCDR 2744

This case involves the condemnation of real property. The county sought to condemn real property for a road project. A declaration of taking was filed on January 11, 2010. The property owners acknowledged service on March 1, 2010, and filed both an answer and a motion to set aside and vacate the declaration of taking on March 31, 2010. Following several delays and attempts at settlement the trial court set a hearing for April 11, 2011. The trial court dismissed the motion to vacate on the basis that it was barred procedurally under O.C.G.A. 32-3-11(c) in that the hearing on the motion did not take place within 60 days of the date of filing of the declaration of taking. On appeal, the Supreme Court of Georgia reversed and remanded the case back to superior court. First, the Court followed two previous decisions of the Court of Appeals in the *Fincher* and *Robertson* cases that the 60 day rule under the statute was directory. Second, the Court determined that it was the responsibility of the trial court, and not the condemnee, to

schedule the hearing. Consequently, the case was remanded so the trial court could conduct a hearing on the merits of the motion to vacate the declaration of taking.

Hubert Properties, LLP v. Cobb County

Georgia Court of Appeals

October 17, 2012; A12A1584; A12A1922; 12 FCDR 3267

This case involves a county property transfer and construction of O.C.G.A. 36-9-3, 32-7-3, & 32-7-4. The county condemned land owned by the LLC. Subsequently, the county offered an unused portion of the condemned tract back to the LLC. The contract was never signed by the county. Later, the county, pursuant to 36-9-3(h), then sold the remainder to adjoining property owners since it was incapable of being used independently as zoned. The LLC sought to void that transfer claiming it should have been the recipient of the property under 32-7-3 and 32-7-4. The trial court upheld the transfer to the adjoining owners. On appeal, the Court of Appeals affirmed. The contract was not binding as it had not been signed by the county. Regarding the issues of which statutes controlled, 32-7-3 & 32-7-4 were general and merely authorized a way of transfer, while 36-9-3 was specific and applied to the fact situation. The court, citing *Cobb Co. v. Smyrna*, restated the well settled rule that a specific statute prevails over a general statute absent contrary legislative intent, to resolve inconsistencies between them.

McMeans v. Department of Transportation

Georgia Court of Appeals

November 16, 2012; A12A1376; 12 FCDR 3760

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.

CONSTITUTION

Great American Dream, Inc. v. DeKalb County

Supreme Court of Georgia

March 23, 2012; S11A1375; 12 FCDR 1091

This case involves freedom of speech issues and the scope of a county's authority to regulate adult entertainment and nude dancing. Great American Dream ran an adult entertainment nightclub which provided nude dancing. Operations of this facility were in compliance with county ordinance until the ordinance was amended. The revised ordinance required that hours of operation be reduced. The nightclub sought a TRO and an injunction. The trial court denied any relief pending trial. The nightclub appealed claiming the trial court applied the 'rational basis' test under the First Amendment of the US constitution when it should have applied the 'furtherance of governmental interest' test under Art. I, Sec. I, Para.V of the GA Constitution. The Supreme Court agreed and reversed under the broader free speech protections under the state constitution and cited the *Grady v. Athens-Clarke Co. (2011)*; *Harris v. Ent.*

Sys.(1989); Goldrush II v. Marietta (1997); & Paramount v. Busbee (1982) cases. The case was remanded for the trial court to evaluate the injunction request under the correct standard.

CONTRACTS

Old Peachtree Partners LLC v. Gwinnett County

Georgia Court of Appeals

March 8, 2012; A11A2097 & A11A2150; 12 FCDR 998

This case involves breach of contract issues and the scope of a county attorney's authority. The county sought to acquire right of way and easements from property owned by OPP. OPP granted an irrevocable option to purchase to the county. OPP discovered subsequently that the county intended to install a forced main sewer across its adjacent property and purported to withdraw its option claiming inverse condemnation of the other property. The county attempted to nonetheless exercise its purchase option but OPP refused to participate. The county sued for breach of contract. OPP presented a settlement agreement which the county refused. The county countered with its own settlement offer which OPP accepted. The board of commissioners, however, in a public meeting, voted against the purchase of the adjacent land. The county then attempted to enforce its original purchase option claiming that the settlement agreement as a condition precedent required the board's approval at a public meeting and OPP claimed breach of the settlement agreement. The trial court ruled that the settlement required public approval by the board of commissioners and was thus invalid. The Court Of Appeals reversed holding that the board had in fact authorized the counteroffer settlement and that the county attorney had the authority to act on behalf of the board pursuant to a county ordinance. A vote in a public meeting was a required formality to effectuate the purchase of the property, but the board's failure to complete that formality in good faith when voting in a public meeting cannot destroy an already existing settlement agreement when the county attorney had the authority to make the settlement offer.

Johnson v. DeKalb County

Georgia Court of Appeals

March 14, 2012; A11A2358 & A11A2359; 12 FCDR 1001

This case involves issues regarding the acceptance of a settlement offer. Johnson sued the county when storm water drainage discharged onto his property causing erosion damage. During alternative dispute resolution proceedings, the county made a settlement offer to correct the drainage and repair damages to the property based upon the county's concept plan prepared by its engineering consultant. Johnson hired an engineering consultant who proposed numerous modifications to the concept plan. Several subsequent email exchanges occurred between the county attorney and Johnson's attorney making different offers and counteroffers. The county sought to enforce its final offer as the negotiated settlement agreement which Johnson disputed as being merely 'an agreement to agree'. The trial court concluded that the settlement agreement was enforceable. The Court Of Appeals agreed holding that the county's final email which clearly delineated the settlement terms (which did not include any of the proposed modifications to the concept plan) had been accepted by Johnson's attorney and that his email confirmed that the other settlement terms sought by Johnson were not a part of the county's offer. The terms of the offer made in the county's final email had been accepted in the response email from Johnson's attorney. Consequently, the parties entered into a mutually binding agreement even though the formal documents were not signed. The drafting of the formal documents necessary to effectuate the settlement agreement may have been a condition of the performance, but it was not an act necessary to the acceptance of the offer to settle. This was a case where an agreement to terms was clearly made, but a party changed his mind and

subsequently and no longer wanted to settle. The court held further that no statute of frauds claim could prevail as the email exchanges between the counsels was sufficient to memorialize the terms of the settlement agreement and render it an enforceable contract.

City of Baldwin v. Woodard & Curran, Inc.

Georgia Court of Appeals

July 11, 2012; A12A0620; 12 FCDR 2363

This case involves a contract dispute and issues of ultra vires actions and quantum meruit. A city allegedly entered into 2 different agreements with a consultant regarding wastewater treatment. The city argued that the second agreement was ultra vires and not binding because it had been signed by the mayor but had not been approved by a quorum of the city council. The trial court awarded the consultant the amount it had claimed under the agreements and the Court of Appeals affirmed. The Court held that where an agreement existed for a city that was not otherwise enforceable as a contract, quantum meruit would allow recovery to the extent of the value of the benefit received. Unlike with counties, there are no statutory requirements for establishing a contract with a city.

