COUNTIES & THE LAW

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Counties & the Law 2015 Compilation Edition includes decisions of interest to county attorneys published in the Daily Report Opinions Weekly between January 3, 2015, and January 1, 2016. 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 2015 as a result of the publication of *Counties & the* Law and we welcome your continued suggestions and opinions.

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COUNTIES & THE LAW

ANTE LITEM NOTICE

City of College Park v. Sekisui SPR Americas LLC

Georgia Court of Appeals
April 30, 2015; A14A1690

This case involves a dispute between a city and a subcontractor (the LLC). The LLC had worked on a city sewer project sued the city when the contractor failed to pay the LLC for work performed. The trial court granted summary judgment to the LLC. The Court of Appeals reversed. The city relied upon the *Jacks* case to support its argument that ante litem notice under OCGA 36-33-5 is applicable to a claim arising under OCGA 36-91-91. The Court "disapproved" *Jacks* to the extent that it holds ante litem notice under OCGA 36-33-5 applies to a claim under OCGA 36-91-91 because the plain text of OCGA 36-33-5 is clear that it only applies to personal injury and property damage claims. The city also contended that it was not required to obtain a payment bond since the project has been necessitated by an emergency. The Court agreed. OCGA 36-91-22 plainly provides that the only requirement is that the emergency be described in the minutes of the governing body, which it was in this case. Finally, the city contended that OCGA 36-91-91 provides for the exclusive remedy under which the city could be sued and that claims for unjust enrichment, quantum meruit, and implied obligation are barred. Citing the *Hussey*, *Callahan*, and *Weaver* cases, the Court again agreed.

Georgia Department of Corrections v. Grady Memorial Hospital Corp.

Georgia Court of Appeals
September 1, 2015; A15A0549; A15A0550

An inmate of the state DOC was transferred temporarily to custody of the county sheriff to be available for a trial in the county. While housed in the county jail, the inmate was injured and treated at the hospital. The inmate was later returned to state custody. The hospital sued the state and the county for payment for the emergency care that it rendered. The state and the county moved for summary judgment on the basis of sovereign immunity and the county also moved for summary judgment on the basis that the hospital failed to comply with the ante litem notice provisions of O.C.G.A. 36-11-1. The trial court denied both motions. The Court of Appeals reversed the trial court. O.C.G.A 42-5-2(a) imposes the duty and cost of medical care of inmates upon the custodial governmental unit. Since the state did not have custody at the time, no waiver of sovereign immunity occurred. As to the county, the plaintiff was required to prove that

it complied with ante litem notice and it failed to do so. Because of that finding, the Court did not address the immunity question as to the county.

Foster v. Georgia Regional Transportation Authority

Supreme Court of Georgia
September 23, 2015; S15G0321

A passenger on a GRTA bus was injured and sued GRTA (a state authority) under the Georgia Tort Claims Act, O.C.G.A. 50-21-20, *et seq*. GRTA moved for judgment on the pleadings since the statute of limitations under the Tort Claims Act is two years and the suit was filed too late. The plaintiff argued that ante litem notice had been provided under O.C.G.A. 36-33-5(d) and that O.C.G.A. 50-21-7(c) tolled the statute of limitations under the Tort Claims Act, "as provided elsewhere in this Code" (meaning anywhere else in the O.C.G.A.) The trial court denied the motion. The Court of Appeals reversed. The Supreme Court affirmed the Court of Appeals. The Court of Appeals 'reasoned' that the two statutes simply could not be harmonized. The Supreme Court analysis went in a different direction. It 'reasoned' that statutory tolling provisions apply to claims under the Tort Claims Act in the same way and to the same extent that they would apply to claims not brought under the Tort Claims Act. In other words, since GRTA was not a municipality but rather a state authority, the municipal ante litem notice provision simply did not apply to a claim against GRTA whether the claim was brought under the Tort Claims Act or otherwise.

BONDS

Savage v. State of Georgia

Supreme Court of Georgia
July 8, 2015; S15A0277; S15A0278; S15A0279

{This is an extremely long and very technical decision involving the validation of bonds for the financing of the new baseball stadium in Cobb County and interested readers should consult the text of the entire opinion.}

The Supreme Court upheld the trial court's determination that validated the revenue bonds for the new stadium. The bonds are to be issued pursuant to an intergovernmental agreement between the county and a coliseum and exhibit hall authority (created by local Act). The authority agreed to issue the bonds to cover much of the construction cost and the county agreed to pay the authority amounts sufficient to cover the bond payments not covered by licensing fees paid by the Atlanta Braves. The Court concluded that the IGA was valid; the issuance of bonds did not violate the constitutional debt limitation, gratuities, or lending clauses of the constitution or revenue bond law; and that the process used to validate the bonds was not deficient.

CEMETERIES

City of Sandy Springs v. Mills

Georgia Court of Appeals
May 28, 2015; A14A1547

This case involves the questions of an abandoned cemetery and the sale of that cemetery for unpaid taxes. An individual purchased a tract of land at a tax sale. The tract contained a family burial ground. The purchaser wanted to build a single family residence on a portion of the tract where there were no human remains. The city refused to issue a building permit on the basis that the tract was encumbered by a cemetery use restriction. The purchaser sued the city alleging that a taking has occurred since the deed restriction was no longer enforceable. The trial court denied the city's motion for summary judgment. The Court of Appeals affirmed the trial court. Summary judgment is proper only when there is no genuine issue of material fact. Here, there was clear evidence that at although a cemetery easement still exists, there were genuine issues of fact as to what portion of the property has been or might be used for burial purposes and whether at least a partial abandonment of the family burial ground had taken place. The purchaser failed to obtain a ruling from the trial court on the tax sale question and consequently that resulted in a waiver of review on that issue.

CIVIL PRACTICE

Woodham v. Atlanta Development Authority

Georgia Court of Appeals
December 8, 2015; A15A1034; A15A1035

Woodham and a citizen group intervened in a bond validation proceeding. Their conduct in that proceeding led the trial court to order them to pay attorney fees and expenses to the authority. The Court of Appeals vacated the portion of the order on attorney fees and remanded for a statutory basis for the award. On remand, the trial court issued an order from which Woodham and the group improperly attempted to appeal leading the Court of Appeals to assess a frivolous appeal penalty. The trial court subsequently ordered them to pay attorney fees and expenses. The authority attempted to collect the awards. Following much procedural wrangling, one trial judge recused himself and Woodham sought recusal of the second judge. A contempt order was issued against Woodham. The Court of Appeals found no error regarding the judge's denial of recusal. It also found that Woodham had waived appellate review of his claim of improper discovery since he consented to discovery. The Court upheld the contempt order

but not the requirement to pay legal fees and costs to purge contempt. Finally, the Court reversed the supersedeas bond since it reversed the order as to fees and costs.

CONDEMNATION

Fulton County v. Dillard Land Investments LLC

Georgia Court of Appeals
January 26, 2015; A13A0562

{The case summary of the Supreme Court decision in this case is available in Counties & the Law 2014 Compilation Edition, p11.}

This case involves the question of whether a condemnor may voluntarily dismiss a condemnation action without the consent of the court or the condemnee, after a special master has entered an award valuing the property at issue but before the condemnor has paid the award amount into the registry of the court or to the condemnee. The Supreme Court reversed the Court of Appeals and ruled that a condemnor may not voluntarily dismiss such a condemnation action. Here, the Court of Appeals vacates its judgment and adopts the Supreme Court's opinion as its own.

