Real Property

by Linda S. Finley*

I. INTRODUCTION

This Article surveys developments in Georgia real property law from June 1, 2017 to May 31, 2018.[1] This Article covers noteworthy cases decided during this period by the state and federal courts in Georgia. Additionally, this Article includes information about legislation enacted during the survey period that affects real property law.[2]

II. LEGISLATION

The 2018 regular session of the 154th Georgia General Assembly convened on January 8, 2018, and adjourned *sine die* on March 29, 2018.[3] During the session, the legislature, among other things, corrected law enacted in 2017 creating a statewide lien for tax executions,[4] passed a private bill setting forth a new rule for recording real estate instruments in Fulton County,[5] enacted law affecting the rights of landlords when

*Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Mercer University (B.A., 1978); Mercer University School of Law (J.D., 1981). Member, State and Federal Bars of Georgia and Florida; United States Court of Appeals for the Eleventh Circuit; Supreme Court of the United States. The Author wishes to give special thanks to Kitty S. Davis and Teta Bacilieri for handling the many administrative tasks necessary to bring this survey Article to print.

1. For an analysis of real property law during the prior survey period, see Linda S. Finley, *Real Property*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 251 (2017).

2. Other resources for reviewing case law decided and legislation enacted during the survey period are: Carol V. Clark, *2018 Judicial Update*, 40 REAL PROP. L. INST. 46 (Institute of Continuing Legal Education in Georgia) (2018); Bret Chaness, *2018 Legislative Update*, 40 REAL PROP. L. INST. 16 (Institute of Continuing Legal Education in Georgia) (2018); and Mo Thrash, *Legislative Report from Under the Gold Dome*, LOBBYIST NEWSLETTER (Mortgage Bankers Association of Georgia), Mar. 27, 2018 (on file with Author).

3. *Georgia House Calendars*, GA. HOUSE OF REPRESENTATIVES, http://www.house.ga.gov/clerk/en-US/HouseCalendars.aspx (last visited Aug. 21, 2018).

4. Ga. H.R. Bill 337, Reg. Sess., 2017 Ga. Laws 723 (amending O.C.G.A. tits. 11, 15, 44, 48); *see also* Finley, *supra* note 1, at 252.

5. Ga. H.R. Bill 1036, Reg. Sess. (2018).

their tenants are victims of domestic abuse,[6] and established the Abandoned Mobile Home Act.[7]

The most robust legislation concerning real property law was the cleanup of 2017 legislation creating a state tax lien registry. In 2017, the legislature passed the Satisfaction of Liens Via Electronic Database (SOLVED) Act.[8] SOLVED was an attempt to create a central statewide database to record state tax liens.[9] Additionally, SOLVED provided a means for parties to real estate transactions to obtain a Certificate of Clearance from the Georgia Department of Revenue (DOR) to confirm that property being sold had no state tax lien encumbrances.[10] Following enactment of the legislation, DOR exercised its rule-making authority and passed a rule stating that no deeds, with minimal exceptions, could be recorded without the Certificate of Clearance.[11] The new rules were met with vigorous opposition from real estate professionals and attorneys, and in November 2017, "the House Ways and Means Committee and the Senate Finance Committee voted . . . to suspend the adoption of the DOR rules."[12]

House Bill 661[13] was drafted to correct the issues created by SOLVED and the subsequent DOR rules. The Bill was submitted early in the legislative session, passed both chambers by February 5, 2018, and was signed into law by the Governor on February 20, 2018.[14] In simple terms, House Bill 661 reverts the law to the former process, "whereby the DOR must record [state tax] liens individually in each county, and the lien will only attach to real property in the county where the lien is recorded."[15] The DOR continues to maintain a SOLVED page on its website[16] to provide payoff information for recorded tax liens. "The [DOR] is no longer required to temporarily cease the accrual of interest for 30 days after

6. Ga. H.R. Bill 834, Reg. Sess., 2018 Ga. Laws 969 (codified as amended at O.C.G.A. §§ 19-13-3, 44-7-23, 44-7-33 to -35 (2018)).

7. Ga. H.R. Bill 381, Reg. Sess., 2018 Ga. Laws 666 (codified at O.C.G.A. §§ 44-7-110 to -119, 15-10-2 (2018)).

8. Ga. H.R. Bill 337.

9. Chaness, *supra* note 2, at 17.

10. Ga. H.R. Bill 337.

11. Chaness, *supra* note 2, at 17.

12. *Id.* at 17–18.

13. Ga. H.R. Bill 661, Reg. Sess., 2018 Ga. Laws 1 (amending O.C.G.A. tits. 15, 44, 48 (2018)).

14. Chaness, *supra* note 2, at 18.

15. *Id.*

16. *SOLVED (Satisfaction of Liens Via Electronic Database) and House Bill 661*, GA. DEP'T OF REVENUE, https://dor.georgia.gov/solved-satisfaction-liens-electronic-database-and-house-bill-661 (last visited Aug. 21, 2018).

providing payoff information. [It] now has 5 years after the final assessment of a tax debt to record the corresponding state tax lien" with the clerk of the superior court.[17]

Untouched by House Bill 661 are requirements that the DOR electronically submit liens and related documents to the Georgia Superior Court Clerks' Cooperative Authority (GSCCCA) for recording by a clerk of the superior court, and that liens submitted by the DOR to the GSCCCA attach to and are perfected against real estate (solely in the county of recording).[18] Active recorded state tax liens expire ten years after the recording date (subject to certain exceptions) and are not subject to renewal.[19]

House Bill 1036 is a private bill that created additional requirements for recording real estate instruments in Fulton County, Georgia (Atlanta and other Fulton County municipalities).[20] The law authorizes the Fulton County Superior Court Clerk to require that all instruments conveying title to property include the tax parcel identification number on the top of the first page of the instrument.[21] Otherwise, the instrument shall not be entitled to recordation.[22] Addressing concerns of the Real Property Law Section of the Georgia Bar that the bill would create recording standards in Fulton County that were different than in Georgia's other 158 counties,[23] the Bill was revised to assure

> [t]he presence of an incorrect tax parcel identification number, or the absence of a tax parcel identification number, on a recorded instrument [would] not void or render voidable such instrument, [would] not affect the validity or enforceability of such instrument, and [would] not affect any notice, constructive or otherwise, provided by the recordation of such instrument.[24]

Beware, however, there is nothing in the Bill that would prevent the Fulton County Superior Court Clerk from refusing to record an instrument if it lacks the tax parcel identification number.

Enacted to protect victims of domestic violence, House Bill 834 states:

> A tenant may terminate his or her residential rental or lease agreement for real estate effective 30 days after providing the landlord

17. *Id.*; *see also* Ga. H.R. Bill 661.
18. GA. DEP'T OF REVENUE, *supra* note 16.
19. *See* Ga. H.R. Bill 661.
20. Ga. H.R. Bill 1036.
21. *Id.*
22. *Id.*
23. Chaness, *supra* note 2, at 22.
24. Ga. H.R. Bill 1036.

> with a written notice of termination when a civil family violence order or criminal family violence order has been issued: (1) Protecting such tenant or his or her minor child; or (2) Protecting such tenant when he or she is a joint tenant, or his or her minor child, even when such protected tenant had no obligation to pay rent to the landlord.[25]

To properly terminate a lease, the tenant must provide the landlord a copy of the court's order along with the notice of termination.[26] The tenant must pay rent until the effective date of termination but is not liable for other penalties arising from early termination.[27] If the lease is terminated fourteen days or more prior to initial occupancy, the lease may be terminated without any penalties.[28] The status applies only to lease agreements, renewal, modifications, or extensions entered into on or after July 1, 2018.[29]

House Bill 381, the Abandoned Mobile Homes Act, created a process for local government and courts to review a landowner's request to remove mobile homes abandoned by a tenant from a landowner's property.[30] The Act does not apply to mobile homes that are affixed to the property.[31] The process begins with a determination of whether the mobile home is abandoned.

> "Abandoned mobile home" means a mobile home that has been left vacant by all tenants for at least 90 days without notice to the landowner and when there is evidence of one or more of the following:
>
> (A) A tenant's failure to pay rent or fees for 90 days;
>
> (B) Removal of most or all personal belongings from such mobile home;
>
> (C) Cancellation of insurance for such mobile home;
>
> (D) Termination of utility services to such mobile home; or
>
> (E) A risk to public health, safety, welfare, or the environment due to such mobile home.[32]

25. Ga. H.R. Bill 834 (codified as amended at O.C.G.A. § 44-7-23 (2018)).
26. O.C.G.A. § 44-7-23(c) (2018).
27. O.C.G.A. § 44-7-23(d) (2018).
28. *Id.*
29. O.C.G.A. § 44-7-23(e) (2018).
30. Ga. H.R. Bill 381.
31. Chaness, *supra* note 2, at 22.
32. O.C.G.A. § 44-7-112(1)(A)–(E) (2018).

If the mobile home meets this criteria, the local government then determines whether the mobile home is intact,[33] meaning livable, or derelict.

> "Derelict" means an abandoned mobile home which is in need of extensive repair and is uninhabitable and unsafe due to the presence of one or more of the following conditions:
>
> (A) Inadequate provisions for ventilation, light, air, or sanitation; or
>
> (B) Damage caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe.[34]

"'Intact' means an abandoned mobile home which is in livable condition under applicable state law and the building and health codes of a local governing authority."[35]

If the mobile home is determined to be intact, the landowner can file a lien in the amount of unpaid rent, not to exceed $3 per day, and then foreclose the lien.[36] If the mobile home is determined to be derelict, the government must post notice on the mobile home informing the mobile-home owner that they are entitled to a hearing before the magistrate court of the county where the mobile home is located and that a hearing must be requested within ninety days of the date on the notice.[37] In addition to physical posting of the notice, the landowner must send notice to all responsible parties by registered or certified mail, statutory overnight delivery, or place notice in the county legal organ if the whereabouts of the mobile-home owner is unknown.[38] Thereafter, a hearing is held before the magistrate court to confirm or deny the decision of the government that the mobile home is abandoned and derelict.[39] If the mobile home is found to be derelict, the landowner can proceed with its disposal.[40]

33. O.C.G.A. § 44-7-112(4) (2018).

34. O.C.G.A. § 44-7-112(2)(A)–(B) (2018).

35. O.C.G.A. § 44-7-112(4).

36. O.C.G.A. § 44-7-115(2) (2018).

37. O.C.G.A. § 44-7-113(c) (2018).

38. O.C.G.A. § 44-7-113(d)(1)–(2) (2018). This Bill also amended O.C.G.A. § 15-10-2(16) (2018) to provide jurisdiction to the magistrate court relative to foreclosure of liens of abandoned mobile homes.

39. O.C.G.A. § 44-7-114(a) (2018).

40. O.C.G.A. § 44-7-114(c) (2018).

III. TITLE TO REAL PROPERTY[41]

In *Interfinancial Midtown, Inc. v. Choate Construction Co.*,[42] a case of first impression, the Georgia Court of Appeals[43] held that the recovery of general and punitive damages for fraudulent real estate conveyances could be recovered under Georgia's Uniform Fraudulent Transfers Act (UFTA)[44] by virtue of the catchall provision allowing for "[a]ny other relief the circumstances may require."[45] In 2001, a developer, through an entity that he co-owned, purchased real property known as "700 Piedmont" to develop eleven townhomes. The developer hired Choate to perform the construction work, but construction stopped when the developer became insolvent. At that point, Choate was owed approximately $403,000, demanded payment, and filed suit in 2002. With the Choate suit pending, the developer attracted another partner who agreed to complete the project upon condition that the property be transferred to a new entity in which the new partner was a member, and that the new partner be indemnified for any losses arising from the Choate suit. In 2004, the property was sold to the new entity, funds were paid to the developer and other related entities, but nothing was paid to Choate.[46]

In 2005, Choate filed its second suit alleging that the sale of the property and payment to the developer and related entities, rather than to Choate, violated Georgia's UFTA. Choate also asserted a claim for bad faith and sought compensatory and punitive damages arising from the fraudulent transfers. The case was tried before a jury in 2016 resulting in a judgment of $1,731,858.15 against the developer, the purchasing entity, and other related entities, plus punitive damages of $40,300 against the individual officer of the developer who put together the sale.[47]

The seminal issue on appeal was whether the specific relief identified in Official Code of Georgia Annotated (O.C.G.A.) §§ 18-2-77[48] and

41. This section is authored by Teresa L. Bailey. Of Counsel, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. University of Florida (B.A., 1983); Emory University School of Law (J.D., 1986). Member, State Bar of Georgia; United States Court of Appeals for the Eleventh Circuit; United States District Court for the Northern, Middle, and Southern Districts of Georgia.

42. 343 Ga. App. 793, 806 S.E.2d 255 (2017).