Greater Georgia Amusements LLC v. State of Georgia

Georgia Court of Appeals

May 25, 2012; A12A0692; 12 FCDR 2572

This case involves a contract appointing special assistant district attorneys and providing for a contingent fee reimbursement. The district attorney entered into a contract appointing two special district attorneys to represent the state in civil claims arising out of a Georgia RICO investigation. The contract was challenged as beyond the scope of authority of the district attorney to enter into the agreement and as being void for violating public policy. The Court of Appeals held an agreement appointing special district attorneys was clearly authorized by O.C.G.A. 15-18-20. However, an arrangement compensating special district attorneys on a contingent fee basis was repugnant in the context of RICO forfeiture actions. District attorneys represent the state and are bound to seek justice rather than a result desired by a client. The court followed precedent set in the *Parsons, Wooten, Frazier, and Patel* cases.

ELECTIONS

Burgess v. Liberty County Board of Elections

Supreme Court of Georgia

October 29, 2012; S12A1068; 12 FCDR 3327

This case involves two challenges to the qualifications of a candidate for city council. The candidate resigned from his seat on the council of city 1 in order to run for a seat on the council of city 2. Two separate challenges to his qualifications were filed with the election board alleging he did not meet the 12 month residency requirement of city 2. The board entered 2 separate orders disqualifying the candidate. Under OCGA 21-2-6, the candidate appealed the first disqualification order in superior court, but did not appeal the second disqualification order. The trial court entered an order denying the appeal petition on the basis of mootness since the time for appealing the second order had passed. The candidate appealed to the Court of Appeals which transferred the case to the Supreme Court under Art. VI, Sec. VI, Para. II. The Court affirmed the trial court. Following the *Pimper* case, reversal of the first disqualifying order alone would have no effect since the later disqualification order would remain in effect. Hence, the appeal was moot.

EMPLOYMENT

Owens v. City of Greenville

Supreme Court of Georgia

February 27, 2012, S11A1645, 12 FCDR 565

A newly elected mayor fired the acting city clerk and fired the acting police chief and then appointed other persons to those positions. The fired individuals sued alleging wrongful termination. The trial court held that it had no jurisdiction over a purely political question, and alternatively, that summary judgment was warranted since the terms of the fired individuals had expired naturally under the city charter. The Supreme Court reversed that decision stating that the issue was not a purely political question and could be decided impartially on the basis of the city charter. While the charter set forth annual terms for the individuals, it did not specify when those terms began or concluded. This was an issue of fact and law to be determined by the trial court. The court also concluded that sovereign immunity was waived in this case due to the city's insurance policy covering the claims. Finally, the court held that the letter sent to the city by the attorney representing the fired individuals constituted proper ante litem notice of the wrongful termination claims as it alleged that the terminations were improper procedurally and unlawful.

Jones v. Valdosta Board of Education

Georgia Court of Appeals

October 3, 2012; A12A1066; 12 FCDR 2981

This case involves the issue of age, race, and gender discrimination in employment. The school board sought candidates for a vacancy in the position of director of information technology. A younger candidate of a different race and gender was ultimately selected by the board. Jones brought a Title VII claim and contended her qualifications were superior and that discrimination had occurred. The trial court did not agree and granted summary judgment to the school board. On appeal, the Court of Appeals affirmed. Following the *Combs*, *Burdine*, and *Green* cases, the employer only needs to produce evidence that would allow the trier of fact to conclude rationally that the employment decision had not been motivated by discriminatory animus. In such event, the burden of persuasion is on the employee to show by a preponderance of the evidence that the legitimate reasons offered by the employer were not the true reasons, but rather were a pretext for discrimination. Jones failed to present any evidence to refute the board's evidence.

HOME RULE

Board of Commissioners of Miller County v. Callan

Supreme Court of Georgia

January 9, 2012, S11A1502, 12 FCDR 70

The case involves the amendment by Miller County home rule ordinance (HRO) of two provisions of the organic local Act which created the board of commissioners of Miller County, Ga. L 1983, p. 4594. The first HRO changed a prohibition regarding the board members transacting business with the county and allowed an exception where a majority of board members approved a contract and the goods, services or property could not be obtained for less. The second HRO required that all bills be paid by check signed by at two officials consisting of the board chair, vice chair, clerk, or finance committee chair. The trial court

held both HRO's unconstitutional. The Supreme Court reversed and upheld both HRO's as within the county's home rule authority. Both HRO's were valid exercises of 'second-tier delegation' authority under Art. IX, Sec. II, Para. I(b). There was no attempt to confer executive authority by affecting the composition or form of the board of commissioners and no action which affected the elective office of commissioner. In addition, no violation of the uniformity provision of the Constitution (Art. III, Sec. VI, Para IV(a) occurred as the Supreme Court followed the ruling in the Fieldale Farms case in that the HRO did not 'conflict' with general law. This case should be reviewed carefully for its important explanations of the distinctions between first and second tier delegation in home rule analysis (citing, at length, Professor Emeritus R. Perry Sentell, Jr.) and its detailed discussion of the Fieldale Farms case.

IMMUNITY

Board of Commissioners of Putnam County v. Barefoot

Georgia Court of Appeals

December 16, 2011, A11A1901, 12 FCDR 31

A county employee used a county vehicle (a pot-patcher) to perform road maintenance. The following day, Wendy Barefoot, abruptly swerved to avoid an oncoming vehicle and lost control of her vehicle when it encountered the patched portion of the repaired area. She was injured and brought suit and alleged her injuries were caused by excess, loose gravel left in the roadway by the pot-patcher. The county moved for summary judgment on the basis of sovereign immunity. The trial court denied the motion holding that immunity had been waived by the County's purchase of liability insurance covering injuries arising from the use of a county vehicle. The Court of Appeals reversed as the pot-patcher was not in use at the time of the accident and thus the use was too remote in time to waive sovereign immunity under O.C.G.A. 33-24-51.

Georgia Department of Community Health v. Data Inquiry LLC

Georgia Court of Appeals

January 25, 2012, A11A2087, 12 FCDR 275

The case involves the claims by the LLC that the state agency breached an agreement to pay for computer-related services. The Court of Appeals reversed the trial court and held the case was barred by sovereign immunity under Art. I, Sec. II, Para. IV. The LLC provided services even though no valid contract had been entered. Without being able to prove the existence of a valid contract, there was no exception to the rule of sovereign immunity. The LLC also sought relief on the basis of unjust enrichment and quantum meruit. These claims, based upon equitable principles, were likewise barred by sovereign immunity.