DeKalb County v. Heath

Georgia Court of Appeals
April 9, 2015; A14A1887

This case (*Heath* II) involves protracted litigation involving property damage allegedly caused by the county maintaining a nuisance and failing to repair its storm water drainage system. The county constructed a block retaining wall along a creek bed on the plaintiff's property. Plaintiff alleged that the county did not maintain the wall and that its deteriorated condition caused property damage. The trial court granted damages to the plaintiff in the amount which represented the cost of repairing the failing retaining wall. The Court of Appeals upheld the verdict. In *Heath* I, the plaintiff prevailed in an inverse condemnation claim for diminished value of his property caused by the flooding from the failing wall. In *Heath* II, this case, the plaintiff raised for the first time the issue of improper maintenance of the wall. Res judicata, (a court judgment is conclusive between the same parties as to all matters before the court) does not prevent the damages in *Heath* II. The 2 causes of action were not identical. Diminution of property value caused by the flooding is not the same thing as the cost of maintenance and repair of the wall which allowed the flooding. The plaintiff was not required to simply amend the claim in *Heath* I because a nuisance cause of action arose in this case every time it rained.

Evans v. Department of Transportation

Georgia Court of Appeals
April 17, 2015; A14A1795

This case involves a dispute over the value of undeveloped timberland containing an underground kaolin deposit. The land was condemned by DOT for a road project. The trial court granted a condemnation award far below what had been sought by the property owners. The Court of Appeals upheld the award. The property was located within the corporate limits of a city and closely situated to a neighborhood. It was zoned agricultural under the city ordinance, and thus mining was not a permitted use of the property. DOT asserted the highest and best use under current zoning was its present use as timberland and valued it accordingly. DOT experts also opined that the kaolin deposit should not be taken into account as the property could not be mined and that a change in zoning of the property was not likely. The Court held that, as in other types of condemnation cases, zoning considerations are relevant and material to a jury determination of what constitutes just and adequate compensation. Given the record of evidence, the Court could not say that the opinion testimony of DOT's experts regarding the likelihood of a change in zoning was speculative.

White v. The Ringgold Telephone Company

Georgia Court of Appeals
December 8, 2015; A15A1382

The telephone company and a property owner entered an easement agreement for telephone and telecom services. The company agreed to provide certain services to the property owner at no charge. The company stopped the services and the owner sued for breach of contract and a declaratory judgement canceling the easement. The company then sought to condemn the property. The Court of Appeals held the pendency of the breach of contract suit did not preclude the special master condemnation proceeding under O.C.G.A. 22-2-101.

Fincher Road Investments LLLP v. City of Canton

Georgia Court of Appeals
December 28, 2015; A15A1280

This case involves a temporary rather than a permanent taking. A city sought to condemn property. Protracted litigation ensued. The city sought to dismiss the condemnation. The trial court awarded attorney fees and litigation costs to the owner, but no compensation for the temporary taking. The Court of Appeals reversed. It is well established that when the government's actions have worked a taking of all use of the property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

CONSERVATION & NATURAL RESOURCES

Georgia River Network v. Turner

Supreme Court of Georgia
June 18, 2015; S14G1780; S14G1781

{This is a long and complex case with a convoluted procedural history. Interested readers may want to consult the Court of Appeals case text or Counties & the Law 2014 Compilation edition, p. 12 for a better understanding of the matter.} A county board of commissioners planned to build a fishing lake and sought and was granted a stream buffer variance under O.C.G.A. 12-7-1 et seq. from the director of the environmental protection division of the Department of Natural Resources. Two different river protection groups filed a challenge to the buffer variance. An administrative law judge reversed the variance. Judicial review was sought in the superior courts of Fulton and Grady counties. Both superior courts reversed the decision of the ALJ. The river groups appealed both orders. The EPD and the county appealed the Grady county court order. The Court of Appeals reversed both trial court orders. The Court concluded that the river groups challenged an 'order or action' of the EPD, that they had standing to do so, and that the trial courts erred in determining that the buffer requirement applied only to state waters with wrested vegetation. The Court noted that although the statute was internally inconsistent, the legislative intent of the General Assembly was expressed clearly in O.C.G.A. 12-7-2, and therefore it must be read to give effect to the intent to strengthen and extend erosion and sediment control activities. The Supreme Court reversed the Court of Appeals. The Court held that the buffer requirement under O.C.G.A. 12-7-6(b)(15)(A) does not apply to state waters that are adjacent to banks without wrested vegetation. Consequently, no further analysis is necessary since the literal language of the statute does not provide for a buffer.

CONSTITUTION

Cottrell v. Atlanta Development Authority d/b/a Invest Atlanta

Supreme Court of Georgia
March 16, 2015; S14A1874

This case involves multiple constitutional issues regarding the financing of the new stadium facility in downtown Atlanta (the New Stadium Project or NSP). Following the bond validation hearing, the trial court validated the bonds over the objections of the interveners who asserted that, among other things, the 2010 amendment to O.C.G.A. 48-13-51(a)(5) (the hotel motel tax) which allowed the tax to be extended for the purpose of constructing a successor facility to the current domed stadium, was an

unconstitutional special law which violated Art. III, Sec. VI, Para. IV(a) of the Constitution. On appeal, the Supreme Court upheld the trial court. The Supreme Court in fact quoted the part of the 2010 amendment that set a condition precedent requiring a contract with an NFL team to use the NSP through the end of the extension period and still found the statute to be of uniform operation throughout the state. The Court's analysis was that the domed stadium provision under (a)(5) was merely one of many exceptions to the 3% hotel motel levy under (a)(1). The Court blithely goes on to say that "it is of no consequence" that the provision only affects the NSP at this time since any other city or county under (a)(5)(A) could likewise build their own multipurpose domed stadium facility. What the Court does not address is that "any other city or county under (a)(5)(a)" is apparently ONLY the City of Atlanta and Fulton County. Consequently, one is left wondering what it would take for the Court to find that a classification was arbitrary and unreasonable to the extent necessary to trigger what little seems to be left of the special laws prohibition. At least those jurisdictions which levy a hotel motel tax may rest easy knowing that their respective levies are safe from a special law claim. *{The case also deals with questions regarding invalid intergovernmental contracts related to the NSP and Revenue Bond Law violations because the authority does not own or operate the NSP and the revenue was not derived from the project. The Court was equally untroubled by these claims and the interested reader is directed to the full text of the case for those matters.}*

Green v. State

Georgia Court of Appeals
June 12, 2015; A14A1849

This case involves the alleged violation of privacy rights. Following surveillance in connection with burglaries, police obtained a court order allowing the placement of a GPS device on a suspect's vehicle. The suspect was subsequently arrested following additional burglaries. The trial court refused defendant's motion to suppress the GPS evidence as a constitutional violation of privacy. The defendant was convicted. The Court of Appeals affirmed the trial court. To be aggrieved by an unreasonable search and seizure, one must show that the government has trespassed upon one's property or invaded some place where one has a reasonable expectation of privacy. Here, the truck belonged to the co-defendant so it was not his property. {The case also involves issues regarding waiver of right to a jury trial and the interested reader is directed to the case text for those matters.}

CONTRACTS

Fulton County v. Andrews

Georgia Court of Appeals
July 17, 2015; A15A0712

County public defenders sued the county asserting breach of contract and pay disparity because the county attorneys were paid a higher amount. The Court of Appeals upheld the trial court. County

attorneys and public defenders were classified the same under the merit system consequently the personnel regulations were violated.