43. The Georgia Court of Appeals' jurisdiction was expanded effective 2017 to include title to land disputes and other cases previously reserved to the Georgia Supreme Court. O.C.G.A. § 15-3-3.1 (2018).

44. O.C.G.A. § 18-2-70 (2018).

45. O.C.G.A. § 18-2-77(a)(3)(C) (2018).

46. *Interfinancial Midtown, Inc.*, 343 Ga. App. at 794–95, 806 S.E.2d at 257–58.

47. *Id.* at 796, 806 S.E.2d at 259.

48. O.C.G.A. § 18-2-77 (2018).

18-2-78[49] precluded a creditor from obtaining additional relief in the form of general and punitive damages.[50] The court reviewed the statutory history and development of UFTA, and the prior fraudulent transfer statute at O.C.G.A. § 18-2-22,[51] and noted that fraud always gives rise to a cause of action.[52] As such, the court concluded that UFTA supplemented the common law tort of fraud since common law fraud was not specifically displaced by UFTA.[53] Because of the catchall phrase "any other relief the circumstances may require," the remedies enumerated under UFTA were not exclusive. [54] Thus, Choate was entitled to recover general and punitive damages for the fraudulent conveyance in the second suit.[55] The Georgia Supreme Court denied the appellant's petition for certiorari on June 18, 2018.[56] However, the case stands as physical precedent since two of the judges, on the panel of three, concurred in the judgment only.[57]

In a show of how even criminal law affects real property law, in *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*,[58] the Georgia Court of Appeals determined whether a private organization that leases its property from a government entity can prohibit visitors from carrying guns on its premises under the provisions of O.C.G.A. § 16-11-127(c),[59] the criminal statute that authorizes those with gun licenses to carry weapons at any location not excluded by the statute.[60] The City of Atlanta (the City) owns the property where the Atlanta Botanical Garden (the Garden) is located. The Garden is a private, non-profit corporation that leases the property from the City. Phillip Evans, a member of GeorgiaCarry.Org, Inc. (GeorgiaCarry), a gun rights organization, visited the Garden twice in October 2014 openly carrying a handgun in a holster on his waistband. Although no one took action on the first visit, an

49. O.C.G.A. § 18-2-78 (2018).

50. *Interfinancial Midtown, Inc.*, 343 Ga. App. at 799–800, 806 S.E.2d at 261.

51. O.C.G.A. § 18-2-2 (2018).

52. *Interfinancial Midtown, Inc.*, 343 Ga. App. at 799–800, 806 S.E.2d at 261–62.

53. *Id.* at 800–01, 805, 806 S.E.2d at 262, 264.

54. *Id.* at 801, 806 S.E.2d at 262 (quoting O.C.G.A. § 18-2-77 (2018)).

55. *Id.* at 799–800, 806 S.E.2d at 261.

56. *2018 Denied Certiorari Petitions*, SUP. CT. OF GA., https://www.gasupreme.us/granted-denied-petitions/2018-denied/ (last visited Aug. 21, 2018).

57. Ga. Ct. App. R. 33.2.

58. 345 Ga. App. 160, 812 S.E.2d 527 (2018).

59. O.C.G.A. § 16-11-127(c) (2018).

60. O.C.G.A. § 16-11-127(b) (2018). The statute identifies the prohibited places as government buildings, courthouses, jails and prisons, places of worship (except where allowed by the governing body of the church), state mental health facilities, nuclear power plants, and polling places. *Id.*

employee of the Garden stopped Evans on his second visit, advised that weapons were prohibited, and escorted Evans from the Garden. Evans and GeorgiaCarry filed suit seeking declaratory judgment and interlocutory relief based on O.C.G.A. § 16-11-127(c), claiming that the Garden, as a lessee of the City, was covered under the carry statute. The trial court dismissed the suit, but the Georgia Supreme Court affirmed in part and reversed in part and returned the matter to the trial court.[61]

On remand, the trial court granted summary judgment to the Garden on the basis that the Garden property was private property, and therefore, could prohibit guns.[62] Evans and GeorgiaCarry contended that since the property was owned by the City of Atlanta, the Garden should be considered public for the purposes of the statute.[63] In holding that the leased property was private, the court of appeals "look[ed] to the lessee, not the lessor, to determine the status of the leased property."[64] "[W]hen [the] public authority convey[ed] [the] leasehold interest to a private lessee, the leasehold estate 'is severed from the fee' and [thereafter] classified as private property."[65] The trial court's decision was affirmed, and the Garden was deemed free to prohibit guns.[66] Evans' and GeorgiaCarry's petition for certiorari is pending in the Georgia Supreme Court.[67]

In *Cahill v. United States*,[68] the Georgia Supreme Court was presented a certified question from the United States District Court for the Northern District of Georgia as follows:

> When two people who own a piece of real property as joint tenants with a right of survivorship are divorced pursuant to a decree that purports to resolve all issues as to equitable division of [the] property between them, grants one party exclusive use and possession of the real property, directs that both parties shall remain on the title until it is sold, and provides that the property shall be placed on the market some seven years in the future with the net proceeds divided equally between the parties but which makes no express reference to severance or retention of the joint tenancy, what is the effect of that

61. *GeorgiaCarry.Org, Inc.*, 345 Ga. App. at 160–61, 812 S.E.2d at 528.

62. *Id.* at 161, 812 S.E.2d at 528.

63. *Id.* at 162, 812 S.E.2d at 529.

64. *Id.* at 163, 812 S.E.2d at 529.

65. *Id.* at 162, 812 S.E.2d at 529 (citing Delta Airlines, Inc. v. Coleman, 219 Ga. 12, 16, 131 S.E.2d 768, 771 (1963)).

66. *Id.* at 163–64, 812 S.E.2d at 530.

67. *Computerized Docketing System*, SUP. CT. OF GA., https://scweb.gasupreme.org:8088/results_one_record.php?caseNumber=S18C1149 (last visited Aug. 21, 2018) (case number S18C1149).

68. 303 Ga. 148, 810 S.E.2d 480 (2018).

> divorce decree on the joint tenancy and right of survivorship under Georgia law?[69]

The facts leading to the suit began when Robert A.E. Hall, Jr. purchased property in Roswell, Georgia in 1999. In 2005, Hall married Cathleen Mary Cahill and recorded a quitclaim deed transferring the property to himself and Cahill as "Joint Tenants with Right of Survivorship." They later divorced. A settlement agreement incorporated into the final judgment and divorce decree provided that Cahill was to have exclusive use and possession of the property until she reached sixty-six years of age, and then the property was to be sold and the net proceeds divided equally between the parties. The decree directed that both Hall and Cahill remain on title until the property was sold.[70]

Hall failed to pay federal income taxes, and in February 2013, a notice of tax lien was filed in Fulton County against all property owned by Hall. Cahill turned sixty-six in February 2015 and died a couple of months later. The property had not been sold before her death. After her death, her estate filed a quiet title action against the United States seeking a determination that the right of survivorship in Cahill's vesting deed was severed before Cahill's death resulting in her one-half interest in the property becoming part of her estate upon her death and not subject to the tax lien. Her estate reasoned that the settlement agreement reached in the divorce demonstrated that Hall and Cahill intended to sever the joint tenancy. The government argued that the failure of the settlement agreement to unambiguously address the issue of severing the joint tenancy resulted in the retention of the right of survivorship in Hall making the entire property subject to the government's lien. The district court was uncertain how Georgia law would apply and certified the question to the Georgia Supreme Court.[71]

The supreme court applied the statutory principles of contract interpretation to the final order of divorce to answer the question.[72] Though the divorce decree specifically addressed the issues of use, possession, and the eventual sale of the property, as well as how the property was to be titled, the decree did not address the question of survival of the joint tenancy, and therefore, was ambiguous.[73] As such, the court set about to give clear meaning to the provision by construing it in the context of the entire agreement.[74] In that light, the court

69. *Id.* at 149, 810 S.E.2d at 481–82.
70. *Id.* at 148, 810 S.E.2d at 481.
71. *Id.* at 148–49, 810 S.E.2d at 481.
72. *Id.* at 150, 810 S.E.2d at 482.
73. *Id.* at 151, 810 S.E.2d at 483.
74. *Id.* at 150–51, 810 S.E.2d at 482–83.

determined that the parties intended to sever the joint tenancy, especially since the settlement agreement as a whole was intended to dissolve the parties' marriage and divide their property.[75] The court found that the divorce decree created a new deed when it awarded the property to Cahill for a period of years but was "reluctant to infer the retention or creation of a joint tenancy absent express language" to that effect.[76] Finally, the court reasoned that it made little sense that the parties would agree to divide the proceeds of an intended sale after a set period of time and yet retain the right-of-survivorship provision if one of the parties died during the seven-year period leading up to the intended sale date.[77] The court concluded that the divorce decree severed the joint tenancy, and that the Cahill estate's one-half interest was unencumbered by Hall's unpaid debt to the IRS.[78]

Khimani v. Ruppenthal[79] concerned an equitable partitioning of real property, and the opinion clarified the law on the limitations period for claiming contribution from a co-tenant. The evidence in the case was that Mohammad Khimani (Mohammad), Salim Khimani (Salim), and Sikander Nathani (Sikander), acquired property as tenants-in-common in 1998 and later obtained a construction loan from First Georgia Community Bank (First Georgia) secured by the property. Mohammad paid off the First Georgia loan and the accrued property taxes in 2007 using funds from a personal loan from a different bank. Salim died, and in 2015, Bob Ruppenthal (Ruppenthal), the executor of Salim's estate, filed a statutory partition action seeking a sale of the property and the disbursement of the proceeds in equal, one-third shares. Mohammad counterclaimed for equitable partition and an accounting, claiming a larger share of any proceeds due to his contributions to the property. Ruppenthal moved for summary judgment as to those expenditures made more than four years prior to 2015 (when Mohammad filed his counterclaim), including the payoff of the First Georgia loan and any taxes paid by Mohammad through 2011, relying upon O.C.G.A. § 9-3-25[80] to claim that the four-year statute of limitations applied. The Clayton County Superior Court granted the motion, and Mohammad appealed.[81]

The court of appeals reversed the trial court holding that, while the four-year limitation period generally applies to contributions claimed by

75. *Id.* at 151, 810 S.E.2d at 483.

76. *Id.*

77. *Id.* at 151–52, 810 S.E.2d at 483.

78. *Id.* at 152, 810 S.E.2d at 483–84.

79. 344 Ga. App. 658, 811 S.E.2d 448 (2018).

80. O.C.G.A. § 9-3-25 (2018).

81. *Khimani*, 344 Ga. App. at 658–59, 811 S.E.2d at 449–50.

an obligor who pays off a common debt under O.C.G.A. § 9-3-25, it is not applicable to a claim to partition the property under O.C.G.A. § 44-6-140.[82] "A court resolving such equitable claims has 'the authority to adjust the accounts or claims of cotenants' based on payments made to protect the property," and nothing in the statute limits these adjustments to payments made within four years of the request or demand.[83] Further, even if the four-year limitations period had applied in this case, the court of appeals found that the limitations period did not commence until Ruppenthal filed his petition in 2015, and Mohammad made his claim well within four years of that time.[84]

In *Faison v. Faison*,[85] Lora Faison filed a complaint for partition of real property against the heirs of Alonzo Faison and obtained default judgments against five of eighteen heirs who failed to respond to the complaint. The remaining eight heirs entered into a settlement agreement with the plaintiff that was approved by order of the Wilcox County Superior Court. Three of the defendants against whom the plaintiff obtained default judgments filed motions to set aside default, which the trial court denied. [86] The three defendants appealed, and the court of appeals reversed and remanded the case for further proceedings.[87]

According to the complaint, Alonzo owned seven tracts of real property totaling 400 acres in Wilcox County when he died intestate in March 2000. The plaintiff alleged that she and the thirteen defendants were all of Alonzo's heirs at law, and title to his property passed to them as tenants in common. Since the property could not be equally and fairly divided, the plaintiff sought an order of sale and distribution of the sale proceeds to the parties.[88]

At the default judgment hearing, "[t]he [trial] court noted that the action was one involving unliquidated damages."[89] In its order granting default judgment, the trial court ordered that the five defaulting defendants transfer their interest in the property to the plaintiff in exchange for $13,000 each to be paid by the plaintiff.[90] "Less than 30 days

82. *Id.* at 659–61, 811 S.E.2d at 450–51 (citing O.C.G.A. § 44-6-140 (2018)).

83. *Id.* at 659–60, 811 S.E.2d at 450 (citing Taylor v. Sharpe, 221 Ga. 282, 284, 144 S.E.2d 390, 392 (1965)).

84. *Id.* at 661, 811 S.E.2d at 451.

85. 344 Ga. App. 600, 811 S.E.2d 431 (2018).

86. *Id.* at 600–01, 811 S.E.2d at 432.