Williford v. Lee County Board of Commissioners

Georgia Court of Appeals

February 17, 2012, A11A2215, 12 FCDR 645

Plaintiff was struck by a rock launched by a tractor-pulled lawnmower which was owned and operated by the county. Plaintiff sued but the trial court awarded summary judgment to the county on the basis of sovereign immunity since, as a matter of law, the tractor-pulled mower was not a motor vehicle within the meaning of OCGA 33-24-51(b) and, that, no insurance waiver of the immunity had occurred. The Court of Appeals reversed stating that the trial court had applied the narrow definition of motor vehicle under OCGA 36-92-1(6). The court followed its holding in the recent Glass v. Gates case and stated that the correct definition of motor vehicle to be applied to determine whether sovereign immunity had been waived by insurance was that used in OCGA 33-24-51(a).

Georgia Department of Transportation v. Smith

Georgia Court of Appeals

February 29, 2012; A11A1579, A11A1580, A11A2017, & A11A2089; 12 FCDR 770

These cases involve a wrongful death action which ensued from a large oak tree falling on the vehicle driven by plaintiffs' parents. In each case, the plaintiffs alleged the tree was hazardous, was growing in DOT right of way, and that DOT employees were negligent in failing to discover and remove the tree. In the first 2 cases, the trial court denied summary judgment to the DOT on the basis of sovereign immunity. The Court of Appeals upheld the denial. The court followed its holding in the recent *GA DOT v. Miller* case and stated that the DOT employees' operational inspections of the roadways, and their concomitant decisions as to whether or not to inspect and remove hazardous trees, do not constitute 'basic governmental policy decisions' within the scope of the 'discretionary function' exception to the waiver of sovereign immunity under the OCGA Section 50-21-24 (state tort claims Act). In the second 2 cases, the trial granted summary judgment to the DOT as there was no issue of material fact regarding whether the DOT knew or should have known that the tree constituted a dangerous condition. The Court of Appeals upheld the summary judgment as there was no evidence that the tree at issue showed any evidence of disease or decay that would be apparent to a lay person.

Gates v. Glass

Supreme Court of Georgia

July 2, 2012; S12G0133; 12 FCDR 2152

This case involves sovereign immunity and liability insurance. Inmates were on road detail operating tractors with attached bush hogs. A rock was hit and flung into a supervisor's neck causing him fatal injury. A wrongful death action was brought against the county and the inmate who operated the tractor and bush hog. The county asserted sovereign immunity. Plaintiff claimed it had been waived under O.C.G.A. 33-24-51 (a) & (b) by purchasing both a general liability policy and an automobile liability policy. The county asserted that a 2002 legislative change in O.C.G.A. 33-24-51 (b) demonstrated legislative intent to utilize the more narrow definition of 'motor vehicle' under O.C.G.A. 36-92-1 in determining whether sovereign immunity had been waived by the purchase of the liability insurance on a motor vehicle. Under O.C.G.A. 36-92-1, neither a tractor nor a bush hog could be deemed a motor vehicle, and thus no waiver of immunity had taken place. The trial court granted the county's motion for summary judgment. The Court of Appeals reversed and held that the broader definition of 'motor vehicle' under O.C.G.A. 33-24-51 should be applied and that sovereign immunity had been waived by the county due to the purchase of the insurance policies. The Supreme Court of Georgia granted certiorari and affirmed the Court of Appeals. The Court noted that the legislature created a two-tier scheme within which sovereign immunity is deemed to be waived by local government. The first tier under O.C.G.A. 36-92-1 requires waiver up to prescribed limits for motor vehicle incidents regardless of whether automobile liability insurance is procured. The second tier under the 2002 amendment to O.C.G.A. 33-24-51 requires waiver to the extent a local government purchases liability insurance in an amount greater than the prescribed limit in O.C.G.A. 36-92-2. In the case under review, since the local government purchased automobile liability insurance in an amount greater than the limit under O.C.G.A. 36-92-1 et seq., it waived sovereign immunity to the extent of its insurance coverage as required under O.C.G.A. 33-24-51 (b) and that the broad definition of 'motor vehicle' applied. The Court noted further that had the General Assembly intended a narrow definition of 'motor vehicle' in cases where a local government purchased automobile liability insurance coverage for amounts over and above the prescribed sovereign immunity limits, it would have done so explicitly.

Howell v. Willis

Georgia Court of Appeals

June 29, 2012; A12A0222; 12 FCDR 2219

This case involves a question of official immunity. A property owner sued a builder for negligent home construction and also brought the action against the county building inspector. The trial court granted summary judgment to the building inspector and the Court of Appeals affirmed. The Court held that the doctrine of official immunity affords limited protection to public officers and employees for discretionary actions taken within the scope of their official duties, and done without willfulness, malice, or corruption. In this case, the Court stated while many ‘allegations’ were offered, there was insufficient evidence to prove that the inspector failed to conduct adequate and proper inspections or failed to use proper judgment in conducting the inspections. Hence, the inspector was entitled to official immunity.

McSmith v. Brown

Georgia Court of Appeals

October 3, 2012; A12A1140; 12 FCDR 2982

This case involves prosecutorial immunity. A defendant sought a jury trial for multiple traffic citations, including DUI less safe for marijuana. The defendant was found not guilty on the DUI charge and then brought a malicious prosecution claim against the solicitor. The trial court dismissed for failure to state a claim. On appeal, the Court of Appeals affirmed. Under OCGA 15-18-74(c), solicitors-general have the same immunity from private suit as district attorneys. Following the *Robbins* and *Battle* cases, a solicitor’s decision to file formal charges is intimately associated with the judicial phase of the criminal process and is thus protected by prosecutorial immunity.

Whitfield v. Brown

Georgia Court of Appeals

November 7, 2012; A12A1172; 12 FCDR 3550

This case involves the issue of physical injuries sustained from a fall which occurred in the bathroom of a public library. The plaintiff sued the library employees and claimed negligence and gross negligence in the performance of their ministerial duties. The trial court granted summary judgment to the library employees without explanation. On appeal, the Court of Appeals affirmed. There was no fixed policy in place for dealing with emergency cleaning situations. The defendant did not have a ministerial duty to clean the bathroom. Further, even if the defendant’s duty to eliminate the hazard was ministerial (which the Court emphasized that it was not) the defendant appears to have carried out that duty. {The case is notable for its very clear explanation of official immunity, qualified immunity, ministerial duties, and discretionary acts.}

Ray v. City of Griffin

Georgia Court of Appeals

November 13, 2012; A12A0815; 12 FCDR 3663

In this case, plaintiff was injured and his spouse killed when their vehicle was struck by another vehicle which was fleeing from a police pursuit. The trial court dismissed the action against the police officer and granted summary judgment to the city. On appeal to the Supreme Court, the Court upheld the dismissal of the officer under OCGA 36-92-3. However, genuine issues of material fact remained as to whether, under OCGA 40-6-6, the officer acted with reckless disregard of proper law enforcement procedures and whether his actions were the proximate cause of the collision. Thus the trial court erred in granting summary judgment to the city. There is a lengthy discussion of issues regarding self-contradictory

testimony which is quite fact dependent and it is recommended that the case itself be read for anyone interested in these points.

