

COUNTIES & THE LAW

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2013 Compilation Edition

Counties & the Law, 2013 Compilation Edition includes decisions of interest to county attorneys published in the Daily Report Opinions Weekly between December 31, 2012, and December 27, 2013. 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 2013 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.

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COUNTIES & THE LAW

ANTE LITEM NOTICE

City of Atlanta v. Bennett

Georgia Court of Appeals
July 9, 2013; A13A2063; 13 FCDR 2311

This case involves a class action dispute by city firefighters against the city on the basis that a firefighter promotion exam was tainted by cheating. The trial court permanently enjoined any promotions. On appeal, the Court of Appeals reversed the trial court and ordered a new trial. The Court agreed with the city contention that the trial court abused its discretion by excluding testimony from the owner of the company that had actually developed the test. The witness was testifying not as an (undisclosed) expert but merely as a fact witness who had personal knowledge of the company's general operating procedures in developing the exam. As a fact witness, there was no requirement that he be disclosed as an expert witness. Although O.C.G.A. 36-33-5 requires ante litem notice for personal injuries or injuries to property, the Court reiterated that it had specifically overruled part of the 2000 *Dover* case and that ante litem notice is not required for a claim for attorney fees and costs under O.C.G.A. 13-6-11.

BONDS

Sherman v. Development Authority of Fulton County

Georgia Court of Appeals
March 7, 2013; A12A2112; 13 FCDR 526

This case involves a challenge to validation proceedings of revenue bonds issued by the Development Authority of Fulton County (DAFC). A county resident sought to become a party to the validation proceedings by filing a "Notice of Becoming a Party to Bond Validation Petition Proceeding." The individual then filed objections to the validation proceedings. DAFC filed a motion to strike the pleadings on the basis that the proper statutory procedure for intervening in a civil action had not been followed. The trial court granted that motion and also validated the bonds. On appeal, the Georgia Court of Appeals upheld the decision. The Court specifically overruled the *Hardin Const. Group* case and held that the

explicit statutory procedure of O.C.G.A. 9-11-81 combined with the absence of any provision to the contrary in the Revenue Bond Law meant that the provisions of the Civil Practice Act addressing intervention would apply to bond validation proceedings. The Court declined to address the rest of the claims since standing to make the challenges was lacking.

Sherman v. Development Authority of Fulton County

Georgia Court of Appeals
March 22, 2013; A12A2111; 13 FCDR 935

This case involves the validation of revenue bonds in superior court. The development authority (DAFC) sought to develop a manufacturing 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, as in a similar previous case involving these same parties, 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. An appropriate order under this statute requires the setting forth of requisite findings of fact and conclusions of law which cite legal authority and contain analysis that explain them. This same flaw occurs in the challenge to the ramp up method of valuating the leasehold for ad valorem tax purposes. The trial court order fails to set forth the facts on which it is based as well as the analysis by which it arrived at its decision. (The absence of a transcript does not prevent this.) Third, the trial court order ignored the claim that the structure of the bond transaction violated OCGA 36-62-8(b). Fourth, even though the issue of the assessors approving the memo was not challenged as an ultra vires act at trial, it can be challenged on appeal since the trial court expressly held in its order that the execution of the memo was not an ultra vires act. Finally, the trial court again fails to address the issue of the creation of an unconstitutional tax exemption. It fails to cite the constitutional justifications and offers no analysis regarding why the exemption is not illegal. 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.

Sherman v. City of Atlanta

Supreme Court of Georgia
June 17, 2013; S13A0067; 13 FCDR 1818

This case involves a different aspect of the continuous litigation regarding the issuance of revenue bonds in Atlanta. During a bond validation hearing, an 'objection to bond validation and denial of bond petition allegations' was filed. Petitioners alleged they were city residents. They did not attend the hearing but their counsels appeared on their behalf. The city objected on the basis that petitioners could do nothing until they proved through witnesses or other evidence that they were city residents. The trial court validated the bonds. On appeal, the Supreme Court agreed and upheld the trial court. The petitioners' right to participate in validation proceedings is contingent under O.C.G.A. 36-82-77 on proving they are state citizens and city residents at the time an objection is filed. Simply asserting a 'fact' does not make it

true. Petitioners' counsel chose to 'stand on legal arguments that turned out to have no legs'. Petitioners had the burden of proof to establish the facts with competent evidence which they willfully chose not to do.

Sherman v. Development Authority of Fulton County

Georgia Court of Appeals

September 26, 2013, October 2, 2013; A13A0861; 13 FCDR ****

This case involves the continuous litigation between the plaintiff and DAFC regarding bond validation. In this installment, the Court of Appeals holds that its previous *Sherman* decision {321 Ga. App. 550 (2013)} will apply retroactively to this case. The Court applies the 3 prong test of *Chevron Oil Co.* to reach this conclusion. Consequently, while O.C.G.A. 36-82-77 allows the right to intervene, an intervener must follow the steps in O.C.G.A. 9-11-24(c). Plaintiff here did not and therefore has no standing to appeal the trial court's judgment.

CIVIL PRACTICE

Barham v. City of Atlanta

Supreme Court of Georgia

February 4, 2013; S12A1720; 13 FCDR 172

This case involves a class action by a group of firefighters against the city regarding the failure of the city to prevent cheating on an exam upon which promotions were based. Following a jury verdict that cheating had occurred, the trial court issued a permanent injunction and required a retest. Individuals who scored 84 or higher would have to score within 2 standard deviations on the retest to retain their promotions. The 6 firefighters who scored 90 or higher on the first test would immediately have their promotions revoked. The group of 6, who were not parties to the class action, appealed the order. The Supreme Court vacated the portion of the injunction which treated the group of 6 differently from the class members. First, the Court held the group had standing to appeal the injunction even though the injunction was aimed at the city since the injunction required the city to punish the 6 just as if they had been parties. Second, the court held that it was the duty of the parties of the suit to have joined the 6 as additional parties rather than placing the burden on the additional parties to intervene once they had knowledge of the suit. Finally, the Court held the trial court had abused its discretion by failing to give the group of 6 their day in court and an opportunity to have a full and fair opportunity to litigate. An enforcement order cannot be so broad as to punish the conduct of persons whose rights have not been judged according to law.

Association of Guineans in Atlanta, Inc. v. DeKalb County

Supreme Court of Georgia
February 4, 2013, S12A1603, 13 FCDR 175

This case involves the denial of a special land use permit to allow a single-family residence located in a residential area to be used as a place of worship. The board of commissioners denied permit application. The trial court granted the county's motion to dismiss. On discretionary review to the Supreme Court of Georgia, the Court upheld the dismissal as to a constitutional challenge since that issue was raised for the first time at trial court. Following *Shockley* and *Cooper*, the Court reiterated that a constitutional claim against a zoning ordinance must be raised before the local governing body in order to afford that body the opportunity to amend the ordinance and bring it within constitutional limits. However, the Court agreed that trial court had applied the wrong standard for the motion to dismiss the claim regarding a violation of the federal Religious Land Use and Institutionalized Persons Act. The trial court was ruling on a motion to dismiss that had not been converted into a motion for summary judgment, and was required to assume the factual allegations in the complaint to be true and then determine whether some form of relief exists under the assumed set of facts. The case was remanded for application of the correct standard of analysis.

Rehman v. Belisle

Supreme Court of Georgia
November 4, 2013; S13A1605; 13 FCDR 3327

This case involves a dispute over a city ordinance. A citizen brought a pro se suit against mayor and council seeking either mandamus or a declaration that the ordinance was "ill-conceived, confusing, detrimental, or unconstitutional". The ordinance provided that it was "unlawful for any person to have in his possession less than one ounce of marijuana". The trial court dismissed the petition for lack of jurisdiction due to lack of service and for failure to state a claim. The Supreme Court affirmed. First, the Court cited *Seabolt* and noted that service had not been perfected under O.C.G.A. 9-11-4 and cited *Adams* and noted that actual knowledge of the petition did not cure defective service here. Second, the petitioner had no standing as he had not been charged with or even threatened with a violation of the ordinance.

Duncan v. Moreland

Georgia Court of Appeals
November 6, 2013; A13A1491; 13 FCDR 3410

This case involves a dispute over the probate of a will. {The fact setup is somewhat convoluted and the interested reader is directed to the case for those matters.} The point of the case is that the Court of Appeals upheld a superior court holding that a probate court has no authority to extend the time of appeal beyond the 30 day period set forth in O.C.G.A. 5-3-20.

Center for a Sustainable Coast, Inc. v. Turner

Georgia Court of Appeals

November 15, 2013; A13A1487; A13A1488; 13 FCDR 3705

This case involves the Erosion and Sedimentation Act, O.C.G.A. 12-7-1, *et seq.* A structure was built which encroached upon marsh buffer area. The EPD director entered into a consent order with the builder. The nonprofit corporation petitioned an ALJ alleging the consent order was an after-the-fact variance which allowed the structure to remain in place and sought an amendment to the consent order by the ALJ that would require removal of the structure. The ALJ found that the petitioner had established an injury. The Court of Appeals found that the petitioner lacked standing based upon its inability to demonstrate redressability. In other words, it must be able to show that the injury will be redressed by a favorable decision. Here, however, nothing in the statute required the EPD director to order the removal of the structure. The director had discretion with respect to whether and how to take enforcement action. Consequently, the petitioner could not show that it was likely that the injury would be redressed by a favorable decision by the EPD director.

Daniel v. Fulton County

Georgia Court of Appeals

November 19, 2013; A13A1643; 13 FCDR 3756

This case involves the issue of judicial estoppel in the context of bankruptcy. Ante litem notice was served on the county regarding an inverse condemnation claim resulting from alleged sewer overflow. Subsequently, the party filed bankruptcy but did not include the potential claim for damages in the bankruptcy petition. The trial court dismissed the claim on the basis of judicial estoppel since the party failed to produce evidence that the bankruptcy petition had been reopened and the schedules amended. The party filed for reconsideration and attached a copy of a motion to reopen the bankruptcy and a copy of the bankruptcy court's order that granted the motion to reopen. However, the trial court entered its order on the last day of its term. On appeal, the Court of Appeals explained that judicial estoppel is an equitable doctrine that prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding and that it is commonly used to prevent a bankruptcy debtor from pursuing a damages claim when such was not listed among the party's assets. Citing the *Vojnovic*, *Period Homes*, & *Zahabiun* cases, the Court noted that whether judicial estoppel bars a claim depends on 3 factors. First, the later position must be clearly inconsistent. Second, the party must have succeeded in persuading a court to accept the earlier position. Third, a court must consider whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment if not estopped. In this case, the trial court did not consider the 3rd factor and the case was remanded back for that purpose.