Shelnutt v. Mayor & Aldermen of the City of Savannah

Georgia Court of Appeals
July 24, 2015; A15A0381

This case involves a pay dispute between city firefighters and the city governing authority. The city had a written pay policy and the firefighters were paid less than the amount specified under that pay policy. The firefighters sued alleging breach of contract (the pay policy). The trial court granted the city's motion to dismiss. The Court of Appeals reversed the trial court. The city argued that a provision in the policy which allowed the city manager to make exceptions demonstrated that the policy was discretionary and not binding. The city also relied upon disclaimer language in the employee handbook stating that employment policies were only a general guide and could be changed at any time and that the employee handbook did not constitute either an express or implied contract. The Court first noted that prior to 2014; the pay policy was not part of the handbook. The version controlling the employees in this case is determined by time of employment. At that time, the handbook did not contain any of the noted disclaimers. Therefore, the pay policy itself controls. Although the firefighters were terminable-at-will, such an employment relationship can still give rise to certain contractual rights. Consequently, the Court could not say that the firefighters might not be entitled to contractual relief under any state of provable facts. Finally, the city manager was required to exercise discretion in making exceptions in good faith. That officer was accused of personal favoritism and bias. Thus the discretionary language does not demand dismissal as a matter of law.

COUNTY BOUNDARIES

Kemp v. Monroe County

Supreme Court of Georgia
November 10, 2015; S15A1741

{This is round 2 of a long standing boundary dispute between Bibb and Monroe counties. For Round 1, see C&tL 2014 Compilation Edition, p. 14.}

The Supreme Court for the second time reversed the trial court and remanded the case. The trial court misconstrued the previous ruling (Round 1) as expressly precluding the Secretary of State from allowing the record to be reopened and new evidence to be introduce and developed. The Secretary of State is not making a second determination of the true boundary. It was his initial failure to make a final determination as to the boundary line that is the reason for this appeal. The trial court should not have prohibited the Secretary of State from holding a hearing and considering new evidence before reaching a final decision.

ELECTIONS

Kanitra v. City of Greensboro

Supreme Court of Georgia
March 4, 2015; S14A1870

This case involves the question of the status of a holdover member of a city planning and zoning board. The board was created by ordinance pursuant to general authority under the city charter for the creation of boards. The ordinance specified four year terms. A member of the board was not reappointed at the end of term, but continued to serve as a holdover member. The city council then appointed a new member, but the holdover member contended that he could only be removed for cause and was entitled to notice and hearing prior to being removed. The trial court determined the city could replace the member without regard to cause. The Supreme Court agreed. First, neither the city charter nor the ordinance allows the board member to hold over after the term expires. Although general law does so provide for officers of the state, O.C.G.A. 45-2-4, the Court does not decide whether the board member was such an officer. The Court reasoned that even if the member was entitled to hold over, the city could still replace him at any time and the removal for cause protection would not be available in such case. Further, there was no legitimate claim to entitlement to the position once he became a holdover so due process protections would not apply.

EMPLOYMENT

Cochran v. Kendrick

Supreme Court of Georgia
September 18, 2015; S15A0833

A tax commissioner reorganized the office by eliminating certain positions and creating some new ones. One of the new positions required a bachelor's degree. A person whose position had been eliminated applied for the new position but was not selected as her education level was only a high school equivalency. She did not apply for any other position and her employment was terminated. She brought suit alleging racial discrimination. The trial court granted summary judgment to the tax commissioner. The Court of Appeals upheld the trial court. The former employee failed to show that the tax commissioner had a clear legal duty to maintain her employment and failed to show she was ever a merit system employee. The reason for the reorganization, increased office efficiency, was a legitimate non-discriminatory reason for the adverse employment decision as was providing for an educational qualification. The terminated employee failed to show that either reason was a pretext for discrimination.

Clayton County Board of Commissioners v. Murphy

Supreme Court of Georgia
October 16, 2015; S15A0995

An assistant director in the community development department was terminated after having been warned that he was not to do building inspections for property where his private electrical service firm had done business. The terminated employee appealed to the county civil service board claiming the firing had been without cause. The board agreed and ordered him to be reinstated. The county appealed to the superior court. In the meantime, the assistant director position had been eliminated through a reduction in force (RIF) program. The trial court dismissed the county appeal from the reinstatement order of the board. The county refused to rehire the former employee and he filed a mandamus action to compel the county to rehire him. The trial court granted the writ of mandamus. The Supreme Court reversed. The Court analysis began with whether the former employee had a clear legal right to employment in the former position as assistant director. The trial court order only stated that he must be provided with employment as specified in the civil service rules. It refers, however, to the particular rule about RIF terminations and offering a position that is of the same nature as that which had been previously held. The rule does not require an eliminated position to be recreated, so there is no clear legal right to the position. Next, the Court looked at whether the trial court was authorized to require that the county offer employment in some other position. While there may have been 'available' jobs 'of the nature' of assistant director, nothing in the trial record establishes that an available job was sufficiently similar to his prior job to provide him with a clear legal right to that job. Because mandamus requires the petitioner to establish a clear legal right to the job, the trial court erred.

City of Albany v. Pait

Georgia Court of Appeals
December 23, 2015; A15A1180; A15A1181

A firefighter pled guilty to two counts of theft and was terminated by the city fire department. The former employee appealed to the city manager who conducted an evidentiary hearing and affirmed the decision. The case was then appealed to superior court. The trial court held that the city manager's decision was not supported by the evidence. The Court of Appeals reversed. The test should have been whether there was any evidence to support the administrative agency rather than to reweigh that evidence. There was no procedural due process problem since the fire department's termination notice expressly informed the former employee of the termination and of the right of appeal to the city manager.

IMMUNITY

Georgia Department of Corrections v. Couch

Georgia Court of Appeals
February 2, 2015; A13A0223
{The case summary of the Supreme Court decision in this case is available in Counties & the Law 2014 Compilation Edition, p. 22.}

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

Agnes Scott College, Inc. v. Hartley

Georgia Court of Appeals
February 112, 2015; A12A1989

This case involves the question of whether the GA Tort Claims Act expressly waives sovereign immunity for campus police officers of a private college. The answer is no. The officers do not qualify as state officers

or employees and were not acting for a state government entity. Summary judgment to the college was incorrect under the circumstances of this case because the college did not establish that Hartley could not possibly present evidence that the campus police were acting under the direction of the college at the time the alleged tort was committed.

Primas v. City of Milledgeville

Supreme Court of Georgia
February 19, 2015; S12G0753

This case involves the question of a waiver sovereign immunity. An individual was injured while driving a prison work-detail van. The van was leased to DOT, but under a contract, the city was responsible for maintenance and insurance. The brakes failed and the van crashed into a utility pole. Primas sued the city alleging negligent failure to inspect and maintain. The city moved for summary judgment arguing that the maintenance was a discretionary act for which sovereign immunity had not been waived. The trial court denied the motion and the Court of Appeals reversed. The Supreme Court reversed. A city is immune under sovereign immunity unless immunity is waived. O.C.G.A. 36-33-1(b) waives immunity for the negligent performance of a ministerial function but retains immunity for other government functions. Here, the Court of Appeals failed to make any determination regarding whether the negligence arose out of the performance or nonperformance of a governmental function and failed to apply the definitions of governmental and ministerial functions as those terms relate to the city's sovereign immunity. The case is remanded back for reconsideration of these points and in light of the City of Atlanta v. Mitcham decision.