DeKalb County v. Bailey

Georgia Court of Appeals

November 19, 2012; A12A1419; A12A1420; 12 FCDR 3727

This case involves claims against a police officer and the county following a shooting of a fleeing person by the police officer. The officer and the county each moved for summary judgment which was denied by the trial court. On appeal, the Court of Appeals upheld the trial court as to denying summary judgment to the officer ((A12A1420), but reversed as to the county (A12A1419). {This summary deals only with the county portion of the appellate decision.} The Court noted that 42 USC Section 1983 does not hold municipalities liable unless action pursuant to municipal policy caused a constitutional tort. In other words, a municipality is not liable under 1983 solely because it employs a tortfeasor. Citing the *Gold, Russell, & City of Canton* cases, the Court concluded that there had not been sufficient showing that the county failed to train its officers to such an extent that it amounted to ‘deliberate indifference to the constitutional rights of persons with whom the police come into contact’. Consequently, the county was entitled to summary judgment.

Ankerich v. Savko

Georgia Court of Appeals

November 28, 2012; A12A0974; A12A0975; 12 FCDR 3839

This case involves claims against a deputy sheriff when a car collision occurred at an intersection where the deputy was directing traffic. The deputy parked her car and engaged the front and rear flashing lights. An accident occurred when a driver collided with a school bus. The central question was whether sovereign immunity had been waived to the extent of the county’s liability insurance under OCGA 33-24-51(b). In other words, was the driver injured as a result of the deputy’s ‘use’ of the patrol vehicle? The trial court denied summary judgment stating that the issue of use was for the jury to decide. On appeal, the Court of Appeals disagreed and held that the car was not in ‘use’ and that the county’s purchase of liability insurance did not waive sovereign immunity. Citing the *Tittle & Williams* cases, the Court concluded that mere activation of lights and utilization of the car as a barrier do not constitute use within the meaning of the statute. Consequently, the deputy was entitled to summary judgment.

Anderson v. Tattnall County

Georgia Court of Appeals

November 28, 2012; A12A1643; 12 FCDR 3882

This case involves a damages claim against county EMT personnel. A driver was injured in a car accident resulting from a collision with a fallen tree. EMT personnel suspected possible spinal trauma and immobilized the driver and began transporting her to the hospital. Due to rainy conditions, the ambulance did not engage strobe lights and sirens so as to improve ambulance driver visibility. During transport, another driver failed to yield the right of way and struck the ambulance further injuring the immobilized patient. The central question was whether statutory immunity under OCGA 31-11-8 precluded any negligence claims. The trial court determined that it did. On appeal, the Court of Appeals agreed and held that the EMT’s were providing emergency care within the meaning of the statute. The EMT’s had no information to cause them to determine that immediate attention was unwarranted and that had they acted otherwise, they could have subjected the county to possible suit for not acting in an emergency.

Douglas Asphalt Co. v. Georgia Department of Transportation

Georgia Court of Appeals

November 29, 2012; A12A1593; 12 FCDR 4022

This case involves sovereign immunity. (There is a complicated procedural setup to this case, beyond the scope of this writing, and interested readers may wish to consult the court opinion). The Court of Appeals addressed the issue of whether sovereign immunity had been waived by GDOT based upon a contract. Although there were multiple documents, they were not final and signed contemporaneous agreements between the parties. Further, since the asphalt company sought contractual indemnity as the assignee of another party, even if there had been a written contract, which writing would have to have been shown to contain an express indemnity provision in order for sovereign immunity to be waived. The asphalt company also claimed that sovereign immunity had been waived under the negligence exception. The Court does not ‘reach the issue’ because here, the duty, if any, was not imposed by law, but by the alleged contract. Since there was no actual written contract, no waiver of sovereign immunity had occurred.

INSURANCE

Lumpkin County v. Georgia Insurers Insolvency Pool

Supreme Court of Georgia

November 19, 2012; S12A1451; 12 FCDR 3597

In this case, a county’s workers’ compensation insurance company became insolvent and the county submitted the pending claims to GIIP pursuant to OCGA 33-36-1. GIIP denied the claims asserting that the county’s net worth exceeded the statutory net worth cap under OCGA 33-36-9. GIIP filed a declaratory action on that basis and the trial court granted it summary judgment. On appeal, the Supreme Court affirmed. The county asserted that the statute’s net worth calculation should include only ‘unrestricted net assets’. The court disagreed noting that the wording was ‘unambiguous’ and that it would not rewrite the definition of ‘net assets’ to mean only unrestricted assets. The court also disposed of the county’s assertion of a due process claim by citing the *Hancock* case for the proposition that a county is not a person but rather a public corporation and thus does not possess due process rights.

MANDAMUS

Burke County v. Askin

Supreme Court of Georgia

October 15, 2012; S12A0649; S12X0650; 12 FCDR 3145

This case involves a writ of mandamus regarding the obligation to maintain roads dedicated to the county. 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 under the general mandamus statute, OCGA 9-6-20, rather than the specific road mandamus statute, OCGA 9-6-21. Since OCGA 9-6-21 was allowed only to residents of the county, mandamus should fail since the owner did not live in Burke County. The Supreme Court disagreed, citing the *Fountain* and *Van*

Valkenburg cases, noting that the new, specific remedy did not take away the existing remedy unless there was an express intent or necessary implication in the statute. Thus, the trial court was correct in applying OCGA 9-6-20 in conjunction with the county duty to maintain roads under OCGA 32-1-2. The Court held further, however, that the fact a county has accepted an express dedication of roads does not mean that the county is without discretion to leave certain roads unopened.