CONDEMNATION

Georgia Department of Transportation v. Bae

Georgia Court of Appeals
February 21, 2013; A12A2493; 13 FCDR 351

This case involves an inverse condemnation claim arising from construction of a section of a state highway near the commercial property of the plaintiffs. The allegation was that plaintiffs' business had fallen due to lack of access to the newly constructed portion of the highway. The trial court denied DOT's motion to dismiss. On appeal, the Court of Appeals reversed. The Court restated the rule from the *Tift County* case that inverse condemnation claims fall into 2 distinct categories: first, general rights which are in common with the public; and second, special rights which are held by virtue of ownership of the property. A taking or damaging of property can occur only if special rights have been violated. Citing the *Tift County* and *Fountain* cases, the Court noted that here, the DOT did nothing to the roads abutting the property and did not terminate or obstruct access to those roads. Consequently, the harm resulted from a re-routing of traffic, not a diminishment of access, and thus, the injury falls under the general rights category and not the special rights category and is not compensable.

Barngrover v. City of Columbus

Supreme Court of Georgia
March 4, 2013; S12A1492; 13 FCDR 402

This case involves an inverse condemnation claim arising from sinkholes and fecal coliform bacteria on the residential property of the plaintiff. The allegation was that plaintiff's property was damaged by continuous leakage from the network of city sewer and drain pipes under the property. A jury verdict awarded monetary and equitable relief for the inverse condemnation. In addition to the monetary damages, the city was ordered to abate the drainage system away from the house and repair the house to its condition prior to the occurrence of the damage. The trial court retained jurisdiction and the city filed a plan to implement relief. The court rejected the plan and after many years of various motions appointed a special master to enforce its judgment. The special master found repair impossible and ordered the house to be razed and rebuilt as well as recommending an alternative pipe routing that would be less disruptive to the entire neighborhood where plaintiff lived. Plaintiff objected to the special master report. After a hearing the trial court adopted the report and plaintiff appealed. On appeal, the Supreme Court of Georgia upheld the decision. The Court noted that the trial court had expressly retained jurisdiction to ensure completion of the equitable remedies. Citing the *Essex Group* case, the Court held that such remedies are a matter within the sound discretion of the trial court and will be sustained by appellate courts where discretion has not been abused. No showing was made that such discretion had been abused. The Court rejected the plaintiff's contention that the special master was unqualified noting that plaintiff never questioned the qualifications during the 51 months of special master oversight but only raised the matter due to unhappiness with the findings in the report.

Georgia Department of Transportation v. Jackson

Georgia Court of Appeals
June 12, 2013; A13A0419; 13 FCDR 1897

This case involves an inverse condemnation claim for compensation when DOT closed a driveway as part of roadwork. The driveway led from the highway, across another tract of land, and over a railroad crossing before reaching plaintiff's property. Plaintiff claimed that he had acquired a prescriptive easement to the driveway as well as the railroad crossing. The trial court agreed and awarded compensatory damages. On appeal, the Court of Appeals agreed and upheld the trial court. The Court cited *DeCastro* and multiple other cases and held that the evidence here showed that the plaintiff had established a prescriptive easement. The Court cited the *Trammel* and *Yawn* cases and held that the plaintiff had shown that the railroad was in fact on notice of the adverse use. At one point the railroad had even asked the plaintiff for permission to upgrade and repair the crossing. Having established the prescriptive easement, the plaintiff was entitled to compensation.

Fulton County v. Dillard Land Investment LLC

Georgia Court of Appeals
June 19, 2013; A13A0562; 13 FCDR 1963

This case involves a special master condemnation proceeding when the county sought to condemn, for library expansion, land owned by the LLC. The special master determined the valuation and filed the award with the trial court. The trial court adopted the award. However, following the award adoption, but prior to the award amount being paid into the court registry or to the LLC, the county filed a voluntary dismissal of the condemnation petition. The trial court granted the LLC's motion to set aside the dismissal. On appeal, the Court of Appeals disagreed and reversed the trial court. The Court cited the 2006 amendment to O.C.G.A. Section 22-1-12 which authorizes a condemnation proceeding to be abandoned by the condemning authority. The Court distinguished the *Gramm* case noting that the county never paid the award amount to the condemnee or into the court registry and never took title to the land for any period of time. While the purpose of the amendment was to grant expenses to property owners in abandonment cases, the statute nonetheless allows the condemning authority to voluntarily dismiss its condemnation petition.

Walleye LLC v. City of Forest Park

Georgia Court of Appeals
July 1, 2013; A13A0447; 13 FCDR 2246

This case involves an inverse condemnation claim. The LLC was running a nude dancing business with private rooms and on-site alcohol service. The city enacted a new ordinance governing sexually-related business which banned the sale of alcohol and the use of private rooms at nude dancing establishments. When the LLC sought to renew its application for adult entertainment licenses, the application was denied. A suit was filed alleging an inverse condemnation claim on the basis that there was no viable other use of the property and that the city had deprived the LLC of all viable economic use of the property. The

City sought and was granted summary judgment since the LLC did not have vested property rights in renewed adult business or alcohol licenses and therefore had not established a regulatory taking. On appeal, the Court of Appeals agreed and upheld the trial court. The Court noted that the LLC argued it was unnecessary to establish a vested property right because the license requirement applied only to its tenants and that the vested property right requirements did not apply to this case. The Court held that this very argument establishes that the LLC failed to state a claim for which relief for which they could recover. First, they have failed to present any evidence that their property could not be converted to a use other than an adult business. Second, since the zoning allowed for adult businesses, the LLC failed to show that they could not continue leasing their buildings to other businesses in the same category that would not have violated the licensing rules. Consequently, there was a failure to demonstrate any compensable taking.

Department of Transportation v. Revco Discount Drug Centers, Inc.

Georgia Court of Appeals

July 15, 2013; A13A0040; 13 FCDR 2420

This case involves an inverse condemnation claim decided upon some unforgiving procedural grounds. DOT sought to condemn a tract of land. Revco was not named as a condemnee; however, it filed a separate action against DOT for inverse condemnation. Acting upon an agreement of the parties and an order of the trial court, Revco intervened in the direct condemnation action and also dismissed its inverse condemnation action with prejudice. DOT moved for summary judgment on the basis the dismissal of the inverse condemnation action with prejudice constituted adjudication on the merits which therefore barred Revco's claim for the same damages in the direct condemnation action. The trial court denied Revco's motion to set aside the dismissal with prejudice and also denied DOT's motion for summary judgment. A jury trial ensued with a verdict for Revco. DOT filed for judgment notwithstanding the verdict which the trial court denied. On appeal, the Court of Appeals noted that it was "unfortunately, constrained to agree" with DOT. Revco did not appeal the trial court's denial of the petition to set aside the dismissal with prejudice. Hence, under O.C.G.A. 9-12-40, the Court of Appeal's analysis shifted solely to the applicability of res judicata to Revco's claim for damages. The trial court was a court of competent jurisdiction. A voluntary dismissal with prejudice constitutes a judgment on the merits for purposes of res judicata with regard to the same parties and the same cause of action. Revco's dismissal was voluntary because: it was not required to intervene in the direct action; it was not required by the parties' agreement; and it was not required by the trial court to dismiss with prejudice. Citing *Kent*, a mistake by a party as to the legal result of an act, is no ground for either defensive or affirmative relief. The inverse condemnation and the direct condemnation had an 'identity of parties' and it involved 'the same subject matter'. Finally, Revco had a full and fair opportunity to litigate the issue. Had Revco declined to intervene or had it dismissed without prejudice, it could have litigated its damages claim. Consequently, res judicata applies and the Court held that the judgment in favor of Revco be vacated and that the trial court was reversed on its denial of judgment NOV in favor of DOT.

Bray v. Department of Transportation

Georgia Court of Appeals

October 23, 2013; A13A1454; 13 FCDR 3291

This case involves a dispute between a property owner and GDOT following a condemnation. The county condemned land for a GDOT road improvement project. The owner was duly compensated. Subsequently, the owner filed an inverse condemnation action against GDOT seeking additional compensation due to damage to the remaining property allegedly caused by negligent construction and negligent professional engineering. The trial court granted GDOT's motion to dismiss on the basis of failure to comply with ante litem notice under O.C.G.A. 51-21-26 and failure to comply with the expert affidavit requirement of O.C.G.A. 9-11-9.1. The Court of Appeals affirmed in part and reversed in part. First, the Court noted that the original condemnation award was conclusive as to all damages to the remaining property resulting from proper construction regardless of whether foreseen or not. The inverse condemnation action for compensation for property taken by negligent or improper construction is not barred by the prior award. Second, the trial court erred by dismissing for failure to comply with ante litem notice. Under the tort claims Act, Sovereign immunity does not exist when a cause of action for inverse condemnation lies because the Constitution itself affords the right of action. Third, the trial court correctly dismissed the damage claim on the allegation that professional engineering negligence caused the damage and no expert affidavit was filed. Finally, however, the Court noted that the allegations of the complaint were so general that the damage claim could be liberally construed to claim damages on the basis of ordinary or other negligence not controlled by O.C.G.A. 9-11-9.1. Citing the *Hardwick*, *Williams*, and *Bazemore* cases, the Court held that the plaintiff should have been allowed to produce evidence in support of an ordinary negligence claim.