City of Atlanta v. Mitcham

Supreme Court of Georgia
February 19, 2015; S14G0619

This case involves the question of a waiver sovereign immunity. An individual alleged he was injured while in police custody due to their failure to provide him necessary medical treatment. The city moved for summary judgment arguing that the medical care of an inmate was a discretionary act for which sovereign immunity had not been waived. The trial court denied the motion and the Court of Appeals upheld. The Supreme Court reversed. A city is immune from liability for acts taken in the performance of its governmental functions but it may be held liable for the negligent performance of its ministerial functions. The determination of whether a function is governmental or ministerial in character for purposes of city sovereign immunity focuses broadly on the nature, purpose, and intended beneficiaries of the function performed by the city. The definition and evaluation of an act performed by an individual for purposes of official immunity is not interchangeable with and should not be substituted for the definition used to identify the nature of the functions of a city for purposes of sovereign immunity. The term 'ministerial duties' as it pertains to the question of official immunity should not be confused with the term 'ministerial functions' as it is used in determining the waiver of sovereign immunity under O.C.G.A 36-33-1(b). Because there has been no waiver of sovereign immunity in this case, the plaintiff is precluded from negligence claims against the city and the police.

City of Atlanta v. Mitcham

Georgia Court of Appeals
September 16, 2015; A13A0912

The Supreme Court overruled the Court of Appeals in this case *{see above}*. Accordingly, the Court of Appeals vacated its 2013 decision and adopted the judgment of the Supreme Court as its own.

Williams v. Pauley

Georgia Court of Appeals
March 2, 2015; A14A2033

This case involves the question of immunity in the context of attempting to impound livestock. A police officer responded to a call that a horse was wandering loose on the highway. The horse had a halter but no rope or reigns were attached. The officer called for instructions and was told to try and lead the horse as far off the median as possible. The officer led the horse off the median but it followed the officer back onto the median. The officer departed the scene trying to locate a rope or restraint, but a car hit the horse and a fatality resulted. A wrongful death suit ensued. The trial court denied the officer's motion for summary judgment on the basis of official immunity and the Court of Appeals reversed. The record shows there were no protocols or instructions of any kind that the police department used to guide officers how to deal with stray horses or other livestock. In determining whether the officer was entitled to official immunity, the issue is whether the officer's actions were discretionary or ministerial. Although O.C.G.A. 4-3-4(a) requires the impoundment of stray animals or livestock, it contains no specific instructions or procedures and consequently the officer in his case was clearly required to use deliberation and judgment. Consequently, official immunity applies.

Board of Regents of the University System of GA v. Winter

Georgia Court of Appeals
May 8, 2015; A14A1851

This case involves a breach of contract dispute between UGA and a research scholar who was a British citizen. *{The fact situation involves an array of attempts to change employment status through several federal agencies and the interested reader is directed to the case text for those matters.}* UGA ultimately withdrew its employment offer as Winter had failed to secure the necessary visa. Winter sued for breach of contract in the State Court of Fulton County. The trial court denied summary judgment to UGA. The Court of Appeals reversed. UGA asserted that all breach of contract cases were required to be filed in the superior court under OCGA 50-21-1. The Court rejected that assertion noting that it was not exclusive and merely states that such actions "shall be proper" in superior court. The Court agreed with UGA that it was entitled to summary judgment under sovereign immunity. The parties did not enter into a formal traditional written agreement signed by both parties and Winter failed to carry the burden of proof that the parties has entered into signed contemporaneous agreements sufficient to establish a written contract.

Wyno v. Lowndes County

Georgia Court of Appeals
May 11, 2015; A14A2086

This case involves sovereign immunity. A woman was killed by a neighbor's dog and her husband sued the dog's owner as well as the county and four county employees with animal control services. The trial court dismissed the action against the county and the county employees concluding that sovereign immunity, or, alternatively, the Responsible Dog Ownership Law, OCGA 4-8-20 et seq. barred the action. The Court of Appeals affirmed the dismissal against the county and the county employees in their official capacities. However, the Court reversed the dismissal of the action against the employees in their individual capacities. The plaintiff challenged the constitutionality of the statute as violating Art. IX, Sec. II, Para. IX (d). The trial court implicitly rejected that challenge, but the Court, citing the *City of Decatur, Stafford*, and *Buchan* cases, noted that it cannot review that ruling until the trial court makes it expressly. Consequently, the case is remanded back for further proceedings on that issue.

Tucker v. Pearce

Georgia Court of Appeals
June 11, 2015; A14A2105

This case involves a wrongful death action resulting when an inmate hung himself in jail with his socks. Police officers responded to a 911 call and arrested a man outside a home with a gun. There were two notes wrapped around his driver's license which an officer did not believe were suicide notes. After arrival at the station, intake procedures were followed, but the officer failed to do a medical screening. The detainee committed suicide with his socks. The officer was sued for wrongful death. The officer moved for summary judgment on the basis of sovereign immunity and that there was insufficient evidence that his acts caused the death. The trial court denied the motion for summary judgment. The Court of Appeals reversed the trial court. The issue was whether the failure to perform the medical screening was the proximate cause of the suicide or whether the suicide was an unforeseeable act that was not caused by the officer's failure to screen. Generally, suicide is an unforeseeable intervening cause of death which absolves the tortfeasor of liability, unless the tortfeasor's act causes the injured party to kill himself during a rage, frenzy, or uncontrollable impulse. Here, the exception to the rule does not apply since Pearce was calm and controlled and appeared to know what he was doing. Also, there was no evidence that even if the screening had taken place that the suicide could have been prevented. The plaintiff's argument that the test would have offered information regarding a suicide risk is purely speculative.

Brown v. GeorgiaCarry.Org, Inc.

Georgia Court of Appeals
June 10, 2015; A14A2021

This case involves the issue of qualified immunity in the context of a malicious prosecution claim under 42 USC 1983. An armed man attempted to enter a shopping mall with a holstered gun. A security guard had informed the man that the mall premises had a no-weapons policy and to take the gun back to his vehicle. On the way to his vehicle, he was approached by another security guard and an off-duty police officer who demanded to see his weapon license. The suspect refused and the officer called in and

dispatch sent officers to the scene. He was arrested as a suspect in a shoplifting case and for obstruction under O.C.G.A. 16-10-24(a) as he continued to refuse to produce either his gun license or driver's license. The suspect brought a malicious prosecution claim under 42 USC 1983. The trial court denied the officers' motion for summary judgment on the basis of qualified immunity. The Court of Appeals reversed the trial court. The issue was whether the officers had "arguable reasonable suspicion" to detain the suspect and request identification. If so, then qualified immunity applies. Here, there was positive and uncontroverted evidence that complaints had been received about a man with a gun inside the mall and that the man was a suspect in a shoplifting incident in that mall. This was not a first tier encounter (*Terry* stop) where a citizen could merely walk away from the officer.

Georgia Department of Transportation v. Wyche

Georgia Court of Appeals
July 28, 2015; A15A0346

A construction worker was struck and killed by a car while employed by a road construction firm contracting with the Dot to perform night road repairs. The driver of the car had proceeded through a green light at a dark intersection which was not marked with construction signs. Another company was under contract to DOT to perform inspections and ensure safety compliance. The trial court denied DOT's motion to dismiss on the basis of sovereign immunity. The Court of Appeals reversed the trial court. The DOT's sovereign immunity has not been waived for the negligence committed by independent contractors. Responsibility for site safety was not on an employee but on a contractor.