Inagawa v. Fayette County

Supreme Court of Georgia

October 15, 2012; S12A0849; S12X0850; 12 FCDR 3148

In this case, a county solicitor-general filed a mandamus action against the county claiming his compensation had been calculated incorrectly. The solicitor-general's salary was set by a 1994 local Act at 75% of the 'salary' of a state court judge. The same 1994 local Act set the state court judge's salary at 85% of the 'base salary' of a superior court judge. A subsequent 2008 local Act set the solicitor-general's salary at 68% of the base salary of a superior court judge and set the state court judge's salary at 90% of the 'base salary' of a superior court judge plus 90% of the county supplement paid to the superior court judge. The solicitor-general argued that he had been underpaid and that the 2008 Act was void from inception because it reduced his salary in violation of OCGA 15-18-67. The trial court found that the solicitor-general had been underpaid and that the 2008 Act was not void from inception (i.e. from the time of its effective date when signed by the Governor) but that as applied to the solicitor-general, the Act would not become effective until the beginning of the solicitor-general's second term. On appeal to the Supreme Court, the Court addressed first the issue of whether the solicitor-general's salary was calculated upon the state court judge's salary, or, upon that salary amount plus supplement. The 1994 Act had used the terms 'salary' and 'base salary', but defined neither term. Citing the *Thomson* case, the Court followed the rule that where a qualifying word was used in one provision but not in another the presumption is that the other provision was not intended to have such qualification. Thus, 'base salary' would include salary amount only and would exclude supplement amounts, and 'salary' would include both base salary plus supplements. Since the state court judge's supplement was increased, his 'salary' was increased. This triggered an increase in the solicitor-general's salary. The Court however, disagreed that the 2008 Act, as applied to the solicitor-general, would become effective later than its stated effective date in order for there to be no conflict with OCGA 15-18-67. The stated Governor's effective date was plainly intended and conflicted irreconcilably with that general law. Thus, the 2008 amendment which would have reduced the solicitor-general's salary during his term of office was invalid and the 2008 Act remained in effect as to the solicitor-general's salary.

NEGLIGENCE

Couch v. Red Roof Inns, Inc.

Supreme Court of Georgia

July 9, 2012; S12Q0625; 12 FCDR 2159

This case involves the apportionment of damages in a premises liability action. This is a voluminous decision with an almost equally voluminous dissent and warrants very careful reading and study. The case was filed in federal district court and that court certified 2 questions to the Supreme Court of Georgia. The first question posed was whether OCGA 51-12-33 allowed the jury to apportion damages among a defendant property owner and a criminal assailant in a premises liability case by considering the 'fault' of the criminal defendant. The Court answered yes. The second question posed was whether jury instructions or a special verdict form in such a case violate the plaintiff's constitutional rights to a jury

trial, due process, or equal protection. The Court answered no. The in depth analysis of damage apportionment in both the majority opinion as well as the dissent lend themselves to careful scrutiny by county attorneys since counties are often a ‘deep pocket’ target.

NUISANCE

Columbus, Ga. v. Cielinski

Georgia Court of Appeals

November 30, 2012; A12A1621; 12 FCDR 3889

This case involves a nuisance claim stemming from repeated flooding of a home allegedly caused by an inadequate county drainage system and failure to properly maintain the system. Following the first instance of flood problems, it was discovered that the home encroached on the city drainage easement and that a sewer line was in fact under part of the house. The county and the homeowner entered into an agreement that the city would not require that part of the house to be moved and the homeowner would release the city from liability or damage caused by any legitimate entry to construct or repair the drains. If damage did occur the city would restore to the best of its ability the damaged property. Further flooding occurred and suit was brought against the city alleging nuisance as well as breach of contract. The city sought summary judgment which was denied on most issues without explanation by the trial court. On appeal, the Court of Appeals held that summary judgment was properly denied on the continuing nuisance claim. Following the *Kleber* case, a permanent nuisance claim was barred by the statute of limitations. Summary judgment should have been granted the county on the breach of contract issue. The agreement was clear and unambiguous and by its own terms did not cover damages stemming from improper or negligent maintenance of the drainage system.

OPEN MEETINGS/OPEN RECORDS

Cardinale v. City of Atlanta

Supreme Court of Georgia

February 6, 2012, S11G1047, 12 FCDR 339\

During an annual elected officials retreat, a poll was conducted during an open meeting. A vote conducted by a show of hands resulted in 7 members voting in favor of changing a rule and 8 members voting to maintain the rule without any change. The official minutes did not reflect the actual vote details, but only that the membership was not in favor of the proposed rule change. The plaintiff requested that the minutes be amended. The city’s legal department responded with a memo opining that in a non-roll-call vote, the open records act does not require that the minutes reflect the names of the council members and how their individual votes were cast. Plaintiff sued alleging, among other things, a failure to comply with OCGA 50-14-1(e) (2). The trial court dismissed the claim and the dismissal was upheld by the court of appeals. The Supreme Court granted certiorari and reversed on that open records claim. The Supreme Court held that OCGA 50-14-1(e) (2) requires, in the case of a non-roll-call vote, that “the minutes must list the names of those voting against a proposal or abstaining”. The court distinguished between the higher standard required in a roll-call vote, which would require the listing of names and the specific vote cast by each member voting, and a non-roll-call vote, which would maintain a reduced administrative burden of merely requiring the listing of names of those voting against a proposal or abstaining.

TAXATION

Fulton County Board of Tax Assessors v. LM Atlanta Airport LLC

Georgia Court of Appeals

December 27, 2011, A11A2055, 12 FCDR 29

The case involves the issue of a superior court's award of attorney fees and costs in litigation involving valuation of commercial property for ad valorem tax purposes in 2009 and 2010. The 2009 tax appeal was finally resolved by court order establishing the valuation. Since the tax year in the 2010 tax appeal is within the two year window of O.C.G.A. 48-5-299(c), that statute applied and controlled the valuation. Because the taxpayer was compelled to file the 2010 tax appeal and incurred significant expenses in litigating the appeal before the board of tax assessors conceded that O.C.G.A. 48-5-299 (c) applied, the Court of Appeals held that this case was controlled by its decision in *Fulton County Board of Tax Assessors v. Lamb*, 298Ga. App. 618, 680 SE2d 656 (2009) and that attorney fees costs were properly awarded pursuant to O.C.G.A 48-5-311(g)(3).

Calliope Properties LLC v. Fulton County Board of Tax Assessors

Georgia Court of Appeals

January 30, 2012, A11A2058, 12 FCDR 405

This case involves the appeal of a 2009 tax assessment on a parcel of property in the amount of \$77,700. The owner of the parcel on January 1, 2009, conveyed the parcel to owner 2 on January 20, 2009. On that same day, owner 2 conveyed the parcel to owner 3. Owner 3 filed a 2009 property tax return claiming a value of \$15,100. The assessors lowered the parcel valuation to \$73,900. Owner 3 appealed to the board of equalization and then to the superior court. When the assessors certified the appeal to the superior court, they listed owner 1 as the taxpayer. Owner 3 filed a motion to correct. It was unopposed. The value was determined to be \$15,100. Since this was less than 85% of the value set by the assessors, attorney's fees were granted under OCGA 48-5-311(g) (4) (B) (ii). The Court of Appeals upheld the attorney's fees stating that the assessors waived the right to claim that owner 3 was not the true taxpayer since they failed to raise the issue prior to the superior court judgment on the merits and since they negotiated the value with owner 3.