87. *Id.* at 603, 811 S.E.2d at 434.

88. *Id.* at 601, 811 S.E.2d at 432.

89. *Id.*

90. *Id.*

after entry of the final order, [four of the defaulting defendants] filed a motion to set aside the final order and for a new trial, arguing in part that the court" had no evidence before it to support a determination of fair market value of the property because "the [trial] court had failed to order or submit an appraisal, as required under O.C.G.A. § 44-6-184[91] of the Uniform Partition of Heirs Property Act ('UPHPA')."[92] The trial court denied the motion because no determination had been made whether the property was the heirs' property as defined under UPHPA due to the settlement reached with the non-defaulting defendants.[93]

On appeal, the court of appeals preliminarily noted that the UPHPA was designed, in part, to assure that the heirs' property was not undervalued in partition actions,[94] and that

> UPHPA provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.[95]

The court of appeals held that UPHPA requires the trial court to make a preliminary determination whether the property at issue was the heirs' property before taking further action, including ordering the parties to mediation in this case.[96] Had the trial court concluded that the property was the heirs' property, the trial court would have been required to partition the property under the procedures set forth under UPHPA unless all of the co-tenants agreed, regardless of whether they were in default in the suit.[97] As such, the trial court erred in failing to set aside the default and granting a new trial.[98] The court of appeals reversed the trial court, and the matter was remanded for further proceedings.[99]

91. O.C.G.A. § 44-6-184 (2018).

92. *Faison*, 344 Ga. App. at 601, 811 S.E.2d at 432; *see* O.C.G.A. §§ 44-6-180 to -189 (2018).

93. *Faison*, 344 Ga. App. at 601, 811 S.E.2d at 432–33.

94. *Id.* at 602, 811 S.E.2d at 433.

95. *Id.* (quoting *Partition of Heirs Property Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Partition%20of%20Heirs%20Property%20Act (last visited Aug. 21, 2018)).

96. *Id.* at 603, 811 S.E.2d at 433–34.

97. *Id.* at 603, 811 S.E.2d at 434.

98. *Id.* at 603–04, 811 S.E.2d at 434.

99. *Id.*

IV. SALE OF REAL PROPERTY[100]

In *Oconee Investment Group, LLC v. Turk*,[101] the Georgia Court of Appeals addressed the issue of whether an individual could recover a commission for referral services provided in connection with a real estate transaction where the individual was not a licensed Georgia real estate broker.[102] Oconee Investment Group, LLC (Oconee) offered to sell Lisa Turk several lots in a real estate development. Turk declined the offer, but reached an agreement with Oconee where "Oconee would give Turk a specific lot and trailer in the development if Turk referred to Oconee a bona fide purchaser for the remaining lots and trailers at a specified minimum price per lot." Turk referred a buyer to Oconee who purchased the remaining lots and trailers. However, Oconee refused to pay Turk the referral compensation following the sale and, instead, offered her $7,200 or a credit toward the purchase of a lot and trailer. Turk declined the offer and filed a lawsuit against Oconee for breach of contract, fraud, *quantum meruit*, and unjust enrichment. Oconee filed a motion for summary judgment, which was denied by the Greene County Superior Court.[103] The court of appeals granted interlocutory review.[104] On appeal, Oconee argued that it was entitled to summary judgment because O.C.G.A. § 43-40-24(a),[105] which limited compensation to licensed brokers, precluded Turk from receiving compensation.[106]

The court of appeals upheld the trial court's ruling, holding that there are several exceptions to O.C.G.A. § 43-40-24(a).[107] Specifically, O.C.G.A. § 43-40-29(a)(9),[108] which permits a person to act as a "referral agent" where they "(A) [do] not receive a fee . . . from the party being referred; (B) [do] not charge an advance fee; and (C) [do] not act as a referral agent in more than three transactions per year."[109] The court held that Turk

100. This section was authored by Alexander F. Koskey, III, CIPP/US. Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Samford University (B.S., 2004); Cumberland School of Law, Samford University (J.D., 2007). Member, State Bars of Georgia, Florida, and Alabama; United States Court of Appeals for the Eleventh Circuit, United States District Courts for the Northern District of Georgia, Middle District of Georgia, and Middle District of Florida.

101. 344 Ga. App. 31, 807 S.E.2d 512 (2017).

102. *Id.* at 31, 807 S.E.2d at 513.

103. *Id.* at 31–32, 807 S.E.2d at 513.

104. *Id.* at 32, 807 S.E.2d at 513.

105. O.C.G.A. § 43-40-24(a) (2018).

106. *Oconee Inv. Grp., LLC*, 344 Ga. App. at 32, 807 S.E.2d at 513.

107. *Id.* at 34, 807 S.E.2d at 515.

108. O.C.G.A. § 43-40-29(a)(9) (2018).

109. *Oconee Inv. Grp., LLC*, 344 Ga. App. at 32, 807 S.E.2d at 513 (emphasis omitted) (quoting O.C.G.A. § 43-40-29(a)(9)).

fell within the exception set forth in O.C.G.A. § 43-40-29(a)(9) as she provided an affidavit outlining her agreement with Oconee for a referral fee if she found a buyer, she did find a buyer, and a sale was completed.[110] Moreover, Turk testified that she was not involved in any of the actual negotiations with the buyer, that she did not receive a referral from the party referred, and that she did not act as a referral agent in more than three transactions per year.[111] Therefore, because Turk qualified for the exemptions of O.C.G.A. § 43-40-29(a)(9), she was not required to hold a Georgia brokerage license to receive a referral fee, and the denial of Oconee's motion for summary judgment was proper.[112]

In *Behdadnia v. E.E. Beavers Family Partnership*,[113] the Georgia Court of Appeals reversed an order dismissing a buyer's claim for specific performance where he failed to tender the purchase price.[114] On July 15, 2016, Rahmat Behdadnia entered into an agreement with E. E. Beavers Family Partnership, L.P. (Beavers) to purchase a shopping mall plaza for $525,000. Behdadnia paid $5,000 in earnest money and put up more than $450,000 prior to the closing. Following a meeting between the parties, Beavers terminated the sales agreement.[115]

Behdadnia filed suit against Beavers seeking specific performance of the agreement. Beavers filed a motion to dismiss, which was granted by the Cobb County Superior Court. Behdadnia filed an appeal alleging that the trial court erred in holding that his failure to tender the purchase price barred his claim for specific performance. Behdadnia did not claim to have paid the purchase money in accordance with the terms of the agreement but did assert that he had paid over $450,000 of the purchase price.[116] On appeal, Behdadnia did not provide a transcript of the motion to dismiss the hearing, and it was unclear to the appellate court "whether the trial court relied on testimonial evidence outside of the pleadings in arriving at its conclusion, thus converting the motion to one for summary judgment."[117] On this basis, the Georgia Court of Appeals vacated the trial court's prior order and remanded the case for reconsideration.[118]

110. *Id.* at 33, 807 S.E.2d at 514.
111. *Id.*
112. *Id.* at 34, 807 S.E.2d at 515.
113. 345 Ga. App. 711, 815 S.E.2d 103 (2018).
114. *Id.* at 713, 815 S.E.2d at 105–06.
115. *Id.* at 712, 815 S.E.2d at 104–05.
116. *Id.* at 712–13, 815 S.E.2d at 105.
117. *Id.* at 713, 815 S.E.2d at 105.
118. *Id.* at 713, 815 S.E.2d at 105–06.

In *Wallin v. Wallin*,[119] the court of appeals addressed the issue of whether a judgment voiding a transfer of property as fraudulent under the Uniform Fraudulent Transfers Act (UFTA)[120] was proper.[121] In 1990, Gene Wallin's brother and his wife, Jack Wallin and Linda Wallin, purchased property by obtaining a mortgage and executing a security deed in favor of the lender, Citizens Bank & Trust (Citizens Bank). Jack and Linda conveyed the property to Gene in 1994 by way of a warranty deed. However, the parties did not execute a promissory note at the time of transfer, and Gene made payments directly to Citizens Bank. In 2002, Jack and Linda divorced, and Gene executed a promissory note in favor of Linda for $150,000 and pledged the property as collateral. The security deed was not recorded.[122]

After execution of the security deed, Gene's son, Jeremy, and his wife, Cassie, leased the property and paid rent directly to Linda. "Cassie and Jeremy made . . . improvements to the property and . . . paid the mortgages, insurance, and taxes . . . under an oral agreement with Gene that, if they did so, he would deed the property to them." In 2009, "Gene purportedly breached that agreement, [and] Cassie filed suit against [Gene and Jeremy] seeking damages [for] claims of breach of contract and *quantum meruit*."[123]

Following a trial on April 8, 2011, a jury awarded Cassie $276,000 on her claim for *quantum meruit*. On May 12, 2011, the Dade County Superior Court affirmed the jury's verdict in favor of Cassie, and Gene executed a second security deed in favor of Linda, pledging the property as collateral. The second security deed was recorded. Shortly after Cassie obtained a writ of *fieri facias* for $276,000, she learned of the second security deed Gene had executed in favor of Linda and filed a lawsuit against Gene, Linda, and Jeremy alleging that the subject property was fraudulently conveyed and sought to have the second security deed voided. During discovery, Gene admitted that he executed the second security deed to Linda so she would have priority over Cassie. However, Gene also contended that his first security deed from 2002, which was unrecorded, gave Linda priority over Cassie's judgment. Nonetheless, the trial court entered an order finding that the conveyance by Gene was fraudulent.[124]

119. 341 Ga. App. 440, 800 S.E.2d 617 (2017).

120. O.C.G.A. § 18-2-70 (2018).

121. *Wallin*, 341 Ga. App. at 440, 800 S.E.2d at 618.

122. *Id.* at 440–41, 800 S.E.2d at 618.

123. *Id.* at 441, 800 S.E.2d at 618–19.

124. *Id.* at 441–42, 800 S.E.2d at 618–19.

On appeal, Gene, Jeremy, and Linda contend that the trial court erred in finding that the 2011 conveyance was fraudulent under the UFTA.[125] The Georgia Court of Appeals agreed, reasoning that "satisfaction of a judgment authorizes a levy only upon property which the judgment debtor owns."[126] Under O.C.G.A. § 18-2-71(2)(A),[127] the term "'[a]sset' . . . does not include . . . [p]roperty to the extent it is encumbered by a valid lien."[128] The court of appeals held that, although the 2002 security deed was unrecorded, it was a valid lien on the property with respect to Cassie's judgment.[129] Even if the second security deed was executed with nefarious intent, the court of appeals held that it was essentially superfluous with respect to establishing Cassie and Linda's respective priority as Gene's creditors.[130] The 2002 security deed gave Linda priority over Cassie's judgment, and as a result, the trial court's judgment voiding the transfer of the property was reversed.[131]

V. EASEMENTS, COVENANTS, AND BOUNDARIES[132]

Easements and declarations of covenants can be affirmative or negative. Both are methods of granting certain rights in connection with the property while retaining title to the land. Easements are usually affirmative, giving the holder the right to use someone else's land for a specified purpose, while covenants are usually negative, limiting what the burdened party can do on her own land. Boundary lines are meant to dispel disputes between landowners, but issues emerge when a question arises as to the legal boundaries of the property.

In *905 Bernina Avenue Cooperative, Inc. v. Smith/Burns LLC*,[133] the Georgia Court of Appeals upheld an express easement on adjacent land that was formerly a railroad spur track, even though the track had been filled with concrete.[134] Here, the owners of a commercial building

125. *Id.* at 442, 800 S.E.2d at 619.

126. *Id.* at 443, 800 S.E.2d at 620 (quoting Wells Fargo Bank, N.A. v. Twenty Six Props., LLC, 325 Ga. App. 662, 664, 754 S.E.2d 630, 633 (2014)).

127. O.C.G.A. § 18-2-71(2)(A) (2018).

128. *Wallin*, 341 Ga. App. at 444, 800 S.E.2d at 620 (alteration in original) (citing O.C.G.A. § 18-2-71(2)(A)).

129. *Id.*

130. *Id.* at 444–45, 800 S.E.2d at 621.

131. *Id.*

132. This section was authored by Tanisha Pinkins. Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Buffalo State College (B.A., 2010; B.S., 2010); Emory University School of Law (J.D., 2016). Member, State Bar of Georgia. Special thanks to Scott Chen, a 2018 summer associate, for his assistance.

133. 342 Ga. App. 358, 802 S.E.2d 373 (2017).

134. *Id.* at 358, 802 S.E.2d at 375.