Tuggle v. Rose

Georgia Court of Appeals
August 6, 2015; A15A0711

A teacher was accused of assault and battery by a student. The trial court denied the teacher's motion to dismiss on the basis of official immunity. The Court of Appeals reversed the trial court. First, the trial court relied upon self-contradictory evidence regarding the duration of an alleged 'headlock' which evidence was not admissible. Second, no evidence was presented that the teacher's actions violated school district policies. Finally, there is no evidence of actual malice. Evidence of frustration, irritation, and possibly anger, do not equate to actual malice sufficient to overcome official immunity.

City of Fitzgerald v. Caruthers

Georgia Court of Appeals
August 3, 2015; A15A0442

A city employee was injured by a falling tree limb while standing at a street curb. The trial court denied the city's motion to dismiss on the basis of sovereign immunity. The Court of Appeals affirmed the trial court. Under O.C.G.A. 32-4-93(a), a city generally has a ministerial duty to keep streets in repair and are liable for injuries resulting from defects after actual notice or after the defect has existed for a sufficient length of time for notice to be inferred. This Court has held defects include objects adjacent to or

suspended over a street which render it unsafe. While unclear if the city had actual notice as it had admitted that not all complaints about conditions were documented, there was a question as to whether it had constructive notice. Consequently, denial of summary judgment was correct.

Tattnall County v. Armstrong

Georgia Court of Appeals
August 20, 2015; A15A0163

A county jail inmate alleged that he was denied proper medical care in jail and sued the sheriff and the county. The trial court dismissed as to the sheriff, but, denied the county's motion to dismiss on the basis of sovereign of official immunity. The Court of Appeals reversed the trial court. O.C.G.A 42-5-2(a) imposes the duty and cost of medical care of county inmates upon the county. However, this statute does not waive sovereign immunity and the trial court should have dismissed as to the county and the individual defendants. The Court overruled and disapproved both the *Cantrell v. Thomas* and *Middlebrooks v. Bibb County* cases.

Layer v. Barrow County

Supreme Court of Georgia
October 21, 2015; S15A0725

Layer built a sewer pumping station for Barrow County. He alleged that he entered into an oral agreement with the county under which he would retain an interest in a portion of the pumping capacity. After he was refused the alleged interest, he sued the county, a city, and a host of county and city officials asserting breach of contract, unjust enrichment, unconstitutional taking, and other claims. He sought damages, just compensation, and specific performance in the form of injunctive relief and mandamus. The trial court dismissed the lawsuit. The Supreme Court affirmed. The Court analysis began with the breach of contract and various quasi-contractual theories and concluded they were all barred (except one) by sovereign immunity. Under the *SJN Properties* case, sovereign immunity does not bar mandamus relief. However, mandamus relief cannot be granted to enforce a private right under a contract, so it fails. The multitude of contractual and quasi-contractual claims fails because it is undisputed that none of the named persons was a party to the 'alleged' contract. Finally, while sovereign immunity does not bar an unconstitutional taking claim, such a claim requires that the taking be of a valid property interest. Here, since the 'alleged' contract was never reduced to writing, it does not bind the county and confers no valid property interest.

City of Greensboro v. Rowland

Georgia Court of Appeals
November 12, 2015; A15A1145

The city installed expansion piping in a drainage ditch to remedy flooding. The plaintiffs' notified the city that the piping was causing flooding on plaintiffs' property. The plaintiffs' sued alleging that no easement had been acquired and no compensation made for the damaged property. The city moved to dismiss based upon sovereign immunity and failure to provide proper ante litem notice. The trial court rejected the

motion without explanation. The Court of Appeals affirmed the denial of the city's motion. The Court analysis was simple. First, it held that *Sustainable Coast* as modified by *Shank* clearly deals with sovereign immunity for cities and applies equally to sovereign immunity under Article IX, Section II, Paragraph IX. Under *Shank*, the Constitution itself provides an exception to sovereign immunity for unlawful taking; hence, sovereign immunity has been waived in this case. Second, the plaintiffs' substantially complied with the ante litem notice statute sufficient to put the city of notice of the general character of the complaint.

Crosby v. Johnson

Georgia Court of Appeals
December 18, 2015; A15A1095

A coroner transported a body to a shed behind his private funeral home that he operated instead of to the refrigerated county morgue. As a result, the deceased became unsuitable for an open casket. The family sued. The trial court characterized the coroner as a county official rather than a state official who would have been immune under the Georgia Tort Claims Act. The Court of Appeals reviewed O.C.G.A. 45-16-1 *et seq.* and concluded the coroner is a county officer. Nonetheless, the coroner was entitled to sovereign and official immunity.

Jobling v. Shelton

Georgia Court of Appeals
December 22, 2015; A15A1090

The surviving parents of daughter killed when her car slid on an icy county road sued the manager of the county road maintenance division in both his official and personal capacities. The Court of Appeals agreed that the manager was entitled to sovereign immunity since no waiver thereof had been identified and entitled to official immunity since there was no evidence of action or failure to act with malice or willfulness. In fact, the road had received four ice treatments during the short period preceding the accident.

Robinson v. MARTA

Georgia Court of Appeals
December 31, 2015; A15A1398

An off-duty police officer was involved in an altercation with an intoxicated person at a MARTA station. Although not the aggressor and merely defending himself he was tased by a MARTA officer and several MARTA officers piled on him and handcuffed him. The intoxicated man was charged, but the off-duty officer was not. He then sued MARTA alleging personal injury caused by excessive force and false arrest and due process violations under 42 U.S.C. 1983. The trial court granted summary judgment to MARTA. The Court of Appeals affirmed. Qualified immunity under 42 U.S.C. 1983 applies to government officials

performing discretionary functions if their conduct does not violate clearly established statutory or constitutional rights. The test for reasonable force must be judged from the perspective of a reasonable officer on the scene rather than with 20/20 hindsight. The reasonableness inquiry is an objective one and if a reasonable officer would have acted similarly under the same circumstances, then qualified immunity applies.

INTERGOVERNMENTAL AGREEMENTS

Jackson County v. Upper Oconee Basin Water Authority

Georgia Court of Appeals
January 7, 2015; A14A0805

This case involves a dispute regarding the terms of an intergovernmental agreement executed between the authority and several counties. The Court of Appeals upheld the trial court's grant of summary judgment to the authority. The authority could not be held in breach of an obligation under the agreement when, by its plain terms, the agreement did not impose the obligation on the authority.

JUDICIAL SALARIES

Lewis v. Chatham County Board of Commissioners

Supreme Court of Georgia
November 11, 2015; S15A1251; S15A1252

This case involves a salary dispute between the probate judge and the board of commissioners. In Chatham County, the salaries of judicial officers, as well as many others, are specified by local Act and not by general law minimum salary statutes. Here, the local Act provided specifically for longevity increases for magistrates but made no such provision for the probate judge. Under the 2007 local Act, the magistrates received a longevity increase in 2013. The probate judge sued asserting that he was entitled to the same increase on equal protection grounds. The trial court denied the probate judge's request for declaratory judgment and mandamus. The Supreme Court affirmed. The Court analysis was simple. The probate judge failed to show he was similarly situated to members of a class who were treated differently than he was treated. In other words, he had to show that probate judges are similarly situated to magistrates. They are not. The Constitution and general laws creates theses courts as separate classes with separate jurisdictions and powers, duties, and functions.

OPEN MEETINGS\OPEN RECORDS

Lue v. Eady

Supreme Court of Georgia
June 19, 2015; S15A0117

This case involves a dispute over the actions of a mayor who was sued for violating open meetings, the city charter, and city personnel policies. The Court held that where the city charter required a quorum of 4 councilmembers, and makes a distinction between the mayor and a councilmember, a quorum is not attained by the mayor and three councilmembers. The Court disallowed a claim for a civil penalty against the mayor under O.C.G.A. 50-14-6 since the mayor was sued in her official capacity but not in her individual capacity. The Court noted that injunctive relief does not provide a remedy against an act which has already been completed and also that a claim to remove someone from office must be asserted against the officeholder in their individual and not official capacity.