Fulton County Board of Tax Assessors v. Fast Evictions LLC

Georgia Court of Appeals

February 16, 2012, A11A2155-A11A2157, 12 FCDR 405

This decision covers 3 cases which involve the same identical issue. The taxpayer appealed to the assessors a 2010 tax valuation assessment on real property. Taxpayer elected arbitration under OCGA 48-5-311(f). Taxpayer submitted a certified written appraisal. The assessors notified taxpayer 53 days later that it rejected the appraisal valuation and adopted a different valuation. On appeal to superior court, the court agreed with the taxpayer's assertion that assessors had failed to meet the 45 day rejection period and that consequently, the value set forth in taxpayer's certified appraisal became the final value under OCGA 48-5-311 (f)(3)(A). The Court of Appeals upheld the decision stating that the board failed to meet the deadline and that the deadline was mandatory rather than discretionary since the statute specified a punitive result (i.e. the taxpayer's appraisal value becoming the final value).

Douglas County Board of Tax Assessors v. Denyse

Georgia Court of Appeals

February 21, 2012, A11A2353, 12 FCDR 641

The taxpayer appealed a 2009 tax valuation assessment on real property. Taxpayer had filed an ad valorem tax return on the property and then received a tax assessment notice from the assessors as well as two subsequent notices, each of which listed a higher valuation. Taxpayer appealed and the trial court granted summary judgment in favor of the taxpayer. The Court of Appeals upheld the decision stating that the board had not issued new assessment notices to remedy mere clerical errors such as the omission of a digit or the transposition of numbers, but rather it had made substantive valuation decisions. As such, the amended notices were not authorized under the clerical error rule, under the DOR Appraisal Procedures Manual, or under any clear statutory authority.

Fulton County Board of Tax Assessors v. Greenfield Investment Group LLC

Georgia Court of Appeals

March 1, 2012; A12A0025; 12 FCDR 833

This case involves an ad valorem tax appeal and the award of attorneys' fees. The subject property was owned by a bank on January 1, 2009. Property taxes were based upon an assessed value of \$121,400.00. Greenfield became the new owner in May, 2009, paid the taxes under protest, and appealed the tax assessment. The board of equalization reduced the assessed value to \$77,900.00. Greenfield appealed that amount to superior court and sought attorneys' fees. The board of assessors sought dismissal as Greenfield did not own the property on January 1. Greenfield filed a motion to correct misnomer while also seeking the bank's written authorization to pursue the appeal (which the bank granted). The board stipulated at trial that the property's value was \$12,900.00. The trial court granted attorneys' fees under OCGA Section 48-5-311(g)(4)(B)(ii) in the amount of \$7,628.00. The Court of Appeals upheld the attorneys' fees on the basis that the final value was less than 85% of the value set by the assessors and no abuse of the trial court's discretion occurred in determining the fee amount. The court followed its recent holding in the *Fulton Co. Bd. Of Assessors v. Calliope Properties* case and stated that the motion to correct misnomer was more in the nature of a motion to substitute a party. Thus there was no error in granting attorneys' fees incurred prior to Greenfield becoming the actual party in interest in the case.

Fulton County Board of Tax Assessors v. Calliope Properties, LLC

Georgia Court of Appeals

April 5, 2012; A12A0589; 12 FCDR 1383

This case involves an ad valorem tax appeal and attorneys' fees. Owner 1 held property on January 1 and sold it to the LLC on January 23 for \$25,490. The LLC file an ad valorem tax return in the amount of the purchase price. The board of tax assessors assessed the property at \$98,900 and mailed the assessment notice to owner 1. The LLC paid the taxes and filed a tax appeal and identified itself as the actual property owner. The assessors reduced the assessment to \$82,600 and the LLC appealed to the BOE. The BOE affirmed that amount and the LLC appealed to superior court. In a pretrial order, the value was agreed upon at \$30,000. Since this was less than 85% of the value set by the assessors, \$6,437 was awarded as attorneys' fees. The Court Of Appeals disagreed with the county's assertion that the LLC was not the proper party since it was not the January 1 owner noting that the board of assessors had at every step accepted the LLC as the owner, including when it certified the appeal to the trial court. The award of attorneys' fees was proper under O.C.G.A. 48-5-311 (g)(4)(B)(ii) as no evidence was shown that the award was unreasonable.

Mattox v. Franklin County

Georgia Court of Appeals

June 13, 2012; A12A0265; 12 FCDR 1932

This case involves the challenge to a SPLOST levy and the Public Lawsuits Act. Mattox filed a pro se lawsuit challenging a SPLOST levy in Franklin County. The referendum was alleged to be void *ab initio* and the proposed proceeds expenditure was alleged to be void as impermissible. The trial court granted the county's motion to dismiss holding the SPLOST resolution was sufficiently descriptive as a matter of law and that the remainder of the claims were not ripe for review. Mattox filed a notice of appeal. The county then moved for an appeal bond of over \$2.5 million under O.C.G.A. Sections 5-6-46 & 50-15-2, an amount which represented potential increases on interest during the pendency of the appeal as well as additional legal fees and expenses that would be incurred by the county. The trial court ordered a bond to be posted in the amount of \$2.1 million as a condition precedent to any further pursuit of the appeal. Mattox appealed the court order to the Supreme Court of Georgia. That court transferred the appeal to the Georgia Court of Appeals. The Court Of Appeals agreed with the trial court and upheld the requirement of the appeal bond. The Court first noted that purpose of the public lawsuit statute was to protect the public from increased financial costs resulting from non-meritorious or frivolous lawsuits against public improvement projects. The Court cited *Haney v. Development Authority of Bremen* as precedent for holding that the definition of 'public lawsuit' was intended to be broad. Since Mattox's allegations challenged the validity of financing a public improvement project by a political subdivision it met the definition of public lawsuit under O.C.G.A. 50-15-1(2). Citing 1990 Op. Atty. Gen. U90-18, the Court also found Mattox's claims challenging the lack of specificity in the SPLOST resolution to be without merit since the SPLOST statute did not require the alleged degree of specificity. The Court further found that any inconsistencies between the funding amounts in the intergovernmental agreement and the SPLOST resolution did not render the referendum void as they could be corrected by merely amending the intergovernmental agreement. Finally, the Court agreed with the trial court that the allegation that funds would be used for projects not owned by the county was hypothetical, abstract, and not ripe for adjudication since nothing in the SPLOST resolution, referendum, intergovernmental agreement, or proposed project list showed that specific capital outlay projects will be owned by entities other than a county or city.