(Elizabeth Owners) filed suit against owners of the adjacent building (Bernina Owners), who constructed a fence that the Elizabeth Owners alleged encroached on a railroad platform attached to the commercial building. The Bernina Owners counterclaimed, asserting that they owned the platform, and that the Elizabeth Owners had no easement in an alley or concrete-filled railroad spur track between the properties. The location of the properties' common boundary line and the existence of easements in a disused, railroad-spur track and alley were essential to the outcome of the case. The spur track was located on the boundary line between the two properties, and the alley ran alongside both properties, providing access from a public street to the spur track.[135]

> [Long] ago, a common owner developed the parties' properties as part of a group of warehouses with attached platforms backing up to a railroad spur track. Today, the spur track is filled in with concrete and level with the platforms. The buildings at 905 Bernina and 331 Elizabeth sit across the [former] spur track from each other. The spur track is on the 905 Bernina property. An alley runs [alongside] both properties, [which] provid[es] access to the filled-in spur track.[136]

The dispute arose when the Bernina Owners constructed a fence on the spur track and on a portion of the platform attached to the Elizabeth Owners's property. The Elizabeth Owners objected to obstructions on their property. Both parties filed motions for partial summary judgment arguing their respective rights in the platform, the spur track, and the alley. The Fulton County Superior Court entered an order, which had the effect of granting partial summary judgment to the Bernina Owners regarding the alley and granting partial summary judgment to the Elizabeth Owners regarding the spur track and platform. Both parties appealed.[137]

Regarding the platform, the court of appeals found that a quitclaim deed from 1928 for the 331 Elizabeth building included the platform, although, the metes and bounds description in that deed did not.[138] However, when the building at 331 Elizabeth was built, the platform was installed and extended one foot inside the Elizabeth building. That one foot inside the building was described in the quitclaim deed. Thus, the platform was attached to an integral part of the 331 Elizabeth building, and its removal would severely harm the property.[139] The court of appeals

135. *Id.*

136. *Id.*

137. *Id.* at 358–60, 802 S.E.2d at 375–76.

138. *Id.* at 365, 367, 802 S.E.2d at 380–81.

139. *Id.* at 366–67, 802 S.E.2d at 380–81.

affirmed the trial court's grant of partial summary judgment to the Elizabeth Owners on this issue.[140]

Regarding the issues related to the spur track, the Bernina Owners contended that the easement, if one existed, was limited to railroad use and that the Elizabeth Owners' current use exceeded the scope of that easement.[141] The court of appeals disagreed.[142] The 1927 conveyance of the easement gave the original owner the "right to use" the spur track, with no qualifications or limitations as to the type of use.[143] Thus, the court of appeals affirmed the trial court's grant of partial summary judgment to the Elizabeth Owners on this issue.[144]

Reviewing the issues related to the alley, the court of appeals found that it was depicted in a 1915 recorded plat of the property, and the Elizabeth Owners acquired 331 Elizabeth in a chain of title descending from the original developer through instruments that referred to the 1915 recorded plat.[145] This gave the Elizabeth Owners an easement in the alley.[146] The Bernina Owners argued that the Elizabeth Owners abandoned the easement because the Elizabeth Owners failed to object to the Bernina Owners' construction of obstructions in the alley.[147] The court of appeals held that the person with the dominant estate has twenty years within the prescriptive period to object to the obstruction.[148] The Bernina Owners then argued that the Elizabeth Owners failed to maintain the contested portion of the alley, rendering it unusable because the Elizabeth Owners allowed others to park their vehicles there.[149] The court of appeals held that this conduct was equivalent to nonuse but did not rise to the level of abandonment.[150] Therefore, while the Elizabeth Owners did not use their easement, the evidence did not clearly and unequivocally show any intent by the Elizabeth Owners to abandon the easement.[151] The court of appeals ruled in favor of the Elizabeth Owners on this issue, thereby reversing the trial court's finding.[152]

140. *Id.* at 368, 802 S.E.2d at 382.
141. *Id.* at 369, 802 S.E.2d at 382.
142. *Id.*
143. *Id.*
144. *Id.* at 370, 802 S.E.2d at 383.
145. *Id.* at 363, 802 S.E.2d at 377.
146. *Id.*
147. *Id.* at 371, 802 S.E.2d at 383.
148. *Id.* at 371–72, 802 S.E.2d at 384.
149. *Id.* at 373, 802 S.E.2d at 385.
150. *Id.*
151. *Id.*
152. *Id.*

In *Amberfield Homeowners Ass'n v. Young*,[153] the Georgia Court of Appeals held that a homeowners association (the Association) was authorized to accept an easement granting homeowners access to recreational facilities and to assess homeowners their share of the cost.[154] A dispute arose between the Association and a group of homeowners (the Owners) over the validity of an amendment that expressly authorized the Association to enter into an agreement with a nearby, private swim-and-tennis club (the Club). The Club granted an easement to the Association's members for the right to use the Club's facilities. This agreement provided that Club fees would be added to the assessments collected from the Owners, which would then be paid to the Club. Both parties filed cross-motions for summary judgment. The Gwinnett County Superior Court held that the amendment was void. The court granted the Owners motion for summary judgment and denied the Association's motion for summary judgment. The Association appealed both rulings.[155]

The court of appeals held that an amendment in 2011 gave the Association authority to accept easements on behalf of the Owners as members of the Association and not merely on behalf of the Association itself.[156] The court of appeals stated,

> [W]here the declaration governing [the] association "delegates decision-making authority to a group and that group acts, the only judicial issues are whether the exercise of that authority was procedurally fair and reasonable, and whether the substantive decision was made in good faith, and is reasonable and not arbitrary [or] capricious."[157]

The court of appeals ruled in favor of the Association, thereby reversing the trial court's findings on these issues.[158]

In *Milliken & Co. v. Georgia Power Co.*,[159] the Georgia Court of Appeals held that an easement's indemnification clause met the conditions for application of a statute prohibiting certain contractual indemnity provisions, holding the easement clause void and unenforceable as against public policy.[160] The issues arise from lawsuits brought by family

153. 346 Ga. App. 29, 813 S.E.2d 618 (2018).

154. *Id.* at 38, 813 S.E.2d at 624–25.

155. *Id.* at 29–30, 813 S.E.2d at 619.

156. *Id.* at 36, 813 S.E.2d at 623.

157. *Id.* at 37, 813 S.E.2d at 624 (quoting Sanders v. Thorn Woode P'ship, 265 Ga. 703, 704, 462 S.E.2d 135, 137 (1995)).

158. *Id.* at 37, 813 S.E.2d at 624–25.

159. 344 Ga. App. 560, 811 S.E.2d 58 (2018).

160. *Id.* at 564, 811 S.E.2d at 62.

members on behalf of passengers and pilots killed or injured (collectively, plaintiffs) when the airplane they occupied crashed near an airport. The plane allegedly aborted a landing attempt and struck a Georgia Power transmission pole located a short distance from the runway on a property owned by Milliken and Company (Milliken). The plaintiffs allege that Milliken and Georgia Power negligently placed the transmission pole too close to the end of the runway. The transmission pole was located on the Milliken property pursuant to an easement where Milliken permitted Georgia Power to build the pole to provide electricity to the Milliken plant. Milliken then filed an identical cross-claim against Georgia Power asserting that it was contractually liable to Milliken for all sums that the plaintiff recovered from Milliken. The Fulton County State Court granted summary judgment to Georgia Power on the cross-claims. Milliken appealed.[161]

On appeal, Milliken relied on a provision in the easement "that Georgia Power shall hold Milliken harmless 'from any damages to property or persons (including death), or both, which result from [Georgia Power's] construction, operation or maintenance of its facilities.'"[162] Under O.C.G.A. § 13-8-2(b),[163] a covenant is void and unenforceable when two conditions are met. First, "[t]he provision must . . . relate in some way to a contract for 'construction, alteration, repair, or maintenance' of certain property."[164] Second, the provision must "promise to indemnify [the] party for damages arising from that own party's sole negligence."[165]

The court of appeals held that the first condition is clearly met because the easement agreement between Milliken and Georgia Power is related to the construction, alteration, repair, or maintenance of the transmission poles.[166] The second condition is also met because Milliken's cross-claims against Georgia Power are "necessarily based on the contention that the easement provision at issue makes Georgia Power contractually liable to indemnify Milliken for any damages that the plaintiffs recover against Milliken caused solely by Milliken's negligence."[167] Holding the covenant void and unenforceable, the court of

161. *Id.* at 560–61, 811 S.E.2d at 60.

162. *Id.* at 562, 811 S.E.2d at 60.

163. O.C.G.A. § 13-8-2(b) (2018).

164. *Milliken*, 344 Ga. App. at 563, 811 S.E.2d at 61 (quoting Kennedy Dev. Co. v. Camp, 290 Ga. 257, 259, 719 S.E.2d 442, 444 (2011)).

165. *Id.*

166. *Id.* at 564, 811 S.E.2d at 62.

167. *Id.*

appeals affirmed the trial court's grant of summary judgment to Georgia Power against Milliken's cross-claims.[168]

Turning to boundaries, in *McBee v. Aspire at West Midtown Apartments, L.P.*,[169] the Georgia Supreme Court reversed and remanded the Fulton County Superior Court's ruling that Thomas R. McBee and his wife Mary A. McBee failed to establish a claim to quiet title based on adverse possession.[170] A dispute arose between neighboring landowners over a rectangular strip of land (the Disputed Area) located on a lot to which Aspire at West Midtown Apartments, L.P. (Aspire) claimed title. Thomas claimed an interest in the Disputed Area by virtue of adverse possession for more than twenty years. Aspire had developed an apartment complex on the Disputed Area. Thomas sued Aspire and the trial court granted Aspire's motion for summary judgment on Thomas's adverse possession claim. Thomas appealed.[171]

For decades, Thomas's family owned both their lot and the Disputed Area. When Thomas was a child, his family conveyed half the property to his aunt and conveyed the remaining half to the same aunt as a trustee for Thomas and his brother. Eventually, his aunt executed a deed in her capacity as executrix and conveyed the Disputed Area to herself for a sum of money. Thomas's aunt executed another deed that quitclaimed any interest she had in the other lot to Thomas, his mother, and his brother. Thomas, his mother, and his brother then executed a deed quitclaiming any interest they had in the Disputed Area to his aunt. Since then, Thomas had been maintaining the Disputed Area and treating it as his own. Later, his aunt conveyed the Disputed Area to Aspire.[172] Aspire argued that Thomas's claim to the Disputed Area failed because he signed the quitclaim deed for the disputed lot to his aunt.[173]

The Georgia Supreme Court reasoned that Thomas may be charged with knowledge of what the deed said because he signed it.[174] However, "knowing what the deed said about the boundaries of the [Disputed Area] does not automatically demonstrate knowledge of precisely where all those boundaries lie in relation to the . . . Disputed Area."[175] In a previous case, the Georgia Supreme Court held that "the mistaken idea that the boundaries [were] recited in the deed . . . would not prevent such actual

168. *Id.*
169. 302 Ga. 662, 807 S.E.2d 455 (2017).
170. *Id.* at 662, 807 S.E.2d at 456.
171. *Id.*
172. *Id.* at 663–64, 807 S.E.2d at 456–57.
173. *Id.* at 667, 807 S.E.2d at 459.
174. *Id.*
175. *Id.*

adverse possession ripening into a prescriptive title in 20 years, nor would such [a] mistake render the possession fraudulent."[176] So, even assuming Thomas understood what the quitclaim deed said, there is no evidence that the line separating both lots was marked in any way at any point in time. Thus, he was not acting in bad faith.[177] Thomas met all elements for adverse possession.[178] The Georgia Supreme Court reversed the trial court's grant of Aspire's motion for summary judgment, holding in favor of Thomas's adverse possession claim.[179]

In *Moore v. Jackson*,[180] the court of appeals affirmed a jury verdict in favor of Jackson and against Moore on his claim of adverse possession.[181] Decades ago, Lounell Dorminey purchased 100 acres from Joseph Brown. During negotiation of the sale, Brown walked the boundary line between the parcel he was selling and what he was retaining. The parties to the transaction were of an understanding that the boundary between the parcels was the county line. The actual line between the properties was sixty feet south of the walked line. The Dormineys paid property taxes to only one county. Later, Brown sold his land to Billy Jackson. After Billy Jackson died, the property was devised to his son, Jackson, pursuant to a will. The Dormineys sold one-half acre to W. D. Dowdy. Dowdy built a house on the property and had the land surveyed, which showed that the northern corner of the house was only 5.7 feet south of the property line. He later built a well house that sat two feet south of the county line and maintained that portion of the land. "After Dowdy died . . . Ruth Moore bought the property, including the home." Moore understood that her property was entirely within one county at the time and continued to maintain the same portion of land as Dowdy. Jackson claimed that his title to land extended to the county line. Moore asserted a claim to the disputed area citing adverse possession. After trial, a jury returned a verdict in favor of Jackson, determining that the county line formed the actual boundary and not the originally walked line. Moore appealed.[182]

The court of appeals held that Jackson met the burden of proof to establish his claim to the disputed area by producing evidence through plats, deeds, and testimony that the correct southern boundary of his property was the county line.[183] "Because the jury heard [the] conflicting