Gravitt v. Olens

Georgia Court of Appeals
September 14, 2015; A15A0348

{This is a long and complicated case and interested readers should consult the text of the complete opinion}.

The Attorney General (AG) brought a civil action under O.C.G.A. 50-14-5 to enforce the Open Meetings Act (OMA) against a mayor and city council for refusing to let a member of the public attend and videotape a city council meeting. The trial court denied the city's motion for summary judgment on the basis of sovereign and official immunity; granted summary judgment to the AG on the OMA claim; and imposed civil penalties and attorney fees against the city. The Court of Appeals affirmed in part and reversed in part. First, there is no merit to the city's contention that sovereign immunity bars an action against it to enforce an OMA claim brought by the AG. In ruling that it was not creating a judicial exception to sovereign immunity, the Court held that because the city derives its sovereign immunity from the state, and because the state's own immunity cannot be asserted against the state, the city had no immunity which could be asserted to bar the state's enforcement claim. The Court noted that the trial court relied on other reasoning to conclude that sovereign immunity did not apply here, and indicated that it would affirm the trial court nonetheless under the 'right for any reason' rule. Second, to the extent that the mayor took action which negligently violated the OMA, his actions were ministerial, and he was not entitled to official immunity. The third point involves statutory construction. The OMA does not define 'person'. O.C.G.A. 1-3-3 does define the term to include a 'corporation'. However, when looking at the OMA as a whole, it is clear the legislature did not intend a 'person', within the meaning of the OMA, to include a municipal corporation or any other kind of corporation. Hence, the trial court's ruling which allowed the imposition of civil penalties against the city under O.C.G.A. 50-14-6 was error.

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

Georgia Court of Appeals
December 16, 2015; A15A1128

{This is a long decision with a complex fact situation and the interested reader is directed to the text of the entire opinion. The case also includes a good discussion of standards of statutory construction.}

This case involves the applicability of exemptions of the open records law to a variety of records relating to a budget shortfall at a member institution of the board of regents. The Court of Appeals reversed the trial court because the exemption relied upon, O.C.G.A. 50-18-72(a)(4) did not apply. The trial court was allowed on remand to conduct in-camera proceedings to determine if the withheld documents could be exempt under another exemption. Further, no attorney fees would be allowed under O.C.G.A. 50-18-73(b) since there was substantial justification for the violation. Here, employees worked nights and holidays trying to respond as expeditiously as possible to the voluminous requests.

ORDINANCES

Whitfield v. City of Atlanta

Supreme Court of Georgia
February 5, 2015; S14A1882

{This case involves a city ordinance, but the principle of law is that same for a county ordinance.}

In a case involving vehicle immobilization ordinance, the Supreme Court reversed the trial court ruling that the ordinance was unconstitutional. Not only was a certified copy of the ordinance missing from the record, there was no copy at all. Citing the *Strykr* and *Thorsen* cases, the Court again followed the rule that an ordinance must be properly presented in the record, by producing the original thereof or a certified copy. Without it, the constitutionality cannot be adjudicated.

Oasis Goodtime Emporium I Inc. v. City of Doraville

Supreme Court of Georgia
June 19, 2015; S15A0146

This case involves constitutional challenges to a city's nude dancing ordinance. *{This is an extremely long case so interested readers should consult the text of the entire opinion.}* A nude dancing club operated in the unincorporated area of a county. The location became included in the corporate limits of a city by means of a local Act. The city had an ordinance which prohibited alcohol sales in sexually oriented businesses. Oasis challenged the local Act under O.C.G.A. 28-1-14(b), but had no standing as that provision was designed to protect government, not the public. The ordinance itself was upheld under the standard analysis of the *Paramount Pictures* 3 pronged test. Finally, the argument that Oasis should have

been grandfathered in was brushed aside. A vested right might have precluded retroactive application of a zoning ordinance but this case involves a business licensing ordinance so application of the ordinance was proper.

Elbert County v. Sweet City Landfill LLC

Supreme Court of Georgia
July 8, 2015; S15A0489

This case involves a challenge to a county's solid waste disposal ordinance. In 2009, the LLC requested a special use permit for a landfill. At that time, the county was in the process of amending its solid waste ordinance to exempt from special use permits a 'waste to energy' facility as defined under O.C.G.A. 12-8-22(41). The LLC sought to amend its application to qualify as a waste to energy facility and thus be exempt from the special use permit. The county took no action on the LLC application, but went forward with a proposal for a different facility operated by a different LLC. Two lawsuits were filed by the first LLC. In 2011, that LLC and the county entered into a 'tolling agreement' while they sought common ground on the special use permit application. Then, the county again amended its solid waste ordinance to require that all solid waste facilities, including waste to energy facilities, must have a special use permit. In 2012, the board of commissioners voted not to enter a host agreement with the first LLC and also to terminate the tolling agreement. In 2013, the LLC sought injunctive relief and a declaration that the solid waste ordinance was unconstitutional. The trial court granted summary judgment to the LLC on the ground that the ordinance violated the dormant commerce clause of the US constitution and equal protection clause of the state constitution. The Supreme Court reversed the trial court. The LLC had a vested right to have the county issue a letter of zoning compliance with the solid waste plan, but failed to obtain a final decision from the Board and afford it the opportunity to address the claim of a vested right to a special use permit. In other words, the court can only address the issue after the local zoning authority has refused to issue the necessary permit. Thus, the trial court erred in reaching the merits of the claim. Finally, the trial court failed to apply the balancing test required under the *Pike* case. When an ordinance regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. The case is remanded in order for this balancing test to be applied.

OUTDOOR ADVERTISING

Golden Isles Outdoor LLC v. The Lamar Co. LLC

Georgia Court of Appeals
May 7, 2015; A14A2020

This case involves a dispute over a digital billboard ordinance. Lamar submitted an application to the city to convert a traditional poster billboard into a digital billboard which was granted. The ordinance limited the number of digital bill boards and Lamar's competitor, Golden, was only able to get one billboard

approved since one of the remaining permits had already gone to Lamar. Golden challenged the Lamar permit in the zoning board asserting that the ordinance did not allow the Lamar permit since the street was a collector street and not a four-lane or arterial road. The board agreed and rescinded the Lamar permit. Lamar appealed and the superior court reversed the zoning board. Golden appeals and asserted that the trial court erred in its construction of the zoning ordinances. The Court of Appeals reversed. The Court cited the *Reed*, *Carringer*, *Dailey*, and *Sikes* cases and noted that in considering the meaning of a city ordinance, a court should apply the same well-settled principles that guide the construction of statutes. Here, the cardinal rule would be to ascertain and effectuate legislative intent and to do so by looking at the ordinance not as an isolated part but in context of the other ordinances of which it is a part. When the meaning is doubtful, then courts should look to the legislative history to ascertain intent. The Court applied those principles and concluded that the trial court had erred.