We, the Taxpayers v. Board of Tax Assessors of Effingham County

Supreme Court of Georgia

November 6, 2012; S12A0700; S12X0701; 12 FCDR 3600

These 2 cases involve multiple appeals reading taxation issues resulting from a county's increase in some ad valorem assessments during the period when former OCGA 48-5B-1 was in effect. That provision placed a moratorium on assessment increases except in some cases where a county performed or had signed a contract to perform countywide revaluations. The Supreme Court held that taxpayers had no right to either challenge the validity OCGA 48-5B-1 or challenge the assessors' actions as ultra vires without having first exhausted their administrative remedy under OCGA 48-5-311. Consequently, the Cort vacated the trial court's order denying summary judgment to the board assessors.

Fitzpatrick v. Madison County Board of Tax Assessors

Supreme Court of Georgia

November 19, 2012; S12A1435; 12 FCDR 3602

This case involves a tax appeal under OCGA 48-5-311. The board of equalization denied an appeal and the taxpayer filed in superior court under the statute. The board of assessors refused to certify the appeal to

the trial court because the taxpayers refused to pay the filing fee to the superior court clerk. The Supreme Court held that even though OCGA 48-5-311 did not expressly require a fee, it also did not provide any exemption from the fee required under OCGA 15-6-77 and 77.2. As the Attorney General had previously opined in 1985 Op. Att’y Gen. 171, court appeals under OCGA 48-5-311 are de novo actions and are subject to superior court filing fees.

Marsh v. Clarke County School District

Supreme Court of Georgia

October 15, 2012; S12A1568; 12 FCDR 3603

This case involves a mandamus action in which a taxpayer seeks the return excess proceeds from an educational sales tax. {NOTE: the Court describes this as an”ELOST” This is technically incorrect. There are 7 counties which have an ELOST, but these are local constitutional amendments. What is at issue in the case is in fact an ESPLOST under Article VIII of the Constitution.}

The trial court denied the mandamus since there was no showing that excess funds actually remained. The Supreme Court affirmed on the same basis. Most of the opinion, however, deals with the Court explaining the application of laches (an equitable defense) to a mandamus claim (an extraordinary legal remedy). It was not necessary to resolve the case, but the Court did so to assist with the contradictory case law. The Court concludes that the correct line or reasoning is that a mandamus action can be barred by gross laches and it expressly overrules the *Crow* line of cases.

Morgan County Board of Tax Assessors v. Ward

Georgia Court of Appeals

October 24, 2012; A12A0952; A12A1070; 12 FCDR 3385

This case involves an alleged breach of a conservation use covenant and assessment of penalties for that breach. The taxpayer enrolled property under the covenant pursuant to OCGA 48-5-7.4. Subsequently, a portion was subdivided and sold to purchaser 1 who in turn transferred the tract to purchaser 2. Purchaser 2 entered into another covenant and later transferred the tract to purchaser 3. Purchaser 3’s application to continue in covenant was denied by the assessors’ board. The board notified the taxpayer of the breach and assessed penalties. Taxpayer appealed to the board of equalization under OCGA 48-5-311. The BOE upheld the breach. Taxpayer appealed to superior court and moved for summary judgment on the basis that the assessors had no authority to levy penalties since they had not provided the taxpayer with the statutory 30 day period to cure the breach but had only notified taxpayer of the breach. The trial court denied summary judgment. On appeal, the Supreme Court reversed. The Court addressed first the issue of whether the taxpayer could appeal the cure period under OCGA 48-5-311(e) as a matter incident to the BOE’s decision and determined that the taxpayer could litigate the question of taxability de novo in superior court including whether the lack of proper notice barred the penalty imposition. The Court then ruled that the assessors had failed to comply with the notice to the taxpayer of the cure period and that summary judgment should have been granted to the taxpayer.

H.O.P.E. Through Divine Interventions, Inc. v. Fulton County Board of Tax Assessors

Georgia Court of Appeals

November 16, 2012; A12A1100; 12 FCDR 3762

This case involves the denial of an ad valorem tax exemption under OCGA 48-5-41(a)(4). A Section 501 (c)(3) and OCGA 43-17-5 charitable organization bought a property to renovate and use for its charitable purposes. The BOA denied the application for exemption for the years during which the renovation

occurred. The trial court granted summary judgment to the BOA. On appeal, the Court of Appeals affirmed. The Court reiterated the 3 criteria under *York* which must be met to qualify for the exemption: institution devoted entirely to charitable pursuits; owner's charitable pursuits must be for benefit of the public; and the use of the property must be exclusively devoted to those charitable pursuits. The 3rd criterion was not met in this case. Nothing in the statute, binding precedent interpreting the statute, and governing principles applicable when discerning entitlement to tax exemptions, would allow a broadening of the plain words of the exemption statute to include 'preparing property for its charitable use'.

TORTS

City of Douglas v. Hudson

Georgia Court of Appeals

March 20, 2012; A11A1914; 12FCDR 1165

This case involves a negligence claim against the city. Hudson was seriously injured in a criminal assault by another individual following several incidents regarding disruption of Hudson's cable service by that individual. The police were called multiple times and during the last such call informed Hudson they would handle the matter. It was following that assertion that Hudson was injured. Hudson sued the city claiming it had negligently failed to protect him. The trial court denied the city's summary judgment motion. The Court of Appeals reversed the decision. In a matter involving insufficient police protection, the mere assertion of a generalized obligation of the city to protect the public is insufficient. It must be shown that the city owed a duty to the individual in particular and that showing requires proof of a special relationship which creates a special duty. This showing requires 3 elements: an explicit assurance by a city officer or employee that the city would act; direct proof that the city knew its failure to act could expose the individual to harm; and direct proof that the injured individual justifiably and detrimentally relied upon the city's assurance that it would act. The evidence in this case was insufficient to establish the requisite special relationship and summary judgment for the city was warranted.

Stevenson v. City of Doraville

Georgia Court of Appeals

March 28, 2012; A11A1940; 12 FCDR 1354

This case involves the public duty doctrine. Stevenson's car broke down on the highway in very heavy traffic at night under rainy conditions. A city police officer saw the stalled vehicle and turned on its flashing lights which were not roof mounted. The officer could not safely reach the stalled vehicle and called for additional assistance. Stevenson was struck by another vehicle while attempting to exit her own car. She sued alleging negligence. The city moved for summary judgment on the basis that it was insulated from liability under the public duty doctrine. The trial court granted the motion and the Court of Appeals affirmed. Under the public duty doctrine, there is no liability for failure to provide police protection unless a special relationship exists. The officer owed a general duty to the public and not to Stevenson in particular. More harm than good would have been caused if the officer had tried to reach her under the existing conditions. To prove a special relationship requires an explicit assurance or promise of action; government knowledge that inaction would lead to harm; and justifiable and detrimental reliance by the injured party on the government's action. Since the first and third prongs on this test were not met, the relationship was not proven.