City of Tybee Island v. Live Oak Group LLC

Georgia Court of Appeals

November 5, 2013; A13A1570; A13A1617; 13 FCDR 3432

This case involves a dispute over zoning. The LLC received written confirmation from the city administrator that a parcel was zoned R-1. The LLC purchased the parcel and then was made aware the zoning was in fact PUD, and a single family residence could not be built. The LLC applied for a zoning amendment which was denied. The LLC brought suit alleging multiple claims including inverse condemnation and due process violations. The trial court granted summary judgment to the LLC on inverse condemnation and summary judgment to the city on the remaining claims. On appeal, the Court of Appeals reversed summary judgment to the LLC. Here, there was simply no affirmative act by the city for a public purpose causing a nuisance or trespass on the LLC's property which resulted in diminished utility and functionality of the property. {The case contains a lengthy analysis of inverse condemnation in a zoning context and readers interested in this should consult the text of the case.} The case was remanded back to the trial court to consider the federal takings claim.

CONSTITUTION

DeKalb County School District v. Georgia State Board of Education

Supreme Court of Georgia
November 25, 2013; S13Q0981; 13 FCDR 3656

This case involves multiple constitutional questions regarding whether O.C.G.A 20-2-73 can provide circumstances under which elected school board members may be suspended and then removed from office. The statute was challenged in federal court as prohibited by the constitutional provisions regarding school boards; improper delegation; violation of the 'control and management authority' of school boards; and due process violations. The federal court certified these issues to the Supreme Court which concluded that the statute was constitutional. {This is an extremely lengthy opinion with a plethora of analysis and case citations and the interested reader is urged to consult the case for an in depth examination of these issues.}

CONTRACTS

Greene County School District v. Circle Y Construction, Inc.

Georgia Court of Appeals
March 13, 2013; A12A1850; 13 FCDR 662

This case involves a construction of O.C.G.A. 20-2-506. A prior decision of the Georgia Court of Appeals in this case, 308 Ga. App. 837 (2011), was vacated by the Supreme Court of Georgia in 291 Ga. 111 (2012). The Court here adopts that opinion and vacates its own earlier opinion.

Goody Products, Inc. v. Development Authority of the City of Manchester

Georgia Court of Appeals
March 20, 2013; A12A1724; A12A1725; 13 FCDR 903

This case involves a contract dispute with multiple issues regarding breach, ambiguity, jury charges, diminished value, costs, & interest. {This is a lengthy case and the interested reader should consult the complete text as this summary will focus merely on the contract.} The company was found liable for \$6 million to the development authority for breach of contract when (without the knowledge of the development authority) it spent weeks removing the entire electrical system from an eight acre facility and left it powerless but for a single light bulb run from an extension cord. The contract was ambiguous as

to whether the electrical system constituted a ‘trade fixture’ which could be removed, or a ‘permanent improvement’, which could not be removed. Consequently, it was proper to submit it to the jury rather than its construction being a question of law.

City of Baldwin v. Woodard & Curran, Inc.

Supreme Court of Georgia

May 20, 2013; S12G1317; 13 FCDR 1557

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 (see 12 FCDR 2363). 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. The Supreme Court reversed. Citing the *City of Calhoun & Brown* cases (as well as Professor R. Perry Sentell, Jr.), the Court stated that quantum meruit is a quasi-contractual remedy and that an ultra vires agreement can be given no legal effect whatsoever, even quasi-contractually. To do otherwise would permit a city to expand its own powers beyond that set by the General Assembly and to accomplish indirectly that which it could not achieve directly. The Court went on to say that where a city charter specifically provided how a municipal contract shall be made and entered, that method becomes “absolute and exclusive”. The Court continued by holding that if a city charter sets forth the method of entering contracts, and thereby commits the city and taxpayers to pay the contract, then that is how the contract must be approved if it is to be enforceable directly or through equitable remedies. To the extent that the *Walston*, *City of Dallas*, and *Stottler* cases allow quantum meruit under such circumstances, they are overruled. As to the first agreement, the claim for quantum meruit also fails as a matter of law. It was a valid contract for \$5000.00 for supporting engineering documents for a funding application and nothing more. It does not support a claim that the city requested or knowingly accepted any additional engineering services.

City of Baldwin v. Woodard & Curran, Inc.

Georgia Court of Appeals

August 30, 2013; A12A0620; 13 FCDR 2850

This case involves a contract dispute and issues of ultra vires actions and quantum meruit. Here, the Court of Appeals has vacated its previous opinion (see 12 FCDR 2363), which was reversed by the Supreme Court (see immediately above, 13 FCDR 1557). The Court of Appeals makes its judgment that of the Supreme Court.

Estate of Mack Pitts v. City of Atlanta

Georgia Court of Appeals

July 16, 2013; A11A1487; 13 FCDR 2553

{There is an extremely long fact situation and the majority of this case deals with claims against a general contractor and subcontractors. The interested reader is encouraged to read the case itself for those aspects. This summary will deal solely with the portion of the case as it affects the city.}

This case is the third installment of protracted litigation involving contractual and workers' compensation claims which ensued in 2011 following the death of a person working on construction of the international terminal at the Atlanta airport. The posture of the case at this point with respect to the city is that the Supreme Court of Georgia reversed the Court of Appeals and found no evidence of a breach of any contractual duty by the city to the deceased. First, the Court of Appeals reaffirmed summary judgment to the city on the claim that it owed a private duty to the deceased independent of the contract. The Supreme Court did consider this part of the opinion and the Court of Appeals simply reaffirmed its prior ruling. Second, the Court of Appeals adopted the ruling of the Supreme Court as its own on the issue of whether the city breached a contractual duty and held that there was no contractual duty on the part of the city to ensure that the trucking company (one of the subcontractors) carried the amount of automobile insurance coverage required under the contract between the city and the general contractor.

ELECTIONS

Cook v. Board of Registrars of Randolph County

Georgia Court of Appeals

March 18, 2013; A12A1946; 13 FCDR 787

This case involves a dispute over the qualifications to vote on the basis of residency. {The reader is directed to the case itself for the lengthy, underlying fact situation}. The focus of the appellate court review here is the question of intent. The Court of Appeals found 'plain and palpable' evidence of intent to remain a Randolph County resident even though the individual's home had been destroyed and he had bought a home in another state since his employment, business ownership, driver's license, vehicle registration, mail service, voting records, tax records, etc. all support this stated intent to continue his lifelong domicile in Randolph County. Mere ownership of a residence outside the county coupled with periodic stays outside the county did not support a contrary finding due to the evidence of intent.

Meade v. Williamson

Supreme Court of Georgia
June 3, 2013; S13A0517; 13 FCDR 1678

This case involves a contested election for the office of sheriff. The contest was filed after a candidate lost by a mere 39 votes. The trial court concluded that sufficient irregularities had occurred both in voting as well as in the election process to cast doubt upon the result and declared the result void and ordered a new election. The Supreme Court disagreed and reversed the trial court and upheld the election. The Court noted two standards by which elections may be set aside. First, if evidence shows that a sufficient number of electors voted illegally or were irregularly recorded to change or cast doubt upon the election and second, where systemic irregularities occurring in the election are egregious enough to cast doubt on the result. The Court held that the evidence presented at trial failed to meet either of these standards. Consequently, the election results are upheld. (The Court engaged in a lengthy analysis of the evidence under each of the standards and interested readers should consult the case text for those details.)

EMPLOYMENT

City of St. Marys v. Brinko

Georgia Court of Appeals
October 30, 2013; A13A1456; A13A1457; 13 FCDR 3360

This case involves a dispute over employment status. A former city employee brought suit against mayor and council, the city manager, and others alleging wrongful termination, interference with employment contract, and a due process violation for not getting a post-termination hearing. The trial court granted summary judgment to the defendants on all claims except the post-termination hearing. On appeal, the Court of Appeals affirmed summary judgment to the defendants and reversed the trial court's denial of summary judgment of the hearing issue. The plaintiff was, without equivocation, an at-will employee who could be terminated at will. Consequently she had no protected property interest that was subject to procedural due process. {Interested readers may want to know that the alleged contract in the case was in fact an alleged oral agreement with duration of 50 years.}

Freeman v. Smith

Georgia Court of Appeals
October 31, 2013; A13A1289; A13A1290; A13A1291; 13 FCDR 3378

This case involves a dispute over employment status. A former university system employee brought suit against a university president and vice president and the Board of Regents alleging wrongful termination in retaliation for her role as a whistleblower, breach of employment contract, and a due process violation.

{This is a lengthy case and interested readers should read it in full for its analysis of whistleblower implications.} On appeal, the Court of Appeals held that no evidence had been presented which showed a causal connection between the disclosures and the adverse employment action. Further, the plaintiff was an employee at will so the termination did not breach any contract. Consequently she had no protected property interest that was subject to procedural due process.

GRATUITIES

City of Columbus v. Georgia Department of Transportation

Supreme Court of Georgia

May6, 2013; S13A0079; S13X0080; S13X0081; 13 FCDR 1452; 13 FCDR 1603

This is a revision of a case reported previously. See 13 FCDR 1452. The revision merely notes that all Justices concurred.

This case involves yet another dispute over the constitutionality of the O.C.G.A. Section 32-6-75.3 which allows trees and vegetation to be removed if they block billboards. The Supreme Court followed *Garden Club II* and again concluded the statute did not violate the gratuities clause. The Court noted the statute specified the benefit to the state, evidence showed benefit to the public, & payment is required in order for removal to occur. Consequently, there was no illegal gift to the state. The Court held that the trustee clause of the Constitution was not violated by DOT allegedly undervaluing the trees since this was not a case of a public officer reaping personal financial gain at the expense of the public. The Court also held that “permitted beautification project” was not unconstitutionally vague because the term, while not explicitly defined in the statute, was clearly provided for in DOT regulations. The Court finally held that the gratuities clause was not violated by a provision of the statute which allowed take down credits for removal of old billboards since the statute explicitly found such removal provides a significant benefit and the removal saved the state from having to expend its funds to do the work.

IMMUNITY

Gentry v. Hutchins

Georgia Court of Appeals

February 1, 2013; A12A2280; 13 FCDR 198

This case involves a tort action for damages for physical injury caused by stepping into a hole in a curb. A superintendent in the public works department was sued. The official was denied summary judgment on

the basis of official immunity. On appeal, the Court of Appeals reversed and ruled that due to official immunity, the superintendent was entitled to summary judgment. *The case is important as it contains a clear delineation of official immunity, qualified immunity, and the difference between ministerial and discretionary acts.* The evidence in the case showed clearly that the official's decisions were made in the personal judgment afforded a government official, and hence, were discretionary. Thus summary judgment should have been granted.