POWERS OF A MAYOR OR COUNTY COMMISSION CHAIR

Kautz v. Powell

Supreme Court of Georgia
June 18, 2015; S14G1161

A city charter expressly authorized the mayor to hire the city attorney. (The provision did not state employment duration or that the appointee was to 'serve at the pleasure of'). The charter was silent on who could exercise termination powers. The Court of Appeals (in a 4-3 decision) affirmed the trial court holding that since there was no express termination authority in the charter, but, that the charter did state that the city council was vested with all powers of government not otherwise provided for, then the city council, and *not the mayor*, had the power to fire the city attorney. The power to terminate could not be implied. The Court stated that it "was neither necessary nor allowable for a court to construe the unambiguous provisions of the charter as implicitly giving the mayor" the authority to fire. A strongly worded dissent, citing the *United Healthcare of Georgia*, *Bailey*, *Wright*, and *Clark* cases noted that long standing Georgia law held that a governmental official or agency that was granted the power to hire an officer for an indefinite term necessarily possessed the power to remove that officer. The dissent noted further that statutory construction "must square with common sense and reasoning, and a statute should not be interpreted in a manner that would lead to an absurd result." The Supreme Court reversed the Court of Appeals. The Court noted that the charter provision relied upon by the lower court was insufficient to overcome the universally accepted rule that where no tenure is fixed and no other provision is made for removals, an appointing authority retains the right of dismissal as an incident to the power of appointment.

PRESCRIPTIVE TITLE

Smith v. Mitchell County

Georgia Court of Appeals
December 14, 2015; A15A0958

This case involves a boundary dispute between a parcel of county property and a parcel owned some individuals. The county relied upon a 1991 survey and the individuals relied upon a 2012 survey. The trial court submitted the matter to a special master. Notice was sent out about an evidentiary hearing and neither party responded. The special master concluded the county survey was correct and the trial court decreed fee simple title to the county. The Court of Appeals upheld the trial court. The objection as to the lack of a hearing was waived by the failure to respond to the hearing request. Further, the evidence showed clearly that the county had attained title by prescription and met all of the requirements of O.C.G.A. 44-5-161.

QUO WARRANTO

Jones v. Boone

Supreme Court of Georgia
July 7, 2015; S15A0521

{This case deals with the termination and appointment of a city attorney but is equally relevant to county attorneys.}

A city charter required the affirmative vote of four council members to adopt any motion. The charter authorized the mayor to vote only in the case of a tie, but, authorized the mayor to vote in all elections for officers elected by the city council. Finally, the charter also provided that the city attorney would be appointed by the city council and serve at the pleasure of the city council. At a council meeting a motion was made to terminate the city attorney. The vote was 3 yes, 2 no, and 1 abstention. The mayor then voted yes to get the needed 4 votes. The same vote pattern was repeated for the delegation of the power of appointment of an interim city attorney by the mayor. The ousted city attorney sought leave to file a quo warranto petition challenging the mayor's actions as ultra vires. The trial court granted the petition. The Supreme Court affirmed the trial court. The city attorney had standing to seek quo warranto and also followed a procedure specifically approved by the Supreme Court under the *Richardson* case and under O.C.G.A. 9-6-60. The Court did not address the argument that the mayor was without authority to appoint the city attorney. Under the *Merry* case, this Court recognized that the requirement of a specific number of affirmative votes exhibits a legislative intent that an abstention NOT be counted as an affirmative vote or a negative vote. In this case, the charter is silent on how an abstention is to be treated and there is no

evidence that the council adopted Roberts Rules of Order or any procedure to handle abstaining votes. Consequently, there was no tie vote and without 4 affirmative votes, the actual motion failed.

TAXATION

CPF Investments LLLP v. Fulton County Board of Tax Assessors

Georgia Court of Appeals
March 3, 2015; A14A2268

This case involves the question of a valuation dispute. In 2011, the LLLP purchased real property from Freddie Mac. The board of tax assessors (BTA) did not value the property at the purchase price as required under O.C.G.A. 48-5-2(3). The BTA asserted that paragraph (3) did not apply to government sales as those sales do not constitute arms' length transactions. The trial court denied the LLLP's motion for summary judgment and the Court of Appeals reversed. The question of whether Freddie Mac is a government agency is relevant only if paragraph (3) allows the BTA to treat property sales involving government agencies differently from other property sales. It does not. It requires that FMV be set at the purchase price for the next taxable year. The BTA had the burden of proof to show that the sale was other than an arm's length transaction. Where there is an absence of evidence supporting the BTA's position, or, there is affirmative proof contradicting that position, then the taxpayer is entitled to summary judgment.

SJN Properties LLC v. Fulton County Board of Tax Assessors

Supreme Court of Georgia
April 2, 2015; S14A1493

This case involves the question of a valuation dispute. SJN disagreed with the BTA's method of valuing leasehold estates arising from a sale-leaseback bond transaction involving the Development Authority of Fulton County. The trial court granted the BTA's motion for summary judgment. The court struck as untimely two voluminous affidavits (one of which was a statement by SJN's counsel) served on the BTA at 5:24 PM the day before the hearing. The Supreme Court upheld the summary judgment but concluded reluctantly that the trial court erred in striking the affidavits. The Court found that the "voluminous eleventh-hour filing" was "discourteous" and "the gamesmanship in such delayed filings distasteful", but that the O.C.G.A. 9-11-56(c) "regrettably" allowed such tactics. Consequently, the Court would consider the affidavits de novo in its review. The Court noted that the dual role of SJN's counsel as both lawyer and witness constituted "questionable ethics" and that "the fact that SJN could apparently find no witness or documentary evidence to substantiate its claims other than the self serving so-called 'testimony' of its own attorney, demonstrates the propriety of summary judgment". Regarding the claim that the assessment in this case was faulty, the Court noted the long standing policy of taxing leasehold interest in real property that are subject of a financing agreement... at 50% of the appraised value for the term of the lease. The Court examined the testimony of SJN's "expert appraiser" and noted that the witness while assailing in

the abstract the assumptions underlying the 50% formula actually admitted in the deposition that he has not actually appraised any of the leasehold estates involved in the case. Critically, when asked point-blank whether the assessed values of any of the contested properties in any given year were incorrect, he replied that he did not know. The Court concluded that SJN fails for the simple reason that no evidence shows that any actual assessment of any particular property has been or is other than at fair market value.

Surette v. Henry County Board of Tax Assessors

Georgia Court of Appeals
July 15, 2015; A15A0218

This case involves property valuation under O.C.G.A 48-5-299(c).

Ballard v. Newton County Board of Tax Assessors

Georgia Court of Appeals
July 22, 2015; A15A0298

This case involves the question of whether a tax sale is an arm's length transaction for purposes of the one year freeze under O.C.G.A. 48-5-2(3). The trial court ruled that it was not and this was upheld by the Court of Appeals. A tax sale is for the purpose of collecting taxes and is a forced sale and not one under normal conditions and clearly does not qualify as an arm's length transaction.

Fulton County Board of Tax Assessors v. Piedmont Park Conservancy

Georgia Court of Appeals
September 4, 2015; A15A0356

The BTA denied a purely public charitable tax exemption to the conservancy as to a building which it owned, but which it rented a portion thereof to lessees who operated two restaurants. The BOE upheld the exemption denial. The trial court reversed and granted the conservancy the exemption on the portion of the building which was not leased to the restaurants. The Court of Appeals affirmed the trial court. Citing O.C.G.A. 48-5-41 (c) and (d), and many cases including *Nuci Phillips*, the Court noted that the Supreme Court has long granted tax exemptions to charities even when commercial activity at the property generates income so long as the income is used exclusively for religious, educational, or charitable purposes. The Court used the 3 prong *York Rite* test as the basis for granting a 'proportional' exemption for the building. In other words, the commercially used portion is taxable while the remainder is exempt. The Court made this finding despite the fact that nothing in the exemption statute provides for such a result.