Newman v. Johnson

Georgia Court of Appeals
October 26, 2012; A12A1114; 12 FCDR 3490

This case involves the issue of a physical injury as a result of alleged violations of the Americans with Disabilities Act (ADA) & the Life Safety Code (LSC) {all citations were omitted in the case text}. Plaintiff was allegedly injured when she tripped and fell on the step of a county-owned building. The lawsuit against the chairperson of the county commission and the director of public works alleged violations of two building codes, the ADA and the LSC. The trial court granted summary judgment to the chairperson on the basis of sovereign immunity but denied it to the director on the ADA claim. On appeal, the Court of Appeals reversed on the basis that the plaintiff made no claim that she is disabled and had failed to show that she was within the class of disabled persons for whose benefit the ADA was enacted. The case was remanded back to the trial court because it had not addressed the LSC issues in its order denying summary judgment to the director.

Bennett v. Georgia Department of Transportation; Johnson v. Georgia Department of Transportation

Georgia Court of Appeals
November 6, 2012; A12A1064; A12A1065; 12 FCDR 3548

This case involves the issue of physical injuries in a car accident in which the alleged proximate cause was the negligent design, maintenance, and failure to provide proper traffic control devices at an intersection by GDOT. The plaintiffs traveling in car 1 were struck by car 2 which failed to stop at an intersection marked with stop signs and overhead flashing lights. The trial court granted summary judgment to GDOT on the basis there was no genuine issue of material fact for the jury as to the proximate causation issue. On appeal, the Court of Appeals affirmed on the basis that the driver of car 2 had an absolute statutory duty to stop and failed to do so even though he admitted that he seen the stop signs.

ZONING

East Georgia Land & Development Co LLC v. Newton County

Supreme Court of Georgia
March 19, 2012; S12A0114; 12FCDR 955

This case involves a zoning dispute. EGL purchased 427 acres of land in Newton County for the purpose of constructing a landfill. As a part of DNR landfill permitting requirements, EGL requested a letter of zoning compliance from the county as required by state law. The county declined on the basis that a landfill was an impermissible use under the 1985 zoning ordinance. EGL contended that the ordinance was invalid since it was not attached to the minutes of the 1985 meeting when it was purportedly adopted and also that the zoning maps were improperly adopted. The trial court granted summary judgment to county since a copy of the ordinance had been used to ‘reestablish’ the lost ordinance. The Supreme Court reversed the decision. First, the court held that the establishment of a copy of the ordinance under O.C.G.A. Section 24-8-1 was insufficient to cure issues relating to its validity and that it accomplished nothing more than establishing the copy as an ‘evidentiary substitute’ for the original. Second, the court held that the county’s use of mere parol evidence was insufficient to prove the existence of the original set of maps which had been incorporated by reference into the ordinance. The county’s claim that the maps

were kept in the zoning administrator's office could easily have been proven by simply producing the original maps, something which the county failed to do.

Haralson County v. Taylor Junkyard of Bremen, Inc.

Supreme Court of Georgia

July 2, 2012; S12A0200; 12 FCDR 2154

This case involves mandamus and appeals to superior court. A property owner's application for a business license was denied by a zoning appeals board on the basis of nonconforming use which violated the county zoning ordinance. The property owner filed in superior court for a writ of mandamus. The superior court granted the writ finding that there was no evidence supporting the decision of the zoning appeals board. The county applied for a discretionary appeal to the Supreme Court of Georgia for review. The county contended that the superior court had erred in granting mandamus since the county zoning ordinance itself provided a means for appealing adverse decisions of the zoning appeals board to superior court. As a result, the county contended that mandamus was not an available remedy. The Court disagreed and upheld the mandamus. The Court cited the 1991 Walton County v. Scenic Hills case for the proposition that under the Constitution, only a statute, and not a mere ordinance, could create a mechanism for direct appeal to superior court. Since the General Assembly had provided no statutory mechanism, the mandamus was proper. The Court also found no sufficient factual basis for the zoning appeal board's decision.

Mortgage Alliance Corporation v. Pickens County

Georgia Court of Appeals

July 11, 2012; A12A0401; 12 FCDR 2367

This case involves a question of what constitutes a final zoning decision. The sole commissioner of the county signed a resolution adopting a new county zoning ordinance. The sole commissioner sent a letter to the property owner/developer notifying them that the new zoning ordinance would apply to their proposed development and that the property would not be given "grandfathered" status. Two years later the property owner/developer filed an inverse condemnation action. The trial court granted summary judgment to the county since more than 30 days had elapsed from the date of the zoning decision and that the claim was thus barred under O.C.G.A 5-3-20. The Court of Appeals affirmed. The Court noted that under the statute, the letter from the sole commissioner commenced the running of the 30 day clock and that failure to file an appeal within 30 days rendered the claim time-barred.

Settles Bridge Farm LLC v. Masino

Georgia Court of Appeals

November 16, 2012; A12A0898; 12 FCDR 3785

This case involves a rezoning of property and a subsequent Anti-SLAPP suit. The LLC sought to sell a tract it owned to a purchaser who wanted to build a private school. Purchaser and the LLC discussed the zoning with the city and were told the proposed use would qualify as a 'by-right use'. A chamber of commerce official overheard that discussion and further inquired of the city manager whether it was correct. Upon confirmation, the city manager advised mayor and council to amend the zoning ordinance to prevent the use of the property for a school without a special use permit. The ordinance was so amended and the purchase contract was terminated. The LLC sued and the trial court dismissed the action under OCGA 9-11-11.1. On appeal, the Court of Appeals affirmed the dismissal. The Court noted that the LLC had expressly conceded that the claims against the chamber official and the chamber were governed by the Anti-SLAPP statute. Further, nothing in the employment confidentiality agreement between the chamber official and the chamber was for the benefit of the LLC or anyone outside the chamber. Even if it was,

nothing could have been construed as confidential since the LLC and the purchaser had already discussed the zoning classification and the question of permitted uses. Thus, the statements were made in connection with an issue of public interest. In addition, the LLC failed to show that the chamber official had acted in bad faith.

Marietta Properties, LLC v. City of Marietta

Georgia Court of Appeals

August 31, 2012; A12A1186; 12 FCDR 4074

This case involves a dispute under a certificate of approval for construction of a building which would exceed the height limitations under a zoning ordinance adopted after the certificate was granted. The trial court dismissed on the basis that the LLC had not exhausted administrative remedies. On appeal, the Court of Appeals agreed and held that the LLC could not seek a declaratory judgment that it was entitled to a vested right to construct the building. First, the LLC had never submitted an application for a building permit. Second, the zoning and planning director was required to review any proposed land use before such permit was issued and the ordinance established a zoning board of appeals for adverse decisions of the director. Since neither the director nor the appeals board had made a decision regarding the issuance of the building permit, any court determination on the matter would be premature.