176. *Id.* at 667–68, 807 S.E.2d at 459.
177. *Id.* at 668, 807 S.E.2d at 459.
178. *Id.* at 665, 807 S.E.2d at 458.
179. *Id.* at 668, 807 S.E.2d at 459–60.
180. 343 Ga. App. 532, 807 S.E.2d 495 (2017).
181. *Id.* at 532, 807 S.E.2d at 496.
182. *Id.* at 534, 807 S.E.2d at 497–98.
183. *Id.* at 535, 807 S.E.2d at 498.

evidence . . . and there was some evidence upon which the jury could rely in forming their verdict," the court of appeals did not find a reversible error.[184]

VI. TRESPASS AND NUISANCE[185]

Georgia courts have robustly protected the rights of land and property owners using doctrines of nuisance and trespass to real property. Courts during the survey period explored the relation of these doctrines and concepts to such interconnected topics as easements and municipal liability. The case of *DeNapoli v. Owen*[186] analyzed how the theories of trespass and easements are interrelated.[187] The DeNapolis purchased nearly two acres of land (Lot 2) from the Owens. After the transaction was completed, the Owens commenced construction of a driveway across Lot 2. Alleging trespass and fraudulent misrepresentation, the DeNapolis filed suit against the Owens, who counterclaimed for trespass and tortious interference with property rights. The Fannin County Superior Court ruled in favor of the Owens and granted their requests for injunctions, "finding that the DeNapolis purchased title to Lot 2 subject to a 20-foot easement in favor of Lot 3." The DeNapolis appealed on the basis of the language in the plat for Lot 2 referring to a proposed 20-foot easement, arguing that the language was insufficient to reserve or create an easement across Lot 2 in favor of the adjoining land parcel, Lot 3.[188]

The court of appeals reversed, holding explicitly that there was no creation of an easement, either expressly or by implication.[189] Concluding that the deed contained within it no "express creation of an easement," the court refused to recognize an express reservation.[190] Additionally, the court noted that although the survey of the land contained a note of a proposed 20-foot easement, that proposal "remain[ed] an unenforceable hope or suggestion."[191] The court relied heavily upon the verbiage contained within the plat documents, emphasizing the inclusion of the

184. *Id.* at 536, 807 S.E.2d at 499.

185. This section was authored by Sarah-Nell H. Walsh. Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. University of Virginia (B.A., 2001); Marshall–Wythe School of Law, College of William & Mary (J.D., 2004). Member, State and Federal Bars of Georgia and the United States Court of Appeals for the Eleventh Circuit. Special assistance was provided by the firm's 2018 summer associate Alexis Trumble.

186. 341 Ga. App. 517, 801 S.E.2d 314 (2017).

187. *Id.* at 517, 801 S.E.2d at 315.

188. *Id.*

189. *Id.* at 519–20, 801 S.E.2d at 316–17.

190. *Id.* at 519, 801 S.E.2d at 316.

191. *Id.* at 519, 801 S.E.2d at 317.

modifier, "proposed."[192] With respect to the creation of an easement by implication, the court again refused to recognize the easement's existence.[193] Citing *Bruno v. Evans*,[194] the court noted,

> The right of private way over another's land may arise by implication of law when the right is necessary to the enjoyment of lands granted by the same owner. Thus, a way of necessity arises in this State by implication of law under O.C.G.A. § 44-9-1 when the common owner sells the dominant estate first and retains the servient estate. The common owner is impliedly deemed to have granted an easement to pass over the servient estate. However, if the common owner sells the servient estate first as happened in this case, he has deeded everything within his power to deed and retains no easement in the servient estate.[195]

The court noted that, at the time of sale of Lot 2, the Owens retained possession of Lot 3, along with additional property that allowed the Owens access to the public roadway.[196] Because of this, "no way of necessity existed at the time of the sale," and therefore, no easement by implication could exist.[197] This determination served as the basis for the Georgia Court of Appeals to overturn the trial court's grant of declaratory judgment and injunctions to the Owens.[198] The DeNapolis asserted that the Owens trespassed on their property by clearing land to construct a driveway; the Owens argued that they had an easement on Lot 2, and therefore, were incapable of trespass.[199] The finding by the court that there was no easement on Lot 2, either express or implied, allowed the DeNapolis' trespass claim against the Owens to proceed in the trial court.[200]

McDonald v. Silver Hill Homes, LLC[201] concluded in accordance with Georgia precedent that punitive damages may be awarded in cases involving claims of trespass and nuisance.[202] A boundary line dispute between two adjoining property holders included claims by McDonald for

192. *Id.*

193. *Id.* at 520, 801 S.E.2d at 317.

194. 200 Ga. App. 437, 408 S.E.2d 458 (1991).

195. *DeNapoli*, 341 Ga. App. at 520, 801 S.E.2d at 317 (quoting *Bruno*, 200 Ga. App. at 440–41, 408 S.E.2d at 461–62); *see also* O.C.G.A. § 44-9-1 (2018).

196. *DeNapoli*, 341 Ga. App. at 520, 801 S.E.2d at 317.

197. *Id.* at 521, 801 S.E.2d at 317.

198. *Id.*

199. *Id.* at 517, 801 S.E.2d at 315.

200. *Id.* at 521, 801 S.E.2d at 317.

201. 343 Ga. App. 194, 806 S.E.2d 651 (2017).

202. *Id.* at 195, 806 S.E.2d at 652.

nuisance, trespass, punitive damages, and attorney's fees. The Fulton County Superior Court granted summary judgment to defendant Silver Hill Homes as to the punitive damages and attorney's fees claims.[203] Plaintiff McDonald appealed, and the appellate court reversed.[204]

Citing the Georgia Supreme Court case *Tyler v. Lincoln*,[205] the court explained that punitive damages may, in fact, be authorized in cases alleging trespass and nuisance.[206] The court explained that

> [a] conscious indifference to consequences relates to an intentional disregard of the rights of another. Wilful and intentional misconduct is not essential. But a trespass is an intentional act. Thus, a wilful repetition of a trespass will authorize a claim for punitive damages. So too, will a claim of continuing nuisance.[207]

The court held that McDonald's trespass allegations that Silver Hill's "'fail[ure] to contain construction materials and debris on [its property], result[ed] in the discharge of soil, nails, and other construction debris' onto McDonald's [adjoining] property," as well as his nuisance allegations that Silver Hill's excavation and construction processes discharged materials, debris, storm water, and runoff onto his property, interfering with his use and enjoyment of the property, could allow a jury to consider a claim for punitive damages.[208] This conclusion upheld Georgia's precedential treatment of claims relating to real property in the context of punitive damage awards.[209]

During the survey period, Georgia courts also grappled with city and municipality liability for creation or maintenance of a nuisance. The first of two relevant cases, *Mayor & Aldermen of Savannah v. Herrera*,[210] considered the liability of a city with respect to damages arising from a vehicle accident caused in part by an obstruction in a drivers' line of sight caused by a tree.[211] The plaintiffs, conservator and guardian of driver Lisa Muse, levied claims against the Mayor and Aldermen of the City of Savannah (the City) for negligence and nuisance. Alleging that the city created a nuisance by allowing motorists' vision to be obstructed by a

203. *Id.* at 194–95, 806 S.E.2d at 652.
204. *Id.* at 195, 806 S.E.2d at 652.
205. 272 Ga. 118, 527 S.E.2d 180 (2000).
206. *McDonald*, 343 Ga. App. at 195, 806 S.E.2d at 652.
207. *Id.* (quoting *Tyler*, 272 Ga. at 120–21, 527 S.E.2d at 180).
208. *Id.* at 195–96, 806 S.E.2d at 652–53.
209. *Id.* at 196, 806 S.E.2d at 653.
210. 343 Ga. App. 424, 808 S.E.2d 416 (2017).
211. *Id.* at 424, 808 S.E.2d at 417–18.

large tree located on the city's right-of-way, the plaintiffs sought to establish liability on the part of the City.[212]

Muse's vehicle was struck on the driver's side by a truck traveling at a high rate of speed along a four-lane divided highway as she attempted a left-hand turn. The intersection at which she attempted to cross, according to witness motorists who had traversed the intersection themselves, offered drivers a diminished or obstructed line of sight due to two large oak trees, one of which was located on the city's right-of-way.[213] The trial court record reflected that the City was made aware on several occasions of the visibility impact created by the large oak trees: the Director of Savannah's Traffic Department visited the intersection in 1998 and observed the diminished line of sight, and another motorist was struck at the intersection in 2007.[214]

Georgia law defines public nuisance as "one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals."[215] As a result, "a public nuisance requires 'some act or omission which obstructs or causes inconvenience to the public in the exercise of rights common to all.'"[216] Additionally, the Georgia Supreme Court has provided guidance on the criteria necessary to define nuisances for which cities may be held liable:

> First, the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence. Second, the act must be of some duration, and the maintenance of the act or defect must be continuous or regularly repetitious. Third, the city must have failed to act within a reasonable time after knowledge of the defect or dangerous condition.[217]

The City advanced two arguments supporting its position that the tree on the right-of-way did not constitute a nuisance. First, it proffered that its "degree of misfeasance did not exceed mere negligence." Second, it called upon the fact that only one prior accident included documentation of the tree as a possible contributing factor.[218] Noting that the City had notice for over a decade of the line of sight obstruction, the court found

212. *Id.*

213. *Id.* at 425–27, 808 S.E.2d at 418–19.

214. *Id.* at 431, 808 S.E.2d at 422.

215. O.C.G.A. § 41-1-2 (2018).

216. *Herrera*, 343 Ga. App. at 435, 808 S.E.2d at 424 (quoting City of College Park v. 2600 Camp Creek, LLC, 293 Ga. App. 207, 209, 666 S.E.2d 607, 608 (2008)).

217. *Id.* (quoting Thompson v. City of Fitzgerald, 248 Ga. App. 725, 727, 548 S.E.2d 368, 370 (2001)).

218. *Id.*

there was a genuine issue of material fact as to whether the tree was considered a nuisance and, as such, denial of summary judgment to the city on the nuisance claim was proper.[219]

The Georgia Court of Appeals again wrestled with municipal liability in *City of Gainesville v. Waldrip*,[220] a case analyzing a city's liability for property damage resulting from flooding.[221] The plaintiff, Waldrip, owner of a shopping center, concluded that flooding that damaged his property arose from surface water drainage obstructions caused by debris and other material which washed downhill across a stretch of private land. The obstructions, he alleged, were created by water discharged from a drainage pipe operated by the City.[222]

In holding that the City was entitled to summary judgment on all of the plaintiff's claims, including those for nuisance, trespass, and the taking of property, the court of appeals discussed the requirements necessary to establish a cause of action for nuisance.[223] After dismissing any potential permanent nuisance claims based on the applicable four-year statute of limitations, the court offered an alternative route to liability: the plaintiff must present sufficient evidence to create factual questions regarding whether the property onto which the draining pipe discharges water was encompassed within the drainage system that the City undertook to maintain, and whether the City's maintenance of that drainage system caused repeated flooding.[224] The City argued that because it did not own or maintain the property onto which the drainage basin drains or runs, it could not be held liable.[225] Although the court granted summary judgment to the City on plaintiff's nuisance claims, it is important to note that the court provided critical commentary dismissing the City's position on this issue:

> [W]hile ownership of property generally may give rise to a nuisance when property is used to cause harm to others, such ownership is not an essential element of the cause of action for nuisance. Rather, the exercise of dominion or control over the property causing the harm is sufficient to establish nuisance liability.[226]

219. *Id.* at 435, 808 S.E.2d at 424–25.

220. 345 Ga. App. 478, 811 S.E.2d 130 (2018).

221. *Id.* at 478, 811 S.E.2d at 131.

222. *Id.* at 479, 811 S.E.2d at 132.

223. *Id.* at 479–80, 811 S.E.2d at 131–32.

224. *Id.* at 480–81, 811 S.E.2d at 132–33.

225. *Id.* at 481, 811 S.E.2d at 133.

226. *Id.* (alteration in original) (quoting City of Atlanta v. Hofrichter/Stiakakis, 291 Ga. App. 883, 886, 663 S.E.2d 379, 383 (2008)).