Dowdell v. Fitzgibbon

Georgia Court of Appeals
November 24, 2015; A15A1613

This case involves a personnel dispute between an appraiser and the chief appraiser of the Fulton County Board of Tax Assessors. An appraiser was terminated following a verbal and physically threatening confrontation with his supervisor after questioning regarding his leaving of confidential files in a hallway. The chief appraiser investigated the incident, determined several personnel regulations had been violated, and fired the appraiser. The appraiser appealed to the county personnel board. The board concluded that the appraiser should have been suspended not terminated. The chief appraiser filed a petition for certiorari with the superior court. The trial court determined that the board erred as a matter of law by imposing its own less severe discipline despite determining, indirectly, that the appraiser had violated a regulation for the third time during a two year period. (The violated regulation actually required termination.) On appeal, the Court of Appeals reversed. The Court's analysis on the matter would have centered upon two questions. First, was there any evidence supporting the superior court's decision? Second, does the record support the initial decision of the administrative agency? The problem however, was that the merits could not be reached because the record did not contain a certified copy of the relevant personnel regulations. It is well settled that neither trial nor appellate courts can take judicial notice of county ordinances or regulations. They must be alleged and proved by producing an original or a properly certified copy.

TORTS

Clayton County v. Segrest

Georgia Court of Appeals
August 21, 2015; A15A0502

During a police pursuit, the suspect's vehicle struck and killed the driver of a motorcycle. The surviving spouse sued the county for wrongful death. At trial, the county sought, under O.C.G.A. 24-7-702(b), to disqualify the testimony of plaintiff experts on the basis that the testimony was not reliable, not of assistance to the trier of act, and amounted to legal conclusions. The trial court denied the county's motion to dismiss. The Court of Appeals affirmed the denial of the motion to dismiss, but, reversed the trial court for failing to disqualify the testimony. The Court noted that the witnesses had specialized knowledge of police pursuit procedures, and that knowledge could allow them to draw conclusions from the evidence that a layperson could not. However, O.C.G.A. 24-7-704(a) specifically prohibits an expert from telling the jury what result to reach and prohibits testimony to the legal implications of conduct. Hence, in this case, the experts could not testify that the officer 'proximately caused' the death or acted in 'reckless disregard' of the pursuit standard.

Brown v. DeKalb County

Georgia Court of Appeals
September 14, 2015; A15A0265; A15A0267

{This is a substitute opinion in which the Court of Appeals vacates its original opinion. The original opinion reversed the trial court and the substitute opinion affirms the trial court}.

A fire truck responding to an emergency call was blowing its air horn when it entered an intersection against a red light and struck another vehicle. The occupants of the vehicle were injured and sued the county. Based upon the direct evidence that the fire truck was authorized under O.C.G.A. 40-6-6 to enter the intersection against the red light, and in the absence of any evidence showing negligence on the part of the fire truck operator, the Court of Appeals affirmed the trial court's granting of summary judgment to the county.

WHISTLEBLOWER

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

Georgia Court of Appeals
January 9, 2015; A14A1220

A college chief of police who was terminated by the college president alleged the action was in retaliation for upholding the law. The trail court granted summary judgment to president as well as the board of regents finding that the chief did not engage in protected whistleblower activity and that even if he had, there was no causal connection, and, that the claim was barred by the statute of limitations. The Court of Appeals reversed the trial court. Here, the chief repeatedly objected to the administration's interference with criminal investigations and attempts to influence the outcomes of criminal cases. Additionally, the record contains evidence of a causal connection between the whistleblowing activity and the termination. Finally, the statute of limitations did not bar the action because even though threats of termination had been ongoing for several years, it was filed within one year after the actual termination occurred.

Tuohy v. City of Atlanta

Georgia Court of Appeals
June 11, 2015; A14A2148

This case involves the question of an alleged retaliatory termination under the whistleblower statute. The city treasurer was instructed by the chief financial officer to pay an invoice and charge the amount to a particular department. The treasurer refused after questioning the propriety of such as the invoice dealt with several departments. Shortly thereafter, the treasurer was terminated for performance reasons. A

whistleblower suit was filed under O.C.G.A. 45-1-4(a) alleging that he was fired for questioning an illegal or unethical directive. The trial court granted the city's motion for summary judgment. The Court of Appeals affirmed the trial court. Summary judgment is proper only when there is no genuine issue of material fact. Following *McDonnell Douglas*, the plaintiff failed to establish a prima facie case of retaliation and failed to show that the reasons for termination were pretextual. Had the plaintiff established a prima facie case, the burden would have shifted to the employer to articulate legitimate firing reasons. There was clear evidence that the firing was due to slow performance, approval of duplicate invoices, and the use of a work phone to issue physical threats.

ZONING

Southern States-Bartow County Inc. v. Riverwood Farm Property Owners Association Inc.

Georgia Court of Appeals
May 8, 2015; A14A1562

This case involves a dispute over a landfill application. To understand this convoluted case, one must follow the bouncing ball of facts. In 1989 the applicant filed for a landfill permit with EPD. This permit required compliance with local zoning. County zoning did not at that time allow landfills on that property and litigation ensued. In a related action, the Bartow County zoning ordinance was ruled invalid. As a result, the superior court ruled that since there was no valid zoning restriction on the property at the time of the application, the owner/applicant could secure a permit even though a reenacted ordinance prohibited the use. The county then issued a certificate of zoning compliance. Nothing more happened for ten years. In 2004, the applicant requested what was characterized as new permit application. Although the current zoning ordinance prohibited the use, the county assumed it was still governed by the trial court order and issued another certificate of zoning compliance. Again, nothing more happened for close to ten years. In 2012, the applicant submitted to EPD yet another certificate of zoning compliance that had been issued by the county. In 2013, plaintiffs sued contending that the landfill violated county zoning, and amended the allegations to include nuisance and RICO charges. The trial court denied the applicant's motion to dismiss. Then EPD issued a solid waste permit for the landfill. The applicant again sought a motion to dismiss this time alleging that the plaintiffs' were required to pursue an administrative remedy against EPD. The trial court granted partial summary judgment to the plaintiffs finding that the vested rights of the applicant had lapsed when it failed to commence landfill use of the property within one year under the initial permit. On appeal, the Court of Appeals agreed with the trial court that an administrative remedy under OCGA 12-2-2 was required because that proceeding would not resolve the issue of the primary claim that the landfill use violated the zoning ordinance. The Court also agreed with the trial court that, under the plain wording of the zoning ordinance, the vested right had lapsed for failure to commence operations within one year. The Court remanded the case back to the trial court however, because the trial court did not rule on the applicant's challenge to the constitutionality of the ordinance. The trial court also erred in ruling that the applicant had waived any vested right when it sought a new permit from EPD in 2004. Consequently, the case was remanded back for further proceedings.

Bulloch County Board of Commissioners v. Williams

Georgia Court of Appeals
July 16, 2015; A15A0459

This case involves the application of the 'any evidence' standard' for review of a zoning decision. The planning and zoning department recommended approval of a conditional use permit for a personal care home. The board of commissioners denied the application. The trial court reversed the denial. The Court of Appeals reversed the trial court. The board of commissioners had considered the road condition and the distance to the nearest hospital, which was enough under the any evidence standard.

Burton v. Glynn County

Supreme Court of Georgia
July 16, 2015; S15A0082; S15X0083; S15A0626; S15X0627

This case involves a dispute regarding whether use of ocean front property for a wedding venue violated single family zoning classification.