Amica Mutual Insurance Company v. Gwinnett County Police Department

Georgia Court of Appeals
February 19, 2013; A12A1068; 13 FCDR 340

This case involves an interpretation of different provisions of the state constitution. Damage to a home occurred during a police standoff to arrest a suspect. After paying the homeowner's claim, the insurance company brought a subrogation action the police department and the county asserting inverse condemnation. The trial court granted a motion to dismiss to both the police department and the county. The insurance company appealed the decision as to the county. The Court of Appeals upheld the dismissal. The insurance company claimed that the damage to the house was for the public purpose of exercising its police power and that this amounted to taking of private property without compensation under eminent domain {Art. I, Sec. III, Para. I of the constitution} and that this provision served as a waiver of the county's sovereign immunity {state sovereign immunity under Art. I, Sec. II, Para IX(e) extends to counties}. Citing the *Bray* case, the Court held the county was entitled to sovereign immunity as a matter of law against a damage claim caused by the exercise if its inherent police powers. The exercise of those powers is 'distinct' from the exercise of eminent domain and thus does not waive sovereign immunity.

Douglas Asphalt Company v. Linnenkohl

Georgia Court of Appeals
March 15, 2013; A12A1933; 13 FCDR 790

This case involves a dispute over sovereign immunity under OCGA 50-21-25(a). The paving company was hired by GDOT to do interstate paving work. Certain engineering tests were conducted and used as the basis for declaring project default due to deficiencies. The GDOT commissioner sought and was granted summary judgment on the basis of sovereign immunity under the statute. On appeal, the Court of Appeals upheld. The trial court's decision to not allow discovery will not be reversed without a showing that discretion was abused. The company never indicated what the further questioning would have revealed that was not already stated in the discovery it had conducted and never provided a reason for its untimely notice of deposition beyond the limit set by the trial court. Even though the commissioner has subsequently retired, he was entitled to immunity since the prior discovery and the actions which were the basis for his immunity occurred while he was a state officer.

Bomia v. Ben Hill County School District

Georgia Court of Appeals
March 15, 2013; A12A1852; 13 FCDR 791

This case involves a dispute over sovereign immunity. A school bus driver was involved in a traffic accident and failed to report it. The school district transportation director did report the accident. Multiple criminal charges against the driver were dismissed in magistrate court; however, the driver was terminated for violating district policy. The driver sued the director and the district. They sought and were granted summary judgment on the basis of sovereign immunity. On appeal, the Court of Appeals upheld. The driver failed to show that sovereign immunity had been waived by insurance coverage and failed to show that any such waiver would have applied to her claims of wrongful termination since the district's liability for those claims was not predicated on use of an automobile. Further, the record shows that the district handbook which sets out the director's discretionary actions in the event of an accident was followed. No ministerial duty was shown. Nothing showed that the director acted or failed to act with deliberate intent to harm the driver. She followed her duty to report the accident, nothing more. The director did not decide to terminate and the director did not pursue a criminal warrant. Consequently, the director was entitled to official immunity because her discretionary action did not involve actual malice or intent to injure.

Hagan v. Georgia Department of Transportation

Georgia Court of Appeals
March 20, 2013; A12A2409-2412; 13 FCDR 945

This case involves a dispute over governmental immunity. Hagan suffered serious and permanent injuries from a fall on a downtown sidewalk located on a state highway right of way. GDOT sought and was granted summary judgment on the basis of sovereign immunity. The city sought and was not granted summary judgment on the basis that it had no duty to repair the state highway system that it did not construct or agree to maintain. On appeal, the Court of Appeals upheld as to GDOT. Foregoing routine inspections or repairs as a result of 'prioritizing maintenance activities based upon budgetary constraints' falls within the discretionary function exception and thus is the type of governmental decision protected from tort liability. The Court reversed as to the city. OCGA 32-4-93 applies here and since the city did not own the sidewalk and never repaired or agreed to repair it, it is not liable and should have been granted summary judgment.

Clayton County v. Austin-Powell

Georgia Court of Appeals
March 28, 2013; A12A2217; A13A0034; 13 FCDR 1133

This case involves a wrongful death claim arising from a high speed police pursuit. An innocent passenger seeking a ride to a movie found himself in a car involved in a high speed pursuit. The passenger pleaded for the driver to stop. A wreck ensued and that passenger was killed. The Court of Appeals held that the trial court should not have granted summary judgment to the county. The trial court should not have found the passenger to be a 'fleeing suspect' within the meaning of OCGA 40-6-6. The evidence showed

clearly that this individual did not know the driver, got in the car to join his friends going to a movie, did not know the driver would flee the police, and pleaded with the driver to stop. The Court did uphold the trial court in finding that no spoliation of evidence occurred. There was no proof that a tape of the chase existed and had been destroyed by the officer. Further, the mere fact of injury in an accident, without more, is not notice that the injured party is contemplating litigation sufficient to trigger the rules of spoliation. Finally, the trial court correctly denied summary judgment. The plaintiff did not actually move for summary judgment on the merits, but rather filed a motion for sanctions based on the allegation of spoliation of evidence and in that motion requested summary judgment as to spoliation. This does not constitute a proper motion as to the merits.

Watkins v. Latif

Georgia Court of Appeals

June 19, 2013; A13A0060; 13 FCDR 1974

This case involves an immunity defense to a false imprisonment claim. {There is a fairly lengthy factual setup and the interested reader is urged to consult the case text.} In the course of a traffic stop, the officer told the driver that signing the ticket was not an admission of guilt but only acknowledgement of ticket receipt. The driver continued to refuse and was arrested. The driver's contended that the officer could not arrest him under O.C.G.A 40-13-2.1 but only bring him before a judicial officer to post bond. The trial court granted summary judgment to the officer. On appeal, the Court of Appeals agreed and upheld the trial court. The Court noted that the *Torres* case does not hold that an officer may never arrest for failing to sign a ticket, but holds that once an officer decides to issue a citation rather than arrest for traffic violations, the officer must explain that signing the ticket does not acknowledge guilt and the failure to sign will result in having to post a cash bond. Neither *Torres* nor the statute quite address the facts here where the officer initially decided to issue a ticket instead of custodial arrest and complied with the notice requirements. Under Art. I, Sec. II, Para. IX of the Constitution, the act of arrest was discretionary and the immunity defense could only be overcome by showing malice or intent to injure. A mere inference of malice is insufficient.

Peach County School District v. Austin

Georgia Court of Appeals

June 20, 2013; A13A0517; A13A0625; 13 FCDR 1978

This case involves a sovereign immunity defense and an official immunity defense to a personal injury claim. The plaintiff fell off a sidewalk on the premises of a high school upon leaving a graduation ceremony. An action was brought against the school district and also against multiple named individuals of the school district. The trial court denied summary judgment to the school district on the basis of sovereign immunity but granted summary judgment to the individuals on the basis of official immunity. On appeal, the Court of Appeals reversed the trial court as to the school district and upheld the trial court as to the individuals. The Court noted that school districts are political subdivisions and hence entitled to sovereign immunity under Art. I, Sec. II, Para. IX(e). Although the school district had purchased liability insurance, there has been no waiver of immunity by legislative act as required under the GA Tort Claims

Act. Next, the Court under the *Cameron* and *Cosby* cases, official immunity applies to school district employees. Thus the question becomes whether the alleged duty to inspect and repair was ministerial or discretionary. Citing the *Golden* and *Hemak* cases, there were no specific and clear procedures for dealing with the hazard. Thus, the duties were discretionary and protected by official immunity.

Georgia Department of Corrections v. Couch

Georgia Court of Appeals
June 13, 2013; A13A0223; 13 FCDR 1974

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. On appeal, the Court of Appeals agreed and upheld the trial court. The Court 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.

Dudney v. State of Georgia Department of Defense

Georgia Court of Appeals
June 27, 2013; A13A0197; 13 FCDR 2123

This case involves a dispute under the whistleblower statute, O.C.G.A. 45-1-4. A former GA Army National Guard general and director filed a complaint under the whistleblower statute alleging he was terminated in retaliation for a critical report he had filed. The GA DOD sought and was granted a motion to dismiss first on the basis the claim was barred under the intra-military affairs doctrine and second because Dudney was not a public employee under the statute. The trial court granted summary judgment to the DO on both points. On appeal, the Court of Appeals agreed and upheld the trial court. The Court noted that there was no doubt that the injuries alleged arose out of activities "incident to military service". Consequently, a motion to dismiss on that basis was proper and rendered all else moot.

J. N. Legacy Group, Inc. v. City of Dallas, Georgia

Georgia Court of Appeals
June 27, 2013; A13A0729; 13 FCDR 2133

This case involves a sovereign immunity defense to a property damage claim resulting from sewer overflow. {There is a lengthy set of facts and the interested reader is urged to consult the case itself for those details.} The plaintiff framed the claimed violation of a ministerial duty as a breach of duty to maintain an easement through which the sewer line ran. The trial court granted the city's motion to dismiss since no waiver of sovereign immunity had occurred. The Court of Appeals agreed. The plaintiff also alleged the city was maintaining a nuisance. The trial court granted the city's motion to dismiss. The Court of Appeals disagreed. There was evidence that the city had maintained the sewer line for a period of

time without a backflow preventer and there was a question of fact whether a second preventer was needed. A final claim sought the recovery for the cost of remediation of contamination. The city failed to contest the admissibility of expert testimony but instead argued that the testimony did not connect the claim for damages for mold remediation to the alleged nuisance and thus did not establish causation. Since the issue of admissibility was never raised, the trial court's summary judgment order cannot be construed as a ruling on the admissibility of such evidence and there is nothing for the Court to review in that regard. Thus, the Court affirmed partial summary judgment as it related to any claim for potential contamination, but, reversed the trial court to the extent the order reached any claim for remediation of actual contamination.