The court concluded that Waldrip presented no evidence of the City's exercise of the aforementioned dominion or control over the uphill property between the drainage basin and Waldrip's shopping center.[227] The fact that the city cleared concrete blocks and other material or debris on Waldrip's property on one occasion was deemed insufficient to establish the City's dominion or control over the uphill property.[228] The court held that summary judgment should have been granted to the city and that the plaintiff's request for attorney's fees under that claim should have been denied.[229]

VII. FORECLOSURE OF REAL PROPERTY[230]

In *Mike's Furniture Barn, Inc. v. Smith*,[231] the Georgia Court of Appeals addressed the issue of whether foreclosure of a security deed for the borrower's home more than seven years after the stated loan maturity date was wrongful.[232] Cheryl Smith borrowed $2,154.22 from Mike's Furniture Barn (MFB). In return, Smith executed a promissory note, which identified the collateral as "[t]he goods or property being purchased."[233] The promissory note also indicated that Smith was giving MFB a security interest in a loan on real property. Smith also executed a deed to secure the debt of $2100 in favor of Michael Miller (Miller), President of MFB. This deed granted Miller the power of sale upon default. Smith failed to repay a loan, and seven years later, MFB foreclosed the security deed for Smith's home. Smith filed an action against MFB to prevent the foreclosure sale and enjoin it from taking further dispossessory action. The Greene County Superior Court found in favor of Smith and held that the Smith's security deed was subject to a statutory seven-year revisionary period. Therefore, the title of the property had "reverted . . . to Smith prior to the foreclosure sale." MFB appealed. [234]

227. *Id.*

228. *Id.*

229. *Id.*

230. This section was authored by Dylan W. Howard. Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Yale University (B.A., 1999); University of Georgia School of Law (J.D., cum laude, 2002). Member, State Bar of Georgia, Supreme Court of Georgia, United States Court of Appeals for the Eleventh Circuit, United States District Court for the Middle, Northern, and Southern Districts of Georgia. Special thanks to the firm's 2018 summer associate, Scott Chen for his assistance in the preparation of this section.

231. 342 Ga. App. 558, 803 S.E.2d 800 (2017).

232. *Id.* at 558, 803 S.E.2d at 801.

233. *Id.* at 558, 803 S.E.2d at 801–02 (alteration in original).

234. *Id.*

The court of appeals first held that MFB had no right to foreclose on the property.[235] In Georgia, "only the holder of [a] deed may initiate foreclosure proceedings. Here, Miller, and not MFB, was the holder of the [d]eed."[236] There was no evidence that Miller ever assigned the deed to MFB.[237] Thus, only Miller could initiate the foreclosure sale.[238] The court of appeals affirmed the trial court's ruling on this issue.[239]

Next, MFB argued that the language in the promissory note and deed should be viewed together. This interpretation, it argued, would "show that the parties intended to extend the statutory revisionary period to 20 years."[240] The court of appeals disagreed because the deed at issue did not indicate the intent to extend this statutory revisionary period.[241] Under Georgia law, after "seven years from the maturity of [a] debt . . . or the maturity of the last installment . . . as stated . . . in the record of the conveyance," the title will revert to the borrower unless there is an affirmative statement in the deed that intends to create a perpetual and indefinite security interest.[242] The promissory note and deed were inconsistent at times, and the discrepancies between the two documents suggested that they both did not refer to the same loan.[243] Regardless, neither the promissory note nor the deed, viewed separately or together, "contain[ed] an affirmative statement that extend[ed] the revisionary period beyond" the statutory seven years.[244]

MFB then argued that both the promissory note and deed contained dragnet clauses, and that these clauses satisfied the affirmative statement requirement.[245] If a security deed contains a dragnet clause, then the security interest conveyed is "effective as long as any debt between the grantor and grantee [exists]."[246] The court of appeals agreed that both documents contained dragnet clauses, but disagreed with respect to the ultimate effect of those clauses because they contained fixed maturity dates.[247] The court of appeals previously ruled that establishing a revolving line of credit and an indefinite interest in the

235. *Id.* at 559, 803 S.E.2d at 802.
236. *Id.* (citations omitted).
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 560, 803 S.E.2d at 802–03 (quoting O.C.G.A. § 44-14-80(a)(1) (2018)).
243. *Id.* at 560–61, 803 S.E.2d at 803.
244. *Id.* at 561, 803 S.E.2d at 803.
245. *Id.* at 561, 803 S.E.2d at 804.
246. *Id.* at 561, 803 S.E.2d at 803.
247. *Id.* at 562, 803 S.E.2d at 804.

collateral that required additional action beyond the mere payment of the indebtedness to satisfy the debt was enough to show an affirmative statement of intent to create a perpetual and indefinite security interest in the property.[248] In the instant case, since the deed had a fixed maturity date rather than a revolving line of credit, the court of appeals held that the deed did not meet the affirmative statement requirement.[249] The promissory note also contemplated a fixed maturity date as well as a set number of payments.[250] The court of appeals compared the dragnet clause with the fixed maturity dates and set number of payments and found that they conflicted and created ambiguity.[251] Thus, the court held that this ambiguity "cannot constitute an affirmative statement of intent."[252] The court of appeals affirmed the trial court's injunction on MFB's ability to take further dispossessory action.[253]

In *Fannie Mae v. Harris*,[254] the Georgia Court of Appeals addressed the issue of whether the Chatman County State Court abused its discretion in refusing to admit unauthenticated documents that purportedly determined ownership of certain property.[255] Federal National Mortgage Association (Fannie Mae) purchased a residential property from a lender who had obtained the property at a foreclosure sale. Fannie Mae then brought a dispossessory action against the previous owner of the property, Rickey Harris, in "Chatham County Magistrate Court and [provided an] affidavit stating that Fannie Mae was the owner . . . and that Harris remained in possession as a tenant at sufferance." Harris argued that he was not indebted to Fannie Mae because the property had been released from the mortgage.[256] "[T]he magistrate court granted a writ of possession to Fannie Mae . . . and [ordered] Harris to pay $1,200 per month 'until [any] appeal [was] finally determined.'"[257] Harris appealed de novo to the state court.[258]

At trial, "Fannie Mae offered recorded copies of the deed under power [foreclosure deed] and limited warranty deed, submitted a file-stamped copy of [a] superior court order restoring the [previous] security deed, and

248. *See* Stearns Bank, N.A. v. Mullins, 333 Ga. App. 369, 372–73, 776 S.E.2d 485, 488–89 (2015).

249. *Mike's Furniture Barn*, 342 Ga. App. at 562–63, 803 S.E.2d at 804.

250. *Id.* at 563, 803 S.E.2d at 805.

251. *Id.*

252. *Id.*

253. *Id.*

254. 343 Ga. App. 295, 807 S.E.2d 75 (2017).

255. *Id.* at 295, 807 S.E.2d at 76.

256. *Id.* at 296–97, 807 S.E.2d at 77.

257. *Id.* at 297, 807 S.E.2d at 77.

258. *Id.*

argued that these documents proved . . . its right to possession of the property."[259] However, the trial court limited its determination to "'whether any of the documents' introduced by Fannie Mae were admissible" because some of them were from a state other than Georgia.[260] The trial court determined that the deed under power and the security deed were not valid as they were not original documents nor certified copies, and no witnesses had been called to authenticate these documents.[261] Thus, the trial court found in favor of Harris and held that "Fannie Mae 'had failed to carry it[s] burden of proving that it [was] entitled to possession' of the property."[262] Fannie Mae appealed.[263]

Georgia law holds that, for unsealed or uncertified documents, "[t]he requirement of authentication or identification . . . [is] satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[264] Some examples of authentication or identification are "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."[265] Although the trial court did not state explicitly that Fannie Mae's documents were inadmissible, it did warn Fannie Mae that it would not admit unauthenticated documents.[266] The court of appeals found that the trial court "abused its discretion [because] it failed to consider whether the [uncertified] documents were admissible" and remanded the case back to the trial court to determine the authenticity of the documents.[267]

In *Y.C. Development Inc. v. Norton*,[268] the court of appeals addressed the issue of proper notice of a foreclosure sale.[269] Chandra Norton "executed a purchase money note in favor of [Y.C. Development Inc. (YCD)]," which was secured by Norton's land (the property at issue). The security deed required that YCD deliver all communications under the security deed or the purchase money note in writing to Norton personally or at a specified address. However, Norton failed to specify an address. After failure to make payment, YCD sent a notice of default to both

259. *Id.*
260. *Id.* at 297–98, 807 S.E.2d at 77.
261. *Id.* at 298, 807 S.E.2d at 77.
262. *Id.* at 298, 807 S.E.2d at 77–78 (alteration in original).
263. *Id.* at 298, 807 S.E.2d at 78.
264. *Id.* at 299, 807 S.E.2d at 78 (quoting O.C.G.A. § 24-9-901(a) (2018)).
265. *Id.* (emphasis omitted) (quoting O.C.G.A. § 24-9-901(b)(4) (2018)).
266. *Id.*
267. *Id.* at 300, 807 S.E.2d at 78–79.
268. 344 Ga. App. 69, 806 S.E.2d 662 (2017).
269. *Id.* at 69, 806 S.E.2d at 663.

Norton's primary residence address and the address of the property at issue, but the notices were returned as undeliverable. Soon after, YCD sent letters to notify Norton of its intent to foreclose upon the property at issue at the same addresses. Again, the letters were returned as undeliverable. YCD began foreclosure proceedings and sold the property at issue to a buyer. Norton filed a suit against YCD for breach of contract and wrongfully foreclosing upon her property. The Fulton County Superior Court granted Norton's motion for summary judgment because "the text of the security deed was unambiguous and required that Norton actually receive notice of default." YCD appealed.[270]

On appeal, "YCD argue[d] that . . . the trial court erred in its interpretation of the notice requirements contained in the [purchase money] note and security deed."[271] The court of appeals agreed.[272] The security deed provided that notice is given when it is: (1) personally delivered to Norton; or (2) when two days pass after depositing the notice in certified mail with return receipt requested and all postage prepaid in the United States Mail.[273] Although Norton's address was left blank on the security deed, it was undisputed between the parties that Norton provided her primary residence address for purpose of notice under the security deed.[274] Since the security deed defined the act of "giving notice," this definition controlled the meaning of "receiving notice."[275] Thus, since YCD had mailed the notice according to the terms in the security deed and two days had passed, Norton did not need to actually receive the notice.[276] The court of appeals reversed the trial court's ruling on this issue.[277]

Next, YCD argued that the trial court erred in concluding that "YCD failed to comply with the terms of the purchase money note and security deed before exercising the power of sale and foreclosing upon Norton's property."[278] The court of appeals agreed.[279] "YCD complied with the terms of the note and security deed" for giving notice to Norton.[280] Thus, for the same reasons it reversed the trial court's ruling on the first issue

270. *Id.* at 69–72, 806 S.E.2d at 664–65.
271. *Id.* at 72, 806 S.E.2d at 665–66.
272. *Id.* at 72, 806 S.E.2d at 666.
273. *Id.* at 74, 806 S.E.2d at 667.
274. *Id.*
275. *Id.* at 76, 806 S.E.2d at 668.
276. *Id.*
277. *Id.* at 77, 806 S.E.2d at 669.
278. *Id.* at 76, 806 S.E.2d at 668.
279. *Id.*
280. *Id.*

of proper notice, the court of appeals reversed the trial court's ruling on the issue of wrongful foreclosure and held in favor of YCD.[281]

VIII. CONDEMNATION AND EMINENT DOMAIN[282]

In *City of Marietta v. Summerour*,[283] the Georgia Supreme Court considered whether a city fulfilled its obligation under O.C.G.A. § 22-1-9[284] to attempt to negotiate the acquisition of the property through a voluntary sale.[285] To build a park, the City of Marietta (the City) sought to acquire Summerour's land and small grocery store. After obtaining a professional appraisal of Summerour's property, the City sent several offer letters to purchase Summerour's property. Summerour did not respond. About two-and-a-half years later the City sent an updated offer and Summerour responded with a counteroffer. Despite several earlier requests for the City's most recent appraisal, Summerour did not receive a summary of that appraisal until ten months after it was prepared. Negotiations failed, and the City voted to take the land by eminent domain and filed a petition to condemn Summerour's property.[286]

The Cobb County Superior Court adopted the findings of the special master and entered an order of condemnation. "Summerour appealed, and the Court of Appeals set aside the condemnation order." The court of appeals held the City failed to fulfill its obligations to attempt to negotiate the acquisition of the property through a voluntary sale as is required by O.C.G.A. § 22-1-9. The court of appeals remanded the case to the superior court to consider whether the City's failure amounted to bad faith. Before the superior court ruled, the supreme court granted writ of certiorari to review the decision of the court of appeals.[287]

The supreme court rejected the City's argument that O.C.G.A. § 22-1-9's introductory provisions were merely suggestive.[288] The City argued that the controlling language of the introductory provisions state

281. *Id.* at 77, 806 S.E.2d at 669.

282. This section was authored by Ivy N. Cadle. Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. Adjunct Professor of Law, Mercer University School of Law. University of Georgia (B.S., 2000; M.Acc., 2002; CPA, 2008); Mercer University School of Law (J.D., 2007). Member, State and Federal Bars of Georgia; United States Court of Appeals for the Eleventh Circuit; Supreme Court of the United States. Substantial assistance with the preparation of this section was provided by the firm's 2018 summer associate, Scott Chen.