Fulton County v. Lord

Georgia Court of Appeals

July 8, 2013; A13A0694; A13A0695; 13 FCDR 2288

{This case review is longer than usual due to the complex nature of this case.}

This case involves a grievance filed against the county under its civil service policy by county law clerks claiming they were unfairly paid less than staff attorneys in the county attorney's office, despite performing similar work. The county board of commissioners had adopted a job pay and classification system. The system rated judicial law clerks & county attorney staff attorneys at identical classification and pay grades. During various periods of time staff attorneys received higher pay via additional 'premium pay' and through an additional pay schedule. The pay differential between the two groups was approximately 36%. The law clerks filed a group pay grievance claiming they were not receiving equal pay for equal work. The grievance claim was denied and that denial upheld by the county manager. The dispute was then submitted to arbitration. The arbitrator ruled in favor of the law clerks awarding back pay and also interest from the date of the award to the entry of judgment. The law clerks filed in superior court to confirm the award. The county moved to dismiss and alternatively argued the claim was barred by sovereign immunity. The superior court confirmed the arbitration award. Following confirmation, the law clerks sought back pay which had accrued between the initial entry of the award and the court's confirmation thereof. The county opposed the motion and raised for the first time a claim that the back pay calculations to which they had previously agreed were 'grossly inflated'. The superior court again confirmed the award but did not include the accrued post-award back pay. The law clerks then sought and were granted attorney fees. On appeal, the Court of Appeals partially upheld and partially overruled the trial court. The Court noted that the purpose of the arbitration statute is to allow dispute resolution without having to incur the time and expense of civil litigation. The county contended that sovereign immunity barred the claim. And that the failure of the arbitrator to dismiss it constituted manifest disregard of the law. The Court disagreed on the basis that the clerks' claim was 'in contract' and therefore not barred by sovereign immunity. Moreover, to not allow a contract claim would itself violate the constitutional prohibition against impairing the obligation of contracts. The Court refused to address the county's claim of a gratuities violation since it had not been raised before the arbitrator or the superior court. The law clerks contended that the superior court should have confirmed the arbitration award as of the date of the award and not as of the date of the superior court ruling. The Court agreed that this was required under O.C.G.A. 9-9-15. The County contended that the superior court should not have awarded attorney fees. The Court disagreed and noted that the superior court correctly awarded them under O.C.G.A. 9-15-14 (a) and (b).

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

Georgia Court of Appeals

September 25, 2013, September 30, 2013; A13A1328; 13 FCDR ****

This case involves sovereign immunity in the context of the failure of the board to confirm validity of a payment bond under a services contract. The trial court denied the board's motion to dismiss on the basis of sovereign immunity. On appeal, the Court of Appeals reversed. Citing the *Hall County School District* case, there was no duty on the part of the board to confirm the validity of the bond. The harm in this case, unpaid wages, was not the fault of the board but the fault of the contractor for whom the employees worked. Sovereign immunity has not been waived hence the motion to dismiss should have been granted.

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

Georgia Court of Appeals

October 28, 2013; A13A0969; 13 FCDR 3366

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.

City of Atlanta v. Durham

Georgia Court of Appeals

November 7, 2013; A13A1344; 13 FCDR 3444

This case involves multiple negligence claims against the city when a person was killed during the demolition of a house owned by the city. The city claimed sovereign immunity but the trial court denied summary judgment on that claim. On appeal, the Court of Appeals reversed. The Court concluded that the city was exercising a governmental function when it demolished the abandoned house and consequently it was entitled to sovereign immunity of the negligence claims.

Roper v. Greenway

Supreme Court of Georgia
November 18, 2013; S12G2030; 13 FCDR 3501

This case involves the question of official immunity. A dog owner was taken to the hospital by ambulance for health issues. His 2 dogs remained at home. The owner alleges that while in the emergency department, and uncertain if he would live, he was pressured by a deputy sheriff to sign a release form allowing for the euthanization of his dogs. He could not read the form without his glasses and his understanding was that the dogs would go to the Humane Society. The dogs were euthanized before he recovered. The Court of Appeals found that official immunity insulated the deputy from liability from the decision to ask the owner to sign the form, but not from the actual execution of that decision. On certiorari, the Supreme Court reversed. The Court concluded the step of actually providing the form cannot be separated from the decision to take that step when analyzing whether the relevant act is discretionary or ministerial. Because the distinction between discretionary and ministerial does not foreclose potential liability if the discretionary act was malicious, the case was remanded back to the Court of Appeals for further proceedings.

Colon v. Fulton County

Supreme Court of Georgia
November 18, 2013; S12G1905; S12G1911; S12G1912; 13 FCDR 3503

This case involves the issues of sovereign immunity and the interpretation of the whistleblower statute (WBS), O.C.G.A. 45-1-4. Some county employees alleged they suffered retaliation for disclosing waste and abuse under the WBS. The county's defense was sovereign immunity and that the WBS did not apply since the claim did not involve any state programs or operations. On certiorari, the Supreme Court concluded that the WBS set forth a specific waiver of sovereign immunity and the extent of the waiver. No specific 'magic words' are necessary such as 'sovereign immunity is hereby waived'. The WBS creates a specific right of action against the government that would otherwise be barred by sovereign immunity and expressly allows for money damages. There can be no doubt that the legislature intended sovereign immunity be waived. In regard to interpreting the WBS, while the definitions of 'public employee' and 'public employer' make reference to local governments receiving funds from the state or a state agency, the operational provisions of the WBS, subsections (b) and (d), are not subject to any 'state programs or operations' limitation. The Court of Appeals erred by attempting to rewrite this into the WBS. The case was remanded back to the Court of Appeals for further proceedings.

City of Atlanta v. Mitcham

Georgia Court of Appeals
November 20, 2013; A12A0912; 13 FCDR 3774

This case involves the question of sovereign immunity in the context of failure to provide medical care to an inmate. The city failed to monitor and regulate an inmate's diabetic condition and the inmate suffered permanent injuries. The city moved to dismiss under O.C.G.A. 36-33-1 stating it was engaged in a governmental function and thus immune. The trial court denied the motion and the Court of Appeals affirmed. The provision of medical care to inmates is a ministerial act; the duty is imposed by statute; and

medical care is a fundamental right of inmates in custody. Consequently, sovereign or governmental immunity is not applicable to this case.

Atkinson v. City of Atlanta

Georgia Court of Appeals
November 21, 2013; A13A1040; 13 FCDR 3863

This case involves the question of governmental immunity in the context of maintaining a nuisance. A city water main broke and caused substantial damage to plaintiff's property. Plaintiff was not satisfied with the speed of the city's repairs and filed a nuisance claim. The city moved for, and the trial court granted, summary judgment. The Court of Appeals affirmed. First, the plaintiff presented no evidence to show how long it took the city to begin repair work or how long it took to stop to stop the water flow. Thus no issue of fact was created regarding whether the city acted within a reasonable time. Second, plaintiff failed to show the city operated or maintained a nuisance on his property. The water main broke once and caused only a single incident of flooding. Even though the water 'ponded' on plaintiff's property, the plaintiff presented no evidence that a repetitious or regular condition had been created. Finally, the plaintiff did not show that the city had a proactive duty to repair all the damage rather than compensate the plaintiff for damages. Plaintiff fixed some of the damage himself. His failure to fix all of it cannot be converted into a nuisance claim against the city for delay in effecting repairs. Consequently, the nuisance exception to sovereign or governmental immunity is not applicable to this case.

IMPACT FEES

Greater Atlanta Homebuilders Association Inc. v. City of McDonough

Georgia Court of Appeals
July3, 2013; A13A0225; 13 FCDR 2235

This case involves a class action dispute to recover impact fees assessed by the city against developers and attorney fees. The trial court granted summary judgment to the developers on the impact fees but denied it as to the attorney fees for failure to provide ante litem notice to the city under O.C.G.A. 36-33-5. On appeal, the Court of Appeals reversed the trial court regarding the attorney fees. O.C.G.A. 36-33-5 requires ante litem notice for personal injuries or injuries to property. The question of refunding impact fees is neither of those types of claims hence that notice statute does not apply. The Court specifically overruled part of the 2000 *Dover* case.

JUDICIAL SALARIES

Pike County v. Callaway-Ingram

Supreme Court of Georgia
April 29, 2013; S12A0137; 13 FCDR 1387

This case involves a dispute between the county and the chief magistrate over salary and funding of court operations. (There is a lengthy and complicated fact situation and the interested reader is directed to the case itself for those details.) In a nutshell, the former chief magistrate resigned in the middle of an elected term of office and a successor was appointed for the remainder of the unexpired term. Over the successor's objections, the county reduced the salary of that position. Regarding the fulltime associate magistrate, who was paid more than the chief magistrate; the county changed the position to part time and reduced that salary, without any operational analysis of court staffing needs and also over the objection of the chief magistrate. Finally, the county refused to provide staff and funds for court operations (even withholding applications for positions the chief magistrate was trying to fill). The trial court granted summary judgment to the chief magistrate. On appeal the Supreme Court affirmed. The Court noted the county had violated both Art. VI, Sec. VII, Para. V of the Constitution, as well as O.C.G.A. Section 15-10-23, by reducing the salary of the chief magistrate during a term of office. Citing the *Lee v. Peach County* case, an incumbent is the individual in possession of the office who is qualified to perform the duties thereof and incumbent status is not affected by the method by which an individual attains the office. In addition, the term of office is the statutorily set, definite extent of time an elective office may be held. The county had asserted that the salary was guaranteed only for the particular judge and that a midterm replacement judge does not inherit that salary. The Court, however, declared that argument to be 'unavailing'. The trial court properly held that the county should not be permitted to continue with the salary and position reduction and that it not be allowed to interfere with the chief magistrate's ability to interview and hire personnel.