283. 302 Ga. 645, 807 S.E.2d 324 (2017).

284. O.C.G.A. § 22-1-9 (2018).

285. *Summerour,* 302 Ga. at 645–46, 807 S.E.2d at 326.

286. *Id.* at 646–48, 807 S.E.2d at 326–27.

287. *Id.* at 648–49, 807 S.E.2d at 327.

288. *Id.* at 649*,* 807 S.E.2d at 328.

that "all condemnations and potential condemnations shall, to the greatest extent practicable," be guided by the requirements of O.C.G.A. § 22-1-9.[289] Instead, the court strictly construed the language of the statute to hold that the provisions of O.C.G.A § 22-1-9 are mandatory, except to the extent that compliance with those provisions is impracticable.[290] The court reasoned that the statute imposes meaningful, judicially enforceable limits upon condemnations, even if failure to abide by those limits can be excused in limited circumstances.[291]

Among other things, O.C.G.A § 22-1-9 requires the government to

> [(1)] pursue negotiations before resorting to the power of eminent domain, [(2)] obtain an independent appraisal of the real property to establish its fair market value, [(3)] offer no less than the value established by the independent appraisal, [(4)] disclose the basis for that valuation to the owner of the real property, and [(5)] negotiate in good faith.[292]

The court held the City violated this statute because the City "failed to disclose [its] appraisal summary to Summerour in a timely manner."[293] The summary was not disclosed until ten months after the appraisal was prepared, and there was nothing prohibiting the City from providing it to Summerour.[294] To evaluate the statute's qualification "to the greatest extent practicable," the court evaluated whether or not the City's failure to provide Summerour with the appraisal could be excused.[295] In its analysis, the court examined the plain meaning of the term "practicable" as it is found in the statute.[296] In this sense, practicable means "feasible in a particular situation" not "convenient."[297] Holding that the reasons the City offered for withholding the appraisal concerned the convenience of the City, not the feasibility of providing Summerour the appraisal, the court held that the City failed to comply with the requirements of O.C.G.A. § 22-1-9.[298]

289. *Id.* at 650, 807 S.E.2d at 328.
290. *Id.* at 653–54, 807 S.E.2d at 331.
291. *Id.* at 649, 807 S.E.2d at 328.
292. *Id.* at 650, 807 S.E.2d at 328 (quoting O.C.G.A. § 22-1-9).
293. *Id.* at 656, 807 S.E.2d at 332.
294. *Id.*
295. *Id.* at 650, 807 S.E.2d at 328.
296. *Id.*
297. *Id.* at 658, 807 S.E.2d at 334.
298. *Id.* at 658–59, 807 S.E.2d at 334.

In *PHH Investments, Inc. v. Department of Transportation*,[299] the Georgia Court of Appeals analyzed whether a landowner could recover damages for a partial taking of an access easement on a neighboring parcel of land.[300] Edens and Avant Financing II Limited Partnership (E&A) owned a Kroger shopping center. PHH Investments, Inc. (PHH) owned a shopping center outparcel, operated as a Wendy's restaurant (Out Parcel). The Out Parcel did not have direct access to public roads, but it did have an easement over the Shopping Center. The Department of Transportation (DOT) filed a petition to condemn a portion of the shopping center and altered the access the shopping center enjoyed to the adjacent roadways. It was PHH's position that the change made it more difficult for customers to reach the Wendy's restaurant, which consequently diminished the value of PHH's easement. Because PHH was named as an easement holder in the Shopping Center condemnation case, PHH claimed it was entitled to recover the diminution in the market value of the Out Parcel, in addition to the reduction in value of the easements themselves. None of the Out Parcel was condemned. After hearing a motion for summary judgment filed by the DOT, the Dawson County Superior Court found that PHH, as owners of the Out Parcel, could not recover consequential damages in the condemnation case for the Shopping Center. PHH appealed.[301]

Citing precedent, the Georgia Supreme Court reaffirmed that property owners cannot recover damages to their property when the taking was from a contiguous tract of land having different ownership.[302] PHH did not own any portion of the shopping center, and no part of the Out Parcel was condemned.[303] Therefore, the court held that PHH could not recover consequential damages for the Out Parcel.[304] The court emphasized that its ruling did not foreclose recovery for damages to its easements on the shopping center parcel that was actually condemned.[305] The court went on to advise that PHH could only attempt to recover any alleged damages to the Out Parcel in an inverse condemnation action.[306]

299. 343 Ga. App. 462, 808 S.E.2d 431 (2017).

300. *Id.* at 462, 808 S.E.2d at 432.

301. *Id.* at 462–64, 808 S.E.2d at 432–33.

302. *Id.* at 463, 808 S.E.2d at 433 (citing Ga. Power Co. v. Bray, 232 Ga. 558, 560, 207 S.E.2d 442, 443 (1974)).

303. *Id.*

304. *Id.*

305. *Id.* at 464, 808 S.E.2d at 433.

306. *Id.* at 464–65, 808 S.E.2d at 434.

In *Edwards v. City of Warner Robins*,[307] the Georgia Supreme Court considered whether a zoning ordinance that prohibited mobile homes on property constituted a regulatory taking without just compensation.[308] The plaintiff, Edwards, acquired a parcel of land and subdivided it into three lots, each with a mobile home for rent. In 1997, Edwards added to the mobile home park by purchasing adjoining properties, "which . . . comprise[d] seven acres consisting of 36 lots. Each lot either had a mobile home on it or was being held out for use by a mobile home." Even when Edwards purchased the additional land, the city of Warner Robins's (the City) Base Environs Overlay District (BEOD) had restrictions that prohibited mobile homes on the properties. The BEOD was added to the City's zoning ordinances in 1994 as an overlay district to protect Robins Air Force Base from incompatible development. However, the BEOD restrictions also contained an exception to allow mobile homes as an existing, nonconforming use. In 2008, the City further amended the BEOD with a table that states, "'mobile home parks or courts' and 'related structures' are prohibited."[309]

In 1997, Edwards submitted an application to have the property rezoned from R-3 to R-MH. R-MH zoning allows mobile homes whereas R-3 does not. The City granted the request, but in 2009, the City sent Edwards an email explaining that even though the R-MH zoning allowed mobile homes on his property, the restrictions of the BEOD took precedence and prohibited mobile homes because the BEOD has an express preemption provision. In 2011, Edwards submitted a formal request to replace an existing mobile home with a newer model and to place three additional mobile homes on the property. After losing appeals before the City's planning and zoning commission and the board of zoning appeals, Edwards sued the City, arguing that the BEOD ordinance was unlawfully enacted or unlawfully vague, and therefore, constituted a regulatory taking of his properties without just compensation. After a great deal of procedural maneuvering, the Houston County Superior Court ultimately ruled the zoning ordinance was constitutional, and that Edwards' claims of regulatory taking lacked merit. The instant appeal to the Georgia Supreme Court followed.[310]

The court determined that Edwards waived or abandoned certain procedural challenges to the BEOD.[311] The court then examined

307. 302 Ga. 381, 807 S.E.2d 438 (2017).

308. *Id.* at 381, 807 S.E.2d at 439.

309. *Id.* at 381–83, 807 S.E.2d at 439–40.

310. *Id.* at 383–84, 807 S.E.2d at 440–41.

311. *Id.* at 386, 807 S.E.2d at 442.

Edwards' claims that the zoning resulted in a regulatory taking.[312] The court dismissed Edwards' argument that the language of the 2008 BEOD ordinance was unconstitutionally vague, holding that someone of common intelligence would easily understand the term mobile home court or mobile home park.[313] The court dismissed Edwards' argument that Edwards should be able to expand the mobile home park, holding that the restrictions placed by BEOD were reasonable.[314] The court also held that any rights to the zoning that existed prior to the 1994 BEOD were personal to the previous owner and not transferable with the land.[315] The court further held that the City's agreement to rezone the property to R-MH did not change Edwards' entitlement to develop a mobile home park since the BEOD ordinance remained undisturbed.[316] Finally, the court held that Edwards' argument that the BEOD ordinance effectively took the property was incorrect because Edwards only argued that it would be more expensive to build something other than mobile homes.[317] The court also cited Edwards' failure to place a certified copy of the relevant zoning ordinance provisions in the record, ultimately concluding that Edwards presented no competent evidence to support the claim for a regulatory taking under the Fifth Amendment.[318]

IX. TAXATION OF REAL PROPERTY[319]

Notable Georgia cases related to taxation of real property concerned the public property exemption to ad valorem taxation for projects financed by public bonds, the damages recoverable by plaintiffs in tax-refund class actions, and a tricky conflict between Georgia's tax-sale statute[320] and Chapter 13[321] of the Bankruptcy Code, which divided the judges of the United States Bankruptcy Court for the Northern District of Georgia.

312. *Id.* at 385, 807 S.E.2d at 442.

313. *Id.* at 386, 807 S.E.2d at 442.

314. *Id.* at 387, 807 S.E.2d at 443.

315. *Id.* at 388, 807 S.E.2d at 443.

316. *Id.*

317. *Id.* at 388–89, 807 S.E.2d at 444.

318. *Id.* at 389, 807 S.E.2d at 444; *see also* U.S. CONST. amend. V.

319. This section was authored by Joseph R. Buller III. Associate, Baker Donelson, Bearman, Caldwell & Berkowitz, PC. Louisiana State University (B.S., 2004); Emory University School of Law (J.D., 2008). Member, State Bar of Georgia; Georgia Supreme Court; Georgia Court of Appeals; United States District Courts for the Middle and Northern Districts of Georgia.

320. *See* O.C.G.A. § 48-4-40 (2018).

321. 11 U.S.C. ch. 13 (2018).

In *Columbus Board of Tax Assessors v. Medical Center Hospital Authority*,[322] the Georgia Supreme Court considered whether two prior bond validation proceedings were conclusively adjudicated, for the purposes of O.C.G.A. § 48-5-41(a)(1)(A),[323] and whether the underlying property was public property exempt from ad valorem taxation.[324] The case's lengthy history began in 2004 when The Medical Center Hospital Authority (the Hospital Authority) entered a long-term, real-property lease with Columbus Regional Healthcare System, Inc. to "construct, own, and operate" a continuing care retirement center on land owned by Columbus Regional. To finance the project, the Hospital Authority issued revenue bonds. To develop and manage the property, the Hospital Authority entered into a management agreement with a subsidiary of Columbus Regional, another private company.[325]

The revenue bonds were validated in 2004 and a second issuance was validated in 2007 by the Muscogee County Superior Court. The superior court noted that the underlying real property and the retirement center itself were owned by a private entity, Columbus Regional, but the Hospital Authority's role in the project and its holding of a leasehold interest was undertaken to further the Hospital Authority's mission, and therefore, served a valid public purpose. Soon after the project began, the Columbus Board of Tax Assessors (Tax Board) sent the Hospital Authority a tax bill for its interests in the real property, including the value of improvements, and the Hospital Authority refused to pay on the grounds that its leasehold interest was exempt from taxation as public property pursuant to O.C.G.A. § 48-5-41(a)(1)(A).[326]

The Hospital Authority sued for declaratory and injunctive relief, and the Muscogee County Superior Court granted it summary judgment, finding that the Hospital Authority's interest was a public property, and therefore, was exempt from taxation.[327] The Georgia Court of Appeals affirmed, deciding that the holdings in the two bond validation proceedings were conclusive to the key factual issue in the case: whether the Hospital Authority's leasehold interest was held for a public purpose.[328] The Georgia Supreme Court granted certiorari to review whether the fact-findings in the bond-validation proceedings were

322. 302 Ga. 358, 806 S.E.2d 525 (2017).

323. O.C.G.A. § 48-5-41(a)(1)(A) (2018).

324. *Columbus Bd. of Tax* Assessors, 302 Ga. at 358–59, 806 S.E.2d at 526.

325. *Id.* at 359, 806 S.E.2d at 526–27.

326. *Id.* at 359–60, 806 S.E.2d at 527.

327. *Id.* at 360–61, 806 S.E.2d at 527–28.