MANDAMUS

Scarborough v. Hunter

Supreme Court of Georgia
July 11, 2013; S13A0060; 13 FCDR 2180

This case involves a dispute regarding county road abandonment under O.C.G.A. 32-7-2. A dead end road serving no existing homes but which abutted several undeveloped lots was abandoned by the county after becoming severely damaged and unstable. The lot owners sued and the trial court concluded the county was arbitrary and capricious and had abused its discretion and entered a mandamus order for the board of commissioners to repair and maintain the road. On appeal, the Supreme Court disagreed and reversed the trial court. The Court noted that it was the statutory function of the board of commissioners to make the abandonment determination and cited cases going back to *Marietta Chair Co.* in 1904 for the principal

that the abandonment determination is within the discretion of the lawmaking body. The only question for the trial court was *not* whether in the court's judgment the road should be abandoned, but whether *the board's judgment* on the matter was so arbitrary and capricious that it amounted to an abuse of discretion. Consequently, the review standard for the appellate court is *not* whether there was evidence to support the superior court decision, but whether there was evidence to support the decision of the board of commissioners. The Court held that the trial court had inappropriately substituted the court's view of the evidence and the public interest standard under the statute for that of the board of commissioners. Reversal on the abandonment issue required reversal of the mandamus order which the trial court had specifically predicated on the setting aside of the board's decision.

NEGLIGENCE

Clark v. City of Atlanta

Georgia Court of Appeals

June 7, 2013; A13A0230; 13 FCDR 1781

This case involves personal injuries suffered when a person slipped and fell on uneven sidewalk pavers. The city was granted summary judgment after the trial court concluded that no evidence had been presented which showed that the defect had existed for a sufficient length of time to create a jury issue as to whether the city had constructive notice. The Court of Appeals disagreed and reversed the trial court. The plaintiff had submitted Google Street View photographs which showed the pavers had been in an uneven and defective condition for at least 7 months. The Court noted that even though some of the photos were not entirely clear, that even slight evidence will be sufficient to satisfy plaintiff's burden of production of some evidence on a motion for summary judgment. This gives rise to a triable issue of material fact.

Georgia Department of Transportation v. Griggs

Georgia Court of Appeals

June 28, 2013; A13A0606; 13 FCDR 1963

This case involves ante litem notice under the GA Tort Claims Act. An individual stopped in the emergency lane of an interstate highway and stepped onto a plywood board covering a manhole. The grate had been removed by thieves. The individual was injured and sued GDOT. The ante litem notice under O.C.G.A. 50-21-26 identified the portion of the highway where the injury occurred. GDOT sought a motion to dismiss on the basis that plaintiff's notice did not strictly comply with the statute because it did not sufficiently describe the place the incident occurred. The trial court denied the motion. On appeal, the Court of Appeals agreed and upheld the trial court. The Court noted that GDOT acknowledged it could identify the area as well as the locations of all manhole and storm drains. In addition, GDOT made an offer of settlement which the plaintiff rejected. Citing the *Cummings* case, the Court held it was reasonable to conclude that notice was sufficient in this case since the state had attempted to settle the case.

NUISANCE

Floyd County v. Scott

Georgia Court of Appeals
March 20, 2013; A12A2168; 13 FCDR 931

This case involves a nuisance causing flooding damage. The county installed drain pipes and a drainage tie-in on property adjacent to that owned by the Scotts which resulted in repeated flooding of their property. The trial court granted summary judgment to the county on all claims except for the nuisance claim. On appeal, the Court of Appeals reversed and held the nuisance claim was barred by the statute of limitations. The drainage work was done in 2003 but the lawsuit was not filed until 2011. The flooding has been continuous and progressive. A change in the degree of harm does restart the statute of limitations. Consequently, the action is barred under OCGA 9-3-30(a) since over four years have elapsed from the initial damage to the property.

OPEN MEETINGS/OPEN RECORDS

Deal v. Coleman

Supreme Court of Georgia
November 18, 2013; S13A1084; S13A1085; 13 FCDR 3507

This case involves a question of whether an amendment to the Open Records Act (ORA) applies to litigation ongoing at the time of the amendment. An automaker located a facility in in Georgia. A state technical college provided training as part of a Quick Start program. Plaintiffs filed an ORA request to the technical college system for records regarding the hiring practices of the automaker. The request was refused. Litigation ensued. While the suit was pending, the ORA was specifically amended by adding paragraph (47) in subsection (a) of O.C.G.A 50-18-72 to provide a specific exemption for certain Quick Start records. The trial court did not decide the extent to which the new exemption applied to the requested records and concluded that it would be unconstitutional to apply the new exemption in a pending lawsuit. On appeal, the Supreme Court concluded that the new exemption applies by its own terms and that application in the pending case is constitutional. The Court noted that retroactive application is disfavored unless there is some clear indication that the statute is intended to be applied retroactively. In the amendment at issue here, the text clearly states that it is to apply to requests made prior to the effective date of the amendment. Thus, the question becomes whether the constitution would permit such application. The Court concludes that it is permissible since no vested 'private' rights are injuriously affected. The rights in this case are 'public' rights which can be modified by the legislature prospectively or retroactively as it sees fit. The Court indicates that the ORA confers a public right to the

people as a whole and as such, it could not vest in any particular persons. {This is a lengthy opinion with a plethora of case citations and the interested reader is urged to consult the case for an in depth examination of these issues.} The Court remanded the case back to the trial court to determine the specific applicability of the exemption to the requested records.

TAXATION

Homewood Village LLC v. Unified Gov't of Athens-Clarke County

Supreme Court of Georgia
March 4, 2013; S12A1836; S12X1837; 13 FCDR 405

NOTE: This case is important for stating, once again, the difference between a fee and a tax. This case involves a dispute over stormwater utility fees. The Unified Government (UG) adopted a stormwater runoff ordinance which required payment of fees based upon the amount of level, impervious surface. The LLC refused to pay the fees. The UG sued to recover unpaid fees and the LLC counterclaimed for a declaratory judgment that the ordinance imposed an unconstitutional tax. The trial court granted summary judgment to the UG finding the ordinance imposed a fee and not an unconstitutional tax and summary judgment to the LLC on its contentions that the UG cannot collect unpaid fees under a theory of unpaid accounts and that it has not established any of the elements necessary to establish a claim for quantum meruit. The Supreme Court of Georgia held the issue was controlled by its decision in the *McLeod* case and restated the difference between a fee and a tax. A tax is a means of government raising general revenue and is usually based upon ability to pay (such as property or income) without regard to direct benefits which may inure to the property or the payor who is taxed. A fee is composed of three elements: it is intended to be and should be clearly described as a charge for a particular service provided; it should apply based upon the contribution to the problem; and the payor should receive some benefit from the service for which they are paying (although benefits may be indirect or immeasurable). The ordinance here clearly imposed a permissible fee and summary judgment was properly granted to the UG on its claim to collect the unpaid fees. That decision being correct, the claims regarding open account and quantum meruit were rendered moot.

DeKalb County Board of Tax Assessors v. Presbytery of Greater Atlanta, Inc.

Georgia Court of Appeals
March 12, 2013; A12A2321; 13 FCDR 673

This case involves a question of whether property qualifies for a tax exemption as a place for religious worship under O.C.G.A. 48-5-41 (a)(2.1)(A). The Presbytery is a bona fide tax exempt religious non-profit organization under the IRS. It took over property of one its churches which became defunct. Unable to sell the property, it leased it to another church organization which was also a bona fide tax exempt religious

non-profit under the IRS. The monthly lease payment was \$4,000.00 less than the actual rental market rate. The assessors withdrew the ad valorem tax exemption since the owner of the property was not using it as a place of religious worship. The trial court granted summary judgment to the church. On appeal, the Georgia Court of Appeals adopted the trial court's order as its own. Citing the *Pickens County* case, it is the use of the property that governs the religious worship exemption, not the ownership. Further, the property was not used for the primary purpose of securing an income. The record reflects clearly that no profit was realized under the lease.

Mesteller v. Gwinnett County

Supreme Court of Georgia

March 25, 2013; S12A1920; 13 FCDR 748; 13FCDR 1035

This case involves a dispute over billing trash collection fees on the ad valorem tax bill. The county adopted a home rule solid waste ordinance under which it divided the county into 5 zones and contracted with one waste collection company for each zone for trash pickup. Fees for collection were placed on the annual ad valorem tax bill. A disgruntled resident challenged the fee as beyond the scope of the home rule provision and OCGA 12-8-39.3 since a private company, and not the county itself, was actually providing the service. The trial court granted summary judgment to the county. On appeal, the Supreme Court upheld the trial court. Citing the *Smith* and *Stryker* cases, the county had the duty and discretion to decide the method of implementing trash collection and the fact the service was not performed by county employees was 'of no moment' to the constitutional challenge. Citing the *Stryker & Guthrie* cases, the county's method of providing, paying for, and collecting charges for the service was not unreasonable. Finally, under the *Levetan* case, this collection charge was not an unlawful tax but a proper charge for services rendered. {A revised opinion corrected Constitution citations from Article XI to Article IX.}

City of Atlanta v. City of College Park

Supreme Court of Georgia

March 28, 2013; S12G1839; 13 FCDR 874; 13 FCDR 1338

Revision of a case previously reported in 13 FCDR 874. The revisions are consolidated into this new summary.

This case involves a dispute over the occupation tax. In 1969, as part of the airport expansion, Atlanta and College Park entered into an agreement, a portion of which granted Atlanta the exclusive right to levy and collect occupation taxes from businesses located at the airport that were inside the corporate limits of College Park. In 2007, College Park informed Atlanta that it would no longer honor the agreement and that it would collect occupation taxes from airport businesses located within its corporate limits, including proprietary business operations by Atlanta. The trial court found the 1969 agreement unenforceable and ruled that Atlanta was exempt from occupation tax under OCGA 48-13-13(5) which excluded the levy of that tax on any 'local authority'. On appeal the Court of Appeals affirmed that the agreement was unenforceable but reversed the finding that Atlanta was exempt as a local authority. The Supreme Court agreed. First, citing the *Clayton County* case, Atlanta was not carrying out a government function but was acting in a proprietary business capacity outside of its corporate limits. Second, the Court noted that the occupation tax statute did not define 'local authority' and, after examining numerous other provisions of general law, held that nothing showed that the legislature intended a city to be a local authority for

purposes of the exemption. Justice Benham wrote a dissenting opinion concluding that a city could be a local authority for purposes of that statute.