328. *Id.* at 361–62, 806 S.E.2d at 528.

conclusive with respect to the taxability of the Hospital Authority's leasehold.[329]

The supreme court agreed with both lower courts that, because the Hospital Authority was a state instrumentality rather than a part of the state government, the key issue in determining whether its interest was taxable was whether the authority held the leasehold for a public purpose.[330] The court also acknowledged that the superior court ruled upon this very issue in the two bond validation proceedings and that bond validation proceedings are final and conclusive for all issues adjudicated in those proceedings.[331]

However, the supreme court then disagreed with the court of appeals, holding that the scope of the bond validation proceedings was tightly limited to rulings made with respect to those bonds.[332] The fact-findings made by the superior court in the bond validation proceedings could have no conclusive effect on the taxability of the Hospital Authority's interest. Because this reasoning was the basis for the superior court's holding and the court of appeal's affirmation, the supreme court reversed the court of appeals and held that the bond validation proceedings did not adjudicate the purpose of the Hospital Authority's leasehold, and therefore, the taxability of that interest turned on an unanswered question of fact.[333] The supreme court remanded the case for a determination of the purpose of the Hospital Authority's leasehold interest.[334]

In *Coleman v. Glynn County*,[335] the Georgia Court of Appeals applied recent developments in sovereign-immunity law to tax-payer-refund class actions.[336] In the first part of its holding, the court of appeals reversed a grant of summary judgment to Glynn County and found that the county had misconstrued the provisions of a private bill enacted by the General Assembly in 2000,[337] which created a homestead exemption

329. *Id.* at 362, 806 S.E.2d at 528.

330. *Id.* at 362, 806 S.E.2d at 529 (citing Hosp. Auth. of Albany v. Stewart, 226 Ga. 530, 537, 175 S.E.2d 857 (1970)).

331. *Id.* at 362, 806 S.E.2d at 528 (citing Sherman v. Fulton Cty. Bd. of Assessors, 288 Ga. 88, 94, 701 S.E.2d 472, 477 (2010)).

332. *Id.* at 363, 806 S.E.2d at 529. "The question of whether a hospital authority's property interest qualifies for ad valorem tax exemption as 'public property' is a separate and distinct question from the issues presented in a bond validation proceeding." *Id.*

333. *Id.*

334. *Id.*

335. 344 Ga. App. 545, 809 S.E.2d 383 (2018).

336. *Id.* at 545, 809 S.E.2d at 385.

337. Ga. H.R. Bill 1690, Reg. Sess., 2000 Ga. Laws 4612.

specific to Glynn County.[338] The error caused several classes of property owners to overpay real property taxes from 2001 to the present.[339]

The court of appeals then confronted the key question of what damages were available to the named plaintiffs and to the class members.[340] The court of appeals began its analysis by noting that a cause of action for an unpaid tax refund is a suit for damages against the state of Georgia or one of its divisions and a taxpayer must rely upon an explicit waiver of sovereign immunity to obtain relief.[341] O.C.G.A. § 48-5-380(b)[342] allows Georgia taxpayers to file lawsuits to recover unpaid tax refunds for tax payments made within three years of an initial written claim for a refund.[343] Here, the named plaintiffs served their first written notice of refund claim in 2011; therefore, the court held that they could recover refunds for payments made in or after 2008.[344]

The court of appeals next analyzed the potential recovery for class members who failed to serve refund requests. The court of appeals noted that, pursuant to O.C.G.A. § 48-5-380(b), the refund request served by the named plaintiffs satisfied that precondition for the class members.[345] However, the court of appeals relied upon *Schorr v. Countrywide Home Loans, Inc.*[346] to hold that plaintiffs' refund request was effective for the class members only on the date the class action lawsuit was filed.[347] *Schorr* dictates that when a named plaintiff fulfills a precondition to filing suit on behalf of a class against a governmental body, the government is on notice after both the precondition is fulfilled and the suit is filed.[348] The plaintiffs filed suit in 2012; therefore, the court of appeals reversed the Glynn County Superior Court's holding that recovery began in 2010 for the class members and found that their period for potential refunds began in 2009.[349]

Finally, the court of appeals addressed the plaintiffs' argument that they could recover refunds beyond 2008 based on an equitable action;

338. *Coleman*, 344 Ga. App. at 549, 809 S.E.2d at 387.

339. *Id.*

340. *Id.*

341. *Id.* at 549, 809 S.E.2d at 387–88. "As governmental bodies, the counties of this State are entitled to sovereign immunity and, thus, are not subject to suit for any cause of action unless provided for by statute." *Id.* at 549, 809 S.E.2d at 387.

342. O.C.G.A. § 48-5-380(b) (2018).

343. *Coleman*, 344 Ga. App. at 549–50, 809 S.E.2d at 388.

344. *Id.* at 550, 809 S.E.2d at 388.

345. *Id.*

346. 287 Ga. 570, 697 S.E.2d 827 (2010).

347. *Coleman*, 344 Ga. App. at 550, 809 S.E.2d at 388.

348. *Schorr*, 287 Ga. at 572–73, 697 S.E.2d at 829.

349. *Coleman*, 344 Ga. App. at 551, 809 S.E.2d at 388.

specifically, requests for an injunction, a declaratory judgment, and a writ of mandamus.[350] The court of appeals first applied *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*[351] and *SJN Properties LLC v. Fulton County Board of Assessors*[352] to reject the plaintiffs' requests for an injunction and a declaratory judgment on the basis that, without statutory authorization, sovereign immunity bars any claim for equitable relief against the State of Georgia.[353] The court of appeals then addressed plaintiffs' petition for a writ of mandamus. The court noted that the plaintiffs had a clear legal right to a refund during the three-year statutory recovery period pursuant to O.C.G.A. § 48-5-380(b).[354] Therefore, mandamus was not available to recover refunds during the time period already covered by O.C.G.A. § 48-5-380(b).[355] For the plaintiffs' time-barred refunds, the court of appeals held that the petition for a writ of mandamus failed because it was a request to reverse a past action—the denial of a tax refund request.[356] The court of appeals reasoned that the act of giving a refund is not prospective in nature but, instead, is a request to undo a prior action.[357] Holding otherwise would render O.C.G.A. § 48-5-380(b) and the procedure filing for requesting tax refunds meaningless and subsumed by an unbounded ability to claim tax refunds through petitions for writs of mandamus.[358] Therefore, the trial court was correct to limit the plaintiffs and the class members to monetary recovery for refunds within the three-year time frame set forth in O.C.G.A. § 48-5-380(b).[359]

In re Alexander[360] concerned a Chapter 13 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Georgia and addressed a conflict between Georgia's tax-sale statute and Chapter 13 of the Bankruptcy Code. Specifically, the issue was whether a Chapter 13 debtor may redeem real property sold at a pre-petition tax sale through the reorganization plan, or whether the debtor must redeem the

350. *Id.*

351. 294 Ga. 593, 755 S.E.2d 184 (2014).

352. 296 Ga. 793, 770 S.E.2d 832 (2015).

353. *Coleman*, 344 Ga. App. at 551, 809 S.E.2d at 388–89.

354. *Id.* at 551–52, 809 S.E.2d at 389.

355. *Id.* at 552, 809 S.E.2d at 389.

356. *Id.* "Furthermore, 'mandamus relief applies prospectively only. It will not lie to compel the undoing of acts already done, and this is so even though the action taken was clearly illegal.'" *Id.* (quoting Atlanta Indep. Sch. Sys. v. Lane, 266 Ga. 657, 660, 469 S.E.2d 22, 26 (1996)).

357. *Id.*

358. *Id.* at 551–52, 809 S.E.2d at 389.

359. *Id.* at 552, 809 S.E.2d at 389.

360. 578 B.R. 669 (Bankr. N.D. Ga. 2017).

property with a lump-sum payment, pursuant to O.C.G.A. § 48-4-40[361] prior to the expiration of the one-year deadline imposed by the statute.[362] The court first noted that this question has created a division among the judges of Georgia's bankruptcy courts.[363] Orders from *In re Jimerson*[364] and *Francis v. Scorpion Group, LLC* (*In re Francis*)[365] held that the debtor may redeem the property through the Chapter 13 plan.[366] On the other hand, orders from *In re Edwards*[367] and *Callaway v. Harvest Assets, LLC* (*In re Callaway*)[368] held that state law deadlines apply, extended by sixty days from the date of the filing of the bankruptcy petition.[369] In the end, the court held that the debtor may redeem property through the bankruptcy plan because federal bankruptcy law supersedes Georgia's tax-sale statute.[370]

The debtor here filed a petition under Chapter 13 of Title 11 of the United States Bankruptcy Code on August 8, 2017. Before her petition was filed, certain real property she owned was sold to a third party at a tax sale, and the redemption period was set to expire on September 1, 2017. The debtor's proposed plan included regular installment payments to the tax-sale purchaser to pay the redemption amount over the course of the five-year applicable commitment period, completing payment years after the September 1, 2017 statutory redemption deadline.[371] The tax-sale purchaser filed a claim for the redemption amount and objected to the plan on the grounds that the redemption deadline could be extended only by sixty days after the filing date of the bankruptcy case pursuant to 11 U.S.C. § 108(b)[372]—meaning October 9, 2017, in this case.[373]

361. O.C.G.A. § 48-4-40 (2018).

362. 578 B.R. at 671.

363. *Id.* at 672–73.

364. 564 B.R. 430 (Bankr. N.D. Ga. 2017) (Baisier, J.).

365. 489 B.R. 262 (Bankr. N.D. Ga. 2013) (Hagenau, J.).

366. *In re Jimerson*, 564 B.R. at 432; *In re Francis*, 489 B.R. at 266–67.

367. No. 14-51366-CRM, 2014 Bankr. LEXIS 5432 (Bankr. N.D. Ga. Nov. 13, 2014) (Mullins, C.J.).

368. No. 14-64446-CRM, 2015 Bankr. LEXIS 4525 (Bankr. N.D. Ga. Feb. 6, 2015) (Mullins, C.J.), *aff'd*, No. 1:15-cv-570-ODE, 2015 U.S. Dist. LEXIS 185160 (N.D. Ga. Oct. 30, 2015) (Evans, J.).

369. *In re Edwards*, 2014 Bankr. LEXIS 5432, at *8–9; *In re Callaway*, 2015 Bankr. LEXIS 4525, at *1.

370. *In re Alexander*, 578 B.R. at 671.

371. *Id.* at 671–72.

372. 11 U.S.C. § 108(b) (2018).

373. *In re Alexander*, 578 B.R. at 672.

The two relevant issues for determination were (1) whether the tax-sale purchaser had a claim in the bankruptcy, and if so, (2) whether that claim could be modified in the plan pursuant to 11 U.S.C. § 1322(b)[374] to allow for installment payments.[375] For the first question, the court found that the tax-sale purchaser had a claim in the bankruptcy case.[376] The court gave two reasons. First, the tax-sale purchaser filed a claim, which contains a statement under penalty of perjury that the filer has a claim.[377] Therefore, the tax-sale purchaser admitted that it had a claim in the case.[378] Second, even without that admission, the tax-sale purchaser's right to recovery fit the definition of a claim, which should be construed broadly.[379] Namely, the interest is a right to receive a payment from the debtor and comes with the right to pursue an equitable remedy if the debtor fails to make the payment.[380] In this case, the tax-sale purchaser was entitled to receive payment of the redemption amount, and if the debtor failed to make that payment, the purchaser could confirm title to the real property in question and obtain possession.[381] The tax-sale purchaser argued that its interests were distinct from a claim because it possessed legal title to the property after the tax sale.[382] However, the bankruptcy court reasoned that the tax-sale purchaser's interest was tantamount to that of a creditor holding a deed to secure debt, which also transfers legal title.[383] Real property owned by a debtor subject to a deed to secure debt enters a Chapter 13 bankruptcy as property of the debtor, and the debt is a secured claim.[384] Judge Diehl applied that reasoning here and treated the post-tax-sale property as part of the debtor's estate.[385]

374. 11 U.S.C. § 1322(b) (2018).

375. *In re Alexander*, 578 B.R. at 672.

376. *Id.* at 675–76.

377. *Id.* at 676.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* at 674. "WCR Project argues that, because it holds legal title and because the Debtor did not pay the Redemption Amount in full prior to the final date set forth in the barment notice (extended by 60 days by § 108(b)), the Property is fully vested in WCR Project, and therefore the Property is not property of the estate." *Id.* at 675.

383. *Id.* at 675.

384. *Id.*

385. *Id.* "Just like a borrower under a deed to secure debt, on the Petition Date, the Debtor in this case possessed all the rights to the property except legal title. In light of the foregoing, this Court finds that the Property is property of this Debtor's Chapter 13 estate." *Id.*

The bankruptcy court then held that, because the property in question was not the debtor's primary residence, 11 U.S.C. § 1322 applied to modify the tax-sale purchaser's claim to conform to the debtor's plan, extending the redemption period and allowing for payment through regular installments rather than requiring a lump-sum payment.[386] The court acknowledged that this holding conflicts with Georgia's tax-sale statute, which requires payment of the full lump-sum-redemption amount prior to the expiration of the one-year redemption period.[387] The bankruptcy court resolved that dilemma by noting that "[a]lthough the applicable state law might require a lump-sum payment, Chapter 13 of the Bankruptcy Code allows a debtor to pay debts over time, superseding state law."[388] The claimant's objection was overruled.[389]

386. *Id.* at 677–80.

387. *Id.* at 680.

388. *Id.*

389. *Id.* at 681.