First Congregational Church v. Fulton County Board of Tax Assessors

Georgia Court of Appeals

March 27, 2013; A12A2535; 13 FCDR 1107

This case involves a question of whether church property qualifies for an ad valorem tax exemption. The church is a bona fide tax exempt religious non-profit organization under the IRS. In order to provide additional parking, it purchased land across the street to create parking. The only building on that parcel was removed so that the lot consists of parking spaces only. The church leased the property to a private company to operate as a parking lot and received monthly income which it used for its services and operations. Except for a limited number of spaces, and except for certain days and times, the private company lessee operated the lot as a paid parking facility for its own profit and benefit. The church sought and was denied an ad valorem tax exemption by the board of assessors. The trial court granted summary judgment to the board assessors. The Court of Appeals affirmed. First, the property was not exempt as a place of religious worship under OCGA 48-5-41(a)(2.1). The lot was leased to a commercial entity for the purpose of securing income. Analyzing under the *Nuci* case, under the lease agreement, the majority of activity on this property was not church parking but commercial, paid parking. Second, the exception under OCGA 48-5-41(d)(4) does not apply since there is no building on the lot.

Georgia Power Company v. Cazier

Georgia Court of Appeals

March 29, 2013; A12A2440; 13 FCDR 1295; 13 FCDR 1354

Revision of a case previously reported in 13 FCDR 1295. The revisions are consolidated into this new summary.

This case involves a putative class action lawsuit against Georgia Power Company (GPC) alleging that it had improperly collected certain sales taxes and fees. The trial court has not yet certified the class, but issued a certificate of immediate review. GPC monthly bills for electricity include a construction cost recovery fee (for a new nuclear generating facility) and a municipal franchise fee (for municipalities granting access to GPC to roads and rights of way). GPC has assessed and is collecting sales tax on both of the fees. Plaintiffs allege these fees are not subject to sales tax and brought an action against GPC for a refund. The Court of Appeals agreed that the trial court incorrectly allowed the direct cause of action for the refund. In harmonizing together O.C.G.A. Sections 48-2-35 & 35.1, a purchaser can bypass the filing of a formal refund claim with DOR by first simply requesting the dealer to provide a refund. If the dealer fails to do so, the right to pursue an administrative remedy with DOR is preserved. If DOR denies the refund, the purchaser may bring a direct action against DOR. Nothing in the statute allows a direct action against the dealer for a refund. The plaintiffs also alleged an alternative basis for the action under O.C.G.A. Section 48-8-72, part of the Streamlined Sales & Use Tax Agreement provisions (SST). The Court concluded that in adopting the SST provisions, the General Assembly merely adopted the seller protection provisions of SST, however, that adoption did not itself create a new cause of action against a seller. In

the appellate brief, but not in the initial complaint, an allegation was made, under O.C.G.A. 46-2-90, that a direct action could be made against a company subject to PSC jurisdiction. The Court held that issue had been waived for purposes of the appeal and it expressed no opinion as to whether the complaint could be amended to assert such a claim or as what the merits of such a claim might be. Finally, the Court noted that of the initial complaint by plaintiffs the only remaining pending claim is the allegation that the municipal franchise fee was calculated improperly. The Court affirmed the trial court holding of improper calculation. *{The opinion is noteworthy both for what it says as well as what it does not say. First, it addresses only the procedural matter of the party against whom the refund was sought. It is silent on the allegations in counts 1 & 2 of the complaint that sales taxes were improperly collected on the cost recovery fee and the franchise fee. These are disposed of with the quote, "Given our rulings above, only count three...remains viable." Likewise, it is silent on count 3 of the complaint in that it does not address any specifics regarding how or why the franchise fees were improperly calculated. It merely affirms that they were miscalculated.}*

Iglesia del Dios Vivo Columna y Apoyo de la Verdad la Luz del Mundo Inc. v. Downing

Georgia Court of Appeals
April 26, 2013; A13A0093; 13 FCDR 1477

This case involves the matter of how excess proceeds from a tax sale may be used. The tax commissioner levied on certain church property for delinquent ad valorem taxes. Excess proceeds of that tax sale were then used to satisfy delinquent taxes owed on that property for other tax years. The trial court upheld this usage. The Court of Appeals reversed. O.C.G.A. Section 48-4-5 allows excess proceeds to be applied to other outstanding ad valorem taxes only if they accrued before the tax sale. In this case the taxes accrued after the tax sale and would be governed by O.C.G.A. Section 48-4-42 which addresses the amount payable for redemption of the property. The trial court had allowed O.C.G.A. Section 48-5-9 to be used to charge the church as defendant in fi fa with the taxes that accrued after the tax sale during the redemption period. The Court of Appeals held that to the extent O.C.G.A. 48-5-9 conflicted with O.C.G.A. 48-4-42, the later would control as it the more specific tax statute and the former the more general tax statute.

Columbus Board of Tax Assessors v. Yeoman

Supreme Court of Georgia
June 3, 2013; S13A0203; 13 FCDR 1685

This case involves an ad valorem tax assessment dispute. In Columbus (unlike every other tax jurisdiction) a local constitutional amendment (LCA) freezes the ad valorem tax value of a homestead at the fair market value when the exemption is first allowed or when the property is sold. The LCA does not itself define fair market value. In this case, after a home was sold, the board of assessors assessed the fair market value at a rate higher than was specified in O.C.G.A. 48-5-2 (3). Under that statute, the rate for the first year, and consequently, the rate for purposes of the LCA freeze, should have been the purchase price. The trial court held that general law controlled the determination of fair market value under the LCA. On appeal, the Supreme Court affirmed. Since there was no conflict between the LCA and the statute, the statute would control as to the fair market value determination. *{Interestingly, the Court's determination in this case rested exclusively on the issue of conflict between the LCA and the statute. It does not appear*

that the assessors raised the issue of whether of the law itself posed a uniformity violation by arbitrarily setting a fair market in the year following a sale that ignores all other standards for determining fair market value.}

Sherman v. Atlanta Independent School System

Supreme Court of Georgia

June 3, 2013; S13A0333; 13 FCDR 1686

This case is the inevitable follow up to the 2008 *Woodham* case in which the Supreme Court held that the inclusion of school taxes in the Beltline TAD tax allocation increments violated Art. VIII, Sec. VI, Para. I (b) of the constitution. Subsequent to that ruling, an amendment to Art. IX, Sec. II, Para. VII (b) {the Redevelopment Powers Clause} was ratified which expressly authorized school taxes to be used for general redevelopment purposes. Additionally, the constitutional amendment authorized the enactment of a new general redevelopment powers law after January 1, 2009 and expressly allowed approval of school taxes for TADs even if the approval occurred before January 1, 2009. As a result, the Supreme Court upheld the use of school taxes for TADs “because the subsequent constitutional amendment and revision of the statute governing TADs *changed* the applicable law, and those changes were expressly made retroactive with respect to county, city, and local board of education approvals needed to use school taxes for redevelopment purposes.” {This case is noteworthy for the Court’s very clear explanation that the void from inception rule does not apply when the Constitution itself has been amended and that amendment expressly authorizes a retroactive application of a statute. The Constitution expressly prohibits retroactive laws; however, the Constitution may be amended to provide an exception to that rule.}

Morgan County Board of Tax Assessors v. Vantage Products Corporation

Georgia Court of Appeals

September 9, 2013; A13A1470; A13A1471; 13 FCDR 2877

This case involves an ad valorem taxation dispute between the board of tax assessors and the corporation. The corporation makes and sells burial grave liners. The liners are sold to funeral homes who sell them to customers. The liners are stored on property in the county until the customer actually needs the liner. In prior litigation over the taxability of the stored liners, a 2001 consent order was entered that the liners were not taxable property of the corporation. In 2010, the board of assessors again attempted to tax the liners and unsurprisingly this too ended up being litigated. The trial court denied summary judgment to both parties. A certificate of immediate review to the Supreme Court was issued. The Supreme Court held that the matter would be determined under a collateral estoppel analysis rather than a res judicata analysis. The prior consent order of the very same trial court contained sufficient detail to identify that the same issues were litigated and decided under the same statute (unamended since the original order). This determination has not in the intervening time become “obsolete or erroneous” due to facts which have “vitally altered”. Consequently, the board of assessors is collaterally estopped from relitigating the issue of whether the liners stored in the county are taxable and summary judgment should be awarded to the corporation.

Turner County v. City of Ashburn

Supreme Court of Georgia

October 7, 2013; S13A0992; 13 FCDR 3060

This case involves a dispute between local governments in a special district in which a local option sales tax (LOST) is levied. The parties could not agree on distribution percentages and the matter went to so called baseball arbitration under O.C.G.A. 48-8-89(d)(4). The superior court adopted the best and final offer of the municipalities. The Supreme Court granted the county's application for discretionary appeal to challenge the constitutionality of the LOST baseball arbitration process. Although multiple issues were raised by the county, the Court ruled that one issue was dispositive of the case. The Court held, in a unanimous decision, that the procedure for judicial resolution of LOST distribution (baseball arbitration) set forth in (d)(4) violated the separation of powers doctrine under Art. I, Sec. II, Para. III of the Constitution. The Court stated that the trial court had erred when it had denied the county's motion to dismiss and had sustained the constitutionality of (d)(4). In supplemental briefs, the parties had urged the Court to fashion an equitable remedy to allow additional time to renegotiate a new tax certificate. The Court declined stating it is not the role of the courts to legislate alternative procedures to replace unconstitutional enactments of the legislature. {None of the parties filed a motion to reconsider by the deadline on October 17, 2013.}

Moss v. City of Dunwoody

Supreme Court of Georgia

October 21, 2013; S13A1105; 13 FCDR 3197

This case involves a dispute between the city and attorneys. The city imposed an occupation tax, pursuant to O.C.G.A. Section 48-13-5, *et seq.*, on attorneys who maintained an office and practiced law within the city limits. Some attorneys subject to the tax brought suit alleging the tax ordinance was an unconstitutional precondition on the practice of law; an improper attempt to regulate the practice of law; and an equal protection violation. The superior court upheld the constitutionality of the tax ordinance. The Supreme Court upheld the trial court. First, the Court cited the *Sexton, Brown, Barnes*, and other cases and reiterated that local governments can impose and enforce occupational taxes on lawyers as long as the tax is merely for generating revenue and does not act as a precondition or license in the practice of law. To determine the constitutionality, the Court look's beyond the ordinance's stated purpose and inquires instead as to its operative effect. Elements which would render it invalid include whether payment was required prior to transacting business, whether a tax certificate was required to be obtained and displayed, and whether non-payment could result in criminal prosecution. The challenged ordinance contained none of those elements. Second, it did not regulate the practice of law since it did not in any manner seek to suspend or revoke a law license. Finally, it applied equally to all lawyers in the city limits who were the class who were receiving municipal services.

Georgia Department of Revenue v. Moore

Supreme Court of Georgia

November 4, 2013; S12G1931; 13 FCDR 3342

This case involves a question of whether the voluntary payment doctrine precludes collection of disputed sales tax amounts. {The fact setup is somewhat convoluted and the interested reader is directed to the case for those matters.} Unpaid sales taxes were owed. DOR sought payment from joint obligors. The trial court reversed the decision of DOR and an administrative law judge and held that under the voluntary payment doctrine of O.C.G.A. 13-1-13, after settling for the full amount from one obligor it forfeited its right to pursue any potential joint claim. The Court of Appeals affirmed. The Supreme Court granted certiorari. The Supreme Court concluded that the statute applied only to contracts and not to tax indebtedness and hence had no application to this case. Consequently, the case was remanded back to the Court of Appeals to consider whether the second obligor was a necessary party to the action under O.C.G.A. 9-11-19(a)(2).

Terrell County Board of Tax Assessors v. Goolsby

Georgia Court of Appeals

November 7, 2013; A13A0981; 13 FCDR 3435

This case involves a question of whether the operation of a grain business breaches a conservation use covenant. The property owners entered a tract into a conservation use covenant under O.C.G.A. 48-5-7.4. Subsequently, they began operating a commercial grain business on a portion of that tract. The board of assessors notified them of breach of covenant. The board of equalization upheld that decision. The trial court reversed the decision and held the covenant had not been breached. The Court of Appeals reversed. The Court construed (b)(1) of the statute and DOR reg. 560-11-6-.02(e) and concluded that if the taxpayer is operating a business, and, the business is separate and apart from the commercial production of agricultural products (the qualifying use in this case), and, the business is not incidental, occasional, intermediate, or temporary, but is detrimental to or in conflict with the property's primary purpose, then the covenant is breached. Consequently, the case was remanded back to the trial court for reconsideration.

TORTS

Miller v. City Views at Rosa Burney Park GP LLC

Georgia Court of Appeals

July 16, 2013; A12A2331; 13 FCDR 2689

This case involves liability claims which ensued following the shooting of a person by an off duty police officer in the course of his employment by an apartment complex to provide security services. {The case involves multiple issues; however, this summary will focus only on the matter of vicarious liability.} The trial court granted summary judgment to the victim on the issue of vicarious liability. On appeal, the Court of Appeals reversed. The Court restated with emphasis that in cases involving off-duty police

officers working for private employers, an employer escapes liability if the officer was performing police duties which the employer did not direct when the cause of action arose. In such cases, liability does not extend to the private employer simply because a tort occurred on the private employer's premises. However, such officer may occupy a dual position of exercising BOTH the functions of the private employer AND of the public. In such a case, when a tort is committed where the duties discharged are that of the private employer, that employer is liable. Here, the evidence showed that the officer was implementing the private employer's policy of regulating access to the apartment complex rather than simply performing a police function. Consequently summary judgment was error.

Stevenson v. City of Doraville

Supreme Court of Georgia
November 25, 2013; S12AG1316; 13 FCDR 3652

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. On certiorari, the Supreme Court also 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. The special relationship was not proven in this case. The Court declined to determine whether a special duty existed in the absence of a special relationship stating that it has never utilized such a broad exception to the public duty doctrine even when urged to do so and would not do so in this case.

WEAPONS

Ferguson v. Perry

Supreme Court of Georgia
March 25, 2013; S12A1643; S12X1644; S12A1645; 13 FCDR 743

This case involves a dispute over the issuance of a license to carry a weapon. Following a federal felony conviction, an individual was granted relief from federal firearms disabilities under 18 USC Sec. 925. The individual then sought and was granted a restoration of civil and political rights by the state board of pardons and paroles. The individual sought and was denied by the probate judge a license to carry a

weapon. {At that time, such restoration orders did not address specifically the restoration of gun rights, but do so now.} On appeal, the superior court granted summary judgment to the individual since the gun disability had been removed by the restoration order, issued a mandamus order compelling issuance of the license, and denied the claim that federal constitutional rights had been violated. The Supreme Court of Georgia upheld the summary judgment since the restoration of civil and political rights was an ‘additional’ method by which gun rights could be restored. The lack of specific mention of gun rights restoration was cured by the order which stated ‘all’ rights were restored. The disability was imposed by law and removed by the order. Consequently, the mandamus order was also upheld. The constitutional claim should not have been addressed since it was rendered moot by prevailing on the license claim.

Hertz v. Bennett

Supreme Court of Georgia
November 4, 2013; S13A1288; 13 FCDR 3330

This case involves a dispute over the denial of a license to carry a weapon. A probate judge denied the license on the basis that the applicant has pled nolo to five felony charges in Florida. The applicant filed for mandamus alleging the denial violated O.C.G.A. 16-11-129 and his constitutional right to keep and bear arms. The superior court upheld the denial finding that the probate court had followed the statute and that the denial did not violate either the state or federal constitutions. The Supreme Court affirmed. {The case contains a lengthy analysis of the matter under 2nd Amendment constitutional law principles and readers interested in this should consult the text of the case.}

WORKERS’ COMPENSATION

Reid v. Metropolitan Atlanta Rapid Transit Authority

Georgia Court of Appeals
July 16, 2013; A13A0814; 13 FCDR 2699

This case involves a claim for penalties under OCGA 34-9-104(b) following the untimely payment of temporary total disability benefits. A MARTA employee was injured on the job. A claim was filed with the State Board of Workers’ Compensation. Temporary total disability payments were made during a period of from 1999 to 2002. Of 32 payments, 12 were untimely. In 2010, the benefit recipient sought statutory late penalties. MARTA denied the request on the basis the penalties were barred by the statute of limitations. In a series of appeals to the State Board, an administrative law judge, and the superior court, the claim was denied. The reasoning was that the claim for penalties constituted a ‘change in conditions’ under the statute and was thus barred by the statute’s 2 year limitations period. On appeal, the Court of Appeals reversed. The Court held that the violation by an employer of the time in which payments were required to be made and the failure of the employer to pay penalties incurred as a result of that violation does not constitute a change in conditions. Consequently, the unpaid penalties are not subject to the

limitation period under OCGA 34-9-104. The Court recognized that “applying the statute according to its terms can lead to results that some may view as absurd”; such as here where penalties are allowed more than 10 years after the late payments were made. However, it is up to the legislature, not the Court, to address the absurdity and remedy the deficiency in the statute.

ZONING

Marietta Properties, LLC v. City of Marietta

Georgia Court of Appeals
August 31, 2012; A12A1186; 13 FCDR 65

This case was initially reported in 123 FCDR 4074. A footnote was revised and was reported again. The 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.

City of Suwanee v. Settles Bridge Farm LLC

Supreme Court of Georgia
February 18, 2013; S12A1599; 13 FCDR 273

This case involves a claim of an unconstitutional regulatory taking of a large parcel of property. The LLC assembled a large parcel of property in an area zoned residential in order to develop a subdivision. A purchaser approached the LLC about buying the parcel for use as a private school (a permitted use under the zoning classification). City council, which was in the process of developing a long range comprehensive land use plan, then imposed a moratorium on building permits and imposed a special use permit requirement on large projects. The LLC and the school filed suit against the city claiming an unconstitutional taking. The trial court agreed and awarded substantial damages. The Supreme Court reversed and concluded the case should have been dismissed. First, the Court restated the general rule that a party must exhaust administrative remedies prior to seeking a judicial declaration of unconstitutionality. Second, the Court recognized the exception to that rule in situations where the litigant establishes that submitting to the administrative process would be ‘futile’. In this case, the LLC never actually applied for the special use permit. The LLC did appeal informally to the city in opposing the adoption of the special use permit requirement itself and at a public hearing; however neither action

constituted part of the administrative appeal process. Consequently, the administrative remedy had not been exhausted and the case should have been dismissed.

City of Statesboro v. Dickens

Supreme Court of Georgia
September 9, 2013; S13S0910; 13 FCDR 2803

This case involves a dispute between the city and property owners over the construction of a detached garage. The actual size of the garage being constructed exceeded the size allowed by the building permit as well as the size permitted under the zoning ordinance. A stop work order was issued. Through various means (described in detail in the case itself), the property owners continued to attempt to seek approval of an application to continue construction. A final denial by the city was appealed to the Zoning Board of Appeals. That board likewise voted to deny the application. The property owners then filed a mandamus action in superior court. The trial court denied summary judgment to the city. A certificate of immediate review to the Supreme Court was issued. The Supreme Court held that the trial court should have dismissed the action. First, the Court cited the *DeKalb County* and *McClung* cases and stated that O.C.G.A. 5-4-1 specifies that the proper method of judicial review of zoning board ruling is a writ of certiorari. Second, regardless of the failure to use the correct writ remedy, (certiorari rather than mandamus) O.C.G.A. 5-4-6 requires the writ to be filed within 30 days of the zoning decision. In this case it was not and consequently it should have been dismissed as untimely.

Mortgage Alliance Corporation v. Pickens County

Supreme Court of Georgia
November 4, 2013; S12G1885; 13 FCDR 3337

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. {12 FCDR 3785; See *Counties & the Law 2012 Compilation Edition*, p. 26} The Court of Appeals 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. The Supreme Court granted certiorari. The Supreme Court concluded that the case is properly resolved on the ground that the letter was not a decision within the meaning of O.C.G.A. 5-3-20 and that the county never made a final decision on the development proposal. Consequently, the inverse condemnation claim never ripened for judicial review and the trial court should have granted summary judgment to the county on this ground. The trial court and the Court of Appeals both erred in concluding that there was an appealable decision, however, they reached the right result. Citing the “right-for-any-reason doctrine” under the *Honda Motor* case, the Supreme Court affirmed the Court of Appeals, but declared the portion of the Court of Appeals decision on the matter of whether the letter was entered or filed to be treated as dicta.